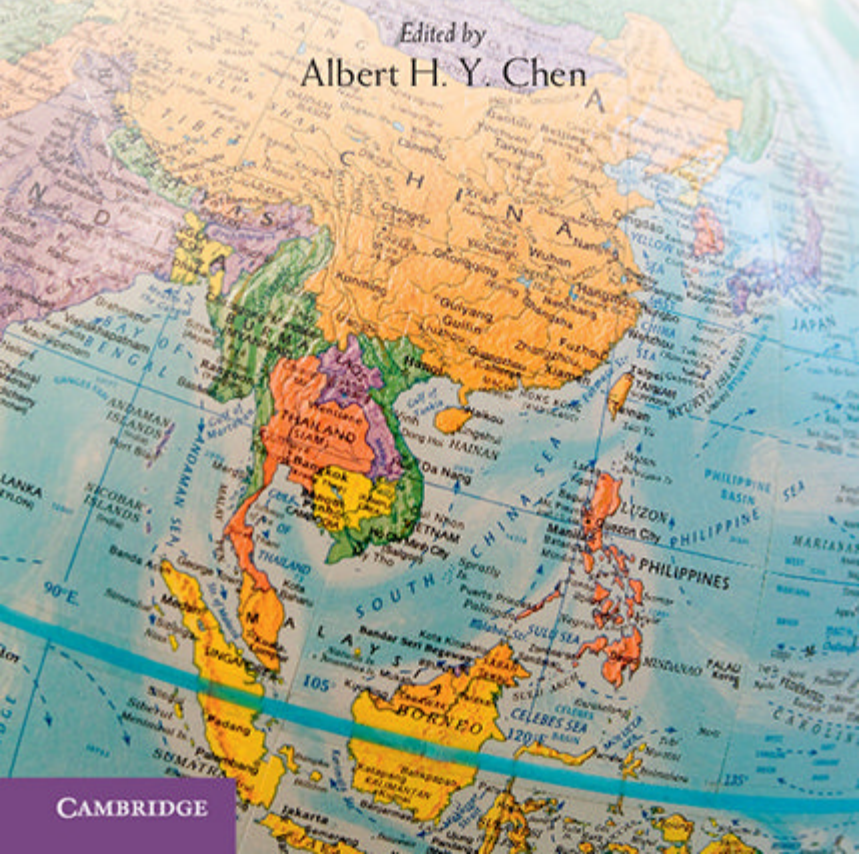
Comparative Constitutional Law and Policy

CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY

Edited by
Albert H. Y. Chen



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CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY

Examining developments in the first decade of the twenty-first century, this authoritative collection of essays studies the evolving practice of constitutional law and constitutionalism in Asia. It provides a comprehensive overview of the diverse constitutional issues and developments in sixteen East, Southeast and South Asian countries. It also discusses the types of constitutionalism that exist and the general trends in constitutional developments whilst offering comparative, historical and analytical perspectives on Asian constitutionalism. Written by leading scholars in the field, this book will be of great interest to students and scholars alike.

Albert H.Y. Chen is Chan Professor in Constitutional Law at the University of Hong Kong.

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ALBERT H.Y. CHEN
University of Hong Kong

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Contributors

Bui Ngoc Son, Lecturer in Law at the Vietnam National University–Hanoi, has published extensively on constitutional law, ancient Chinese political philosophy and the relationship between Confucianism and constitutionalism. He is a PhD graduate of the Faculty of Law, University of Hong Kong.

Johannes Chan, Professor and Dean of the Faculty of Law at the University of Hong Kong and a Senior Counsel, is a leading scholar of constitutional law, administrative law and human rights in Hong Kong.

Wen-Chen Chang, Professor at the College of Law of National Taiwan University, is a leading scholar of constitutional law in Taiwan. In recent years she has published major works of scholarship on comparative constitutional law.

Albert H.Y. Chen, Chan Professor in Constitutional Law, Faculty of Law, University of Hong Kong, specialises in Hong Kong constitutional law, the study of Chinese law from a comparative-law perspective, and legal and political theory.

Surya Deva is an Associate Professor at the School of Law of the City University of Hong Kong. His primary research interests lie in corporate social responsibility, Indo-Chinese constitutional law, and international human rights. His most recent book is the co-edited *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013).

Yash Ghai, Emeritus Professor of Public Law and formerly the Sir Y.K. Pao Professor of Public Law at the Faculty of Law, University of Hong Kong, is a world-renowned scholar of comparative constitutional law in Africa, Asia and the Pacific. He has given advice frequently on constitution-making and constitutional issues in many developing countries.

Tom Ginsburg, Leo Spitz Professor of International Law and Ludwig and Hilde Wolf Research Scholar at the University of Chicago Law School, is a leading authority on international and comparative law, Asian law, and the study of law from the perspectives of political science and economics. He is Co-director

of the Comparative Constitutions Project and a Research Professor at the American Bar Foundation. He was elected to membership of the American Academy of Arts and Sciences in 2013.

Nadirsyah Hosen, Senior Lecturer at the Faculty of Law, University of Wollongong in Australia, specialises in Indonesian constitutional law, Islamic law, and law and religion.

Jongcheol Kim is a Professor of Law at the Yonsei University School of Law in Korea. He has published in Korean and English on constitutional law, administrative law and socio-legal theories.

H.P. Lee, Sir John Latham Chair of Law at Monash University, Australia, is a leading authority on Malaysian and Australian constitutional law.

Raul C. Pangalangan is the George Malcolm Professor of Law and a former Law Dean at the University of the Philippines, where he teaches constitutional law and public international law. He has taught at Harvard Law School as Visiting Professor, and has lectured at the Hague Academy of International Law. He held the Asian Public Intellectual Fellowship in 2012–13. He is currently the Publisher of the *Philippine Daily Inquirer*, the nation's most influential newspaper.

Shojiro Sakaguchi, Professor of Constitutional Law and Director of the Law School at Hitotsubashi University in Tokyo, is a leading scholar of Japanese constitutional law who writes in both Japanese and English.

Cheryl Saunders is a Laureate Professor at Melbourne Law School and founding Director of its Centre for Comparative Constitutional Studies. She is a leading authority on Australian constitutional law and comparative constitutional law, including Asian constitutional law. She is President Emeritus of the International Association of Constitutional Law and a member of the advisory board of International IDEA.

Kevin Y.L. Tan is a leading scholar of constitutional law, legal history and the legal system of Singapore, as well as of comparative law in Southeast Asia. He is currently Adjunct Professor at both the Faculty of Law, National University of Singapore, and the S. Rajaratnam School of International Studies, Nanyang Technological University.

Thio Li-ann, Provost's chair and Professor of Law at the National University of Singapore, is a leading authority on constitutional and administrative law, human rights and international law, with a focus on Asian practice. She was formerly a Nominated Member of the Singapore Parliament (Eleventh Session).

Tu Kai is an Assistant Professor at the Law School at Tsinghua University, Beijing. He teaches comparative constitutional law and legal theory, and is interested in the study of federal and devolved governments.

Wang Zhenmin, Professor and Dean of the Law School at Tsinghua University, is a leading scholar of Chinese constitutional law who writes extensively in both Chinese and English. He is a Vice-President of the Chinese Society of Constitutional Law and a member of the American Law Institute.

Jiunn-rong Yeh, University Chair Professor at the College of Law of National Taiwan University, is a leading scholar of constitutional law, administrative law and environmental law in Taiwan. In recent years he has published major works of scholarship on comparative constitutional law, administrative law and environmental law in East Asia and beyond.

Dae-Kyu Yoon is Professor of Law and Vice-President of Kyungnam University at Seoul Campus. He is a leading authority on law and society in South Korea and on North Korean law, writing in both Korean and English on these subjects. He has served as Director of the Institute for Far Eastern Studies at Kyungnam University, and is a former President of the Korean Law and Society Association.

Preface

This book is a study of constitutional developments and the practice of constitutional law and constitutionalism in sixteen selected Asian countries or jurisdictions in the first decade of the twenty-first century. The objective is to create systematic narratives to document such developments, and to provide comparative, historical and analytical perspectives on various elements of converging or diverging practices and trends of constitutionalism in the jurisdictions concerned. It is hoped that this book will be of interest to scholars and students of comparative constitutional law, comparative politics, and Asian studies, particularly human rights, democracy, legal systems, the rule of law, constitutional adjudication and governance in Asia.

The existing English-language literature on comparative constitutional law, like the literature on comparative law generally, focuses mainly on Europe and North America, and also to some extent South Africa and Japan, but devotes relatively little attention to Asian countries.[1] There do exist some valuable works on constitutional law and constitutionalism in Asia, such as Lawrence Beer (ed.), *Constitutional Systems in Late Twentieth Century Asia* (Seattle: University of Washington Press, 1992), and Cheryl Saunders and Graham Hassall (eds.), *Asia-Pacific Constitutional Yearbooks* (Centre for Comparative Constitutional Studies, University of Melbourne, 1995–9). These works are, however, no longer up to date. More recently, some works have appeared on constitutional courts in Asia.[2] These works focus mainly on constitutional courts and judicial review, and are less concerned with broader issues of constitutional law and constitutional developments. As far as Southeast Asia is concerned, a relevant work is Clauspeter

[1] See, e.g., Norman Dorsen et al., *Comparative Constitutionalism: Cases and Materials*, 2nd edn (St Paul, MN: West, 2010); Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law*, 2nd edn (New York: Foundation Press, 2006).

[2] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003); Andrew Harding and Penelope Nicholson (eds.), *New Courts in Asia* (London: Routledge, 2010); Björn Dressel (ed.), *The Judicialization of Politics in Asia* (London: Routledge, 2012).

Hill and Jörg Menzel (eds.), *Constitutionalism in Southeast Asia* (Singapore: Konrad-Adenauer-Stiftung, 2008). The coverage of that book, however, is limited to Southeast Asian countries.

It is hoped that this present book can contribute to filling a gap in the existing literature, because (1) it is more comprehensive in coverage than existing works, both in terms of the countries or jurisdictions covered and in terms of the constitutional issues and developments covered; (2) it is more up to date than existing works; and (3) it attempts to contribute comparative and theoretical reflections on contemporary constitutional phenomena in Asia.

In this book, apart from Chapters 1, 2 and 17, which are on theoretical, comparative and transnational perspectives, all other chapters are 'country chapters' devoted to describing and analysing constitutional developments in the particular country or jurisdiction concerned. It is hoped that these 'country chapters' as a whole will enable readers to acquire an overall view of constitutional developments in East and Southeast Asia, India and Nepal in the first decade of the twenty-first century. The 'country chapters' are designed not to be too specialised or detailed, but to provide a comprehensive and systematic review of major constitutional developments in the countries or jurisdictions concerned in the first decade of the twenty-first century. Authors of these chapters were invited to cover, as far as practicable, some or all of the following aspects of constitutional development: (1) discussions or proposals regarding, or actual enactment of, in the first decade of the twenty-first century, a new constitution or constitutional amendment, (2) major constitutional-law cases decided by the courts in this period, and the trend, if any, emerging from the cases, (3) major legislative developments in the domain of constitutional law in this period, and (4) major political developments in this period that can inform our understanding of constitutional developments in the country or jurisdiction concerned, such as changes of government, or major political, social or economic events.

Contributors to this book were all invited to attend the Fourth Asian Constitutional Law Forum (4th ACLF) held at the Faculty of Law, University of Hong Kong (HKU), on 16–17 December 2011, and to present their draft chapters as papers for this conference. The manuscripts were then revised, taking into account comments received at the conference, and updated to take into account developments in 2012, and, in some cases, also particularly significant developments in early 2013. The publication of this book would not have been possible without the successful organisation of the 4th ACLF at HKU. I am therefore much indebted to all those who contributed to the 4th ACLF, particularly Professors Jiunn-rong Yeh and Wen-Chen Chang of the College of Law of National Taiwan University, who, as organisers of the 3rd ACLF in Taipei in 2009, passed to me the 'torch' for organising the 4th ACLF; Dean Johannes Chan of our Faculty of Law, HKU, who secured the financial resources for the 4th ACLF; Professor Simon Young, Director of the Centre for Comparative and Public Law (CCPL) at the Faculty

of Law, HKU, who decided that the CCPL would host the 4th ACLF; and, last but not least, Ms Sharron Fast and Ms Flora Leung – our able and dedicated staff at the CCPL – who provided excellent administrative support in planning, organising and managing the conference. I am also grateful to Mr M. Howard-Johnson – JD student and my research assistant in 2012 – for his invaluable editorial assistance in the preparation of the manuscript for this book. May I also take this opportunity to record my deepest gratitude to the contributors to this volume for their willingness to participate in, and their hard work and steadfast support for, both the conference and this book project, and to Ms Finola O'Sullivan of Cambridge University Press for her keen interest in, and kind support for, the present project.

Albert H.Y. Chen

1

The achievement of constitutionalism in Asia

Moving beyond 'constitutions without constitutionalism'

Albert H.Y. Chen

The phrase 'constitutions without constitutionalism' has been used by various authors to describe the state of constitutional law in Africa, the Middle East and Latin America at various points in time.[1] For significant periods, the constitutional circumstances of many Asian countries may also be aptly summarised by 'constitutions without constitutionalism'. Just as in the daily life of individuals, it is relatively easy to say something or make a promise, but more difficult to translate what is said or promised into action and reality, so in the political and legal life of nations, it is relatively easy to make a constitution, but more difficult to put it into practice, to implement it and be governed by it – which is what 'constitutionalism' is about. There is therefore nothing surprising about the phenomenon or 'syndrome' of 'constitutions without constitutionalism', particularly in developing countries to which Western ideas, theories and institutions of constitutionalism have been transplanted in the course of the last two centuries.

As it is by no means obvious or likely that a nation's constitution will be successfully put into practice after it has been enacted, it is indeed right and appropriate to talk of constitutionalism as an 'achievement'. After identifying what he calls the five 'functional characteristics' of constitutionalism, Grimm

[1] See generally H.W.O. Okoth-Ogendo, 'Constitutions without constitutionalism: reflections on an African political paradox', in Douglas Greenberg et al. (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993), p. 65; Atilio A. Borón, 'Latin America: constitutionalism and the political traditions of liberalism and socialism', in ibid., p. 339; Nathan J. Brown, *Constitutions in a Nonconstitutional World* (New York: State University of New York Press, 2002); Asem Khalil, 'From constitutions to constitutionalism in Arab states: beyond paradox to opportunity' (2010) 1(3) *Transnational Legal Theory* 421.

suggests that if 'all these elements are present, we speak of the *achievement* of constitutionalism'.[2] He elaborates:

> Constitutionalism ... deserves to be called an achievement, because it rules out any absolute or arbitrary power of men over men. By submitting all government action to rules, it makes the use of public power predictable ... It provides a consensual basis for persons and groups with different ideas and interests to resolve their disputes in a civilized manner. And it enables a peaceful transition of power to be made. Under favourable conditions it can even contribute to the integration of a society ... [C]onstitutionalism ... is not an ideal type in the Weberian sense that allows only an approximation, but can never be completely reached. It is a historical reality that was in principle already fully developed by the first constitutions in North America and France and fulfilled its promise in a number of countries that had adopted constitutions in this sense.[3]

Although Grimm notes that constitutionalism is more than a mere ideal type, and stresses that 'Constitutions that show all the characteristics of achievement did exist in history and do exist today',[4] I believe it is fair to say that even in the early twenty-first century, constitutionalism is still a work in progress in many parts of the world, particularly in Asia, Africa and Latin America. Many Third World countries have still not grown out of the syndrome of 'constitutions without constitutionalism'; the 'achievement' of constitutionalism is yet to come. Just as Fuller speaks of the project of legality or rule of law as being governed by a 'morality of aspiration',[5] which means that whether the ideal of the rule of law is realised in a particular country or legal system is a matter of degree, and the practitioner of the morality of aspiration should try her best to achieve excellence in, or a higher degree of fulfilment of, this ideal, so this 'morality of aspiration' is also applicable to the practice of constitutionalism. The achievement of constitutionalism in a particular nation-state (or in the international order, insofar as the idea of global or transnational constitutionalism is valid[6]) is also a matter of degree.

[2] Dieter Grimm, 'Types of constitutions', in Michel Rosenfeld and András Sajó (eds.), *Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), p. 98 at 104 (emphasis in original).

[3] Dieter Grimm, 'The achievement of constitutionalism and its prospects in a changed world', in Petra Dobner and Martin Loughlin (eds.), *The Twilight of Constitutionalism* (Oxford: Oxford University Press, 2010), p. 3 at 10.

[4] Grimm, 'Types of constitutions', p. 105.

[5] Lon L. Fuller, *The Morality of Law*, rev. edn (New Haven: Yale University Press, 1969), p. 5. The morality of aspiration is concerned with the striving to achieve a particular good that can be realised in different degrees. The higher the degree to which the good is achieved, the more successful and excellent is the moral project concerned.

[6] See, e.g., Nicholas Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (Cambridge: Cambridge University Press, 2007); Jeffrey L. Dunoff

The present book project attempts to inquire into the state of constitutionalism in Asia in the early twenty-first century, or the extent or degree to which constitutionalism has been 'achieved' in this part of the world at the present time. Although constitutionalism as a theory and practice of government and law first originated in Western Europe and North America, there is by now considerable evidence of its positive reception in and successful 'transplant' to a significant number of Asian countries. As I wrote previously, 'A macrohistorical perspective, covering developments in Asia since the late nineteenth century, suggests that constitutionalism has broadened and deepened its reach, significantly, over the course of time.'[7] The experience of different Asian countries in this regard provides useful and fascinating case studies of what Grimm calls the 'achievement of constitutionalism'.

For example, postwar Japan and India have been cases of the stable and relatively successful practice of constitutionalism in Asia for more than half a century. South Korea and Taiwan, two of the 'Four Little Dragons' of East Asia, are cases of successful democratic transition since the 1980s from authoritarian developmental states into liberal constitutional democracies, where democratic consolidation was still in progress in the early twenty-first century. The Philippines, Thailand, Cambodia and Indonesia, which have also undergone democratic transitions at various points in time since the 1980s, are developing countries in the process of building constitutional democracy of a higher quality. Constitutional courts now exist in Taiwan, South Korea, Thailand, Cambodia and Indonesia (as well as Mongolia, which is not covered by this volume), and have achieved varying degrees of success.[8] The cases of Singapore and Malaysia have posed the question whether there exist peculiarly 'Asian' values that shape conceptions of human rights and constitutionalism in Asia.[9] Nepal provides an example of a most recent and still ongoing enterprise of constitution-making in Asia. Myanmar provides an example of a most recent and still ongoing exercise in transition from military government to constitutional rule. In the People's Republic of China, Vietnam and North Korea, one-party states still exist that seem to contradict the trends of constitutionalisation, judicialisation and democratisation in their neighbours, though movements

and Joel P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (New York: Cambridge University Press, 2009); Ming-Sung Kuo, 'The end of constitutionalism as we know it? Boundaries and the state of global constitutional (dis)ordering' (2010) 1(3) *Transnational Legal Theory* 329.

[7] Albert H.Y. Chen, 'Pathways of Western liberal constitutional development in Asia: a comparative study of five major nations' (2010) 8 *International Journal of Constitutional Law* 849 at 884.

[8] See, e.g., Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003); Björn Dressel (ed.), *The Judicialization of Politics in Asia* (London: Routledge, 2012).

[9] See, e.g., Albert H.Y. Chen, 'Conclusion: comparative reflections on human rights in Asia', in Randall Peerenboom et al. (eds.), *Human Rights in Asia* (London: Routledge, 2006), p. 487.

towards the rule of law and improved legal protection of rights have taken place in China and Vietnam.[10] In China's Special Administrative Region of Hong Kong (as well as in Macau, which is not covered by this volume), the constitutional experiment of 'one country, two systems' has unfolded. These, then, are the Asian countries and jurisdictions discussed in this book.

This introductory chapter consists of two main parts. Section I attempts to develop a conceptual framework for the purpose of studying, analysing and evaluating constitutional, political and legal developments in countries on their path towards the 'achievement of constitutionalism'. Section II discusses the experience of Asian countries and jurisdictions from a historical and comparative perspective, utilising the conceptual apparatus developed in section I.

I. A CONCEPTUAL FRAMEWORK FOR THE STUDY OF THE ACHIEVEMENT OF CONSTITUTIONALISM

The modern idea of a written 'constitution' for a nation-state came to fruition in the late eighteenth century in the course of the American and French Revolutions, the English constitutional instruments promulgated during the revolutionary upheavals of the seventeenth century being precursors of the modern constitutions.[11] The very meaning of the word 'constitution' was transformed. As Sartori points out, although this word has been used to translate the term *politeía* in Aristotle's works, '*politeía* only conveys the idea of the way in which a polity is patterned',[12] while the modern meaning of the word 'constitution' refers to 'a frame of political society, *organized through and by the law*, for the purpose of restraining arbitrary power'.[13] In the premodern era the word 'constitution', or its equivalent in other European languages, was 'a descriptive, not a prescriptive, term',[14] referring to 'the situation of a country as determined by a number of factors such as its geography, its climate, its population, its laws etc.', or 'the state of a country as determined by its basic legal structure'.[15] The 'ancient idea of the constitution expressed the health and strength of the nation'.[16]

[10] John Gillespie and Albert H.Y. Chen (eds.), *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (London: Routledge, 2010).

[11] An example of such documents is the Instrument of Government (1654) promulgated under Cromwell's rule. See Grimm, 'Types of constitutions', p. 101. As Grimm also points out (at p. 101), 'After the Glorious Revolution in 1688, "constitution" in the singular gained ground and meant the basic rules concerning the government.' The constitutional documents of the British colonies in North America (including the colonial charters granted by the Crown and the Fundamental Orders of Connecticut (1639)) are also examples of the earliest constitutions: see Karl Loewenstein, *Political Power and the Governmental Process* (Chicago: The University of Chicago Press, 1957), p. 132.

[12] Giovanni Sartori, 'Constitutionalism: a preliminary discussion' (1962) 56(4) *American Political Science Review* 853 at 860 (italics in original).

[13] Ibid. (emphasis in original). [14] Grimm, 'Types of constitutions', p. 100. [15] Ibid.

[16] Martin Loughlin, 'What is constitutionalism?', in Dobner and Loughlin, *Twilight of Constitutionalism*, p. 47 at 48.

What is new and distinctive about the modern idea of a constitution is that it is conceived as a fundamental written law which simultaneously establishes the governmental system of a state and regulates the exercise of political power within the system. In other words, the constitution constitutes the state and its government. The government derives its legitimacy and authority from the constitution. But who makes the constitution? The answer provided by eighteenth-century thinkers,[17] influenced by the social-contract philosophy of the seventeenth century and the Age of Enlightenment, is that it is 'the people' – the people of the nation-state – who are the makers of the constitution, acting directly or through their representatives in a constituent assembly. This is the theory of the constituent power, as distinguished from the government power which is constituted by the constitution. The exercise of the constituent power by the people is a manifestation of the sovereignty of the people, a fundamental concept that underlies most constitutions of modern times all over the world.

In terms of their substantive content, modern constitutions represent attempts by their drafters to design rationally a form of government that can best serve the objectives of the nation-state. As Loughlin puts it, their theorists 'imagined a situation in which somehow the people would come together to reject their traditional constitutions, the products of "accident and force", and would deliberate and devise a new framework of government from "reflection and choice"'.[18] Influenced by liberalism, social-contract theory and Enlightenment thought, and determined to put an end to the absolutism of the post-feudal state of the early modern era, the drafters of the first modern constitutions devised schemes of government for the purpose of minimising the possibility of tyranny, oppression or abuse of political power, and maximising the protection of political freedom and the individual's rights to life, liberty and property. Hence principles and institutions such as the rule of law, separation of powers, checks and balances, parliamentary elections and judicial independence were written into constitutions. Bills of rights[19] were also promulgated to specify and catalogue citizens' rights and freedoms which governments must respect.

After the birth of the first modern constitutions in the USA and France, the practice of constitution-making quickly spread throughout Europe in the course of the nineteenth century, and then all over the world in the course of the twentieth century. In today's world, almost all countries (Britain being the most notable exception) have written constitutions. The possession of a constitution seems to have been accepted by all as a hallmark of the legitimacy of a nation-state and its regime for both domestic and external purposes. However, as Grimm has rightly

[17] The most important of whom include Thomas Paine and Emmanuel Joseph Sieyès.
[18] Loughlin, 'What is constitutionalism?', p. 48.
[19] Such as the French Declaration of the Rights of Man and the Citizen (1789) and the Bill of Rights inserted into the Constitution of the USA in 1791.

pointed out, 'once invented the constitution could be instrumentalized for purposes other than the original ones, adopted only in part or even as a mere form'.[20] For political scientists and scholars of comparative constitutional law, therefore, the challenge is to understand and distinguish the different purposes or functions which constitutions have served,[21] and the different kinds of constitution or constitutionalism which have come into existence since the modern idea of the constitution was born in the late eighteenth century.

At the outset, a distinction may be drawn between what I would call 'pristine' constitutions and 'secondary' constitutions. Constitutions and constitutional thought first originated in Western civilisation, and were then transplanted to societies and cultures in other parts of the world such as the Middle East, Asia and Africa. Constitutions in Western states may therefore be called pristine constitutions, and those in countries outside the orbit of the West called secondary constitutions. Since constitutions and constitutional practices evolved endogenously in some Western states and were quickly adopted by neighbouring Western states with similar social structures, economic circumstances and culture, it may be assumed that constitutionalism in its original form was more compatible with Western culture and social conditions than with those of civilisations and societies to which the practice of having constitutions was subsequently exported. Pristine constitutions can therefore be expected to be more successful in practice than secondary constitutions. This is borne out by the phenomenon of 'constitutions without constitutionalism' mentioned above in this chapter.

Unlike the earliest pristine constitutions, the first constitutions adopted by regimes in the non-Western world were not enacted after a revolution in order to constitute a new state and a new political order, nor were they inspired by the liberal doctrine of the protection of individuals' rights against possible violations by the government. Instead, such secondary constitutions were designed to bolster the legitimacy of regimes threatened by Western powers and to enhance the effectiveness of their rule, although they did have the effect of modifying the existing political structure by introducing Western-style institutions such as parliaments and elections. Brown coins the term 'politically enabling documents'[22] to characterise such constitutions: instead of aiming at the limitation and control of government, they were promulgated by the existing regime to enable itself to be more legitimate and more effective, and thus more capable of survival when faced with domestic and external challenges. Examples include the Ottoman Empire's constitution of 1876, the Egyptian constitution of 1882 and the constitution promulgated

[20] Grimm, 'Types of constitutions', p. 105.

[21] See, e.g., the discussion of the functions of constitutions in Saunders's chapter in this volume.

[22] Nathan J. Brown, 'Regimes reinventing themselves: constitutional development in the Arab world', in Saïd Amir Arjomand (ed.), *Constitutionalism and Political Reconstruction* (Leiden: Brill, 2007), p. 47 at 49, 67.

by the Meiji Emperor of Japan in 1889. The Qing Empire in China also attempted to move towards a constitutional monarchy in the early twentieth century, but was overthrown by the 1911 Revolution before the constitutional reforms could materialise.

The Meiji Constitution was modelled on the Prussian constitution of 1850.[23] Although the movement of constitution-making engulfed European states – as well as the newly independent states in Latin America – in the nineteenth century, there was not yet a uniform practice of enshrining citizens' rights in constitutions, which were primarily documents defining the structure of government and the division of powers between various state organs. For example, neither the Bismarckian federal constitution of Germany enacted in 1871 nor the 1875 constitution of the Third Republic in France included a bill of rights.[24] And the achievement of constitutionalism in Europe in the nineteenth century suffered reversals and setbacks in the course of the twentieth century, with the Bolshevik Revolution in Russia in 1917 and the rise of Nazism and Fascism in Germany and Italy. Ultimately, the terror and atrocities of the Second World War prompted deeper reflections on constitutionalism, what it requires and how it can be sustained. As a result, what has been termed the 'postwar constitutional paradigm' came into existence,[25] in which respect for human dignity and equality came to be recognised as the core value of the modern constitutional state. This paradigm was exemplified by the German Basic Law of 1949, which affirms the inviolability of human dignity, declares the basic principles of the liberal-democratic order and the basic rights of individuals, and establishes a Federal Constitutional Court exercising the power of judicial review as guardian of the Constitution and the 'objective value order' affirmed by it.[26]

The end of the Second World War and the decolonisation of Asia and Africa that followed gave rise to many new states in the international community. The exercise of constitution-making proved to be extremely useful for the founders of the new states. Constitutions declare their newly acquired sovereignty and independence, and serve as a symbol of nationhood and of the unity and collective identity of the people of the new state. This wave of constitution-making is an illustration of 'constitutional learning' at work.[27] The idea of a 'constitution', which indigenous leaders of the colonised peoples had learnt from the metropolitan powers, was now used to put an end to colonialism and to proclaim the independence, liberation and empowerment of a new political community, whose territorial boundaries

[23] Hiroshi Oda, *Japanese Law* (London: Butterworths, 1992), p. 28.

[24] See the discussion in Loewenstein, *Political Power*, pp. 142–3.

[25] Lorraine E. Weinrib, 'The postwar paradigm and American exceptionalism', in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006), p. 84.

[26] See ibid.

[27] For constitutional learning theory, see David S. Law and Mila Versteeg, 'The evolution and ideology of global constitutionalism' (2011) 99(5) *California Law Review* 1163 at 1173–5.

were in many cases those carved out by the former colonial powers struggling against one another. But the widespread adoption of the 'Western' practice of constitution-making by newly independent states in Asia and Africa does not necessarily mean that the new constitutions were intended to serve the same functions and purposes as the 'pristine constitutions' (as defined above) or the contemporary 'postwar constitutional paradigm' (as defined above) in the Western world, such as the legal limitation of state power, checks and balances among state organs, and the defence of citizens' rights against the state.

Consider, for example, the cases of the Middle East and Africa. In the Middle East, constitutions were made in the new states that were created, some after the First World War and some after the Second World War. Their common features included strong executives, weak parliaments and weak courts.[28] Some introduced single-party systems.[29] As Brown observes,

> the constitutions of independence generally established some democratic and liberal forms of government while depriving them of any tools to operate effectively . . . Elections were mandated in presidential systems but voters presented with a single choice determined by a stacked parliament. In monarchical systems, the king retained tools that allowed him to override or ignore elected parliaments.[30]

Starting from the 1950s, another wave of constitution-making swept the Arab states in the Middle East as new revolutionary regimes opposed to Western liberal values (which were now associated with imperialism) gained power. New national charters and constitutions were introduced which embodied the new ideology of the states.[31] 'Egypt led the way in this regard, issuing a "National Charter" after embarking on an "Arab socialist" path in 1962; this was followed by a provisional constitution two years later'.[32] The anti-liberal-democratic orientation of Arab constitutional patterns was challenged in more recent times, particularly after the US-led invasion of Iraq and the 'Arab Spring' in Tunisia, Egypt, Libya and other parts of the Middle East.[33]

In sub-Saharan African, there was also a trend of reaction against Western-style liberal-democratic constitutions soon after independence. For example, Kwame Nkrumah, founding father of Ghana as sub-Saharan Africa's first independent state, criticised the independence constitutions – usually modelled on those of the former colonial masters – as being intended for 'the preservation of imperial

[28] Brown, 'Regimes reinventing themselves', p. 53. [29] Ibid. [30] Ibid., p. 54.
[31] Ibid., pp. 54–5. [32] Ibid.
[33] See, e.g., Adeed Dawisha, *The Second Arab Awakening* (New York: W.W. Norton, 2013). For constitutionalism in the Middle East, see also Chibli Mallat, 'On the specificity of Middle Eastern constitutionalism' (2006) 38 *Case Western Reserve Journal of International Law* 13; Raja Bahlul, 'Is constitutionalism compatible with Islam?', in Pietro Costa and Danilo Zolo (eds.), *The Rule of Law: History, Theory and Criticism* (Dordrecht: Springer, 2007), p. 515.

interests in the newly emergent state'.[34] Other African leaders such as Tanzania's Julius Nyerere and Kenya's Jomo Kenyatta were also critics of Western constitutionalism.[35] Faced with 'the twin challenges of nation building and socioeconomic development',[36] African governments rationalised authoritarianism or even explicit constitutional endorsement of a one-party state as a political system appropriate for the conditions of their countries; they also preferred socialism to capitalism.[37] 'Between 1960 and 1962 thirteen newly independent African states, beginning with Ghana, amended or replaced their independence constitutions.'[38] It was only after three decades of failure in economic development that African countries turned again to liberal constitutional democracy. In the 1990s, as the 'third wave' of democratisation swept the globe, constitutional reforms were introduced in many African states to enable multiparty elections and constitutional transfers of political power to take place, and they have indeed taken place. Civil liberties have been expanded, and the courts have taken on a more active role in enforcing the rights provisions in the constitutional texts.[39]

Given the diversity of constitutional trajectories and experience among countries in different parts of the world, the question arises how their constitutions and legal–political practices relating to constitutions may be studied, analysed and classified. In the following, I will attempt to outline a conceptual framework for doing so, drawing on the brief historical survey above and the classifications of constitutions developed by Loewenstein and Sartori.

Loewenstein develops 'a new approach to the classification of constitutions' which he calls the 'ontological' classification.[40] 'The ontological approach, instead of analysing substance and content, focuses on the concordance of the reality of the power process with the norms of the constitution.'[41] Loewenstein thus distinguishes between three types of constitution: normative, nominal and semantic. Using a simile, he suggests that a normative constitution 'is like a suit that fits and that is actually worn'; a nominal constitution is like a suit which 'for the time being, hangs in the closet, to be worn when the national body politic has grown into it'; and in the case of a semantic constitution 'the suit is not an honest suit at all; it is merely a cloak or a fancy dress'.[42] The meaning of the classification may be further elaborated as follows.

In Loewenstein's view, 'A constitution is what power holders and power addressees make of it in practical application.'[43] A normative constitution is 'a living constitution', one that is 'real and effective', 'faithfully observed by all

[34] H. Kwasi Prempeh, 'Africa's "constitutionalism revival": false start or new dawn?' (2007) 5 *International Journal of Constitutional Law* 469 at 473.

[35] Ibid., at 481. [36] Ibid., at 475. [37] Ibid., at 475–7. [38] Ibid., at 474.

[39] See generally Prempeh, 'Africa's "constitutionalism revival"'. See also Charles Manga Fombad, 'Constitutional reforms and constitutionalism in Africa: reflections on some current challenges and future prospects' (2011) 59 *Buffalo Law Review* 1007.

[40] Loewenstein, *Political Power*, p. 147. [41] Ibid., pp. 147–8. [42] Ibid., pp. 148–50.

[43] Ibid., p. 148.

concerned', and 'actually governing the dynamics of the power process instead of being governed by it'.[44] A nominal constitution is one 'that is not lived up to in practice',[45] because the 'existing socioeconomic conditions' militate against its implementation,

> but the hope exists, supported by the will of power holders and power addressees, that sooner or later the reality of the power process will conform to the blueprint. The primary objective of the nominal constitution is educational, with the goal, in the near or distant future, of becoming fully normative.[46]

The nominal constitution is said to have 'its natural habitat in states where western democratic constitutionalism has been implanted into a colonial or feudal–agrarian social order'.[47] Loewenstein believes, 'The novices in constitutional government in Asia and Africa will have to pass through an extended apprenticeship in the nominal constitution before they can graduate to constitutional normativism.'[48]

As regards the semantic constitution, Loewenstein defines it as one that 'is fully applied and activated, but its ontological reality is nothing but the formalization of the existing location of political power for the exclusive benefit of the actual power holders'.[49] 'Instead of serving for the limitation of political power, it has become the tool for the stabilization and perpetuation of the grip of the factual power holders on the community. The peaceful, non-revolutionary change in the location of political power is impossible.'[50] Loewenstein considers the constitution of the Soviet Union to be an example of the semantic constitution.[51]

If we apply Loewenstein's classification, then the pristine constitutions that evolved endogenously in the Western world, and the constitutions of liberal-democratic states in the world today, may be regarded as normative constitutions, while contemporary communist states' constitutions that explicitly affirm and justify the communist party's monopoly of power would fall into the category of semantic constitutions. Indeed, as Grimm points out, such 'socialist constitutions', together with constitutions of theocratic regimes, stand apart from other constitutions in the contemporary world in the sense that their legitimating principle is a 'supra-individual absolute truth' rather than based on values of individual autonomy, pluralism and consensus.[52] In the socialist constitution, the communist party's 'position is legitimized by superior insight in the ultimate aim of history and the true interest of the people'.[53] In practice,

> the Communist Party is the sole authoritative interpreter of the Constitution and the laws. The Constitution rather assists the government in achieving the pre-existing purpose of political rule ... The question is

[44] Ibid., pp. 148–9. [45] Ibid., p. 148. [46] Ibid., p. 149. [47] Ibid., p. 151.
[48] Ibid., pp. 151–2. [49] Ibid., p. 149. [50] Ibid., p. 150. [51] Ibid., p. 152.
[52] Grimm, 'Types of constitutions', p. 114. [53] Ibid., p. 128.

> therefore whether it is justified to regard these constitutions as a type of constitutionalism. If the measure is what was called here the achievement of constitutionalism, all essential characteristics of constitutions are missing.[54]

Loewenstein's concept of the nominal constitution is more problematic. The nominal constitution as understood by Loewenstein is not merely a constitution that is not fully implemented nor effective (because the 'existing socioeconomic condition – for example, lack of political education and training, absence of an independent middle class, and other factors' – militates against its implementation[55]); it is one that has the 'hope' of being effective at some future point in time.[56] What is the basis of this hope? Loewenstein seems to ground this hope in 'the will of power holders and power addressees',[57] whom he describes as 'novices in constitutional government in Asia and Africa' going through 'an extended apprenticeship in the nominal constitution'.[58] However, this seems to assume too much goodwill on the part of rulers of states with nominal constitutions. History shows that many of these rulers were simply interested in maintaining their power and perpetuating their rule, just as in the case of rulers under Loewenstein's semantic constitutions. And many of these rulers (of states with nominal constitutions) did not themselves share Loewenstein's belief that it would be in the interest of the people of the states under their rule to practise Western-style liberal democracy in accordance with a normative constitution, because, for example, they believed that authoritarian rule would better facilitate economic development, or that the indigenous culture and values are such that Western-style liberal democracy would be counter-productive in terms of political stability and social order.

Bearing in mind these problems in Loewenstein's classification, we now turn to examine Sartori's classification of constitutions. Although Sartori wrote that he 'agree[d] very much (in substance, even though not in terminology)' with Loewenstein's scheme,[59] his own threefold classification consists of the '*garantiste* constitution (constitution, proper)', the 'nominal constitution' and the 'façade constitution (or fake constitution)'. Sartori's '*garantiste* constitution' is equivalent to Loewenstein's normative constitution; such a constitution fulfils what Sartori considers to be 'the purpose, the *telos*, of English, American and European constitutionalism', which 'could be expressed and synthesized by just one word: the French (and Italian) term *garantisme*'.[60] '[A]ll over the Western area

[54] Ibid., p. 129.

[55] Loewenstein, *Political Power*, p. 149. Loewenstein also points out (at p. 148) that 'a constitution requires a national climate conducive to its realization. The tradition of autocratic processes must have sufficiently atrophied in the minds of governors and governed to give constitutional government a reasonably fair chance'.

[56] Ibid., p. 149. [57] Ibid. [58] Ibid., pp. 151–2.

[59] Sartori, 'Constitutionalism: a preliminary discussion', at 861. [60] Ibid., at 855.

people requested, or cherished, "the constitution," because this term meant to them a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a "limited government.'"[61] As regards Sartori's 'nominal constitution', he acknowledges that this refers to 'the constitutions that Loewenstein labels "semantic" (a difficult, and perhaps not quite appropriate labeling)'.[62] They are 'collection[s] of rules which organize but do not restrain the exercise of political power in a given polity ... They frankly describe a system of limitless, unchecked power. They are not a dead letter. It is only that this letter is irrelevant to the *telos* of constitutionalism.'[63]

What is most significant for our present purposes is Sartori's concept of the 'façade constitution (or fake constitution)'. Façade constitutions 'take the appearance of "true constitutions"' but 'are disregarded (at least in their essential *garantiste* features). Actually they are "trap-constitutions." As far as the techniques of liberty and the rights of the power addressees are concerned, they are a dead letter'.[64] As mentioned above, Loewenstein has suggested that the objective of what he calls a 'nominal constitution' is 'educational, with the goal ... of becoming fully normative'.[65] In discussing the 'façade constitution', Sartori expressly rejects the view that the façade constitution or 'fake constitution has an educational *purpose*. It *may* turn out that it has an educational *effect*. But this is a very different matter. We are not historians dealing with past events and looking for their *a posteriori* justification'.[66]

For Sartori, the main difference between what he calls 'nominal constitutions' and 'façade constitutions' is that whereas the former 'actually describe the working of the political system' (though 'they do not abide by the *telos* of constitutionalism') and are in this sense 'sincere reports', the latter 'give us no reliable information about the real governmental process' and are 'basically a disguise'.[67] However, Sartori also recognises that there is 'often a considerable overlapping between nominal and façade constitutions', and there exists '"a mixed type" (partly nominal and partly fake) of pseudo-constitution'.[68]

A comparison between Loewenstein's 'nominal constitution' and Sartori's 'façade constitution' may be useful at this point. Both constitutions consist of texts which are consistent with the normative project of constitutionalism. They are therefore likely to be liberal-democratic in orientation, providing for what Sartori calls the 'techniques of liberty' such as separation of powers, checks and balances, protection of human rights, periodic elections to parliaments and top governmental offices, peaceful transfer of power in accordance with electoral

[61] Ibid., at 855. [62] Ibid., at 861. [63] Ibid. [64] Ibid.
[65] Loewenstein, *Political Power*, p. 149.
[66] Sartori, 'Constitutionalism', at 861 (emphasis in original). [67] Ibid.
[68] Ibid.

outcomes, the rule of law, and judicial independence. And both are constitutions which are not fully put into practice in the countries to which they are legally applicable.

Examples of such non-implementation of the constitution might include the following: when the government and its bureaucracy are weak and have no capacity to enforce the law across the country; when the rights recognised in the constitution are not realised in any meaningful way and are worth no more than paper; when constitutional institutions such as legislatures and courts are weak and are not able to exercise their constitutionally prescribed powers and functions in a practically significant or effective manner; when there are no independent media, middle class or active civil society to monitor and promote the implementation of the constitution; when political parties are weak and ineffective, and fail to operate constitutional mechanisms or processes available to them under the constitution; when extra-constitutional forces such as the military do not abide by the constitution and may resort to coups; or when the existing power holders have no commitment to the constitution and manipulate constitutional norms, institutions and processes for the purpose of staying in power, by, for example, rigging elections, buying votes, illegitimately controlling who may be candidates in elections, violating constitutional rights and human rights, using the law in a discriminatory manner to persecute political opponents, or otherwise denying political opponents a fair opportunity to compete for power on a level playing field in accordance with constitutional norms.

It may be noted that some of the above examples (particularly those attributable to the incongruence between the actual sociopolitical conditions and environment of the country concerned and its constitutional norms) correspond to what Loewenstein says about 'nominal constitutions', while others (particularly those attributable to the lack of intention or will on the part of the power holders to observe and implement the constitution faithfully) relate to what Sartori says about 'façade constitutions'. Indeed, the key difference between Loewenstein's 'nominal constitutions' and Sartori's 'façade constitutions' appears to lie in the reasons why constitutional norms are not translated into reality. In Sartori's case, the power holders do not take them seriously, hence the term 'fake constitutions'. In Loewenstein's case, the power holders are making a genuine attempt to implement the constitution, though implementation is difficult because of the country's socioeconomic conditions and political reality. Hence Loewenstein believes that there is still 'hope'.

I have in my previous works proposed a threefold classification of constitutionalism or of political, constitutional and legal practices relating to constitutions:[69]

[69] Chen, 'Pathways', at 880; Albert H.Y. Chen, 'Constitutionalism and constitutional change in East and Southeast Asia: a historical and comparative overview', in Albert H.Y. Chen and Tom Ginsburg (eds.), *Public Law in East Asia* (Farnham: Ashgate, 2013), p. xv (Introduction) at xvi–xvii.

'constitutionalism in its classical sense' (or 'genuine constitutionalism', abbreviated as GC); 'Leninist–Stalinist forms of rule by a communist party-state legitimised by a written constitution defining the structure of the state and declaring the rights of citizens',[70] or 'communist/socialist constitutionalism' (abbreviated CC) (though it is doubtful whether this is a genuine form of constitutionalism); and 'hybrid constitutionalism' (abbreviated HC) or 'hybrid constitutional practices' (which is a concept analogous to that of 'hybrid regimes' as theorised by political scientists[71]), 'practised in states in which both elements of liberal constitutionalism and authoritarian elements that subvert or are inconsistent with such constitutionalism exist'.[72] This scheme of classification may be mapped onto Loewenstein's and Sartori's schemes as follows. GC corresponds to Loewenstein's 'normative constitution' or Sartori's '*garantiste* constitution'. CC would be based on what Loewenstein calls a 'semantic constitution' or what Sartori calls a 'nominal constitution'. And HC would embrace Loewenstein's 'nominal constitutions', Sartori's 'façade constitutions' and Sartori's 'mixed type of pseudo-constitution'.

This threefold classification of GC, CC and HC may provide the point of departure for a comparative study of political, legal and judicial practices relating to constitutions in different parts of the world. Such a comparative inquiry should include a study of both the 'statics' and 'dynamics' of constitutions and constitutionalism. 'Dynamics' here refers to constitutional change, development or evolution, including both progress and regression or degeneration – notions which presuppose that GC (as compared to HC or CC) is the highest level of constitutionalism, corresponding to what Grimm calls the 'achievement of constitutionalism', and the fullest realisation of what Fuller calls the 'morality of aspiration' as applied to the domain of politics and public law.

The dynamics of constitutional development in a particular country's history may be such that it moves from HC to GC (as the East Asian cases of South Korea, Taiwan and Indonesia have exemplified), or from CC to GC (as demonstrated in Eastern Europe in the 1990s). Loewenstein himself has contemplated the movement of Asian and African countries from 'nominal constitutions' to 'normative constitutions', as well as the 'gradual transition' in communist states 'from a strictly semantic to a nominal or even a normative constitution'.[73] More recently, scholars of Asian constitutional change have written about 'transitional constitutionalism' (in countries such as South Korea and Taiwan which have undergone a transition from authoritarianism to democracy)[74] and the idea of a 'constitutional tipping

[70] Chen, 'Pathways' at 880.

[71] See Larry Diamond, 'Thinking about hybrid regimes' (2002) 13(2) *Journal of Democracy* 21.

[72] Chen, 'Constitutionalism and constitutional change', p. xvii.

[73] Loewenstein, *Political Power*, pp. 151–3.

[74] Jiunn-Rong Yeh and Wen-Chen Chang, 'The changing landscape of modern constitutionalism: transitional perspective' (2009) 4(1) *National Taiwan University Law Review* 145. See also these two scholars' co-authored article on comparative constitutional law in Taiwan,

point' (as applied to Southeast Asian countries), defined as 'the point in the development of a constitutional order at which the political struggle for constitutionalism rapidly gives way to an entrenched constitutional culture and the constitution takes on a normative life of its own'.[75]

In the contemporary world, GC is basically co-extensive with the political system of liberal-democratic states in the West and in non-Western states which have successfully evolved into liberal democracy. The equivalence of GC with liberal democracy was not always the case in history, as the 'achievement of constitutionalism' in Western states such as Britain, France and the USA *preceded* their democratisation to become states which practised universal and equal suffrage for all citizens. Nevertheless, in the early twenty-first-century world, GC is indeed almost synonymous with liberal democracy. Furthermore, if we turn to the dynamics of constitutional development in the contemporary world, a transition from CC or HC to GC is in practice the same process as the transition of the country concerned from communist party rule or other forms of authoritarian, pseudo-democratic or semi-democratic governance into liberal democracy. The question therefore arises, what exactly is the province of the study of constitutionalism as compared to the study of liberal democracy and of democratisation in the contemporary world?

The answer to this question would appear to lie in the distinction between the overlapping, but by no means identical, concepts of constitutionalism and democracy themselves. Democracy is about the self-government and self-determination of the people – people who consider themselves members of the same nation-state. It is also about electoral and voting systems that resolve differences of opinion by giving effect to the will of the majority. Constitutionalism, on the other hand, is concerned with what Sartori calls the design and operation of those 'techniques of liberty' that are put into effect and used by the constitution for the purposes of constraining, controlling and regulating the exercise of political power by government, preventing power from being arbitrary or absolute, and safeguarding those fundamental rights and freedoms that derive from the human being's personhood and human dignity. Constitutionalism is therefore concerned with matters such as separation of powers, checks and balances, legislative oversight of the executive, the rule of law, judicial independence, constitutional judicial review, and human rights. Constitutionalism also provides the legal foundation for the operation of democracy, by stipulating electoral rules; protecting political rights to free speech, assembly and association; and regulating power transfer or succession of top power holders.

The study of constitutionalism in a particular country should therefore include matters such as the following: activities of constitution-making and constitutional

South Korea and Japan, 'The emergence of East Asian constitutionalism: features in comparison' (2011) 59 *American Journal of Comparative Law* 805.

