Clauspeter Hill / Jörg Menzel (Eds.)

Constitutionalism in Southeast Asia

Volume 2 Reports on National Constitutions

Konrad Adenauer Stiftung

CONSTITUTIONALISM IN SOUTHEAST ASIA

Volume 2
Reports on National Constitutions

Konrad
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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). Consitutionalism clearly is a Southeast Asian agenda item.

This three volume publication includes the constitutional documents of all countries in Southeast Asia as at December 2007, 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 at the end of March 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 in Vol. III, which is scheduled for publication in summer 2007, will 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. We would finally like to express our sincere appreciation to the Law Faculty of the National University of Singapore, which is not only the academic home of some of the authors, but was also the co-host of a conference on the occasion of this publication. Special thanks go to Professor Gary Bell for facilitating the arrangement.

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, April 2008
Clauspeter Hill Jörg Menzel

Brunei

BRUNEI
Entrenching an Absolute Monarchy

*Tsun Hang TEY**

I. Introduction

Brunei,[1] the only monarchical regime in Southeast Asia, is one of the remaining states that are technical absolute monarchies in the modern world – with an almost total absence of any institutionalized popular participation.[2] Brunei has a history of monarchy-led constitutional changes that were aimed at entrenching the status quo of the absolute monarchy. Instead of delivering on the promises of greater political participation[3] and enhancing the prospects of democratization, the constitutional changes - including that of the unprecedented amendments made in 2004-2006 - in actual effect, further entrench the absolute monarchy, scuttle the prospects for democratization in the near future, and in the process, may serve to undermine its long-term regime legitimacy.

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1 Brunei is a country situated in the north-western region of the Borneo island in Southeast Asia. Geographically, it consists of four districts comprising two unconnected enclaves separated by the Sarawak territory of Limbang (Malaysia). Today, it has about 370,000 inhabitants, with the Malays forming the dominant race: See online at <https://www.cia.gov/library/publications/the-world-factbook/print/bx.html>. See also: A Allaert, 'Negara Brunei Darussalam: A Country Study on the Wealthiest State in South East Asia' (May 1995) Centre for ASEAN Studies, CAS Discussion Paper No. 2.

2 Due to its minute proportions, Brunei attracted little scholarly attention. See Roger Kershaw (1998) 'Constraints of history: the eliciting of modern Brunei' Asian Affairs, 29:3, 312-317.

3 See for *e.g.* 'New era dawns in Brunei' Borneo Bulletin (17 July 2004): 'The landmark Titah (speech) by His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam on his 58th birthday continued to generate nationwide and worldwide acclaim as the Monarch set the pace to an era of constitutional reforms in the Sultanate…His Majesty stated that the Brunei parliament will be reconvened for the first time in decades as part of the political reforms to 'engage the citizens'. The Monarch also stated the decision to revitalize the parliament is to 'give priority to widening the opportunities to the public to engage and contribute to nation-building.'; 'Brunei parliament revived in 'first steps towards polls" Sunday Times (12 September 2004): 'Brunei's Sultan Hassanal Bolkiah has revived parliament for the first time in 20 years in a first step towards possible future elections, official said yesterday.' See "Brunei to tackle constitutional reforms in a new parliament" *The Straits Times* (20 September 2004).

II. Constitutional History

One has to delve into Brunei's 1959 Constitutional set-up,[4] its legal and political system as a backdrop to appreciate the Bruneian monarchy's all-encompassing obsessive desire to ensure Brunei's, and its, continued existence, and preserve the status quo.

The comparison between the 1959 Constitution and the constitutional changes in 2004-2006 also serves to show: (i) how much more the status and the untrammeled power the monarchy possesses has been further entrenched; (ii) the constitutional affirmation of racial and religious discrimination through the introduction of race and religion-based qualifications for certain leadership positions; (iii) the exclusion of judicial review as a means of check and balance; (iv) how the Legislative Council has been rendered a meaningless rubber-stamping chamber.

The modern history[5] of Brunei is replete with political struggles between the sultanate and its domestic political rivals,[6] as well as foreign British colonial intervention.[7]

Brunei became a British Protectorate state in 1888.[8] By the late 19th century, the dissolution of the Sultanate appeared to be at hand.[9] By then, the Sultan was virtually reduced to impotence in ruling beyond the narrow confines of the Brunei Town.[10] Brunei was an "ordinary protectorate", in contrast to the Federated Malay States, where Residents were appointed to help in the internal administration. No such Resident was appointed to Brunei until 1906.[11]

4 See a good introduction, Ahmad Ibrahim and V S Winslow (1992) 'The Kingdom of Brunei: Constitution and Monarchy in Brunei, in L W Beer ed., Constitutional Systems in Late Twentieth Century Asia (1992, Seattle, University of Washington Press) pp 365-372.

5 See generally, Graham Saunders, *A History of Brunei* (London: RoutledgeCurzon, 2002).

6 See also: S Baring-Gould and C A Bampfylde, 'A History of Sarawak Under its Two White Rajahs 1839-1908 (1909 London, Henry Sotheran).

7 See generally, D S Ranjit Singh, *Brunei 1839-1983: The Problems of Political Survival* (Oxford: Oxford University Press, 1984); N Tarling (1971) 'Britain, the Brookes and Brunei' (Kuala Lumpur, Oxford University Press).

8 Prior to the 1888 Protectorate Agreement with Britain, Brunei for all intents and purposes was an independent sovereign state.

9 By 1890, Brunei faced extinction through continuous sale of customary territorial rights to foreigners by the governing aristocrats. By 1905, Brunei was left with only four 'rivers', having lost no less than 18 such districts to Sarawak alone. Having reached the end of its fortunes, Brunei by then had evolved into one of those decaying Malay-Muslim states of Southeast Asia. Throughout most of the 19th century, Brunei was referred to by British officials as a decrepit principality, whose chief characteristics were political weakness and anarchy.

10 Not surprisingly, by then, the rapid fragmentation of his domains alarmed Sultan Hashim as well as his heir. The desire to ensure Brunei's, and its monarchy's, continued existence became a new and important motivation, and has since persistently been its all-encompassing obsession. This desperate motivation was also behind Sultan Hashim's refusal to accept the proferred "cession money" from Charles Brooke for the annexed Limbang in 1890. Some historians argued that had the British not established the Residency system in 1906, Brunei could well have been absorbed by Sarawak.

11 By Article I of the Treaty, Brunei gained British Protection while retaining internal independence. By Article III of the Treaty, Brunei handed over the conduct of her foreign relations to Britain. The traditional government in Brunei led by the Sultan, the various wazirs and pengirans and the indigenous State Council continued to function

Following the Supplementary Agreement with Britain of 1905-06, the Foreign and Colonial Offices agreed to install a resident in Brunei, bringing about major changes to the political and administrative set-up.[12] An administrative system similar to the one that existed in the Federated Malay States evolved.[13]

Thereafter, to all intents and purposes, the British Resident became the ruler of Brunei, except in matters relating to the Islamic religion and local Malay customs. Henceforth, Brunei survived as a quasi-sovereign, a British Protectorate, until 1959, with an interregnum during World War II under the Japanese occupation.

Under the Residency system, a rudimentary legal system gradually evolved.[14] It was a period of peace and stability.[15] In the years after the Japanese occupation, the British intention was to gain wider and more direct control over the Malay Rulers than they had previously.[16] One of the longer-term plans was the creation of Borneo-Malaya Union.[17]

Although the World War II accelerated the process of change and the ascendancy of nationalism throughout Southeast Asia, this was not the case in Brunei, perhaps due to the extremely limited provisions made for education.[18]

It was in the midst of these rumblings that Sultan Omar[19] ascended the throne on 6 June 1950, on the sudden death of his brother, Sultan Sir Ahmad Tajuddin in Singapore two days earlier. Brunei's backwardness at that point was only too apparent.[20] Legislative and

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intact.

12 The 1888 Protectorate Agreement failed to give adequate protection and support to the Sultan to retain some control over his domains in Brunei, shown most glaringly in the annexation of Limbang by Sarawak despite the Sultan's protests and the considerable publicity given to that action. The prospect of oil discovery and existence of other minerals at the same time also made it seem possible that a residency could be self-sufficient. See further: A V M Horton, The British Residency in Brunei, 1906-1959, Occasional Paper no.6, Centre for South East Asian Studies, University of Hull, 1984.

13 The main feature of the 1905-06 Agreement was the appointment of a British Resident whose "advice must be taken and acted upon on all questions in Brunei, other than those affecting the Muslim religion and the local custom".

14 There was partial accommodation of existing indigenous law; new laws were promulgated, courts created, a Penal Code enacted and a police force set up.

15 A clear testimony to this was the absence of any major uprising. However, the Residency system also brought a most subtle change - the expanding gaps between the uppermost levels, comprising the Sultan and the ruling elites, and the rest of society. The wazirs, whilst retaining their seats on the State Council, had a largely formal role and played little or no part in the running of the country after 1906.

16 Brunei was seen to fall within the same category as the Unfederated Malay States.

17 Cooperation between the three Borneo territories took the form of Governors' Conferences, later known as the Inter-Territorial Conferences.

18 During the early years, no provisions for education were made. A qualified State Education Officer was appointed only in 1949. Combined with the high rate of illiteracy was also the obvious fact of Brunei's extreme isolation from much of the world around it.

19 See a laudatory account of the sultan's rise, in B A Hussainmiya, *Sultan Omar Ali Saifuddin and Britain – The Making of Brunei Darussalam* (USA: Oxford University Press, 1996).

20 In neighbouring Sarawak, as early as 1947, the British had encouraged local self-government as a step towards

Executive Councils were non-existent. Brunei had only a State Council. Whilst political authority was vested in the Sultan-in-Council, in real terms, ultimate powers lay in the hands of the British Resident.[21] In every sense, the State Council was a mere rubber stamp for the British Resident.

III. Constitution Making

Although the nationalist impulse[22] was slow to take off in Brunei,[23] there existed a small pool of nationalist sentiment[24] simmering in the late 1950s.[25] To preempt criticisms, but mainly to consolidate his own position,[26] Sultan Omar embarked on a cautious programme designed to give Brunei self-government and some measure of parliamentary democracy - all on his terms. In 1953, Sultan Omar made clear his wish that a written constitution be set up for Brunei, whilst also emphasizing the authority and power of the sultan. The primary objectives of the royal announcement were to ease future succession matters and clarify how the state was to be governed and how power was to be divided or delegated.

The first major political party, Partai Rakyat Brunei (People's Party of Brunei, PRB)[27] was founded in 1956, and was in many ways a manifestation of non-aristocratic Brunei Malay sentiment and dissatisfaction.[28] Its popularity grew swiftly and it soon emerged

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eventual independence. Sarawak had a Council Negri with legislative and financial jurisdiction and unofficial appointed members since the Brooke Constitution of 1941. The 1941 Constitution also provided for a Supreme Council. In 1946 when Sarawak became a colony, the Supreme Council and the Council Negri retained the authority granted to them in 1941. Sarawak's constitution was modified in 1956 with an increase in the membership of the Council Negri and 24 of the Legislative's 42 members were indirectly elected. North Borneo had a Legislative Council in 1950, with no nominated unofficial majority.

21 The Residency System was introduced after the signing of a Supplementary Agreement between the sultan and the British in 1905-06 that provided for full protection by the British Government, assurance of due succession to the Sultanate of Brunei, and the establishment of a Residency in Brunei 'whose advice must be taken and acted upon on all questions in Brunei, other than those affecting the [Islamic] religion': See D S Ranjit Singh, *Brunei 1839-1983: The Problems of Political Survival* (Oxford: Oxford University Press, 1984) at 236.

22 A V M Horton, 'So Rich as to Be Almost Indecent': Some Aspects of Post-War Rehabilitation in Brunei, 1946-1953' (1995) Bulletin of the School of Oriental and African Studies, University of London, Vol 58, No 1, pp 91-103.

23 Brunei was to witness only a nascent Malay nationalism during and after the war, one that appealed largely to loyalties of race, language and religion and, seldom, if at all, effectively transcended traditional state boundaries.

24 It was a nationalism that sought ultimately a specific political community to safeguard essentially Bruneian Malay interests. See generally, Haji Zaini Haji Ahmad, *Partai Rakyat Brunei – The People's Party of Brunei: Selected Documents* (Kuala Lumpur: INSAN, the Institute of Social Analysis, 1988).

25 See a comprehensive historical coverage of the British administration in Brunei 1906-1959: A V M Horton, 'British Administration in Brunei 1906-1959' Modern Asian Studies, Vol 20, No 2 (1986) pp 353-374.

26 See: A J Stockwell, 'Britain and Brunei, 1945-1963: Imperial Retreat and Royal Ascendancy (2004) Modern Asian Studies 38.

27 The PRB was socialist in its orientation.

28 Nationalist activity in the Federation of Malaya, Indonesia and Singapore had much to do with its formation. Its president, A M Azahari, had close connections with political movements, and close links with eminent left-wing Malay politicians, in these three territories.

as a major political party[29] and demanded[30] full independence[31] and free and democratic elections.[32]

Much of the political turmoil and uncertainty during the years 1957-1959 revolved around the negotiations between the sultan and the Colonial Office. Although the sultan, explicitly suspicious of democracy and preferred a gradual approach to constitutional reform, the PRB's strident demands prompted him to subsequently negotiate the terms of a constitution with the British Secretary of State for the Colonies in early 1959. Sultan Omar announced in October 1957 that elections would be held to elect unofficial members (official members were appointees) of the District Councils by traditional "showing of hands". This was dismissed by PRB outright.[33]

On 23 January 1958, the PRB submitted a memorandum containing observations and petitions on the proposed Constitutional Enactments published by the government. The memorandum, *inter alia*, petitioned the sultan to reconsider and amend the proposed Constitutional Enactment by renouncing and excluding certain powers guaranteed under the proposed enactments.

The outcome of this was a new treaty between the sultan and the British, and the proclamation of the first written constitution of Brunei. Under the terms of the 1959 Anglo-Brunei Agreement, Britain granted self-government to Brunei, whilst revoking the 1905-06 Agreement. The British retained jurisdiction over external affairs, defence and internal

29 Within a year of setting up, it claimed to have some 16,000 members.

30 In mid-1957, PRB engaged an eminent British constitutional lawyer, Walter Raeburn QC, to prepare a memorandum of its demands for submission to the Secretary of State for the Colonies in London and also to the sultan. Subsequently a delegation comprising Azahari, Jasin Affendy and Zaini Haji Ahmad went to London to present it at about the same time when the sultan and his delegation were there to discuss constitutional reforms. In its essence, the memorandum demanded full independence and free and democratic elections. It was a failure. The British insisted that Azahari refer the matter to the sultan instead. See Haji Zaini Haji Ahmad, *Partai Rakyat Brunei – The People's Party of Brunei: Selected Documents* (Kuala Lumpur: INSAN, the Institute of Social Analysis, 1988) at 119.

31 The PRB sought independence and the reunion of the three British Borneo territories as Kalimantan Utara (Northern Borneo), one single political entity to be governed by a democratically elected legislature that would be led by the Sultan of Brunei as a constitutional monarch. In many respects, the vision was similar to Suharto's dream of a pan-Indonesian state encompassing the whole archipelago of the Malay world, to be known as Nusantara. See also: W A Hanna, 'Three New States in Borneo Part II: Pageantry in Brunei (Southeast Asia Studies Vol XVI, No. 19 (Brunei) (New York, American Universities Field Staff).

32 A memorandum presented on behalf of the party described itself as more than a political party, saying that '(the party) is a movement which traces its origin to the awakening of national consciousness more than ten years ago, in 1946. It represents the sentiments and aspirations of many thousands of the comparatively small population of the State of Brunei who have no other means of articulation. Those sentiments and aspirations are common to most of the peoples of South East Asia at the present time and are summarized as a desire of the common people to have a voice in their own government': See Haji Zaini Haji Ahmad, *Partai Rakyat Brunei - The People's Party of Brunei: Selected Documents* (Kuala Lumpur: INSAN, the Institute of Social Analysis, 1988) at 102.

33 See Haji Zaini Haji Ahmad, *Partai Rakyat Brunei – The People's Party of Brunei: Selected Documents* (Kuala Lumpur: INSAN, the Institute of Social Analysis, 1988) at 127-135. The demand for the sultan to surrender substantially his autocratic powers and to promote a more democratically shared government was ignored when the sultan proceeded with a constitutional conference with the British Government before finally proclaiming the Constitution of Brunei on 29 September 1959, the terms of which were predictably favourable to the Sultan.

security. The post of the British Resident was terminated. In its place, a Malay Menteri Besar was to be appointed by the sultan, to whom he would be responsible for the exercise of executive authority in the state.[34]

IV. General Overview and Characterisation of the Constitution

It was however a constitution that never delivered on its promises.

The written constitution is contained in two basic documents: the Constitution of Brunei 1959 and the Succession and Regency Proclamation 1959. It reflected and highlighted Sultan Omar's wishes, the strongly personal sovereignty of the sultan with specific and explicit provisions that protected, preserved and maintained his prerogative powers.[35] In many respects, the personal rule of the sultan was maintained to an extensive degree. The preamble to the 1959 Constitution stated that it was by his prerogative powers that the 1959 Constitution was proclaimed. It also stipulated that the sultan is both the head of state and prime minister.

Section 84 of the 1959 Constitution specifically preserved and maintained the prerogative powers and jurisdiction of the sultan, to proclaim further constitutional provisions as may seem to him expedient.[36] Section 85(1) of the 1959 Constitution also gave the sultan the power to amend the Constitution.[37] It was notable for an absence of features that are associated with a system of public law. There was no distribution of powers associated with a federal system. There was an absence of any provision on the protection or guarantee for human rights and individual liberties. The independence of the courts and the judiciary was not guaranteed by any specific provision in the 1959 Constitution. There was no provision on the set-up, jurisdictional limits, remuneration, independence and retirement age of the

34 It marked a degree of progress "from an essentially autocratic system of government under which the Sultan possessed…almost despotic powers not regulated by any written constitution": Malaya and Singapore, The Borneo Territories, The Development of Their Laws and Constitutions, ed. L.A. Sheridan, 1961, p 120. It should be noted that there were two other agreements signed at the same time: the Brunei and Sarawak Separation Agreement, and the Overseas Officers Agreement. The purpose of these two agreements was to separate and remove any administrative overlap between Sarawak and Brunei under the British influence.

35 It was promulgated by the Sultan "with the advice and consent of [the] traditional advisers", with the intention of "[introducing] further representative institutions into the government of the State".

36 Section 84 of the 1959 Constitution provides:

"84.(1) The Government of the State shall be regulated in accordance with the provisions of this Constitution, and the form of such Government shall not be altered save in pursuance of the power conferred by section 85.

(2) Save as provided in subsection (1), and save to such extend as may be necessary to avoid inconsistency with any of the provisions of this Constitution, nothing in this Constitution shall be deemed to derogate from the prerogative powers and jurisdiction of the Sultan and, for the avoidance of doubt, it is declared that the Sultan retains the power to proclaim a further Part or further Parts of the law of the Constitution as to him form time to time may seem expedient."

37 Section 85 of the 1959 Constitution provides:

"85.(1) The Sultan may, by Proclamation, amend or revoke any of the provisions of this Constitution including this section; and this Constitution shall not otherwise be amended."

judiciary. The judiciary was obviously not regarded as a fundamental institution of the state. The 1959 Constitution also denied the power of the judiciary to interfere with the constitutional structure through interpretation or construction of its provisions. Section 86 of the 1959 Constitution provided for the establishment of an Interpretation Tribunal, which was vested with the power of interpreting the Constitution, whose members shall be appointed by the sultan.[38]

Succession to the throne was clarified in minute detail and rules were laid down on how the state was to be governed[39] - contained in the Succession and Regency Proclamation 1959. More important features of the Succession and Regency Proclamation 1959 include provisions sanctifying the sultan,[40] forbidding the sultan from amalgamating Brunei with other foreign countries,[41] and the functional aspects of the Council of Regency.[42]

The State Council, which had become somewhat irrelevant and filled largely by privileged aristocrats, was abolished and replaced by three new Councils: Executive, Legislative and Privy Council. In every sense, these three Councils were advisory units and did not constitute any meaningful checks upon the powers of the sultan.[43]

The Privy Council was presided over by the sultan[44] and comprises six *ex-officio* members (the Chief Minister, State Secretary, Attorney-General, State Financial Officer and the Religious Adviser, and two *wazirs*), nominated members whose office was held at the sultan's pleasure, and the British High Commissioner.[45] The Privy Council effectively functioned on a consultative basis, summoned only at the behest of the sultan[46] on matters regarding the constitution as well as the appointment of persons to Malay customary ranks.[47]

The Executive Council was presided over by the sultan[48] and consisted of seven *ex-officio* members (the Chief Minister, State Secretary, Attorney-General, State Financial Officer, Religious Adviser and two *wazirs*), seven unofficial members (six elected members of

38 Section 86 of the 1959 Constitution provides:

"Interpretation Tribunal

86.(1) The Sultan may refer any question involving the meaning, interpretation, construction or effect of any of the provisions of this Constitution to the Interpretation Tribunal established in accordance with subsection (7) for their determination…

(7) The Interpretation Tribunal shall consist of a Chairman, who shall be a person who holds or has held high judicial office in, or has for at least ten years been engaged in legal practice in, any part of the Commonwealth, and two other members, which Chairman and other members shall be appointed by the Sultan by Instrument under the Seal of the State."

39 See also A V M Horton, *Turun Temurun: A Dissection of Negara Brunei Darussalam* (UK, 1996) at 109.

40 Section 28 of the 1959 Succession and Regency Proclamation.

41 Section 24 of the 1959 Succession and Regency Proclamation.

42 Part III of the 1959 Succession and Regency Proclamation.

43 For all three Council, supreme executive authority continued to be vested in the Sultan.

44 Section 8 of the 1959 Constitution.

45 Section 5 of the 1959 Constitution.

46 Section 7 of the 1959 Constitution.

47 Section 6 of the 1959 Constitution.

48 Section 11 of the 1959 Constitution.

the Legislative Council, one nominated member) and the British High Commissioner.[49] Although the sultan may dismiss any member of the Executive Council other than the ex-officio members at his pleasure,[50] he could otherwise remove ex-officio members from office since these ex-officio members after all owe their offices and tenure to the sultan.

The Legislative Council,[51] presided over by the Menteri Besar, consisted of eight *ex-officio* members (the Chief Minister, State Secretary, Attorney-General, State Financial Officer, Religious Adviser, two *wazirs* and one appointee of the sultan), six official members, three nominated and 16 elected members. The sultan retained the power to remove any of the official and nominated members.[52]

The 1959 Constitution did not assist any democratic element to take root in the political governance in Brunei. The sultan occupied a unique position as sovereign monarch, wielding enormous powers, and enjoys significant privileges.[53] Brunei remained an absolute monarchy, unconstrained by parliamentary institutions, or the judiciary.[54] In as much as political power till 1959 had been centralized in the hands of the British Resident, in 1959, the sultan became heir to those very extensive powers. It made no concessions to democracy. The PRB's legal adviser, Raeburn QC, was right in describing that the 1959 Constitution "which depends entirely for its safeguards for the subject on the benevolent forbearance of the sovereign is in effect no constitution at all."[55]

Under the provisions of the 1959 Constitution, elections for the four district councils had to be held within two years of its proclamation, before 29 September 1961. It was to be an indirect process – a two-tier electoral system. Fifty-five members were to be elected to four district councils, which in turn formed an electoral college of 16 representatives. But the 16 representatives elected would be out-numbered by eight ex-officio, six official and three nominated members – a total of 17 – all the sultan's appointees.

The long awaited elections to the district councils were held on 30 - 31 August 1962.[56] Over 90% of the total electorate voted. The PRB won 54 out of 55 district council seats and secured 16 seats in the 33-seat Legislative Council. It was a sweeping popular mandate.[57] However, the 1959 Constitution made no provisions to allow the winning party to form a

49 Section 11 of the 1959 Constitution.
50 Section 12(5) of the 1959 Constitution.
51 Part VI of the 1959 Constitution.
52 Section 31(1) of the 1959 Constitution.
53 See further: Ahmad Ibrahim and A V Winslow, The Kingdom of Brunei – Constitution and Monarchy in Brunei, in the Constitutional Systems in Late Twentieth Century Asia, ed. Lawrence W Beer, p 368.
54 See further: Roger Kershaw, Brunei: Malay, monarchical, Micro-state, ed. John Fuston.
55 The PRB was quick to denounce the constitutional set-up as a move towards legitimizing absolute monarchy in Brunei.
56 The elections were delayed till August 1962 for purportedly technical reasons, principally the difficulty of working out the mechanics of voter registration. It was suggested that the delay was to give the government time to promote a new political party.
57 See: A J Stockwell, 'Britain and Brunei, 1945-1963: Imperial Retreat and Royal Ascendancy (2004) Modern Asian Studies 38, 4, p 798.

government as had happened in the Federation of Malaya in the 1950s, when the Alliance won a majority in the local elections. Thus, the PRB could not form a government and its 16 members in the Legislative Council were still outnumbered by the 17 nominated members.

In April 1962, the rubber-stamp Legislative Council voted 24-to-four authorizing the sultan to negotiate Brunei's entry into Malaysia.[58] After three postponements of the Legislative Council meeting in September, October and November 1962, an anti-merger motion put up by the PRB for debate in the Council was disallowed in early December 1962. Such an anti-merger motion was most probably sparked by the doctrine of self-determination demanding that all countries should respect the people's collective decision in choosing the country they wished to belong to. The semi-elected nature and the narrow outnumbering of the 16 elected members in the Legislative Council was argued by the PRB as denying the expression of the people's will on the merger issue.[59]

The denial of constitutional means for elected members to express their views in the Legislative Council has generally been assessed by historians as the principal factor that precipitated the revolt[60] on 8 December 1962.[61] Sultan Omar immediately proclaimed a state of emergency.[62] The British acted fast, law and order was soon restored. The obvious winner in this high-stake competition was Sultan Omar. Now in total control, he immediately effected a firm grip on political parties and the labour movement. Subsequent actions by the sultan ensured that very little progress was made towards popular government.[63]

The experiment in political change and development came to a total halt.[64] The Legislative Council was dissolved on 19 December 1962.[65] In its place, an Emergency Council was

58 By the second half of 1962, the PRB had strong reasons for feeling frustrated in both its bid for power and of preventing Brunei joining Malaysia. The sultan continued to be in favour of joining Malaysia. Under the circumstances, there was very little Azahari and his supporters could do to prevent that eventuality. See Graham Saunders, *A History of Brunei* (London: RoutledgeCurzon, 2002) at pp 144-145. See also: W A Hanna (1964) 'The Formation of Malaysia: New Factor in World Politics (New York, American Universities Field Staff) pp 31-39.

59 See Haji Zaini Haji Ahmad, *Partai Rakyat Brunei – The People's Party of Brunei: Selected Documents* (Kuala Lumpur: INSAN, the Institute of Social Analysis, 1988) at 240-241: 'We believe that the significance of the Brunei uprising is clear to all impartial observers. The people of Brunei, arbitrarily deprived of all constitutional means, had expressed their will in no uncertain terms, albeit in violence… The choice of weapons, as the fact shows, was dictated by the anti-democratic behaviour of the colonial power…We believe that this policy of repression is deliberately aimed at crippling all effective opposition to the Malaysia scheme. It is also meant to intimidate'.

60 For an account of British role in putting down the nationalist rebellion, see Alun Chalfont (1989) By God's Will, a Portrait of the Sultan of Brunei (London, Weidenfeld and Nicholson) pp 69-77.

61 See further Zariani Abdul Rahman, *Escape from Berakas! – 1962 Brunei Revolt* (Selangor: Al-Ahad Enterprise, 1992); Haji Zaini Haji Ahmad, *Partai Rakyat Brunei – The People's Party of Brunei: Selected Documents* (Kuala Lumpur: INSAN, the Institute of Social Analysis, 1988). See also: T Harrison, Background to a Revolt; Brunei and the Surrounding Territory (1963, Brunei Town, The Light Press).

62 Proclamation of Emergency, 1962 (E 17 of 1962) 12 December 1962.

63 See further: G Saunders, A History of Brunei, 1994.

64 The 1962 revolt that brought about the first Proclamation of Emergency (E 17 of 1962) on 12 December 1962 effectively stopped any introduction of further representative institutions.

65 By the Emergency (Suspension of Constitution) Order, 1962 (S16/63), 19 December 1962.

established.[66] The revolt served to arrest any prospect of further peaceful political change. Under emergency regulations imposed immediately after the revolt,[67] the Executive Council governed Brunei until 23 July 1963.

Initially attracted to the Malaysian Federation proposal, Sultan Omar did not decide to immediately pull out of the Malaysia talks. But when the Malaysia Agreement was signed by all the other heads of delegations in July 1963, Sultan Omar had decided to opt out of Malaysia.[68] Again, the sultan was an obvious beneficiary of the dramatic turn of events. In the broader context, Brunei's opting out also denied the Malaysian government the ability to apply any effective political pressure on the sultan to establish some form of popular government in Brunei. The rule of the sultan was strengthened even further, with the quickening spirit of participatory democracy extinguished altogether. Brunei was to later see itself having its state of emergency continuously renewed till today – a perpetual rule by decree. The Legislative Council was turned into a meaningless talk-shop.[69]

The British government showed its impatience[70] over the slow progress towards a responsible government by pressing the sultan to introduce more elected members to the Legislative Council. But the sultan resisted. Rather than giving in to British demands and thereby weakening the authority of the monarchy, Sultan Omar abdicated in favour of his son, Hassanal, the current sultan, on 4 October 1967.[71] Arguably, one of the key motivations

66 Also by the Emergency (Suspension of Constitution) Order, 1962 (S16/63), 19 December 1962.

67 Only in January 1990, under international pressure, primarily from Amnesty International, were five former members of the PRB and a brother of Azahari Mahmud who had been involved in the nationalist rebellion released. See: Minh Quang Dao (1996) 'Brunei: An economy in transition' Journal of Contemporary Asia, 26:4, 505-511.

68 Brunei's opting out was primarily caused by the issue of the settlement of Brunei's rich oil revenues. The Malayan leaders were only prepared to give Brunei control of its oil for the first 10 years after Malaysia Day, whereas the sultan wanted to have control of its oil wealth in perpetuity. Britain never seriously sought to have Brunei incorporated into the Malaysian Federation, and did little to encourage Brunei in doing so, no doubt aware that the interests of Royal Dutch Shell might be adversely affected if Brunei entered the Federation. Two other secondary issues that probably contributed to the Sultan's decision in withdrawing from the Malaysia plan was the ranking of Sultan Omar last in the hierarchy of the Council of Rulers amongst the other sultans of the Malayan states (in accordance with the date of entry of the Brunei Sultanate into the Federation of Malaysia), as well as the intention of Malaya to impose taxes on any new oil and mineral discovery after Brunei joined Malaysia.

69 In December 1963, having freed itself from any commitment to join Malaysia, Sultan Omar announced that elections would be held within the next two years. But there was a catch – only 10 members were to be elected to form a 21-member Legislative Council. See Constitution (Amendment) Proclamation 1964 (E 4 of 1964) 30 January 1964 that changed the membership of the Legislative Council to six ex-officio members, five nominated and 10 elected members. It also changed the Executive Council to be Council of Ministers, comprising six ex-officio members, the High Commissioner and four members from the Legislative Council, appointed by the sultan. Elections were held in March 1965. Although the PRB was banned, seven out of the ten elected were former members of the banned PRB. See: Graham Saunders, *A History of Brunei* (London: RoutledgeCurzon, 2002) at p 159.

70 Britain was then facing growing pressures from the anti-colonial lobby in the United Nations. A delegation was sent to discuss plans for independence, but this was rejected by the Sultan. See also: Michael Leifer 'Decolonisation and International Status: The Experience of Brunei' (Apr 1978) International Affairs (Royal Institute of International Affairs) Vol 54, No 2, p 240 at pp 245-248.

71 Caught by surprise, the British ceased to apply pressures for constitutional reforms. Eventually, the British virtually conceded defeat on constitutional reforms thereafter. See further: G Saunders, A History of Brunei, 1994, p 162;

for Sultan Omar's abdication[72] was to delay Brunei's independence for as long as possible,[73] whilst giving himself the freedom to consolidate his domestic power base.

When the term of the second Legislative Council expired in May 1970, the new sultan reverted to government by decree. Even the provision of 10 elected seats in the Legislative Council was abolished. On 12 April 1970, by the Emergency (Council of Ministers and Legislative Council) Order, 1970[74], the composition of the Legislative Council was changed to an entirely-appointed body - six Ex-officio Members, five Official Members and 10 Nominated Members. The Election (Conduct of Elections) (District Councils) Regulations, 1961 and Constitution (District and Legislative Councils) Order, 1962 were suspended.

V. System of Government

In 1971,[75] the Anglo-Brunei Agreement of 1959 was amended, removing the last vestige of British control of Brunei's internal affairs,[76] diminishing the role of the High Commissioner, who thereafter ceased to retain any advisory functions nor any role in internal governance.[77] Brunei only very reluctantly[78] assumed full independence at the end of 1983 when Britain surrendered responsibility for its defence[79] and foreign policy. It is obvious that Britain

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A J Stockwell, 'Britain and Brunei, 1945-1963: Imperial Retreat and Royal Ascendancy (2004) Modern Asian Studies 38, 4, pp 785-819.

72 Sultan Omar, by abdication, 'had bought the time he believed Brunei needed to transform itself into a viable independent state under a benign if autocratic monarchy', and that 'the flirtation with democracy was rapidly ended': See Graham Saunders, *A History of Brunei* (London: RoutledgeCurzon, 2002) at 160.

73 This was, according to Horton, the Sultan's wish 'to shelter under the British protection internationally whilst maintaining a free hand for himself in domestic affairs': A V M Horton, *Turun Temurun: A Dissection of Negara Brunei Darussalam* (UK, 1996) at 32. See also: W A Hanna, 'Three New States in Borneo Part II: Pageantry in Brunei (Southeast Asia Studies Vol XVI, No. 19 (Brunei) (New York, American Universities Field Staff) p 2.

74 (S59/70) 12 April 1970.

75 By the 1971 agreement, the title of the High Commissioner was changed from 'Her Majesty's High Commissioner' to the 'British High Commissioner'.

76 This was, to many, symbolic of a shedding of the constitutional relationship between Britain and Brunei. However, the diplomatic relationship between the two countries remained friendly. See Chalfont Arthur Gwynne Jones, *By God's Will: A Portrait of the Sultan of Brunei* (London: Weidenfeld & Nicolson, 1989) at 102.

77 Britain retained responsibility for defence and Brunei's foreign affairs, but only on a consultative basis.

78 Despite the initial reluctance by the sultan to proclaim Brunei's independence, his worries over Brunei's future security in the region was gradually assuaged when the Association of South East Asian Nations (ASEAN) expressed its warm welcome to include Brunei after its independence. Joining the ASEAN meant that Brunei's sovereignty and security in the Southeast Asian region would be secured. See Donald E Weatherbee, "Brunei: The ASEAN Connection" (June 1983) Vol 23 No 6, Asian Survey pp 723-735. Brunei also eventually joined the Commonwealth and became the 159th member of the United Nations.

79 Since the early 1960s, a complete Gurkha battalion has been stationed in Brunei with a permanent base. The arrangement was confirmed by a secret Exchange of Letters in 1983 on the eve of the Independence, and has since been renewed every five years. See Roger Kershaw (2003) 'Partners in realism: Britain and Brunei amid recent turbulence' Asian Affairs 34:1, 46-53; Tony Gould (1999) Imperial Warriors, Britain and the Gurkhas (London, Granta Books) 383; K Mulliner 'Brunei in 1984: Business as Usual after the Gala' (Feb 1985) Asian Survey Vol 25 No 2 p 214 at 216-217.

handed over power without any regard for the principle of majority rule.[80]

The concept of the Malay Islamic Monarchy, or the Melayu Islam Beraja (MIB), was officially promulgated on Brunei's independence,[81] to serve as a prescriptive system for 'nation-building'. An ideological construct began in earnest. It seeks to consolidate 'a single national identity, born of convergence on a dominant Malay culture, and long binding a loyal citizenry to an absolute monarchy of the same race, with the blessing and divine sanction of Islam'.[82] It was regarded as 'a concept which upholds Islamic principles and values based on the Quran and hadith as the basis of all activities concerning the racial necessity, language, Malay culture and the monarchy institution as the governing system and administration' in Brunei.[83] It is widely accepted that the elevation of the recently-concocted[84] state ideology[85] around the monarchy[86] offers an indigenous alternative to otherwise secular imported ideas and concepts[87] around representative democracy, which would otherwise offer a fundamental challenge[88] to the political status quo,[89] namely absolutist control over the nation's political as well as economic resources.[90]

Instead of taking steps towards democratization and the institution of representative government, on 13 February 1984, shortly after independence, Parts VI and VII of the Constitution relating to the Legislative Council were suspended,[91] in effect, leading to

80 Timothy T M Ong, 'Modern Brunei, Some Important Issues' (1983) Southeast Asian Affairs (Singapore, Institute of Southeast Asian Studies, 1983) pp 71-84.

81 Since before Independence, moral autarchy has been a standard theme in official communications with the Brunei public. See G C Gunn (2000) New World Hegemony in the Malay World (New Jersey, The Red Sea Press Inc.) pp 159-183; A V M, 'A New Sketch of the History of Negara Brunei Darussalam' p 33. See extract of the 1984 Titah (royal address) in Borneo Bulletin Brunei Yearbook 2000 p 92.

82 G Braighlinn (1992) 'Ideological Innovation Under Monarchy: Aspects of Legitimation Activity in Contemporary Brunei' (Amsterdam: VU University Press (Comparative Asian Studies, 9)) at p 19.

83 See Borneo Bulletin Brunei Yearbook 2000 p 92.

84 G Braighlinn credited Ustaz Badaruddin as the architect that constructed the ideological foundations of the *Melayu Islam Beraja* concept. See G Braighlinn (1992) 'Ideological Innovation Under Monarchy: Aspects of Legitimation Activity in Contemporary Brunei' (Amsterdam: VU University Press (Comparative Asian Studies, 9)) at pp 5, 19. See also R Kershaw, 'Constraints of History: the eliciting of Modern Brunei' (1998) 29 Asian Affairs 312 at p 315.

85 See Hans C Blomqvist (1993) 'Brunei's strategic dilemma', The Pacific Review, 6:2, pp 171-175.

86 See *e.g. Melayu Islam Beraja* has been a compulsory annual subject at the University of Brunei Darussalam and all national schools since 1991; 'The goal is to fortify attachment and loyalty in the rakyat towards MIB concept.' Borneo Bulletin 12 July 1992; Naimah S Talib, 'A Resilient Monarchy: the Sultanate of Brunei and Regime Legitimacy in an era of Democratic nation-states' (2002) 4 New Zealand Journal of Asian Studies 134.

87 See *e.g.* B Hussainmiya, 'Philosophy for a Rich, Small State' (1994) 157 Far East. Econ. Rev. 31; 'Sultan Calls to meet Globalization Challenges Through Bruneian Identity' Borneo Bulletin 24 September 2004.

88 The state ideology is seen as a way of controlling social forces released by rapid economic development. See: Sharon Siddique, 'Brunei Darussalam 1991, the Non-Secular Nation', Southeast Asian Affairs 1992 (Singapore: Institute of Southeast Asian Studies 1992) 91.

89 See *e.g.* 'Royal Call to Preserve Brunei's Unique Identity' Borneo Bulletin 6 November 2006.

90 Geoffrey C Gunn, *Language, Power, and Ideology in Brunei Darussalam* (Athens, Ohio: Ohio University Center for International Studies, 1997) at 224.

91 See Emergency (Constitution) (Amendment and Suspension) Order 1984 (S8/84) 13 February 1984, suspending Parts VI and VII of the Constitution that relate to the Legislative Council. See also Proclamation Dissolution of the Legislative Council (S46/2004) 13 February 1984, proclaiming the dissolution of the Legislative Council, and also stating that the Legislative Council 'first met on [21 December 1983]'. See 'Sultan at Legislative Council'

further political consolidation[92] of the monarchical system[93] in Brunei. This is despite the fact that under Part VI of the 1959 Constitution, the Legislative Council shall only comprise six ex-officio members, five official members and 10 nominated members[94] - an entirely appointed body.[95] Although a ministerial form of government was unveiled in 1984, the sultan's influence and presence continued to be overwhelming, appointing himself as the Prime Minister (replacing the previous position of Menteri Besar or the Chief Minister), Finance Minister and Home minister.[96]

In his speech on the 10th anniversary of Brunei's independence, in 1994, the sultan announced that the 1959 Constitution would be reviewed, with one of the objects of increasing political participation by the citizens of Brunei through the establishment of a national Legislative Council.[97]

VI. Unprecedented Political and Constitutional Changes – Redefining an Autocratic Monarchy

One must therefore have in mind this historical baggage - from the persistent weakening and contraction of the sultanate in the 19th century, to the 1962 revolt and the 1963 opting out of Malaysia that perpetually drives the intense desire on the part of the Bruneian monarchy to ensure Brunei's, and its, continued existence, and preserve the status quo - in appreciating the political motives behind the unprecedented constitutional changes in 2004-2006.

On 15 July 2004, the sultan delivered a speech that touched on constitutional reforms to increase political participation, and the reinstatement of the Legislative Council.[98] The

www.brudirect.com (16 March 2006) reporting that, 'The council held its first sitting on December 27, 1983 and was dissolved on February 13, 1984.'

92 Since 1984, the sultan has been able to main his authoritative power over the country. See Minh Quang Dao (1996) 'Brunei: An economy in transition' Journal of Contemporary Asia, 26:4, 505-511.

93 For instance, one important feature of the constitutional developments upon Brunei's independence was the drawing up of a new government structure under the installation of the Cabinet of Ministers whose seats were largely filled up by the royal family. See further Chalfont Arthur Gwynne Jones, *By God's Will: A Portrait of the Sultan of Brunei* (London: Weidenfeld & Nicolson, 1989) at pp 128 and 140.

94 See further: Ranjit Singh, Brunei Darussalam in 1987: Coming to Grips with Economic and Political Realities, Southeast Asian Affairs 1988.

95 This composition could be traced to the Emergency (Council of Ministers and Legislative Council) Order 1970 (S59/70) 12 April 1970.

96 See Emergency (Constitution) (Amendment) Order 1983 (S32/83) 1 January 1984. This provided for the monarch as supreme executive authority. It also provided the posts of Prime Minister, Ministers and Deputy Ministers and Attorney-General. See further: D Leake, Brunei: The Modern Southeast Asian Islamic Sultanate, 1990.

97 A Committee to review the Constitution was set up soon after the speech. See further: Mohamad Yusop bin Awang Damit, Brunei Darussalam: Weathering the Storm, Southeast Asian Affairs 2000.

98 See 'New era dawns in Brunei' Borneo Bulletin (17 July 2004): 'The landmark Titah (speech) by His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam on his 58th birthday continued to generate nationwide and worldwide acclaim as the Monarch set the pace to an era of constitutional reforms in the Sultanate…His Majesty stated that the Brunei parliament will be reconvened for the first time in decades as part of the political reforms

suspension of the provisions of Parts VI and VII of the Constitution, which relate to the Legislative Council, ceased to have effect on 16 August 2004.[99] On 25 September 2004,[100] an entirely-appointed Legislative Council[101] of six ex-officio, five official and 10 nominated members was reinstated with a specific purpose of passing a series of constitutional amendments.

This part of analysis seeks to show that behind the unprecedented constitutional developments was pure political expediency[102] - of clarifying, broadening and entrenching the absolute nature of the monarchy.[103] In fact, the constitutional amendments set out in the clearest terms the complete and unfettered powers and privileges enjoyed by the sultan, and underscore his supreme authority on all matters in the governance of Brunei.[104]

Indeed, with the constitutional changes, it is not inaccurate to regard the Constitution of Brunei as a worthless piece of document. The Constitution is certainly not a superior law of the land. The monarch is clearly made 'above the law'.[105]

VII. The Sultan's Unfettered Legislative Authority

The constitutional changes served to remove all the little kinks in the monarch's vast arsenal of totally untrammeled legislative authority. Firstly, Section 39 of the Constitution

to 'engage the citizens'. The Monarch also stated the decision to revitalize the parliament is to 'give priority to widening the opportunities to the public to engage and contribute to nation-building.'

99 See Constitution (Amendment and Suspension)(Amendment) Order 2004 (S47/2004) 16 August 2004. It inserts a new section declaring that the suspension of Parts VI and VII of the Constitution that relate to the Legislative Council (effected by the Emergency (Constitution) (Amendment and Suspension) Order 1984 (S8/84) 13 February 1984) ceases to have effect.

100 See Constitution (Proclamation under section 52(2)) (S51/2004) 11 September 2004 that proclaims 25 September 2004 for the commencement of a session of the Legislative Council. See also: 'State Legislative Council to Reconvene Next Saturday', Brudirect.com (19 September 2004); 'Constitutional Amendments Reflect Nation's Monarchical System' Radio Televisyen Brunei (30 September 2004).

101 That was the first time in 20 years the sultan reconvened the Legislation Council. See Constitution (Proclamation under section 52(2)) (S51/2004) 11 September 2004. See also Proclamation Dissolution of the Legislative Council (S46/2004) 13 February 1984. 'Sultan at Legislative Council' www.brudirect.com (16 March 2006) reporting that, 'The Brunei Legislature was re-opened on September 25, 2004, after a 21-year absence, with its first agenda being the proposed amendment of the 1959 constitution.'

102 See '[The sultan] hoped the amendments to the 1959 Constitution discussed by the Legislative Council this week will lay down a strong foundation towards fulfilling his vision. His Majesty also stressed that these amendments will truly reflect Brunei's position as a sovereign and truly independent national that has practised the monarchical system of government for 600 years.': 'Constitutional Amendments Reflect Nation's Monarchical System' Radio Televisyen Brunei (30 September 2004).

103 'The amendments are designed to strengthen the monarch system and to better regulate the relationship between the government and people. The move is timely, as it will bring the Constitution in line with special traditions, practices and customs of Brunei as well as to ensure that the Constitution is updated.': Borneo Bulletin (16 July 2004) p.1.

104 The sultan himself, as the Prime Minister, and his younger brother, Prince Mohamed, the Foreign Minister, were also members of the Legislative Council that approved the constitutional amendments.

105 See further Roger Kershaw, Monarchy in South-East Asia: The Faces of Tradition in Transition (London: Routledge, 2001) at 122.

provides that the sultan 'may make laws for the peace, order, security and good government of Brunei'. Such an unrestricted clause allows the monarch to make any laws he pleases. Although this is carried over from the 1959 Constitution, under the 1959 Constitution, the sultan must receive the advice and consent of the Legislative Council before he can make such laws. As a result of the recent constitutional amendments, even this little inconvenience was removed.[106]

Secondly, the sultan also retains reserved powers under Section 47 to make laws.[107] The recent constitutional amendments have widened the reserved powers. The monarch now has the power to declare any Bill to have legal effect, if he should 'consider that it is expedient in the interests of public order, good faith or good government of Brunei' or 'for any other reason whatsoever' that the Bill should have the legal effect. Section 47 now provides that the sultan retains the reserved powers to declare any Bill to have legal effect despite the failure of the Legislative Council to pass it.

Thirdly, the sultan also retains his wide prerogative powers and jurisdiction under Section 84(2).[108] The declaratory effect of this constitutional amendment is that the monarch 'retains the power to make laws and to proclaim a further Part or Parts of the law of this Constitution' as it may seem expedient to him.[109]

Fourthly, as a result of the constitutional amendments, Section 43 now stipulates that the monarch may declare a Bill to have effect as an Act despite a negative resolution by the Legislative Council.[110] It is unclear how Section 43(5) is, in substance, any different from Section 47.

VIII. Rendering the Legislative Council a Meaningless Rubber-Stamp Chamber

As a result of the constitutional amendments, the monarch has now strengthened his grip considerably over the Legislative Council, further reduced it to a meaningless rubber-stamp chamber.

It should be pointed out here that following the declaration of emergency after the 1962 nationalist rebellion, the role of the Legislative Council in submitting and debating

106 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that substitutes a new section 39 for the previous one.

107 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that substitutes a new section 47 for the previous one.

108 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that substitutes a new section 84(2) for the previous one.

109 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that substitutes a new section 84(2) for the previous one.

110 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that substitutes a new section 43(3) for the previous one, and adds new subsections (4) and (5) to section 43.

amendment proposals to the 1959 Constitution has not been observed. Instead, the sultan has since been relying on the perpetually renewed emergency status of Brunei to implement amendments to the Constitution.[111] It would also be fair to say that due to the constitutional amendments, the Legislative Council is rendered meaningless, with all its residual symbolic functions nullified.

The sultan's absolute power is manifested in Section 24 which provides that he may amend the composition and membership of the Legislative Council by order published in the government gazette.[112] With the constitutional amendments, the composition and membership of the new Legislative Council is found in the Second Schedule to the Constitution, comprising up to 30 appointees,[113] the ex-officio members are all the cabinet ministers, including the sultan himself as the Prime Minister, his younger brother, the Foreign Minister, and the crown prince, and up to 15 District Representatives from the four districts in Brunei.[114] Its utter meaninglessness is shown in paragraph 8 of the Second Schedule that declares that the sultan has the 'absolute discretion to proclaim that the Legislative Council' 'has been properly and validly constituted' notwithstanding that no members have been appointed under one or more of the categories of membership of the Legislative Council.[115]

It seems that under the Second Schedule to the Constitution, the nomination and appointment procedures for District Representatives[116] is meant to deal with the transitional period before laws relating to elections are put in force.[117] Pending the introduction of the election process, candidates from various districts will be proposed by the village leaders[118]

111 Roger Kershaw in 2001 noted (in Roger Kershaw, *Monarchy in South-East Asia: The Faces of Tradition in Transition* (London: Routledge, 2001) at 124) the following as regards the dwindling importance of the Constitution: '… it seems to have become a practice to extend the Sultan's powers through further Emergency Orders (Subsidiary Legislation) which invoke the authority of the Constitution yet do not amend its text in the relevant Sections. Reflecting its declining importance, the Constitution has not been published for general sale since the early 1970s, and Constitution Day (29 September), after being effectively moribund for some years, was replaced, from 1991, by Teachers' Day (23 September) as an annual mark of honour to the late Seri Begawan Sultan' (Sultan Omar).

112 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that substitutes a new section 24 for the previous one.

113 Paragraph 1(a) of the Second Schedule to the Constitution, introduced by Constitution (Amendment) Proclamation (S65/2004) 29 September 2004.

114 Paragraph 1(b) of the Second Schedule to the Constitution, introduced by Constitution (Amendment) Proclamation (S65/2004) 29 September 2004.

115 Paragraph 8 of the Second Schedule to the Constitution, introduced by Constitution (Amendment) Proclamation (S65/2004) 29 September 2004.

116 Paragraphs 5 and 6 of the Second Schedule to the Constitution.

117 See paragraph 4(2) of the Second Schedule to the Constitution. No date for elections has so far been set. See also: 'Constitutional Amendments Reflect Nation's Monarchical System' Radio Televisyen Brunei (September 2004), carrying the reminder of caution from the monarch: 'His Majesty expressed the hope that for the benefit of country's future, the Legislative Council would be a strong and loyal institution. The Monarch reminded that the proposed system of the people' representation should be implemented with more caution, for the sake of the people and the future of the nation. There was no doubt that it needed a closer study as well as an infrastructure for electing the representatives so that the system is organized and trustworthy.' It looks like elections for the District Representatives will not be held soon, if at all.

118 Where the District Representatives in the Legislative Council are to be selected (with approval from the

- presumably through a process of 'indirect election'. These candidates will be scrutinized by a Selection Committee appointed by the sultan,[119] which will make recommendations for the sultan's approval[120] on their suitability for appointment to the Legislative Council.

The constitutional amendments also curb the extent of the freedom of expression within the chamber, and increase the risks for the appointed members to be evicted, should they be foolish enough to make disagreeable comments.

Among the new grounds that a member of the Legislative Council[121] will lose his seat or be disqualified from selection will be if he has shown himself to be "disloyal" or "disaffected" towards to the sultan, the meaning of which is left undefined.[122] The sultan may declare any member to be incapable of discharging his functions as a member.[123] The sultan may also suspend[124] any member from the exercise of his functions.

Freedom of expression within the Legislative Council is also substantially curtailed. There are new restrictions on the ability of members to freely express their views.[125] The new Section 53(1A) now prohibits comments derogatory of the sultan, the royal family, the state ideology of Malay Islamic Monarchy[126] or any matter that constitutes an offence under the Sedition Act. It is now an offence to "directly or indirectly lower or adversely affect the rights, status, position, powers, privileges, sovereignty or prerogatives" of the sultan, his spouse, successors or other members of the royal family. The amendment also makes it an offence to "directly or indirectly lower or adversely affect the standing or prominence" of the state ideology.[127]

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government) from the elected members at the village and sub-district level. See paragraph 5(4) of the Second Schedule to the Constitution.

119 Paragraph 5(4) of the Second Schedule to the Constitution.

120 Paragraph 5(5) of the Second Schedule to the Constitution.

121 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that clarifies the sultan's power in section 31(1), stating that every member of the Legislative Council shall hold his seat at the sultan's pleasure.

122 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that introduces a new section 30(a).

123 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that substitutes a new section 31(4) for the previous one.

124 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that substitutes a new section 31(5) for the previous one.

125 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that introduces a new section 53(1A).

126 See G Braighlinn, Ideological Innovation under Monarchy: Aspects of Legitimation Activity in Contemporary Brunei, Comparative Asian Studies No. 9, 1992, p 19. It should be pointed out that the Declaration of Independence of 1984 mentioned that Brunei would be known as *Negara Melayu Islam Beraja* (a Malay Islamic Monarchical state).

127 The ideology of Malay Islamic Monarchy was first enunciated in 1990, an attempt to define Bruneian identity in terms of its citizens' attachment to the Malay culture, the Islamic religion and loyalty to the monarchy, a means to create a 'unifying ideology which would bolster [the Sultan's] power, blunt the appeal of those calling for a stricter observance of Islam, and develop a sense of purpose in the young': G Saunders, A History of Brunei, 1994, pp 187-188. See also: 'Brunei Darussalam in 1992: Monarchy, Islam and Oil' (Feb 1993) Asian Survey Vol 33, No 2 p 200; 'Negara Brunei Darussalam in 1991: Relegitimizing Tradition' (Feb 1992) Asian Survey Vol 32, No. 2 pp 127-128.

The amendment to Section 43 also results in requiring the Legislative Council to submit a report to the sultan if it refuses to pass a Bill.[128] The sultan will consider the report of the Legislative Council, but is entitled to declare that the rejected Bill should still be made law in its original, or an amended, form.[129]

Under the 1959 Constitution, the sultan may by Proclamation amend the Constitution, but the Legislative Council must first approve that amendment. As a result of the recent constitutional amendments, under the new section 85(4),[130] the sultan's draft Proclamation to amend the Constitution will be placed before the Legislative Council, which will be entitled to propose amendments to it within 14 days. What is significant, if no amendments are proposed by the Legislative Council, the sultan may now proceed to declare the Proclamation. If amendments are proposed within the deadline, the sultan may accept the proposed amendments or make such amendments as he deems fit.[131]

Even with all these provisions that render the Legislative Council a meaningless chamber, there seems no great hurry to implement the provisions on the elections of the District Representatives. In fact, the events give the impression that the Legislative Council was convened with only one purpose - to pass the series of constitutional amendments to entrench the monarchy.[132] After the passing of the constitutional amendments by the Legislative Council in September 2004, it was dissolved on 1 September 2005,[133] and all new members appointed by the monarch.[134]

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128 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that introduces a new section 43(4).

129 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that introduces a new section 43(5).

130 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that introduces a new section 85(4).

131 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that introduces a new section 85(5).

132 See Hj Mohd Yusop Hj Damit, "Brunei Darussalam: Towards a New Era" in Daljit Singh & Lorraine C Salazar eds., *Southeast Asian Affairs 2007* (Singapore: Institute of Southeast Asian Studies Publications, 2007) 103.

133 See 'Legislative Council Dissolve' www.brudirect.com (2 September 2005) reporting that 'His Majesty… consented for the present Legislative Council to be dissolved and consented to appoint new members with effect from tomorrow.' ; 'PKKB Lauds New Legco Appointments' www.brudirect.com (2 September 2005), reporting that, 'His Majesty announced on August 31, 2005 that the Legislative Council was to be dissolved yesterday and new members appointed with effect from today. Some 29 members of the council were appointed including five district representatives, a penghulu and four headmen representing the four districts of Brunei-Muara, Belait, Tutong and Temburong.'; See 'Sultan at Legislative Council' www.brudirect.com (16 March 2006) reporting that, 'The Brunei Legislature was re-opened on September 25, 2004, after a 21-year absence, with its first agenda being the proposed amendment of the 1959 constitution. The council now houses 29 members after the government dissolved the previous sitting on September 2, 2005.'; 'Explore Other Resources to Avoid Foreign Dependency' www.brudirect.com (16 March 2006) reporting that, 'Today is the first session of the meeting for the State Legislative Council members who have just been appointed. It houses 29 members, with five representatives from the four districts.'

134 Among the 29 members are the monarch himself, the crown prince and the monarch's younger brother. Five members were appointed under paragraph 5(1) of the Second Schedule to the Constitution to represent the four districts of the country. See: 'Legislative Council Dissolve' www.brudirect.com (2 September 2005); 'PPKB Lauds New Legco Appointments' www.brudirect.com (2 September 2005) reporting that, 'Some 29 members of the council were appointed including five district representatives, a penghulu and four headmen representing

IX. Centralizing and Accentuating the Executive Authority in the Monarch

As a result of the constitutional amendments, the sultan's executive authority was clarified, expanded and centralized. Section 4 of the Constitution now stipulates that the sultan shall be the Prime Minister[135] and the Supreme Commander of the Royal Brunei Armed Forces.[136]

Section 4 indicates that the supreme executive authority vests in, and stipulates that the executive authority shall be exercised by, the sultan.[137] Section 4 also stipulates that the sultan may revoke[138] the appointment of any Minister or Deputy Minister at any time without showing cause.[139]

The cabinet is rendered toothless[140] - the sultan is not bound to act in accordance with the advice of the cabinet. And no decision of the cabinet is valid without the sultan's endorsement.[141] The monarch now has absolute control over the proceedings of the cabinet.

Various constitutional and legislative amendments were also made to enhance the protection of the sultan's status as an absolute sovereign.

Section 57[142] provides that the Civil List shall be reasonable, adequate and suitable to the rank, position and dignity of the sultan. Section 57 gives the sultan power, without any restraint on it, to draw up a schedule of the members of the royal family who are entitled to be recipients under the Civil List, and the power to revoke, suspend or reduce any amount of allowances payable to the member.[143]

The 1959 Constitution did not confer any immunity on the sultan against civil and criminal proceedings. As a result of the constitutional amendments, Section 84B[144] now makes it clear that no proceedings, whether criminal or civil, may be initiated against the sultan for things done or omitted to have been done by the sultan during or after his reign,

the four districts of Brune-Muara, Belait, Tutong and Temburong.'

135 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that adds a new section 4(1A).

136 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that adds a new section 4(1B).

137 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that adds a new section 4(2).

138 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that adds a new section 4(3).

139 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that clarifies that every Minister shall hold his position during the sultan's pleasure. See also Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that adds a new proviso to section 4(6) stating that power.

140 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that substitutes a new section 19 for the previous one.

141 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that adds a new section 19A.

142 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that substitutes a new section 57 for the previous one.

143 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that adds new subsections (4) and (5) to section 57.

144 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that introduces a new section 84B.

whether in his official or personal capacity.[145]

Section 84B(2)[146] also extends this immunity[147] to anyone acting on his behalf or under his authority.[148] The proviso however provides that provision may be made by written law for the bringing of proceedings against the government or any officer, servant or agent thereof, in respect of wrongs committed in the course of carrying on the government.[149]

The sultan's prerogative powers are also explicitly preserved by the Constitution.[150] Section 84 now provides that the Constitution shall not be deemed to derogate from the prerogative powers and jurisdiction of the sultan.

Other than the constitutional amendments, there was also a whole series of legislative amendments that appear aimed at shielding the monarch from embarrassing exposè from court proceedings.

Section 15(4) of the Supreme Court Act describes the multitude[151] of situations in which court proceedings that touch, directly or indirectly, on the standing or conduct of the sultan, must be conducted in camera. Section 15(5) of the Supreme Court gives the sultan

145 See also Succession and Regency (Amendment) Proclamation 2004 (S49/2004) 18 August 2004 that introduces a new section 25(1)(b), that similarly provides that the Sultan can do no wrong in either his personal or official capacity.

146 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that introduces a new section 84B(2).

147 However, section 24 of the Succession and Regency Proclamation forbids the sultan to amalgamate Brunei with any other foreign country. This seems to be the only constitutional restriction imposed on the sultan, presumably to protect Brunei's sovereignty. This section was amended very lightly to rectify a few wordings: see Succession and Regency (Amendment) Proclamation 2004 (S49/2004) 18 August 2004.

148 Arguably a constitutional form of vicarious immunity.

149 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that introduces a proviso to section 84B(2).

150 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that substitutes a new section 84(2) for the previous one. See also Interpretation and General Clauses Act (Amendment) Order 2004 (S54/2004) 18 September 2004 that inserts a new section 52, "Saving of rights etc. of His Majesty. 52. No Act shall in any manner whatsoever affect the rights, privileges, position, authority, powers and prerogatives of His Majesty unless it is therein expressly provided."

151 See Supreme Court Act (Amendment) Order 2004 (S55/2004) 18 September 2004 that adds section 15(4):

"(4) Whenever any party or the Supreme Court in any proceedings or any part thereof –

(a) makes a reference, whether orally or in writing, directly or indirectly, to any act, decision, grant, revocation or suspension, or refusal or omission to do so, any exercise of or refusal or omission to exercise any power, authority or discretion of His Majesty the Sultan and Yang Di-Pertuan; or

(b) intends to refer to any issue or matter that may directly or indirectly pertain to or concern the inviolability, sanctity or interests of the position, dignity, standing, honour, eminence or sovereignty of His Majesty the Sultan and Yang Di-Pertuan,

the Supreme Court shall hold such proceedings or such part thereof in camera:

Provided that His Majesty the Sultan and Yang Di-Pertuan may issue a direction in writing to the Supreme Court that such proceedings or such part thereof not be heard in camera."

See also similar amendments by Subordinate Courts Act (Amendment) Order 2004 (S56/2004) 18 September 2004 and Intermediate Courts Act (Amendment) Order 2004 (S57/2004) 18 September 2004 that add a new section 7(3) respectively, to similar effect.

the power to order hearing of any proceedings to be held in camera,[152] the venue and time of hearings of court proceedings[153] - all these by excluding judicial review of such executive decisions.[154] Amendments are also made to seal court materials or proceedings that may portray the sultan in a bad light, with a penalty clause as deterrent against breach.[155] Such protective coverage includes criminal proceedings.[156]

Besides this extensive legislative protective shield, the sultan is further made above the

152 See Supreme Court Act (Amendment) Order 2004 (S55/2004) 18 September 2004 that adds section 15(5):

"(5) Without prejudice to His Majesty the Sultan and Yang Di-Pertuan's power in subsection (4), His Majesty the Sultan and Yang Di-Pertuan may issue a direction in writing to the Supreme Court to hold the hearing of any proceedings or any part thereof in camera."

See also similar amendments by Subordinate Courts Act (Amendment) Order 2004 (S56/2004) 18 September 2004 and Intermediate Courts Act (Amendment) Order 2004 (S57/2004) 18 September 2004 that add a new section 7(4) respectively, to similar effect.

153 See Supreme Court Act (Amendment) Order 2004 (S55/2004) 18 September 2004 that adds section 15(6):

"His Majesty the Sultan and Yang Di-Pertuan may issue a direction in writing to the Supreme Court to hold the hearing of any proceedings or any part thereof at such time and venue as His Majesty the Sultan and Yang Di-Pertuan may determine."

See also similar amendments by Subordinate Courts Act (Amendment) Order 2004 (S56/2004) 18 September 2004 and Intermediate Courts Act (Amendment) Order 2004 (S57/2004) 18 September 2004 that add a new section 7(5) respectively, to similar effect.

154 See Supreme Court Act (Amendment) Order 2004 (S55/2004) 18 September 2004 that adds section 15(7):

"Any direction issued by His Majesty the Sultan and Yang Di-Pertuan under subsection (4), (5) or (6) shall not be called in question in or be subject to any judicial review or by appeal to any court."

See also similar amendments by Subordinate Courts Act (Amendment) Order 2004 (S56/2004) 18 September 2004 and Intermediate Courts Act (Amendment) Order 2004 (S57/2004) 18 September 2004 that add a new section 7(6) respectively, to similar effect.

155 See Supreme Court Act (Amendment) Order 2004 (S55/2004) 18 September 2004 that adds section 15(8):

"No person shall publish or reproduce in Brunei Darussalam or elsewhere any or any part of proceedings, including but not limited to any evidence, exhibit, judgment or document produced in any proceedings, that may have the effect of lowering or adversely affecting directly or indirectly the position, dignity, standing, honour, eminence or sovereignty of His Majesty the Sultan and Yang Di-Pertuan; and any person who acts in contravention of this subsection is guilty of an offence and liable on conviction to a fine not exceeding $5,000 or imprisonment for a term not exceeding one year or both."

See also similar amendments by Subordinate Courts Act (Amendment) Order 2004 (S56/2004) 18 September 2004 and Intermediate Courts Act (Amendment) Order 2004 (S57/2004) 18 September 2004 that add a new section 7(7) respectively, to similar effect.

156 See Criminal Procedure Code (Amendment) Order 2004 (S62/2004) 23 September 2004, that adds a new section 6A:

"Section 6 read subject to other Acts.

6A. Section 6 shall be read subject to section 15 of the Supreme Court Act (Chapter 5), section 7 of the Intermediate Courts Act (Chapter 162) and section 7 of the Subordinate Courts Act (Chapter 6)."

courts,[157] cannot be compelled to attend any legal proceedings,[158] and has the power to exempt others from attending court proceedings[159] - the latter two, arguably, allow the monarch to interfere with judicial proceedings in Brunei.

Besides the constitutional amendments, the amendments to the Succession and Regency Proclamation also enhance and entrench the monarch's position,[160] including giving him the power to proclaim another person[161] to be his successor[162] through a proclamation.

The picture that emerges is a comprehensive legalistic effort that serves to enhance protection of the sultan's status as an absolute monarch, at all costs.

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157 See the Application of Laws Act (Amendment) Order 2004 (S58/2004) 18 September 2004 that adds a new section 3:

"Crown Proceedings Act, 1947 of the United Kingdom.

3. For the avoidance of doubt, it is hereby declared that the Crown Proceedings Act, 1947 of the United Kingdom is not and has never been in force in Brunei Darussalam."

The implication of this may be that the law is brought back to the pre-1947 English common law position. The Crown Proceedings Act, 1947 of the United Kingdom served to subject the Crown to liability in tort in respect of the Crown in the UK to much the same extent, as that to which it would be subject if it were a person of full age and capacity.

The notion that the Sultan is 'above the law' and 'can do no wrong in either his personal or any official capacity' has been reiterated in an unprecedented lawsuit filed against the sultan by several directors of an Australian company Garsec over a dispute arising from a sale of a 400-year-old relic from the Ottoman Empire in May 2005: See "Sultan claims immunity in court" Janet Fife-Yeomans, *The Daily Telegraph* (19 June 2007).

158 See Supreme Court Act (Amendment) Order 2004 (S55/2004) 18 September 2004 that adds section 34(1):

"His Majesty not compellable to attend Court.

34.(1) For the avoidance of doubt, it is hereby declared that His Majesty the Sultan and Yang Di-Pertuan shall not be compellable to attend any proceedings in or be summoned before the Supreme Court."

See also similar amendments by Subordinate Courts Act (Amendment) Order 2004 (S56/2004) 18 September 2004 and Intermediate Courts Act (Amendment) Order 2004 (S57/2004) 18 September 2004 that add a new section 26(1) and section 29A(1) respectively, to similar effect.

159 See Supreme Court Act (Amendment) Order 2004 (S55/2004) 18 September 2004 that adds section 34(2):

"(2) His Majesty the Sultan and Yang Di-Pertuan may, in writing, exempt any person who is required to attend any proceedings in or summoned before the Supreme Court, from having to comply with such requirement or summons; and such exemption shall not be called in question or be subject to any judicial review or by appeal to any court."

See also similar amendments by Subordinate Courts Act (Amendment) Order 2004 (S56/2004) 18 September 2004 and Intermediate Courts Act (Amendment) Order 2004 (S57/2004) 18 September 2004 that add a new section 26(2) and section 29A(2) respectively, to similar effect.

160 See Succession and Regency (Amendment) Proclamation 2004 (S45/2004) 11 August 2005 that notifies that the Council of Succession approved the amendments to the Succession and Regency Proclamation, 1959. Amongst others, a new section 6 (2A) now states that every member of the Council of Succession 'shall hold his office during [the sultan's] pleasure'; a new section 31 gives the sultan unfettered power to "add to, amend or revoke all or any of the provisions" of the Succession and Regency Proclamation; a new section 34 excludes any possibility of judicial review: see Succession and Regency Proclamation (Amendment) Proclamation 2004 (S49/2004) 18 August 2004.

161 See Succession and Regency (Amendment) Proclamation 2004 (S49/2004) 18 August 2004 that adds a new proviso to section 3.

162 See Succession and Regency (Amendment) Proclamation 2004 (S49/2004) 18 August 2004 that adds a new section 3 (2) that clarifies that the crown prince is now the 'lawful successor to the throne of Brunei', as well as subsections (3) and (4) to section 3 that clarify the successive line of succession.

X. Ouster of Judicial Review

What is most disturbing from the recent constitutional amendments is the ouster of judicial review in Brunei.[163] It now specifically provides that the remedy of judicial review has been removed from the jurisdiction of Brunei. Section 84C[164] now provides that there shall be no judicial review of the sultan's decision, and that the sultan shall not be required to assign any reason for his decision. Its breadth and depth is shocking:

> No judicial review
>
> 84C. (1) The remedy of judicial review is and shall not be available in Brunei Darussalam.
>
> (2) For the avoidance of doubt, there is and shall be no judicial review in any court of any act, decision, grant, revocation or suspension, or refusal or omission to do so, any exercise of or refusal or omission to exercise any power, authority or discretion by His Majesty the Sultan and Yang Di-Pertuan, or any party acting on his behalf or under his authority or in the performance of any public function, under the provisions of this Constitution or any written law or otherwise, including any question relating to compliance with any procedural requirement governing such act or decision.[165]

It thus seems that the remedy of judicial review in Brunei has been entirely and expressly ousted as a result of these constitutional amendments.

Such a reading is supported by the amendments to the Supreme Court Act - where Sections 20A to 20E of the Supreme Court Act describe the only review jurisdiction which the Supreme Court has is its power of supervisory jurisdiction over inferior courts.[166] Such a reading is further supported by the amendments to the Specific Relief Act[167] and Succession

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163 The doctrine of *ultra vires* has been described as the juristic or constitutional basis for judicial review. In the case of bodies exercising statutory powers, the underlying principle is that the powers may only be exercised in the way in which Parliament intended, and that Parliament must have intended those powers to be exercised lawfully. (R v Lord President of the Privy Council, ex p Page [1993] AC 682 at 701; Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 at 171; Halsbury's Laws of England, Vol. 1(1): Administrative Law, Admiralty, at 161).

164 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that introduces a new section 84(C).

165 See also Specific Relief Act (Amendment) Order 2004 (S59/2004) 18 September 2004 that also ousts judicial review, in similar language.

166 See Supreme Court (Amendment) (No 2) Order 2004 (S61/2004) 23 September 2004 that adds five new sections, sections 20A to 20E, describing the power of the High Court i.e. power of High Court to call for records of civil proceedings in Intermediate and Subordinate Courts, power of High Court on revision of civil proceedings, no revision at instance of party who could have appealed, general supervisory and revisionary jurisdiction of High Court, and discretion of High Court as to hearing parties.

167 See Specific Relief Act (Amendment) Order 2004 (S59/2004) 18 September 2004 that adds a new declaratory section 6A:

and Regency Proclamation.[168]

It should also be noted that the Application of Laws Act (Amendment) Order, 2004[169] now declares that the British Crown Proceedings Act, 1947 "is and has never been in force" in Brunei. This signals that Brunei law does not allow for companies or individuals to sue the government.[170]

It is unclear how this total ouster of judicial review will work in Brunei, or will impact on its common law legal system. What seems clear is the ruthless political determination to oust the last means of check and balance from Brunei's political structure – however weak and indirect that means of check and balance could constitute.

XI. Race and Religion-Based Qualification for Leadership Offices

As a result of the constitutional amendments, section 84A[171] now affirms discrimination against racial and religious minorities in the Constitution, by stipulating that only persons who are Malay citizens professing the Islamic religion qualify to be appointed to various important offices specified in the Third Schedule. These offices are that of Auditor General, Clerk to the Privy Council and Legislative Council, Chief Syarie Judge, Mufti Kerajaan, Attorney General, Chairman of the Public Service Commission, Yang Di-Pertua Adat

"Judicial review.

6A.(1) It is hereby declared that, for the avoidance of doubt and without prejudice to any provision of this Act, the remedy of judicial review is and shall not be available in any court in respect of any act, decision, grant, revocation or suspension, or refusal or omission to do so, any exercise of or refusal or omission to exercise any power, authority or discretion by His Majesty the Sultan and Yang Di-Pertuan, or any party acting on his behalf or under his authority or in the performance of any public function, including any question relating to compliance with any procedural requirement governing such act or decision.

(2) In this section, "judicial review" means proceedings instituted by any manner whatsoever including, but not limited to, proceedings by way of –

(a) an application for any of the prerogative orders of *mandamus,* prohibition and *certiorari*;

(b) an application for a declaration or an injunction;

(c) a writ of *habeas corpus*; and

(d) any other suit or action relating to or arising out of any act, decision, grant, revocation or suspension, or refusal or omission to do so, any exercise of or refusal or omission to exercise any power, authority or discretion conferred on His Majesty the Sultan and Yang Di-Pertuan, or any party acting on his behalf or under his authority or in the performance of any public function."

168 See Succession and Regency (Amendment) Proclamation, 2004 (S49/2004) 18 August 2004 that introduces a new section 34.

169 See Application of Laws Act (Amendment) Order 2004 (S58/2004) 18 September 2004 that adds a new section 3:

"Crown Proceedings Act, 1947 of the United Kingdom.

3. For the avoidance of doubt, it is hereby declared that the Crown Proceedings Act, 1947 of the United Kingdom is not and has never been in force in Brunei Darussalam."

170 See also US Department of State, "Brunei - Country Reports on Human Rights Practices 2005" released by the Bureau of Democracy, Human Rights, and Labor (8 March 2006).

171 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that introduces a new section 84A.

Istiadat, Speaker to the Legislative Council and Secretary to the Council of Ministers.[172] The amendments also rule out the appointment of Ministers and Deputy Ministers from the racial and religious minorities, with a proviso giving the sultan the discretion to decide otherwise.[173] Further, the Islamic religion was clarified - to be the Islamic religion according to the Shafii sect.[174]

This is disturbing as it constitutes an explicit constitutional discrimination on the basis of race[175] and religion for the qualification of important governmental and constitutional offices. In line with the *Melayu Islam Beraja* concept which aims to negate a multi-cultural society by strident promotion of mono-culturalism[176] in Brunei, this could only serve to marginalize the racial and religious minorities in Brunei.

XII. Perpetuating Rule by Decree

When a state of emergency is declared, the constitution confers upon the sultan an absolute discretion to make any order which he considers desirable in the public interest. While section 83 of the Constitution does not provide an exhaustive list of the orders which the sultan may make, section 83(3)(l) specifically provides that the sultan may make an order

172 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that introduces a new Third Schedule.

173 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that adds a new section 4(5).

174 See Constitution (Amendment) Proclamation 2004 (S65/2004) 29 September 2004, Interpretation and General Clauses Act (Amendment) Order 2004 (S54/2004) 18 September 2004 and Succession and Regency (Amendment) Proclamation 2004 (S49/2004) 18 August 2004 that add a new definition, "Islamic Religion" means the Islamic Religion according to the Shafeite sect of Ahlis Sunnah Waljamaah".

175 Citizenship laws are relatively strict and discriminatory against ethnic non-Malays in Brunei. Currently the government may only grant citizenship to applicants who are born in Brunei and have resided there continuously for at least 10 years. Applicants born outside Brunei must have resided in the country for at least 15 years. On top of this, the applicant must also be able to read and write in Malay and understand the local culture, something that many non-Malay applicants are unable to fulfil. See further: Allen R Maxwell, "Malay Polysemy and Political Power: Census Categories, Ethnicity, and Citizenship in Brunei Darussalam" (2001) 9(2) South East Asia Research 173 at 175-176. See also: Graham Saunders (1994, Kuala Lumpur, Oxford University Press) 174; 'Unfortunate PRs of Brunei Darussalam: Born and Raised in Brunei' Borneo Bulletin (11/12 December 1999); William Case, 'Brunei in 2006: Not a Bad Year' Asian Survey Vol. 47, Issue 1, pp189-193, at p 191; D E Brown, 'Brunei on the Morrow of Independence' (Feb 1984) Asian Survey Vol 24 No 2 p 210 at p 206. Donald E Weatherbee, "Brunei: The ASEAN Connection" (June 1983) Vol 23 No 6, Asian Survey pp 724-725 says, 'Brunei's population according to the 1981 census is only 192,000, some 34,000 fewer than the 1980 population estimate based on extrapolations from the 1971 census figure of 136,000. About one-quarter of the population is ethnic Chinese of whom more than 30,000 are stateless.' And 'some unease exists in the Chinese community given Brunei's stringent nationality law and limits on property rights. Already those who can afford it are emigrating.'

176 See *e.g.* Abdul Ghani Bujang, 'Education for Nationhood' (1987) 24 Southeast Asian Journal of Educational Studies 39 at p 43; 'Nearly 10,000 Embrace Islam in 10 Years' Borneo Bulletin 5 April 2005; 'Dusun Family Embrace Islam' Borneo Bulletin 14 May 2005; US Department of State, 'Country Reports on Human Rights Practices 2005' at www.state.gov/g/drl/rls/hrrpt/2005; Abdul Latif, 'Cultural and Counter Culture Forces in Contemporary Brunei Darussalam' in E Thumboo (ed.) Cultures in ASEAN and the 21st Century (1996) 4 at p 30.

modifying or amending any provision of any written law.[177]

As a result of the constitutional amendments, section 83A now declares that the existing laws passed during the period of emergency, and made pursuant to proclamations of emergency dated between 12 December 1962 and 8 March 2004 are deemed valid and constitutional.[178] This appears to be an expedient mopping-up clause, ensuring that no time will be wasted by requiring each and every law made under the previous emergency proclamations to be officially laid before the Legislative Council.

What is disturbing is that there does not seem to be any urgency on the part of the monarch to terminate the emergency, despite the peace and quiet obtained in the country in the last four decades. It continues to be renewed biennially.[179] Brunei continues to be subject to a perpetual[180] rule by decree.[181]

XIII. Concluding Remarks

Brunei's recent political history has persistently favoured the monarchy, at the expense of democracy and popular representation. The recent monarchy-led constitutional changes were meant and did further entrench and strengthen its absolutist monarchical system. The sultan's supremacy was clarified, sustained, broadened and enhanced.

The ideology of Malay Islamic Monarchy[182] has been sanctified and given constitutional and statutory protection. It is an ideological construct - a legitimizing instrument[183] - that has been fully exploited to enhance the regime legitimacy.[184] The ideology continues

177 Under the state of emergency, the freedom of speech, press and assembly have also been severely curtailed: See US Department of State, "Brunei - Country Reports on Human Rights Practices 2006" released by the Bureau of Democracy, Human Rights, and Labor (6 March 2007).

178 See Constitution (Amendment) Proclamation (S65/2004) 29 September 2004 that introduces a new section 83A.

179 See Proclamation of Emergency, 2004 (S22/2004) 8 March 2004; Emergency (Continuation and Validation of Emergency Provisions) Order, 2004 (S23/2004) 8 March 2004.

180 The state of emergency in Brunei remains in place today: See Foreign and Commonwealth Office (UK) Country Profile on Brunei online at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029394365&a=KCountryProfile&aid=1018965304551>.

181 It makes a mockery that the 'abode of peace' has to be placed under an emergency perpetually. Negara Brunei Darussalam means Nation of Brunei, the Abode of Peace. Darussalam is an honorific Arabic title.

182 So much emphasis has been placed on the concept of MIB that it was observed that the Constitution of Brunei itself has effectively 'been superceded, as the supreme 'charter' setting forth the goals of the state and role of the people, by the national ideology of 'MIB": See Roger Kershaw, *Monarchy in South-East Asia: The Faces of Tradition in Transition* (London: Routledge, 2001) at 124; William Case, 'Brunei Darussalam in 1996: Business as Usual in the 'Abode of Peace' (Feb 1997) Asian Survey Vol 37, No 2, p 194 at p 196.

183 Naimah S Talib, 'A Resilient Monarch: The Sultanate of Brunei and Regime Legitimacy in an Era of Democratic Nation-States' New Zealand Journal of Asian Studies (December 2002) 134-147, at 141-144.

184 See further: G Braighlinn (1992) 'Ideological Innovation Under Monarchy: Aspects of Legitimation Activity in Contemporary Brunei' (Amsterdam: VU University Press (Comparative Asian Studies, 9). See also: G C Gunn (1997) 'Language, Power and Ideology in Brunei Darussalam' (Athens: Ohio University Center for International Studies (Monographs in International Studies, Southeast Asia Series, 99).

to permeate Brunei's government administration, promoting Islam as the state religion and the monarchical rule as the sole valid governing system,[185] as well as upholding the rights and privileges of ethnic Malay Bruneians, whilst at the same time, alienating and marginalizing the non-Muslim and non-Malay population.[186]

The state of emergency has been renewed biennally since the first proclamation of emergency in 1962. It is disturbing that after the reinstatement of the Legislative Council in 2004 and the constitutional amendments, there has been no sign that emergency will be lifted soon.

Although the Second Schedule to the Constitution provides for up to 15 District Representatives from the four districts in Brunei for the Legislative Council, no efforts appear to have been made to pass laws relating to elections of District Representatives. As a result, a small number of village leaders were appointed by the sultan to represent the four districts in a slightly expanded - but still an entirely appointed - Legislative Council. At the grassroots level, Brunei continues to have only a traditional system of village chiefs[187] elected by secret ballots by all adult villagers. Candidates must however be approved by the government, with exclusion of the racial minorities.[188] The monarchy continues to be extremely cautious about the effects of any kind of party politics.[189]

The results of the political and constitutional developments seem to be continuity of much the same as before – Brunei continues to be under emergency, the sultan continues to rule as an absolute monarch,[190] without any meaningful limits on his powers. Behind the serenity, it was a doubly-fortified monarchical regime. The ideology of *Melayu Islam Beraja* has been made use of as a vehicle to legitimize the preservation and enhancement of the regime of absolutist monarchy. An intense obsession with the preservation of the status quo, and the monarchy's continued existence and preeminence, continues to hang over

185 G Braighlinn referred to the 'royal absolutism under a divine mandate': See G Braighlinn (1992) 'Ideological Innovation Under Monarchy: Aspects of Legitimation Activity in Contemporary Brunei' (Amsterdam: VU University Press (Comparative Asian Studies, 9)) at p 43; and that Islam was made use to command political obedience and as a special, legitimizing prop to the monarchy: See G Braighlinn (1992) 'Ideological Innovation Under Monarchy: Aspects of Legitimation Activity in Contemporary Brunei' (Amsterdam: VU University Press (Comparative Asian Studies, 9)) at p 22.

186 '[T]he Sultan has recently been more active in his capacity as religious leader of the country than before': Han C Blomqvist, "Brunei's Strategic Dilemma" (1993) 6(2) The Pacific Review 171 at 173.

187 These village leaders communicate the villagers' wishes through the periodic meetings with senior government officers.

188 Candidates must also be of Malay or a recognized indigenous race.

189 It is a standing regulation that members of the civil service, who form a substantial portion of the population, are not permitted to participate in political activities. See further: Abu Bakar Hamzah, Brunei Darussalam: Continuity and Tradition, Southeast Asian Affairs 1989. See also Hj Mohd Yusop Hj Damit, "Brunei Darussalam: Towards a New Era" in Daljit Singh & Lorraine C Salazar eds., *Southeast Asian Affairs 2007* (Singapore: Institute of Southeast Asian Studies Publication, 2007) p 103 at p 105.

190 The monarch now holds the post of the Prime Minister, the Minister of Defence, the Minister of Finance; the crown prince is the Senior Minister in the Prime Minister's Office and the monarch's younger brother, the Minster of Foreign Affairs. See: http://www.brunei.gov.bn/government/cabinet.htm

Brunei.[191] Brunei remains a political anachronism[192] in Southeast Asia.

Further Reading

A J Stockwell, 'Britain and Brunei, 1945-1963: Imperial Retreat and Royal Ascendancy' (2004) Modern Asian Studies 38; *W A Hanna*, 'Three New States in Borneo Part II: Pageantry in Brunei' (Southeast Asia Studies Vol XVI, No 19 (Brunei) (New York, American Universities Field Staff); *G Braighlinn*, 'Ideological Innovation Under Monarchy: Aspects of Legitimation Activity in Contemporary Brunei' (1992) (Amsterdam: VU University Press (Comparative Asian Studies, 9); *G C Gunn*, 'Language, Power and Ideology in Brunei Darussalam' (1997) (Athens: Ohio University Center for International Studies (Monographs in International Studies, Southeast Asia Series, 99).

191 See further: G Gunn, Rentier Capitalism in Negara Brunei Darussalam, in Southeast Asia in the 1990s: Authoritarianism, Democracy and Capitalism, eds. K Hewison, R Robison and G Rodan, 1993.

192 See also, A V M Horton, 'Brunei in 2004: Window-Dressing an Islamizing Sultanate', Asian Survey, Vol 45, Issue 1, pp 180-185, at 185; W A Hanna, 'Three New States in Borneo Part II: Pageantry in Brunei (Southeast Asia Studies Vol XVI, No. 19 (Brunei) (New York, American Universities Field Staff) p 11; G C Gunn, 'Brunei Darussalam in 1994 – The Triumph of Regionalism?' (Feb 1995) Asian Survey Vol 35 No 2 p 217 at 220.

Cambodia

CAMBODIA
From Civil War to a Constitution to Constitutionalism?

*Jörg Menzel**

I. Introduction

The current Constitution of Cambodia of 1993 is the fifth constitution since the first written constitution was adopted in 1947[1]. The concepts followed in these constitutions could not be more diverse, but they hardly give an impression of the dramatic history that unfolded during this time in a country which has a record of centuries of great ancient history, but which is nowadays mostly associated with the absolute terror of the Khmer Rouge regime that lasted less than four years between 1975 and 1979.

The following report attempts to give an overview of the historical developments and current constitutional structures in Cambodia, which have only rarely been discussed in academic literature so far. This article argues that the adoption of the 1993 constitution has been a big step in the direction towards liberal democracy, but that one and a half decades later constitutionalism is still more concept than reality in the political and legal system of Cambodia.

II. A Short Constitutional History

No country's constitutional system can be understood without some knowledge of its historical background. In Cambodia, this trivial wisdom is probably even more important to keep in mind than in many other places. Cambodia is in many respects stricken by its past, with visions of ancient grandeur and in the horrors of its recent history. However,

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1 Constitution of 1993. This constitution has been amended a number of times, but with the amendment of 1999 a new chapter (on the Senate) was included, which changed the numbers of articles from article 99 onward. Article numbers quoted here are according to the current "post-1999" version. For a useful collection of the historic constitutions of Cambodia see *Raoul M. Jennar*, The Cambodian Constitutions (1953-1993), Bangkok 1995 (White Lotus Press). *Jennar* lists six constitutions altogether, treating the extensive amendments of the constitution of 1981 in 1989 effectively as the adoption of a new constitution. For a French language collection of the historic 20th century constitutions see *Kim Y* (ed.), Collection Droit Khmer. Droit Constitutionnel, 1947-1993, Phnom Penh 1997.

whereas the general history of the country is quite well researched[2], its constitutional or legal history is not[3]. The following can only offer some glimpses.

The Pre-Colonial Time, "Angkor" in particular

There is some uncertainty, as to the existence of a "state" in the era of Funan (beginning in the first century AD). Funan was considered a state by contemporary Chinese reports, but these are questioned in recent historical research which suggests that it was probably only a loose alliance of towns[4]. Knowledge is not better regarding "Chenla", which seemingly emerged with the decline of Funan. The leaders in Pre-Angkorian times are sometimes (not always) called "kings", but from what we know their "kingdoms" typically were small and unstable.

It is not disputed, however, that Cambodia achieved statehood and was an absolute monarchy in the Angkorian time, which is generally considered to have started in the early 9th century. At its peak time, the capital area of Angkor was probably the most populous city worldwide. Angkor Wat, the main temple complex built in the first half of the twelfth century, is considered to be the largest sacral building complex in the world. The Empire of Angkor was an absolute monarchy with the king at the top holding legislative, executive and judicial control[5]. There is some discussion about how "divine" the kings were supposed to be but undoubtedly they exercised very earthly powers. Showcasing strong power was therefore a necessity and religious symbolism sometimes seems to merge with state symbolism. The Bayon Temple in Angkor, built in the time of Jayarvarman VII, is famous for the hundreds of faces watching and listening in every direction; probably symbolizing a divine ruler as a perfect "Big Brother" of its time[6]. There was, however, no intergenerational constitution in the sense that succession to the throne was effectively regulated. The Angkor Empire was plagued not only by external, but also by internal violent power struggles, assassinations

2 For "general histories" see *John Tully*, A Short History of Cambodia, Chiang Mai 2006 (Silkworm Books) and *David P. Chandler*, A History of Cambodia, 2007 (Westview Press).

3 For a short outline with a legal/constitutional focus *Laksiri Fernando*, Khmer Socialism, Human Rights and UN Intervention, in: Alice Tay (ed.), East Asia – Human Rights, Nation Building, Trade, Baden-Baden 1999 (Nomos Verlag), pp. 441-497; see also *Claude-Gilles Gour*, Institutions Constitutionelles et Politiques du Cambodge, Paris 1965 (Dalloz), pp. 17-87.

4 *Michael Vickery*, Society, Economics, and Prehistostory in Pre-Angkor Cambodia. The 7th and 8th Centuries, Tokyo 1998 (The Toyo Bunko); *Tully* (note 2), p. 9. Knowledge is not better for the later "state" called Chenla, in respect to which even its precise location is unclear.

5 For the Angkorian society with some information on political and legal structures see *Ian Mabett / David Chandler*, The Khmers, Oxford 1995 (Blackwell Publishers); *Charles Higham*, The Civilization of Angkor, London 2003 (Orion Books). The most cited source with some information on the political and legal system is the report by a Chinese visitor, who spent a year in Angkor between 1296 and 1297. The report contains some information on law (chapter 14), but does not elaborate on the constitutional system. For a new edition of this important report see *Zhou Daguan*, A Record of Cambodia. The Lands and its People, translated with an introduction and notes by Peter Harris, Chiang Mai 2007 (Silkworm Books).

6 For the "Big Brother"-Interpretation of the Bayon Temple see also *Mabett/Chandler* (note 5), p. 207; the "meaning" of the Bayon is highly controversial, however, see recently *Joyce Clark* (ed.), Bayon. New Perspectives, Bangkok 2007 (River Books).

and violent regime change. There is some discussion about the extent of totalitarianism of this system, but it seems evident that it was based on a massive amount of collective labour. Significant parts of the population are reported to have been slaves[7].

However, knowledge about the legal system during the Angkor period is limited. There seems to be an understanding that Indian texts played an important role. Interestingly, some of the main problems during that time seem similar to current concerns. Land conflicts are reported to be among the most common legal disputes and according to some historians deforestation contributed to the decline of Angkor. Although the role of the Khmer kingdom was of reduced strength after the end of the Angkor period because of the rise of neighbouring powers and internal struggles, the principle of monarchy prevailed until the French takeover of the country in 1863.

French Protectorate[8]

The French takeover has been labelled as "gun boat diplomacy", not escalating in actual violence, but probably not without coercion[9]. There is, however, a common perception among historians that the French takeover rescued Cambodia from the risk of vanishing between more powerful and chronically invasive neighbours, Siam and Vietnam (the Khmer saw themselves "between the tiger and the crocodile"). In fact, the Cambodian King had asked France for protection as early as 1853[10]. When taking control by treaty with King Norodom, France did not formally and fully colonize Cambodia, but gave it the status of a protectorate[11]. During its time as a protectorate, the Cambodian monarchy was not abolished, but was limited by French control. Whereas France initially did not interfere much in the internal government of Cambodia with the treaty of 1863 being a protection against such interferences, it pressured the king (with open threat to use force[12]) to accept substantial reforms in 1884 and cede much of his power[13].The treaty amendment was followed by a devastating revolt, but slavery was formally abolished and French power was increased. Following the crowning of King Sisowath in 1904 attempts to reform the

7 See *Daguan* (note 5), Chapter 9; *Fernando* (note 3); pp. 446-448; *John Tully*, France on the Mekong. A History of the Protectorate in Cambodia 1863-1953, Lanham / New York / Oxford 2002 (University Press of America), pp. 36-38; on the remaining relevance of slavery in the 19th century see *Tully* (2), pp. 42-45.

8 The period of the French protectorate is comprehensively described and analyzed by *Tully*, (note 7); see also *Milton E. Osborne*, The French Presence in Cochinchina and Cambodia, Bangkok 1997 (White Lotus; reprint of the original edition 1969) .

9 See *Tully* (note 7), p. 3.

10 *Tully* (note 7). p. 13.

11 *Tully* (note 7), p. 18, speaks of a "de facto colony". From the perspective of constitutional and legal history the difference between "colony" and "protectorate" is noteworthy, however, and it had relevant, practical consequences at least in the early times of French rule in Cambodia.

12 Compare *Tully* (note 2), p. 75: "on bayonet point".

13 Article 2 of the Treaty reads: "His Majesty the King of Cambodia accepts all the administrative, judicial, financial, and commercial reforms which the French government shall judge, in future, useful to make their protectorate successful." Prince *Norodom Sihanouk* stated in 1972: "From 1884 to 1945, our kings were nothing more than what the Khmer people called 'parrots' , trained to say 'Bat, Bat' (yes), quoted in Tully (note 2), p. 135.

legal system intensified[14] and French control over the government was tightened. In 1913, a Consultative Council was established, whose main purpose was to exercise some control over the king's rule. Apart from this, France did not promote any representative political institutions before the Second World War[15].

In 1941, France handpicked the new king for the country, eighteen year old Norodom Sihanouk[16], apparently assuming that the underage man would be easy to control in the further process. Sihanouk, however, quickly developed an ambition for politics and power. He declared Cambodia's independence when Japanese forces temporarily took over control in Cambodia during World War II[17], immediately reversing inter alia, the French decision to introduce the Latin script in Cambodia. After the French regained control in 1945, King Sihanouk continued in office (and the Khmer script remained untouched). Sihanouk first pressured for more autonomy in internal affairs and finally went on a "royal crusade" to achieve complete independence from France in 1953.

Kingdom of Cambodia

King Sihanouk substantially influenced the process that led to the adoption of the country's first written constitution in 1947[18]. A Constituent Assembly to advise the king on the Constitution was elected in a general election in 1946, the first democratic election ever held in Cambodia. The Democratic Party, which won a landslide victory in this election, successfully pushed for strong democratic elements in this constitution. In substance, the original Constitution of 1947, to a large extent modelled on the French constitution of the 4th republic, provided the model of a parliamentary monarchy. The king was head of state, but not head of the government. He had, however, extensive emergency powers, which should have become very relevant in practice. Apart from an elected National Assembly there was a Council of the Kingdom as a second chamber. The Constitution also provided for Popular Assemblies and a National Council. There was no special Constitutional Court or Constitutional Council. The Constitution also provided for a catalogue of fundamental rights.

In subsequent political history, the Democratic Party won the elections held in 1947 and 1951, but Sihanouk removed the elected government with the help of French troops, dissolved parliament and took over direct control in 1952. His "democratic" approach of 1946 was replaced by a concept that Sihanouk himself later described as, the "original form

14 *Tully* (note 2), pp. 142-143.
15 *Fernando* (note 3), p. 454.
16 For the life of Sihanouk see the first volume of his autobiography "Shadows over Angkor", edited by *Julio A. Jeldres*, Phnom Penh 2005 (Monument Books), covering the years until 1991, as well as *Milton Osborne*, Sihanouk. Prince of Light, Prince of Darkness, Chiang Mai 1994 (Silkworm Books).
17 For an analysis of this short period of „independence" compare *David Chandler*, The Kingdom of Cambodia, March-October 1945, in: David Chandler, Facing The Past, Chiang Mai 1996 (Silkworm Books), pp. 165-188.
18 For a French language analysis of the constitutional system of this time *Gour* (note 3).

of guided democracy"[19], whereas others have labelled it as "authoritarian". The young king maintained that "those following democracy in Cambodia are either bourgeois or princes …. The Cambodian people are children. They know nothing about politics. And they care less."[20] Formally, the Constitution of 1947, which was subject to a total number of nine amendments with major changes in 1956 and 1960, remained the Cambodian basic law until 1970.