[75] Victor V. Ramraj, 'Constitutional tipping points: sustainable constitutionalism in theory and practice' (2010) 1(2) *Transnational Legal Theory* 191 at 192.

amendment; constitutional litigation, the interpretation of the constitution by courts (or the constitutional court if such a court exists) and their exercise of the power of review of legislation or governmental actions (this subject is sometimes called 'legal' or 'judicial' constitutionalism[76]); the making of major laws relating to the implementation of the constitution; the exercise of powers by the legislature, particularly how it scrutinises the work of the government and ensures the accountability of the government (the operation of the legislature and the exercise of its constitutional functions are of particular interest from the perspective of 'political constitutionalism'[77]); the use of the constitution and the institutions and processes established by it in the resolution of major conflicts between opposing political forces and in ensuring peaceful transfer or succession of power; and public discourse, political activism and social struggles in the community which draw on the concepts, principles and rights enshrined in the constitution or any part of its text as resources to be used (these may be said to fall within the concept of 'social constitutionalism'[78]). The degree of activities or activism in the above domains ('degree of constitutional activism', abbreviated as DCA) would indicate to what extent the constitution is really 'normative' (in Loewenstein's sense), to what extent GC exists in the country concerned, to what extent there has been the 'achievement of constitutionalism' or to what extent there has been a movement from HC or CC to GC.

The above discussion supplies a basic conceptual framework which may be used for the study of constitutional and related political and legal phenomena in the Asian countries covered by this book. In the next part of this chapter, I shall attempt to provide an overview and general review of such Asian experience of constitutions and constitutionalism from a historical and comparative perspective, using the concepts of GC, CC, HC and DCA introduced above.

II. THE ACHIEVEMENT OF CONSTITUTIONALISM IN ASIA

This book consists of country-based reviews of constitutional developments in sixteen Asian countries or jurisdictions, focusing in particular on developments since the beginning of the twenty-first century, together with three chapters (including the present Chapter 1) which consider Asian constitutional trends more generally. The country studies include all countries or jurisdictions in East Asia (Japan, North and South Korea, the People's Republic of China (PRC), Taiwan,

[76] See generally Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007), pp. 1–12; Ramraj, 'Constitutional tipping points', at 193–5.

[77] See Bellamy, *Political Constitutionalism*; Ramraj, 'Constitutional tipping points', at 195–7.

[78] Ramraj, 'Constitutional tipping points', at 197–9. See also Stéphanie Balme and Michael W. Dowdle (eds.), *Building Constitutionalism in China* (New York: Palgrave Macmillan, 2009), especially Chapter 1.

Hong Kong), most of the countries in Southeast Asia (Vietnam, Cambodia, Thailand, Myanmar, Malaysia, Singapore, the Philippines and Indonesia), and two selected case studies from South Asia (India and Nepal). There is great ethnic, linguistic, religious and cultural diversity among these Asian societies. What they have in common is that they have all experienced, either directly or indirectly, Western imperialism and colonialism in their modern history, which have had a significant impact on their constitutional and political developments.

Southeast Asia (with the exception of Thailand) and India were colonised by Western powers and only became independent nation-states after the Second World War. Japan and China did not come under Western rule, but experienced respectively the Meiji reform and the 1911 Revolution which initiated their modern constitutional trajectories. Taiwan and Korea came under Japanese rule at the end of the nineteenth century and at the beginning of the twentieth century respectively, which came to an end only after the Second World War. It appears that the geographical location and size of Asian countries have been relevant factors affecting their political fates in modern times. The following discussion of Asian constitutional experience and pathways of development will therefore be organised geographically, starting with East Asia, then turning to mainland Southeast Asia, and then maritime Southeast Asia, and finally South Asia. Actually, the order in which chapters in this book on the relevant countries and jurisdictions appear also follows these geographic divisions.

Japan. Japan was the first Asian country to embark upon the project of constitutionalisation after it came into contact with the West. The political configuration of the feudal society under the Tokugawa shogunate was transformed by the Meiji Restoration of 1868, which established a strong and centralised system of government under the Meiji Emperor. The principal objective of the Meiji reform was to build a rich country and a strong military that could stand up to the Western challenge. In response to an indigenous movement for constitutional reform, the Meiji Constitution was promulgated by the emperor in 1889. The Japanese experience from the 1890s until the rise of a military government in the 1930s that practised a high degree of authoritarianism may be described as hybrid constitutionalism (HC). The constitution vested sovereignty in the emperor instead of the people, but a parliament (the Imperial Diet) was established, including a lower house which by 1925 was elected by universal male suffrage with competition among different political parties. A British-style practice of parliamentary government came to evolve. The constitution declared the rights and duties of subjects, though in practice civil and political rights were tightly restricted by law. The constitution did not require ministers appointed by the emperor to be responsible to parliament. The emperor and not the civilian government enjoyed the constitutional authority to command the military.

After the Second World War, the Meiji Constitution was amended to become a new constitution which affirms the sovereignty of the people (with the emperor

becoming a symbolic head of state), parliamentary government, human rights and judicial review. The distinctive feature of this 1946 constitution is its Article 9, the 'pacifism' provision on the renunciation of war. With no single amendment since its enactment, this constitution is now one of the oldest surviving constitutions in the contemporary world. And it has been fully put into practice, providing a paradigmatic example of a country progressing from HC (under the Meiji Constitution, moving, however, to a completely 'fake constitution' in Sartori's sense in the 1930s) to GC, though doubt has been expressed whether Japan would have achieved this transition 'without the shock of losing the Pacific War and without massive Occupation support for Japan's liberal forces'.[79] Sakaguchi's chapter in this volume discusses various attempts and proposals to amend the constitution, particularly Article 9, partly motivated by the Liberal Democratic Party's view that it was imposed on Japan while it was still under American occupation immediately after the war. In my view, these attempts demonstrate that the constitution has indeed been taken seriously in Japan. Sakaguchi also illustrates the roles of the Cabinet Legislation Bureau (which he describes as a quasi-constitutional court) and the Supreme Court in interpreting the Japanese constitution. It seems that there is at least a moderate degree of constitutional activism (DCA) in contemporary Japan.

Korea. In Korea, once a tributary state of China, the Cho-sen dynasty (1392–1910) came to an end with the Japanese annexation of Korea after Japan's victories in its wars with China (1895) and Russia (1905). The Korean people experienced colonial Japanese rule of a highly authoritarian nature until the end of the Second World War, when Korea became divided into the Republic of Korea in the south and the Democratic People's Republic of Korea in the north. North Korea has been under one-man rule through a communist party – the Korea Workers' Party – to this day. Although the constitution is basically Stalinist in style and orientation, the legitimacy of the regime under Kim Jong-il and now Kim Jong-un is largely based on 'dynastic succession' from Kim Il-sung, the founder of the regime. North Korea's constitution and its various amendments exemplify what Loewenstein calls the 'semantic constitution', because they do provide information about the formal structure of the North Korean state and its ideology. Yoon's chapter in this volume shows how successive changes to this constitution reveal the ideological evolution of the regime, such as the gradual de-emphasis on Marxism–Leninism and communism and the introduction of the indigenous ideology of *Juche* (self-reliance) and subsequently of *songun* (military first), shifts in economic policy (from strict communism to a certain degree of openness to foreign investment), and modifications of the governmental structure (such as the increasing concentration of political power in the National Defence Commission and its chairman).

[79] Lawrence W. Beer, *Human Rights Constitutionalism in Japan and Asia* (Folkestone: Global Oriental, 2009), p. 168.

In contrast to the apparent political stability (at the cost of totalitarian repression) and 'dynastic' continuity of North Korea, South Korea, which adopted a liberal-democratic constitution in 1948, experienced four tumultuous decades and nine major constitutional revisions in its history, the last of which resulted in the 1987 constitution of the 'Sixth Republic', which is currently in force. The varying patterns of constitutional and political practices in these four decades may be said to fall under the rubric of HC, with different mixes of democracy, constitutionalism and authoritarianism at different points in time. South Korea did experience rapid economic development under the strongman rule of President Park Chung-hee (1961–79), who steered Korea's rise as one of the 'Four Little Dragons' of East Asia. In 1972, he proclaimed martial law and pushed through the *Yushin* constitution, described by critics as 'a constitution which legalized authoritarian rule',[80] inaugurating a 'dark age' for constitutionalism in South Korea.[81] Political instability engulfed South Korea after Park was assassinated in 1979, leading to the infamous Kwangju massacre of 1980. Fierce struggles by activists and civil society for democratisation finally won concessions from the military-led regime, resulting in the liberal-democratic constitution of 1987, which introduced direct popular election of the president (in lieu of election by an electoral college) and established a new constitutional court. Kim's chapter in this volume provides ample evidence of the high DCA in South Korea today, including the debate on constitutional revision and the emergence of the constitutional court as a key player in what Kim calls 'mega-politics'. The chapter clearly shows that the process of democratic consolidation is alive and well in this new stronghold of GC in Asia.

China (including Hong Kong and Taiwan). Compared to its neighbours Japan and South Korea, China (particularly mainland China after the establishment of the PRC) has lagged behind in the achievement of constitutionalism. The PRC still practises CC today, although GC has now emerged in the Special Administrative Region of Hong Kong and on the island of Taiwan.

During the last decade of its dynastic rule in China, the Qing court began to move towards a constitutional monarchy. An 'Imperial Constitutional Outline' was promulgated in 1908, and provincial assemblies were elected. The 1911 Revolution overthrew the Qing Empire, and the Republic of China (RoC) was established in 1912 with a liberal-democratic provisional constitution. In the first decade and a half of the republican era, several constitutions were promulgated or drafted by successive governments in Beijing, but none was effective as China was beset with warlordism and civil strife. In 1928, the Kuomintang (KMT, or Chinese Nationalist Party) under Chiang Kai-shek's leadership succeeded in unifying large parts of

[80] Jürgen Kleiner, *Korea: A Century of Change* (River Edge, NJ: World Scientific, 2001), p. 156.

[81] Tscholsu Kim and Sang Don Lee, 'The influence of U.S. constitutional law doctrines in Korea', in Lawrence W. Beer (ed.), *Constitutional Systems in Late Twentieth Century Asia* (Seattle: University of Washington Press, 1992), p. 303 at 318.

China (but not areas under the control of the Chinese Communist Party (CCP)) and established a new RoC government in Nanjing. The KMT adhered to the strategy of constitutional development advocated by its founder, Dr Sun Yat-sen, which involved a three-stage process of military government, political tutelage (under one-party rule in preparation for the third stage) and constitutional government. Using our terminology, this may be understood as a strategy of establishing HC first and then moving towards GC. A provisional constitution for the period of political tutelage was promulgated in 1931 which expressly vested power in the KMT. After the end of the Sino-Japanese War in 1945, a new constitution of the RoC, containing all key ingredients of a liberal constitutional democracy and establishing a constitutional court (consisting of the Grand Justices of the Judicial Yuan), was adopted by a constituent assembly in 1946.

This new constitution was not accepted by the CCP, and a civil war between the CCP and the KMT raged for several years, ending in the KMT's defeat and the retreat of the RoC government to Taiwan, which had been ceded by the Qing Empire to Japan in 1895 and liberated from Japanese rule in 1945. During the civil war, the KMT regime introduced a constitutional amendment known as the Temporary Provisions for the Period of National Mobilisation to Suppress the Communist Rebellion, which expanded the emergency powers of the president. Martial law was decreed by the KMT government, first in the mainland and then in Taiwan. The civil liberties and democratic elections promised by the 1946 constitution were suspended by the RoC regime in Taiwan for nearly four decades, during which time Taiwan, under the strongman rule of Chiang Kai-shek and then his son Chiang Ching-kuo, underwent rapid economic development and rose to become another of the 'Four Little Dragons' of East Asia, together with South Korea, Hong Kong and Singapore. In this period, the constitutional court was operational, though not in such a manner as to challenge the government on politically sensitive matters. As time progressed, there was a considerable degree of social and even political pluralism, and elections took place at the municipal and county levels, as well as elections to a minority of seats in the Legislative Yuan. The constitutional and political practices of this period may be understood as falling within our concept of HC.

Taiwan's transition from HC to GC began with the lifting of the martial-law decree by President Chiang Ching-kuo in 1987. In the late 1980s and the early 1990s, Taiwan underwent rapid liberalisation and democratisation. The Temporary Provisions were repealed in 1991. Seven exercises of constitutional revision from 1991 to 2005 substantially changed the nature and structure of the RoC state. A 'silent revolution'[82] was achieved in Taiwan. Multiparty elections were periodically held, leading to changes in government and transfers of power between

[82] Lee Teng-hui, *Taiwan de zhuzhang* (The Views of Taiwan) (Taipei: Yuanliu, 1999), pp. 162–3 (in Chinese).

political parties (the KMT and the Democratic Progressive Party (DPP)) in 2000 and 2008. Since the late 1980s, the constitutional court has played an active role in declaring as unconstitutional the laws and regulations of the previous authoritarian regime. The constitutional amendment of 1999 was even declared unconstitutional and invalid by the constitutional court,[83] invoking the jurisprudence that certain fundamental principles of the liberal-democratic constitutional order ought to be protected against amendment or violation. As the chapter by Yeh and Chang in this volume demonstrates, in the first decade of this century the constitutional court has played a more crucial role than ever before in adjudicating political conflicts arising from the circumstances of a 'divided government' in which the presidency and government on the one hand and the Legislative Yuan on the other hand were controlled by different political parties (the DPP and the KMT respectively). The chapter also shows the high DCA in Taiwan, which, as in the case of South Korea, testifies to the vibrancy of the process of democratic consolidation.

On the Chinese mainland, the first constitution of the PRC was enacted in 1954, largely modelled on the Stalinist constitution of 1936. China under Mao Zedong pursued a more 'leftist' path than the USSR itself. The second constitution of the PRC – the 1975 constitution – codified the ideology of the Cultural Revolution era. The 1978 constitution marked the beginning of the retreat from Maoism, while the 1982 constitution laid the institutional and legal foundations for Deng Xiaoping's era of 'reform and opening'. This fourth constitution of the PRC is still in force today, subject to four sets of amendments introduced between 1988 and 2004. The amendments reflect the changing ideology and priorities of the CCP, which, despite radical changes in its policies of economic and social development, has continued to defend at all costs its monopoly of political power. The details of the 2004 amendment are discussed in the chapter by Wang and Tu in this volume, which also covers other major legislative initiatives in the domain of Chinese constitutional law in the first decade of this century, and landmark events such as the *Qi Yuling* case and the Sun Zhigang incident. It is noteworthy that, as evidenced by the repeal in 2008 of the Supreme People's Court's landmark interpretation in 2001 in the *Qi Yuling* case, the regime has made it clear that Chinese courts have no role to play in interpreting and enforcing the constitution. However, the Sun Zhigang incident of 2003 and subsequent developments in *weiquan* ('rights defence') movements in Chinese civil society suggest that the concepts, principles and rights enshrined in the Chinese constitution have been increasingly used by litigants, activists and aggrieved persons to fight for justice and for the protection of their constitutional rights against violations by authorities. It may be said that there is a moderate DCA in China today.

[83] Interpretation No 499 (March 2000). See generally www.judicial.gov.tw/constitutionalcourt.

The practice of 'one country, two systems' (OCTS) with regard to the autonomous Special Administrative Regions of Hong Kong and Macau, established in 1997 and 1999 respectively after the termination of British and Portuguese colonial rule, is an interesting feature of the existing constitutional order of the PRC. Constitutional developments relating to OCTS are briefly touched upon in the chapter by Wang and Tu in this volume, and discussed in greater detail in Chan's chapter. In my assessment, although Hong Kong has not yet achieved full democratisation in the sense of the election of its Chief Executive and of all members of its Legislative Council by universal suffrage, its constitutional and political practices in the post-handover period may be considered as GC at work, with elements such as the rule of law, judicial independence, civil liberties, separation of powers, and political checks and balances, as well as a free press and a vibrant civil society. In the first decade of this century, the struggles for the further democratisation of Hong Kong have brought about a high DCA there. It is to the PRC's credit that even though its own constitution is one of CC, it has enacted and adhered to a Basic Law (of the Hong Kong Special Administrative Region) that has sustained GC in Hong Kong, the foundation of which was laid during the period of transition in 1984–97 (1984 being the year when the Sino-British Joint Declaration on Hong Kong's future was signed), when Hong Kong underwent a transition from HC (which was typical of the authoritarian mode of British colonial rule in Asia and Africa) to GC.

Vietnam. Traditional imperial rule in Vietnam, which had been influenced by Chinese Confucian civilisation, disintegrated as French colonisation proceeded in the second half of the nineteenth century. Vietnam became part of French Indo-China, until it came under Japanese occupation during the Pacific War. After the war, the Vietnamese fought for independence from France. The French were defeated; the Geneva Agreement of 1954 recognised Vietnamese independence and partitioned it between North and South. War raged for many years between the two regimes, culminating in massive US interventions in the 1960s. In South Vietnam, the 1956 and 1967 constitutions were liberal-democratic in their texts. North Vietnam became communist, as clearly evidenced by its 1959 constitution, which replaced the more liberal 1946 constitution. After South Vietnam was conquered by the North in 1975, a new constitution was adopted in 1980, which established CC in the newly unified state. As in the case of post-Mao China, Vietnam also embarked on the path of economic reform and liberalisation from totalitarianism when its communist party announced the *doi moi* (renovation) policy in 1986. The new constitution enacted in 1992 affirms both human rights and property rights. In a manner reminiscent of the Chinese constitutional amendment of 1999, the 2001 constitutional amendment in Vietnam declares that Vietnam is a 'law-governed socialist state'. Bui's chapter in this volume provides an overview of constitutional developments in Vietnam since the beginning of this century, including the latest proposals for a new constitution which was eventually

adopted in November 2013. The chapter shows, for example, that despite the maintenance of one-party rule in contemporary Vietnam, more room has now been allowed for electoral competition among candidates for the National Assembly; the National Assembly has become more assertive in exercising its constitutional powers; constitutional provisions have been invoked in public discourse to challenge government policies or decisions; and the Communist Party itself has recognised the legitimacy of concepts such as the limitation and control of state power. There appears therefore to be at least a moderate DCA in Vietnam, although it is disappointing that the latest constitutional amendment did not result in the creation of the constitutional court that had been much discussed. The case of Vietnam demonstrates that CC is capable of significant self-reform, possibly inaugurating a transition at least to HC, even if GC is still too remote to be contemplated.

Cambodia. As recounted in Tan's chapter in this volume, Cambodia became a French protectorate in 1863 with its traditional monarchy being preserved. Prince Norodom Sihanouk ascended the throne in 1941 with French support. After the Second World War, in 1946, the French organised an election for a constituent assembly, which adopted a constitution in 1947 modelled on that of the French Fourth Republic, though Cambodia was a monarchy under this constitution. Cambodia was granted full independence in 1953. Sihanouk ruled as a strongman in an authoritarian manner until he was ousted by a coup in 1970. Nine constitutional amendments were made before 1970. In 1975, the Khmer Rouge came to power. An estimated one million people died during the communist reign of terror, which only ended with the Vietnamese invasion in 1979. With Vietnamese support, Hun Sen practised strongman rule, with a communist constitution modelled on those of the USSR and Vietnam (or what we call CC). A civil war raged for years between Hun Sen's government and a coalition of resistance forces including the Khmer Rouge and Royalists supporting Sihanouk. An internationally brokered ceasefire came with the Paris Peace Accord of 1991. The UN Transitional Authority in Cambodia oversaw the election of a new national assembly in 1993, which adopted a new constitution – drafted in accordance with liberal-democratic guidelines laid down by the Paris Agreement – re-establishing Cambodia as a constitutional monarchy. Since 1993, regular elections with multiparty competition have taken place, several constitutional amendments have been introduced, and a constitutional council was established in 1998 which has since exercised the power of constitutional review. Yet Hun Sen has survived the constitutional changes and continued to rule as strongman. Cambodia can probably be said to be in a state of HC.

Thailand. Thailand's constitutional story is also told in Tan's chapter in this volume. Thailand is the only nation in Southeast Asia which was not colonised by Western powers. Its constitutional practice, which began with the establishment of a constitutional monarchy in 1932, is therefore an entirely indigenous enterprise. Thai constitutional history is characterised by frequent oscillations between

military and civilian rule, with recurring cycles of constitution-making, general election, formation of and rule by a constitutional civilian government, and then military coup. Seventeen constitutions, some provisional and some intended to be more permanent, have come and gone. There existed critical moments of popular protests changing the course of Thai political history, such as the students' revolution of 1973, and the popular protests in Bangkok in 1992 which led to bloodshed and intervention by the highly respected King Bhumibol. As Tan points out in his chapter, the 1997 constitution was hailed as Thailand's most liberal and democratic constitution, and as a 'people's constitution' enacted only after extensive public consultation. It established a constitutional court, which subsequently played a crucial role in Thai politics. Yet the great promises of this constitution were dashed when a military coup in 2006 toppled Prime Minister Thaksin Shinawatra. Although the military returned power to a civilian government elected under the new 2007 constitution (which replaced the interim constitution of 2006) which was approved by the people in a referendum, the political situation soon deteriorated with the continuous and violent confrontation between the anti-Thaksin 'Yellow Shirts' and the pro-Thaksin 'Red Shirts'. The conflict has continued after the 2011 election, by which Yingluck Shinawatra came to power. Whether Thailand will finally grow out of its own brand of HC in which constitutional continuity is prone to be broken by coups remains to be seen.

Myanmar (Burma). The Burmese kingdom was one of the most powerful states in Southeast Asia at the end of the eighteenth century, but weakened relative to the Thai and Vietnamese kingdoms in the nineteenth century. In 1886 Burma came under British rule. It became part of British India, but was constituted a separate colony in the 1930s, with a new colonial constitution enacted in 1935. As pointed out in Tan's chapter in this volume, the British allowed the Burmese to practise parliamentary cabinet government in the 1930s. After the war, a constituent assembly was elected in which the Anti-Fascist People's Freedom League, formed during the war against Japan and led by Aung San, won the majority of seats. A constitution was adopted in 1947, providing for a British-style parliamentary system and federalism, and Burma was granted independence in 1948. But, as pointed out by Tan, Burma was beset by ethnic strife, secessionist movements and civil war, and its civil service was weak. The experiments in parliamentary democracy finally came to an end with the military coup of 1962. The 1947 constitution was set aside, and the military government ruled by decree for twelve years until a new 'socialist' constitution for one-party rule was adopted in 1974. In 1988, popular demonstrations for democracy were suppressed and another military coup occurred. The new government set aside the 1974 constitution, and held an election in 1990. Although the National League for Democracy led by Aung San Suu Kyi won a landslide victory, the government refused to hand over power and for two decades maintained authoritarian rule without even a 'fake constitution' (in Sartori's sense). Finally, in 2008, a new constitution of the Republic of the

Union of Myanmar – the drafting of which actually started in 1993 – was enacted and approved by a referendum, allowing multiparty elections but reserving a quarter of the seats in each house of parliament for the military. There have been signs of political liberalisation more recently, with the release of Aung San Suu Kyi from house arrest in 2010, and she and her party securing parliamentary seats in the 2012 by-elections. Thus Myanmar has moved from a state without even a 'nominal' or 'semantic' constitution (in Loewenstein's sense) to the beginnings of HC.

Malyasia. Like Burma, Malaysia also formed part of the British Empire in Asia, but its constitutional path after independence was much more stable and relatively successful. Shortly before Malaya acquired independence in 1957, a general election was held in 1955 at which the Alliance led by the United Malays National Organisation (UMNO) first came to power. Malaya's independence constitution was drafted by a commission led by Lord Reid from Britain, and provided for a British-style parliamentary system, a federal structure and a constitutional monarchy. In 1963, the Federation of Malaysia was formed by the addition of three new states to the Federation of Malaya. (One of them, Singapore, was ejected from the federation in 1965.) The Alliance, subsequently known as Barisan Nasional (BN), has been continuously in power since independence through victories in parliamentary elections, although, as emphasised by Lee in his chapter in this volume, the opposition made considerable gains in the 2008 election (and subsequently in the 2013 election) which led to BN losing the two-thirds parliamentary majority that is required for any constitutional amendment. Since the independence constitution was made, fifty amendments have been introduced, the trend of which was to concentrate more power on the executive. A watershed event in Malaysian history was the 1969 racial riots which led to a declaration of emergency and curtailment of civil liberties. Under the leadership of Dr Mahathir Mohamad, who served as prime minister for successive terms from 1981 to 2003, Malaysia made good progress in economic development, but judicial independence suffered a severe blow in 1988 when the Lord President and two other Supreme Court judges were removed. Lee in his chapter points out that even today, public confidence in the judiciary has not been completely restored. He also discusses the politics of democratisation and Islamisation, and the role of the hereditary Malay rulers. There seems to be at least a moderate DCA in Malaysia. Constitutional and political practices in Malaysia may be classified as constituting HC or as being very close to GC, depending on how much weight one attaches to civil liberties, judicial independence and transfer of power as an electoral outcome.

Singapore. There are considerable similarities between the constitutional trajectories of Malaysia and Singapore; the latter's constitutional practices have been described by Thio as 'communitarian constitutionalism'[84] or 'illiberal

[84] See Thio's chapter in this volume.

constitutionalism'.[85] When Malaya became independent in 1957, Singapore was still a British colony. As in Malaya, elections had already been held in Singapore before it acquired independence. In the 1959 election, the People's Action Party (PAP) led by Lee Kuan Yew came to power. As mentioned above, Singapore joined the new Federation of Malaysia in 1963, but became independent in 1965. Singapore's constitution was in many ways similar to Malaysia's, adopting the British parliamentary system and inheriting the English common law, but Singapore is a republic. The PAP has been continuously in power since independence through victories in periodic elections, always (since 1968) controlling more than the two-thirds parliamentary majority required for constitutional amendments, nearly forty of which have been introduced as the government thought fit. Opposition candidates did compete in elections. As pointed out in Thio's chapter in this volume, a significant development in the 2011 election was that an opposition party won a multi-member constituency for the first time. In that election, the PAP won 60 per cent of the votes; thus a significant number of voters voted for non-PAP candidates. Thio also discusses the constitutional innovations introduced by the PAP regime over the years, including the creation of a popularly elected presidency, independent of the executive and exercising financial powers, and the introduction of nominated (non-popularly elected) members and non-constituency members of parliament (the latter being candidates from the opposition who failed to get elected). Thio points out that the Singapore courts prefer communitarian values (including the social goals of political stability, interracial harmony and economic development) to Western concepts of the individual's rights, and are relatively more conservative or deferential to the government than are their Malaysian counterparts in the exercise of their powers of review of governmental actions and in interpreting rights provisions in the constitution. As in the case of Malaysia, I consider the case of Singapore to be one of HC or very close to GC, depending on how much weight we attach in our assessment to civil liberties, judicial activism and transfer of power as an electoral outcome.

The Philippines. Whereas the constitutional foundation for Malaysia and Singapore was laid by the British, American influence was predominant in the case of the Philippines. Spanish colonisation of the Philippines began in the late sixteenth century. During the Spanish–American War, in 1898, the Filipinos declared independence and proclaimed the establishment of the first republic in Asia. However, the Philippines came under US rule in 1901. US policy was to prepare the Philippines for independence as a liberal-democratic state. A constitution modelled on the US Constitution was enacted in 1935 for the Philippines Commonwealth as a territory which enjoyed autonomy under American sovereignty. The Philippines were taken over by the Japanese during

[85] Li-ann Thio, 'Constitutionalism in illiberal polities', in Rosenfeld and Sajó, *Oxford Handbook of Comparative Constitutional Law*, p. 133.

the Pacific War. In 1946, they acquired independence with an American-style political system based on the 1935 constitution, which remained in force. A twenty-five-year experiment in liberal democracy came to an end in 1972 when Marcos (president since 1966) declared martial law. In 1973, a new constitution was enacted to replace the 1935 constitution. Marcos's authoritarian rule came to an end in the peaceful 'People Power' revolution of 1986 which followed the presidential election in which Corazon Aquino, widow of the assassinated opposition politician Benigno Aquino, ran against Marcos. A new 1987 constitution with strong liberal-democratic features was enacted under Corazon Aquino's presidency. Since then, despite periodic elections, political stability has been occasionally threatened by popular unrest, attempted coups and secessionist struggles in the south. In 2001, President Estrada was ousted by another 'People Power' protest, which led to the assumption of the presidency by Arroyo, then vice-president. As discussed in Pangalangan's chapter in this volume, Arroyo's presidency (2001–10) faced various challenges, including a legal challenge to the validity of her assumption of power, allegations of rigging of the 2004 election, impeachment attempts by Congress, and attempted coups. Pangalangan points out that Arroyo resorted to emergency powers four times, often in such a manner as to evade the checks and balances provided for in the constitution. The Supreme Court has been called upon to adjudicate various politically controversial issues, and has invalidated some of the impugned governmental actions. Pangalangan's chapter shows that there is a high DCA in the Philippines, with political actors making use of constitutional and legal rules and institutions in their struggles against one another. It is at least a case of HC, and may be regarded as approximating GC, except that the record of 'People Power' revolutions and attempted coups would militate against GC.

Indonesia. Like the Philippines, Indonesia also experienced authoritarian strongman rule preceded and followed by attempts to practise liberal democracy, except that the period of strongman rule in Indonesia was much longer. Dutch colonisation of what is today Indonesia began in the mid-eighteenth century. After the Pacific War, the indigenous Indonesians fought against the Dutch for independence. The Dutch were defeated and at the Hague Conference of 1949 the independence of Indonesia as a republic was recognised. Earlier, in 1945, an independence constitution had been promulgated, which expressed Soekarno's *Pancasila* ideology and was also based on Soepomo's concept of the integralist or organic state (as opposed to individualism and liberalism). The new 1950 constitution established a parliamentary system, and in 1955 the first general election was held, in which sixteen political parties secured parliamentary seats. However, Soekarno declared martial law in 1957 and restored the 1945 constitution. His authoritarian rule continued until 1965, when a coup occurred during which an estimated half a million people were massacred in an anti-communist drive. General Soeharto came to power and established a 'New Order' regime with guaranteed participation of the military in the political system (*dwifungsi*).

As pointed out by Hosen in his chapter in this volume, in the New Order regime only three political parties were allowed to participate in elections, which were generally stage-managed. Soeharto's rule finally came to an end in 1998 when Indonesia was badly hurt by the Asian financial crisis and there was civil unrest. Civil liberties were restored, and 1999 saw the first free election since 1955, in which forty-eight political parties participated. As discussed by Hosen in his chapter, the newly elected National Assembly enacted a series of constitutional amendments in 1999–2002 which transformed Indonesia into a liberal-democratic constitutional state. Since then, direct presidential elections have been successfully held in 2004 and 2009, with the 2004 election resulting in a peaceful transfer of power (to Yudhoyono as president). The Constitutional Court established in 2003 has built up a reasonably good record in reviewing and invalidating laws and in adjudicating election disputes. Human rights protection has been strengthened, and, as pointed out by Hosen, civil and political rights in Indonesia have been highly evaluated by Freedom House relative to other Southeast Asian countries. Indonesia, as the most populous Muslim state in the contemporary world, is now also one of the world's most populous democracies. Hosen observes that key political actors in Indonesia are committed to resolving their disputes non-violently through constitutional processes; Indonesia may be able to provide a model for other countries of the reconciliation of Islam with constitutional democracy. Thus Indonesia seems to be an important and revealing case of transition from HC to GC in Asia, though with only two recent presidential elections by universal suffrage on the record, whether democratic consolidation has occurred is yet to be observed.

India. The Mogul Empire was in existence in India when the English East India Company began its activities in India in the seventeenth century. In 1858, the British Raj in India was established as the British government assumed full responsibility for the governance of India and Parliament enacted the Government of India Act 1858. The last constitutional document enacted by the British Parliament for India before its independence was the Government of India Act 1935. Before independence, elections to the Indian legislature had already been introduced, and political parties such as the Indian National Congress and the Muslim League were already in existence. In 1947 the British Parliament enacted the Indian Independence Act, providing for the creation of India and Pakistan, each having its own constituent assembly for making its constitution. In 1949, the Constitution of India was adopted. This lengthy 395-article constitution inherited much of the content of the Government of India Act 1935, and exhibited all the features of liberal constitutional democracy. India was given a federal structure and a parliamentary system of government at both the union and state levels.

The Indian constitution has undergone approximately a hundred amendments, some of which were introduced to override decisions of the Supreme Court, which has been active in exercising the power of constitutional review and has even developed a doctrine that it is beyond the competence of parliament (acting by a

two-thirds majority of each of its two houses) to amend constitutional provisions that pertain to the 'basic structure' of the constitution. As pointed out by Deva in his chapter in this volume, the colonial experience has led to the internalisation by the Indian political elite of elements of the British constitutional tradition, and the constitutional norms of liberal democracy have been largely adhered to except for a short period in the mid-1970s (when Prime Minister Indira Gandhi proclaimed a state of emergency). Deva discusses particularly the activism of the Indian Supreme Court in 'day-to-day issues' faced by ordinary people. He explains that the dysfunctional response of the executive and the legislature in handling problems such as 'governance gaps' and environmental pollution has created an opportunity for the judiciary to play a dominant role in such matters, 'becoming an all-in-one governance institution tasked to rule the country on a day-to-day basis', but he also doubts whether the courts have the capacity to tackle these problems effectively. Generally speaking, the Indian judiciary is apparently not known for its effectiveness, as demonstrated by long delays in the judicial process and occasional corruption scandals. Nevertheless, given that India is a developing country with much poverty; huge social and economic inequalities; and tensions between groups divided along ethnic, religious and caste lines, its achievement in constitutionalism is indeed significant and may be regarded as a case of GC with a high DCA.

Nepal. Last but not least, we turn to the case of Nepal, which, as demonstrated in Ghai's chapter, is an interesting case of constitution-making during the first decade of the twenty-first century. The territory of what is today Nepal was first unified in 1768, inaugurating the Shah dynasty of kings which continued until Nepal became a republic in 2008. In the 1864–1951 period, the Shah monarchs were no more than figureheads, and Nepal was ruled by the Rana dynasty, which practised hereditary succession to the position of prime minister, the real power holder. The first constitution in Nepali history was promulgated in 1948. Autocratic rule by the Rana family came to an end in 1951 with the restoration of power to the Shah monarch, King Tribhuwan, who ruled with the assistance of the developing political parties. In 1959, under the reign of King Mahendra, a constitution based on the British parliamentary model was promulgated, pursuant to which the first multiparty election in Nepali history was held in 1960. However, conflict between the monarchy and parliamentary leaders soon led to the dissolution of parliament and absolutist rule by King Mahendra, who legitimised his rule by the 1962 constitution, which established the *panchayat* (council) system in which multiparty electoral competition was not allowed. In 1972 King Birendra ascended the throne. He maintained the *panchayat* system, which survived the referendum of 1980. However, in 1990 a popular revolt known as the 'People's Movement' (*Jana Andolan*) forced the king to give up the *panchayat* system and to turn Nepal into a constitutional monarchy with multiparty parliamentary democracy. A new liberal-democratic constitution was enacted in 1990, pursuant to which the general election of 1991 was held. Nevertheless, the practice of parliamentary government

failed to stabilise because one of the political parties, the Communist Party of Nepal (Maoist), began an armed rebellion against the government in 1996. The civil war only came to an end in 2006 with the signing of a Comprehensive Peace Accord, as discussed in Ghai's chapter in this volume. Ghai also discusses the enactment of the interim constitution of 2007, the parliament's decision in 2007 to abolish the monarchy, the election in 2008 of a constituent assembly to draft a new constitution, the difficult issues faced by the constitution-makers, and the failure to agree on a new constitution by the deadline stipulated in the interim constitution. In November 2013, another election was held for a new constituent assembly to continue the task of constitution-making. It may therefore be seen that Nepal is still in an early stage of constitutional development. It has evolved a kind of HC which, however, was threatened by a decade-long civil war. Apparently there now exists a commitment on the part of the political elite to move towards GC in the future, and there has been a high DCA in recent years because of constitution-making activities.

Conclusion. As Saunders points out in her chapter in this volume, although the existing literature on legal transplant focuses largely on private law, the development of constitutions and constitutional law in non-Western parts of the world such as Asia has also been a process of legal transplant, and thus faces the common problems and challenges faced by all legal transplants, in addition to those peculiar to the project of constitutionalism. Given the inherent difficulties of transposing a Western plant to Asian soil, the phenomenon or syndrome mentioned at the beginning of this chapter of 'constitutions without constitutionalism' is by no means surprising. As mentioned earlier in this chapter, the 'achievement of constitutionalism' or the practice of 'genuine constitutionalism' (GC) is a matter of degree, governed by what Fuller calls the morality of aspiration. The brief survey above in this chapter and the remainder of this book tell this story of the achievement of constitutionalism in Asia to this day.

Using the classification of GC, CC and HC developed in this chapter, the overall situation in the countries or jurisdictions studied in this book may be summarised as follows. In modern times, Western constitutional ideas and practices were introduced into Asia either by colonisation or as Asian civilisations came under the challenge of imperialism. Before the Second World War, forms of HC had begun to develop in Japan and China. After the Second World War, GC was soon established in Japan and newly independent India. Mainland China, North Korea and Vietnam came under the influence of CC. As Ginsburg implies in his chapter in this volume, the legal reforms and constitutional discourses in contemporary China and Vietnam demonstrate that their constitutions are by no means merely a 'fake constitution' or 'nominal constitution' (in Sartori's classification). This suggests that the concept of CC may not be completely satisfactory and adequate (insofar as it fails to distinguish between the case of North Korea on the one hand and those of China and Vietnam on the other), and elements of HC may also evolve within CC.

HC is a broad concept which may be applied to most of the other countries covered by this book at various points in time. HC was practised in South Korea and Taiwan, both of which have undergone successful transition to GC since the second half of the 1980s. Malaysia and Singapore have trodden a stable and steady path of constitutional development since independence which I would describe as HC or close to GC, depending on how much weight we attach to civil liberties. Other Southeast Asian countries experienced varying degrees of instability in the course of their constitutional development. Among them, Indonesia may be regarded as a case of transition from HC to GC since the turn of the century. The Philippines since the democratisation of the 1980s is a case of HC approximating GC. HC in Thailand has been characterised by cycles of military coups and rule by democratically elected civilian politicians. The potential for GC under the current constitution exists. HC in Cambodia is conditioned by Hun Sen's strongman rule. Myanmar has experienced significant periods of military rule without even a constitutional document, but is now moving in the direction of HC. Nepal, which has seen political instability and civil war in recent times but is now in the process of making a new constitution, may be classified as a case of HC with aspirations towards GC.

Generally speaking, the achievement of constitutionalism in Asia since the end of the Second World War, and particularly since the 1980s, has been considerable and significant. Although some scholars associate the Western form of liberal constitutional democracy with imperialism and global capitalism,[86] the historical evidence is that constitutionalism has appealed to Asian peoples in their struggles for emancipation and justice, and has also been embraced by the political elite in many Asian countries as a political order that is both morally legitimate and practically appropriate for local conditions. If progress is at all possible in human history, then the achievement of constitutionalism in the governance of human societies may be regarded as a significant element and sign of such progress. This book is a testimony to such progress in the context of Asian societies in search of a legitimate and viable means of their own governance. It shows that constitutionalism is still very much a work in progress in many parts of Asia, a goal, an ideal and an aspiration for and towards which many people, famous or anonymous, high or low, are working, toiling, struggling or suffering. The 'end of history'[87] is not yet in sight.

[86] See, e.g., James Tully, 'The imperialism of modern constitutional democracy', in Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007), p. 315.

[87] Francis Fukuyama, *The End of History and the Last Man* (New York: The Free Press, 1992).

2

East Asian constitutionalism in comparative perspective

*Tom Ginsburg**

Is there a distinctively East Asian constitutionalism? This question has come to the fore in an era in which comparative constitutional law is a resurgent discipline. The modern nation-states of East Asia (by which I mean the region from Myanmar to North Korea, including the regions conventionally known as Northeast and Southeast Asia) have usually been thought to have adopted public-law models that are derivative of Western legal forms. After all, each country in the region has a written constitution, many of which were imposed by colonialism. Even those countries that were not colonized, such as Thailand and Meiji-era Japan, tended to adopt Western legal forms prophylactically, as part of an effort to retain independence. The result was a good deal of convergence with the formal institutions of Western constitutions. Notwithstanding this convergence, as well as the tremendous internal diversity that characterizes our region, this chapter argues that there *are* certain distinctive features of constitutionalism in East Asia when compared with other regions. It utilizes an unusual method, quantitative analysis, to support the argument. The most distinctive feature, it shows, of Asian regions is the persistence of a vital tradition of Leninist constitutions.

Let us begin by acknowledging that the operation of public law in Asia may reflect, at least in its deep structure, the region's long tradition of political thought. After all, Asia is home to several different religious and legal traditions, each of which embodies different ideas about the organization and restraint of public power. These ideas naturally have some impact on the attitudes of legal actors, though the extent to which they are still influential is a matter of scholarly controversy. The stakes were apparent in the so-called "Asian Values" debate of the 1990s, in which some argued that Asia was fundamentally different with regard

* Thanks to James Melton.

to ideas about the state and human rights.[1] We would expect, if "Asian Values" proponents are to be believed, fewer rights in Asia and greater concentrations of power in executive branches. One of the fruitful outcomes of this debate was the reminder that neither classical thought nor modern legal structures are static. Both are continually transforming, and accommodating to dynamic local, regional, and global pressures.

Concurrently, all the countries in the region share, more or less, the idea that constitutional state building was a part of the modernization project. Constitutions in the region have very rarely resulted from bottom-up political pressure or been the result of hard-fought struggles for rights on the part of a people. Perhaps only the Philippines "People Power" constitution of 1986 can be so characterized. Instead, most constitutions in the region are elite projects that only later, if ever, became part of the lived experience of the public. Constitutional politics as a terrain of social struggle is a relatively recent development. Indeed, the top-down nature of constitution-making to some degree evokes the tradition of state authority. It is consistent with an approach rooted in the region's political traditions.

That constitution-making is part of state building implies a certain amount of similarity or isomorphism between the constitutions of East Asian states and those of other regions. This is because top-down efforts will be designed, by their nature, to communicate partly to outsiders about the capacities of the state to govern itself and behave as a responsible international actor. One would thus expect elites to use some of the same language and institutions found in other countries. Indeed, some scholars talk of greater global convergence in constitutional documents.[2] On the other hand, if deep local traditions remain relevant in the minds of constitution-makers, there may be *less* convergence, and perhaps even a distinctive type of Asian constitution.

This chapter proceeds as follows. It first describes the landscape, arguing that Asian constitutional schemes come in several types: liberal-democratic, Leninist, and hybrid types, the latter referring to a pattern of non-Leninist authoritarianism or semi-authoritarianism. The liberal-democratic constitutions reflect certain common patterns found in liberal democracies in the rest of the world, though the implementation in Asia may have certain distinct features. The tradition of Leninist constitutionalism is still quite vital, and is not found anywhere else. The constitutional systems of Vietnam and China belie simple characterization as being mere sham constitutions, but instead reflect, at least at the current moment,

[1] See, e.g., Joanne Bauer and Daniel A. Bell, *The East Asian Challenge for Human Rights* (New York: Cambridge University Press, 1999); Kishore Mahbubani, *The New Asian Hemisphere: The Irresistible Shift of Global Power to the East* (New York: PublicAffairs, 2008).

[2] David S. Law and Mila Versteeg, "The evolution and ideology of global constitutionalism" (2011) 99(5) *California Law Review* 1163.

complex attempts to reconcile the forms of constitutionalism with one-party Leninist states. The hybrid documents also reflect certain trends found in regimes of those types elsewhere. The theme of this section is that, given the varieties of constitutional order, Asia is an internally diverse region. We also argue that it is not appropriate to think of Asian constitutionalism as merely sham or *faux* constitutionalism. It has, in every society save perhaps North Korea, real bite and real effects, even if these are manifest through complex channels unfamiliar to those who limit their view of constitutionalism to liberal democracies.

Next, the chapter provides some evidence from a large comparative project on constitutions, to understand the formal features of constitutional texts. This part of the chapter essentially tests the Asian Values and global convergence arguments. Are Asian constitutions really different? Using "large-n" tools is not the only way of deriving this question, but it does provide one way of seeing whether there indeed are gross patterns that would only be apparent from a bird's-eye view. The results are surprising. The exercise shows that Asian constitutions are marked by high levels of *legislative* power and relatively low levels of *executive* power. In formal terms, Asian executives are relatively weak compared to those in other countries, surprisingly to those who view the region as one of strong states. More interestingly, the constitutions of Asian countries contain no fewer rights than do those of Western countries, except in the area of criminal procedure.

The inquiry is relevant to the debate on whether there are continuing legacies in the modern era of the region's long and distinct traditions of thinking about the organization of political power. While I accept, and argue elsewhere,[3] that these may continue to have some influence on institutions today, I find little evidence of this in the formal texts of national constitutions. One would expect that the Asian countries would, if their traditional patterns persisted, have relatively unconstrained executives and few rights. But we do not see this. Any lingering traditional influence, such as it is, is likely to be found in the style and patterns of constitutional implementation, rather than in its form per se.

The conclusion brings together the various threads of the analysis to juxtapose the two discrete analytical points developed in separate parts of the chapter. If formal constitutions in the region differ in systematic ways from those found elsewhere, and if they also, to some extent, accurately describe many features of political life, we can speak of broad trends toward an Asian style of constitutional order. The observed pattern, however, suggests that Asian Values arguments are overstated, except in the area of criminal procedure. Asian constitutions are different but not in the way predicted by advocates of traditional Asian Values. To the extent Asian constitutionalism is discrete, it seems to be in the existence of a still robust tradition of Leninist

[3] Tom Ginsburg, "Confucian constitutionalism: globalization and judicial review in Korea and Taiwan" (2000) 27(4) *Law and Social Inquiry* 763; Tom Ginsburg, "Constitutionalism: East Asian antecedents." (2012) 88 *Chicago-Kent Law Review* 11.

parliamentary sovereignty. To state the point in an extreme way, Asia is the region of formal parliamentary power, not executive power.

I. SURVEYING THE LANDSCAPE

Constitutional systems come in several varieties. Professor Chen, in a helpful recent taxonomy, distinguishes three basic types in Asia.[4] First, there is classical, liberal constitutionalism in which a limited government operates under the rule of law that protects human rights and democracy. Second, there is communist/Leninist constitutionalism, in which one party uses a constitution to legitimate itself, but is not actually constrained as in the genuine form of constitutionalism. Third, there is what Chen characterizes as a hybrid constitutionalism, which has elements of both liberal and authoritarian constitutionalism. Unlike the communist/Leninist variant, there is some realm of political, social, or economic life that is not controlled by the party. This evokes earlier characterizations of Asian politics as varieties of authoritarian pluralism, or one-and-a-half-party systems.[5] We adopt Chen's typology, and note that in Asia there are examples of each of his three types. I describe each in turn, but would like to distinguish certain subcategories as well.

The liberal-constitutionalism variant has at least two distinct genealogies. First, there are the stable Northeast Asian liberal democracies of Taiwan, Korea and Japan. These countries have a number of features in common. First, they each were subject to the strong influence of the Meiji Japanese variant of authoritarian constitutionalism in the nineteenth and early twentieth centuries. Each then experienced top-down constitution-making processes in one form or another, through occupation imposition in the cases of Japan and Korea[6] or through the KMT regime, which itself became a kind of occupier of Taiwan. All three countries are today liberal democracies, in which Yeh and Chang have identified several features.[7] First, they argue that constitutions in the region have not typically been demanded from below but "tend to be elite creations designed to modernize ancient states." Second, Yeh and Chang note that there are substantial textual and institutional continuities in the constitutional orders of East Asian states. Japan's constitution remains unamended since its adoption in 1946, the longest such period for any constitution currently in force anywhere in the world. South Korea and Taiwan similarly retain, as a formal matter, constitutions adopted in the

[4] Albert H.Y. Chen, "Introduction: constitutionalism and constitutional change in East and Southeast Asia – a historical and comparative overview," in Albert H.Y. Chen and Tom Ginsburg (eds.), *Public Law in Asia* (Farnham: Ashgate, 2013), p. xv.

[5] Lucien Pye, *Asian Power and Politics* (Cambridge, MA: Harvard University Press, 1988).

[6] Chaihark Hahm and Sung Ho Kim, "To make 'We the People': constitutional founding in postwar Japan and South Korea" (2010) 8(1) *International Journal of Constitutional Law* 800.

[7] Jiunn-rong Yeh and Wen-chen Chang, "The emergence of East Asian constitutionalism: features in comparison" (2011) 59 *American Journal of Comparative Law* 805 at 817.

late 1940s, even though each has in fact undergone substantial amendment. Third, each system has what Yeh and Chang characterize as "reactive and cautious" judicial review. While one might contest the claim with regard to particular cases, such as South Korea,[8] the fact is that most Asian liberal democracies are not "juristocracies."[9] Instead, the courts exist in rough balance with other institutions, and their power ebbs and flows in a kind of dialogic fashion. This fact speaks to Michael Dowdle's work, informed by his long engagement with the Chinese experience, that decenters judicial review as the definitional element of constitutionalism.[10]

This basic pattern of formal continuity, with substantial amendments but cautious review, might be said to characterize the Indonesian case as well. Like Taiwan, Indonesia had an old constitution that survived a transition to democracy and then was significantly modified. It has produced a constitutional court, directly adapted from the South Korean model, that has at times played a prominent role. Scholars of the Indonesian court focus on the limitations of jurisdiction that have prevented it from playing a high-profile role.