Sihanouk resigned as King in 1955 in order to lead the country as Prime Minister of his party that controlled all seats in the National Assembly after the elections in 1955. When his father, who had been installed as king, died in 1960, Sihanouk took the role of a "Head of State"[21] and put his mother in formal charge of the regency (without making her the "Queen" in a formal sense). Be it as King (1946-1955), Prime Minister (1955-1960) or Head of State (1960-1970), Sihanouk dominated Cambodian politics until 1970, when he was removed from office by forces within his own government which opposed his position on the issue of the Indochina War.

Republic of Cambodia

Sihanouk was removed from office as Head of State through a parliamentary non-confidence vote on March 18, 1970, initiated by United States backed Prime Minister, General Lon Nol and Deputy Prime Minister, Sirik Matak in 1970[22]. On October 9, 1970, Cambodia was declared a republic[23]. General Lon Nol, who allegedly never recovered his full intellectual capacities after a stroke in 1971 and who was strongly influenced by spiritual ideas and advisors, declared himself President in March 1972 and dissolved parliament. A new constitution was put to referendum, accepted with 97.5 % of the votes and than promulgated on May 10, 1972. The constitution contained a catalogue of fundamental rights and prescribed a presidential model of government, a bi-cameral parliament, a catalogue guaranteeing human rights and a "Constitutional Court"[24]. This constitution, fairly distinct from earlier and later constitutions in Cambodia, never came into full effect and did not get much attention inside or outside of Cambodia. An increasingly barbaric

19 Memoirs, p. 59.

20 Cited in *David P. Chandler*, The Tragedy of Cambodian History. Politics, War, and Revolution since 1945, Chiang Mai 1991 (Silkworm Books), p. 72.

21 See Article 122 of the Constitution (as amended in 1960).

22 The removal of Sihanouk was accepted by a parliamentary secret vote of 89 - 3. Sihanouk immediately criticized his removal as a coup d'état, a view which was more than two decades later officially endorsed by the Cambodian Constitutional Assembly on 14 June 1993. The extent of US-involvement in the "coup" is a matter of discussion, see for example *Tully* (note 2), pp. 154-155.

23 For a history of the Khmer Republic comparatively sympathetic to the regime see *Justin Corfield*, Khmer Stand Up! A history of the Cambodian Government 1970-1975, Melbourne 1994.

24 The notion that this was a European-style Constitutional Court *Stephen P. Marks*, The New Cambodian Constitution: From Civil War to a Fragile Democracy, 26 Columbia Human Rights Law Review 43-110 (1994), p. 53, is misleading, however, as in substance this "court" was more a French style Constitutional Council. Compare also supra VII.

war was raging, the United States tried to bombard Cambodia back to the stone age[25], corruption was out of control[26] and the government lost control of more and more parts of the country. When the Khmer Rouge finally took Phnom Penh on April 17, 1975, Lon Nol had already left the country, but nearly all officials of his government and administration not able or willing to leave, were killed.

Democratic Kampuchea

The Khmer Rouge implemented the most extreme version of communism ever adopted in the 20th century[27]. The rule of terror opened with a range of drastic measures, among which was the execution of all leaders of the former regime, the abolition of money, and the worst being the evacuation of all towns including the capital Phnom Penh, which harboured maybe up to three million inhabitants and internally displaced people at the time[28]. People were moved to the countryside, where they were labelled as "new people" and subjected to the most severe forced labour.

The Khmer Rouge basically abolished any notion of law in Cambodia. In a literal sense the most lawless state in recent world history was established. As historian David Chandler put it: "There is no evidence that any judges held office in DK or that there was a legal system in Cambodia between 1975 and 1979"[29]. The only law adopted during the reign of the Khmer Rouge was the Constitution of 1946, a crude text of twenty-one articles which remained widely unknown in Cambodia and basically had the function of documenting the full statehood of the Khmer Rouge Cambodia to the outside world[30]. Head of State,

25 There have been reasonable suggestions that United States bombardments in Cambodia until August 1973, which according to estimates killed between 150.000 and 750.000 people, amount to severe violations of international law. The most famous criticism is *William Shawcross*, Sideshow. Kissinger, Nixon and the Destruction of Cambodia, London 1991 (The Hogarth Press); for a legal analysis see *Nicole Barrett*, Holding Individual Leaders Responsible for Violations of Customary International Law: The U.S. Bombardment of Cambodia and Laos, 32 Columbia Human Rights Law Review 429 (2001).

26 On the corruption within the Khmer Republic system (commonly called the system of "bonjour") see for example *Tully* (note 2), pp. 165-6.

27 For historical analysis see e.g. *Ben Kiernan*, The Pol Pot Regime, 2nd edition, Chiang Mai 2002 (Silkworm Books); *Michael Vickery*, Cambodia 1975-1982, Chiang Mai 1984 (Silkworm Books); *Craig Etcheson*, The Rise and Demise of Democratic Kampuchea, Boulder 1984 (Westview Press); *Elisabeth Becker*, When the War was Over. Cambodia and the Khmer Rouge Revolution, New York 1986 (Simon & Schuster); *Karl D. Jackson* (ed.), Cambodia 1975-1978. Rendezvous with Death, Princeton 1989 (Princeton University Press); for biographies of Pol Pot see *David Chandler*, Brother Number One. A Political Biography of Pol Pot, Revised Edition, Chiang Mai 2000 (Silkworm Books); *Philip Short*, Pol Pot. The History of a Nightmare, London 2004 (John Murray Publishers).

28 According to one document, the following eight measures were announced by Pol Pot immediately in time of victory: „1. Evacuate all people from all towns. 2. Abolish all markets. 3. Abolish Lon Nol regime currency, and withhold the revolutionary currency that had been printed. 4. Defrock all Buddhist monks, and put them to work growing rice. 5. Execute all leaders of the Lon Nol regime beginning with the top leaders. 6. Establish high-level cooperatives throughout the country, with communal eating. 7. Expel the entire Vietnamese minority population. 8. Dispatch troops to the borders, particularly the Vietnamese border. (cited in *Ben Kiernan*, How Pol Pot came to Power, London 1985 (Verso), p. 415/6).

29 *Chandler* (note 20), p. 262.

30 For a discussion at that time see *David Chandler*, The Constitution of Democratic Kampuchea, 79 Pacific Affairs

Khieu Samphan, allegorically declared that this constitution was "not the result of any research of foreign documents, nor [was it] the fruit of any research by scholars. In fact, the people – workers, peasants, and revolutionary army – wrote the constitution with their own hands."[31] A "People's Representative Assembly", which was part of the institutional system prescribed by the constitution (Article 5), was dubiously "elected" once and met only once in 1946. Courts were not operating, although the existence of "People's Courts" was stipulated in the constitution (Article 9). The constitution mentioned some fundamental rights, among which the "right to work" and the statement that there was to be "absolutely no unemployment" (Article 12) seems most ironical in a state that effectively had become an oversized labour camp.

According to the most common estimate around 1.7 million people lost their lives due to system related reasons under the Khmer Rouge regime[32], with intellectuals of all kind being particularly targeted. Around 14,000 people were tortured and killed in the central prison "S 21" ("Tuol Sleng") alone, without any legal procedure [33].

People's Republic of Cambodia

After a short war between Vietnam and Cambodia in 1978/79, Vietnam occupied Cambodia[34] and a Vietnamese backed government took control. Cambodia's development in the decade to follow was not only hampered by structural problems of the political system, but also by international isolation and an ongoing civil war with the Vietnamese backed government on one side and a coalition of resistance forces (Khmer Rouge, Royalists etc.) on the other. Cambodia was seeking its own identity but was still a place of internal and external struggles. A socialist constitution was adopted in 1981[35]. A long preamble emphasized the friendship with Vietnam and Laos, at the same time blaming the United States and China for the developments that lead to the disastrous "Pol Pot – Ieng Sary

(1979), p. 505.

31 Quoted in: *Chandler* (note 20), p. 262.

32 The varying estimates are discussed by *Ben Kiernan*, The Demography of Genocide in Southeast Asia, The Death Tolls in Cambodia 1975-79, and East-Timor, 1975-80, 35 Critical Asian Studies 585-597 (2003).

33 The absurdity of S-21 is well documented; see *David Chandler*, Voices from S-21. Terror and History in Pol Pot's Secret Prison, Chiang Mai 2000 (Silkworm Books), updated summary in: Judy Ledgerwood (ed.), Cambodia Emerges from the Past, 2002 (Northern Illinois University), pp. 16-37; for the memories of one of the reportedly seven survivors see *Vann Nath*, A Cambodian Prison Portrait. One Year in Khmer Rouge's S-21, Chiang Mai 1998 (Silkworm Books); for an investigation into the life of S-21 Commander Kaing Guek Eav ("Duch") see *Nic Dunlop*, The Lost Executioner. A Story of the Khmer Rouge, London 2005 (Bloomsbury Publishing).

34 The legality of the Vietnamese action is still under discussion. Whereas the USA, most Western states, China and local neighbours such as Thailand called it an illegal invasion, Vietnam mainly argued that it acted in self defence, but also indicated the notion of a humanitarian intervention. For a justification see *Gary Klintworth*, Vietnam's intervention in Cambodia in international law, Canberra 1989 (Australian Government Publishing Service).

35 For an extensive study on the "people's republic" see *Evan Gottesman*, Cambodia After the Khmer Rouge. Inside the Politics of State Building, New Haven & London 2002 (Yale University Press). This book is indispensable for an advanced understanding of Cambodian politics and law today. Another good and somewhat more favorable account is *Margaret Slocomb*, The People's Republic of Kampuchea. The Revolution after Pol Pot, Chiang Mai 2003 (Silkworm Books).

– Khieu Samphan Clique". The political system was typically socialist in the Soviet and Vietnamese model, with a single party playing a major role. Some fundamental rights and the system of a state run economy were stipulated. Chapter VII of the constitution was dedicated to the "local people's revolutionary committees", whereas chapter VIII defined the role of the judiciary, without stipulating the concept of independence of the courts. In reality, the criminal justice system worked with hardly any legal foundations and arbitrary arrests were common during the people's republic time. These were evidenced last but not least by numerous appeals of the then Minister of Justice, to end these practices[36].

State of Cambodia

The "winds of change" in the Socialist block resulted in a reduction of Soviet assistance for Vietnam in the second half of the 1980s, which was then not able to sustain its intensive engagement in Cambodia. Prime Minister Hun Sen and Prince Sihanouk started to engage in negotiations. Attempts at constitutional reform culminated in a fundamental amendment to the constitution in 1989. The abolishment of socialism was symbolized in the change of the state's name to "State of Cambodia", leaving a decade of being a "People's Republic" behind. The state was once again re-named, this time to "State of Cambodia". The peace process and attempts to overcome international isolation culminated in the Paris Agreements of 1991, a comprehensive international treaty that was designed to settle internal conflict and external interference in Cambodia[37].

Part of the Paris Agreements was the installation of a "United Nations Transitional Authority in Cambodia", widely know by its acronym UNTAC. During its eighteen month's mandate, given by the UN-Security Council[38], UNTAC employed up to 22,000 foreign personnel in Cambodia and consumed a budget of around 1.6 billion dollars, the largest and most expensive UN peace building mission until that time. UNTAC's main responsibility was to provide a neutral environment for free and fair elections in 1993. Legally the United Nations obtained supreme authority in Cambodia during the mission of UNTAC. The government of the State of Cambodia (SOC) continued to be in control of the country. Whereas UNTAC was not able to prevent the re-emergence of the Khmer Rouge insurgency in Cambodia[39], and produced a range of serious problems for Cambodian society, it was somewhat successful in the sense that arguably free and fair elections to a Constituent Assembly were held in 1993[40]. The balance sheet might be

36 See *Gottesman* (note 35), p. 255, citing Minister of Justice Uk Bunchheuan with a statement made in 1987: "We should impose some punishment on people who hold power and have violated the law. Now, we take the rights of the citizens and the lives of the citizens as pieces in a game for us all to play. We want to arrest people and do whatever we want to them. If we want to release them, we can. If not, we can." Reports about arbitrary arrests were also published by Amnesty International etc.

37 See generally *Steven Ratner*, The Cambodia Settlement Agreements, 87 AJIL 1-41 (1993).

38 Resolution 745 of 1992.

39 For a critical assessment see for example *Serge Thion*, Watching Cambodia, Bangkok 1993 (White Lotus), Chapter 10 ("United Nations Traditional Apathy in Cambodia").

40 The UN Security Council endorsed the elections as basically free and fair. For an analysis of the mission see

mixed, but UNTAC certainly had better results than some other UN missions that would follow in the 1990s[41].

III. The Making and Development of the Constitution

The Paris Agreements

Constitution making in Cambodia was requested to be a comparatively quick affair in 1993 as the Paris Agreements required adoption of the constitution within three months after the election of the Constitutional Assembly[42]. The main direction of a Cambodian Constitution was already given as well. The Paris Agreements provided guidance in Annex 5, basically prescribing the supremacy of the constitution and a concept of liberal, human rights and rule of law based democracy:

> "(1.) The constitution will be the supreme court of the land. It may be amended only by a designated process involving legislative approval, popular referendum, or both.
>
> (2.) Cambodia's tragic recent history requires special measures to assure the protection of human rights. Therefore, the constitution will contain a declaration of fundamental rights, including the rights to life, personal liberty, security, freedom of movement, freedom of religion, assembly and association including political parties and trade unions, due process and equality before the law, protection from arbitrary deprivation of property or deprivation of private property without compensation, and freedom from racial, ethnic, religious or sexual discrimination. It will prohibit the retroactive application of criminal law. The declaration will be consistent with the provisions of the Universal Declaration of Human Rights and other relevant international instruments. Aggrieved individuals will be entitled to have the courts adjudicate and enforce these rights.

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e.g. *Trevor Findlay*, Cambodia: The Legacy and Lessons of UNTAC, New York 1995 (Oxford University Press); *Michael W. Doyle*, UN Peacekeeping in Cambodia: UNTAC's Civil Mandate, Boulder 1995; *Lucy Keller*, UNTAC in Cambodia – from Occupation, Civil War and Genocide to Peace, 9 Max Planck United Nations Yearbook 127-178 (2005).

41 For general analysis on United Nations Peace Building and Transitional Authority Activities with multiple references to Cambodia see e.g. *Michael W. Doyle / Nicholas Sambanis*, Making War & Building Peace. United Nations Peace Operations, Princeton 2006 (Princeton University Press) and *David Chesterman*, You, The People. The United Nations, Transitional Administration, and State Building, Oxford 2004 (Oxford University Press).

42 For descriptions of the process see *Marks* (note 24), pp. 56-64; *MacAlister Brown / Joseph J. Zasloff*, Cambodia. Confounds of the Peacemakers 1979-1998, Ithaca & London 1998 (Cornell University Press), p. 199; *Raoul Jennar*, International Co-operation in the Drafting of the 1993 Constitution, in: Faculty of Law and Economics / Nagoya University, International Symposium "Constitutionalism in Cambodia", Phnom Penh 2003, pp. 27-36 *Say Bory*, Constitutional Changes in Cambodia in the context of international relations, presentation at the Asian Forum of Constitutional Law, Nagoya, September 22/23.

> (3.) The constitution will declare Cambodia's status as a sovereign, independent and neutral State, and the national unity of the Cambodian people.
>
> (4.) The constitution will state that Cambodia will follow a system of liberal democracy, on the basis of pluralism. It will provide for periodic and genuine elections. It will provide for the right to vote and to be elected by universal and equal suffrage. It will provide for voting by secret ballot, with a requirement that electoral procedures provide a full and fair opportunity to organize and participate in the electoral process.
>
> (5.) An independent judiciary will be established, empowered to enforce the rights provided under the constitution.
>
> (6.) The constitution will be adopted by a two-thirds majority of the members of the constituent assembly."

These benchmarks were drawn from the Namibian Constitution-Making in 1982 and were also used in Bosnia Herzegovina in the beginning of the 1990's[43]. It seems therefore that these criteria are emerging as the necessary nucleus of a modern constitutional state. The Paris Agreements are part of a general development towards a right to good governance and democracy[44]. The constitution making process in post-conflict countries is immediately affected by this development, if it takes place in the context of United Nation's involvement. Cambodia is a remarkable example of this phenomenon, given the fact that a range of parties to the Paris Agreements do not fulfil the aforementioned criteria for a constitution in their own systems.

Constitution Making

The elections for the Constituent Assembly had provided the Royalist FUNCINPEC Party, under Prince Norodom Ranaridhh (a son of former King Sihanouk), with a majority, followed by the Cambodian People's Party (CPP) of Prime Minister Hun Sen as the second strongest force. As CPP controlled basically all state institutions and was not prepared to give up control, difficult negotiations were predictable. The relevant draft for a constitution was in the end not prepared by the Constitutional Assembly, but by a small committee consisting of twelve members appointed by the Assembly[45].

Despite massive criticism by the media and NGOs about the secrecy surrounding the deliberations[46] they remained widely confidential. The committee had no spokesperson and

43 See *Ratner* (note 37), p. 27.

44 See the groundbreaking article by *Thomas M. Franck*, The Emerging Right to Democratic Governance, 86 AJIL 46, 90-91 (1992); comprehensively *Gregory H. Fox / Brad R. Roth* (eds.), Democratic Governance and International Law, Cambridge 2000 (Cambridge University Press).

45 Six FUNCINPEC, five CPP, one BLDP (Buddhist Liberal Democratic Party).

46 Phnom Penh Post, August 13-26, 1993 and August 27-September 9, 1993.

members were not allowed to speak publicly about the process. Even the other members of the Constituent Assembly were not informed about the drafting process in detail! Foreign influence was blocked from the beginning of the work of the committee[47] and the draft for a "bill of rights" prepared by the UNTAC Human Rights Component was not even disseminated to the members of the Constitutional Assembly[48]. In the end there were two options, one republican (seemingly favoured by CPP) and one monarchic (seemingly favoured by FUNCINPEC)[49]. Hun Sen and Ranaridhh travelled to consult with former King Sihanouk in Pyong Yang (North Korea) and afterwards a draft constitution, reviving a constitutional monarchy, was put for open debate in the National Assembly. Within five days of discussion (September 15 to 19, 1993) this constitution was adopted with 113 votes in favour, 5 against and 2 abstentions.

Constitutional Amendments

Since 1993 the Constitution has been amended repeatedly. A first amendment in 1994 related to Article 28, allowing the king to delegate his duty of signing laws, to the acting head of state in case of illness and hospitalization abroad. The most important amendment was made in 1999, when, in order to overcome the difficulties after the elections of 1998, a Senate was created. Another amendment in 2001 affected some provisions about the king. In 2004, again ending a post-election-stalemate, an "additional law to the Constitution" was adopted which allows the amendment of constitutional rules after elections outside the procedure of constitutional amendment[50]. This law did not amend the constitutional text itself, but amended it in substance. In 2005, mainly in reaction to an ongoing boycott of parliament sessions by the opposition, quorums for parliament sessions were lowered, and in 2006 the unusual two-thirds majority for the parliamentary confidence vote on the government was abolished in favour of the internationally more "normal" absolute ("fifty plus one") majority principle. Finally, in January 2008 the provisions on the administration levels (Articles 145, 146) were slightly amended.

The number of amendments of the constitution since its adoption in 1993 (seven including the additional law) is not exceptionally high by international standards. Constitutions that are taken seriously occasionally need amendments and there is no general rule that constitutions should be amended as rarely as possible. It is not so much the number of amendments which seem problematic in Cambodia, but the occasions and their means of adoption. Each of the amendments, as well as the "additional law", were more or less a spontaneous reaction to political crisis or situations[51]. In no case has there been any public

47 *Brown/Zasloff* (note 42), p. 195, suggest, however, that a draft of French professor Claude Gilles Gour, who was working in behalf of Norodom Ranaridhh, was most close to the constitution finally adopted.

48 *Brown/Zasloff* (note 42), p. 193-194.

49 *Marks* (note 24), 63; on the Monarchy-Republic-question see also *Brown/Zasloff* (note 42), pp. 197-199.

50 Law of July 8, 2004. Whereas originally such amendments needed at least a two/third majority in parliament they can, after amendment of the law in 2006, now be conducted with the absolute majority of votes.

51 See also *Say Bory* (note 42), p. 8.

debate. Furthermore, there has not been and there is not currently, any substantial debate about constitutional reform in Cambodia.

IV. General Overview and Characterisation

Core Elements of the Constitution

The Constitution, as it stands in early 2008, is based on the principles of democracy, fundamental rights, rule of law and separation of power[52]. Although details are not always carefully drafted and therefore numerous uncertainties in interpretation remain[53], the constitution undoubtedly follows the concept of a liberal democracy. It is influenced not only by the benchmarks of the Paris Agreements, but also by historical constitutions in Cambodia (particularly the 1947 monarchic Constitution as well as the immediate precedent of 1989) and other sources. Despite certain foreign influences (constitutions as diverse as those of Japan, France, Germany, the United States, the Philippines, Thailand and even Zimbabwe were reportedly taken into account[54]), the constitution has been rightly described as being "distinctly Cambodian"[55].

From a comparative perspective the Cambodian Constitution is medium sized with 158 fairly short articles in sixteen chapters, encompassing the fundamentals of the state, institutions and fundamental rights, and prescribes the major policies[56]. The most remarkable concept of the original version of the constitution, from a comparative constitutional law perspective, was the establishment of a two-third majority for a vote of confidence in favour of the incoming Prime Minister, which gave the constitution a somewhat "consensual" flavour. As mentioned, this peculiarity was abandoned in 2006.

52 For overviews on the Cambodian Constitution see *Marks* (note 24); *Maurice Gaillard* (dir.), Droit Constitutionel Cambodgien, Phnom Penh 2005 (Edition Funan); *Jörg Menzel*, Cambodia, in: Gerhard Robbers (ed.), Encyclopedia of World Constitutions, Vol. I, New York 2006 (Facts on File), pp. 150-156; *H. Suresh*, Comments on the Constitution of the Kingdom of Cambodia, Legal Reforms on Cambodia Series. Monograph No. 1, Hong Kong 2001; a basic textbook is *Matthew Rendall*, The Constitution and Government of Cambodia, Phnom Penh 1999.

53 It should be noted that, from a comparative perspective, technical weaknesses in constitutions are fairly normal around the world, as constitutions are often drafted under extreme time pressure and as they often contain vague political compromises on controversial issues. Some imprecision might not be negative at all, as it keeps the constitution open for a dynamic interpretation in time.

54 See *Say Bory*, (note 42), p. 3. Professor Say Bory was involved in the drafting process.

55 See *Brown/Zasloff* (note 42), p. 200, citing two Louis Aucoin and Dolores Donovan, two American law professors who served as advisors in Cambodia during that time.

56 The chapters are as follows: I. Sovereignty; II. The King; III. The Rights and Obligations of Khmer Citizens; IV. On Policy; V. Economy; VI. Education, Culture and Social Affairs; VII. The National Assembly; VIII. The Senate; IX. The Assembly and the Senate; X. The Royal Government; XI. The Judiciary; XII. The Constitutional Council; XIII. The Administration; XIV. The National Congress; XV. Effects, Revisions and Amendments of the Constitution; XVI. Transitional Provisions.

The Concept of a Rigid Constitution and the "Additional Constitution"

The Cambodian Constitution is a normative constitution from its textual concept. Article 150 stipulates the supremacy of the constitution in plain words. Every law and every state action shall conform to the provisions of the constitution. A Constitutional Council is established to ensure that this supremacy prevails in practice. The constitution itself tries to put barriers to its amendments by prohibiting amendments "affecting the system of liberal multi-party democracy and the regime of Constitutional Monarchy" (Article 153)[57], thereby also describing a set of core principles of this constitution.

The rules of constitutional amendment were significantly compromised, however, when in 2004 an additional law to the constitution was adopted, which, outside the procedure for constitutional amendment, opened the door for de facto amendments of the constitution after National Assembly elections, by Members of the new National Assembly. The law was, despite strong arguments suggesting unconstitutionality, not declared void by the Constitutional Council, which argued that after its adoption it had constitutional rank and was not subject to control by the Constitutional Council[58]. Its irregularity has been further increased by an amendment of the law adopted in 2006, which allows for such de facto amendments after elections with an absolute majority of votes (instead of the two-thirds normally necessary for constitutional amendments). Because of the "additional constitution", the rigidity of the original constitution is now to a certain extent periodically suspended after national elections.

V. System of Government

The institutional system of the Cambodian Constitution is quite standard for a bi-cameral constitutional monarchy nowadays: the King is Head of State with mainly symbolic functions; the Government (Council of Ministers) is headed by a Prime Minister; legislation lies with Parliament, which consists of a National Assembly and a Senate; the constitutionality of laws shall be guaranteed by a Constitutional Council. Apart from these "standard" institutions the Constitution provides for two kinds of congresses. The "Congress" is the common gathering of National Assembly and Senate and it shall "resolve important questions of the nation" (Arts. 116-117). A "National Congress" has Khmer citizens as participants and it shall adopt recommendations for consideration by the National Assembly and Senate (Arts. 147-149). For both congresses no implementing legislation has been adopted and none have been put into practice yet[59]. Whereas these

57 Similar "eternity clauses" can be found in other constitutions around the world, particularly in countries with experiences of cruel dictatorship, see e.g. Article 79 (3) of the German Constitution.

58 Decision of September 2, 2004, Dec. No. 060/002/2004. The case might be regarded as a strong reminder about the limits of constitutionalism in current Cambodia, but at the same time it seems remarkable that the "additional law-solution", as doubtful from a constitutional perspective as it may be, is still based on an attempt to formally legitimize the procedure, preferring a doubtful legal construction over open breach of the constitution on a kind of "emergency" argument.

59 In the case of the National Congress this seems to be a violation of the Constitution, as it clearly provides that this

congresses can therefore be neglected for the time being and the Constitutional Council will be discussed in the next chapter, some remarks may be made here regarding king, government and parliament.

Monarchy

As mentioned above, re-establishment of the monarchy seemingly was among the controversial topics during the making of the constitution. The sensitivity of the issue is revealed by the fact that not only is the principle of "constitutional monarchy" immune to constitutional amendment (Article 153), but also Article 7 according to which "the king shall reign but not govern" (Art. 17). Despite these "eternity-clauses" protecting the monarchy (and limiting it at the same time) there was from the beginning occasional speculation on whether the monarchy would be upheld after the end of the reign of King Sihanouk. But when Sihanouk, in 2004, declared his definite wish to resign, another problem was on the table first. The constitution stipulates that the office of the king is for a lifetime (Article 7 (2)) and does not mention the possibility of resignation. The Prime Minister accordingly first stated that King Sihanouk legally could not retire, but later changed his mind and King Sihamoni (a son of King Sihanouk and Queen Monique) was crowned in a three day long ceremony October 28-30, 2004. Tensions between the throne and the office of the Prime Minister seemingly have become less since then, as the new king adheres more strictly to a principle of non-interference in politics.

Constitutionally, the king has probably more rights than the general clause "the king of Cambodia reigns but does not govern" suggests. One of the powers which are of significant political relevance is the right to grant amnesty (Article 27) and currently there is an uncertainty and controversy on whether the king is free in this decision to grant amnesty or if he can only act on the recommendation of the government[60].

Government

The status and function of the Royal Government ("Council of Ministers") resembles that of governments in parliamentary systems around the globe, if one simply bases the analyses on the constitutional text. The candidate for the office of Prime Minister, chosen by the chairman of the National Assembly from the winning party, as well as his candidates for the government, requires a vote of confidence from the National Assembly. The constitution does not have much to say about the government: the chapter on government contains

Congress shall meet on a yearly basis. It seems that these are simply "forgotten" institutions of the constitution.

60 This discussion is interesting as it offers insights into the nature of the criminal justice system itself: As the constitution does not mention any right of the government / prime minister to substantially decide on amnesties, such a right might only derive from the provision that the king shall not "govern". Qualifying amnesties as part of "governing" seems indeed to be quite realistic in Cambodia, given the fact that many politicians in the country have been sentenced and subsequently pardoned in recent history for reasons that critics qualified as "political". Such a line of argument seems to contradict, however, to the concept of a non political criminal justice and judicial system as stipulated in the constitution.

only nine articles, compared to twenty-four articles in the chapter regarding the king. The particular strength of the Office of the Prime Minister is also not apparent from the constitutional provisions, but it has a clear legal basis in the Law on the Organization and Functioning of the Council of Ministers (1994), which stipulates in Article 9 that the Prime Minister "manages and gives out commands on all activities of the executive in all fields". Apart from this law it is mainly a question of the political culture and present political situation in Cambodia, in which current Prime Minister Hun Sen is commonly labelled as the "strong man" of the country[61], a "title" which he has occasionally personally endorsed[62]. This strongman-position is not only intra-governmental, but also applies to the other constitutional institutions. Generally the government is comparatively strong as many laws regulating their conduct are either not in place. Legislation itself is proposed almost exclusively by the government and parliament rarely questions, rejects or modifies proposed legislation in the process. Judicial control of government action is also a theoretical concept.

There is no regulation and no control whatsoever on the size of the government. Cabinet had around 260 members after the establishment of a new government in 2004, making it one of the biggest cabinets in the world. In addition to the Prime Minister, Deputy Prime Ministers, Senior Ministers, Ministers and Secretaries of States, there are, according to some estimates, around a thousand governmental Advisors, which often equal in rank with Ministers. Administratively, the country consists of provinces, districts, communes and villages. Commune councils are directly elected by the people since the first commune elections in 2002. Officials on the other levels have traditionally been appointed, but according to current draft legislation (as of February 2008) there shall be indirectly elected councils on the district and province levels in the future. Decentralization and public service reform are officially top priorities in the field of administrative reform[63].

Parliament

The bi-cameral Cambodian parliament consists of a National Assembly and Senate[64]. The current 123 members of the National Assembly are elected in a national election for a five year mandate, whereas the current 61 Senators are mostly indirectly elected by Commune Council and National Assembly members for a six year mandate. Candidates are appointed exclusively by political parties and although the constitution promises freedom

61 For criticism see e.g. *Duncan McGargo*, Cambodia: Getting Away With Authoritarianism?, 16 Journal of Democracy 98-112 (2005); *Steve Heder*, Hun Sen's Consolidation. Death or Beginning of Reform?, Southeast Asian Affairs 2006, pp. 113-131.

62 See *Harish C. Mehta / Julie B. Mehta*, Hun Sen, Strongman of Cambodia, Singapore 1999 (Graham Brash), p. 261.

63 On Decentralization see generally *Caroline Rusten / Kim Sedara / Eng Netra / Pak Kimchoueun*, The Challenges of Decentralisation Design in Cambodia, Phnom Penh 2004 (Cambodia Development Resource Institute*); Robert B. Oberndorf*, Law Harmonization in Relation to the Decentralisation Process in Cambodia, Phnom Penh 2004 (Cambodia Development Resource Institute).

64 The Law of Parliament consists mainly of the respective constitutional provisions, election laws for National Assembly and Senate, Laws on the Statute of its members and the International Regulations of both houses.

of individual mandate, election laws for the National Assembly and Senate stipulate loss of mandate in the case of loss of party membership. This is particularly significant as party structures in Cambodia are traditionally fairly autocratic with no available remedies against expulsion under the Law on Political Parties[65]. Repeatedly there have been expulsions of members from the National Assembly as well as from the Senate[66]. Furthermore, immunity of members of the National Assembly has been lifted on a number of occasions, partly allowing for criminal prosecutions that were labelled as politically motivated by critics.

Laws can be proposed by parliament, but in practice nearly all laws are drafted within the government and then sent to parliament for adoption. Draft laws are first discussed and adopted in the National Assembly and are then reviewed by the Senate within (normally) four weeks. The Senate cannot finally veto any law, but only send it back to the National Assembly with recommendations, which can than either change the draft law or simply overrule the Senate's objections. National Assembly and Senate have some legal possibilities to monitor government activities and they are involved in some appointments of other public officials. National Assembly and Senate have various (currently nine) commissions as well as influential permanent committees. The President of the Senate serves as Acting Head of State in case of absence or illness of the king.

Overall there is widespread opinion (even among the parliamentarians themselves) that the functions of parliament (National Assembly and Senate alike) are not fully developed yet in substance[67].

VI. Fundamental Rights

The Constitutional Concept of Fundamental Rights

As already mentioned, fundamental rights play a prominent role in the constitution. The constitutional chapter on rights starts with an embracement of the international human rights in Article 31 (1):

> "The Kingdom of Cambodia recognizes and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights

65 The Law on Political Parties (1997) requests the political parties to establish by-laws which, inter alia, shall contain rules regarding admission and expulsion of members (Article 10 (a)(4)), but no grounds for expulsion are listed, nor are there remedies.

66 In practice, members of the National Assembly and the Senate have repeatedly been expelled from their parties and removed from their mandates over the years. The most famous case was the removal of former FUNCINPEC Minister of Finance, Sam Rainsy, from the National Assembly in 1995. Three CPP Senators lost their membership in the Senate after expulsion from their political party in 2001, after the Senate had, with a majority, rejected the controversial law on Aggravating Circumstances for Felonies. Whereas the legality of the Senators' removal at the time was controversial, it is now clarified in the election laws for National Assembly and Senate that loss of party membership implicates loss of mandate as a member of parliament.

67 See also *Hor Peng*, The Reform of Parliament in Cambodia: Towards Effective Working Parliament in Terms of Strong Representation, PhD study (unpublished), Nagoya 2005.

> and the covenants and conventions related to human rights, women's and children's rights."

The precise legal relevance of this clause is subject to considerable uncertainty. Whereas human rights organisations are mostly of the opinion that this provision lifts human rights treaties into the rank of constitutional law, the Cambodian Government has been inconsistent with its statements, by sometimes insisting on the necessity for a transformation by national legislation (dualist theory), and sometimes recommending immediate application by courts. The Cambodian Constitutional Council, in a decision of June 19, 2007, has stipulated that the international conventions ratified by Cambodia (like the Child Rights Convention) are to be taken into account when applying national law [68].

The fundamental rights granted by the Cambodian Constitution itself mostly resemble a traditional rights catalogue, mixing liberal, political, economic, social and cultural rights. The wording is an obvious mixture of provisions of earlier Cambodian constitutions and modern influences. Part of the Right to Life is the abolishment of the death penalty (Article 32), which is remarkable in the Southeast Asian context where the death penalty is still applied (but which had already been introduced by the 1989 constitutional amendments[69]). An obvious deficit from a general perspective is that many fundamental rights seem only to be granted to "Khmer Citizens" and there are indications that the choice of words is designed to allow discrimination particularly of people of Vietnamese descent[70]. Apart from this it has been criticised that the fundamental rights catalogue would emphasize the limits of fundamental freedoms too much. In the very beginning of the chapter on fundamental rights (Art. 31 (2)) we find a general limitation:

> "The exercise of personal rights and freedom by any individual shall not adversely affect the rights and freedoms of others. The exercise of such rights and freedoms shall be in accordance with the law."

Seemingly broad restrictions are also made possible in some specific provisions. Particular wide is Article 41 (1):

> "Khmer citizens shall have freedom of expression of their ideas, freedom of information, freedom of publication and freedom of assembly. No one shall exercise these rights to infringe upon the honour of others, or to affect the good customs of society, public order and national security."

Although some restrictions of fundamental freedoms in general and the freedom of expression are inevitable in any society, one might argue that such restrictions, as in Article

68 On this decision see supra VII.

69 See Constitution of the State of Cambodia (1989), Article 35 (9).

70 See *Marks* (note 24), p. 70-73. Earlier English translations suggest that even the right to life, personal freedom and security (Article 32 [1]) are only attributed to Khmer Citizens, but this is a mistake in translation as the Khmer version speaks of "everybody" insofar.

40, are broad by international standards[71]. They are, however, in line with a certain tradition of Southeast Asian constitutional thinking, which emphasizes community obligations and suggests that individual freedoms (particularly political freedoms) can be effectively traded off against economic and social development.

In this context of Asian (Southeast-Asian) values it seems consequential that the whole chapter containing fundamental rights is titled "The Rights and Obligations of Khmer Citizens" and that it contains a range of obligations of citizens as well as rights (Articles 47, 49, 50). Despite such particularities, it is widely acknowledged from an overall perspective that the catalogue on civil rights is in line with standards not only in the Asian world, but also from a Western perspective[72]. In parts, the agenda is decisively modern and in line with modern rights language. Women's and children's rights are properly stipulated as is protection from exploitation at work etc. Environmental rights are still missing, however, maybe because environmental degradation was not as visible as a problem in the Cambodia of 1993, as it is today.

Fundamental Rights and State Practice

Cambodia's problem in the sphere of fundamental rights is not located on the paper of the constitution, but in the political and legal reality. International organisations, as well as national non-governmental organisations, have continuously criticised the Cambodian human rights record since the adoption of the constitution[73]. A culture of human rights seems not to be established yet[74]. The Cambodian Government unsurprisingly does not accept that criticism, partly claiming that positive developments are not sufficiently taken into account by the numerous reports, and partly insisting that progress takes time and Cambodia is still recovering from a decades long conflict situation. In the case of press freedom, it also claims that freedom in Cambodia is more advanced than most Southeast Asian countries. However, the list of problems is long. With regard to the media it cannot be ignored, for example, that critical and independent reporting has no place in Cambodian Television yet. The constitutionally guaranteed freedom of assembly and demonstration has been largely suspended for years after riots against the Thai Embassy following accusations

71 Compare also the ICCPR, Article 19, allowing restrictions on the freedom of opinion and expression if they are "provided by law and are necessary (a) for the respect of the rights or reputation of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals.

72 *Fernand*o (note 3), p. 494.

73 For numerous reports see the websites of the Cambodian Office of the Office of the United Nations High Commissioner for Human Rights (http://cambodia.ohchr.org), where yearly general reports as well as numerous thematic reports and statements can be accessed. Further information is available e.g. at the websites of the State Department of the United States, Amnesty International, Human Rights Watch. Important sources of information are also the regular reports of national human rights NGOs like ADHOC (http://www.adhoc-chra.org) and LICHADO (http://www.lichadho.org).

74 See also *Terence Duffy*, Towards a Culture of Human Rights in Cambodia, 16 Human Rights Quarterly 82-105 (1994).

that a young female Thai singer had insulted Cambodians[75]. Excessive use of force by police, violations of the rights of the accused in criminal procedure and inhuman prison conditions, are all well reported. Domestic violence, particularly against women, is an ongoing problem despite the adoption of a special law and children's rights have been widely disregarded in criminal procedure as has their treatment in prison[76]. Problems of forced land eviction have been in the focus of national and international human rights organizations for years[77]. Social rights promised by the constitution still are in sharp conflict with the reality of one of the lowest life expectancies in the region, insufficient healthcare, low quality educational facilities etc. This problem, however, is hardly specific to Cambodia, but is shared by nearly all developing countries which endeavour to guarantee social rights in their constitutions.

Institutions of Fundamental Rights Protection

From an institutional perspective the protection of fundamental rights is still in its infancy. Most effective for the time being is the work of NGOs and international organisations. Cambodian Courts, on the other hand, rarely take rights into account. In the National Assembly and the Senate there are commissions that can be petitioned by people with human rights complaints, but government ministries often do not even answer requests from these commissions for explanation about certain events. The Prime Minister has appointed a governmental human rights advisor, but there is no *independent* human rights commission, as in a number of other ASEAN states. Cambodia has also not signed the first additional protocol to the ICCPR and therefore individual complaints are impossible at an international level for the time being.

VII. Judicial Review

The Constitutional Council as a Constitutional Court

As mentioned earlier the Constitution clearly stipulates the supremacy of the constitution. The Constitutional Council[78] is the main organ of judicial review. The Constitutional Council is basically an institution inspired by the French constitutional tradition, but

75 The constitutionality of the pre-constitutional and Law on Demonstrations (1991) has been confirmed by the Constitutional Council in its decision of October 4, 2004 (Case No. 062/004/2004). The court did not address, however, the fact that the practice of the authorities does evidently not reflect the state of the law, as it has to be interpreted in the light of the constitution.

76 On prison conditions generally see LICHADO, Prison Conditions in Cambodia 2005 & 2006: One day in the life … (January 2007).

77 See most recently *Amnesty International*, Rights Razed. Forzed Evictions in Cambodia, February 11, 2008.

78 The official website of the Constitutional Council with decisions in Khmer, French and English (from 2004) is http://www.ccc.gov.kh/english/history.php. For an early French language analysis on the Constitutional Council see also *Jeanne Page*, Le Conseil Constitutionnel du Cambodge, Annuaire international de justice constitutionnel, Vol. 17 (2001), p. 75.

also takes up elements of a constitutional court. The Constitution seems to borrow from the Constitution of 1972. However, the "Constitutional Court" stipulated there was much less a court than today's "Constitutional Council". And whereas the Constitutional Court under the 1972 Constitution actually never materialized, the establishment of the current Constitutional Council finally took place five years after adoption of the constitution (raising the question if laws adopted in between were constitutional at all[79]). The Constitutional Council has nine members, who are regularly appointed for a nine year term. Constitutional Council members do not need to have a legal background, but require a high level qualification. There is a minimum age of 45 years but no maximum age[80]. The competences of the court are enumerated in Articles 136, 140 and 141. The Constitutional Council is responsible for deciding on:

- disputes on the election of the members of the National Assembly and Senate (Art. 136 (2)),
- the constitutionality of the internal regulations of the National Assembly and the Senate as well as other organisational laws before promulgation (Article 140 (2)),
- the constitutionality of other laws already adopted by parliament but before promulgation on the request of the King, the Prime Minister, the President of the National Assembly or the Senate, 1/10 of the members of the National Assembly or ¼ of the members of the Senate,
- the constitutionality of laws after promulgation on the request of the King, the Prime Minister, the President of the National Assembly or the Senate, 1/10 of the members of the National Assembly or ¼ of the members of the Senate or the courts,
- the decision of the Ministry of Interior not to register a political party[81].

Furthermore,

- the Constitutional Council shall be consulted by the king on all proposals to amend the constitution (Article 143) and
- it gives advisory opinions based on its competence to interpret the constitution (Article 136 (1))[82].

The overview clearly shows that the Cambodian Constitutional Council combines functions of the French model of a constitutional council with those of real constitutional courts[83].

79 See *Matthew Granger*, King's Advisor Bemoans Lack of Constitutional Council, Phnom Penh Post, October 6, 1998.

80 In summer 2007, one member retired at the remarkable age of 103 years!

81 Law on Political Parties (1997), Article 25.

82 One might doubt that Article 136 (1) of the Constitution really provides jurisdiction. It seems more appropriate to understand this provision as an introductory statement on the general function of Council.

83 For qualification as a constitutional court see *Graham Hassall / Cheryl Saunders*, Asia-Pacific Constitutional Systems, Cambridge 2002 (Cambridge University Press), p. 179.

It makes ex ante and ex post control of laws possible and even allows courts to refer cases to the Constitutional Council if the constitutionality of a law is in doubt[84]. This function of checking laws after adoption and on occasion of their application in the courts, clearly exceeds the French model of a Constitutional Council.

Towards a Decade of Jurisprudence

From a practical point of view, cases about election dispute have dominated the Council's work, but the right to make a request to the Constitutional Council has also been used repeatedly by Presidents of the National Assembly and Senate, as well as groups of parliamentarians. It seems fair to assess that the Constitutional Council has been careful not to provoke the government so far[85]. Only rarely has it declared provisions in a law to be unconstitutional[86], and in no case has it challenged the government on a politically sensitive issue. The ascetic style of drafting decisions, hardly offering any reasoning but only presenting results, contributes to the insignificant impact it has had so far on legal development in Cambodia.

The "visibility" of the Constitutional Council is also reduced by having no dissenting votes and its members are not allowed to speak publicly about cases. This in itself might not be a negative concept, given the fact that the court still has to establish itself as an authority. Only in a very few cases has the Constitutional Council delivered a thorough reasoning. One such case was an election control case of 1998[87], another one was in respect of the Law on Communal Administration[88]. In 2006, a law on the status of members of the National Assembly, which seems to contain a significant restriction on parliamentary immunity[89], was declared constitutional on the basis that the law is only supposed to raise awareness of the parliamentarians, but that they would not be deprived of any constitutionally

84 The same concept is to be found in Germany, see Article 100 (1) of the German Constitution. The law on the Constitutional Council has limited this right to the Supreme Court, however, it is a restriction which seems questionable as the constitution simply states that "the courts" may refer cases to the Constitutional Council. Until now no cases have yet been referred by the courts to the Constitutional Council. An interesting question could arise if the constitutionality of Cambodian laws becomes a topic at the Extraordinary Chambers in the Courts of Cambodia (Khmer Rouge Tribunal), see *Scott Worden*, An Anatomy of the Extraordinary Chambers, in: Jaya Ramji and Beth van Schaack (eds.), Bringing the Khmer Rouge to Justice, Lewiston 2005 (Edwin Mellen Press), pp. 171-220, at 204-205.

85 UN-Special Representative on Human Rights of December 2006 (http://cambodia.ohchr.org), paragraph 22.

86 See Decision of May 28, 1999 (Dec. No. 07/99), regarding a provision in the law on the formation of the Minister of Womens' and Veterans' Affairs that required the minister to be a woman, decisions of January 28, 2000 (Dec. No. 035/001/2000) and of August 28, 2000 (Dec. No. 037/003/2000), regarding the establishment of the National Audit Authority; Decision of February 12, 2001 (Dec. No. 040/002/2001), regarding the unconstitutionality of a death penalty in the Law on the Extraordinary Chambers.

87 Decision of July, 17, 1998 (Docket No. 03).

88 Decision of January, 15, 2003 (Dec. No. 050/001/2003).

89 Art. 5 of the Law on the Status of the Members of the National Assembly: "The members of the National Assembly shall not use their immunity to violate the credit of other individuals, good custom of society, public order, and national security."

guaranteed immunity[90]. It should be acknowledged that this decision at least indicates some willingness to enforce constitutional values[91].

The 2007 Decision on Children's Rights

On July 10, 2007, the Constitutional Council has, again in only a few words, stated clearly that judges have to consider not only the constitution, but also international human rights treaties ratified by Cambodia when applying the law[92]. The decision has been applauded by the UN Human Rights watchdog in Cambodia as well as by local NGOs. It is indeed "good news" in the sense that it clarifies a most relevant problem in Cambodian law, which seemingly disallowed reduced penalties for children in case of certain felonies. At the same time, the case illustrates the obvious carefulness of the Constitutional Council. The decision is short and vague. The whole reasoning is as follows:

> "The Constitutional Council …
>
> - Understands that [although] article 8 modifies article 70[93] of UNTAC law, it does not affect [undermine] the rights and interests of children. The provision of article 8 of the law on aggravating circumstances above is not unconstitutional.
>
> - Understands that at case trial, in principle, a judge shall not only rely on article 8 of the law on aggravating circumstances, but also relies on law. The term law here refers to the national law including the Constitution which is the supreme law and other applicable laws as well as the international conventions that Cambodia has recognized, especially the Convention on the Rights of the Child. …"

These few sentences constitute what is currently considered the most important statement of the Constitutional Council from a human rights perspective. The approach seems to be similar to the decision in the case of immunity of members of the National Assembly of 2006. The law is declared constitutional, but the reason for unconstitutionality is removed by interpretation. In fact, the Constitutional Council seems to practice what in Germany is called interpretation in conformity with the constitution[94]. The lack of clarity in the language of the decision makes it difficult, however, to be sure about the precise content of the decision itself.

90 Decision of November, 10, 2006 (Dec. No. 082/009/2006).

91 But compare the aforementioned OHCHR-Report, in which the decision is simply mentioned as an example for the reluctance of the Constitutional Council to challenge the government.

92 Decision of July 10, 2007 (Dec. No. 092/003/2007); for an unofficial English translation see OHCHR Cambodia, Public Statement of July 25, 2007 (http://cambodia.ohchr.org).

93 The number seems to be mistaken, as Article 68 is the relevant provision.

94 See *Donald P. Kommers*, The Constitutional Jurisprudence of the Federal Republic of Germany, 2nd edition, Durham and London 1997 (Duke University Press), p. 51.

VIII. Legal System and the Rule of Law

Cambodia and the Global Legal Traditions

The Cambodian constitution does not make any declaration about the legal system[95], nor about its guiding principle, nor about the religious or indigenous legal systems within the country. From the perspective of the world's legal traditions, it is quite clear that Cambodian law has a range of sources. Typically it is characterised as a civil law country as a consequence of the French influences in the late 19th and the first half of the 20th century[96]. This does not mean, however, that other traditions have not had their impact on current Cambodian law. Many other former colonies may be seen as a melting pot of legal traditions[97] and Cambodia is further evidence for the argument that the simple common law – civil law dichotomy is not universally applicable. The socialist concept of law officially dominated in different forms from 1975 to at least 1989 and is also still present in the current system[98]. Concepts from common law countries began to be influential in the 1990s, although they have not had much impact on the system as such[99]. Last but not least, "Asian" influences and more specifically "Khmer customs" should not be forgotten as an influential factor, although it is difficult to identify them in positive law apart from the general invocations by the constitution. Within the dominating civil law tradition, there are again various influences to be identified. Whereas the new criminal law is basically drafted alongside French models, the new civil law is based on Japanese concepts (with Japan itself being influenced by German law). Cambodian law remains, obviously, the result of a patchwork of diverse historic concepts and multiple current interventions.

To make things even more problematic, an important aspect of Cambodian law is the poor quality of all aspects of the legal system of Cambodia. A strong legal system was neither introduced by the French colonial power nor was it developed during the first two decades of independence. During the rule of the Khmer Rouge all legal institutions were shut down and nearly all persons with legal knowledge were killed. According to various estimates, a maximum of ten legally educated people within the country survived the Khmer Rouge Regime[100]. Although some legal institutions

95 For short outlines on Cambodian law see *Béatrice Balivet*, (coord.), Introduction au Droit Cambodgien, Phnom Penh (ca.2004); *Sok Siphana / Denora Sarin*, The Legal System of Cambodia, Phnom Penh 1998.

96 See *Loie Avillaneda*, in: Balivet (note 95), p. 29; *Sok/Denora* (note 95), p. 31.

97 See *M.B. Hooker*, Legal Pluralism. An Introduction to Colonial and Neo-Colonial Laws, Oxford 1975 (Clarendon Press); *M.B. Hooker*, A Concise Legal History of South-East Asia, Oxford 1978 (Clarendon Press); for a general perspective see *Jaques du Plessies*, Comparative Law and the Study of Mixed Legal Systems, in: Mathias Reiman / Reinhard Zimmermann (eds.), The Oxford Handbook of Comparative Law, Oxford 2006 (Oxford University Press), pp. 477-512.

98 *Basil Fernando*, Problems Facing the Cambodian Legal System, Hong Kong 1998, p. vi, argues that the country still is based on the socialist concept of law.

99 But compare *Roque Reynolds*, Dicey in Cambodia or Droit Administrative meets the Common Law, The Australian Law Journal 72 (1998), p. 204, (arguing that the jurisdiction of the normal courts for administrative courts would be a common law element); more realistic *Avillaneda* (note 96), p. 37, speaking of occasional influences.

100 An estimate by the Lawyers Committee for Human Rights estimated that in 1979 there were ten persons with a law degree left in Cambodia. Other estimates are even lower (see e.g. *Marks* [note 24],p. 44).

were re-established during the time of the "People's Republic" the rule of law was not a priority in this period. People selected to become judges typically received a few weeks of 'crash courses' on law (including training on Marxism-Leninism) at best. The government also did not spend much time on preparing and adopting laws; the country was widely ruled by occasional decrees only regulating the most necessary questions. Commitments to improve the legal and judicial system have been expressed since the adoption of the new constitution, but still today the general assessment is that the system is widely dysfunctional[101]. Therefore, the constitution remains somewhat a head without a body, for the time being.

The Laws of Cambodia

Part of the Rule of Law in democratic countries of the civil law tradition is the concept that all important laws need to be adopted by a democratically elected parliament. The rule of law in that sense is rule by parliament made laws. In Cambodia, however, law teachers often speak of the "rule of sub-decree", implicating that the main legal source is not parliament made law, but executive regulation.

The prevalence of government regulations is partly the consequence of a simple lack of laws in many fields, and partly it is the consequence of a legislation technique which is still practiced and often hardly regulates issues but only provides for vague guidelines while leaving the rest to governmental sub-decrees. At least in some major areas the situation is improving. A fairly comprehensive Labour Law was drafted with help of the International Labour Organisation and adopted in 1997[102]. Civil and criminal procedure codes, as well as a civil code, have recently been adopted and a penal code is in the final stage of preparation. Cambodia also tries to fulfil international demands by adopting laws on various topics. WTO accession implicated a lengthy "to do list" regarding legislation. International terrorism produced a shorter one.

More fundamental laws are mostly supported by international donors and prepared with the help of international experts. As mentioned, criminal code and criminal procedure code were prepared with the help of French cooperation, while Japanese consultants were in charge of drafting the civil code and civil procedure code. A multitude of bilateral and international partners and consultants from around the globe are involved in more specific legislation. Whereas technical quality of the laws of Cambodia has inevitably somewhat increased over time, the patchwork of influences perpetuates systematic problems.

101 A much cited drastic assessment on the dysfunctions of the Cambodian judiciary was given by an expert group appointed by the Secretary General of the United Nations in order to report on a possible concept for a Khmer Rouge Tribunal (see Report of the Group of Experts for Cambodia Established pursuant to General Assembly Resolution 52/135 (February 1999), Annex, U.N. Doc. A/53/850, S/1999/231, §§ 129, 133).

102 On a specific aspect of the the ILO's work in Cambodia see more recently *Kevin Kolben*, Note from the Field: Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories, 7 Yale Human Rights & Development Law Journal 79 (2004).

Application and Enforcement of the Law

Law implementation is an even bigger problem. The adoption of the new codes in civil law and criminal law means that hundreds of judges, prosecutors and lawyers, many of whom have never received any substantial legal education, must now adapt to a system of highly systematic codes of thousands of articles. It seems impossible that this will happen in the short term and the conclusion is inevitable that re-establishment of a professional legal system and culture is in every respect a task that will take at least a generation to fulfil. The severity of the problem is increased by the fact that it is not simply a matter of "incompetence" and cannot therefore be solved by training and waiting for better educated personnel. The combination of incompetence, corruption and political interference[103] makes it difficult for effective reform. Some steps have been taken to address problems, for instance, with a significant increase in the official salaries of judges[104] and the establishment of a Royal School for Judges and Prosecutors[105]. Change in the overall legal culture obviously needs time, however, and for the time being the lack of independent academic research and debate remains one of the additional obstacles in this process. At universities, law is on offer (and increasingly popular with students) but Cambodian law faculties are hardly places of research and for the time being they are far from being "think tanks" in the field of law. There is no law library of quality, no legal journal or any alternative forum for academic discussion and there are hardly any quality textbooks for the purpose of learning[106].

All human rights reports consider impunity to be one of the most important human rights issues in the country and the Cambodian Government itself has repeatedly acknowledged the problem. High profile criminality often goes unpunished because of police incompetence, corruption or fundamental misunderstandings about constitutional and legal requirements in respect of the action of police, prosecution and courts. Widespread illegal behaviour is also commonly acknowledged in respect of land ownership and use. Although Cambodia has a comparatively modern and comprehensive Land Law (2002), "land grabbing" by the "rich and powerful" is still an acknowledged phenomenon[107] and the Prime Minister has described it as the potential cause of a future "farmer's revolution".

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103 Even the quasi-official "Who's who" of Cambodia, published under the auspices of the Ministry of Information, points to two other problems by stating that "the judicial branch in Cambodia is highly corrupt and can be easily pressured from executive branch" (Who's Who in Cambodia 2006 – 2007, Phnom Penh 2006, p. 299).

104 Salaries of judges are now – after a recent substantial rise – between 300 and 600 dollars. This is progress, but the amount is still clearly insufficient to support the life of an upper middle class family (judges are supposed to belonging to this group) in Cambodia.

105 The Royal School of Judges and Prosecutors conducts two year long preparatory trainings, which mainly consists of classroom sessions in the first year and internships in the second year.

106 For some textbooks of a certain quality see e.g. *Say Bory*, General Administrative Law, 2nd ed. 2001 (Khmer only); *Stuart Coghill*, Resource Guide to the Criminal Law of Cambodia, Phnom Penh 2000 (Khmer and English); *Eduard De Bouter / Daniel Adler / Lee U Meng / Patricia Baars*, Cambodian Employment and Labor Law, 3rd ed., Phnom Penh 2005 (Khmer and English).

107 For an introduction to the Land Law see *Matthew Rendall*, Land Law of Cambodia, Phnom Penh 2003. The problem of lawlessness in the field is the topic of repeated reports of the Special Representatives of the Secretary-General for human rights in Cambodia, see e.g. *Peter Leuprecht*, Land Concessions for economic purposes in Cambodia (2004); *Yash Gai*, Economic land concessions in Cambodia. A human rights perspective (2007) (both at http://cambodia.ohchr.org).

It remains to be seen if action against corrupt judges will become a more regular event and will finally result in systemic change[108]. For the time being, "rule of law", the right of all to be equal before the law (Article 31 [2]), the right to security (Article 32 [1]) etc. remain unfulfilled promises of a visionary constitution.

The Khmer Rouge Tribunal

The so called Khmer Rouge Tribunal, officially named the Extraordinary Chambers in the Courts of Cambodia (ECCC), is by any standards the most prominent legal event in Cambodia since adoption of the Constitution in 2007. The Tribunal aims to bring to justice the (surviving) senior leaders of the Khmer Rouge Regime of 1975 to 1975 and the ones most responsible for its crimes. The Tribunal is what in international law is called a hybrid court, being composed of national and international judges, prosecutors and staff. The Cambodian ECCC is a novelty in the field as this is the first time that such a court has been made up of a majority of national judges. The court took nearly a decade to be established after Prime Ministers Ranaridhh and Hun Sen requested international assistance for such a tribunal in 1997. After a difficult start it is now fully in process.

It is not necessary to examine the details of the ECCC here. There is a wealth of academic analysis on the topic[109], which contrasts sharply with the lack of interest in the Cambodian Constitution. In the context of this report it should be mentioned that the tribunal faces (potential) constitutional questions[110], for example, regarding the relationship between the ECCC and the Cambodian Constitutional Council[111]. From a general perspective, the ECCC is widely seen as a test case for overcoming impunity and for improving rule of law in Cambodia[112]. Despite all problems ahead it is first of all an opportunity to promote the concept of rule of law in Cambodia and thereby making the constitutional promises more effective. Whether it will fulfil these functions remains to be seen.

108 Unusual action was taken on August 2007, when, on the occasion of the "launching" of the new Criminal Procedure Code in a Phnom Penh Hotel the Prime Minister announced the removal of the President of the Court of Appeals, allegedly as a sanction for taking a bribe of $ 30.000 in exchange for the acquittal of some brothel owners accused of human trafficking. Cambodia Daily, August 13, 2007, pp. 1-2. The procedure of removal and appointment was criticized afterwards as unconstitutional however, and it caught the attention of the international community in particular because the person appointed to be the new president of the Appeals Court was serving as the investigating judge at the ECCC, raising concerns about the independence of that court and possible delays in its procedures.

109 See for example *Ramji/van Schaack* (note 83); *Jörg Menzel*, Justice delayed or too late for justice? The Khmer Rouge Tribunal and the Cambodian "genocide" 1975-1979, in: 9 Journal of Genocide Research 215-234 (2007), with further references.

110 The Law on the Extraordinary Chambers was initially declared unconstitutional by the Constitutional Council as it seemingly allowed for application of the death penalty in violation of Article 32 (2) of the constitution (Decision of February 12, 2001, No. 040/002/2001).

111 See *Scott Worden*, An Anatomy of the Extraordinary Chambers, in: Ramji / van Schaack (note 84), pp. 171-220 (at 204-205).

112 Deputy Prime Minister Sok An, who is in charge for the tribunal within the government, expressed hope that the court would become a "model court".

IX. Cambodia and the World

As Cambodia's recent history has been much influenced by world politics and as its constitution has been developed in the context of an international agreement and United Nations intervention, it seems interesting to take a closer look at how the constitution deals with questions of national sovereignty and international openness. Perhaps unsurprisingly, taking the cultural background and historical circumstances into account, the constitution embraces the concepts of national sovereignty and internationality at the same time.

National Sovereignty and Internationality

The Paris Agreements and the whole process leading up to the elections in 1993 and the adoption of the constitution have often been labelled as "Nation Building". At the outset, Cambodia was considered to be on the edge of being a "failed state" and re-establishing internal unity, as well as external sovereignty were the main goals of the process. The constitution's strong emphasis on this is therefore explicable from the circumstances of the time, but is also deeply rooted in Cambodian constitutional history, beginning with the pathetic constitution of the Khmer Republic of 1972. The Constitution of 1993 makes plenty of references to national sovereignty, unity and the protection of Cambodian culture, referring explicitly as other constitutions before, to the glorious Angkor times. Such provisions are in fact quite deeply embedded in the psychology of Cambodians and the fear for national sovereignty, pride and culture has resulted in a range of disputes and measures in recent years[113].

When Cambodia reorganized itself at the beginning of the 1990s, by trying to overcome civil war and establish a system based on democracy, human rights and democracy, the whole process was not an internal affair but an international effort. The Paris Agreements is an international treaty framework with eighteen other states as parties. This treaty already contained the framework for the constitution and UNTAC was in charge to guarantee the success of the first free elections. Unsurprisingly, for a system so deeply based on an effort of the international community, the constitution provides a range of guidelines relevant to the foreign policy of the country and its relationship with the outside world. According to Article 2 "[t]he Kingdom of Cambodia shall be an independent, sovereign, peaceful, permanently neutral and non-aligned country." These principles are elaborated in Articles 53 to 55. The principle of non-alignment is not only a constitutional obligation, but part of the Paris Agreements and therefore binding international law for Cambodia, that in return has to be respected by all signatory states of that agreement. As the principle of non-alignment only affects military alliances it does not stop Cambodia from being an active part of regional

113 Voices critical of the government have challenged its approach to the regulation of border issues with Vietnam. Critical comments on a border treaty with Vietnam, ratified on October 6, 2005, culminated in a number of criminal court procedures, arrests and escapes at the end of 2005. The situation de-escalated in January 2006. See ADHOC, Human Rights Situation Report 2005 (Phnom Penh 2006), p. 5; LICHADO, Human Rights in Cambodia: The Façade of Stability, Report, May 2006, pp 9-11.

and international institutional organisations. In fact, the country has become a member to numerous international organisations and treaties. Cambodia is party to most global human rights treaties and most of the important global environmental treaties. It became the 10th member of ASEAN in 1999[114], it was the first Asian state to ratify the Rome Statute on the International Criminal Court in 2002 and is a pioneer among least developed states by joining the World Trade Organisation in October 2004. Cambodia is last but not least a major recipient of international development cooperation, with international organisations, bilateral cooperation partners and numerous NGO's contributing in different ways to the country's budget, administration and development[115].

The Rank of International Law

Taking the context of its genesis into account, it might come as a surprise that the Cambodian constitution does not clearly express the status and rank of international law within the national legal framework. In respect of human rights treaties there is, as mentioned earlier, the provision of Article 31 and one might argue that this lifts the respective treaties into the rank of constitutional law[116]. As mentioned before, the Constitutional Council has recently at least clarified that national courts have to consider international human rights treaties when interpreting and applying national laws and thereby indicated that these treaties might be in the rank of the constitution itself[117]. The ECCC, in its first decision, took the same path by applying provisions of the ICCPR[118].

Apart from the field of human rights the constitution does not address the rank of international treaties. However, as international treaties are basically adopted like laws[119] it seems reasonable to assume that they rank as laws (if they are qualified as self-executing), which means inter alia that in case of conflict the later law will prevail[120]. There is no indication regarding the rank of customary international law in the text of the constitution and the author is not aware of any published opinions on this so far[121]. Taking the general tendency of openness and friendliness towards the international community as a basis, one might suggest that customary international law should at least be part of the "law of the land". This topic has yet to be explored in Cambodia.

114 Accession to ASEAN was postponed in 1997 due to the "coup" of Second Prime Minister Hun Sen, toppling First Prime Minister Ranaridhh.

115 International cooperation is, last but not least, plentiful in the field of legal and judicial system. Foreigners are involved in nearly every major piece of legislation as well as in the field of legal education. The most significant current involvement of the international community is the establishment of the so called "Khmer Rouge Tribunal", which is based on an international treaty between the Cambodian Government and the United Nations and is mainly financed by foreign contributions.

116 *Coghill* (note 106), § 2.27.

117 Infra VI.

118 Decision of December 3, 2007, Criminal Case File No 001/18-07-ECCC-OCIJ (PTC01), paragraph 24.

119 Article 26: Signing and ratification by the king after approval by National Assembly and Senate.

120 See similar *Chaing Sinath / Béatrice Balivet*, in: Balivet (note 95), 103.

121 *Rendall* (note 52), p. 58, mentions customary international law as a source of law in Cambodia, but does not indicate any opinion about its rank.

X. Concluding Remarks

The Cambodian Constitution, as every constitution, can be put into a variety of comparative perspectives. It can be compared and analyzed in the context of its historical precedents, regional or global constitutional developments and last but not least, with other states facing similar problems of transition to democracy. Cambodia's current constitution draws heavily from the past, in particular from Cambodia's first constitution of 1947 and the immediate predecessor of 1989, but is also influenced by foreign developments. The making of this constitution comes at a time of major constitutional change in many states, be it in Southeast Asia[122] or globally. Since the end of the 1980s there has been a clear worldwide trend towards strengthening of constitutional order, democracy, fundamental rights and rule of law. Transition is, however, a difficult process and Cambodia has a particularly long way to go after the complete breakdown of civilized statehood in the 1970s. In addition it should be acknowledged that the concept of liberal and pluralistic democracy and comprehensive fundamental rights protection, hardly had any consolidated stronghold in Southeast Asia at the beginning of the 1990s, nor does it have today. A fair assessment of development in Cambodia must take this regional context into account.

One of the very few publications on the Cambodian constitution, published shortly after its adoption, was subtitled "from civil war to a fragile democracy"[123]. The qualification made in that subtitle still seems relevant. After the constitution was adopted the country suffered a few more years from the effects of civil war and the violent clash between the two Prime Ministers in 1997 was a reminder that the country was still far from being a stable constitutional state. In the last decade progress has been made in respect of political stability and economic development, but the Prime Minister himself reminds his people on a regular basis that stability has only recently been achieved and is still fragile. However, some significant institutional developments occurred from 1998. A Senate, the Constitutional Council and a National Audit Authority were established. The future of the monarchy, against widespread predictions, was saved beyond the reign of King Sihanouk, for the time being, through a surprisingly smooth succession to the throne in October 2004. The country will experience National Assembly elections for the fourth time in July 2008 and the constitutional amendments of 2006 might result in the existence of a stronger opposition as there is no longer any requirement for power-sharing to reach a two-third majority in the National Assembly. Commune elections were conducted for the first time in 2002 and again in 2007. The Senate was elected for the first time in 2006. Some aspects of the democratic process seem to have become routine and this success should not be underrated. However, the concept of the constitution, which provides for pluralistic democracy, human rights and rule of law, is still ahead of reality in Cambodia. The former single party, CPP, has clearly won all elections after its surprising defeat of 1993 and the same Prime Minister has been ruling the country for more than two decades,

122 For current regional perspectives see *Hassall/Saunders* (note 83); *Kevin YL Tan*, The Making and Remaking of Constitutional Orders in Southeast Asia: An Overview, in: Singapore Journal of International and Comparative Law 6 (2002).

123 *Marks* (note 24).

with an interim as "Second Prime Minister" from 1993 to 1997. More importantly from a constitutional perspective, separation of powers, a concept sometimes described as strange to Cambodia[124], is still more a formal than substantial concept in Cambodia, as is the concept of "checks and balances". The reality of human rights protection is defined by deficient legal, administrative and judicial institutions and practices. Reform in these areas, although officially at the centre of government policies[125], has proven to be difficult.

Cambodia has gained a constitution, but the spirit of constitutionalism, belief in the advantages of legally limited government, separation of powers and the protection of fundamental rights[126], are still under development.

Further Reading:

Stephen P. Marks, The New Cambodian Constitution: From Civil War to a Fragile Democracy, 26 Columbia Human Rights Law Review 43-110 (1994); *Steven R. Ratner*, The Cambodia Settlement Agreements 87 American Journal of International Law 1 (1993); *Say Bory*, Constitutional Changes in Cambodia in the context of international relations, presentation at the Asian Forum of Constitutional Law, Nagoya, September 22/23; *Jörg Menzel*, Cambodia, in: Gerhard Robbers (ed.), Encyclopedia of World Constitutions, New York 2007 (Facts on File), Vol. I, pp. 150-156; *Hor Peng*, The Reform of Parliament in Cambodia, unpublished PhD study, Nagoya 2004; Phnom Penh Faculty of Law / Center for Asian Legal Exchange of the Nagoya University, International Symposium "Constitutionalism in Cambodia", Phnom Penh 2003; *Matthew Rendall*, The Constitution and Government of Cambodia, Phnom Penh 1999 (Cambodian Legal Textbook Series). For the historic Cambodian Constitutions see *Raoul M. Jennar*, The Cambodian Constitutions (1953-1993), Bangkok 1995 (White Lotus Press); Literature in French: *Maurice Gaillard* (dir.), Droit Constitutionnel Cambodgien, Phnom Penh 2005 (Funan); *Béatrice Balivet*, Introduction au Droit Cambodgien, Phnom Penh 2003.

124 *Jennar* (note 42), p. 34, citing French professor Gour (allegedly a key-contributor to the 1993 constitution).

125 Royal Government of Cambodia, Address by *Samdech Hun Sen*, Prime Minister of the Royal Government of Cambodia on "Rectangular Strategy" for Growth, Employment, Equity and Efficiency, Phnom Penh, July 16, 2004, pp. 12-17.

126 For a comprehensive study on the idea of constitutionalism see *András Sajó*, Limiting Government. An Introduction to Constitutionalism, Budapest 1999 (Central European University Press).

East Timor

EAST TIMOR (TIMOR-LESTE) Constitutional Framework for a Country in the Making

*Christian Roschmann**

I. Introduction

Timor-Leste is the youngest nation in Asia and the second youngest in the world.

This means the country still has some way to go in terms of nation building and more specifically, institution building. The existence of a good and viable Constitution is a prerequisite to attaining these goals. Another prerequisite is the implementation of such a Constitution, especially to effectively safeguard the boundaries between law and politics.

Besides being a "constitutional beginner" Timor-Leste has to live and deal with an extremely difficult legacy of colonial neglect. This was superseded by a brutal, if not genocidal, occupation for a quarter of a century, leaving the country with hundreds of thousands dead. The wounds of this nightmarish past have not yet healed. The constitutional issues involved in dealing with Timor-Leste's past tie up resources and are still making the 'beginning' difficult.

Timor-Leste is not alone. The involvement of the United Nations has been large-scale from the beginning to this day. Timor-Leste is also assisted by a host of potent and well-meaning bilateral donors and some multilateral ones such as the World Bank.

At the end of a winding road to independence and the beginning of Timor-Leste's statehood, a workable, albeit not flawless[1] Constitution has been painstakingly elaborated. It is being more or less successfully implemented, partially with international help. The outstanding features of the Constitution are respect for the rule of law, democracy and, not surprisingly, considering the country's past experiences, human rights and the honesty of its implementation. Of course, the country has its share of corruption but the great majority of Timorese leaders are honest to a degree not customary in the region. The features are major assets to the country.

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1 As will be discussed below.

Over five years have elapsed since the introduction of the Constitution and it has been put to the test during this period. In day-to-day governmental work it has been successfully applied in many cases. In other instances and for some important issues, it has been unsuccessful. Some changes have been necessary, but overall the country has fared reasonably well with its Constitution.

Following is an overview of the Timor-Leste Constitution, its theory and practice.

II. Constitutional History

In the early 1500s, Portugal began gradually colonizing the eastern part of the island of Timor in the Indonesian archipelago. Portuguese rule was marked politically by a loose grip on the countryside outside of Dili, the capital. Frequent insurrections, neglect and misgovernment with use of physical punishment[2] occurred. In 1973, less than 50 % of children attended primary school and about 1,000 attended the only secondary school. In 1974, 39 Timorese students were enrolled in a tertiary institution[3]. Portuguese rule was marked economically by exploitation and underdevelopment. Freedom of expression and political parties were outlawed until 1974. A head tax was exacted on every Timorese male adult and forced labor was recruited.

The process of decolonization started almost immediately after the 1974 "Carnation Revolution" in Portugal, which overthrew a decade-long dictatorial regime. Political parties began to form in East Timor, known to the world by then as Timor-Leste, its Portuguese name. The two major parties were the Uniao Democratica Timorense (UDT) and the Associacao Democratica Timorense (ASDT) which soon renamed itself to Fretilin.

In 1975, a transitional administration was formed between the two parties, to prepare for national elections and a view to ending colonization in 1978. However, Indonesian propaganda on the one hand and revolutionary ideas on the other caused the two parties to drift apart. The UDT leaned more to the right and Fretilin to the left, partly embracing revolutionary ideas of Marxist origin and to some extent mirroring the developments in Portugal.

Eventually, Indonesia instigated the UDT to stage a coup against the current Portuguese administration. Fretilin reacted and the country plunged into civil war until Fretilin managed to effectively gain control with the help of the mostly Timorese-born army. The Portuguese administration abandoned the colony and with it, the decolonization process.

2 For an outline of the historical background of Portuguese rule in Timor see Monika Schlicher, Portugal in Ost Timor – eine kritische Untersuchung zur portugiesischen Kolonialgeschichte in Ost Timor 1850 -1912, Hamburg 1996.

3 Randall Garrison, The role of Constitution-Building Processes in Democratization, Case Study East Timor, Paper prepared for IDEA's Democracy and Conflict Management Programme, Stockholm, 2005, http:// www.idea.int/ conflict/cbp, p. 4.

On November 28, 1975, Fretilin declared Timor-Leste's independence unilaterally and installed a state administration of its own.

On December 7, 1975, Indonesia launched a massive military invasion of Timor-Leste. Its forces took control of the urban areas very swiftly. In rural pockets, Fretilin offered resistance until 1978 when it was forced to resort to guerilla warfare. In the resistance years, a rift within Fretilin became apparent. The guerilla movement in the mountains of Timor was embracing more and more Marxist views. At the same time many exiles, particularly Ramos-Horta, Foreign Minister (at the time of the invasion on an official trip out of the country) took a much more moderate and balanced standpoint.

On December 23, 1975, the UN General Assembly issued a resolution calling for the withdrawal of the Indonesian troops, asserting Timor-Leste's right to self-determination. Indonesia ignored the resolution, reinforced its troops and stayed, annexing the country. The Indonesian occupation was characterized by brutality and human rights' violations on a grand scale and of the highest order. Massacres occurred with an estimated 200,000 casualties. Forced resettlements took place in order to impede guerilla warfare[4].

On the other hand, Indonesia was improving the infrastructure and assisting in economic development. By 1989, the level of income had quintupled in comparison to the pre-1975 period[5]. The United Nations, however, never recognized the annexation and regarded Timor-Leste as a non-self-governing territory.

In the following years, the resistance movement regrouped and organized the guerilla war efficiently throughout the occupation. It managed to reach all segments of society[6] and opened a diplomatic front[7] with the charismatic, competent and eloquent Jose Ramos Horta (later Foreign Minister again, then Prime Minister and now President) who presented the Timor-Leste cause to international bodies. He managed to attract international public attention to Timor-Leste[8] without which independence could never have been reached. The campaign to end human rights' violations and end the conflict brought him the 1996 Nobel Peace Prize (together with the Dili Catholic bishop Carlos F. X. Belo, another resourceful supporter of the resistance movement).

4 For a comprehensive overview of the history of the Indonesian occupation see George Aditjondro, In the Shadow of Mount Ramelau. The Impact of the Occupation of East Timor, Leiden 1994, see also Carmel Budiardjo/Liem Soei Liong, The War Against East Timor, London 1984, James Dunn, Timor, A People Betrayed, Sydney 1996; Klemens Ludwig (ed.) Osttimor – Der Zwanzigjährige Krieg, rororo aktuell, Hamburg 1996; John G. Taylor, Indonesia's Forgotten War; The Hidden History of East Timor, London 1991.

5 Garrison, op.cit. p. 6.

6 Constancio Pinto/Matthew Jardine, East Timor's Unfinished Struggle – Inside the Timorese Resistance, Boston, 1997; Torben Retboll (ed.), East Timor. Occupation and Resistance, IWGA (International Work Group for Indigenous Affairs) Nr. 89, 1998. See also Jörg Meier, Der Osttimor Konflikt. Gruende und Folgen einer gescheiterten Integration. Ein Handbuch. Bewaffnete Konflikte nach dem Ende des Ost-West Konflikts (hrsg. von Hans Krech). Band 17 1998 - 2000.

7 In 1989 a change of tactics became visible. Guerilla warfare was significantly reduced and emphasis was placed on the diplomatic front, a change that eventually proved successful.

8 Also published. See e.g. Jose Ramos-Horta, Towards a Peaceful Solution in East Timor, Sydney, 1996.

In 1988, the Timorese resistance formed a broad union of all factions (CNTM) which moved away from a Fretilin dominated movement. Falintil, the fighting wing of the resistance, ceased to be a Fretilin instrument. Subsequently, resistance leaders like Jose Ramos-Horta and Xanana Gusmao left Fretilin. In 1998, all Timorese factions united under the umbrella of CNRT (Conselho Nacional da Resistencia Timorense).

In 1999, under a great deal of international pressure, Indonesia finally gave in and allowed a popular consultation supervised by the UN. Indonesia negotiated with the UN and Portugal[9] to hold a referendum between options of a special autonomy status for East Timor within Indonesia, or full autonomy. The UN Mission in East Timor (UNAMET) was created by the UN Security Council in order to organize and supervise the popular consultation which took place on August 30, 1999[10]. Nevertheless, Indonesian backed militia tried to counteract the consultation to the last minute, with intimidation and violence. Hundreds of Timorese, including four local UN employees, were killed. Many buildings were burnt and important infrastructure was destroyed.

The result of the consultation was a 78.5% victory for the supporters of independence organized under the CNRT. After the consultation, Indonesian backed violence increased even further. The Assistant Secretary-General of the subsequently established UN Transitional Administration in East Timor, Jean-Christian Cady, estimated that of 880 000 people living in East Timor prior to the referendum, 750 000 fled or were in some way displaced from their homes[11]. Over 200 000 of these people were forced to move into Indonesian West Timor. It is commonly believed that around 75% of the already poor country's infrastructure was destroyed by September 20, 1999, when a UN lead international force created by the Security Council arrived to restore peace.

Monika Schlicher, a leading expert on Timor-Leste, argues convincingly that the atrocities are mainly owed to the omission of necessary and foreseeable preventive measures[12].

The UN, entrusted with exercising full sovereignty through a transitional administration by a Security Council mandate on October 25, 1999, quickly established a full-fledged administration, the United Nations Transitional Administration in East Timor (UNTAET). It was headed by a Special Representative of the UN Secretary-General, a Brazilian, Sergio Vieira de Mello, who held unrestricted powers[13]. UNTAET created a Consultative Council

9 See Paulo Gorjao, Regime change and Foreign Policy: Portugal, Indonesia and the Self Determination of East Timor, Democratization. Volume 9, Issue 4 , 2003, pp. 142 - 160.

10 See Damien Kingsbury (ed.) Guns and Ballot Boxes: East Timor's Vote for Independence, Monash Asia Institute, Melbourne, Australia, 2000; Ian Martin, Self-Determination in East Timor: The United Nations, the Ballot and International Intervention, London 2001.

11 According to Hilary Charlesworth, The Constitution of East Timor, May 20, 2002, in: I.CON, Volume 1, Number 2, 2003, pp. 325- 344, p. 326.

12 Monika Schlicher, Das Beispiel Osttimor – Konfliktloesung ohne ausreichende Prävention, in: Thomas Hoppe (ed.) Schutz der Menschenrechte, zivile Einmischung und militaerische Intervention – Analysen und Empfehlungen, Projektgruppe Gerechter Friede der Deutschen Kommission Justitia et Pax, Verlag Dr. Koester, Berlin, Kapitel 6, Intervention in Asien, pp. 257 - 300.

13 For a critical evaluation see Joel C. Beauvais, Benevolent Despotism: A Critique of UN Statebuilding in East

of 15 Timorese and foreign members (seven CNRT, one from the Catholic Church, three pro-Indonesia and four UN) to assist and counsel with reference to legislation. One of its decisions (endorsed by UNTAET) was the introduction of the US dollar which remains the country's currency to this day.

The Consultative Council later became the National Council which was headed by Kay Rala Xanana Gusmao (former leader of the armed resistance, later the first President and now Prime Minister) and was composed of 33 Timorese members. In August 2000, the Transitional Administration created a nine-member Cabinet of Timorese and foreigners to share the executive power. For administration purposes the East Timorese Transitional Administration (ETTA) was created. In September 2001, a restructure took place. The Second Transitional Government (20 members) was formed and the administration was renamed and reorganized as the East Timor Public Administration[14].

III. Constitution Making

On August 31, 2001, the Timorese voters elected an 88 member Constituent Assembly whose main task was the elaboration of a Constitution with a view to full independence[15]. This was accomplished by 9 February, 2002 when the Assembly presented a draft Constitution. The majority of its members were Fretilin party members. At this time practically all of the political parties active in 1975 re-emerged[16] on the political scene.

In 2002, members of the Constituent Assembly formed the first Parliament of Timor-Leste, without further elections. The term of the 88 members, of whom 23 were women, expired in 2007 when the second Parliament was democratically and peacefully elected, despite the country going through significant turmoil in 2006.

The process of drafting the Constitution was marked by popular participation. Thirteen commissions were established to consult with the public. In all parts of the country, at national, district and sub-district levels, meetings were held involving some 38,000 people[17]. Input from everybody was welcomed and given by many. Often it was from individuals but more so from civil society organizations, various associations including informal groups and NGOs, and churches, especially the predominant Catholic Church.

Considering the country's past, it is small wonder that human rights groups were particularly

Timor. New York University Journal of International Law and Politics. Volume 33, 2001, p.1101.

14 For a critical assessment see Tanja Hohe, The Clash of Paradigms: International Administration and Local Political Legitimacy in East Timor, in: Contemporary South East Asia: A Journal of International Affairs, Volume 24, Issue 3 (December 2002), pp. 569 - 591.

15 For an overview of the constitution drafting process, see Alipio Baltazar, An Overview of the Constitution Drafting Process, in: East Timor Law Journal, Article 9, 2004, online: www.easttimorlawjournal.org/Articlesalipionetconstitution.html.

16 Randall Garrison, op. cit. p. 13.

17 Hilary Charlesworth op.cit. p. 328.

active in this process. They were also very successful. The text which was finally adopted has an extensive and comprehensive human rights' section. Women's rights' organizations were particularly vociferous and to this day have a powerful voice in Timor-Leste and access to the administration through the Office of (Gender) Equality. The attempt to create a women's quota of 30 percent in the Constituent Assembly, however, failed. But women were elected to 28 percent of the Constituent Assembly seats and the Constitution establishes in its art.63, 2, the right for women to have equal access to the public service. This right is exercised and encouraged by the government. Today, almost half of all public servants and about a third of the present government members are women.

As a consequence of this focus on human rights, after independence, the country acceded to almost all UN human rights conventions[18]. The first comprehensive human rights' report submitted to the UN by the Timor-Leste Government was on the Convention on the Elimination of All Discrimination Against Women (CEDAW). Its preparation took several years and was accomplished by the Timor-Leste Foreign Ministry with the assistance of the UN human rights specialist, Catherine Anderson[19]. Other reports are scheduled to follow. The Ministry of Foreign Affairs formed a working group for human rights' reporting in October 2007, headed by one of the leading Timorese human rights experts, the diplomat Licinio Branco. The group is working closely with the human rights section of the present UN mission to East Timor (UNMIT).

An estimated 5 to 10 % of Timor-Leste's population could not participate in the drafting of the Constitution because at the time an estimated 50,000 to 80,000 refugees from Timor-Leste were still in Indonesian West Timor[20]. These persons had supported the Indonesian integration policy and were afraid to go back to Timor-Leste. The majority of these people still live in camps in West Timor.

The Constitution as a whole, however, did not differ to a great extent from a draft which was elaborated by Fretilin in exile in 1998 and which mirrors the Portuguese and Mozambique Constitutions. With the exception of human rights' issues, this may be seen as somewhat of a failure to successfully incorporate popular participation and a victory for the Fretilin majority in the Constituent Assembly. It was, however, a Timorese Constitution and not imposed or created by foreigners.

There was no popular vote on it (a major shortcoming). It was adopted by the Constituent Assembly which, also without vote, transformed itself into the first Parliament. In June 2007, the first true parliamentary elections took place, reducing the Fretilin seats from about 60% to 30%. This clearly indicates dissatisfaction with Fretilin and the result was widely attributed to its perceived authoritarian tendencies and a shift of focus from Fretilin's historic role in the independence struggle to its present political stance.

18 See below VI.

19 Nevertheless, in everyday Timorese live, there is still a significant problem of domestic violence.

20 Randall Garrison, op. cit. p. 11.

But before this event, in May 2006, the hopes and expectations for the Constitution to be a unifying force received a severe blow. In the wake of the dismissal of almost 600 men from the armed forces because of alleged insubordination, a cataclysm of violence broke loose. The soldiers had been complaining of discriminatory treatment because of their origins from the country's East. This event triggered lingering tensions between "Easterners" and "Westerners", as the conflicting parts of the population which were mainly segmented by geographic origin, were soon called. A wave of violence with street fighting, burning of buildings and residential dwellings, looting and killing, led to a breakdown of law and order and eventually to the army fighting the police. Nine policemen who had surrendered were killed. This violence was fostered by officials supplying illegal weapons to certain factions. Thousands of people were made homeless and many have been living in refugee camps ever since.

Behind the apparent line of conflict between East and West several other sources of conflict are suspected to have interacted with the East-West tensions. One is the Fretilin affiliation versus the allegiance to its adversaries[21]. Another is a political divide, partly within Fretilin, over political power. A further source is tribal affiliations which led to clashes in Timor and on the surrounding islands of Indonesia for centuries until a strong Indonesian state quelled them. The conflict, whatever its source or sources may be, has not been completely resolved even though tensions have noticeably eased. The surreptitious throwing of stones and launching of metal-pointed arrows, a frequent occurrence in the aftermath of the May 2006 conflict, has almost completely ceased.

The UN conducted an inquiry into the causes of the breakdown of constitutional order. It stressed the historical and cultural context of the crises but noted expressly that institutional weakness of the state contributed, among other factors[22]. Nevertheless, the state apparatus has been functioning almost without interruption throughout the crises and since, even though precariously at times because a number of staff fled Dili. Presidential and parliamentary elections have taken place calmly in 2007. Public life is essentially normal and the Constitution is in force.

IV. General Overview

As in all countries where legal order is based on Roman Law (erroneously labeled "civil law" in Anglo Saxon countries) all laws and institutions in Timor-Leste must have their source in the Constitution. The overarching principles of the Timor-Leste Constitution are the refusal of, and protection from, all kinds of domination (particularly foreign but

21 The majority of the armed forces were loyal to Xanana Gusmao, the former guerilla leader and opposed to Fretilin, whereas the police was seen as a Fretilin instrument.

22 United Nations Independent Commission of Inquiry for Timor-Leste (2006, p. 16), see also Jose, "Josh" Trinidade, Bryant Castro, Technical Assistance to the National Dialogue Process in Timor-Leste. Rethinking Timorese Identity as a Peacebuilding Strategy: The Lorosa'e – Loromonu Conflict from a Traditional Perspective, Dili 2007, EU/GTZ project paper.

also internal[23]), the guarantee of human rights, democratic elections, control of the state and a multi-party system, separation of powers, rule-of-law, and solidarity within society. It includes combating poverty and healing the wounds of the occupation. A Commission for Truth and Reconciliation has been established.

The structure of the Constitution is as follows:

I Fundamental Principles

II Rights, Obligations, Liberties and Fundamental Guarantees

III Organization of Political Powers

IV Economic and Financial Organization

V Defense and National Security

VI Guarantee and Revision of the Constitution

VII Final and Transitional Provisions

The Constitution has an interesting structural flexibility. It can be revised six years after enactment with the exception of the general and overarching principles outlined above.

From a number of constitutional features it becomes visible that the blueprints were, to a large extent, the 1989 Portuguese and the 1990 Mozambique[24] Constitutions[25].

Unfortunately different parts were not always harmonized and coordinated with each other[26].

The interpretation of the Constitution by the state authorities appears flexible but marked also by a certain lack of expertise. For instance, in article[27] 115, 3, the Constitution provides for the government to make laws concerning its own structure, as a way of taking the separation of powers into account. Using this power the government has set out to pass a number of laws governing issues that go clearly beyond administrative structures[28].

23 This constitutional principle corresponds with an acute awareness of domination or attempted domination and is suspected to have been a contributing factor to the May 2006 turmoil.
24 Itself influenced by the Portuguese constitution.
25 See also Hilary Charlesworth op.cit. p. 328.
26 See below p. 12.
27 Articles quoted in the following are such of the Timor-Leste Constitution of 2002.
28 See below p. 11.

V. System of Government

The constitutional system could be called semi-presidential. The organs of sovereignty are the President of the Republic[29], the National Parliament[30], the Government[31] and the Courts of Law[32]. It is noteworthy that the President is not seen as a part of the executive but as an overarching figure. The separation of powers has been observed in practice. The President who is directly elected by the people has ample powers to dissolve the Parliament, reject laws and dismiss the government. In practice, the incumbent president, Jose Ramos-Horta, the Peace Nobel Prize laureate, enjoys a high prestige which is also reflected in the interpretation of the scope of his office.

A Council of State[33] gives advice to the President of the Republic regarding the execution of his functions. It includes the President of the Parliament, the Prime Minister and also members of the opposition parties and civil society.

As in all democracies, the Parliament is the central representative organ of the people and has law-making and budget-determining functions. It oversees the activities of the government. Its internal rules and regulations are made in the form of an organic law.

In the legislative system Timor-Leste has adopted, which is influenced by the Portuguese Constitution, the Parliament has exclusive legislative powers regarding certain issues[34] whereas in others[35] it can delegate legislative power to the government. On the other hand, in certain areas the government has exclusive legislative powers. Its laws are named "decree-laws"[36].

Article 115, 3 gives the government exclusive legislative power for its own organization and functioning and for those of the public administration. This peculiarity was adopted from the Portuguese Constitution and is sometimes interpreted in a very broad way[37]. The government has passed many laws that refer to administrative services, but they go far beyond the scope of organization and deal with people's rights. They include the law on passports which governs the right to receive a passport besides determining the administrative provisions for issuing passports.

A serious problem is presented by an inconsistency[38] in the regulatory mechanisms concerning legislative powers. Article 95, 2 confers exclusive legislative powers on the Parliament in areas that are named individually in Art. 95, 2 lit. b-q. On the other hand,

29 Art. 74 - 89.
30 Art. 62 - 73.
31 Art. 101 - 117.
32 Art. 118 - 131.
33 Art. 90.
34 Art. 95, 2.
35 Art. 96.
36 Following the Portuguese role model.
37 See above p.10.
38 Due to a lack of harmonization of the various blueprints used, see above II.

Art. 96, 1 gives the Parliament power to delegate legislative powers to the government regarding areas specifically named in Art. 96, 1 lit. a-l. The problem is that the areas mentioned in both articles are not exhaustive. There are some not mentioned in Art. 95, 2 or in Art. 96, 1. Does this mean that Parliament has exclusive legislative powers in respect of the areas specified in Art. 95, 2 and all other areas can be delegated? This would mean that the enumeration in Art. 96, 1 of areas where Parliament is authorized to delegate the legislative function is not exhaustive and contains only examples of matters that can be delegated. Or does it mean that the enumeration in Art. 96, 1 is exhaustive and Parliament may only delegate its legislative power in respect of areas mentioned therein? This in turn would entail that the enumeration in Art. 95, 2 is not exhaustive but contains only examples of areas of exclusive parliamentary legislation.

The former interpretation is generally preferred because Art. 95, 2 contains the term "exclusively" and Art. 96, 1 does not[39].

The structure of the government changed from the first to the second electoral period. During the first period, the Fretilin party formed the government. Fretilin was seen as the immediate successor to the independence movement which had been initiated in 1975 by that party. It is an organization with a leftist view and with a Marxist past whose majority still adheres to a more authoritarian philosophy of state centeredness and state control shaped in Mozambique during the exile years.

After the 2006 riots, which were in the eyes of many observers instigated by a Fretilin faction in order to transform the country into a one-party authoritarian state, Prime Minister Alkatiri was forced to step down under foreign, mainly Australian, pressure. Ramos-Horta, no longer a Fretilin member but a non-partisan at the time, became Prime Minister with a very fragile backing by the Fretilin dominated Parliament. In the second electoral period, beginning in 2007, a coalition of several parties, all opposed to Fretilin led by the former resistance leader and first head of state, Kay Rala Xanana Gusmao has been forming the government. It includes the experienced diplomat, former Ambassador to the UN and Foreign Minister[40], Jose Luis Guterres as Deputy Prime Minister and the efficient, former CNRT diplomatic representative to the European Union, Zacarias da Costa as Foreign Minister, and is using a neo-liberal approach, strongly endorsed by President Ramos-Horta,

The Fretilin government used a classic structure of Ministries, which were shaped after the Mozambique model and led by Senior Ministers, assisted by one or two Vice-Ministers. The present government introduced a more complicated structure. It is comprised of a

39 A third alternative would be that the Constitution leaves it open for certain areas whether legislative powers regarding them could be delegated or not, a very unsatisfactory solution.

40 Successor to Ramos-Horta as Foreign Minister. When Ramos-Horta became President in May 2007, Guterres was forced to step down as Foreign Minister because he had formed an opposition movement, Fretilin Mudanca, within Fretilin which is now going its own way. He was succeeded by Vice Minister Adaljiza Magno, a Fretilin member and skilled administrator who held the position until the Fourth Government came into office in August 2007.

reduced number of Ministers and independent Secretaries of State. At the same time, the Ministers' deputies also carry the title of Secretary of State, or Vice-Ministers.

The present government is known as the Fourth Constitutional Government, based on the number of Prime Ministers. The first Prime Minister was Mari Al-Katiri, a Fretilin veteran who spent the occupation years in exile in Mozambique and who had to step down in June 2006, in the aftermath of the May 2006 riots. His successor was Jose Ramos-Horta, the Foreign Minister since 1975, who was not a Fretilin member at the time of becoming Prime Minister. His governing was tolerated by Fretilin. After becoming President in May 2007, Ramos-Horta's deputy, Arcanjo da Silva (previously Minister of Agriculture), succeeded him. Da Silva remained Prime Minister until August 2007 when the present newly elected government was installed.

The government represents the executive and is responsible for formulating and executing national policy as well as[41] for carrying out public administration within the boundaries of the laws[42] made by Parliament and by itself. The head of the executive is the Prime Minister. The political party or parties with a parliamentary majority suggest the Prime Minister who is then appointed by the President[43]. The party/parties also suggest the members of their government who are then appointed by the President[44].

This presented major problems with the nomination of the present Prime Minister and government. Fretilin had received 30 percent of the votes that was more votes than any other party but not a majority, and tried to forestall the installation of the present government with the argument that the strongest party should form the government. This opinion was not endorsed by the Constitution and not implementable because a government with a 30% parliamentary backing would hardly be in a position to do business successfully.

The government defines the general outlines of domestic and foreign policy, the Prime Minister leads and guides its execution and the ministers implement policy through their ministries.

The territorial administrative structure consists of 13 districts sub-divided into 65 sub-districts, the lowest level of state administration. The enclave of Oecussi[45] and the island of Atauro represent special administrative entities under the Constitution[46]. As the issue of decentralization of the public administration has been elevated to the rank of a constitutional principle[47], the government has entrusted elected local governments with the two lowest levels of state administration - the "suco" and "aldeia" administrations. It has installed a Ministry of State Administration for dealing with all aspects of administration

41 Art. 103.
42 Art. 107.
43 Art. 106, 1.
44 Art. 106, 2.
45 Surrounded by Indonesian territory and the ocean.
46 Art. 5, 3.
47 Art. 5, 1.

but specifically with decentralization issues and issues of local government. The greatest challenge decentralization faces in practice is lack of skills which, due to a low general level of formal education, is sure to persist for some time to come despite major government capacity building efforts[48].

VI. Fundamental Rights

The protection of human rights is a major issue in Timor-Leste public life as well as politics. This is of course due to the history of atrocious human rights' abuses the country lived through between 1975 and 1999. There is an acute awareness of human rights within the Timor-Leste public and it is reflected in the position human rights are accorded in the Constitution.

All duly ratified international treaties that Timor-Leste is party to are elevated to constitutional rank in Art. 9, 3, which declares all national legislation not in accordance with the treaties, to be null and void[49]. This provision puts all human rights so far created in the UN system within reach of the Timorese people. Art. 23 clarifies that the human rights enshrined in international treaties are not exclusive but can be complemented by nationally created rights. It specifies that any such nationally created rights have to be interpreted in the light of the Universal Declaration of Human Rights, a provision with an intended harmonizing effect.

In the first years after independence, the government made it its business to accede to as many human rights' conventions as administratively possible[50]. This policy was deftly and painstakingly carried out by the Ministry of Foreign Affairs and Cooperation under its Secretary General, Nelson Santos, now Ambassador to the UN, and its Director for Legal Affairs, now Secretary General[51], Joao Freitas de Camara. Camara himself had been a victim of human rights violations and spent seven years in prison together with Xanana Gusmao.

The most important of these conventions are the following, cited by the date of signing:

2002:	28 Aug	Statute for the International Criminal Court
	10 Dec	Covenant on International Economic, Social and Cultural Rights (ICESCR)

48 Such as a trilateral capacity building project with Indonesia and Germany which is presently under way.

49 It is arguable whether the term "legislation" also includes the Constitution. The argument that it does not seems preferable as the Portuguese term "lei" which is used here generally refers to statutes below constitutional rank.

50 Which entails subsequent major reporting duties for Timor-Leste about the individual status of implementation of each treaty - a tall order, which the present government is making efforts to meet (s. above p. 7).

51 Successor to Nelson Santos who succeeded Jose Luis Guterres as Ambassador to the UN, who in turn succeeded Jose Ramos-Horta as Foreign Minister.

	10 Dec	International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)
	10 Dec	International Convention Against Torture etc. (CAT)
	10 Dec	Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
	10 Dec	Convention on the Rights of the Child (CRC)
	10 Dec	Optional Protocol to the Convention on Discrimination Against Women (CEDAW-OP)
	10 Dec	Optional Protocol on the Rights of the Child and the Involvement of Children in Armed Conflicts (CRC-OP-AC)
	10 Dec	Optional Protocol to the International Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (CRC-OP-CS)
	24 Dec	Protocol to the Status of Refugees
2003		
	24 Apr	Geneva Conventions relating to the Protection of Victims of Armed Conflicts - Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field Ratified - Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea - Geneva Convention Relative to the Treatment

	of Prisoners of War
	- Geneva Convention Relative to the Protection of Civilian Persons in Time of War
24 Apr	Convention Relating to the Status of Refugees
12 Sep	International Covenant on Civil and Political Rights (ICCPR)
12 Sep	Second Optional Protocol on Covenant on Civil and Political Rights (abolition of death penalty) (OCCPR-OP2- DP)
16 Dec	International Convention for Protection of Rights of Migrant Workers and Families

2004:

22 Jul	Protocol I to the Geneva Conventions, Relating to the Protection of Victims of International Armed Conflicts
22 Jul	Protocol II to the Geneva Conventions, Relating to the Protection of Victims of Non-International Conflicts

In addition to these international conventions, a number of articles of the Constitution expressly provide human rights, some of them to citizens only. The position of ombudsman[52] has been created to oversee those rights. In addition, a number of agencies have been created by the government, such as the Office of the Advisor on Human Rights to the Prime Minister. This is now the coordinating agency within the public administration for collecting and compiling data for the extensive human rights' reporting by the Foreign Ministry to the UN, the Office of the Advisor to the Prime Minister on the Promotion of (Gender) Equality and the National Commission on the Rights of the Child.

52 Art. 27.

The human rights embodied in the Constitution are:

- Equality before the law[53]
- The right of senior citizens to protection by the state[54]
- Equal rights and protection for the disabled[55]
- The right of citizens residing outside the country to consular protection[56]
- The right to present complaints to the Ombudsman[57]
- The right to resistance to illegal orders affecting a person's rights and guarantees[58]
- The right to access to personal data[59]
- The right to petition[60]
- The right to work[61]
- The right to education and culture[62]

The duties of the ombudsman are[63]:

- to investigate human rights' violations
- to monitor the correct functioning of all government agencies
- to review legislation with relevance to human rights
- to challenge the constitutionality of government, parliamentary or judiciary acts at the Supreme Court of Justice

This body of rights and safeguards are complemented by parliamentary and government legislation also containing safeguards for human rights. Furthermore, the Constitution provides that limits on constitutional fundamental rights can only be imposed by law. An example of such legislation is the law on Freedom of Assembly and Demonstration. Another limit on constitutional rights is provided in Art. 54, 4 of the Constitution itself where foreigners are barred from owning land in Timor-Leste[64].

53 Art. 16, 1.
54 Art. 20, 1.
55 Art. 21, 1.
56 Art. 22.
57 Art. 27, 2.
58 Art. 28, 1.
59 Art. 38, 1.
60 Art. 46.
61 Art. 50, 1 which does not entail, as in former socialist countries, a right to state employment but is rather a barrier to restrictions to exercise an activity.
62 Art. 59.
63 Art. 27.
64 The rationale for this being the fear that foreign demand might raise real estate prices beyond the means of Timorese residents. The downside is that this is one of the most serious obstacles to foreign investment. The government has noticed this and is contemplating ways to deal with the problem. A government agency for foreign investments has already been created to address the issue, among others.

VII. Constitutional Jurisprudence

Article 123 deals with the court system in Timor-Leste. It provides for a Supreme Court of Justice. As this court has not yet been established its functions are exercised by the Court of Appeals. This court has been using restraint in deciding constitutional issues. Noteworthy are cases where the constitutionality of laws had to be taken into account. This was mainly an issue with cases in the first years, where a decision had to apply to Indonesian or Portuguese law.

VIII. Legal System and Rule of Law

The supreme source of law is the Constitution. All other laws have to be in accordance with the Constitution and are measured by its yardstick. Timor-Leste has, since 2002, tried to pass as many laws as possible to regulate all necessary aspects of society. Restrictions in the institutional mechanisms due to a lack of skilled staff and coordination have somewhat slowed that process down.

Lately, the government has created a significant yet unnecessary legislation bottleneck in the Secretariat of the Council of Ministers. In the Secretariat proposed laws and decree-laws are handed in by the various Ministries to be processed for presentation to, and approval by, the Council of Ministers and, in the case of parliamentary laws, to be passed on to Parliament. Here, strict formal requirements copied from blueprints in Portugal and frequently not in accordance with the administrative capabilities of Timorese ministries, have been introduced. They are watched over by international advisors who are not always experienced enough to deal successfully with local specifics. The most basic of these requirements is the correct use of the Portuguese language, the official language for all government business. Good knowledge of the language is a very rare quality in Timorese ministries. This requirement is combined with the omission to install an efficient governmental translation service. Important laws and decree-laws have been held up for months in the Secretariat of the Council of Ministers, as a result, on grounds of formalities. It is clear that any modernization of the Timorese administration needs a holistic approach in order to avoid dysfunction of this kind caused by heterogeneous inputs.

Nevertheless, many important areas of legislation have been covered so far albeit others, such as a criminal code or procedural codes are still due. Still in force, but of course subsidiary to Timor-Leste legislation, are the UN regulations issued between 1999 and 2002, the vast body of Indonesian legislation (all being applicable in Timor-Leste at the time) and even laws dating back to Portuguese rule which Indonesia had not overruled. It is sometimes unclear whether those overruled by Indonesia are still in force.

Within the Timor-Leste legislative system there is a noteworthy peculiarity which was adopted from the Portuguese Constitution. That is, the above mentioned[65] distinction

65 See p. 11.

between laws passed by the Parliament ("laws") and laws passed by the government ("decree-laws").

It is a Timor-Leste government priority to create a full-functioning court system and the government is making efforts to staff the courts well (for the time being with international jurists) and to educate local judges and prosecutors. As the Timor-Leste Constitution establishes Timor-Leste as a rule of law state, the independence of the judiciary is a fundamental constitutional principle. The Constitution establishes the independence of the judiciary, which is subject only to the law[66]. The legislative is bound by the court decisions[67].

This principle is taken seriously and its enforcement was demonstrated in the case of the former Minister for the Interior of the previous Fretilin government who was sentenced by international judges to seven years imprisonment for illegally handing out weapons to partisans. This action provoked, or at least aggravated, the political crisis in May 2006 and the weapons caused the deaths of a number of people. In 2007, the former Minister was given court permission to fly to Malaysia for urgent medical treatment unavailable in Timor-Leste. The present government tried to countermeasure this by holding his plane and ordering him to stay. A judge overruled the government decision and the convicted former Minister left unhindered. This is a good example of the prevalence of the rule of law in the entire region.

The court system is dealt with in Art. 123 of the Constitution. The highest court of law the system provides is the Supreme Court of Justice. This court has not yet been installed due to a lack of human resources[68] so its function of guaranteeing a uniform interpretation of the law, notably the Constitution, has not been exercised. The function is much needed considering the heterogeneous sources of Timor-Leste law[69]. To some extent, these functions are presently exercised by the Court of Appeals which otherwise hears appeals from the four district courts. The Constitution also provides for administrative and tax courts that are still far from being installed, because substantive or procedural administrative laws have not yet been enacted.

Mainly foreign judges from Portuguese-speaking countries run the existing courts because Timor-Leste has very few trained lawyers. Attempts to train local staff as judges by international judges, failed. In 2005, none of the candidates passed the minimum requirements of the exam, mostly because of problems with the Portuguese language, the official language of Timor-Leste.

To ensure the independence of the judiciary further, the Constitution provides for a Superior Council for the Judiciary to deal with the administration of the courts, namely

66 Art. 119.
67 Art. 188.
68 See above VII.
69 See above p. 20.

the nomination of judges. The Superior Council for the Judiciary is presently composed partly of international jurists and partly of Timorese lawyers.

In practice, only a small percentage of the Timorese population has access to the justice system. There are only four courts of law, in Dili, Baucau, Suai and Oecussi. There is little knowledge about the existence of a justice system among the people, or the procedures of how to deal with it. In addition, the vast majority of the population could not afford the legal costs. There is also a communication problem, particularly as the courts have no legal support system for issuing summons or warrants, serving documents or, in many cases, even carrying out arrests. For these reasons, traditional justice, administered by the village (aldeia) and suco (cluster of villages) chiefs since time immemorial and legal principles handed down through the ages, still play a major role. The importance of traditional justice increases with distance from main the centers.

The Constitution establishes the Office of Prosecutor General[70]as an independent organ of the state. This independence is an important feature as it relieves criminal prosecution from political pressure and strengthens the rule of law in a country where this rule is relatively new and not well-entrenched in all quarters – an important measure for keeping law and politics apart.

Impartiality of prosecutors is another important feature. That is, safeguarding the rights of the accused and avoiding the obvious pitfalls of the Anglo-Saxon legal system that lets the outcome of criminal justice be determined largely by the economic resources available to the accused. The Timor-Leste system accomplishes this by adopting the more balanced continental European approach.

IX. International Law and Foreign Relations

The program for the foreign relations of Timor-Leste is contained in Art. 6 lit.h which sets "friendship and cooperation with all states and peoples" as a leitmotiv for Timor-Leste's Foreign Policy. In a more detailed fashion in Art. 8 it establishes Timor-Leste's national independence, as well as self determination for all peoples, as fundamental principles. It determines Timor-Leste's relationship with all other peoples as one of friendship, with the Portuguese speaking community as privileged and its neighbors as special.

A constitutional concretization of this mandate is in Art. 162. This article perpetuates the Commission for Reception, Truth and Reconciliation that was created during the UN administration. This commission deals exclusively with Indonesia in its external relations. It tries to work through Timor-Leste's past. In the interpretation of the present and past Timor-Leste governments, friendship for the future has generally been seen as more important than justice for the past. Therefore, pressure for punishment

70 Art. 132.

of Indonesian and Timorese wrongdoers was not too hard during the occupation and independence struggle - an attitude that caused some anger among former victims and their supporters.

The policy towards Indonesia is directed by the desire to normalize relations and develop them, especially in the economic field, which is very important for Timor-Leste's fledgling economy[71]. A step in this direction was the conclusion of a Memorandum of Understanding between the two countries in 2003 that introduced border passes and border-crossing documents in lieu of passports, for the nationals of the two countries living in the border areas of the two countries. These people would otherwise have to apply for costly visas to attend traditional markets, or cultural and family events[72].

Timor-Leste's other two major bilateral partners are Australia and Portugal. Portugal's relationship has mainly a historical and cultural basis[73] and Australia has geo-strategic and economic connections. The cooperation with both countries is extensive and comprises a vast number of areas. Both countries give a considerable amount of development aid to Timor-Leste. Portugal is spending 42% of its foreign development aid budget on Timor-Leste. From Australia, a great amount of private money and support is also given to Timor-Leste through service clubs such as the Rotary Club.

Ties of friendship and cooperation also exist with a number of other countries that give Timor-Leste significant development assistance. Among the main donors are (in alphabetical order) Brazil, China, Cuba, the European Union, France, Germany, Ireland, Japan, Korea, Kuwait, Malaysia, New Zealand, Norway, the Philippines, Spain, Thailand, the USA.

Besides, Timor-Leste has diplomatic relations with over a hundred countries. It has embassies in New York/Washington, Lisbon, Paris, Brussels, Geneva, Tokyo, Beijing, Manila, Jakarta, Kuala Lumpur and Canberra. A possible embassy in Bangkok is being considered and at some later date, further embassies in Havana (where many Timorese students are studying), Kuwait and at the Vatican. It has two consulates. One is in Kupang, (West Timor) where many refugees from the liberation struggle who took the Indonesian side are still residing and are afraid to move back to Timor-Leste. The other is a Consulate General in Bali, one of the two ports of entry[74] into Timor-Leste[75] and home to a large Timorese population, mainly students.

Timor-Leste is undertaking a major effort at present in terms of foreign politics in an attempt to accede to ASEAN. Full accession is hoped to be achieved in 2010. Membership in the ASEAN regional cooperation will give Timor-Leste political integration in the region, important economic advantages and advantages in the sectors of migration and

71 Timor-Leste is presently the poorest country in Asia, a feature the government is making major efforts to change.
72 The executive decree-law is awaiting ratification in the Council of Ministers.
73 Corresponding to Timor-Leste's membership in the Community of Portuguese Speaking Countries (CPLP) which is a constitutional mandate (Art. 8, 3).
74 Besides Darwin in Australia.
75 Not counting the land border which has one major port of entry at Batugade.

security. The latter advantage is not only because ASEAN is a major defense system but also for combating terrorism and trafficking in humans[76] and drugs.

Migration aspects include the issue of Timorese students attending universities and other institutions of higher education in the region, mainly in Indonesia. Presently, students from Timor-Leste are paying foreigner student fees in Indonesia. With few grants available, many Timorese have had to abort their studies due to lack of resources. This is of course highly detrimental for Timor-Leste, a country in desperate need of skilled labor. There are presently well over 1,000 Timorese students in Indonesia, by far the highest number of Timorese students abroad. With Timor-Leste's access to ASEAN, it is hoped that the issue of fees will change.

Another feature of Timor-Leste's foreign politics is its observer status in the Pacific Island Forum, the regional cooperation of the adjacent Pacific region. Timor-Leste's involvement in the UN system is also important. The country is party to numerous international treaties, including most conventions in the human rights area[77], to the Geneva Conventions on the consequences of wars and regarding refugees and to the Non-Proliferation Treaty regarding nuclear weapons. The government feels a commitment to contribute to enhancing peaceful cooperation on a global scale and is very serious in its efforts to fulfill this commitment.

X. Concluding Remarks

The Timor-Leste Constitution reflects history, self-image and state of mind as every Constitution does. The horrifying experiences of the past are reflected in an emphasis on human rights, stronger than in most other Constitutions. Those experiences were also part of the formative process of public opinion concerning the role of the state.

The Constitution clearly expresses the view that democracy, rule-of-law and social solidarity are the lead values by which the Timorese people want their public affairs to be conducted. So, these principles are enshrined in a prominent position in the Timor-Leste Constitution. This makes the Timor-Leste Constitution one of the most modern Constitutions in the region and one that measures up to the highest standards in terms of democracy, rule-of-law and state transparency worldwide.

However, enforcement is still limping behind due to economic and social factors that can only change very slowly. But considering this, the efforts and successes of the successive governments in implementing the Constitution so far, deserve respect. The fact that those efforts are continuous and are continually supported by the international community gives rise to the hope that, over time, they will lead to enduring success and sustainable prosperity.

76 Trafficking in humans, mainly women for purposes of prostitution in the neighboring countries, has become a problem in Timor-Leste.

77 See above VI.

Further Reading

For further reading on Timor-Leste the following books and articles are recommended[78]: Internal Displacement Monitoring Centre: Timor-Leste: Unfulfilled Protections and Assistance Needs Hamper the Return of the Displaced. A Profile of the Internal Displacement Situation, 7 September 2007 http://www.internal-displacement.org/8025708F004CE90B/(httpCountries)3FF6A63FDDF45BD6C12571780029F4AB?OpenDocument; UN Human Rights Report on Human Rights Developments in Timor-Leste, August 2006 – August 2007 http://www.unmit.org/unmitwebsite.nsf/192bda2f4f2cbc284925739500311c4c/$FILE/Report%20on%20human%20rights%20developments%20in%20Timor-Leste.pdf; *Bob Lowry*, Strategic Insights 38 – After the 2006 Crisis: Australian Interests in Timor-Leste, ASPI (The Australian Strategic Policy Institute) Paper http://www.aspi.org.au/publications/publication_details.aspx?ContentID=144&pubtype=6; *Babo Soares da Costa*, Branching from the Trunk, east Timorese Perceptions of Nationalism in Transition, Thesis, The Australian National University, Canberra, December2003; *Francisco da Costa Guterres*, Elites and Prospects of Democracy in East Timor, Thesis, Griffin University, January 2006; *Tanja Hohe*, Totem Polls: Indigenous Concepts and "Free and Fair" Elections in East Timor, in: International Peacekeeping, Vol. 9, No. 4, Winter 2002, pp69-88; Report of the United Nations Independent Special Commission of Inquiry for Timor-Leste, Geneva, 2 October 2006, http://www.ohchr.org/english/docs/ColReport-English.pdf; *David Cohen*, Indifference and Accountability. The United Nations and the Politics of International Justice in East Timor, East-West Center Special Report 9, Honolulu, East-West Center, 2006; *Ali Alatas*, The Pebble in the Shoe; The Diplomatic Struggle for East Timor, Jakarta 2006; *Monika Schlicher*. Geschichte eines Scheiterns, Strafverfolgung und Versoehnung in Osttimor, Der Ueberblick, Heft 1+2, Mai 2007; *Monika Schlicher*, Portugal in Ost Timor – eine kritische Untersuchung zur portugiesischen Kolonialgeschichte in Ost Timor 1850 – 1912, Hamburg 1996; *Randall Garrison*, The Role of Constitution-Building Processes in Democratization, Case Study East Timor, www.idea.int/conflict/cbp, p.4; *James Dunn*, Timor, A People Betrayed, Sydney, 1996; *George Aditjondro*, In the Shadow of Mount Ramelau. The Impact of the Occupation of East Timor, Leiden, 1994; *Liem Soei Liong*, The War Against East Timor, London 1984; *Jose Ramos-Horta*, Towards a Peaceful Solution in East Timor, Sydney, 1996; *Damien Kingsbury* (ed.), Guns and Ballot Boxes: East Timor's Vote for Independence, Monash University, Asia Institute, Melbourne, 2000; *Alipio Baltazar*, An Overview of the Constitution Drafting Process in East Timor, East Timor Law Journal, Article 9, 2004, www.easttimorlawjournal.org/articles/alipioonetconstitution.html; *Ian Martin*, Self-Determination in East Timor: The United Nations, the Ballot and International Intervention, London 2001.

78 I am grateful to Monika Schlicher for indicating the majority of these references.

Indonesia

INDONESIA
In Search for a Democratic Constitution (1945-2008)

Denny Indrayana[1]

I. Introduction

Indonesia declared its independence on 17 August 1945. The following day, a 1945 Constitution was adopted as Indonesia's first Constitution. Over the next sixty two years Indonesia adopted four different constitutions: the 1945 Constitution, the 1949 Federal Constitution, the 1950 Provisional Constitution and the 2002 Constitution.[2] The last one is Indonesia's current Constitution after four amendments to the 1945 Constitution which took effect in 1999, 2000, 2001 and 2002. The four amendments are constitutional reforms made after the downfall of Soeharto's authoritarian regime in 1998. The amendments are very significant because the People Consultative Assembly effectively rewrote the Constitution. However, none of the political factions in the Assembly admit that they have made a new Constitution. Therefore, formally, the Constitution after the four amendments is still named the '1945 Constitution'.

This chapter elaborates on the four Indonesian Constitutions and consists of nine sections. The first section provides a brief account of Indonesia's history, especially its constitutional development, focusing on the making of the Constitution prior to the current Constitution. Section III describes the constitution-making of the 2002 Constitution. Section IV provides an overview of the fundamental characteristic of the Indonesian Constitution. It includes general information and questions of rigidity and constitutional policies. Section V describes Indonesia's parliament and system of government. The protection of human rights guaranteed under Chapter XA of the 2002 Constitution is addressed in Section VI. Key features of Indonesia's system of law and constitutional jurisprudence are addressed in Section VII, followed by a brief section, Section VIII, on the status of international treaties. Section IX concludes the chapter.

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2 I name the current Constitution as the 2002 Constitution because it is actually a new Constitution and not only amendments to the 1945 Constitution, as it is formally argued. Further elaboration is in Section III.

II. Constitutional History

Following is a brief elaboration of Indonesia's constitutional history prior to the 1999-2002 amendments. It outlines key elements of the history of the 1945 Constitution, the 1949 Constitution and the 1950 Constitution.

The 1945 Constitution: A Temporary and Express Constitution

The 1945 constitution-making process was the first effort, following colonization, to write an Indonesian Constitution and formally started Indonesia's constitutional history as a modern independent state.[3] The situation at the end of the Second World War, however, forced Indonesia's founders to draft the 1945 Constitution very hastily – within just twenty working days.[4] It is clear that the founders' priority was to have a minimal Constitution to fulfill the basic requirements of Indonesian independence. Therefore, they were less concerned with creating a complete and democratic Constitution.[5]

Realizing the shortcomings and imperfections of the 1945 Constitution, the founders had wisely decided that it would be a temporary Constitution. On 18 August 1945, Soekarno, later Indonesia's first President, declared that the 1945 Constitution would be a short-term document, and consequently, should be replaced by an improved Constitution as soon as possible. Soekarno declared:

> [t]he Constitution we are now drafting is a temporary one. If I may say, this is an express Constitution. Later if we have already established a state and are in a peaceful situation, we will certainly call the People Consultative Assembly which will frame a complete and perfect Constitution. In the future, we should make a perfect and complete Constitution.[6]

Unfortunately, the election to form a People Consultative Assembly and to make a more democratic Constitution had to be repeatedly postponed because of the unstable situation of the revolution. Despite its temporary nature, the 1945 Constitution was used for more than four years before it was replaced by the 1949 Constitution.

The 1949 Constitution: A Temporary Federal Constitution

The 1949 Constitution was made in the shadow of the Round Table Conference, the formal negotiations between the Dutch and Indonesia that ended the revolution begun

3 Slamet Effendy Yusuf and Umar Basalim, *Reformasi Konstitusi Indonesia: Perubahan Pertama UUD 1945* (Indonesia's Constitutional Reform: The First Amendment of 1945 Constitution) (2000) 6.

4 Ibid 58.

5 Ibid.

6 Muhammad Yamin, *Naskah Persiapan Undang-undang Dasar 1945* (The Draft of 1945 Constitution) (1959) vol. 1, 410.

in 1945. The conference led to the formal transfer of sovereignty from the Dutch to Indonesians.[7] According to this Constitution, Indonesia became a federal state. This was not the intention of the founders, who preferred a unitary state. In fact, the federal system is widely believed to have been an attempt by the Dutch to leave a political legacy that would eventually fragment Indonesia, using its established colonial strategy of 'divide and conquer' (*divide et impera*).[8]

In this context, it is understandable that the 1949 Constitution was little more than a strategy employed by Indonesians to obtain international acknowledgment for their independence. Anthony Reid noted, "for many convinced Republicans the Republic of the United States of Indonesia was only tolerable as a stepping stone to the true aim of the revolution, the unitary Republic proclaimed in 1945".[9] Holding the same opinion, Muhammad Yamin, one of Indonesia's best-known founding fathers, wrote in 1960 that the format of United States of Indonesia was temporary and intended to stimulate the forming of the unitary state of Indonesia.[10] This Constitution – like its predecessor – was expressed to be temporary in nature. This can be clearly seen in Article 186.

> [t]he *Konstituante* (Constituent Assembly) together with the government shall enact as soon as possible the Constitution of the Republic of the United States of Indonesia, which shall replace this provisional Constitution.

Its 'strategic' objectives and temporary nature made the life of the 1949 Constitution very short. In the end, the Constitution was in force for less than eight months: from 27 December 1949 until 17 August 1950. The shortest period that a Constitution has been applied in Indonesia and one of the shortest in the world.

The 1950 Provisional Constitution: A More Democratic but Temporary Constitution

The 1950 Provisional Constitution replaced the 1949 Federal Constitution. This Constitution was more democratic than the previous constitutions. It firmly asserted the people's sovereignty and provided detailed protection for human rights, such as adopting the United Nations Declaration on Human Rights and incorporated the right to hold demonstrations and strikes.[11]

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7 Adnan Buyung Nasution, *The Aspiration for Constitutional Government in Indonesia: A Socio-legal Study of the Indonesian Konstituante 1956-1959* (1992) 27. The Round Table Conference was held in Den Haag in late 1949. During the conference the Dutch finally acknowledged Indonesian independence.

8 C.S.T. Kansil, Christine S.T. Kansil, and Engeline R. Palandeng, *Konstitusi-konstitusi Indonesia Tahun 1945-2000* (Indonesia's Constitutions 1945-2000) (2001) 42 – 43.

9 Anthony Reid, *The Indonesian National Revolution 1945-1950* (1974) 162.

10 Muhammad Yamin, *Proklamasi dan Konstitusi Republik Indonesia* (Declaration of Independence and Indonesia's Constitution) (1960) 34.

11 Nasution, above n 7, 28.

Despite its democratic nature, the 1950 Constitution was, again, intended to be a temporary one. This was obvious from its official name: "The Provisional Constitution of Republic of Indonesia". In Article 134 it explicitly stated, in exactly the same terms as Article 186 of the 1949 Constitution, that:

> [t]he *Konstituante* together with the government shall enact as soon as possible the Constitution of the Republic of Indonesia which shall replace this provisional Constitution.

Based on this Article, the government finally conducted its first general election in 1955 to elect members of the Constituent Assembly (*Konstituante*). The following paragraphs discuss the *Konstituante*, the organ of state which had specific responsibility for drafting a new Constitution for Indonesia and played a crucial role in Indonesian Constitutional history.

The Konstituante's Constitutional Draft: An Unfinished Democratic Constitution?

From the *Konstituante's* first meeting on 10 November 1956 until its last on 2 June 1959, the *Konstituante* conducted regular discussions to develop a new Constitution.[12] During that period, many heated debates emerged regarding the philosophy of the state, human rights and the possible re-application of the 1945 Constitution.[13] Nasution has praised the *Konstituante's* meetings. He argues:

> [t]he whole enterprise of the *Konstituante* … manifested a truly democratic spirit, a complete freedom of expression and a fundamental commitment to a constitutional reform of government on the part of majority of its members … the enterprise of the *Konstituante* can rightly be appreciated as the peak of Indonesia's effort to achieve constitutional government.[14]

Nasution has disagreed with the opinion — promoted both by the Soekarno and Soeharto regimes — that the *Konstituante* had failed in conducting its task of drafting a Constitution. In Nasution's opinion:

> [t]here is no proof for the allegations that the *Konstituante* failed to draft a Constitution because of the ideological conflicts which manifested themselves most clearly in the debate on the *Dasar Negara*.[15] The fact is that the *Konstituante* did not have the opportunity to conclude its deliberations on this issue; until the ultimate positions concerning the *Dasar Negara* have been taken by the

12 Ibid 41.
13 Further exploration on the debates in the *Konstituante* 1956-1959, see Nasution, above n 7, 51 – 401.
14 Ibid 405.
15 The philosophy of state (Indonesian).

> contending factions, any judgement on the outcome of this ideological debate must still be considered premature.[16]

As Nasution says, the democratic discussions and debates in the *Konstituante* from 1955-1959 were, in fact, never finished. They were discontinued by President Soekarno's Decree of 5 July 1959 [17] which unilaterally dissolved the *Konstituante* and reinstated the 1945 Constitution.[18] At that time, the *Konstituante* had almost completed a draft Constitution and only needed to resolve the debates on the *Dasar Negara*.[19] The Decree, therefore, ended Indonesia's chances of having a Constitution which was committed to democracy, human rights and limitation of power.[20]

Soekarno's Decree was strange policy, because Soekarno himself had previously agreed that the *Konstituante* was a more legitimate constitution-making body compared to other constitution-making bodies in the past – including the committees which produced the 1945 Constitution that he had reinstated. The *Konstituante* was directly elected in a relatively free and secret ballot with the specific task of drafting a new Constitution.[21] This did not, however, stop Soekarno from dissolving it.

Disappointment with the Konstituante's dissolution grew because Soekarno chose to reapply the 1945 Constitution rather than any of the other Indonesian constitutions.[22] This was highly inconsistent behavior on his part since he was the one who, on the day of enactment of the 1945 Constitution (18 August 1945) had firmly stated that it was temporary, express and revolutionary. Nevertheless, from 1959 until the end of his presidential power in 1966, Soekarno no longer treated the 1945 Constitution as temporary. By reapplying the 1945 Constitution and implementing personal rule under his 'Guided Democracy' rubric, Soekarno created his own authoritarian regime, one that was to last until 1966.

Indeed, it is the vague and incomplete nature of the 1945 Constitution which contributed to the rise of authoritarian regimes under President Soekarno (1945 – 1966) and, later, his successor, President Soeharto (1967 – 1998).[23] Therefore, one of the basic demands of the student movements that succeeded in toppling Soeharto in 1998 was to reform the 1945 Constitution.[24]

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16 Nasution, above n 7**,** 405.

17 The Decree contains three decisions: (1) to dissolve the *Konstituante*, (2) to put the 1945 Constitution into effect again and, therefore, to declare invalidation of the 1950 Provisional Constitution and (3) to form a Provisional People Consultative Assembly and a Provisional DPA (*Dewan Pertimbangan Agung Sementara* or Provisional Supreme Advisory Council).

18 For further elaboration of the reasons why Soekarno issued this decree, see: Daniel S. Lev, *The Transition to Guided Democracy: Indonesian Politics, 1957-1959* (1966) 235 – 289. See also Nasution, above n **7,** 313 – 401.

19 Nasution, above n **7,** 405.

20 Ibid 405 – 410.

21 Ibid 36 – 37.

22 Bagir Manan, *Teori dan Politik Konstitusi* (Theory and Politics of Constitution) (2002) 4.

23 See, eg, R. William Liddle, 'Indonesia's Democratic Transition: Playing by the Rules' in Andrew Reynolds (ed), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (2002) 373, 376; National Democratic Institute, *Indonesia's Road to Constitutional Reform: the 2000 People Consultative Assembly Annual Session* (2000) 1.

24 Indra J. Piliang, 'Amandemen Konstitusi dan Gerakan Mahasiswa: Sebuah Proyeksi' (Constitutional Amendment

III. Constitution Making and Amendments

This section describes the constitution-making process and amendments in the period 1999-2002. As mentioned above, the People Consultative Assembly adopted four amendments to the 1945 Constitution. Before these amendments the 1945 Constitution had been in force in two different periods, first from 1945 to 1949, and again from 1959 to 1998. Since 1999, the 1945 Constitution has been amended four times. I refer to the amended document as the "2002 Constitution", although formally it is still called the "1945 Constitution".

Officially, the People Consultative Assembly started the amendment process in 1999 and ended it in 2002. However, the embryo of the amendments was developed in the earlier period between Soeharto's forced resignation in May 1998 and the passing of the First Amendment in 1999,[25] that is, during Habibie's presidency. During this period, Habibie's administration set up popular initiatives such as better protection for human rights, release of political prisoners and reform of electoral laws. These initiatives created an environment conducive to the introduction of amendments to insert greater protection of rights into the Constitution. Habibie's initiative in bringing forward the election from 2002 to 1999 was another important pre-amendment decision. The 1999 General Election was crucial as part of the preliminary requirement to build a legitimate People Consultative Assembly that could then amend the 1945 Constitution.

The 1999 – 2002 Amendments: A Continuing Change Schedule

The People Consultative Assembly, however, did not complement its decision to carry out the constitutional amendment, with a clear timetable. The amendment schedule set up by the Assembly changed almost every year from 1999 to 2002. Originally, the People Consultative Assembly stipulated that the amendment should be completed by 18 August 2000.[26] In 2000, however, the deadline was not met. Instead the Assembly stipulated that the draft amendments must be ready by 2002.[27] In its 2002 Annual Session, the People Consultative Assembly faced a possible deadlock. There were calls from members to again delay the amendment from 2002 to the following year. In the end, however, three years later than originally scheduled, the Fourth Amendment was finally ratified.

How the Constitution-Making was Conducted

Indonesia had no clear direction as to what the amendments should seek to achieve. The only direction which guided the People Consultative Assembly was the obvious need to

and Student Movement) (2000) 4 *Analisis CSIS* 441.

25 Andrea Bonime-Blanc, *Spain's Transition to Democracy* (1987) Boulder and London: Westview Press, 139.

26 Article 2 of the People Consultative Assembly Decree No. IX of 1999.

27 Article 3 of the People Consultative Assembly Decree No. IX of 2000.

change the Constitution. The five principles that the Assembly members all agreed on were:

- to preserve the preamble of the Constitution;
- to maintain the unitary state of the Republic of Indonesia;
- to keep the presidential system government;
- to insert the normative provisions then in the elucidation, into the body text of the Constitution; and
- to process the amendments through the form of 'addenda', without deleting the original text of the 1945 Constitution.

These five agreements meant, however, that making a totally new Constitution was impossible. Yet, in reality, the agreement to merely amend the Constitution was not consistent. Table 1 shows the structure of the Constitution before and after the four amendments. It demonstrates that most provisions of the 1945 Constitution were either amended or deleted. Therefore, the amendments were effectively a total revision of the 2002 Constitution.

Table 1 The 1945 Constitution: Before and After the Amendments

	Before Amendment	After Amendment					
		Unchanged	Deleted	Amended	Added	Total	% Unchanged
Chapters	16	1	1	14	5	20	1/20= 5%
Articles	37	8	1	28	37	73	8/73= 11%
Paragraphs	65	29	2	34	131	194	29/194= 15%

Table 1 demonstrates that 95% of the chapters, 89% of the Articles and 85% of the paragraphs are either new or were alterations of the originals. Chapter XI on Religion is the only one which has not been changed. This again shows that the relationship between Islam and the state was one of the most sensitive issues dealt with during the amendment process.

This paper argues therefore that the four amendments were a step-by-step process to write a new Constitution, but without reopening the question of the national symbolism of the original 1945 Constitution: the rejection of Islamic state and the nationalist state ideology, the *Pancasila*.[28] It was an evolutionary constitutional renewal. In fact, although it has been changed and modified significantly, the official name of the renewed document remains the '1945 Constitution'.

28 Sanskrit for 'Five Principles'. The principles, which are deliberately highly abstract, are Belief in One God, a Just and Civilized Humanity, the Unity of Indonesia, Democracy Guided by Inner Wisdom in Unanimity Arising out of Deliberation among Representatives and Social Justice for All the People of Indonesia.

Asshidiqie criticized the amendment process for the absence of an academic draft to guide the process.[29] For him, the paradigm was only found much later, when the People Consultative Assembly became involved in the serious amendment discussions.[30] Lubis agrees that the process was conducted without a clear paradigm "without any clear concept, being ad hoc and partial in nature".[31] Jakob Tobing, the Chairperson of the Drafting Committee of the People Consultative Assembly, admitted that the agenda setting for the amendment appeared to have been:

> … by coincidence. Each member of the Drafting Committee of the People Consultative Assembly had different goals. But after three years of intense negotiation and working together … we had finally achieved the common goals that we had been fighting for together.[32]

Who the Constitution-Making Body was to be

The question of 'who the constitution-making body should be' overshadowed the four amendment processes. The role of the People Consultative Assembly was constantly challenged by the possibility of establishing a Constitutional Commission. In the end, the Assembly could not resist the pressure from the public to establish a Commission. The Commission established in 2003 after the four amendments were completed was, however, given only limited authority to 'review' the four amendments and submit its findings to the People Consultative Assembly.

Although the People Consultative Assembly finally issued a Decree to establish a Constitutional Commission at the end of the 2002 Assembly's Annual Session, this Commission was far from what was expected. The mandate of the Constitutional Commission was also very weak. It was subordinate not only to the People Consultative Assembly but also to the Working Body of the People Consultative Assembly.[33] This means that the Commission would merely be a powerless assistant to the People Consultative Assembly. In this form, the Commission would have no power to design the structure of any new amendment.[34] With such an inferior position, it was not difficult for the People Consultative Assembly to reject the Commission's report, which thus became a useless document.[35]

29 "Seharusnya Dibuat Naskah Baru UUD 1945" (There should be a New Draft to replace the 1945 Constitution), *Kompas*. 2 July 2002.

30 Ibid.

31 Todung Mulya Lubis. "The Urgency of Constitutional Reform", *Van Zorge Report's Homepage*, 2001. Van zorge Report, Singapore. 3 October 2003. <http://www.vanzorgereport.com/report/popup/index.cfm?fa=ShowReport&pk_rpt_id=16&CFID=315606&CFTOKEN=71680888>.

32 "Most People Didn't Realize What Was Happening Until It Was Too Late", *Van Zorge Report's Homepage*. 2002. Van Zorge Report, Singapore. 3 October 2003. <http://www.vanzorgereport.com/report/ popup/index.cfm?fa=ShowReport&pk_rpt_id=462&CFID=315606&CFTOKEN=71680888>.

33 Ibid.

34 "Assembly Gears up to Establish Constitution Commission", *The Jakarta Post*. 15 July 2003.

35 Up to the writing of this paper, the People Consultative Assembly has never seriously considered the report submitted by the Constitutional Commission.

In spite of the strong criticism of the People Consultative Assembly, no one can deny its achievement in ratifying the four amendments. Few predicted that the Assembly, a body with "a justified reputation for party political in-fighting and horse trading"[36] would ever succeed in achieving a majority decision to approve the amendment drafts. One of the reasons behind the success was its willingness to reduce its own power. For Ellis, the People Consultative Assembly has made an exceptional international precedent by agreeing to abandon its previously all-powerful status.[37] The original Article 1(2) of the 1945 Constitution stated that the Assembly was the sole representative of the sovereignty of the people. This monopoly on sovereignty had become the legal basis for the People Consultative Assembly to be a supreme parliament. Extraordinarily, this power was relinquished by the Assembly by the Third Amendment of Article 1(2), which now stipulates that, "Sovereignty is in the hands of the people and is exercised in accordance with Constitution".

Public Participation: Limited and Badly Organized

Public participation in the four amendments can be divided into two categories: the participation arranged by the People Consultative Assembly and that of the civil society (media and non-governmental organizations). The Assembly failed to conduct comprehensive public participation and the participation it allowed was often partial and ad hoc. Fortunately, however, the civil society covered this shortcoming through active advocacy.

In the First Amendment, public participation arranged by the People Consultative Assembly was almost non-existent. The time limitation placed on the First Amendment discussions meant that participation could not be organized properly. During the Second Amendment discussions, the People Consultative Assembly was allowed a longer time for amending the Constitution and some of the time was used to involve the public in the amendment process and seminars and hearings were conducted. The members of the People Consultative Assembly's Drafting Committee of 2000 visited 21 countries as part of a program called "international comparative studies". These studies, however, were more of a 'picnic' as there was no obligation for the members to make a comprehensive report after they had completed the visit.[38]

During the Third Amendment discussions, the People Consultative Assembly, responding to criticism from the civil society, formed an 'Expert Team' to help the amendment process. Most of this team's recommendations were not adopted by the People Consultative Assembly. Lastly, during the Fourth Amendment discussions, public participation programs worked better than in the case of the previous amendments. It was only during this last amendment debate that the public had a better opportunity to comment on the amendment

36 Tim Lindsey, 'Indonesian Constitutional Reform: Muddling Towards Democracy' (2002) 6 *Singapore Journal of International and Comparative Law* 244, 244.

37 Andrew Ellis. "Constitutional Reform and the 2004 Election", unpublished paper. 2003, no page.

38 Minutes of the 12th meeting of the Drafting Committee of the People Consultative Assembly. 11 February 2000.

proposals.[39] However, the way the Assembly arranged the participation program did not leave the public sufficient time to discuss the amendment drafts. The People Consultative Assembly's seminars were mostly held in big hotels in metropolitan cities and people in rural areas, where most Indonesians live had no opportunity to join the seminars.

Fortunately, the transitional period brought with it more open political conditions. This allowed more involvement from civil society to actively monitor the four amendment processes. The media should be applauded for actively reporting the amendment debates. In the People Consultative Assembly sessions on the amendments, live broadcasting by the electronic media and special columns allocated by the printed media enabled viewers and readers to understand the amendment proposals. This media involvement transferred the amendment debates from the elite in the parliament building to the ordinary people on the street.

In sum, without the support of the media and the civil society, public participation in the four amendments would have mostly been very limited. Even then the participation program was not fully successful. The People Consultative Assembly's failure to arrange a comprehensive participation program resulted in limited public acceptance of the four amendments. Further, the chance was missed for the public to acquire a greater sense of ownership of the Constitution[40] through better public consultation.

An Unavoidably Messy Process

This section argues that one of the main reasons for the messy amendment process was because of fundamental perceptions of certain key aspects of the 1945 Constitution itself. Although this Constitution was widely and passionately criticized as undemocratic text, it was, and still is, seen by nationalist factions – including the military – as an important document, which contains two crucial aspects for the survival of the country. These are the rejection of an Islamic state and the imposition in its place of a nationalist state ideology, the *Pancasila*, contained in the preamble to the Constitution. Agreement to keep the preamble was, therefore, at the heart of all of the constitutional amendments. As the leader of the nationalist camp, President Megawati was particularly keen to retain the preamble in its present form.[41] She argued strongly that:

> [t]he position to keep the preamble is non-negotiable. This preamble does not merely consist of words; it mirrors the national spirit, soul and feelings of the founders and the freedom fighters.[42]

39 Minutes of the 3rd meeting of the Working Body. 4 June 2002, 175.

40 Julius Ihonvbere. "How to Make An Undemocratic Constitution: The Nigerian Example", *Third World Quarterly*, Vol. 21:2, 2000, 346 — 347.

41 "Constitutional Change: The Charter Again", *Laksamana Sukardi's Homepage*. 2002. Laksamana.net, Jakarta. 23 April 2002 <http://www. laksamana.net>.

42 "Megawati dan Hamzah Haz Sepakat tidak Ada Voting" (Megawati and Hamzah Haz agreed no Vote), *Kompas*.

The preamble was thus more than just a symbolic text: it was a fundamental principle. Without the agreement to keep it, amendment would have been difficult if not perhaps impossible. Members of the People Consultative Assembly, especially from the nationalist faction, rejected the possibility of changing the preamble, saying it embraced what they believed to be the sacrosanct principles of the country: the *Pancasila* state ideology and the unitary state of the Republic of Indonesia.[43] For them, the preamble should never be changed as it acknowledges the presence and urges the peaceful existence of diverse ethnic groups, cultures and religions in this country.[44]

The debate on maintaining the preamble again revealed two fundamental but different ideological groups in Indonesian politics: the nationalists and Islamic groups.[45] The conflict between the two political streams, especially on the issue of the state and Islam, had been evident in the constitution-making process in 1945 and in the *Konstituante* of 1956-1959. Therefore, in the 1999-2002 amendment process, the nationalist faction was again afraid that the Islamic parties would use the momentum of constitutional reform to establish a preliminary constitutional basis for an Islamic state. This fear influenced almost all of the decision-making during the four amendment processes, including the decision to amend and not make a new Constitution, although in reality this amendment decision was inconsistent.

While mostly acknowledging that the 1945 Constitution was vaguely worded, members of these nationalist factions were not prepared to have it discarded completely, more for emotional reasons than anything else.[46] For them, replacing the 1945 Constitution would mean the 'death of the country'.[47] The stronger rejection of constitutional amendment during the Fourth Amendment discussions, which might have led to a constitutional deadlock, was evidence that these nationalist factions had real power but realized too late that the amendment process had effectively produced a new Constitution.

It should be noted, Chapter XI, Article 29 of the 1945 Constitution, on Religion, was the only chapter that was not altered by the 1999-2002 constitutional reforms. The rejection of the proposal to insert the 'seven words' *syariah* law of the Jakarta Charter into Article 29(1) was more evidence that the debates on nationalism and Islamic state are sensitive and crucial issues in Indonesian constitutional history. The 1999-2002 constitutional debates on the insertion of the Jakarta Charter, in fact, repeated the same debates which had taken place in 1945 and 1956-1959. From these three debates, the outcome has always been to maintain the preamble (*Pancasila*) and reject the insertion of *syariah* (Islamic law) into the Constitution. This same outcome is strong evidence

13 July 2002.

43 "Indonesia Needs to Rewrite Constitution: Coalition", *The Jakarta Post*. 6 August 2002.

44 "Should We Amend or Replace the Basic Law", *The Jakarta Post*. 31 December 2001.

45 *Constitutional Change: The Charter Again*, above n 41.

46 *Should We Amend or Replace the Basic Law*, above n 44.

47 Indonesia Needs to Rewrite Constitution: Coalition, above n 43.

that demands to maintain the nationalist state ideology *Pancasila* and Article 29 as they currently stand, is the preferred option of the majority of social groups in Indonesia.

After the four amendments, the basic conditions are in place to make the constitutional system work. The *Jakarta Post* has stated that whatever shortcomings one finds in the four amendments, "they still stand a better chance than the original text in sparing Indonesia from being plunged back into darkness once again".[48] In commenting on the process and the outcome, Lindsey argues that:

> … despite all the difficulties, progress is being made: the 1945 Constitution after the Fourth Amendment has many shortcomings but it is an incomparably better document … historically few countries have ever managed to adopt constitutional reforms as effective as Indonesia's purely through parliamentary debate.[49]

Lindsey further argues that, in a country denied constitutional debate for the last four decades, perhaps the messy process is necessary to build a national understanding.[50] Hopefully, this 'muddling through',[51] in its search for a more effective Constitution, will guide Indonesia's transition to becoming an even more democratic country. Finally, from Indonesia's experience, besides observing the general characteristics of constitution-making process in transition, scholars should note how the symbolic value of the 1945 Constitution strongly overshadowed the way constitutional reform took place. Despite a process that was different to democratic processes in other countries, Indonesia's slow, patchy and tentative process managed to lead the country to a more democratic Constitution and contributed significantly to Indonesia's transition from overt authoritarianism. As *The Asia Times* wrote after the ratification of the Fourth Amendment in 2002:

> [t]he process may have been messy and circuitous, but Indonesia's adoption of constitutional amendments underline how, in the end, the … country remains very much on the transitional, if bumpy, road to democracy.[52]

IV. General Overview and Characterization of the Constitution

Indonesia's constitutional history shows that the country has adopted various constitutional forms. The 1945 Constitution, which was amended to be the 2002 Constitution, adopts a presidential system, while the 1949 and the 1950 Constitutions adopted the parliamentary system. As to the form of the state, the 1949 Constitution characterized Indonesia as a federal country for only one year, while the other Constitutions define Indonesia as a

48 "The Beginning of the End", *The Jakarta Post*. 1 August 2002.
49 Lindsey, above n 36, 260.
50 Ibid, 276 — 277.
51 Ibid.
52 "Indonesia: A Step on Democracy's Bumpy Road", *The Asia Times*. 14 August 2002.

unitary state. In Article 37(5) of the Fourth Amendment of the 2002 Constitution, the form of unitary state is clearly stated as a non-amendable Article.

The other important feature of Indonesia's Constitution has been its temporariness. The 1945, 1949 and 1950 Constitutions were all temporary basic laws. Only in the second term of the implementation of the 1945 Constitution, the document became more "permanent". Under the authoritarian regime of Soeharto (1966 – 1998), at least three policies were adopted to ensure the 1945 Constitution as a "permanent Constitution".

Firstly, a 'national consensus' authorized the President to appoint Soeharto's loyalists as one-third of the MPR's members. [53] By doing so, any attempt to amend the 1945 Constitution would not have succeeded, because one of the requirements to amend the 1945 Constitution was the attendance of more than two-thirds of the MPR members.[54] Secondly, the MPR Decree No. IV of 1983 on Referendums strengthened the national consensus. This decree clearly showed Soeharto's authoritarian regime sought to 'sanctify' the 1945 Constitution. It stated:

> … the MPR has determined to maintain the 1945 Constitution, it does not wish and does not want to make changes to it and intends to implement it purely and consistently.[55]

Thirdly, the 1983 MPR referendum decree was then confirmed by Law No. 5 of 1985 on Referendum. Although this statute seemed to allow the possibility of amending the 1945 Constitution, its very difficult requirements, paradoxically, made amendment almost impossible. To amend the Constitution, the statute required a referendum to be held in which:

a) at least 90% of the authorized voters were required to vote; and
b) at least 90% of these voters had to agree to the MPR proposal to amend the 1945 Constitution.[56]

As a 90 per cent voter turn out and agreement is probably impossible, the New Order's strategy was clearly to entrench and sanctify the 1945 Constitution. Further, the requirements under the statute were only some of the requirements to amend the 1945 Constitution. Even if the referendum statute's requirements had been met, the amendment would not have been valid if the requirements under 37 of the 1945 Constitution had not been satisfied. That is, a minimum two-thirds of the MPR members attend the plenary meeting and at least two-thirds of those attending agree on the amendment proposal.

53 Harry Tjan Silalahi, *Konsensus Politik Nasional Orde Baru* (The New Order's Political Agreement) (1990) 32 – 48.
54 Article 37 (1) of the 1945 Constitution.
55 See also Article 115 of MPR Decree Number I of 1978.
56 Article 18 of the Law Number 5 of 1985 on Referendum.

To reform the 1945 Constitution, therefore, in 1998, the People Consulative Assembly revoked the decree on referendum. Pursuant to the current provision, Article 37 of the 2002 Constitution, the mechanisms to amend the Constitution are: A proposal to amend the Constitution may be placed on the agenda of a session of the People Consultative Assembly if it is proposed by not less than one-third of the total number of members of the Assembly; Each proposal to amend the Constitution shall be submitted in writing and shall clearly show the parts which are proposed to be amended, with reasons; In order to amend the Constitution, not less than two-thirds of the total number of members of the Assembly must be present at the session; Decisions to amend the Constitution shall be made with the agreement of not less than fifty per cent plus one member of the entire membership of the Assembly. Finally, as explained earlier, the form of the Unitary state of the Republic of Indonesia may not be amended.

V. Parliament and System of Government

This section considers parliament, the legislation process, and system of government pursuant to the four amendments. The 2002 Constitution is clearly a more democratic text than it was before the amendments. This section also compares the relevant constitutional provisions before and after the amendments and criticizes some shortcomings of the outcomes to show that further reform is still needed.

Legislative Reform

The four amendments have changed the structure of the parliament. The People Consultative Assembly, which had previously consisted of the DPR (House of Representatives) and additional functional groups – including the military –, has changed to include the members of the DPR and the DPD (the Regional Representative Council).[57] The members of the DPR represent political parties' interests, while the members of the DPD represent regional interests.[58] Importantly, all members of the two chambers are now elected by the people. This has meant the end of the system of "free" seats for the military and other functional groups.

A monumental change occurred when the Third Amendment stipulated that the 'sovereignty is in the hands of the people and is exercised in accordance with the Constitution'.[59] This had the effect that the People Consultative Assembly is no longer the sole holder of sovereignty, is no longer the highest institution in the Republic and no longer holds unlimited powers. The sovereignty amendment was followed by other functional reform of the People Consultative Assembly. Table 2 shows the Assembly's power before and after the amendments. It

57 Article 2(1) of the Fourth Amendment.
58 Article 22C (1) *juncto* 22E (3) and (4) of the 1945 Constitution.
59 Article 2(1) of the Third Amendment.

demonstrates that the People Consultative Assembly now has more limited powers than it did before the amendments. This highlights the fact that the People Consultative Assembly, as the constitution-making body, has been able to reform and limit its own powers.

Table 2 The People Consultative Assembly: Before and After the Amendments

Provisions	Before the Amendments	After the Amendments
People's Sovereignty	Monopolized by the People Consultative Assembly.[60]	The People Consultative Assembly does not monopolize the sovereignty. Sovereignty shall be implemented in accordance with the Constitution.[61]
Position	The highest state institution, with unlimited powers.	The People Consultative Assembly is one of several institutions with limited powers.
Presidential Election	Elected by the People Consultative Assembly.[62]	The People Consultative Assembly inaugurates the President and Vice President, who are directly elected by the people.[63]
The Broad Guidelines of State Policy (GBHN)	Prepared by the People Consultative Assembly, the President should implement and account for implementation to the People Consultative Assembly.[64]	The People Consultative Assembly does not have this authority.
Constitutional amendment	Amended and determined by the People Consultative Assembly.[65]	The People Consultative Assembly still has these authorities.[66] (although the amendment procedures have been changed).
Presidential Impeachment	Removed by the People Consultative Assembly. The procedure was not explicitly stipulated in the Constitution.	The People Consultative Assembly has the power to remove the President. This power is explicitly stipulated in detail in the Constitution.[67]
Vacant Presidency	The Constitution was silent on this.	The People Consultative Assembly has the power to elect the President and/or Vice President, in the case that one or both of the positions become vacant.[68]

60 Article 2 (1) of the 1945 Constitution.
61 Article 2 (1) of the Third Amendment.
62 Article 3 (2) of the 1945 Constitution.
63 Article 3 (2) of the Third Amendment.
64 Article 3 of the 1945 Constitution.
65 Articles 3 and 37 of the 1945 Constitution.
66 Articles 3 (1) and 37 of the Third and Fourth Amendment.
67 Articles 7A and 7B (5), (6) and (7) of the Third Amendment.
68 Article 8 (2) and (3) of the Third Amendment.

Since the amendments, the DPR has become a very powerful legislative body. Isra argues that the amendments have, in fact, resulted in a 'supreme' DPR[69] and the Constitution has thus shifted from being an executive-heavy Constitution to a DPR-heavy Constitution.[70] Asshiddiqie points out the DPR's involvement in the acceptance of foreign ambassadors[71] as an example of how much more powerful the DPR has become since the amendments. He argues that this Article is not practical and breaches the international customs of diplomacy.[72] Table 3 shows how the DPR has shifted from a 'rubber stamp' to a 'supreme' organ of state.

Table 3 The DPR: Before and After the Amendments

No.	Before	After
1.	The Constitution did not clearly stipulate that the DPR had legislative, budgetary and supervisory functions.	Clearly stipulated.[73]
2.	The Constitution did not stipulate that the DPR had the right of interpellation, the right to carry out inquiries and the right to express its opinion.	Stipulated. [74]
3.	The Constitution did not stipulate that each of the members of the DPR had the right to submit questions, to convey suggestions and opinions, and a right of immunity.	Stipulated.[75]
4.	The Constitution stipulated that the DPR's agreement was required to declare war, make peace and conclude treaties; and to promulgate a government regulation in lieu of law to become a statute.	Has similar powers. [76]
5.	The Constitution did not stipulate that the DPR's agreement was required: to make an international agreement; to approve and confirm the candidate judges of the Supreme Court; to appoint and remove the members of the Judicial Commission.	Stipulated. [77]

69 Saldi Isra. "Penataan Lembaga Perwakilan Rakyat: Sistem Trikameral di Tengah Supremasi Dewan Perwakilan Rakyat", *Jurnal Konstitusi*, Vol. 1:1. 2004, 128.
70 Ibid.
71 Article 13 (3) of the First Amendment.
72 Jimly Asshiddiqie, "Telaah Akademis Atas Perubahan UUD 1945" (Academic Review of the Amendment of the 1945 Constitution), *Jurnal Demokrasi dan HAM*, Vol. 1:4. 2001, 22.
73 Article 20A (1) of the Second Amendment.
74 Article 20A (2) of the Second Amendment.
75 Article 20A (3) of the Second Amendment.
76 Articles 11 (1) and 22 of the 1945 Constitution.
77 Articles 11 (2), 24A (3) and 24B (3) of the Second and Third Amendments.

6.	The Constitution did not stipulate that the DPR selected the members of the state Audit Board, and three judges of the Constitutional Court.	Stipulated. [78]
7.	The Constitution did not stipulate that the DPR selected the members of the state Audit Board, and three judges of the Constitutional Court.	Stipulated. [79]
8.	The Constitution stipulated that the DPR received the report from the state Audit Board.	Has similar powers. [80]
9.	The Constitution did not clearly stipulate the DPR's role in an impeachment process.	Clearly stipulated. [81]
10.	The elucidation of the Constitution stipulated that the President could not dissolve the DPR .	Clearly stipulated in the body of the Constitution. [82]

Another monumental achievement of the amendment process occurred when the First Amendment withdrew the power to make statutes from the President, and gave the power to the DPR. Manan argues that this amendment established clearer checks and balances between the President, as the executive body, and the DPR as the legislative body.[83] It also addressed the previous unsatisfactory situation, whereby the President had the stronger authority to make statutes. This concept had resulted in wide-spread abuse of powers under Soeharto's authoritarian regime.[84] Nevertheless, the legislative role of the DPR remains vulnerable. All the Bills must be approved by both the President and the DPR through discussion to become law[85] and the President retains an absolute veto power to reject any Bills at this discussion stage,[86] although as explained later, once the President agrees he or she cannot later veto by refusing to sign a Bill. Within 30 days it will become law regardless of such a refusal (Article 20(5)).

A further legislative reform was the establishment of a regional 'senate' (DPD). This new institution was intended to give regional communities a more active role in governance,

78 Articles 13 (2) (3) and 14 (2) of the First Amendment.
79 Article 23F (1) of the Third Amendment.
80 Article 23E (2) of the Third Amendment.
81 Articles 7A and 7B (1) (2) (3) (4) (5) of the Third Amendment.
82 Article 7C of the Third Amendment.
83 Bagir Manan. *DPR, DPD dan People Consultative Assembly dalam UUD 1945 Baru* (DPR, DPD and People Consultative Assembly in the New 1945 Constiution), Yogyakarta: UII Press. 2003, 20 – 22.
84 Ibid 21.
85 Article 20 (2) (3) of the First Amendment.
86 Mohammad Fajrul Falaakh, *Presidensi dan Proses Legislasi Pasca Revisi Konstitusi (Parlementarisme Lewat Pintu Belakang?)*, (Paper presented at National Seminar on Meluruskan Jalan Reformasi, the University of Gadjah Mada, Yogyakarta, 25 – 27 September 2003) at http://ugm.ac.id/seminar/reformasi/i-fajrullfallakh.php at 1 July 2004.

in line with the concept of regional autonomy.[87] The DPD, however, was given very limited authority, especially when compared to the DPR. This is yet another example of compromise in the amendment process.

As a result, the DPD now lacks strong legislative powers.[88] It can only submit Bills to the DPR and then participate in the discussion of Bills relating to regional autonomy, central-region relations, the formation, expansion and merger of regions, the management of natural resources and other economic resources, and the financial balance between central and the regions. [89] The DPD can also advise the DPR on Bills relating to the state budget, taxation, education and religion.[90] However, it is not involved in the ratification process of any of these Bills. This is a matter solely for the DPR and the President.[91] Further, the DPD has the authority to supervise the implementation of laws on these matters, but does not have the authority to take further action. This action is a matter for the DPR, to which the DPD submits the results of its supervision.[92] Consequently, Manan argues that the DPD is only a complementary, rather than supplementary, chamber to the DPR.[93]

Executive Reform

Ellis argues that, before the amendments, Indonesia's so-called presidential system was not 'presidential' in the sense the term is understood in the United States and the Philippines, because Indonesian presidents were not directly elected and could be discharged by People Consultative Assembly vote.[94] Since the amendments, however, Indonesia has adopted this more 'conventional presidential system' model.[95] Table 4 shows the Indonesian presidential system before and after the amendments.

87 Manan, above n 83, 53.
88 Denny Indrayana, "Ancaman Tirani DPR", *Kompas*. 2 September 2002.
89 Article 22D (2) of the Third Amendment.
90 Ibid.
91 Article 20 of the First Amendment.
92 Article 22D of the Third Amendment.
93 Manan, above n 83, 56.
94 Andrew Ellis, "The Indonesian Constitutional Transition: Conservatism or Fundamental Change", *Singapore Journal of International and Comparative Law*, Vol. 6. 2002, 119 — 120.
95 Ibid 152.

Table 4 The Presidential System: Before and After the Amendments

Provisions	Before	After
One Person or Collegiate	One Person.	One person.[96]
Status	Chief of Executive.	The same.[97]
Election Process	Indirect, by the People Consultative Assembly.	Directly elected by the people.[98]
Tenure	Unlimited, could be re-elected every 5 years.[99]	Limited for a maximum two terms of 5 years.[100]
	Not fixed, easily removed.	Fixed, not easily removed.[101]
Legislative Powers	More dominant than the DPR.	Shares powers with the DPR and DPD.
Appointment and removal Powers of high ranking state officials.	Not clearly stipulated. In practice, these powers are, therefore, unlimited.	Limited.
Impeachment Procedure:		
• Legal Basis	Generally mentioned in the elucidation of the Constitution, and was mostly stipulated in a People Consultative Assembly Decree.	Stipulated in the Constitution.[102]
• Reasons	More political than legal: if the President 'truly breached' state policy and the Constitution.	More criminal. That is if the President is convicted of 'treason, corruption, other high crimes or misdemeanors, or proven to no longer fulfill the requirements of the office of President'.[103]
• Judicial Branch	Not involved in the process.	Involved. The Constitutional Court shall investigate, try and decide on a recommendation by the DPR that the President should be impeached.[104]

96 Article 4 of the 1945 Constitution.
97 Article 4(1) of the 1945 Constitution.
98 Article 6A of the Third and Fourth Amendments.
99 Article 7 of the 1945 Constitution.
100 Article 7 of the First Amendment.
101 Articles 7, 7A and 7B of the First and Third Amendments.
102 Articles 7A and 7B of the Third Amendment.
103 Article 7A of the Third Amendment.
104 Article 7B of the Third Amendment.

• Requirement	Easier. A simple majority vote, which rejects the accountability speech, could impeach a President.	More difficult. The process requires the decision-making in the DPR, Constitutional Court and People Consultative Assembly. Only an absolute majority vote in the DPR, a guilty decision in the Court and another absolute majority vote in the People Consultative Assembly can impeach a President.[105]

Table 4 demonstrates that Indonesia now enjoys a better system of checks and balances on presidential powers. Although the direct presidential election strengthens the legitimacy of the President, this does not mean that the power of President will be unlimited. The President's removal and the appointment power of high-ranking state officials is better regulated. For example, under the original 1945 Constitution, there were no provisions on how members of the People Consultative Assembly, DPR, BPK (the State Audit Agency) and Supreme Court Judges were to be elected or appointed. Consequently, President Soeharto managed to choose loyalists as members of these institutions. These "President's men" contributed to a general absence of institutional controls over the President for most of the New Order period. The amendments directly addressed these problems. Now, for example:

- members of the People Consultative Assembly, DPR and DPD shall be elected by the people;[106]
- the members of BPK shall be chosen by the DPR, taking into consideration the advice of the DPD, and approved by the President;[107] and
- the names of candidates for appointment as a Justice of the Supreme Court shall be submitted by the Judicial Commission to the DPR and then be confirmed by the President.[108]

The legislative power, which was previously dominated mainly by the President, has now shifted to become a power of the DPR,[109] with little participation by the DPD (as mentioned). The President, however, still has a significant legislative power. Bills are discussed and must be assented to by both the DPR and President at this stage.[110] This Presidential consent requirement is basically the 'veto right' for the President. This right is stronger than the veto right of the President of the United States. In Indonesia, if the President rejects a Bill there is no mechanism by which the DPR and/or the DPD can overrule such a rejection. However, if the President does give assent at this stage he or she

105 Article 7B of the Third Amendment.
106 Article 2(1) of the Fourth Amendment.
107 Article 23F (1) of the Third Amendment.
108 Article 24A (3) of the Third Amendment.
109 Article 5(1) and 20 (1) (5) of the First Amendment.
110 Article 20(2) (3) of the First Amendment.

may not later change his or her mind and refuse to sign the Bill into law. Article 20(5) provides that a Bill agreed upon by both the President and DPR will become law in 30 days, in such circumstances. To strengthen the system of checks and balances, however, the President's legislative powers should therefore be further reformed by being reduced or limited by giving the DPR and DPD an American-style right to counter veto a discussion stage refusal by the President.

As to the judicial branch, the potential for Presidential intervention has been reduced by the amendments. For example, the President's power to grant pardons and restoration of rights is now limited by the Supreme Court's advice. The President's power to grant amnesties and abolition is restricted by the DPR's advice.[111] The President is only granted the power to appoint and remove members of the Judicial Commission, with the agreement of the DPR.[112] The President has only limited power in confirming Supreme Court judges because the names of candidates must be previously submitted by the Judicial Commission to the DPR for approval, and has to share the power to appoint the nine judges of the Constitutional Court, with the DPR and Supreme Court, each of which has the authority to appoint three judges.[113]

The impeachment process created by the Third Amendment is much more detailed than before. The current Indonesian procedure is more similar to that of the United States. Table 4 on impeachment, demonstrate this similarity. In terms of the reasons for impeachment, Indonesia has adopted almost the same criteria as the United States, with only 'corruption' added as an additional ground.

There are two political compromises which have resulted in shortcomings in relation to the executive branch and both relate to the election of the President. The first relates to the requirements for becoming a presidential candidate. The Constitution stipulates that a presidential candidate "must be mentally and physically able to carry out the duties and obligations of the President and Vice-President'.[114] This requirement was closely related to the blindness of Abdurrahman Wahid. In the amendment debates, the original proposal required mental and physical 'health'. In the end, the factions in the People Consultative Assembly finally agreed to change the word 'health' to 'ability' but this 'ability' requirement is ambiguous and tends to discriminate against people with disability.

The second shortcoming is the monopoly held by political parties in proposing presidential candidates.[115] This provision blocks the possibility of independent presidential candidates and weakens the idea of a 'direct' presidential election, because candidates must first be approved by a party. Further, the provision is another example of the political bias of the constitution-making body (People Consultative Assembly), most members of which came from political parties themselves.

111 Article 14(1) (2) of the First Amendment.
112 Article 24B (3) of the Third Amendment.
113 Article 24C (3) of the Third Amendment.
114 Article 6(1) of the Third Amendment.
115 Article 6A (2) of the Third Amendment.

VI. Fundamental Rights

The original 1945 Constitution lacked sufficient human rights provisions.[116] This was one of the biggest shortcomings addressed through the amendments. Kawamura, for example, argues that:

> [i]f Indonesia intends to become a democratic state, establishment of constitutional guarantee of human rights and freedom as inalienable rights of human beings certainly is one of the top priority tasks.[117]

Indeed, after the Second Amendment of the 2002 Constitution, the human rights protections were more impressive, on paper at least. Clarke argues that the amendment on the Bill of Rights is "the first meaningful protection of human rights in Indonesia's 1945 Constitution".[118] Lindsey argues that the long and impressive Chapter XA on Human Rights succeeds in shifting the original 1945 Constitution from a document which guaranteed few human rights, to one which, in a formal sense at least, provides more extensive human rights protection than do many developed states.[119]

There are, however, at least two shortcomings in the human rights provisions. The first is relatively minor, in relation to duplication of provisions: for example, both Articles 27(1) and 28D (1) stipulate equality before the law. The second, however, is a major shortcoming. It relates to Article 28I (1) (the non-retrospectivity provision), discussed earlier. The problem is not the non-retrospectivity provision itself. Despite being widely debated, the notion of a law not being applied retrospectively has been adopted in many countries and is a norm of international law, although with qualifications.[120]

The problem for Indonesia is that the Second Amendment stipulates that the non-retrospectivity provision "may not be interfered with under any circumstances at all".[121] This is against international norms, which are usually read by Courts as gratifying retrospectivity prohibitions. Clarke, for example, argues that, "[the] most established exception to the principle of non-retrospectivity is crimes against humanity".[122] This exception cannot apply in Indonesia as the Constitution now stands and this has serious implications for human rights prosecutions in relation to abuses committed, for example, under the New Order by the military.

116 Bivitri Susanti, "Constitution and Human Rights Provisions in Indonesia: An Unfinished Task in the Transitional Process", Paper presented at the Conference on "Constitution and Human Rights in a Global Age: An Asia Pacific History, Canberra. 30 November-3 December 2001, 3.

117 Koichi Kawamura, "Toward a Modern Constitution: The Second Amendment of the 1945 Constitution", *Ajiken World Trends*, Vol. 63. 2000, 2.

118 Ross Clarke, "Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials", *Australian Journal of Asian Law*, Vol. 5:2. 2003, 3.

119 Lindsey, above n 36, 254.

120 Clarke, above n 118, 8 – 14.

121 Article 28I (1) of the Second Amendment.

122 Clarke, above n 118, 11.

VII. System of Law and Constitutional Jurisprudence

This section elaborates judicial reform pursuant to the four amendments. In the 2002 Constitution, there are two main judicial reforms: first, in addition to Article 1(3) of the Third Amendment, which expressly stipulates that Indonesia is a state based on Law,[123] the Third Amendment further strengthens judicial reform by explicitly inserting the 'independence of the judiciary' principle into the Constitution.[124] This principle had previously only been stipulated in the elucidation of the Constitution and not in the text.

Secondly, compared to the executive and legislative bodies, the structural reforms to the judiciary are more comprehensive. The Third Amendment established two new institutions: the Constitutional Court and Judicial Commission. The Court has an equal position to the Supreme Court, but with a different jurisdiction. The decision to form a new court is a better solution than giving the new judicial powers to the Supreme Court, given the acute corruption problems in the Supreme and existing lower level courts. As Lindsey points out, concern about the integrity of existing courts was, in fact, one of the key reasons for the establishment of the new Court.[125] Table 5 shows the judicial branch before and after the amendments.

Table 5 The Judiciary: Before and After the Amendments

	Before	**After**
Independence	Stipulated in the elucidation.	Stipulated in the body of the Constitution.[126]
Institutions	The Supreme Court and its lower level courts.	The Supreme Court, lower level courts, Constitutional Court and Judicial Commission.[127]
Judicial review of a statute	N/A	Performed by the Constitutional Court.[128]
Dispute settlement between state institutions	N/A	Performed by the Constitutional Court.[129]
Political parties dissolution procedure	N/A	Performed by the Constitutional Court.[130]

123 Article 1(3) of the Third Amendment.
124 Article 24(1) of the Third Amendment.
125 Lindsey, above n 36, 261.
126 Article 24(1) of the Third Amendment.
127 Articles 24(2) and 24B of the Third Amendment.
128 Article 24C (1) of the Third Amendment.
129 Ibid.
130 Ibid.

Dispute settlement of general elections results	N/A	Performed by the Constitutional Court.[131]
Involvement in the impeachment	N/A	Performed by the Constitutional Court.[132]
Appointment and removal of judges	Unclear - in practice was monopolized by the President.	For the judges of the Supreme Court, this is a matter for the Judicial Commission, the DPR and President.[133] For the Constitutional Court, this is a matter for the President, DPR and Supreme Court.[134]

One of the crucial powers newly granted is judicial review of statute, something which was unavailable prior to the Third Amendment. Indeed, within one year of its establishment in 2003, the Constitutional Court had "won a reputation for competence and independence" through its exercise of this new power.[135]

In terms of rule of law, in 2001, the Third Amendment of the 1945 Constitution rules that "The Indonesian state is a state ruled by law". Before the amendment, the same provision is only part of the elucidation of the 1945 Constitution. During the amendment process in 1999 – 2002, important provisions in the elucidation are adopted as body text of the Constitution, while the rest of the elucidation is no longer acknowledged as part of the Constitution.

Further, the Indonesian legal system is outlined in Article 24, the Judicial Power Chapter of the 2002 Constitution which rules that the judicial power is the independent power to maintain a system of courts with the objective of upholding law and justice. The judicial power is exercised by a Supreme Court and the courts below it in the respective environments of public courts, religious courts, military courts, administrative courts and by a Constitutional Court.

Article 24C of the 2002 Constitution rules that the Constitutional Court has the authority to hear matters at the lowest and highest levels and to make final decisions in the review of legislation against the Constitution, the settlement of disputes regarding the authority of state bodies whose authority is given by the Constitution, the dissolution of political parties, and the settlement of disputes concerning the results of general elections. The Constitutional Court has the duty to adjudicate on the opinion of the House of Representatives regarding

131 Ibid.
132 Article 24C (2) of the Third Amendment.
133 Article 24A (3) (4) of the Third Amendment.
134 Article 24C (3) of the Third Amendment.
135 Tim Lindsey, Simon Butt, and Ross Clarke. "Review is not a Release", *The Australian*. 27 July 2004.

allegations of misconduct by the President and/or the Vice President in accordance with the Constitution.

The Constitutional Court is comprised of nine constitutional judges who are appointed by the President, of whom three are proposed by the Supreme Court, three by the House of Representatives and three by the President. The Chairperson and Vice Chairperson of the Constitutional Court are elected from and by, the constitutional judges. The Constitutional Court was established in 2003 and the first period will end in August 2008. Currently, the selection process of the nine judges is publicly discussed. The Constitutional Court law rules that selection should be transparent, participative and accountable.

In practice, the main problem of Indonesia's judicial power is judicial corruption which has contaminated almost all of the judiciary process. Court Mafia has badly influenced law enforcement. The report of Transparency International in the last four years has shown that the judiciary, parliament and political parties are the most corrupt institutions. This judicial corruption is one of the reasons for establishing the Judicial Commission under the Third Amendment of the Constitution in 2001.

Article 24B of the Constitution stipulates that an independent Judicial Commission shall have the authority to suggest the appointment of Justices of the Supreme Court and shall have further authority to protect and uphold the honor, dignity and the good behavior of judges. The members of the Judicial Commission must possess knowledge and experience in the field of law, have integrity, and be of irreproachable character. The members of the Judicial Commission are appointed and removed by the President with the agreement of the House of Representatives (the DPR).

In practice, the authority to monitor judges' behaviour has created constitutional conflicts between the Judicial Commission and the Supreme Court. In fact, 31 Supreme Court Judges have filed a petition to review the Judicial Commission law before the Constitutional Court. In 2006, the Constitutional Court ruled that the monitoring of judges' behaviour is constitutional. However, in order to make a better and clearer mechanism, some Articles in the Judicial Commission law were declared unconstitutional and therefore, amendments to the law should be conducted. The amendments are necessary to ensure that monitoring by the Commission will not violate the principle of independence of the judiciary.

VIII. International Law and Foreign Relations

Article 11 of the Constitution stipulates that, in agreement with the House of Representatives (DPR), the President declares war, makes peace and concludes treaties with other states. The President must have the agreement of the DPR in order to conclude other international treaties that have wide and profound effects on the lives of the people relating to the financial burden of the state.

The Article clearly rules that international treaties should be ratified by the DPR to be effective. Some members of the DPR argued that ratification should also include international agreements with the private and business sector, where the Government of Indonesia is one of the parties. They filed a petition before the Constitutional Court arguing that some of the Articles in Oil and Gas Law, breached Article 11 of the Constitution because the Articles do not oblige the President to have the consent from the DPR before he signs a business agreement with international companies.

The petition was rejected by the Constitutional Court. The Court decided that Members of Parliament have no legal standing to question the constitutionality of a statute. Any disagreement by the Members of Parliament should be discussed during the legislation process. Once a bill becomes law, the Members of Parliament could not question its constitutionality before the Constitutional Court.

IX. Conclusion

The development of the Indonesian Constitution in the last 62 years, from 1945 – 2008, has been strongly influenced by debates on the relationship between the state and Islam. The last constitutional amendments of 1999 – 2002 are highly coloured by the same debates. The four constitutional amendments lacked what has widely been accepted as key features of a democratic constitution-making process. This problem with the reform process, however, related to fundamental issues within the Constitution itself. It contained two aspects seen as crucial to the identity and survival of the country by most nationalists, including the military: the rejection of an Islamic state and the imposition in its place of a nationalist state ideology, the *Pancasila*, contained in the preamble to the Constitution. Many nationalists feared that opening the Constitution to real change would jeopardize these positions, which they saw, and still see, as non-negotiable.

Despite these problems, at the end of the process, the Constitution is more democratic in form. In particular, the amendments established a clearer separation of powers between the executive, legislature and judiciary and more impressive human rights protections. This is because the euphoric transitional period provided a setting that encouraged open constitutional debates in the People Consultative Assembly and allowed public participation in these debates, despite the flaws in the Assembly's system for public engagement.

The amended Constitution remains, however, far from perfect. Further amendment is needed to, first, strengthen the system of checks and balances introduced between 1999 – 2002; and, second, to entrench the preamble and guarantee the difficult relationship between Islam and state in their current form.

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Laos

LAOS
A Constitution in Search of Constitutionalism

Gerald Leather[1]

I. Introduction

Laos is by regional standards, a sparsely populated state. Its 6.52 million people (July 2007 est.) are spread over a land area of 236,800 square miles. It is a landlocked country of high mountain ranges intersected by deep river valleys and includes several high plateaus. Its population is ethnically diverse. 68% are Tai speaking Lao Lum ("Lao of the valley floor"). 22% are Lao Thoeng ("Lao of the mountain slopes") who are a mix of Austroasiatic minority tribes. 9% are Lao Sung ("Lao of the mountain tops") a grouping which includes the Hmong and Tibeto-Burman speaking minorities. Approximately 1% are ethnic Vietnamese.[2]

Laos has long borders with Vietnam in the east and Thailand in the west. In the north it borders Burma and China and in the south, Cambodia. Its geographical position between Vietnam and Thailand has made it strategically important as a buffer state between these two large, powerful, competing states.

Laos is a very poor country. It is categorized by the United Nations as one of 50 Least Developed Countries (LDC). The criteria for LCD status are low national income, weak human resources and high economic vulnerability. Laos is ranked 130th out of 177 on the Human Development Index which measures three dimensions of human development: life expectancy (127th - 63.2 years), literacy (106th – 68.7% and participation in education (128th), GDP per capita (139th – US$2039 Purchasing Power Parity)[3]

Laos has had three Constitutions. Constitution making is usually associated with some momentous event in the history of a country. The first Laos Constitution fits that pattern. It was drafted in a dramatic attempt to seize national independence from the French in the vacuum created by the defeat of the Japanese at the end of World War II. The next two Constitutions were developed for much more pragmatic reasons and primarily designed to maintain the political status quo rather than to map a way through a new political landscape.

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1 The author wishes to acknowledge Emeritus Professor Martin Stuart-Fox's contribution to this chapter. His books and articles are the cornerstone of the chapter and his advice and comments on the chapter have been invaluable. While he has contributed generously, he is absolved of any responsibility for the views expressed in it - for those the author is entirely responsible.

2 www.cia.gov/library/publications/the-world-factbook viewed on 25 January 2008.

3 http://hdrstats.undp.org/countries/country_fact_sheets/cty_fs_LAO.html viewed on 25 January.

The second Constitution was drafted by the French in an attempt to resist calls for independence and retain Laos within the French Union. Despite its pragmatic origins, this Constitution lasted nearly 30 years. Notwithstanding almost continuous warfare within the country over that period, the Constitution was observed over that part of the country, controlled from time to time, by the Royal Lao Government. During this period, constitutionalism appeared to take hold and the constitution was amended on a number of occasions to reflect the gradual process of Laos becoming fully independent from France and to deal with circumstances created by the exigencies of war and attempts to end the conflict.

By contrast, having a constitution seems to have been low on the list of priorities of the Pathet Lao Government that came to power in 1975. Fourteen years were to elapse between the effective revocation of the second Constitution and the adoption of the third Constitution in 1991. Although that Constitution was amended in 2003 there has been, at least until recently, little interest in or commitment to, constitutionalism.

II. Constitutional History

Statehood (in the European sense of a uniform administration over a defined territory) is a prerequisite of constitution making. In this sense, Laos only became a modern nation state in 1945[4] although nationalist aspirations, inspired by the "Kingdom of *Lan Xang*", were evident much earlier. Those aspirations were, until 1945, thwarted by Lao political culture and organization, by the influence and intrusions of the two powerful neighbours, Vietnam and Thailand, and by French colonial rule.

Pre-colonial Period

The earliest forms of political organizations of the Lao people were *mandala* - concentrations of political, economic and military power developed by "men of prowess" and legitimized by the Hindu and Buddhist religions. A *mandala* consisted of a number of smaller political units called *meuang*. Smaller *meuang* "nested within" larger *meuang*. *Meuang* were not primarily territorial but rather a social grouping owing personal loyalty to a leader, the *chao meuang*, who was always from the leading aristocratic family in the *meuang*. Common people who were members of a *meuang* swore allegiance to the *chao meuang*. In return for protection of his *meuang*, the *chao meuang* swore allegiance and paid tribute to a more powerful prince who in turn swore allegiance to and paid tribute to the king of a *mandala*. The extent of a *mandala's* influence depended on the power of the ruler, which in turn depended on the resources he acquired from trade, the extraction of tribute from *meuang* and from military conscription. The size and power of individual mandala varied over time according to

4 Martin Stuart-Fox, A History of Laos, Cambridge, (1997) Cambridge University Press, p.6.

the ruler's ability to protect, and therefore demand tribute, and/or military conscripts, from *meuang*. [5]

The Kingdom of *Lan Xang* was the largest and most successful of the Lao mandalas. Based originally on Luang Prabang, it was founded in 1354 by *Fa Ngum*. The physical borders of *Lan Xang*, particularly those with Vietnam and parts of the Siam *mandalas*, remained fluid and fluctuated depending on the power of the king. At its height, *Lan Xang* exercised influence over most of what is now Laos and much of northeastern and northern Thailand.[6] When *Lan Xang* was weakened by a struggle for succession in 1694, it broke into three separate kingdoms - Luang Prabang in the north, Vientiane in the centre and Champasak in the south. These three kingdoms became the primary centres for the regional loyalties which have been and remain, a feature of Lao' political culture.[7] In the 1760s, the Burmese attacked Siam and Luang Prabang but within a decade were driven out by a new Siamese king who forced the three Lao Kingdoms to accept Siamese suzerainty. Siam, however, was also a *mandala* with no centrally appointed administrative control over its tributaries. Only a limited number of matters had to be referred by the Lao *mandalas* to Bangkok. The three Lao kingdoms therefore remained almost entirely autonomous. Nevertheless, Lao opposition to Siamese domination continued and a rebellion in 1826 led to the complete destruction by the Siamese of the Kingdom of Vientiane and reduced the extent and influence of the other two Lao kingdoms.[8]

The Colonial Period

The territorial borders of modern Laos were determined during the French colonial period.

By 1885, all of Vietnam was under the control of the French who then began delineating the borders of Vietnam. The French took advantage of the fluidity of the Lao and Siamese *mandala* systems to extend their influence westward. To lay claim to Lao territory they used Vietnamese records which showed that some Lao *meuang* had at some time in the past paid tribute to the Vietnamese court, and so had been counted as administrative divisions of Vietnam. In 1893, after eight years of diplomatic maneuvering and some gunboat diplomacy the French forced the Siamese to sign a treaty renouncing all territory east of the Mekong. The treaty enabled France to establish a protectorate over Luang Prabang and establish direct administrative control over central and southern Laos.[9] The treaty did not permanently define the border. However, despite the efforts of Auguste Pavie, an

5 Martin Stuart-Fox (1997) p.7.
6 Martin Stuart-Fox (1997) p.9.
7 Martin Stuart-Fox, Politics and Reform in the Lao People's Democratic Republic, , Working Paper No.126, Asian Research Centre, Murdoch University, Western Australia, November 2005. At http://wwwarc.murdoch.edu.au/wp/wp126.pdf. p.4.
8 Martin Stuart-Fox (1997) p.14.
9 Martin Stuart-Fox. *Buddhist Kingdom , Marxist State: The Making of Modern Laos*, Bangkok , 2nd Edition (2002) (White Lotus Press) p.12.

"indefatigable schemer in the cause of French imperialism"[10], France eventually agreed to the Mekong essentially becoming the border between Laos and Siam. That left more ethnic Lao living on the Khorat plateau in Siam (now Thailand) on the western side of the Mekong, than live in Laos. Treaties signed in 1904 and 1907 redefined the frontier between Siam and French Indochina, which subsequently became the border between the modern states of Laos and Thailand.[11] Other minor changes to Laos' borders with Vietnam and Cambodia were made as administrative decisions by the French Indochinese administration during the colonial period.

Having secured Laos, the French were uncertain what to do with it. Although they administered Laos as a separate province of French Indochina,[12] it was the least important of the four provinces and was treated "as a hinterland for Vietnamese expansion and French exploitation."[13] The French did not see Laos as an independent state partly because its sparse population and lack of natural resources meant that it was unable to meet the cost of their colonial rule. The French made little effort to try to build a Lao nation state because they thought that it would ultimately be absorbed into Vietnam.

Brief Independence and the First Constitution

There were some nationalist stirrings among the Lao in the 1930s but it was the Japanese success in defeating colonial regimes, which gave Lao nationalism a boost. Nationalist organisations were formed. Their goals were to get rid of the Japanese, the French and the Vietnamese, who had been encouraged by the French to settle in Laos. On 8 April 1945, under pressure from the Japanese, King Sisavangvong of Luang Prabang declared independence and Prince Phetxarat became Prime Minister. He was, however, unable to persuade the Japanese to reunite Laos.

When the Japanese surrendered in August 1945, the King declared his earlier declaration of independence null and void and welcomed the returning French. The elite in southern Laos, who had supported the French resistance to the Japanese, also agreed to the French return. Only in central Laos was there any resistance, strongly supported by Vietnamese settlers. Encouraged by Ho Chi Minh's declaration of Vietnamese independence, Prince Phetxarat in Vientiane, continued to assert Laos' independence and proclaimed the unification of Luang Prabang with the rest of Laos. In return for a French promise to recognize his sovereignty over the whole of Laos, the King dismissed Prince Phetxarat as Prime Minister.

10 Martin Stuart-Fox. (1997) p.21.

11 These treaties did recover for France, and later the modern state of Laos, some small areas on the Western side of the Mekong in the south and the north but "gave France no more than half the former Lao Kingdom of Lan Xang." Martin Stuart-Fox (2002) p.23.

12 The other three provinces were Cambodia, Annam (much of Vietnam except the Mekong Delta) and Cochin (Southern Vietnam including the Mekong delta).

13 Martin Stuart-Fox (1997) p.6.

A "People's Committee" made up of various nationalist groups led by Lao Issara (Free Lao) met in Vientiane where they confirmed Lao independence and promulgated a provisional Constitution - Laos' first Constitution. They also appointed a provisional government which co-opted a 45-member National Assembly. The King declared these developments illegal and on 20 October 1945, the National Assembly resolved to depose the King.[14] In April 1946, the Lao Issara Government persuaded the King to legitimize it and the provisional Constitution, in return for the King becoming a constitutional monarch. A few days later French forces entered Vientiane and the Lao Issara Government fled to Thailand.[15]

The 1945 Constitution consisted of a preamble and 41 articles in six sections. The three articles in Section One declared the country indivisible but for administrative purposes divided it into 11 provinces. Article 4 provided for Laos to be a constitutional monarchy and for the King to act only with the approval of the National Assembly. The rights and duties of the people were spelt out in Section Three. The rights specified included, equality before the law, rights to free speech, freedom of expression, freedom of assembly, freedom of association, privacy, property, employment and education. Section Four established the National Assembly as the country's legislature. Although the members of the National Assembly were to be the people's representatives there was no provision in the Constitution as to how they would be elected. Section Five defined the roles and duties of the Government (the executive) and Section Six dealt with the judiciary.[16]

The Royal Government and the 1947 Constitution

The King welcomed the return of the French who now realized that a new constitutional framework was required to retain Laos within the French Union. A Constituent Assembly was elected on the basis of universal male suffrage, in December 1946. The Constituent Assembly first met in March 1947 and after much debate adopted a Constitution for the Kingdom of Laos as a unified "autonomous" state within the French Union.

The 1947 Constitution consisted of a preamble and 44 articles divided into seven sections. The seven articles in Section One reaffirmed Laos as a unified and indivisible kingdom and specified, among other things, French as the official language, the national flag and the national anthem. Section Two specified the powers of the King, including his role in issuing orders and regulations and promulgating laws and treaties approved by the National Assembly. The King was also the Supreme Head of the Armed Forces and authorized to declare war subject to National Assembly approval. Section Three dealt with the appointment, roles, and duties of the Government. The King appointed the Prime Minister who then selected a Government (which could include persons who were not

14 Martin Stuart-Fox (1997) p.62.
15 Martin Stuart-Fox (1997) p. 65.
16 Phongsavath Boupha, *The Evolution of the Lao State*, Delhi, (2003) Konark Publishers PVT Ltd, p.29.

members of the National Assembly). The Government had to be approved by the National Assembly. The National Assembly could dismiss the Government by passing a vote of no confidence in it. Section Four defined the roles and responsibilities of the National Assembly. The National Assembly was elected for a term of four years (increased to five years by a 1956 constitutional amendment) by universal male suffrage. Forty four members from 11 provinces were elected to the first legislature. The National Assembly had power to legislate, approve the budget and government borrowing and to review the activities of the Government. The National Assembly could be dissolved by the King.

Section Five created a Royal Council consisting originally of nine members, but later 12 members, half of whom were appointed by the King and half by the National Assembly. The Royal Council reviewed legislation passed by the National Assembly and could act as a Supreme Court. Section Six dealt with administration, the judiciary and regional government. Section Seven provided for the Constitution to be amended by a two-thirds majority of the Kings Council which comprised the National Assembly and the Royal Council.

Phongsavat Boupha is critical of the failure of the 1947 Constitution to spell out the "rights and duties of Lao citizens" as the first Constitution had, but in his view, its most significant deficiency was the lack of a declaration of independence.[17]

The first parliament under the 1947 Constitution was elected in August 1947 and sat for the first time in November. The cabinet of seven ministers were members of the French educated political elite and carefully selected to balance power among geographical regions and political clans. The French retained control of defence and foreign relations but also a range of other government functions so that "[d]espite the façade of constitutional self government, French control continued to be almost as total as before the [Second World] war."[18]

This attempt to blunt the demand for independence was not sufficient to meet Lao demands and in July 1949, France and the Lao Government signed a General Convention granting Laos greater self-government. This convention transferred control of most government services from the Federal Indochinese administration to the Lao Government, although monetary policy and customs continued to be governed on a federal basis. France retained control of defence, foreign affairs and justice. These changes were incorporated into an amended Constitution promulgated in September 1949.[19] There were minor amendments to the Constitution in 1952 including specifying the timing of the sessions of the National Assembly.[20]

In mid-1953 a new French Government, recognizing that it could not win the war against the Vietminh, declared that it would transfer all remaining powers held by France, in the

17 Phongsavath Boupha (2003) p.36.
18 Martin Stuart-Fox (1997) p.69.
19 Martin Stuart-Fox (1997) p.70.
20 Phongsavath Bhoupha (2003) p.46.

areas of justice, finance and military affairs, to Laos, Vietnam and Cambodia. These changes were embodied in the Treaty of Friendship and Association signed in October 1953. The treaty recognized Laos' independence, albeit within the French Union. However, under an accompanying military convention France remained responsible for planning the defence of Laos and was allowed to freely move French troops within Laos to defend its borders.[21]

Unity and Neutrality

Two of the most influential Lao politicians of the period, Prince Phetxarat and his brother Prince Suvanna Phuma, believed that for Laos to be a viable state it had to be independent, united and neutral. Their view that neutrality was essential to true independence was based on the Lao people's long history of trying to survive sandwiched between two powerful nations.[22] For the next twenty years Prince Suvanna relentlessly pursued the goals of unity and neutrality.

The Geneva Conference called in 1954, to end the First Indochina War, led to the signing on 20 July 1954 of an Agreement on the Hostilities in Laos, which required all foreign forces to withdraw from the country. The French were, however, allowed to retain two military bases in Laos with a total garrison of not more than 3500 troops and a further 1500 French military advisers, to provide training to the Royal Lao Army. The Final Declaration of the Geneva Conference included two statements on behalf of the Royal Lao Government. The first declared that Laos would not pursue aggressive policies, nor allow others to use its territory to pursue aggression, and that it would not join any military alliance which did not conform to the Charter of the United Nations or the Geneva Agreements. The second guaranteed the political rights of all Lao citizens, including those who had opposed government forces.

The Constitution was amended again in September 1956, to remove all reference to French rule and thereby recognize Laos' full independence. A constitutional amendment in 1957 included a provision giving women the right to vote for the first time. It also included rules for succession to the throne.

Between the signing of the Geneva Agreements and the communist takeover in 1975 Laos became an international battleground as an unwilling participant in the Second Indochinese War.[23] The North Vietnamese and the communist Pathet Lao fought to retain the eastern provinces of Laos to protect the Ho Chi Minh Trail. The Royal Lao Government, supported on a massive scale by the United States and Thailand sought to disrupt this critical supply line between North and South Vietnam. While the Royal Lao Government continued to function during this period, at various times considerable parts of Laos were not under its administrative control.

21 Martin Stuart-Fox (1997) p.83.
22 Martin Stuart-Fox (1997) p.93.
23 Inaccurately known in the West as the Vietnam War.

Despite the internationalisation of the struggle between Lao rightist, neutralist and communist factions, Prince Suvanna Phuma, as leader of the neutralist parties, continued to attempt to reconcile and unite the Lao people by negotiating the formation of three coalition governments incorporating all parties. In November 1956, he negotiated the first of these coalitions with his half brother Prince Suphanuvong, a leading member of the communist Lao People's Party and its resistance government, the Pathet Lao, which controlled two northern provinces bordering Vietnam and a well-armed force of 6000 men. A minor constitutional amendment was made to facilitate the establishment of a coalition government. The formation of this Coalition Government was vehemently opposed by the United States because it included the communist Pathet Lao. This Government fell after only eight months in power when the United States cut off foreign aid payments.[24] It was replaced by a right wing Government which committed itself to fighting communism. The civil war intensified, however, and by April 1961, on the eve of a second Geneva Conference on Laos, twothirds of the country was in the hands of the Pathet Lao and neutralist forces.

To reduce political instability, the Constitution was amended in 1961 to increase the majority required for a vote of no confidence from a simple majority to a two-thirds majority.[25]

In June 1962, after six months of talks in Geneva and pressure from United States on the rightists, a second coalition government, the Provisional Government of National Union, was formed. The Government included eleven neutralist ministers and four ministers each from the right and the Pathet Lao. In July, the Geneva Conference agreed to a declaration on the neutrality of Laos, which included five principles of peaceful coexistence proposed by the Royal Lao Government.[26] The five principles were designed to neutralize Laos. They included not entering into, or accepting the protection of, a military alliance; not permitting foreign interference in the country's internal affairs; removing all foreign military personal; and only accepting aid that did not have strings attached. Despite the agreements, fighting continued: the Pathet Lao were armed and supplied by the Vietnamese, while the Rightists were armed and supplied by the United States. The Provisional Government of National Union lasted nine months. Communist ministers then left. As the civil war resumed, the neutralists were largely eliminated as a military and political force.[27]

In 1965, due to the civil war, it was impossible to hold National Assembly elections across the whole country. The Constitution was amended to give the King powers to extend the term of the National Assembly in an emergency and to allow for the election of an interim National Assembly elected from those areas under the Royal Government's control.[28]

24 Martin Stuart-Fox (1997) p. 100.
25 Phongsavath Bhoupha (2003) p. 47.
26 Martin Stuart-Fox (1997) p.93.
27 Martin Stuart-Fox (1997) p.129.
28 Martin Stuart-Fox (1997) p.147. Phongsavath Bhoupha (2003) p.48.

Peace talks between the United States and North Vietnam in 1972 spurred a new round of conciliatory moves in Laos.

When the Vietnam ceasefire was agreed in January 1973, pressure mounted on the Pathet Lao and the rightists to follow suit. In February, the Agreement on the Restoration of Peace and National Reconciliation was signed.[29] The Agreement required the establishment of a Provisional Government of National Union and a National Political Consultative Council, within 30 days. However, the negotiation of the protocols required to establish these bodies took until September. Prince Suvanna, the only remaining neutralist, continued as Prime Minister and ministerial portfolios were shared equally between the Pathet Lao and the right wing parties. The National Political Consultative Council, which had equal status with the Government, consisted of 42 members - 21 members from each side. In a surprise move, the Pathet Lao's Prince Suphanuvong chose to head the Council rather than become a Deputy Prime Minister. This gave him equal status with Prince Suvanna. The Agreement also envisaged National Assembly elections "as soon as possible".

The Consultative Council, rather than the Government, drove the political agenda. In May 1974 it unanimously endorsed a reconstruction plan which was "moderate and liberal democratic in tone". In a harbinger of what was to come, the Pathet Lao bypassed the National Assembly and with the agreement of the Government had all laws promulgated by royal decree. It also delayed the holding of National Assembly elections.[30] National Assembly members reacted to this loss of power and privilege by occupying the National Assembly building. On the recommendation of Prince Suvanna Phuma, the National Assembly was dissolved by the King on 13 April 1975 in preparation for elections to be held in July. The elections were never held although district and provincial level elections took place in November 1975.[31]

Although the new Government "functioned reasonably effectively",[32] economic problems, growing social unrest and the fall of Phnom Penh to the Khmer Rouge and Saigon to the North Vietnamese in April 1975, caused rightist ministers to flee. This provided the Pathet Lao with the opportunity to take control of the army and eventually the country.

The 1947 Constitution of the Kingdom of Laos which had remained in force throughout the civil war and the Second Indochinese War, was effectively (if unconstitutionally) revoked on 2 December 1975 by a secret meeting of a hastily-convened National Congress of the People's Representatives which accepted the forced abdication of the king and proclaimed the Lao People's Democratic Republic.[33]

For the next 16 years, the Lao People's Revolutionary Party (as the Lao People's Party had

29 Martin Stuart-Fox (1997) p.152.
30 Martin Stuart-Fox (1997) p.156.
31 Martin Stuart-Fox, The Constitution of the Lao People's Democratic Republic, *Review of Socialist Law*, Vol. 17, No.4 (1991), 299-317 p.299.
32 Martin Stuart-Fox (1997) p.158.
33 Martin Stuart-Fox (1997) p.164.

been renamed) ruled by decree and until 1989 little effort was made to put a constitutional or legal framework in place.[34]

III. Constitution Making and Amendments

The Long and Painful Birth of the 1991 Constitution

For thirteen years, the Lao People's Revolutionary Party ("the Party") saw no pressing need for Laos to have a constitution.