A second variant of liberal constitutionalism was demanded from below. Thailand's 1997 constitution, now replaced but with continuing institutional legacies,[11] was an example here; others include the "People Power" constitution of the Philippines and arguably, though from a different angle, post-Soeharto Indonesia.[12] All three polities have experienced some significant judicialized politics. The Philippines comes closer than Thailand to exhibiting features of fully fledged liberal constitutionalism. There have been repeated instances since 1987 in which governments have sought to extend their rule and engage in practices that were then not allowed, either by the courts or by popular opinion. In my view, the Philippines is an important case that deserves further attention because it seems to be the case in the region that corresponds to the "classical" view of liberal-democratic constitutionalism emerging from below as a result of social struggles. Thailand, on the other hand, can hardly be considered stable in its constitutional form, as it is the region's poster child for constitutional instability. All in all,

[8] Tom Ginsburg, "The Constitutional Court and the judicialization of Korean politics," in Andrew Harding et al. (eds.), *New Courts in Asia* (New York: Routledge 2009), p. 145.

[9] Ran Hirschl, *Toward Juristocracy* (Cambridge, MA: Harvard University Press, 2004).

[10] Michael Dowdle, "Beyond judicial power: courts and constitutionalism in modern China," in Stephanie Balme and Michael Dowdle (eds.), *Building Constitutionalism in China* (New York: Palgrave Macmillan, 2009), p. 199.

[11] Tom Ginsburg, "Constitutional afterlife: the continuing impact of Thailand's post-political constitution" (2009) 7(1) *International Journal of Constitutional Law* 83.

[12] On Indonesia, see Donald Horowitz, *Constitutional Change and Democracy in Indonesia* (New York: Cambridge University Press, 2013). He notes that the constitution was not produced with public involvement, but the mass demonstrations that brought Soeharto down indicate a certain presence of the people-power dynamic. Notably the Philippine constitution was not produced with extensive public involvement.

however, these countries seem to fit in Chen's model of classical constitutionalism, at least to some degree.

Cases that are more clearly categorized as hybrids are countries that have the form of liberal-democratic institutions without full political competition. These include failed or new states in which international administration was a major contributor to the constitution-making period, such as East Timor and Cambodia; former common-law colonies Malaysia and Singapore, which Professor Thio characterizes as "nonliberal constitutional democracies";[13] and perhaps, the new constitution of Myanmar, which seems to be in the throes of a cautious liberalization after the adoption of the long-gestating 2010 constitution.

These two forms of liberal and hybrid constitutionalism are found in Asia, and found in many other regions of the world as well. What makes the Asian region distinctive is its somewhat vital tradition of Leninist constitutionalism. While Chen's scheme treats constitutions in socialist systems as essentially legitimating devices, this issue raises the interesting question who exactly believes their promises. This question is a general one with regard to the account of constitutions in authoritarian regimes. Indeed, we observe that Leninist countries (and other dictatorships, like that of Myanmar) sometimes spend significant resources in drafting and amending constitutions, even when they are, by their own terms, not enforceable, which is a very different model of constitution than found in liberal democracies.

Surely there are some socialist constitutions which are truly sham documents, though even they too have their moments of accuracy.[14] North Korea's constitution remains a classic "sham" constitution, but might be said to be accurate in that it describes itself as a dictatorship, and says that the state "shall conduct all activities under the leadership of the Workers' Party of Korea."[15] Surely that is an honest statement. Still, one cannot talk about any kind of real operation of the North Korean Constitution.

I am of the view that China after 1979 and Vietnam under Doi Moi represent something a bit different. In both cases, constitutional reform was part of a broader process of trying to expand the role of law both as an instrumental tool of governance and also as a mechanism for producing stability in government affairs. It is sometimes argued that China's great reformer, Deng Xiaoping, was motivated toward the socialist rule of law to avoid the excesses of arbitrary rule that he had personally experienced during the Cultural Revolution. Whereas the

[13] Li-ann Thio, "Soft constitutional law in nonliberal Asian constitutional democracies" (2010) 8(1) *International Journal of Constitutional Law* 766.

[14] On shams see David S. Law and Mila Versteeg (forthcoming), *Sham Constitutions*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989979; Walter Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Baltimore: Johns Hopkins University Press, 2008).

[15] Art. 11; Art. 12.

1975 constitution was overwhelmingly ideological in character, extolling Marxism–Leninism–Mao Zedong thought as well as proletarian internationalism (and containing a promise that China would never become a superpower), the 1982 constitution de-emphasizes the Party and emphasizes constitutional supremacy.

Today, much discourse in China concerns whether and how the Chinese constitution "matters." On the one hand, the PRC constitution has been described as the *least* important document in the Chinese legal system,[16] and, except for the mention of the right to education in a single case, *Qi Yuling* in 2001, it has not been treated as judicially enforceable. This case was itself repealed by the Supreme Court in 2009 with great fanfare.[17] Thus, if one limits one's view of constitutional "mattering" to legal enforceability, socialist constitutionalism is a non sequitur.

On the other hand, there is clearly tremendous symbolic value in the Constitution which is true for both the regime and the people. For the regime, if the document did not matter in any sense, why would the Chinese Communist Party amend the document four times since 1982 (in 1988, 1993, 1999, and 2004)? The Constitution plays an important role as an authoritative ideological statement and communicative act.[18] The Chinese Communist Party uses constitutional amendments to signal new directions in policy. Elevation of a particular policy into the constitutional text marks it as a legitimate basis for governance, and usually follows, rather than precedes, implementation. The constitution thus serves as a co-ordination device for internal discourse within the authoritarian regime.

The four revisions of the Constitution reflect China's economic reforms. This process is in the exclusive hands of the party-state both as a formal and an informal matter. In 1988, the Constitution was revised to make reference to a private sector to complement the "socialist public economy."[19] It also provided for transfer of land-use rights, even though land remained owned exclusively by the state or collectives. The 1993 amendments added the phrase "socialism with Chinese characteristics" to the preamble and introduced the "socialist market economy," incorporating Deng Xiaoping's formula for a market-friendly economy. In 1999, a reference to the recently deceased Deng Xiaoping was incorporated into the preamble. In 2004, the Constitution was amended to guarantee private property rights and provide for compensation for expropriated land, an important signal for both foreign investors and China's own market sector.[20] Human rights are also included, reflecting the Party's ideological pushback against critics of its practices.[21]

[16] Donald Clarke, "Puzzling observations in Chinese law: when is a riddle just a mistake?," in C. Stephen Hsu, ed., *Understanding China's Legal System: Essays in Honor of Jerome Cohen* (New York: New York University Press, 2003), p. 93.

[17] Qianfan Zhang, "A constitution without constitutionalism? The paths of constitutional development in China" (2010) 8(4) *International Journal of Constitutional Law* 950.

[18] Andrew Nathan, *Chinese Democracy* (Berkeley: University of California Press, 1986); Deborah Cao, *Chinese Law: A Language Perspective* (Farnham: Ashgate Publishing, 2004), p. 122.

[19] Art. 11. [20] Art. 13. [21] Art. 23.

In addition, in keeping with the tradition of each Chinese leader leaving his mark on the Constitution, Chairman Jiang Zemin's theory of the Three Represents made the preamble.[22] This theory provided ideological coverage for inclusion of the business class ("advanced productive forces"). It seems quite plausible that a future amendment will incorporate the latest formula of the Harmonious Society that is the mark of the previous leadership.

The Constitution matters for the citizenry too. The widely discussed Sun Zhigang incident, in which a constitutional challenge led to the repeal of the system of detention and repatriation in the wake of a student's death in custody, shows the symbolic power of the Constitution.[23] Other groups and individuals have sought to wield the Constitution in particular struggles over property rights, labor rights, and health care.[24] It is poignantly captured in images, such as the story Zhang tells of an old man wielding the Constitution to resist his eviction.[25] We thus have a vibrant and vigorous Constitutional discourse, wholly apart from legal enforceability or efficacy in individual cases.

Arguably, this process is distinct from that we observe in the more conventional democracies in that it is more based on popular will than on elite institutions. As Balme and Dowdle put it,

> Although perhaps initially conceived of by China's leadership as a top-down exercise in social management, legal reform is now interacting with the public and the grassroots in ways that are outside of such political control … it is a process that has become markedly bottom-up – driven by the dynamics of social participation.[26]

Unlike the top-down constitutionalism that emerged in Japan and its later colonies, the Chinese process is one now in the hands of the people themselves, who lack more conventional means of political participation. Constitutional discourse is a substitute for democratic discourse, and is at once both stunted and dynamic.

The Vietnamese leadership too has shown some attention to constitutional matters.[27] It undertook amendments in 2001 to introduce the concept of the

[22] The Three Represents theory provided that the Communist Party should represent "advanced productive forces, the orientation of the development of China's advanced culture, and the fundamental interests of the overwhelming majority of the people in China." This is read as providing for inclusion of the new capitalist classes, development of culture, and some theory of political representation.

[23] Keith Hand, "Citizens engage the constitution: the *Sun Zhigang* incident and constitutional review proposals in the People's Republic of China," in Balme and Dowdle, *Building Constitutionalism in China*, p. 221.

[24] Zhang, "A constitution without constitutionalism?" [25] Ibid.

[26] Stephanie Balme and Michael Dowdle, "Introduction: exploring for constitutionalism in 21st century China," in Balme and Dowdle, *Building Constitutionalism in China*, p. 1 at 13.

[27] Ngoc Son Bui, "Constitutional developments in Vietnam," paper presented for Fourth Asian Constitutional Law Forum, Hong Kong University, December 2011.

socialist rule-of-law state. Political observers have focused on the expanding role of the National Assembly, as it has taken over functions previously reserved to the Standing Committee, has been subject to genuine elections which include non-party members, and has acquired the function of a vote of confidence in individual officials. It has rejected major policies put forward by the government, such as the proposed high-speed rail link between Ho Chi Minh City and Hanoi.[28] The effort seems to be to revitalize the party-state system through genuine operation of formal institutions, which serve to provide information, and to some degree check arbitrary exercise of state power. The system is wrestling with the rule of law, even if one might not say that it has achieved it.

Socialist constitutions follow the Leninist line as a formal matter, and this is a model based on parliamentary sovereignty, with a single party serving as the leading force in society. The Supreme People's Congress and National Assembly are at the apex of the formal structure, embodying the people's power while not actually being representative of it. The National Assembly, as Bui puts it, is a "pontifical institution" that has formal authority to supervise the other branches and through its standing committee monopolizes constitutional interpretation, while being free from external control.[29] In short, constitutionalism in the socialist states is not always sham constitutionalism. The state may not be constrained in the conventional sense by courts, but we see examples of genuine constitutional discourse, with some bite, in China, and an effort to regularize state power through law in Vietnam.

There is a precedent for this kind of legislature-centered constitutional scheme in Asia. The Five-Power Constitution of the Republic of China, inspired by the political thought of the great Chinese statesman Sun Yat-sen, had a similar structure.[30] It too was based on the idea of tutelage, in which a dominant political party would exercise power on behalf of a politically immature people. Although the people were ultimately sovereign, they were understood as being incapable of exercising power, given China's level of education and the tumultuous political circumstances of the time. The prospective challenge of governing a large and uneducated populace in the context of an ongoing civil war led the KMT to deploy Sun's notion of political tutelage, whereby the party would serve as a leading force in society, gradually educating the people to the point where they could exercise their political rights. This stage of tutelage would last for an unspecified period, but eventually the people would be sufficiently capable of exercising authority.[31]

Sun sought to blend Western constitutional structures with imperial Chinese institutions. In addition to the standard Montesquieuan set of branches, he added

[28] Ibid. [29] Ibid.

[30] Sun Yat-sen, "Address on democracy," in *The Teachings of Sun Yat-sen: Selections from His Writings*, ed. N. Gangulee (London: Sylvan Press, 1945), p. 111.

[31] Tutelage later provided a useful justification for authoritarianism when the leaders of the Republic fled to Taiwan in 1949. By providing an intellectual underpinning for the Leninist KMT, Sun's notion legitimated the patronizing relationship between party and society.

two others, drawn from the imperial Censorate (which became the Control Yuan) and the examination bureaucracy (which became the Examination Yuan). He saw the National Assembly as the embodiment of the people's sovereignty, a superior locus of power to all the government branches. Sun's creative synthesis, while never fully implemented anywhere, marks the major twentieth-century attempt to develop a truly distinctive constitutional form in Asia.

In short, we observe three broad types of constitutional system in Asia: liberal-democratic, hybrid, and socialist–Leninist. These obviously are not pure types. But at a broad level, the typology is helpful for understanding the internal variation in Asia.

II. FORMAL FEATURES OF CONSTITUTIONS IN ASIA

This section reports on several different measures of de jure power, utilizing data I have developed with colleagues in the Comparative Constitutions Project (CCP).[32] This is a large project to analyze and understand features of formal written constitutions for all countries from 1789. We ask about some 667 dimensions of constitutional design, for nearly 1,000 different constitutional systems, contemporary and historical. We have produced a number of different summary measures and indices in order to make the data more digestible, and we will report on these data here. We describe each of the indices below.

Here we focus on current constitutions still in force today. The approach is to analyze the data by region, in order to compare Asia with other regions of the world. Furthermore, to reflect the typology developed above, we further divide the seventeen countries in the region into three groups: liberal democracies (eight): Japan, Korea, Taiwan, Thailand, Indonesia, Mongolia, the Philippines, and East Timor; hybrids (five): Singapore, Malaysia, Cambodia, Myanmar, and Brunei; and Leninist (four): China, Vietnam, Laos, and North Korea. Table 2.1 presents the global comparisons for all indices, with sub-categories for the three Asian types. Table 2.2 provides the ranking of Asia among the different regions.

Scope and detail

In our work, we have developed measures of the specificity of national constitutions, including two measures that we call scope and detail.[33] *Scope* refers to the breadth of coverage of the constitution, as measured by the number of topics (according to an inventory of ninety-two potential topics from our survey) included in the constitutional text. *Detail* refers to the level of precision used to cover each

[32] For more details on the project, see www.comparativeconstitutionsproject.org.

[33] Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (New York: Cambridge University Press, 2009).

Table 2.1 *Regional differences.*

			Rights indices				Powers indices		Specificity	
Region	n	Mean age	Overall	Political	Economic	Criminal	Executive	Legislative	Scope	Detail
Latin America	33	28	0.51	0.66	0.45	0.5	0.33	0.26	0.59	0.23
W. Europe/N. America	24	79	0.34	0.50	0.30	0.34	0.42	0.27	0.53	0.11
E. Europe/post-Soviet	32	15	0.51	0.72	0.49	0.44	0.47	0.34	0.61	0.08
Sub-Saharan Africa	47	16	0.41	0.64	0.36	0.37	0.41	0.29	0.59	0.16
Mideast/N. Africa	19	33	0.25	0.43	0.22	0.16	0.46	0.23	0.51	0.07
South Asia	7	19	0.42	0.52	0.41	0.41	0.29	0.22	0.62	0.30
Oceania	14	56	0.27	0.42	0.07	0.41	0.18	0.18	0.42	0.19
East Asia	**17**	**34**	**0.34**	**0.51**	**0.33**	**0.26**	**0.30**	**0.32**	**0.55**	**0.14**
E. Asia: liberal democracy	8	36	0.42	0.64	0.43	0.36	0.33	0.35	0.59	0.10
E. Asia: Leninist	4	26	0.30	0.49	0.34	0.17	0.08	0.37	0.50	0.07
E. Asia: hybrid	5	35	0.21	0.31	0.15	0.18	0.43	0.25	0.52	0.25
Global average	193	32	0.40	0.59	0.36	0.38	0.38	0.28	0.57	0.15

Table 2.2 *Relative rank of East Asia among eight regions.*

Endurance	3
Rights	6
Political	5
Economic	5
Criminal	7
Executive power	6
Legislative power	2
Scope	5
Detail	5

topic; we measure it using the number of words included per topic. Our concern in 2009 was to relate these concepts to the endurance of the constitution; here we simply report differences across regions in level of scope and detail. Figure 2.1 presents the results in two panels. Our general finding is that Asian constitutions do not have significantly different levels of scope from those from other regions. They tend, it seems, to be less detailed than constitutions from Latin America or South Asia, but are more detailed than those in the Middle East.

Executive and legislative power

A central feature of any constitution is its establishment of institutions through which power is exercised. This attribute is true even of constitutions in dictatorships or without rights. We evaluate the institutional structures using two different measures, *legislative power* and *executive power*.

Legislative power captures the amount of power formally assigned to the legislature. This includes powers that are distinct to the legislature, as well as the relative power. The legislative power index draws on the survey by Fish and Kroenig,[34] and consists of a set of thirty-two binary variables drawn from our CCP survey that match the de facto items in their additive index.

For executive power, we use a measure we created on our own. We drew on other data on the percentage of executive proposals that ultimately became legislation, to try to determine which of eight institutional features of executive power "matter" most.[35] We also use a measure of maximum executive tenure developed

[34] M. Steven Fish and Mathew Kroenig, *The Handbook of National Legislatures: A Global Survey* (New York: Cambridge University Press, 2009).

[35] The measure of executive power is described in Zachary Elkins, Tom Ginsburg, and James Melton, "Constitutional constraints on executive lawmaking," paper presented at American Political Science Association annual meeting, 2011, Seattle, WA. It aggregates the sub-components of the measure using weights derived inductively from a regression model. Here, we adopt an unweighted version of that measure, because the sample in this chapter is drastically different from that elaborated in Elkins, Ginsburg, and Melton.

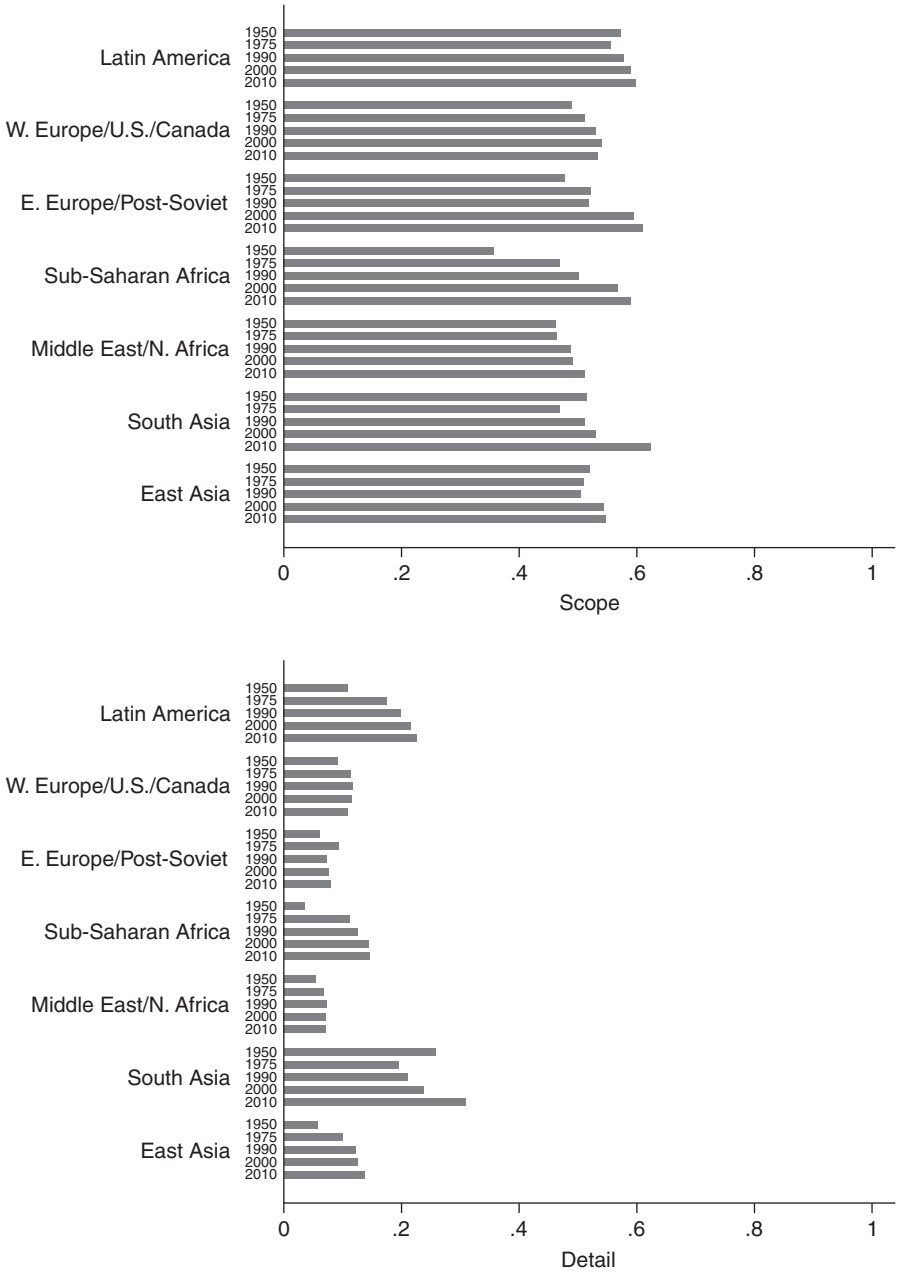


FIGURE 2.1: Scope and detail, by region, over time.

in some work on term limits, as one indicator of the executive's ability to maintain power.[36] This variable captures the maximum number of years that an executive could legally remain in office according to the constitution as it stood at the time the executive ascended to office (without passing a constitutional amendment). Finally, we use a measure that captures the executive's ability to manipulate his or her selection.[37] We refer to this measure as executive selection specificity, as it is simply a measure of the level of detail provided for the selection and removal of the head of state.[38] We assume that selection and removal procedures are more easily manipulated if they are not specified in the constitution. Hence, authoritarian leaders should have lower scores on this measure.

Figure 2.2 presents the results. Interestingly, East Asia (along with South Asia) is among the regions of the world which exhibit the *lowest* levels of formal executive power in their constitutions.[39] (Oceania has an even lower ranking.) In terms of executive selection specificity and executive term, East Asia is in a relatively modest intermediate position. On the index of legislative power, on the other hand, East Asia exhibits the second-highest levels as of 2010, behind only Eastern Europe. Lest one think this is driven by the Leninist cases, note that even the liberal democracies in Asia have high levels of parliamentary power, above the global mean. In short, a purported emphasis on executive authority is not borne out by the formal provisions of Asian constitutions. Instead, we see a good deal of *legislative* power as a hallmark of the region.

We also created several indices of rights protection. The first is an overall rights index, which is simply the percentage of rights included in the constitution, out of a total of eighty-one variables in the CCP survey. We also created sub-indices for civil and political rights, criminal procedures, and economic rights. Each of these indices indicates the percentage of that type of right in the constitution, out of nineteen, twenty-five, and nineteen rights respectively.

The Asian Values proponents argued that Asian countries emphasized rights over duties. One corollary of this argument is that one might expect fewer formal rights in Asian constitutions than are found in other regions. Our data only partly bear this out. The index of overall rights protection, involving eighty-one rights, shown in Figure 2.3a–d, shows that Asian countries have roughly the same level of rights protection as countries in the Western European/North American

[36] Tom Ginsburg, Zachary Elkins, and James Melton, "On the evasion of executive term limits" (2011) 52 *William and Mary Law Review* 1807.

[37] Zachary Elkins, Tom Ginsburg, and James Melton, "The content of authoritarian constitutions," paper presented at University of Chicago Conference on Constitutions in Authoritarian Regimes, October 21–2, 2011.

[38] Most of the components of this measure are not included in our overall measure of constitutional scope.

[39] While South Asian constitutions exhibit a significant change in these levels over time, the East Asian levels are quite stable.

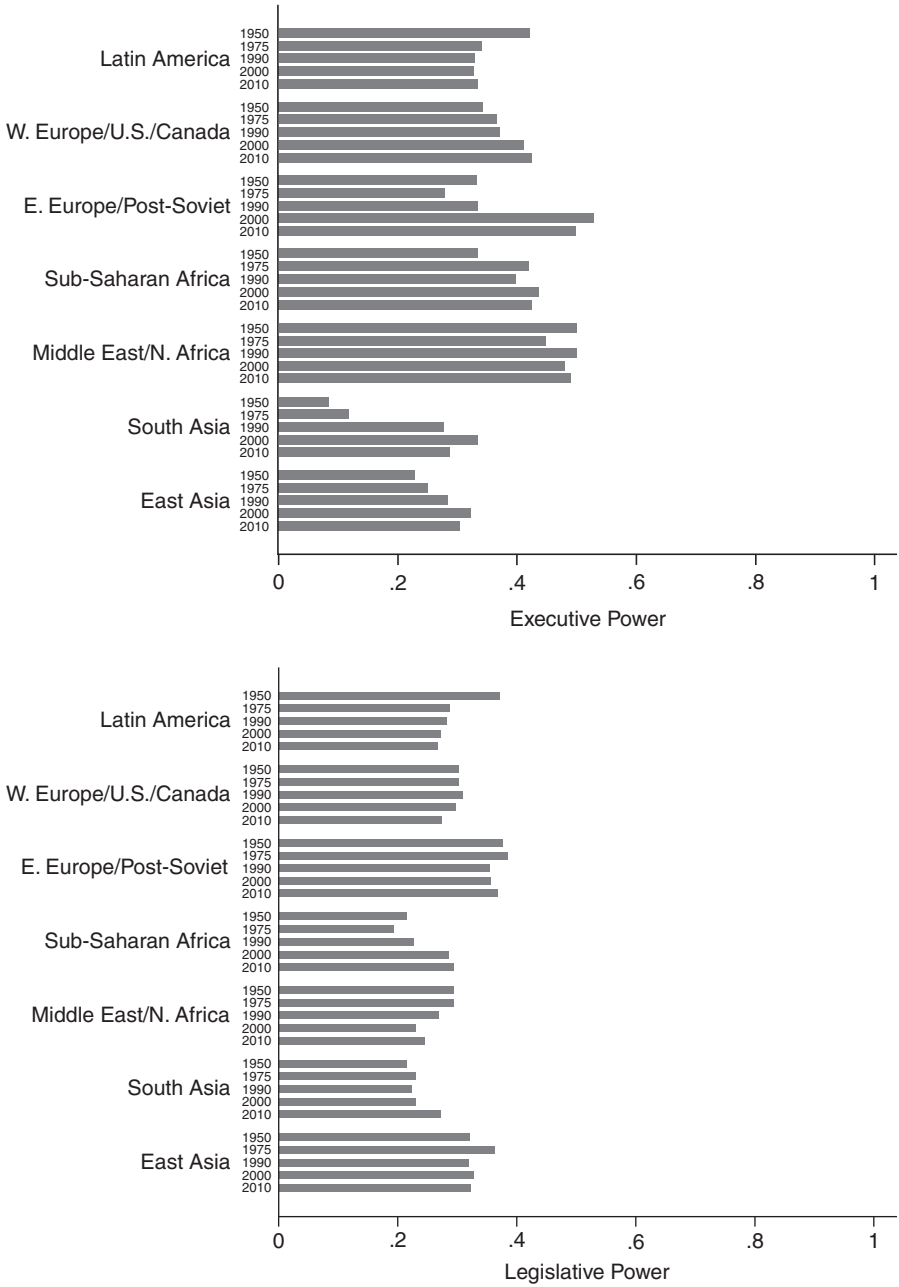


FIGURE 2.2A: Government power indices, by region, over time.

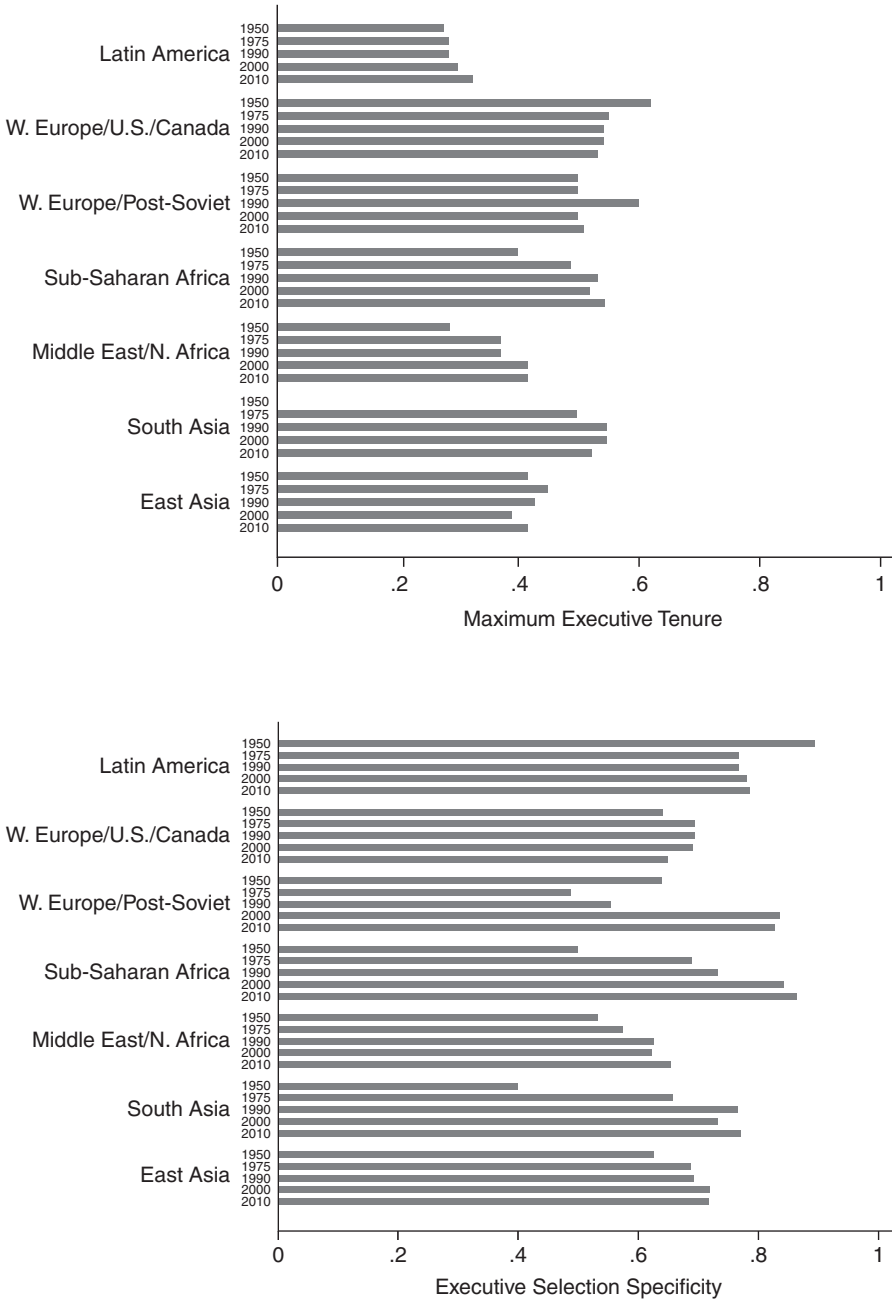


FIGURE 2.2B: Details of executive power, by region, over time.

group, precisely the countries against which the Asian Values proponents were making their claims. The sub-indices for civil/political rights and economic rights exhibit no significant differences between the "Western" and "Eastern" constitutions. But the subtypes of constitutions exhibit different configurations in this regard. Notably, the liberal democracies in Asia have *greater* levels of rights protection than do the constitutions of the Western European/North American countries.

With regard to criminal procedures, however, the Asian region is just above the Middle East and North Africa as the area with the fewest rights. The Asian constitutions have been remarkably stable, showing roughly the same level of protection in 2010 as they had in 1950. (Indeed Asia is the only region with slightly *lower* levels of protection in the latter period; regions like Eastern Europe, South Asia and Latin America have seen significant and profound expansions of their criminal-procedure rights.)

Stability

Another notable feature of this exercise has been to show that East Asian constitutions have been remarkably stable. One does not see sharp declines in legislative power, as in the Latin American case, or dramatic swings with regard to criminal procedure. As mentioned above, this stability is one of the features noted by Yeh and Chang in their study of Northeast Asian constitutionalism.[40] It also reflects the lack of major conflict in the region since the Vietnamese invasion of Cambodia in 1979. Constitutional stability reflects, and contributes to, political stability.

For some countries, such as China, this stability is a relatively recent phenomenon. The seventeen currently living constitutions of East and Southeast Asia have an observed average age of thirty-four years, well above the global average life expectancy for all time of nineteen years and behind only the Western European/North American group and Oceania. Even new democracies, such as Mongolia, have shown remarkable constitutional endurance in recent decades. This fact is an important feature to note. However, earlier eras have seen some instability, and so East Asia's position in the global statistics is lower than, say, Western Europe (see Table 2.1) because of a pattern of some trial and error that is necessary for countries to find stable institutions.

To summarize, we observe some distinctive patterns when comparing the formal features of Asian constitutions with those of other regions of the world. Much, though, depends on the level of abstraction, and the results are somewhat driven by particular sub-groups of countries. The Leninist countries are clearly driving the

[40] Yeh and Chang, "The emergence of East Asian constitutionalism."

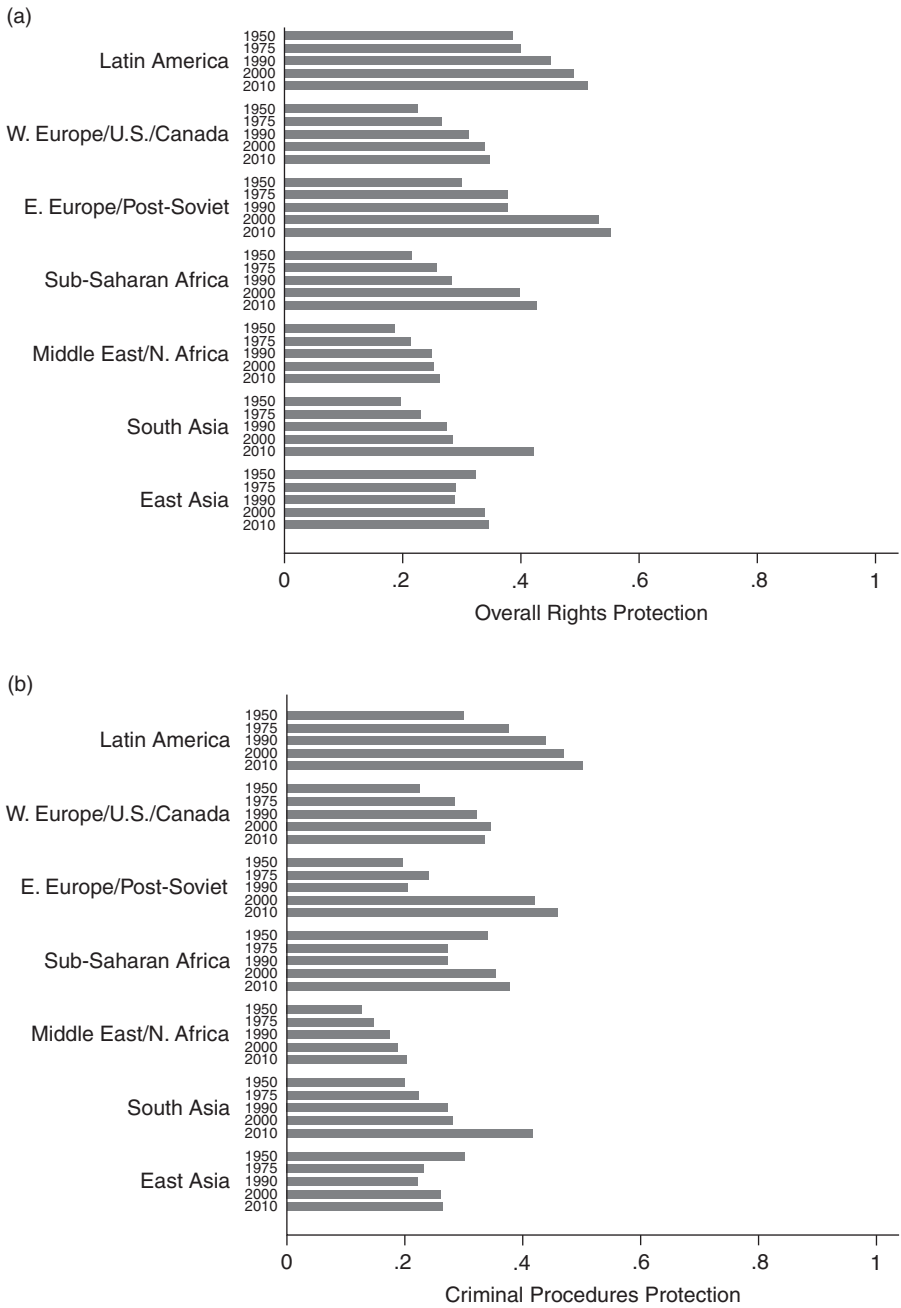
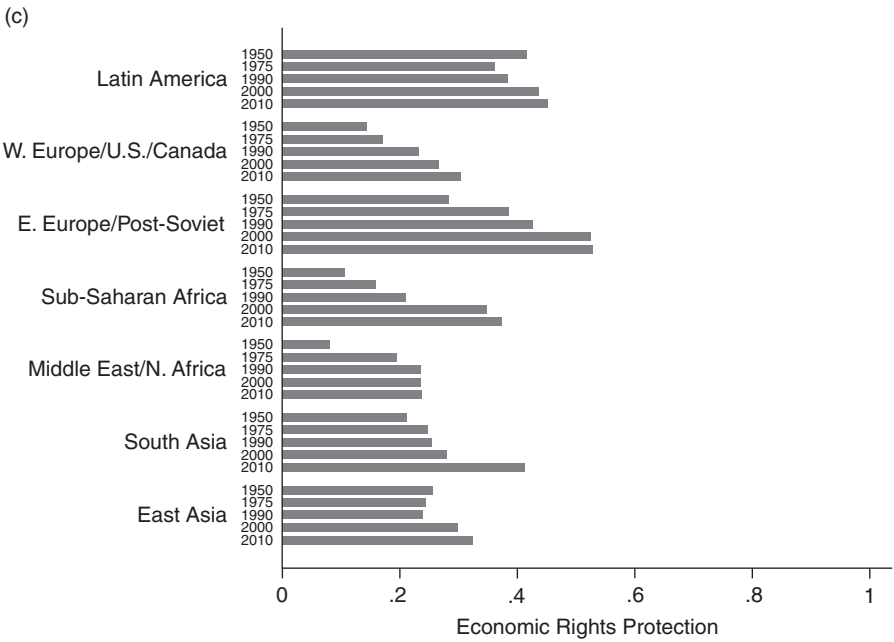


FIGURE 2.3 Rights, by region, over time. 2.3a overall number of rights; 2.3b criminal procedure rights, by region, over time; 2.3c economic rights, by region, over time; 2.3d property rights, by region, over time.



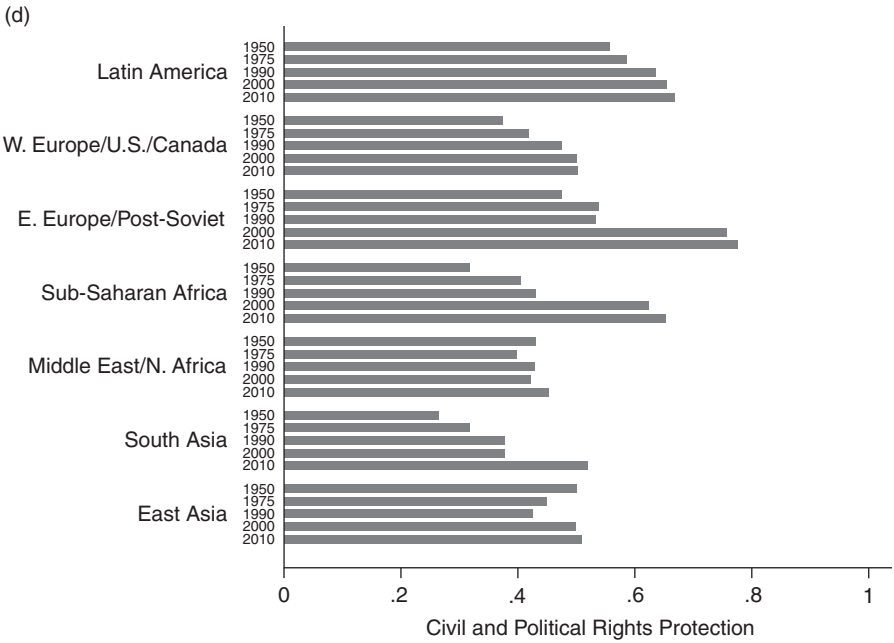


FIGURE 2.3 (*cont.*)

overall Asian results for the power indices, with more extreme numbers for both parliamentary and executive power. On the other hand, the rights features tend to look similar to other countries, except for the area of criminal procedure.

III. CONCLUSION

Clearly the formal patterns of constitutions in Asia do not reflect the conventional Asian Values argument, at least in its simplest version. The overall level of rights in Asian constitutions seems to generally fit the global convergence story. There is, however, one exception: the area of criminal-procedure rights.[41] Asian countries are less likely to protect criminal defendants through the constitution than are countries in other regions. Whether this reflects deeply rooted cultural attitudes toward crime is beyond the scope of this chapter to evaluate. But it is an interesting and heretofore relatively unremarked-upon feature that distinguishes the region.

In terms of the power structure of political institutions we find less evidence for overall convergence. Constitutional systems around the world exhibit a good deal of variation in formal powers granted to the executive or to the legislature. What Chen calls the liberal-democratic and hybrid models are general types that may be found in many regions. While the liberal-democratic and hybrid models in Asia tend to be similar to those in other regions, we showed that Asia is distinctive because of the existence of Leninist countries that continue to maintain the tradition of parliamentary sovereignty. This drives the overall regional pattern of higher levels of parliamentary power, as well as lower levels of executive power, than in other regions. To the extent that one is willing to draw conclusions about an overall regional Asian pattern, the distinctive features seem to flow from the socialist constitutions.

To conclude, it is worth remembering the limits of the present analysis, which is only drawn from formal provisions of constitutions and does not touch on their actual functioning. Yet formal texts are likely to be significant repositories of national values, precisely because of their symbolic nature. To the extent that the proponents of Asian Values are articulating a position that Asian publics have different preferences about the nature of government, these should be manifest in expressive documents like constitutions.

[41] For the convergence story, see Law and Versteeg, *Sham Constitutions*.

3

Major constitutional developments in Japan in the first decade of the twenty-first century

Shojiro Sakaguchi

This chapter reviews several major constitutional developments in Japan in the first decade of the twenty-first century and then examines the current and future state of Japanese constitutional law. Among the many possible topics that merit attention, this chapter focuses on two main subjects from the perspective of comparative constitutional law, namely (1) the rise and fall of the movement towards constitutional reform and (2) the recent tendency towards activist judicial review by the Supreme Court of Japan.

Regarding the first issue, I argue that the conflict between the Cabinet Legislation Bureau and conservative politicians concerning the interpretation of Article 9 is a principal cause of the recent movement towards constitutional revision.

As to the second issue, I argue that the Supreme Court has not finally abandoned its conservative attitude despite its recent tendency towards activism. I also briefly discuss the revision of the Fundamental Law on Education.

Finally, I argue that the impact of the change of government, from the Liberal Democratic Party (LDP) to the Democratic Party, on the development of Japanese constitutional law is relatively insignificant since both parties are basically inclined towards constitutional reform. In December 2012, the LDP won the House of Councilors election and returned to the position of ruling party. Since then, the LDP has made revision of the Constitution part of its political agenda.

The first topic is a major development in Japanese constitutional law in the first decade of the twenty-first century. The Constitution of Japan has never been amended despite attempts to do so in the past. The current movement to revise the Constitution will have an effect across Asia because Article 9, which is the main issue of current constitutional revision, was originally enacted to ensure peace in the region. Since Japan has still failed to deal with the question of war responsibility and earn the trust of neighboring countries, any revision of Article 9 would be too premature to be accepted by them.

As for the second topic, I would like to highlight the fact that since the end of the Cold War, the world has witnessed the sudden rise of constitutionalism, which usually incorporates active judicial review as its core, and the Supreme Court has been perceived to be the most reluctant court to exercise its review function. In fact, the court has been described as "the most conservative constitutional court in the world for good reason."[1] The court has struck down only eight statutes since its creation at the end of the Second World War. However, between 2002 and 2008, it struck down three. Has the court finally awoken from its characteristic slumber?

I. THE PROBLEM OF CONSTITUTIONAL REFORM AND AMENDMENT

Historical background

Though the Constitution of Japan has never been amended, there has been considerable movement towards constitutional reform since it entered into force in 1947. It is no exaggeration to say that any attempt to amend the Constitution has become a major political issue in postwar Japan.

This ought to be a particular source of bewilderment from the perspective of comparative constitutional law. Except during the short period of Occupation by the Allied Forces, the legitimacy of the Constitution has been the subject of heated debate. Usually the ruling power in any given country accepts the legitimacy of the constitution, and uses the legitimacy of the constitution to justify its rule. In Japan, however, the conservative Liberal Democratic Party remained in power for almost half a century until 2009 without interruption, and during that time it consistently attacked the legitimacy of the Constitution and called for its revision, claiming that the Constitution ought to be null and void since it was drafted by Americans and "imposed" on the Japanese government and people against their will.[2]

The LDP has consistently called for an "independent revision" of the Constitution in its party's platform. Liberal constitutional scholars in postwar Japan have been haunted by the fact that the political forces in power have failed to accept the legitimacy of the Constitution and to fully embrace the concept of constitutionalism.[3] Conservative politicians have often been concerned with defending the national identity and traditional values, arguing that Japanese society should be based on the

[1] David S. Law, "The anatomy of a conservative court: judicial review in Japan" (2009) 87 *Texas Law Review* 1545 at 1546. He even suggests that judicial review in Japan can be characterized as a "failure": David S. Law, "Why has judicial review failed in Japan?" (2011) 88 *Washington University Law Review* 1425 at 1426.

[2] On the origin of the Constitution, see generally Koseki Shoichi, *The Birth of Japan's Postwar Constitution*, trans. Ray A. Moore (Boulder, CO: Westview, 1997).

[3] Yoichi Higuchi, "The paradox of constitutional revisionism in postwar Japan," in Yoichi Higuchi (ed.), *Five Decades of Constitutionalism in Japanese Society* (Tokyo: University of Tokyo Press, 2001), p. 351 at 352.

authority of the emperor, whereas the Constitution unduly emphasizes protecting the rights of the individual without due regard to the public welfare and public obligation to society and to others. In short, the LDP does not embrace modern constitutionalism; thus it is no exaggeration to say that if there were an enemy of democracy and freedom in postwar Japan, it would be the LDP itself.[4]

In 1956, the LDP government submitted a bill to establish a constitutional commission to discuss the issue of amendments, and, in 1957, a Commission on the Constitution was established within the Cabinet with the goal of investigating constitutional problems and preparing a draft amendment despite strong opposition from the Japan Socialist Party (JSP).

This fact is interesting for two reasons. First, why did the LDP government use the modest expression "investigation of constitutional problems" instead of "preparing a draft of a new constitution to replace the constitution imposed on Japan" to define the goal of the commission? The most plausible reason is that there was a fundamental difference in attitude at that time between the Japanese people, who were positive about the postwar Constitution, and the political forces in power, who were reluctant to accept it. Since its enactment, many Japanese citizens had been strong supporters of the Constitution. The LDP government could not run the risk of saying it was planning to enact a new constitution after dispensing with the postwar Constitution entirely. Further, the largest opposition party to the LDP was the JSP, which defined itself as a defender of the Constitution. Despite the fact that the Socialist and Communist Parties were strongly influenced by Marxism and usually took a critical stance towards modern constitutionalism, the JSP and the Japan Communist Party were both staunch defenders of the Constitution.

The JSP refused to participate in the Commission on the Constitution and most constitutional scholars also took a dim view of the commission. Although the commission examined the process for enacting the Constitution and what the problems were within the Constitution, it took seven years for the commission to release its final report. The commission was disbanded in 1965 after submitting its final report, which failed to articulate a single conclusion or propose a specific amendment procedure. From the late 1950s to the 1980s, public opinion polls showed that a clear majority of the Japanese people did not favor revision of the Constitution. Unable to mobilize two-thirds of the vote of both houses of the Diet, as required for revising the Constitution,[5] the LDP's efforts proved fruitless, not even managing to reach the discussion stage. Since then, although the LDP's long-term dream of enacting a new constitution or revising the current Constitution has remained on its party platform, no LDP government has risked making it

[4] Shojiro Sakaguchi, "Japan," in Markus Thiel (ed.), *The "Militant Democracy" Principle in Modern Democracies* (Farnham: Ashgate, 2009), p. 219.

[5] Article 96 of the Constitution.

a political issue in a general election, and the LDP has generally refrained from categorizing the issue in its immediate political agenda.

Recent reform movements

On November 22, 2005, the LDP released a draft proposal to reform the Constitution. This draft was spawned by momentum from a movement in the 1990s towards reforming the Constitution. As mentioned above, the main justification in the 1950s for revising the Constitution was that the Constitution was deemed illegitimate because the United States had imposed its will on Japan. Although support can still be found for such an argument today, the main argument for revision has shifted gradually from one of replacing an illegitimate constitution to one of revising a legitimate but imperfect one.