When it assumed control of the country in 1975 the Party's important organs were the Political Bureau (Politburo), a Secretariat and a Central Committee. The powerful Politburo consisted of seven members including Kaison Phomivan (Secretary-General and ranked number one), Nuhak Phumsavan (ranked number two) and Prince Suphanuvong (ranked number three). A Secretariat, responsible for day-to-day affairs of the Party, consisted of five members of the Politburo. The Central Committee consisted of twenty one full time members and six alternate members. These bodies established the new government structure consisting of a Supreme People's Assembly, a law-making body of 45 members (who pending an election were named by the National Congress of People's Representatives) and a Council of Ministers nominally accountable to the Assembly but in reality answerable to the Party. Prince Suphanuvong was appointed President of the Assembly and President of the State. The Council of Ministers consisted of the Prime Minister, Kaison, and 12 ministers, two chairs of state committees and the President of the State Bank. Four influential ministers without portfolio ran the Prime Minister's office. This new structure was rubber-stamped by the National Congress of People's Representatives which never met again.[35]

The Supreme People's Assembly was charged with drafting a constitution but nothing further was heard about the constitution for nine years. In 1984, two subcommittees appointed to review progress on the drafting of the constitution and to review the social situation, promised a constitution "without delay". The lack of progress made by the Assembly is unsurprising given that it consisted of minor Party functionaries and a few representatives of the earlier political order whose numbers were, over the years, depleted by deaths, imprisonment and members fleeing the country. [36]

Economic problems were a significant catalyst for the finalization and adoption of the 1991 version of the current Constitution. Economic reforms in 1979, the introduction of the New Economic Mechanism in 1986 and further changes necessary because of an internal economic crisis in 1987 amounted to a step-by-step dismantling of the Party's attempts

34 Joerg Menzel, Laos, in: Gerhard Robbers (ed.), Encyclopedia of World Constitutions, New York 2007 (Facts on File), Vol. I, pp.509-512.

35 Martin Stuart-Fox (1997) p. 170 The National Congress of People's Representatives consisted of 264 delegates chosen by the Party controlled Lao Patriotic Front to represent the local administration at district and provincial level and the front itself. Martin Stuart-Fox (1991) p.299.

36 Martin Stuart-Fox (1991) p.300.

to impose a conventional, centrally planned, Marxist economy on Laos. The transition to a market economy was hastened in the late 1980s and early 1990s by the collapse of communism in the Soviet Union and Eastern Europe and the resultant very abrupt and almost complete cessation of Soviet and Soviet bloc economic aid to Laos.[37]

The challenge for the Party was to maintain its monopoly on political power, while allowing the development of a free market to encourage foreign investment and to meet the conditions imposed for receiving economic aid from western countries, the World Bank and the IMF.

There was another threat to the Party's power. The traditional political culture of Laos gave regional and provincial political leaders almost complete local control and autonomy over their regions, to the point where central government officials required the consent of provincial authorities to visit a province. This feature of the *mandala* system survived after independence. Although lip service was paid to policy edicts from the central authorities, whether the Royal Lao Government or the Pathet Lao, local leaders were free to and did interpret those policies quite differently or simply ignored them. After the Pathet Lao takeover little changed. Although appearances of strong central direction were maintained, Party officials in the provinces continued to operate largely autonomously. The powers of patronage of the provincial governors were increased in 1986 by the New Economic Mechanism, which decentralized economic and financial management and the delivery of many government services to the provinces, without any effective means of monitoring the performance of the duties delegated to the provinces. In the absence of effective oversight of provincial expenditure, the provincial governors used their greater powers of patronage to strengthen their political power base, by influencing the election of people's councils and administrative councils. By 1989, the central government had virtually lost control of the administration of the provinces. The Party decided to use the new constitution to recentralise power and regain control of the provinces.[38]

In March 1989, the first election of the Supreme People's Assembly was held to replace the body originally appointed in 1975. Among the roles of the new Assembly was the promulgation of a constitution and the passing of legislation. A 17-member Constitution Drafting Committee was appointed by the Politburo. It included six members of the Supreme People's Assembly and six members of the Party Central Committee and was chaired by Nuhak Phoumsavanh, the second ranked member of the Politburo and President of the Supreme People's Assembly.[39]

The first draft of the Constitution was presented to the Politburo on 4 April 1990 and published for discussion in the Party journal on 4 June.[40] The first article in the first draft gives a clear idea of an important objective of the Constitution. It proposed to enshrine the

37 Martin Stuart-Fox (1997) p.182.
38 Martin Stuart-Fox (2005) p.14.
39 Martin Stuart-Fox (1991) p.301.
40 Martin Stuart-Fox (1991) p.302.

role of the Party by defining Laos as "a people's democratic state under the leadership of the Lao People's Revolutionary Party." Influenced by the development of multiparty political systems in formerly communist Eastern Europe, younger public servants and intellectuals criticized the retention within the constitution, of the Party's monopoly on power.[41] This criticism continued until October 1990 when three leaders of the movement seeking a multiparty system were arrested and subsequently jailed for 14 years.

A second draft of the constitution was completed in March 1991. It included changes designed to overcome some of the criticisms of the first draft and was submitted to the Politburo for discussion by the Party's Central Committee. Following that discussion a third draft was presented to the Supreme People's Assembly where it was discussed, modified very slightly and adopted unanimously on 14 August 1991.[42]

The 1991 Constitution was amended in 2003 and the amended Constitution promulgated on 28 May 2003. The amended Constitution comprises 11 chapters (10 chapters in the 1991 Constitution) and 98 articles (80 articles). The amendments to the 1991 Constitution are effected by replacing it in its entirety with the 2003 Constitution (hereinafter referred to as the "2003 Constitution").

IV. General Overview and Characterization of the Constitution

The Constitution as promulgated in 1991 was strongly influenced by the socialist Constitutions of the Soviet Union, Vietnam and the People's Republic of Kampuchea.[43] However, those precedents were modified to accommodate the free market economy necessary to attract foreign investment and aid, following the evaporation of socialist economic aid after the collapse of communism in the Soviet Union and the Soviet Bloc.

The current Constitution is described in Article 96 (a new article introduced in the 2003 amendment) as "the fundamental law of the nation", and requires that "All laws must comply with the Constitution."

The order of the chapters of the current Constitution seems indicative of the priorities of the sponsors and drafters of the Constitution.

A feature of Chapter One, "The Political Regime", are the articles designed to ensure the continuation of the Party's monopoly on power. Article 3 installs the Party as the "leading nucleus" of "the political system". This article has its origins in Article 1 of the first draft of the 1991 Constitution which defined Laos as "a people's democratic state under the leadership of the Lao People's Revolutionary Party."[44] Although in the third draft the

41 Martin Stuart-Fox (1991) p.302.
42 Martin Stuart-Fox (1991) p.303.
43 Martin Stuart-Fox (1991) p.317.
44 Martin Stuart-Fox (1991) p.304.

language of this article was softened and it was moved back from first to third, it no less effectively establishes the Party's monopoly on power. Article 3 uses the same terminology as Article 6 of the 1977 Soviet Constitution, which described the Communist Party of the Soviet Union "as the "nucleus" of the political system of the USSR."[45]

The other pillar of the Party's power monopoly is Article 5, which states "The National Assembly and other state organizations are established and function in accordance with the principle of democratic centralism." Democratic centralism was originally an organizational tool employed by communist parties to streamline decision making within the party. It requires that while discussion may occur, usually in secret, before the party makes a decision, once the decision is made all party members are bound by it and criticism is prohibited. In the Lao Constitution this principle has been elevated from a party organizational rule to a constitutional doctrine.[46] Article 5 of the Lao Constitution also appears to have been influenced by the 1977 "Brezhnev" Constitution, Article 3 of which similarly elevated democratic centralism to a constitutional doctrine. S. E. Finer argued that in the Soviet system the combination of the communist party with a constitutional monopoly on political power, democratic centralism and the concentration of powers made the rest of the 1977 Soviet Constitution "decoration".[47] That judgment may not be applicable to the whole of the current Lao Constitution because, unlike the pre-Perestroika 1977 Soviet Constitution, one of the main purposes of the current Lao Constitution was to provide a legal framework that would encourage foreign investment and aid from the West to rescue Laos from economic crisis. However, experience since 1991 indicates that much of the rest of the Lao Constitution could be regarded as "decoration", particularly the articles relating to fundamental rights.

As one of the main reasons for the promulgation of the 1991 Constitution was the need for foreign investment and western foreign aid to strengthen the economy, it is not surprising that Chapter Two deals with the "The Socio-Economic Regime". Despite the reforms already introduced by 1991 to establish a free market economy, the tension between those who supported the continued pursuit of socialist economic policies and those who sought a framework that would attract foreign investment, is evident.[48] In the negotiation and drafting which preceded the promulgation of the 1991 Constitution and again in the 2003 amendments, there is evidence of continuing movement in the direction of market policies, although the compromises required to achieve agreement produced ambiguity and contradictions. For example, in the 1991 Constitution, Article 13 states that the economy is "multi-sectoral"[49] with the objectives of expanding production and increasing

45 Manfred Hornung, Post-Socialist Reforms in the Lao People's Democratic Republic? A New Legal Framework at the Disposal of a Single Party System, an unpublished essay as part of a Master's course, Australian National University (2003) p.23.

46 Manfred Hornung p.25.

47 Manfred Hornung p.23 who refers to SE Finer (1979), Five Constitutions, Harvester Press, Hassocks, p.29.

48 Martin Stuart-Fox (1991) p.307.

49 This probably refers to the five sectors of the economy referred to in the Seventh Resolution of the Supreme People's Assembly in 1979 which acknowledged the need for parts of the capitalist economy to continue to function while the socialist economy was being constructed. The five sectors are the individual economy of private production for

goods in production, and transforming the subsistence economy into a "commodities economy" to raise living standards. However, in the first two drafts of Article 14 the State is also committed to "developing productive forces" by direct State involvement in a broad range of industries. Even the final draft of Article 14 requires the State to protect "state collective and individual ownership." In the 2003 Constitution there is a significant change of emphasis. The economy remains "multi-sectoral" but "is encouraged by the government" to expand, broaden, modernize and integrate into regional and global markets. Nevertheless, the proponents of the old socialist economic policies appear not to have given up completely because although all "enterprises are declared equal before the law and operate according to market principles" they are also to be "regulated by the State in the direction of socialism." [50]

There is similar ambiguity about the security of land tenure. In the first two 1991 drafts of the constitution all land belongs to the "national community, which is represented by the state". In the final 1991 Constitution the application of this provision is restricted to "land which is under the ownership of the national community" and provides an assurance that the State will protect property rights in general. In the 2003 amendment, all land has become "a national heritage and the State ensures the right to use, transfer and inherit it in accordance with the laws." [51]

This highlights an interesting feature of the Constitution. Many of the articles, particularly of the 2003 Constitution, appear to be designed to persuade international and domestic investors to invest, and to encourage international agencies and donors to provide funding. However, some "rights" may be of limited value. Take Article 17. Although "the State ensures the rights to use, transfer and inherit" land, it will do so "in accordance with laws [passed by the National Assembly]". Such laws may severely circumscribe the constitutional "right", it is capable of being interpreted as restricted by subsequent laws. In effect the law will have supremacy over the Constituion because a court must follow the law and has no jurisdiction to consider whether the law is constitutional or not, and so must enforce it despite the constitution.[52]

The struggle between the conservatives wishing to retain the socialist economic controls and those who supported a freer market economy is again evident in the provisions on economic management. [53] The first draft of the 1991 Constitution gave the State considerable power to intervene in the economy. In the second draft, the power of the State was reduced and the importance of the market recognized. The final 1991 version appears to try to please all sides. It accepts that the economy operates as a market economy but reduces the State's role to "adjustment", which can be implemented by a mix of central and provincial

personal gain, the capitalist economy, the collective economy, the state sector and joint state-capitalist ventures. Martin Stuart-Fox. (2002) p.235.

50 Art.13 (all references to articles are to articles in the 2003 Constitution unless otherwise stated.).

51 Martin Stuart-Fox. (1991) p.308 Art. 15 in the 1991 Constitution and Art. 17 in the 2003 Constitution.

52 The only body with power to interpret the Constitution is the National Assembly Standing Committee.

53 Martin Stuart-Fox, (1991) p.308 Art. 16 in the 1991 Constitution and Art. 18 in the 2003 Constitution.

bureaucracies. The two factions seem to have been unable to find the common ground necessary to clarify the role of the State. The 2003 article is essentially unchanged, except that central and local government management is in accordance with laws and regulations, which for the reasons given above offers little comfort to potential investors because it will be the unchallengeable laws and not the Constitution that will determine rights.

Reflecting the importance the Lao Government attaches to encouraging the continued presence of international donors, non-government organizations and foreign investors, Chapter Two of the 2003 Constitution has been expanded from eight to eighteen articles. The last five articles[54] (all new) are at best little more than aspirational statements in which the "State and society attend to" encouraging sport, protecting labour rights, providing social security, protecting women and children, and promoting tourism.

The article on tourism highlights an unsatisfactory feature of the Constitution, because it prohibits tourism that is "detrimental to the fine culture of the nation or which contravenes the laws and regulations."[55] There are several objections to this and similar prohibitions in five other articles.[56] They are so vaguely worded as to be unenforceable in a court system with an independent judiciary, but in the politically controlled Lao justice system they can easily be used in an oppressive manner. In addition, there is no detail on what the consequences of breaching the prohibition will be. The courts have neither the power to interpret the Constitution nor to enforce its provisions or any prohibition within it. The National Assembly Standing Committee ("the NASC") has power "to interpret and explain the provisions of the Constitution" but no formal power to enforce them.[57] The proper place for prohibiting an activity, clearly defining it and spelling out the consequences, is in a law, the constitutionality of which should then be challengeable in independent courts.

The State is also responsible for health[58], education[59], and "cultural activities, fine arts, and inventions"[60]. The State also "attends to improving and expanding the mass media", although rather ominously "for the purpose of national protection and development." The scope for limiting freedom of expression is considerable because mass media activities which "are detrimental to national interest or the fine traditional culture and the dignity of the Lao people are prohibited."[61] The State is also responsible for "the preservation of the national culture."

The importance and power of the defence and security forces are indicated by the insertion in the 2003 amendment of a separate three-article Chapter Three entitled "National Defense-

54 New Arts. 26 to 30.
55 Art. 30.
56 The others are in Arts. 6,8,9,23 and 25.
57 Art.57 (2).
58 Art. 25.
59 Art. 22.
60 Art. 23.
61 Last two paragraphs of art.23.

Security". This new chapter is in addition to Article 11 in Chapter One.[62] National defence and security are the responsibility of the armed forces but also an obligation of all Lao citizens.[63] The national defence and security forces are described as "the main task force in the protection of …peace and social order", which appears to give them an internal policing role, as well as a "national defence" role. As no clear definition is given of "defence and security forces", this leaves room for blurring the distinction between the roles of the police and the armed forces in respect of the policing of civilians. In return for the defence and security forces taking on this responsibility, the State is required to provide materials and training to improve the skills and capacity of the armed forces.[64] These articles do not spell out how the armed forces are to be controlled by and made accountable to the civilian government. In sharp contrast to the vagueness of the articles in the Constitution are the very specific provisions in the Party statute, which state that "The Party directly leads the People's Army and the People's Security Forces in a centralized, uniform and comprehensive manner." This leaves the very clear impression that the Army and the Security Forces are under the control of the Party and not the Government.[65] The last sentence of Art.33 requiring that the "national defence and security forces must endeavor to become self reliant" was presumably inserted to protect and secure the Army's extensive involvement in economic enterprises.

Only in Chapter Four are the "Fundamental Rights and Obligations of Citizens" set out (examined in Section VI below). Chapters Five to Nine set out the composition, roles and duties of the National Assembly, the President, the Government, local government and the courts and prosecutors. These are examined in the next Section.

The articles in Chapter Ten specify Lao as the official language and define the national emblem, the national flag, the national anthem, the national day, the currency and the capital of the country.[66] In Chapter Eleven the Constitution is declared to be "the fundamental law of the nation", which may only be amended by a two-thirds majority of all members of the National Assembly. [67]

V. System of Government

Laos is a unitary state. It consists of 17 administrative units, 16 provinces, and the independent prefecture of the capital, Vientiane. Each province is divided into districts which comprise a number of villages.

At national level, the Constitution appears to provide for the separation of powers by

62 Martin Stuart-Fox (2005) p.10. More than half the members of the Politburo elected in 2001 were Army officers and nearly all Army officers are members of the Party.
63 Article 31.
64 Articles 32 and 33.
65 Stuart-Fox (2002) p.309.
66 Articles 89 to 95.
67 New article 96 & article 97.

formally providing for a head of state (the President of the State), a legislature (the National Assembly), an executive (the Government) and the judiciary. However, an examination of the detail of the provisions of the Constitution regarding these organs reveals that their powers are not fully separate. Moreover, some organs are significantly more powerful than others are, so that the checks and balances that a purer form of the separation of powers might provide are very limited in the Lao Constitution. The relative power of the four organs depends on the power wielded by two other bodies given much less prominence in the Constitution. One of these is the National Assembly Standing Committee ("NASC") which carries out most of the functions of the National Assembly for all but the four to six weeks of each year when the National Assembly is sitting. The other body is the Party, mentioned only once in the preamble and once in the Constitution, which effectively monopolizes power throughout the country by permeating and controlling all the institutions established by the Constitution.[68]

The President

The President of the State is elected by the National Assembly and must secure a two-thirds majority of the votes of members attending the session.[69] The National Assembly may, by a simple majority of members attending the session, also elect a Vice-President.[70] The election of the President and Vice President are among the closely prescribed obligations of the opening session of a new National Assembly, which must be convened within sixty days of the National Assembly election. The President of the State (and presumably the Vice-President) hold office for the same term as the National Assembly, for which the maximum term is five years and runs from the beginning of the opening session until the beginning of the opening session of the succeeding National Assembly.[71] The National Assembly may also remove the President of the State or the Vice President. The type of majority required in the National Assembly for the exercise of this power of removal, is not specified. The National Assembly exercises these powers of appointment and removal on the recommendation of the NASC. [72]

The powers of the President of the State, as presented in the first drafts of the 1991 Constitution, were strengthened and clarified in the final version by the removal of six powers from the NASC that conflicted with the powers of the President.[73] The President

68 Martin Stuart-Fox (2005) p. 8.
69 Art. 66.
70 Art. 68.
71 Art.5 Law on the National Assembly.
72 Art. 53.
73 It is reasonable to infer that the powers of the President of the State were reshaped this way to maintain power balances between the Party faction supporting Kaison, who was the Secretary General of the Party and became the first President of the State, and the faction supporting Nuhak who was the President of the Supreme People's Assembly, and became the President of the National Assembly and ex officio a member of the NASC. This "two line struggle" between Kaison's faction who wanted to reform the economy and Nuhak's faction, for whom the existing economic system provided patronage opportunities, had its origins in the economic reforms of the 1980's.

was also given the power to propose legislation and to ask the National Assembly to reconsider legislation it had passed.[74] Presidential powers were further strengthened in the 2003 Constitution. The President is the head of the armed forces, may order military conscription, may declare national or local states of emergency, confer military and State honours and grant amnesties. The President has the right to convene and preside at "the government's special meetings." This gives him/her the potential to have significant and free ranging influence over government policy as there is no reference to, or definition of, a "special meeting" in the Constitution. (This provision was amended in 2003. The equivalent provision in the 1991 Constitution gave the President the rather vague right to "preside over meetings of the Government when necessary". The right in the 2003 amendment significantly increases the President's power by giving him/her the right to convene as well as chair the "special meetings", the specialness of which may simply be that the meeting has been convened by the President.[75])

The President also has an unfettered power "to issue edicts and decrees." (This power was strengthened by the 2003 amendment which removed the requirement that edicts and decrees be issued on the recommendation of the NASC. The Government now has the right to "submit" decrees to the President.) This executive power to legislate is a very unsatisfactory deviation from the complete separation of powers because it enables the President to preempt or overrule the legislature. Worse still, there is no requirement that the decrees be published so that the President may issue secret decrees.[76]

The 2003 amendment has also clarified the President's role in the selection of the Prime Minister. The President now has an active role in proposing a candidate for the position of Prime Minister to the National Assembly and proposing the removal of a Prime Minister. If the President's candidate is approved by the National Assembly, the President formally appoints the Prime Minister and the members of his/her Government as proposed by the Prime Minister and approved by the National Assembly.[77]

Most other Presidential duties are formalities. They include promulgating the Constitution and laws adopted by the National Assembly, issuing ratifications of treaties and international agreements and appointing or removing the Vice President of the People's Supreme Court and the Deputy Supreme People's Prosecutor (on the recommendation of the President of the People's Supreme Court and the Supreme People's Prosecutor respectively). On the recommendation of the Prime Minister the President appoints, transfers or removes provincial and city governors, promotes or demotes generals, appoints or recalls ambassadors to foreign countries and accepts foreign ambassadors.[78]

Martin Stuart-Fox (1991) p.195.

74 Martin Stuart-Fox (1991) p.311.

75 Art. 70.

76 Somphanh Chanthalyvong, Paper presented at the Asia Forum for Constitutional Law on Constitutional Changes and Asian Constitutionalism in the 21st Century, 22-23 September 2007, Nagoya University, Japan, p.3.

77 Art. 67.

78 Art. 67.

The National Assembly

The Lao legislature is unicameral, consisting solely of the National Assembly. In the first drafts of the 1991 Constitution, the legislative body was named the Supreme People's Assembly but in the final version, it reverted to the name used in previous constitutions, the National Assembly.[79]

The National Assembly is elected for a five-year term. There are currently 115 members of the National Assembly. Elections must be held no later than 60 days prior to the end of the term of the National Assembly and the newly elected Assembly must hold its opening session within that 60-day period. The National Assembly has power to extend its term in the event of "war or any other circumstance which obstructs the election" but must hold the election no later than six months after the "situation returns to normal". The Assembly may also call an early election if two thirds of all National Assembly members vote in favour of an early dissolution.[80]

On paper, the National Assembly appears to have extensive powers "to make decisions on fundamental issues of the country and to oversee the executive…."[81] In practice the Assembly's ability to properly scrutinize legislation, hold the executive to account and consider fundamental issues, is very limited. It is restricted by the lack of capacity of its members and further reduced by its very limited sitting time of four to six weeks per year. So most members perform other functions and are only part-time legislators. The National Assembly and its members are also poorly resourced.[82]

The National Assembly is dominated by the Party. All but two of the members of the current National Assembly are Party members who under the principle of democratic centralism must follow the Party line. The brevity of the sittings and the fact that the agenda of the National Assembly is set by the NASC, which is dominated by members of the powerful Politburo, ensures there is little time for members to raise matters of national importance, although greater discussion by members has been noted in recent times.[83] Another positive development has been the introduction of a limited question time in the National Assembly.[84] Both of these developments have the potential to increase the influence of the Assembly, particularly if its sessions were substantially extended.

The National Assembly has the usual powers of a legislature: to amend the Constitution, to legislate, to set, change and abolish taxes, and to approve the budget and socio-economic plan. It also has the power to grant amnesties, ratify or withdraw from international treaties, decide on matters of war and peace, oversee the implementation of the Constitution and laws and "exercise such other rights and perform such other duties as provided by the laws."

79 Martin Stuart-Fox (1991) p. 311.
80 The power to call an early election was inserted by the 2003 amendment. Art. 54.
81 Art 52.
82 Evaluation of the Implementation of the Rule of Law in Laos PDR, Vientiane (October 2003) UNDP p.8.
83 Martin Stuart-Fox (2005) p.22.
84 UNDP p. 10.

On the recommendation of the President of the State, it may appoint or remove the Prime Minister and appoint or remove the Supreme Public Prosecutor. On the recommendation of the Prime Minister, it may appoint other members of the Government, establish or dissolve ministries and provincial and city authorities, and decide on provincial and city boundaries. On the recommendation of the NASC, the National Assembly may elect or remove the President and Vice President of the National Assembly and the President or Vice President of the State.[85]

All but two of the members of the current National Assembly are Party members.

The Legislative Process

New laws may be proposed by the President of the State, the NASC, the Government, the People's Supreme Court, the Office of the Supreme Prosecutor and the four mass organizations permitted to operate in Laos.[86] The proponent of the law must make a proposal to the NASC explaining the reason for proposing the law, before the law is drafted. The NASC must respond to the proposal within 15 days. The proposing organization must submit the law to the NASC at least 60 days before the opening of the next session of the National Assembly. The NASC then submits the law to the Law Committee and other committees with an interest in the law and must also decide whether to submit the draft law for public consultation. The law is then submitted to the National Assembly for consideration and approval.[87]

Once it has been adopted by the National Assembly, the law is submitted to the President of the State who must promulgate it within 30 days unless the President asks the National Assembly to reconsider the law. If the National Assembly reaffirms the law, the President must promulgate it within 15 days.[88]

The legislative process is very slow. As an example, the drafting of the Law on Local Administration started in 1996 and took until early 1999. It was then in the hands of the NASC for four years and was finally discussed at the April/May 2003 session of the National Assembly and passed at the September session.[89]

85 Art. 53.
86 Art. 59 The four mass organizations are the Lao Front for National Construction, the Federation of Lao Trade Unions, the Lao Women's Union and the Revolutionary Youth Union. All are directed by the Party. Martin Stuart-Fox. (2005) p. 9.
87 Arts. 58 to 60 of the Law on the National Assembly.
88 Art. 60.
89 UNDP p.8.

The National Assembly Standing Committee

The National Assembly Standing Committee is established by the Constitution[90] unlike the other six committees of the National Assembly which are established under the Law on the National Assembly.[91] The Standing Committee includes the President and Vice President of the National Assembly and other members elected by the National Assembly. The number of other members is not specified in either the Constitution, or the Law on the National Assembly. In 2003, the other five NASC members were the chairs of four of the six National Assembly committees and the Chief of the Cabinet (Office) of the National Assembly.[92]

The NASC overshadows the National Assembly which, by virtue of the infrequency and brevity of its sittings and the consequent lack of capacity and expertise of its members, largely rubber stamps matters placed before it by the NASC. [93] For approximately 45 weeks of each year the NASC carries out the duties of the National Assembly, apart from adopting legislation, amending the Constitution and approving the budget and socio-economic plan. The NASC has parallel power to oversee the executive, the people's courts and public prosecutor[94], impose, amend or abrogate taxes and duties, and monitor and improve the implementation of the Constitution and laws. It gets much more opportunity to exercise these powers than the National Assembly does, because of the brevity of sitting sessions. The power to oversee the courts results in practice in the NASC reviewing decisions of the courts, including the People's Supreme Court, at the request of parties to the proceedings or of the Party. A request from the Party to review a case is regarded virtually as an order to overturn the decision, which has significant implications for the separation of powers and the independence of the judiciary.[95]

Even when the National Assembly is in session, its agenda is set by the NASC, which also prepares and reviews draft laws for adoption by the National Assembly. In addition, many of the National Assembly's powers are exercisable only on the recommendation of the NASC. The National Assembly's formal power to appoint the President and Vice President of the State, is exercised only on the recommendation of the NASC. The National Assembly also has the power to approve the appointment or removal of the Prime Minister, on the recommendation of the President of the State,[96] but the NASC has the power to appoint all other ministers and senior officials on the recommendation of the Prime Minister, subject to later approval by the National Assembly[97]. Similarly, while the National Assembly has the power to appoint or remove the President of the People's Supreme Court on the

90 Art. 55.
91 Art. 32 Law on the National Assembly. Under this Article, the National Assembly may establish additional committees "based on the recommendation of the National Assembly Standing Committee."
92 UNDP p.8.
93 UNDP p.10.
94 Art. 56.
95 Somphanh Chanthalyvong, p.3.
96 Art. 53 of the Constitution and Art.3 Law on the National Assembly.
97 Art. 24 Law on the National Assembly.

recommendation of the President of the State[98], the NASC has the power to appoint, transfer and remove "judges of the people's courts at all levels and of the military courts" on the recommendation of the President of the People's Supreme Court.[99]

The Government

The Government is lead by the Prime Minister. The appointment of the Prime Minister is initiated by the President of the State who proposes a candidate to the National Assembly. If the National Assembly approves that candidate, the President of the State then formally appoints the candidate as Prime Minister. The National Assembly may dismiss a Government or a member of the Government by a vote of no confidence. The President may, within 24 hours of such a vote, request the National Assembly to reconsider the no confidence motion. The National Assembly must reconsider the motion within 48 hours of the passing of the original motion. If the motion of no confidence is confirmed the Government or the member must resign.[100]

The Government consists of the Prime Minister, Deputy Prime Minister(s), Ministers and chairs of ministry equivalent organizations.[101] Members of the Government are appointed by the National Assembly on the recommendation of the Prime Minister.[102] The Prime Minister may also appoint, transfer or remove, vice-ministers, vice-chairs of ministry equivalent organizations, deputy governors and deputy mayors.

The Government has the usual duties of an executive including implementing law and policy, proposing new laws, proposing development plans and annual budgets, and ensuring that laws, policies and development plans are carried out.

Local Government

There are three tiers of local government. The top tier consists of the provinces and cities. The middle tier consists of districts and municipalities and the lowest tier consists of villages.[103]

In attempting to re-establish central government's control of the provinces the drafters of the 1991 Constitution, apparently intentionally, removed democracy, popular participation and accountability at local government level. After the 1975 takeover by the Pathet Lao, democratic elections were held at district and provincial level to replace district chiefs and provincial governors with administrative committees. People's committees took over

98 Art. 53 of the Constitution and Art. 3 Law on the National Assembly.
99 Arts. 56 & 81 of the Constitution and Art 24 of the Law on the National Assembly.
100 Art.74.
101 Art.71.
102 Art.53.
103 Art.75.

the administration of villages from village chiefs. In parallel with each administrative and village committee there was a local Party committee and the secretary of the Party committee was often the chair of the administrative or village committee.[104] Although the village and administrative committees were mentioned in the first and second drafts of the 1991 Constitution, they disappeared completely from the adopted Constitution, thereby effectively abolishing the people's committees at all three levels of local government.[105]

This gave the Party much greater control over local government. The provincial governors are also often the local Party secretary. Govenors are appointed by the President on the Prime Minister's recommendation. Deputy governors are appointed by the Prime Minister and district heads are appointed by the governor of each province. Village chiefs are elected in closely supervised elections, from a list of candidates drawn up by the district authorities. There is no village council. Virtually all village chiefs must be Party members and all other local government appointees must be approved by the Party.[106]

The Party

No discussion of the institutions of government would be complete without touching on the role of the Party. Despite it only being mentioned once in the Constitution, real political power lies with the Lao People's Revolutionary Party. The Party controls the Government, the bureaucracy, the army and the judiciary. Virtually all of the leading figures in these institutions are Party members. Ministerial appointments are decided by the Party and rubberstamped by the National Assembly. Deputy Ministers and department heads have to be approved by the Party. The Government "is merely the executive arm of the Party" and no major decisions are taken without reference to the Politburo. Within ministries, the leadership consists of the Minister and Deputy Minister and the president of the Party cell.[107]

The overlap between the Party and the formal organs of government is illustrated by the leadership positions at the time the 1991 Constitution was adopted. Kaison, ranked number one in the Politburo and the president of the Party, became President of the State. Nuhak, ranked number two in the Politburo, was President of the National Assembly (and therefore a member of the NASC), while third-ranked General Khamtai Siphandon became the Prime Minister. When Kaison died in 1992, Nuhak became President of the State and Khamtai became Party president.[108] On Nuhak's retirement, Khamtai became State President as well as Party president.[109] The current President of the State, Lieutenant General Choummali Saignason, is also President of the Party. The current Prime Minister,

104 Martin Stuart-Fox (1997) p.163.
105 Martin Stuart-Fox (1991) p.313.
106 Martin Stuart-Fox (2005) p14.
107 Martin Stuart-Fox (2005) p.9.
108 Martin Stuart-Fox (1997) p.203.
109 Martin Stuart-Fox (2005) p.8.

Bouasone Bouphavanh, is a member of the Politburo as are at least three of his four Deputy Prime Ministers. Two Deputy Prime Ministers are army officers or retired army officers. All but two of the members of the National Assembly are Party members.

The Law on the National Assembly is more explicit than the Constitution in acknowledging the importance of the Party as an institution of government. The National Assembly committees are required to coordinate "with the Party organizations". National Assembly members have a duty "to disseminate the Party's policies, the laws and regulations of the State and the resolutions of the National Assembly", "to participate in meetings and important ceremonies of the Party's organizations"[110] and "to study, comprehend and implement the Party's policies".[111] These provisions are also confirmation that Party policy is as at least as important, if not more important, than the law. The Cabinet (Office) of the National Assembly is required "to liaise and coordinate with the National Assembly committees, the Office of the Party Central Committee, the Office of the President, the Office of the Prime Minister…."[112]

VI. Fundamental Rights

The rights of Lao citizens are set out in Chapter Four, "Fundamental Rights and Obligations of Citizens". Lao citizens have rights to equality before the law,[113] to vote at 18 and stand for office at 20,[114] to gender equality,[115] to education,[116] to work,[117] of movement,[118] to lodge complaints and petitions,[119] to the inviolability of their bodies, honour and residences,[120] to religious belief or non belief,[121] to freedom of speech and assembly[122] and to carry out research, create artistic and literary works and engage in cultural activities.[123]

While this is a reasonably comprehensive list of rights, some internationally recognized rights are not included. In 1990, Amnesty International recommended that the Constitution be amended to include the right to life, prohibitions against arbitrary arrest, incommunicado detention and torture, and that freedom of religion be extended to include freedom to practice and teach religion.[124] These recommendations were not adopted. There is no

110 Art. 43 of the Law on the National Assembly.
111 Art. 47 of the Law on the National Assembly.
112 Arts 39 & 53 of the Law on the National Assembly.
113 Art. 35.
114 Art. 36.
115 Art. 37.
116 Art. 38.
117 Art. 39.
118 Art. 40.
119 Art. 41.
120 Art. 42.
121 Art. 43.
122 Art. 44.
123 Art. 45.
124 Martin Stuart-Fox (1991) p.310.

general prohibition of discrimination on grounds of gender, race, ethnicity, language, religion, political or other opinion, national or social origin, birth or other status. Nor is there any prohibition of slavery, servitude or forced or compulsory labour.

Of greater concern are the provisos attached to some rights that provide the means by which the rights may be circumscribed, if not completely negated. The rights to "engage in occupations", to free speech, assembly and association and the right to conduct research, create artistic works and engage in cultural activities, are only exercisable to the extent that they "are not contrary to the laws." The right to participate in democratic elections may be denied to those whose rights have been "revoked by the court." In Laos, these drafting devices allow plenty of opportunity to render the boldly stated constitutional rights, of little value. There are no effective remedies for a citizen who wants to use to enforce their constitutional rights. By contrast, there are laws which severely curtail rights specified in the Constitution. For example, the Criminal Code of 1989 gives priority to a chapter of "infractions against the Nation's stability and social order" which contains no less than 29 articles of which seven carry the death penalty. Despite the seriousness of the consequences of being convicted of one of these offences the definitions are vague, including "propaganda against the Lao PDR (Article 59), division of solidarity (Article 60), and group gatherings for the purpose of generating turmoil (Article 66)".[125] The vagueness of these definitions, combined with a criminal justice system where judges and prosecutors are members of the Party and bound by the principle of democratic centralism, where judges are in important cases required to consult local coordination committees before hearing cases and where decisions in cases involving political or security issues are routinely submitted to senior Party leaders before being handed down, give the Party the means to repress any dissent, however reasonable and peacefully delivered. The use of provisions of the Criminal Code, only 18 months after the promulgation of the 1991 Constitution, to impose 14 year terms of imprisonment on three senior public officials who had criticized provisions of the draft constitution indicates just how decorative the fundamental rights are. The defendants in that case were convicted and sentenced for distributing letters which criticized "the policy of the Party and the government, the competence of the members of the governing class, the state apparatus and many other aspects" and for having "set up meetings with a group of people while talking about free elections and other issues unfavourable to the [P]arty and government"[126]

Given the Party's determination to retain political power at almost any cost, it is not surprising to find that the rights to free speech, assembly and association are curtailed by the broad definitions in the Criminal Code of "betrayal of the nation", rebellion and of improper gathering and the use of intelligence. Permits are required for any public demonstration and are never granted. A demonstration in 1999 by 30 students calling for greater political freedom was immediately broken up by police who arrested the five ringleaders. Although the trial and its outcome were never reported in the media, it is believed that the students were sentenced in June 2001. One of the students has died,

125 Manfred Horfnung p.15.
126 Manfred Horfnung p.16.

apparently because of mistreatment, two are in prison in Vientiane and the Lao authorities claim not to know the whereabouts of the other two.[127]

Similarly, official approval is required for the formation of associations. While approval is given for associations with financial or economic objectives, any association which might result in gatherings of intellectuals or anyone else who might criticize the government is almost always declined.[128] There is little prospect of the development of a genuine civil society.

Some rights and freedoms are routinely overridden. For example, upland ethnic minority villages are resettled by the government at lower altitudes purportedly to preserve forest resources and improve access to government services. These resettlements are supposed to be voluntary but on some occasions villagers have been coerced into resettling in breach of their right to freedom of settlement.

Christians are regarded with great suspicion and some have been arrested and forced to renounce their faith, in breach of their right under the Constitution to religious belief.

On the positive side, the government has been more active in protecting women and encouraging gender equity, although little action has been taken to reduce the trafficking of women and girls to neighbouring countries.[129]

Press freedom throws up an interesting anomaly in the Constitution. In Chapter Four, "Fundamental Rights and Obligations of Citizens", "Lao citizens have the right and freedom of speech, press and assembly;…"[130]. In Chapter Two, "The Socio-Economic Regime" "media activities which are detrimental to the national interest … are prohibited."[131] The media is tightly controlled in Laos, although in 2004 Stuart-Fox cited the publication of articles on what should be done about illegal logging and prostitution, previously taboo subjects, as evidence that there had been some "loosening up" of media controls.[132]

VII. Constitutional jurisprudence

The 2003 Constitution is described in Article 96 as "the fundamental law of the nation" and requires that "All laws must comply with the Constitution." However, the only body with power to decide whether laws are constitutional is the Standing Committee of the National Assembly, effectively the Party.[133] The lack of any provision for independent judicial review

127 http://www.freedomhouse.org/template.cfm?page=140&edition=8&ccrcountry=159&section=85&ccrpage=37 viewed on 15 February 2008.
128 Martin Stuart-Fox (2005) p.21.
129 http://www.freedomhouse.org/template.cfm?page=140&edition=8&ccrcountry=159&section=85&ccrpage=37 viewed on 15 February 2008.
130 Art. 44.
131 Art. 23.
132 Martin Stuart-Fox (2005) p.21.
133 Art. 56.

of the constitutionality of laws or Government actions, gives the Constitution little value as a means by which ordinary citizens can assert their rights or question the constitutionality of laws or Government actions.

Recently the Ministry of Foreign Affairs has, as part of a proposal to introduce a comprehensive Bill of Rights also proposed that the Supreme Court be given the power to decide on the constitutionality of laws. The proposals have been sent to the Prime Minister's office. If the proposal is accepted, a constitutional amendment would be required and as the legislative process is very slow this significant change is unlikely to occur in the near future.[134]

VIII. Legal System and Rule of Law

Starting from Scratch

The modern Lao legal system is less than 20 years old. Its development has been similar to what occurred in China and Vietnam, both of which abolished their previous legal systems and left law in the hands of the ruling communist party. In Laos since 1989, the Party has begun to appreciate the need for a unified body of law, uniformly applied across the country. While some progress has been made towards that goal, it has been and continues to be, very slow.

In 1975 "socialist law", effectively directives of the Party, replaced the legal system of the Royal Lao regime. Justice was administered by "people's tribunals" which dealt with criminal cases and the suppression of all opposition to the Party. There was no uniformity across the country because local party officials were able to, and did, interpret party directives as they saw fit. This led to excesses including arbitrary arrests based on flimsy evidence of opposing the regime. In 1978, the Party acknowledged these abuses by issuing a decree forbidding arrests without a warrant from a tribunal and restricting arrests to daylight hours. This decree failed to reduce the abuses for reasons that continue to apply today. Firstly, the decree was not widely publicized so few citizens knew about it. Secondly, Party leaders considered that they were above the law or that they were the law.

In a further attempt to ensure the uniform application of justice across the country, the Supreme People's Court was established in 1983 to adjudicate on important cases and to hear appeals from People's Courts.[135] Since 1989, stimulated by the need to create the legal framework in which a market economy might operate and a politico-social environment that might attract foreign aid, the National Assembly has adopted a steady flow of laws. The first four laws adopted in 1989, were the Criminal and Civil Codes and Laws on the Office of the Public Prosecutor and the People's Courts. Ten new laws were passed in 1990, three laws and the Constitution in 1991, none in 1992 or 1993, six (five of which were

134 Somphanh Chanthalyvong, p.2.
135 Martin Stuart-Fox (2005) p.16.

commercial laws) in 1994, six in 1995, two in 1996, five in 1997, one in 1998, four in 1999, three in 2000 and three in 2001. While credit should be given for the progress that has been made toward creating a modern legal framework, the quality of those laws leaves much to be desired. "Laws tend to be superficial (inevitable in view of their brevity) and to contain a number of gaps and inconsistencies. They do not use language in a precise way; expressions are used in one sense at one place and in another at other places. They may cover one aspect of an issue, but provide no information on other aspects or other situations."[136]

The Rule of Law

Enacting laws is only one part of the process of establishing the rule of law. The citizenry must be aware of the laws, understand what rights they have under the laws, have access to legal advice and counsel, have access to courts where their cases can be fairly resolved and be able to enforce any judgment in their favour.

Although many new laws have been enacted, dissemination of the laws to the general public has been "very limited". There seems little interest on the part of government ministries in making an effort to inform all citizens of their rights under the constitution or explain the laws in a manner which the citizens might understand.[137] In part, this is because the laws are not well known or understood by the public officials who are supposed to implement and disseminate them.[138]

The rule of law depends on having a court system in which three parties, (judges, prosecutors and defence lawyers) interact independently according to clearly defined roles. In Laos, neither the judges nor the lawyers are independent. The judges' independence is undermined by the institutionalized interference of the executive and the Party in court proceedings as outlined in the next section. As if that was not enough, the prosecutors have the legal authority to further undermine the courts through use of a power to "monitor and inspect the implementation of laws in the court",[139] to cancel or propose changes to judgments of courts and suspend the enforcement of judgments if they are considered inappropriate.[140]

The legal profession lacks independence. It does not have its own law, operating instead under a Prime Ministerial decree.[141] Since 1991, there has been a Lao Bar Association but it lacks the independence and authority to enforce professional standards on its members. The Minister of Justice retains the power to appoint, remove and suspend members of the Bar Association. The

136 UNDP (2003) p.23.
137 UNDP p.33.
138 Martin Stuart-Fox (2005) p.17.
139 Art. 16 Law on the People's Courts.
140 UNDP p.72.
141 Somphanh Chanthalyvong p.6.

Bar Association itself was suspended for four years before being reactivated by the Ministry of Justice in 1996.

The Constitution provides that defendants in court cases have a right to defend themselves and that "Lawyers have the right to provide legal assistance to the defendants."[142] These noble statements have not been translated into reality. Only one percent of defendants in criminal cases are legally represented.[143] That is perhaps not surprising as there were only 69 private lawyers in Laos in 2003. Although they are very experienced in narrow fields their average age in 2003 was 60. Nor is the situation likely to improve, because law graduates find a career as a judge or prosecutor more attractive than the lonely, low paid, low status occupation of being a private lawyer.[144] Nearly all the lawyers live in Vientiane and those who venture outside the capital cover only five of the eighteen administrative units.[145]

The role of lawyers is further limited by the attitudes of other government officials and some, perhaps initially well-intentioned, legislation. Prosecutors and police discourage defendants from engaging lawyers and most judges do not encourage legal representation. Prosecutors claim, in accordance with the ideology of the French tradition which has traditionally influenced the law of the countries of Indochina, that they represent the interests of the defendants.[146] There is, however, considerable academic debate about French prosecutors' ability to both prosecute and protect the rights of the defendant and there is research suggesting that French prosecutors do not effectively protect the interests of the defendants.[147] It seems much less likely, given the circumstances that prevail in Laos, that Lao prosecutors will be able to balance the conflicting duties of prosecuting and protecting the rights of the defendant.

Provisions in the Law on Civil Procedure and the Law on Criminal Procedure permit parties to be represented by a range of organizations and individuals, who will usually not be legally trained and may not be sufficiently independent. While these provisions may be a well-intentioned means of providing some representation when lawyers are not available, they may also be counterproductive by discouraging the development of an independent legal profession across the country.

Development of the rule of law in Laos is held back by both a lack of resources and unequal distribution of those resources. While the judges, the Bar Association and private lawyers receive little aid, the public prosecutors are "the favourite sons" of both the donor community and the Laos Government. By contrast with the shortage of judges, there are

142 Art. 83.
143 Somphanh Chanthalyvong p.10.
144 Somphanh Chanthalyvong p.6.
145 UNDP p. 117. In 2002, only 19 lawyers and 17 provisional members (under probation for one year) were licenced by the Ministry of Justice.
146 UNDP p.119.
147 See Jacqueline Hodgson, J, 2005, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France,* Hart Publishing, Oxford and Portland, Oregon.

prosecutors in all provinces and nearly all districts. In 2003, there were 524 prosecutors.[148] Like the judges, prosecutors are mostly very inexperienced and they take little part in the proceedings. Prosecutors are appointed, transferred or removed by the Supreme People's Prosecutor, who also supervises their activities.[149] Many owe their appointments to family and political contacts. The Supreme People's Prosecutor is appointed or removed by the National Assembly on the recommendation of the President of the State.[150] The Deputy Supreme People's Prosecutor is appointed by the President of the State on the recommendation of the Supreme People's Prosecutor.[151] The prosecutors are in a strong position to dominate the courts because, unlike the judges, in carrying out their duties they "are subject only to the laws and the instructions of the Supreme Public Prosecutor."[152]

As is perhaps to be expected, given the Party's determination to retain political power while adopting a free market economic system, the courts come closest to the rule of law in their civil and commercial jurisdiction. In these cases the courts' decisions are seen as "fair and the outcomes reasonable." However, few civil cases get to court because the courts are slow, expensive, distant and perceived to be unpredictable. Most disputes are resolved in village mediation which is informal, inexpensive and swift. Only cases that cannot be resolved by mediation, complicated commercial cases and serious criminal cases, are dealt with by the courts. The standard of adjudication in the civil courts is not yet high enough to allay the concerns of foreign investors who fear judicial incompetence and inexperience, contract invalidation, arbitrary adjudication and non-enforcement of judgments.[153] If one of the purposes of adopting a constitution and laws was to encourage foreign investment it seems that Laos still has some work to do. The rule of law is still very weak, even in the civil courts and the success of a commercial venture is still dependent on securing the support of influential people in the Party through their patronage networks. Securing that support is expensive and subject to the political fortunes of patrons. For western business people this is likely to be too complicated. But without investment from diverse sources, Laos risks becoming an economic colony of Vietnam, Thailand and China.

In criminal cases, despite changes to the Law on Criminal Procedure, the trials "are nearly devoid of the rule of law" and "nothing more [than] forgone convictions" that were the standard during the lawless pre-1989 period.[154] Defence lawyers are not always allowed to meet with their client before the trial and do not receive the case file until just before the trial. In some cases, judges confer with the prosecutor before the trial and decide on conviction and sentence. The amended Law on Criminal Procedure provides a range of protections, which should ensure a fair trial for defendants. The issue is whether the judges and prosecutors are allowed to, willing to and have the capacity to, abandon the beliefs

148 Somphanh Chanthalyvong p.5.
149 Art. 87.
150 Art. 53 (8).
151 Art. 87.
152 Art. 88.
153 Somphanh Chanthalyvong p.7.
154 Somphanh Chanthalyvong p.9.

and modes of operation which have become ingrained since 1975, and commit themselves wholeheartedly to making the new procedures work so that trials are fair.

The Courts

The 1991 Constitution recognized the People's Supreme Court, the people's provincial and city courts, the people's district courts and the military courts. In the 2003 Constitution, the judicial branch is defined as consisting of the same courts plus appellate courts.[155] All courts operate as three member benches. The district courts are currently the courts of first instance, although in 2003 there was a suggestion that these courts might be replaced with district mediation units. Fortunately, this change no longer seems imminent. It would have made the provincial People's Courts the courts of first instance and unless the judges of those courts were to sit in the districts of each province on circuit, access to the courts for poor people in remoter districts would be at least limited and at worst, impossible.[156] The three regional appellate courts have been established to hear appeals from provincial courts that were previously heard by the Supreme People's Court. This change has improved access to justice.

The Supreme People's Court is "the highest judicial organ of the State" and administers and reviews the decisions of all other courts, including the military courts.[157] The President of the Supreme People's Court is appointed and can be removed by the National Assembly, on the recommendation of the President of the State.[158] On the recommendation of the Court President, the Vice President of the Supreme People's Court is appointed by the President of the State. All other judges at all levels are appointed by the NASCon the recommendation of the President of the Supreme People's Court.[159] The Supreme People's Court has a full bench of judges though some of the new judges are young and lack experience.[160]

There are insufficient judges for all of the district and municipal courts. In 2003, there were 11 Supreme People's Court judges and 76 provincial court judges but only158 judges for 423 positions in 141 districts and municipalities. (Of these 158 judges only 66 had been formally appointed, the rest were officials co-opted to be judges.) This shortfall resulted in districts being clustered together so that district courts sat in only 46 districts and municipalities.[161] That situation has slightly improved. There are now a total of 283 judges but this is well short of the estimated 732 judges needed by 2020. Potential litigants who do not have the time or money to travel the greater distance to a court in another district

155 Art. 79.
156 UNDP p.50.
157 Art. 80.
158 Art. 53 (This is a new provision. Under the 1991 Constitution the SPC President was nominated by the NASC.).
159 Art 81.
160 In 2003, several judges were aged between 28 and 33. UNDP p.43.
161 UNDP (2003) p.39.

are likely to be deterred from taking claims to the court.

The Constitution requires that judges be independent and strictly comply with the law.[162] However, their decisions are subject to interference by the Party, the executive and the legislature both before and after they are delivered. Instructions issued to lower courts by the President of the Supreme People's Court require judges in important, difficult and complicated cases to consult local coordination committees before hearing the cases. These committees may include the local prosecutor, local government officials, the police, the local office of the National Assembly and state and party organizations. This interference is justified by officials on the basis that the judges are inexperienced, but "it is difficult to see how administrators who have no legal training at all could help."[163] Judgments in cases involving political or security issues are routinely submitted to senior Party leaders before being handed down.[164]

Under the Constitution, Party organizations, state organizations and all citizens are required to respect and implement court decisions when they become final.[165] However, getting a final court decision and then enforcing it can be very difficult. Court decisions are influenced by corruption, a need to ensure that the decision conforms to Party policy (advice on which is often provided by a Party official seeking a particular outcome), and pressure brought to bear by influential friends or relatives of the parties.[166]

Obtaining a judgment from a court, even the Supreme Peoples Court, is not the end of the process. In addition to formal appeals through the courts, the prosecutors at all levels have the right to cancel or propose changes to court judgments or suspend the enforcement of the judgment if it is considered improper. Parties also appeal against court decisions at all levels, to the National Assembly, local authorities or public prosecutors. The enforcement of the judgment is then suspended for however long it takes for the "appeal" to be considered - in some cases as long as five years.[167] Contrary to expectations raised by Government policy papers prior to the 2003 amendment to the Constitution, Article 52 of the 2003 Constitution preserved the status quo by continuing the National Assembly's right "to oversee the activities of … the people's courts." The availability of these extra-judicial appeals is one of the reasons why only ten per cent of judgments are enforced.[168]

162 Art. 82.
163 UNDP (2003) p.44.
164 http://www.freedomhouse.org/template.cfm?page=140&edition=8&ccrcountry=159&section=85&ccrpage=37 viewed on 15 February 2008.
165 Art. 85.
166 Martin Stuart-Fox (2005) p.17.
167 UNDP p.42.
168 UNDP (2003) p.26.

IX. International Law and Foreign Relations

Article 12 of the Constitution commits Laos to a foreign policy of "peace, independence, friendship and cooperation" on the basis of the principles of "peaceful coexistence; respect for each other's independence, sovereignty and territorial integrity; non interference in other's internal affairs; and equality and mutual benefit."

The foreign policy of the Lao People's Democratic Republic has been influenced by the same international and regional developments that have influenced its development as a state. Laos' special relationship with Vietnam was forged during their shared 30 year struggle for independence, by their shared political ideology and by Laos' continuing need for political, military and economic support from Vietnam. This special relationship was formalized in 1977 when Laos and Vietnam signed a 25 year Treaty of Friendship and Cooperation which provided for military cooperation, including the stationing of Vietnamese troops in Laos, economic cooperation and economic and technical aid to Laos, recognition of issues regarding their mutual border and the coordination of their foreign policies.

The special relationship with Vietnam and the Treaty of Friendship did not preclude Laos from maintaining friendly relations with both Russia and China and improving relations with Thailand in the period prior to 1979. However, when the Vietnamese invaded Cambodia, Laos had little choice but to support Vietnam against China, Thailand and the United States, which supported the Khmer Rouge and other rebel groups against the Vietnamese-backed Government of the People's Republic of Kampuchea. Laos, under possible threat from Lao resistance groups supported by the Chinese and the Thais, consolidated its relationship with Vietnam and Cambodia. By the mid-1980s, however, encouraged by the Soviet Union, Laos quietly asserted some independence from Vietnam by gradually improving relations with China to the point where exchanges of high level delegations between China and Laos took place in 1986 and there was continuing growth in trade, aid and political contacts through the 1990s. By the time the Treaty of Friendship was due for renewal in 2004, both Laos and Vietnam were members of the Association of Southeast Asian Nations (ASEAN), and it was celebrated and forgotten.

Surprisingly, relations with the United States were never broken off and Laos was quicker than Vietnam to improve relations with the United States. Full diplomatic relations with the United States were restored in 1992.

Relations with Thailand remained difficult due to a number of border incidents in the 1970s and 1980s and continued Thai support for Lao resistance groups. Despite the strained relationship, trade and Thai investment flourished during the late 1980's and in 1991 there were talks at ministerial level designed to reduce tension.[169]

The Constitution authorises the Government to "sign treaties and agreements with foreign countries and guide their implementation."[170] The National Assembly is required to ratify

169 Martin Stuart-Fox (2002) p.269.
170 Art. 70 (8).

such treaties and obligations and the President to "issue" the ratification of the treaty.[171] There is no explicit provision in the Constitution which automatically incorporates the provisions of a treaty or international obligation into Laos' domestic law. For provisions of a treaty to become part of Laotian law they have to be expressly adopted or incorporated into domestic legislation by the legislature. Although Laos abolished all earlier domestic law in 1975, it did not repudiate international treaties and agreements entered into by earlier governments.

Of the 25 international agreements designated by the Secretary General of the United Nations as core agreements, Laos has acceded to 15 (including two acceded to by the Royal Lao Government). Of the other ten agreements, Laos signed the International Convention on Civil and Political Rights (ICCPR) in December 2000 but has not yet acceded to it. Since 2003, it has been "studying in depth with the intention of signing", the conventions on torture and migrant workers. It has not yet participated in the optional protocols to the ICCPR and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Convention on the Status of Refugees, the two Conventions on Landmines, or the Rome Statute.[172]

Although there is considerable interest in international law from government officials and the staff of mass organizations, there are insufficient personnel with the expertise, skills and English language capability to deal with the complexities of signing, ratifying and implementing treaties and reporting to treaty bodies. Consequently, reporting to treaty bodies has been neglected and little effort has been made to harmonise domestic law with international treaty obligations.

X. Concluding Remarks

An analysis of the Laos constitution in the context of current Lao political culture provides little evidence that at the upper echelons of power the Constitution is taken seriously as a binding basis for the legal system and an effective regulator of the political processes. While the Constitution may establish the formal political institutions, power still lies in the hands of the Party. So despite the Party's claimed commitment to the rule of law, the Constitution fails to guarantee this. There are two reasons for this: firstly there is no constitutional court: the body which interprets the Constitution is political and not judicial; and secondly the Party dominates the courts, either directly or through the legislature.

However, in Laos as elsewhere, constitutional development is ongoing. While the structural features of the Constitution inhibit full acceptance of constitutionalism, small and incremental changes are occurring which may give Laos and its people the confidence gradually to embrace it. Capacity building, exposure to international law and to constitutional development and constitutionalism in ASEAN and other neighbouring

171 Arts. 53(11) & 67(13).
172 UNDP (2003) p.88.

states, will all be important for building that confidence. The increased participation of National Assembly members in Assembly debates and the introduction of question time are examples of the incremental improvements that are occurring in the legislature. In the wider community, citizens are becoming more aware of their legal rights. For example, the Lao Women's Union has taken a keen interest in the implementation of CEDAW and provided a detailed analysis of provisions of Lao laws which are inconsistent with CEDAW, ICCPR, the International Convention on the Elimination of all Forms of Racial Discrimination and the Convention on the Rights of the Child. [173]

At another level, despite the use of vaguely formulated laws for repressive purposes, there has been some loosening of controls; for example, on freedom of the press and freedom of expression. As examples of the latter, cultural cooperation with Thailand has recently included a Lao pop music band playing in Thailand, and joint production of a feature film set in Laos starring Thai and Lao actors. These are welcome freedoms, but controls can easily be arbitrarily tightened again. As for the rule of law, uncertainty over its operation discourages local entrepreneurs and is unacceptable to international investors and business people. Only constitutionalism and genuine rule of law can provide the certainty which investors require. Both are essential if landlocked Laos with its small population is to attract foreign investment. Both are also essential for the welfare and wellbeing of the Lao people.

XI. Further Reading

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173 UNDP (2003) p.89.

Malaysia

THE CONSTITUTION OF MALAYSIA (1957-2007)

Fifty Years, Fifty Amendments and Four Principal Developments

*C. L. Lim**

I. Introduction

Following the independence of Malaya in 1957, during which the *Merdeka* Constitution came into being,[1] Malaysia was formed in 1963 with the addition of the Borneo states of Sarawak and Sabah and also Singapore which later withdrew in 1965. The Constitution of Malaysia today is essentially the 1957 *Merdeka* Constitution as subsequently amended. This chapter resolves itself into ten sections.

The following section provides a short account of Malaysia's history, in particular its constitutional history, focusing on the development of federalism, cabinet government and a parliamentary democracy. Section III goes on to describe the making of the *Merdeka* Constitution by staunch democrats who favoured strong federal government. It also describes how the original inter-communal constitutional bargain was struck due to Malaysia's multicultural nature. Section IV provides an overview of the principal characteristics of the Malaysian Constitution, and dwells on the more significant changes wrought by a total of 50 amendments over the course of the last half century of the constitution's existence. Section V describes Malaysia's system of parliamentary government, the state-federal relationship, the position of the traditional rulers and that of the judiciary. The fundamental rights guaranteed under Part II of the Constitution are addressed in section VI. The treatment has perforce been selective, focusing only on those rights that lie at the heart of contemporary democratic debate – liberty, freedom of expression and of assembly. Special attention is also given to the subject of emergency powers as it has had a considerable impact on Malaysian constitutionalism. Key features of Malaysia's constitutional jurisprudence are addressed in Section VII, followed by a short section, Section VIII, on the rule of law today. Finally, the subject of foreign relations law is dealt with in Section IX. Section X concludes the chapter.

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1 "*Merdeka*" means "independence".

II. Constitutional History and Development

What follows is a rough sketch of three separate threads of development prior to 1957 in relation to the Federated Malay States, the "Unfederated" Malay States and the Straits Settlements.[2] These threads provide the beginnings of Malaysia's early constitutional development.

Colonial Beginnings & the Straits Settlements

According to one account of pre-constitutional history, the story begins in the state of Perak and the Treaty of Pangkor of 1874 according to which a British resident was first sent to advise the Sultan. According to this view, Malaysia's constitutional history is simply the colonial history of British Malaya. But if so, our story should perhaps have commenced with the Anglo-Dutch treaty of March 17th 1824, and which marked the end of colonial competition and the disposition of the Malay Peninsula to Britain's sphere of influence in return for Sumatra which was to fall within the Dutch sphere. As Hickling, who also provides an excellent detailed account of constitutional development during the pre-independence period, wrote "[i]t was in 1824 therefore, that the interests of the British in Malaya were intensified".[3]

But it was as early as 1786 that the East India Company first "purchased" the island of Penang (Prince of Wales Island) from the Sultan of Kedah, followed by the cession of Province Wellesley fourteen years later. In 1805 Penang became a Presidency of India, and was vested with control of Malacca and Singapore in 1826 before falling under the purview of the Governor-General of Bengal in 1930. In 1867, Penang, Malacca and Singapore acquired the status of a separate Crown Colony, replete with its own Governor and Legislative Council.[4]

The Unfederated Malay States

During this period, in the five so-called "Unfederated Malay States" – Perlis, Kedah, Kelantan and Terengganu in the North and Johore in the South - Captain Burney's Treaty of 1826 had recognized the suzerainty of Siam over the four northern states.[5] It was not until 1903 that the Siamese consented to a British Adviser in Kelantan, followed by a similar appointment in Kedah two years later. Siam finally transferred these claims of suzerainty to Britain by the Treaty of Bangkok in 1909.

2 I employ the tripartite categorization in Rupert Emerson, Malaysia, Kuala Lumpur 1964 (University of Malaya), chs. 4, 5 & 6.

3 R.H. Hickling, An Introduction to the Federal Constitution, Kuala Lumpur 1960 (Federation of Malaya Information Services), 1.

4 Id., 1-2.

5 Id., 2.

As for Johore, the most vigorous of all the Malay states in defending her independence, a "General Adviser" did not make his way there until 1914.

From the Federated Malay States to the Federation of Malaya and Malayan Independence

In what eventually became known as the Federated Malay States of Perak, Selangor, Negri Sembilan and Pahang there was great experimentation with the concept of federalism even as early as 1895. Emerson puts it as early as even 1893, and in his landmark work on British rule in Malaya,[6] singled out "the Federation" as the kernel of an inevitable, logical and eventual common union which would embrace the whole of the Malay Peninsula.[7]

In 1895, a federation of the States of Malaya was conceived, to be administered under "British advice". No legislative council was sought to be established however until 1909 comprising the High Commissioner, Resident-General and the rulers and residents of the four States. This was to continue until the next phase of federalist experimentation under the ill-fated Malayan Union which was established in 1946 as part of an attempt (and this was the very source of controversy) to "weld" the nine Malay states, Malacca and Penang into a "single effective political unit".[8] This comprised all the entities described above – i.e. all the Malay States and the original Straits Settlements – with the exception of Singapore which was constituted as a separate colony.

In an adverse reaction to the Malayan Union, ostensibly because it deprived the Malay rulers of their rights, the idea of a *"Persekutuan Tanah Melayu"* (i.e. a "Federation of Malaya") was born.[9] It is noteworthy that this was preferred over the term "Malayan Federation" which suggested inclusion of those who were not Malays.[10] Thus the Federation of Malaya came into being by Agreement and by the (United Kingdom) Federation of Malaya Order in Council on February 1st 1948. It was a federal constitution in the strict legal sense.[11] Its governing structure comprised the High Commissioner, an Executive Council and an embryonic parliament in the form of the Legislative Council. There was also a Conference of Rulers and enlarged state powers with a State Executive Council and a legislative body,

6 Emerson, op. cit., 136.

7 Id., 135, where he writes: "Although the Federation proved speedily to be moving toward centralization, there still remained the Colony and the five unfederated States which continued to go their separate ways despite the obvious tendency to join them together in some sort of common union". Compare the Unfederated Malay States which "form[ed] no single political entity like the Federation" and whose States "have no special inner ties among themselves"; id., 194. Others have emphasized that federalism was not an alien notion transmitted through the colonial encounter, and that it had existed in the *"Minangkabau"* system of Negri Sembilan; Harry E. Groves, The Constitution of Malaysia, Singapore, 1964 (Malaysia Publishing House), 35.

8 Emerson, op. cit., 6. See further Tun Mohd. Suffian, An Introduction to the Constitution of Malaysia, Kuala Lumpur, 1976 (The Government Printer, Malaysia), 7-10 et seq.

9 Emerson, op. cit., 9.

10 Id.

11 Id., 10.

a Council of State, in each of the States.[12] Compared to the Malayan Union idea too, the Federation left the Rulers in firm control of matters of Muslim religion.[13] A final noteworthy aspect was the introduction of nascent cabinet government in 1951 with duly appointed "members" of the Legislative Council being entrusted with responsibility over various departments of Government. In 1952, these members became a part also of the Executive Council. The notion of government comprising a "committee" of the legislature, as Walter Bagehot once described, in other words "cabinet government", was therefore put into effect in British Malaya in that year.

With the 1955 elections, the broader notion of parliamentary democracy also came into being when the Legislative Council witnessed an elected majority for the first time with the Alliance Party securing 51 out of the 52 elected seats. The Alliance went on to press for independence which came in 1957. These discussions which are described in the ensuing section, below, produced the blueprint for what recognizably became the present-day constitution.

III. The Making of the Merdeka Constitution

The Malaysian Constitution today is, essentially, the Malayan Constitution of 1957 (the *Merdeka* Constitution). Its drafting history is, unsurprisingly, a history of the Alliance Party to which the Framers belonged.[14]

On the Structure of Government

What was remarkable was the great unity of vision which the Framers had. There was hardly a murmur of dispute about what form or structure of government an independent Malaya would possess. It was to be parliamentary, cabinet government and this too is not so surprising in light of both the earlier development of constitutionalism in Malaysia discussed in the preceding section, and the training and outlook of the Framers. Neither, it might be said, is the idea of having a constitutional monarchy. It could be said that, in its bare essence, this was practised in the colonial method of rendering British "advice" to the Sultans, and Emerson's explanation was that the idea that the rulers had any real power at all had already been rendered completely fictitious by 1895 when Sir Frank Swettenham, the resident of Perak, was tasked with seeking the approval of the rulers whose four "Southern" States (i.e. with the exception of Johore) were to comprise the Federated Malay States. But Emerson's is only one explanation.

What is more obvious, as Professor Joseph Fernando has recently shown, was that the

12 Id., 11.

13 Id.

14 I avoid the somewhat American term "Founding Fathers" out of respect for common, uncontroversial acceptance amongst Malaysians that there was but one "Founding Father" – Tunku Abdul Rahman.

Framers of the Malayan Constitution – the key Alliance members – were, as a group, staunch democrats. This demanded a parliamentary democracy with a constitutional monarchy.[15] So far as the legislature was concerned, it was to be a Westminster-style bicameral system comprising of an upper house (*Dewan Negara*) and a lower house (*Dewan Rakyat*) with power concentrated in the latter.[16] They also sought the protection of individual rights by an independent Supreme Court possessed of the power to render final interpretations of the constitution,[17] and which therefore required close attention to the separation of powers and the principle of checks and balances,[18] and finally, a Conference of Rulers. These were some of the bare essentials of the Alliance Memorandum.[19]

What also deserves special mention is the balance of federal and state powers as originally conceived. For the Reid Commission, the states were only to exercise residual powers and these were to be relatively inextensive unlike the situation in some other federal systems. In independent Malaya, there would be a strong central government.[20] This is unsurprising where nation-building was based upon prior colonial incursions into state power which had already achieved the diminution of the power of the several rulers. Thus, the Alliance leaders in seeking to forge a nation together, were in some ways working on the basis of already enfeebled state powers and in many ways had a free hand to forge a federal constitution.

The Communal Issues

Citizenship, language and the special position of the Malays were vexed issues in comparison and these were entrusted to a separate committee from that tasked with drafting the Alliance Memorandum's section on the structure of government. The compromise, or what Professor Fernando has called "the inter-communal constitutional bargain", was that the *jus soli* would apply and naturalization would be based on eight years' residence, Malay was to be the official language with Hindi and Mandarin being used in the private sphere, and that the Chinese would be able to preserve their schools, language and culture. On the special position of the Malays, the understanding was that it would be reviewed within a 15-year time-frame but this was not stated in the Memorandum due to its sensitivity but rather it was mentioned to the Reid Commission orally.[21]

Those were the elements ultimately put to a Commission originally proposed in 1954 and which became a principal electoral issue in the 1955 Federal Legislative Council elections. It

15 Joseph M. Fernando, The Making of the Malayan Constitution, Kuala Lumpur 2002 (Malaysian Branch of the Royal Asiatic Society), 92.
16 Id., 69.
17 As well, it seems, as the power to judicial review and overturn contrary legislation, id., 70 (citing the Alliance Memorandum).
18 Id., 69.
19 Id., 68-76.
20 Id., 71.
21 Id., 84-9.

was chaired by Lord Reid (the Reid Commission), comprised a wholly non-Malayan body, and was tasked with the actual drafting of Malaya's independence constitution to replace the Federation of Malaya Agreement.[22] Setting Malaya on the road towards becoming a vibrant democracy while retaining what is peculiar to Malaya's political environment seemed to have been the twin-objectives of the Reid Commission's work, in the hope of resulting in "a blend of Malayan and Euro-American constitutional traditions".[23] In this, the Reid Commission was largely influenced by the Alliance's views (both on the intended structure of government and the communal issues) and the practicability of the eventual product of its work, with the most serious split within the Commission itself caused, predictably, by the communal issues.[24] Amongst the more notable departures from the Alliances' position was the Reid Commission's refusal to stipulate an official religion, citing this as the preserve of the states.[25]

The more notable of the amendments made since 1957 will be discussed in the next section as their frequency and impact have also made them a major feature of the Constitution.

IV. General Overview and Characterization of the Constitution and Constitutional Amendments

Characteristics of the Malaysian Constitution

A number of tensions therefore characterized the aims of the Alliance Memorandum, and consequently the Reid Commission's recommendations and the final product of its work. Lying at the heart of the constitution was an attempt to balance regard for the special position of the Malays with the rights of the other communities. So far as the latter was concerned, we have already seen that an independent, vigorous judiciary would be entrusted with the protection of individual rights and it was thought that this would allay unjustified fears about the need to accord the special position of the Malaya due regard. A related aspect was the question of having Islam as the religion of the federation (Art. 3),[26]

22 See G.P. Means, Malaysian Politics, London, 1976 (Hodder & Stoughton), 170-89; Karl von Vorys, Democracy without Consensus, Princeton, 1975 (Princeton University Press), 122-39; Fernando, op. cit., 95-142 (and further works cited therein).

23 Fernando, op. cit., 97.

24 Id.

25 Id., 129.

26 See further, Fernando, The Making of the Malayan Constitution, op. cit., 138; Ahmad Ibrahim., The Position of Islam in the Constitution of Malaysia in: Tun Mohd. Suffian, H.P. Lee & F.A. Trindade (eds.), The Constitution of Malaysia, Its Development: 1957-1977, Kuala Lumpur, 1978 (Oxford University Press), 41, esp. 48-9. The leading ruling is that of Salleh Abas L.P. in Che Omar bon Che Soh v. Public Prosecutor [1988] 2 M.L.J. 55 (Federal Court, Malaysia): 'The law [i.e. Islamic law] was only applicable to Muslims as their personal law. Thus it can be seen that during the British colonial period, through their system of indirect rule and the establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only…In our view it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word "Islam" in the context of art. 3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void."

while at the same time protecting the freedom of religion.[27] Likewise, the Malay language was chosen as the official language.[28]

Monarchy and democracy too are ideas which exist in tension. It was thought that a constitutional monarchy would not be incompatible with a parliamentary democracy. As for federal-state relations, the Reid Commission favoured federal power and, as Professor Fernando explains, attempted to redress the previous system "whereby the legislative power rested with the Federal government and executive power lay with the States", seeking instead to "enhance the power of central government".[29]

Many of the subsequent constitutional controversies may be looked upon as a result of the tension originally inherent in these opposing ideas of federal-state power, monarchy-democracy, Islam-religious freedom, the special position of the Malays-individual rights, and so on. Viewed this way, and despite occasional heightened controversy over the years, this is all as it should be with a constitution built on compromise. It was the great belief of the Framers that goodwill and a sense of common nationhood would eventually prevail.

Constitutional Rigidity and Major Amendments

The framers would have taken parliamentary supremacy for granted, and yet took the advice of those federalists on the Reid Commission for whom "constitutions which are federal are also supreme".[30] The Reid Commission had proposed that "the method of amending the Constitution should be neither so difficult as to produce frustration nor so easy as to weaken seriously the safeguards which the Constitution provides". Therein lies the tension between the English notion that parliament can do anything but turn a man into a woman, and the opposing idea of constitutional supremacy now contained in article 4 of the Constitution.[31] In Loh Kooi Choon v. Government of Malaysia, it was considered that:[32]

> There should be a certain amount of flexibility so as to allow the country's growth. In any event [the framers] must be taken to have intended that [the constitution] can be adapted to changing conditions, and that the power of amendment is an essential means of adaptation…"The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man. Neither has any generation a property

27 Art. 11. See also arts. 8(2) (non-discrimination, *inter alia*, on the ground only of religion) & 12 (rights in respect of education).

28 For their bearing on constitutional equality in Malaysia, see (e.g.) C.L. Lim, Race, Multicultural Accommodation and the Constitutions of Singapore and Malaysia, Sing. J.L.S., July (2004), 117.

29 Id., 121.

30 Hickling was, here, quoting Wheare; R.H. Hickling, An Overview of Constitutional Changes in Malaysia, in: Suffian, Lee & Trindade (eds.), The Constitution of Malaysia, op. cit., 1, 4-5.

31 Id.

32 [1977] 2 M.L.J. 187 (per Raja Azlan Shah F.J.).

> in the generations which are to follow…It is the living and not the dead, that are to be accommodated" (Thomas Paine, Rights of Man).

The court went on to explain the four separate amendment procedures under the Constitution – (1) the Art. 159(4) procedure relating those parts of the Constitution which simply require an ordinary majority in both Houses, (2) Art. 159(5) amendments which require a two thirds majority in both Houses and the consent of the Conference of Rulers, (3)Art. 161E(2) amendments relating to East Malaysia which require a two-thirds majority in both Houses and the consent of the Governor of the East Malaysian state, and (4) finally, Art. 159(3) amendments which require only a majority of two-thirds in both Houses of Parliament.[33] The most general method is the last, but this too has been the subject of constitutional alteration over time, in particular the shift in the balance of power away from the states and towards the federal authorities within the Senate.[34]

Constitutional supremacy is secure as a matter of orthodox jurisprudence, but against that must be weighed the very fact that the constitution has been amended 50 times in the 50 years between 1957 and 2006.[35] Amongst the more notable of these were those following the formation of Malaysia on 16th September 1963, and the Malaysia Agreement of 9th July 1963 which incorporated Singapore, Sarawak and North Borneo (i.e. Sabah) into the federation. It is sometimes said that this resulted in a "new constitution" altogether for a "newly enlarged nation".[36] The amendments were based upon the negotiations with Sarawak, Sabah and Singapore and led to substantial restructuring of the 1957 constitutional framework, which concerned the judiciary, various questions of citizenship, the distribution of legislative powers, the public services and the protection of the special interests of the two Borneo states and Singapore.

In an important constitutional test case, Kelantan (one of the constituent states of the Federation of Malaya) challenged the formation of Malaysia before the courts. Kelantan argued that the formation of Malaysia required consultation of the original states, consultation of the Rulers in the states, and violation of the Federation of Malaya Agreement of 1957, and unconstitutionality and *ultra vires* on the part of the federal legislature in seeking to enact the Malaysia Act under article 159 of the 1957 Constitution. Kelantan's challenge failed.[37]

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33 Id., 187.

34 See the discussion of federal-state relations, below.

35 One author puts it at 41 times between 1957 and 1996; P.L. Tan, Malaysia in: P.L. Tan (ed.), Asian Legal Systems: Law, Society and Pluralism in East Asia, Sydney, 1997 (Butterworths), 271. The actual number was eventually 42. As at 5th May 2006, the constitution had been amended 50 times; Federal Constitution (as at 5th May 2006), Petaling Jaya, 2006 (ILBS), 203-5.

36 Professor H.P. Lee cites Harry Groves; H.P, Lee, Constitutional Conflicts in Contemporary Malaysia, Kuala Lumpur 1995 (Oxford University Press), 9.

37 The Government of the State of Kelantan v. The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-haj [1963] M.L.J. 355.

Following the separation of Singapore from the federation two years later, Parliament also passed the Constitution and the Malaysia (Singapore Amendment) Act of 1965. This Act purported to grant independence to Singapore, the transfer of federal legislative powers and the powers of the *Yang di-Pertuan Agong* to Singapore and the *Yang di-Pertuan Negara* (i.e. head of state) of Singapore. Other features of the Act consequently touched on the termination of Singapore representation in the Upper and Lower Houses of the federal legislature, treaty succession and so on. Constitutional amendments were effected by the Constitution (Amendment) Act of 1966.[38]

A third major incident was the "May Thirteenth" Crisis of 13 May 1969. This arose from significant opposition electoral gains in the 1969 elections. An emergency was proclaimed under article 150(2) of the Constitution. Following the deliberations of the newly established National Consultative Council, Parliament passed the Constitutional (Amendment) Act of 1971.[39] This led to the insertion of what is now "clause 4" into art. 10. Amongst the changes made were new restrictions on free speech and parliamentary privilege.[40]

Likewise, the enactment of the Internal Security Act in 1960, which serves to perpetuate the emergency power of preventive detention, required constitutional amendment. This amendment, the post-May 13th amendments, as well as other amendments which also granted enlarged emergency legislative powers will be discussed more fully below.[41]

One amendment which is presently the subject of public controversy is the 1988 amendment to the judicial power of the Federation, resulting in what is now art. 121(1A).[42] Art. 121(1A) reads: "The courts referred to in Clause (1) [i.e. the two High Courts of coordinate jurisdiction and such inferior courts as may be provided for under federal law] shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts". Whatever its ultimate legal effect, the intent of art. 121(1A) is clearly to vest certain matters concerned with Islamic personal and family laws within the (exclusive) jurisdiction of the Syariah courts to the preclusion of the two High Courts where previously the civil courts have also been administered by the civil courts.[43]

38 H.P. Lee, op. cit., 10-11.

39 Act A30 of 1971.

40 H.P. Lee, Constitutional Conflicts in Contemporary Malaysia, op. cit., 14.

41 See the discussion on "Fundamental Rights" in Part VI, below.

42 See the Chief Justice of Malaysia's lecture - Tun Dato' Sri Ahmad Fairuz bin Dato' Sheikh Abdul Halim, Recent Developments in Malaysia's Constitutional Law, The 2006 Singapore Law Review, forthcoming in the Singapore Law Review.

43 Mohamed Habibulah b. Mahmood v. Faridah bte. Dato Talib [1992] 2 M.L.J. 793 (*per* Harun Hashim S.C.J.).

V. System of Government: Parliament and the State Senators, the Rulers and the Judges

Aspects of Federal-State Relations[44]

Malaysia is a parliamentary democracy. That usually means a strong executive in the form of a cabinet derived from the lower chamber of the legislature in the English manner. Legislative power was divided according to the Federal, State and Concurrent Lists, with Federal laws prevailing over state laws in the event of inconsistency.[45] The states admittedly possess a residual power of legislation.[46] However, as will be seen below, the federal legislature has the authority to bring the state constitutions in line with the Federal Constitution.[47] Taking parliamentary democracy to its logical conclusion, the executive powers of the states also became co-extensive with the allocation of legislative powers.[48] In a more practical vein, revenue was largely allocated to the federal authorities by making taxation dependent on federal law,[49] and by vesting the Federal Government with control over the ability of the states to borrow or to undertake financial guarantees.[50] Revenue for the states means, largely, revenue from lands, mines and forests.[51] For historical reasons relating to the formation of Malaysia, special negotiated provisions apply to the Borneo states of Sabah and Sarawak. These have to do with revenue.[52] Putting aside such special provisions, it is a general truth that the federal authorities hold the purse strings with all its attendant consequences, especially for the "errant state". On the other side of the equation is the risk that such power may be made to prevail over the need to constantly strive to maintain in good faith the spirit of the original constitutional bargain. In any event, Malaysia is for all intents and purposes a unitary state in an emergency, with then power to legislate on matters exclusively within the competence of the states.[53]

This is not to say that there have not been challenges to federal rule. In addition to Kelantan's challenge during the formation of Malaysia, two further incidents arose which confirmed the significant powers which the federal authorities could wield. The first concerned Sarawak. Generally speaking, a similar system of parliamentary democracy exists at state level as it does at federal level. This was the case in Sarawak where the Chief Minister is the person who commands the confidence of the majority in the state legislature, and is appointed as such by the Governor or the State Ruler as the case may be. In 1966, an attempt was made to oust the Chief Minister of Sarawak. Representations were made to the Governor that

44 See further Tan Sri Datuk Mohd. Salleh bin Abas, Federalism in Malaysia – Changes in the First Twenty Years in: Suffian, Lee & Trindade (eds.), The Constitution of Malaysia, op. cit., 161

45 Part VI, ch. 1, Federal Constitution.

46 Id., art. 77.

47 Id., art. 71 (4).

48 Id., art. 80(1).

49 Id., art. 96.

50 Id. arts. 111(2) & (3).

51 Id., Tenth Schedule, Part II, art. 2.

52 See (e.g.) id., Part VI, ch. 8 & Part VII, ch. 2.

53 Id., art. 150.

the incumbent, Stephen Kalong Ningkan, had lost the support of the majority in the state legislature, and the Governor purported to dismiss Ningkan on that basis. In the resulting proceedings before the High Court of Kuching, Acting Chief Justice Harley distinguished Commonwealth authority and ruled that a vote of no confidence in the state legislature (the *Council Negri*) was a precondition to the Governor's actions under the Sarawak state constitution, and ordered Ningkan's reinstatement as Chief Minister. In response, a request was made by the Alliance majority to convene the state legislature, presumably so that the vote of no confidence might take place. Ningkan instead requested the dissolution of the state legislature of the Governor, and direct elections so that he might take his fight to the voters of that state. The *Yang di-Pertuan Agong* proclaimed an emergency in Sarawak and Parliament passed the Emergency (Federal Constitution and Constitution of Sarawak) Act of 1966 as a means of resolving the political deadlock and the deteriorating situation in that state.[54]

The second incident in 1970 involved Kelantan, and again the federal authorities resorted to emergency legislation in the form of the Emergency Powers (Kelantan) Act of 1977 which extended federal executive authority to Kelantan and transferred state legislative authority to the Ruler of that state – in other words, federal rule. A third attempt to invite federal intervention in Sabah in 1985 failed.

In the earlier years, there was also one particularly noteworthy aspect which it might have been thought was an integral part of the effort to forge the various states into a singular nation. Each state, represented by two senators, would result in the states holding sway in the Upper Chamber by a majority of 28 to 22. The subsequent enlargement of the composition of the Senate (*Dewan Negara*) did not maintain the previous balance of power, and this led both to the diminution of the number of State senators as opposed to federally appointed senators by 28 to 32, and thus the diminution in the sway or influence of the states acting independently of the federal legislators in the Upper Chamber.[55] The expulsion of Singapore caused a further loss of two seats for the States.

Together with the lessons from Sarawak and Kelantan, it can safely be said that federal authority is not only strong under the original design of the framers, but that the Federal Government will not be timorous if it considers that state circumstances warrant federal intervention.[56]

54 Act 68 of 1966.

55 Constitution (Amendment) Act of 1964, s. 6.

56 Compare however the view that the Kelantan and Sabah incidents were political incidents largely confined to the circumstances arising therein; H.P.Lee, Constitutional Conflicts in Contemporary Malaysia, op. cit., 16. See further the engaging study by Bruce Ross-Larson, The Politics of Federalism: Syed Kechik in East Malaysia, Singapore, 1976 (Bruce Ross-Larson).

The Rulers

Malaysia is also a constitutional monarchy. The King (*Yang di-Pertuan Agong*) is elected amongst the nine hereditary rulers who form the Conference of Rulers, and indeed the election of the King is one of the principal tasks of the Conference of Rulers.[57] But the rulers, as well as the King also play a role in the law-making process by assenting to legislation at the state and federal levels, respectively.

The Royal Assent became a matter of intense controversy in 1983 when the Government, it appears, feared the ascension of a "defiant" King.[58] Either the ruler of Perak or Johore it seemed would be next in line for election to the position of the *Yang di-Pertuan Agong* of Malaysia. Both were known to be forceful personalities. In anticipation of the impending ascension, Parliament sought to pass the Constitution (Amendment) Bill of 1983. The aim of which was to amend art. 66(5) of the Federal Constitution regarding the Royal Assent with a "deeming" provision – a Bill is deemed to have received the Royal Assent if such assent has not been provided within fifteen days. The Bill also seeks to effect a similar change in the state constitutions by virtue of the power granted to Parliament to effect such state constitutional amendments under art. 71(4) of the Constitution, mentioned earlier above. Finally, the Bill sought to amend art. 150 to make a proclamation of emergency dependent not on the King's satisfaction, but the Prime Minister's instead.

The King refused to assent to the Bill thus raising also the question of art. 38(4) of the Constitution, which states that no law directly affecting the privileges of the Rulers shall be passed without the consent of the Conference of Rulers. The provision is further reinforced by, *inter alia*, art.38(6) which states the Conference of Rulers are to act in their discretion in giving or withholding their consent where the proposed law affects the "privileges, position, honours or dignities of the Rulers".[59] Eventually, agreement was reached between the Rulers and the Federal Government and the Bill passed as the Constitution (Amendment) Act of 1983. The agreement between the Rulers and the Government then led to the Constitution (Amendment) Act of 1984 which revised the 1983 Act passed the previous year. This removed the proposal to amend the state constitutions as well as the proposal to replace the King's satisfaction with the Prime Minister's in relation to proclamations of emergency. As for the "deeming" provisions, the new Art. 66(4B) and the consequential amendment to Art. 66(5) of the Constitution now provides for a period of thirty days as well as a provision for the King to return a non-money Bill within that period stating the reasons for his objection but without prejudice to the operation of the new thirty-day rule – that, essentially, was the compromise reached.

Ten years later, in 1992, another controversy arose over the privileges and immunities of the rulers. The ostensible basis of the constitutional amendments which followed was the assault of a school master by the Sultan of Johore. The Conference of Rulers rejected

57 Federal Constitution, art. 38(2) & Third Schedule.
58 Lee, Constitutional Conflicts in Contemporary Malaysia, op. cit., 26.
59 Id., 29 et seq.

the original Bill, upon which a second draft was produced providing for a Special Court instead of the jurisdiction of the ordinary courts. The second draft secured the requisite two-thirds majority in both the House of Representatives and the Senate, and was finally passed in 1993 following the acceptance of certain amendments proposed by the King.[60] The principal amendment was made to what are now arts. 181(2) and (3) of the Federal Constitution, which remove the personal immunities of the rulers. A consequential amendment was made by inserting a new clause 12 to art. 42 concerning the power of pardon so as to avoid the King or a ruler pardoning himself, his consort or his children. A further amendment was made to arts. 63 and 72 restoring the privilege of members of Parliament and state legislative assemblies to criticize the Malay Rulers while retaining the prohibition on any advocacy of the abolition of the constitutional position of the King or that of the state rulers. As we will see below in the discussion of fundamental rights, the Constitution (Amendment) Act of 1971 had earlier inserted a new clause 4 in art. 10 of the Constitution with the aim of abolishing privilege in respect of speech criticizing the rulers and of the King, thereby allowing the prohibition of such speech as sedition.

The Judges

An incident in 1988 which attracted wide international attention concerned the suspension and subsequent removal of the then serving Lord President, Tun Salleh Abas.[61] While the facts are not undisputed, it appeared that in the face of criticism by the executive branch of the judiciary, the Lord President's remarks about interference with the judiciary had incurred displeasure in the King whose power to remove a judge rests on Prime Ministerial advice.[62] In essence, what occurred was a tussle between the Mahathir Administration and the judiciary. A Tribunal was convened as was required under the constitution, but here matters became more complex. The Lord President sought to prevent the Tribunal from making its recommendation alleging irregularities pertaining to its composition, amongst other matters. A special sitting of the Supreme Court ruled in favour of the Lord President. The Supreme Court judges were themselves suspended, and a second Tribunal was convened to make a recommendation in their case. The end result was that the Lord President was removed together with two of the five Supreme Court judges who heard his case for a limited stay. This incident has been widely seen as a blow to the independence of the Malaysian judiciary.

60 See id., 90-3 for a concise explanation of the amendments.

61 Id, ch. 3. Andrew Harding, Law, Government and the Constitution in Malaysia, Kuala Lumpur 1996 (Malayan Law Journal), 142-8; Andrew Harding, The 1988 Constitutional Crisis in Malaysia, I.C.L.Q., Vol. 39 (1990), 57; F.A. Trindade, The Removal of the Malaysian Judges, L.Q.R., Vol. 106 (1990), 51; R.H. Hickling, The Malaysian Judiciary in Crisis, Public Law (1990), 20; A.J. Harding, The Malaysian Judiciary Crisis, Commonwealth Judiciary Journal, Vol. 8 (1989), 3.

62 Federal Constitution, art. 125(3), subsequently amended by the Constitution (Amendment) Act of 1994,. Act A885 of 1994.

The whole affair put Malaysian constitutionalism to the test insofar as it had something to do with the Prime Minister expressing the view that he was dissatisfied with recent judicial interpretations of parliamentary legislation. In his view, it was for the courts to follow what Parliament intended; it was not for Parliament to duck around judicial obstacles instead. For those for whom the Constitution means what the judges say it means because the judges have the task of interpreting the law, and the Constitution is simply the highest law, the entire affair led to the diminution of the role of the judiciary in Malaysia. I shall return to this in discussing the rule of law, below.

Insofar as the system of government in Malaysia envisages a role for the monarchy and the courts as part of a system of checks and balances, the diminution of the rulers and the courts has thereby resulted today in a great shift of power in the direction of the Executive Branch.

VI. Fundamental Rights

Constitutional Rights

Mention has already been made of the central role given to fundamental rights in the design of the framers as a counter-balance to constitutional recognition of the special position of the Malays. That at least was the original intent but we have seen that the Constitution has been subject to amendments which have trimmed away some of that original intent. The courts for their part have not generally considered Parliament's power of constitutional amendment, even where it comes at the expense of fundamental rights, to be outside the bounds of constitutional permissibility. In *Loh Kooi Choon*, Raja Azlan Shah F.J. considered that:[63]

> The framers of our Constitution have incorporated fundamental rights in Pt. II thereof and made them inviolable by ordinary legislation. Unless there is a clear intention to the contrary, it is difficult to visualize that they also intended to make those rights inviolable by constitutional amendment. Had it been intended to save those rights from the operation of clause (3) of Article 159, it would have been perfectly easy to make that intention clear by adding a proviso to that effect. I am inclined to think that they must have had in mind what is of more frequent occurrence, that is, invasion of fundamental rights by the legislative and executive organs of the State by means of laws, rules and regulations made in exercise of legislative power and not the abridgment of such rights by amendment of the Constitution itself in exercise of the power of constitutional amendment.

Both after May 13th, and also in the enactment of wide emergency powers generally, Parliament has acted to abridge fundamental rights contained in the Constitution by way of amendment.

63 [1977] 2 MLJ 187.

Part II of the Constitution protects liberty (art. 5), equality (art. 8), freedom of speech, assembly and association (art. 10), freedom of religion (art. 11), rights in respect of education (art. 12) and rights to property (art. 13). It prohibits slavery and force labour (art. 6), as well as retrospective criminal laws and repeated trials (art. 7), banishment and protects freedom of movement (art. 9). Some rights distinguish between citizens and others – e.g. the rights to equality, freedom of movement, freedom of speech and assembly while others do not draw that distinction.

Some Restrictions on Rights

It should also be mentioned that the inclusion of some of these rights in the Constitution does not mean that they did not previously exist under Malaysian law. The effect instead is that, *generally* speaking, they are now entrenched insofar as their abridgment would require the two-thirds majority requirement for a constitutional amendment. Having said that, there are exceptions.

Rights may be abridged under the constitution's emergency provisions; namely, by simple Parliamentary majority under art. 149 or art. 150, or by the *Yang di-Pertuan Agong* under art. 150 during an emergency. Call this the first exception, and more will be said in the following section below in the section dealing with emergencies. Secondly, where a right is expressly made subject to law, legislation passed by a simple majority *may* also suffice – one example given for this is in respect of the freedom of movement.[64]

Liberty

Following the Communist Insurgency which began in 1948, the pre-independence Emergency Regulation Ordinance of 1948 was passed and that Ordinance as well as subsidiary legislation made thereunder were carried over following independence in 1957. In 1960, it was decided that emergency regulation would be retained under the new Internal Security Act of 1960 which preserved preventive detention (i.e. so-called "detention without trial"). Article 149 of the Constitution (legislation against subversion) was also amended to avoid inconsistency with art. 5 (liberty) of the Constitution.[65]

Originally it might have been thought that the 1960 amendment would nonetheless require preventive detention cases to be linked to organized violence or, even more narrowly, to organized violence committed by the Malayan Communist Party.[66] This view

64 See (e.g.) Suffian, An Introduction to the Constitution of Malaysia, op., cit., 206-7; R.H. Hickling, Malaysian Public Law, Petaling Jaya, 1997 (Pelanduk Publications), 130-131 (discussing the 1976 amendment to art. 5(4)).

65 Hickling, Malaysian Public Law, op. cit., 129.

66 A related aspect concerns the power of the judges to review preventive detention orders, and this will be discussed under the heading "Emergency Powers" below.

was rejected in a ruling by Salleh Abas L.P in *Theresa Lim*. [67] In 1989 the Act was amended so as to preclude judicial review of detention orders altogether.[68] Under the doctrine of constitutional supremacy the Act would have been subject to the terms of the Constitution, but in this case the Act falls under the category of legislation against subversion in art. 149 of the Constitution and is thereby insulated from constitutional review by the terms of article 149(1).

By way of the Constitution (Amendment) Act of 1978,[69] the grounds for Parliament's special powers had already been expanded such that "action taken or threatened by any substantial body of persons (whether inside or outside the country)…which is prejudicial to the security of the Federation or any part thereof" would include such action which is also "prejudicial to public order". Likewise, in 1981, the constitution was amended to allow confiscation of property used for subversive purposes notwithstanding art. 13's constitutional guaranty of property. The 1981 amendment was part of a slew of amendments designed to address a Privy Council ruling which we will discuss further, below.[70]

Freedom of Speech and Assembly

Mention has been made of the abridgment of free speech following the events of May 13th. An emergency was swiftly proclaimed, following which amendments were made to the Sedition Act of 1948 by the Emergency (Essential Powers) Ordinance 45 of 1970. The new sections are 3(1)(f) and 3(2). Section 3(1)(f) today makes it unlawful to question the "four sensitive issues"; namely, citizenship, the national language, the special rights of the Malays and the sovereignty of the rulers. The Constitutional (Amendment) Act of 1971 effected constitutional amendments along the same lines abridging the right to free speech in article 10 of the Constitution by way of the insertion of a new "clause 4".[71] More generally, section 3(1)(a) of the Sedition Act contains a "catch-all" clause. According to a well-known ruling in the Malaysian courts, speech amounts to sedition under section 3(1)(a) if "used naturally, clearly and indubitably" it "has the tendency of stirring up hatred, contempt or disaffection against the Government". So far as "disaffection" is concerned, it has been defined to mean "the implanting or arousing or stimulating in the minds of the people a feeling of antagonism, enmity and disloyalty tending to make government

67 Theresa Lim Chin Chin & Ors. v. Inspector General of Police [1988] 1 S.C.R. 141. Salleh Abas L.P. who was asked to consider the Reid Commission's report and speeches made by the late Prime Minister Tun Abdul Razak in Parliament refused to be ruled by the legislative history of the Act. This ruling was confirmed in a later case before the Supreme Court in Mohamed Ezam bin Mohd. Noor v. Ketua Polis Negara and Other Appeals [2002] 4 MLJ 449, 493 (per Mohamed Dzaiddin C.J.).

68 Internal Security (Amendment) Act 1989, Act A739 inserting what is now "Section 8B" of the Act. Se further, Michael Hor, Law and Terror: Singapore Stories and Malaysian Dilemmas in Victor V. Ramraj, Michael Hor & Kent Roach (eds.), Global Anti-Terrorism Law & Policy, Cambridge, 2007 (Cambridge University Press), 273; Hickling, Malaysian Public Law, op. cit., 127-130.

69 Act A 442 of 1978.

70 See the discussion on the "Emergency Nexus", below.

71 Act A30 of 1971.

insecure".[72] Other provision of the Sedition Act – paragraphs (d) and (e) - capture speech "which is apt to produce conflict and discord amongst the people or create race hatred".[73] A further noteworthy aspect is that the law of sedition in Malaysia extends also to Parliamentary speech which ordinarily would have been immune under the doctrine of Parliamentary privilege. That doctrine is enshrined in art. 63 of the Constitution. However, the Constitutional (Amendment) Act of 1971 has now inserted an exception to parliamentary privilege in "clause 4" of art. 63 and which allows, *inter alia*, prosecutions under the Sedition Act to be brought notwithstanding the fact the impugned speech amounts to parliamentary speech.[74]

In addition to speech restrictions in the Internal Security Act and the Sedition Act, other restriction to speech may also be found in the Official Secrets Act of 1972 and the Printing Presses and Publication Act of 1984.[75] There are also significant restrictions on the closely related expressive right of freedom of assembly through a further slew of legislation; namely, the Penal Code,[76] the Societies Act of 1966, the Police Act of 1967,[77] the Education Institutions (Discipline) Act of 1976,[78] Public Order Preservation Act,[79] and the Trade Unions Act.[80]

The Emergency Powers Regime

This account is selective and we only touch on a few major constitutional exceptions to freedom of liberty, speech and expression.[81] But no account of restrictions on rights would be complete without a fuller appreciation of the Malaysian regime of emergency powers. Malaysia has never formally ceased to be in a state of emergency.

The birth of the nation was marked by the communist insurgency. In a sense, it has yet to overcome that historical legacy. None of the four emergencies formally proclaimed since independence – the federation-wide emergency in 1964 caused by confrontation with Indonesia, the 1966 state-wide emergency in Sarawak, a federation-wide proclamation following the May 13th incident in 1969, and finally, the 1977 emergency in Kelantan - have been revoked.[82]

72 Public Prosecutor v. Ooi Kee Saik [1971] 2 M.L.J. 108 (High Court, Malaysia) (per Raja Azlan Shah J.).
73 Id.
74 See further Mark Koding v. Public Prosecutor [1982] 2 M.L.J. 120.
75 Act 88 of 1972, and Act 301 of 1984, respectively.
76 F.M.S. Cap. 45.
77 See Pendakwa Raya v. Cheah Beng Poh & Ors. [1984] 2 M.L.J. 225.
78 Act 174 of 1976.
79 Act 296.
80 Act 262.
81 For rights in respect of education and property rights, see the chapters by Dato' Visu Sinnadurai and A.J. Harding in F.A. Trindade & H.P. Lee (eds.), The Constitution of Malaysia, Further Perspectives and Developments: Essays in Honour of Tun Mohamed Suffian, Kuala Lumpur, 1986 (Fajar Bakti), 46, 59.
82 Although the Privy Council had ruled in Teh Cheng Poh v. Public Prosecutor [1980] A.C. 458 (*post*) that the 1969 emergency terminated the earlier ones by implication.

The key constitutional provisions are articles 149, 150 and 151. Article 151, of which more will be said, provides certain procedural safeguards to the powers supplied by articles 149 and 150. Article 149 deals with legislation against subversion while article 150 deals with the *Yang di-Pertuan Agong's* power to proclaim an emergency. In essence, Parliament is required to be summoned by the *Yang di-Pertuan Agong* "as soon as may be practicable", that is what the Constitution says and Parliament may then revoke the *Yang di-Pertuan Agong's* emergency proclamation, but there is a saving clause to the effect that such a revocation shall not affect such ordinances which His Majesty may have promulgated during the emergency. A further significant feature, which is best explained on democratic grounds, is that Parliament's art. 149 powers are far wider, in fact extraordinarily wide in an emergency, when compared to the *Yang di-Pertuan Agong's* powers under art. 150. The breadth of those powers is the basis of Parliament's constitutional authority to abridge the fundamental rights otherwise guaranteed under the Constitution.[83] We have already noted the Internal Security Act which was passed pursuant to Parliament's power to legislate against subversion under article 149, as well as the emergency amendments to the Sedition Act of 1948. The seminal case before the courts was *Karam Singh* in which the Federal Court ruled that it would not review preventive detention made pursuant to art. 149.[84] We have already discussed the ouster clause in (what is now) section 8B of the Internal Security Act. That provision seeks to preclude judicial review, and was inserted in 1989.[85] But this is not the end of the matter.

The more recent case of *Mohamad Ezam* is also worthy of mention. Following the arrest of various followers of deposed Deputy Prime Minister, Anwar Ibrahim, during the Mahathir Administration the Malaysian Federal Court, in a curious decision by an extraordinary bench of five judges as opposed to the normal quorum of three, ruled the prior police detentions to be *mala fides* and illegal in contrast with the non-justiciability of the subsequent Ministerial order.[86] While that did not suffice to change the outcome of the case, and the ruling was largely symbolic, it does demonstrate what one long-standing observer has termed "a demonstration of judicial resistance".[87] In legal terms however, several prior rulings to the contrary (i.e. that the police detention order too was unreviewable) were overturned.

In addition, there is at least one major, general exception to the *Karam Singh* ruling. *Karam Singh* itself had allowed the possibility that, although the courts would not review the Minister's discretion, a detention made in bad faith (i.e. on irrelevant grounds) can indeed be challenged. The burden of proof is on the detainee and as Abdoolcader J. once observed,

83 Harry E. Groves, Fundamental Liberties in the Constitution of the Federation of Malaysia in: Suffian, Lee & Trindade (eds.), The Constitution of Malaysia, op. cit., 27, 35.

84 Karam Singh v. Mentri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 M.L.J. 129.

85 See our discussion in the section on "liberty" above.

86 S. 73 of the Internal Security Act authorizes the police to arrest and detain a person if they have reason to believe that there are grounds to justify ministerial detention or that the person is likely to act in a manner prejudicial to the security of Malaysia.

87 Mohamad Ezam bin Mohamad Noor v. Ketua Polis Negara [2002] 4 M.L.J. 449. See further Hor, Law and Terror: Singapore Stories and Malaysian Dilemmas, op. cit., 287-8.

presents a significant challenge for the detainee: "The onus of proving mala fides on the part of the detaining authority is on the applicant and is normally difficult to discharge as what is required is proof of improper or bad motive in order to invalidate the detention order for *mala fides* and not mere suspicion".[88] It has been said however that this is confined to review of the grounds stated on the detention order and not review of the facts which the Minister relied upon.[89]

For completeness, there was also a noteworthy ruling in *Re Tan Boon Liat* in 1977 where the Federal Court upheld a challenge to the detention order on the basis that an Advisory Board which was required to make a recommendation to the *Yang di-Pertuan Agong* within three months had failed to do so, and thus the continued detention beyond that three month period violated the procedural safeguards in article 151 of the Constitution.[90] That loophole was swiftly closed by constitutional amendment to article 151(1)(b).[91]

The "Emergency Nexus"

We have already seen that Parliament's art. 149 powers allow for the abridgment of arts. 5 (liberty), 9 (prohibition of banishment and freedom of movement), 10 (freedom of speech, assembly and association) and 13 (right to property).[92] Since such abridgments of fundamental liberties depend on the emergency powers granted under the Constitution, it might be asked whether these incursions into the fundamental rights also guaranteed under the Constitution may be questioned by way of questioning whether there is indeed an emergency justifying the particular abridgment.

Here, we should mention the *Teh Cheng Poh* case in closing.[93] In that case, the Privy Council ruled that the executive promulgation that was purportedly the basis for a criminal trial tried under emergency procedure lapsed when Parliament resumed. But it avoided dealing with whether the 1969 emergency proclamation was still in force considering that the cause for that proclamation (i.e. an emergency) had ceased to exist. As for the power to proclaim an area a security area under the Internal Security Act (indeed the government's

88 Yeap Hock Seng @ Ah Seng v. Minister for Home Affairs, Malaysia & Ors. [1975] 2 M.L.J. 279 (High Court, Malaysia) (per Abdoolcader J.). See also Tan Boon Liat [1976] 2 M.L. J. 83 (Abdoolcader J.).

89 Minister for Home Affairs, Malaysia & Anor. v. Karpal Singh [1988] 3 M.L.J. 29 (Supreme Court, Malaysia) (per Abdul Hamid, Acting L.P.) which sought to narrow the effect of Abdoolcader J.'s reading of Karam Singh's mala fides "exception" by distinguishing between the facts relied upon by the Minister (which would be unreviewable) and the grounds stated in the detention order (which would be reviewable on the basis of the exception).

90 Re Tan Boon Liat @ Allen & Anor et al; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri & Ors. and Other Appeals [1977] 2 M.L.J. 108 (Federal Court, Malaysia).

91 Constitution (Amendment) Act 1976. The amended provision now reads: "no citizen shall continue to be detained… unless an advisory board…has considered any representations made by him…and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow". See further Groves, Fundamental Liberties in the Federal Constitution of Malaysia, op. cit., 36-7.

92 Art. 149(1), Federal Constitution.

93 Hor, Law and Terror: Singapore Stories and Malaysian Dilemmas, op. cit., 290 et seq.

view was that the whole of Malaysia was, and was declared to be, a security area), such a proclamation was reviewable, at least as a matter of legal principle. Failure to revoke such a proclamation would amount to abuse of discretion. In theory at least, the Privy Council's ruling opened the door to judicial review of emergency proclamations. Parliament reacted through the Constitution (Amendment) Act of 1981 which we mentioned earlier above,[94] which inserted what is now art. 150(8), for example, into the Constitution. It states that the *Yang di-Pertuan Agong's* satisfaction that a grave emergency or similar situation exists "shall be final and conclusive and shall not be challenged or called in question in any court on any ground". It also extended the class of threats to which such a grave emergency would relate under art. 150(1) by including a threat to "public order", and not simply to the "security" or "economic life" of the Federation.[95]

It is not difficult to imagine that these amendments to art. 150, particularly the 1981 amendments, do not simply represent an incursion into individual rights but that they could, potentially, cause "the permanent eclipse of constitutional government" altogether in the words of Professor H.P. Lee.[96]

VII. Constitutional jurisprudence

Some well-known rulings have already been mentioned especially in discussing the various amendments and the question of fundamental rights. Some of these rulings go to the heart of fundamental issues. One result is the constitutional balance being tilted against the generous construction of fundamental rights. In *Loh Kooi Choon*,[97] Raja Azlan Shah F.J. (as he then was) considered that Parliament, so long as it complied with the criteria for amendment stipulated in the constitution, should be allowed to adapt the Constitution to changing circumstances. If he is correct, the practice of constantly amending the Constitution is not only permissible, it is exactly as it should be.

In *Loh*, the argument was raised as to whether there may be implied limits to the power of amendment; limiting the amending power only to such amendments which do not violate the "basic features" of the Constitution. It was argued further that Parliament's power to amend does not extend to the abrogation of a fundamental right – i.e. that the fundamental rights are a basic feature of the Malaysian Constitution. This basic features doctrine is an idea which originates from the jurisprudence of the Indian Supreme Court.[98] But we have seen that Raja Azlan Shah F.J. (as he then was) rejected outright the idea of

94 Act A514 of 1981.

95 See further H.P. Lee, Emergency Powers in Malaysia" in: Trindade & Lee (eds.), The Constitution of Malaysia, Further Perspectives and Developments, op. cit., 135, 147 et seq. This incident is also widely believed to have precipitated the final abolition of appeals to the Privy Council; see Victor V. Ramraj, The Teh Cheng Poh Case in: Andrew Harding & H.P. Lee (eds.), Constitutional Landmarks in Malaysia: The First Fifty Years, 1957-2007, Kuala Lumpur 2007 (Malayan Law Journal/LexisNexis), 145, 150.

96 Id., 35.

97 [1977] 2 M.L.J. 187.

98 Kesavananda Bharati & Ors. v. The State of Kerala & Ors., A.I.R. 1973 S.C. 1461 (Supreme Court of India).

such a limitation on Parliament's power of amendment.[99] Wan Suleiman F.J. while finding the amendment in question valid on account of the difference between a "reasonable abridgement" and an *"abrogation"* was content to leave open the "broader issue of whether the power to amend includes the power to abrogate a fundamental right". He did not "feel that the issue before this court would call for my view on whether there are indeed inherent or implied limitations to the power of amendment under art. 159".[100] Might it be that the Malaysian courts will find such implied limits one day? For now at least that seems an extremely remote possibility.

In *Loh*, some might argue, the fundamental rights had therefore become no more fundamental than what Parliament's power to amend would allow. Raja Azlan Shah F.J. had considered that if a further degree of entrenchment than the two-thirds majority procedure was intended, the framers would have said so explicitly. This was as much as could be conceded to the original constitutional bargain. And thus the impression that the courts have not been venturesome in the generosity which they accord to the construction of the fundamental rights is also given confirmation by the textualist and originalist view that Parliament "would otherwise have said so".

Elsewhere, emphasis has been given to the idea that the rights of Malaysians cannot but be limited and that "[t]here cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint; for that would lead to anarchy and disorder".[101] Its corollary is sometimes found in a wide reading of governmental power. Mention has been made of *Theresa Lim* in which Salleh Abas L.P. (as he then was) ruled significantly in favour of a broad reading of the power of preventive detention.[102] *Karam Singh* has likewise served to insulate the Minister's discretion largely from challenge,[103] even if *Re Tan Boon Liat*,[104] and the more recent case of *Mohamad Ezam*, have struck a more progressive note[105] But in *Tan* the result was a constitutional amendment, as an example of the recurring tendency not only to use constitutional amendments to adapt the *Merdeka* Constitution to new circumstances, but to curb judicial rulings. Indeed, in the sphere of free parliamentary speech, we have another example of further amendment piled upon earlier amendment where an abridgment of the right by constitutional amendment was later partially retracted by a latest amendment which nonetheless continued to specify the exact bounds of permissible speech instead of leaving that to the courts. Arguably, parliament has an interest in doing so where it concerns parliamentary speech, but such examples have further reinforced the strong impression that fundamental rights are no more so than what the requirements of constitutional amendment would allow, with the result that the courts have had a lesser role to play in rights protection than was originally envisaged in the original scheme of the Constitution.

99 See also Phang Chin Hock @ Ah Tee v. Public Prosecutor [1980] 1 M.L.J. 70 (Federal Court, Kuala Lumpur) (*per* Suffian L.P.).
100 [1977] 2 M.L.J. 187.
101 Public Prosecutor v. Ooi Kee Saik [1971] 2 M.L.J. 108 (High Court, Malaysia).
102 [1988] 1 S.C.R. 141.
103 [1969] 2 M.L.J. 129.
104 [1977] 2 M.L.J. 108.
105 [2002] 4 M.L.J. 449.

VIII. The Rule of Law

Prior to 1988, art. 121 of the Federal Constitution stated that *"Subject to Clause 2 the judicial power of the Federation shall be vested in* two High Courts of co-ordinate jurisdiction and status…and such inferior courts as may be provided by federal law". The italicized words have since been deleted by the Constitution (Amendment) Act of 1988. In consequence. Art. 121 no longer refers to the judicial power of the Federation. There is a well-established line of Commonwealth case law on the significance of the term. In the classic sense, the phrase "judicial power" typically requires us to ask whether a particular piece of legislation strays beyond the purely legislative field and encroaches upon the judicial power of the courts. Explicit constitutional language vesting the judicial power of a nation in the judiciary, though not definitive in its absence,[106] does serve the purpose of emphasizing the independence of the judicial function. As Lord Pearce put it, it requires us to inquire into "the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings".[107]

The resistance of judicial power to purely abstract conceptual analysis is often seen to mean that, in practice, it is the judicial branch itself which is required to pronounce on the boundaries of that power. In *Dato Yap Peng's* case,[108] legislation allowed the Public Prosecutor to transfer a case from a subordinate court to the High Court. Should the Public Prosecutor be allowed to do so, notwithstanding that legislation, in light of art. 121(1) of the Federal Constitution which vests the judicial power in the courts? Abdoolcader S.C.J. observed that "[t]he power to transfer a case is a judicial power exclusively exercisable by a court". As such, the Act therefore represented a "legislative and executive intromission into the judicial power of the Federation". Left unchecked, this would relegate "the provisions of art. 121(1) vesting the judicial power of the Federation in the curial entities specified to no more than a teasing illusion, like a munificent bequest in a pauper's will".[109] Two other judges dissented.

This jealous guarding of judicial power against incursion by the other branches resulted in the Constitution (Amendment) Act of 1988, which unfortunately has caused some contemporary uncertainty about the scope and basis of the judicial power of the Federation.[110]

IX. International Law and Foreign Relations

The Malaysian Constitution is *virtually* silent, unlike say the United States and Netherlands constitutions, or the German Basic Law, in relation to the reception of international law.[111]

106 Liyanage v. The Queen [1967] A.C. 259 (Privy Council, on appeal from Ceylon) (per Lord Pearce).

107 Id.

108 Public Prosecutor v. Dato' Yap Peng [1987] 2 M.L.J. 311 (Supreme Court, Malaysia).

109 Id. (per Abdoolcader S.C.J.).

110 Compare Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah [1998] 3 C.L.J. 85, 110; Datuk Seri Samy Vellu v. S. Nadarajah [2002] 3 C.L.J. 766, 776. See Abdul Aziz Bari & Farid Suffian Shuaib, Constitution of Malaysia: Text and Commentary, Kuala Lumpur 2004 (Pearson/Prentice Hall), 214-5.

111 Virtually, but not completely. Article 76(1) provides for the power of Parliament to legislate in respect of state

But following English practice, treaties do not have what an American might term a self-executing nature or automatic effect under Malaysian law. In English law this would have been because Parliament is the supreme law-maker and not Her Majesty's Government which negotiates and enters into treaties on behalf of Great Britain. Allowing treaties to have automatic effect under English Law would transfer law-making power from Parliament to the Government. It might be thought that Malaysian law does not *necessarily* require this view as Malaysia has a written constitution in relation to which, regardless of its silence, the application of international law would simply fall to be considered as a matter of constitutional construction. But if this thought occurs to us, there has been no evidence of its veracity as a matter of Malaysian law. Even if it is true that the Constitution and not Parliament is supreme under Malaysian law, the cases and the view of commentators would seem to agree on a need for treaties to be incorporated by statute as a precondition to their application under Malaysian domestic law.[112]

Examples of treaties which have been incorporated and implemented under Malaysian legislation include the International Organizations (Privileges and Immunities) Act of 1992 implementing the 1946 Convention on the Privileges and Immunities of the United Nations,[113] and the Diplomatic Privileges (Vienna Convention) Act of 1966 implementing the 1961 Vienna Convention on Diplomatic Relations.[114] An example of an international rule which was rejected as being a part of Malaysian law in the absence of statutory implementation may be found in *Public Prosecutor v. Narongne Sookpavit and Ors*,[115] which concerned the innocent passage rule under Article 14 of the 1958 Convention on the Territorial Sea.

Finally, since the courts are tasked with the construction of statute, it would usually fall to the courts to construe the scope and effect of such treaty obligations which have been implemented under Malaysian law. This does not mean either that special rules cannot apply to the construction of treaties as opposed to the local rules governing the construction of other domestic statutes,[116] or that in some cases, executive certification would not be

subjects. It appears in Part IV concerning the relations between the federation and the states, and provides that Parliament may makes laws with respect to any matter enumerated in the State List "for the purpose of implementing any treaty, agreement or convention between the Federation and any other country". It might be argued that this constitutional provision states or at least confirms the need for statutory implementation of treaties if the latter is to have domestic legal force.

112 H.L. Dickstein, The Internal Application of International Law in Malaysia: A Model of the Relationship between International and Municipal Law, Jurnal Undang-Undang/Journal of Malaysian & Comparative Law, Vol. 1 (1974), 204, 207-209; Wan Arfah Hamzah, Amalan Triti Malaysia, Jurnal Undang-Undang/Journal of Malaysian & Comparative Law, Vol. 12 (1985), 17, at 22 et seq. (in the Malay language); C.L. Lim, Public International Law before the Singapore and Malaysian Courts, Singapore Year Book of International Law, Vol. 8 (2004), 243, 258 et seq.

113 No. 485 of 1992. See MBF Capital Bhd. & Anor. V. Dato' Param Cumaraswamy [1997] 3 Mal. L.J. 300 (Zainun Ali J.C.); Lim, id., 272 et seq.

114 (Act 24/1966). See Public Prosecutor v. Orhan Olmez [1988] 1 Mal. L.J. 13 (Mal., H.C.) (per Zakaria Yatim J.); Lim, id., 278 et seq.

115 [1987] 2 Mal. L.J. 100 (Mahadev Shankar J.); Lim, id., 252 et seq.

116 For which, see The Government of Kelantan v. The Government of Malaysia and Tunku Abdul Rahman Putra Al-Haj [1963] Mal. L.J. 355; Lim, id., 257 et seq. In the Kelantan case, Thomson C.J. considered that legislation

determinative of a particular issue arising under Malaysia's treaty obligations.[117]

Customary international law is different. According to Blackstone, custom is a part of the common law and this is sometimes construed to mean that custom is automatically a part of the common law.[118] As such it would ordinarily fall to the courts to determine the existence of a purported customary rule and to interpret the scope and effect of such rules.[119] Disputes might arise as to whether a rule is a customary rule, whether a new rule has replaced an old rule,[120] or whether a particular rule is opposable to the state in the first place but these should not, in principle at least, detract from the basic principle common law principle that custom is part of the common law.

Clearly international law in the form of treaty and custom applies to Malaysia on the *international* plane, and this has been recognized in the Malaysian courts. Just as clearly, such rules sometimes result from the membership of international organizations.

X. Conclusion

The development of the Malaysian Constitution in the last fifty years, from 1957-2007, may be said to be the result of four principal developments. First, the story of Malaysia's constitutional development is very much one of constitutional amendment. In this sense, the changes wrought in the last fifty years may be found on the face of the constitutional document itself. Generally speaking, a series of significant amendments saw a shift of power from the judiciary to Parliament and the executive branch, and the consequent engorgement of executive power where, as is the case with parliamentary democracies, the executive is by definition that estate which already commands the confidence of the majority in Parliament We have seen the example of the amendments made in relation to the executive determination of emergency in the wake of the *Teh Cheng Poh* case, the removal of the *Merdeka* Constitution's judicial power clause which had vested such power explicitly in the judicial branch, and the immunity of executive determinations made under the Internal Security Act from judicial challenge, with all that implies for Malaysian liberty. Secondly, there was a concomitant shift of power from the states to the federal authorities and this development was at times closely connected to the possession and use of emergency power by the federal authorities. Thirdly, monarchical power has been

implementing the Malaysia Agreement (i.e. a treaty) should "not be subjected to the minute interpretation which in private law may result in defeating through technical construction the real purpose of the negotiators".

117 Cf. MBF Capital Bhd. & Anor. v. Dato' Param Cumaraswamy [1997] 3 Mal. L.J. 300 (Zainun Ali J.C.); Lim, id., 272 et seq.

118 William Blackstone, Commentaries on the Laws of England, Oxford 1765 (Clarendon), Book IV, Ch. 5.

119 See (e.g.) Prosecutor v. Narongne Sookpavit and Ors [1987] 2 Mal. L.J. 100 (Mahadev Shankar J.) where the court also considered whether the innocent passage rule was a rule of customary international law recognized under Malaysian law.

120 For a progressive ruling on this point, see Commonwealth of Australia v. Midford (Malaysia) Sdn. Bhd. & Anor. [1990] 1 Mal. L.J. 475 (Mal., S.C.) (per Gunn Chit Tuan S.C.J.); discussed in Lim, Public International Law before the Singapore and Malaysian Courts, op. cit., 254-5.

diminished in terms of the privileges and immunities of the rulers as well as in relation to the power to withhold consent to Parliamentary legislation. Fourthly, the judiciary whose constitutional position has already been eroded by both Parliamentary and executive encroachment, is unfortunately still hampered in terms of everyday perceptions of their institutional independence by the controversy which followed the removal of the Lord President and the suspension and subsequent removal of certain other Supreme Court judges in 1988.

Further Reading

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Myanmar

MYANMAR (Burma)
From Parliamentary System to Constitutionless and Constitutionalized One-Party and Military Rule

Myint Zan

I. Introduction

Burma, today officially called Union of Myanmar, has had three official names since independence from Great Britain: the Union of Burma (January 1948 to March 1974), the Socialist Republic of the Union of Burma (March 1974 to September 1988), (again) the Union of Burma from September 1988 to May 1989, and the Union of Myanmar. (The last two name changes were made by order of the ruling State Law and Order Restoration Council in September 1988 and May 1989, respectively).

Burma has had two Constitutions. The 1947 Constitution established a parliamentary form of government under which political parties operated freely. A Prime Minister chosen by the lower house of the Legislature held executive power and a ceremonial President acted as the formal Head of State. The Supreme Court enforced citizens` rights and the judiciary was independent.

The military coup of March 1962 effectively ended the liberal parliamentary Constitution of 1947. The group of army officers who took power at that time ruled by military decree for 12 years. In January 1974, a new Constitution came into force. In effect, it legalized and perpetuated one-party rule under the Burma Socialist Programme Party (BSPP).

Massive protests against one-party rule resulted in another military takeover by the State Law and Order Restoration Council (SLORC) on September 18, 1988. The protests, known as the 1988 Uprising, were crushed but at the same time the one-party system ended. After the SLORC takeover, political parties were allowed to operate, albeit under severe restrictions, and some were allowed to contest the May 1990 elections.

However, more than 17 years after these elections the political parties (the National League for Democracy (NLD) and its allies) have not gained political power or even nominally managed to share it with the ruling SLORC or with the State Peace and Development

Council (SPDC). They continue to operate under severe restrictions. Since January 1993, a military-run National Convention has been meeting periodically to lay down 'guidelines and detailed guidelines' for a promised new Constitution. The National Convention has convened in various sessions at various intervals between January 1993 and September 2007- a period of 14 ½ years. In mid-October 2007, the ruling State Peace and Development Council announced the formation of a 54 member State Constitution Drafting Commission. In August 2003 the ruling SPDC announced a so-called seven-step 'road map to democracy'. The first step was the reconvening of the National Convention to lay down 'guidelines and detailed basic guidelines' to draw up a new Constitution. After more than 15 years process of 'laying down detailed guidelines' through recurring 'National Conventions' it was announced by the State Peace and Development Council on 9 February 2008 it that a draft constitution would soon be put to a referendum in May 2008 (see comments at end of Chapter).

This Chapter presents and briefly compares selected provisions of the defunct 1947 liberal and 1974 Constitutions, as well as some of the principles or 'guidelines and detailed guidelines' laid down by the National Convention. Since the constitution drafting process was not yet completed when this Chapter was written, the approach and focus of this particular Chapter is different. The term 'constitution drafting process' is not an accurate description of the activity that occurred between January 1993 and October 2007 because all that has been produced as at the end of January 2008 are guidelines for a 'firm constitution'. Certain provisions of the previous two defunct Constitutions (those of 1947 and 1974) will be compared with a few of the basic guidelines agreed upon by the National Convention. Since September 1988, Burma has not had a constitution in force. As far as the (possible) future constitution is concerned the author's analysis and commentary are based upon the important aspects of the agreed principles or detailed guidelines adopted in the National Convention. The author has been able to glean these from various published reports and news items.

II. Constitutional History

The Union of Burma gained independence from Britain on January 4, 1948. During the 19th century, the British and the Burmese fought three wars (1824-26, 1852, and 1885). After the third Anglo-Burmese war in November 1885, the whole country was annexed into the British Indian Empire on January 1, 1886.

Prior to the country regaining its independence in 1948, a 111 member Constituent Assembly met from June to September 1947 and adopted the Constitution on September 24, 1947. The Constitution came into force with independence in January 1948.

The 1947 Constitution can be described as generally based on the British Westminster parliamentary form of government. It established a two-chamber Parliament. The lower chamber, the *Pyithu Hluttaw* (Chamber of Deputies in the official English translation),

was elected nationwide on the basis of universal adult suffrage, while the upper chamber, the *Lumyosu Hluttaw* (Chamber of Nationalities), was elected or appointed on the basis of ethnicity, with designated numbers of representatives from the various indigenous ethnic groups. During the period 1948 to 1962, a period pejoratively referred to as the 'capitalistic parliamentary democracy period' by the Revolutionary Council and Burma Socialist Programme Party (1962-1988), various political parties operated. The leader of the political party that received most votes in the Chamber of Deputies (also known generally as Parliament, even in Burmese) became the Prime Minister, who was the 'Head of Government'. The President was the Head of State, but this was largely a ceremonial post. The constitutional system that was practiced while the 1947 Constitution was in force can be generally described as prime ministerial or parliamentary, rather than presidential. In general terms it can be said that the current Federal Constitution of Malaysia, the Constitution of the Commonwealth of Australia and the 1947 Burmese Constitution are based on the Westminster parliamentary system. For example, money bills under the 1947 Burmese Constitution were only proposed in the lower house of Parliament as in the current Australian and Malaysian Constitutions. .

The 1947 Constitution lasted until the military coup of March 2, 1962. On that day, a group of army officers led by the late General Ne Win (1910-2002) took power. On the day of the coup the President, the Chief justice of the Union, the Prime Minister and the cabinet Ministers, were arrested. Parliament was abolished by a decree of the Revolutionary Council on March 3, 1962. The Supreme and High Courts of Burma were abolished by another decree, on March 30, 1962. A 17-member Revolutionary Council (RC) was formed. Later, a Revolutionary Government was also formed, consisting mainly of active duty military officers. The RC, which issued laws by decree during its 12-year existence, can be considered as the Legislature and the Revolutionary Government can be considered the cabinet of that era. Membership of the RC and the Revolutionary Government overlapped, especially in the early days.

The 1947 Constitution was never formally revoked either by decree or by military announcement, but it can be safely said that it ceased to function sometime after March 1962. On July 4, 1962, the Revolutionary Council formed a new political party, the Burma Socialist Programmed Party (BSPP). The system of multiple political parties competing for elections also ended when the RC issued the *Law Protecting National Unity* on March 23, 1964. All political parties except the BSPP were banned and their assets confiscated.

From 1962 to 1974, when a new constitution took force, no formal constitution operated in the country. In December 1973, a referendum was held to adopt a new constitution, which is now known as the 1974 Constitution. The referendum presented an illusory choice. If the people rejected the draft constitution, the RC would continue to rule by decree. If the Constitution was adopted, then power would be transferred to the *Pyithu Hluttaw*, a unicameral legislature almost all of whose members would be from the only party, the ruling BSPP. The Chairman of the Revolutionary Council was U Ne Win. The Chairman of the Burma Socialist Programme Party was also U Ne Win. Not surprisingly, the official tally

showed that 90.19 percent of the voting populace had endorsed the new Constitution.

After the adoption of the 1974 Constitution, U Ne Win became the first President of the Socialist Republic of the Union of Burma on March 4, 1974. The preamble of the 1974 Constitution pledged that "we the people … will faithfully follow the leadership of the Burma Socialist Programme Party." Article 11 stated, 'The State shall adopt a single-party system. The Burma Socialist Programme Party is the single political party and it shall lead the State.'

The 1974 Constitution was effectively revoked by a coup on September 18, 1988. For several months prior to that date there had been widespread demonstrations against the ruling BSPP government. On September 11, 1988, an emergency session of the *Pyithu Hluttaw* (roughly translated as 'People's Congress' since there was only one political party in the Legislature) passed a resolution to hold multiparty elections 'not earlier than 45 days and not later than 90 days' from that date. Just a week later on September 18, 1988, another group of army officers took over power and formed a military junta called the State Law and Order Restoration Council (SLORC). The SLORC abolished all organs of State power that were formed under the 1974 Constitution. The SLORC changed its name to the State Peace and Development Council (SPDC) on November 15, 1997. Both the SLORC and SPDC (there is some overlap of its members) in turn declared that they were not bound by any of the provisions of either the 1947 or the 1974 Constitution.

Within 10 days of SLORC takeover on September 18, 1988, the main opposition party, National League for Democracy (NLD), was formed under its general secretary, Daw Aung San Suu Kyi (Nobel Peace Prize Laureate for 1991). The former BSPP renamed itself the National Unity Party (NUP). Multiparty elections took place on May 27, 1990. Ninety-one political parties contested the elections. The NLD won nearly 60 percent of the votes and 81 percent of the seats - 392 of the 485 seats contested. But the new National Assembly was never allowed to convene. After the election, the SLORC, in violation of its promises before the election, issued an announcement (Order 1/1990) on July 27, 1990, that the role of elected delegates was not to act as a legislature but to draft a new constitution.

Since 1990, many members elected in the 1990 elections have been arrested. Some managed to flee the country. Some resigned or were forced to resign.

On 23 April 1992, after the forced retirement of the late Senior General Saw Maung, the first Chairman of the State Law and Order Restoration Council (SLORC), the SLORC announced that a National Convention would be held for the purpose of drawing up guidelines for a new, firm constitution. On January 9, 1993, the first session of the National Convention to lay down guidelines for the principles of a new constitution, was convened, only to be adjourned the next day. Of the 702 delegates, only 86 were from the NLD. Even before the Convention began, the SLORC had already stipulated six objectives that had to be followed. They were (and still are): (1) preservation of the Union;

(2) preservation of national solidarity; (3) protection of sovereignty; (4) flourishing of a genuine multiparty system; (5) further flourishing of the noblest and worthiest of world values, namely justice, liberty, and equality; and, (6) participation of the *Tatmadaw* (the armed forces) in the national political leadership of the future State.

Between January 9, 1993, and March 30, 1996, the National Convention was convened and adjourned several times. In November 1995, the NLD delegates boycotted the National Convention to protest restrictions and the predetermined agenda. As a result of the boycott, the NLD delegates were expelled from the Convention. It was adjourned on March 30, 1996, to be reconvened after eight years on May 17, 2004, and was again adjourned in July 2004. It was reconvened in February 2005 and was yet again adjourned in March 2005. After a few more sessions in 2006 and 2007, the last session of the Convention concluded in September 2007.

As at the end of January 2008, the first step in the State Peace and Development Council's 'road map' (first announced in August 2003) has apparently been completed. The second step in the 'road map' is the 'step-by-step implementation process necessary for the emergence of a genuine and disciplined democratic system' and the third step is the 'drafting of a new constitution in accordance with basic principles and detailed basic principles laid down by the National Convention'. The fourth step 'is the adoption of the constitution through national referendum'.

The SPDC assumes, and will ensure, the approval of the referendum and the new constitution, since the envisaged constitution will formalize and entrench military rule or a praetorian system of government, just as the 1974 Constitution 'constitutionalized' a one-party system which had been a *fait accompli* for at least ten years prior to its adoption through a 'referendum' in December 1973.[1] History could well repeat itself both as farce and tragedy with another referendum which might formalize or constitutionalize (albeit in different form) what has been a fait accompli since 1988 - the perpetuation of military rule.[2] The fifth step is 'holding of free and fair elections for *Pyithu Hluttaws* (legislative

1 For a recounting of and commentary on the process concerning the 'national referendum' of 1973 see Myint Zan, 'Law and Legal Culture, Constitutions and Constitutionalism in Burma' in Alice Tay (ed.) *East Asia [:] Human Rights, Nation-Building Trade* (1999) 236-39.

2 Just as the 1973 referendum 'constitutionalizes' what was already *a fait accompli* at least since 1964, i.e. one party rule, the 'referendum' (which according to the SPDC announcement on 9 February 2008 would take place in May 2008) is intended to and will solidify and consolidate military rule in an elaborate manner. The possible rejection of the 1974 Constitution in the 1973 referendum (which *was* unthinkable at that time and in the light of the subsequent result of '90.19%', approving the draft 1974 Constitution is 'academic' in more sense than one) would have continued the rule of the Revolutionary Council (the military council that ruled Burma from March 1962 to March 1964) under Chairman U Ne Win who was also the Chairman of the only legal political party. Hence, whether the referendum on what was to become the 1974 Constitution was adopted or rejected would not have mattered in any significant sense since either way, one party-cum-military rule would have continued. Similarly, when yet another national referendum scheduled for May 2008, is held for the 'future Constitution', history is likely to be repeated as 'farce' and 'tragedy': 'farce' in the sense that the referendum would be, like the 1973 referendum, a non-choice. The scheduled 'referendum' would be history repeating itself as 'tragedy' since it would perpetuate and constitutionalize military rule. The current constitution-less military rule and the future constitutionalized military rule would continue to negate not only genuine constitutionalism but also a semblance of genuine representative

government: something that has eluded the Burmese people for more than four decades now. By comparison, at least some of its ASEAN members have been able to avoid being enmeshed so deeply in such a constitutional 'trap' by means of deceptive referenda.

The non-choice that was the 1973 referendum and the non-choice that will be the forthcoming referendum can be instructively compared with that of the referendum that was placed before the Chilean people in October 1988 when Chilean voters were asked whether or not they wanted to extend Augusto Pinochet's rule to 1997. In the Chilean referendum: (1) the opposition to the referendum proposal was able to campaign freely against the referendum proposal, including on radio and television; (2) the choice given to the Chilean people in October 1988, unlike the choice given in the December 1973 Burmese referendum and the 'referendum' stipulated in the SPDC's 'road map', was real and meaningful; (3) unlike the '90.19%' who voted for the 1974 Constitution, 54.7% of the Chilean people voted *against* Pinochet's referendum to change the Chilean Constitution and 43% voted for the then proposed amendment to the Chilean Constitution. For a contemporaneous report on the 1988 Chilean referendum see John Greenwalt 'Chile [:] Fall of the Patriarch' *Time* magazine, Monday October 17, 1988. More recently the referendum in which Venezuelan President Hugo Chavez proposed constitutional amendments and lost, is also real and genuine in that voters were asked to indicate whether or not they approved the proposed amendments to the Venezuelan Constitution and Chavez lost the referendum. See, for example, Tim Padgett 'Chavez Tastes Defeat Over Reforms' *Time* magazine, Monday, December 3, 2007. Both in 1988 and 2007, magazine and newspaper reports were more extensive on the genuine referenda that took place in what was then an authoritarian regime of the right (Chile in 1988) and an alleged authoritarian government of the left (Venezuela in 2007) but at least in *Time* and perhaps in other news magazine there were **no** such reports on the 1973 Burmese referendum exposing the deceptive nature of the referendum. The scheduled May 2008 referendum is being held to adopt the SPDC's praetorian Constitution will also be a charade and will provide a bogus choice whereas by comparison both the Chilean people in 1988 and the Venezuelan people in 2007, in their respective referenda, were given a 'real choice'. Moreover there is yet another striking difference between both the 1973 Burmese referendum, the scheduled May 2008 referendum and the referenda that were held in Chile and Venezuela in October 1988 and December 2007 respectively. In both the Chilean and Venezuelan referenda the opposition in each country were able to openly campaign –including the use of State radio and television- *against* the proposals put forward in the referenda. As I have already stated to say that the 'campaign' to adopt the 1974 one-Party Constitution was 'one-sided' is a gross understatement. (Myint Zan, 1999, page 238). More than a generation after the 1973 one Party referendum adopted the 1974 Constitution history is about to be repeated in Burma with all its negative connotations. It would be repeated not only in terms of the illusory nature of the 'choice' provided but also in the total and draconian prohibition of *any* campaigning against the draft Constitution which preceded the bogus 1973 Burmese referendum. Just as in the 1973 referendum 'campaign' even minimal public dissent or 'canvassing' for a 'no' vote in the May 2008 referendum could result in at least the safety and liberty of the 'no-campaigners' being deeply compromised. (Again this in stark and utter contrast not only to the Chilean and Venezuelan referenda of 1988 and 2007 but also to the Thai referendum of 2007 as well.) Decree No. 5 (1996) issued by the State Law and Order Restoration Council *The Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention against Disturbances and Oppositions* [sic] made any criticism of the 'National Convention process' a criminal offence punishable by a minimum of five years imprisonment. It is logical and to be expected that this same law and other additional laws which the SPDC has decreed will be applied not only to negate but also to 'crush' any campaign or dissent to vote 'no' in the scheduled referendum of May 2008. And the SPDC has already assumed –and needless to say will make sure that the referendum to adopt its Constitution is to be passed- since on the same day the referendum was announced it also announced in SPDC Decree 2/2008 its intention to hold national elections in the year 2010. Whereas in the case of the 1988 Chilean referendum Augusto Pinochet did step down as Head of State in 1990 after the defeat of his referendum proposal. Also, a generation later in another of Burma's neighboring country the military junta that took power to overthrow a corrupt if democratically elected government did step down within 15 months after it assumed power and handed over power to (at least in comparison with Burma) a genuinely civilian government. Even in the almost impossible defeat of the scheduled May 2008 referendum State and Peace Development Council, like the Revolutionary Council in 1973-74 will **not** step down. In Chile the defeat by Pinochet in the referendum in October 1988 led within 1 1/2 years to a democratically elected and much less military dominated government in March 1990. In contrast in Burma neither the defeat nor the virtually certain success of the May 2008 referendum would make Burma less praetorian nor reduce in any way the endemic military control of the country. In the constitutionalized military rule of the forthcoming Constitution the current constitution-less military rule would become a 'firm' Charter-based military rule where the military would constitutionally play a 'permanent' and leading role.

bodies); the sixth being 'convening of the Hluttaws attended by Hluttaw members' and the seventh step is the 'building of a modern, developed and democratic nation by the state leaders elected by the *Hluttaw* and the government and central organs by the *Hluttaw*'.

As at the end of January 2008 the 'road map' is apparently in the second stage of the so-called, 'step by step implementation process necessary for the emergence of a genuine and disciplined democratic system'.

III. Constitution Making and Amendments

The current constitution making process has been described in the above sections. By comparison, the making of the previous two Constitutions (those of 1947 and 1974) reveals that the 1947 Constitution was drafted and adopted in the period June 1947 to September 1947 and the drafting of the 1947 Constitution took approximately two months. The drafting and adoption of the 1974 Constitution took from the date of the formation of a Commission to draft a new State Constitution on 25 September 1971[3], to its adoption on 3 January 1974[4] - less than two years and four months. By contrast and as stated previously, from the first meeting of the National Convention on 9 January 1993 to the end of January 2008, the constitution 'drafting' process was seemingly completed in February 2008 after a process of more than 15 years.

As the author does not have access to most of the detailed guidelines laid down by the National Convention upon which the 54 member Constitution Drafting Commission has drafted the (as of late February 2008 still unpublished) new constitution, the author cannot provide the details of the constitution amendment process as laid down in the detailed guidelines. In comparison, the 1974 Constitution stated that certain key provisions could only be amended if three-quarters of the members of the Legislature approved and a majority of all eligible voters voted for the amendments in a national referendum. Among such entrenched provisions was Article 11, which stated, 'The State shall adopt a single party system. The Burma Socialist Programme Party is the sole political party and it shall lead the State".

On September 11, 1988, in the wake of massive demonstrations against the BSPP Government and demands for multiparty elections, the *Pyithu Hluttaw* passed a resolution 'overcoming the Constitution'. This in effect set aside the one-party provision of the 1974 Constitution by scheduling multiparty elections without a referendum being held, as required by the 1974 Constitution. A week later the State Law and Order Restoration Council seized power.

3 A news item about the formation of a 'New State Constitution Drafting Commission' can be read in the front pages *The [Rangoon] Guardian* and *The Working People's Daily,* 26 September 1971 issues.

4 The [Rangoon] *Guardian* has a red banner headline in its 4 January 1974 issue 'New State Constitution Adopted'.

IV. General Overview and Characterization of the yet-to-be-adopted 'Constitution' based upon the 'Guidelines and Detailed Guidlines' laid down by the National Convention'

As at the end of January 2008 the country does not have a constitution and the reportedly finalized draft has not been published. The following is a general description of some features of the envisaged constitution based on snippets of reports concerning the 'guidelines and detailed guidelines' laid down by the National Convention. However, under each sub-heading I have made comparisons between what is known, as at the end of January 2008, about the likely form of the new constitution and provisions and spirit of the 1947 Constitution or the 1974 Constitution when they were in force. A brief description of current (as of February 2008 but in general this structure has been in place since the then State Law and Order Restoration Council seized power) government structures, with brief comparisons between the structures under the 1947 Constitution and 1974 Constitution periods as well as the period of 1962 to 1974) when, as now, there was no Constitution in force, is mentioned in Part V.

Selected Aspects of the 'Agreed-Upon' Principles or 'Guidelines and Detailed Guidelines' of the National Convention

The President: According to the 'agreed upon' principles of the National Convention, the President will be both Head of State and Head of the Government. The President must be at least 45 years old and must have political, military and administrative 'outlook' or vision. The President's parents, spouse, and children cannot be the subjects of any foreign power, and the President must have resided in the country continuously for at least 20 years.

The President would be elected by an electoral college consisting of representatives of the *Pyithu Hluttaw* (House of Representatives), the *Amyotha Hluttaw* (House of Nationalities) and the *Tatmadaw* (Armed Forces). Since there would at least be a few members of the *Tatmadaw* in the first two electoral groups, and considering the qualifications required for the presidency, it is all but certain that only a military man or a former military man would be likely to become President. This prediction of a future constitutional set-up is based on a guideline that was laid down and accepted by the National Convention on 30 March 1996, before its long hiatus during which no sessions of the National Convention were held between March 1996 and July 2004. Moreover this provision is also included in the (final) detailed guidelines produced by the National Convention in September 2007. It therefore can indeed be seen as a 'blue print' of constitutionalized military rule.

The Legislature: According to the principles agreed upon in the National Convention, there will be two chambers in Parliament; the *Pyithu Hluttaw*, filled largely by nationwide elections, and the *Amyotha Hluttaw*, elected on the basis of state divisions. In both chambers, one quarter of the members will be appointed by the Commander in Chief of the Armed Forces and shall be military officers.

Military Defense and State of Emergency

For most of the time since independence, Burma has been under various forms of military rule. Such rule has been direct and blatantly obvious since 1988. It is believed that between 40 and 50 percent of the national budget is spent on the military. Since 1988, the Burmese armed forces have doubled their number of soldiers and their firepower. There are currently about 450,000 to 500,000 soldiers in the country's armed forces.

Under the provisions agreed upon by the National Convention, when the Commander in Chief of the Armed Forces is of a view that there is a national emergency, he has the right to take over the reins of power. (The President is not the Commander in Chief.) In addition, the Armed Forces will administer their own affairs free of legislative or executive supervision.

The Judiciary

Currently, under the Supreme Court are Divisional Courts, District Courts, and Township Courts. The judges in these courts are generally appointed by the Supreme Court, with the approval of the SPDC.

In the 1947 Constitution, the highest courts were totally separate from, and independent of, both the executive and the legislature. In the 1974 Constitution, the members of the top judicial body, the Council of People's Justices, were all members of the unicameral one-party Legislature, the *Pyithu Hluttaw*, and they were under the provisions of the Constitution responsible to it.

According to the principles agreed upon in the National Convention, the Supreme Court judges must not concurrently be members of the Legislature. The President would appoint the Chief Justice of the Union and other Supreme Court judges subject to the approval of the *Pyidaungsu Hluttaw* or Union Parliament. However, the Union Parliament 'shall not have the right to reject the person nominated by the President for appointment of the Chief Justice of the Union unless it can clearly prove that the person does not meet the qualifications for the post of Chief Justice of the Union (or as Supreme Court Judges) as prescribed by Constitution'. Similar provisions have also been agreed upon for the appointment of Ministers, by the President.

Provisions Concerning Religion

The majority (about 85 percent) of Burmese are Buddhists. There are also Christians, Muslims, Hindus, animists and others. Nevertheless, except for a brief period in 1961 when the 1947 Constitution was amended to accord Buddhism the recognition that it was the religion of an overwhelming majority of its citizens, Buddhism has not been

accorded any special status or official recognition in the 1947 Constitution. Even after the amendment, the status of Buddhism did not prevent non-Buddhists from freely practicing their own religion - freedom of worship was guaranteed under the same 1961 constitutional amendment. The brief period (six months) of constitutional status for Buddhism as a state religion under the 1947 Constitution, like virtually all of its provisions, did not survive the military takeover of March 1962. Although the 1947 Constitution was not formally revoked or even officially suspended after the takeover, its designation of Buddhism as the state or official religion died together with the entire Constitution.

The 1974 Constitution mentioned that '[e]very citizen shall have the right to freedom of thought, and of conscience, and to freely profess any religion' (in Article 156 a) but also stipulated that 'religion and religious organisations shall not be used for political purposes. Laws shall be enacted to this effect.' (Article 156 c) The detailed guidelines adopted by the National Convention, from newspaper reports, do include a statement to the effect that 'the State recognizes Buddhism as the religion professed by a great majority of the population'. The detailed guidelines also mentioned that 'the State also recognizes Christianity, Hinduism, Islam and the worship of *nat spirits* ('animism') as other religions also worshipped and practiced in the State'.[5]

There have been many charges that the SLORC and SPDC persecute some Christians and Muslims. Although there could be some truth in those allegations, those who bear the main brunt of SLORC and SPDC violations of human rights are Buddhists.

V. System of Government

Under the 1947 Constitution and the general system of governance that was in place during the period of the 1947 Constitution (January 1948 to March 1962), the system of government can be described as parliamentary. During the period from March 1962 to March 1974 the system of government was rule by military decree and the country did not have a formal constitution. From the period of March 1974 to September 1988, the system of government can be described as a one party system where, according to constitutional provisions, the

5 The author obtained this statement from a Burmese language newspaper, *Kyemon,* which was published during one of the National Convention sessions in 2007. An observation that could be made here is that the 1947 Constitution after the 1961 amendment did not mention, apart from Buddhism, any particular religion. The 1974 Constitution, while stipulating freedom of religion, also stated that 'religion shall not be used for political purposes'. In light of the detailed guidelines mentioning Buddhism, Christianity, Islam, Hinduism and *nat* worship as 'other religions' the query is what would be the status of other unmentioned religions such as those of Judaism, Sikhism, Taoism, Confucianism, Zoroastrianism (there could be at least a few adherents of these religions among Burmese nationals). In the Indonesian Constitution or under Indonesian law only some religions are officially recognized (see for example 'Religion in Indonesia' (http//en.wikipedia.org./wiki/Religion_in_Indonesia#State_recognised_religions, accessed 27 January 2008) and others are not recognized. As far as the future Burmese Constitution is concerned one is not sure whether or not the mention of only certain religions in the detailed guidelines is tantamount to State recognition and that other religions not mentioned in the Constitution will not receive State recognition.

Burma Socialist Programme Party led the State. From the period of September 1988 to the time of writing, when again there is no formal constitution, the system of government can be described as military rule by decree. A few of the detailed principles agreed to by the National Convention have already been alluded to above. To summarize the system of government since September 1988 and which is expected to continue in the future, can be described as 'praetorian' because of the domination of the military.

The Election Processes

Multiparty elections were held under the 1947 Constitution in 1951, 1956, and 1960. Elections in which candidates from the ruling Burma Socialist Programmed Party (BSPP) ran unopposed were held under the provisions of the 1974 Constitution in 1974, 1978, 1981, and 1985.

What were officially designated as multiparty, democratic general elections were held on May 27, 1990. The leading opposition party, NLD, overwhelmingly won the elections.

Political Parties

There were single-party elections in 1974, 1978, 1981, and 1985, in which voters could vote only for the BSPP candidate. These elections were similar to those held in the former Soviet Union and other countries where only one ruling party participated in the elections.

In the 1990 elections, by contrast, 92 political parties participated. Since then, many political parties have been de-registered by the Election Commission. The main opposition party, NLD, operates under extremely harsh conditions. Many NLD offices have been closed and the two top NLD leaders, Aung San Suu Kyi and the former general, Tin U, have been under house arrest since May 30, 2003. Quite a few of the middle-ranking NLD officials are also in jail under various charges. Some features in the detailed guidelines laid down by the National Convention and in what has been touted as the future 'democratic, civil administrative system' (according to the SPDC announcement on 9 February 2008 announcing the scheduled holding of a referendum in May 2008) are mentioned in summary in Part IV. The following are brief descriptions of the current system of government and government structures.

'The Legislature' (State Peace and Development Council)

Since September 18, 1988, the country has not had a constitution. Since September 1988 the State Peace and Development Council (SPDC) has been at the top of the State hierarchy and is the supreme body of the State. Since it has issued laws it can be considered as a legislature. The laws issued are usually signed by the Chairman of the State Peace and

Development Council and Commander in Chief of the Armed Forces, Senior General Than Shwe, who has held those posts since 23 April 1992 and who is referred to in the official media as 'Head of State'. Some laws have been issued in the name of other leading members of the SPDC, generally issued 'By Order' and signed usually by 'Secretary 1' of the State Peace and Development Council.

The Lawmaking Process

Currently, the SPDC issues new laws, makes amendments to existing laws and repeals laws. There are no formal or conventional rules for the process.

The Executive or the Cabinet:

There is a cabinet or government headed by a Prime Minister. Since October 2007, the Prime Minister has been General Thein Sein.

The Apex Judiciary

In late September 1988, approximately one week after its takeover on September 18, 1988, the SLORC established a Supreme Court, which originally consisted of five members. The current Supreme Court consists of 15 judges, all appointed by the ruling SLORC or SPDC. There is a Chief Justice and two deputy Chief Justices. The SLORC and SPDC can remove (and has removed) justices, by decree or with a statement 'permitted to retire'. For example, on November 13, 1998, five of the six judges of the Supreme Court were 'permitted to retire'.

The principles agreed upon by the National Convention can be described as a military-presidential system or a praetorian-presidential system. Even before the National Convention met in January 1993 it was stated that the '*Tatmadaw* (the Armed Forces') were to play a leading role in the future democratic State.

VI. Fundamental Rights

Under the 1947 Constitution, certain fundamental rights, mainly of a civil and political nature, were enforceable in courts. They were protected by the Supreme and High Courts.

Under the 1974 Constitution, the courts were also supposed to enforce certain enumerated rights. However, the judiciary was controlled by the ruling party and failed to fulfill that

responsibility. The current Burmese judiciary is also under the control of the military authorities.

The provisions of both the 1947 and 1974 Constitutions have not been applicable in the country since September 1988. Hence the 'rights' mentioned in these two defunct Constitutions have no role, impact, or function.

Both the 1947 and 1974 Constitutions contained some provisions limiting civil and political rights under certain conditions. Although violations of fundamental civil and political rights could be challenged before the nation's courts under the 1947 Constitution, no litigation has successfully challenged violations of fundamental rights, since 1962.

VII. Constitutional Jurisprudence

The constitutional history of Burma is perhaps unique among former British colonies, at least in Asia and perhaps elsewhere, in that since independence it has moved from a generally common law based legal system to one that embodied aspects of a 'socialist' legal system and now to a praetorian legal and political system. Legal educators within the country have described the legal system between 1962 and 1988, and especially after the adoption of the 1974 Constitution, as belonging generally to the 'socialist law family'[6] and the orientation of the legal system post-1988 as movements backwards to rejoining the 'common law' system.

Under the 1947 Constitution, it can be said that there was constitutional jurisprudence of an academic and high standard. The Supreme and High Courts of Burma interpreted and ruled on the provisions of the 1947 Constitution. Hence, the constitutional jurisprudence during the period of 1947 Constitution was based on the generally Westminster based parliamentary form of government, the separation of powers and also the assumption, at least implicitly, that the highest court of the land could interpret the major provisions of the Constitution.

With the military coup of March 1962, the 1947 Constitution effectively came to an end and since there was no formal constitution between 1962 and 1974, there was no 'constitutional jurisprudence'.

6 Ministry of Higher Education, Department of Higher Education, First Year (Code No.45) Introduction to the Study of Law, Module Law 1103, Myanmar Legal History, 9 where it is stated that during the 1962-1988 period 'Myanmar has a socialist legal system; and 'belongs to the socialist legal family'. The teaching materials claimed that currently (early 21st century) 'it is certain that Myanmar would no longer be a member of the Socialist Law Family' and that 'we cannot ignore the influence of the Common Law System which was deeply rooted in Myanmar'. For a brief discussion on 'whether Myanmar left the common law world 30 or 40 years ago' see Andrew Huxley 'Case Note: Comparative Law Aspects of the Doe v Unocal Choice of Law Hearing' (2006) *1 Journal of Comparative Law* 219,221.

The constitutional principles underlying the 1974 Constitution are radically different from those of the 1947 Constitution in that, (1) the courts, including the highest court, did not have the power to interpret the Constitution because under Article 201 of the Constitution any interpretation of the Constitution was to be made by the *Pyithu Hluttaw,* and, (2) the courts that were formed under the 1974 Constitution, including the highest courts, were totally subservient to the single ruling Party. It is in this sense that Burma's constitutional jurisprudence is peculiarly different from other Asian countries, which have inherited at least in part, the common law legal system because they are former colonies of Britain. Even though other Asian countries, which in general constitutional terms inherited or were 'bequeathed' the Westminster or parliamentary forms of government and have had different Constitutions in their post-independence constitutional history, none have gone through such drastic or peculiar transformations as Burma has. India, Pakistan, Bangladesh, Sir Lanka, Singapore or Malaysia did not changed their constitutions from a parliamentary form of government to that of a constitutionally mandated one-party state. Among the countries mentioned, Pakistan (both before and after the secession of East Pakistan to become Bangladesh) and Bangladesh, in periods of their history, have had various forms of military governments but none of them changed their Constitution from a Westminster type parliamentary government to a one party state in the first 25 years of post-independence, as did Burma.

As there has been no Constitution since 1988 there has been no constitutional jurisprudence since that date.

To summarize, it can be argued that the crux of the constitutional jurisprudence between the years 1947 to 1962 is located within the common law legal tradition with its separation of powers concept, Westminster type of government and judicial review. The constitutional discourse or constitutional jurisprudence of the period 1962 to 1988 (and especially post-1974) would be consistent with that of socialist legal systems (at least with its constitutional set-up) and the constitutional jurisprudence of the post-1988 period, including those based on some of the detailed guidelines mentioned in the National Convention, can be described as 'praetorian'.

As far as the Constitutional Court is concerned, Burma like most countries from Asia which were previously British colonies, did not have a separate Constitutional Court. Indeed it could be argued that in most (though not all) common law based countries the highest court is also the 'constitutional court'.[7] Hence, in both the 1947 and 1974 Constitutions there are no separate provisions for a separate constitutional court. In the detailed guidelines laid down by the National Convention there are provisions for

7 Under the 1972 Republican Constitution, Sri Lanka had a separate Constitutional Court. (See H.M.Zafrullah, *Sri Lanka's Hybrid Presidential and Parliamentary System and the Separation of Powers Doctrine* (University of Malaya Press, 1981) but under the 1977 Sri Lankan Constitution there is no provision for a Constitutional Court (ibid, at 77). In comparison with other former British colonies in Asia such as those of Malaysia, Singapore, Pakistan and Bangladesh, Sri Lanka had inherited not only a common law system from the British but also elements of a civil law based system because Sri Lanka had for centuries also been a Portuguese and Dutch colony.

a separate Constitutional Court that would have a separate jurisdiction from either the Supreme Court or the Court Martial Appeal Court. According to the detailed guidelines the Constitutional Court will adjudicate and decide disputes concerning the interpretation and application of the Constitution.

VIII. Legal System and Rule of Law

The legal system of Burma for the period between 1947 and 1962 can be described as a mixture of common law and customary law. Common law is the underpinning of most of the substantive and procedural laws, which are of mainly British/Indian origin. In the first fourteen years after independence, writs such as *habeas corpus, certiorari*, prohibition, *mandamus* and *quo warranto* operated, and the two highest courts (the Supreme Court and High Court of Burma) issued these writs. Hence, if the definition of the term 'rule of law' includes, among others, the requirement that all of its citizens are to be treated equally and the excesses of government officials and the executive can be challenged before the Courts, it can be stated that the rule of law applied and was practiced much more in the pre-1962 period than it was in the post-1962 period. The existence and use of these writs and the general adherence to the separation of powers during the pre-1962 period is testament to the fact that the rule of law *had* existed in the past in Burma. Since 1962, the rule of law has deteriorated to a very great degree. In the post-1988 period, occasional slogans appeared in the government controlled newspapers urging or requiring citizens to obey (so-called) 'the rule of law' and so, even this phrase has been used or distorted to perpetuate authoritarian rule.

The detailed guidelines laid down by the National Convention, in contrast to the 1974 Constitution, mentioned the concept of separation of powers between the three branches of government. The authoritarian and oppressive nature of the military regime, as well as the leading role to be accorded to the *Tatmadaw* (Armed Forces) in the 'future democratic State', is indicative of the continuing subservience of both the concept of constitutionalism and the rule of law, in the present system of government and under any future constitutional scheme.[8]

8 The rule of law also entails the independence of the judiciary including security of tenure of the judges and protection against the executive arm of the government interfering in the judicial process. The Burmese judiciary experienced massive and deleterious interference as well as deterioration in the judicial process in a way, and to an extent, that did not occur in other common law based countries, in and outside of the Association of Southeast Asian Nations. Although the 1988 'judicial crisis' in Malaysia attracted (see for example '1988 Malaysian Constitutional Crisis' http://en.wikipedia.org/wiki/1988_Malaysian_constitutional_crisis, accessed 27 January 2008) some attention from both lawyers and scholars in the outside world, the utter emasculation of the Burmese judiciary, which took place first, after the military coup in 1962, and secondly when the 1974 Constitution was adopted and the utter subservience of the judiciary to one-party rule did not receive as much attention either in press reports or in academic writing. Regrettable as it is, the erosion of independence of the judiciary in Malaysia in 1988 was not as fatal, deleterious or massive as that which occurred in Burma in the 1960s during the Revolutionary Council period and during the 1970s and 1980s.

Similarly, the sacking, reinstatement, house arrest and imbroglio concerning the Chief Justice, Iftikhar Muhammad Chaudry of Pakistan, by Pakistani President Pervez Musharraf in 2007 received considerable attention in news reports. (See for example http://en.wikipedia.org/wiki /Iftikhar_Muhammad_Chaudhry, accessed 26 January

IX. International Law and Foreign Relations

There were a few provisions in the 1947 Burmese Constitution dealing with foreign relations. A few cases dealing with the application of principles of international law to Burmese domestic law were decided by the Supreme Court and High Courts during the 1947 Constitution period.[9]

In the preamble of the 1974 Constitution it is mentioned that 'we the working people will … constantly strive to promote international peace and friendly relations among the nations.'[10] No important case law decisions applying international law principles to domestic law (at least of comparable quality and importance to the cases decided by the Supreme and High Courts established under the 1947 Constitution) were given by the highest court, the Central Court, during the 1974 Constitution era nor by the Supreme Court established by SLORC.

The author does not currently have access to provisions (if there are any) concerning foreign relations and international law in the detailed guidelines laid down by the National Convention.

X. Concluding Remarks

This Chapter, unlike perhaps all other Chapters in this book, does not provide information and analysis about an existing, far less a 'living' constitution because there is currently no constitution.

2008). Whereas, when five (of the six member) SPDC appointed Supreme Court were 'permitted to retire' it was both in terms of international coverage and reportage of news, a 'non-event'. (For the author's description and commentary on the removal of the five out of six SPDC appointed Burmese Supreme Court Judges described as 'permitted to retire', see Myint Zan, 'A Comparison of the First and Fiftieth Year of Independent Burma's Law Reports' (2004) 35, *Victoria University of Wellington Law Review*, 385, 400 and footnotes 43 and 44 and also at 425.) The differences in coverage of the interference by the executive branch of the government in the highest levels of the judiciary of both Pakistan in 2007 and Malaysia in 1988 and the relative lack of reporting on Burma might be due to the fact that both Pakistan (for the author's brief comparison of Burmese and Pakistani judicial independence see at 424) and Malaysia have had more independent or less subservient and less-controlled judiciaries for more than three decades now. Therefore, the attempted dismissal by the executive arm of the government or dismissals of the highest Supreme Court judges in those countries would be considered more newsworthy or subject to academic discussion as developments in Burma, where rule of law as well as constitutionalism have lagged behind those of its nearby countries which shared (or had shared) a common law legal heritage as well as concepts of constitutionalism and the rule of law.

9 See for example. *Dr T Chan Taik v Ariff Moosajee Dooply and One* (1948) *Burma Law Reports* (BLR) 454 (High Court) (HC). The case dealt mainly with legal issues arising from the Japanese occupation of Burma during the Second World War and with the certain provisions of application of the 1907 Hague Regulations. In *E. V. Kovtunenko v U Law Yone* 1960 BLR (SC) the Burmese Supreme Court considered the issue of diplomatic immunity and the application of provisions concerning foreign relations under the 1947 Burmese Constitution.

10 Preamble of the 1974 Constitution. English translation accessible at http://jurist.law.pitt.edu/world/myanmar.htm. (accessed 26 January 2008). Immediately after the phrase 'we the people' is the statement that 'the people' would 'faithfully follow the leadership of the Burma Socialist Programme Party.' Just as the turgid preamble to the 1974 Constitution sang the praises of the Burma Socialist Programme Party and how 'the Revolutionary Council of the Union of Burma assumed responsibility as a historical mission, adopted the Burmese Way to Socialism, and also formed the Burma Socialist Programme Party' it is certain that the new constitution (which as at the end of January 2008, is still not available) will contain equally effusive praise of the *Tatmadaw* and how it has so many times 'saved' the nation with so much sacrifice and how it will lead a 'disciplined democratic State'.

It has attempted to give 'snippets' of information about the two previous Constitutions Burma has had and some information, commentary and analysis on the envisaged 'future constitution'. In the context of ASEAN countries Burma is peculiar, not only because it is perhaps the only country without a Constitution for more than nineteen years, but also because it has changed its Constitutions on a number of occasions. I believe that the constitutional jurisprudence in Burma is such that the changes in the nature and substance of the Constitutions and constitutional discourse have been radical as well as regressive.

The issue of whether Burma has had a common law legal system since the 1970s is also one that can be contrasted with constitutional changes that have occurred in other countries. In relation to the public law aspects of the common law legal system which the former British colonies inherited, the Burmese break from its British heritage is more marked than that of India, Pakistan, Bangladesh, Malaysia, Singapore and countries in the South Pacific.

As far as comparative ASEAN constitutionalism is concerned, one can make a brief comparison with that of its neighbor, Thailand. Thailand, like Burma, has had several periods of military rule in the past fifty years. However, the Thai military governments have not been continuous or even as long running as that of its less fortunate neighbor, in terms of governance and constitutionalism. For example, the most recent military takeover in Thailand occurred on 19 September 2006, almost eighteen years to the day after the Burmese military junta took power on 18 September 1988. Yet just over 16 months after the September 2006 military coup, the Thai military junta has disbanded and the military Commander-in-Chief has 'insist[ed] that there will be no more coups'.[11] Within a year of the military junta's takeover, a new constitution was put to a referendum and approved by 57.8 % of the voters[12], elections have been held and the Thai junta has relinquished power. It is true that both the drafting and adoption process of the 2007 Thai constitution have been criticized[13], though as has been explained above and as will be elaborated the allegedly dubious measures taken by the 2006 to 2007 Thai military junta in the drafting and adoption of the 2007 Constitution of Thailand pales in comparison with the measures taken by the Burmese military junta (in power for more than nineteen years) to perpetuate and constitutionalize military rule.

The deception and bogus nature of the 1973 referendum leading to the 1974 Burmese Constitution, have already been mentioned. With the announcement that a constitutional referendum will be held in May 2008, the prospect of history repeating itself in yet another non-choice referendum looms large. In comparison with the elaborate Burmese constitutional charade, the recent drafting and adoption of the 2007 Constitution of Thailand is much less undemocratic and considerably more of an exercise in genuine constitutionalism. More relevantly and importantly, the Thai military relinquished power within 16 months of its

11 See Panarat Thepgumpanat, 'Thai Junta Vows No More Coups' The *Irrawaddy Magazine,* January 24, 2008, www.irrawaddy.org/article.php?art_id=10022 (accessed 27 January 2008).

12 See for example. '2007 Constitution of Thailand' http:en.wikipedia.org/wiki/Next_Constiution_of-Thailand (accessed 26 January 2008).

13 Ibid.

takeover. The Burmese military junta which 'temporarily' took over power in September 1988, far from relinquishing power as the Thai military has done, is using all the military, political, economic and legal resources at its disposal to perpetuate military rule through an elaborate, constitutional charade.

The guidelines already laid down by the military junta, even before the Burmese National Convention was first convened in January 1993, stated that the Burmese *Tatmadaw* must be given a leading role in the future democratic State. By contrast, in the 2007 Constitution of Thailand there is no explicit mention of such pervasive and embedded praetorianism. It is true that the Thai Commander-in-Chief's promise (in January 2008) that 'there will be no more coups' may be, based on what has occurred in the past in Thailand, not turn out be the case. Still, in Burma, from the outset of the National Convention, the delegates (an overwhelming majority of whom were hand-picked by the junta) were forced to accept not only the leading role of the military, but also to ensure that the President (who under the detailed guidelines would be both Head of State and Head of Government) would either be a military or a retired military officer. In addition, the Commander in Chief (who is not the President under the detailed guidelines) would have a constitutional right to take over State power whenever he[14] feels that the exigencies of a national emergency require it. This constitutional provision when (rather than 'if' since it seems very likely now that the Constitution will eventually be forced through) would *a priori* 'constitutionalize' future military coups. To the best of this author's knowledge, no other ASEAN countries (not even Indonesia during the dictator Suharto's regime) have a provision in their Constitution that openly states that the Commander in Chief has at his discretion the constitutional right to take over State power.[15] None of the countries in the Asia-Pacific region, including Bangladesh, Fiji, Indonesia, Pakistan, South Korea or Thailand, which have had periods of military rule, have such formalized, sweeping, praetorian and military-dominated provisions in their Constitutions. This is so even if their governments and societies are subject to the same degree of military control as Burma. In fact it is doubtful whether any other Asian countries have the same degree of military control and domination as is the case in Burma. One can confidently assert that none of the above countries have endured the duration and extent of military domination and control the Burmese have been subjected to over the past four and half decades.

Further, even South American countries which have in the past had a history of military rule, might not have such constitutional provisions stipulating: (1) the leading role of the army which is virtually certain to be stated in the preamble of the new constitution itself[16];

14 The author has not used the 'gender-neutral' term 'they' or 'he/she' since it is clear that both the President and the Commander in Chief would be males.

15 It should be emphasized here that the author is not mentioning the power under stringent conditions and in exceptional cases, in some Constitutions, for the proclamation of a state of emergency either by the Head of State or the Legislature. The detailed guidelines mentioned that the Commander in Chief of the Armed Forces will have *a prior constitutional and unilateral right* (that is without the approval, of the legislature or any other government organ) to take over State power. That, to the best of the author's knowledge and research probably does not exist in any other constitution, draft constitution or in detailed guidelines concerning a constitution.

16 The Preamble to the 1974 Constitution contained repeated references to the leading role of the Burma Socialist

(2) the stipulation that the President must have military, political and administrative experience or 'vision' thus ensuring that the President would be a military officer of a high rank or a retired military officer; (3) the election of the President by an electoral college', the majority of which would consist of military personnel; (4) the appointment of the members of the President's cabinet, the Attorney-General, the Chief Justice and members of the Supreme Court by the President and the stipulation in the detailed guidelines that the Legislature has no right to reject the President's nominations until it can clearly prove that the persons nominated by the President do not meet the qualifications stipulated in the Constitution; (6) the stipulation that the Legislature would have no control over the affairs of the *Tatmadaw* and that the Armed Forces can freely exercise its own affairs; and (7) the assignment of a prior constitutional right to the Commander in Chief of the Armed Forces to take over State power when he deems that appropriate. These constitutional provisions might well be unique not only in ASEAN constitutional history, but also in all former British colonies, the constitutional histories of military regimes including those in Asia, Africa, Latin America and Southern Europe such as Spain[17] and Portugal[18] and in the annals, at least since the end of the Second World War, of world constitutional history.

The lack of a current constitution makes this article a comparative exercise between a few of the detailed guidelines laid down by the National Convention and the previous Constitutions and a brief comparison with a few other countries. In terms of constitutionalism, Burma lags behind some of its ASEAN neighbors in many major aspects, at least both in terms of having a constitution that provides some semblance of legitimacy and fair treatment to its citizens and also in terms of checking the untrammeled power of one person and/or one institution. When the envisaged constitution comes into force the current military rule by decree would be 'transmogrified' (rather than being transformed) into an elaborate, constitutionalized, praetorian system that could be so deeply embedded in military domination that it might well be the most praetorian constitution in post-Second World War constitutional history. The essential features of the new constitution that could eventually come into force would justify the observation that many meaningful and minimal features of genuine constitutionalism would continue to be absent, as they have been in the past few decades in the Burmese legal, political and constitutional landscape.

** As far as the events in this Chapter are concerned, the 'cut-off' date is 10 February 2008. On 9 February 2008, after a preliminary submission of this Chapter was sent to the editor, the ruling State Peace and Development Council announced that it will hold a referendum to adopt the new State Constitution in May 2008 and also stated that the process of producing a draft of the State Constitution would soon be completed. As of end of February 2008 a draft Constitution*

Programme Party. The author predicts that similar references to the 'selfless sacrifices' and the leading role of the *Tatmadaw* (if not described as the 'savior of the nation') will also be emphatically mentioned in both the draft and the final new Constitution as well.

17 If the Franco dictatorship or the authoritarian Spanish governments between 1938 and 1975 can be considered as a succession of 'military regimes'.

18 If the Salazar dictatorship or the succession of authoritarian Portuguese governments between 1926 and 1974 can be considered as a succession of military regimes.

has not yet been published. Even if a draft Constitution is published before this Chapter goes to press it is not possible to incorporate comments on it due to the exigencies of time. Hence the comments and analysis of the yet to be published draft Constitution are based on aspects of the 'guidelines and detailed guidelines' laid down by the National Convention.

Further Reading

Copies of the former 1947 and 1974 Constitutions in English are available online (http://jurist.law.pitt.edu/world/myanmar.htm; accessed 28 January 2008; http://missphat.net/law/Countries/Myanmar_-_Burma/constitution/index.shtml, accessed on September 28, 2005); *A.P. Blaustein and G.H. Flanz*, Constitutions of the World. Dobbs Ferry, N.Y.: Oceana, 1990 (an English translation of the 1974 constitution can be found under the heading "Union of Myanmar, formerly known as Burma"); Burma's Constitution. Rev. ed. The Hague: Martinus Nijhoff, 1961 (a copy of the 1947 Constitution can be found in the appendix of each edition of the book); *Albert D. Mascotti*, Burma (Union), Burma's Constitution and Elections of 1974: A Source Book. Singapore: ISEAS, 1977; The Basic Principles Laid Down by the National Convention Plenary Sessions Up to March 30, 1996. Yangon: Union of Myanmar, 1996; *Andrew Huxley*, Case Note: Comparative Law Aspects of the Doe v Unocal Choice of Law Hearing, 1 Journal of Comparative Law, (2006); *Myint Zan*, Law and Legal Culture, Constitutions and Constitutionalism in Burma, in: Alice Tay (ed.), East Asia - Human Rights, Nation-Building, Trade Baden-Baden 1999 (Nomos Verlags-Gesellschaft); *Myint Zan and Sam Garkawe*, Restoring the Rule of Law in Burma, 4 Southern Cross University Law Review (2004); *Myint Zan*, A Comparison of the First and Fiftieth Year of Independent Burma's Law Reports, 35, Victoria University of Wellington Law Review, 385-426 (2004).

Philippines

THE PHILIPPINES
Quezon's Wish Granted

Harry Roque

"I prefer a country run like hell by Filipinos to a country run like heaven by Americans. Because, however bad a Filipino government might be, we can always change it."

Manuel Luis Quezon
(1878-1944)
First President,
Philippine Commonwealth

I. Introduction

The Philippines is an archipelago of over 7,100 islands lying about 805 km off the southeast coast of Asia. The Philippines is the world's 12th most populous country,[1] with a population of 88 million. Its national economy is the 39th in the world with a 2007 gross domestic product (GDP) of over US$145 billion.[2] The Philippines is rich in natural resources. Unlike many other Southeast Asian countries, the Philippines boasts a literate population that easily understands the English language as is well equipped with computer skills, advanced technological expertise, good Western managerial skills. Despite having these natural and human endowments, it is still mired in a developing world status.

This country report shall first trace the history of the Philippine Constitution to its present incarnation. It will then go on discussing the present Philippine Constitution in the context of the Philippine Government, including its practice with its fellow international actors.

Short concluding remarks end this country report.

1 World Development Indicators database, World Bank, 14 September 2007.
2 World Development Indicators database, World Bank, 1 July 2007.

II. Constitutional History

The Philippine Constitution is a living document. It has been re-written numerous times since the Spanish Colonial period to the present 1987 Constitution. Throughout this time, it has stood witness to the resilience and strength of the Filipino people and is the articulation of all our aspirations as a State. The Constitution contains the set of rules and principles which serve as the fundamental law of the land. It contains the form and duties of the government, the distribution of powers of the government, and the basic rights of the people.

Pre-Colonial Period

Before the Spanish colonizers came to the Philippines, there was no law that unified the archipelago into one nation. This stemmed directly from that fact that a central government did not exist in the country. The population was comprised of autonomous households organized into *barangays* – villages based on kinship ties. In these *barangays*, the *datu*'s, or chieftains, word was law, according to established custom of honoring the strongest, wisest and wealthiest. There was an absence of governmental machinery due to the scarcity of resources and the primitiveness of technology. Thus, the *datu* had to assume the role of legislator, judge and commander in chief.[3]

The Spanish Colonial Period and the Malolos Constitution

The Malolos Constitution was the first document of its kind to be enacted in the Philippines. The Revolutionary Congress of Malolos officially pronounced this Constitution on Jan. 21, 1899 while the First Philippine Republic, the first democratic government in Asia, was inaugurated two days later.[4]

The Malolos Constitution was a unifying document in that it organized the government based on the social system and traditions of the Filipinos. It provided for a strong centralized government where power would be shared between the military and the educated elite.

A notable feature of the Malolos Constitution was the inclusion of the Bill of Rights which comprised a large part of the text. It made explicit some rights that were observed by the Revolutionary government: the right to petition the government for redress of grievances, the right to protection against arbitrary arrest and detention and right to domicile among numerous others.

Unfortunately, both the government and this document were short-lived because the arrival American troops a scant ten months later marked the demise of the Philippines'

3 Perfecto V. Fernandez, Custom Law in Pre-quest Philippines (1976).

4 Cesar A. Majul, "A Legislature of a Dictatorship," in the Political and Constitutional Ideas of the Philippine Revolution, Quezon City 1996 (U.P. Press).

first attempt at establishing an independent Republic.[5]

American Occupation

The Philippines became an unincorporated territory of the United States.[6] The newly established military government adhered to the organic laws created by the US President and Congress. Principal among these laws was President McKinley's Instructions to the Second Philippine Commission. This directive prioritized the establishment of local government units, an educational system, a functional legislative department and efficient judicial structures. Executive power was vested in a Military Governor up until the 1901 Spooner Amendment transformed the government from a military to a civil one.[7]

In 1902, the Philippine Bill, entitled "An Act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands and for other purposes" took effect. This document contained more detailed provisions concerning matters such as the determination of Philippine citizenship, the use and exploitation of natural resources, the sale of public lands, etc. It also provided for the creation of the Philippine Assembly to sit with the Philippine Commission in a bicameral legislature.[8] The Bill served as the organic act of the Philippine government until the U.S. Congress enacted the Philippine Autonomy Act in 1916.

The Philippine Autonomy Act was significant in that it was in this document that the U.S. formally announced its intention to withdraw from Philippine territory as soon as a stable and independent government could be established. The efforts of local officials came to fruition when the American government finally recognized the Philippines' movement towards independence with the passage of the Tydings-McDuffie Act.

The Commonwealth Government and the 1935 Constitution

The first fully-enforced Philippine Constitution was drafted by virtue of the Tydings-McDuffie Act[9] in 1934. This document was later to be known as the 1935 Constitution and was in effect from 1935 to 1943.[10]

5 Vicente V. Mendoza, "The Origin and Development of the Philippine Constitutional System," in From McKinley's Instructions to the New Constitution (1978).

6 Id.

7 Id.

8 Isagani A. Cruz, Philippine Political Law, Quezon City 1995 (Phoenix Press, Inc.).

9 An Act adopted by the Philippine Congress which 1) authorized the call to a constitutional convention, 2) required the submission of the constitution to the President of the United States for certification that it contains certain provisions concerning country's trade relations with the U.S., Philippine foreign relations and status of finances, 3) required the submission of the constitution to the people for ratification.

10 Id.

The 1935 Constitution declared that "The Philippines is a republican state. Sovereignty resides in the people and all government authority emanates from them."[11] The framers of the Constitution divided such authority among three branches of government. The President was given Executive powers.[12] Legislative powers were vested in a unicameral National Assembly.[13] Judicial power was wielded by the Supreme Court and other inferior courts as might be established by law.[14]

While there was separation of powers among the three branches of government, these departments were not equal. Legal scholars have placed much emphasis on the fact that the President inherited the vast authority of the colonial governor and the other departments were relatively powerless in the face of a direct order coming from the President.

Under this Constitution, much premium was placed in achieving the goal of social justice and enforcing basic protections for Filipino citizens. Policies concerning the protection and development of the environment, economy and education were also codified.

Martial Law and the 1973 Constitution

The 1935 Constitution was replaced with a new document ratified in 1973, after Ferdinand Marcos had declared martial law through Proclamation 1081. Its drafting, ratification and subsequent application were all attended by controversy.

This Constitution provided for a shift to a parliamentary form of government where a National Assembly would be vested with legislative powers. Executive power was vested in the Prime Minister and his cabinet. They were responsible for the program of government and the formulation of national policy.[15] A President was also selected to become the symbolic head of state. As in the 1935 Constitution, judicial power was vested in the Supreme Court and other inferior courts. Existing courts under the former constitution were merely continued in the new one. A special court called the Sandiganbayan was also created and was given jurisdiction over civil and criminal offenses committed by public officials. The 1973 Constitution was the creation of three independent commissions: the Civil Service Commission, the Commission on Elections, and the Commission on Audit.[16]

Four subsequent amendments followed, all designed to grant more power to Marcos and to fuel the oppressive regime. It was not long before the Filipinos launched the EDSA People Power Rebellion, a bloodless revolt of thousands that caused the ouster of the Marcos administration.

11 1935 Const., Art. II, Sec. 1.
12 Id., Art. VII, Sec. 1.
13 Id., Art. VI, Sec. 1.
14 Id., Art. VIII, Sec. 1.
15 1973 Const., Art. IX, Secs. 2 and 10; Art. VIII Sec. 19(3).
16 Id., Art. XII.

The Freedom Constitution

In the aftermath of the Martial Law and the EDSA People Power Revolution, newly elected President Corazon Aquino issued Proclamation No. 3 which allowed for the promulgation of the 1986 Freedom Constitution as a transitional document meant to re-establish democracy in the country.

The Freedom Constitution granted the President the authority to remove the last vestiges of the Marcos regime from the government. She was given the power to completely re-organize the government and eradicate oppressive structures as well as to rehabilitate the badly beaten national economy.[17] She hastened to reinstate the guarantees of civil, political, human, social, economic, and cultural rights and freedoms which were suspended during Martial Law.[18] Under the mandate of the Freedom Constitution, President Aquino sought to give justice to the victims of abuses under the Marcos regime and restore peace and order as expeditiously as possible.

Being a transitional document, a Commission comprised of individuals chosen from various sectors of society was tasked to frame a new constitution.[19] The goal of the Commission was to create a new constitution that would be truly reflective of the ideals and aspirations of the Filipino people. The 1987 Constitution was ratified soon after.

The 1987 Constitution

With the ratification of the 1987 Constitution, normalcy and stability was once again established. It took effect on February 2, 1987 and is at present the applicable law and borrowed heavily from its predecessors.

The scars of the Marcos dictatorship had not yet fully healed. Thus, the provisions of the present constitution were drafted to address the specific problems that arose during the regime. Article 2, Sec. 1 provides that the Philippines would be a "democratic and republican state" and that "sovereignty resides in the people and all government authority emanates from them". The Bill of Rights again reaffirmed the highest level of protection given to life, liberty and property as well as to other specific rights such as the right to be protected from unlawful search and seizures, the right to free speech and peaceful assembly, the right to habeas corpus, and the right to the free exercise of religion.[20] State policies such as the affirmation of the importance of labor, the family unit, the environment and education were also enunciated.[21]

17 1986 Const., Art.1, Sec. 1(a).
18 Id., Art. 1, Sec. 1(b).
19 Id., Art. 5, Sec. 1.
20 1987 Const., Art. 3.
21 Id., Art. 2.

The 1987 Constitution affirmed the co-equal powers of the executive, legislative and judicial branches of government under the doctrine of separation of powers. However, an interesting innovation of this Constitution concerns the expansion of the Supreme Court's power of judicial review. Art. VIII, Sec. 1. states that the "Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government." Thus, the new system of government established by the present Constitution provided for checks and balances to safeguard against a repetition of history.

III. Constitution Making and Amendments

Legal and Historical Process of Making the Current Constitution

The 1987 Philippine Constitution is the product of a people's revolution.[22] It is the fifth fundamental law to govern the Philippines.

The Malolos Constitution, approved on 20 January 1899, was the first constitution of the Philippines.[23] It was the first republican constitution in Asia.[24] The Malolos Constitution established the First Philippine Republic under the leadership of General Emilio Aguinaldo. The second constitution of the Philippines was the 1935 Commonwealth Constitution. It was written and approved during the American rule of the Philippines. It adhered closely to the American Constitution because of the experience acquired by Filipino leaders and their familiarity with American political ideas and institutions under American rule.[25]

On 4 July 1946, the Philippines became an independent republic. Even so, the Philippine Republic continued to operate under the 1935 Constitution, such that many felt a certain unease in that an independent republic should continue to operate under a constitution that had been fashioned under colonial auspices.[26] On 16 March 1967, the Philippine Congress passed Resolution No. 2 (which was amended by Resolution No. 4 adopted on 17 June 1969) calling a convention to propose amendments to the 1935 Constitution. Said Resolution No. 2, as amended, was implemented by Republic Act No. 6132, approved on 24 August 1970, pursuant to the provisions of which the election of delegates to the said convention was held on 10 November 1970. The 1971 Constitutional Convention

22 Reynato Puno, Judicial Review: Quo Vadis?, Philippine Law Journal, Vol.79 (2004), 259.

23 Teodoro A. Agoncillo, Malolos: The Crisis of the Republic, Quezon 1960 (The University of the Philippines Press), 306.

24 Perfecto V. Fernandez, A Study of the Philippine Constitution, Quezon 1974 (JMC Press), 69.

25 Myrna S. Feliciano, The Philippine Constitution: Its Development, Structures, and Processes, in: Carmelo V. Sison (ed.), Constitutional and Legal Systems of Asean Countries, Quezon 1990 (The Academy of Asean Law and Jurisprudence), 184.

26 Joaquin G. Bernas, The 1987 Constitution of the Republic of the Philippines: A Commentary, Manila 2003 (Rex Book Store), xxxix.

began to perform its functions on 1 June 1971. While the Convention was in session, then President Ferdinand Marcos issued Proclamation No. 1081, on 21 September 1972, placing the entire Philippines under Martial Law. The first act of Pres. Marcos at the start of Martial Law was to order the arrest of the leaders of the opposition in the Legislative Department (such as Sen. Benigno Aquino Jr., and Sen. Jose Diokno) and the people in media (such as Max Soliven). He also ordered the closure of print media. Hence, Martial Law virtually crippled the Legislative Department and the press.

On 29 November 1972, the Convention approved its Proposed Constitution of the Republic of the Philippines. The next day, 30 November 1972, Pres. Marcos issued Presidential Decree No. 73, 'submitting to the Filipino people for ratification or rejection the Constitution of the Republic of the Philippines proposed by the 1971 Constitutional Convention, and appropriating funds therefor,' as well as setting the plebiscite for said ratification or rejection of the Proposed Constitution on 15 January 1973. Various cases were filed questioning Presidential Decree No.73 contending that only Congress has the power to call a plebiscite and to appropriate funds for it.[27] At a time when the said cases were being heard in oral arguments before the Philippine Supreme Court, Pres. Marcos issued Proclamation No. 1102 on 17 January 1973, announcing the ratification of the proposed constitution through the citizens' assemblies.[28] This proclamation was questioned in numerous petitions, now collectively known as the case of *Javellana v. Executive Secretary*, wherein a majority of the members of the Supreme Court concurred that:

> There is ample reason to believe that many, if not most, of the people did not know that the Citizens' Assemblies were, at the time they were held, plebiscites for the ratification or rejection of the proposed Constitution; the questions propounded in the Citizens' Assemblies indicate strongly that the proceedings therein did not partake of the nature of a plebiscite or election for the ratification or rejection of the proposed Constitution; and it is a matter of judicial knowledge that there have been no such citizens' assemblies in many parts of Manila and suburbs, not to say, also, in other parts of the Philippines. In the light of the foregoing, it cannot in good conscience be declared that the proposed Constitution has been approved or adopted by the people in the citizens' assemblies all over the Philippines.[29]

Nevertheless, the dispositive portion of the decision stated:

> ACCORDINGLY, by virtue of the majority of six (6) votes of Justices Makalintal, Castro, Barredo, Makasiar, Antonio and Esguerra with the four (4) dissenting votes of the Chief Justice and Justices Zaldivar, Fernando and Teehankee, all the aforementioned cases are hereby dismissed. This being the vote of the majority, there is no further

27 Planas v. COMELEC, G.R. No. 35925, Jan. 22, 1973.
28 69 O.G. 592 (January, 1973).
29 G.R. No. 36142, March 31, 1973.

judicial obstacle to the new Constitution being considered in force and effect.[30]

This decision sealed the Martial Law Regime under Pres. Marcos.

The Martial Law period under Pres. Marcos, was seen as one of the darkest moments of the Philippine Republic. Basic civil and political rights, such as the freedom of speech and of the press, were curtailed by the martial law executioners. Arbitrary arrests and detentions were committed on the mere suspicion that a person might be a member of the Communist Party of the Philippines. Hence, during the Martial Law Regime, there was a semblance of democracy, but without its substance. It was also a time when massive graft and corruption were committed by government officials led by the President himself and the First Lady. Hence, the Martial Law Regime was such a time when there was almost complete paralysis of the checks-and-balances mechanism inherent in a republican government.

On 17 January 1981, Pres. Marcos issued Proclamation No. 2045 lifting martial law. On November 1985, Pres. Marcos, in an act of bravado due to his complete control of government, called for a snap presidential election even if his term was still to expire in 1987. Pres. Marcos and his running mate, Arturo Tolentino, were challenged by Corazon Aquino and Salvador Laurel. The snap presidential election was held on 7 February 1986. Amid charges of widespread electoral fraud committed by the administration, the *Batasan Pambansa*, the legislative body under the 1973 Constitution, proclaimed Ferdinand Marcos and Arturo Tolentino as the winners on 15 February 1986. On 22 February 1986, then Defense Minister Juan Ponce Enrile and General Fidel Ramos, withdrew their support from Pres. Marcos, and set-up camp in Camp Aguinaldo and Camp Crame. Upon the exhortation of Jaime Cardinal Sin, then Archbishop of Manila, unarmed civilians started to flock along the stretch of Epifanio de los Santos Avenue (EDSA), the major highway in Metro Manila, to serve as human shields to protect the rebel soldiers from troops loyal to Pres. Marcos. Eventually, the crowd grew and this phenomenon eventually became the "EDSA People Power Revolution" wherein the superior number of troops loyal to the dictator, aided by tanks, were won over by the prayers, flowers and food offered by the people along EDSA. On 25 February 1986, Corazon Aquino and Salvador Laurel were proclaimed President and Vice-President, respectively. In the evening of the same day, Mr. Marcos, accompanied by his family and loyal supporters, went into exile in Hawaii after being proclaimed President by the Batasan Pambansa on the said day.

President Aquino issued Proclamation No. 1 where she declared that she and Vice-President Laurel were "taking power in the name and by the will of the Filipino people" on the basis of the clear sovereign will of the people expressed in the election of 7 February 1986.[31] Pres. Aquino set-up a revolutionary government and issued Proclamation No. 3, which promulgated a provisional or what is popularly known as the "Freedom Constitution," to temporarily replace the 1973 Constitution, which was automatically abrogated with the setting-up of the revolutionary government. Proclamation No. 3 called for the creation

30 G.R. No. 36142, March 31, 1973.
31 82 O.G. 1236 (March 1986).

of a Constitutional Commission to draft a new constitution.[32] Pres. Aquino, through Proclamation No. 9, created the 1986 Constitutional Commission, composed of 48 commissioners appointed by her. The 1986 Constitutional Commission convened on 1 June 1986 and finished its work on 15 October 1986.[33]

Current Constitution's Historical Development

`The 1973 Constitution re-enacted the policy provisions of the 1935 Constitution, but the 1987 Philippine Constitution, went on to add several more policies on the national economy and patrimony, on social justice and human rights, on science and technology, arts, culture, and sports, and even on the family.[34] Philippine Supreme Court Justice Bellosillo noted in the *Manila Prince Hotel v. GSIS* case:

> As against constitutions of the past, modern constitutions have been generally drafted upon a different principle and have often become in effect extensive codes of laws intended to operate directly upon the people in a manner similar to that of statutory enactments, and the function of constitutional conventions has evolved into one more like that of a legislative body.[35]

The 1987 Philippine Constitution follows this modern trend.[36]

IV. General Overview and Characterization of the Constitution

General Information

The1987 Philippine Constitution was framed by the 1986 Constitutional Commission set-up in pursuant to Proclamation No. 3 of then Pres. Corazon Aquino.[37] Pres. Aquino appointed 48 commissioners from varied backgrounds The 1986 Constitutional Commission convened on 1 June 1986 and finished its work on 15 October 1986.[38]

The 1987 Philippine Constitution is composed of eighteen (18) articles. It has been described as "pro-life, pro-people, pro-Filipino and anti-dictatorship."[39] Although it is basically patterned after the 1973 Constitution, the 1987 Philippine Constitution consists

32 Sec. 1, Article VI, Proclamation No. 3.
33 *Supra* note 26 .
34 Pacifico A. Agabin, Judicial Review of Economic Policy under the 1987 Constitution, Philippine Law Journal, Vol. 72 (1997), 182.
35 G.R. No. 122156, Feb.3, 1997.
36 *Supra* note 34 at 177.
37 Article VI of Proclamation No. 3.
38 *Supra* note 26.
39 Philippine Constitutional Commission of 1986, Primer: The Constitution of the Republic of the Philippines, Manila 1986, 26.

of 100 new sections which deal primarily with social justice, the national economy, family rights, education and human resources, the Commission on Human Rights and the autonomous regions.[40] The 1987 Philippine Constitution is considered to be excessively long compared to the 1935 and 1973 Philippine Constitutions.[41] This might be due to the varied backgrounds of the 48 commissioners. It is composed of 21,650 words.[42] Perhaps it is the only constitution in the world that enshrined the word 'love'[43] and 'sports'. The 1987 Philippine Constitution also contains many provisions that are very poetic and reminds one of the songs of Romeo to Juliet, to wit:

PREAMBLE

> We, the sovereign Filipino people, imploring the aid of Almighty God, in order to build a just and humane society, and establish a Government that shall embody our ideals and aspirations, promote the common good, conserve and develop our patrimony, and secure to ourselves and our posterity, the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace, do ordain and promulgate this Constitution.

and

> Section 10. The State shall provide the policy environment for the full development of Filipino capability and the emergence of communication structures suitable to the needs and aspirations of the nation and the balanced flow of information into, out of, and across the country, in accordance with a policy that respects the freedom of speech and of the press.

Structurally, the 1987 Philippine Constitution establishes a national government composed of three branches: the Legislative Department, the Executive Department, and the Judicial Department.

The 1987 Philippine Constitution also establishes three Constitutional Commissions: the Civil Service Commission, the Commission on Elections, and the Commission on Audit. These three constitutional commissions are independent from the three branches of government. The 1987 Philippine Constitution also provides for the Local Government.

40 *Supra* note 25 at 190.
41 *Supra* note 8 at 10.
42 We excluded, in our word count, the Ordinance appended to the 1987 Philippine Constitution.
43 *Supra* note 26 at 3.

Questions of Rigidity

Based on the number of articles and words of the 1987 Philippine Constitution, it is a very rigid constitution. Very specific provisions on subjects such as the family, education, science and technology, arts, culture and even sports education, are included. This has lead one commentator to state that the present Constitution include provisions that should have been embodied only in implementing statutes to be enacted by the legislature pursuant to basic constitutional principles.[44]

Impact of the Constitution

The 1987 Philippine Constitution has a great impact on Philippine society. It impact rests specifically on three things: the increased power of the Judicial Department, the subjection of the Executive Department to greater legislative and judicial checks, and the more explicit provisions on Social Justice, in general, and on economic issues, in particular.