In the late 1990s, the prospects for revision began to take shape. The outbreak of the Gulf War in 1990 had legitimized the LDP government's decision to put the problem of constitutional reform back on its political agenda. The Gulf War focused world attention on Japan's political unwillingness to contribute personnel to a United Nations-endorsed multinational military and peacekeeping operation. Although the Japanese government spent US$13 billion on financially supporting multinational forces against Iraq, no troops were deployed, on the ground that Article 9 of the Japanese Constitution prohibits the government from dispatching the Self-Defense Forces (SDF) abroad.

The Gulf War generated international criticism of Japan due to its absence from the multinational military force. The Japanese financial contribution seemed weak to the United States government, and Japan was perceived as attempting to buy its security. After the Gulf War, questions quickly emerged, along the lines of "why isn't Japan contributing in amounts commensurate with the size of its economy?" and "why does Japan alone not have to suffer war casualties, but instead can seemingly buy its way out of the Gulf War?"[6] Japan was expected to contribute both financially and with a contingent of personnel.

The LDP government exploited this call for international peacekeeping to justify reforming the Constitution. Since Japan was a leading world economy with many Japanese living or travelling abroad, the LDP government harshly criticized Article 9 as embodying a "one-country pacifism" and insisted on the need to meet its international responsibilities.

This argument struck a chord with many Japanese people. Major Japanese newspapers and public-opinion polling organizations periodically conduct surveys of public opinion on various aspects of the Constitution. According to a survey conducted by the *Yomiuri* newspaper in 1991, 33.1 percent of the people favored

[6] Kenneth L. Port, *Transcending Law: The Unintended Life of Article 9 of the Japanese Constitution* (Durham, NC: Carolina Academic Press, 2010), p. 67.

revision of the Constitution, while 51.1 percent opposed any revisions. Later, in 1993, the result of a survey by the *Yomiuri* newspaper showed that 50.5 percent of the people favored revision, while 33 percent opposed revision. The results revealed the changing attitudes of the people, and a movement towards reforming the Constitution gained momentum.

The LDP government advanced another argument for the revision of the present constitution, namely that the Constitution is outdated and fails to meet the needs of changing social and international circumstances, especially since there has been no amendment to the Constitution since its drafting over sixty years ago. For example, there are some proposals to add a bill of rights including new rights, such as the right to privacy or the right to enjoy a healthy and clean environment.

In the year 2000, research commissions on the Constitution were established in both houses of the Diet. This was the first time that the Diet had established such commissions since the Constitution entered into force in 1947. This was made possible by a broad ruling coalition of three parties (the LDP, the Liberal Party, and New Komeito), with support from one opposition party, the Democratic Party of Japan (DPJ). The aim of such commissions is normally to propose revisions that could lead to a complete rewriting of the Constitution. However, the commissions' purpose was officially defined as "conducting broad and comprehensive research on the Constitution of Japan" (Article 102-VII of the Diet Law) and the commissions were not granted authority to submit bills. In July 1999, when the commissions were authorized by the Diet, the *Asahi* newspaper interviewed three prominent political leaders for their reaction. Yasuhiro Nakasone, a former prime minister who for decades has led the push for revising the Constitution, noted that the purpose of the two Diet Commissions is only to "openly discuss the Constitution" and "the discussion will not be conducted on the a priori assumption of revision."[7]

The two commissions held public hearings, sought expert testimony and advice from many sources, and sent observers to examine the constitutions of the world. Although the commissions discussed various aspects of the Constitution in a final report published in April 2005, they failed to present a consolidated view either for or against constitutional amendment, and their reports resemble a detailed record of their research rather than a final report. Deprived of the authority to submit bills, the attendance rate by members of the Diet was very low and debates at the commissions were subdued.

Meanwhile, in May 2004, the *Yomiuri* newspaper, which has the largest circulation in Japan and is also known for its conservative stance, released the third draft outline of its own proposed constitutional amendments. For the first time as a major political party, the LDP also formed a Constitution Drafting Committee

[7] Atsushi Odawara, "The dawn of constitutional debate" (2000) 47 *Japan Quarterly* 17 at 17–18.

in the fall of 2004, and released a draft proposal to reform the Constitution in November 2005, when the LDP celebrated its fiftieth anniversary.

Article 9 and the issue of the Self-Defense Forces

There have been lively debates on various issues concerning constitutional revision from Article 9 to new rights. Among these discussions, however, we should ask, which issue remains the most important? Although many recent proposals refer to new rights, such as the right of privacy or the right to enjoy a healthy environment, these do not constitute the main reason for constitutional revision, since these rights have no legal barrier to overcome. Although the Japanese Constitution has no provisions expressly protecting the right to privacy, constitutional scholars generally recognize the right to privacy as a constitutional right, and the Supreme Court recognizes it as legal right, carefully avoiding categorizing it as a constitutional right as such. As for the right to enjoy a good environment, this should be an underenforced constitutional right, the protection of which comes mainly from the legislature.[8] The arguments for the inclusion of new rights appear designed to rally the support of public opinion and hide the real aim of constitutional revision.

The main contentious issue regarding constitutional revision continues to be Article 9, since that Article severely limits Japanese defense policy. Article 9 provides:

1. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or the use of force as a means of settling international disputes.
2. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

Japanese pacifism, as embodied in Article 9, was the product of negotiation between the American Occupation forces and the Japanese government at the end of the Second World War. Although the origins of Article 9 are unclear,[9]

[8] Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (New Haven, CT: Yale University Press, 2004), pp. 95–102.

[9] There is some dispute over the proper source of the idea behind Article 9. As to the original intent of Article 9, see James E. Auer, "Article Nine: renunciation of war," in Percy R. Luney Jr. and Kazuyuki Takahashi (eds.), *Japanese Constitutional Law* (Tokyo: University of Tokyo Press, 1993), pp. 69, 70–4; Derek Van Hoften, "Declaring war on the Japanese Constitution: Japan's right to military sovereignty and the United States' right to military presence in Japan" (2003) 26 *Hastings International Law and Comparative Law Review* 289 at 290–9; John O. Haley, "Waging war: Japan's constitutional constraints" (2005) 14(2) *Constitutional Forum* 18 at 21–3.

one of the most important aims of the Occupation was undoubtedly the complete disarmament and demilitarization of Japan. This was necessary not only for the United States, but also for neighboring Asian countries, since Japan had always justified invasions as acts of self-defense.

Although there was some difference of opinion among Japanese politicians as to whether the renunciation of war as a sovereign right extended even to self-defense under Section 1, it was apparent that the Government at least took the position that Japan could not have armed forces even for the purpose of self-defense under Section 2. The majority of Japanese people welcomed Article 9 since there was a strong antipathy against armies among the people and they thought that the disasters of the past had occurred as a result of governmental action.

Interpreted literally, Article 9 precludes the nation from maintaining military forces of any kind. "Despite its original intent, since the 1950s, the interpretation of Article 9 was transformed from absolute prohibition to something else"[10] and the so-called "Peace Constitution" was interpreted to allow for the development and maintenance of a quasi-military force. The government could not maintain the original position that armed forces, even for self-defense, were not permitted under Article 9.

While the chief goal of the Occupation had been the complete disarmament of Japan, the United States had been forced to change its position shortly after the outbreak of the Korean War in 1950. As General MacArthur was forced to transfer armed forces to Korea, he requested that the Japanese government establish the National Police Reserve (NPR). According to the executive order, the function of the NPR was limited to the task of policing, but its actual aim was to take the first step in the rearmament of Japan. After Japan concluded a security treaty with the United States in 1952, the Japanese government decided to transform the NPR into the National Safety Force, and finally established the Self-Defense Forces (SDF) in 1954.

As the United States put pressure on Japan to update her security arrangements and share a larger portion of the cost of her defense, the scope and strength of the SDF was expanded. Today, the SDF is a formidable force even by international standards. In fact, the SDF has the third-largest defense budget in the world.[11] Canon Pence points out that "the SDF is now more active internationally than ever before. In addition to a 1992 peacekeeping mission in Cambodia and logistical support for the UN in the Golan Heights, the SDF has recently engaged in large-scale operations in the Middle East."[12]

[10] Robert A. Fisher, "The erosion of Japanese pacifism: the constitutionality of the 1997 U.S.–Japan Defense Guideline" (1999) 32 *Cornell International Law Journal* 393 at 408.

[11] Van Hoften, "Declaring war on the Japanese Constitution," p. 296.

[12] Canon Pence, "Reform in the Rising Sun: Koizumi's bid to revise Japan's pacifist Constitution" (2006) 32 *North Carolina Journal of International Law and Commercial Regulation* 335 at 368.

The Cabinet Legislation Bureau as the main interpreter of Article 9

Often any change in the interpretation of Article 9 is attributed to the role of both the judiciary and the government. For example, Robert A. Fisher refers to the transformation in the interpretation of Article 9 and notes that "this change can be attributed to the role played by the judicial, executive, and legislative branches in defining and applying Article 9."[13] However, this account seems to be half right and half incomplete, and somewhat misleading, since it does not distinguish the role of the courts from the government and fails to identify exactly who has been the main interpreter.

As Toshihiro Yamauchi wrote, "the discrepancy between constitutional norm and reality has been the basis for many constitutional cases during the past fifty years."[14] Several cases involving constitutional challenges to Japan's security arrangements with the United States and the establishment and expansion of the role of the SDF have reached the courts. Lower courts have on rare occasions declared the SDF itself or its involvements in US-led operations unconstitutional.

In the *Naganuma* case,[15] local residents brought legal action against the decision of the minister of agriculture and forestry to reclassify a local forest reserve as land for the construction of a missile base. In 1973, the Sapporo District Court declared the SDF unconstitutional for the first time. According to the court,

> the SDF is a military force, since it is clearly "an organization of men and material which has as its purpose combat activity involving physical force against a foreign threat." Accordingly, the Ground, Maritime, and Air SDF correspond to the "war potential" of "land, sea, and air forces", maintenance of which is forbidden by section 2 of Article 9 of the Constitution.[16]

Even in April 2008, in a case in which local citizens challenged a governmental decision to dispatch the SDF to Iraq, the Nagoya High Court, albeit merely in *obiter dictum*, held that the SDF's activities in Iraq violated the Special Measures Act[17] and Article 9 of the Constitution, since Baghdad could be seen as a war zone

[13] Fisher, "The erosion of Japanese pacifism," p. 408.

[14] Toshihiro Yamauchi, "Constitutional pacifism: principle, reality, and perspective," in Higuchi, *Five Decades of Constitutionalism in Japanese Society*, 27, 36.

[15] 712 *Hanrei Jiho* 24 (Sapporo District Court, September 7, 1973). This decision was reversed by the Sapporo High Court on appeal on the ground that the case became moot, and the Supreme Court affirmed the judgment of the high court in 1982. The decision was translated and reprinted in Lawrence W. Beer and Hiroshi Itoh, *The Constitutional Case Law of Japan, 1970 through 1990* (Seattle, WA: University of Washington Press, 1996), p. 83.

[16] Beer and Itoh, *The Constitutional Case Law of Japan*, p. 111.

[17] The exact title of this Act is An Act on Special Measures Concerning Humanitarian Relief and Reconstruction Work and Security Assistance in Iraq, enacted on July 26, 2003. The Japanese text of this law is available at www.kantei.go.jp/jp/houan/2003/iraq/030613iraq.html, last visited April 23, 2013.

and the transportation of soldiers by the Air Self-Defense Force could be construed as a military action.[18]

However, despite some exceptional willingness in the lower courts to find governmental action unconstitutional, Japanese courts in general, and the Supreme Court in particular, remain unwilling to make a direct ruling on Japanese defense policy. In the famous case of *Sunagawa*[19] concerning the constitutionality of the Japan–United States Mutual Security Treaty,[20] the Supreme Court held in dicta that Article 9 did not deny Japan's inherent right to self-defense and since "war potential," prohibited by Section 2 of Article 9, was limited to that over which Japan could exercise command and control, the American troops stationed in Japan were thus not a prohibited "war potential." It then held that the courts could not examine the constitutionality of the Japan–US Mutual Security Treaty unless it was clearly unconstitutional on the ground that such a decision presented a highly political question and should be entrusted to the executive and legislative branches.

However, this does not mean that the Supreme Court has accorded extreme deference or a margin of appreciation to the legislature in this area. If that were the case, the Supreme Court should have found the SDF constitutional. Rather, the Supreme Court has thus far refused to rule directly on the constitutionality of the SDF and its involvement with international operations, so these problems remain unresolved.

The lack of a definitive ruling by the Supreme Court on the constitutionality of Japanese defense policies has left a legal vacuum, which has been filled by the voices of the Cabinet Legislation Bureau (CLB). "For most of the postwar periods, Japanese politicians have found it useful to leave interpretation of Article 9 to an extraordinary group of bureaucrats – the legal scholars in the Cabinet Legislation Bureau (CLB)."[21] As John O. Haley correctly suggests, "in the end, the Cabinet Legislative Bureau emerged as the single most influential actor."[22]

Modeled on the French Conseil d'état, the CLB was established in 1885 when the Cabinet system was created in Japan for the first time.[23] The core staff of the

[18] 2056 *Hanrei Jiho* 74 (Nagoya High Court, April 17, 2008).
[19] 13 *Keishu* 3225 (Supreme Court, G.B., December 16, 1959).
[20] Security Treaty, April 28, 1952, U.S.–Japan, 3 U.S.T. 3329.
[21] Richard J. Samuels, "Constitutional revision in Japan: the future of Article 9," the Brookings Institution, Center for Northeast Asian Policy Studies, December 15, 2004, p. 2, available at www.brookings.edu./fp/cnaps/events/20041215.pdf (last visited April 23, 2013).
[22] Haley, "Waging war," p. 28.
[23] As to the organization and the function of the CLB in Japanese politics, see Richard J. Samuels, "Politics, security policy, and Japan's Cabinet Legislation Bureau: who elected these guys, anyway?," Japan Policy Research Institute, JPRI Working Paper No 99, March 2004, available at www.jpri.org/publications/workingpapers/wp99.html (last visited April 23, 2013); Yasuo Hasebe, "The Supreme Court of Japan: its adjudication on the electoral systems and economic freedoms" (2002) 5 *International Journal of Constitutional Law* 296 at 298–9.

CLB consists mostly of legal experts. Unlike other elite bureaucrats of the administrative agency, the CLB has no entrance examination and no "incoming class"[24] of college graduates. Members of the CLB are recruited from among judges or other administrative bureaucrats with equivalent legal ability and expertise for extended periods of time.

The CLB has two formal tasks. First, it examines drafts of all bills, regulations, Cabinet orders, and treaties, for both consistency and coherence with the legal system, and especially for their constitutionality. In postwar Japan, most of the bills enacted into statutes are those proposed by the Cabinet. Any bills proposed by the Cabinet must first be submitted to the CLB for legal examination prior to Cabinet approval. Second, the CLB has authority to provide opinions to the prime minister and the Cabinet on legal issues. CLB director generals are invited to Diet meetings to answer questions from Diet members. Sometimes the CLB drafts "unified government interpretations" of legal problems when questions with respect to the legal position of the government are raised by opposition party members in Diet proceedings.

With its capacity and authority, the CLB has had a disproportionate, if not always decisive, voice in governmental interpretations of Article 9. Richard J. Samuels describes the role of the CLB as follows:

> The CLB has emerged as a quasi-constitutional court with a *de facto* monopoly on interpreting the constitution ... By exhaustively and authoritatively reviewing all proposed policies and by issuing "unified government interpretation" (*tôitsu kenkai*), the CLB effectively interpreting "collateralizes" the authority of bureaucrats, lawmakers, and jurists alike.[25]

Exercising this second authority, the CLB filled a legal vacuum left by the Supreme Court on the limits of defense policies.

The CLB's interpretation of Article 9 consists of three propositions. First, Article 9 does not deny the right of self-defense. However, this does not ultimately decide the constitutionality of the SDF since the CLB has adopted some limits on the exercise of the right of self-defense.

Second, the CLB has taken the position that Section 2 of Article 9 prohibits Japan from maintaining "war potential," whether for aggression or for self-defense. The CLB has defined "war potential" as a force with the equipment and organization capable of conducting modern warfare. Given that defining what constitutes war potential requires a concrete judgment about the surrounding states' capabilities and about international conditions, the CLB has admitted to evolving its definition of "war potential" and thus allowing for greater and greater expansion

[24] Richard J. Samuels, "Politics, security policy and Japan's Cabinet Legislation Bureau," p. 2.
[25] Ibid., pp. 2, 3.

of the SDF. However, according to the CLB's interpretation of Article 9, it is unconstitutional neither to maintain capabilities that fall short of war potential nor to utilize these capabilities to defend the nation from direct invasion. Thus the SDF is constitutional so long as it is maintained for the purpose of self-defense and it limits force levels to those sufficient to provide "self-defense," as defined narrowly.

Third and most importantly, although Article 9 does not deny the right of self-defense, it does not allow the exercise of collective self-defense recognized under the UN Charter. In May 1981, the CLB issued its "famously tortured interpretation"[26] of collective security as follows:

> It is recognized under international law that a state has the right of collective self-defense, which is the right to use actual force to stop an armed attack on a foreign country with which it has close relations, even when the state itself is not under direct attack. It is therefore self-evident that since it is a sovereign state, Japan has the right of collective self-defense under international law. The Japanese government nevertheless takes the view that exercise of the right of self-defense as authorized under Article IX of the Constitution is confined to the minimum necessary level for the defense of the country. The government believes that the exercise of the right of collective self-defense exceeds that limit and is not, therefore, permissible under the Constitution.[27]

This opinion remains the politically controlling interpretation of Article 9 and has imposed tremendous burdens on the government. For example, in 1992 when the Diet enacted the Law Concerning Co-operation with UN Peacekeeping Operations and Other Operations permitting the SDF to participate in peacekeeping operations, the CLB set strict limitations on the deployment of the SDF in foreign countries in the form of five preconditions: (1) a ceasefire must be in place and actively maintained among the host countries; (2) the host countries must consent to the SDF participation; (3) the United Nations must be impartial in the dispute; (4) the use of arms is limited to cases of self-defense or necessity and may not be ordered by the United Nations; and (5) in the event of "suspension or termination" of any of the three preconditions, the SDF's participation ends.[28] In sum, the CLB strikes a very delicate balance between the limits imposed by Article 9 and external pressure to contribute to the international community.

[26] Ibid., p. 5.

[27] The National Institute for Defense Studies (ed.), *East Asia Strategic Review 2002* (Tokyo: The National Institute for Defense Studies, 2002), p. 315, available at www.nids.go.jp/english/publication/east-asian/pdf/2002/east-asian_e2002_8.pdf (last visited April 23, 2013).

[28] Edward J.L. Southgate, 'From Japan to Afghanistan: the U.S.–Japan joint security relationship, the War on Terror, and the ignominious end of the pacifist state?" (2003) 151 *University of Pennsylvania Law Review* 1599 at 1631.

CLB versus conservative politicians: a real target of the recent reform movements

The significance of the recent reform movements should be examined by asking what is the real motivation and target of these movements. Some have suggested that conservative forces, weary with the long debate and struggle over the legitimacy of the SDF, settled the problem through constitutional revision. In the past, attempts to obtain the two-thirds voting majority necessary to propose a draft of an amendment have failed. The Socialist Party of Japan (SPJ), which used to be the largest opposition party and constantly suspicious of the constitutionality of the SDF, split into the Democratic Party of Japan (DPJ) and the Social Democratic Party of Japan (SDPJ). The DPJ recognizes the constitutionality of the SDF and supports constitutional revision. The SDPJ has also now finally recognized the constitutionality of the SDF. As a result, almost all parties share the view that the SDF is constitutional as the minimum self-defense force necessary. Thus, at least in politics, there is no need to take pains to initiate the cumbersome process of constitutional revision to confirm the constitutionality of the SDF.

The real object of the reformist movement should be the CLB's interpretation of Article 9, which has set severe limits on the exercise of collective self-defense. Since the 1990s, many conservative politicians have severely criticized the limits imposed upon the exercise of collective self-defense by the CLB. It was the CLB's role in the 1990–1 debates on the deployment of the SDF as a UN Peacekeeping Force or Operation that frustrated conservative politicians the most. Although the ultimate passage of the Law Concerning Co-operation with UN Peacekeeping Operations and Other Operations suggests that the CLB could not withstand pressure from politicians, the CLB, with the help of pragmatic LDP politicians concerned about the risk of Japan being entangled in American wars, began to impose the strict limitations on SDF deployment in foreign countries mentioned above. But the situation seems to have since changed.

After the Gulf War in the 1990s, pragmatist politicians gradually lost their leadership in the LDP. Revisionists began to portray Article 9 as an obstacle to "international co-operation" and the cause of Japan's failure to gain respect from the international community. They also began to attack the role of the CLB, insisting that the recalcitrant attitude of the CLB was the best example of how acquiescent everyone was to being ruled by bureaucrats. They complained that the CLB should not have the authority to make constitutional interpretations that belong primarily to the judiciary.[29]

It is against this political background that we should carefully read the current LDP draft proposal for a new constitution.[30] The new draft first retitles the second

[29] Samuels, "Politics, security policy, and Japan's Cabinet Legislation Bureau," pp. 6–9.

[30] On the new draft of the LDP, see Shigenori Matsui, *The Constitution of Japan: A Contextual Analysis* (Oxford: Hart Publishing, 2011), pp. 270–1; Pence, "Reform in the Rising Sun," 377–81.

chapter from "Renunciation of War" to "National Security." It proposes amending Section 1 of Article 9 in order to constitutionalize the SDF and adding a new Section 2 on national defense and international peace co-operation.

The draft provides in Section 1 that "in order to defend the peace and independence of our country and to protect the safety of the country and its citizens, the Self-Defense Military, which is to be commanded by the Prime Minister as commander-in-chief, should be established." The new draft thus officially renames the SDF and explicitly refers to the maintenance of a "self-defense military." This change is of interest because it would mark the first time since the end of the Second World War that Japan has referred to its own armed forces as a military.

However, we can find more important changes in Sections 2 and 3. The draft provides in Section 2 that "in order to perform activities to fulfill the duties under the preceding section, the Self-Defense Military must be subject to Diet approval and other necessary control." It also provides in Section 3 that

> the Self-Defense Military is authorized to perform, as defined by law, international co-operative activities in order to secure the peace and security of the international society and activities to protect public order and to protect the lives and safety of citizens in times of emergency, in addition to activities permitted under section 1.

These changes allow Japan to participate actively with the United States and the UN in various international military and peacekeeping endeavors.

However, constitutional revision is not the only route conservative politicians should take to overcome the limits to militaristic action imposed by the CLB. There is another route, which is to increase political pressure on the CLB to change its interpretation of Article 9. In the past, Prime Minister Yasuhiro Nakasone, who, on August 15, 1985, was the first postwar prime minister to visit Yasukuni Shrine in his official capacity, organized a private advisory panel to investigate whether the official visit and worship would be constitutional after he was met with some resistance from the CLB. The advisory panel concluded that an official visit would not violate the Constitution, and the CLB was forced to change its former guidelines prohibiting Cabinet ministers from participating in Shinto rites.[31]

In April 2007, Prime Minster Shinzo Abe established a prime minister's advisory panel to examine the question whether to revise the current interpretation of the Constitution in order to permit Japan to engage in certain specified collective self-defense operations. While the Abe government continued to advance the agenda for constitutional reform to amend Article 9, the appointment of this panel of experts to reinterpret Article 9 was an effort to establish "an alternative path to constitutional change as a hedge against the possible failure of the amendment

[31] Samuels, "Politics, security policy, and Japan's Cabinet Legislation Bureau," p. 4.

process."[32] It was also another attempt to put pressure on the recalcitrant CLB to change its interpretation of Article 9.

However, this strategy has proven risky for conservative politicians as the CLB has helped them several times in the past. For instance, the CLB provided the ingenious interpretation of Article 9 to justify the establishment of the SDF. The government used the interpretation by the CLB as an excuse to refuse demands from the United States.

Future prospects

When Abe fought the 2007 House of Councilors election, insisting that the issue of constitutional revision was very high on the political agenda, it resulted in a devastating loss for the LDP. As a result, the two prime ministers who succeeded Abe, Yasuo Fukuda and Taro Aso, were both reluctant to focus on the problem of constitutional revision. The LDP eventually lost the 2009 House of Representatives election and had to relinquish power. The movement towards constitutional revision has temporarily lost vigor, and the results of recent public opinion polls have been ambiguous. While a majority of people seem to support some kind of constitutional revision, they remain ambivalent about any radical revision of Article 9. It is difficult to predict when and how the constitutional revision of Article 9 will regain its place on the political agenda.

Both the DPJ and the LDP still see the need to revise the Constitution or change the current interpretation of Article 9 in order to permit Japan to engage in certain specified collective self-defense operations. The DPJ Constitutional Commission also issued an interim report for constitutional reform in June 2004. The last part of the report dealt with the problem of national security. It stressed the need to recognize that Japan could participate in collective-defense activities. It refers to this collective defense as a form of "limited self-defense" since its exercise should be admitted within the limits of the Charter of the UN.[33]

In December 2012, the LDP won the House of Representatives election and returned to the position of ruling party. Since then, it has put revision of the Constitution back on the political agenda. On April 27, 2012, the LDP released another draft proposal to reform the Constitution which was more revealing of the true intention of the LDP than the 2005 draft proposal had been. The proposed

[32] Craig Martin, "The case against 'Revising Interpretations' of the Japanese Constitution," *Asia-Pacific Journal: Japan Focus*, available at www.japanfocus.org/-Craig-Martin/2434 (last visited November 3, 2011), p. 1.

[33] The report of DPJ commissions imposed several limitations upon the exercise of the right of collective self-defense. The exercise of the right of collective self-defense was permitted, provided that (1) it was extremely necessary, (2) it was done as an interim measure until the collective defense of the UN was in play, (3) the Japanese government should report its activities to the UN, (4) the use of force should be restrained as much as possible.

draft makes an explicit recognition of a "self-defense military" and the establishment of a military tribunal. More importantly, it denies individualism and the universal character of constitutional rights. Whereas the current Article 13 provides that every person shall be respected as an "individual," the proposed draft replaces "individual" with "human." It also completely deletes Article 97, which declares that "the fundamental human rights . . . guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they . . . are conferred upon this and further generations in trust, to be held for all time inviolable."

The proposed draft of the LDP appears to aim to replace the fundamentally individualistic and universal character of the human reflected in current constitutional rights with more communitarian and Japanese-specific rights. It is no exaggeration to say that the proposed draft is a kind of declaration of independence from Western constitutionalism that has finally extended to Eastern European countries.

The second Abe government now plans first to remove the supermajority requirement of constitutional amendment in Article 96 to make it possible to amend the Constitution by a simple majority. If the LDP and other right-wing parties win the upcoming election for the House of Councilors, they will have the supermajority to amend the Constitution as they wish.

II. THE AWAKENING OF JAPANESE JUDICIAL REVIEW?

The most conservative court in the world

There is a now a consensus among comparative constitutional scholars that the Supreme Court of Japan has been one of the most conservative constitutional courts in the world. For example, the famous Canadian comparative constitutional scholar David Beatty has said that "among comparativists, constitutional review in Japan is regarded as the most conservative and cautious in the world."[34] Recently, David S. Law pointed out that one could characterize the court as "conservative" in two senses of the word.[35] On the one hand, one could characterize it as "conservative" in the sense that it is so passive or cautious that it almost never challenges the government.[36] Although over sixty years have passed since its

[34] David Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995), p. 121.

[35] David S. Law, "The anatomy of a conservative court," pp. 146–7.

[36] See, e.g., John O. Haley, "The Japanese judiciary: maintaining integrity, autonomy, and the public trust," in Daniel H. Foote (ed.), *Law in Japan: A Turning Point* (Seattle, WA: University of Washington Press), p. 99; Noriho Urabe, "Rule of law and due process: a comparative view of the United States and Japan," in Luney and Takahashi, *Japanese Constitutional Law*, pp. 173, 182; Shigenori Matsui, "Why is the Japanese Supreme Court so conservative?" (2011) 88 *Washington University Law Review* 1375.

creation in 1947, the court has held legislation to be unconstitutional on only eight occasions. On the other hand, since the court has usually declared statutes to be constitutional, the net result of the rulings of the court has not departed from the mainstream of views and preferences of Japan's long-ruling conservative party, the LDP. It should also be noted that even in the very rare cases when the court has declared certain statutes unconstitutional, it barely raised the eyebrows of conservative politicians.

A revisionist account: the method of limiting construction

Although the Supreme Court has proven reluctant to strike down legislation and acts deferentially toward the other branches of government, this does not mean that the court has abandoned its role of scrutinizing laws of the government and conducting judicial review. The court has generally upheld the validity of laws, but imposed a limiting construction on rather open-ended terms in statutes. By giving a limiting construction, the court has imposed limits on legislative discretion and protected the fundamental rights of citizens. The court's jurisprudence on the tort law of defamation provides a good example.

In Japanese law, defamation gives rise to criminal as well as civil liability. Article 230 of the Penal Code prohibits the publication of defamatory statements revealing facts in public. It provides that a person who defames another by alleging facts in public shall, regardless of whether such facts are true or false, be punished by imprisonment with or without hard labor for a period not exceeding three years or a fine not exceeding 500,000 yen. This provision was inserted in the Penal Code under the Constitution of the Empire of Japan (Meiji Constitution), in which the protection of freedom of speech was weak.

When the Japanese constitution was enacted, the Diet amended the Penal Code and expanded Article 230-2. Section 1 of Article 230-2 provides that when an act prescribed under paragraph (1) of the preceding Article is found to relate to matters of public interest and has been conducted solely for the benefit of the public, the truth or falsity of the alleged facts shall be examined, and punishment shall not be imposed if they are proven to be true. By adding these exceptions, the Penal Code gives immunity to those who publish defamatory statements which (1) relate to matters of public interest, (2) are published with the sole purpose of advancing the public interest, and (3) can each be proven to be true. This exception clause still appears to require a defendant to establish the literal truth of the allegedly defamatory statements in order to avoid liability.

Nevertheless, in the *Evening Wakayama News* case,[37] the court construed Article 230-2 as also giving immunity when the publisher believed mistakenly in

[37] 23 *Keishu* 975 (Sup. Ct. G.B., June 25, 1969).

the existence of the facts and there was good reason for his mistaken belief on the basis of reliable information and grounds, even if he could not prove that the statement was true. The court justified this interpretation on the ground that "Article 230-2 of the Penal Code has been enacted to reconcile the personal security of the honor of an individual with freedom of speech."[38] At face value, this explanation is unpersuasive since it raises the question why there was a need to add another exception in addition to those already provided in the Penal Code. This defamatory defense is justified in that the importance of free speech for maintaining democracy is not readily discernible when reading the text of the Constitution literally.

In the *Hoppo Journal* case,[39] the Supreme Court acknowledged the link between freedom of speech and a functioning democracy:

> In a democratic nation where sovereign power resides with the people, the following is the foundation of its existence. That is, the people as constituents of that nation may express any doctrine, advocacy of a doctrine and the like as well as receive such information from each other, and by taking whatever they believe rightful from among them of their own free will, majority opinion is formed, and government administration is determined through such a process. Therefore, the freedom of expression, especially the freedom of expression relating to public matters, must be respected as a particularly important constitutional right in a democratic nation.[40]

Essentially, the court supports the position that the freedom of expression of public concern should have priority over the protection of personal honor by adding more exceptions than we can glean from the text of the Penal Code. Thus, "the Supreme Court did not declare any part of Article 230 of the Penal Code contrary to the Japanese Constitution; instead, it simply rewrote the exceptions clause to make it compatible with Article 21's guarantee of freedom of speech."[41]

Thus, it is possible to appreciate the revisionist account of the court's behavior. Ronald J. Krotoszynski Jr suggested recently that "one could view the Supreme Court's practice of providing limiting constructions as a form of judicial activism, rather than as the product of extreme judicial deference."[42] Even if we could not characterize the practice of the court as a form of judicial activism, it is at least arguable that the conventional account of the court as an extremely deferential court is quite misleading. The court has never completely abandoned its role as the guardian of constitutional rights.

[38] Ibid., p. 977. [39] 40 *Minshu* 872 (Sup. Ct. G.B., June 11, 1986). [40] Ibid., p. 877.
[41] Ronald J. Krotoszynski Jr, *The First Amendment in Cross-cultural Perspective: A Comparative Legal Analysis of the Freedom of Speech* (New York: New York University Press, 2006), p. 156.
[42] Ibid., p. 177.

Activism without constitutional argument: the doctrine of the abuse of discretion

The Supreme Court has developed another method of protecting constitutional rights that employs the doctrine of the abuse of discretion.[43] For instance, in the *Jehovah's Witness Kendo Refusal* case,[44] the court held that a public high school should not be allowed to expel a student who refused to participate in the practice of kendo – Japanese-style fencing – because of his religious beliefs. This case concerned a public-school student who, as a Jehovah's Witness, deemed taking part in the practice of kendo as a combative sport as essentially irreconcilable with his religious faith. He informed the school of his religious reasons for refusing to engage in kendo and requested that he be given alternative activities such as writing reports instead. However, since kendo practice, considered an essential core of the health and physical education program, was a compulsory subject at that school, the student was refused advancement and ultimately expelled for persisting with his refusal.

The court held that the decision of the school was "unlawful beyond the scope of discretionary authority" of the school.[45] Japanese textbooks on constitutional law once referred to this case in relation to the issue of freedom of religion, and considered it a rare example of the Supreme Court actually protecting religious rights.

Again, however, this characterization is half right and half misleading. On the one hand, it is true that the court finally protected freedom of religion by deciding in favor of the student in this case. On the other hand, it is somewhat misleading to refer to this case as a "constitutional" one. First, the court held the school's action "unlawful" rather than "unconstitutional." The case was dealt with by the Supreme Court not as a case of constitutional law, but as one of administrative law. Secondly, it is very difficult to find many compelling constitutional arguments in this judgment. We can find them only twice. The decision refers to freedom of religion in the context of the court ruling that "the said dispositions could not be said to directly restrict the freedom of religion."[46] The decision also refers to the separation of religion and state in the context of the court rebutting the school's argument that taking alternative measures is against Article 20, paragraph 3, of the Constitution, which prescribes the separation of religion and state. The court held:

> the Court does not believe that, in the case of a student who is not able to participate in kendo practice for valid reasons of religious faith, the action of offering alternative activities such as requiring the relevant student to take part in alternative physical training activities … has religious implications in its purpose, or has the effect of supporting,

[43] Matsui, *The Constitution of Japan*, p. 149.
[44] 50 *Minshu* 469 (Sup. Ct. G.B., March 8, 1996). [45] Ibid., p. 480. [46] Ibid., p. 478.

> enhancing, or promoting a specific religion or the effect of oppressing or interfering with those believing in other religions or those with no religion.[47]

According to a law clerk,[48] "taking into account the fact that the protection of freedom of religion works in the background, the court ruled that the expulsion was an abuse of discretion."[49]

Thus, even if we could regard this decision as protecting freedom of religion, we should admit that it could do so without much constitutional argument. The Supreme Court thus has oftentimes avoided even constitutional arguments to protect fundamental rights. In the jurisprudence of the court, constitutional protection of fundamental rights only works as a background fact.

In this sense, the attitude of the court was peculiar as compared with other constitutional courts around the world.

Finally, the awakening of the court?

As mentioned above, over the course of its entire existence – a period spanning over sixty years – the Supreme Court has struck down statutes on only eight occasions, three of which were in the first decade of the twenty-first century. Before addressing whether we are now finally witnessing the awakening of judicial review in Japan, it is necessary to examine briefly a few important cases.

The first case is the 2002 *Postal Act* case.[50] The court struck down Articles 68 and 73 of the Postal Act because it deemed the government's liability to be inadequate in cases where it had mishandled the mail. At issue was the constitutionality of the provisions of the Postal Act limiting the liability of the postal service for the loss of registered mail. The Postal Act gave immunity to the government even when the Post Office intentionally caused damage or was grossly negligent in handling registered mail, while imposing limited liability only when the registered mail was lost or damaged. The court found this immunity unreasonable and an unconstitutional violation of the right to seek damages from the government under Article 17 of the Constitution.

The second case is the 2005 *Overseas Voters* case,[51] which the court struck down as an unjust provision of the Public Office Election Act, which denied the right to vote to Japanese nationals living abroad. The court held that the right to vote

[47] Ibid., p. 479.

[48] On the role of Japan's law clerk, see Masako Kamiya, "'Chosakan': research judge toiling at the stone fortress" (2011) 88 *Washington University Law Review* 1601.

[49] Hiroshi Kawakami, "Hanrei kaisetsu (Case account)," in Hosokai (ed.), *Saiko Saibansho Hanrei Kaisetsu Minjihen Heisei Hachi Nendo (Jo)* (Case Accounts of the SCJ Cases on Civil Law in the 1996 Term) (Tokyo: Hosokai, 1999), pp. 174, 185.

[50] 56 *Minshu* 1439 (Sup. Ct., G.B., September 11, 2002).

[51] 59 *Minshu* 2087 (Sup. Ct., G.B., September 14, 2005).

"serves as the core of parliamentary democracy, and a democratic nation should give this right equally to all citizens who have reached a certain age." Except for disenfranchisement in order to maintain fairness in elections, any disqualification from voting or limitation on the right to vote should not be allowed in principle, unless it is necessary for compelling reasons. Since the court could not find such compelling reasons in this case, it held that the total exclusion of overseas voters from the election constituted an unconstitutional denial of equal protection.

The third case is the 2008 *Illegitimate Children Nationality Discrimination* case,[52] in which the court struck down paragraph 1 of Article 3 of the Nationality Act. Article 2 of the Nationality Act grants Japanese nationality to a child born to a Japanese father or mother. However, under Article 3, paragraph 1, an illegitimate child born to a foreign mother could acquire Japanese nationality only after his or her parents married. This paragraph was held by the court to constitute unreasonable discrimination.

The fact that these three decisions were handed down in the first decade of the twenty-first century suggests that this decade could be characterized as the eventual "period of awakening of the Grand Bench of the Supreme Court of Japan."[53] However, it is not clear whether the court has finally abandoned its conservative attitude or not.

First, the court appears to still be maintaining its conservative stance in the sense of sharing the ideological preferences of conservative political forces. Recent decisions of the court, even including the three aforementioned decisions where the court held statutes to be unconstitutional, has not provoked strong criticism from conservative political forces. In other cases where the court has been concerned about appearing "politically sensitive," it appears to have maintained its conservative position, rejecting many constitutional challenges to governmental actions. For example, in the 1995 *Discrimination against Illegitimate Children* case,[54] the court rejected a challenge to Article 900 of the Civil Code, which gave an illegitimate child only one-half of the inheritance share of a legitimate one. The court held that the Diet had a very broad discretion in this area and this differential treatment was constitutional.

Second, with respect to decisions where the court has held statutes unconstitutional, they might be characterized as conservative decisions in the sense that they have been so cautious that they never squarely challenged the government. Even in the *Overseas Voters* case and the *Illegitimate Children Nationality Discrimination* case, where the court held the statutes to be unconstitutional, the court incorporated in its decisions some device to mitigate their radical implications. In these cases, the court did not rule that these statutes were unconstitutional

[52] 62 *Minshu* 1367 (Sup. Ct., G.B., June 4, 2008).
[53] Joji Shihido, "Shiho no puragumatic" (Pragmatism of judiciary) (2007) 322 *Jurisuto* 24 at 24.
[54] 49 *Minshu* 1789 (Sup. Ct., G.B., July 5, 1995).

from the day they were enacted. In order to avoid strong political reactions from conservative political forces, the court emphasized the change in circumstances as a reason to declare these statutes unconstitutional. For instance, in the *Illegitimate Children Nationality Discrimination* case, the court held expressly that the provision at issue was constitutional at the time of enactment, but that the passage of time had made it unconstitutional:[55]

> Since then, along with the changes in social and economic circumstances in Japan, the views regarding family lifestyles, including the desirable way of living together for a husband and wife, as well as those regarding parent–child relationships, have also varied, and today, the realities of family life and parent–child relationships have changed and become diverse, as evident in that the percentage of children born out of wedlock in the total number of newborn children has been increasing. In combination with these changes in socially accepted views and social circumstances, Japan has recently become more international and international exchange has been enhanced; consequently, the number of children born to Japanese fathers and non-Japanese mothers has been increasing. In the case of children whose parents are Japanese citizens and foreign citizens, the realities of their family lifestyles (e.g. whether or not each child lives with a Japanese parent) as well as the views regarding a legal marriage and the ideal form of parent–child relationship based therein are more complicated and diverse than in the case of children whose parents are both Japanese citizens, and in the former case, it is impossible to measure the degree of closeness of the ties between the children and Japan just by examining whether or not their parents are legally married.[56]

The court was thus still very cautious even when its decisions were not likely to elicit strong reactions from conservative politicians. This is very interesting when compared to the attitude of the Supreme Court of the United States because the strategy of emphasizing the change of circumstances was precisely the one used when the Warren Court declared racial segregation unconstitutional for the first time in *Brown* v. *Board of Education*.[57] In Brown's first case, Chief Justice Earl Warren emphasized that changing historical circumstances justified a departure from the long practices of the South.[58] The compromise by the court was both necessary and yet inadequate to gain the support of the south. The Supreme Court of Japan adopted the same strategy to mitigate the reaction from conservative forces and it seemed to be successful in Japan.

[55] 62 *Minshu* 1367 at 1372–3. [56] Ibid. at 1373–4.
[57] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).
[58] See Morton J. Horwitz, *The Warren Court and the Pursuit of Justice: A Critical Issue* (New York: Hill and Wang, 1998), pp. 26–9.

Although several explanations have been offered for the apparent conservatism of the Supreme Court,[59] I would like to emphasize two factors.

The first is the existence of the CLB. Since the CLB has checked the constitutionality of statutes *ex ante*, the Supreme Court has rarely had a chance to declare a statute unconstitutional. Between 1947 and 2001, only five statutes were declared unconstitutional, and, of these, four were submitted to the Diet as individual Diet member's bills and were not reviewed by the CLB initially.[60]

The second factor is that the LDP has governed Japan almost without interruption and appointed justices who share the same political preferences. However, the relationship between the long rule of the LDP and the conservatism of the Supreme Court is not so simple. The judiciary was not a mere puppet of the LDP and the judiciary itself seems to have built up a strong internal system of self-restraint in order to avoid direct control from politics. The independence of the lower-court judges was severely controlled not by the LDP, but by the chief justice and the General Secretariat of the Supreme Court.[61]

III. CONCLUSION

Japanese conservative political forces have been eager not only to revise Article 9, but also to reform the education system. They believe that the curriculum in postwar Japan has eschewed the teaching of morality and patriotism. Conservatives have been zealous in their criticism of the teaching of Japanese history, arguing that the progressive textbooks and pedagogy are the main causes of the dearth of patriotism being promoted among students. In particular, they have disparaged textbook accounts portraying Japan's conduct in the Second World War as aggressive and giving details of incidents such as the Nanjing Massacre and the "comfort women" system (the Japanese military's system of forced prostitution). They have also criticized the attitudes of some teachers who have refused to stand and sing the national anthem as part of the rituals of school entrance and graduation ceremonies.

After a long struggle with liberals, conservatives finally succeeded in revising the Fundamental Law of Education (FLE) in 2006. The FLE was enacted in 1947 and has been considered a mainstay of the demilitarization and democratization of the

[59] See Hasebe, "The Supreme Court of Japan," pp. 298–300; Law, "The anatomy of a conservative court," 1549–86; Law, "Why has judicial review failed in Japan?," p. 1425; Matsui, "Why is the Japanese Supreme Court so conservative?," pp. 1400–16.

[60] Samuels, "Politics, security policy, and Japan's Cabinet Legislation Bureau," p. 3.

[61] David M. O'Brien and Yasuo Ohkoshi, "Stifling judicial independence from within: the Japanese judiciary," in Peter H. Russell and David M. O'Brien (eds.), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (Charlotteville: University of Virginia Press, 2001), p. 37; Law, "The anatomy of a conservative court," p. 1587.

Japanese education system. Although the revised FLE contained a number of differences from the original version, two points merit attention.

First, the new statute added a new target to the list of objectives of education. This additional target of education involves "cultivating an attitude that esteems tradition and culture, a love of country and the hometowns throughout it, [and] at the same time, respects other countries and contributes to international society's peace and development."[62] Though conservatives carefully avoided the term "patriotism," many liberals fear that the government could use the educational system to promote patriotism at the expense of individual freedoms.

Second, the new statutes revised sections concerning the administration of education. Prior to the amendment, Article 10 of the FLE provided that "education shall not be subject to improper control, but shall be directly responsible to the whole population."[63] The revision states that "education should be performed without improper control, and on the basis of what the law and other laws stipulate." Furthermore, the national government is responsible for determining and enforcing education-related measures throughout the country, and local governments are responsible for "planning and enforcing measures that correspond to the real situation in the area."[64] This revision aims to increase governmental political control over reluctant teachers.

In 2007, the Supreme Court held that an elementary school principal did not violate a teacher's freedom of thought by reprimanding the teacher for refusing to play the national anthem on the piano during a school entrance ceremony.[65] In May 2011, the court held that a high-school principal's act of ordering a teacher to stand and sing the national anthem in circumstances where the teacher refused to sing did not violate the teacher's freedom of thought.[66]

The revision of the FLE should be viewed together with the movement towards constitutional revision since both have been the principal goals of Japanese conservative politicians. They have now successfully achieved one of their goals. With respect to the other one, if conservatives fail to change the interpretation of Article 9 via the CLB through political pressure, they will have to resort to pursuing a new path to constitutional revision.

Nevertheless, this is not a good time either to revise Article 9 or to change the existing interpretation as Japan has yet to earn the trust of her neighboring countries. Japan has also failed to deal with the question of war responsibility or to

[62] See Revised FLE, Art. 2, Sec. 5, translated in Isaac Young, "Shut up and sing: the rights of Japanese teachers in an era of conservative educational reform" (2009) 42 *Cornell International Law Journal* 157 at 168.

[63] Translated in Edward R. Beauchamp and James M. Vardaman Jr. (eds.), *Japanese Education since 1945: A Documentary Study* (Armonk, NY: M.E. Sharpe, 1994), p. 109.

[64] See Revised FLE, Art. 16, translated in Young, "Shut up and sing," pp. 168–9.

[65] 61 *Minshu* 291 (Sup. Ct., 3rd P.B., February 27, 2007).

[66] 65 *Minshu* 1780 (Sup. Ct., 2nd P.B., May 30, 2011).

resolve its moral obligations to other Asian countries. Over the years, many Cabinet ministers have sought to justify Japan's colonial rule of Korea and the invasion of China and Southeast Asia, and this attitude of the Japanese government has hurt the sensibilities of the people of South Korea and China and attracted harsh criticism from many Asian countries. Many Asian countries believe that the Japanese lack of reflection on the past is a sufficient reason for their distrust.

Japanese people and governments bear this fact in mind when they consider revising the Constitution. Even though the prerogative of constitutional revision belongs to "We, the Japanese People," we should make an effort to earn the trust of neighboring countries before exercising it.[67]

[67] Higuchi, "The paradox of constitutional revisionism in postwar Japan," pp. 353–5.

4

Upgrading constitutionalism

The ups and downs of constitutional developments in South Korea since 2000

Jongcheol Kim

I. INTRODUCTION

Themes

In the first decade of the twenty-first century, many Korean people have encountered a number of constitutional problems not only peculiar to Korean society but also common to modern constitutional democracies. The ways in which they have managed to solve such problems can be analyzed in the perspective of constitutionalism as a normative ideal, which liberal democracies enshrine in the constitution. The aim of this chapter is to report the ongoing process and outcomes of constitutional developments in the Republic of Korea, internationally known as South Korea, in this period.

Constitutionalism can be divided into two pillars in its normative composition: (1) the democratic pillar and (2) the liberal one. Whilst the latter concerns the issues of human rights protection, the former involves the accomplishment of popular sovereignty and the democratic operation of the polity. The democratic pillar of constitutionalism is concerned with the government structure and political decision-making process. These include how to stabilize and enhance the efficiency of the political system that has been democratized since the 1987 constitutional revision, on the one hand, and, on the other, how to co-ordinate the increasing demand for direct democracy and representative democracy. The debate on constitutional revision or amendment is a key issue that remains unsettled; there is widespread skepticism on its feasibility and on the necessity of achieving its goals. In addition, the Constitutional Court and the ordinary courts have dealt with a number of constitutional cases in this area, along with a number of reforms in the political process that were reflected in major political legislation.

In terms of the protection of constitutional rights under the liberal pillar of constitutionalism, there have been ups and downs. Major debates in this area

include how to materialize social and cultural rights while striking a balance between civil and political rights and public interests like national security and public order. This period of constitutional controversy has also witnessed remarkable developments of civil society.

The last section of the main part evaluates the constitutional changes in this period as a whole by way of revealing schematically sociopolitical implications and the nexus between constitutional and legal changes and their social and political backgrounds.

Background: characteristics of Korean constitutional history from 1948 to 1987

To understand recent developments, it is necessary to know the basic periods and features of the Korean constitution.[1] Since the enactment of the first constitution of 1948, nine constitutional revisions have been made. Most revisions were made to change governmental structure, either in order to reflect de facto shifts of political power in the wake of a coup d'état or civil revolution, or in order to strengthen despotism by way of changing institutional bars to the re-election of the incumbent president or to strengthen authoritarian powers. The only exception is the Fifth Amendment of November 29, 1962, which was intended to provide interim measures in the addendum of the Constitution to sanction in retrospect those involved in illegal and corrupt activities under the Rhee administration. Long-standing strides toward democratization produced the present constitutional system as a direct outcome of the People's Uprising of 1987. Five features of Korean constitutionalism are worthy of attention.

First, a kind of presidential system has been preferred in Korea. However, it should be borne in mind that the executive power is not granted to the president alone, but to a collective entity of administrative agencies and committees. The prime minister, the State Council, and state councilors are institutionalized to facilitate and control presidential powers.

Second, the National Assembly as a single chamber of legislature is entrusted to exercise broad discretion in the composition of governmental structure and the restriction of constitutional rights. Unlike the Constitution of the United States of America, where Congress can act only as prescribed by the Constitution,[2] the legislative body was vested with the general regulatory power to guarantee national security, public order, and public welfare.[3]

[1] For a further sketch of the history of constitutionalism in modern Korea and its characteristics, see Jongcheol Kim, "Constitutional law," in Korea Legislation Research Institute (ed.), *Introduction to Korean Law* (Heidelberg: Springer, 2013), pp. 31–8. The author draws on this work in the sections below on 'legal status of an independent commission' and 'freedom of conscience'.

[2] The Constitution of the USA, Article 1, Section 8.

[3] The Constitution of the ROK, Article 37(2).

Third, the constitutional adjudication system is institutionalized mainly to control legislative and executive powers.

Fourth, the Constitution has a Bill of Rights in which a comprehensive list of basic rights ranging from civil and political rights to social, economic, and cultural rights are enumerated.

Fifth, since the first constitution of 1948, a special constitutional concern has been given to the market economy to intervene in the relationship between the state and civil society.

II. MAJOR POLITICAL DEVELOPMENTS SINCE 2000

The politics of constitutional revision

Since the consolidation of democratization, dissatisfaction with the present constitution has surfaced with a bid for constitutional amendment or revision. Unlike previous constitutional revisions, this movement has been initiated not only by politicians but also civil society across various political or social spectra. However, three major reasons can be summarized and commented on with regard to the causes of discomfort.

First, the present constitution was criticized for not reflecting many Korean people's genuine will or their ideals of democracy and the rule of law, though some important progress, such as popular direct presidential election and the introduction of the Constitutional Court system, was accomplished through it. The egotistical influence of the then powerful political leaders, Roh Tae-woo, Kim Young-sam, Kim Dae-jung, and Kim Jong-pil has generally been blamed. However, such a simplistic criticism has failed to convince the general public, and criticism of the present constitution must also acknowledge the precarious circumstances that brought about constitutional change in and around 1987.

Second, criticisms focus upon the form of government and/or the term of the president. The form of government which the present constitution envisaged was a balanced separation of powers between the National Assembly and the president. However, the current system can be very unstable because, according to the change of political situation, it may result in either an imperial presidency or a divided government. Another source of criticism is the president's lack of accountability, which originated from a single-term limitation. These criticisms may be questioned in terms of whether such problems can only be solved by constitutional revision, which may in turn have unnecessary sociopolitical costs, as well as financial costs, because such aims may well be achieved by other means.

Third, the Korean constitution needs to reflect the changed atmosphere within and outside the Korean peninsula, where confrontation between South and North Korea causes fundamental constitutional issues. The vicissitudes of globalization and the creation of economic blocs have transformed the relationship between

domestic constitutional issues and international issues and the independence of sovereign nations' control of national economies. In response, the status of the people in this changing environment needs to be readjusted to new developments. However, it is not certain that the proposals suggested can accommodate such visions.

In August 2008, the Final Report of the Advisory Commission on Constitutional Revision for the Speaker of the National Assembly was published, proposing many constitutional amendments summarized in three points. First, the Bill of Rights should be reorganized to include the right to life and security, the "basic right" to information, and so on. Second, constitutional reform should abridge the president's power by changing the form of government from the current "five year single term presidency" to a semi-presidential or premier–presidential system. Third, the judicial system should be democratized and rationalized by adopting new institutions and changing the formation of the judiciary, including the Constitutional Court. Proposed judicial reforms include the repeal of the recommendation power of the chief justice of the Supreme Court for his associate justices when there is a vacancy, the introduction of abstract norm control (constitutional review of legislation without specific cases or controversies), and the transfer of jurisdiction of election suits from the ordinary courts to the Constitutional Court.

Despite the plausibility of the arguments for constitutional reform at the executive and judicial levels, it should be borne in mind that the targeted reforms may also be achieved by legislative changes without constitutional revision. Substantial public supports for constitutional revision cannot be obtained until it is the only effective solution to the target constitutional problems.[4]

Furthermore, regardless of the persuasiveness of constitutional reform or opposition to it, it is the will of the sovereign people that decides whether or not a new constitution is necessary. In the midst of an economic crisis, it is unlikely that reform of constitutional design can attract public enthusiasm. Even if amendment cannot be avoided, what should be given more attention is not only the relationship between the legislature and the executive but also how to enhance the independence and effectiveness of other branches, such as the judiciary, the Constitutional Court, the Election Commission, and the Board of Audit and Inspection.

Emergence of the Constitutional Court as the centre of political co-ordination

A notable development in the operation of state institutions is increasing awareness of the actual importance of the Constitutional Court in relation to matters of "mega-politics." Compared to its predecessors in Korean constitutional history,

[4] For a rough examination of the Final Report from this point of view, see Jongcheol Kim, "Does Korean democracy really need another constitutional revision? A critical review on proposals of the Advisory Commission for Constitutional Revision for the Speaker of the National Assembly" (in Korean) (2010) 38 *Korean Journal of Law and Society* 125.

the constitutional adjudication system has been considerably activated since the establishment of the Korean Constitutional Court (KCC) in 1988; and in the first decade of the twenty-first century, the KCC finally emerged as an influential branch of government to shape the political landscape and the national agenda.

Indeed, two KCC decisions of 2004 are noteworthy. The first case is the presidential impeachment trial, since 1948. In this case, the KCC ruled that it is entrusted with the power to decide whether the president and high-profile public officials should be impeached even if they are found to have committed wrongdoings in their official activities. According to this view, based upon constitutional interpretation rather than explicit constitutional or statutory provision, Roh Moo-hyun regained his power though the KCC recognized that he had violated constitutional and statutory obligations on three counts.[5] The KCC distinguished between the president and other officials in determining whether the actual violation was of the required level of gravity because, since he is the head of state as well as the head of the executive elected directly by the people, the dismissal of the president can cause much greater change in the working of constitutional arrangements and political conflicts. However, there have been strong criticisms of the court's findings of violation because it related to political suggestion and political speeches that can be justified on the ground of his personal freedom of speech and constitutional status as a national political leader.[6]

The second case showing the empowered status of the KCC is the notorious *Relocation of the Capital* case.[7] The movement of major governmental agencies and departments was one of the key issues in the 2002 presidential election. As soon as he was elected, President Roh Moo-hyun proposed a bill for the relocation of the capital and this bill was successfully passed in the course of political negotiation between the ruling Open Uri Party and the main opposition Grand National Party (GNP), though there were a group of dissident assemblymen in the GNP. The dissenters made a constitutional complaint before the KCC, which was surprisingly upheld in a four-stage judgment: first, the proposition that Seoul is the capital of the Republic of Korea must be recognized as a kind of customary constitution with the same effect as written constitutional provisions; second, this constitutional custom should be changed through a constitutional amendment procedure; third, the enactment of a statute with the effect of de facto relocating the capital violates this required procedure; and finally this violation infringes citizens' right to referendum as a requisite of constitutional amendment.

[5] Constitutional Court Decision 2004Hun-Na1, May 14, 2004, *Korean Constitutional Court Reports*, Vol. 16, No 1, 609.

[6] See Jongcheol Kim, "What does the Korean Constitutional Court miss or misunderstand in the impeachment trial against President Roh Moo-hyun?" (in Korean) (2004) 9 *World Constitutional Law Review* 1.

[7] Constitutional Court Decision 2004Hun-Ma554, October 21, 2004, *Korean Constitutional Court Reports*, Vol. 16, No 2, Part 2, 1.

The KCC flexed its judicial muscles by striking down a statute proposed as an election manifesto and later confirmed by the legislature.

However, the KCC is vigilant about when to use a margin of appreciation regarding the legislature or the executive branch, especially if a decision carries political ramifications. For example, the KCC did not nullify the passage of the Newspapers Act and the Broadcasting Act in the *Media Laws* case, though it found that the rights to deliberation and vote of a number of assemblymen were infringed in the course of summary resolution by the majority assemblymen.[8] In addition, the KCC tends to avoid hard cases by applying strict standing rules. For example, it dismissed a competence dispute raised by minority assemblymen arguing that an international trade agreement did not get the allegedly required consent of the National Assembly. The KCC ruled that without explicit statutory provision, the minority of the National Assembly cannot represent the legislature, so that they cannot bring a competence dispute in the name of the National Assembly in its entirety.[9] Furthermore, the KCC happens to restrain its power only because, once procedural requirements are met, executive or legislative decisions of a highly political character such as the dispatch of national military forces to overseas regions should be respected.[10]

III. DEVELOPMENTS IN JUDICIAL AND CONSTITUTIONAL ADJUDICATION PROCEEDINGS SINCE 2000

Major constitutional-law cases in relation to governmental and political arrangements

Nullification of presidential emergency decree under the 1972 constitution

In 2010, the Korean Supreme Court (KSC) drew public attention by nullifying a presidential emergency decree under the 1972 constitution (the so-called "Yushin"[11] Constitution).[12] This decision was a dramatic change from its previous view that it could not review such decrees partly because Article 53(4) of the 1972 constitution precluded the possibility of judicial review in this regard.[13] The KSC said that the procedural limit of the former constitution cannot block judicial review of its

[8] Constitutional Court Decision 2009Hun-Ra12, November 25, 2010, *Korean Constitutional Court Reports*, Vol. 22, No 2, Part 2, 320.

[9] Constitutional Court Decision 2005Hun-Ra8, July 26, 2007, *Korean Constitutional Court Reports*, Vol. 19, No 2, 26.

[10] Constitutional Court Decision 2003Hun-Ma814, April 29, 2004, *Korean Constitutional Court Reports*, Vol. 16, No 1, 601.

[11] Literally *Yushin* means revitalizing reforms, but in reality it is a counterconstitutionalist regime in the name of "Korean-style democracy."

[12] Supreme Court Decision 2010Do5986 (*en banc*), December 16, 2010.

[13] Supreme Court Decision 74Do3510 (*en banc*), March 22, 1997; Supreme Court Decision 77Mo19 (*en banc*), May 13, 1977.

substantive rationality or legitimacy under the present constitution. In addition, the KSC ruled that in a constitutionalist democracy, the notion of "act of state," an equivalent of "political questions" according to US constitutional law, can be recognized only to the extent that it is not beyond the rule of law, and can be subject to judicial review, though in relatively less strict terms. On that ground, it is held that the promulgation of an emergency decree should not be excluded from judicial review though it could be seen as an "act of state." Furthermore, the KSC regarded the said decree as an order, though it has been treated as having statutory effect because in the Constitution the legislature has not been allowed to approve or to request repeal. This approach was known to provoke the KCC, which has been hesitant to clarify the character of presidential emergency decrees because if such a decree, having statutory effect, can be seen as an Act, then the KCC, not the KSC, has the constitutional power to review the constitutionality of the Act. On March 21, 2013, the KCC declared that it is endowed with an exclusive power to review presidential emergency decrees based upon the 1972 constitution. It also held that the Presidential Emergency Decrees No 1, No 2, and No 9 prohibiting political expression and activity pursuing constitutional revision violate the principle of popular sovereignty and the free and democratic basic order.[14]

The constitutional status of the president challenging the Election Commission's warning

In 2007, the constitutional status of the president was once again challenged. President Roh Moo-hyun filed a constitutional complaint to the KCC alleging that his freedom of political speech had been breached by the warnings of the national Election Commission which relied upon an unconstitutional provision of election law. On June 2, 2007, President Roh, attending an open meeting organized by his supporters, made some controversial comments on presidential candidates of a major opposition party, such as "it will be a shame if foreign newspapers comment that the Korean leader is the daughter of a dictator"; "It will be a disaster if the GNP win the presidential election because this irresponsible party will strengthen regionalist policies." On June 8, 2007, he made another political speech at an awards convocation for his honorary doctoral degree, saying that the "Korean people must not be deceived by the tax-cut policy and private-investment-oriented Grand Canal Proposal of GNP presidential candidate Lee Myong-bak." Upon the GNP's denouncements of President Roh, the Election Commission confirmed at separate sessions that his speeches were against the general neutrality principle stipulated in Article 9 of the Public Officials Election Act, and requested him to restrain himself from making speeches similar to those at issue.

[14] Constitutional Court Decision 2010Hun-Ba132, March 21, 2013.

In this complaint case, five justices were of the opinion that the election-law provision was constitutional and two justices were of the opinion it was unconstitutional, while the remaining two justices opined that President Roh's filing of the complaint failed to meet the procedural requirements prescribed by the Constitutional Court Act. The reasoning of the majority was, among other things, that although the president has a the constitutional status of a politician or a political institution, his freedom of political speech can be restrained for the sake of the prevailing interest of maintaining fairness in election management, because his status as the head of the executive presents the real danger of a rigged election. The dissenting opinion argued that the president, being by nature a political official, could not be subordinate to public officials' general obligation of neutrality in election provided by Article 9 of the Public Officials Election Act, so that the measure by the Election Commission was not grounded in justifiable law and thereby infringed upon President Roh's political right.[15]

Constitutional review of the election system

In a 2001 landmark election-law case, a mutated proportional election system was declared unconstitutional. The KCC struck down the element of proportional representation of the old election law designed to distribute seats according to the number of votes cast in favor of candidates of political parties in constituencies instead of allowing the voters to cast a separate ballot for the listed party of their choice.[16] The KCC ruled that such a mutated system violated the constitutional principles of democratic election and direct election, as well as equal protection before the law. Responding to this decision, the national assembly introduced the so-called "one person two votes" system, in which every voter is permitted to cast two votes, for a candidate in an election district and for a listed party. This new system would ideally help advance small parties like the Democratic Labor Party in the 2004 and 2008 national elections and the United Progressive Party in the 2012 election.

In another 2001 case dealing with the election reapportionment plan, the KCC declared that the constitutional principle of equality in election requires the population disparity among all election districts to meet a limit of 50 percent deviation (in which case the maximum permissible ratio between the most populous district and the least would be three to one), though in principle a limit of 33.33 percent deviation would need to be achieved in the future. According to this

[15] Constitutional Court Decision 2007Hun-Ma700, January 17, 2008, *Korean Constitutional Court Reports*, Vol. 20, No 1, Part 1, 139.

[16] Constitutional Court Decision 2000Hun-Ma91 · 112 · 134 (consolidated), July 19, 2001, *Korean Constitutional Court Reports*, Vol. 13, No 2, 77. See also Jongcheol Kim, "Critical review of the decision of unconstitutionality on the method of voting and distribution of seats in the system of nationwide proportional seats – Constitutional Court Decision, July 19, 2001, 2000Hun-Ma91 · 112 · 134 (consolidated)" (in Korean) (2002) 3 *Study on Constitutional Practice* 321.

temporary permissible range, which was tightened compared to the KCC's previous decision requiring a limit of 60 percent deviation (in which case the maximum permissible ratio between the most populous district and the least would be four to one), the existence of an election district with a 57 percent deviation from the national average was enough to nullify the total reapportionment plan.[17] However, the KCC applied a different permissible range of population in local elections. In 2007, the KCC ruled that considering the peculiarity of social circumstances, such as unbalanced urbanization, as far as local elections are concerned a limit of 60 percent deviation is acceptable.[18]

Legal status of an independent commission established by Act

For the first time in Korean modern history, in 2001, the National Human Rights Commission (NHRC) was established to inspect civil liberties violations by state or public institutions and discrimination in public agencies and private organizations. Since its establishment, its constitutional or legal status has been inundated in fierce debates about the desirable legal status and scope of powers between human rights activists, who prefer an independent human rights commission with significant executive powers, and the Ministry of Justice, who seek to have it as one of its affiliated institutions with limited advisory powers.

The key issue in such debates is whether the establishment of an independent administrative agency institutionally separate from the executive branch is compatible with the Constitution. The advocates of an independent human rights agency argued that the Constitution would not prohibit the creation of a statutory independent agency for the completion of its basic goals, such as the protection of basic rights. However, opponents argued that whatever good causes it pursues, such an administrative agency should be installed within the executive branch to which the executive power is entrusted. The compromised outcome of such debates was the obscure provisions about the legal status of the NHRC. The NHRC Act contains no explicit provision mentioning where the NHRC should be located in constitutional arrangements, but declares in Article 3 the purpose of the establishment of the NHRC and the principle of its independence in dealing with designated affairs. As recently as 2009, this obscurity finally backfired when the Ministry of Administration and Security attempted to curtail the number of public officials allotted to the NHRC by 21.2 percent through revision of the relevant ordinance governing the organization of the NHRC.

In a dispute before the KCC, the NHRC alleged that such revision constituted a breach of its competence and thereby should be declared invalid. In a 6–3 decision

[17] Constitutional Court Decision 2000Hun-Ma92•240 (consolidated), October 25, 2001, *Korean Constitutional Court Reports*, Vol. 13, No 2, 502.

[18] Constitutional Court Decision 2005Hun-Ma985, March 29, 2007, *Korean Constitutional Court Reports*, Vol. 19, No 1, 287.

in 2010, the majority ruled that the NHRC was not entitled to file a competence dispute because it was a mere statutory agency, and so could not be recognized as an institution that, having a constitutional basis for its establishment, can be granted standing for a competence dispute.[19] Three justices dissented and opined that even those statutory institutions that have no explicit constitutional basis for their existence can be granted standing for a competence dispute if they are regarded as constitutional institutions because their existence and authorities, as in the case of the NHRC, are derived from the Constitution, and if there would be no way to redress the breach of their competence as such independent bodies.[20]

Constitutional status of local governments

Regarding local autonomy, the Korean constitution has only two clauses, which permit a wide range of legislative discretion in the concrete institutionalization of the basic composition and structure of local autonomy. For example, the KCC ruled that Article 117(2), providing that the unit of local government shall be prescribed by an Act, can be construed to allow the legislature to repeal inferior units of local autonomy in order to consolidate them into a single specialized local autonomous region.[21]

Though the Constitution allows a wide legislative discretion, it is not absolute, and once a local government is created its autonomy in carrying out its autonomous powers should be respected. In one remarkable 2009 case regarding the extent to which the central government can inspect and audit local government's autonomous activities under the Local Autonomy Act, the KCC ruled that central government's comprehensive audit and inspection can be recognized only on explicit legislative grounds and that such legislative provision must be narrowly construed so that the autonomous power of local government cannot be arbitrarily infringed by central government.[22]

Major decisions in relation to human rights

Human dignity and worth

The KCC has come to hold since its establishment that human dignity and worth under Article 10 of the Constitution can be elaborated in three major specific rights: (1) the right to self-determination (or personal autonomy), (2) the general right to free activity, and (3) the right of personality.

[19] Constitutional Court Decision 2009Hun-Ra6, October 28, 2010, *Korean Constitutional Court Reports*, Vol. 22, No 2, Part 2, 6.

[20] Constitutional Court Decision 2009Hun-Ra6, October 28, 2010, *Korean Constitutional Court Reports*, Vol. 22, No 2, Part 2, 10–11.

[21] Constitutional Court Decision 2005Hun-Ma1190, April 27, 2006, *Korean Constitutional Court Reports*, Vol. 18, No 1, Part 1, 652.

[22] Constitutional Court Decision 2006Hun-Ra6, May 28, 2009, *Korean Constitutional Court Reports*, Vol. 21, No 1, Part 2, 418.

What has drawn public attention among these rights in the first decade of the twenty-first century is the right to self-determination. The KCC ruled that the right to self-determination is recognized as a constitutional right based upon human dignity and worth, covering the right to personal information,[23] the right to rest,[24] and the right to smoke or the right to be free from smoking.[25] For example, in 2004, the KCC recognized the rule of self-responsibility drawn from the general right to free activity and the right to self-determination. This rule means that if a legal burden like the obligation to pay tax is imposed beyond one's own responsibility or determination, it may infringe on one's general right to free activity or self-determination.[26]

The most controversial part of self-determination involves sexual autonomy. According to the KCC, the right to self-determination includes the right to sexual self-determination, which means that every human being has the freedom to choose his or her sexual relationships. The KCC has had chances four times to review Article 241 of the Criminal Act, which bans adultery, but the unconstitutionality opinion has so far failed to obtain the required six justices. As a matter of fact, in a 2008 case, a majority of five KCC justices delivered an unconstitutionality opinion on this matter but failed to obtain one more concurring justice out of the remaining four to meet the quorum to declare the unconstitutionality of the law.[27] However, in 2009, the KCC invalidated Article 304, which prohibits any person from inducing a female, not habitually immoral, to engage in sexual intercourse under the pretense of marriage. The court ruled that such a criminal sanction excessively restricts not only males' sexual self-determination but also females' right to sexual self-determination by regarding females as being inferior to males in enjoying their right to sexual self-determination under their own responsibility.[28]

Another issue relating to human dignity and worth involves the death penalty. In 2010, the KCC deliberated the constitutionality of the death penalty in terms of human dignity and the right to life. The KCC ruled in a 5–4 decision in favor of the death penalty.[29] However, a tightly split decision represents a change in social

[23] Constitutional Court Decision 99Hun-Ma513, 2004Hun-Ma190 (consolidated), May 26, 2005, *Korean Constitutional Court Reports*, Vol. 17, No 1, 668, 683.

[24] Constitutional Court Decision 2000Hun-Ma159, September 27, 2001, *Korean Constitutional Court Reports*, Vol. 13, No 2, 353, 362.

[25] Constitutional Court Decision 2003Hun-Ma457, August 26, 2004, *Korean Constitutional Court Reports*, Vol. 16, No 2, Part 1, 355–63.

[26] Constitutional Court Decision 2002Hun-Ka27, June 24, 2004, *Korean Constitutional Court Reports*, Vol. 16, No 1, 706.

[27] Constitutional Court Decision 2008Hun-Ka17, October 30, 2008, *Korean Constitutional Court Reports*, Vol. 20, No 2, Part 1, 696.

[28] Constitutional Court Decision 2008Hun-Ba58, November 26, 2009, *Korean Constitutional Court Reports*, Vol. 21, No 2, Part 2, 520.

[29] Constitutional Court Decision 2008Hun-Ka23, February 25, 2010, *Korean Constitutional Court Reports*, Vol. 22, No 1, Part 1, 36.

attitude towards capital punishment after the first KCC decision on this issue was overwhelmed by the constitutionality opinion of seven justices. As a matter of fact, since 1998 there has been no execution, though there were still death row prisoners, partly because the social movement for repeal of capital punishment became more significant.[30]

In a 2008 case, the majority of the KCC declared that the right of personality based upon human dignity was infringed by Article 20(2) of the Medical Service Act, which prohibits medical doctors and their aides from informing pregnant women and their families of the gender of the fetus.[31]

The right to equality

Article 11 of the Constitution enshrines equality before the law and the KCC derives the right to equality from this provision. One key issue in this area is how to set up the standard of rationality against which legislative policies can be evaluated to see whether these policies abide by the constitutional principle of equal protection. Before 1999, the traditional arbitrariness test was the only standard with which the KCC reviewed the rationality of unequal treatment. In the famous 1999 *Extra-Points Premium for Veterans* case, the KCC first set forth the two-tiered standard which, notwithstanding the arbitrariness test, requires a more stringent test. The new standard, called the "proportionality test," is to strike a balance between the purpose of unequal treatment and the means chosen to achieve that purpose. This strict standard is applied when there are explicit constitutional provisions prohibiting specific discrimination or when serious danger of infringement of those constitutional rights connected to unequal treatment is expected.[32]

In 2001, the KCC elaborated this two-tier test by declaring that even if the proportionality test is required, in cases where explicit constitutional provisions permit state institutions to provide benign discrimination or privilege to a certain group of people, the strict test can be relaxed in the course of balancing. In this case, the KCC upheld another extra-point system for those who had provided distinguished service to the state because their privilege is explicitly safeguarded by Article 32(4) of the Constitution and therefore the relaxed strict test can be applied.[33]

Since Korean society is traditionally influenced by a patriarchal family system, the KCC has had a number of cases dealing with statutory provisions in relation to

[30] Constitutional Court, *Constitutional Adjudication System's Influence on Korean Society* (in Korean) (Seoul: Constitutional Court, 2010), p. 66.

[31] Constitutional Court Decision 2004Hun-Ma1010, July 21, 2008, *Korean Constitutional Court Reports*, Vol. 20, No 2, Part 1, 236.

[32] See Jongcheol Kim, "The structure and basic principles of constitutional adjudication in the Republic of Korea," in K. Cho (ed.), *Litigation in Korea* (London: Edward Elgar Publishing, 2010), pp. 129–30.

[33] Constitutional Court Decision 2000Hun-Ma25, February 22, 2001, *Korean Constitutional Court Reports*, Vol. 13, No 1, 386.

family relations and gender equality. In the last decade, significant reforms were made through constitutional adjudications. In 2005, two important cases cleared the old paternalistic civil-law provisions. First, the KCC held that Article 781(1) contained an unconstitutional element by prohibiting children from following their mother's surname because it results in gender inequality in determining their choice of family name.[34] Second, the KCC invalidated the so-called House Head System in which a household as the basic unit of the legal family is forced to be formed around the house head at its core and to be passed down only through direct male descendants serving as successive house heads.[35] In this case, KCC held that the provisions of the Civil Code that constituted the backbone of the House Head System are not compatible with the individual dignity and sexual equality required by Article 36(1) of the Constitution on the ground that, based on stereotypes concerning sexual roles, it discriminates between men and women in determining the succession order of the house head, in forming marital relations, and in forming relations with children.

The infringement of the right to equality was again at stake in the *Overseas Koreans' Voting Rights* case of 2007.[36] The KCC ruled that Article 37(1) of the Public Officials Election Act was unconstitutional because the requirement of residency in Korea as the only factor to deprive overseas Koreans of their right to vote in national elections cannot meet the required rule against excessive restriction, and thereby encroached on overseas Koreans' right to vote and right to equality, and the principle of universal suffrage. Due to this case, the election law was changed so that Koreans residing in other countries are allowed to vote in national elections such as the general election in April and presidential election in December 2012.

Freedom of conscience

Since autocratic governments tended to control political dissidents by suppressing diverse moral and political ideas and dissemination thereof among the public, Article 19 of the Constitution, which guarantees freedom of conscience, continues to be a controversial issue, especially defining the concept of constitutionally guaranteed "conscience." For example, in a law-abidance oath case, the majority of the KCC ruled that requiring an oath to abide by law in the parole-review process only of those inmates convicted of the violation of two major political

[34] Constitutional Court Decision 2003Hun-Ka5, December 22, 2005, *Korean Constitutional Court Reports*, Vol. 17, No 2, 544.

[35] Constitutional Court Decision 2001Hun-Ka9 and 2004Hun-Ga5 (consolidated), February 3, 2005, *Korean Constitutional Court Reports*, Vol. 17, No 1, 1.

[36] Constitutional Court Decision 2004Hun-Ma644, 2005Hun-Ma360 (consolidated), June 28, 2007, *Korean Constitutional Court Reports*, Vol. 19, No 1, 859, 875–9. For an English summary of this case, see Constitutional Court of Korea, *The Twenty Years of the Constitutional Court of Korea* (Seoul: Constitutional Court of Korea, 2008), pp. 332–5.

criminal laws, such as the National Security Act and the Assembly and Demonstration Act, did not fall under the scope of protection guaranteed by freedom of conscience, because the exclusion of parole could not constitute the deprivation of a right but a privilege; and thus the original legal status of such inmates has not changed.[37] The dissenting opinion presented by two justices argued that the requirement of an oath to abide by law to applicants for parole can amount to the deprivation of "expected" liberty, and thereby have a direct impact on their conscience.[38]

The issue of "conscientious objection" is another example showing the narrow stance taken by the KCC in terms of the scope of freedom of conscience. In 2004, the KCC held that the Military Service Act, which criminalizes those who, upon the receipt of a conscription notice, fail to enlist or to report for duty without justifiable causes, is constitutional because freedom of conscience is not envisaged to safeguard an individual's right to deny the duty to provide national defense and to request the state to introduce an alternative service system for them. The dissenting opinion is that the lack of minimum legislative efforts to provide an alternative service system by forcing only active military service fails to conform to freedom of conscience.[39]

Freedom of expression

Article 21 of the Constitution guarantees freedom of speech and of the press, along with freedom of assembly and association. These freedoms are reinforced by the express prohibition of licensing or censorship of speech and the press, and of licensing of assembly and association in Article 21(2). The KCC has been anxious to control executive agencies' censorship by declaring that such prohibition of censorship is an absolute ban so that any law prescribing a kind of prior content regulation can be invalidated. In fact, the KCC struck down a number of laws introducing various content-based review systems.[40]

[37] Constitutional Court Decision 98Hun-Ma425, 99Hun-Ma170 · 498 (consolidated), April 25, 2002, *Korean Constitutional Court Reports*, Vol. 14, No 1, 351, 364–6. For a sketch of this case in English, see also Constitutional Court of Korea, *The Twenty Years of the Constitutional Court of Korea*, pp. 238–40.

[38] Constitutional Court Decision 98Hun-Ma425, April 25, 2002, *Korean Constitutional Court Reports*, Vol. 14, No 1, 351, 353–4.

[39] Constitutional Court Decision 2002Hun-Ka1, August 26, 2004, *Korean Constitutional Court Reports*, Vol. 16, No 2, Part 1, 141.

[40] This tendency initiated from Constitutional Court Decision 93Hun-Ga13, 91Hun-Ba10 (consolidated), October 4, 1996, *Korean Constitutional Court Reports*, Vol. 8, No 2, 212, 225, concerning the Korea Public Performance Ethics Committee, and continued in the first decade of the twenty-first century, e.g.. Constitutional Court Decision 2000Hun-Ga9, August 30, 2001, *Korean Constitutional Court Reports*, Vol. 13, No 2, 134, 150–1, concerning the Korea Media Rating Board.

Like its counterparts in most liberal democracies, the KCC developed some criteria by which the constitutionality of any legislation limiting freedom of expression can be evaluated. Among them, the most frequently used by the KCC is the rule of clarity (an equivalent of "void for vagueness," according to US constitutional law).[41] Two representative cases merit attention. In 2008, the KCC declared that Article 21(3), Item 5, of the Promotion of Motion Pictures and Video Act, intended to define the "restricted" category of film that can be shown only in a specially licensed place, was incompatible with the Constitution because the definition is too obscure to meet the rule of clarity.[42] In 2010, the KCC also struck down Article 47(1) of the Electric Telecommunication Act, which criminalizes those who transmit false communication through electric communication facilities with the intent to harm the public interest, on the ground that it violates the principle of *nulla poena sine lege* and the rule of clarity. This case concerns a controversial indictment of an Internet controversialist named "Minerva" whose economic comments on the financial crisis in 2008 drew dramatic public attention. The KCC reasoned that the "public interest" is too ambiguous and abstract to notify ordinary citizens of what purpose of communication, among "permitted communications," is prohibited.[43]

The most controversial case in this area is the *Newspapers Act* case in 2006. The then president Roh Moo-hyun was a champion of media reform even before he came into power because he believed that unfair competition in a media market dominated by monopolized press companies has been a major cause of a distorted political process in favor of conservative vested interests. In fact, three major conservative presses, the *Chosun Ilbo* ("Daily"), the *Joongang Ilbo* and the *Donga Ilbo*, occupied 60 percent of the press market. The ruling Open Uri Party managed to pass the Newspapers Act, containing, among others, two controversial media regulations. First, Article 15(2) of the said Act prohibited any daily newspaper from concurrently running any news agency or any broadcasting business that performs general programming or professional programming running news reports under the Broadcasting Act. Second, Article 15(3) of the same Act regulated multiple possession of newspapers by the dominant stockholder of a newspaper. The KCC ruled that the former prohibition can be regarded as the constitutional exercise of legislative power while the latter regulation of multiple possession of newspapers was incompatible with the Constitution because such regulation did not allow exceptional permission of multiple possession of newspapers that did not hinder the diversity of newspapers

[41] Constitutional Court Decision 99Hun-Ma480, June 27, 2002, *Korean Constitutional Court Reports*, Vol. 14, No 1, 616.

[42] Constitutional Court Decision 2007Hun-Ka4, July 31, 2008, *Korean Constitutional Court Reports*, Vol. 20, No 2, Part 1, 20.

[43] Constitutional Court Decision 2008Hun-Ba157•2009Hun-Ba88, December 28, 2010, *Korean Constitutional Court Reports*, Vol. 22, No 2, Part 2, 684.

but, on the contrary, contributed to it.[44] Not surprisingly, when the conservative GNP returned to power after the 2007 presidential election and 2008 parliamentary election, even the first regulation on cross-ownership of media that had survived constitutional review in 2006 was repealed by the revision of the Newspapers Act in 2009 so that newspaper companies were able to own broadcasting companies.

In the meantime, the KCC considered controversial cases of freedom of assembly and demonstration, such as the *Nighttime Outdoor Assembly Prohibition* case. Article 10 of the Assembly and Demonstration Act used to prohibit outdoor assembly across the country between sunset and sunrise unless the head of police granted permission to hold assembly under certain conditions. On September 24, 2009, the KCC reversed its previous position,[45] declaring that such regulation was incompatible with the Constitution because, on the one hand, as the five majority reasoned, such regulation could be seen as a de facto assembly-licensing system banned by Article 21(2) of the Constitution and, on the other, as the two concurring justices recognized, it was excessive restriction on the freedom of assembly beyond necessity.[46]

The right to property

Article 23 of the Constitution provides that a general right to property is guaranteed according to the law prescribing the content and limit of such right. The Roh Moo-hyun administration made efforts to solve the epidemic realty speculation problem across the nation and regarded tax reform as an effective means to control such a socioeconomic problem. The comprehensive real-estate tax is a key policy tool introduced for such a purpose, targeting the owners of houses in overheated speculative zones. Not surprisingly, those hit by the new tax filed a constitutional complaint which lasted two years. One year after the 2007 presidential election that resulted in the victory of the opposition GNP candidate Lee Myong-bak, who pledged to repeal the comprehensive real-estate tax, the KCC invalidated a couple of key provisions of estate tax law. For example, the provision imposing comprehensive real-estate taxes on housing was declared not to conform to the Constitution as it violated property rights of a certain group of taxpayers who "have held the housing for a certain period of time or who have yet to retain for the set period but have low or de facto no taxpaying capacity due to lack of specific properties or income other than the housing subject to

[44] Constitutional Court Decision 2005Hun-Ma165, June 29, 2006, *Korean Constitutional Court Reports*, Vol. 18, No 1, Part 1, 337.

[45] Constitutional Court Decision 91Hun-Ba14, April 28, 1994, *Korean Constitutional Court Reports*, Vol. 6, No 1, 281, 302.

[46] Constitutional Court Decision 2008Hun-Ka25, September 24, 2009, *Korean Constitutional Court Reports*, Vol. 21, No 2, Part 1, 427.

taxation."[47] In this case, the provision employing aggregate taxation of households in imposing comprehensive real-estate taxes is declared to contradict Article 36, Section 1, of the Constitution, which ensures marriage and family life, because such a taxation system discriminated between married and non-married couples without important public interest.

Freedom of occupation

Article 15 of the Constitution guarantees the freedom to choose occupation. It is well established that this freedom to choose occupation means the freedom of occupation, which may be employed to protect the freedom of occupational activities. Simultaneously, it is also generally accepted that in terms of regulatory balancing, the freedom to choose occupation is given relatively higher protection in comparison with the freedom of occupational activities in the sense that the KCC shows a greater deference to the legislature in adopting regulations on occupation when the latter rather than the former is at stake in constitutional review.[48] However, this dichotomy is a relative distinction in that a supposedly stricter review regarding the freedom to choose occupation seldom results in a decision of unconstitutionality. For example, in a 2008 case where the freedom to choose occupation was concerned, the KCC held constitutional a law prohibiting those who are not visually handicapped from applying for qualification as a massager.[49] This decision is a dramatic reversal of the KCC's previous position in a 2006 case where substantively the same regulation was declared unconstitutional though the object of review was different because the 2006 case concerned a departmental decree instead of an Act.[50] However, in another 2008 case, the KCC invalidated a couple of provisions in the Broadcasting Act and accompanying enforcement decree giving only the Korea Broadcasting Advertising Corporation and commercial broadcast marketing agencies financed by the corporation permission to function as agencies in the terrestrial broadcasting marketing business, on the ground that they violated the claimant's equality rights as well as freedom of occupational operation.[51]

In the KCC jurisprudence, the right to occupational operation includes the right to business operation. Article 104 and Article 142 of the Copyright Act impose a

[47] Constitutional Court Decision 2006Hun-Ba112, 2007Hun-Ba71·88·94, 2008Hun-Ba3·62, 2008Hun-Ka12 (consolidated), November 13, 2008, *Korean Constitutional Court Reports*, Vol. 20, No 2, Part 2, 1.

[48] See Constitutional Court Decision 2002Hun-Ba41, October 28, 2004, *Korean Constitutional Court Reports*, Vol. 16, No 2, Part 2, 138.

[49] Constitutional Court Decision 2006Hun-Ma1098, October 30, 2008, *Korean Constitutional Court Reports*, Vol. 20, No 2, Part 1, 1089.

[50] Constitutional Court Decision 2003Hun-Ma715, 2006Hun-Ma368 (consolidated), May 25, 2006, *Korean Constitutional Court Reports*, Vol. 18, No 1, Part 2, 112.

[51] Constitutional Court Decision 2006Hun-Ma352, November 27, 2008, *Korean Constitutional Court Reports*, Vol. 20, No 2, Part 2, 367.

statutory obligation on online service providers (OSPs) to take necessary measures such as technological measures to disable illegal interactive transmission of original works upon the request of rights holders and if they fail to meet such obligation they shall be subject to punishment of a fine for negligence not exceeding 30 million Korean won (KRW). In a 2011 case where a group of OSPs challenged such provisions, the KCC unanimously held that the said law is constitutional because it

> properly balances interests involved in that, while imposing limited responsibility to take technical measure on designated OSPs, it cannot be deemed a significant interference on the freedom of occupation; public interest in preventing harmful consequences of unlawful transmission of original works for the sake of improving and developing culture in society and related industry is grave.[52]

The right to judicial justice

In 2010, the KCC struck down Article 19(1) prohibiting appeal of a decision of criminal compensation because of an important public interest to provide reasonable compensation for those whose personal liberties are infringed. This would block any appeal of a decision of compensation which may have flaws in fact-finding or in the measurement of compensation, infringing the essential element of the right of access to judicial justice guaranteed by Article 27(1) of the Constitution.[53]

The right to education

Article 31 of the Constitution safeguards the right to equal education according to one's abilities. To materialize this basic right, the state must carry out positively an effective public education system. Free compulsory education is one of the specific institutions the Constitution expressly articulates to promote the right to education. In the first decade of the twenty-first century, the KCC experienced several opportunities to elaborate this provision. For example, the KCC held that "the constitutional provision regarding free compulsory education is meant to transfer the financial burden of education from the parents or guardians of school-age children to the community as a whole, in order to guarantee the right to receive education more practically."[54] However, whether all expenses of compulsory education must be covered by taxation is open to question. In a 2008 case, the KCC ruled that Article 2, Item 2, and the main text of Article 5(1) of the

[52] Constitutional Court Decision 2009Hun-Ba13, February 24, 2011, *Korean Constitutional Court Reports*, Vol. 23, No 1, Part 1, 53.

[53] Constitutional Court Decision 2008Hun-Ma514, October 28, 2010, *Korean Constitutional Court Reports*, Vol. 22, No 2, Part 2, 180.

[54] Constitutional Court Decision 2007Hun-Ga1, September 25, 2008, *Korean Constitutional Court Reports*, Vol. 20, No 2, Part 1, 412.

Act on Special Cases of School Site Procurement, prescribing that a real-estate development company that meets specific conditions must cover the expenses for buying a school site, is constitutional, but decided that Article 5(4) of the Act on Special Cases, not having provided an exception to the case where such a developer remodels and extends an existing school building for donation, is incompatible with the Constitution.[55]

The right to work

Article 32 of the Constitution guarantees the right to work and secures the duty of the state to provide a variety of special protection for minorities. Traditionally, this right is considered a kind of social right that itself cannot be guaranteed for foreigners to enjoy as a constitutional right. However, in a case concerning Guidelines for the Protection and Supervision of Foreign Trainees of Industrial Technology, a departmental decree of the Ministry of Labor, the KCC ruled that the right to work safeguards not only "a right to seek a working opportunity" in the manner of a social right, but also "a right to seek a working environment" of a character free from inhumane treatment in terms of working conditions, so that foreign trainees are entitled to bring a constitutional complaint on the ground that their right to work is encroached.[56]

IV. DARK SIDES OF CONSTITUTIONAL DEVELOPMENT IN SOUTH KOREA SINCE 2000

As witnessed above, Korean constitutionalism continues to make progress. Social conflicts are mainly handled in regular decision-making processes. Periodical elections take place without significant interruption to the extent that the peaceful transfer of powers can be guaranteed. At the time of writing, six consecutive presidential elections and seven general elections have occurred peacefully. Judicial and constitutional adjudication systems work relatively well.

Despite this bright side of constitutional development in this period, there are still a number of dark sides too. By and large, four problems merit mention.

Personalization (or private misuse) of public powers

Personalization (or private misuse) of public powers occurs when law enforcement is used for enhancing political leaders' personal power to the detriment of their opponents instead of to achieve justice and peace. This phenomenon, common in

[55] Constitutional Court Decision 2007Hun-Ka9, December 22, 2008, *Korean Constitutional Court Reports*, Vol. 20, No 2, Part 1, 424.

[56] Constitutional Court Decision 2004Hun-Ma670, August 30, 2007, *Korean Constitutional Court Reports*, Vol. 19, No 2, Part 1, 297.

authoritarian regimes, also characterized the pre-1987 era of Korea. Although some initiatives achieved their intended goals, the Kim Young-sam administration (1993–8) and the Kim Dae-jung administration (1998–2003) did too little to abate the personalization of public powers sufficiently to distance themselves from the dark legacy of their authoritarian predecessors.

The Roh Moo-hyun administration (2003–8) made an effort to depart from the authoritarian legacy of the personalization of public powers. Even his political opponents accepted that President Roh was eager to forgo political misuse of law-enforcement powers such as the prosecutorial office, the police, the national intelligence service and the tax office. However, as soon as President Roh's term ended, the useful arms of presidential powers became increasingly politicized. For example, public confidence in the prosecutor's office declined as soon as the inauguration of President Lee Myong-bak because the office has become highly politicized in its abuse of monopolized power of indictment and investigation. The fact that former President Roh was forced to face an arbitrary investigation for bribery shortly after his retirement, and his eventual suicide, should be enough to verify the revival of a dark legacy.

In addition to this political retaliation through criminal proceedings, in a number of other cases politically motivated indictments turned out to have no legal grounds in the courts. The president of the Korean Broadcasting System (KBS) refused to resign and challenged the new president Lee Myong-bak's request to resign with no legal ground. He was indicted for breach of trust, but no wrongdoing in his performance was found in the criminal proceedings.[57] The producers of a popular focus report, called *PD's Notebook*, of the Moonwha Broadcasting Company (MBC), whose program about mad cow disease had been blamed for inciting the public to mount anti-Lee Myong-bak candlelit demonstrations lasting more than three months by distorting facts and opinions, were indicted for defamation but found not guilty.[58] Another indictment, of an amateur economic commentator who, using the pseudonym "Minerva," rose to popularity by disseminating false information, was also rejected because the law used to indict him was declared unconstitutional.[59] On the other hand, the prosecutor's office either did not investigate, or intentionally delayed investigation of, important abuses or misuses of governmental powers. For example, although the office revealed that public officials of the Prime Minister's Office were involved in the

[57] Supreme Court Decision 2010Do15129, January 12, 2012. See also Kim Tae-jong, "Ex-KBS head cleared of charges of breach of trust," *Korea Times*, 12 January 2012, available at www.koreatimes.co.kr/www/news/include/print.asp?newsIdx=102764.

[58] Supreme Court Decision 2010Do17237, September 2, 2011. See also Kim Tae-jong, "PD Notebook producers cleared of defamation," *Korea Times*, September 2, 2011, available at www.koreatimes.co.kr/www/news/include/print.asp?newsIdx=94089.

[59] Constitutional Court Decision 2008Hun-Ba157•2009Hun-Ba88 (consolidated), December 28, 2010, *Korean Constitutional Court Reports*, Vol. 22, No 2, Part 2, 684.

unlawful investigation of a civilian allegedly suspected to have a financial connection with the former president Roh Moo-hyun, delays in the investigation allowed those officials to dispose of important evidence such as computer records. As far as the intelligence service's abuse of power is concerned, two recent cases can be mentioned. First, the National Intelligence Service (NIS) filed a defamation suit against a famous civic activist and now Seoul mayor, Park Won-soon, for his accusations of NIS's unlawful inspection of civilians. On December 12, 2011, the Civil Proceedings Panel 13 of Seoul Appellate Court rejected the NIS's appeal challenging the inferior court's denial of the case. Second, it was revealed that agents of the Defense Security Command (DSC) had unlawfully been inspecting a professor for a couple of years.[60]

Three interconnected reasons may explain the continuation of this unpleasant practice. First, the tendency toward "conviction politics," where presidents imposed their personal beliefs or ideologies in deciding and implementing state policies, made inroads into the development and functioning of the organized public sphere, the National Assembly and political parties, as well as public administration.[61] President Lee Myong-bak, who stepped down on February 24, 2012, after his five-year term, has been criticized as having a political style that tends to ignore the National Assembly and the public sphere in the process of setting and managing the national agenda.

Second, official public administration is controlled or influenced by those within the president's inner circle. "The circle of real power," trusted by presidents, tends to play an important role in the decision-making process and the appointment of high-ranking officials and directors of government-involved corporations. Ministers; high governmental officials, including the head of the information agency; and even high-ranking prosecutors jockey for connections to "the circle of real power." As soon as President Lee Myong-bak came to power, a number of core members of President Lee's inner circle were named in political gossip. For example, Lee Sang-deuk, the president's elder brother and six-term lawmaker, was finally indicted for political bribes in 2012, and Park Hee-tae, a member of the "Six Elders" who were the top political advisers to presidential candidate Lee at the presidential election, resigned as the Speaker of the National Assembly because of his involvement in the distribution of envelopes containing KRW 3 million during the ruling GNP's leadership election campaign in 2008. Choi Si-joong, another member of the Six Elders, also resigned in disgrace as chairperson of the Korea Communications Commission because of his core aide's corruption in early

[60] See *Dong-A Ilbo* Editorial, "Must root out the notorious practice of unlawful inspection of civilians by the Defense Security Command" (in Korean), November 1, 2011, available at http://news.donga.com/3/all/20111101/41541937/1.

[61] See Sug-Min Youn, "The crisis of communication and the media in Korea" (in Korean), Symposium of the Korean Society for Journalism and Communication Studies (Proceedings), Vol. 2011, No 5, pp. 203–7.

2012. This practice reveals ubiquitous cronyism and nepotism in the decision-making process and hinders the ideal of open and fair government. The conflict between power and responsibility not only creates moral hazards in the organization of government but also sabotages constitutional mechanisms of checks and balances.

Third, the tendency to criminalize moral or administrative sanctions also enables law-enforcement agencies to abuse their powers. For example, too strict a regulation of political funding increases the likelihood of criminal violation, allowing the prosecutor's office a wide margin of arbitrary indictment. In addition, the hypocritical duplicity innate in Korean culture tends to produce overly idealistic law, which in turn renders strict enforcement difficult. For example, in the former president Lee's term, former minister of justice Lee Kwi-nam, the then prosecutor-general Han Sang-dae, and several Supreme Court justices were forced to apologize for their false residence registrations, which still remains a criminal offence.[62]

Politicization of the media

Free and fair media is one of the mainstays of a constitutional democracy. If the media market is politicized and commercialized in an unbalanced way, the guarantee of a free flow of ideas and opinions, together with the democratic process, may be distorted. Many Korean people are proud of the level of democratization achieved since 1987, but during the Lee Myong-bak administration (2008–13) this pride waned significantly. Heads of major media like YTN, a public news agency, and of KBS and MBC, two major public broadcasting companies, were appointed by those with political connections to the president or his political inner circle. Choi Si-joong, a senior political aide, worked for Mr Lee in the period of the election, and was appointed, and remained around four years until early 2012, chairperson of the Korea Communications Commission, entrusted with regulatory power over the media market. His most controversial action was the change of media laws governing newspapers and broadcasting in the direction of permitting cross-ownership between press companies and broadcasting companies. One serious problem in this regard is that many of the press companies acquiring licenses for comprehensive program services are those which control more than 60 percent of the press market and are well known for their conservative policies.

[62] See Rahn Kim, "Aide to Lee Sang-deuk arrested for bribery," *Korea Times*, December 11, 2011, available at www.koreatimes.co.kr/www/news/include/print.asp?newsIdx=100569; Min-uck Chung, "Assembly speaker quits over vote buying," *Korea Times*, February 9, 2011, available at www.koreatimes.co.kr/www/news/include/print.asp?newsIdx=104489; Sung-jin Yang, "Chief of telecom regulator resigns," *Korea Herald*, January 27, 2011, available at www.koreaherald.com/pop/NewsPrint.jsp?newsMLId=20120127001130.