The 1987 Philippine Constitution is really a direct reaction to the excesses of the Marcos Martial Law Regime. Born out of the trauma of martial law, the 1987 Constitution relies on a strengthened Judicial Department not only to safeguard the liberties of the people, but also to prevent the unwarranted assumption of power by the Executive and the Legislative Department.[45] Hence, it is understandable that the power of the Judicial Department has been greatly increased to check any abuse of power by any government entity. The judiciary was given extra strength when the Constitution expanded the definition of judicial power.[46] The Constitution now provides that the judicial power includes the duty of the courts of justice to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.[47] This expanded 'certiorari jurisdiction' of the judiciary, was proposed by Commissioner Roberto Concepcion, himself a former Supreme Court Chief Justice during the Martial Law period. He explained the purpose for the expanded definition of judicial power, to wit:

> [T]his is actually a product of our experience during martial law….[t]he role of the judiciary during the deposed regime was marred considerably by the circumstance that in a number of cases against the government, which then had no legal defense at all, the Solicitor General set up the defense of political question and got away with it. As a consequence, certain principles concerning particularly the writ of *habeas corpus*….and other matters related to the operation and effect of martial law failed because the government set up the defense of political question…. The Committee on Justice feels that this

44 Supra, note 8 at 11.
45 Supra, note 34 at 189.
46 Supra, note 22 at 259.
47 Sec. 1, Article VIII, 1987 Constitution.

> was not a proper solution to the question involved. It did not merely request an encroachment upon the rights of the people, but it in effect, encouraged further violations thereof during the martial law regime.[48]

Also, the power of the Executive has been subject to greater legislative and judicial review. The President, as Commander-in-Chief of all armed forces of the Philippines, has the power to suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law.[49] Nevertheless, Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session, may revoke such proclamation or suspension by the President and such revocation cannot be set aside by the President.[50] Also, the Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ of habeas corpus or the extension thereof.[51]

Due to the increased certiorari jurisdiction of the Judicial Department, various issues that were before not decided by the Judiciary (specifically the Philippine Supreme Court) were now taken cognizance by the Judiciary. In pre- 1987 Philippine Constitution cases before the Supreme Court, the Executive and the Legislative Department easily invoked the *political question doctrine*. The said doctrine means that the courts will not decide cases involving political questions or those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government.[52] After the ratification of the 1987 Constitution on 2 February 1987, there was a drastic change. Hence, the Supreme Court in the case of *Tanada v. Angara*, decided the issue of whether the Philippine Senate acted in grave abuse of discretion amounting to lack or excess of jurisdiction when they voted for concurrence in the ratification of the agreement Establishing the World Trade Organization.[53] In *Estrada v. Desierto*, the Supreme Court decided the issue of whether or not then Pres. Joseph Estrada resigned from office during People Power 2.[54] And in *David v. Arroyo*, the Supreme Court decided the issue of whether the President has the power to declare a state of national emergency.[55]

The 1987 Philippine Constitution has also been invoked in cases concerning economic issues. In *Garcia v. BOI*, the Supreme Court reversed the decision of the Board of Investments to allow a foreign corporation to set-up a petrochemical plant in a certain province.[56] While in *Manila Prince Hotel v. GSIS*, the Supreme Court reversed the decision

48 The 1986 Constitutional Commission, Record of the Constitutional Commission, Quezon 1986, 434-436. *Cited in* Reynato Puno, Judicial Review: Quo Vadis?, Philippine Law Journal, Vol. 79 (2004), 259.
49 Sec. 18, Article VII.
50 *Id.*
51 *Id.*
52 *Tanada v. Cuenco*, 103 PHIL 1051, 1067 (1965), *citing* 16 C.J.S. 413.
53 G.R. No. 118295, May 2, 1997.
54 G.R. No. 146710, March 2, 2001.
55 G.R. No. 171396, May 3, 2006.
56 G.R. No. 92024, Nov. 9, 1990.

of the Government Service Insurance System (a government owned corporation) to award a winning bid for the Manila Hotel to a Malaysian corporation.[57] The 1987 Philippine Constitution has also been creatively invoked in environmental issues. In *Oposa v. Factoran Jr.*, the Supreme Court granted legal standing to the minor petitioners holding that they have a responsibility to the future generations of Filipinos, a doctrine called *inter-generational equity*. The Supreme Court also recognized the "right to a balanced and healthful ecology", referring to Section 2, Article II of the 1987 Philippine Constitution.[58]

Constitutional Policies

Structurally, the clear policy of the 1987 Philippine Constitution is to prevent the possibility of another Marcos Martial Law Regime. Also, its inclusion of a separate Article on Social Justice and Human Rights[59] (containing provisions on Labor, Agrarian and Natural Resources Reform, Urban Land Reform and Housing, Health, Women, Role and Rights of People's Organizations, and Human Rights) show a clear intention to further strengthen social justice and respect for basic human rights. The specific constitutional policies are enumerated in Article II on the Declaration of Principles and State Policies wherein it enumerates six (6) principles and twenty-two (22) state policies.

V. System of Government

The Philippine model of constitutional government bears the hallmarks of a strong American influence, and is inspired by the liberal-democratic idea of a Constitution as a fundamental law – as both the highest law setting the criterion for the validity of any act of government and defining the organization and delineating the powers of the different branches of government. It provides for a unitary and presidential form of government, with a bicameral legislature and an independent judiciary. The close similarity of the Philippine Constitution can be attributed to the firm conviction held by the drafters of the 1935 Commonwealth Constitution (who were products of American legal education) that a constitutional democracy of the American variety was the best suited to the Philippines. The organic acts previously enacted by the United States government for its colony, which the Supreme Court then had been construing and upholding, embodies rights in a language nearly identical to that of the United States Constitution. Lastly, as the certification of the President of the United States that the Constitution would provide for a republican government and a bill of rights was a necessary condition for the establishment of the Philippine Commonwealth Government under the Philippine Independence Act of 1934, the drafters took care not to make any departures from the United States Constitutional system.[60]

57 G.R. No. 122156, Feb.3, 1997.
58 224 SCRA 792, 804-805 (1993).
59 Article XIII.
60 Enrique Fernando, The American Constitutional Impact on the Philippine Legal System, in: Lawrence Edward

The present Constitution, as did its predecessors, embodies the fundamental principle of separation of powers between the different branches of government, and provides for a system of *checks and balances* between and among them. In general, the President exercises powers of appointment over members of the judicial department as well as a general power of veto over bills submitted to him or her by the legislature. The legislature in turn may impeach the President and the members of the Supreme Court. Appointments made by the President to cabinet, foreign service, and high-ranking military posts are likewise subject to its approval through its Commission of Appointments. Last but not the least, the judicial branch, through the Supreme Court, exercise the power of judicial review over acts of the other two branches, and may declare them invalid if done in contravention of the Constitution. The experience of Philippine government through the years has been characterized by a strong executive, a bicameral legislature often given to patronage politics, and recently, a judiciary with a fair reputation for independence.

The Executive

Executive power under the 1987 Constitution is vested in the President,[61] who exercises it through his person or the executive departments and bureaus under his direct control.[62] The intent behind vesting the power to execute laws in a single person rather than a plural executive was to 'invest the holder with energy' and allow him or her to wield the considerable powers given to the office to meet the demands of any exigency.[63] While by and large the 1987 Constitution provides for more structural checks on the powers of the executive (a response to the Philippines' experience under the late President Marcos' Martial law regime and the vast powers he assumed for his office), the office of the Chief Executive remains a powerful and potent one, despite issues of legitimacy and accountability that have perennially haunted the past holders of the position.

The President, as well as the Vice-President, is elected by the direct vote of the people for a term of six years. While the Vice-President may run for reelection for no more than two successive terms, the President will not be eligible for any reelection. The case of the current President Macapagal-Arroyo, who was elected into office during the 2004 national elections after having replaced former President Estrada in 2001 is a unique one, as she is the first President after Marcos who has been able to hold the office for more than one term.

Beer (ed.), Constitutionalism In Asia: Asian Views of the American Influence, California 1979 (Univ. of California Press) 144-180.

61 Art. 7, sec. 1.

62 Art. 7, sec. 17. qualified political agency – recognizes the executive departments and agencies as adjuncts of the executive, and provides that except in cases where the Constitution, the laws, or the exigencies of the situation require the President to act in person, *the acts of the secretaries of such departments, performed and promulgated in he regular course of business, are, unless disapproved or reprobated by the Chief Executive, presumptively the acts of the Chief Executive*. Villena v Secretary of the Interior 67 Phil. 451, at 451, 453.

63 Bernas, The 1987 Constitution of the Republic of the Philippines: A Commentary 730-731 (1996).

The Constitution gives the President powers of general supervision over local governments, [64] and aside from his signature being the final act necessary for the effectivity of laws, the President also participates in the legislative process through his veto power.[65] The President also has authority to nominate and appoint persons to cabinet and diplomatic posts, officers of the armed forces from the rank of colonel or naval captain, commissioners of the Commission on Elections, Commission on Audit, and Commission on Human Rights, as well as other officers he may be required to appoint by law, subject to the approval of a Commission of Appointments comprised of members of both houses of the legislature.[66] The Chief Executive has also been held to possess *residual powers* beyond those granted to the office by the Constitution and the laws which are implied with the grant of executive power and which are necessary for him or her to comply with the duties under the Constitution.[67] Through the exercise of these powers, holders of the position of President of the Philippines are given considerable control over government and the execution of the laws.

Other powers of the President that have recently been the subject of controversy are the President's primary authority to enter into treaties,[68] grant executive clemency,[69] and the exercise of powers as commander-in-chief of the armed forces.[70] In *Pimentel v Executive Secretary*,[71] petitioners asserted that the Executive Secretary, as alter-ego of President Macapagal-Arroyo, was under a ministerial duty to transmit the signed text of the Rome Statute to the Philippine Senate for its concurrence under Art. 7, sec. 21. Under this provision, no treaty signed by the President or his duly authorized representative shall bind the Philippines without the concurrence of the Senate.[72] The Supreme Court ruled against the petitioners, holding it to be within the authority of the President to refuse to submit a treaty to the Senate, and even to refuse to ratify it despite having signed the same. The power to ratify treaties is vested in the President, subject to the concurrence of the Senate, but the role of the Senate, however, is limited only to giving or withholding its consent, or concurrence, to the ratification. To date, it remains to be seen when and if the President will transmit the Rome Statute to the Senate.

The Chief Executive's pardoning powers also figured in debates surrounding President Arroyo's pardon of deposed former President Joseph Ejercito Estrada in the wake of the

64 Art. 10, sec. 4.

65 Art. 6, sec. 27 (1). The President is, as a general rule, not allowed to veto particular items in a bill transmitted to him or her by Congress, but must instead approve or veto it in its entirety. The exception when the President may exercise such item veto powers lies in revenue, appropriation, and tariff bills.

66 Art. 7, sec. 16; Art. 9 provisions

67 Marcos v. Manglapus, 177 SCRA 668 (1989); Motion for Reconsideration 178 SCRA 760, at 765 (1989).

68 Art. 7, sec. 21.

69 Art. 7, sec. 19 states: "Except in cases of impeachment, or as otherwise provided in this Constitution, the President may grant reprieves, commutations, and pardons, and remit fines and forfeitures, after conviction by final judgment. He shall also have the power to grant amnesty with the concurrence of a majority of all the Members of the Congress."

70 Art. 7, sec. 18.

71 G.R. 158088, July 6, 2005.

72 Art. 7, sec. 21.

latter's conviction under the Philippines' anti-plunder law. In what was widely perceived as a political move to insulate herself from future plunder and corruption charges when she steps down from office in 2010, President Macapagal-Arroyo issued Estrada a pardon from the offense in return for the outright confiscation of the latter's assets believed to have come from kickbacks and percentages from excise taxes and illegal gambling. This move has been condemned as typical of the Philippine experience of having the growth and development of its democratic government institutions held hostage by the short-term interests of those holding office.

Amidst growing political dissent against the Arroyo administration, the assumption by the President of emergency powers and calling-out of the armed forces in times of emergency became the subject of controversy. In *David vs. Arroyo*,[73] petitioners challenged the constitutionality of issuances by President Arroyo in the wake of the arrests of numerous civilians and political oppositionists during the course of their participation in political demonstrations. The assailed Presidential Proclamation no. 1017 declared a state of national emergency on the 20th anniversary of the EDSA People Power Revolution, citing as cause the existence of a conspiracy between elements of the Philippine opposition and extremist communist insurgents and their repeated attempts to bring down the Arroyo administration. Among the grounds relied on by the petitioner was that the President alleged that President Arroyo abused her discretion in calling out the armed forces without any clear and verifiable factual basis of the possibility of lawless violence nor a showing that there is necessity to do so. Her issuance of the Proclamation was also assailed as having the effect of assuming for her office powers that could only be exercised after a declaration of Martial Law, which under the present Constitution would require the consent of Congress.[74] The Supreme Court upheld the President's exercise of her 'calling-out' powers, finding the same to have sufficient factual bases and passing the tests laid out in the cases of *Lansang v. Garcia*[75] and *IBP v. Zamora*.[76] The Proclamation was, invalidated, however, insofar as it purported to be an assumption of the President of legislative powers to 'promulgate decrees' and enforce obedience thereof through the armed forces.

The Chief Excutive's role as commander-in-chief of the armed forces[77] has likewise figured greatly in questions as to President Arroyo's accountability for the wave of extrajudicial killings and abductions of journalists and activists critical of her administration, which

73 G.R. No. 171396, May 3, 2006.

74 Art. 6, sec. 23 (2).

75 42 SCRA 448 (1971). The prevailing rule on the exercise by the President of calling-out powers is in favor of subjecting the same to judicial scrutiny – while it may be discretionary and according to the wisdom of the President, "this does not prevent an examination of whether such power was exercised within permissible constitutional limits or whether it was exercised in a manner constituting grave abuse of discretion." The Court is now authorized to look into the sufficiency of the factual bases asserted by the President to justify the deployment of the armed forces.

76 G.R. No. 141284, August 15, 2000, 338 SCRA 81. The IBP case laid down the rule that "it is incumbent upon the petitioner to show that the President's decision is totally bereft of factual basis" and that if he fails, by way of proof, to support his assertion, then "this Court cannot undertake an independent investigation beyond the pleadings."

77 Art. 7, sec. 18.

has also attracted the attention of the international community. President formed an independent commission on August 21, 2006 to formulate a report and suggest effective policy measures to address and eliminate the causes of the growing problem of media and activist killings. The Report of the Commission applied the principle of 'command responsibility" and implied that the Arroyo administration was partly responsible for killings attributable to its military forces. The United Nations Human Rights Council also recently sent Special Rapporteur Philip Alston to investigate the issues in early 2007. In both his interim and final reports, Alston scores the executive and its departments for its passivity in pursuing the prosecution of these incidents, and lays the blame for their perpetration on the armed forces in the implementation of Arroyo's policy of all-out war against the insurgents. An international opinion court has likewise recently issued a verdict finding the charges of human rights violations committed against the people of the Philippines by the Arroyo administration and the government of United States President George Bush as adequately substantiated.[78] President Arroyo has largely been silent in the face of these indictments, and has even promoted Maj. Gen. Jovito Palparan (now retired). The high-ranking military official suspected of having masterminded a number of the attacks.

The Legislature

The 1987 Constitution vests plenary legislative power[79] in a bicameral Congress composed of a House of Representatives elected by legislative district and by sectoral representation through the party-list system, and a Senate elected at large by the people. The exercise by the Legislature of its legislative power is subject to both substantive limitations (those in the Constitution which circumscribe its exercise) and formal limitations (procedural requisites for the validity of a bill). The validity of legislative enactments is also subject to the principle of non-delegability, under which statutes and enabling laws passed by Congress must both set the policy to be implemented by the executive arm concerned and fix a definite or determinable standard to which the delegate must conform in the performance of his functions.[80]

The present bicameral structure of the legislature was arrived at after a lengthy debate among the Commissioners during the drafting of the Constitution, in which bicameralism prevailed over unicameralism by a vote of 23 to 22.[81] The arguments presented then by both sides of the debate – focusing on the balance between legislative care and expediency, responsiveness to constituents, guarding against the parochial tendencies of locally-elected

78 Verdict Indicting the U.S. Backed Arroyo Regime and its accomplices for HHHuman Rights Violations, Economic Plunder and Transgression of the Filipino People's Sovereignty (Permanent Peoples' Tribunal, Second Session on the Philippines, March 21-25, 2007), available at: http://www.philippinetribunal.org/dmdocuments/verdict_ppt2_philippines.pdf.

79 Legislative power is defined in Philippine jurisprudence as the authority to make laws, and to alter or repeal them. Bernas, *supra* note 63, at 601.

80 Pelaez v. Auditor-General, 15 SCRA 569, at 576-577 (1965); U.S. v. Ang Tang Ho 43 Phil. 1, at 5-6. (1922).

81 See vol. II, Record of the 1986 Constitutional Commission 47-69.

representatives and interference by the executive - again figured substantially in recent attempts to push for an amendment of the Constitution during the Ramos, Estrada, and Arroyo administrations.[82]

The 250-member House of Representatives is composed of representatives of the different legislative districts of the country, and includes a fifth who will be elected at large through the party-list system.[83] Members of the House of Representatives are elected to a term of three years with reelection of up to three consecutive terms.[84] Senators on the other hand are elected to a term of six years with reelection of up to two years.[85] Membership in the House of Representatives has traditionally been associated with local political and economic elites, as a great majority of its members trace their roots to families whose members have held public office for two or more generations, and often rely on substantial landed or business wealth to sustain and advance their political careers.[86] The Senate is just as exclusive a chamber, as it is also dominated by traditional political elites of the same or similar background. Voting patterns of Filipinos have recently diversified, however, as indicated by the growing number of movie and television celebrities who have been elected to both houses for the past elections.

Upon assumption of office, all members of Congress are required by the Constitution to make a full disclosure of their financial or business interests, and of any conflicts of interest that may arise therefrom with any proposed legislation.[87] They are also subject to certain restrictions on the practice of their professions and holding of other government office.[88] Both houses are allowed to elect their own officers, Senate President (in the case of the Senate) or Speaker (in the case of the House), and to promulgate their own internal rules of procedure.[89] In matters affecting only the internal operation of the legislature, the Supreme Court has adhered strictly to the principle of separation of powers and declared the formulation of such rules to be within the exclusive domain of the legislature and beyond the reach of the courts.[90] The Court has, however, considered as a judicial question the determination of a construction of a rule that affects private rights and persons other than members of the legislature.

The Constitution vests in the Congress control over the annual budget of the national government and its agencies and provide that general appropriation bills must originate exclusively from the House of Representatives.[91] The Congress, through the separate vote

82 A primer on the arguments made for amending the 1987 Constitution is available at: Institute for Popular Democracy, A Primer for Constitutional Reform. http://www.ipd.ph/chacha/primer/chacha_primer.html.

83 Art. 6, Sec. 5. The present law governing the party-list system of representation is Republic Act. No. 7941.

84 Art. 6, sec. 7.

85 Art. 6, sec. 4.

86 See Sheila S. Coronel, The Rulemakers: How the Wealthy and Well-Born Dominate Congress, Quezon City, Philippines, Philippine Center for Investigative Journalism (2004).

87 Art. 6, sec. 12.

88 Art. 6, secs. 13-14.

89 Art. 6, sec. 16.

90 Osmeña v. Pendatun, 109 Phil. 863, at 871-872 (1960).

91 Art. 6, sec. 24. Among the other bills that must originate exclusively from the House of Representatives are tariff

of both houses jointly assembled, also holds the sole power to declare the existence of a state of war, and may grant emergency powers to the President for a limited period subject to its withdrawal or any limitations it may prescribe.[92]As discussed previously, appointments made by the President to certain positions are subject to the approval of a Commission of Appointments composed of members of both Houses.[93]

As part of the system of checks and balances, the Congress also holds the power of impeachment over the President, the Vice-President, members of the Supreme Court, the Commissions on Audit, Elections, and Human Rights, and the Ombudsman.[94] The House of Representatives has the exclusive power to initiate all cases of impeachment[95], while the Senate shall have the sole power to try and decide all cases of impeachment.[96] Impeachment proceedings under these provisions were first resorted to during the aborted impeachment case against former President Estrada in December of 2000 that ultimately led to the assumption of Gloria Macapagal-Arroyo of the presidency in January of 2001. An attempt was also made to impeach then Chief Justice Hilario Davide in 2003 for alleged irregularities in the disbursement of the judiciary's Judicial Disbursement Fund, but was abandoned in the face of unfavorable public opinion and a Supreme Court decision declaring the same to be in contravention of the Constitution. Ruling on a number of consolidated petitions challenging the action of the House of Representatives' amendment of its internal rules of procedure to accommodate the filing of a second impeachment complaint against Chief Justice Davide,[97] the Supreme Court looked int the debates of the 1986 Constitutional Commission and held that the use of 'initiate' in Art. 11, sec. 3(5) refers to the filing of the impeachment complaint. The Constitution therefore imposes a limitation on the resort to impeachment by providing that no impeachment proceedings shall be *initiated* against the same official more than once within a period of one year,[98] hence, no further complaints will be considered by the House until a year after the first complaint has been filed. From the time of her election into office in 2004, President Arroyo has had to contend with impeachment complaints filed against her by the political opposition. Through the application of the ruling in the *Francisco* case holding 'initiation' of impeachment proceedings to begin as of the filing of the complaint and by marshalling support from a commanding majority in the House, administration allies have been able to thwart all impeachment attempts against President Arroyo by filing an insubstantial complaint ahead of the opposition's and taking advantage of the one-year ban.

bills, private bills, bills authorizing an increase of the public debt, and bills of local application. Under Art. 6, sec. 25, the Congress may not increase the appropriations recommended by the President for the operation of the government as specified in the budget.

92 Art. 6, sec. 23.

93 Art. 6, sec. 18.

94 Art. XI, sec. 2.

95 *Id.,* at sec. 3(1).

96 *Id.,* at sec. 3(6).

97 Francisco v. House of Representatives, G.R. 160261, November 10, 2003.

98 Art. XI, sec. 3(5).

Another power of the legislature that has also given rise to a near-constitutional crisis is its oversight function which it exercises through inquiries in aid of legislation.[99] In *Drilon, et al. vs. Executive Secretary*,[100] the Supreme Court of the Philippines struck down an Executive Order issued by President Arroyo preventing heads of departments of the executive branch from appearing and answering questions in hearings in aid of legislation before Congress. The EO invoked the doctrine of 'executive privilege' to justify the prohibition on the attendance by executive officials to legislative hearings, but did not give clear and specific grounds for the necessity of the application of the privilege. Drawing on established legal principles and jurisprudence[101] on the scope of 'executive privilege' and the constitutional power of inquiry held by the Philippine Congress, the Court invalidated the portion of the EO which required executive officials to secure the consent of the President prior to attending hearings conducted by Congress in aid of legislation. The Court held that any claim of executive privilege must give precise and certain reasons for its application, and cannot leave Congress in the dark as to how the requested information could be deemed classified.

Legislation is done by filing of a proposed bill in either chamber of Congress, where it will undergo three readings in the chamber and consideration at the Committee level. Once a bill and its amendments are approved in one chamber, it is transmitted to the other chamber, in which it will undergo the same process. When the other chamber has already approved a counterpart bill, a Conference Committee is called comprising members from both chambers to reconcile differences in the two bills and submit a final report to be submitted for the approval of both chambers.[102] The Supreme Court has also ruled that the power of the Conference Committee includes the power to introduce new provisions germane to the subject of the proposed legislation.[103] This ruling has been criticized as circumventing the constitutional provision barring amendments to bills on their last reading, as under the pronouncement in *Tolentino*, legislators may then be allowed to smuggle otherwise unpopular amendments at the Conference Committee hearings.

The legislative process concludes with the signing by the President of the consolidated bill approved by the two chambers, after which it becomes a Republic Act.[104] Recent Philippine experience with legislation however, has shown how it can be prone to legislative deadlocks, as disagreements in opinion or policy between the two chambers - or between either of them and the President - has at a number of times resulted in the delay and failure to pass

99 Art. 6, sec. 21.

100 G.R. No. 169777**,** April 20, 2006.

101 In *Arnault v. Nazareno* (87 Phil. 29 [1950]), the Court held the power of inquiry – with process to enforce it – to be an essential and appropriate auxiliary to the legislative function, and upheld the Senate's power to punish recalcitrant witnesses for contempt. The oversight function and authority of Congress is understood as including the power to resort to compulsory process to enforce it.

102 Art. 6, sec. 26.

103 In the case of *Tolentino v. Secretary of Finance* (G.R. no. 115455, August 25, 1995), the Court upheld the inclusion in the consolidated version of a tax law of provisions not found in either the House or Senate versions of the bill but which were introduced by the Conference Committee.

104 Art. 6, sec. 27(1).

important legislation. The legislature has likewise demonstrated a tendency to dwell on legislative investigations regarding alleged irregularities in government transactions and on impeachment attempts brought about by persisting questions as to the legitimacy of President Arroyo's presidency.

The Judiciary

The Philippine judiciary is composed of a constitutionally-created Supreme Court, an anti-graft and corruption court with jurisdiction over offenses committed by public officials in the course of official duty (the Sandiganbayan), a Court of Appeals, a Court of Tax Appeals, and a system of Regional and Municipal Trial Courts. The 1987 Constitution grants these courts power to "settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[105] This definition of judicial power serves as a limitation on the courts, as they can only decide disputes that fulfill the requisites of judicial review, namely, that there be an actual case and controversy, that the parties have standing to sue, and that the dispute be a justiciable and not a political question best left to the wisdom of the other co-equal branches of government.[106] Judicial power under the 1987 Constitution was also given an expanded definition during the debates of the1986 Constitutional Commission,[107] and now includes the power to correct any "grave abuse of discretion" on the part of any branch or instrumentality of government.[108] The judicial branch is now authorized to check even the acts of its co-equal branches of government, but it exercises this power with great hesitation and often defers to the principle of separation of powers.

The exercise of judicial review by the Philippine judiciary – as well its requisites and exceptions – closely follows the American experience, except that while judicial review was only implied in the American Constitution by the case of *Marbury v. Madison*,[109] the 1987 Constitution gives the Philippine Supreme Court an express authority to review, revise, or affirm all cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question,[110] as well as cases involving the constitutionality, application, or operation of presidential decrees, proclamations, orders, instructions, ordinances, and other regulations.[111] The Philippine concept of

105 Art. 8, sec. 1.
106 Kilosbayan v. Guingona, 232 SCRA 110; PHILCONSA v. Enriquez, 235 SCRA 506; Avelino v. Cuenco 83 Phil. 17; Joya v. PCGG, 225 SCRA 568.
107 RECORD OF THE CONSTITUTION COMMISSION, Vol. 1, July 10, 1986 at 439-443.
108 Art. 8, sec. 1.
109 1 Cranch 137 (1803).
110 Art. 8, sec. 5(2)(a).
111 Art. 8, sec. 4(2).

judicial review, as expressly embodied in the 1987 Constitution, has been described by the Supreme Court as being "not just a power but also a duty."[112] and it was given an expanded definition to include nevertheless stays true to the theory and spirit of judicial review first put forward by *Marbury*, and adheres to the principles of separation of powers and checks and balances as well as the supremacy of the Constitution as the ultimate criterion of the validity of acts of government.[113]

Appointments to the Supreme Court and all other subordinate courts are made by the President from a list of nominees submitted by a Judicial and Bar Council,[114] and are not subject to the approval of the Commission of Appointments. Authority to appoint officials and employees of the judiciary is vested in the Supreme Court.[115] To further ensure its independence, the Constitution provides for the fiscal autonomy of the judicial department by declaring that the legislature may not reduce appropriations for the judiciary below the amount appropriated the previous year and mandating their automatic and regular release upon approval.[116] The Judicial department also has a *Judiciary Development Fund* (JDF). The JDF was created by Presidential Decree No. 1949[117] "to help ensure and guarantee the independence of the Judiciary as mandated by the Constitution and public policy and required by the impartial administration of justice." The JDF was aimed to augment the allowances of the members and personnel of the Judiciary and to "finance the acquisition, maintenance and repair of office equipment and facilities." While it has been accepted beyond debate that the grant of fiscal autonomy to the judiciary is essential to maintaining its independence, the perceived lack of checks and accountability on its disbursement has at times given rise to 'turf wars' between the judicial department and the legislature with the latter's zealous exercise of its oversight functions.

The Constitution itself provides for the qualifications of members of the Supreme Court and the other collegiate courts, but allows Congress to prescribe qualifications for judges of the Municipal and Regional Trial Courts.[118] The Supreme Court sitting en banc is also given the power to discipline judges of the lower courts.

112 Francisco v. House of Representatives, *supra* note 97.

113 The Court in *Angara v. Electoral Commission* (63 Phil. 139, at 158 [1936]), regarded as the case which established judicial review in the Philippines declared that the Court in the exercise of judicial review does not assert any supremacy over the other coordinate branches but rather the supremacy of the Constitution: "…and when the judiciary mediates to allocate constitutional boundaries, it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties to an actual controversy the rights which that instrument guarantees to them."

114 Art. 8, sec. 8.

115 Art. 8, sec. 5(6).

116 Art. 8, sec. 3.

117 "Establishing a Judiciary Development Fund and For Other Purposes," July 18, 1984. The sources of income for the JDF have been supplemented by A. M. No. 99-8-01-SC ("A resolution providing for other sources of the Judiciary Development Fund"), September 14, 1999.

118 Art. 8, sec. 7.

Under the Constitution, the Supreme Court is given broad rule-making powers with which it can promulgate rules for the protection of rights, pleading, practice, and procedure in all courts, and the regulation of the legal profession.[119] In response to the recent wave of extrajudicial killings, summary executions and abductions of journalists and opposition activists, the Supreme Court, led by the current Chief Justice Reynato Puno, held a summit on extrajudicial killings wherein legal experts, members of the judiciary and law enforcement agencies, and victims and concerned citizens' groups gathered to discuss possible measures that the Court may take to help arrive at solution to the problem.[120] The Supreme Court also promulgated rules for the adoption of the *Writ of Amparo*, a special remedy for the protection of constitutional rights. The Writ, which originated from Mexico, was adopted by various Latin American countries as a remedy to protect the whole range of constitutional rights during the time they were governed by military juntas.[121] The Writ as adopted in the Philippines is aimed at securing and protecting the right to life, liberty, and security of a person whose rights are violated or threatened with violation by an unlawful act or omission of a public official or employee or private individual or entity.[122]

A number of decisions by the Supreme Court on recent constitutional issues have earned it a fair reputation of independence. As a response to the growing political dissent and a number of crises of legitimacy that rocked the Arroyo administration in 2006, the President issued a number of executive acts that infringed constitutional rights and purported to exercise powers beyond those that may be validly exercised by her office. *David v. Arroyo*[123] involved a Presidential Proclamation declaring a state of national emergency in light of perceived threats to the duly-elected government and a General Order ordering the armed forces to "carry out the necessary and appropriate actions and measures to suppress and prevent acts of terrorism and lawless violence." *Drilon v. Executive Secretary*[124] involved an Executive Order prohibiting heads of executive departments, security officials, and high-ranking military officials from appearing and answering answers in legislative inquiries. *BAYAN v. Executive Secretary*[125] on the other hand involved a statement of the Executive Secretary declaring purporting law enforcers to adopt a response of 'calibrated pre-emptive response' to rallyists in political demonstrations – in derogation of the 'maximum tolerance' standard required by the law regulating public assemblies in the Philippines. In striking down these issuances, the Supreme Court met the constitutional issues raised in the petitions and answers by the government officials concerned, and reiterated its sworn duty to protect fundamental rights and uphold the Constitution.

119 Art. 8, sec. 5(5).

120 The National Consultative Summit On Extrajudicial Killings And Enforced Disappearances was held at the Centennial Hall of the Manila Hotel on July 16-17, 2007. A copy of the summary of the report is available at: http://www.supremecourt.gov.ph/publications/summit/summation1.pdf.

121 Annotation to the Writ of Amparo 1 (2007).

122 A.M. No. 07-9-12-SC, approved September 25, 2007, sec. 1.

123 *Supra* note 56.

124 *Supra* note 101.

125 G.R. No. 169838, April 25, 2006.

VI. Fundamental Rights

The 1987 Constitution embodies guarantees for a number of fundamental rights in its Bill of Rights - which was closely patterned after that of the Constitution of the United States - as well as in its State Policy[126] and Social Justice[127] provisions. As in the case of the United States Constitution, the human rights provisions do not provide a grant, but rather, a recognition of inalienable rights possessed by the individual. It acts as a limitation on the acts and powers of government, which cannot be exercised in a manner that would impair or defeat these rights.

The 1987 Constitution declares as a policy of the state that it shall value "the dignity of every human person" and guarantee "full respect for human rights."[128] Rights under the present Constitution may be classified according to civil, political, and social and economic rights.[129] The civil rights guaranteed under the Constitution include guarantees of personal freedom,[130] the right to privacy of communication and correspondence,[131] liberty of abode and right to travel,[132] right to association,[133] religious freedom,[134] right to information,[135] free access to courts and judicial bodies,[136] the privilege of the *writ of habeas corpus*[137] and the rights of the accused.[138] Political rights covered by the Constitution include the rights to freedom of speech and expression, of the press and of the right to peaceful assembly,[139] suffrage,[140] the right to information on matters of public concern,[141] and the provisions governing citizenship.[142] The social and economic rights guarantee to the individual the enjoyment of property, as can be seen in the provisions on the right to property,[143] the right to just compensation for property taken for public use,[144] and the non-impairment clause.[145] Other guarantees of social

126 Art. 2.
127 Art. 13.
128 Art. 2, §. 11.
129 Myrna Feliciano, The Philippine Constitution: Structure, Operation, and Processes 216, in ASEAN Constitutional/Legal Systems. Civil rights refer to rights which courts would enforce at the instance of the private individual to ensure the latter's enjoyment of their means of happiness. Political rights grant to the individual the power to participate, directly or indirectly, in the establishment or management of the government. Social and economic rights refer to those that ensure the peoples' well-being and economic security.
130 Art. 3, sec. 1.
131 Art. 3, sec. 3 (1).
132 Art. 3, sec. 6.
133 Art. 3, secs. 4, 8.
134 Art. 3, sec. 5.
135 Art. 3, sec. 7
136 Art. 3, sec. 11.
137 Art. 3, sec. 15.
138 Art. 3, secs. 11-12.
139 Art. 3, sec. 4.
140 Art. 5.
141 Art. 3, sec. 7
142 Art. 5.
143 Art. 3, sec. 1.
144 Art. 3, sec. 9.
145 Art. 3, sec. 10.

and economic rights are found in the various provisions of the 1987 Constitution on:

1) the promotion of social justice and human rights;[146]
2) the right to education, science, and technology, culture and sports;[147]
3) the family;[148]
4) the conservation and utilization of natural resources;[149]
5) the right to own establish, and operate economic enterprises;[150]
6) the protection of consumers from trade malpractices and substandard and hazardous products;[151]
7) the right to health;[152]
8) the right to a balanced and healthful ecology;[153]
9) and the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions.[154]

Of paramount importance among the rights guaranteed under the Bill of Rights are the rights to due process and equal protection of the laws.[155] Drawn from American constitutional law, these rights have traditionally been given strong protection by the courts. The due process guarantee in the Philippines has evolved and given rise to different standards for administrative, criminal, and procedural due process, but courts are generally unanimous that it includes at the minimum, the right to be given notice and be heard. Interpretation of the equal protection clause has remained faithful to the principles established by the early American jurisprudence from which it traces its roots. The construction and protection granted by the courts to these and the other rights derived from the American Constitution has largely been faithful to the ideal.

More noteworthy, however, is the inclusion in the 1987 Constitution of a considerable number of provisions on social and economic rights which are hardly given any mention in the Constitution of the United States. This was due to the experience of the United States – and even the Philippines during its occupation by the former – during which the *laissez faire* theory of economics held sway. During the enactment of the Philippine Constitutions, however, concern for the increasing number of people living in poverty gave rise to a belief

146 Art. 3., secs. 9-11, 13-23 & 26; Art. 13.
147 Art. 14.
148 Art. 15.
149 Art. 12, secs. 1 &2.
150 Art. 12, sec. 6.
151 Art. 16, sec. 9.
152 Art. 2, sec. 15.
153 Art. 2, sec. 16. The right to a balanced and healthful ecology has been recognized by the Supreme Court in *Oposa v. Factoran* (224 SCRA 792) as granting a petitioner to sue to compel the cessation of government action that would damage the environment. The recognition of standing is based on a theory of "intergenerational equity" that allows the petitioner to sue on behalf of the unborn generations who also stand to be injured should the environment suffer damage due to the continuation of the acts sought to be enjoined.
154 Art. 2, sec. 22 & art. 14, sec. 17.
155 Art. 3, sec. 1.

that the State should actively participate in addressing the problem, rather than leave the same to the free interplay of market forces. The drafters then acted to adopt guarantees of social and economic claims that the government must attend to assure the promotion of individual welfare and well-being. In this regard, the Philippine Constitutions may be said to have taken a departure from the United States model.[156]

Recent events, however, have exposed the dark stain on the human rights record of the Philippines. No serious effort has been made to address the problem of the alarming number of extrajudicial killings, summary executions, and abductions of journalists and activists. This passivity and failure of the Philippine government to bring to justice the ones responsible has been denounced by an independent commission created by President Arroyo herself,[157] as well as by the international community through the Reports of UN Special Rapporteur Philip Alston[158] and the Peoples' Permanent Tribunal in March 2007.[159] In all these reports and investigations, adequate evidence was found to conclude that the Philippines' own armed forces may be behind a considerable number of the violations – and that by virtue of the doctrine of command responsibility, the President is liable as well. These alleged acts and blatant omissions of the Philippine government have unfortunately created an atmosphere of impunity under which the citizens' rights to life, liberty, political expression and even association may be trampled upon without fear of penalty or prosecution.

VII. Constitutional Jurisprudence

In the Philippine system of government, judicial power is vested in one Supreme Court and in such lower courts as may be established by law.[160] The Court has been the traditional guardian of the Constitution and has always sought to ensure its faithful application in legal matters.

It is important to note that not all cases that come to the Supreme Court are resolved on the merits. Although vested with this authority, history has shown that the Court has

156 Fernando, *supra* note 60.

157 Report of the Independent Commission to Address Media and Activist Killings, January 22, 2007. Available at: http://www.inquirer.net/verbatim/Meloreport.pdf. (hereinafter *Melo report*). The Commission stated as part of its findings that General Palparan - a high-ranking military official said to be the one ordering the killings as part of a systematic anti-insurgency campaign - and some of his superior officers may be held responsible for failing to prevent, punish or condemn the killings under the principle of command responsibility, squarely implying culpability on the part of the Philippine government.

158 *Preliminary Note on the Visit of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, to the Philippines (12-21 February 2007)*, U.N. Human Rights Council, 4th Sess., Agenda Item 2, at 5,U.N. Doc. A/HRC/4/20/Add.3 (2007); *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, MISSION TO PHILIPPINES*, November 27, 2007, Available at: http://www.inquirer.net/verbatim/A-HRC8-Philippines_Advance.pdf.

159 Verdict Indicting the U.S. Backed Arroyo Regime and its accomplices for HHHuman Rights Violations, Economic Plunder and Transgression of the Filipino People's Sovereignty, *supra* note 79.

160 1987 Const., Art. VIII, Sec. 1.

chosen not to decide certain controversies which it believed were non-justiciable. In a number of illustrative cases, the Court limited its own jurisdiction to matters which did not deal with the discretionary acts of co-equal branches of government.

The case of the *Philippine Bar Association v. Commission on Elections*[161], the petitioners challenged the constitutionality of then President Marcos' resignation after the winners of a "snap" election were proclaimed. They argued that a snap election would only be justified if there was an actual vacancy before the holding of such election. The Court denied the petition and upheld the election as well as the subsequent resignation on the ground that this issue concerned a political question which could only be resolved by the electorate acting in their sovereign capacity.

The scope of the political question has been limited in the 1987 Constitution.[162] Unlike in earlier constitutions, such judicial power has been expanded to include "the duty to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government."[163] This provision codifies the authority of the judiciary to act as a check and balance to the executive and legislative branches of government, a power that has found expression in numerous cases decided by the Court.

The groundwork for the application of judicial review was laid down in *Angara v. Electoral Commission*.[164] Here, Jose A. Angara petitioned the Court to issue a writ of prohibition to restrain the Electoral Commission from taking cognizance of a protest filed by Pedro Ynsua against the election of Angara as a member of the National Assembly. The case was one of first impression. At issue was the Court's jurisdiction over the Electoral Commission, a constitutional organ specifically created for the purpose of resolving all election-related controversies. The Court ruled that while the doctrine of separation of powers is a fundamental principle in our system of government, the Constitution has provided for "an elaborate system of checks and balances to secure coordination in the workings of various departments of the government". The Court denied the petition after determining that the Electoral Commission was "acting within the legitimate exercise of its constitutional prerogatives to take cognizance of the election protest."

In the 1997 case of *Santiago v. Commission on Elections*[165], the Court had occasion to comment on the unavailability of people's initiative as a means to amend the Constitution when it declared Republic Act No. 6735[166] inadequate for failing to provide sufficient

161 140 SCRA 455 (1985).
162 *Supra* note 8 at 88.
163 Id.
164 63 Phil. 139.
165 106 SCRA 270.
166 Republic Act No. 6745, entitled "An Act Providing for a System of Initiative and Referendum and Appropriating Funds Therefor".

standards for its implementation. It declared that while Art. XVII[167] recognizes the right of the people to directly propose amendments to the Constitution, this right cannot be exercised until the Congress provides subordinate legislation. The Court ruled that the Commission on Elections acted without jurisdiction or with grave abuse of discretion when it entertained a petition for an amendment to the Constitution. It enjoined the Commission from taking cognizance of any other petition for initiative or amendments to the Constitution and prohibited it from prescribing rules and regulations for the conduct of such initiatives or amendments.

In the case of *The Integrated Bar of the Philippines v. Zamora*[168], the Court upheld then President Joseph Estrada's order commanding the deployment of the Philippine Marines to conduct visibility patrols around the metropolis, ratiocinating that such deployment was consistent with the President's Commander-in-Chief powers found in the Constitution.[169] This was an instance of "permissible use of military assets for civilian law enforcement" since there was sufficient factual basis for such governmental action. The Court went on to say that Estrada exercised his discretionary authority in determining the existence of threats to public security that would warrant the exercise of his "calling out" the Marines. It was thus decided that this issue was a non-justiciable question that was not appropriate for Court review. The "grave abuse of discretion" which would give rise to judicial review refers to "the capricious or whimsical exercise of judgment that is patent and gross as to amount to an evasion of a positive duty or to a virtual refusal to perform a duty enjoined by law"[170], the commission of which the petitioners failed to establish in this case.

The Supreme Court also took cognizance of the case of *Estrada v. Desierto*[171] in 2001. The Court, speaking through Justice Puno, reiterated that it had the prerogative to determine what it can do to prevent grave abuse of discretion amounting to excess or lack of jurisdiction on the part of any branch or instrumentality of government in accordance with the provisions of the Constitution. Thus, the Court held that it may properly inquire into the legitimacy of the Arroyo administration. It noted that the new government resulted from EDSA II, an intra-constitutional ousting of then President Estrada. The succession of the Vice President to as President is a matter that properly falls within the scope of judicial review.

In *Francisco v. House of Representatives*[172], the Court once again had occasion to reiterate the doctrine of judicial review. In this case, the Court ruled that it had jurisdiction over issues arising from impeachment proceedings initiated in the House of Representatives, citing the limitations provided in the Constitution concerning the "manner of initiation, the required

167 Art. XVII, Sec. 2 provides that "Amendments to this Constitution may likewise be directly proposed by the people through initiative upon a petition of at least 12 per centum of the total number of registered voters, of which every legislative district must be represented by at least 3 per centum of the registered voters therein."

168 81 SCRA 338.

169 1987 Const., Art. VII, Sec. 18.

170 *Supra* note 169.

171 452 SCRA 353.

172 44 SCRA 415.

vote to impeach and the one year time bar before a second impeachment complaint can be filed" as "judicially discoverable standards" for determining the validity of the exercise of such discretion.[173] Mention was also made of the limitations to the exercise of judicial review that the Court has observed in numerous decisions: 1) the existence of an actual case or controversy calling for the exercise of judicial power, 2) the person challenging the act must have "standing", 3) the question of constitutionality must be raised at the earliest opportunity, and 4) the issue of constitutionality must be the lis mota of the case.

In the 2006 case of *David et al. v. Arroyo et al.*[174], The Supreme Court declared that Proclamation 1017[175] was constitutional in so far as it constitutes a call by President Gloria Macapagal-Arroyo on the Armed Forces of the Philippines to prevent or suppress lawless violence. The Proclamation was also valid in so far as it declared a national emergency pursuant to Art. VII, Sec. 17 of the Constitution. However, provisions in the Proclamation that authorized the AFP to enforce laws not related to lawless violence were declared unconstitutional. The Court also declared that the warrantless arrests of certain individuals, the warrantless search of private businesses, the imposition of standards on the press, and the seizure of news articles for publication were blatantly unconstitutional. This ruling was given in spite of the fact that the case was allegedly moot and academic in light of the issuance of Proclamation 1021 which lifted the state of national emergency. The Court found that this issue was one of paramount public importance. It ruled that grave violations of the Constitution were committed during the 8 days that Proclamation 1017 was in effect and that the case was capable of repetition yet evading review. For the guidance of the bench, bar and the general public, the Court proceeded to resolve the controversy.

Although separation of powers is a long-recognized and well-established doctrine, it cannot be said with finality that each branch of government is supposed to function in isolation. The cases here mentioned illustrate the complex interrelationship of the three branches of government, resulting in a "blending of powers"[176] that makes it even more necessary for the Court to ensure the observance of Constitutional guidelines in order to prevent abuses.

VIII. Legal System and Rule of Law

In *Lambino, et al. vs. The Commission on Elections*[177], the Supreme Court interpreted the phrase "rule of law" as a limit to the rights of the Filipino people enshrined in the Constitution itself. The Court explained that:

> "True it is that ours is a democratic state, as explicitated in the Declaration

173 Id.
174 GR No. 171396 (May 3, 2006).
175 Proclamation Declaring a State of National Emergency.
176 *Supra* note *8 at* 75
177 G.R. No. 174153 (October 25, 2006)

> of Principles, to emphasize precisely that there are instances recognized and provided for in the Constitution where our people directly exercise their sovereign powers, new features set forth in this People Power Charter, namely, the powers of recall, initiative and referendum.
>
> Nevertheless, this democratic nature of our polity is that of a democracy **under the rule of law**. This equally important point is emphasized in the very Preamble to the Constitution, which states:
>
> ". . . the blessings of . . . democracy under the rule of law . . . ." (emphasis provided by the Supreme Court)

The principle of the rule of law translates in the decisions of the Supreme Court as Constitutional supremacy. In the case of *Ernesto B. Francisco, jr., et al. vs. The House of Representatives, et al.*[178], the Supreme Court has emphasized the long-standing principle of Constitutional supremacy:

> "From as far back as Angara v. Electoral Commission, 63 Phil. 139 (1936), it has been recognized that this is **not the supremacy of the Court. It is the supremacy of the Constitution and of the sovereign Filipino people who ordained and promulgated it**." (emphasis provided)

The principle of Constitutional supremacy defines the judicial system of the Philippines following the "basic principle in constitutional law that all laws and contracts must conform with the fundamental law of the land"[179]. The interplay of the principle of rule of law, Constitutional supremacy and the role of the judiciary has been explained by the Supreme Court in *Mutuc vs. COMELEC*[180] :

> ". . . The concept of the Constitution as the fundamental law, setting forth the criterion for the validity of any public act whether proceeding from the highest official or the lowest functionary, is a postulate of our system of government. That is to manifest fealty to the rule of law, with priority accorded to that which occupies the topmost rung in the legal hierarchy. … In its task of applying the law to the facts as found in deciding cases, the judiciary is called upon to maintain inviolate what is decreed by the fundamental law. Even its power of judicial review to pass upon the validity of the acts of the coordinate branches in the course of adjudication is a logical corollary of this basic principle that the Constitution is paramount. It overrides any governmental measure that fails to live up to its mandates. Thereby there is a recognition of its being the supreme law."[181]

178 G.R. No. 160261 (November 10, 2003)
179 Manila Prince Hotel vs. Government Service Insurance System, *et al.* (G.R. No. 122156. February 3, 1997).
180 L-28517, February 21, 1968, 22 SCRA 662.
181 *Id.*

Nevertheless the present Constitution itself provides certain powers of the Congress over lower courts of the Judiciary, subject to explicit powers of the Supreme Court stated in the Constitution. This is stated in Section 2, Article VIII of the Constitution. Furthermore, the courts are governed by the provisions of Section 14, Article VIII on the requirements judicial decision-making as it also provides the timeframe for submitting decisions identified in Section 16, Article III.

With these features, the Constitution is evidently meticulous not only with the powers of the judiciary, but with the form and manner of rendering judicial decisions.

IX. International Law and Foreign Relations

The status of international law and foreign relations in the Philippines are encapsulated in two broad provisions of the Constitution. The first is the incorporation clause in Section 2, Article II. The second is the treaty clause in Section 21, Article VII of the Constitution. The texts are provided below:

> ARTICLE II
>
> "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."
>
> ARTICLE VII
>
> "SECTION 21. 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."

With the incorporation clause, the Philippines assumed the duties dictated by the generally accepted principles of law as part of domestic Philippine Law. Furthermore, the Supreme Court in *Secretary of Justice vs. Hon. Ralph C. Lantion and Mark B. Jimenez*[182] had the occasion to rule that with the incorporation clause, these rules of international law are valid in the Philippines even without legislative enactment. The Supreme Court held that:

> "**The observance of our country's legal duties under a treaty is also compelled by Section 2, Article II of the Constitution** which provides that "[t]he 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." **Under the doctrine of incorporation, rules of international law form part of the law of the land and no further legislative**

182 G.R. No. 139465. January 18, 2000.

> **action is needed to make such rules applicable in the domestic sphere** (Salonga & Yap, Public International Law, 1992 ed., p. 12)."

In the same case, the Supreme Court discussed the conflict rule when provisions of international law and domestic Philippine law are not in agreement. In *Lantion*, the Supreme Court subordinates international law to Philippine domestic laws. Thus, in case of conflict between these laws, domestic laws would prevail. Supreme Court stated:

> "The doctrine of incorporation is applied whenever municipal tribunals (or local courts) are confronted with situations in which there **appears to be a conflict between a rule of international law and the provisions of the constitution or statute of the local state**. Efforts should **first be exerted to harmonize** them, so as to give effect to both since it is to be **presumed that municipal law was enacted with proper regard for the generally accepted principles of international law** in observance of the Incorporation Clause in the above-cited constitutional provision (Cruz, Philippine Political Law, 1996 ed., p. 55). In a situation, however, where the conflict is irreconcilable and a choice has to be made between a rule of international law and municipal law, **jurisprudence dictates that municipal law should be upheld by the municipal courts** (Ichong vs. Hernandez, 101 Phil. 1155 [1957]; Gonzales vs. Hechanova, 9 SCRA 230 [1963]; In re: Garcia, 2 SCRA 984 [1961]) for the reason that such **courts are organs of municipal law and are accordingly bound by it in all circumstances** (Salonga & Yap, op. cit., p. 13)."[183]

The inferiority of international law to Philippine domestic laws domestic laws is even more evident with the superiority of the Philippine Constitution over international law, adopted through the incorporation clause as domestic law, and over other domestic laws. Thus, international law are subject to the *derogate priori* rule when these come in conflict with Philippine domestic laws. The Supreme stated this rule in *Lantion*:

> "The fact that international law has been made part of the law of the land **does not pertain to or imply the primacy of international law over national or municipal law in the municipal sphere**. The doctrine of incorporation, as applied in most countries, decrees that rules of international law are given equal standing with, but are not superior to, national legislative enactments. Accordingly, the **principle lex posterior derogat priori takes effect** — a treaty may repeal a statute and a statute may repeal a treaty. In states where the constitution is the highest law of the land, such as the Republic of the Philippines, **both statutes and treaties may be invalidated if they are in conflict with the constitution**."[184]

183 Secretary of Justice vs. Hon. Ralph C. Lantion and Mark B. Jimenez [G.R. No. 139465. January 18, 2000.]
184 Secretary of Justice vs. Hon. Ralph C. Lantion and Mark B. Jimenez [G.R. No. 139465. January 18, 2000.]

The incorporation clause, as interpreted by the Supreme Court, broadens the content of "generally accepted principles of international law" to include certain treaty obligations. The Supreme Court made this pronouncement in *Priscilla C. Mijares, et al. vs. Hon. Santiago Javier Ranada, et al.*[185]:

> "There is no obligatory rule derived from treaties or conventions that requires the Philippines to recognize foreign judgments, or allow a procedure for the enforcement thereof. However, **generally accepted principles of international law, by virtue of the incorporation clause of the Constitution, form part of the laws of the land even if they do not derive from treaty obligations.**"

The *Mijares* rule is variation of earlier statement of the Supreme Court in *Shigenori Kuroda vs. Major General Rafael Jalandoni, et al.*[186]. In *Kuroda*, the statement of the Supreme Court will indicated that the Philippines can be bound by treaties, even without being a signatory thereto, as long as the contents of such treaties form part of the generally accepted principles of international law. The Supreme Court stated in *Kuroda*:

> "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 regulations of the Hague and Geneva conventions form part of and are wholly based on the generally accepted principles of international law. In fact, these rules and principles were accepted by the two belligerent nations, the United States and Japan, who were signatories to the two Conventions. **Such rules 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 rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory."

In fact, the incorporation clause worked to recognize the obligations under the Universal Declaration of Human Rights as binding upon the Philippines. In *Jose B.L. Reyes vs. Ramon Bagatsing*[187] mentioned that:

> "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.**"

185 G.R. No. 139325. April 12, 2005.
186 G.R. No. L-2662. March 26, 1949.
187 G.R. No. L-65366. November 9, 1983.

The Supreme Court furthermore noted in *Leovillo C. Agustin vs. Hon. Romeo F. Edu, et al.*[188] that through the incorporation clause, a treaty ratified by the Philippines finds additional basis for enforcement in the Philippines. The Supreme Court has used the incorporation clause in this manner in *Edu*:

> "The conclusion reached by this Court that this petition must be dismissed is reinforced by this consideration. The petition itself quoted these two whereas clauses of the assailed Letter of Instruction: "[Whereas], the hazards posed by such obstructions to traffic have been recognized by international bodies concerned with traffic safety, the 1968 Vienna Convention on Road Signs and Signals and the United Nations Organization (U.N.); [Whereas], the said Vienna Convention, which was ratified by the Philippine Government under P.D. No. 207, recommended the enactment of local legislation for the installation of road safety signs and devices; . . ." 35 It cannot be disputed then that **this Declaration of Principle found in the Constitution possesses relevance: "The Philippines . . . adopts the generally accepted principles of international law as part of the law of the land,** . . ."

Regarding the treaty clause, the Supreme Court has interpreted the phrase to designate the President as having the sole power to negotiate and enter into treaties. The Senate only serves as a passive check on the decision of the President. This was clear from the Supreme Court's statement in *Bayan vs. Zamora*[189]:

> "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 agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate." The 1935 and the 1973 Constitution also required the concurrence by the legislature to the treaties entered into by the executive.
>
> xxx
>
> **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.**"

188 G.R. No. L-49112. February 2, 1979.
189 342 SCRA 449 (2000).

X. Concluding Remarks

The present Philippine Constitution, as an articulation of the Filipinos aspirations of a better life, has remained as such: an articulation of aspirations. As the fundamental law of the land, some of its provisions have been subject to interpretations that would make the Philippine Commonwealth President Quezon seem prescient.

Singapore

CONSTITUTION OF THE REPUBLIC OF SINGAPORE

The Indigenisation of a Westminster Import

Li-ann Thio

I. Introduction

Singapore attained independence on 9 August 1965 after peacefully seceding from the Federation of Malaysia.[1] A former British colony, it retains a legal system essentially modeled on the British legal system based on the common law and the Westminster model of parliamentary government. Notable modifications include the adoption of a written Constitution which is the supreme law (article 4), such that inconsistent legislation is void to the extent of that inconsistency.

The ultimate political check of the Westminster model of representative democracy is the prospect of political turnover where an opposition party defeats the incumbent government at general elections to form an alternative government. Such a check has been absent in Singapore where the ruling People's Action Party (PAP) has exerted continuous hegemonic rule since Independence through maintaining an overwhelming parliamentary majority. Since then, constitutional experiments have been undertaken, in the form creating two categories of non-elected parliamentarians, introducing a multi-member electoral system designed to secure minority legislative representation[2] and transforming the presidency into an elective office with minimal executive powers.[3]

A city-state of some 4.1 million people,[4] its multi-ethnic population 'shapes every aspect of civil life in Singapore.'[5] In a multi-religious setting where 86% of the population professes a religious faith,[6] Singapore practices a form of quasi-secularism. Security imperatives,

1 Albert Lau, *A Moment of Anguish: Singapore in Malaysia and the Politics of Disengagement* (Singapore: Times Academic Press, 1998).

2 The Group Representation Constituency and non-elective MPs schemes have effectively stymied the development of a political opposition. For a detailed analysis, see Thio Li-ann, 'The Right to Political Participation in Singapore: Tailor-Making a Westminster-Modelled Constitution to fit the Imperatives of 'Asian' Democracy' (2002) 6 Sing JICL 181-243.

3 See generally *Managing Political Change: The Elected Presidency of Singapore*, Kevin YL Tan & Lam Peng Er eds. (Routledge, 1997).

4 As of June 2000, the population breakdown is Chinese (77%), Malay (14%), Indians (8%) and Other ethnic groups (1%). Para 2.1., Convention on the Rights of the Child (CRC) Initial Report CRC/C/51/Add.8, (17 March 2003). ("CRC Initial Report").

5 Para. 2.1, CRC Initial Report, *id.*

6 Singapore Population Census (2000) Advance Data Release No.2: Religion – The breakdown of religious affiliation

including maintaining public order, racial and religious harmony and social cohesion through wielding intrusive executive powers, limit the scope of civil liberties.

As an 'Asian tiger' Singapore has achieved great economic success, being a 'high income' economy[7] with one of the highest standards of living in Asia,[8] legitimating PAP rule. It ranked 28 out of 175 countries in 2003[9] on the UNDP's Human Development Index, based on factors like life expectancy, health, education, and standard of living. Virtually all Singaporeans enjoy modern sanitation, high public health standards, a clean, green environment and high life expectancies.

Today, Singapore has become a communications and transport hub and a regional financial services centre. 90% of Singaporeans are homeowners, with 92% of the population[10] living in flats built by the chief houser, the Housing and Development Board, as part of the successful public housing programme the PAP introduced in 1959 as a facet of long-term development strategy.[11] The post Independence problems of poverty, unemployment and homelessness have been effectively dealt with although Singapore remains vulnerable to external and internal shocks in the post 9-11 political landscape, underscoring the need for eternal vigilance against terrorism and to preserve global competitiveness in pursuing a knowledge-based economy restructured to focus on high-tech areas like medical care and biotechnology.[12]

The official view is that this success rests on sustaining a conducive, orderly environment to attract foreign investment.[13]This translates into a 'communitarian' ethos. 'Confucian' traits like social discipline, high savings, education and active state management over both economic[14] and political development are advocated as grounding a different law and development model from those associated with Western liberal democracies. The developmentalist state thus emphasizes the importance of strong, effective government unopposed by political lobbies, institutional checks[15] and unruly labour,[16] employing non-

was Christianity (14.6%), Buddhism (42.5%), Taoism (8.5%), Islam (14.9%), Hinduism (4%), Other Religions (0.6%), No Religion (14.8%), out of 2.5million residents aged 15 and above: at http://www.singstat.gov.sg/papers/c2000/adr-religion.pdf.

7 http://www.worldbank.org/data/countryclass/classgroups.htm#High_income.

8 In 1998, for every 10,000 people, there were 30 public buses, 1,140 private cars, 14 doctors, 2 dentists, 40 nurses and 3,470 residential telephone lines: para 3.1., CRC Initial Report.

9 UNDP Human Development Report (2003): at http://www.undp.org/hdr2003/pdf/hdr03_HDI.pdf.

10 Para 2.3., CRC Initial Report.

11 Aya Gruber, 'Recent Development: Public Housing in Singapore' (1997) 38 Harv. Int'l L.J. 236.

12 'The Lion in Winter', 161 (26) *Time* 7 July 2003.

13 See Melanie Chew, 'Human Rights in Singapore: Perceptions and Problems' (1994) 43 (11) *Asian Survey* 933-948 at 945.

14 Statutory Boards helm economic development, public housing and public utilities facilities.

15 However, the rationale for introducing the Elected Presidency in 1991 with limited watchdog powers over financial reserves was precisely to limit the Cabinet's untrammeled power.

16 Woodiwiss notes that Singapore exists solely because of 'transnational economic forces' but argues it has achieved 'very high levels of social and economic justice': Anthony Woodiwiss, 'Singapore and the Possibility of Enforceable Benevolence' in *Globalisation, Human Rights and Labour Law in Pacific Asia* (UK: Cambridge University Press, 1998) at 216, 222.

liberal laws[17] to control social threats such as triads, communists, terrorists, even dissident politicians.

II. Constitutional History

The Pragmatic Origins of the Singapore Constitution

The Singapore constitution is not the product of mature deliberation, through the convening of a constituent assembly as in India, or crafted through protracted political negotiations with departing British colonial powers, which characterized the experience of many former British colonies with a Westminster system, such as Malaysia.

This is unsurprising, as Singapore was an accidental nation, acquiring sovereignty after being invited to leave the Federation of Malaysia, stemming from political tensions as Singapore's Prime Minister ("PM") Lee Kuan Yew lobbied for a 'Malaysian Malaysia' based on the principle of meritocracy, as opposed to supporting a scheme by which Malays as *bumiputeras* (sons of the soil) enjoyed special privileges. Given the exigencies attending unexpected statehood and the imperative of nation-building, the pragmatic decision was taken to retain the existing Singapore state Constitution, designed to operate within a larger federation, and to renovate it with amendments consequential to attaining independence.[18]

The original version of the Singapore Constitution was located in three documents. The Malaysian Parliament transferred all legislative and executive powers formerly wielded by the Federal government to the new Singapore government under the *Constitution and Malaysia (Singapore Amendment) Act*.[19] On 22 December 1965, the Singapore Parliament passed the Constitution of Singapore (Amendment) Act[20] made retrospective to 9 August 1965, and the *Republic of Singapore Independence Act* ("RSIA") of 1965.[21] Under the RSIA, first Prime Minister ("PM") Lee Kuan Yew issued a Proclamation declaring Singapore "shall forever be a sovereign democratic and independent nation, founded upon the principles of liberty and justice and ever seeking the welfare and happiness of her people in a more just and equal society." Thus, as Kevin Tan observed, the 1965 Act and RSIA "provided the newly-independent country with a working constitution at very short notice" such that the composite Constitution was found in "three separate documents: the R.S.I.A., the State Constitution of Singapore (and its amendments) and provisions of the Federal Constitution of Malaysia as made applicable by the R.S.I.A."[22] A consolidated reprint was printed in 1979; the latest

17 'From Singapore, Textbook Case of Stifled Subversion' *Wall Street Journal,* 23 Sept 1986, 1.

18 *PP v Taw Cheng Kong* [1998] 2 Singapore Law Reports ("SLR") 420C to 421B.

19 Act No. 53 of 1965.

20 Act No. 8 of 1965.

21 Act No. 9 of 1965.

22 See generally Kevin YL Tan, 'Singapore's Constitution: Its Development from 1945-1989' [1989] 1 SAcLJ 1 at 17.

version issued by the Attorney-General under article 155 is the 1999 reprint.[23]

Exploring Constitutional Principles

The government convened a constitutional commission in December 1965 led by Chief Justice Wee Chong Jin to specifically address the problem of racial and religious minorities, including the Indians and Malays, within a Chinese-dominated city state. Singapore was then perceived as a potential 'Asian Cuba' vulnerable to Chinese chauvinism and communism. PM Lee stated his intent to incorporate "built-in safeguards" for minorities to ensure "any elected Government" continued PAP policy "to raise the economic and educational levels of the Malays", to "honour and respect minority rights."[24]

The resultant 1966 Wee Report provides a fascinating insight into three main issues shaping Singapore's republican constitution. The first concern was to shape a constitutional order after the British inheritance of parliamentary democracy. The second related to the minorities question and how to assuage their fears of discriminatory treatment by the majority, to avoid "racial communalism and religious bigotry."[25] Lastly, having a written constitution was useful to foster constitutionalism and the rule of law through establishing oversight institutions and entrenching rights. The basic prescription was to nurture a democratic, "multi-racial secular society" as key to ensuring state survivability in an age of nationalism.[26]

Various points bear highlighting: first, the decision was taken not to recognize specific minority group rights in the Constitution. Article 152 does recognize "racial and religious minorities" and obliges the government to care for their interests through positive programmes. It does not contain justiciable group entitlements, the prevailing assimilationist philosophy being that the rights of minority groups would be realised by securing the rights of their individual members under the article 12 equal protection clause.[27] Second, the Wee Commission in articulating its vision of the principle of democracy opposed the idea of non-elected parliamentarians, stipulated minority legislative quotas, and proportional representation systems for fear these would precipitate racial politicking, social tensions and weak coalition governments. Third, the model of religious liberty and vision of religious

23 Text available at Singapore Statutes Online: http://statutes.agc.gov.sg/.

24 Transcript of the Proceedings when Singapore and Malaysian PAP Leaders met followed by a Press Conference, Cabinet Office, City Hall, 12 August 1965, available at Speech-Text Archival and Retrieval System: http://stars.nhb.gov.sg/.

25 Report of the Constitutional Commission 1966 [Singapore: Government Printer, 1966] at 7, para 33.("Wee Report"); Reproduced in Appendix D, Kevin YL Tan & Thio Li-ann, *Constitutional Law in Malaysia and Singapore* (Asia: Butterworths, 1997).

26 EW Barker, Ministerial Statement, 24 Singapore Parliament Reports ("SPR") 22 Dec 1965 col. 429.

27 S. Rajaretnam, 25 SPR 16 March 1967 col. 1329 at 1356-1359.

pluralism[28]framing the Singapore version of "accommodative secularism"[29] differed markedly from the "confessional" state model in Malaysia. Three important modifications merit attention.

First, the Singapore Constitution does not contain any clause similar to article 3 of the 1957 Malaysian constitution which states: "Islam is the religion of the Federation but other religions may be practiced in peace and harmony in any part of the Federation."[30] Singapore views itself as a "democratic secular state",[31] whose brand of secularism is "neutral" insofar as it "is certainly not atheistic."[32] Second, the Singapore Constitution adopts a more laissez faire approach towards freedom of religious profession and propagation and purposefully rejected having the equivalent of article 11(4) of the Malaysian constitution which permits states to enact laws restricting the propagation of other faiths to persons professing Islam. Such an anti-propagation clause "singling out a particular religion for special treatment" would be "inappropriate" and "inconsistent" in the Singapore context.[33] Third, the Singapore Constitution does not conflate religious with ethnic identity as article 160 of the Malaysian Constitution does. "Malay" is defined as "a person who professes the religion of Islam, habitually speaks the Malay language, [and] conforms to Malay custom." This has compounded the problem of apostasy where former Muslims wish to leave that religion. Indeed, Malaysia courts have defined their religious freedom guarantee as excluding a right to change religions[34] and have declared that Malays remain Muslims "until his or her dying day"[35], an egregious restriction of religious freedom. In Singapore, the government recognizes a duty to ensure that "every citizen is free to choose his own religion."[36]

Thus, religious tolerance and pluralism requires that the state be agnostic about the veracity of religious truth claims and maintain a legal framework within which distinct religious groups can co-exist. The constitutional principle of secularity connotes the equal treatment of all religion and sensibly eschews militant secularism.

28 See Li-ann Thio, 'Control, Co-optation and Co-Operating: Managing Religious Harmony in Singapore's Multi-Ethnic, Quasi-Secular State, (2005) 33 (2) and (3) *Hastings Constitutional Law Quarterly* 197-253; Thio Li-ann, 'Secularism: The Singapore Way' *Straits Times* Review, 30 Oct 2007.

29 *Peter Williams Nappalli vs Institute of Technical Education* [1999] 2 SLR 569 at 576, para. 29.

30 Text of the 1957 Federal Constitution of Malaysia available online at http://confinder.richmond.edu/local_malaysia.html.

31 Declaration on Religious Harmony 2003, full text at: http://www.mcys.gov.sg/MCDSFiles/Press/Articles/press-release-9Jun-final.html.

32 "Government is secular: not atheistic: BG Yeo" *Straits Time* (Singapore), 8 Oct 1992 at 2.

33 Para 38, Wee Commission Report.

34 *Daud bin Mamat* [2001] 2 Current Law Journal 161 (HC).

35 Thamby Chik J, *Lina Joy v Majlis Agama Islam Wilayah* [2004] 2 Malayan Law Journal (MLJ) 119 at 143, para. 58. See Thio Li-ann, 'Apostasy and Religious Freedom: Constitutional Issues Arising from the *Lina Joy* Litigation' [2006] 2 MLJ i.

36 Para 5, Maintenance of Religious Harmony White Paper, (Singapore National Printers, Cmd 21 of 1989).

III. Constitution Making and Amendments

Constant Refining of the Singapore Constitution

Although for the most part the supreme Singapore Constitution has been formally "rigid", in practice it has been extremely malleable, amended some thirty-eight times since Independence.

One of the criteria for the supremacy of a Constitution as the fundamental law is that its amendment procedure be more onerous than that for amending ordinary legislation, that is, a simple parliamentary majority. However, upon Independence, the Singapore Constitution was made an uncontrolled one.[37] The 1965 Constitution Amendment Act repealed article 90 which required that constitutional amendment bills be supported by a two-thirds parliamentary majority.[38] This implied that Parliament was supreme.[39] The 1966 Constitutional Commission recommended including a constitutional supremacy clause, today enshrined in article 4, to avoid any doubt as to its status as the supreme law.[40] It also proposed three different modes of entrenchment, instructively specifying that the most onerous procedures should apply to the most important constitutional provisions.[41] Eventually in 1972, only matters pertaining to the sovereignty of Singapore was deeply entrenched in requiring a national referendum vote.[42] Subsequent amendments to the Constitution included the creation of the Presidential Council of Minority Rights (Part VII) and enacting anti-hopping laws today entrenched in article 46(2)(b).

In 1979, the Constitution was made "controlled" as the general norm for constitutional amendment, entrenched in article 5(2), was that a special two-thirds parliamentary majority was required to adopt constitutional amendment bills. The reason for this change was because "all consequential amendments that have been necessitated by our constitutional advancement have now been enacted." [43] This was ironic, as the post 1979 period inaugurated the "constitutional renaissance"[44] introducing a spate of constitutional innovations in the mid-1980s. This was facilitated by the PAP government's continuing parliamentary dominance, which made securing special majorities a foregone conclusion. For example, after the 2006 General Elections, it controlled 82 of 84 elected seats; since Independence, the parliamentary opposition at its height has only managed to win 4 seats, after the 1991 General Elections.

37 *McCawley v The King* (1920) 28 Commonwealth Law Reports 106, 114–15.

38 24 SPR 22 Dec 1965 col. 430.

39 Notably, PM Lee stated that eventually "what will be the supreme law will be the Republic of Singapore Constitution after it has been brought up to date," with the intent to embody it in "one simple document." 24 SPR, 22 Dec 1965, col. 430 at 446.

40 Wee Report, para. 74.

41 Wee Report, para. 73-81, pp. 23-26.

42 32 SPR, 3 Nov 1972 cols. 307ff. Article 6 requires the support of two-thirds of voters at national referendum for matters relating to surrending state sovereignty or relinquishing control over the Police or Armed Forces; this procedure itself could only be amended by a similar referendum.

43 Law Minister EW Barker, Singapore Parliamentary Debates, 30 March 1979 at 296.

44 Li-ann Thio, 'Choosing Representatives: Singapore Does it Her Way', in *The People's Representatives: Electoral Systems in the Asia-Pacific Region*, Graham Hassall & Cheryl Saunders eds., 1997 at 43.

The government's attitude towards constitution-making is not to start with a blank slate but to treat the Constitution as an "old shoe" which was "always better than a brand new pair of shoes …" as it could be stretched and resoled to meet future exigencies.[45] In introducing the non-constituency MP scheme in 1984, PM Lee observed "From my experience, constitutions have to be custom-made, tailored to suit the peculiarities of the person wearing the suit."[46]

Thus, in fairly quick succession, two classes of non-elective parliamentarians were created in 1984 and 1990, respectively, the Non-Constituency Member of Parliament (NCMPs) and the Nominated Member of Parliament (NMPs), the electoral system was significantly altered by Group Representation Constituencies (GRCs) introduced in 1988, which co-existed with single member wards; in 1991, the presidency was made an elective office and vested with limited executive powers.

As these institutions quite radically altered the Westminster system of parliamentary democracy, where the head of state is a ceremonial office and the electoral system is based on 'first past the post' contests in single member wards, there were proposals that they be put to a referendum, although this was not legally required. However, the PAP government refused, on the basis that an elected government possessed a sufficient mandate to govern as it thought fit. This logically entailed that a government could assume a mandate to change even the constitution's basic structure, however controversial this might be. It is worth noting that the PAP justified the introduction of the elected presidency by locating a mandate in the 61% electoral victory at the 1988 General Elections, when the scheme was not raised as an electoral issue.[47] Although a rule by law mentality is evident in the legalistic adherence to procedure, the technically 'rigid' amendment procedure, designed to enhance mature deliberation, is ineffectual given the political context.

Subsequently, the amendment procedure was itself modified by new articles 5(2A)[48] and 5(A),[49] incorporating a role for populist voices through a referendum and the exercise of presidential discretion. Neither provision is currently in force; their introduction was closely associated with amendments made to the elected presidency scheme.

45 44 SPR, 24 July 1984 at cols. 1735-1736.

46 44 SPR 24 July 1984 at col. 1735.

47 Kevin Y.L. Tan, 'The Elected Presidency in Singapore: Legislation Comment and List', (1991) Sing J. Leg. Stud. 191-93.

48 Article 5(2A) provides that bills seeking to amend certain stipulated parts of the Constitution including Part IV (fundamental liberties); Part V Ch 1 (elected presidency provisions), Article 93(A) (presidential election judges) and articles 65-66 (concerning the dissolution of Parliament and general elections), unless the President otherwise directs the Speaker in writing, must be supported by two-thirds of the voters at a national referendum, rather than be passed by Parliament under article 5(2).

49 Article 5A essentially provides that the President may in his discretion withhold his assent to a constitutional amendment bill (other than a Bill referred to in Article 5(2A) which curtails the President's discretionary powers. If a constitutional tribunal is of the view that a referred bill does curtail presidential power, the Prime Minister may direct that said bill be referred to the electors for a national referendum. To understand the genesis of this bill, see Conitutional Reference No. 1 of 1995 [1995] 2SLR 201.

The history of the constant refining of the elected presidency scheme for over 15 years indicates that the PAP government apparently considers the easy amendability of the Constitution desirable. Although it was not brought into being by a referendum in 1991, Article 5(2A) provides that where the president refuses to consent to the removal of this office, a two-thirds vote at a national referendum is needed, which would make abrogating or amending the scheme extremely difficult. However, Article 5(2A), which is over a decade old, is still not in effect. Despite assertions that this institution was "carefully drafted, debated over many years and finally passed in 1991,"[50] the government, as its architect, still wishes to shape this institution. Indeed, significant amendments, which reduced presidential powers, were made in 1994, 1996, 1997, 1998 and 2004. In 2007, Law Minister S. Jayakumar noted "we are not ready to bring Article 5(2A) into operation soon" as the presidential safeguards were still undergoing "refining…especially in regard to the country's reserves. This is a gradual process that requires time."[51]

It may also be noted that subsequent amendments to innovations like the GRC has departed from the constitutional rationale enunciated in article 39A which is "to ensure the representation in Parliament of Members from the Malay, Indian and other minority communities". The original 3 person size of GRC teams was expanded to a maximum of 4 in 1991 and 6 in 1996, for non-constitutional reasons, to service the town council and community development council schemes. Indeed, in 2005, Senior Minister Goh Chok Tong candidly admitted that enlarged GRC team sizes facilitated the renewal of the ranks of the PAP government as each GRC is anchored by a minister whose stature is supposed to pull in votes, allowing relative newcomers to 'ride' on their coat-tails. He said: "GRCS kill two birds with one stone: they ensure a multi-racial Parliament and help in the recruitment of candidates with Ministerial potential" as few successful Singaporeans would risk their career to enter politics "without some assurance of a good chance of winning at least their first elections…"[52]

IV. General Overview and Characterisation of the Constitution

The Westminster System, Singapore Style

The Singapore Constitution is based on the Westminster model of parliamentary government, the elements of which include:[53]

(1) a unicameral or bicameral chamber whose members are freely elected by universal adult suffrage
(2) from one of more political parties

50 'SM Lee: Elected President Not the Second Centre of Power', *Straits Times* (Singapore), Aug. 12 1999, at 32-33.
51 82 SPR 12 Feb 2007 (Article 5(2A) of the Constitution: Operation of Constitutional Provisions).
52 Remarks, South East CDC Appointment Ceremony, 26 June 2006, Arts House, Old Parliament.
53 Modified from William Dale, 'The Making and Remaking of Commonwealth Constitutions' (1993) 42(1) International & Comparative Law Quarterly 67-83 at 72-73.

(3) executed power vested in a head of state but primarily exercised by cabinet government headed by a prime minister as head of government who is
(4) chosen from the political party commanding the support of the legislative majority and answerable to that elective chamber
(5) a recognized opposition
(6) a set of constitutional conventions

There were incipient and later modifications to this scheme. For example, British conventions have been constitutionalised, particularly those relating to ministerial appointments and dismissal (articles 25, 26). Singapore has a duallist democracy with the advent of the Elected President (EP) and Parliament includes non-elective MPs.

In institutional terms, the Singapore model of constitutionalism and rights protection may be characterised as an Anglo-American hybrid. Following the British model, the Singapore constitution is a "modified" version of "the doctrine of the separation of powers", accommodating "the Westminster model of parliamentary government."[54] What Bagehot termed the "efficient secret of the English Constitution" is reproduced in the Singapore context, this being "the nearly complete fusion of the executive and legislative power", through the "connecting link" of the Cabinet, which is "a committee of the legislative body selected to be the executive body"[55] As the Cabinet effectively controls Parliament, the doctrine of ministerial responsibility is merely formal. Parliament, or more accurately, the parliamentary executive, enjoys *de facto* supremacy, and may amend the Constitution at will.

The adoption of a written constitution with a justiciable bill of rights borrows from the influence of American constitutionalism. Judges, as a legal check against invalid government action and legislation, are charged with safeguarding fundamental rights. Theoretically, Singapore judges play a larger role than their British compatriots in protecting fundamental liberties, insofar as acts of Parliament are not beyond scrutiny, as confirmed in *Colin Chan v PP* [56]and *Taw Cheng Kong v PP.*[57] Judicial review is an integral part of judicial power, conferred by article 93 and regulated by the Supreme Court of Judicature Act (SCJA).[58] However, the efficacy of judicial review is circumscribed by ouster clauses which courts

54 Chan Sek Keong J, *Cheong Seok Leng v PP* [1988] 2 MLJ 481, 487.

55 Walter Bagehot, The English Constitution (1867), available at http://derecho.itam.mx/facultad/materiales/proftc/herzog/The%20english%20constitution%20walter%20bahegot%20adobe.pdf.

56 Yong Pung How CJ noted in *Chan Hiang Leng Colin & Ors v PP* [1994] 3 SLR 662 at 681B-C: "The court has the power and duty to ensure that the provisions of the Constitution are observed. The court also has a duty to declare invalid any exercise of power, legislative and executive, which exceeds the limits of the power conferred by the Constitution…"

57 [1998] 1 SLR 943. The Court of Appeal [1998] 2 SLR 410 overturned the High Court decision, but not on the point of judicial review of the constitutionality of legislation.

58 First Schedule, SCJA (Cap 322): (Additional Powers of the High Court) confers powers on the High Court to issue prerogative writs.

have been broadly construed,[59] as well as notwithstanding clauses.[60] For example, art 149 of the Singapore Constitution confers special legislative powers with respect to subversion to enact laws such as the Internal Security Act ("ISA") (Cap 143) which are deemed valid notwithstanding that they breach various fundamental liberties like life and personal liberty, the prohibition against retrospective legislation, equality clause, freedom of movement and free speech clause. Where available, judicial review plays a marginal role in protecting rights as the leading interpretive theory prioritises statist imperatives over civil liberties, with this 'communitarianism' justified by reference to local culture.[61]

The Elected President (EP) has a limited role in checking abuse related to the issuance of preventive detention and restraining orders under the ISA and Maintenance of Religious Harmony Act (MRHA) (Cap 167A) respectively. Basically, where non-elected advisory bodies like the ISA Advisory Board[62] or Presidential Council for Religious Harmony[63] disagree with a ministerial decision to issue or vary an order, the EP may then 'veto' or refuse to confirm such order. If these advisory bodies are *ad idem* with the minister, the EP is bereft of a role in rights protection.[64]

The Impact of the Constitution: The Importance of Constitutional Culture

Ultimately, merely transplanting institutions and processes alone does not guarantee their effective functioning. Importing the Westminster model of parliamentary system[65] into a context where the political culture does not "support its operative conventions" reveals a propensity for the import to be "transformed into a dictatorship"[66] A certain cultural soil is needed to sustain the growth and flourishing of the import. Similarly, a human rights culture is necessary to sustain rights protection. This relates to the mindset of Citizen, Judge, Executive and Governor. Such a culture will necessarily be at tension with a political culture which prioritises state-defined community interests, which may lead to

59 *E.g.* see *Teo Soh Lung v Minister of Home Affairs*, [1989] SLR (H.C.), in relation to the Internal Security Act (Cap 143).

60 The Court of Appeal in *Chng Suan Tze v Minister of Home Affairs* [1988] SLR 132 at 155B has upheld the article 149 notwithstanding clause in relation to an article 12 argument, as the previous article 149 only immunized legislation which violated articles 9. 13 and 14; a 1989 amendment extended the application of the notwithstanding clause to article 12.

61 Thio Li-ann, 'An i for an I': Singapore's Communitarian Model of Constitutional Adjudication' (1997) 27 *Hong Kong Law Journal* 152-186.

62 Art 151(4), Republic of Singapore Constitution.

63 Art 22I, Republic of Singapore Constitution.

64 Li-ann Thio, '*Lex Rex or Rex Lex*: Competing Conceptions of the Rule of Law in Singapore' (2002) 20 *UCLA Pacific Basin L. J.* 1 at 52-58.

65 See S.A. de Smith, Ch 3, 'Westminster's Export Models: Executive and Legislature' in *The New Commonwealth and its Constitutions* (London: Stevens & Son, 1964).

66 William Dale, 'The Making and Remaking of Commonwealth Countries' (1993) 42 ICLQ 67, citing the 1972 Wooding Commission set up to review the Trinidad and Tobago Constitution.

the conflation of state and government.[67] Indeed, both the Attorney-General[68] and Chief Justice[69] have affirmed the Latin maxim *salus populi suprema lex* (the safety of the people is the supreme law), a principle reflected in both government policy and the dominant strain of judicial reasoning.

It is particularly important in studying Singapore constitutional law to go beyond the mere study of the constitutional text and case law, which would confine the constitutional lawyer to the explanation of "a political system which exists on paper and not in practice."[70] Jennings argues that a public lawyer will fail to understand a constitution apart from "the social conditions that produce it and its consequences for the people who are governed by it."[71] The operation of law must be appreciated within its socio-legal context and political culture, particularly given the political dominance of the PAP government such that mere ministerial statements or other non-binding white papers may exert legal impact in shaping ideals of good government and governance. Indeed, political statements are made claiming it is more important to have good governors with a demonstrated track record rather than good government which focuses on institutional safeguards. Indeed, the 1991 *shared values white paper*[72] may be considered a sort of 'constitutional soft law'[73] and informal preamble[74] which influences how institutions are designed and rights are adjudicated.

The government commitment to 'communitarianism' which prioritises the interests of the group over the individual and social harmony is evident in the five declared shared values:

a. Nation before community and society above self
b. Family as the basic unit of society
c. Regard and community support for the individual
d. Consensus instead of contention
e. Racial and religious harmony

In contradistinction to the fundamental premise of Lord Acton that "Power corrupts and absolute power corrupts absolutely", the white paper at paragraph 41 declares:

> The concept of government by honourable men who have a duty to do right for the people and who have the trust and respect of the population, fits us

67 On the conflation of state, party and national community, see Li-ann Thio, '*Lex Rex or Rex Lex*: Competing Conceptions of the Rule of Law in Singapore' (2002) 20 *UCLA Pacific Basin L. J.* 1 at 30.

68 'Law Society Failed to Defend Legal System: A-G', *Straits Times* (Singapore), 18 Nov 1991 at 1.

69 *Colin Chan v. PP* [1994] 3 SLR 662, 678G-H. For a critical comment, see Thio Li-ann, 'The Secular Trumps the Sacred: Constitutional Issues Arising out of *Colin Chan* v *PP*' (1995) *Singapore Law Review* 26.

70 W. Ivor Jennings, *The Law and the Constitution* (University of London Press, 1956), 4th ed., at xiv.

71 W. Ivor Jennings, *ibid.,* at xv.

72 Cmd 1 of 1991, Singapore Parliament.

73 Thio Li-ann, 'Constitutional 'Soft' Law and the Management of Religious Liberty and Order: The 2003 Declaration on Religious Harmony' (2004) *Singapore Journal of Legal Studies* 414-443.

74 Benedict Sheehy, "Singapore 'Shared Values' and Law: Non East versus West Constitutional Hermeneutic" (2004) 34(1) Hong Kong L.J. 67.

> better than the Western ideas that a government should be given as limited powers as possible, and should always be treated with suspicion unless proven otherwise.

In the field of human rights, the government has expressed its distaste for abstract moralizing, favouring a realistic approach which focuses on delivering results in terms of high levels of human development. This has legitimated PAP rule.

The Singapore strain of 'Asian values' considers that civil-political liberties need to be controlled during the early stages of a country's development, to secure social stability necessary for a stable investment environment, a precursor to economic take-off, noting that "Poverty is an obscene violation of the most basic of individual rights".[75] The Singapore government considers that human rights should not be viewed in abstract but as an "inter-related" facet of "the rule of law and good governance." It considers the best environment for securing human rights was one "underpinned by strong economic, cultural and social foundations" mediated by "sound national policies that promote economic growth, raise living standards and provide basic social welfare…"[76] Thus, "it is absurd to talk about human rights independent of the overall economic development of a society"[77] as "economic growth is the necessary foundation of any system that claims to advance human dignity, and that order and stability are essential for development."[78]

The courts have recognised that Parliament places a "premium on public order, accountability and personal responsibility" which limits the scope of enjoyment of a constitutional liberty. This prioritisation of public order considerations in regulating political dissent is also apparent in the desire to preserve racial and religious harmony, which saw the unleashing of the Sedition Act on an internet posting of "reckless remarks" on "racial or religious subjects", which threatened "social disorder," as no legislation prohibiting racial hate speech then existed.[79] Evidently, the vision of the individual is that of one situated in society, rather than the autonomous individual, given the emphasis that free speech had to be "balanced by the right of another's freedom from offence, and tampered by wider public interest considerations." Furthermore, as a "basic ground rule", each citizen, "independent of any legal duty" was obliged to observe "appropriate social behaviour", to ensure nothing was said or done "which might incite the people and plunge the country into racial strife and violence." Given Singapore's history with race riots, this is not an abstract concern,

75 Statement by Mr. Wong Kan Seng, Singapore Foreign Affairs Minister, 'The Real World of Human Rights', Singapore Government Press Release No. 20/JUN/09-1/93/06/16.

76 Foreign Minister George Yeo, 73 SPR 9 April 2007 (ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (Establishment) col. 37.

77 Singapore Government Press Release, Media Division, Ministry of Information and the Arts, Minister George Yeo, Colloquium on Human Rights and Human Responsibilities, Hamburg Germany 20 Nov 1998, http://stars.nhb.gov.sg/stars/public/.

78 Statement by Mr. Wong Kan Seng, Singapore Foreign Affairs Minister, 'The Real World of Human Rights', Singapore Government Press Release No. 20/JUN/09-1/93/06/16.

79 This was introduced in the slew of amendments to the Penal Code in 2007.

given the self-admittedly "paranoid" model of government which third PM Lee Hsien Loong declared "worries all the time", is "proactive" and "plays a crucial role in this system."[80]

The focus on the need for good governors and pragmatic policies must have informed Prime Minister's comment that he foresaw "a system shaped by Singaporeans and their values. Not any magic formula or Constitution."[81] This denotes the marginal place of the highest law of the land in political discourse, which has, on occasion been unfortunately replicated in the judicial arena.[82]

Constitutional Policies – social welfare programmes

Social Welfare: The Constitution does not contain a preamble, directive social welfare principles,[83] or socio-economic rights.[84] The 1966 constitutional commission rejected a call by an Indian group to include a list of constitutional social-economic rights akin to the European Social Charter as these were not considered justiciable.

Nonetheless, the human rights treaties that Singapore is party to, the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) contain a broad range of both civil-political and socio-economic rights relating to employment, education, health and other socio-economic benefits relating to an adequate standard of living which Singapore has to address in the state reporting process.

In addressing socio-economic welfare, the preferred language is not "rights" but of government commitment to promoting the people's well-being through a programme-oriented approach which is 'measured' against indicia of successful welfare gains. Hman welfare is thus secured without human rights. Indeed the CEDAW committee so noted in expressing concern that the advancement of Singapore women "was being implemented as a welfare framework rather than a human rights framework."[85] The chief distinguishing feature of a human rights based approach is the articulation of clear, measurable obligations owed by the state to individuals, which could be the subject of formal complaint at the

80 PM Lee Hsien Loong, Speech, Parliamentary Debate on Civil Service Salary Revisions, 11 April 2007, available at http://stars.nhb.gov.sg (date accessed: 5 June 2007).

81 'Spore will set its own political model: PM' *Straits Times* (Singapore), 7 October 2005 at 3.

82 For example, in deciding the constitutionality of the Military Court of Appeal in *Abdul Wahab bin Sulaiman v Commandant, Tanglin Detention Barracks* [1984-1985] SLR. 555. See V. Leong and R. Samosir, Forever Immune? Abdul Wahab Sulaiman v Commandant Tanglin Detention Barracks, 28 Malaya L.Rev. 303 (1986).

83 The Malaysian courts have been more adventurous in seeking to infer from social legislation an expansive reading of the right to life guarantees to include the social-economic right to livelihood or employment: *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261.

84 On Singapore's approach towards socio-economic rights, see Thio Li-ann, '"Pragmatism and Realism do not mean abdication": A Critical Inquiry into Singapore's Engagement with International Human Rights Law' (2004) 8 *Singapore Yearbook of International Law* 41 at 79-85.

85 Para 30, CEDAW/C/SR.514 (7 Sept 2001), Summary Record, 514th Meeting, CEDAW Committee.

initiative of the right-holder. Nevertheless one could ask: would Singaporeans want a right to housing, or a house?

While rejecting the idea of a welfare state, the government actively addresses human development issues through social assistance programmes such as rent assistance, student fee assistance etc...[86]. There are three principles supporting the government's approach towards providing a social safety net which may be referenced back to the quasi-constitutional principle of having "regard and community support for the individual" in the shared values white paper.

First, to prevent a welfare dependency mentality, self-reliance is promoted by providing "a safety net that gets the needy out of trouble, but not have them entangled in the net."[87] In other words, the upholding of the "work ethic" is fundamental and financial assistance is tied to "active job search and skills upgrading for employability." Second, "mutual obligation and personal responsibility" was key insofar as recipients of assistance had to "help themselves". It considers the obligation of the extended family to "support relatives" as a "key survival instinct for Asian societies" and a "noble tradition" worth upholding, in seeking to privatise compassion and community self-reliance.[88] Third, the government invests in "preventive programmes" to enable low-income families to build up their capacity and ensure children took advantage of educational opportunities available.[89]

In addition, to enlist private sector help in delivering social services, the government supplies grants to Voluntary Welfare Organisations and has also set up a Social Enterprise Fund to nurture philantrophy through social enterprises to help the less privileged in society.[90] Rather than profit maximization, generated revenues would underwrite social causes.

Much depends on the will and vigilance of the legislators to promote social welfare issues and to highlight the needs of vulnerable groups during parliamentary debates, which are met by specific government programmes such as the Assistive Technology Fund which allows the physically disabled to purchase certain sorts of computer keyboards[91] to facilitate their educational or employment endeavours. This focus on the vulnerable sectors of society is not dissimilar to human rights based guidelines that neglecting the most vulnerable sectors of society constitutes a 'violation' of socio-economic rights.[92]

Parliament also provides a forum for some form of accountability in this field. For example, in 1994, the issue of homeless or destitute persons was raised in parliament,[93] with the

86 77 SPR 16 March 2004, col. 1935 (Charles Chong). For example, the government has increased the amount committed to social assistance, from $15million in FY2001 to $36million in 2004.

87 77 SPR 16 March 2004, col. 1935 (Assoc Prof Yaacob Ibrahim).

88 Yu-Fu Yee Shoon, 83 SPR, 22 May 2007, Financial and Non Financial Assistance for Needy Singaporeans.

89 77 SPR 16 March 2004, col. 1935 (Assoc Prof Yaacob Ibrahim). [Budget: MCDS].

90 *Id.,* col. 1935ff .

91 *Id.*

92 The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights January 22-26, 1997, available at http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html.

93 "1,341 Destitute persons in govt homes" *Straits Times* (Singapore),8 March 1994 at 25.

minister pointing out that under the Destitute Persons Act (Cap 78) some 1341 destitute persons (including beggars or persons without visible means of subsistence or place of residence) were living without charge in three government houses, some of whom were being trained for employment or engaged in suitable work to contribute towards their maintenance. The International Labour Organisation (ILO) criticised this Act as violating the ILO Forced Labour Convention to which Singapore is party.[94] Article 10(2) of the Constitution prohibits forced labour, excepting laws on compulsory national service; the Act was defended as a piece of social legislation that provided shelter, care and rehabilitation of destitute persons with a view to societal reintegration.

Constitutional Duty to Protect Minorities and the Indigenous People of Singapore: Typical of 1960s drafted constitutions, the Constitution has no collective or minority group rights and does not mandate affirmative action, departing from Malaysia's *bumiputra* rights scheme.[95] The prevalent ideology considered that safeguarding individual rights would secure minority interests, in rejecting special rights or privileges for the Malays. Part IV liberties have an assimilationist bent,[96] phrased primarily in individualist terms, [97] though the communal aspects of liberties like religious association is recognized.[98]

Article 152 enjoins the government to care for the interests of racial and religious minorities – a non-justiciable minority protection rather than rights-based system. Under article 152(2) the special position of the Malays as the indigenous peoples is recognized, obliging the government "to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language." Malays constitute 14% of the population and most ethnic Malays are Muslim.[99] Their special position is reflected too in Article 153A's symbolic recognition that Malay is the national language as well as an official language, together with Mandarin, Tamil and English. The national anthem is also written in the Malay language.

94 US Country Report (1999) online: US State Department <http://www.state.gov/www/global/human_rights/99hrp_index.html>.

95 Special rights are accorded *bumiputras* (sons of the soil), through quotas for educational institutions, public sector employment and business licences: art 153(2), Federation of Malaysia Constitution. The UMNO Chairman (Singapore) called for preferential treatment for Malays as indigenous peoples to enable them to co-exist at the same level of economic prosperity with other citizens, *e.g.* state sponsorship of Malay education, special consideration in the employment sphere and commerce: 'How other races can also be Malays: UMNO', *Straits Times* 4 Mar 1966.

96 Lee Kuan Yew thought individual rights a more pressing problem than the rights of minorities; the latter would be protected by safeguarding the former: *SPR* 15 Mar 1967, col. 1299.

97 The idea of equal individual rights (and thus, the equal treatment of all communities, a rejection of the Malaysia 'special indigenous rights' approach) is embodied in arts 12 and 16, Constitution, pursuant to the Singaporean Singapore ideal. This may be surprising, given that Singapore espouses a 'communitarian' vision of state-society relations but not unexpected because in parallel with 1960s human rights standard-setting, minority rights were disfavoured, featuring only in a singular paragraph couched as an individual rights in art 27, Covenant on Civil & Political Rights, 999 UNTS 171 (ICCPR). Further, 'community' in Singapore tends to be conflated with the state.

98 Arts. 15(2), 16(2), Singapore Constitution.

99 See Lily Zubaidah Rahim, 'Minorities and the State in Malaysia and Singapore: Provisions, Predicaments and Prospects' E/CN.4/Sub.2/AC.5/2003/WP.12.

Mandating Legal Pluralism through Religious / Personal Laws and Religious Courts: In addition, article 153 requires the legislature to adopt laws "for regulating Muslim religious affairs and for constituting a Council to advise the President in matters relating to the Muslim religion." Thus, this limited form of legal pluralism is an exception to the general common law, allowing the Muslim minority to preserve its cultural particularities regarding personal and customary law, in matters like education, diet,[100] prayer obligations and religious instruction, as regulated by the Administration of Muslim Law Act (AMLA) (Cap 3).

AMLA establishes the Syariah Court with jurisdiction over matrimonial and divorce matters, the power to impose penalties for Muslim-specific offences and to administer Muslim oaths and testamentary disposition pursuant to Muslim Law. It also establishes Majlis Ugama Islam or MUIS (Islamic Religious Council of Singapore) as a body corporate which advises the President on Islamic matters,[101] oversees Islamic schools, administers the Mosque Building fund, Mecca pilgrimages etc…Critics alleged MUIS is 'severely controlled' [102] as it comes under the direct purview of a Minister in charge of Muslim Affairs, who has a large say over nominating potential MUIS Council members.[103] PAP MPs have asserted that the MUIS's role demonstrates that "Singapore is not anti-religion" as religion is "allowed to play its role in forging a harmonious and cohesive society."[104]

The state's recognition of cultural autonomy buttresses patriarchical and inegalitarian religious law. For example laws precluding women from certain public posts,[105] permitting polygamous marriages (though statistics indicate this is not the norm among Muslim men[106]) and apportioning larger inheritance shares to males over females. [107] Indeed, to insulate gender inegalitarian aspects of Muslim religious and personal law, Singapore appended various reservations[108] to CEDAW in the name of preserving Muslim communal

100 *E.g.,* SAF camps maintain 2 kitchens: pork-free Muslim and beef-free Chinese kitchens, an apparently rare arrangement: 'BG Yeo: NS vital for racial peace', *Sunday Times*, 23 Aug 1998.

101 MUIS' website: http://www.muis.gov.sg.

102 Zulfikar Mohamad Shariff, 'Malay leadership: Interest, protection and their imposition', from a conference entitled 'Political Change in Singapore: what next?' 10-12 Jan 2003, Melbourne at http://www.sfdonline.org/Link%20Pages/Link%20Folders/03Pf/Malay_leadership.html.

103 See section 7 of AMLA.

104 Zainul Abidin Rasheed, 74 Singapore Parliament Debates 23 May 2002.

105 *E.g.* the post of Kadi and Muslim Marriages registrar: ss90(1), 91(1) and 146, AMLA; paras. 8.8, CEDAW Initial Report (CEDAW/C/SGP/1).

106 Section 96(2), AMLA. Para. 17.14, CEDAW Initial Report.

107 Para. 17.33, CEDAW Initial Report notes that the male's inheritance share is double the female's as men are responsible in Islam for maintaining their families (including wife, unmarried sisters, daughters, widowed mothers etc), while a woman's inheritance is for her own use.

108 For Singapore's justifications of reservations to arts. 2 and 16 in aid of protecting minority rights, see Paras. 2.2 and Part II Para. 1.2., Initial Report. Other reservations relate to arts. 9, 11 and 29(2). Minister Jayakumar considered these reservations 'not unusual,' observing that Singapore took 'international obligations seriously' and that existing laws and institutions already complied with CEDAW's aims: 65 *SPR* 18 Jan 1996, col. 443, 444-46. On Singapore's reservations to CEDAW, see Thio Li-ann, 'The Impact of Internationalisation on Domestic Governance: The Transformative Potential of CEDAW' in (1997) 1 *Sing JICL* 248 at 299-305.

autonomy[109] and to accommodate AMLA,[110] which considerably blunts the reach of CEDAW, especially in modifying sexist cultural patterns.[111]

However, there are limits to religious expression, particularly in public spaces, as evident from the January 2002 'tudung' controversy when four female primary schoolgirls were suspended from school for breaching an educational policy directive mandating that only uniforms be worn in public school. This raised important issues as to whether the 'no tudung' rule violates religious liberty or, from a feminist perspective,[112] whether this liberates female Muslims from a repressive patriarchical practice, a view not publicly canvassed. The Mufti, Singapore's highest religious authority, considered that priority should be accorded education over tudung-wearing, which the childrens' fathers rejected,[113] as did Pergas,[114]which demonstrates dissent within the Muslim community.[115] The government's rationale was not to promote gender egalitarianism but to serve the instrumental purpose of preserving a common space to foster national solidarity.

Policy towards the Malay Community: Subjection and Exemption from General Law: While the constitution does not accord privileges to Malays as indigenous peoples, the government has taken active steps to safeguard the interests of Malays in the fields of education etc…

This policy sits at odds with the government's declared meritocracy policy, reflecting the pragmatic need to ameliorate the marginal socio-economic conditions of the Malay community, given the broadening poverty gap, with the 'politics of envy'[116] likely to become more acute, as the Malay community tends to fall within the lower income sector. Further, given the geo-political realities of being a 'small dot in a sea of green,'[117] a Chinese-

109 Para 2.2. CEDAW Initial Report.

110 Braema Mathi, 77 SPR 16 March 2004, col. 1935.

111 Art 5, CEDAW. The CEDAW Committee while recognizing Singapore's plural society and historical sensitivity towards its' communities cultural and religious values, recommended it study reforms in Muslim personal law, consulting the different ethnic and religious groups, including women, pursuant to eventually withdrawing these reservations: para 74, A/56/38.

112 See Lama Abu-Odeh, 'Post Colonial Feminism and the Veil: Considering the Differences' (1992) 26 New England Law Review 1527.

113 'Mufti puts school first', *Straits Times,* 6 Feb 2002, available on Lexis.com.

114 Pergas is the Singapore Islamic Scholars and Religious Teachers Association. It stated that 'No Muslim is allowed to remain complacent and feel satisfied with such hindrance towards fulfilling the religious obligation of the modest covering of aurat.' Chua Lee Hoong, 'Tudung controversy a test in art of negotiation', *Straits Times,* 20 Feb 2002, available on Lexis.com. The English translation of the Pergas stand on the Hijab issue is available at http://www.pergas.org.sg/hijab-press2eng.html (visited 5 July 2003).

115 Muslims also wrote letters to the press strongly supported the government's stance and urging the fathers to send their daughters to madrasah (religious school) if he was insistent that his daughter wear the tudung. Norita Abdullah, 'Send daughter to madarasah', *Straits Times,* 8 Jan 2003, available on Lexis.com.

116 A. Woodiwiss, 'Singapore and the Possibility of Enforceable Benevolence' in *Globalisation, Human Rights and Labour Law in Pacific Asia* (UK: Cambridge University Press, 1998 at 230. On the 'digital divide' see Hussin Mutalib, 'The socio-economic dimension in Singapore's quest for security and stability' (2002) 71(1) *Pacific Affairs* 39.

117 Former Indonesian President BJ Habibie made this derogatory reference: 'President unhappy with Singapore, says AWSJ'*, Straits Times,* 5 Aug 1998 at 16.

majority city-state surrounded by Muslim nations,[118] minority concerns can cause inter-state tensions. For example, as a classic 'kin' state, Malaysian politicians criticized how Singapore treated its 'kindred minorities', the Malay community, in relation to the *tudung* controversy and the alleged suppression of minority religious rights in Singapore.

In displaying sensitivity towards Muslim concerns, there are instances where the Muslim community is exempt from general laws. For example, madrasahs or Islamic religious education schools, which are an important source of cultural identity and future religious leaders, are not subject to the Compulsory Education Act (Cap 51), although the state requires that these attain minimal educational standards and that their students are prepared for national primary school examinations.[119] This was in response to accusations that "the state was intent on eliminating the last bastion of autonomous Islamic activity in Singapore" voiced by PERGAS (Islamic Scholars Association).[120] Notably, other ethnic / religious groups are exempted from general laws in deference to cultural values, as where turbanned Sikhs need not wear helmets when riding motorcycles.

During the Severe Acute Respiratory Syndrome (SARs) health crisis in mid-2003, Muslims were granted an exception to SARs control measures of cremating victims by being allowed immediate burial in two sealed body bags.[121] In protecting the interests of the Muslim community, Muslims are given privileged treatment through policies such as the government sponsored "one mosque per town" program[122] funded through the Mosque Building Fund Scheme and the availability of government machinery to facilitate Islamic tithe collection.[123]

118 Thio Li-ann, 'Recent Constitutional Developments: of Shadows and Whips, Race, Rifts and Rights, Terror and Tudungs, Women and Wrongs' (2002) SJLS 328 at 352-355. Malaysian newspapers have invoked anti-Muslim images in criticizing Singapore policy: a December 2002 editorial entitled 'Singapore Behaving like the Jews in Claiming Batu Putih Island', cited by Irene Ng, 75 *SPR 21 Jan 2003, col. 2121.*

119 Para. 6.10, Singapore, Second Report Periodic Report to the UN Committee on CEDAW (Ministry of Community Development: Singapore, 2001) at http://www.mcys.gov.sg/MCDSFiles/download/CEDAW_second_report.pdf (Second CEDAW Report).

120 Suzaina Kadir, 'The Role of Education in Ethnic/Religious Conflict Management: The Singapore Case' (2005) International Center for Islam and Pluralism (ICIP) Journal Vol 2(1) January 1 at 14 (2005).

121 'No wakes for suspected SARs deaths', *Straits Times* (Singapore), 24 April 2003, H4.

122 Statement, Minister for Social Affairs Othman bin Wok, 37 Singapore Parliament Reports 29 June 1977, (Mosque Building Fund Scheme), col. 62-63. The Mosque Building Fund Scheme funds mosque-building; employers are required to pay a small contribution per Muslim employee per month to the fund and recover this from their Muslim employee wages.

123 Compulsory Muslim contributions towards the Mosque Building Fund are collected through the Central Provident Fund system pursuant to sections 78 AMLA (Cap 3). This concession does not extend to other religious or ethnic minority groups and was denied the Hindu Endowments Board: Ahmad Matter, 42 SPR, 3 Dec 1982 (Contributions from Hindus for Temples etc and Monies from Muslims for Mosques etc) col. 309-311.

V. System of Government

Political Institutions – head of state

Government is organised around the familiar trichotomy of powers: the legislature, the executive and the judiciary. All three branches are established under their own separate constitutional chapters, an implicit application of the separation of powers doctrine although separation is functional as there is no strict institutional separation after the American model, allowing certain offices to straddle government branches. For example, presidential consent is needed to enact laws under article 58.

The head of state is the President, a ceremonial office until 1991. In general, the President acted "in accordance with the advice of the Cabinet", although article 23 vests the executive authority in the President. Exceptionally, articles 25 and 26, which codifies British convention, empowers the President to act in his personal discretion. Article 25 relates to the power to appoint as Prime Minister a parliamentarian who in the President's judgment "is likely to command the confidence of the majority of the Members of Parliament". Article 26 allows the President to declare vacant the Prime Minister's office if satisfied the PM has ceased to command the majority support of Parliament. Article 22P assigns the President a role in granting pardons on the advice of Cabinet.[124]

The Elected Presidency: In 1991, the Presidency was made an elective office for a 6 year term. The elected president (EP) is vested with minimal supervisory powers over specific government activities. These include custodial powers over financial reserves, key civil servant appointments, and limited supervision over civil liberties.[125] In discharging his office, the EP enjoys immunity from suit (article 22K) and is entitled to have access to any information concerning the Government which is available to the Cabinet or any statutory board or Government company stipulated in articles 22A and 22C. The President may require the relevant official to furnish information concerning the Government reserves, those of a statutory body or Government company.

Election Process: Filtering Mechanism. The EP office introduced a duallist element to the practice of democracy in Singapore although this bears qualification for two reasons.

First, a filter in the form of a Presidential Elections Committee (PEC) established by article 18, comprising the Chairman of the Public Service Commission, the Chairman of the Accounting and Corporate Regulatory Authority, and a member of the Presidential Council for Minority Rights. Article 19 charges the PEC with issuing certificates of eligibility to candidates who satisfy stringent pre-selection criteria[126] that have a technocratic or

124 KC Vijayan, 'A pardon to mark National Day?, *Straits Times* (Singapore) 26 Aug 2007.

125 See generally Thio Li-ann, 'The elected president and the legal control of government: quis custodiet ipsos custodes?" in *Managing Political Change: The elected presidency of Singapore*, Tan & Lam eds., (Routledge, 1997) at 100-143.

126 These are more stringent than the criteria which must be satisfied to run for Parliament from whose ranks the Prime Minister is chosen: article 44.

establishment-oriented slant. PEC decisions are not subject to appeal or judicial review and PEC members enjoy immunity from libel suits.[127]

Article 19(2) requires that the PEC in its subjective opinion find that a candidate is "a person of integrity, good character and reputation". Further, the candidate must not have a political party affiliation at the date of election nomination and if he holds a seat in Parliament, must vacate this. Furthermore, the candidate must have held one of the following offices for at least three years:

(i) as Minister, Chief Justice, Speaker, Attorney-General, Chairman of the Public Service Commission, Auditor-General, Accountant-General or Permanent Secretary;
(ii) as chairman or chief executive officer of a statutory board to which Article 22A applies;
(iii) as chairman of the board of directors or chief executive officer of a company incorporated or registered under the Companies Act (Cap. 50) with a paid-up capital of at least $100 million or its equivalent in foreign currency; or
(iv) in any other similar or comparable position of seniority and responsibility in any other organisation or department of equivalent size or complexity in the public or private sector which, in the opinion of the Presidential Elections Committee, has 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.

Under these criteria, people who might be well-qualified to be Elected President such as diplomats or respected community leaders are excluded. To date, only the first presidential elections in 1993 were contested.[128]

Removal Procedure: The process for removing the President is laid out in article 22L, which provides that the PM or at least 25% of the total number of elected parliamentarians may give notice of a motion alleging that the President is "permanently incapable of discharging the functions of his office by reason of mental or physical infirmity or that the President has been guilty of (a) intentional violation of the Constitution; (b) treason; (c) misconduct or corruption involving the abuse of the powers of his office; or (d) any offence involving fraud, dishonesty or moral turpitude. Where this motion is adopted by at least 50% of the MPs, the Chief Justice shall appoint a tribunal to investigate allegations against the President, consisting at least 5 Supreme Court judges. The President may appear before such tribunal and be heard in person or by counsel. If the Tribunal reports to the Speaker that in its opinion the President is so incapacitated, a parliamentary resolution for the removal of the President from his office may be passed by at least three-quarters of the total number of elected parliamentarians.

127 Section 8A, Presidential Elections Act, Cap 240A.
128 Li-ann Thio, (S)electing the President of Singapore: Diluting democracy? (2007) 5(3) International Journal of Constitutional Law 526–543.

Powers of the Elected Presidency: Articles 21-22 set out the role of the EP in respect of financial and non-financial matters.

In relation to financial matters, the EP has a role in guarding national reserves to prevent a current government or public entity from squandering past reserves. The EP can withhold assent to Supply Bills (article 148A), government loan-raising schemes (article 144) and refuse approval of statutory boards and government companies' budgets (article 22B, 22D.). However, this negative 'veto' power has been truncated by subsequent amendments removing certain financial transfers and defence and spending bills from presidential purview.[129]

The Constitution requires the chief executive officer of a statutory board or government company to inform the EP where a proposed transaction is likely to draw down on the reserves accumulated by that body prior to the Government's current term of office. The EP is obliged to state reasons for approving budgets, bills or transactions[130] which draw on reserves, rending the EP accountable for his actions; additionally, the publication of these reasons in the Gazette renders them accessible to the public, strengthening government transparency.

The EP does not act alone but in tandem with the moderating influence of a council of unelected advisors known as the Council of Presidential Advisors ("CPA") established under Part VA. For example, if the EP considers that a supply bill draws down on past reserves not accumulated by the current government and wishes to withhold his assent to such bill, and the CPA advises against this, article 148D allows this assent or 'negative veto' to be overridden by a parliamentary resolution supported by two-thirds of parliament. Thus, the EP does not have a final say in many respects given the provision of this overriding mechanism; the EP cannot hinder a government in control of a two-thirds parliamentary majority.

The EP has a role in preventing nepotism by retaining some powers of scrutiny over key civil service appointments such as judges and the Attorney-General (though this is subject to a parliamentary override mechanism). In relation to preventing corruption, the EP can, under article 22G, without the PM's consent, concur with the Director of the Corrupt Practices Investigation Bureau's decision to investigate a Minister.

Where judicial review is statutorily ousted or limited, the EP has a constitutional role in safeguarding certain fundamental liberties such as personal liberty in relation to detention orders issued under the ISA (Cap 143) and religious freedom which is curtailed where a restraining order is issued under the MRHA. However, certain conditions must apply for this safeguard role to be triggered.

129 Yvonne CL Lee, 'Under Lock and Key: The Evolving Role of the Elected President as a Fiscal Guardian' [2007] SJLS (forthcoming).

130 Article 22B(6) and (7).

For example, under article 22I, the EP may cancel or confirm a restraining order under the MRHA provided the recommendations of the Presidential Council of Religious Harmony are at variance with the Cabinet's advice.[131] The same set-up applies in relation preventive detention orders and the ISA Advisory Board constituted under article 151.

Government

The conduct of government is in the hands of the parliamentary executive or cabinet government headed by the Prime Minister as article 24 provides. This represents government by a team, which is self-moderating, rather than by one man whereby decisions are reached through discussion and compromise.

Powers are 'fused' as Ministers are also Members of Parliament (MP) and Cabinet by the 'Whip' controls the parliamentary majority and weakens the doctrine of collective ministerial responsibility to Parliament. Political power is further centralised through anti-hopping laws (Article 46) which binds a MP to his political party as his parliamentary seat is contingent on retaining party membership.

Parliament

Unlike the supreme UK Parliament, the Singapore Parliament is a body constituted under, and deriving powers from, the Constitution.

Singapore adopted a unicameral legislature with 84 elected seats based on the 'first past the post' electoral system from the outset. Parliamentary government does not entail government by Parliament but rather government drawn from and accountable to Parliament though in reality, MPs are not in a strong position to call Ministers to account where Cabinet controls an overwhelming parliamentary majority. As such the parliamentary opposition is the sole check on the government but this is confined largely to debating and scrutinising bills, as the current opposition is too small to form an alternative government.

Owing to the party system, it is the Cabinet which controls the legislative agenda. Thus, Parliament's chief function is influencing policymaking, although article 59 permits individual MPs to initiate a private member's bill.

A Mixed Electoral System and Non Elected Parliamentarians: Since Independence, the government has conducted a series of constitutional experiments. Two types of non-elective parliamentarians, the Non-Constituency (NCMP) and the Nominated MP (NMP) scheme, were introduced in 1984 and 1990, respectively. There are thus three categories of

131 Deputy PM Wong Kan Seng confirmed that no restraining orders have ever been issued despite several close calls: 82 SPR 12 Feb 2007 (Maintenance of Religious Harmony Act: Number of Restraining Orders issued), col. 1319.

parliamentarians as article 39 provides. Furthermore, the electoral system was transformed in 1988. While retaining a nominal number of single member constituencies (SMC), the Group Representation Constituencies (GRC) system allows voters to choose a team of 4-6 MPs, one of whom has to come from a stipulated minority race in order to ensure minority representation.[132]

The Non-Constituency MP (NCMP): Article 39(1)(b) provides that the function of the NCMP scheme is to ensure that a maximum of 6 NCMPs be present in Parliament "to ensure the representation in Parliament of a minimum number of Members from a political party or parties not forming the Government." In this way, Parliament would never be the sole preserve of one political party, as in the 1970s. As Minister Goh Chok Tong stated at its inception, "we have sensed people want to have a good government plus a few good people to query the government."[133]

The Parliamentary Elections Act (Cap. 218) regulates the scheme which only comes into operation if less than 6 opposition politicians are directly elected into Parliament; the six top 'losers' who garner at least 15% of the vote of their contested constituency are offered NCMPships. At face value, they represent the voters who did not support the incumbent government. This is not really an exception to the 'first past the post system' since NCMPs, while enjoying the same privileges and immunities as ordinary MPs, are really second class parliamentarians who cannot vote on important bills like Supply Bills and 'no confidence' bills. NCMPs will only be appointed if the Singapore legislature continues to be dominated by one party with a pygmy opposition not exceeding double digit numbers; the scheme itself "presumes that the PAP will always be in charge and people only want Opposition to be represented".[134] . After the 2006 General Elections where only 2 opposition politicians were elected into Parliament, Worker's Party Chair Sylvia Lim became the NCMP.

The Nominated Member of Parliament (NMP): The introduction of the NMP scheme in 1990 under article 39(1)(c)was due in part to the government perception that the NCMP scheme had failed to give vent to significant alternative views as opposed to the pungent fumes of empty rhetoric. To fill this lacuna, the intent was to tap the expertise of persons unwilling to enter politics. This is predicated on a hapless opposition unable to discharge its office of debate and scrutiny. The scheme was expanded from an original 2 to 6 to the current ceiling of 9 NMPs. Each Parliament decides whether it wishes to have NMPs within its midst. However, the democratic legitimacy of NMPs as the appointees of an elected Parliament may be questioned, and indeed, harks back to the paternalistic colonial era practice of appointing nominated legislative assembly members, drawn from the better natives.

The Fourth Schedule of the Constitution identifies the criteria for NMPs, to the effect that nominees should be "persons who have rendered distinguished public service, or who have

132 Article 39A, Consttution.

133 Goh Chok Tong, former Defence and Second Health Minister, *Straits Times*, 21 May 1984. See Valentine Winslow, 'Creating a Utopian Parliament' (1984) 24 Malaya Law Review 268.

134 Chiam See Tong, 51 SPR 29 July 1988, col. 464.

brought honour to the Republic, or who have distinguished themselves in the field of arts and letters, culture, the sciences, business, industry, the professions, social or community service or the labour movement." Unlike NCMPs, NMPs are supposed to be apolitical such that the parliamentary special select committee is directed to pay heed to the "need for nominated Members to reflect as wide a range of independent and nonpartisan views as possible." This 'neutral' stance is reflected in article 46(2B) which provides that the NMP shall vacate his seat if he is elected or stands in elections as a candidate for a political party (both of which suggest a political agenda). The NMPs share the same limited voting powers as the NCMPs.

In 1997, the NMP scheme was altered insofar as nominees came not only from the general public but also from certain constituencies or functional groups (labour, business, industry, academia). This discounts the scheme's original rationale to provide non-partisan views, potentially opening the door to the injection of interest groups politics in Parliament through non-elected MPs. Notably, the scheme has been identified as a way to improve female political participation, involving less onerous responsibilities, as most women were thought not to want to juggle career, family *and* constituency.[135]

An initial fear was that the scheme would be a "backdoor" way of getting the incumbent government supporters into Parliament. Practice has proved this fear unfounded as the general perception seems to be that the NMPs are largely independent agents, albeit approved critics, who have enhanced parliamentary debate and drawn attention to certain issues. They have played an educative function as presenting 'constructive' alternative voices and viewpoints which the government may co-opt. Concerns about the scheme contradicting the principle of popular representation seem to be largely ignored now, as the 'expertise' of NMPs serves as a pragmatic justification for giving voice to their personal views.

Introducing non-elective elements into an elected House may represent an evolutionary shift towards an Asian version of democracy which seeks to expand opportunities for citizen participation in policy-making. However, it has had the effect of perpetuating the political status quo characterised by a dominant party controlling Parliament, with a token opposition presence and a pool of government-approved ersatz critics. These developments may minister to desires for dissenting voices, but no real change to political power is effected, supporting the establishment view that strong (PAP) government is the best guarantor of political stability.

Group Representation Constituency and Minority Legislative Representation: The original rationale of the GRC scheme was to promote political stability by institutionalising

135 Goh Chok Tong, 54 SPR 29 Nov 1989, col. 700. It was queried whether the PAP was looking for "certain kinds of women" as possible candidates, leaving out single women or well-educated housewives. Further, it was "no compliment" to say women needed to be exempted from constituency work otherwise they could not manage well as the 4 women in Parliament in 1989 had shown "we can do it all": Dr Aline Wong, 54 SPR 29 Nov 1989, cols. 742-743. See also Irene Ng, 74 SPR, 5 April 2002, col. 602-603.

multi-racialism in the composition of Parliament. A nominal number of single member constituencies (9) were retained.

After the 1984 elections, the PAP expressed the fear that younger voters preferred candidates best suited to serve their own needs, disregarding the importance of returning "a racially balanced party slate of candidates." Thus a corrective measure to ensure that majority rule did not neglect minority interests was introduced in the form of the GRC which is basically a mega-constituency created by the merging together of three former SMCs. It is contested on the basis of teams of four to six candidates. In assembling multi-racial teams, inter-ethnic party alliances and moderate politics would be promoted amongst the political parties contesting GRCs.

The rationale for enlarging GRC teams from 3 to 4-6 members had little to do with ethnic representation, serving non constitutional objectives such as running town councils and community development councils. Opposition politicians argued that this prevented them from contesting GRC wards with a stipulated minority candidate for lack of human resources, such that they have only been able to contest 2 or 3 GRCs at each General Election and have never in fact won a GRC ward. Notably, the constitution itself does not stipulate a minority quota. An increase in the size and numbers of GRCs might entail a corresponding quantitative decline in minority representation.

Legislation Process (PCMR and EP)

Article 38 provides that the "legislative power of Singapore shall be vested in the Legislature which shall consist of the President and Parliament." This acknowledges the President's nominal role of the President in the legislative process. Consistent with Westminster Convention, Article 58 provides that presidential assent is necessary before a bill passed by Parliament, which undergoes three readings, can become law. [136]

Legislative Oversight? A quasi Second Chamber in the form of the Presidential Council on Minority Rights (PCMR) was established to review legislation to guard against laws with "differentiating measures" as defined in article 68 which in their practical application would be "disadvantageous to persons of any racial or religious community." Its members include the Chief Justice, Prime Minister (PM), senior Cabinet members and the Attorney General.

Under article 76(1), the PCMR's general function is to consider and report on matters affecting persons of any racial or religious community which Parliament refers to it. Article 77(2) makes it the particular function of the PCMR to draw attention to any Bill or subsidiary legislation which may contain 'differentiating measures.' The basic goal was to protect minority rights and obstruct the passage of discriminatory legislation which might impair communal harmony.

136 See Kevin YL Tan, 'Parliament and the Making of Law in Singapore' in *Singapore Legal System*, Kevin YL Tan ed., (Singapore University Press 1999), 123-159.

The deficiencies of the PCMR as a mechanism of legislative oversight have been well documented.[137] All PCMR proceedings are held in camera. Article 87 provides that "any Minister, Minister of State or Parliamentary Secretary specially authorised by the Prime Minister" may attend these private meetings.

Even if all these inhibiting hurdles are cleared, the PCMR has limited powers even where it finds a "differentiating measure" in a bill. It can make an adverse report to the Speaker who will present the bill to Parliament for amendment; significantly, this has never been done.

A check exists insofar as article 78(6)(*a*) provides that such a bill cannot be presented to the President for assent unless the Speaker certifies it is free of 'differentiating measures.' However, a two-thirds parliamentary majority can easily circumvent this under article 78(6)(*c*) by endorsing a motion to present the bill to the President notwithstanding an adverse report. The only 'check' is the resultant publicity the overriding of an adverse report may elicit.

Presumably, the PCMR in safeguarding minority rights and concerns is highlighting potentially controversial bills to MPs before the bill becomes law. Unfortunately, article 78(1) only obliges the Speaker to present an authentic copy of the bill to the PCMR after its third and final stage, prior to the presentment for presidential assent, after the conclusion of parliamentary deliberations. MPs thus are precluded from considering the PCMR report during parliamentary debates, which could be rectified if access to the report was made after the first reading

The PCMR's powers of legislative revision are further attenuated by article 78(7) which designates certain types of bills as falling without the ambit of PCMR scrutiny. These include money bills and bills certified by the PM to be of a nature which "affects the defence or the security of Singapore or which relates to public safety, peace or good order in Singapore" or which are "so urgent that it is not in the public interest to delay its enactment." These wide conditions afford the PM virtually untrammeled powers of certification.

VI. Fundamental Rights

Concept of Fundamental Rights in Constitutions

Origins of Singapore's Fundamental Liberties Chapter: Part IV of the Constitution enumerates Fundamental Liberties and is derived, with modifications, from Part II of the Federal Constitution of Malaysia.[138] The Privy Council noted in *Ong Ah Chuan v PP* that

137 See the articles by Thio Su Mien and David S Marshall, 'The Presidential Council' (1969) 1 Singapore Law Review 2 and 9 respectively.

138 Singapore selectively adopted parts of the Malaysian Constitutional bill of rights through the 1965 Republic of Singapore Independence Act; it notably excluded the article 13 property rights clause as it wanted to ensure that land could be compulsorily acquired on nominal terms under the Land Acquisition Act to facilitate national development. The Malaysian Constitution was a product of Anglo-Malayan drafting and "drew substantially

the eight Articles in Part IV were "identical with similar provisions in the Constitution of Malaysia."[139] Part IV rights are largely civil-political rights (articles 9-15 relate to right to life and liberty, prohibition against forced labour, due process rights, equality, freedom of movement, speech, religion, while article 16 relate to educational rights). These largely negative, justiciable rights require the government to refrain from intervention, although the Constitution authorises broad rights limitation. For example, article 14 authorises Parliament where considered 'necessary or expedient' to restrict free speech rights in the interests of public order and morality.

The Singapore constitution does not follow the pattern of other Commonwealth constitutions, particularly in Caribbean countries like Jamaica and Belize, whose codes of fundamental rights was based on the European Convention of Human Rights (ECHR) (1950) drafted by the Council of Europe, which the UK became a party to in 1950.[140] Indeed, cases from these jurisdictions have drawn from ECHR jurisprudence and been rejected by Singapore courts on this score.

Law Minister Jayakumar in introducing a bill to curtail judicial review with respect to ISA cases and to legislatively overrule the case of *Chng Suan Tze v Minister of Home Affairs*[141] in 1989 argued that the court had indulged in judicial activism in emulating the interventionist approach of English courts by applying an objective test of judicial review to ministerial orders issued under the ISA. He considered that "the Court did so because of cases decided in the United Kingdom and other parts of the Commonwealth." [142] Thus, if Parliament did not reverse this tide of foreign case influence, Singapore's law on national security matters would be "governed by cases decided abroad, in countries where conditions are totally different from others,"[143] particularly English judicial reasoning affected by the UK's "entry into the European Community and decisions of the European Court which are factors totally alien to us…It will influence the UK judges and those precedents will be then imported into Singapore."[144] Clearly, this amendment sought to terminate the brief judicial flirtation with foreign case law which supported the development of a rights-based jurisprudence.[145]

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from English constitutional traditions and to a lesser extent, from the Indian, Australian and American constitutions…The elaborate section of fundamental rights (Articles 3-13) was based on similar provisions in the Indian Constitution which in itself was influenced by the Bill of Rights in the American Constitution." Joseph M Fernando, *The Making of the Malayan Constitution* (MBRAS Monograph 31, 2001) at 212. The Indian Constituent Assembly selectively adopted aspects of the US constitutional model, excluding the expression "due process of law" in favouring the narrower "except according to procedure established by law.": Anthony Lester QC, 'The Overseas Trade in the American Bill of Rights' (1988) 88 Columbia Law Review 537 at 544.

139 (1980-1981) Singapore Law Reports (SLR) 48 at 61-62.

140 See generally Anthony Lester QC, 'The Overseas Trade in the American Bill of Rights' (1988) 88 Columbia L.R. 537 at 541, point out that some 26 Commonwealth countries have independence constitutions which guarantee rights and freedoms based on the European Convention model.

141 [1988] SLR 133.The Court of Appeal had held as a matter of principle that the test of judicial review of ministerial powers under the ISA was objective, rather than subjective, quashing a detention order on a technicality.

142 52 Singapore Parliament Debates, 25 Jan 1989 cols. 463ff at col. 468.

143 *Id.*

144 52 Singapore Parliament Debates, 25 Jan 1989 cols. 463ff at col. 468.

145 It is instructive that the Malaysian court in *Kok Wah Kuan v Pengarah Penjara Kajang Selagor Darul Ehsan* [2004]

In 1994, Singapore cut off ties with the Privy Council as its highest court of appeal, partly because its judges were no longer attuned to local conditions. The 1994 Practice Statement on Judicial Precedents[146] further paved the way towards developing an autochthonous public law; it stated that while Privy Council decisions did not bind the Court of Appeal, these would be departed from sparingly "bearing in mind the danger of retrospectivity disturbing contractual, proprietary and other legal rights". Nevertheless, in relation to public law, the Statement continued "we also recognise that the political, social and economic circumstances of Singapore have changed enormously since Singapore became an independent and sovereign republic. The development of our law should reflect these changes and the fundamental values of Singapore society."

Rights Theory in Singapore: The current predominant approach towards constitutional adjudication of fundamental liberties departs from the pro-individual approach advocated by the Privy Council in *Ong Ah Chuan v PP*.[147] There, Lord Diplock stated that the word "law" in constitutional provisions such as article 9 which provides that "No person shall be deprived of his life or personal liberty save in accordance with law", did not merely refer to a collection of rules. Drafted by lawyers steeped in Westminster conventions, "law" referred to a system of law associated with substantive principles of fairness or "fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution."[148] "Law" was not to be read literally as duly enacted legislation, without regard to content, otherwise liberties would be "little better than a mockery." Furthermore, Diplock approvingly quoted Lord Wilberforce's statement that bills of rights in Westminster-based constitutions should be purposively[149] and generously rather than pedantically construed, to ensure individuals receive the "full measure" of liberties. Furthermore, derogating clauses warranted narrow interpretation.[150]

This 'naturalist' approach rejects the positivist obsession of reading rules literally, regardless of substantive content, in favour of ascertaining the principle behind the rule. Karthigesu JA in *Taw Cheng Kong v PP*[151] affirmed the fundamental, inalienable nature of constitutional

5 MLJ 193 (High Court, Kuala Lumpur) in considering an ECHR case, *Director of Public Prosecutors of Jamaica v Mollison* [2003] 2 WLR 1160 with respect to detention at pleasure noted that the English courts in developing case law were "no longer dominated by a search for the intention of Parliament"; rather the court's first duty was "to adopt any possible construction which is compatible with Convention rights." If not possible, the Court could issue the remedy of a declaration of incompatibility: 207-208, paras 32-33.

146 (1994) 2 SLR 689.

147 [1981] 1 MLJ 64; [1980-1981] SLR 48.

148 See Andrew Harding, "Natural Justice and the Constitution" (1981) 23 Malayan Law Review (MLR) 226; T.K.K. Iyer, "Article 9(1) and 'Fundamental Principles of Natural Justice' in the Constitution of Singapore" (1981) 23 MLR 213. These principles have not been substantially developed since 1981: Thio Li-ann, "Trends in Constitutional Interpretation: Oppugning *Ong*, Awakening *Arumugam* ?" [1997] SJLS. 240.

149 In *Constitutional Reference No 1 of 1995* [1995] 2 SLR 201, the Constitutional Tribunal advocated the adoption of a purposive approach towards interpreting the Constitution so as to give effect to the intent and will of Parliament; furthermore, section 9A of the Interpretation Act (Cap 1) required no ambiguity or inconsistency before resort to contemporaneous speeches and documents was permissible.

150 *Ong Ah Chuan v PP* [1981] 1 MLJ 64.

151 [1998] 1 SLR 943 (High Court).

rights and rejected the idea of rights as reciprocal privileges hinted at in *Colin Chan v PP*.[152] There, Yong CJ took judicial notice of the concern of the Defence Ministry that if the Jehovah Witnesses (JWs) could plead religious freedom to willfully disobey orders issued under the Singapore Armed Forces Act[153] which regulates mandatory military service, this would "affect the motivation of the Singapore Armed Forces." Furthermore, JWs would enjoy "the social and economic benefits of Singapore citizenship and permanent residence" while being "excused from the responsibility of defending the very social and political institutions and structure which enable them to do so".[154] Further, the neglect of these duties of citizenship was highlighted by Yong CJ's reference to articles 128 and 131 of the Constitution "under which a citizen may not renounce his citizenship unless he has discharged his liability for national service."[155] This seems to suggest that rights were conditioned by the discharge of citizenship duties.

Karthigesu JA appreciated the 'natural', inherent nature of rights as something beyond positive law which were "enjoyed as fundamental liberties – not stick and carrot privileges". Other privileges "such as subsidies or the right to vote are enjoyed because the legislature chooses to confer them — these are expressions of policy and political will." [156]

Karthigesu JA rejected the idea put forward by the public prosecutor that as part of a 'social contract', Singapore citizens received rights contingent upon behaving "in a manner becoming of their status as citizens of Singapore." For him, the social contract was man's submission to moral prescriptions to avoid the effects of "his own permissiveness" being "revisited upon him."[157] This 'social contract', of mutuality and reciprocity, of state grants of rights in exchange for acceptable behaviour "is not to my knowledge a guiding principle of constitutional interpretation".[158] Rights are thus not contingent on citizen behavior, but inalienable, insofar as the Constitution was supreme.

In stark contrast, Singapore courts reached the heights of positivism and literalism in a series of cases heard in the 1990s. In *Jabar v PP*,[159] the Court of Appeal in addressing the question whether the 'death row phenomenon' would result in the deprivation of life "not in accordance with law", declared:

> Any law which provides for the deprivation of a person's life or personal liberty, is valid and binding so long as it is validly passed by Parliament. The court is not concerned with whether it is also fair, just and reasonable as well.[160]

152 [1994] 3 SLR 662 at 684.
153 (Cap 259).
154 [1994] 3 SLR 662 at 684.
155 [1994] 3 SLR 662 at 685A.
156 *Taw Cheng Kong v PP* [1998] 1 SLR 943 at 965D, para 56.
157 [1998] 1 SLR 943 at 965A.
158 [1998] 1 SLR 943 at 965C.
159 [1995] 1 SLR 617 (Court of Appeal, Singapore).
160 [1995] 1 SLR 617at 631B (Court of Appeal, Singapore).

This envisages an extremely limited role for judicial review in rights protection, implicitly reposing faith that the people will be able to hold their representatives accountable at elections for bad laws. In *Rajeevan Edakalavan v PP*,[161] CJ Yong went so far as to observe that issues relating to fundamental liberties should be raised through parliamentary representatives whom the electorate had chosen to address such concerns such as those relating to social well-being, of which fundamental liberties are a part.[162]

Nevertheless, in subsequent cases, the possibility of challenging legislation which was contrary to fundamental rules of natural justice or which differentiated between classes without a rational basis was preserved. The Court of Appeal in *Nguyen Tuong Van v PP* accepted it was wrong to decide the issue of the constitutionality of a differentiating trait on "a blind acceptance of the legislative fiat" as it was the judicial duty to ascertain "the proper weight that ought to be ascribed to the views of Parliament encapsulated in the impugned legislation".[163] This suggests some minimal control over legislative power. However, the test of rationality is lax and defers to legislative wisdom while not treating it as definitive, as it could be displaced by showing "plausible reasons" that a legislative classification was "purely arbitrary."[164]

Aspects of State Practice: Government-Parliament Oriented Model for Protecting Human Rights

A country may import and transplant the constitutional institutions, processes and rights codes from another jurisdiction but this does not guarantee its exact reproduction, as institutions require a supportive constitutional culture to function effectively. In the absence of a 'rights culture' characterised by citizens utilizing legal processes to redress violations of justiciable rights renders judicial review of marginal weight in controlling official decision-making. Indeed, the government has clearly demonstrated its preference that citizens resort to conciliation and mediation rather than litigation. For example, while the PM stated that the government would abide by a judicial decision, were one sought, that it was unconstitutional to ban primary schoolgirls from wearing Muslim headscarf as violating their religious expression rights, he urged that the controversy be resolved through dialogue. [165]

161 [1998] 1 SLR 815.

162 [1998] 1 SLR 815 at p. 823, para 21.

163 [2005] 1 SLR 103, para 73

164 *Id.*

165 "'Muslims urged to discuss tudung issue: Legal action is not the way to resolve matter,' says MP Zainul Abidin Rasheed, adding 'it's better to have more dialogue'" *Straits Times* (Singapore) 28 Jan 2002 (available on Lexis, accessed 22 May 2002). The Prime Minister has indicated that he would not mind if the parents of the suspended schoolgirls took the case to court: 'Let them take it to court and let them argue the legal rights and wrongs about the case, and let the court decide'. "PM Firm on Tudung Issue" *The Straits Times* (Singapore) 3 Feb 2002 at 1. For a discussion of the tudung controversy, see Thio Li-ann 'Recent Constitutional Developments: Of Shadows and Whips, Race, Rifts and Rights, Terror and Tudungs, Women and Wrongs' (2002) SJLS 328 at 355-369.

The shared value for 'consensus instead of contention' is perhaps also reflected in the government's reticence towards building rights protective institutions, which would provide a focal point for handling specific disputes and cultivate 'rights consciousness' in citizen (as entitlement) and governor (as check). A dedicated institution for complaints-handling might also stir inter-ethnic tensions.[166] This attitude is evident in government rejection of proposals to establish institutions such as an Ombudsman, Equal Opportunities Board[167] or Women's Rights Ministry. [168]

Obviously the preference is to handle potential rights claims in a low-key fashion which does not arouse widespread political interest, through non-binding codes of conduct and maintaining an informal, petitionary model for resolving disputes; further, promotional, educative measures are deployed rather than coercive sanctions to change conduct. Citizens are urged to utilise *ad hoc* or informal avenues to provide feedback[169] or raise concerns with parliamentarians. For example, in responding to complaints made about discriminatory employment practices on grounds of race and relation, the Manpower Ministry issued a press release stating that while these complaints were being investigated, educating employers was the best strategy to promote meritocracy and ensure that race or religion were not made a chief criterion for a job. [170] In 1999, a set of non-binding informal guidelines[171]against discriminatory job advertisements were adopted and have reportedly been successful, resulting in a drop in discriminatory advertisements from 30% to less than 1%.[172]

Parliament is also a forum where MPs have been able to raise rights issues, such as workers' rights. In moving a motion to debate widening inequalities in society,[173] NCMP JB Jeyaretnam called for an Unfair Dismissals Act to protect workers against unfair termination and urged that trade unions "be run on democratic lines" rather than having a Cabinet Minister as Secretary-General of the umbrella National Trade Unions Congress (NTUC)

166 'Discrimination: Maybe watchdog body can help', *Straits Times,* (Singapore) 18 Feb 2001 at 37.

167 This was rejected by the Manpower Minister on the basis that this would make workplace culture more litigious: '"No" to legal body to fight for equal opportunities', *Straits Times* (Singapore), 4 April 2002
MP Irene Ng noted that Singapore has yet to establish an institution to enforce principles of equality in the workplace as it prefers to us "the persuasion, moral suasion and promotional way" to nudge employers down the path. 75 SPR 2 April 2002 (Stayers & Quitters) col. 179.

168 Irene Ng, *id.,*at col. 181.

169 The Committee on the Family, which reports to the Ministry for Community Development, is a feedback avenue for women's issues: Para.3.4, Initial Report, CEDAW Committee. When Opposition MP raised the issue of establishing a Board of Equal Rights to allow all citizens complaining of unfair discrimination, Minister of State for Law Ho Peng Kee said there was sufficient redress through judicial review or through contacting MPs or government ministries who take appeals concerning rights violations 'very seriously.' 69 SPR 30 June 1998, Board of Equal Rights, cols. 380-381.

170 Elaine Swinn-Tan (Assistant Director, Corporate Communications for Permanent Secretary Ministry of Manpower), 'Education Can Curb Biases', *Straits Times* (Singapore) 28 Jan 1999, at 40.

171 Text of Tripartite Guidelines on Non-Discriminatory Job Advertisements available at website of the Ministry of Manpower at http://www.mom.gov.sg.

172 'New rules to address age-biased job ads not needed' *Straits Times* (Singapore) 18 Oct 2005 H6. Second CEDAW Report, paras. 7.6.

173 72 SPR, 25 August 2000, Widening Inequalities in Society, col. 721.

which represents 65 affiliated unions and 400,000 workers.[174] He urged that workers did not enjoy dignity as they lacked rights and were "in the position of a beggar" *vis a vis* the employers.[175] In response, PAP MPs defended the government policy of Tripartism (between employers, the trade unions and government) which focuses on relationship rather than rights. The NTUC Secretary-General could ensure that "workers concerns go direct to the Cabinet and it has helped the workers."[176] Furthermore, the government is quick to underscore the practical results wrought by industrial peace for workers who benefited from the full employment situation in Singapore; the co-operative relationship mediated through Tripartism had also translated into fair remuneration, fair play at workplaces and job security.[177] Controlling trade unions is indeed one of the strategies of the developmentalist state.

VI.I. Constitutional Jurisprudence

The Judicial System

Singapore does not have a separate system of courts aside from religious courts. Thus, article 93 vests the judicial power of Singapore in a Supreme Court which article 94 defines as the Court of Appeal, which has 3 permanent members, and the High Court, whose powers and jurisdiction are regulated by the Supreme Court of Judicature Act (Cap 322). Among the departures from British practice was the abolition of the jury system.[178] Subordinate courts are regulated under the Subordinate Courts Act (Cap 321); judges of these courts are technically part of the executive and are routinely shuffled between the executive and judicial branches, sustaining concerns that they might bring to bear a bureaucratic or corporatist ethos in discharging judicial functions.

Part VIII also provides for security of tenure and remuneration and the process for removing judges. It also provides for short term judges or Judicial Commissioners who serve for stipulated periods of time for the pragmatic purpose of facilitating the disposal of business before the Supreme Court: article 94(4). Indeed, article 94(5) permits the President to appoint a qualified person "to hear and determine a specified case only." Such judges obviously do not enjoy the insulation from political pressure that judicial independence safeguards confer.

Article 100, which was introduced in 1994, provides for one *ad hoc* specialist court. With the Cabinet's approval, the President may refer a question to a constitutional tribunal regarding the actual or prospective effect of any constitutional provision. The Tribunal is

174 83 SPR, 22 May 2007, Financial and Non Financial Assistance for Needy Singaporeans, col. 733.
175 72 SPR, 25 August 2000, Widening Inequalities in Society, col. 734.
176 Hawazi Daipi, 72 SPR, 25 August 2000, Widening Inequalities in Society, col. 759.
177 Hawazi Daipi, 72 SPR, 25 August 2000, Widening Inequalities in Society at col. 756
178 Jury trial was imported into Singapore and Malaysia during the colonial era and was abolished in Singapore by 1970. See Andrew Phang, Jury Trial in Singapore and Malaysia: The Unmaking of a Legal Institution, (1983) 25 Malaya Law Review 50.

to consist of a minimum of 3 Supreme Court judges and the opinion of the majority of its Judges on the validity of any law shall not be questioned by any court. This has been one constitutional reference thus far, relating to the scope of presidential powers.[179] However, there have been two instances when opposition politician JB Jeyaretnam wanted to ask the tribunal whether the Public Entertainments Act was constitutional, and whether the approval of Parliament and the President was required before the government made a sizeable loan to Indonesia.[180] However, article 100 only allows the President to make such references; citizens cannot invoke this process, despite failed calls for a constitutional court to handles complaints with respect to rights violations.[181]

The judiciary is the guardian of Part IV fundamental liberties and has the power to strike down unconstitutional legislation and to regulate executive action through administrative law principles. Although there is no express constitutional right of access to a judicial remedy, this is accepted in practice and standing has been broadly construed, which recognises the citizen's role in ensuring the accountability of public officials.[182]

Limits on Judicial Review

Notably, article 149 provides that legislation against subversion enacted under the authorisation of Part XII (Special Powers against Subversion and Emergency Powers) shall be valid "notwithstanding that it is inconsistent with Article 9, 11, 12, 13 or 14." These would include preventive detention laws like the ISA. Nevertheless, article 151 provides certain procedural safeguards for detainees, in the form of requiring the detaining authority to inform the detainee of the grounds of detention, allegations of fact on which the order is based and shall provide an opportunity for making representations against the order "as soon as may be."

Judicial review may be restricted or excluded by statutory ouster and limitation clauses. For example, section 18 of the MRHA provides that "All orders and decisions of the President

179 In the matter of Articles 5(2), 5(2A) and 22H(1) of the Constitution of the Republic of Singapore, Const. Reference No. 1 of 1995, [1995] 2 SLR 201. For a discussion, see Thio Li-ann 'Working out the Presidency: The Rites of Passage, (1995) SJLS 509; for a reply, see Attorney- General SK Chan, Working out the Presidency: No Passage of Rights, (1996) SJLS 1-39.

180 Opposition politician JB Jeyaretnam wanted to ask the tribunal whether the Public Entertainments Act was constitutional, and whether the approval of Parliament and the President was required before the government made a sizeable loan to Indonesia. 'Constitutional Tribunal Plea Rejected', *Straits Times* (Singapore.), Jan 30, 1999 at 54. 'Send USSGD 5b Loan Case to Constitutional Court', says Jeya, *Straits Times* (Singapore), Nov. 24, 1997 at 28.

181 Chandra Mohan, 76 SPR 13 March 2003 (Budget Judicature), col. 672 at 673-674 (proposal for a constitutional court).

182 Karthigesu JA noted in *Colin Chan v MITA* [1996] 1 SLR 609 at 614C-F that "If a constitutional guarantee is to mean anything, it must mean that any citizen can complain to the courts if there is a violation of it. The fact that the violation would also affect every other citizen should not detract from a citizen's interest in seeing that his constitutional rights are not violated. A citizen should not have to wait until he is prosecuted before he may assert his constitutional rights."

and the Minister and recommendations of the Council made under this Act shall be final and shall not be called in question in any court." Section 8B(2) of the ISA provides: "There shall be no judicial review in any court of any act done or decision made by the President or the Minister under the provisions of this Act save in regard to any question relating to compliance with any procedural requirement of this Act governing such act or decision." This truncates the judicial role as guardian of the constitutional liberties involved, e.g. articles 9, 12, 14 and 15.

Case Law Jurisprudence: Prioritising Public Order, Particularities and Pre-Emptive Strikes

The courts in adjudicating rights have generally adopted what may be called a 'pro-communitarian' approach in balancing rights against competing rights and community interests, with determinative weight accorded to public order considerations, the selective attitude towards endorsing foreign case law and the particularities of culture or 'local conditions' invoked to justify judicial reasoning.

Attitude towards Foreign Case Law: Erecting Four Walls and Invoking Local Particularities? There has been an increasing resort to or discussion of international and comparative case law in public law decisions despite formal endorsements of the "four walls" approach that "the Constitution is primarily to be interpreted *within its own four walls* and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia."[183] The court in *Nguyen Tuong Van v PP* averred that "The common law of Singapore has to be developed by our Judiciary for the common good."[184]

However, unlike the 'transnational judicial conversations'[185] taking place between certain constitutional courts, usually with respect to western liberal values, Singapore courts tend to utilise or dismiss foreign decisions selectively, not to expand rights but to consolidate public order concerns.[186] Indeed, Singapore courts have referenced US decisions with which they are in accord, to disprove arguments that there is international consensus supporting international norms which prohibit the death penalty.[187] This buttresses the status quo. There are exceptions to this, as where the High Court in *Malcolmson Nicholas Hugh Bertram*

183 *Government of the State of Kelantan v Government of the Federation of Malaya & Anor* [1963] MLJ 355 affirmed in *Colin Chan v PP* [1994] 3 SLR 662 at 681D-E.

184 [2004] SGCA 47 at para 88.

185 Christopher McCrudden, 'Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20(4) OJLS 499-532.

186 See Li-ann Thio, 'Beyond the Four Walls' in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories and Constitutional Adjudication in Malaysia and Singapore' [2005] 18(2) *Columbia Journal of Asian Law* 428-518.

187 *Campbell v Woods* 18 F 3d 662 (1994) was cited as this held that hanging did not violate the US constitutional prohibition against cruel and unusual punishments: *Nguyen Tuong Van v PP* [2004] 2 SLR 328 at para 107 (High Court); [2005] 1 SLR 103, para 936.

v Naresh Kumar Mehta suggested that Singapore develop a common law tort of harassment as a facet of an individual's right to privacy in his home and correspondence, borrowing from an English case whose reasoning was influenced by ECHR jurisprudence. [188]

This instrumental use of foreign materials to buttress statist imperatives is evident in *Colin Chan v PP*[189]. The court borrowed from the wartime Australian High Court decision of *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth*[190], reasoned at a time where security issues are prioritised; here restricting the religious freedom of this sect was justified on the basis that their religious convictions impeded the prosecution of war.

In contrast, in that same case, when US cases were cited to buttress the weight of religious liberty, Yong CJ cursorily dismissed their relevance on the basis that decisions should be based on unelaborated "local conditions"[191] or that foreign case law is weightless as Singapore's "social conditions" are "markedly different".[192] The disqualifying factor for the persuasiveness of a foreign decision appears to be its rights-expansive quality, as where Sinnathuray J in *AG v Wain*[193] dismissed foreign concept of court precedents because foreign law had developed "in a liberal direction"[194] in ascribing greater weight to free speech concerns, influenced by the European Court of Human Rights. So too, this particularist bent is evident in Lai J's reasoning in *AG v Chee Soon Juan*,[195] in invoking the existence of unique conditions which necessitate "that we deal more firmly with attacks on the integrity and impartiality of our courts"; specifically, Singapore's small geographical size "renders its courts more susceptible to unjustified attacks", noting that the Privy Council in a 1999 case considered that "the need for the offence of scandalizing the court on a small island (Mauritius) is greater."[196]

Notably, the High Court has invoked a series of foreign cases dating back to the 19th century, where there was a lack of a commitment to constitutional rights, as opposed to common law liberties, to support more restrictive readings of free speech rights in political libel cases. In *JB Jeyeretnam v Lee Kuan Yew*[197], the Court of Appeal invoked the 1863 Canadian case of *Campbell v Spottiswoode*[198] where Cockburn CJ noted there was an "equal interest

188 Lee JC in *Malcolmson Nicholas Hugh Bertram v Naresh Kumar Mehta* [2001] 4 SLR 454 at para. 57, citing Millet LJ, *Fine Robert v McLardy Eileen May* [1998] EWCA 3003 (6 July 1998).
189 (1994) 3 SLR 662.
190 (1943) 67 CLR 116.
191 Sinnathuray J, *AG v Wain* [1991] 2 MLJ 525.
192 *Colin Chan v PP* [1994] 3 SLR 662 at 681G.
193 [1991] SLR 383. This pertained to remarks of the Dow Jones President published in the Asian Wall Street Journal critically commenting on the decision on a libel case, which the Attorney-General contended created the impression that the Singapore judiciary was biased and could be influenced in the case because the plaintiff was the Prime Minister.
194 So noted by Lord Hailsham LC in *Badry v DPP of Mauritius* [1983] 2 AC 297 at p 303; [1982] 3 All ER 973 at 978, discussed in *Wain* [1991] SLR 383 at 393D-F.
195 [2006] 2 SLR 650 at 659, paras 25.
196 Citing *Ahnee v Director of Public Prosecutors* [1999] 2 AC 294 at 305-306, [2006] 2 SLR 650 at 659.
197 [1992] 2 SLR 310.
198 (1863) 32 LJ QB 185 at 200.

in the maintenance of public character" to facilitate the conduct of public affairs and thus "we ought not to sanction attacks upon public men, which if allowed would be destructive of their character and honour, unless such attacks are well founded." This may be fuelled by government ideology that government leaders were honourable men of demonstrated virtue[199] such that an impugning of their character required judicial vindication. [200]

The importance of such local factors which justified the rejection of the 'public figure' doctrine in Singapore, that requires politicians to be thicker skinned when facing criticism in the interests of democratic debate, was underscored in *Re Millar Gavin James QC*[201] affirming that the "peculiar social and political situation in Singapore" influenced how to strike a balance between free expression and protection of reputation.

In Singapore, public reputation is valorised such that reputational interests trump free speech rights, reflected in the judicial view that as a function of equal treatment, politicians should enjoy the same protection to their reputations as did private individuals, despite the fact that the former often receive higher damages precisely because of their high public standing.[202]

Judicial Interpretation: Unwritten Statist Principles, but no Unwritten Rights: The courts have consistently refused to declare un-enumerated constitutional rights such as a right to silence in relation to the article 9(1) right not to be deprived of personal liberty "save in accordance with law",[203] or a right to be told of the article 9(3) right to counsel.[204] The court apparently took a strict textualist approach in stating that in relation to a right to silence, "if the legislature had intended to guarantee full protection for it", it would have been given "specific Parliamentary expression", [205] as it did for the article 9(3) enshrined right to be informed of the grounds of arrest as soon as may be. This indicates judicial resistance towards finding un-enumerated rights through developing supporting or subsidiary rights associated with a textual right,[206] to strengthen individual due process rights.

In *Mazlan*, while recognising that the word 'law' in article 9(1), following *Ong Ah Chuan v PP*, referred to principles of natural justice or fairness, Yong CJ noted that the right

199 In 1988, Goh Chok Tong said in Parliament: "Singaporeans expect the Prime Minister, and indeed any minister, any MP, to be a superior man, a man of ability and integrity who can set things right and ensure good government. He must be a junzi, a Confucian gentleman." 'What Qualities Would You Want in Political Leaders?', *Straits Times* (Singapore), 28 Nov 2007 at 33.

200 'Many People around the World Embrace Junzi Principle', *Straits Times* (Singapore), 22 Aug 1997 at 36-37.

201 [2007] SGHC 178.

202 *Tang Liang Hong v. Lee Kwan Yew* [1998] 1 SLR 97 at 139D-F.

203 *Mazlan v Public Prosecutor* [1993] 1 SLR 512 (C.A., Singapore); see Michael Hor, "The Privilege against Self Incrimination and Fairness to the Accused" [1993] SJLS 35.

204 *Rajeevan Edakalavan v PP* [1998] 1 SLR 815; *Sun Hongyu v PP* [2005] 2 SLR 750.

205 [1993] 1 SLR 512 at 516H.

206 The Attorney-General gave an opinion which suggests there is an implied fundamental right to vote in Singapore, as this was "fundamental to a representative democracy" and effectuated by the Parliamentary Elections Act: 73 SPR 16 May 2001, "Is Voting a Privilege or a Right" at col 1726.

of silence was never "subsumed under the principles of natural justice" but was "largely evidential in nature". To characterise as constitutional a right to silence would "elevate an evidential rule to constitutional status" despite its lack of constitutional expression. It required an unjustified "degree of adventurous extrapolation" in interpreting article 9(1). This transcended the "mere matter of balancing the prejudice to the administration of justice resulting from depriving the court of relevant and important evidence against the interest protected by this right."[207]

This aversion towards unwritten principles is evident also in the rejection of the Indian basic features doctrine[208] which holds that certain constitutional principles are immune from amendment in *Teo Soh Lung v Minister of Home Affairs.* [209]

Nevertheless, the Curt was ready to engage in "adventurous extrapolation" in discovering and proclaiming an unwritten constitutional "paramount mandate" in *Colin Chan v PP*:[210] that the "sovereignty, integrity and unity"[211] of Singapore was paramount, such that anything running counter to these objectives, including pacifist religious beliefs and practices that opposed compulsory national military service (thought crucial to public order), must be restrained. Declaring a statist constitutional principle as a 'trump' over individual rights indicates that rights in Singapore jurisprudence are not Dworkian trumps which bear determinative weight against community interests; rather, rights are defeasible interests subordinated to executive defined state objectives, judicially endorsed. This instrumental resort to extra-textualism sought to consolidate public order arguments.

Rights or Public Goods as Trumps? The Valorisation of Public Order: Courts appear to defer to Parliament in according determinative weight to legislative or administrative concerns. Terse judicial reasoning frequently fail to transcend bare statements that rights are not absolute, and that Parliament has enacted laws restricting fundamental liberties in accordance with constitutionally mandated grounds such as public order.

In *Chee Soon Juan v PP*, [212] the Public Entertainment and Meeting Act which regulates licences for public assemblies was judicially treated as striking the appropriate balance between rights and public goods. This reflects a formalist or positivist approach to the balancing process. The analysis did not go beyond the trite observation that "Broader societal concerns such as public peace and order must be engaged in a balancing exercise with the enjoyment of this personal liberty." Yong CJ noted that since PEMA was enacted pursuant to article 14(2)(a), which permits derogation from the article 14 free assembly guarantee , it was not "in any way contrary to our Constitution"; furthermore, it was "eminently clear" that enacting PEMA fell "fully within the power of the legislature" under

207 [1993] 1 SLR 512 at 516C-D.
208 *Kesavananda Bharathi v Union of India* AIR 1973 SC 1461 (Supreme Court, India).
209 [1989] 2 MLJ 449.
210 [1994] 3 SLR 662.
211 This echoes art 51A of the Indian Constitution which deals with citizens' duties.
212 [2003] 2 SLR 445.

art 14(2(a).[213] This disregards whether these administrative restrictions on a constitutional right are "reasonable" or "fair", considering that the scope of a fundamental liberty is at stake. Indeed, in *Colin Chan v PP*, the legislation on military service was elevated to a "fundamental tenet" such that anything, including constitutional guarantees of religious freedom which detracted from legislative policy "should not and cannot be upheld"[214] as public order would be threatened.

So too, the Court in *Chee Siok Chin v PP*[215] declined to adopt a more intensive form of judicial review based on the principle of proportionality, a continental concept which entered English jurisprudence through the influence of the European Court of Human Rights. Furthermore, Rajah J (as he was then) deferred to parliamentary intent in noting that Parliament had through relevant legislation which restricted public assemblies placed "a premium on public order, accountability and personal responsibility."[216] While acknowledging that public office-holders "in every democratic society" must be open to criticism, this had to be based on "some factual or other legitimate basis" as disseminating false or inaccurate information "can harm and threaten public order."[217] Further, Rajah J construed the "public order" clause broadly, noting that the text provided for restrictive laws "in the interest of" rather than "the maintenance of" public order.[218] This authorised Parliament to adopt a "prophylactic" or preventive approach rather than requiring it to tailor restrictive legislation to immediate or direct threats. By valorising public order, the scope of free speech was accordingly reduced.

Judicial confirmation of the importance of executive considerations is also evident in case law. In *Colin Chan v PP*, Yong CJ demonstrated sympathy for bureaucratic concerns in upholding a blanket ban under the Undesirable Publications Act (Cap 123) on anything published by the Jehovah's Witnesses (JWs) publishing arm, regardless of content.

Despite objections that this was disproportionate as the content of certain publications may be innocuous, Yong CJ brushed this aside in favour of administrative expediency by stating "Any order other than a total blanket order would have been impossible to monitor administratively."[219] There was no attempt to calibrate the restriction to the threat, as Yong CJ gave determinative weight to the proffered ministerial reasons for the ban which "emanated from considerations of national security" as the continued existence of the JWs, which had been de-registered under the Societies Act, "would be prejudicial to public welfare and good order in Singapore'."[220] This is because JWs refuse to perform military service out of religious convictions. Thus, the publications ban complemented the de-registration order. State action was justified so long as there was a *tendency* to threaten

213 [2003] 2 SLR 445 at 450.
214 *Colin Chan v PP* [1994] 3 SLR 662 at 684F-G.
215 [2006] 1 SLR 582.
216 *Id.,* 631 at para 135.
217 *Id.,* 631 at para 136.
218 [2006] 1 SLR 582, 603 at para 50.
219 [1994] 3 SLR 662 at 687C.
220 [1994] 3 SLR 662 at 686 G-H.

public order. Yong CJ rejected the need to show a "clear and immediate danger" to public order, declaring that "any administration which perceives the possibility of trouble over religious beliefs and yet prefers to wait until trouble is just about to break out before taking action must be not only pathetically naive but also grossly incompetent."[221]

This demonstrates the relative weightlessness of rights in the face of administrative expediency. So qualified, rights may become devoid of meaningful content and be an ineffective restraint on state power. Aside from manifesting insensitivity towards human rights concerns and hypersensitivity towards public order simpliciter, this approach ultimately reflects a judicial perception that its primary mandate is to guard executive goals rather than individual liberties.[222]

VIII. Legal System and Rule of Law

The Constitution does not contain any express statement of constitutional principles but it is clear that the rule of law is considered an integral part of the constitutional order, as affirmed in parliamentary debates and judicial pronouncement. However, there are competing conceptions of the rule of law, turning on one's conception of law itself. In brief, the dominant conception is a 'thin' conception, similar to the "virtues" of the rule of law Joseph Raz stated in his seminal article 'The rule of law and its virtue.'[223] To Raz, this is essentially negative, designed to prevent the arbitrary exercise of power, protecting liberty and human dignity against unclear, unstable and retrospective laws.

A 'thicker' conception of the rule of law was espoused by opposition politicians before Parliament in November 1999.[224] In their conception, the rule of law founded a plethora of claims that include alleged breaches of fundamental liberties, discriminatory application of licensing laws,[225] and general allegations of unfairness and undemocratic practices, particularly regarding government treatment of opposing political parties.[226] To them, the Rule of Law extended beyond the judicial process towards ensuring all government branches acted under the law. A widely accepted Rule of Law institutional requirement

221 [1994] 3 SLR 662 at 683C.

222 Fortunately, there are other judgments which demonstrate a consciousness that what is at stake is not a mere interest to be trumped by community concerns, but a fundamental right which is being limited: see Tan Lee Meng J, *Peter Williams Nappalli v Institute of Technical Education* [1998] SGHC 351 at para 53.

223 (1977) 93 L.Q.R. 195-211.

224 71 SPR 24 Nov 1999 (Rule of Law) at cols. 569ff; 573-634. The original motion moved by JB Jeyeretnam "urges the government to ensure the complete and full compliance of the Rule of Law by all Ministers, officials and public servants." The final motion moved by PAP MP Chin Tet Yung was reformulated thus: "commends the Government for upholding the Rule of Law and ensuring that it is fully observed by all." The House believed the urge was met.

225 Mr. Jeyaretnam listed what he considered to be violations of the Rule of Law, including preventive detention laws, denial of due process rights, denial of bail without adequate reasons, denial of freedoms of speech, assembly and the press, shutting off judicial appeals, restricting the right to ravel and the cancellation of licenses by executive officers without proper judicial inquiry. 71 SPR 24 Nov 1999 (Rule of Law) at cols. 577-78, 632.

226 Chiam See Tong, 71 SPR, 24 Nov 1999 (Rule of Law) at cols. 583-84, 629.

is the existence of an independent, accessible judiciary, in which regards there have been allegations of compromise.[227]

The contrary government view was that the Rule of Law's culture was "deeply rooted in the public service"[228] and its key tenets established in the legal system:

> The Rule of Law refers to the supremacy of law, as opposed to the arbitrary exercise of power. The other key tenet is that everyone is equal before the law. The concept also includes the notions of the transparency, openness and prospective application of our laws, observations of the principles of natural justice, independence of the Judiciary and judicial review of administrative action.[229]

In an important statement of principle, the Court of Appeal in *Chng Suan Tze v. Minister of Home Affairs* rejected the subjective test precluding review of a detention order and declared: "The notion of a subjective or unfettered discretion is contrary to the Rule of Law. All power has legal limits and the Rule of Law demands that the courts should be able to examine the exercise of discretionary power." This is somewhat diluted where there are statutory ouster clauses, with the courts upholding this limitation on their powers insofar as judicial review is excluded or limited. Conversely, a conception of the rule of law which better approximates 'rule by law' was articulated by Chua J in *Teo Soh Lung v Minister of Home Affairs* [230] where challenges were made to constitutional and legislative amendments which had the effect of truncating judicial review of preventive detention cases under the ISA and 'suspending' the application of various fundamental liberties. Chua J in affirming the subjective test of review for ISA cases offered an anaemic version of the Rule of Law as the rule which Parliament stipulates in accordance with right procedure, which is an expression of parliamentary supremacy! The height of formalism is scaled in his observation that:

> The amendments touching on arts 11, 12 and 93 are only intended to ensure that the clear intent of Parliament is not disregarded. There is nothing in the amendments which is unrelated to the requirements of national security. A reaffirmation of principles laid down by the courts cannot be said to be objectionable as usurping judicial power or being contrary to the Rule of Law. There is no abrogation of judicial power. It is erroneous to contend

227 A commission led by a pro-government judge was convened to investigate allegations of executive interference with judicial independence. An instance of this was the transfer of District Judge Michael Khoo to the Attorney-General's Chambers. This was widely seen as a demotion as Khoo had been lenient with an opposition politician in imposing a fine on JB Jeyaretnam not crossing the threshold by which one is disqualified from holding a parliamentary seat. The subordinate courts are technically part of the executive branch. The Commission found the allegations unfounded. See Li-ann Thio, *Lex Rex or Rex Lex*: Competing Conceptions of the Rule of Law in Singapore' (2002) 20 *UCLA Pacific Basin Law Journal* 1 at 22.

228 Chin Tet Yung, 71 SPR 24 Nov 1999 (Rule of Law) at col. 604. See the mission statement of the Attorney-General's Chambers to enhance the rule of law at http://www.agc.gov.sg.

229 Ho Peng Kee, 71 SPR, 24 Nov 1999 (Rule of Law) at col. 592.

230 [1989] SLR 499 (H.C.).

> that the Rule of Law has been abolished by legislation and that Parliament has stated its absolute and conclusive judgment in applications for judicial review. Parliament has done no more than to enact the Rule of Law relating to the law applicable to judicial review Legislation designed against subversion must necessarily include provisions to ensure the effectiveness of preventive detention.[231]

In an age of globalization where international trade and commerce is an economic imperative, the importance of compatible commercial legal systems and a common law of nations which promotes pacific co-existence and co-operation is apparent. Here, the government is quick to affirm its commitment to the rule of law as a facet of good governance and to cite laudatory reports about the Singapore legal framework as facilitating the solidification of Singapore's position as an international commercial and communications centre. [232] For example, the World Competitiveness Yearbook has consistently ranked Singapore first for legal framework.[233] Singapore also prides itself on having an efficient judiciary that is speedy in terms of case management control and disposition. While generally lauded for its protection of property rights, critics perceive a government bias in handling politically sensitive cases such as those involving critical speech against the government or judiciary.[234]

The Rule of Law as facilitator and guarantor of a sound business and investment environment becomes synonymous with law and order, buttressing the view that economic productivity and political stability are closely correlated.

IX. International Law and Foreign Relations

International Law and Municipal Law

The Constitution does not contain a formal provision regulating the reception of international law or the hierarchical ordering of international and domestic law. Article 7 provide that the sovereignty of Singapore is not to be construed as being derogated from if Singapore or an organization therein participates in co-operative international schemes which are beneficial to Singapore. For example, Singapore is a member of the United Nations and the Association of South-East Asian Nations (ASEAN).

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231 [1989] SLR 499 (H.C.) at 515A-C.

232 World Bank good governance study: http://info.worldbank.org/governance/kkz2002.

233 Senior Minister Lee Kuan Yew, Special Millennium Address at the Millennium Law Conference Gala Dinner, Apr. 11, 2000, Singapore Government Media Release, available at http://www.gov.sg/sprinter/search.htm. These accolades are regularly reported in the Straits Times. See, e.g., 'Singapore's Legal System Rated Best in the World: Full Confidence that Justice Will be Fast, Fair' *Straits Times* (Singapore), Sep. 26, 1993, at 3; 'Singapore Legal System is Top, Say Investors' *Straits Times* (Singapore), July 22, 1995, at 3.

234 P. Cumaraswamy, Report of the Special Rapporteur on the Independence of Judges and Lawyers, U.N. Commission on Human Rights, 52nd Sess., para 218, UN Doc. E/CN.4/1996/37.

Treaty Law: In general, Singapore follows British practice on the domestic reception of international law. With respect to treaty law, or inter-state agreements, a dualist approach applies and thus, international instruments are not self-executing; Singapore practice follows that articulated in the English case of *JH Rayner v Dept of Trade*[235] which confirms that a further act of incorporation is needed before a treaty has domestic effect.

Thus, when the Penal Code was amended in 2007 to create the offence of genocide, the Minister introducing the amendments noted this was "intended to give greater effect to the Convention on the Prevention and Punishment of the Crime of Genocide, which Singapore acceded to in 1995. As section 302 already covers murder, this new provision would cover actions beyond the killing of individuals *per se*, such as acts committed with the intention of destroying, in whole or in part, a national, ethical, racial or religious group, e.g. imposing measures intended to prevent births within the group."[236]

This is somewhat of a departure from the usual approach towards implementing human rights treaties which Singapore is party to, where the presumption is that domestic law already accords with international standards; the general preference has been to give effect to treaty norms through 'soft' guidelines rather than 'hard rules'. For example, *International Labor Convention No. 100* was to be implemented by adopting a 2002 Tripartite Declaration to uphold the principle of equal remuneration for equal work.[237] In relation to children, the government in 2002 issued the Statement on the Interests of the Child which sought to ensure their well-being through ethical principles of behaviour and the National Standards for Protection of Children[238] which guides child protection professionals in discharging their duties. No specific legislation has been enacted to give effect to the *Convention for the Elimination of All Forms of Discrimination against Women* (CEDAW)[239] and *Convention on the Rights of the Child* (CRC).[240]

There appears greater eagerness to benchmark domestic to international norms in the field of commercial law. For example, to give effect to the *International Sale of Goods Convention* (1980), Parliament enacted the Sale of Goods (United Nations Convention) Act (Cap 283) and section 4 provides that Convention provisions override inconsistent statutory provisions.

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235 [1990] 2 AC 418. See *Oppenheim's International Law*, 9th Edn., Vol 1, Peace, Sir Robert Jennings & Sir Arthur Watts ed., (Longman, 1996) at 56-64.

236 See Second Reading Speech, Senior Minister of State Ho Peng Kee, Penal Code (Amendment) Bill, 22 October 2007, available at http://www.mha.gov.sg/news_details.aspx?nid=1131 (visited 22 Nov 2007).

237 Singapore Parliament Reports, Vol. 70, 18 August 1999, (ILO Convention on Equal Remuneration and Minimum Age) cols. 2130-2135.

238 Part III, Written Replies, Singapore Government, List of Issues (CRC/C/Q/SGP/1) received by CRC Committee relating to Singapore Initial Report (CRC/C/51/Add.8).

239 GA Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46, UN Doc. A/34/46 at 193. See Thio Li-ann, 'The Impact of Internationalisation on Domestic Governance: Gender Egalitarianism and the Transformative Potential of CEDAW' (1997) 1 Sing JICL 278-350.

240 GA Res. 44/25, annex, UN GAOR, 44th Sess., Supp. No. 49, UN Doc. A/44/49 (1989) at 167, *entered into force* September 2, 1990.

Bilateral Agreements: The question of whether international instruments could limit the exercise of judicial sentencing discretion arose in *PP v Salwant Singh s/o Amer Singh*[241]. The Singapore government had entered into an agreement with the Indian government relating to the terms of an extradition order. This stated that the accused Indian national could only be sentenced for a maximum of 7 years for cheating offences under the Penal Code (Cap 224). The sentencing tariff ranges from 7 to 20 years and a sentence of 12 years was imposed.

On appeal, District Judge Kow Keng Siong affirmed the supremacy of domestic law over binding international legal agreements, considering the contention that sentencing discretion was "fettered by the views of an organ of a foreign state" offended the international principle of state sovereignty. He stated that domestic law prevails over the terms of Singapore's international agreement with a foreign state where these conflict, as article 4 declares the supremacy of the Constitution and the nullity of inconsistent legislation. While not precluding the possibility that Singapore might incur international responsibility for not honouring the terms of an international agreement, the current orthodoxy is that Constitutional Law is supreme and takes precedence over unincorporated international agreements. As such, sentencing powers, as an aspect of article 93 conferred judicial power, prevails over the terms of extradition agreements. This is a significant judicial statement affirming the prevailing dualistic approach towards the inter-relationship of international treaties and domestic Singapore law.

Customary International Law: The inter-relationship between domestic law and international customary law differs. Following English practice, Singapore courts recognize that international law is part of Singapore law; while recognized customary international law norms are directly applicable without any further specific act of incorporation, this is subject to the proviso that an inconsistent domestic statute prevails over a customary norm. The Court of Appeal in acknowledging this in *Nguyen Tuong Van v PP*[242], affirmed the English authorities of *Chung Chi Cheung v The King*[243] and *Collco Dealings Ltd v Inland Revenue Commissioners.*[244]

Judicial approaches towards arguments raised in fundamental liberties cases where reference is made to international instruments like the Universal Declaration on Human Rights,

241 [2003] SGDC 146.

242 [2005] 1 SLR 103 at 128, para. 94. See comments by Li-ann Thio, "The Death Penalty as Cruel and Inhuman Punishment before the Singapore High Court? Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in *P.P. v. Nguyen Tuong Van*" (2004) 4(2) Oxford Univ. Commonwealth law Journal 213-226.

243 [1939] AC 160.

244 [1962] AC 1.

which may have the status of customary law,[245] have differed, from the dismissive[246] to more nuanced engagement.

Clearly, Singapore courts accept the direct application of customary international legal norms within the domestic legal order where a norm is accepted as reflecting the "prevailing norms of the conduct between states; in *Nguyen Tuong Van v PP,* article 36(1) of the Vienna Convention on Consular Relations 1963 ("VCCR"), which relates to notifying a sending state that one of its nationals has been arrested, was so recognized, even though Singapore was not party to the VCCR. [247] However, it must also be noted that while the status of a norm such as that embodied in article 5 of the Universal Declaration on Human Rights ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.") may be recognized as customary law and binding, the content of such norm could still be disputed. In *Nguyen*, this was referred to as a source for interpreting the meaning of "law" in article 9 of the Constitution, but the court held that this did not preclude 'death by hanging.' Neither was there sufficient evident to show a customary norm that prohibited the death sentence in general, with the court noting that "The number of States retaining the death penalty was almost equal to the number of States that had abolished it" according to a 2002 UN Commission on Human Rights report.[248] Thus, the courts must be satisfied that any invoked customary international law rule is "clearly and firmly established"[249] before adopting it.

Justiciability and the Separation of Powers

The parliamentary executive or cabinet government is responsible for the conduct of foreign relations; this is a matter of accepted practice rather than specific constitutional allocation of functions, and would be treated as a 'given' amongst lawyers trained in the Westminster constitution mindset. This is a facet of prerogative powers which are nowhere defined exhaustively in the Constitution.

The general principle is that not all prerogative powers are immune from judicial review as the test of review does not turn on the source of a public power but its nature, as affirmed in *Lee Hsien Loong v Review Publishing Co. Ltd*[250]. Again borrowing from English authorities, certain principles were laid down in deciding whether an exercise of executive power was

245 Hurst Hannum, 'The Status Of The Universal Declaration Of Human Rights In National And International Law,' (1995) *Georgia Journal of International and Comparative Law* 287; Kevin YL Tan, 'Fifty Years of the Universal Declaration of Human Rights: A Singapore Reflection' (1998) 20 Singapore Law Review 239-280 at 271.

246 In *Chan Hiang Leng Colin v PP* [1994] 3 SLR 662, references to a breach of the article 18 Universal Declaration on Human Rights religious freedom clause was summarily ignored.

247 [2005] 1 SLR 103 at 112, para. 24.

248 Question of the Death Penalty: Report of the Secretary-General submitted pursuant to Commission resolution 2002/77 UN ESCOR, 59th Sess, UN Doc E/CN.4/2003/106 (2003). [2005] 1 SLR 103 at 127-128.

249 [2005] 1 SLR 103 at 127.

250 [2007] 2 SLR 453.

justiciable. The conduct of foreign relations fell beyond judicial purview for various reasons. For example, in *Civil Aeronautics Administration v Singapore Airlines Ltd*[251], the issue related to whether Taiwan was a state so as to be able to claim state immunity under Singapore laws. This was considered to be an issue of fact and policy the courts were ill-equipped to handle, as courts should not "get involved in international relations" nor reach a conclusion inconsistent from that of the Executive.[252] Sundaresh Menon JC in *Lee Hsien Loong* underscored the importance of a contextual, non-categorical approach in deciding issues of justiciability, while noting there were matters involving "high policy" or "political questions" over which "there can be no expectation that an unelected judiciary will play any role," such as boundary disputes or the recognition of foreign governments. It was important too that judicial pronouncements should not embarrass another branch of government and the court should exercise self-restraint accordingly.[253]

X. Concluding Remarks

As the Privy Council noted in *Hinds v the Queen*, "…the constitutions on the Westminster model were evolutionary and not revolutionary".[254] In the context of Singapore, there has been revolutionary experimentation in relation to various institutions, such as the EP, NCMP, NMP and GRC which reflects the indigenisation of the constitution to reflect localised aspects of the political and legal culture.

However, there has also been a tendency to an 'evolutionary' approach as where past practice or convention is referenced. For example, in relation to why the EP should not be granted the discretion to refer a dispute to the article 100 constitutional tribunal, the government was content to note that article 100 was modeled after the Malaysian Constitution as the Singapore one lack a provision "for referring questions of interpretation of the Constitution to the Courts for an advisory ruling" noting that the Government would need to refer such questions to the courts "from time to time."[255] Since the Malaysian provision, under which the head of state acts on the Cabinet's advice "has worked for them", it was "safe for us to follow them."[256] This in itself cannot be conclusive, given that the EP substantially changed the role of the head of state in according some discretionary powers to check stipulated fields of government activity. However, a further reason was that it was in "the design" of the EP legislation that "the initiative lies with the Government". This is also not an inevitable conclusion, as the government in creating the EP was entering into brave new constitutional terrain. Needless to say, the Singapore experiment in constitutional design and innovation has not yet concluded.

251 [2004] 1 SLR 570.
252 [2004] 1 SLR 570 at paras. 22, 27.
253 [2007] 2 SLR 453 at 490-491.
254 [1977] AC 195 at 235.
255 63 SPR 25 August 1994, Constitution of the Republic of Singapore Amendment No. 2 Bill col. 417 at 428.
256 *Id.*, at col 454.

Constitutional supremacy is the formal, ordering principle in Singapore, although the spirit of parliamentary supremacy still marches on, muting the judicial guardianship role with respect to constitutional rights. The predominant judicial philosophy is based on utilitarian or communitarian concerns, which creates a situation of *de facto* executive supremacy and dependence on the forbearance of the latter not to abuse its powers, perhaps reflecting a Neo-Confucianist trust in governors as honourable men.

Judicial reasoning is often justified by references to local particularities. This is in itself not objectionable although the danger is that statist concerns may clothe themselves with the garb of authentic community concerns, rendering rights nugatory. A rights culture cannot evolve where the predominant judicial culture is oriented towards confirming, rather than constraining government power.

The hope is that foreign cases will be given a more nuanced consideration, compared to the formerly brusque, unsophisticated dismissal of transnational authorities. These can serve as models or anti-models in the development of an autochthonous law which strikes an apt balance between rights and community goods. For example, the principle of democratic debate as a communitarian concern ought to be factored in more strongly in political libel claims.

As Phang JA put it, the export of English law to many colonies today had to be "cultivated with an acute awareness of the soil in which it has been transplanted." This warranted close scrutiny for "appropriateness" on the basis of "general persuasiveness insofar as logic and reasoning are concerned." This would serve the "ideal" of an "indigenous legal system sensitive to the needs and mores of the society of which it is a part." English law should not be "accepted blindly" and should not be followed "where either local conditions and/or reason and logic dictate otherwise."[257] The time has come for a more mature exposition of what these local conditions are.

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257 *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR 604, paras. 27-28.

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Thailand

THAILAND
Another New Constitution as a Way Out of the Vicious Cycle?

Chaowana Traimas & Jochen Hoerth

I. Introduction

With the affirming result of the referendum on 19 August 2007, the 18th Constitution since the proclamation of the first constitutional monarchy in 1932 has come into force. It replaced the 2006 Interim Constitution which was established in the aftermath of a bloodless military coup d'état on 19 September 2006, led by General Sonthi Boonyaratglin. The Interim Constitution specified a process for drafting the above-mentioned permanent constitution. This drafting process met harsh public criticism due to the strong influence the junta had on it. Nevertheless, the military rulers promised to return democracy and the rule of law to Thailand as soon as possible and to overcome the flaws of the 1997 Constitution in order to prevent another one party system headed by an unconducively strong political leader, as embodied by former Prime Minister Thaksin Shinawatra and his Thai-Rak-Thai party. In this chapter we will consider whether the junta has kept its word and how a return to democracy is reflected in the new constitution.

Because the new Constitution has just entered into force this contribution cannot focus only on the description and analysis of its contents and legal characteristics. Nor can it describe the aspects that make the Constitution a 'living document' since it was adopted only a few months ago. Instead the new Constitution has to be seen in the light of this tumultuous constitutional history of Thailand and parallels and comparisons have to be drawn from that. We start with a look at the early stages of Thailand's constitutional development.

II. Constitutional History

History until 1992

Known as Siam until 1939, Thailand is the only Southeast Asian nation that has never been occupied or colonized by a western country. After centuries of absolute monarchy[1]

1 Divided into the following eras: The first was the Sukhothai Era (1218-1438), which merged into the Ayutthaya Era (1350-1767), and was succeeded by the Thonburi Era (1767-1782). Each era is named after the city chosen as

based on a feudal system the idea of turning Thailand into a constitutional state developed during the reigns of King Rama V - VII (1868 - 1935), when strategic groups in the state apparatus, especially young and western trained officials, adopted the idea of constitutionalism and made it a public issue. Not surprisingly this was opposed by the royal elite at the time. In 1932, it was these reformists, dubbed 'Khana Rhassadorn' (The People's Group) composed mostly of lawyers and military graduates, who sparked off a revolution called 'Aphiwat Phrajatippatai' (The Mega Democratization) to convert the absolute monarchy to a constitutional monarchy with the King being head of the state. On 24 May 1932, they took over the government and later declared the first Constitution of the Kingdom of Siam known as the 'Interim Charter for the Administration of Siam Act 1932'. Simultaneously, they forced the king to agree to relinquish his absolute powers and become a constitutional monarch. Imposed by coercion and not by the consensus of the people, this Constitution was adopted to facilitate the transition from a monarchical regime to a new form of government. However, this new concept of government was essentially conceptualized and dominated by a new (military) elite and was noteworthy for the non-participation of the Thai people. The Constitution was exploited as a tool for securing political power rather than constructing and establishing a new democratic regime for the nation.

This began a vicious cycle that has repeated itself right up to the latest coup in late 2006. In the last 75 years there have been no less than eighteen constitutions of which eight were terminated by a military putsch[2]. Only in rare cases could the new constitution be considered a development of the preceding one, and only a handful of constitutional amendments have been moved or adopted. Hence, the coming and going of the constitutions may be described as a vicious cycle, which each time started with the drafting of a new constitution and general elections leading to a new government. The cycle continued with conflicts and disaffection due to maladministration, corruption and fraud, increasing public pressure and political conflict between the factions in the government coalition and ended up with the termination of both the tenure of the government and the constitution itself by a military coup d'état.

If one had to frame three main objectives of the constitutionalization of the Kingdom of Thailand, none of which have yet been achieved, they would be the following:

> ***Political Stabilization:*** It was hoped that making Thailand subject to a constitution would stabilize the political situation and bring continuity into the country's politics. In fact, the contrary has been the case. Neither has there been one single constitution that was gradually amended to adapt to the changes in circumstances, over the course of time[3], nor have the politics ever been stable,

the capital. Since 1782, Bangkok has been the seat of government. This ongoing era is called Rattanakosin Era, with Rattanakosin being the founding district of Bangkok.

2 Refer Appendix I.

3 A rare exemption is the 1952 Constitution which is an adoption of the 1932 version, but it cannot really be classified as a further development or a gradual amendment.

which is largely due to the tendency of Thai politicians to be 'power-crazed' and amenable to influence from the private sector. Strikingly, there have been 57 governments since 1932.

Political Reform: Constitutionalizing Thailand was also seen as a way of creating a democratic government. But in fact, three different types of regimes have occurred over the years, ranging from authoritarian regimes controlled by the military, through half-authoritarian, half-democratic rules co-governed by the military and political parties, to democratic governments which were coalitions of diverse political parties.

Legal Institutionalization: Lastly, it was hoped that a constitution would help to create and apply a harmonious and coherent system of fundamental rules that are indispensable for the settled, orderly and fair-minded co-existence of human beings within a state. Thailand has clearly not achieved this objective. Eighteen constitutions (seven interim charters and eleven permanent constitutions) have come and gone since 1932. Only five out of these eleven constitutions survived more than three years and only three could be said to have had as their aim, the establishment of a coherent system of fundamental rules rather than merely serving as a means by which the drafters secured and retained power. Another remarkable feature of the eleven constitutions is the divergent number of articles in the various constitutions. They range from 29 articles in the 1976/1977 to 336 in the 1997 constitution[4].

The cycle of coups, new constitutions, new civilian regimes, seemed to be interrupted in 1973. In October of that year, tens of thousands of students from Thailand's three major universities converged on the Democracy Monument to protest the tremendous corruption of the Thanom regime of the time. The military intervened and in the uprising left many students dead. In the wake of these events a new government was formed – an event that was later seen as a turning point in Thai politics since it was the first time in modern Thai history that the masses had rallied to rise up against the ruling elite and to demand a change in leadership[5].

However, the people's hopes for change were shattered. The committee established to draft a permanent constitution was dominated by a majority of members from the rural majority but it finally created a Legislative Assembly, 81 percent of whose members were residents of Bangkok. This betrayed the traditional client-patron loyalty and deference to authority which was still strong among the rural classes and far exceeded their longing for democracy[6]. Furthermore, the students, the labor movement, and the middle-class realized that the new regime did not turn out to be as liberal as it claimed to be. A military dictatorship was replaced but the control of the country by the wealthy elite, mainly residing in Bangkok, was perpetuated. Tensions rose between rightist and leftist groups and

4 Refer Appendix I for all the given figures and enumerations.
5 *Uwanno/Burns*, "The Thai Constitution of 1997: Sources and Process", 1998, U.B.C Law Review, 227-247.
6 *Wright*, "The Balancing Act: A History of Modern Thailand, 1991, 221.

violence between them happened with increasing frequency. The climax of this violence went down in history as the Six October Massacre[7], when the Thai police and a mob of rightist activists attacked demonstrators gathered at Thammasat University campus and shot and clubbed to death hundreds of students. This was followed by the mass detention of 1700 protesters[8]. Once again the military had asserted its authority forcefully and taken control of the country's destiny.

After the violent and revolutionary seventies an era of relative moderation set in. This lasted from 1978 until 1991. Although the authority of the state officially lay in the hands of the military the 13th Constitution of the Kingdom of Thailand is considered a 'good' one, due to the implementation of such democratic values as giving the legislature the right to submit a motion for a general debate on a vote of no-confidence in the executive. This created a balance of power between the executive and the legislature. However, this era was not destined to last for ever either. General Prem Tinsulanonda, holding the office of Prime Minister from 1980 until 1988, had to withstand several coup attempts despite his good connections to the military. In 1991, in the wake of a heated feud between PM Chatichai Choonhavan and the military leaders over the dismissal of the then Defense Minister from the cabinet, the military chiefs launched a successful coup d'état and abolished the 1978 Constitution.

Renewed rallies and uprisings in the heart of the city led to "Black May" and intervention by the King finally led to demands for profound political and social reform and to once and for all rid the nation of the destructive cycle of coup after coup that had characterized Thailand's politics for decades[9]. For the first time in Thai history the people actively participated in the political decision-making process.

The reform movement started in 1992, yielded fruit and brought forth the 1997 Constitution, which was and still is, widely respected as one of the most democratic constitutions in the region at that time and made Thailand a forerunner in legal, social and constitutional matters.

The Spirit of Political Reform and Rule of Law (1992 – 1997)

The Reform Movement: Four amendments introduced in the aftermath of the events of May, 1992, heralded a significant period of reformism and set the stage for profound constitutional changes towards democracy and the rule of law. Among other things, the amendments required that future Prime Ministers be members of the House of Representatives and reduced the power of the Senate, which was both unelected and dominated by the military at the time. They also replaced the Speaker of the Senate with the Speaker of the House as chairperson when holding joint sessions of

7 It happened on 6 October 1976.

8 *Uwanno/Burns*, "The Thai Constitution of 1997: Sources and Process", 1998, U.B.C Law Review, 227-247.

9 *Uwanno/Burns*, "The Thai Constitution of 1997: Sources and Process", 1998, U.B.C Law Review, 227-247.

Parliament at the National Assembly. In 1993, the House of Representatives formed the Ad hoc Committee for Constitutional Reform which was charged with reviewing the 1991 Constitution to decide the main issues to be addressed in any proposals for reform by the House of Representatives. In considering how to break out of the constantly recurring cycle of coups and to pave the way for genuine constitutionalism, the committee members determined that the core issues were lack of transparency in government and the associated problem of corruption, the inefficiency of political institutions and the instability of civilian governments[10].

> ***Lack of Transparency / Corruption:*** According to the report of the committee, the first major problem was the lack of transparency in government and the corruption that this fostered. This is seen in the form of vote-buying and electoral fraud. At that time, and still today, it was usual for politicians to send assistants with bags of money to rural areas, where the majority of voters live. The candidate promises that if he or she is elected they will repay the constituent's loyalty with protection[11]. This is the traditional patron-client relationship in Thai politics. The analysts suggested that these practices continued because there were no measures tackling the problem of corruption - measures such as an independent election commission, investigative anti-corruption institutions or laws providing punishments that would deter people from corruption.
>
> ***Inefficiency of Political Processes:*** Another point was the inefficiency of political institutions, above all the Parliament. Under Prime Minister Chavalit there were too many splinter parties involved in the ruling coalitions, and each party wanted a piece of the action. The Senate was appointed by the bureaucracy and formed an obstacle rather than support for the legislative process. Finally the Prime Minister was not a Member of Parliament, but was appointed by the military. Hence, a fruitful interplay of the divergent forces was nearly impossible.

With the support of the media and powerful interest groups centered in Bangkok, the reformist movement gained momentum. Public support for reform increased and attempts by the opposition to derail the movement misfired. The process could not be held back and in 1995, the ruling coalition of Prime Minister Chuan Leekpai began to unravel. The subsequent elections placed Prime Minister Banharn Silpa-archa at the helm of the government. Finally, after months of debate about how to transform the movement and its reformist ideas into law, Parliament passed a Constitution Amendment Bill in May, 1996, which provided for the formation of a Constitutional Drafting Assembly (CDA)[12]. The CDA consisted of ninety-nine members: seventy-six of them directly elected from each of the provinces and twenty-three academics and other qualified persons short-listed by Parliament. The Commission was to conduct public hearings, to prepare a draft constitution. The draft was to be presented to Parliament and if it failed to approve the

10 *Uwanno/Burns*, "The Thai Constitution of 1997: Sources and Process", 1998, U.B.C Law Review, 227-247.
11 *Uwanno/Burns*, "The Thai Constitution of 1997: Sources and Process", 1998, U.B.C Law Review, 227-247.
12 *Uwanno/Burns*, "The Thai Constitution of 1997: Sources and Process", 1998, U.B.C Law Review, 227-247.

Constitution, a public referendum should be held[13]. The people had finally gained a real place in the process.

The "People's Constitution" 1997: The 1997 Constitution was the first constitution to be drafted by a popularly-elected Constitutional Drafting Assembly and is widely hailed as a landmark in Thai constitutional history, due to its progressive character in terms of the granting and protection of civil rights and its introduction of modern democratic values. Hence, it was popularly known as the People's Constitution. The drafting committee submitted the draft in May 1997, and on 11 October of the same year the new Constitution came into effect. The core objective of the constitution drafters was to create legal mechanisms that would help institutionalize a stable and relatively clean form of representative politics. The results can be described as ground-breaking and innovative for the whole region. It won praise due to its many provisions guaranteeing direct citizen participation, setting up and protecting new civil liberties which were for the first time linked to the concept of human dignity, and for its commitment to making elected politicians and public officials accountable and creating greater transparency in the political arena. The key elements of the 1997 Constitution are:

> ***Constitution as Supreme Law:*** Section 6 of the 1997 Constitution stated that the Constitution was the supreme law of the State. The provision of any law, rule or regulation that was contrary or inconsistent with the Constitution was ordered to be unenforceable. This was the first time in Thai history that the constitution drafters had declared the supremacy of the Constitution so clearly and unambiguously, ranking all law, be it formally enacted or substantive, below the status of the Constitution itself. This has to be understood in conjunction with Sections 3, 26 and 27 which require the legislative, executive and judicial branches to comply with the provisions of this Constitution. That this core statement was listed ahead of the provisions dealing with the King makes it even more impressive and underlines its paramount significance.
>
> ***System of Checks and Balances / Separation of Powers:*** The only way to fight the dominance of the bureaucracy at the time was to have a clear separation of powers and to establish a functioning system of checks and balances. Firstly, the legislature was reformed. Unlike the previous practice of appointing the Senators, Section 121 stipulated that the two-hundred seats for the Senate be elected. Section 126 required the Senators to be non-partisan, barring them from any affiliation with the governing or opposition parties. According to Sections 169 and 174, the Senate could only amend or approve a bill passed on to it by the House of Representatives. It was not allowed to propose a bill. In order to provide continuity and security of tenure, the term of the Senate was six years and the Prime Minister was not able to dissolve it. To foster the separation of the executive and the legislature, MPs were forced to resign from the House to become Cabinet Ministers (Sections 109, 118). Measures aimed at enhancing the stability of governments included increasing the

13 *Jumbala*, "Thailand: Constitutional Reform Amidst Economic Crisis", 1998, Southeast Asian Affairs, 269.

requirements for the initiation of a vote of no confidence against the Prime Minister or a Minister. Pursuant to Sections 185, 186, the motion had to be submitted by at least two-fifths of the total number of the members of the House together with the nomination of an alternative Prime Minister to replace the incumbent.

Secondly, the judiciary was strengthened and its independence fostered. This goal was laid down in Section 249, which says that judges are independent in the trial and adjudication of cases and their judgements are free of hierarchical supervision. Furthermore, two new courts were installed: the Constitutional Court[14], which we will elaborate on later, and the Administrative Court,[15] the jurisdiction of which was taken from that of the Court of Justice. Whenever an ordinary citizen had a dispute with a state official, he could bring the case before the Administrative Court which had two levels: the Administrative Courts of First Instance and the Supreme Administrative Court. With the establishment of an independent Constitutional Court, the Ordinary Courts, Military Courts and especially the Administrative Courts were, when deciding a case, motivated to examine whether existing provisions were constitutional and if the authorities had observed the rights and liberties guaranteed by the Constitution.

Other ways of making government officials and other members of the executive accountable, were established by Section 304 of the Constitution which provided for a complaint signed by at least fifty thousand people to be lodged with the President of the Senate requesting the Senate to remove officials such as the Prime Minister, a Minister or a member of the National Assembly from office. In addition, a person whose rights and liberties were violated by an executive authority could bring a lawsuit before the Constitutional Court (Section 28).

Another great achievement was the institution of various supervisory authorities and anti-corruption measures. I have already mentioned the Administrative Court and the Constitutional Court. Chapter XI of the Constitution established the State Audit Commission and the office of the Auditor-General. Section 312 explicitly mentioned that the Auditor General was required to be impartial and independent of the government, which was underlined by the fact that he was appointed by the King on the advice of the Senate. In addition, a National Human Rights Commission was established and anchored in the Constitution to protect and promote human rights. Section 200 provides that it was to be composed of eleven members and had an obligation to examine and report on violations of human rights and to make its findings public, to propose remedial measures to the agencies involved and to propose policies and recommendations to the National Assembly. In order to address the issue of corruption in previous governments, codes of conduct for politicians were introduced and a National Counter Corruption Commission (NCCC) was set up and given the power to investigate and charge any official suspected of being

14 See Sections 255 to 270.
15 See Sections 276 to 280.

unusually wealthy. The chapter dealing with this topic was entitled 'Inspection of the Exercise of State Power'. Under Part One, several persons holding high positions, e.g. the Premier, a Cabinet Minister or a Member of Parliament, were obliged to submit accounts showing particulars of assets and liabilities of themselves, their spouses and children, to the NCCC. Parliamentarians were prohibited from receiving state concessions or monopolies and Ministers had to transfer shareholdings into blind trusts[16]. The nine member anti-corruption committee was appointed for a nine year term and could not be removed from office except by a motion of impeachment initiated by one-quarter of the House of Representatives and decided by the Senate by a three-quarter majority[17]. If members of the National Assembly believed another member to have committed an offence of corruption or malfeasance, the matter may be brought before the Criminal Division of the Supreme Court of Justice if at least one-quarter of all members of both houses agree.