Nevertheless, what counters the dominance of conservative-oriented companies in the media market is the increasing influence of new media in the political process. For example, a progressive podcasting talk program, *We Are Tricksters*, and Social Network Services (SNS) such as Facebook and Twitter are known to have played an important role in the 2011 Seoul mayoral by-election. Without the help of these new media, it would not have been possible for a former civic activist, candidate Park Won-soon, to claim victory against the ruling-party candidate Na Kyong-won. In response to this advance of progressive podcasting and SNS in the public sphere, the Korea Communications Standards Commission, a content-regulatory arm of the Korea Communications Commission, set up an SNS review section. It was inevitable that this movement produced a number of doubts and criticisms at domestic and international levels.[63]

Corruption and increasing social polarization

The dark connection between bureaucrats and business elites is one cause of governmental inefficiency. Korea needs qualified regulation, rather than deregulation, in the direction of enhancing transparency and fair competition, not only in the political sphere but also in the market economy. Notwithstanding this belief, what is worse in the Korean situation is that the relationship between government and business is changing in the direction of the superiority of the latter, reversing the relationship of the past. In other words, it is not the state but big business that decides social and economic policies. The changed relationship between the state and business cannot be more symbolically represented than in President Lee Myong-bak's exercise of the pardoning power for only a single beneficiary, Lee Kun-hee, the chairman of Samsung Group, the biggest conglomerate in Korea, only four months after he had been found guilty of tax evasion and breach of trust in 2009.

This connection has its roots in globalization and the concomitant dominance of neoconservativism in much of Korean society. President Lee Myong-bak's business-friendly policy, i.e. deregulation of the business sector and privatization of a number of government functions and facilities, together with tax reduction for the wealthy, has accelerated social polarization, resulting in the collapse of the middle class and of small and medium businesses in favor of large conglomerates. The top five conglomerates of Korea (Samsung,

[63] See Chico Harlan, "In S. Korea, a shrinking space for speech," *Washington Post*, December 23, 2011, available at www.washingtonpost.com/world/asia_pacific/in-s-korea-a-shrinking-space-for-speech/2011/12/21/gIQAmAHgBP_print.html.

Hyundai-Kia Motors, SK, LG, Lotte) account for more than half of the total GDP of Korea. In the 2008–10 period under the Lee Myong-bak government, the sales of these conglomerates almost doubled, from around KRW 3 trillion to 6 trillion.[64] Increasing pressure of social confrontation may produce unexpected political instability in the Korean constitutional reality.

Lawlessness?

Democratization diminishes the pressure for irrational obedience to illegitimate political power. However, oppression by illegitimate power and the effective authority of legitimate power need to be distinguished. One side effect of democratization in Korea is confusion between the two, which is widespread in every field of social life. Public administration faces increasing difficulties in implementing government policies due to resistance by factional interests. The main beneficiaries of this unregulated lawless circumstance are large organizations with the real power to safeguard their selfish interests, such as trade unions, big business corporations, mass media, and so on. Therefore, the legitimacy of law itself and its fair enforcement is essential so that lawless disobedience and legitimate disobedience can be set apart. The lack of firm democratic procedures prevents people from giving their trust to enacted law. The proliferation of "conviction politics" rather than "consensus politics" hinders the main political parties from setting up consensual legislative procedures, and as a result much of the main legislative agenda causes serious political conflict between the ruling party and the opposition. Some representative examples include political confrontations surrounding private-school laws and the National Security Act under the Roh Moo-hyun administration, and those related to media laws under the Lee Myong-bak administration.

Another problem in Korean political affairs was the Lee Myong-bak administration's strict but arbitrary policy on law and order. Relying on various legal regulations allowing police to abusively block peaceful assembly and demonstration – for example, picketing and press conferences – police and prosecutors undermined freedom of expression. Ironically enough, it should be mentioned that under President Lee Myong-bak, those who stressed the importance of law and order did not hesitate to violate or ignore legal order. For example, in 2010, Assemblyman Cho Jun-hyuk of the ruling GNP defied the court's order not to release the names of teachers affiliated with the National Teachers Union, on the ground that such an uncovering of union members might infringe their privacy and freedom of association, though his criticism of this union had largely focused upon their illegal

[64] Sky E-Daily Internet edition on February 25, 2012, at www.skyedaily.com/news/news_view.html?ID=2954.

activities.[65] This unfair enforcement tended to breed distrust of law and of law-enforcement authority. In sum, much of Korean society is trapped in a vicious circle of socially stratified lawlessness, the enactment of unfair laws, and their arbitrary enforcement.

V. CONCLUDING REMARKS

In the first decade of the twenty-first century, Korean constitutionalism took on a new dimension after the first phase of democratization lapsed in six consecutive transfers of power since 1987. The conservative presidency of Lee Myong-bak between 2008 and 2013 was a contrast to the previous ten years of liberal or progressive governments of presidents Kim Dae-jung and Roh Moo-hyun. Undoing President Lee's unexpected retroactive approaches and setbacks to constitutional developments such as popular participation in the political process and better protection of human rights will be seen by many Korean people as the outstanding task for the new president Park Geun-hye beginning after one circle of transfer of powers between the main political forces since the establishment of the so-called 1987 constitutional system. In addition, the global financial crisis of 2007–10 spurred many Korean people to advocate more procedural democracy, social regulation of the market and fair distribution of social resources, all of which are democratization goals.

In conclusion, after experiencing the ups and downs of constitutional development in the first stage of the new millennium, upgrading constitutionalism in the direction of enhancing both procedural democracy and social equalization now constitutes a return to the verified agenda that the first generation of the 1987 constitutional system in Korea set forth.

[65] Civil Proceedings Panel 51 of South Branch of Seoul District Court 2010KaHap211, April 15 2010. See also "Lawmaker ignores court ruling, discloses members of liberal teachers' union," Yonhap News Agency, April 19, 2010, at http://english.yonhapnews.co.kr/jscript/EnPrint.html.

5

Constitutional change in North Korea

*Dae-Kyu Yoon**

I. INTRODUCTION

From the perspective of constitutional discourse, in the first decade of the twenty-first century, the Democratic People's Republic of Korea (DPRK or North Korea) made hardly any significant changes to its constitution except the revisions of 2009 and 2012. Neither its past significant changes nor its recent ones have been well reported, for constitutionalism and the rule of law is lacking in this isolated state. Therefore, this chapter reviews the series of constitutional changes made by the DPRK since the 1990s. Just like any other country, North Korea has revised its constitution in order to adapt itself to the changing environment of domestic and world affairs. This chapter describes and analyzes each amendment (i.e. 1992, 1998, 2009, and 2012) that followed the constitution of 1972, and discusses relevant social changes that have led to these constitutional amendments on the basis of the 1972 constitution. All of them involve the political power of the leader. While the 1972 constitution manifested the completion of Kim Il-sung's dictatorship, the others after it were occasioned by the succession of power.

Discussion is limited to the texts of the Constitution since there is no case known to outside observers that would afford us an understanding of its real operation in the daily life of North Koreans.

Constitutional processes in North Korea, including the process of constitutional amendment, are not addressed here because all constitutional processes in North Korea are, by design, endorsed without opposition and manipulated by the country's top leadership[1] – an undisputable reality of the totalitarianism housed within

* This chapter largely builds upon the author's previous work, "The constitution of North Korea: its changes and implications," which appears in (April 2004) 27(4) *Fordham International Law Journal* 1289. Sections VII and VIII were newly written for this chapter.

[1] The authority to adopt and amend the constitution in the DPRK has belonged to the Supreme People's Assembly (SPA) since the first constitution. See 1948 Constitution, Art.

the country's borders. The goal of this chapter is not to describe the principles or contents of North Korean constitutions per se, but rather to examine how North Korea has responded to change from a constitutional perspective. Therefore, this chapter reviews the role of law in North Korea as well as her constitutional history.

II. THE ROLE OF LAW IN NORTH KOREA

Like many aspects of life in North Korea, the uniqueness of its law is derived from its political reality, one distinguished by a one-person dictatorship that has lasted for generations. North Korean leader Kim Il-sung consolidated and solidified his absolute power via Stalinist-style purges and elimination of all those who opposed and all that which threatened his leadership. Confrontation with South Korea also contributed to sustaining and strengthening tensions for the sake of his domestic rule. Overall, much of his success in maintaining a totalitarian dictatorship can be attributed to the buildup of pervasive intelligence mechanisms, strong military forces, indoctrination of the people with a cult of personality, and near-total isolation of the populace from the outside world.

Facilitating this totalitarian dictatorship has been the primacy of the Korea Workers' Party (KWP). Its supremacy over official government organizations and unlimited authority has allowed this one-person reign to thrive. Party control is reinforced by interlocking membership between party elites and chief governmental and military figures. The KWP grip over the populace is pervasive and reaches into the daily lives of residents through indoctrination and surveillance. Thus, the KWP has stood as one pillar of the leader's power as he reigns over the state in the uppermost position of the party – general secretary. In this regard, it is not unusual that the Constitution itself provides, "The DPRK shall conduct all activities under the leadership of the Workers' Party."[2] This mandate means that the party directives, which know no limits, stand above the law.

The second pillar of the leader's power is the *Juche* ideology, the backbone of party guidance and state philosophy. *Juche* (or self-reliance) was formulated to justify Kim Il-sung's dictatorship and the succession of power to his son, Kim Jong-il, emphasizing peculiar aspects of the North Korean environment. Advocated as a creative application of Marxist–Leninist principles, the ideology also serves as a tool that justifies the leader's demand for the populace's unquestioning loyalty. This loyalty developed into a cult of personality surrounding Kim Il-sung and Kim Jong-il, officially supplanting all other philosophical and religious beliefs in the

104; 1972 Constitution, Art. 76(1); 1992 Constitution, Art. 91(1); 1998 Constitution, Art. 91(1); and 2009 Constitution, Art. 91(1). Predictably, constitutions have been adopted or amended by a unanimous vote of the SPA without public debate in advance. See Fukushima Masao, *On the Socialist Constitution of the Democratic People's Republic of Korea* (Pyongyang: Foreign Languages Publishing House, 1975), pp. 83, 90.

[2] 1998 Constitution, Art. 11.

state. Consequently, as stipulated in the constitution, *Juche* ideology is the ultimate paradigm that guides state activities.[3]

In the Weberian sense,[4] North Korea can be characterized as a charismatic society where the supreme, "godlike" leader's words and directives are the principal governing norms that supersede all else, including the official law. The leader's word is considered the quintessential source of enlightenment capable of dispensing justice. The official law, on the other hand, plays only a marginal role in the administration of justice and instead acts as a secondary instrument to enforce and realize the leader's directives. Thus, the Constitution exists essentially as a political manifesto laden with programmatic provisions rather than as a document written to ensure justice for the people. The discrepancy between the written laws and law in action is so pervasive that the issue of legal ground is entirely irrelevant on many occasions. Constitutional ground is not necessarily required to invoke state action since the state holds its legitimacy *ipso facto* with no procedure to challenge it.

III. THE FIRST CONSTITUTION OF 1948

The first constitution of the DPRK was inaugurated in 1948, modeled after the 1936 "Stalinist" constitution of the Soviet Union (USSR). Despite constitutional revisions of a drastic nature both in 1972 and 1998,[5] since its 1948 original the basic principles and characteristics of North Korea's constitution have been largely preserved. Much of the structure that exists today emanates from the 1948 constitution.

Drafted in April 1948, the Constitution of the DPRK was adopted at the First Supreme People's Assembly (SPA) in September of that same year.[6] It consisted of ten chapters and 104 articles,[7] and contained provisions on basic principles, rights and duties of citizens, central and local legislative and executive organs, courts, budgets, national defense, amendment procedures, the state emblem, the capital,

[3] Ibid., Art. 3.

[4] Weber's "ideal types" distinguish between (1) charismatic, (2) traditional, and (3) rational–legal authority. As it is, North Korean authority tends to fall under the first category. See Max Weber, *Economy and Society*, Vol. 1, ed. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978), pp. 212–301.

[5] Although the 1992 revision was not extensive, this revision still holds significant meaning. Therefore, the 1992 constitution will also be reviewed in a separate section.

[6] The 1948 constitution is also referred to as the "People's Democratic Constitution."

[7] The ten chapters were as follows: 1 Principles (Arts. 1–10); 2 Fundamental Rights and Duties of Citizens (Arts. 11–31); 3 Supreme Sovereign Organ, Section 1 Supreme People's Assembly (Arts. 32–46), Section 2 Presidium of SPA (Arts. 47–51); 4 State Central Executive Organs, Section 1 Cabinet (Arts. 52–62), Section 2 Ministries (Arts. 63–7); 5 Local Sovereign Organs (Arts. 68–81); 6 Court and Prosecutor's Office (Arts. 82–94); 7 State Budget (Arts. 95–9); 8 National Security (Art. 100); 9 State Emblem, Flag and Capital (Arts. 101–3); 10 Procedure for Constitutional Amendment (Art. 104).

and so on. During its twenty-four-year lifespan, it was amended five times on very minor matters (and, therefore, not worth elaboration here), all within the first fourteen years of its existence.[8]

The 1948 constitution elevated the SPA as the highest organ of state authority, essentially succeeding the two interim bodies that had previously functioned in such a capacity (the North Korean Provisional People's Committee of February 1946, which was dissolved a year later in February 1947 in order to create the People's Assembly of North Korea). The SPA became the legislative body of the nation, modeled after the USSR's Supreme Soviet. According to the Constitution, the SPA was to exercise exclusive legislative power and consist of representatives elected by the people (although this last point is somewhat misleading as SPA representatives are selected by universal, equal, direct, and secret vote as per the Constitution,[9] yet candidates are carefully screened and approved by the Party). Centralization of power into it was made a constitutional principle, and thus the SPA was invested with vast legislative powers: the authority to enact basic domestic and foreign policies, to create a Presidium to operate on its behalf when the Assembly was not in session, to approve the laws and statutes adopted by the Presidium, to revise and amend the Constitution, to deliberate and approve the national budget, to elect and recall a prime minister of the Cabinet and its members, to appoint major officials such as the chief justice of the Supreme Court and procurator-general of the Central Procurator's Office,[10] to dispatch foreign service personnel, and so forth. All the constitutional organs derived their authority from the SPA. Division of labor among other governmental organs was, however, done for the purpose of governing the state; never was such a division intended to create – as is the case in most liberal democracies – a system of "checks and balances" on state authority via a separation or diffusion of powers.

The Presidium of the SPA, comprising a much smaller group of individuals (ranging from fifteen to twenty of the top party personnel, the same men who essentially dominate the KWP), initiated action on almost all policy making. Thus, in reality, the SPA's supremacy was a mere superficiality. As a governmental body, the SPA was – and still is – purely a quasi-independent agency, a façade erected to give the appearance of democratic representation, a puppet whose strings are pulled to legitimize state action.

The Presidium of the SPA was also in the position of the head of state and exercised associated ceremonial authority concerning foreign as well as domestic

[8] For the details, see Dae-Sook Suh, *Korean Communism: 1945–1980* (Honolulu: University of Hawaii Press, 1981), p. 499; also see Dal-kon Choi and Young-ho Shin, *Bukhanbop-ipmum* (Introduction to North Korean Law) (Seoul: Se-Chang, 1998), pp. 51–2; and Fukushima Masao, *On the Socialist Constitution*, pp. 122–4.

[9] 1948 constitution, Art. 3. [10] Ibid., Art. 37.

affairs. The Cabinet exercised executive authority empowered by the SPA. Kim Il-sung, who had been seated as top leader of the northern part of the Korean peninsula by the Soviet Union since its occupation after liberation from Japanese rule in 1945, was appointed prime minister. In fact, the key players of the government administration were members of the Cabinet who had concurrent positions in the Party as well as the SPA. The local sovereign organs were the People's Assemblies, the members of which were elected by the respective local residents. The People's Assemblies supervised the People's Committees, which were in charge of the administration of their respective local districts.[11]

As far as the Constitution and North Korean citizens are concerned, the first constitution stipulated that fundamental rights, similar to those of liberal democracies, be protected. For example, freedom of speech (Article 13), equal protection (Article 11), the right to vote and be elected (Article 12), the right to religion (Article 14), protection of privacy (Article 21), protection from arbitrary arrest (Article 24), the right to petition (Article 25), and so forth were all addressed in the Constitution. However, whether or not these rights were ever protected in practice is highly suspect.[12]

Although North Korea adopted the constitutional principles of the Soviet Union in political structure, the first constitution could not but reflect North Korea's inherent reality. Since North Korea was just beginning to construct a socialist system, there still remained many legacies of the previous system. It was, in a sense, inevitable that the new leadership, which had yet to establish a stable power base, came to a compromise with existing nonsocialist elements. Such aspects were found particularly in connection with the economic sector. For example, private ownership was broadly protected, along with freedom to run businesses.[13] Citizens were also required to pay taxes according to what each was financially capable of paying.[14] In order to rid the country of remnants of Japanese colonial rule, the Constitution contained clauses that called for the confiscation of assets and land owned by Japanese and their collaborators, and the deprivation of their civil rights.[15] Interestingly enough, however, there was one provision, Article 31, which provided protection for ethnic minorities, an addition that would seem to have been blindly adopted from the Soviet constitution,[16] since the Soviet Union

[11] Ibid., Arts. 68–81. The 1972 constitution additionally instituted the Local Administrative Committees as the administrative enforcement agencies of local affairs. 1972 constitution, Arts. 128–32.

[12] For a more in-depth review of human rights protection in North Korea, see Jae Jean Suh et al. (eds), *White Paper on Human Rights in North Korea* (Seoul: Korea Institute for National Unification, 2003); Amnesty International's report, online at www.amnesty.org/web/web.nsf/print/prk-summary-eng; and the US Department of State Country Report on Human Rights Practices, online at www.humanrights-usa.net/reports/dprk.html.

[13] 1948 constitution, Arts. 5, 8, 19.

[14] Ibid., Art. 29.

[15] Ibid., Arts. 5, 6, 12.

[16] See USSR 1936 constitution, Art. 123.

consisted of many different ethnic groups while the issue of ethnic minorities was by and large a nonissue in North Korea.[17]

IV. THE SOCIALIST CONSTITUTION OF 1972

The second constitution of the DPRK was inaugurated in 1972 after the profound transformation of society. Here, two aspects in particular should be noted. First, Kim Il-sung ultimately came out on top in the struggle for absolute power over the country and consolidated his power into an undisputable one-person dictatorship. The unparalleled leadership of Kim Il-sung and his critical role and contribution to socialist state development were well described in the preamble of the 1972 constitution. Second, private ownership was completely eliminated, which ushered in the completion of the socialist central economic planning system, and the principle of collectivism was broadly introduced and strongly emphasized. This new constitution was called the "Socialist Constitution" of the DPRK as it epitomized North Korea's successful transition to a socialist system via the removal of nonsocialist elements inherent in the constitution of 1948. The Constitution provided that "class antagonisms and all forms of exploitation and oppression of man by man have been eliminated for ever,"[18] and that "the historic task of industrialization has been accomplished successfully."[19] However, these expressions did not mean that socialist construction of the state had been completed, but that it would continue until North Korea reached the high phase of communism: "not only classless society but also a highly advanced society where there is no distinction between mental and physical labor and each member of society works according to his ability and receives according to his needs."[20]

The 1972 constitution was drastically different from its 1948 predecessor, not only in form and content but also in its level of sophistication.[21] It professed that the DPRK was an "independent socialist State representing the interests of all the Korean people,"[22] based on proletarian dictatorship.[23] The *Juche* ideology of the Korea Workers' Party was expressly incorporated in the Constitution as the guiding principle of the state and regarded as a "creative application of Marxism–Leninism" to the conditions of North Korea.[24] The status of the Party was thereby

[17] North Korea got rid of this provision as it was omitted from the constitution of 1972.
[18] 1972 constitution, Art. 6. [19] Ibid., Art. 24. [20] Ibid., Art. 25.
[21] The 1972 constitution consisted of eleven chapters and 149 articles. The chapters are as follows: 1 Politics (Arts. 1–17); 2 Economy (Arts. 18–34); 3 Culture (Arts. 35–48); 4 Fundamental Rights and Duties of Citizens (Arts. 49–72); 5 The Supreme People's Assembly (Arts. 73–88); 6 The President of DPRK (Arts. 89–99); 7 The Central People's Committee (Arts. 100–6); 8 The Administrative Council (Arts. 107–14); 9. The Local People's Assembly, People's Committee and Administrative Committee (Arts. 115–32); 10 The Court and the Procurator's Office (Arts. 133–46); and 11 Emblem, Flag and Capital (Arts. 147–9).
[22] 1972 constitution, Art. 1. The first constitution did not mention "socialist state" at all.
[23] Ibid., Art. 10. [24] Ibid., Art. 4.

enhanced through constitutional recognition. The principle of democratic centralism was defined as the basic principle of organization and activity of state organs.[25] This means that once citizens elect their representatives, they should obey representatives' decisions, and lower authority should obey higher authority. No checks and balances among state organs exist, only strict hierarchical domination and submission.

This constitution also created the presidency and made the president the head of state, a position that carried a four-year term with no limit on re-election.[26] Although the SPA was still the supreme sovereign organ and elected the country's president, de facto state power was the president's to exercise. Kim Il-sung was, of course, inaugurated as the first president and served in that position until his death in 1994. Furthermore, the Constitution created new government organs and renamed existing ones. Specifically, the Central People's Committee (CPC) was created, the chairman of which was the president. It became the supreme guiding agency of state sovereignty and policy making.[27] In addition, the Cabinet was renamed the "Administrative Council," which was led by the prime minister, and became the policy enforcement agency under the supervision of the president and the CPC.[28]

The constitution also made changes in terms of citizens' rights. The collectivist principle of "one for all and all for one" was adopted as the basis of the rights and duties of citizens.[29] Thus, "mass line" and "mass movement" were inserted as constitutional principles.[30] Collectivism became the basic orientation of education at all levels. Private ownership of means of production was eliminated, along with the right to run a business;[31] private ownership of goods was limited to personal-use items only.[32] As the state was responsible for providing all the daily necessities needed by the people via a rationing and public distribution system, the system of taxation was abolished.[33] And even amid the beginning of dialogue between North and South Korea in the early 1970s, a peaceful-unification clause was also inserted in the Constitution, although the victory of socialism was still the ultimate goal of the state.[34] (Interestingly, South Korea also amended its constitution in 1972 to extend President Park Chung-hee's rule under the pretext of legitimizing North and South dialogue for peaceful unification.) All these changes were an expression of North Korea's confidence in its own "made-for-Korea" socialist system.

[25] Ibid., Art. 9. [26] Ibid., Arts. 89–99. [27] Ibid., Arts. 100–6. [28] Ibid., Arts. 107–14.

[29] Ibid., Art. 49. Art. 68 also provided, "Citizens must display a high degree of collectivist spirit" and "cherish their collective and organization and develop the revolutionary trait of working interests of the homeland and the revolution."

[30] Ibid., Arts. 12, 13. [31] Ibid., Art. 18. [32] Ibid., Art. 22.

[33] Ibid., Art. 33. It provided, "The State abolishes taxation, a hangover of the old society." In the 1948 constitution, Art. 29 provided that citizens should pay tax.

[34] 1972 constitution, Art. 5.

V. THE 1992 AMENDMENT FOR SUCCESSION OF POWER

Twenty years would pass before an amendment was made to the 1972 document. This revision was a result of a buildup of external events in the 1980s that culminated at the end of the decade, ushering in radical changes that would alter the geopolitical world order and signal the end of the Cold War. While the Soviet Union and Eastern European states that formed the Communist bloc eventually collapsed, Communist China continued on its path of transformation, enacting measures incrementally so as to adopt a market system. This new post-Cold War period that began in the 1990s drove North Korea into a desperate state as the country was forced to survive in the new, radically altered international environment, *sans* reliance on its traditional trading partners for markets and contiguous allies for significant assistance and support. All these external events had a huge impact on the country's economy, as well as threatening its very political survival.[35] Isolated, North Korea has for some time now been forced to attract foreign investment and boost trade in a desperate attempt to climb out of economic destitution. Thus, although dialogue with South Korea had resumed in this regard, the timing was less than optimal, as preparation for the succession of power from the aging Kim Il-sung to his son Kim Jong-il required greater time for the junior Kim to consolidate his power.

With these changes occurring, amendments to the Constitution were made in 1992. First, eliminated from the document was the expression of Marxism–Leninism in conjunction with *Juche* ideology and instead the philosophical principle of *Juche* ideology was constitutionalized by itself.[36] Second, the leading role of the Party was emphatically stipulated.[37] Proletarian dictatorship was replaced with dictatorship of the people's democracy,[38] although the Constitution expressed in Article 1 that the DPRK was a socialist state, as it used to be. However, it is not clear why such a change was made in consideration of the socialist theory that "proletarian dictatorship" is a more developed stage than "dictatorship of the people's democracy" in the process of socialist revolution. It might have happened from the defensive sense of vulnerability since the collapse of the Eastern bloc. Third, North Korea's policy toward the South was changed from an aggressive

[35] For discussion on the impacts of the collapse of the Communist bloc on the DPRK's economy and energy and agricultural sectors, see James H. Williams, David Von Hippel, and Nautilus Team, "Fuel and famine: rural energy crisis in the DPRK," (Spring 2002) 26(1) *Asian Perspective* 111–40; Andrew Natsios, *The Great North Korean Famine* (Washington, DC: United States Institute of Peace, 2001); and Marcus Noland, *Avoiding the Apocalypse: The Future of the Two Koreas* (Washington, DC: Institute for International Economics, 2000), pp. 59–141.

[36] 1992 constitution, Art. 3, stated, "The DPRK is guided in its activities by the *Juche* idea, a world outlook centered on people, a revolutionary ideology for achieving the independence of the masses of people."

[37] 1992 constitution, Art. 11, stated, "The DPRK shall conduct all activities under the leadership of the Workers' Party of Korea."

[38] See ibid., Art. 12. Compare with Art. 10 of the 1972 constitution.

expression to one more receptive to co-existence.[39] At least from the viewpoint of constitutional expression, North Korea seems to have renounced a North Korea-initiated revolutionary unification since 1992, as the 1992 constitution supports the principle of peaceful unification. The new revision removed the foreign-policy clause of international co-operation with socialist states based on Marxism–Leninism and proletarianism by adopting independence, peace, and solidarity as the basic principles of foreign policy.[40]

The most important point of this 1992 revision was the enhancing of the National Defense Commission (NDC) as a separate constitutional organ. Before this, the NDC was merely a subcommittee of the Central People's Committee.[41] However, the 1992 constitution created a new chapter for this commission with six articles.[42] Before this revision, the president, as the chief commander of the state, held the chairmanship of the commission *ex officio*, leading state military affairs.[43] The 1992 amendment separated the highest military leadership from the authority of the president and conferred it on the chairman of the National Defense Commission. Now the chairman of the NDC became the chief commander of the state and exercised the highest military authority. As Kim Jong-il was elected as its chairman, he solidified his status as successor, de jure and de facto.

In the economic realm, several provisions were also supplemented in order to emphasize an independent national economy and the development of science and technology.[44] Constitutional ground was laid for the support of an "open-door" policy, as inferred from Article 37: "The State shall encourage institutions, enterprises or associations of the DPRK to establish and operate equity and contractual joint venture enterprises with corporations or individuals of foreign countries." Although the Joint Venture Act had come into being in 1984 – but lacked constitutional grounding at that time – the creation of this provision suggested a more positive attitude and active policy toward attracting foreign investment. Investment of this nature was possibly seen – as it is today – as a means to assist the country in surmounting its economic hardships. Prior to this amendment, top leadership had already decided in 1991 to create the Rajin-Sonbong Free Economic Trade Zone. Soon after this 1992 amendment, Pyongyang promulgated a series of foreign-investment laws.[45]

Two years after this revision, North Korean leader Kim Il-sung passed away. His death in 1994 heralded imminent change in the power structure. However, in spite of his death, the presidency remained vacant for four years until the new 1998

[39] Compare Art. 9 of the 1992 constitution with Art. 5 of the 1972 constitution.
[40] 1992 constitution, Art. 17. Compare with 1972 constitution, Art. 16.
[41] 1972 constitution, Art. 105.
[42] 1992 constitution, Arts. 111–16.
[43] 1972 constitution, Art. 93.
[44] See ibid., Arts. 19, 26, 27, 28.
[45] For example, the Foreign Investment Act (1992), the Foreign Enterprise Act (1992), the Contractual Joint Venture Act (1992), the Foreign Economic Trade Zone Act (1993), and so forth.

constitution finally abolished the presidency. The fact that there had been no political instability during the four-year absenteeism of the president is proof that Kim Jong-il's control had already put down deep, unshakable roots. Thus, all that was needed was constitutional change fitted for his direct rule.

VI. THE 1998 CONSTITUTION OF THE KIM JONG-IL ERA

The 1998 constitution, which was built upon the old one but refashioned in 1998,[46] was tailor-made by Kim Jong-il and designed to suit his personality and method of rule. First, although the junior Kim established and enjoyed formidable and unquestionable authority in his fiefdom, his authority was inherited, and thus his legitimacy was bound to his father's legacy. To capitalize on his father's sacred reputation and superior charismatic leadership, Kim Jong-il ceremoniously credited the establishment of North Korea to his father by elevating him as the eternal president of the country, where Kim Il-sung continues to reign posthumously. Rules based on Kim Il-sung's teaching have been professed in order to recruit public support and justify Kim Jong-il's rule. This notwithstanding, overcoming the economic difficulty that the country has faced also stood as an urgent problem threatening Kim Jong-il's legitimacy and was thus a problem for his regime to solve. Hence, existing principles in the economic sector required alteration to ensure a more pragmatic direction. If one looks closely, elements addressing these two concerns are reflected in the new constitution.

In its preamble, the 1998 constitution named itself the "Kim Il-sung Constitution," which legally embodies Comrade Kim Il-sung's *Juche* state construction ideology and achievement. Kim Il-sung was idolized as "the founder of the DPRK and originator of the Socialist North Korea," and now the DPRK and its citizens have Kim Il-sung as "the eternal President of the Republic." Essentially, this means that only Kim Il-sung was, is, and shall ever be worthy of the role of president of the DPRK, a position stipulated in the preface of the new constitution. This leadership-affirmed truth thus justified the abolishment of the presidency. This rhetorical and structural change was, of course, a reflection of Kim Jong-il's character and motivations. The powers that seemingly went to the grave with the senior Kim were instead creatively transferred to the son. Kim Jong-il herein strengthened the authority of the National Defense Commission by adding "an organ for general control over national defense" to the

[46] The 1998 constitution had 166 articles in ten chapters. The ten chapters are as follows: 1 Politics (Arts. 1–18); 2 Economy (Arts. 19–38); 3 Culture (Arts. 39–57); 4 National Defense (Arts. 58–61); 5 Fundamental Rights and Duties of Citizens (Arts. 62–86); 6 The Structure of the State, Section 1 The Supreme People's Assembly (Arts. 87–99), Section 2 The National Defense Commission (Arts. 100–5), Section 3 The SPA Presidium (Arts. 106–16), Section 4 Cabinet (Arts. 117–30), Section 5 Local People's Assembly (Arts. 131–8), Section 6 Local People's Committee (139–46), Section 7 Public Procurator's Office and Court (Arts. 147–62); 7. National Emblem, Flag, Anthem and Capital (Arts. 163–6).

existing apparatus, "the highest military leading organ of State power."[47] This thereby empowered the chairman of the NDC to direct and command all the armed forces and guide "defense affairs as a whole."[48] The NDC chairmanship was elevated to the highest position of the state when Kim Jong-il was re-elected chairman via the new constitution. This amounts to delegation of state sovereignty to the chairman of the NDC, since this phrase is interpreted comprehensively.[49] This also suggests that military force is the backbone of Kim's leadership, its means for both regime survival and overcoming the state crisis. To the latter issue, Kim Jong-il himself even suggested construction of a "prosperous and powerful nation" as the goal of his new era. In sum, supremacy of military forces is the principle by which Kim Jong-il intends to rule, a principle that has aptly been termed "military-first politics."[50]

A change accompanying the abolishment of the presidency was the vesting of more authority in the Presidium of the SPA and the Cabinet. The president of the SPA Presidium represents the state as the head of state.[51] The authority of the president and the Central People's Committee, which was also abolished in the current constitution, was distributed to the SPA Presidium and the Cabinet respectively. Presidential authority concerning foreign and external affairs as the head of state and the chairman of the CPC was transferred to the Presidium of the SPA, while his authority concerning government management as the head of the executive and the CPC was given to the Cabinet. Thus, the Cabinet is not only the highest executive enforcement organ but also the general state management organ.[52] Although the Constitution delegated many powers – with the exception of control over military affairs – to other state organs, these designations have not undermined Kim Jong-il's invincible authority as top leader of the state. He is the general secretary of the Korea Workers' Party, the chairman of the NDC and the chief commander of the Korean People's Army.

The other component of constitutional change was concerned with overcoming North Korea's grave economic difficulty. For example, on the one hand, social

[47] 1998 constitution, Art. 100. [48] Ibid., Art. 102.

[49] The office of the chairman of the NDC was exalted as a sacred position. According to the speech proposing to re-elect Kim Jong-il as chairman of the NDC at the first session of the 10th SPA, the chairmanship was described as follows: "The NDC chairmanship is the highest post of the state with which to organize and lead the work of defending the state system of the socialist country and the destinies of the people and strengthening and increasing the defense capabilities of the country and state power as a whole through command over all the political, military and economic forces of the country. It is also a sacred, important post which symbolizes and represents the honor of our country and the dignity of the nation." *Rodong Shinmun* (Korea Workers' Party Daily), September 6, 1998.

[50] For discussion of "military-first politics," see Dae-sook Suh, "Military-first politics of Kim Jong Il" (2002) 26(3) *Asian Perspective* 145; and Kap Sik Kim, "Military-first politics in North Korea: continuity and change in party–military relations" (in Korean) (2001) 4(2) *North Korean Studies Review* 41.

[51] 1998 constitution, Art. 111.

[52] Compare Art. 124 of the 1992 Constitution with Art. 117 of the 1998 constitution.

organizations were added to subjects that can own the means of production, in addition to the state and co-operative organizations.[53] On the other hand, the objects of state ownership were reduced, while objects of private ownership, as well as those of the ownership of social and co-operative organizations, were expanded.[54] Citizens can own income from legal economic activities, in addition to the products of individual sideline activities, including those from the gardens of co-operative farmers.[55] This means that citizens can make money through commercial activities, which was tolerated after the collapse of the public rationing system and is now legalized by the Constitution. This amounts to the initial reception of a primitive market economy. In this regard, creation of citizens' freedom to travel should be noted.[56] Individuals can travel for business as far as constitutional expression is concerned, although residents still need licenses to travel. (This provision seems to have been included to legalize residents' travel to seek food – which was rampant during the food crisis beginning in 1994 – and the state could not but accept such travel, which was out of control as many were starving to death. Therefore, creation of the freedom to travel was the acceptance of a fait accompli, but did not mean an automatic improvement in citizens' fundamental rights.) Protection of patent rights, in addition to existing inventor's rights and copyrights, was newly included in consideration of the expanded protection of intellectual property rights.[57]

This amendment also strengthened the autonomy of individual economic entities. The state introduced an independent cost-accounting system in the economic management system and utilized such economic levers as prime costs, prices, and profits.[58] Expansion of the mode of independent enterprise will hopefully bring about an expansion of autonomy in the economic management of individual entities. Introduction of the concepts of costs, prices, and profits was concerned with the introduction of a market economy, although constitutionalization of these concepts would not bring about a market economy automatically.

Under the previous constitution, foreign-trade activities were monopolized by the state. But this constitution allowed social and co-operative organizations to engage in them.[59] The Constitution also provided a constitutional ground for creating a special economic zone,[60] where foreign investors could enjoy broader freedom of economic activity.[61]

Although this amendment adopted some initial steps needed to begin the first stage of creating a market economy, retention of the general socialist principle of autarky, as well as the regime's seemingly ongoing political inflexibility, still

[53] 1998 constitution, Art. 20. [54] Ibid., Arts. 21, 22, and 24.
[55] Compare Art. 24 of the 1998 constitution with that of the 1992 constitution.
[56] 1998 constitution, Art. 75. [57] 1998 constitution, Art. 74. [58] Ibid., Art. 33.
[59] Ibid., Art. 36. [60] Ibid., Art. 37.
[61] On the basis of this provision, the special laws to create the Mount Geumgang Tourist Zone, the Gaeseong Industrial Complex, and the Sinuiju Special Administrative Region were promulgated in 2002.

inhibits rapid growth toward a market economy. These changes were made within tolerable limits for the regime's survival without undermining the current status quo. All told, this constitution manifested the dilemma that North Korean leaders faced.

VII. THE CONSTITUTION OF 2009: CHANGES FOR ANOTHER POWER SUCCESSION

As the North Korean brinkmanship strategy for its survival has been anchored to the development of nuclear arms – which, the regime believes, is the most effective means to protect itself from outside threats – pressure from the international community led by the United States has intensified. Resolution of this nuclear issue is critical to the survival of the regime. Meanwhile, North Korean leader Kim Jong-il suffered a stroke in August 2008. His precarious state of health led to the somewhat hasty finalizing of the succession issue, as Kim all but officially designated one among his three sons (Kim Jong-un) his heir. From a constitutional perspective, the Constitution would have to be revised to incorporate the future succession of his son to power to give the son more stable and legitimate authority. These developments are key to understanding the revision to the Constitution in 2009.

The 2009 constitution consists of 172 articles, six more than the 1998 constitution, although both have seven chapters.[62] In particular, Chapter 6 created a section on "The Chairman of the National Defense Commission of the Democratic People's Republic of Korea"[63] separate from "The National Defense Commission." The new constitution reinforced the status and power of the chairman of the NDC. The newly created Article 100, which is worthy of attention, expressly provides for the status of the chairman as the supreme leader of the DPRK.[64] The country name (i.e. DPRK) is unusually written together with the term "Chairman" in order to give the position a more authoritative aura. Thus, the chairmanship has been elevated to the highest position from a constitutional perspective. This change gave more solid authority to the young heir who, being in his twenties, lacks experience and therefore may be seen as somewhat incapable of gripping the reins of power over the party and the military. Regardless, Kim Jong-un was elevated to the position of first chairman of the NDC four months after his father's death.[65]

[62] For an unofficial English translation of the 2009 constitution, see http://asiamatters.blogspot.com/2009/10/north-korean-constitution-april-2009.html.

[63] Chapter 6, Section 2, has six articles from Art. 100 to Art. 105.

[64] Article 100 states: "The Chairman of the National Defense Commission of the Democratic People's Republic of Korea is the supreme leader of the Democratic People's Republic of Korea."

[65] Kim Jong-un, the third son of Kim Jong-il, made his formal appearance by appointment as vice chairman of Central Military Committee of the Korea Workers' Party (KWP) and, at

The Constitution clearly stipulates that the chairman has authority to direct the overall affairs of the state,[66] including national defense, such as to command and direct all the armed forces, and to guide the work of the NDC as the supreme commander of the whole armed forces.[67] In addition, the chairman has authority to ratify or rescind major treaties concluded with other countries, and to exercise the right of granting special pardon,[68] which belonged to the Presidium of the SPA in the previous constitution.[69] The chairman has the authority to issue orders[70] and to submit items to the SPA for its consideration.[71] The chairman of the NDC exercises legitimate command of state affairs on the basis of the constitution without the conduit of the Party. The chairman of the NDC is now, de jure as well as de facto, the highest organ of the state. The strengthened status of the chairman of the NDC entailed the relative decline of the status of the SPA.

Another characteristic is the removal of the term "communism";[72] while the military-first (*songun*) ideology was newly added to the existing *Juche* ideology.[73] North Korea would like to discontinue its association with the term "communism." For the regime, the word "socialism" is enough to entertain flexibility for possible change in the future. The utopian dream of communism was essentially renounced after Kim Jong-il claimed "military-first politics" as his ruling ideology. This ideology was inserted in the Constitution alongside Kim Il-sung's *Juche* ideology, in addition to the elevation of the chairmanship of the NDC. With the persistence of the country's economic difficulty, for the regime, it would seem that the military is the most important body on which it will rely for the survival of the North Korean system.

In the section on the economy, no changes were made (whereas the 1998 revision had brought in many changes in this area). In the day-to-day reality of the economy, however, significant changes have occurred. For example, general markets are so pervasive in the daily life of ordinary North Korean residents that the people can now hardly survive without those markets. Special economic zones (the Gaeseong Industrial Complex and Mount Geumgang Tourist Zone) were installed at the border with South Korea in the early 2000s. Therefore, new developments in this area were anticipated. Since no economy-related changes appeared in the 2009 constitution, one may infer that North Korea intends to

the same time, general (*daejang*) of the Korean People's Army (KPA) on September 28, 2010. After Kim Jong-il's sudden death in mid-December 2011, Kim Jong-un was hailed as the DPRK supreme leader (December 17, 2011) and supreme commander of the KPA (December 30, 2011), and then finally officially given the positions of KWP first secretary (April 11, 2012) and NDC first chairman (April 13, 2012).

66 2009 constitution, Art. 103(1). 67 Ibid., Arts. 102 and 103(2).

68 Ibid., Arts. 103(4) and (5). 69 1998 constitution, Art. 110(14) and (17).

70 2009 constitution, Art. 104. 71 Ibid., Art. 95.

72 The word "communism" appears in Arts. 29, 40, and 43 in the 1998 constitution.

73 2009 constitution, Art. 3.

concentrate its energy on political stability following its power succession, putting economic reform or opening up on the back burner – at least for a while.[74]

One other revision deserves mention: the insertion that the state shall respect and protect human rights.[75] This revision is likely to have been added in response to international criticism of North Korea's violation of human rights. However, mere existence of this provision does not guarantee its enforcement. Most articles concerned with human rights exist on paper, but little – if anything – in this regard is put into force.

VIII. THE 2012 CONSTITUTION: THE ERA OF KIM JONG-UN

After Kim Jong-il passed away suddenly in mid-December 2011, North Korea did not wait long to formalize the official rule of the new leader, Kim Jong-un. No sooner had the ceremony for the 100 days' memorial service closed in March 2012 than the Party Representatives Congress was called. On April 11, 2012, at the congress, Kim Jong-un, the third son of Kim Jong-il, was appointed first secretary of the KWP, and chairman of the Central Military Committee of the KWP. Two days later, on April 13, the Supreme People's Assembly was convened to crown him with the top position of the state – chairman of the NDC.[76] Formally, then, the young new leader's ascendance has been completed, as now he holds the top authority of the state as well as of the party and the military.

Before the SPA selected the new chairman of the NDC, it amended the constitution once again. The major change took place in the preamble to inscribe the late Kim Jong-il's status and achievements. Concomitantly, a titular adjustment in the main text was made. The new constitution declares, in the preamble, that Kim Jong-il gloriously defended the socialism bequeathed by Kim Il-sung and transformed the nation into an invincible state of political ideology, a nuclear-armed state, and an indomitable military power, paving the way for the construction of a strong and prosperous nation. Accordingly, Kim Jong-il received posthumously the title "eternal Chairman of the NDC" in a similar way to Kim Il-sung's being named "eternal President of the Republic" in the 1998 constitution. The 2012 constitution elevated Kim Jong-il's standing to equal that of his father Kim Il-sung, the founder of North Korea. In North Korea, this new constitution is

[74] However, in the early stages of Kim Jong-un's reign in 2012, some significant changes occurred, one of which was the January 2012 modification of various laws relating to reform and opening in an effort to improve North Korea's internal economic environment, suggesting the Kim Jong-un regime's realization that more immediate steps need to be taken to rebuild the failing economy. For discussion, see Kim Min Gi, "Moves toward change under the Kim Jong-un regime," (August 2012) 35(8) *Vantage Point* pp. 24–7.

[75] 2009 constitution, Art. 8.

[76] In the case of Kim Il-sung's death, the new constitution was announced four years later in 1998.

referred to as the Kim Il-sung–Kim Jong-il Constitution, while the 1998 Constitution is known as the Kim Il-sung Constitution.

Since the late Kim Jong-il became the eternal chairman of the NDC, no other person can be appointed to the same title. Therefore, the title in the text was changed to the first chairman of the NDC in respective articles.[77] No other change was made to the text.

Despite the limited changes to the constitution, one other important detail should be noted. In the 2012 constitution, North Korea publicly announced itself a "nuclear-armed state," rendering North Korea's nuclear status a constitutional issue rather than a mere policy matter. The specification of the nuclear state in the Constitution signifies that the nuclear program in the DPRK is so vital that its resolution depends on the decision of the people. North Korea now can say, at the very least, that abandonment of nuclear weapons is against the Constitution. Although this explicit insertion of "nuclear-armed state" in the constitution does not prevent North Korea from engaging in denuclearization negotiations with the United States, South Korea, or other parties in the future, it will surely contribute to upping the ante by providing the DPRK with another bargaining chip. Thus, a new obstacle has been erected on the road to the denuclearization of North Korea.

Considering all these changes, one can assume that the junior Kim will likely follow the policy lines his father advocated – at least for a while. Once Kim Jong-un successfully establishes his reign in full, he may reveal his true intentions. At that time, he may amend the Constitution again to fit it to his own direction and rule.

IX. CONCLUDING REMARKS

Each amendment of the Constitution in North Korea has been concerned, in principle, with a change in the status of the supreme leader or power succession. The Constitution has been modified to legitimize each new leader's authority. Additionally, articles relating to the economy were revised from the 1990s to ease the strict central planning system and autarky in order to alleviate the destitute economic situation of the people. Thus, certain economic activities or types of ownership were legitimized on the basis of the Constitution.

However, in North Korea, where the rule of law does not govern, but the directives and words of leaders and administrative directives do, legal grounds for state actions are not sought for their justification. Although the Constitution is the highest law in form, it functions merely as a tool of propaganda. In other words, the Constitution in North Korea exists not for the protection of citizens' rights and interests but merely as a tool to showcase the superiority of the state's system to its citizens and outside observers alike. In this regard, the mere existence

[77] For example, Arts. 91, 95, 100–5, 107, 109, 147, and 156.

of a provision for a fundamental right does not guarantee that right. The lack of constitutional ground does not indicate the impossibility of action by the state either: the Joint Venture Act of 1984[78] and widespread travel of residents – in search of food – before legal provisions were created for such actions in 1998 are cases in point. These situations allow the state a great deal of discretion in the exercise of its authority. Neither does the state suffer any restraint to check its limitless exercise of public authority; nor do any such legal mechanisms exist.

However, the North Korean leadership has tried to adjust itself to the new challenges via constitutional changes by reducing the gap between law in the book and law in action. If an open-door policy is the inevitable option to overcome the country's current economic difficulty, the rule of law will be one of the most important vehicles to persuade foreigners to trust the system and establish economic co-operation. Therefore, examining the law in North Korea, including its constitution, is a rising necessity for many North Korean observers.

The constitutional history of North Korea suggests that revisions are possible anytime the country's leadership decides to change the direction of state management or keep in step with environments in flux. The wishes of citizens have not been at issue and are unlikely to be for some time. The new leadership of Kim Jong-un will face more challenges even though the new constitutional revision was provided to mitigate his shortcomings – legal devices fall far short of superseding the real politics of power struggle in North Korea. The new leader's lack of experience makes institutional legitimacy more important. He can exercise full authority given by the Constitution, although he needs the help – and loyalty – of a senior group of mentors. The new leader may continue to have difficulty commanding the undivided backing of the old generation. Likewise, as the successor, he is in some ways bound to the legacies of his father and grandfather, which will make it difficult for him to reverse the country's economic deterioration. But his ascension as the supreme leader is very different from his father's experience, and Kim Jong-un seems confident early on in his reign. His youth and his study in Europe may contribute to his leaning toward a pragmatic way of thinking.[79] Time will reveal his true colors. And, as the Constitution is a reflection of politics, only a new political scene – if that were ever to occur – could usher in a new constitution.

[78] Constitutional ground for such law was provided in Art. 37 of the 1992 constitution.

[79] In his speech to celebrate his grandfather's 100th birthday on April 15, 2012, Kim Jong-un announced that he will not leave his people hungry, and will work to improve their livelihoods. For an unofficial English translation of the speech, see www.northkoreatech.org/2012/04/18/english-transcript-of-kim-jong-uns-speech. Three months later, in July, he carried out a blitz dismissal of North Korea's military chief Ri Yong-ho – a conservative military man who had been appointed by his father – indicating that Kim Jong-un may be in the process of replacing older or conservative military figures with people he can more easily control and use in his attempt to embark upon reported measures to improve the economy. See "N. Korea's military chief Ri Yong-ho dismissed amid possible power struggle" (August 2012) 35(8) *Vantage Point* pp. 31–3.

6

Chinese constitutional dynamics

A decennial review

Wang Zhenmin and Tu Kai

I. INTRODUCTION

China has reached several milestones in its pursuit of mature constitutionalism in the first decade of the twenty-first century, but its position remains distant from the terminus.[1]

On 10 October 1911, a mutiny triggered a republican revolution that overthrew the last imperial dynasty of China. The revolutionaries devoted their lives to an ideal constitutional republic and, at that time, little did they realise that their sacrifices marked only the beginning of what would become China's century-long quest for constitutionalism. In the early decades of the last century, China promulgated several constitutions, yet most of them were shelved after a short time.