Lastly, the constitution drafters created the Office of the Ombudsman which had jurisdiction over all kinds of maladministration and the power to report to Parliament on any official's administrative failures (Sections 196 to 198).

Fundamental Rights: Another milestone in Thai constitutional history was that for the first time human rights and civil liberties were recognized in the Constitution and an apparatus for the protection of these rights and liberties was established by the Constitution. The Preamble as well as the General Provisions referred to the protection of the rights and liberties of the people, but what was even more striking was the fact that those rights and liberties were directly linked to the idea of human dignity. Several early provisions[18], are aspirational and set out principles. An example is Section 4 which gives priority to the protection of "human dignity, rights and liberties of the people". The particular civil rights are listed from Section 30 onwards. In all, the 1997 Constitution guaranteed no less than forty human rights[19]. Explicitly recognized for the first time were the rights to public health and free education as well as the rights of children, the elderly and the handicapped, the right to freedom of information, and above all, the right to peacefully protest coups and other extra-constitutional means of acquiring power. For the first time the Constitution took an unequivocal stand against previous military customs and practices. In addition, traditional human rights were acknowledged, including freedom of speech, assembly and association, property rights, freedom of religion, the right to due process of law, the right to be presumed innocent until proven guilty, and the equality of men and women.

16 See Section 110.

17 See Sections 297, 298, 299.

18 Refer Section 28: "A person can invoke human dignity or exercise his or her rights and liberties in so far as it is not in violation of rights and liberties of other persons or contrary to this Constitution or good morals."

19 Refer Chapter III (Sections 26 to 65), as well as Sections 80 to 86 where fundamental aims of state policy are laid down.

Electoral Reform: The remaining big challenge was to reform Thailand's electoral system in order to curb vote buying and electoral fraud, to strengthen the party system and to allocate parliamentary seats more fairly. The first measure adopted was the introduction of compulsory voting, aimed at making vote buying so expensive as to not be efficient any more. This came along with a new method of counting the votes for House elections at a central site rather than at each polling station, which made it more difficult for village canvassers to evaluate the effectiveness of vote buying. Secondly, an independent Election Commission with wide-ranging investigative powers was brought into being with a mandate to monitor the elections in the provinces, to detect misuse and inaccuracies, and to eradicate electoral fraud once and for all[20]. MPs were required to at least hold a bachelor's degree. In order to prevent last minute switching, Section 107 of the Constitution forced candidates to be registered members of one political party at least ninety days prior to Election Day. Lastly, a mixed electoral system, following the proportional representation party system of Germany, was adopted. One hundred members of the House were elected from party lists using the d'Hondt formula, and the other four hundred were chosen from single member constituencies[21]. This system was intended to bring MPs closer to their constituents, to assign seats more fairly, and to raise the quality of the candidates[22].

The 1997 Constitution was unquestionably carefully thought out and considered as a means of saving the shaken Thai nation. It was widely praised but there were also critics. Maybe this new democratic Constitution was simply too radical for a conservative country and maybe it offered too many opportunities for the Constitution to be misused in different ways. Unfortunately, modern history has proved exactly this.

APPENDIX: Constitutions of Thailand (1932 – 2007)[23]

1. Interim Charter for the Administration of Siam Act B.E. 2475 (1932)

- Effective : 27 June B.E. 2475 (1932) to 10 December B.E. 2475 (1932)
- Character : An interim charter to facilitate the transition from an absolute monarchy. Provided for a strong unicameral National Assembly that possessed a wide range of power.
- Articles : 39
- Political parties : Not allowed
- State power : Military / Bureaucracy
- Cause of termination : Promulgation of the new Constitution B.E. 2475 (1932)

20 See Sections 136 to 148.

21 *Jumbala*, "Thailand: Constitutional Reform Amidst Economic Crisis", 1998, Southeast Asian Affairs, 275.

22 *Uwanno/Burns*, "The Thai Constitution of 1997: Sources and Process", 1998, U.B.C Law Review, 227-247.

23 Updated version of: *Parichart Siwaraksa/Chaowana Traimas/Ratha Vayagool* , "Thai Constitutions in Brief", Bangkok, P. Press, 1997.

2. Constitution of the Kingdom of Siam B.E. 2475 (1932)

- Effective : 10 December B.E. 2475 (1932) to 9 May B.E. 2489 (1946)
- Character : Drafted by the Constitutional Drafting Committee of the People's Group. It represented a gradual transfer of power from the People's Group to the institutional structure.
- Articles : 68
- Political parties : Not allowed
- State power : Military / Bureaucracy
- Cause of termination : Promulgation of the new Constitution B.E. 2489 (1946)

3. Constitution of the Kingdom of Thailand B.E. 2489 (1946)

- Effective : 9 May B.E. 2489 (1946) to 8 November B.E. 2490 (1947)
- Character : Represented an attempt to modernize the constitutional framework of the country. It replaced its predecessor without a coup - a rarity in the Thai context. Considered one of the most democratic constitutions.
- Articles : 96
- Political Parties : 11 unregistered parties
- State power : Political parties
- Cause of termination : Military coup d'etat

4. Interim Constitution of the Kingdom of Thailand B.E. 2490 (1947)

- Effective : 9 November B.E. 2490 (1947) to 23 March B.E. 2492 (1949)
- Character : Secretly drafted by the coup makers who promulgated it immediately. The Interim Constitution represented a limitation on political rights and democratic principles. A Constitution Drafting Assembly was entrusted to draft a new Constitution.
- Articles : 98
- Political parties : 11 unregistered parties
- State power : Political parties
- Cause of termination : Promulgation of the new Constitution B.E. 2492 (1949)

5. Constitution of the Kingdom of Thailand B.E. 2492 (1949)

- Effective : 23 March B.E. 2492 (1949) to 29 November B.E. 2494 (1951)
- Character : The first ever drafted by a Constitution Drafting Assembly.
- Articles : 188

- Political parties : 11 unregistered parties
- State power : Political parties
- Cause of termination : Military coup d'etat

6. Constitution of the Kingdom of Thailand B.E. 2475 (1932) as amended in B.E. 2495 (1952)

- Effective : 8 March B.E. 2495 (1952) to 20 October B.E. 2501 (1958)
- Character : The Constitution of the Kingdom of Thailand B.E. 2475 (1932) was reinforced with some amendments by the coup makers.
- Articles : 123
- Political parties : 30 parties registered under the Political Party Act B.E. 2498 (1955)
- State power : Military / Bureaucracy
- Cause of termination : Military coup d'etat

7. Interim Charter for the Administration of the Kingdom B.E. 2502 (1959)

- Effective : 28 January B.E. 2502 (1959) to 20 June B.E. 2511 (1968)
- Character : Provided for a Constitution Drafting Assembly with a mandate to draft a new Constitution. It was one of the most repressive charters with an infamous Article 17 that gave special power to the Prime Minister.
- Articles : 20
- State power : Military / Bureaucracy
- Cause of termination : Promulgation of the new Constitution B.E. 2511 (1968)

8. Constitution of the Kingdom of Thailand B.E. 2511 (1968)

- Effective : 20 June B.E. 2511 (1968) to 17 November B.E. 2514 (1971)
- Character : Drafted over a period of 9 years. The Executive was dominated by the military junta. The power of the MPs was also checked by the strong Senate appointed by the military junta.
- Articles : 183
- Political parties : 17 registered parties
- State power : Military / Bureaucracy
- Cause of termination : Military coup d'etat

9. Interim Charter for the Administration of the Kingdom B.E. 2515 (1972)

- Effective : 15 December B.E. 2515 (1972) to 7 October B.E. 2517 (1974)
- Character : Similar to the Constitution of B.E. 2502 (1959). Repressive and authoritarian.
- Articles : 23
- Political parties : Not allowed
- State power : Military / Bucreaucracy
- Cause of termination : The promulgation of the new Constitution B.E. 2517 (1974)

10. Constitution of the Kingdom of Thailand B.E. 2517 (1974)

- Effective : 7 October B.E. 2517 (1974) to 6 October 2519 (1976)
- Character : Drafted by the Constitution Drafting Committee. Considered one of the most democratic constitutions.
- Article : 238
- Political parties : 57 registered parties under the Political Party Act of 6 October B.E. 2517 (1974)
- State power : Political parties
- Cause of termination : Military coup d'etat

11. Constitution of the Kingdom of Thailand B.E. 2519 (1976)

- Effective : 22 October B.E. 2519 (1976) to 20 October B.E. 2520 (1977)
- Character : Drafted by the coup makers to enforce an authoritarian regime after the October 6, 1976 violence. It included Article 21 that gave extensive state power to the Prime Minister.
- Articles : 29
- Political parties : Not allowed
- State power : Military / Bureaucracy
- Cause of termination : Military coup d'etat

12. Interim Charter for the Administration of the Kingdom B.E. 2520 (1977)

- Effective : 9 November B.E. 2520 (1977) to 22 December B.E. 2521 (1978)
- Character : The Charter was promulgated as an interim charter while a new Constitution was being drafted. It provided for the National Policy Council to oversee the administration.
- Articles : 32

- Political parties : Not allowed
- State power : Military / Bureaucracy
- Cause of Termination : The promulgation of the new Constitution B.E. 2521 (1978)

13. Constitution of the Kingdom of Thailand B.E. 2521 (1978)

- Effective : 22 December B.E. 2521 (1978) to 23 February B.E. 2534 (1991)
- Character : Provided for a balance of power between the Executive and the Legislature. Elected politicians shared power with the military and high level officials were appointed to the Senate.
- Articles : 206
- Political parties : 26 registered parties under the Political Party Act of 1 July B.E. 2524 (1981)
- State power : Military / Bureaucracy
- Cause of termination : Military coup d'etat

14. Interim Charter for the Administration of the Kingdom B.E. 2534 (1991)

- Effective : 1 March B.E. 2534 (1991) to 9 December B.E. 2534 (1991)
- Character : Promulgated as an interim charter while a new Constitution was being drafted. It also established the National Peace Keeping Council, dominated by the coup makers.
- Articles : 33
- Political parties : 19 registered parties
- State power : Military / Bureaucracy
- Cause of termination : The promulgation of the new Constitution B.E. 2534 (1991)

15. Constitution of the Kingdom of Thailand B.E. 2534 (1991)

- Effective : 9 December B.E. 2534 (1991) to 10 October B.E. 2540 (1997)
- Character : Drafted by the 20 member Constitution Drafting Committee and endorsed by the National Legislative Assembly, both appointed by the coup makers - the military junta.
- Articles : 233
- Political parties : 20 registered parties
- State power : Political parties
- Cause of termination : The Promulgation of the new Constitution B.E. 2540 (1997)

16. Constitution of the Kingdom of Thailand B.E. 2540 (1997)

- Effective : 11 October B.E. 2540 (1997) to 19 September B.E. 2549 (2006)
- Character : Drafted by the 99 member Constitution Drafting Committee and endorsed by the National Legislative Assembly, both selected by the people. Provided for strong leadership by the Prime Minister, popular participation and a strong political system.
- Articles : 336
- Political Parties : 13
- State Power : Political Parties
- Cause of termination : Military coup d'etat

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

- Effective : 1 October B.E. 2549 (2006) to 23 August B.E. 2550 (2007)
- Character : Drafted by the Council for Democratic Reform. Provided for establishing an interim administrative mechanism suitable to review the political order and prepare a new draft Constitution.
- Articles : 39
- Political Parties : Not allowed
- State Power : Military / Bureaucracy
- Cause of Termination : The Promulgation of the new Constitution B.E. 2550 (2007)

III. The Making of the 2007 Constitution

When General Sonthi Boonyaratglin and his men overthrew the 1997 Constitution, they dissolved Parliament, abrogated the Constitution and replaced the Constitutional Court with an appointed tribunal. Furthermore, a number of restrictions on the media and freedom of association and assembly were imposed. Everything that had been achieved and that the people had been fighting for over decades went at one foul swoop. The coup-makers promised to lead Thailand to a more genuine democracy. Ironically, they did so with the help of the probably most undemocratic remedy at hand.

They promulgated an undemocratic interim charter, aimed at keeping control over the drafting process for the new permanent Constitution. The drafting process was harshly criticized. With the aid of Sections 19, 20, 22 and 24 of the Interim Charter B.E. 2549 (2006), the Council for National Security (CNS), as the junta renamed themselves, controlled the process of choosing the essential group of commissioners who were to draft the Constitution. At first, the CNS appointed a 2000 member National Assembly which in seven days had to select two hundred members out of its midst to be candidates for the then 100 member Constitution Drafting Assembly, to be royally appointed "on the

advice" of the CNS. This process gave the junta complete control both over the drafting process and its outcome. As an example, Section 32 of the Charter gave the CNS the power to hold a joint meeting with the Council of Ministers in order to select and revise any one of the previous Constitutions of Thailand and present it to the King for Royal Signature and subsequent promulgation as the new permanent Constitution.

In December 2006, General Sonthi raised several core issues that the drafters were to take into consideration while shaping the draft Constitution. Among other issues, he wanted the commissioners to restrict the Prime Minister to serving a maximum of two terms, to make it easier to launch a vote of no confidence against the PM or one of the Cabinet Ministers and to transform the Senate from an all-elected body to an organ which is largely appointed by a selection committee.

The drafters finally met the 180 days deadline and largely complied with the junta guidelines.

IV. General Overview

As indicated above, the People's Constitution of 1997 did have a number of weak points – especially with regard to experiences of the past. For example, the first elected Senate was full of the wives, children and associates of politicians, as well as a large contingent of former government officials, many with close ties to party leaders and cliques of Members of Parliament[24]. Even the post-1997 agencies did not seem to be as independent as they were intended to be. The Thaksin government found ways to politicize the process of appointments to these agencies. Dominant power interest groups, such as the ruling Thai-Tak-Thai party, were exposed to limited critical scrutiny[25]. It is no wonder that nearly all of those agencies were shut down in the wake of the military coup. Lastly, there was still too much influence of the military as well as the government on the electronic and print media. Media ownership in Thailand is a problematic issue; there are persistent rumors that prominent figures close to the government have acquired formal or informal ownership of elements of the print media[26]. These crucial points were not, or not sufficiently, addressed by the 1997 drafters, nor were there any amendments made to that effect.

In drafting the 2007 Constitution the drafters intended to tackle and overcome the above-mentioned problems which emerged under the previous Constitution. Although the coup-makers held the reins tightly they did not contemplate pushing Thailand back to the pre-nineties style Constitutions. In fact, the new Constitution is comparable to the 1997 Constitution. The party leader of the Democrat Party considers it an improvement on the 1997 Constitution[27]. Fears that the new Constitution would not provide for a Constitutional

24 *McCargo*, "Countries at Crossroads" – Country report - Thailand, Freedom House, 2007, 5.
25 *McCargo*, "Countries at Crossroads" – Country report - Thailand, Freedom House, 2007, 5.
26 *McCargo*, "Countries at Crossroads" – Country report - Thailand, Freedom House, 2007, 5.
27 In: The Nation, "Draft gets Democrats' vote", on 9 July 2007.

Court or other previously established independent bodies did not materialize. Nor were there any retrogade steps taken regarding the recognition and protection of human rights. Hence, the current Constitution can be characterized as reflecting the drafters' will to establish a democracy where the peoples' participation is encouraged and guaranteed[28]. This is reflected in the way this Constitution has been approved: it was the people who decided the fate of the new Constitution by way of a referendum held in August 2007. However, one must bear in mind Section 32 of the Interim Charter which would have allowed the junta to adopt any of the previous Constitutions of the Kingdom of Thailand if the people had rejected the proposed new Constitution. In addition, the interim government passed a law that made criticism of the draft and opposition to the constitutional referendum, a criminal act. Political parties were not allowed to persuade voters to cast ballots for or against the proposed Constitution. As the Asia Human Rights Commission (AHRC) put it: "Even if amended to allow 'factual' campaigning on the referendum, it is clear that the main purpose of the law is to intimidate and silence persons who don't share the official view"[29]. Meanwhile, the administration, by using significant public funds, strongly advocated a 'Yes', which also offered the perspective for an early general election and the handover to civilian government.

Significant changes from the 1997 Constitution can be seen in the following areas. The chapter dealing with human rights was re-organized and given a clearer structure. The catalogue of the guaranteed rights and liberties was supplemented with additional rights such as the right of free access to information. Secondly, the Constitution de-monopolizes state power, e.g. by restricting a Prime Minister to serving a maximum of two terms and preventing a government from acting as a caretaker administration after dissolving Parliament. These measures are direct reactions to alleged problems of the Thaksin era. An example is the simplification of the process for launching a no-confidence motion against the Prime Minister. Another significant change is the transformation of the Senate from an all-elected, to a semi-elected, body. Also, in contrast to the previous constitutions the new Constitution is well-structured and chapters and provisions are more tidily arranged.

It is hard to predict the impact of the new Constitution. It is, however, possible to analyze those aspects which should have a positive and strong impact, and those which may have a negative and weak impact.

From a positive point of view, the Constitution could provide a way out of the vicious cycle which has once again proved to be self-fulfilling, and pave the way for unhindered and steadily emerging constitutionalism in Thailand. It could, moreover, promote further reform and amendments to the Constitution, strengthening the participation of all citizens, especially through the independent agencies developed for the protection of the interests of the people, to improve the separation of powers, and finally to control and strictly sanction misconduct in office.

28 A matching example is Chapter VII of the Constitution which is headlined 'Direct Political Participation of the Public'.

29 *Daniel Ten Kate*, "Thailand on Spin Cycle", Online article on Asiasentinel.com, on 11 July 2007.

Focussing on negative impacts, the Constitution could bring instability to the political system. Reasons for that could be the possible inefficiency and instability of a multi-party coalition government, an imbalance between the branches of government due to less separation of powers, for example, because the judiciary has a duty to appoint Senators and the Senate has a right to impeach court judges. And there is still the likelihood that Thai politicians will be susceptible to corruption.

These issues are addressed and illustrated in the separate sections dealing with the characteristics of the current Constitution.

V. System of Government

According to Sections 1 and 2 of the Constitution of the Kingdom of Thailand B.E. 2550, Thailand is an indivisible Kingdom which adopts a democratic form of government with the King as Head of State. Hence, the Kingdom of Thailand is a parliamentary democracy headed by a constitutional monarch. Section 3 of the Constitution states that the sovereign power belongs to the Thai people and that the King shall exercise such power through the National Assembly, the Council of Ministers and the Courts in accordance with the provisions of the Constitution.

The National Assembly is the legislative branch of government and is organized as a bicameral body comprising the House of Representatives and the Senate. The House of Representatives consists of 480 members, four hundred of whom are directly elected from electoral constituencies, with the remainder drawn proportionally from party lists[30]. The House is granted the primary responsibility for legislation, while the Senate is to approve legislation or propose amendments, or reject the legislation. Members of the House serve four-year terms[31]. The Senate is non-partisan with limited legislative powers and is comprised of 150 members, seventy-six of whom are directly elected from provincial constituencies, with every province being represented by one senator. The remaining seats are filled by appointees selected by a selection committee which among others includes judges from several courts. Senators are elected or appointed for terms of six years. They may not hold any other office or be a member of any partisan organization[32]. Pursuant to Section 142 et seq. a bill may be introduced only by the Council of Ministers, or at least one-tenth of all members of the House, by various courts and independent organizations, and by not less than ten thousand persons who have the right to vote. After consideration within the House the bill has to be submitted to the Senate. The Senate may agree to, reject or amend the bill. If it rejects the bill, it is sent back to the House which can overrule the Senate's rejection by a vote of more than one half of all members of the House. Finally,

30 In this regard, Section 72 of the Constitution is noteworthy. It obliges people to exercise their right to vote at an election. This measures is intended to reduce electoral fraud by way of vote buying since it makes it inefficient to bribe all voters.

31 See ChapterVI, Part 2, Sections 93 to 110.

32 See Chapter VI, Part 3, Sections 111 to 121.

the Prime Minister presents the bill approved by the National Assembly to King for his signature. It then comes into force upon its publication in the Gazette.

The Council of Ministers is made up of the Prime Minister and not more than thirty five other Ministers appointed by the King. It is the highest level of the executive branch of government and carries out the administration of the country's affairs. Each Cabinet Minister is individually and collectively accountable to the House for the performance of his or her duties and the general policies of the Council of Ministers, respectively. According to Section 171 et seq. the Prime Minister has to be a member of the House of Representatives. The House elects the Prime Minister out of its midst by a majority of all members. As stated above, the Council of Ministers is entitled to introduce bills to the Parliament. Sections 158 to 162 allow parliamentarians to submit a motion of no confidence against the Prime Minister as well as individual Cabinet Ministers. Motions against the Prime Minister and the nomination of a new Prime Minister require the support of at least one-fifth of all members of the House of Representatives. Motions against Cabinet Ministers require the support of at least one-sixth of the members.

Various special chapters and provisions of the Constitution provide for strict control of the people involved in the political process. Pursuant to the Chapter dealing with the inspection of the exercise of state power[33], persons holding important political positions such as the Prime Minister, Cabinet Ministers or members of the National Assembly, shall submit an account showing particulars of their assets and liabilities and those of their spouses and their children, to the National Counter Corruption Commission. In addition, under the provisions of Chapter XII, Part 2 headlined 'Conflict of Interests', the same officials shall not receive any concession from the state, a government agency or a state enterprise. Neither shall a member of the Cabinet hold any position in a partnership, a company or an organization carrying on business, nor shall he or she be an employee of any person. Lastly, Part 3 of the said Chapter deals with the matter of removal from office. Officials whose wealth indicates that they may have been involved in corruption, malfeasance in office or an intentional exercise of power contrary to the provisions of the Constitution or law, or seriously violates or fails to comply with ethical standards, may be removed from office by the Senate. These provisions also apply to certain judges and presidents of certain courts.

The judiciary is divided into those sitting in the Constitutional Court (elaborated upon later in this paper), in the ordinary courts (the Courts of Justice) and in the Administrative Courts[34]. The Courts of Justice are divided into three levels, namely Courts of First Instance, Courts of Appeal and the Supreme Court of Justice. In the main, they try and adjudicate civil and criminal matters. Jurisdiction in cases between state officials or agencies and individuals lies with the Administrative Courts. They separate into Administrative Courts of First Instance, the Appellate Administrative Court and the Supreme Administrative Court.

33 See Chapter XII, Part 1, Sections 259 to 264.
34 See Chapter X.

An important role on the political stage is played by the various independent organizations established under Chapter XI of the Constitution. They are a direct outcome of the reform movement of the nineties reflecting the desire of the reformists to put an end to rampant corruption, the abuses of power and the violations of human rights which have occurred down to the present day. The showpieces are the National Counter Corruption Commission (NCCC) and the National Human Rights Commission (NHRC). The former consists of nine members 'of apparent integrity' who are chosen by a Selection Committee comprising the Presidents of the three highest Courts, the President of the House of Representatives and the Opposition Leader in Parliament. The NCCC's main role is in the field of removing from office and monitoring the morals and ethics of persons holding political positions. But the commissioners are also overseen. Members of the House or Senators can lodge with the Supreme Court of Justice, an allegation against commissioners who have become unusually wealthy or who have committed offences of corruption. The NHRC examines and reports on any violation of human rights or commissions or omissions that do not comply with international treaties and propose appropriate remedial measures to the officer or agency involved. It also promotes education and dissemination of knowledge on human rights among the people. The Office of the Ombudsman has the power to investigate on administrative matters where members of the executive fail to act in accordance with their duties. Individuals who feel they have been unfairly treated by the administration can file a complaint with the Ombudsmen.

However, it should be noted that the independent agencies, all of which existed and were vested with similar powers under the 1997 Constitution, were not as effective as they might have been. Thaksin and his colleagues were never challenged despite the indications that some government actions were not carried out in accordance with the law or with ethical standards. However, hopefully things will change under the new Constitution.

VI. Fundamental Rights[35]

Section 4 of the Constitution professes to protect human dignity, rights and liberty as well as the equality of the people. Following the example of the People's Constitution of 1997, the term human dignity is particularly highlighted. This is further enhanced by Section 26 which calls upon state organs to bear in mind, human dignity, rights and liberties. Hence, the new Constitution links to the conception in the previous Constitution that human dignity is a concept that permeates the Constitution and the fundamental rights guaranteed in Chapter III of the Constitution. Slavery and torture are prohibited, arrested persons have to be brought to court within forty-eight hours – these are practical examples of the implementation of the idea of human dignity[36]. A review of the sections in this

35 For the situation under the previous 1997 constitution see more comprehensively *Vitit Muntabhorrn*, Human Rights in the era of "Thailand Inc.", in: Randall Peerenboom et al. (eds.), Human Rights in Asia, 2006, pp. 320-345.

36 See Part 3: Rights and Liberties of the Individual.

chapter reveals the structuring and re-grouping of the different parts. Different rights and liberties have been embraced by umbrella terms or by matching groups. For instance, Part 11 entitled 'Liberties to Assembly and Association' comprises the right to assemble peacefully and without arms (Section 63), the freedom to unite and form an association or non-governmental organization as well as the right to form a union (Section 62), and the freedom to unite and form a political party (Section 63). The plethora of rights and liberties under Part 10 which deal with the rights to information and petition is also remarkable. This shows that the Constitution is progressive, since the inclusion of such rights into the legal systems was until recently disputed in many Western countries. The same applies to the rights of unhindered access to the courts and the right to a correct, prompt and fair trial[37]. An innovation within this region is the assertion of Section 39 that generally presumes the suspect or the accused in a criminal case, innocent.

Freedom of expression and freedom of the press are recognized in Part 7 of Chapter III. There, restricting measures such as closure, censorship or prevention of a newspaper or other mass media from printing, are clearly outlawed, and private as well as public activities in the field are protected alike. In this context another milestone in the constitutional history of Thailand is set. Section 45 states that a restriction on the freedom of expression can only be imposed by a law specifically enacted by the legislature for the purpose of maintaining the security of the State or protecting the rights and liberties, dignity or privacy rights of another person. This shows that the Constitution drafters have implemented a very crucial principle of the rule of law, namely the requirement for parliamentary enactment. In other words, every governmental act impinging on the rights and liberties of an individual has to be based on a law that authorizes the officer taking a particular action, to take that action. This applies first and foremost when and where fundamental rights and liberties of the people are at stake. Similar expressions, among others, can be found in the parts dealing with property rights, rights and freedoms in relation to occupations and the rights to free assembly and association.

Section 30 in conjunction with Sections 4 and 5 of the Constitution stipulates the general principle of equality of all persons before the law. It also prohibits racial discrimination, but does not mention ethnic minorities. In this context, it is interesting to consider the title of Chapter III 'Rights and Liberties of the Thai People', which implies that all the advantages mentioned above are meant for people who have acquired Thai citizenship, thereby excluding all non-citizens from exercising those rights. Many ethnic minority peoples in the northern highland areas of Thailand are not Thai citizens and have been subjected to persistent discrimination; similar problems apply in the case of Burmese refugees and illegal workers from Cambodia. These groups are vulnerable to arbitrary arrest[38]. Despite the injunctions against such activities in the 1997 Constitution, under the Thaksin government, torture and abuse within pre-trial detention by both police and military agencies were reported, especially in relation to rural protests and alleged drug

37 See Chapter III, Part 4, Section 40.

38 *McCargo*, "Countries at Crossroads" – Country report - Thailand, Freedom House, 2007, 12.

offenders. Thai prisoners are kept in poor conditions: they sometimes have to pay for a space to sleep and generally need money from outside in order to obtain reasonable food[39]. No state officials have faced arrest, prosecution, or trial for acts of torture.

This shows that despite the exemplary recognition and protection of many rights and liberties in the Constitution, there is still a lot to do to realize this comprehensive protection in everyday life and throughout the country. It shows that the law and practice are sometimes far apart.

VII. The Constitutional Court

The Constitutional Court was first introduced in the wake of the promulgation of the 1997 Constitution. After nearly nine years the Court was abolished by the junta in late 2006, after having decided some four hundred cases, many of them of signal importance. The Constitutional Court of 1997 was regarded as a crucial element in the reform process due to its prominent and special status as the highest Court in the country and guardian of the Constitution. However, the court proved controversial in its performance, critically in a case involving then Prime Minister Thaksin Shinawatra, in 2001. Although the NCCC had duly conducted its investigation and passed a judgment by 8 to 1 against Thaksin, the Constitutional Court ruled in favor of Thaksin. Furthermore, it failed to call to account in any meaningful way, the authoritarian and manipulative government of 2001 to 2006. It failed also to correct serious human rights violations[40]. It now remains to be seen whether the new Constitutional Court can overcome the weaknesses of its predecessor and lead Thailand into more transparent times.

According to Sections 204 et seq., the new Constitutional Court is composed of nine judges to be appointed by the King upon advice of the Senate. Three judges of the Supreme Court of Justice and two judges of the Supreme Administrative Court shall occupy five of the nine seats. The President and the judges of the Constitutional Court shall hold office for nine years and only for one term. The judges can only be removed from office under Section 274 after being impeached by the Senate for misconduct in office. This makes their position secure and contributes to the promotion of judicial independence. The four main powers and duties of the Court are: the determination of the constitutionality of laws prior and subsequent to their promulgation[41], the consideration of the qualification of Election Commissioners and members of the House of Representatives and the Senate, adjudication on disputes pertaining to the powers and duties of various organs under the Constitution and the consideration of matters affecting political parties.

Once more, attention is drawn to Section 212 which allows an aggrieved citizen to take

39 *McCargo*, "Countries at Crossroads" – Country report - Thailand, Freedom House, 2007, 8.

40 *Harding*, "A Turbulent Innovation: the Constitutional Court of Thailand, 1998-2006", Paper at the workshop: New Courts in the Asia-Pacific Region, held at the University of Victoria, Australia, on 13-15 July 2007.

41 Refer Section 154 of the Constitution as described above.

cases to the Constitutional Court if he or she thinks his fundamental rights and liberties are violated by state organs.

VIII. Legal System and Rule of Law

The Kingdom of Thailand is one of the few countries in the region that have never been occupied or colonized by a western government. Although the British were omnipresent in Southeast Asia they never took control of Thailand. Hence, the Thai legal system was never influenced by the English common law, as for instance the southern neighbor Malaysia was. On the contrary, it has to be described as a legal system comparable to those in continental Europe and therefore Thailand must be considered a civil law system. Indeed, it is influenced by German and French law. As already noted above, Thailand's judicial system is split into the Constitutional Court, the ordinary courts (Courts of Justice) and the Administrative Courts. The judiciary is generally independent but has also proved to occasionally be susceptible to corruption. A national survey in 2000 found that a third of those who had been involved in court cases had been asked to pay bribes to secure a favorable outcome[42].

Overall, Thailand has to be counted as one of the countries in which the rule of law prevails. That said, there are a lot of exceptions, as seen above in the chapter dealing with the protection of human rights. However, many provisions of the Constitution refer to the existence of the rule of law. A few examples shall be stated here: Section 3 of the Constitution calls on the three branches of government to perform their duties in accordance with the rule of law. Then, there is this strong participation of the people in politics, demonstrated by the Sections of Chapter VII which are entitled 'Direct Political Participation of the Public'. Pursuant to Section 164, 20,000 voters can petition the Senate to remove corrupt officials from office. Furthermore, a person whose rights and liberties recognized by the Constitution are violated, can invoke the provisions of the Constitution to bring a lawsuit or defend himself in a court (Section 28). Additionally, Section 60 entitles a person to sue a state agency or local government in respect of an act or omission by an official or employee. Finally, an aggrieved person can directly attack a provision on which an act or omission violating his or her rights is based by submitting a motion to the Constitutional Court. This measure is comparable to constitutional complaints under the Basic Law of the Federal Republic of Germany[43]. Another significant feature reflects the existence of a system of checks and balances. Under Section 154 of the Constitution, one-tenth of all members in both chambers of the National Assembly who consider a passed but not yet ratified bill unconstitutional, are allowed to submit the bill to the Constitutional Court for a review of its constitutionality. There are also a large number of independent agencies

42 *Phongpaichit/Treerat/Chayapong/Baker*, "Corruption in the Public Sector in Thailand: Perceptions and Experience of Households, Bangkok, Chulalongkorn University, Political Economy Centre, 2000, 58-59.

43 Refer Section 212 of the Constitution with Article 93 para 1 no 4a of the German Basic Law (Grundgesetz).

that have been established to monitor both the legislature, the executive and to some extent, the judges.

Lastly, the catalogue of human rights guaranteed and protected under Chapter III of the Constitution and requirement that those rights only be restricted on the basis of a law enacted by Parliament has to be stressed. These provisions build up the core of the rule of law and are anchored in the Constitution. However, what one can infer from the examples and practical experiences described above, is that the success of this Constitution will depend on how its progressive provisions are put into practice.

IX. International Law and Foreign Relations

As a directive principle of fundamental state policies, Section 82 stipulates that the State shall promote friendly relations with other countries and comply with the human rights conventions which Thailand is a party to. It shall furthermore abide by international obligations concluded with other countries and international organizations. According to Section 190, it is the King's prerogative to conclude a peace treaty, armistice or other international treaties with foreign countries and international organizations. Section 190 also provides for remarkable duties to inform the public and for participation of Parliament before the government signs international treaties.

X. Concluding Remarks

The discourse on the previous pages has proven that the junta has kept its word and re-established democracy on a level comparable to the situation of 1997, due to the fact that the new Constitution literally mirrors the Constitution of 1997, except for the amendments that have been listed above. This raises new questions, namely, whether these changes can now pave the way for new and clean Thai politics, free of corruption, linked to the idea of service for the country and for the people. And whether the new Constitution really can correct the longstanding underlying problems or the vicious cycle of Thai politics can be stopped. Academics all over the country are split over this issue. Mr. Veerasak Kosurat, Deputy Leader of the Chart Thai Party noted that the drafters saw the 1997 Constitution had some sore points which they spotted and dressed with a bandage[44]. Assistant Professor Siripan Nogsuan at the Faculty of Political Science at Chulalongkorn University complained about how the problems were solved by saying: "The drafters were not looking for leaks in the house, they just tore down the whole thing and rebuilt it (…) Maybe the draft constitution will have more emphasis on the rights and liberties and provide for more citizen participation but the challenge is how to encourage the effectiveness for the people

44 Speech at the ISIS Forum – 'Thailand's Draft Constitution: Way out or dead end?", held on 17 July 2007 at Chulalongkorn University Bangkok.

(…) We talk so much about rights and liberties but I am worried about the processes"[45].

Now that the first months after the inauguration of the new government have passed, calls for amendments to the newly adopted constitution are getting louder and a new controversy seems to be emerging.

While facing the serious problem of political instability due to looming removals of officials, dissolutions of political parties and penalties for electoral fraud that could be based on certain provisions of the Constitution, the coalition government argues that the Constitution was neither democratic nor applicable to a majority government and as such urgently needs to be amended both partially with regards to particular articles such as sections 237 or 309 and as a whole. In contrast, the former constituent assembly insists that the Constitution belonged to the people and had been endorsed by way of referendum. The given arguments are both backed by a large scale of highly reputated and colourful political figures and powerful interest groups. For instance, Prof. Dr. Wissanu Kreu-ngam, former Deputy Prime Minister, proposes to upgrade the Constitution in three main terms, namely democratization, clarification and modernization, whereas the democratic alliance networks and the opposition party strongly support the idea of sticking to the democratically adopted version of the 2007 Constitution. Hence, shortly after the political power has been handed over to the people and the Kingdom has been brought back onto the path of democracy, new tensions arise. Prof. Dr. Kramol Thongdhammachati, former President of the Constitutional Court and Dr. Parinya Dheawanaruemitrakul, Deputy President of Thammasat University, even speak of an emergence of political violence[46].

It remains to be seen if this dispute can be settled in a positive way, but eventually it shows that a serious political debate about Thailand's future is ongoing and that this debate is based on the awareness of the importance of a strong and democratic constitution adaptable to the changes of time and the challenges of an advancing and modern society.

In the end it is all up to the people in charge of the politics and their willingness to play a part in the new game. Change and stability can only be accomplished if the main characters on the political stage want to be part of it. In the reformist 1990s Thailand already demonstrated its ability to step forward. Now it is the time for the next steps.

Further Reading

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45 Speech at the ISIS Forum – 'Thailand's Draft Constitution: Way out or dead end?", held on 17 July 2007 at Chulalongkorn University Bangkok.

46 See Thai Post, 02 April 2008, p. 4; Mathichon, 03 April 2008, p. 1,14; Post Today, 15 April 2008, p. 6.

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Vietnam

VIETNAM
Constitutional development in a re-united country

Clauspeter Hill

I. Introduction

The Socialist Republic of Vietnam, as it is named today, was founded as the Democratic Republic of Vietnam on September 2, 1945 when Ho Chi Minh in his capacity as President of the National Liberation Committee, declared independence from French colonial rule. In 1941, the Indochinese Communist Party[1] at its Eighth plenum had established the League for Independence of Vietnam, which was commonly known as Viet Minh and included a number of non-communist but nationalist groups[2]. The Japanese occupied the country during World War II and installed a national administration, which declared Vietnam independent after the defeat of Japan in 1945. On August 16, 1945, the Viet Minh National Congress elected the National Liberation Committee with Ho Chi Minh as its leader and called for a countrywide uprising. A week later almost the whole country was under control of the Viet Minh and independence was achieved.

However, it did not last for long because non-communist groups assumed control of part of Ha Noi and compelled Ho Chi Minh to accept nationalist, Nguyen Hai Tan, as Vice-President of the newly proclaimed republic. Furthermore, in October 1945 the Viet Minh were to give up substantial parts of territory in the south after French troops seized control of Sai Gon and other regions. Six months later, in March 1946, an agreement with the French was concluded: France recognized the Democratic Republic of Vietnam (DRV) as a sovereign state within the French Union and Ho Chi Minh agreed that French troops would move to the north.

Instead of being a peacekeeping compromise, the French required the Vietnamese troops in the north to surrender their arms, which in turn spurred a stronger rebellion against the recently returned colonial masters. The resistance war, or the so-called first Indochinese War, started with the French mainly controlling the cities and the Viet Minh had their strongholds in the countryside.

1 This party was founded on February 3,1930 in Hong Kong by Ho Chi Minh. Later the party was called Vietnam Workers' Party and renamed Communist Party of Vietnam after reunification.

2 In Vietnamese language: Viet Nam Doc Lap Dong Minh Hoi – in short: Viet Minh.

Despite this, the first Constitution of the DRV was adopted by its National Assembly on November 9, 1946[3]. Formally, it applied to the whole nation but in fact was effective only in the northern part of Vietnam. French rule continued in the south and a Constitution was enacted not before 1956.

Since then Vietnam has had three more Constitutions in 1959, 1980 and 1992 - each of them being introduced after landmark events in the history of the country. The first event was the refusal by the southern government to adhere to the Geneva Agreement of 1954 requiring it to participate in nationwide elections, which cemented the division of Vietnam for the next twenty years. That led to the 1959 Constitution in the DVR (North Vietnam) claiming to be the Constitution for the whole the country (Art. 1) and the 1956 Constitution in the Republic of Vietnam (South Vietnam), making the same claim.

The next important event was the conquest of the south by the Viet Minh and the reunification of the country under North Vietnamese leadership marked by the takeover[4] of Sai Gon on April 30, 1975. With a unified state under the rule of the Vietnam Worker's Party, a truly communist system was established over the whole country, which made it necessary to reflect this "progress towards socialism" in a new Constitution[5].

During the first years of independence, the constitution was seen as the document marking freedom from foreign rule, after a millennium of Chinese domination and almost a century of French colonialism. The 1946 Constitution was therefore very symbolic, not only for the leaders, but also for the ordinary Vietnamese. After a long period of feudal systems and Chinese occupation, where the orders of the rulers or its representatives were the law, the French colonial masters had introduced their own laws. Again, those were seen only as the law of the occupying force and thus, opposition against any rule of law (or rather: rule by law) was widespread and common. With the declaration of independence and the subsequent enactment of its own constitution the nation for the first time had an indigenous legal basis.

Until 1975, the overarching goal had been the struggle for unity and independence, not to establish a socialist state[6]. All new Constitutions, at least in northern Vietnam, have to be seen in the light of a strong desire for independence, reunification and nation building. And all are inseparably linked to the leading figure, Ho Chi Minh, who is still regarded as the father of the Vietnamese nation, or as people still use to call him: Uncle Ho[7]. He was born under the name of Nguyen Sinh Cung in the Nghe

3 The term "Constitution" in this article refers to the Constitution of 1992 as amended in 2001. Otherwise, the constitutions are determined with the year of their promulgation. Articles cited without specification of the law are provisions of the Constitution 1992 as amended in 2001.

4 Vietnamese sources use the term "Liberation" and others use "Fall".

5 See: 15. Paragraph of the Preamble, 1980 Constitution.

6 *Alice Erh-Soon Tay / Guenther Doeker-Mach* in: Asia-Pacific Handbook, Vol. III: Socialist Republic of Vietnam, p. 26.

7 See: Interview with Party Secretary General *Nong Duc Manh* on Jan. 22, 2002 in: TIME at: http://www.time.com/time/world/article/0,8599,195506,00.html, accessed on Feb. 17, 2008.

An province (Central Vietnam), probably on May 19, 1890 and died, aged 79, on September 2, 1969[8].

II. Constitutional History

Feudal System, Chinese Influence and French Domination

Settlements of the Viet people can be traced back some centuries before the modern era. Those settlements were initially in the Red River delta in northern Vietnam, from where the people moved south later. In the first century B.C., the territory was invaded by the Han Dynasty (111 B.C.) and was under Chinese rule for the whole of the following millennium. The Chinese ruled again in Vietnam during the early 15th century, under the Ming Dynasty. Their Confucian philosophy strongly influenced the legal thinking of the occupied nation. Laws were merely ethical rules to ensure correct behaviour according to their Confucian doctrine[9].

In 1428, King Le Thanh Tong assumed the throne in Vietnam and ended Chinese rule. Under his reign, the first law of Vietnamese origin, the Hong Duc Code, was enacted. Although to a large extent the Code was Chinese law – such as land ownership regulations and most criminal provisions – it also incorporated new provisions in accord with Vietnamese tradition, mainly family related issues[10]. Furthermore, Le Thanh Tong modernized the state administration system and added procedural rules to the Hong Duc Code. This legislation applied throughout the reign of the Le Dynasty until 1803 although the country was divided into two parts during the 16th and 17th century. In 1527, the Le emperor was overthrown after expansion to the south, which did not resolve problems of land distribution and led to great instability. Two upper class families, the Nguyen and the Trinh, fought for restoration of the Le Dynasty but their competition led to division of the country into northern and southern parts. There was continuous fighting between the two parts, which caused a sharp economic downturn especially in the most important sector of agriculture: rice production[11].

After the Tay-Son rebellion in 1772, (staged by three brothers from a town named Tay Son) the Nguyen Dynasty which had retreated to a southern island, managed to regain control of the major city in the south, Gia Dinh (now Ho Chi Minh City or Sai Gon), and subsequently the whole country including the northern capital of Thang Long (now Ha Noi). The new emperor, Nguyen Anh, changed his name to Gia Long (a composite of the names of the main cities of the south and the north) and founded a new capital city in Hue (Central Vietnam). Chinese customs were reintroduced, the Hong Duc Code was

8 These dates are generally given; see: http://www.cpv.org.vn/leader.asp, accessed on Feb. 17, 2008.

9 *Alice Erh-Soon Tay / Guenther Doeker-Mach*, (FN4), p. 32-33.

10 *Nguyen Ngoc Huy / Ta Van Tai*, "A brief Legal History of Vietnam" in: The Le Code – Law in Traditional Vietnam, Vol. I, Ohio University Press, 1987, pp. 4-43 at p. 20.

11 *Alice Erh-Soon Tay / Guenther Doeker-Mach* (FN 3) at p. 22.

abolished, and in 1803, the new Gia Long Code was enacted. It was more or less the law of the Chinese Qing Dynasty of the time and abrogated all Vietnamese influenced law from the previous period[12].

The next phase was colonial rule by France, which lasted from the mid 19th century until 1954, briefly interrupted by the Japanese occupation in World War II. European traders were rarely seen in Indochina before the first French missionaries arrived at the beginning of the 16th century. They had a remarkable impact on Vietnamese culture and the language in particular. The Jesuit missionary, Alexandre de Rhodes, came to Vietnam in 1627 and was expelled after three years. Nevertheless, he created an alphabet with Latin letters using French and Spanish accents to indicate the six tones that determine the meaning of a word. This script was called Quoc Ngu[13] and is still used today.

At first, France occupied the southern part of what is today Vietnam and established a colony under the name of Cochinchina in 1862. In 1882, a Treaty of Protectorate was signed in Hue (Central Vietnam) which created two protectorates - one in the central part called Annam and one in the North, called Tonkin. These together with the protectorate of Cambodia made up the Indochinese Union which was founded in 1887. A few years later, the protectorate of Laos was included.

The Gia Long Code was applied in the two Vietnamese protectorates but in the southern colony of Cochinchina, the Code Napoleon (1853) was introduced with several amendments, in order to ensure control by the colonial rulers. These included restrictions on freedom of expression, press and assembly[14]. Again, the country was split - this time in three parts with different sets of rules. Consequently, the law of the land was a melange of Vietnamese feudal rules and French law adjusted to serve the purpose of the colonial administration[15].

Independence and the 1946 Constitution

The division of the country into three parts lasted until the Japanese withdrew from Indochina in mid 1945. The August Revolution under the leadership of Ho Chi Minh led to the Viet Minh proclaiming independence on September 2, 1945 at Ba Dinh square in the centre of Ha Noi. Until then, there had not been any legislation in the territory of Vietnam which could be called a Constitution. Apart from the period of almost three hundred years during which the Hong Duc Code was in force, all laws had been imposed

12 *Bui Kim Chi, "The Role of Law in Vietnam",* in: Asia-Pacific Constitutional Yearbook 1994, p. 254-277 at p. 263; *Nguyen Ngoc Huy / Ta Van Tai* (FN 5) at p. 29.

13 In English: National Script; see Vietnamese – English Online Dictionary (further on: Online Dict.): http://vdict.com/quốc%20ngữ,2,0,0.html, accessed on Feb. 23, 2008

14 *Mark Sidel*, "The Ambiguities of State-directed Legal Reform" in: Poh-Ling Tan (Ed), Asian Legal Systems, Butterworth, 1997, chapter 9, p. 361.

15 *Nguyen Ngoc Huy / Ta Van Tai*, (FN 5), p. 31

by foreign powers or were derived from them.

The first Constitution of 1946 was brief and simply structured to serve the needs of the time, which were to proceed with independence while parts of the country remained under colonial control by the French. This constitution clearly had a citizen-oriented approach with participatory elements. It comprised 70 brief articles and neither the preamble nor any statute made reference to socialism or a single party system. The most important basic rights were guaranteed in Articles 6 – 16 with an emphasis on education (Art. 14 and 15, 1946 Constitution). Article 16 even provided for the right to asylum for "persons outside the country struggling for democracy and freedom who must flee". Constitutional amendments and "important issues concerning the destiny of the nation" were to be submitted to a referendum (Art. 21).

It is doubtful that this 1946 Constitution was ever a living document because of the ongoing resistance war against the restoration of French rule. Nevertheless, it showed the commitment of the Vietnamese leaders at that time to establish a new state that embraced democracy and the rule of law[16].

The fight for independence and national unity became more and more, a guerrilla war between the Viet Minh supported by the Soviet Union and China on one side and France on the other. The struggle ended with the defeat of the French army at Dien Bien Phu on May 7, 1954. In light of the worldwide situation in the early 1950s, an international East-West Conference had been underway in Geneva since 1953. The Indochina problem was included in its agenda and a meeting of the World War II allies (the Soviet Union, the United States, France and Great Britain) was scheduled for May 8, 1954 – one day after the French capitulation at Dien Bien Phu[17].

The peace talks between the formerly allied nations were joined by the Chinese Foreign Minister, Zhou En-Lai, and delegates from the three Indochinese countries (Vietnam, Laos and Cambodia). Vietnam was represented by two delegations: one from the Bao Dai regime in the south and another from the Democratic Republic of Vietnam in the north, led by Prime Minister Pham Van Dong. An agreement between France and the DRV was reached on July 21, 1954. According to this armistice agreement, Vietnam was again divided into two parts. The Viet Minh were given control over the territory north of the 17th parallel, whilst the French retreated south of the demarcation line. It was also agreed that elections be held in both parts in July 1956[18].

16 *Bui Kim Chi* (FN 8) at p. 264-5.

17 *Marc Frey*, "Die Geschichte des Vietnamkriegs" (The History of the Vietnam War), Munich 1999, at p. 36.

18 See: Internet Modern History Sourcebook "The Final Declaration of The Geneva Conference on Restoring Peace in Indochina, July 21, 1954: http://www.fordham.edu/HALSALL/MOD/1954-geneva-indochina.html, accessed on Jan. 31, 2008.

Division and the 1959 Constitution

It became clear to Ho Chi Minh and his comrades that allies in the struggle for national unification could only be found in the communist bloc, namely in the Soviet Union and in China. They decided that a socialist state structure was more appropriate in times of resistance and while the nation was fighting for reunification[19]. Thus, unsurprisingly, the second Constitution of 1959 gave more emphasis to collectivism, the "alliance between the workers and peasants"[20] and "the clear-sighted leadership of the Vietnam Lao Dong Party"[21]. However, there was still no statute referring to the position, role and function of this Worker's Party although it was the only party in power.

The first chapter addressed the nature of the State describing it as "a people's democratic state" (Art. 2) practising democratic centralism (Art. 4, Par. 2). In the second chapter the economic and social system was laid down, prescribing that the DRV "is advancing step by step from people's democracy to socialism by developing and transforming the national economy along socialist lines…" (Art. 9, Par. 1).

Fundamental rights were granted in the third chapter but under the condition that the State forbade the use of these democratic freedoms if they were deemed detrimental to "the interest of the State and of the people" (Art. 38). What was more, the enforcement of the law was assigned to administrative departments at national and local level, persons working in state organs and all citizens (Art. 105). The top level of this political control instrument was the Supreme People's Organ of Control responsible to the National Assembly (Art. 108).

President Ho Chi Minh had long envisioned an independent Vietnam as a democratic state governed by the rule of law. As early as 1919 he had sent an "eight-point demand of the Annamese people" to the Versailles Peace Conference demanding the application of the rule of law by the French administration in Vietnam[22]. Again in 1957, he called upon the judiciary to "contribute to the realization of the rule of law, [to] maintain and defend the rights and interests of the people…"[23].

Contrary to Ho Chi Minh's intent, the 1959 Constitution drafted in 1957 did not mention the rule of law principle. In some statutes there were references to "as prescribed by law" or "within the limits of the law". None of the provisions bound the State organs to the rule of law and the Constitution. There are no clear indications as to why this Constitution did not refer to the rule of law even though the President had emphasised it so strongly. One

19 See: *Ho Chi Minh* "Report to the 3rd Session of the First National Assembly (Dec. 1, 1953)" in: Selected Writings 1920 – 1969, Hanoi, 1994, p. 155 – 170 at p. 156-7.

20 Preamble of the 1959 Constitution, 13. Paragraph.

21 Preamble of the 1959 Constitution, last paragraph; *Lao Dong* means: Labour, see Online Dict.: http://vdict.com/lao%20động,2,0,0.html; accessed on Feb. 23, 2008.

22 *Ngo Ba Thanh* "The 1992 Constitution and the Rule of Law" in: *Charlyle A. Thayer / David G. Marr* (Eds), Vietnam and the Rule of Law, Australian National University, Canberra, 1993, p. 81-115 at p. 85.

23 *Ngo Ba Thanh*, supra, at p. 86.

can only speculate that Ho Chi Minh needed to compromise with hard liners in the party who thought that the underground tactics necessary in the struggle for reunification were only possible with a strict control over all of the country[24].

Southern Vietnam

Interestingly, and rather surprisingly, whenever the legal history and constitutional development of Vietnam are reviewed, reference to southern Vietnam during the separation from 1954 until 1975 is seldom made. After French and British engagement in the southern territory of Vietnam in the late 1940s and early 1950s, the government in Sai Gon was strongly backed by the United States[25].

From 1949 to 1954, the State of Vietnam was partially autonomous from France but a member of the French Union. The last Emperor of the Nguyen dynasty, Bao Dai, who previously reigned in the French Protectorate of Annam (Central Vietnam), became the Chief and Ngo Dinh Diem became Prime Minister. There was no constitution and the legal framework was similar to that of France or the former colony of Cochin China[26]. The State of Vietnam in the south and the Democratic Republic of Vietnam in the north, spearheaded by their proponents Bao Dai and Ho Chi Minh, both claimed legitimacy as government of the whole country[27].

Contrary to the agreement in Geneva, the Prime Minister of the State of Vietnam, Ngo Dinh Diem, refused to take part in the nationwide elections, arguing that his country never signed the agreement. In fact, both Diem and the U.S. administration of that time, under President Eisenhower, feared a communist victory[28]. Thus, neither the DRV nor the State of Vietnam conducted the elections. The separation agreed upon in the Geneva Accord was only intended to be for a short period until the polls took place in July 1956. With the core element of the agreement not being implemented the division was to last much longer.

Meanwhile, the south was officially named Republic of Vietnam and enacted its own Constitution on October 26, 1956. It adopted a presidential form of government modelled after the United States system (Art. 3, 1956 Constitution). It was a clearly anti-communist state, declaring all activities aimed at promoting communism to be unconstitutional (Art. 7, Constitution 1956). Ngo Dinh Diem declared himself the first president after he won a referendum against Bao Dai (manifested in Art. 96, Constitution 1956) and continued

24 *Ho Chi Minh* "Report on the draft amended Constitution, December 18, 1959" in: Selected Writings 1920 – 1969, Hanoi, 1994, p. 209 – 230.

25 *Mark Sidel* (FN 12) at p. 357.

26 John Gillespie, "Vietnam: The Emergence of a Law-based State" in: *Alice Erh-Soon Tay* (Ed.) "East Asia – Human Rights, Nation Building, Trade" (1999) p. 333 – 371.

27 Every Constitution of both Northern and Southern Vietnam between 1946 and 1975 constituted the country as an independent and indivisible state within one territory. See each Article 1 of the respective Constitutions.

28 *Marc Frey* (FN 16) at p. 50/51.

to govern the country more and more autocratically[29]. Although the 1956 Constitution looked democratic, it provided for far-reaching powers for the President, which made it easy to sideline parliament. The power to declare war could be exercised by a 50% majority of the members of parliament. (Art. 36, 1956 Constitution) while no specific provision described the preconditions under which the President could impose martial law (Art. 44, Constitution 1956). The acceptance by the parliament of a motion seeking the impeachment of the President required a majority of 60% of all parliamentarians and the passing of the motion required a majority of only 66.6% (Art. 77, Constitution 1956).

Under strong pressure from the U.S. Government under President Kennedy, Diem was forced out of office on November 1, 1963 by parts of the South Vietnamese army[30]. The Revolutionary Military Commission ("RMC") unconstitutionally set aside the 1956 Constitution[31]. On August 16, 1964 a new Constitution drafted by the RMC was enacted which maintained ultimate power for the military. Pursuant to Article 19, the RMC was the highest organ of the State "which had the duty to govern the people in this historical time". The RMC elected the President, appointed the Vice-President and members of the provisional parliament, as well as the Chief Justice (Art. 20 – 22, Constitution 1964). This provisional status remained until 1967.

Despite the rule of the military, the situation in the south continued to grow more unstable and riots occurred frequently. In pursuit of democratic legitimacy, the leadership now under General Nguyen Van Thieu held elections on September 11, 1966, which produced disappointing results for the Thieu camp. The Constitutional Assembly nevertheless enacted a new Constitution which took effect on April 1, 1967 (Art. 108, 1967 Constitution). Like the 1956 Constitution, the document explicitly re-affirmed both the indivisibility of Vietnam and the anti-communist nature of the State (Art. 1 and 4, 1967 Constitution). Fundamental rights were granted in Chapter 2 where Article 29 stipulated that limitations to these rights were only allowed by a specific law that explicitly prescribes such restrictions. The core values of fundamental rights were declared inalienable (Art. 29, Par. 2, 1967 Constitution). Such provisions were rather modern and progressive at that time. Similar provisions for safeguarding human rights in such a profound manner could be found in some Western European Constitutions[32].

The governmental system was presidential, with a bi-cameral parliament and the ministerial executive headed by a Prime Minister. The President was elected by the people (Art. 51, 1967 Constitution) and he appointed the government (Art. 58, 1967 Constitution). To start an impeachment procedure required the support of more than half of the deputies of both houses and a 75% majority was required to pass the motion (Art. 87, No. 1, 1967 Constitution). The judiciary was said to be independent (Art. 76, 1967 Constitution)

29 *Marc Frey* (FN 16) at p. 58.
30 *Marc Frey* (FN 16) at p. 59.
31 First Provisional Constitutional Agreement of Nov 4, 1963. A Second Provisional Constitutional Agreement from Feb. 7, 1964 made only minor alterations hereto.
32 Compare for instance: Art. 19, Par. 2 of the German Basic Law.

and contrary to the 1956 Constitution, judges were obliged to follow only the law and their conscience (Art. 78, No. 2, 1967 Constitution). In the earlier Constitution they had to consider the "interest of the state" (Art. 71, 1956 Constitution). A Supreme Court was introduced and entrusted with the power to interpret the Constitution and to review the constitutionality of laws, ordinances and administrative acts (Art. 81, No. 1, 1967 Constitution). This was also an astonishingly modern provision, although it probably did not play an important role in reality.

Chapter VII guaranteed the right to found and operate political parties, pledged to develop a multi-party system and acknowledged the important role of parties, including that of a political opposition (Art. 99 – 102, Constitution 1967). Those were, however, partially contradicted by Article 4, which forbade communism and all related activities.

Unification and the 1980 Constitution

Notwithstanding the different constitutional settings in North and South Vietnam, the war continued and became ever more disastrous for both the Vietnamese people and American soldiers. Finally, on April 30, 1975 North Vietnamese troops moved into the southern capital of Sai Gon completing the conquest of the whole country. Vietnam was finally reunified under the rule of the north. Subsequently the socialist system was also implemented in the south. The charismatic leader of the independence and reunification movement, Ho Chi Minh, had been dead for six years when his successors achieved their common goal. During the war against the south and the American troops, the Viet Minh relied largely on the support of the Soviet Union. Its influence on the form of government and the economic system provided a clear direction for the DRV in fully adopting a socialist state structure. In 1976, the Vietnam Worker's Party was renamed the Communist Party of Vietnam ("the Party"), at its Fourth National Congress in 1976. In order to create a legitimate basis for the now unified State, a new Constitution was drafted. The preamble was again longer than the previous one, praising the achievements of the revolution and stating the purpose of the new Constitution as being "for the period of transition to socialism on a national scale"[33].

The 1980 Constitution was a mirror image of a Soviet Union style constitution. It explicitly stated, "The Socialist Republic of Vietnam is a state of proletarian dictatorship" (Art. 2). Further, it speaks of the "collective mastery" of the working class, the collective peasantry and the socialist intelligentsia (Art. 3). For the first time the Constitution contained a provision on the role of the Communist Party of Vietnam as the only political party (Art. 4). The party was only limited insofar as "its organizations [were to] operate within the framework of the Constitution" (Art. 4, Par. 3). Since the whole Constitution was structured around the leading position of that party, the limitation was not recognizable.

33 Preamble of the 1980 Constitution, 16. Paragraph.

Article 14 stressed the fraternal friendship with other socialist countries, namely the Soviet Union, Laos and Kampuchea. With regard to the economic system, Article 15 provided that the country was "directly advancing from a society in which small-scale production predominates to socialism, bypassing the stage of capitalist development…"

One can find a reference to law governing in Article 12, saying, "the state manages society according to the law and constantly strengthens the socialist legal system". However, this did not introduce the rule of law but rather manifested the rule by (or through) laws coming from the party leadership.

Renovation period

After the dissolution of the Soviet Union and the entire eastern bloc, which assisted the poor country to a large extent, Vietnam had to go its own way. In 1986, the Sixth Party congress introduced the reform policy called *Doi Moi* ("renovation")[34]. Although this has been misunderstood by the West as a Vietnamese version of perestroika and glasnost, this policy led to dramatic changes and improvements. The main feature was a complete change in the economic system, in particular in the agricultural sector that was re-privatised. Subsequently, other parts of the economy were privatised. Initially private businesses were allowed and step-by-step achieved equal recognition with state enterprises.

The need for the new constitution emerged when the first results of the renovation policy became evident. By the end of the 1980s, the privatization of agriculture – at that time more than 80% of the GDP – led to an enormous increase in food production and stabilized the food situation. Farmers were obliged to pay a land rental by using their products (mainly rice) as a form of land use tax. The State then planned the distribution of this food to remote areas where local production was much lower. The prices for these staple food products were fixed at a low level, by state authorities.

However, agriculture managed to produce substantially more than was required for taxation. This additional outcome inspired the very creative and industrious Vietnamese people to start selling it in local markets and later to wholesalers, who took it to the cities where demand was greater than local farmers could produce. This created a fast growing retail trade under market economy conditions: prices were bargained and not determined by the State. Thus, a private economic sector began to develop.

As was common practice in many socialist countries, new constitutions were drafted at shorter intervals and not just after a completely new beginning, such as in Germany after World War II. The 1992 Constitution is clearly the farewell to the former constitutional systems and the 1980 Constitution in particular. The latter explicitly prescribed a centrally-planned command economy (Art. 15 et seq., 1980 Constitution) where even small traders

34 Literally, *Doi* means "to change, to alter" see Online Dict.: http://vdict.com/đổi,2,0,0.html; *Moi* means: "new, fresh" – see Online Dict.: http://vdict.com/mới,2,0,0.html; accessed on Feb. 23, 2008.

and handicraft workers needed to integrate into collective production systems (Art. 24, 1980 Constitution).

New developments in the late 1980s, the successful enhancement of food supply and the dissolution of the 'Council of Mutual Economic Assistance' (COMECON) in the Soviet Union, dramatically contradicted the system prescribed in the 1980 Constitution. That was the motivation for completely overhauling the Constitution in order to adjust the legal fundamentals to the new situation and to pave the way for new opportunities, both economically and politically. The major reason for a revision of the Constitution was the conviction that the economic system needed to be thoroughly overhauled. Thus, the most dramatic changes were in Chapter II where the centrally planned command economy was abolished and a more diversified system introduced. Pursuant to Article 15, Par. 1, "the state promotes a multi-component commodity economy functioning in accordance with market mechanisms". And Article 16 states that: "The aim of the State's economic policy is to make the people rich and the country strong".

The 1992 Constitution was adopted by the National Assembly on April 15, 1992. It has been amended once, at the end of 2001, in order to make adjustments reflecting the very fast development in the second part of the 1990s. The amendment also served the purpose of preparing for more changes to come, such as the conclusion of bilateral trade agreements with a number of western countries and accession to the World Trade Organisation[35].

The amendment to the Constitution was even more progressive by directly stipulating that, "the State develops the socialist-oriented market economy" (Art. 15, Par. 1 as amended in 2001). Also, the Tenth Party Congress in 2006 praised the development of the private economic sector as the "most striking success"[36].

III. Making of the Constitution

The 1992 Constitution

The 1992 Constitution was prepared over a period of two years after the "Committee for the Amendment of the 1980 Constitution" was set up by the National Assembly in June 1990[37]. There were reportedly long debates as to the role of the party and the economic system within the party organizations and also in the National Assembly's deliberations[38]. Since the Fifth Party Congress in March 1982, the pure socialist ideology regarding the

35 The BTA with the U.S. was negotiated in 1999 – 2001 and became effective on December 10, 2001. On January 11, 2007, Vietnam became the 150th member of the WTO.

36 *Dinh Van An*, "Further developing various economic sectors and forms of production and business organizations", in: Vietnam Law & Legal Forum Online at: http://news.vnanet.vn/vietnamlaw/Reports.asp?CATEGORY_ID=1&NEWS_ID=1546&SUBCATEGORY_ID=6, accessed on Feb. 23, 2008.

37 *Alice Erh-Soon Tay / Guenther Doeker-Mach*, (FN4), p. 45.

38 *Alice Erh-Soon Tay / Guenther Doeker-Mach*, (FN4), p. 46.

economy has been challenged more openly[39]. The reformers called for a separation of the party from day-to-day management of the State - which should be implemented through proper legislation[40]. However, the decisive step toward the renewal was the Sixth Party Congress held in Hanoi from December 15 – 18, 1986. The Party decided to change its "line of thinking and to take a realistic approach"[41]. Such complete renovation requires proper reflection in the Constitution and the law. Since the 1980 Constitution, in particular its Chapter II on the Economic System, did not correspond with the new party line in this regard, the need to revise the Constitution became evident.

After intense deliberations, this Constitution was adopted by the National Assembly of the Socialist Republic of Vietnam on April 15, 1992.

The Amendment 2001

For the first time in Vietnam's constitutional history, this fundamental law of the State was amended in a proper legislative process, according to its Art. 147, instead of writing a completely new constitution.

Slowly in 1998/99 and more openly in 2000, officials and academics started discussing the need for an adjustment to the Constitution to align it with the rather fast changing reality, in particular in the economic sector. There was a lot of talk about enshrining the rule of law and market economy in the Constitution, streamlining the state structures to create more legal certainty and preparing for the standards required for bilateral trade agreements with western countries and membership of the World Trade Organisation. Naturally, there was also strong concern by traditionalists among the officials who considered that these changes would endanger the "socialist path"[42].

On June 29, 2001, the National Assembly established a "Committee for Drafting of Amendments and Supplements to a Number of Articles of the 1992 Constitution" headed by the Chairman of the National Assembly, Nguyen Van An[43]. On August 15, 2001, the proposed amendments were made public by the Chairman who called for public opinions and comments from the general population[44]. In the following months, the country saw an intense debate in newspapers and innumerable seminars, workshops and conferences.

Finally, on December 25, 2001, the National Assembly plenum adapted the amendment which was promulgated on January 7, 2002. The amendment became effective the next

39 See: Circular No. 3831/TP of June 11, 1982 by Minister of Justice "Concerning some immediate work to be done by the Judiciary Sector to implement the 5th Party Congress Resolution".

40 *John Gillespie*, (FN 26) at p. 341.

41 See: Report in Vietnam News from April 15, 2006 at: http://vietnamnews.vnagency.com.vn/showarticle.php?num=01POL150406, accessed on Feb. 29, 2008.

42 http://vietnamnews.vnagency.com.vn/showarticle.php?num=01POL150406, accessed on Feb. 23, 2008.

43 Resolution of the National Assembly *43/2001/QH10.*

44 Nhan Dan (The People Daily Newspaper) dated Aug. 16, 2001 at p. 1-2.

day on January 8, 2002[45].

At present, there is a serious discussion on further amending the Constitution, in particular with regard to the judicial system and the introduction of a mechanism for constitutional review. This is expected to be completed in 2009 and definitely before the next Party Congress[46].

IV. General Overview

When reference is made to 'the Constitution' in the following chapters, it always means the 1992 Constitution as amended in 2002.

According to its preamble, the 1992 Constitution is a revised version of the previous one dating from 1980. But this preamble is only one third of the length of its predecessor. In earlier cases, it praised the victorious revolution and described all its achievements in detail, whereas the 1992 Constitution's preamble simply mentions the most important steps starting with the foundation of the Party, the Declaration of Independence, the victory in Dien Bien Phu and the liberation of the south leading finally to reunification. It explicitly refers only to two dates: the Declaration of Independence on September 2, 1945 and renaming of the country to Socialist Republic of Vietnam on July 2, 1976.

In its second half, the preamble immediately refers to the Fourth Party Congress of 1986 and its decision to introduce the reform policy, *Doi Moi*, describing it as "a comprehensive national renewal". Further on, it says that, "the National Assembly has decided to revise the 1980 Constitution", although one can safely assume that the Party had given that order according to its leading role.

The preamble also describes the function of the Constitution, mainly by listing the chapters of the document. Unlike in the 1980 Constitution's preamble[47] it now "institutionalizes the relationship between the Party as leader, the people as master and the State as administrator". That indicates a more rule-based approach with the new Constitution, which now provides the legal foundation for the existence and role of the Party. This corresponds with the provision that "all Party organizations operate within the framework of the Constitution and the Law" (Art. 4, Par. 2).

Finally, the preamble mentions Marxism-Leninism and Ho Chi Minh's thought as the state ideology, whereas its predecessor referred only to Marxism-Leninism. That indicates two changes. Firstly, the leadership carefully began to depart from the pure communist ideas of Marxism-Leninism, since they were recognized as inadequate in the fast changing world

45 Art. 3 of the Resolution of the National Assembly *51/2001/QH10* dated Dec. 25, 2001, Cong Bao (Official Gazette) 2002 (No. 9 – 10) at p. 516 – 521.

46 Interview with *Pham Quoc Anh*, President of the Vietnam Lawyer's Association on Feb. 28, 2008.

47 In the 1980 Constitution the wording was: "specifies…"

of the mid-1980s. Secondly, it was time also to incorporate into the nation's ideology, the views of the national hero who had specific Vietnamese views about independence and running an agricultural state.

There is an interesting comparison to the Chinese Constitution, which also refers to the thoughts of Mao Zedong and Deng Xiaoping's theory[48]. That shows a willingness to adjust the ideology of Marx and Lenin by including references to national leaders who had a strong impact on their countries' political development. And it opens the door to deviate further from the pure communist ideology which proves not to function in reality.

This Constitution is officially regarded as a continuation of the 1980 Constitution in a revised form[49]. However, there are a number of significant changes although the order of chapters and the number of articles are the same.

From a formal point of view, it further develops the State's foundation but it is also substantially a new beginning. The fact that Vietnam chose to create a completely new document indicates the depth of the change, which has occurred during the renovation period that had started with the *Doi Moi* policy in 1986 and continues to this day[50]. There are now too many alterations and new expressions in the Constitution to call this Constitution only an updating of the 1980 Constitution[51].

The Constitution is structured into twelve chapters, beginning with the political system and the economic system. The country is now "a law governed, socialist state of the people, by the people and for the people" (Art. 2, Par. 1) and not a "proletarian dictatorship" anymore, as in Article 2 of the 1980 Constitution. Interestingly, the phrase "of the people, by the people and for the people" comes from a speech by US President Abraham Lincoln[52]. As this phrase was incorporated into the Constitution in 1992, it indicates a new beginning.

The Constitution "is the fundamental law of the State and has the highest legal effect. All other legal documents must conform to the Constitution." (Art. 146). Thus, according to its own suggestion, the Constitution can be regarded as directly applicable law.

V. System of Government

The Socialist Republic of Vietnam maintains a parliamentary form of government with the President as the head of State, the Prime Minister elected by parliament as the head of

48 See par. 7 of the Preamble of the Constitution of the Peoples' Republic of China as amended on March 14, 2004.

49 See par. 4, last sentence of the Preamble of the 1992 Constitution.

50 *Otto Depenheuer*, Die Vietnamesische Verfassung vom 15. April 1992 (The Vietnamese Constitution of April 15, 1992) in: Jahrbuch des Öffentlichen Rechts (Yearbook for Public Law) 1997, p. 675 – 698 at p. 676.

51 *John Gillespie*, (FN 26) at p. 343.

52 http://www.dadalos-d.org/deutsch/Demokratie/Demokratie/Grundkurs1/Material/zitate.htm , accessed on February 20, 2008

the Executive, the President of the Supreme People's Court heading the judiciary, and the National Assembly. As the country follows democratic centralism, the regional and local structures are derived from those at the national level (Art. 6, Par 2).

Previously, the system followed the Leninist principles of a State Council as the legislature and the Council of Ministers as its executive organ. There was too much overlapping as Party officials held government positions and this often paralysed the functioning of the state apparatus[53].

The new Constitution brought about both structural and functional changes and greater separation of powers. A member of the Standing Committee may not hold any government office (Art. 90, Par. 2, Sentence 2). Together with a relatively clear distinction of duties between the National Assembly and the Government, these provisions aim at enhancing the efficiency and professionalism of state management.

The Communist Party of Vietnam

The exclusive role of the Communist Party of Vietnam (the Party), is constitutionally safeguarded in Article 4, stipulating that the Party "is the force leading the State and society". This provision lays the fundamental principle according to which the Party is involved in every aspect of the life of the nation. Unlike the 1980 Constitution however, the formulation now is not anymore "the only force".

Despite the Party's dominant position, all Party organizations have to obey the Constitution and the law (Art. 4, Par. 2). That might be seen as a contradiction, since in a single-party state the same party determines what the law should be[54]. But again it shows dedication to becoming a law-governed country where the law-making process is more transparent and carried out by parliament, instead of a directly party-governed state[55].

As with all communist or socialist parties, the Party has three major organs - the Politburo, the Central Committee and the Party Congress[56]. The Politburo is the core group of Party officials who provide the guidelines. The Central Committee is the main organizational body of the Party and has a number of commissions headed by party-employed secretaries. The current leader of the Party is the Secretary General of the Central Committee, Nong Duc Manh, who was previously the Chairman of the National Assembly[57].

There is no formal legislation on the structure and functioning of the Party, except for the cited provision in the Constitution (Art. 4). It has its own statutes (rules). Yet the Party has its structures at all levels of state government, in all courts and state owned enterprises and

53 *Alice Erh-Soon Tay / Guenther Doeker-Mach*, (FN 4), p. 49.
54 *John Gillespie* (FN 26) at p. 345.
55 See: Documents of the 8th Party Congress (National Politics Publishing House, Hanoi, 1996) at p. 61.
56 See Statutes of the CPV, Art. 9 at: http://coombs.anu.edu.au/~vern/van_kien/statute.txt, accessed on Feb. 26, 2008.
57 http://www.britannica.com/eb/topic-1105290/Nong-Duc-Manh

other state agencies (e.g. universities). Everywhere, there is at least a party secretary who observes the performance of each unit, gives directives and makes reports to the Party[58]. According to Art. 41 of the Party Statutes, "the party leads the state and political and mass organizations through its political platform, strategy, policies, and lines; by its ideological tasks, organizations, and cadres; and by its supervision and control".

This control mechanism is maintained through power to nominate key personnel and the coordinating function of the Commission for Internal Affairs of the Central Committee[59]. Article 10, No. 1 of the Statutes of the Party stipulates that "the party's organizational system is set up in accordance with the state organizational system". It is in fact a parallel structure alongside the government system, which gives the constitutional order of Vietnam the character of a dual state[60].

State President

The President of the Socialist Republic of Vietnam is the head of the State and represents the country internally and externally (Art. 101). He is elected by the National Assembly from among its members, has the same tenure as the National Assembly, acts as the Commander-in-Chief of the armed forces and is the Chairman of the National Defence and Security Council (Art. 102, 103, No. 2). In terms of government, his main duties are to promulgate the Constitution and other laws (Art. 103, No. 1), as well as to propose to the National Assembly, the election and removal from office of the Vice-President, the Prime Minister, the President of the Supreme People's Court and the Head of the Supreme People's Office of Supervision and Control (Art. 103, No. 3).

Thus, the President is more than just a figurehead. His position can be compared to that of presidents of some western countries e.g. the Federal Republic of Germany[61].

In Vietnam, the position of the State President has changed significantly as compared to the 1980 Constitution. The aim was to structure state organs similar to those of most other modern states. This demonstrates another example of the tendency to turn away from classical socialist structures of state management.

Parliament

Chapter VI of the Constitution (Articles 83 – 100) defines Vietnam's parliament, called the National Assembly. It is referred to as the "highest representative organ of the people and

58 See: Statutes of the CPV, Art. 10 and 41 - 43 at: http://coombs.anu.edu.au/~vern/van_kien/statute.txt, accessed on Feb. 26, 2008.
59 *John Gillespie,* (FN 26), at p. 344;
60 *Otto Depenheuer,* (FN 31), at p. 677
61 Art. 60 and Art. 82 of the German Basic Law

the highest organ of State power" (Art. 83, Par. 1). The tenure of the National Assembly is five years and it holds two plenary sessions per year. In between these sessions, the Standing Committee of the National Assembly acts as its permanent representative and comprises the Chairman of the National Assembly, the Vice-Chairmen and selected members (Art. 90). According to Article 7, Par. 1, the electoral principles for both the National Assembly and the People's Councils at lower levels are universal, equal, direct and secret suffrage. All other details regarding the National Assembly, such as the electoral procedure and the number of deputies, are to be established by law (Art. 85, Par. 2). They are dealt with in the Election Law from 2001[62].

Pursuant to this law, the National Assembly comprises 450 members to be elected in constituencies of three to five deputies. At least 25% of the total number of members are full-time deputies, whereas the other deputies work on an honorary basis and convene only twice per year for the plenary sessions of the National Assembly in the capital city, Hanoi. All candidates must be approved by the Fatherland Front, which derives its authority from the Constitution itself (Art. 9). Officially, the law allows every Vietnamese citizen to run for a seat in parliament but in reality more than 90% of candidates are members of the Party and the remainder conform with the overall policies of the Party.

The National Assembly's plenum deliberates on important issues of the nation, as enumerated in Article 84 Nos. 1 – 14. It has the exclusive authority to make and amend the Constitution and ordinary laws while the Standing Committee can enact so-called decree-laws after the plenum has entrusted the committee by specifying the relevant matters[63].

The authority to propose a bill is given to all central state organs (Art. 87, Par. 1) although most legislation is drafted by the relevant ministry in charge of the issue and sent to the National Assembly for approval. Increasingly, those drafts are heavily debated in parliament during its plenary sessions and sometimes even sent back to the Government for revision. This is partly due to the fact that the part-time deputies lack knowledge and background information about legislation and also because of differing points of view which are frankly articulated. Often the sessions are extended for a few days in order to complete the deliberations and pass the law.

Over the past fifteen years, the National Assembly has developed from a body that merely rubber-stamped laws into an increasingly self-confident state organ. It is striving to fulfil its functions as the people's representative and the law-making body. Although around 90% of its deputies are members of the Party, draft laws approved by the party organs are not necessarily passed without any changes. This is even more the case when personnel matters are decided. The separation of powers is not yet complete, but a kind of power-sharing is

62 Law on the Election of National Assembly Deputies, No. 31/2001/QH10, dated Dec. 25, 2001, Cong Bao (Official Gazette) 2002 (No. 9 – 10) at p. 540 – 543.

63 The National Assembly works out and decides on a programme for making those decree laws (Art. 84, No. 1); the competence of the Standing Committee is provided for in Art. 91, No. 4.

occurring while the National Assembly is further developing into a fully-fledged legislative body[64].

Nowadays parts of the plenary meetings, in particular the question and answer sessions, are broadcast live in order to create more transparency and let people follow the performance of their deputies. Before and after the plenary session, deputies have to conduct public meetings in their constituencies to listen to the complaints and opinions of the people and to explain the decisions of the parliament[65]. There is a sense of basic democracy in this system, aimed at monitoring and channelling the ideas and concerns of the population.

The National Assembly still needs to improve its professional skills. The Office of the National Assembly serves both as an organisational unit and as technical experts, with a limited number of staff[66]. It also has to manage public elections not only to the National Assembly but to the People's Councils on local levels as well. In light of these comprehensive tasks it is obvious that the National Assembly struggles to cope with its duties under the Constitution.

Government

The governmental structure is that of a centralized system with the Prime Minister at the head of the executive branch. He is elected by the National Assembly from amongst its members and appointed by the President. The ministers, their vice-ministers and the heads of a number of other central agencies such as the Supreme People's Court, the Supreme People's Procuracy or the Central Bank, form the cabinet[67].

The government does the day-to-day work of managing the country, and formulating details of policies endorsed by the Party or the National Assembly. It has professionalized substantially since the renovation process began. However, on important issues it does not have a completely free hand but needs to seek the consent of the Party and parliament.

The country is organizationally structured into provinces, and cities with the status of a province (Art. 118). Article 118 gives specific descriptions of various units at the provincial and district level. Basically, provinces are divided into districts or towns, whereas the districts are divided into communes and villages. On these two levels of regional and local government, there are People's Councils (Art. 119) and People's Committees as the executive organ of the Council (Art. 123). Thus, it is a mirror image of the central level

64 *Ngo Duc Manh*, "Some Thoughts on the Legislation by the National Assembly" (1994) (4) Nha Nuoc va Phap Luat (State and Law) at p. 8.

65 Law on the Organization of the National Assembly , No. 30/2001/QH10 dated Dec. 25, 2001, Cong Bao (Official Gazette) 2002 (No. 9 – 10) at p. 521 – 539.

66 See: www.na.gov.vn/htx/English/C1330, accessed on March 30, 2008.

67 Law in the Organization of the Government, No. 32/2001/QH10 dated Dec. 25, 2001, Cong Bao (Official Gazette) 2002 (No. 9 – 10) at p. 543 – 556.

where the National Assembly is the elected body that constitutes the executive by electing the Prime Minister and his ministers.

The details are determined by law as prescribed in Art. 118, Par. 5[68]. At present, the country is divided into 57 provinces and 4 cities under central rule equivalent to a province (Ha Noi, Ho Chi Minh City, Hai Phong and Da Nang). Already according to the provisions of the Constitution, there are a number of overlapping functions and responsibilities. The People's Council is elected by the citizens and is "accountable to them and to the superior State organs" (Art. 119). The council of a district is obliged to follow the directive of the superior State organ (Art. 120), which is the People's Committee of the province. What is more, the "chairman of a People's Committee can suspend wrong decisions of People's Councils of a lower rank and at the same time propose to the People's Council at his own level to annul such resolution" (Art. 124, Par. 4). Thus, the executive branch of the upper level supervises the performance of a lower ranked elected body. The problem is how and by whom is decide,what a "wrong decision" is. Unlike in other countries, that has not yet been challenged and there are neither regulations nor any court cases on these issues.

All government ministries have their branch offices at regional and local levels to coordinate with the relevant People's Committees - a principle which ensures that power is centralised. On the other hand, however, this leads to ongoing disputes about the authority of the various actors, which are not clearly specified by any regulations[69].

Judiciary

Chapter X of the Constitution is dedicated to the People's Courts and the People's Office of Supervision and Control. Their duty is to "safeguard the socialist legality" and also the "lives, property, freedom, honour and dignity of the citizens" (Art. 126).

The court districts correspond with the administrative units from the district level upwards. At the local level the courts of first instance are the district courts; the second level are provincial courts (one for each province) with the Supreme People's Court as the top level. As well, there are Military Tribunals "and other tribunals established by law".

The President of the Supreme People's Court is elected by the National Assembly (Art. 84, No. 7) and he "is responsible and makes his reports to the National Assembly (Art. 135, Par. 1). The local courts are answerable to the respective People's Council (Art. 135, Par. 2) whereas the Supreme People's Court "supervises and directs the judicial work of the local People's Courts and Military Tribunals" (Art. 134 Par. 2).

On the other hand, Article 130 stipulates that "during a trial the judges and assessors are independent and shall only obey the law". However, in light of the aforementioned

68 Law on the Election of People's Councils No. 12/2003/QH11, dated Nov. 26, 2003.
69 Law on the Organization of the Governement (Fn. 68).

accountabilities and directive authorities it cannot be concluded that the judiciary is truly independent. Furthermore, the Supreme People's Office of Supervision and Control[70] has been assigned to "control the judiciary"[71]. That also reduces the prospect of a truly independent judiciary.

Nevertheless, the Constitution guarantees some important judicial basic rights, such as the right to defence (Art. 132, Par. 1) and the presumption of innocence (Art. 72, Par. 1). Both are significant changes for the better compared to the 1980 Constitution. Yet, a constitutional principle of a fair trial and a right to judicial review and appeal is not specifically mentioned. However, the presumption of innocence implies at least, the basic idea of a fair trial, whereas the right to appeal can be derived from procedural laws.

It can therefore be said that the basic principles for dispensing justice are enshrined into the Constitution, although the judiciary is not completely independent.

VI. Fundamental Rights

For the first time in Vietnamese constitutional history, Article 50 of the 1992 Constitution declares, "human rights such as political, civil, economic, cultural and social rights are respected". In total, thirty-three articles refer to citizen's rights, enshrining the whole list of universally accepted human rights. The understanding of the concept of human rights, however, is somewhat different from that of the West. According to Vietnamese thinking, the fundamental rights are related to the right of all nations to freedom from any interference by other countries. Moreover, citizen's rights "are inseparable from his duties" (Art. 51, Par. 1) and "the citizen must fulfil his duties to the State and society" (Art. 51, Par. 2).

That shows a different approach to the western concept of fundamental rights which are guaranteed independently of any obligation. The fate of society and the country is more important than individual rights or at least of equal importance. Rights are granted only on the basis of reciprocity and any opposition is seen as acting against "the people" and the motherland[72]. It is the state – and behind it the Party – which grants rights but they are not derived from human dignity as a principle of natural law[73].

Property rights are guaranteed in the Constitution, except for land ownership (Art. 17, 18 and 58) and Vietnamese citizens enjoy the right to freedom of enterprise (Art. 57). Since the 2001 amendment all sectors of the economy, i.e. state-owned enterprises, collective

70 Sometimes it is referred to as the "Procuracy" because of its function to initiate public prosecution. But it also has the duty to supervise and control obedience to the law by all state organs and to ensure a serious and uniform implementation of the law (see Art. 137, Par. 1).

71 Art. 137, Par. 1 was amended in this respect in 2002.

72 *Ngo Ba Thanh*, (FN 17) at p. 108.

73 *Mark Sidel*, (FN 12) at p. 375

sector and private individual economy, are regarded equal under the Constitution (Art. 16 as amended in 2001). All rights relating to economic activities are generally observed and incorporated in all related laws.

Attention is paid to the family as "the cell of society"; the State protects marriage, which is to be freely contracted, and family with equality between husband and wife. (Art. 64, Par. 1-3). At the same time, "children and grandchildren have the duty to show respect and look after their parents and grandparents" (Art. 64, Par. 4). That makes the traditional values of family a constitutional principle.

However, other citizen's rights are not as well protected in daily life. Despite provisions in Article 69 of the Constitution giving the right to freedom of opinion, speech and press, the right to assemble, form associations and hold demonstrations, these rights do not prevail in reality since they are granted only "in accordance with the law". And there are numerous provisions limiting the exercise of these rights, mainly in sub-laws or ordinances which leave large discretion to the local authorities[74].

Although the Constitution provides for a presumption of innocence (Art. 72) and guarantees the right to defence, court trials are often only about the sentence to be imposed rather than an objective procedure, hearing and judging of evidence.

VII. Constitutional Jurisprudence

The obligation of safeguarding the Constitution is given to the National Assembly. Pursuant to Article 84, No. 2, its obligation is "to exercise supreme control over conformity to the Constitution…". Such conformity is required in Article 146, Par. 2 for all other laws and regulations. However, there is no further provision as to procedures for challenging laws or regulations on the grounds that they may be unconstitutional and the consequences if a law or regulation is found to be unconstitutional. No case has been reported yet.

The power to interpret the Constitution is given to the National Assembly's Standing Committee (Art. 91, No. 4). How this power is to be exercised is not spelt out in the Constitution itself nor in any other law or ordinance. Neither the lower courts nor the Supreme People's Court have opined on constitutional provisions and principles in their judgments.

This is in line with the widely held view that law cannot be properly implemented unless detailed regulations are issued by the relevant government agency. To a certain extent, this is due to the structure of the Vietnamese language which has limited ability to feature abstract ideas or notions. The application of an abstract legal principle in a specific single case is therefore uncommon and thus, laws, ordinances and decrees need implementing regulations for their administration, which are in many cases issued months after the law

74 *Ngo Ba Thanh*, (FN 17) at p. 108

comes into force. This gives the executive, particularly at the provincial and local level, wide discretion in applying the law.

For a number of years some academics have discussed an effective mechanism for ensuring compliance with the constitutional order. After the Tenth Party Congress, the Central Committee decided to establish such an instrument and ordered the National Assembly to conduct the necessary research and prepare legislation[75]. Consequently, the National Assembly resolved on January 17, 2008 to establish a commission to carry out this function. This seven-member commission is headed by the Vice-Chairman of the National Assembly and former Minister of Justice, Uong Chu Luu, and includes the Chief Justice, the current Minister of Justice as well as specialized technical experts[76].

It is not likely that this institution will be a fully-fledged Constitutional Court like those in European or Latin American countries. Nevertheless, it provides evidence that Vietnam is, at albeit at a very slow pace, approaching a true rule of law state.

VIII. Legal System and Rule of Law

Vietnam follows the civil law system, which it inherited from the French colonial rulers. There is also a longer tradition of written laws developed under East Asian (mainly Chinese) influence. Between the end of World War II and the beginning of the Doi Moi era, it had a Soviet style legal system which was also based on written statutes. A large number of law students were educated in Eastern Germany where they learned the traditional, continental European legal thinking.

Since the renovation period, the country has received substantial assistance in drafting laws, from Japanese experts and numerous other donors, from civil law countries as well as from common law backgrounds. The fact however, that there was a historical influence from East Asia, that many lawyers were trained in the former Soviet Union and former German Democratic Republic and the practice of referring to statutes rather than to preceding cases, is evidence that Vietnam adheres to the civil law system. Interestingly, the 1995 Civil Code, for instance, shows many similarities to the Civil Code of Germany.

According to Article 2 of the Constitution, Vietnam is "a law governed socialist state of the people, by the people and for the people". The concept of "a law governed socialist" was introduced in the 2001 amendment and can be seen as a confirmation that the country subscribes to the rule of law. After enacting a huge number of modern laws such as the Investment Law, the Enterprise Law, the Labour Code and the Civil Code in the second half of the 1990s, together with many regulations for their implementation, Vietnam became more and more legalistic. Pursuant to Art. 12, Par. 1 "building a law-governed socialist State of Vietnam is the responsibility of all agencies, organizations and citizens".

75 Documents of the 10th Party Congress (National Politics Publishing House, Hanoi 2006) at p. 127.
76 Resolution of the Party Committee of the National Assembly, No. 95/DD/QH12, dated Jan. 17, 2008.

Nevertheless, in reality, this is still not fully implemented since the Party decides what the law should be according to its constitutional task of leading the State and society (Art. 4, Par. 1)[77]. But the Party is definitely the driving force of modernization and advancement towards a stronger, rules-based system[78].

When the aforementioned phrase was amended, there was some discussion as to whether it truly means the rule of law or only parts of this principle. That depends firstly on the translation of the original Vietnamese words: *pháp quyền xã hội chủ nghĩa*. *Pháp quyền* means originally "jurisdiction"[79] whereas *xã hội chủ nghĩa* means "socialist" or "socialism"[80]. Thus, the full term literally means "socialist jurisdiction" and that has been interpreted by a number of scholars as "socialist Rule of Law"[81].

Secondly, one can speculate on whether this unclear formulation was intentional or just by chance, as it could be used to restrict the pace and amount of change. Given the wording of the wider Constitution, where reference is made to socialism in a number of articles, and the single party system or Marxism-Leninism directly, it possibly does not mean a complete rule of law system as understood by western scholars. However, it does indicate that the country commits itself to a rule-based system as opposed to an oligarchy by top party officials.

In 1986, the Sixth Party Congress delegates addressed this issue by saying:

> "The management of the country should be performed through laws rather than moral concepts. The law is the institutionalisation of Party lines and policies and a manifestation of the people's will; and it must be applied uniformly throughout the country. To observe the law is to implement Party lines and policies. Management by law requires attention to be paid to law making. It is necessary to step by step supplement and perfect the legal system so as to ensure that the State machinery can be organised and operate in accordance with the law."[82]

This statement indicates only an intention to switch to rule by law while the content of the laws was determined by the Party. At this time leading up to the drafting of the 1992 Constitution, such a conclusion may have been valid. However, would it still be valid a decade later when this Constitution was amended in 2001? The introduction of the terms "*pháp quyền xã hội chủ nghĩa*" discussed above, suggests a determination to move towards a rule of law system rather than cementing in place an interpretation from the past. As can

77 *John Gillespie*, (FN 26) at p. 345.

78 *Truong Trong Nghia*, "The Rule of Law in Vietnam: Theory and Practice" in "The Rule of Law – Perspectives from the Pacific Rim", *Mansfield Center for Pacific Affairs* (Ed.), 2000, at p. 132/3.

79 See Online Dict.: http://vdict.com/pháp%20quyền,2,0,0.html, accessed on Feb. 23, 2008; the common understanding is that this does not only include the judiciary but the entire legal system.

80 See Online Dict.: http://vdict.com/xã%20hội%20chủ%20nghĩa,2,0,0.html, accessed on Feb. 23, 2008.

81 Interview with Prof. Dr. *Dao Tri Uc*, Director of the Institute of State and Law, Hanoi on Feb. 27, 2008.

82 Sixth National Party Congress Political Report VNA, Dec. 15, 1986, Part 4-5.

be seen from the history described in Chapter II, constitutional legislation in Vietnam is always forward looking and setting the framework for the immediate future.

Although the sole leading role of the Communist Party of Vietnam is still secured within the Constitution, all its organizations must obey this Constitution and the law (Art. 4, Par. 2). That is, in terms of law drafting technique, a contradiction or tension that indicates a transition stage. It might be more "rule by laws" than rule of law at present but the respective provisions hold out prospects for the latter[83]. And it has been mentioned again and again by various scholars, members of parliament and officials alike, that they want to develop a state governed by the rule of law. For the time being it may be a "socialist rule of law" – but it is part of a transition from the rule of the party to governing with the institutions of the law[84].

IX. International Law and Foreign Relations

According to Article 14 the country maintains friendly relations and seeks cooperation "with all countries in the world regardless of political and social system on the basis of respect for each other's independence, sovereignty and territorial integrity, non-interference in each other's internal affairs, equality and mutual interests". This is a significant change compared with the previous 1980 Constitution where the same Article 14 read: "The Socialist Republic of Vietnam continues to strengthen its fraternal friendship, militant solidarity and cooperation in all fields with the Soviet Union, Laos, Kampuchea and other socialist countries, on the basis of Marxism-Leninism and proletarian internationalism". Remarkably, China was not mentioned.

This new provision was necessary to open the way for the normalization of relations with western countries and also some neighbouring countries that have always strongly opposed communism. ASEAN, the Association of Southeast East Asian Nations, was founded in 1967 as a grouping of non-communist states to prevent the further expansion of communism in Southeast Asia[85]. After changing its foreign policy in the late 1980s and withdrawing from occupied Cambodia, the Socialist Republic of Vietnam became the sixth member of ASEAN in 1995. Since then the country has joined many international (mainly UN) organizations and recently became a non-permanent member of the UN Security Council[86].

Vietnam is party to a number of international agreements such as the International Covenant on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Racial

83 *Otto Depenheuer* (FN 31) at p. 677; *Ngo Ba Thanh*, (FN 17) at p. 111 – 112.
84 *Alice Erh-Soon Tay / Guenther Doeker-Mach*, (FN4), p. 48.
85 *Allan Goodman*, "Vietnam and ASEAN: Who would have thought it possible" (1996) 36 (6) Asian Survey at p. 594/5.
86 See: "VN's new position in international arena" at: http://www.chinhphu.vn/portal, accessed on Feb. 23, 2008

Discrimination[87], the Convention on the Elimination of all forms of Discrimination against Women, and the Convention on the Rights of the Child. It became the 150th member of the World Trade Organization WTO on December 11, 2006 and has concluded a number of bilateral trade and investment treaties.

However, there is no specific constitutional provision dealing with the incorporation of international law into the domestic legal system. Article 84 No. 13 specifies the powers and obligations of the National Assembly regarding external relations. According to this, parliament has the power "to ratify or denounce international treaties". Consequently, the Constitution allows for the application of international agreements as soon as they have been ratified by the National Assembly and are promulgated by the State President.

The Constitution does not contain any provision on the applicability of general international law. Thus, the question remains as to how a conflict between international law (be it general customary law or a particular covenant) on one hand and the Constitution and national law on the other, should be solved and which would prevail.

Another provision dealing with international relations is Article 103 No. 10, which gives power to the State President among others "to negotiate and sign international agreements in the name of the Socialist Republic of Vietnam" and "to submit to the National Assembly for ratification of international agreements". These provisions clearly correspond with those of the National Assembly's competences as elaborated before.

Chapter VIII, Article 112 No. 8, sets out the government's power "to negotiate and sign international agreements in the name of the State of the Socialist Republic of Vietnam, except for cases prescribed in Clause 10 of Article 103; to negotiate, sign, ratify or accede to international agreements in the name of the Government and to direct the implementation of international agreements". This is also in line with the regulations referred to earlier and consistent with the complementary functions of the parliament, president and government.

X. Concluding Remarks

During the relatively short period between unification in 1975 and 1986, a truly communist system was established in Vietnam leading to a disastrous economic situation. With the 1992 Constitution, and more so since its amendment in 2001, the Socialist Republic of Vietnam departed from communism and is now struggling to rhetorically maintain the values of socialism. Even the remaining socialist structures such as state owned enterprises are being adjusted to a market economy which has a "socialist orientation" (Art. 16).

87 All three conventions signed and acceded in 1982 but not ratified yet; see: http://www.unhchr.ch/pdf/report.pdf; accessed on Feb. 23, 2008.

The whole *Doi Moi* policy and the process of renovation, was driven by economic necessities, which were recognized by the extremely pragmatic Vietnamese leaders and people. The accession to the WTO in December 2006 is the culmination of these efforts. Many features of the Constitution and the legal system, shortcomings and contradictions are due to the transitional period in which the country finds itself at present. This transitional phase started in 1986 and will probably continue for another twenty years or more. Given the endurance and single-mindedness of the Vietnamese people, they may accelerate the dynamics of this process.

The current Constitution reflects this period of change as it is a kind of hybrid: introducing a socialist rule of law and a market economy with a socialist orientation and at the same time maintaining the autocracy of a one-party system. It will be interesting to observe how long this dual state can exist and what kind of political system will develop. The signs indicate that it will develop towards a more open system, although it has a long way to go.

XI. Further Reading

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