Since the establishment of the People's Republic of China (PRC) in 1949, China has promulgated four constitutions, in 1954, 1975, 1978 and 1982. Four eras of the regime can be seen in the codes: the 1954 constitution was drafted by the Communist Party of China (CPC) and its political allies who had supported the CPC in the civil war against the Kuomintang (KMT); the 1975 constitution is a leftist text made under the ideological climate of the Cultural Revolution (1966–

[1] See, e.g., Barrett McCormick, *Political Reform in Post-Mao China: Democracy and Bureaucracy in a Leninist State* (Berkeley: University of California Press, 1990). Albert Chen, *An Introduction to the Legal System of the People's Republic of China* (Hong Kong: Butterworths Asia, 1992). Stanley Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford: Stanford University Press, 1999). Feng Lin, *Constitutional Law in China* (Hong Kong: Sweet & Maxwell Asia, 2000). Karen Turner-Gottschang et al., *The Limits of the Rule of Law in China* (Seattle: University of Washington Press, 2000). Keyuan Zou, *China's Legal Reform: Towards the Rule of Law* (Leiden: Martinus Nijhoff Publishers, 2006). André Laliberté and Marc Lanteigne (eds.), *The Chinese Party-State in the 21st Century: Adaptation and the Reinvention of Legitimacy* (Oxford: Routledge, 2008). Donald Clarke (ed.), *China's Legal System: New Developments, New Challenges* (Cambridge: Cambridge University Press, 2008).

76); the 1978 constitution is a text of the transitional period from Mao Zedong to Deng Xiaoping's paramountcy, which was a hybrid of its 1954 and 1975 precedents; the 1982 constitution, contemporarily valid, launched the historic 'reform and opening' era, and it is the basic law of China's new market economy and innovative political reform during the last thirty years.

The 1982 constitution has been amended four times – in 1988, 1993, 1999 and 2004. The 2004 constitutional change was much more crucial and far-reaching than its predecessors. In the fourteen constitutional amendments approved on 14 March 2004 by the tenth National People's Congress (NPC), China's parliament, at its second session, a broad range of political, economic and social issues were addressed. Several significant 2004 constitutional amendments are listed below.

In the eighteenth constitutional amendment to the 1982 constitution of the PRC, the new ideological discourse of 'the important thought of "Three Represents"' was added. This provision and the nineteenth constitutional amendment, which has incorporated 'all builders of socialism' into China's leadership, cofounded the 2000s market-conducive policies of the Chinese authorities.

Against this background, it is no surprise that the twentieth, twenty-first and twenty-second constitutional amendments all relate to the enhancement of protecting private property. The twentieth amendment requires the state to 'make compensation for the land expropriated or requisitioned', regardless of whether the state's action is 'in the public interest and in accordance with the provisions of law'.[2] The twenty-first announces: 'The State encourages, supports and guides the development of the non-public sectors of the economy'.[3] The twenty-second adds a provision that 'citizens' lawful private property is inviolable'.[4]

The thirty-third constitutional amendment declares: 'The State respects and preserves human rights'.[5]

The constitutional amendments also replace 'imposition of martial law' with 'entering the state of emergency'.[6]

The twenty-eighth constitutional amendment reads: 'The President of the People's Republic of China, on behalf of the People's Republic of China, engages in activities involving State affairs and receives foreign diplomatic representatives'. What is added is the phrase 'engages in activities involving State affairs'.[7]

The thirtieth constitutional amendment changed the term of local people's congresses.[8]

[2] The Twentieth Constitutional Amendment to the 1982 Constitution.
[3] The Twenty-First Constitutional Amendment to the 1982 Constitution.
[4] The Twenty-Second Constitutional Amendment to the 1982 Constitution.
[5] The Thirty-Third Constitutional Amendment to the 1982 Constitution.
[6] The twenty-sixth and the twenty-ninth Constitutional Amendments to the 1982 Constitution.
[7] The Twenty-Eighth Constitutional Amendment to the 1982 Constitution.
[8] The Thirtieth Constitutional Amendment to the 1982 Constitution.

In this chapter, we will examine Chinese constitutional dynamics in the first decade of the twenty-first century, especially the 2004 constitutional amendments and their applications and implications. There are eight subsections below, addressing the issues of 'we, the people'; 'constitutional review'; 'amendments to the electoral law'; 'the government of law'; 'human rights'; 'Hong Kong, Macau and Taiwan'; 'judicial reform'; and 'the Chinese presidency'. We finish this decennial review with a short conclusion, where two prospects for China's constitutionalism will be contrasted.

II. CHINESE CONSTITUTIONAL DYNAMICS

We, the people

Socialist states, in orthodox terms, are established by and for the proletariat. As the Chinese constitution states: 'The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants'.[9] In this provision, 'people' is an exclusive concept, which in the Chinese political context draws a line between the country's masters – workers and peasants – and its internal 'aliens' who are either 'people's enemies' or those untrustworthy. However, Article 33 of the Constitution recognises:

> All persons holding the nationality of the People's Republic of China are citizens of the People's Republic of China. All citizens of the People's Republic of China are equal before the law. Every citizen enjoys the rights and at the same time must perform the duties prescribed by the Constitution and the law.[10]

The concept of 'citizenship' is comparatively inclusive, as it discriminates against neither political dissenters nor non-communist nationals. Even if one is neither a worker nor a peasant, she or he remains entitled to civil and political rights pursuant to Article 33.

The 2004 constitutional amendments have paved the way to co-ordinating the two concepts and thus two constitutional provisions. As mentioned in the introduction, 'the important thought of "Three Represents"' was added to the Constitution. Here 'Three Represents' refers to a speech given by President Jiang Zemin on 25 February 2000 in Guangdong. President Jiang declared, 'the Chinese Communist Party represents the developmental needs of China's advanced social productivity; it represents the direction of China's cultural advancement; and it represents the fundamental interest of the broadest range of the Chinese people'. In interpreting 'developmental needs of China's advanced social productivity', the Chinese leadership has recognised that investors and employers' interests shall be respected

[9] The 1982 Constitution, Art. 1. [10] Ibid., Art. 33.

and represented in the political arena, which are central to China's economic longevity and political stability.

Resolving the ideological problems makes it easier to allow new members to join the 'people'. The second sentence of the tenth paragraph of the Preamble reads:

> In the long years of revolution and construction, there has been formed under the leadership of the Communist Party of China a broad patriotic united front that is composed of the democratic parties and people's organizations and embraces all socialist working people, all patriots who support socialism, and all patriots who stand for the reunification of the motherland. This united front will continue to be consolidated and developed.

After 'a broad patriotic united front that is composed of the democratic parties and people's organizations and embraces all socialist working people', the 2004 constitutional amendment adds 'all builders of socialism'. Almost all Chinese citizens – workers, peasants or those in private sectors – are making a contribution to the economy, which entitles them 'builders of socialism'. The emerging bourgeoisie may well feel relieved since the Damoclean sword has now been removed from the Constitution.

Constitutional review

The relationship between the judiciary and the Constitution has been a hot topic since the year 2000. Because the judiciary has explicitly ruled out the possibility of exercising jurisdiction over constitutional cases, China has been exploring alternatives to establish an effective Chinese-style constitutional review system. In this section two cases are contrasted to differentiate the two main approaches that have been tested.[11] The first approach, which was tried and has failed, has been betting on the Chinese judiciary to adopt the spirit of 'common-law constitutionalism', where judges are the last defenders of the Constitution and of individual liberties and rights. This approach continues to inspire many in China and is sometimes echoed emotionally within the judiciary.

The Supreme People's Court did consider this approach in the *Qi Yuling* case, a judgment containing constitutional references. However, the failure of this approach was anticipated because it is unrealistic to expect the judiciary to supervise the administration. In the Chinese political hierarchy, administrative heads are usually superior to judges, who cannot risk irritating the administrations unless specific support from a higher-level authority is granted. This situation also explains

[11] For another introduction to these two cases, see Q. Zhang, 'A constitution without constitutionalism? The paths of constitutional development in China' (2010) 8 *International Journal of Constitutional Law* 950.

why the *Qi Yuling* case, discussed below, was submitted directly to the Supreme People's Court. Hence, scholars of the second approach would rather focus on other key institutions. For example, in the *Sun Zhigang* case scholars appealed to the Standing Committee of the NPC (SCNPC) to annul an outdated administrative regulation that was evidently inconsistent with the Constitution. Since the SCNPC is more powerful than ordinary Chinese courts and may, to an extent, resemble the Continental model of constitutional review, say, only a special organ within or outwith the judiciary may exercise that power.

The *Qi Yuling* case

In this decade we have witnessed the dramatic attempt of the Chinese judiciary to cite constitutional provisions in judgments, as was previously prohibited by two judicial references issued by the Supreme People's Court. On 30 July 1955 the Supreme People's Court, in replying to a question of the Xinjiang Higher People's Court, clarified that the Constitution, as the basic and 'maternal' law, does not prescribe specific crimes and punishments, and it is not appropriate to cite constitutional provisions in ordinary convictions.[12] In 1986 the Supreme People's Court, in another reference to the Jiangsu Higher People's Court, entitled *Reference to People's Court on Citation of Legal Documentation*, instructed the judiciary that legislative acts of the NPC and its Standing Committee, as well as administrative regulations of the State Council, shall be cited in civil judgments; regional regulations of provincial people's congresses or regulations of ethnic autonomous regional people's congresses shall be cited in cases where parties both reside in the respective administrative unit; other regulative documentations shall not be cited explicitly in judgments.[13] The twin references illustrate the fact that in the Chinese mainland no court cites constitutional provisions in either criminal or civil judgments. In this sense, the Constitution is not 'living' in the Chinese judiciary.

However, the rare case of *Qi Yuling*, involving two females living in the same village, presented an opportunity to 'activate' the Chinese Constitution. Qi Yuling was intelligent, but Chen Xiaoqi was privileged because Chen's father was the party chief of their village. In a state-run examination, Qi's marks enabled her to attend a local college. The college's offer was accompanied with urban residentship, which means the permanent right of abode in a Chinese city, the entitlement to public posts, etc. Chen failed the examination; her father colluded with her middle school, college and local education commission so that Chen would be accepted by the college under Qi's name. Subsequently, Qi was told that she had not been

[12] Supreme People's Court *Yanzi* (Zuigao renmin fayuan yanzi) No 11298, issued on 30 July 1955.

[13] Reference to People's Court on Citation of Legal Documentation (Zuigao renmin fayuan guanyu renmin fayuan zhizuo falu wenshu ruhe yinyong falu guifanxing wenjian de pifu), issued on 28 October 1986.

given the offer; she went to a vestibule school instead. Chen started her career in a local bank after her graduation. Qi worked in a steel plant and did not discover Chen's fraud until a colleague of Chen's visited her. Then Qi brought her accusation to a local court to claim infringement of her right to name and deprivation of the right to education. If the Chens and the corrupted institutions had not stolen her name, Qi could have sat in a financial office with a decent salary.

This was a 'hard case' indeed. The Chinese civil law does protect a person's name, but Chen stole not only Qi's name but also her entire life opportunity. Qi alleged that the Chens had violated her constitutional right to receive education, contrary to Article 46 of the Constitution, which reads: 'Citizens of the People's Republic of China have the duty as well as the right to receive education'.[14] Since, at the time, the right was not found in any statute, but was contained in the Constitution, the Shandong Higher People's Court petitioned the case to the Supreme People's Court for reference. In 2001, the Supreme People's Court directed the local court to support Qi. The reference per se cites the constitutional provision mentioned above. Against this background, Chinese public discourse was disturbed by the possibility that the Constitution would finally have been activated in a civil judgment. However, in 2008 the Supreme People's Court decided to repeal the reference to the *Qi Yuling* case. This indicates that the Supreme People's Court's position has returned to the twin references before the *Qi Yuling* case, i.e. that Chinese courtrooms are not the place for constitutional jurisdiction.

The *Sun Zhigang* case

In Kelsenian categories, judicial review has two models: one is based on the praxis of common-law courts that deal with administrative misuse and unconstitutional laws in hearing real cases; the other is embodied in those Continental designs that establish one special organ to review constitutionality.[15] Whereas many never trusted the undemocratic judiciary, countries including China insist that the parliamentary organ shall monopolise the power of constitutional review. The 1982 constitution authorises the Standing Committee of the NPC to 'interpret the Constitution and supervise its enforcement' and also to annul unconstitutional laws, regulations, and decisions alike.[16] In lieu of the judiciary, many now hope the Standing Committee of the NPC may take the responsibility to activate the Constitution.

[14] The 1982 Constitution, Art. 46.

[15] Hans Kelsen, 'Judicial review of legislation: a comparative study of the Austrian and the American constitution' (1942) 4 *Journal of Politics* 183. For a more relavant discussion see Michael Davis, *Constitutional Confrontation in Hong Kong* (New York: St Martin's Press, 1990), pp. 39–78.

[16] The 1982 Constitution, Art. 67.

Sun Zhigang was a college graduate from Wuhan, the capital city of Hubei province. On 24 February 2003 Sun received an offer from a Guangzhou company, so he came to Guangzhou, the capital city of Guangdong province. On 17 March 2003, Sun went to an Internet café without carrying his ID card. At 11 p.m., Sun was questioned by police on his way home and detained. He called a friend to bring his ID card and other identification documents to the police station. Before his friend arrived, Sun had already been sent to a detention centre according to the administrative regulation on 'custody and repatriation' that requires the return of all persons, without permanent resident status or permit of sojourn, to their officially registered residence. This administrative regulation was initially enacted for combating vagrancy, and evolved into a measure where municipal authorities could block working migrants from rural areas. Though having no permit of sojourn in Guangzhou, Sun was certainly not a vagrant as he had a legitimate residence, job and ID card. The public was shocked by the report that Sun was severely beaten and died in the detention centre. Chinese media later revealed the fact that many working migrants were regularly beaten in those detention centres before being forced to return to their rural homes. The authorities sentenced the murderers to death, but the public was still concerned. Thus, many legal scholars requested the Standing Committee of the NPC to review the constitutionality of this administrative regulation, which had provided the authorities such illegitimate power as to deprive people of their freedom of movement and many other personal liberties. The request put pressure on the Standing Committee to act. Finally, the State Council decided to resolve the problem. In June 2003, a new regulation entitled Measures for Administration of Aid Sent to Urban Vagabonds and Beggars without Assured Living Sources was released, which abolished the original regulation Measure for Confining and Sending back Urban Vagabonds and Beggars. In this way, the Chinese authorities avoided the question whether the Standing Committee of the NPC should exercise the power of constitutional review when an administrative regulation is reckoned inconsistent with the Constitution. Nevertheless, the *Sun Zhigang* case demonstrates that the State Council is not unwilling to compromise should public opinion be united and resolute. Bolstered by populist demand, it is still possible that the Standing Committee of the NPC may truly review administrative regulations in line with the Constitution. Pursuant to the Procedure to Record and Review Administrative Regulation, Local People's Congress Regulation, Autonomous and Special Regulation of Ethnic Autonomous Region, and Regulation of Economic Special Zone, amended in 2005, the Standing Committee shall assign one or several committee(s) to review an administrative regulation and submit a report indicating whether the regulation is in conformity with the Constitution and other parliamentary acts; if not, the review committee(s) will return the regulation to the local legislature with a request for amendment. If the local legislature refuses to amend, the reviewing

committee is now competent to appeal to the Standing Committee, or through it to the NPC, to annul the local regulation.[17]

Amendments to the electoral law

This section will address the amendments to Chinese electoral law. The Electoral Law (Act) of the NPC and Local People's Congresses of the PRC (Electoral Law) was revised in March 2010 by the eleventh NPC with the purpose of expanding democracy. For the first time, China realised that the representatives at people's congresses should be elected based on the same population ratios in both urban and rural areas. Chinese peasants now enjoy the same and equal electoral rights as urban residents according to the new amendments.

Pursuant to the Electoral Law, which was made in 1979 and revised in 1982, 1986, 1995 and 2004, votes of Chinese rural residents carried severely less weight than those of urban residents. The statutory basis was founded by the following provisions:

> Article 13: 'In municipalities directly under the Central Government, cities and municipal districts, the number of people represented by a rural deputy shall be greater than the number of people represented by an urban deputy'.
>
> Article 14: 'The number of deputies to the people's congresses of provinces or autonomous regions shall be allocated by the standing committees of the people's congresses at the corresponding levels, in accordance with the principle that the number of people represented by each rural deputy is four times the number of people represented by each urban deputy'.
>
> Article 16: 'The number of deputies to the National People's Congress to be elected by the provinces, autonomous regions, and municipalities directly under the Central Government shall be allocated by the Standing Committee of the National People's Congress in accordance with the principle that the number of people represented by each rural deputy is four times the number of people represented by each urban deputy'.

This set of provisions had been conceptualised by scholars as the '1/4 article', which means a rural vote merely weighs a quarter of its urban counterpart in Chinese elections. The debated inequality of the representative quota between rural and urban areas has been underpinned by the dominant ideology. Marxists contend that agriculture is a disadvantageous productive means, which has to be outstripped

[17] The Procedure to Record and Review Administrative Regulation, Local People's Congress Regulation, Autonomous and Special Regulation of Ethnic Autonomous Region, and Regulation of Economic Special Zone (Xingzheng fagui, difangxing fagui, zizhi tiaoli he danxing tiaoli, jingji tequ fagui beian shencha gongzuo chengxu), enacted by the Standing Committee of the NPC on 16 October 2010.

by nationalised industries. Hence, peasants do not stand on the right side of the deterministic linear history towards modernisation. But in the Chinese context, peasants have so far been the majority of the population; China also has to accommodate their political aspirations until the process of industrialisation has assimilated most rural residents into a working class. Simultaneously, China always keeps an eye on the peasants' political participation to prevent their populous majority outvoting the others.

Against this background, the 1979 Electoral Law actually gave urban areas an eight times larger quota of NPC representatives than rural areas. In 1995, the ratio of urban NPC representatives to rural deputies was reduced to 4–1. It was not until the 2000s that Chinese modernisation could finally produce a sound number of urban residents which is almost equal to the number of Chinese peasants. Logically, by 2010 there has been no ideological or political reason to maintain the '1/4 article' any more, as rural legislators can never overturn their urban counterparts. In light of this, the newly revised Electoral Law has rightly changed the rural–urban ratio to 1–1. However, further urbanisation will continuously lift the number of urban representatives at people's congresses. In the next elections, the number of Chinese rural legislators will reach the ceiling, but eventually the 'majority-takes-all' democratic process will remarginalise Chinese peasants' voices.

The government of law

The principle of the rule of law has been strengthened in the executive branch. Randall Peerenboom states:

> At its most basic, rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite, as captured in the rhetorically powerful if overly simplistic notions of a government of law, the supremacy of the law, and equality of all before the law.[18]

In the first decade of the twenty-first century, the Chinese government issued two guidelines, *Guofa* [2004] No 10 and *Guofa* [2010] No 33, to show its determination to establish a government of law. The 2004 guideline requires local governments to use their powers in line with the principles of legality, rationality, proportionality, procedural prosperity, efficiency, effectiveness, openness and responsibility.[19] The 2010 guideline further requires:

[18] Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002), p. 2.

[19] State Council Notice on Acceleration of Implementation of the Rule of Law Guidelines (Guowuyuan guanyu yinfa quanmian tuijin yifa xingzheng shishi gangyao de tongzhi) *Guofa* [2004] No 10.

(a) an examination or assessment of legal knowledge before official appointment,
(b) an internal system of legal review in the executive branch to ensure the legality of delegated legislation and other governmental regulations,
(c) broader consultation and public participation before making decisions,
(d) decent combination of governance and service,
(e) openness and transparency,
(f) voluntary co-operation and acceptance of supervision from the legislatures or superior administrations,
(g) improvement in mediation and litigation,
(h) annual report, etc.[20]

Transforming local officials into public servants is an ideal of both Confucians and the modern Chinese leadership, and it seems to us that in the last decade the leadership has been expecting that the strengthened principle of the rule of law may help to reach this goal. In this section, we will illustrate this point with three cases. In the first case, a governmental report to its respective legislature was surprisingly rejected. The case thus challenges the 'rubber stamp' image of Chinese legislatures, and also demonstrates the possibility that the public can supervise the executive branch.

The Chinese constitution has provided the people's congresses powers to appoint and remove governmental and judicial heads, and also empowers the people's congresses and their standing committees to supervise the administrations of respective levels. On 27 August 2006 the Law (Act) of the PRC on Supervision by the Standing Committees of the People's Congresses at All Levels was promulgated; it took effect on 1 January 2007. The new parliamentary act gives Chinese legislatures a bigger say, whereas traditionally the legislatures were regarded as a 'rubber stamp' that would never take a direction different from that of the administrations. The 2006 Act stipulates the procedures and details of legislatures' supervision by the administrations. It contains seven chapters in the main text, including 'Hearing of and Deliberation over the Special Work Reports Delivered by People's Governments, People's Courts and People's Procuratorates'; 'Examination and Approval of Final Accounts, Hearing of and Deliberation over Reports on Implementation of the Plans for National Economic and Social Development and the Budgets, and Hearing of and Deliberation over Reports on the Work of Auditing'; 'Inspection of the Enforcement of Laws and Regulations'; 'Keeping on File and Reviewing of Regulatory Documents'; 'Questioning and Addressing Inquiries';

[20] State Council Opinion on Strengthening the Government of Law (Guowuyuan guanyu jiaqiang fazhi zhengfa jianshe de yijian) *Guofa* [2010] No 33.

'Investigation into Special Issues'; and 'Deliberation and Decision on Proposals for Removal from Office'.[21]

With this sword in hand, some Chinese legislatures did surprise the public. On 24 October 2006 in the twenty-fourth meeting of the Standing Committee of the twelfth People's Congress of Zhengzhou, the capital city of Henan province, the government's answer, entitled Report on Actions to Resolve the Problems of Public Health Care with Respect to the Least Well-off Groups Petitioned by Representatives of the People's Congress, was unpredictably rejected by the Standing Committee of Zhengzhou's legislature. The Standing Committee concluded that the report was full of vogue words, and 'if the government has truly attached importance to the issue, there is no problem impossible to resolve'. We neither anticipate that the administrations can be easily tamed, nor know that they can subordinate themselves to Chinese legislatures in the near future. But with this progress, the executive branch of Chinese governments should be more cautious in keeping themselves in line with the law with and public opinion, and this point can also be illustrated by the second case.

Despite supervision from the legislatures, the administrations are also confronting challenges from public opinion that has been supplied with ammunition by the Regulation on Open Government Information that was issued on 5 April 2007. This is the first nationwide regulation to protect the freedom of information of the public. Before the 2007 statute, there was no law to combat the government's intention to hide its secrets and scandals. Jamie Horsley rightly attributes the Chinese authorities' move towards 'open government' to the following developments: (a) rural areas' demand since the 1980s for greater transparency from their local heads, or the 'open village affairs' movement; (b) rapid economic growth; (c) the information-technology revolution; and (d) China's 2001 commitment to the World Trade Organization (WTO).[22] Against this background, the 2007 statute gives the public a tool with which to fight officials behind curtains. One famous case is that relating to a controversial paraxylene (PX) plant in Zhangzhou, a city in Fujian province. The construction was deemed by local residents to be a threat to the city, as a copy of the official environmental impact assessment had been leaked. Due to an influential protest, the citizens successfully forced the government to have the plant relocated. This achievement was widely praised by Chinese constitutionalists, as people could now use governmental information to confront governmental arbitrariness.

Our third case, which is another success for the 'government of law', was achieved by Hunan – the first province to promulgate an administrative procedure and a provincial guideline for 'government of law'. The administrative

[21] Law of the PRC on Supervision by the Standing Committees of the People's Congresses at All Levels.

[22] Jamie Horsley, 'Toward a more open China?', in Ann Florini (ed.), *The Right to Know: Transparency for an Open World* (New York: Columbia University Press, 2007), pp. 54–91.

procedure was enacted by the Hunan People's Congress as a local regulation, which has provided directives for administrations of all levels in Hunan. An innovative chapter of that regulation is 'Procedure to Make Administrative Decisions'. The chapter requires administrations to consult experts as well as the public before making their decisions. At internal meetings, administrations' legal sectors are asked to provide evidence stating the legality of potential decisions. In fact the Constitution and other constitutional Acts merely accentuate that 'democratic centralism' is the principle applied in making administrative decisions.[23] As a result, Hunan province's procedure, to some extent, has made significant progress in restraining administrative heads' arbitrary powers.

To conclude briefly, we believe that these examples have given Chinese constitutionalists hope that some provinces may pioneer China's long march towards 'government of law', and the other provinces will follow under pressure from both the public and the central government.

Human rights

Human rights protection has been enhanced by the Chinese authorities in this decade too. Of interest to many is whether China will be a model for 'the rest' and a threat to the West.[24] Indeed, China has long proclaimed that its concept of human rights protection is different and sometimes even superior to that of the West.

In China's white papers issued in 1991, 1995, 1997, 1999, 2000, 2001, 2004, 2005 and 2010, the Chinese authorities have emphasised that their policy priority with respect to human rights protection is 'the people's rights to subsistence and development'. The Chinese authorities regard the country's rapid economic growth as their most stunning success, which underpins any development with respect to human rights protection. This idea came from China's modern historical experience, which tells the nation that social chaos and economic underdevelopment took any chance of political progress away. In this sense, China did make a difference. For example, since 1949 people's life expectancy has increased from thirty-five years to around seventy. In the first decade of the twenty-first century the age has climbed to seventy-three, which record even outstrips some developing countries in Europe. Other successes are: higher literacy rates, relatively low crime rates, and improved gender and ethnic equality. We hence appreciate China's 'relative success in most areas within limits of resources and other constraints'.[25]

[23] For the concept of 'democratic centralism' see S. Angle, 'Decent democratic centralism' (2005) 33 *Political Theory* 518.

[24] Randall Peerenboom, *China Modernizes: Threat to the West or Model for the Rest?* (Oxford: Oxford University Press, 2007).

[25] Randall Peerenboom, *China Modernizes*, pp. 129–62.

The *Tang Fuzhen* case

Nevertheless, China's rapid economic growth is also accompanied by human rights problems. One of the 2004 constitutional amendments provides:

> The lawful private property of citizens shall not be encroached upon. The state protects by law the right of citizens to own private property and the right to inherit private property. The state may in the public interest expropriate or take over land for public use and pay compensation in accordance with the law.[26]

This provision endorses the public opinion that private property in China should be seriously protected, specifically by an article in the Chinese Constitution.

A tragedy foregrounded the issue. In April 2009 the enforcement section of the city council in Chengdu, the capital of Sichuan province, tried to demolish an illegal construction by Hu Changming, but failed because of Hu and his wife Tang Fuzhen's resistance. Hu and his family threw bottles filled with gasoline at staff, and the enforcement section desisted. On 13 November 2009, the enforcement section once again tried to execute the administrative directive to demolish Hu's shop in order to build a road. Again, Hu and his family threw bottles of gasoline. This time the enforcement section was not called off. Furious, Tang burned herself with gasoline in front of the public. The protest shocked the nation, and Tang eventually died on 29 November 2009.

According to the Regulation for Demolishment and Relocation of Municipal Construction, which was enacted on 13 June 2001, the city council's action was legal. The 2001 regulation authorised the municipal administration to execute construction demolishment if an administrative directive had been issued. But a group of experts at Peking University pointed out that the 2001 regulation was inconsistent with the 2004 constitutional amendment and the new Property Law (Act) 2007. The State Council was advised to review the legality of the 2001 regulation to prevent such a tragedy from happening again.

On 21 January 2011, the State Council issued the new Regulation for Construction Expropriation and Compensation. In the new regulation the State Council removed the article that had authorised administrations to demolish people's houses without consent. Rather, the 2011 regulation requires the administrations to take a legal action if they cannot make an agreement with the owner. The State Council accepts that it is not reasonable to let one party to a conflict freely use violence, and the impartial judiciary should decide which party's claim has a legal basis.

The State Council also defined 'in the public interest'. As in the *Tang Fuzhen* case, some may ask whether a road should be built 'in the public interest'. The 2011 regulation narrows the definition to needs with respect to national defence, diplomacy, public service, council housing, etc. In expropriating people's houses, there

[26] The Twenty-Second Constitutional Amendment to the 1982 Constitution.

has to be a municipal plan approved by the respective people's congresses. In this sense, human rights are more protected in society by administrations.

Hong Kong, Macau and Taiwan

After the sovereign handover of Hong Kong and Macau, constitutional development in the 'special administrative regions' has been a new part of China's constitutional scholarship.[27] The relationship between the Chinese mainland and Taiwan also concerns many Chinese constitutionalists.[28]

Hong Kong

In the past ten years, the major constitutional contestation in Hong Kong has centred on the issue of 'universal suffrage'. Fortunately, the relationship between Hong Kong and Beijing has not been damaged by potential divergences. So far, both the Chief Executive and the Legislative Council of the Hong Kong Special Administrative Region (HKSAR) have been elected in accordance with two annexes of the Basic Law of the HKSAR and the decisions of the Standing Committee of the NPC. The Chief Executive is elected by an 800-member election committee that shall be composed of four groups: 200 from industrial, commercial and financial sectors; 200 from the professions; 200 from labour, social services, religious and other sectors; and the last 200 members of the Legislative Council, representatives of district-based organisations, Hong Kong deputies to the National People's Congress, and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference.[29] The 'functional-constituency' system also applies to the Hong Kong Legislative Council. The sixty-member legislature of Hong Kong consists of around one-half members from functional constituencies, the other half returned by geographical constituencies through direct elections (see Table 6.1).

On 11 July 2007, the HKSAR government published a governmental Green Paper to call for open consultation, especially concerning when universal suffrage

[27] There are a number of works dedicated to studying Hong Kong's constitutional law: Michael Davis, *Constitutional Confrontation in Hong Kong* (New York: St Martin's Press, 1990); Peter Wesley-Smith, *An Introduction to the Hong Kong Legal System* (Oxford: Oxford Unviersity Press, 1998); Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1999); Hualing Fu et al., *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (New York: Palgrave Macmillan, 2007).

[28] The question apparently has attracted international concern. See Stephen Allen, 'Recreating "one China": internal self-determination, autonomy and the future of Taiwan' (2003) 4 *Asia-Pacific Journal on Human Rights and the Law* 21. Bruce Gilley, 'Not so dire straits' (2010) 89 *Foreign Affairs* 44.

[29] The Hong Kong Basic Law, Annex 1.

Table 6.1 *Composition of the Legislative Council of the HKSAR*

The Legislative Council	Functional constituencies	Geographical constituencies	Others
Term 1 (1998–2000)	30	20	10
Term 2 (2000–4)	30	24	6
Term 3 (2004–8)	30	30	0
Term 4 (2008–12)	30	30	0
Term 5 (2012–16)	35 nominally/30 substantially	35 nominally/40 substantially	0

shall be applied to Hong Kong elections after 2007. The options are 2012, 2017 or after 2017 for the election of the chief executive, and 2012, 2016 or after 2016 for the Legislative Council. The Green Paper also gives a list of options to change the 'functional-constituency' system. The chief executive submitted another report to the Standing Committee of the NPC to seek a decision. Upon receiving the report from the chief executive, the Standing Committee of the NPC decided that the method of the 2012 election of the Hong Kong Legislative Council shall not be altered at that moment, but the Standing Committee accepted that in 2017 the chief executive could be elected through universal suffrage.[30] The Standing Committee of the NPC has also allowed for a change in the method of election of the Chief Executive and the formation of the Legislative Council, on condition that the number of members of functional constituencies and of the geographical constituencies must be the same.

Another constitutional issue is the implementation of Article 23 of the Hong Kong Basic Law. This issue derives from the Chinese leadership's concern. Chinese former paramount leader Deng Xiaoping famously opposed the idea that Hong Kong may allow people to attack the Party by deeds, especially to 'convert Hong Kong into a base' to oppose the mainland or to overthrow the socialist state.[31] Article 23 of the Hong Kong Basic Law prescribes:

> The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to

[30] Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2012.

[31] Deng Xiaoping, 'Speech at a meeting with the members of the Committee for Drafting the Basic Law of the Hong Kong Special Administrative Region', in *Selected Works of Deng Xiaoping* (Beijing: Foreign Languages Press, 1995).

> prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.[32]

However, this concern has never been assuaged. Since the 1840s, Hong Kong has been a primary residing site for political dissenters escaping from the Chinese mainland. Their complaints relate not only to curbs on the freedom of speech, but also on the freedoms of association, conscience, migration, etc. There was formidable resistance to potential restrictions of these freedoms when Hong Kong tried to promulgate a territorial ordinance incorporating Article 23 into the indigenous legal system. After a demonstration on 1 July 2003 numbering more than 50,000, the draft was blocked in the Hong Kong legislature and shelved indefinitely.

Macau

For Macau, the most eye-catching development is that the special administrative region was authorised by the Standing Committee of the NPC to take over a part of an island that had not been under its administration before the sovereign handover. The distance between Hengqin Island and the Macau isles is merely 200 metres, and Hengqin is three times larger than Macau. As Macau's land resources have been exhausted, the special administrative region petitioned the State Council to construct the new campus of Macau University in Hengqin instead. The State Council accepted the new campus of Macau University as central to the special administrative region's further prosperity, but many legal issues surrounding border control, customs and legal jurisdiction were raised. Though in the Chinese mainland a change of administrative boundary is decided by the State Council itself, this time the State Council referred the case to the Standing Committee of the NPC for the final decision.

On 27 June 2009, the ninth session of the Standing Committee of the eleventh NPC agreed that the Hengqin campus of Macau University should, from then on, be under the administration of the Macau authorities, and this part of Hengqin should be segregated from the rest of the island. In other words, the special administrative region of Macau has thus been substantially enlarged. This arrangement obviously challenges, and even overturns, many assumptions that 'one country, two systems' is a one-way process to assimilate the special administrative regions into Chinese orthodox ways, or to 'mainlandise' their societies. In sharp contrast to that opinion, the 2009 decision of the Standing Committee of the NPC shows the possibilities of 'de-mainlandising' some parts of Chinese territory in accordance with the special administrative regions' need, demonstrating that the

[32] The Hong Kong Basic Law, Art. 23.

Chinese authorities have been skilful in managing the relationship between the centre and the special administrative regions of Hong Kong and Macau.[33]

Taiwan

The invention of 'one country, two systems' is attributed to Deng Xiaoping's idea of a 'peaceful unification' between the Chinese mainland and Taiwan. Yet, there is a misunderstanding that the Chinese leadership is unrealistically preparing to replicate the Hong Kong model in Taiwan, or that 'one country, two systems' ought to be applied identically in the two territories. From the start, Deng Xiaoping made it clear that the prospective Taiwanese government should be entitled to much greater powers after national unification. Deng Xiaoping himself proposed that Taiwan should maintain its partisan, governmental and military institutions, as well as be provided with some high-ranking posts in the centre. The updated proposal for national unification from the Chinese leadership can be witnessed in the 2005 Anti-secession Law (Act). Most observers in Taiwan focus on Article 8, which reads:

> In the event that the 'Taiwan independence' secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession from China, or that major incidents entailing Taiwan's secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity.[34]

For Taiwan, seeing that the PRC still does not give up 'non-peaceful means' of addressing the problem is unacceptable because many decades have passed since the de facto truce across the strait. However, there are positive signals in Article 7(2), which states:

> The two sides of the Taiwan Straits may consult and negotiate on the following matters:
>
> (1) officially ending the state of hostility between the two sides;
> (2) mapping out the development of cross-Straits relations;
> (3) steps and arrangements for peaceful national reunification;
> (4) the political status of the Taiwan authorities;

[33] Many expect Hong Kong's constitutional praxis will accelerate the centre's change towards mature constitutionalism. See Fu et al., *Interpreting Hong Kong's Basic Law*, p. 2. For similar points see Susan Henders, 'The Hong Kong Special Administrative Region: implications for world order', in Laliberté and Lanteigne, *The Chinese Party-State in the 21st Century*, pp. 106–7.

[34] The Anti-secession Law, Art. 8.

(5) the Taiwan region's room of international operation that is compatible with its status; and
(6) other matters concerning the achievement of peaceful national reunification.

The Chinese leadership has been aware that the 'political status of the Taiwan authorities' needs to be settled, as well as the 'room of international operation' of the Taiwanese people. The straightforward answer would be: Taiwan shall become a 'special administrative region' like Hong Kong, whose government notionally derives from the authorisation of the unitary state, whereas people in Taiwan may participate in international organisations with a non-sovereign membership as the Taiwanese authorities already do in the WTO, Asia-Pacific Economic Co-operation (APEC) and the Olympics. The Chinese leadership now hopes 'the achievement of peaceful reunification' may be reached 'through consultations and negotiations on an equal footing between the two sides of the Taiwan Straits', but it is extremely difficult for the Taiwanese authorities to make a deal without the endorsement of Taiwanese residents. But in any case the new Act has strengthened legal relations between the Chinese mainland and Taiwan.

Economic co-operation

Economic co-operation between the Chinese mainland and the societies of Hong Kong, Macau and Taiwan continues to develop. As the WTO allows members to set up bilateral economic co-operation, the Chinese mainland and the HKSAR on 29 June 2003 signed an agreement or Closer Economic Partnership Arrangement (CEPA). The CEPA, which took effect on 1 January 2004, aims at reducing tariffs, removing discrimination and facilitating trade and investment.[35] The HKSAR has already applied a 'zero tariff' to goods imported from the Chinese mainland, while the Chinese mainland promised to adopt zero tariffs for hundreds of Hong Kong goods too.[36] The two parties agreed not to use anti-dumping or anti-subsidies provisions against each other.[37] Co-operation in finance and tourism is crucial for Hong Kong's sustainable development. The central government promised to encourage mainland banks to locate their international centres in Hong Kong and also invite Hong Kong financial institutions to get involved in mainland financial reforms, which means the Chinese mainland has opened its financial market to Hong Kong banks.[38] Co-operation in tourism, on the other hand, opens the Hong Kong market to mainland residents. Tourist consumption will stimulate Hong Kong's economy, which employs a majority of the population in the service sector.[39] The two parties also promised they will co-operate in investment, customs, food safety, e-business, small business and Chinese medicines.[40]

[35] CEPA, Art. 1. [36] Ibid., Art. 5. [37] Ibid., Arts. 7 and 8. [38] Ibid., Art. 13.
[39] Ibid., Art. 14. [40] Ibid., Art. 17.

On 5 March 1994 the Standing Committee of the NPC promulgated an Act for the Protection of Taiwanese Compatriots' Investment, which pioneers the legal protection of cross-strait economic communication. In 2008 the so-called 'three links' were agreed in the revived cross-strait negotiations: airway, marine and postal direct communications across the Taiwan Strait recommenced after a sixty-year interruption. Since then co-operation in the areas of food safety, finance and customs has also been projected. But one of the most important agreements is the Economic Co-operation Framework Agreement (ECFA), signed on 29 June 2010 (effective as of 12 September 2010), which urges the two parties to reduce tariffs and set up economic co-operation. Yet there is no restriction of anti-dumping or anti-subsidies measures in the ECFA, implying Taiwan is still free to use WTO mechanisms against the Chinese mainland. The ECFA nevertheless includes a list of potential co-operations: intellectual property, finance, trade, customs, e-business, industrial strategy, small business and the exchange of representatives between economic and commercial associations.[41] Regarding 'zero tariffs', the 'early harvest' list of tariff concessions covers 539 Taiwanese products and 267 Chinese mainland goods. The advantage to Taiwan would amount to billions of US dollars, while the Chinese mainland could receive some in return.[42]

Judicial reform

Judicial independence

According to Randall Peerenboom, 'judicial independence is a multifaceted concept'.[43] But at its basis, judicial independence, at least, requires judges to decide cases without illegal interference from other parties. Peerenboom holds that

> one prerequisite for decisional independence is that judges enjoy personal independence, which requires that their terms of office be reasonably secure; appointments and promotions should be relatively depoliticised; judges should be provided an adequate salary and should not be dismissed or have their salaries reduced as long as they are performing adequately.[44]

For a long time, Chinese judges have been deemed in need of this prerequisite.

[41] ECFA, Art. 6.

[42] But the ECFA also raises questions surrounding Taiwan's stance in the WTO. S. Winkler, 'Can trade make a sovereign? Taiwan–China–EU relations in the WTO' (2008) 6 *Asia Europe Journal* 467.

[43] Randall Peerenboom, 'Judicial independence in China: common myths and unfounded assumptions', in Randall Peerenboom (ed.), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge: Cambridge University Press, 2009), p. 71.

[44] Ibid., p. 71.

Article 126 of the Constitution states: 'The people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals.'[45] But external interference from the legislature and the Party is unavoidable. As the sovereign organ of the state, the NPC is entitled to 'supervise' the courts.[46] There are rounds of debate concerning the legitimacy and feasibility of the legislature 'supervising individual cases'; however, the legislature itself has not yet stepped into the judicial field. It is obvious that the members sitting in the legislature lack sufficient professional expertise, but the legislature never gives that possibility up in a context where no 'separation of powers' exists. Further, the Chinese judiciary remains under control of the Party, as the Party has a Political and Legal Affairs Committee to supervise intelligence, the police, prosecutors and judicial courts.[47]

However, the most serious problem remains 'local protectionism'. More than fifteen years ago, Stanley B. Lubman pointed out that '"local protectionism" remains an ominous reason for non-enforcement of judgments'.[48] The reason behind this argument is:

> The same political and economic forces that influence the outcome of judgments can also create formidable obstacles to enforcing a judgment against a local individual or enterprise. Economic reform has increased the dependence of local government on revenue from local enterprises and has consequently increased their inclination to defend such enterprises against economic damage.[49]

Targeting that, a new round of judicial reform is under way. In order to prevent local protectionism, the courts are gradually being financed by the central government.

Guiding cases

Another 'great leap' of the Chinese judiciary is the implementation of a 'guiding cases system' in 2010, which could be a Chinese version of the common-law system's doctrine of precedent. The Supreme People's Court issued the Provisions of the Supreme People's Court Concerning Work on Guiding Cases on 26 November 2010, declaring that 'People's courts at all levels should refer to the Guiding Cases released by the Supreme People's Court when adjudicating similar cases'.[50] However, the Chinese guiding cases remain different from a common-law precedent in two respects. First, there have been only a few guiding cases released by the Supreme People's Court since the provisions were introduced. The first round of four guiding

[45] The 1982 Constitution, Art. 126. [46] Ibid., Art. 67.

[47] Stanley Lubman (ed.), *China's Legal Reforms* (Oxford: Oxford University Press, 1996), p. 16. Also Benjamin Liebman, 'China's courts: restricted reform', in Clarke, *China's Legal System*, p. 66.

[48] Lubman, *Bird in a Cage*, p. 268. [49] Ibid., p. 268.

[50] Provisions of the Supreme People's Court Concerning Work on Guiding Cases, Art. 7.

cases were released on 20 December 2011, and the second round of another four cases came out on 13 April 2012. It seems to us that the Supreme People's Court has been cautious about 'canonising' any case decided by the court itself or others at lower levels. Second, there is no rule of recognition in China providing for guiding cases' *ratio decidendi* being accepted as part of the source of law. In refereeing guiding cases in their judgments, lower courts of justice are expected to rely on guiding cases to clarify vague provisions in parliamentary Acts. However, guiding cases' *ratio* is, most optimistically, an authoritative interpretation of law, which cannot be applied in judgment without relevant legislative texts.

An example of the eight guiding cases released illustrates what they actually are. The *Wang Zhicai* case, an intentional homicide case, is the fourth released by the Supreme Court. The defendant, Mr Wang Zhicai, and the victim had been in a relationship before the tragedy. The victim tried to end this relationship and enraged the defendant, who ruthlessly murdered her after she refused the defendant's offer of marriage. A provincial court initially sentenced the defendant to death. However, all death sentences should be reviewed and approved by the Supreme People's Court before execution, and in this case, the Supreme People's Court showed mercy. After being requested to re-examine the case, the provincial court awarded the defendant a death penalty reprieve, given that he was in a moment of passion when the killing was undertaken, and also that he had gone all out to compensate the victim's family. A death penalty reprieve can sometimes be justified by victims' forgiveness. Yet in the *Wang Zhicai* case the victim's family could not forgive the defendant's fierce violence, and they insisted on severe punishment. Taking the victim's family's demand into account, the provincial court finally decided that the defendant's 'life imprisonment', which is a minimum tariff of twenty years, should not be commuted. The Supreme People's Court praised this judgment for its prudent balance, but this guiding case essentially did not lend anything to Chinese criminal law. There is no new rule that the defendant's or the victim's emotion in a case of intentional homicide shall be a determinative factor in the future. That is why the guiding case *ratio* itself is not 'law' in China.

Article 4 of the Provisions of the Supreme People's Court Concerning Work on Guiding Cases reads:

> Any adjudication unit of the Supreme People's Court may recommend to the Guiding Cases Work Office any ruling or judgment that is made by the Supreme People's Court or local people's courts at any level and that has taken legal effect, so long as such ruling or judgment is deemed by the said unit to meet the requirements set out in Article 2 of this set of Provisions.[51]

[51] 'Article 2 of the provisions ordains guiding cases shall be (i) widely concerned by society; (ii) concerning legal provisions of a relatively general nature; (iii) of a typical nature; (iv) difficult, complicated or cases of new types; and need to (v) have a guiding effect.

Lower courts may also recommend cases to the Supreme People's Court to be granted the status of a 'guiding case', but they are not entitled to issue their own 'guiding cases' at provincial or even lower level.

Although the eight rather vapid cases are not enough for us to make a convincing prediction, this new 'guiding cases system' in China is more like a semi-manufactured product, despite the designers' good intentions.

The Chinese presidency

One of the 2004 constitutional amendments also slightly altered the functionality of the office of the Chinese president. The role of the president has been changing since the 1950s. China's chairman, which is the original translation of the Chinese term *zhuxi* (president), initially held an office with substantial powers and functions, but in the aftermath of the Cultural Revolution it was reduced to an honourable position for ceremonial functions. However, since the late 1980s China has decided to re-strengthen the office under the convention that the presidency should be integrated with the supreme command of Chinese military forces and also with the Party's leadership.

The 1982 constitution theoretically confers a symbolic role on the president. That arrangement fitted the paramount leader Deng Xiaoping's motive to decentralise the supreme authority and distribute powers to separate organs such as the president, the Party, and the chairman of the Central Military Commission that commands Chinese military forces. It is argued that this constitutional design was unsuccessful, as this Chinese-style 'check and balance' provokes political conflict among the heads of the state, the CPC and the military forces.[52] The former president Jiang Zemin said:

> The three offices, general secretary of the party, state chairman and chairman of the Central Military Commission, are integrated into a trinity system of rule. Such a leadership regime and a leadership model is not only necessary, but also most appropriate for a party and a country as large as ours.[53]

Some argue that the Chinese leadership has been aware of the fact that a recentralised supreme authority is central to China's economic boom and political stability.[54] The 2004 constitutional amendment, stating 'The President of the People's Republic of China, on behalf of the People's Republic of China, engages in activities involving State affairs and receives foreign diplomatic representatives', could be a sign of this new trend in Chinese politics.

[52] S. Jiang, 'Written and unwritten constitutions: a new approach to the study of constitutional government in China' (2010) 36 *Modern China* 30.

[53] Ibid. [54] Ibid.

III. CONCLUSION

To summarise, we may draw two pictures based on our analysis. The first one is comparatively passive. In this picture, we saw that the Constitution could not be referred to in civil and criminal judgments. A young female's classmate stole her name, but she had no way to reclaim her right to receive education supposedly protected by the Constitution. We saw that billions of rural residents and working migrants in Chinese cities were not given equal voting rights, as their urban compatriots' votes were valued four times more than theirs in electing representatives at people's congresses. Even so, the supposed 'modern' legislatures are not capable of controlling the administration, which was free to hide its secrets in the name of 'national interest'. We saw that public authorities abused their discretion too. They expropriated people's homes to build roads, or even luxurious houses for the affluent. Some affected persons lost their lives defending their properties, and that was a tragic page in China's constitutional history.

In contrast to that picture, a brighter picture can be drawn too. In this one, we see Chinese legal reformers endeavouring to activate constitutional review in one way or another. It should be remembered that a young man and anonymous persons have sacrificed for the extraordinary experiment. The Internet also continues to contribute to populist protest, to which the authorities must be more responsive to keep laws in line with the Constitution. In addition, the administration has been aware of the necessity to behave humbly towards the legislatures and the people. It has enhanced its transparency and openness, and become more willing to accept external supervision. The revision of China's Electoral Law is another brighter part in the second picture. Now Chinese citizens are entitled to substantially equal votes regardless of their residentship. The representatives at people's congresses are elected by the same population ratios in both urban and rural areas; the '1/4 article' exists no more. There we also see that the 2004 constitutional amendments have strengthened human rights protection, especially of people's private property. The 2011 administrative regulation with respect to land expropriation and compensation in the public interest has further restrained that administration from using violent means to affect persons without judicial instruction. In the 2010s, the experience of 'one country, two systems' has also built up our confidence that the central government and the societies of Hong Kong, Macau and Taiwan might sustain a more reciprocal relationship in the future. If successful, that would certainly complete our second picture with a mark of extraordinary beauty.

Charles Dickens might have loaned his words to Chinese constitutionalists: 'it was the best of times, it was the worst of times . . . we had everything before us, we had nothing before us, we were all going direct to heaven, we were all going direct the other way'. There are twists and turns ahead, but China has come through the first decade of the twenty-first century with many surprising achievements. In concluding this decennial review, we are therefore optimistic.

7

A decade of changing constitutionalism in Taiwan

Transitional and transnational perspectives

Jiunn-rong Yeh and Wen-Chen Chang

I. INTRODUCTION

As constitutionalism has swept the world since the late 1980s, the understanding of constitutionalism, particularly of the functions of constitutions, has substantially changed. Elsewhere we have identified these changed features and functions of constitutionalism as transitional and transnational constitutionalism.[1] Like us, the majority of constitutional scholars have pointed to these profound changes of constitutionalism and concluded that the waves of democratic transition demonstrated most recently by the Arab Spring and the globalization that began with trade and extended beyond served as the two driving forces.[2] In transitional constitutionalism, the functions of constitutions have extended from merely restraining government powers to providing guidance for institutional reforms.[3] In transnational constitutionalism, international norms have crossed sovereign boundaries and

[1] Jiunn-rong Yeh and Wen-Chen Chang, "The changing landscape of modern constitutionalism: transitional perspective" (2009) 4(1) *National Taiwan University Law Review* 145 (discussing the features, perspectives, functions, characteristics, and challenges of transitional constitutionalism); Jiunn-rong Yeh and Wen-Chen Chang, "The emergence of transnational constitutionalism: its features, challenges and solutions" (2008) 27 *Penn State International Law Review* 89 (discussing the features, perspectives, functions, characteristics, and challenges of transnational constitutionalism).

[2] E.g. Ruti Teitel, "Transitional jurisprudence: the role of law in political transformation" (1997) 106 *Yale Law Journal* 2009 (conceiving of jurisprudence as transitional helps to elucidate the nature and role of law during periods of radical political change); Nicholas Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (Cambridge: Cambridge University Press, 2007); Petera Dobner and Martin Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford: Oxford. University Press, 2010) (exploring how traditional constitutionalism has been challenged by political realities that place substantial power beyond the state); Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2010) (discussing how constitutionalism in terms of both values and institutions has been developed beyond states).

[3] Yeh and Chang, "The changing landscape," 145.

have complemented – or even been substituted for – domestic constitutions.[4] Through the developments of both transitional and transnational constitutionalism, the understandings of constitutionalism have been simultaneously altered, enriched, and seriously challenged in terms of accountability, democratic deficit, and rule of law.[5]

Both transitional and transnational constitutionalism has occurred in East Asia.[6] Gradually after World War II and more rapidly in the late 1980s, Japan, South Korea, and Taiwan respectively have transformed into vibrant democracies with a distinctive model of constitutionalism, neither merely mirroring Western standard constitutionalism nor squarely fitting into Asian stereotypical values.[7] The features of transitional and transnational constitutionalism have been in varying degrees embodied in the course of these constitutional developments. This chapter addresses these transitional and transnational aspects of constitutional development in Taiwan as set during the first decade of the twenty-first century.

Taiwan was already a vibrant constitutional democracy before entering into this millennium, having displayed many of the features of transitional constitutionalism.[8] The martial-law decree was lifted in 1987. The first parliamentary election was held in 1992, and the first direct presidential election in 1996. The 1947 Republic of China (ROC) constitution, which was originally adopted in mainland China, has been revised seven times since the beginning of the 1990s.[9] Concurrently, the Constitutional Court (also known as the Council of Grand Justices), despite being an old institution established in 1948, made itself into a strong functioning judicial institution and produced a record in which about 30 to 40 percent of challenged legislative or administrative acts were ruled unconstitutional.[10]

Notwithstanding the successful democratic transition in the 1990s, the first decade of the new millennium witnessed Taiwan's first divided government, which led to fierce political confrontation for eight years. These altercations were due to

[4] Yeh and Chang, "Transnational constitutionalism," 111–14.

[5] Yeh and Chang, "Transitional constitutionalism," 170–5; Yeh and Chang, "Transnational constitutionalism," 111–24.

[6] Jiunn-rong Yeh and Wen-Chen Chang, "The emergence of East Asian constitutionalism: features in comparison" (2011) 59 *American Journal of Comparative Law* 805 (analyzing East Asian constitutionalism through the lens of transitional and transnational constitutionalism, as well as Asian value discourse).

[7] Ibid.

[8] Ibid., 835–7.

[9] For a more detailed discussion of these constitutional revisions, and the developments of constitutional change in Taiwan after democratization, see Jiunn-Rong Yeh, "Constitutional reform and democratization in Taiwan: 1945–2000," in Peter Chow (ed.), *Taiwan's Modernization in Global Perspective* (Westport, CT: Praeger Publishers, 2002), pp. 47–77.

[10] Wen-Chen Chang, "The role of judicial review in consolidating democracy: the case of Taiwan" (2005) 2 *Asia Law Review* 73. See also Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003).

the historical change of government powers in which the long-time ruling party, the Nationalist Party (Kuomintang, KMT), lost the presidential election in 2000 and again in 2004 to the Democratic Progressive Party (DPP) while retaining a persistent majority in the legislature.[11] This divided government and the resulting political conflicts between the executive, led by the DPP, and the legislature, controlled by the KMT, inevitably demanded dispute resolution by the Constitutional Court. Consequently, unconventional constitutional adjudication became the most salient feature highlighting constitutional development in the first decade.

Meanwhile, the development of transnational constitutionalism was at its zenith over the last ten years.[12] On November 11, 2001, Taiwan was granted accession to the World Trade Organization (WTO), and entry became effective on January 1, 2002. In 2007, accession to the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) was passed by an overwhelming parliamentary majority and subsequently announced by the president. The instrument of accession was expectedly rejected by the United Nations. But the government voluntarily complied and released the first state report in March 2009. In the same month, the government also ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). This time, the legislature passed an Implementation Act to make all of the rights enshrined in the two covenants directly applicable in the domestic legal system. Following this example, an Implementation Act for CEDAW was also enacted, effective as of January 1, 2012.

Against these transitional and transnational backdrops, this chapter sets out to analyze the first decade of Taiwan's changing constitutionalism. In what follows, the constitutional developments, in the light of respective features in transitional and transnational constitutionalism, are discussed with critical evaluations on prospects and challenges that may lie ahead for the second decade.

II. TRANSITIONAL PERSPECTIVE

In transitional constitutionalism, three distinctive features are observed.[13] First, transitory constitutional measures are often undertaken in preparation for, complementary with, or even in lieu of formal constitution-making or revisions.

[11] Jiunn-Rong Yeh, "Presidential politics and the judicial facilitation of dialogue between political actors in new Asian democracies: comparing the South Korean and Taiwanese experiences" (2010) 8 *International Journal of Constitutional Law* 911 at 913.

[12] Wen-Chen Chang, "The convergence of constitutions and international human rights: Taiwan and South Korea in comparison" (2011) 36 *North Carolina Journal of International Law and Commercial Regulation* 593; Wen-Chen Chang, "An isolated nation with global-minded citizens: bottom-up transnational constitutionalism in Taiwan" (2009) 4(3) *National Taiwan University Law Review* 203.

[13] Yeh and Chang, "Transitional constitutionalism", 150–7.

Second, unconventional constitutional adjudication is likely to be triggered or even demanded by extraordinary constitutional politics. Last, but not least, quasi-constitutional statutes are enacted as short-term solutions in response to political gridlock that makes constitutional revisions difficult. Like most new democracies, Taiwan's constitutional developments in the 1990s were considerably reflective of these transitional features.[14]

A consolidated democracy notwithstanding, the constitutional developments of the first decade were still reflective of the aforementioned three features. For instance, the constitutional revision in 2005 was seen as an important final step in completing congressional reforms that began in the 1990s. However, as a consequence of political quid pro quo, this revision included a change to the method of constitutional revision that makes subsequent revisions extremely difficult. The difficulty in constitutional revision naturally led to the passage of some quasi-constitutional statutes, which were welcomed as short-term solutions to the political stalemate in the divided government but left complex issues in the long run. Judicial intervention in politically charged cases by the Constitutional Court occurred even more often than in the 1990s.

Constitutional revision that rendered subsequent changes difficult

From 1991 until now, the ROC constitution has endured seven rounds of constitutional revision in Taiwan. In the previous six rounds of revision undertaken before this new century, the issues of legitimacy and democratic representation were only moderately addressed. The first session of delegates in the Legislative Yuan and National Assembly, most of whom were elected in mainland China, were mandated to step down; the names of the country – ROC – and the main text of the Constitution remained intact; the affairs concerning mainland China were addressed by special laws. Besides, the basic structure of government power shifted from a parliamentary system to a semi-presidential one, in order to accommodate the dynamic interactions between the ruling KMT and the rising opposition party, the DPP. While the call for a brand new constitution never really dissipated, the course of constitutional change followed the model of transitory arrangements. Constitutional revisions were made round by round as democratic transition progressed stage by stage.[15]

The last round of constitutional revision began in 2004, after the DPP president was reelected. The Legislative Yuan announced its proposal on August 26, 2004. In less than a year, on June 7, 2005, the National Assembly approved the proposal. This seventh round of constitutional revision was the last passed by the National Assembly, as one of the primary missions in this revision was to abolish the National Assembly itself, making the Legislative Yuan the only legislative branch.

[14] Ibid. [15] Yeh, "Constitutional reform and democratization in Taiwan," pp. 47–77.

In addition, the number of members of the Legislative Yuan was reduced by half and the electoral rule changed to a proportional system. The Constitutional Court was provided with the power to adjudicate presidential impeachment. Proposals for territorial change or constitutional amendment would be required to pass a national referendum with a very high threshold, demanding the approval of at least half of the eligible voters.[16]

Notably, this round of constitutional revision, except for the important accomplishments in parliamentary and electoral reforms, took a strong step in locking the Constitution into its present state. The threshold for a constitutional revision to be passed was made considerably high. The Constitution now mandates that proposals for constitutional amendment must be passed by at least three-fourths of the members present at a meeting attended by at least three-fourths of the total members of the Legislative Yuan, and that upon the expiration of a six-month period from public announcement of the proposal, a public referendum must be held. For any amendment proposal to succeed, it must have the approval of at least one-half of the total eligible voters.[17] These stringent procedural requirements demand no less than a national consensus for any constitutional amendment to pass. In the absence of such consensus, the political status quo structured by the current constitutional arrangements is entrenched.

Unconventional constitutional adjudication

The majority of highly controversial constitutional cases appeared after the first regime change in the year 2000. The Constitutional Court was called upon, many times, to resolve constitutional disputes involving presidential politics that was reflective of political divisiveness. During the DPP administration, which lasted from 2000 to 2008, there were eleven cases associated with the role of the president in the context of a divided government, where the DPP did not control the majority of the Legislative Yuan. Five of the cases took place during President Chen's first term (2000 to 2004), the remaining six during his second term (2004 to 2008).[18] These disputes about government system and separation of powers were a continuous focus of debate, particularly the scope of presidential powers after the first regime change. There was a dispute regarding the contentious presidential election of 2004, J.Y. Interpretation No 585; disputes on separation of powers, J.Y. Interpretation Nos 520, 613, 632, and 645; and disputes between national and local governments, J.Y. Interpretation Nos 550 and 553. Finally, there was even a

[16] For the content of the seventh constitutional revision in 2005, see http://english.president.gov.tw/Default.aspx?tabid=1033#09.

[17] Additional Articles, ROC Constitution (Taiwan), Art. 12.

[18] For an overview and a more detailed analysis of these cases, see Yeh, "Presidential politics and the judicial facilitation of dialogue," 924.

case concerning the criminal investigation of the president, J.Y. Interpretation No 627. In dealing with these politically controversial disputes, the court has resorted to the following strategies.[19]

Strategic avoidance

After rounds of revision, the Constitution still lacks clarity regarding the nature of the system of government: presidential or parliamentary. The constitutional amendments of the 1990s adopted a direct presidential election and provided the president with the power to appoint the premier without legislative confirmation. At the same time, the Legislative Yuan may vote no confidence in the premier, and the president may dissolve the legislature should such a vote take place. Yet these amendments failed to provide a clear division of power between the president, the premier, and the Legislative Yuan. The lack of clarity has generated institutional conflict between the president and the Legislative Yuan, which worsened in the year 2000 with a divided government in which the DPP controlled the executive but the KMT maintained the legislative majority. Interestingly, in resolving these institutional conflicts, the Constitutional Court has strategically resorted to pragmatic solutions without even dealing with the nature of the system of government.

The first such controversy came with the DPP government's suspension of the construction of the fourth nuclear power plant, a project initiated during the KMT administration. The KMT-dominated Legislative Yuan contended that the suspension was unconstitutional as the power of such policy making resided with the legislature, to which the premier was made accountable, and even sought to call for presidential impeachment. The Constitutional Court rendered J.Y. Interpretation No 520 at the government's request. Interestingly, the court did not decide or rely on the nature of the system of government – parliamentary or presidential – as a basis for its decision. Rather, it stated that elected presidents "may change previously existing policies or orientation not necessarily consistent with his political views," while the legislature still maintained its co-decisional power over major government policies. The court directed the government to explain to the Legislative Yuan its decision to suspend the plant construction while compelling the Legislative Yuan to listen and to formulate a policy solution acceptable to both.[20] In the end, the government and legislature issued a joint declaration that affirmed the long-term goal of a nuclear-free homeland while allowing the continuing construction of the power plant.

However, due to the many technical problems, some of which even implicated alleged wrongdoing and corruption, the construction of the fourth nuclear power

[19] Concerning strategic judicial responses, see Wen-Chen Chang, "Strategic judicial responses in politically charged cases: East Asian experiences" (2010) 8 *International Journal of Constitutional Law* 885 (comparing the experiences of Taiwan and South Korea).

[20] J.Y. Interpretation No 520 (2001), available at www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=520.

plant has neither been completed nor even put into operation. Meanwhile, the Fukushima nuclear disaster triggered by a potent earthquake with a magnitude 7.1 and the ensuing tsunami on March 11, 2011 in Japan has significantly changed the perceptions of the Taiwanese people on the safety of nuclear power plants. Taiwan, like Japan, is located at the intersection of the Philippines Sea Plate and the Eurasian Plate, prone to earthquakes. More and more people expressed concern and began to oppose the fourth nuclear power plant. On March 9, 2013, about two hundred thousand people, including those who had never been outspoken on this issue, staged street protests island-wide against the completion of the fourth nuclear power plant. In responding to this unprecedented popular opposition, the KMT government – although in the past strongly against the use of public referenda on the construction of the fourth nuclear power plant – is now proposing to put forward a popular vote on whether to complete and operate the fourth nuclear power plant.

J.Y. Interpretation No 632 is another example of strategic avoidance by the Constitutional Court. The partisan confrontation between the KMT legislative majority and the DPP government was exacerbated as President Chen entered his second term in 2004. The most serious legislative boycott took place during the confirmation of the Control Yuan commissioners, functional equivalents to modern-day ombudsmen. According to the Constitution, commissioners are appointed by the president with legislative confirmation. Yet it is not clear whether the president or the Legislative Yuan is vested with the primary decision-making power regarding the nomination. The KMT legislative majority argued that, based upon the parliamentary system, President Chen must consult with legislators on the list of nominees prior to nomination. But the DPP government opposed such consultation, contending that, due to the presidential system, the president enjoyed the power of nomination alone while the Legislative Yuan was provided with the power of confirmation.

As the third term of the Control Yuan commissioners expired at the end of January 2005, President Chen submitted a list of nominees for legislative confirmation by the end of 2004. However, the KMT legislative majority blocked it from entering floor discussion for an entire year. In February 2005, a newly elected legislature, where the KMT still enjoyed a majority, was inaugurated. President Chen submitted the list again, but the KMT continued the boycott for another three years. At the request of the DPP legislators, the Constitutional Court rendered J.Y. Interpretation No 632 in August 2007. Again, without deciding on the question which institution – the president or Legislative Yuan – was the primary decision-maker, the court simply stated that the Legislative Yuan must exercise the consent power in a timely manner to maintain the constitutional functions of the Control Yuan and directed the issue to be resolved appropriately in accordance with its decision.[21] Regrettably,

[21] J.Y. Interpretation No 632 (2007), available at www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=632.

notwithstanding the court's decision, this constitutional crisis was not brought to an end until after the KMT had resumed political power in the presidential election of 2008, thus ending the state of a divided government.

Procedural solution

In some cases, the court has resolved disputes by providing procedural – rather than substantive – solutions. In J.Y. Interpretation No 627, the court handled a dispute concerning the criminal investigation of the president. In 2007, President Chen petitioned the Constitutional Court for immunity from criminal investigations involving the embezzlement of state-secret funds by the first lady, Ms. Wu Shu-Chen. The first lady was suspected of embezzlement regarding a special presidential fund that provided for the president's undisclosed activities in connection with national security and diplomacy. Despite President Chen's protest, the trial began, and the prosecutors requested that the president and his secretary-general both release further information concerning the use of the special fund. In response, the Constitutional Court allowed for a very limited criminal investigation of the president as long as presidential functions were not undermined.[22] Notably, the decision was issued without separate opinions, a practice that had not happened for quite some time. Moreover, the court seemed aware of the significance of handing down this ruling unanimously.[23]

In disputes between national and local governments, the court has directed the parties to resolve disputes through available procedures. J.Y. Interpretation No 550, a typical example, was concerned with the allocation of financial costs between national and local governments relating to the national health insurance program. In response to the complaint made by the national government, the court issued J.Y. Interpretation No 550, proclaiming that both the national and local governments bear constitutional duties in supporting the national health insurance program, and that the national government could demand that local governments share the financial costs. Interestingly, however, the decision fell short of specifying any particular proportion or formula for sharing financial burdens between the national and local governments. Instead, the decision directed the national government to negotiate with local governments and provide them with sufficient opportunities to participate in the course of further policy formulation.[24]

The other example was J.Y. Interpretation No 553. In 2002, the elections for city and county mayors and representatives were scheduled on the same day nationwide. However, the Taipei municipal government decided to postpone the election

[22] J.Y. Interpretation No 627 (2007), available at www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=627.

[23] Chang, "Strategic judicial response," 888.

[24] J.Y. Interpretation No 550 (2002), available at www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=550.

to a later date due to an earlier redistricting plan. The postponement was revoked by the Ministry of the Interior, which was concerned with electoral inconsistency. Arguing that the revocation was unconstitutional, the Taipei municipal government petitioned the Constitutional Court. In response, the court held that it was within the jurisdiction of the Ministry of the Interior to supervise local elections and even to revoke municipal decisions, if appropriate. At the same time, however, the court also indicated that "if the Taipei municipal government considered the revocation, an administrative disposition, illegal," it could litigate against the said ministry before the administrative court.[25] In other words, the court passed the buck to the administrative court. Yet, as the deadline had passed, the case became moot.

Taking sides

In dealing with politically controversial disputes, the Constitutional Court has often resorted to strategic avoidance or procedural solution in order to facilitate the political dialogue or to make space for compromise. However, in a few cases, the court took rather bold steps to preserve constitutional separation of powers.

In J.Y. Interpretation No 585, the court dealt with the aftermath of the gunshot on the eve of the presidential election in 2004. In the afternoon before the Election Day, President Chen and Vice President Lu were shot while riding in a jeep to their last campaign rally, both sustaining minor injuries. They won the election by a razor-thin margin after several rounds of recount. Challenging the election result, the KMT alleged that President Chen was behind the gunshot incident, designed to draw voters' sympathy and electoral support. The KMT legislative majority quickly passed a special law creating an investigative commission, composed of an extremely partisan, primarily KMT, membership. The DPP contended that the special commission was unconstitutional and petitioned the Constitutional Court.

The court stated that establishing a special commission, if defined as an exercise of the powers of parliamentary investigation, fell within the legislative ambit and, hence, was constitutional. However, the court noted that, given its status as a parliamentary organ, the special commission could not command or supervise prosecutors and other judicial personnel for the investigation and the commission's findings on the gunshot incident could never revoke judicial decisions.[26] In other words, in the view of the Constitutional Court, while the parliamentary investigation might still proceed, the controversy over the presidential election of 2004 had come to an end after the recount was certified and related disputes were resolved by the Supreme Court. The KMT legislative majority, though very

[25] J.Y. Interpretation No 553 (2002), available at www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=553.

[26] J.Y. Interpretation No 585 (2004), available at www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=585.

dissatisfied with the Constitutional Court's decision, accepted the ruling by revising the special Act for the commission to work within the narrowly defined jurisdiction.

J.Y. Interpretation No 613 and J.Y. Interpretation No 645 are similar constitutional decisions concerning power confrontations between government organizations. Against the backdrop of a divided government, the creation of independent regulatory commissions became severely politicized. In creating the first independent commission, the National Communication Commission (NCC), the KMT legislative majority tried to influence the appointment of commissioners. It wrote into the law that independent commissioners were to be appointed directly by a legislative appointment committee whose membership was to be allocated in proportion to parliamentary seats held by political parties. Another, similarly partisan, appointment formula for the Public Referendum Review Committee that was tasked with reviewing referendum proposals was also enacted.

In the former case, the Constitutional Court rendered J.Y. Interpretation No 613. While affirming that the legislature could exercise a significant degree of checks and balances on the appointment process, the court held the partisan appointment committee unconstitutional as it removed, entirely, executive influence over the appointments, which would undermine the independence of the commission.[27] In the later case, J.Y. Interpretation No 645, in defining the referendum review committee as exercising purely executive functions, the court held that the partisan appointment formula was unconstitutional, involving the transgression of executive authority by the legislature.[28]

The above analysis of judicial decisions rendered by the Constitutional Court during the first decade of the twenty-first century shows that the court has been increasingly mature in dealing with politically charged disputes. By resorting to strategic avoidance or procedural solutions, the Constitutional Court has sought to facilitate political dialogue between competing political actors in different government branches. At the same time, however, when the time came for resolute adjudication, the court was not hesitant to take a side in order to preserve the constitutional balance of separation of powers.

Quasi-constitutional statutes

In Taiwan, aside from seven rounds of constitutional revision, statutes or government actions have also taken up quite a few issues in the transitional stage. The 2005 constitutional revision set for future constitution revisions a very stringent

[27] J.Y. Interpretation No 613 (2006), available at www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=613.

[28] J.Y. Interpretation No 645 (2008), available at www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=645.

procedural requirement, such that when coupled with a highly divided and intense political atmosphere, initiating any revision will prove difficult, if not impossible. As a result, statutes passed by the legislature under less strict procedural requirements seem to be the best choice to fill the gap and satisfy the need of a transitional democracy. In the past decade, several significant quasi-constitutional statutes mark this significant constitutional development.

The Referendum Act of 2003 was a great leap forward. The Constitution states, "The exercise of the rights of initiative and referendum shall be prescribed by law."[29] However, in the four decades under the authoritarian rule of martial law, these rights were never realized. In the 1980s, as the calls for democratic reform increased, the status issue of the ROC and Taiwan's independence became a major battle between the ruling KMT and the opposition dissidents, and people's right to referendum emerged at the center of the debate. It was not until the 1990s, upon the advent of democratic transition, that it became possible for a civil movement to advocate people's right to referendum. In 2003, after more than a decade of advocacy, the Referendum Act was passed and people's right to referendum – on both the national and local levels, regarding matters of constitutional amendments, laws, policies – was finally realized.[30]

National referendum has been initiated twice, during each of the presidential elections in 2004 and 2008, as a result of political manipulation. In 2004, along with the presidential election, President Chen initiated two proposals for national referendum which would strengthen national defense and open negotiations with China on an equal basis. However, both proposals failed to pass the required threshold of more than half of the total number of the votes. In 2008, both the ruling party, the DPP, and the opposition KMT respectively initiated referendum proposals as the culmination of political confrontation on the eve of the presidential election. The DPP proposed two issues for national referendum: (1) to retrieve the property that the KMT had unduly acquired from the people during its authoritarian rule in Taiwan and (2) to apply to "enter" the United Nations under the name of Taiwan. The KMT, in turn, proposed two countering issues: (1) to investigate the corruption and misdemeanor of DPP government officials and (2) to "return" to the UN under a more pragmatic and practical name. All these proposals failed due to the low turnout rate.

In March 2013, due to popular opposition to the completion and operation of the fourth nuclear power plant, the KMT government decided to call for a public vote to resolve the controversy. Yet, because of the extremely high threshold in the Referendum Act, this call was not welcome and even strongly criticized by the many groups against the nuclear power plant, arguing that without reducing

[29] ROC Constitution (Taiwan), Art. 136.

[30] The full text of the Referendum Act is available at http://db.lawbank.com.tw/ENG/FLAW/FLAWDAT0201.asp.

the high threshold, the government's call for referendum was merely political manipulation. As of the time of writing, the KMT government has insisted on not revising the threshold and the referendum proposal was filibustered by the opposition and is still on the legislative floor for further decision.

III. TRANSNATIONAL PERSPECTIVE

The recent development in transnational constitutionalism that includes both internationalization of constitutional laws and constitutionalization of international laws has spread around the world. Driven by globalization, constitutionalism has developed beyond nation-states.[31] Three features are distinctive in understanding this new phenomenon: first, the development of transnational constitutions or quasi-constitutional arrangements; second, the abundance of transnational judicial dialogues; and third, a global convergence of institutional arrangements.[32] These developments of transnational constitutionalism became evident in the constitutional developments of the first decade.

Transnational quasi-constitutional arrangements

Although Taiwan has been isolated from the international community as a result of its troubled statehood, this fact has never insulated Taiwan from the trend of transnational constitutionalism. Since the 1990s, Taiwan has made a great deal of progress in the areas of both human rights and trade. Concerning the issue of human rights, several international human rights treaties have been adopted, and were further incorporated as a part of the domestic legal order. On the issue of trade, Taiwan has obtained WTO membership and signed the Economic Co-operation Framework Agreement (ECFA) with China, becoming an avid participant especially in the Asia-Pacific region.

Ratifying international human rights treaties

After being expelled from the UN by General Assembly Resolution 2758 in 1971, Taiwan had difficulty both joining new treaties and ratifying treaties previously signed by the ROC. Since the 1970s, Taiwan has held almost no membership of major international human rights treaties. However, beginning in the late 1990s, several human rights organizations have pressured the government to ratify or join those treaties. Taiwan has thus adopted quite a few major international human

[31] Gavin Anderson, *Constitutional Rights after Globalization* (Oxford: Hart Publishing Ltd., 2005) (arguing that constitutionalism has developed beyond nation-states and advocating legal pluralism as a solution).

[32] Yeh and Chang, "Transnational constitutionalism," 91–2.

Table 7.1 *Adoption of international human rights treaties in Taiwan.*

International human rights treaty	Date of signing	Date of ratifying	Domestic incorporation or implementation
UN Charter	June 26, 1945	September 28, 1945	1947 Art. 141 of the Constitution provides the respect for the UN Charter
Universal Declaration of Human Rights	December 10, 1948		1998 redeclaration of full compliance
Genocide Convention	July 20, 1949	May 5, 1951	1953 Genocide Punishment Act passed
ICCPR	October 5, 1967	March 31, 2009 (legislature) May 14, 2009 (president)	March 31, 2009, Implementation Act passed April 22, 2012, release of the initial state report
ICESCR	October 5, 1967	March 31, 2009 (legislature) May 14, 2009 (president)	March 31, 2009, Implementation Act passed April 22, 2012, release of the initial state report
1971 CEDAW (Women's Convention)		January 5, 2007 (legislature) February 9, 2007 (president)	March 27, 2009, release of the initial state report May 20, 2011, Implementation Act passed
CRC (Children's Convention)			June 14, 1990, amendment of the Children Welfare Act
FCTC (Framework Convention on Tobacco Control)		January 14, 2005 (legislature) March 30, 2005 (president)	July 11, 2007/January 23, 2008, amendment of Tobacco Harm Prevention Act

Source: the authors

rights treaties, as Table 7.1 shows.[33] The case of Taiwan is significant in that it demonstrates how alternative approaches may be developed to internalize international human rights norms.[34]

In the first decade of the twenty-first century, Taiwan has made more significant progress. In 2007, accession to the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) was passed by an overwhelming parliamentary majority and formally announced by the president.[35] However, the

[33] Chang, "Bottom-up transnational constitutionalism," 211.

[34] Chang, "International human rights," 614–18.

[35] Press release, Ministry of Foreign Affairs, "Ministry of Foreign Affairs Proactively Promotes Taiwan's Participation in the Convention on the Elimination of All Forms of

instrument of accession was rejected by the UN on the ground that Taiwan (ROC) was not a member state based on the aforementioned Resolution 2758. Notwithstanding the rejection, the government released the initial state report in March 2009, and invited experts, all of whom were ex-CEDAW committee members, to review it.

In 2009, the Legislative Yuan ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The deposition of these two ratifications with the Secretary General of the UN failed again. However, an Act to implement the ICCPR and the ICESCR was passed to ensure the applicability of all rights protected by the two covenants in the domestic legal system. This law became effective on December 10, 2009. The initial state reports of ICCPR and ICESCR were released on April 22, 2012, with the official English translation published on December 18, 2012. Under the initiative and preparation of the Presidential Consultative Human Rights Committee, an international review of both state reports, which closely emulated the reviewing practice of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, took place at the end of February 2013. Ten international experts, all of whom have had outstanding records in international human rights practices, were invited to serve on the two reviewing bodies, one for the ICCPR and the other for the ICESCR.[36] Concluding observations and recommendations were adopted by these experts on March 1, 2013, and the government has pledged full compliance and implementation.

Notably the convergence of international human rights law and the domestic legal order in Taiwan may be attributed to the democratic transition and the animated civil society it helps foster. Though democratic transition in Taiwan did not breed any constitutional revision that touched directly on the issue of human rights, it did bring about a vibrant and resilient civil society that has greatly contributed to the advancement of international human rights. The convergence of international human rights law and domestic constitutions at the domestic level has proceeded primarily in three major ways: (1) a direct or indirect constitutional codification of international human rights laws, (2) statutory enactment to incorporate international human rights laws, and (3) judicial adoption of – binding or nonbinding – international human rights laws.[37] The development of transnational constitutionalism in Taiwan has been mainly from the second and third approaches, which are more flexible and practical.

Discrimination against Women" (April 30, 2007), available at www.mofa.gov.tw/webapp/content.asp?cuItem=25857andmp=6.

[36] The state reports of the ICCPR and the ICESCR and the information regarding the unprecedented international review are available at www.humanrights.moj.gov.tw/np.asp?ctNode=33565&mp=200.

[37] Chang, "International human rights," 206.

In new democracies, if the original constitution is not written with an international spirit, subsequent constitutional revisions may undertake certain efforts to change it.[38] Rewriting the list of constitutionally protected rights in accordance with major international human rights documents has been typical in the constitutional revisions of the many new democracies.[39] In Taiwan, however, the seven rounds of constitutional revisions throughout the 1990s and 2000s did not touch upon issues concerning international human rights, nor did they involve the rewriting of constitutionally protected rights. Nearly all the constitutional revisions ever undertaken addressed issues concerning separation of powers among institutions. Constitutional codification of international human rights laws has been considerably limited in Taiwan even after democratization began in the 1990s.

As an alternative, domestic legislative actions play an important role in filling the gap. While there are a few judicial references to international human rights laws in constitutional interpretations, a stronger trend in statutory incorporation of international human rights laws has taken place in Taiwan. The most recent example was the enactment of the implementation Act regarding the two international covenants, the ICCPR and ICESCR. The key actor behind the increase of statutory incorporation of various human rights treaties has been nongovernmental organizations (NGOs) in the course of their rights advocacy. These globally minded citizens and NGOs have built an intermediating transnational/constitutional regime, where both international and domestic human rights laws coincide, forming a distinctive model of "bottom-up transnational constitutionalism."[40]

Joining the WTO and signing the ECFA

Trade is another field in which Taiwan has been able to connect itself to the international community. International trade is one of the rare fields in which Taiwan has been successfully making its presence felt in international organizations. Taiwan's participation in the world trade system began in the late 1940s. However, despite the fact that the ROC was one of the original signatories of the General Agreement on Tariffs and Trade (GATT), the KMT government withdrew from GATT in 1950, in part because it could no longer fulfill trade commitments of mainland China, and was subsequently expelled in 1971.[41] Nevertheless, Taiwan's

[38] See e.g. Duc V. Trang, "Beyond the historical justice debate: the incorporation of international law and the impact on constitutional structures and rights in Hungary" (1995) 28 *Vanderbilt Journal of Transnational Law* 1 at 11–12.

[39] See V.S. Vereshchetin, "Some reflections on the relationship between international law and national law in the light of new constitutions," in Rein Müllerson et al. (eds.), *Constitutional Reform and International Law in Central and Eastern Europe* (The Hague: Kluwer Law International, 1998), p. 5.

[40] Chang, "Bottom-up transnational constitutionalism," 230.

[41] Concerning Taiwan's history of participating in international trade and the WTO, see Lori Fisler Damrosch, "GATT membership in a changing world order: Taiwan, China and the former Soviet republics" (1992) 1992 *Columbia Business Law Review* 19 at 24.

trade potential in Asia depended on resolving the political dispute concerning both Taiwan's and China's participation in the WTO.[42] After a decade of effort, Taiwan was finally granted accession to the WTO on November 11, 2001, a day after China was granted accession. Taiwan entered into the WTO through accession as a customs territory, and was the only "customs territory" ever admitted to the multilateral trading system without direct sponsorship by a state exercising diplomatic relations on its behalf. While the WTO is now the only major international organization that permits Taiwan membership,[43] Taiwan has also acquired success as a member of several regional economic organizations, including the Asian Development Bank, the Asia-Pacific Economic Co-operation forum, and the Pacific Economic Co-operation Council.

In addition to entering the WTO, the signing of the Economic Co-operation Framework Agreement (ECFA) was another recent significant accomplishment. After the 2008 presidential election, upon KMT's coming to power, cross-strait relations came to a thaw after eight years of political pressure. President Ma took a more dovish approach to China and vouched to rebuild cross-strait relations by resuming bilateral negotiations with China regarding co-operation on trade and financial services. After rounds of cross-strait talks, the ECFA was signed on June 29, 2010, a preferential trade agreement between the governments of the People's Republic of China (China) and the Republic of China (Taiwan) aimed at reducing tariffs and commercial barriers between the two sides. Signing the ECFA has been celebrated as the most significant development since the two sides split after the Chinese civil war in 1949.

According to its advocates, the ECFA can help stabilize and eventually increase Taiwan's presence in the Asian market. It is said that the ECFA helps normalize the relationship between the two sides of the strait, providing both the PRC and the ROC with a framework for trade and investment under which their businesses may prosper, and that the ECFA prevents marginalization of Taiwan, making it easier for Taiwan to arrange trade agreements with other countries.[44] However, signing the ECFA also courted controversy. Above all, concerns surround the potential derogation of sovereignty and the need for a public referendum. Critics contend that the ECFA may present opportunities for businesses, but, just as the actual drawbacks are precarious, the long-term benefits of the ECFA may be gloomy.[45]

[42] See e.g. Robert P. O'Quinn, "Bringing both China and Taiwan into the World Trade Organization" (1995–6) 14 *Chinese (Taiwan) Year Book of International Law and Affairs* 19.

[43] For the background to and analysis of Taiwan's accession to the WTO, see Steve Charnovitz, "Taiwan's WTO membership and its international implications" (2006) 1 *Asian Journal of WTO and International Health Law and Policy* 401.

[44] Ibid.

[45] See Chi-An Chou, "A two-edged sword: the Economic Cooperation Framework Agreement between the Republic of China and the People's Republic of China" (2010) 6 *Brigham Young University International Law and Management Review* 1.

Transnational judicial dialogues

The second feature of transnational constitutionalism is the abundance of transnational judicial dialogue and references, marked especially by domestic judicial reference to international norms or the laws of other nation-states. In the many new constitutions of third-wave democracies, there has often been a demand for judicial reference to international law or at least international human rights law, and some even directly pronounce that international laws are part of their domestic laws. This domestic "constitutionalization" process of international norms has facilitated not only judicial conversations regarding external norms, but also constitutional functions of international norms.[46] As norms of human rights have become ubiquitous around the world, we seek to demonstrate Taiwan's dynamic judicial dialogue with the world, and explore the functions it served, in analyzing its practices in international human rights law.

Judicial reference to international human rights

Judicial enactment of international human rights law has been the primary method leading to the current development of transnational constitutionalism in Taiwan. The Constitutional Court in Taiwan has been referring to international human rights law since the 1990s, the first reference being made in 1995. Since then, there have been twenty-four decisions where the court cited international human rights law, among which only two decisions appeared in the 1990s, while twenty-two appeared between 2000 and 2010. There were seven majority opinions that referred to international human rights instruments, eighteen references in concurring opinions, and fourteen references in dissenting opinions. Generally, there were limited, but gradually increasing, judicial references to international human rights law in the Constitutional Court. The international human rights law referenced by the court included, besides the ICCPR and CEDAW, the European Convention on Human Rights (ECHR), the Convention on the Rights of the Child (CRC), the International Labor Conventions, the American Convention on Human Rights, and the Universal Declaration of Human Rights (UDHR). Notably, the UDHR was the most frequently cited international document in separate opinions. In spite of their nonbinding nature, these international human rights laws have been treated by the Constitutional Court as persuasive, and at times even compelling, international legal authority.[47]

In fact the attitude of Taiwan's Constitutional Court toward international human rights law in its constitutional adjudication has been quite open. It should be noted that, unlike some constitutions enacted during the 1990s that often

[46] Yeh and Chang, "Transnational constitutionalism," 95–8.

[47] For a more detailed analysis of the use of international human rights law in the Taiwanese Constitutional Court, see Chang, "Bottom-up transnational constitutionalism," 212.

provided a privileged status for international human rights law within the domestic legal regime, the ROC Constitution and subsequent revisions in Taiwan include no such provisions. Interestingly, however, the Constitutional Court in J.Y. Interpretation No 329 gave international human rights treaties a direct domestic applicability by adopting a monistic view on the relationship between domestic and international laws, a view that was not popularly held before.[48] While civil-law jurisdictions often hold a dualist view of the relationship between international and domestic law, Taiwan has opted for a monist interpretation. In other words, once duly ratified or acceded to, international treaties do not require any additional enactment of domestic statute to engender domestic applicability and legal effect.[49]

Features and functions

The Taiwanese Constitutional Court has resorted to international human rights treaties for multiple functions, especially in recent years.[50] First of all, the court referred to international human rights treaties to add new rights and substance to the existing list of constitutionally protected rights. For example, although a child's right to identify his parents is not specified in the Constitution, and nor is any general right of personality, in J.Y. Interpretation No 587 the Constitutional Court added this right to the list of constitutionally protected rights. The court indicated that a child's right to identify his or her blood affiliation was protected by Article 7, Section 1, of the CRC, and therefore the right to establish paternity should be protected under Article 22 of the Constitution.[51]

Second, the court also referred to international human rights treaties to provide persuasive arguments for the protection of existing rights. For example, J.Y. Interpretation No 582 addressed a criminal defendant's right to cross-examine witnesses. In this interpretation, while the right to a fair trial – and subsequently the right of cross-examination – is clearly ensured by Article 16 of the Constitution, the court nevertheless felt obliged to rely further on foreign laws and international human rights documents for additional support. The court's reference to international human rights demonstrates the universal nature of such rights.[52] By referring to international human rights treaties, the court was able to reconcile rights that were equally protected by domestic constitutions. For example, in J.Y. Interpretation No 623, the court found that a child's right to be free from

[48] J.Y. Interpretation No 329 (1993), available at www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=329.

[49] Concerning the domestic status and effects of international human rights law in Taiwan, see Chang, "Convergence of constitutions and international human rights," 600–1.

[50] Ibid., 608.

[51] J.Y. Interpretation No 587 (2004), available at www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=587.

[52] J.Y. Interpretation No 582 (2004), available at www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=582.

sexual exploitation, guaranteed by the CRC, may provide for a constitutional basis to restrict free speech when reviewing a law criminalizing the dissemination of materials that seduce anyone, including children, into engaging in unlawful sexual transactions. The court argued that the Constitution's guarantee of free speech was not absolute, and that the legislature could impose adequate restrictions by enacting clear and unambiguous laws. Since protecting a child from engaging in any unlawful sexual activity is a universally recognized fundamental right and of significant public interest, the purpose of the reviewed Act, to prevent and eliminate the circumstances where children and juveniles were treated as sexual objects, must be deemed rational and legitimate.[53]

Except for the three typical functions, judicial references also provide alternative functions of public policy. As recent cases in the Constitutional Court demonstrated, one of the alternative functions of reference to international human rights law is to provide the benchmark for further legislative revision or policy change. For example, in both J.Y. Interpretation No 549 and J.Y. Interpretation No 578, the court examined the Labor Insurance Act and the Labor Standards Act and, having found the Acts constitutional, advised the government to overhaul the entire statutory regime with relevant international labor conventions. In J.Y. Interpretation No 549, the court requested that "an overall examination and arrangement, regarding the survivor allowance, insurance benefits and other relevant matters, should be done in accordance with the principles of this Interpretation, international labor conventions and the pension plan of the social security system."[54] Similarly in J.Y. Interpretation No 578, the court advised the government to conduct a comprehensive examination of the current scheme regarding labor retirement payment and requested that "the provisions of international labor conventions and the overall development of the nation shall also be taken into account."[55]

Global convergence of institutional arrangements

The third feature of transnational constitutionalism has to do with the triumph of constitutionalism at the end of the last century, and the impact brought about by globalization. Aside from traditional arrangements such as bills of rights and the separation of powers, new institutions particularly responsible for guarding constitutions such as constitutional courts, human rights commissions, and independent auditors have all become common features of new transnational constitutionalism.

[53] J.Y. Interpretation No 632 (2007), available at www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=632.

[54] J.Y. Interpretation No 549 (2002), available at www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=549.

[55] J.Y. Interpretation No 578 (2004), available at www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=578.

The global convergence of constitutions has given rise to a common set of constitutional languages.[56] Constitutional developments in Taiwan have clearly showed the trend of global convergence.

Independent commissions and the empowerment of the court

Establishing independent commissions is a trend that has swept the world in recent years. Independent commissions, primarily based upon the American model,[57] have been introduced and institutionalized in various legal and political contexts, and different socioeconomic contexts breed different issues to be resolved.[58] For various purposes, such as enhancing technical professionalism, pacifying political confrontation, or boosting administrative efficiency, independent commissions are usually established to ensure that administrative affairs are immune from unduly political intervention, and hence are conducted in a more professional, neutral, or efficient manner. Notably in the context of democratic transitions, the establishment of independent commissions may be a double-edged sword. In newly emerging democracies, establishing an independent commission to take charge of certain administrative affairs is a way not only to respond to the global trend but also, probably more importantly, to build public trust in the government. However, concerns of accountability are sparked since independent commissions are made distinct by their insulation from the oversight and management of the administrative bureaucracy. These concerns can be severe for an emerging democracy whose judicial system and civil society still lack a system of checks and balances.[59]

In Taiwan, while several government agencies are named "commissions," very few of them are independent in both the legal and the operational sense. These commissions were created at different times for various reasons, but none had to do with independence. Rather, they were created for representation, foreign intervention, political strategy, and even expediency. The National Communications Commission (NCC), established in 2006, was the first ministerial-level independent regulatory commission in Taiwan.[60] Not surprisingly, its establishment

[56] Yeh and Chang, "Transnational constitutionalism," 97–8.

[57] On the evolution of independent commissions in the United States, see e.g. Gary Breger and Marshall J. Edles, "Established by practice: the theory and operation of independent federal agencies" (2000) 52 *Administrative Law Review* 1111.

[58] See e.g. Mariana Mota Prado, "The challenges and risks of creating independent regulatory agencies: a cautionary tale from Brazil" (2008) 41 *Vanderbilt Journal of Transnational Law* 435.

[59] Concerning institutional arrangements in emerging democracies and the issues of public trust and accountability, see János Kornai, Bo Rothstein, and Susan Rose-Ackerman (eds.), *Creating Social Trust in Post-socialist Transition (Political Evolution and Institutional Change)* (New York: Palgrave Macmillan, 2004).

[60] Concerning the development of independent commissions in Taiwan, see Jiunn-rong Yeh, "Experimenting with independent commissions in a new democracy with a civil law tradition: the case of Taiwan," in Susan Rose-Ackerman and Peter Lindseth (eds.), *Comparative Administrative Law* (Northampton, MA: Edward Elgar, 2010), pp. 246–64.

triggered intense political confrontation, partisan fights, and Constitutional Court rulings against the backdrop of contentious politics in a new democracy. Concerns of accountability also surfaced regarding whether and to what extent the unity of the administration would be derogated for the purpose of establishing the NCC.[61] Despite all the controversies, however, the creation of the first independent commission signified Taiwan's great leap toward a new era of administrative reform.

The empowerment of the judiciary is another recent accomplishment of global constitutional convergence. Similar to establishing an independent commission, for emerging democracies, empowering the judiciary is a way to assuage political imbroglios and uphold justice. In newly emerging democracies, intense political disputes usually arise and require the judiciary to intervene. Especially in a presidential democracy, where the president shoulders not only the function of acting as the head of state, but also the role of chief executive, the winner-take-all institution nearly assures political animosity and severe confrontation. In Taiwan, the constitutional revision of 2005 further invested in the Constitutional Court the power to adjudicate disputes regarding presidential impeachment, a change that clearly corresponded to the global trend of empowering courts to resolve highly charged political disputes.[62]

Government reform and access to information

Globalization appears to be a key driving force for recent government innovation that has taken place in many developed and developing countries.[63] Governments have undertaken reforms over the last two decades while their respective purpose, intensity, measures and timing have varied from one to another. The stated link of these reforms to globalization has been divergent, and reform measures appear to have borne strong connotations of the nature of globalization and the dynamics of global governance. These reforms involve a common outcry for good government in terms of integrity, competence, and quality of performance in the discharge of public functions. They included organizational, operational, and process reforms, as well as new ways of managing human resources. Concurrently, related issues, including access to information and government transparency, also surface as focal points of discussion. Aside from meeting the dynamics of global

[61] J.Y. Interpretation No 613 (2006), available at www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=613.

[62] Chang, "Strategic judicial response," 886.

[63] Concerning government reform in the trend of globalization, see Jiunn-rong Yeh, "Globalization, government reform and the paradigm shift of administrative law" (2010), 5(2) *National Taiwan University Law Review* 113 (arguing that current government reforms have not been comprehensive in their response to globalization, and that massive flows and varying kinds and degrees of convergence require not only domestic government reforms but also transnational collaboration).

governance, in the context of transitional constitutionalism government reform is significant as a measure to build capacity and cultivate trust.

In Taiwan, while there had been plans for government reform, the actual undertaking of reform did not occur until the 2000s.[64] The KMT government had proposed government reform in order to resolve governance problems in different periods. After World War II, government reforms were stipulated upon the KMT's retreat to Taiwan in order to confront the crisis of civil war and to alleviate the crisis of legitimacy of the government. In the 1990s, several proposals for revising the organization of central government were made by the KMT government under the pressure of the opposition party. Yet all these proposals remained merely as policy and were never realized. It was not until after the first regime change in 2000, as the long-term opposition DPP came to power, that a well-designed agenda of government reform could be proposed and entered the stage of legislation. However, tensions and distrust under the divided government resulted in insurmountable obstacles that caused the DPP administration's agenda of government reform to fail. In the eight years of DPP rule, as a result of lacking support in the Legislative Yuan, the success of government reform proposals was limited. After the second party turnover in 2008, as the KMT controlled both the executive and legislative branches, comprehensive government reform was able to bear fruit.

The passage of the Freedom of Government Information Law is another significant development that deserves attention. The freedom of public information, or the right of access to information, has been comprehensively recognized by the international community. In the era of globalization, as both time and space shrink to an unprecedented extent, information becomes the pivotal foundation of management and governance for agents on multiple levels. More and more treaties aim to promote the importance of public information.[65] Besides, in domestic governance, the idea of open government, which holds that citizens have the right to access the documents and proceedings of the government to allow for effective public oversight, is now the prevailing doctrine. There are now over eighty-five countries worldwide that have implemented some form of such legislation.[66]

[64] For a more detailed description of the history and development of government reform in Taiwan, see Guang-Xu Wang and Mei-Ciang Shih, "Dismantling the Government: the reorganisation reform of Taiwan's central government (1987–2008)" (2011) 3(3) *Journal of Public Administration and Policy Research* 52.

[65] For example, the Aarhus Convention deals with the issues of access to information, public participation in decision-making, and access to justice in environmental matters. See Bende Toth, "Public participation and democracy in practice: Aarhus Convention principles as democratic institution building in the developing world" (2010) 30 *Journal of Land, Resources and Environmental Law* 295.

[66] Concerning the theory, functions, and practice of the right to information around the world, see Roy Peled and Yoram Rabin, "The constitutional rights to information" (2011) 42 *Columbia Human Rights Law Review* 357.

Taiwan also managed to keep up with this trend. In 2005, the Freedom of Government Information Law was passed and took effect, to "establish the institution for the publication of government information; facilitate people's sharing and fair utilization of government information; protect people's right to know; further people's understanding, trust and oversight of public affairs; and encourage public participation in democracy."[67]

Proposal for a national human rights commission

Despite all the progressive developments, the establishment of a National Human Rights Commission still remains unresolved. With the development of international human rights law, human rights have become the main focus of the global community. Major human rights treaties have been signed by most states around the world, and national human rights commissions were established by those states as an important mechanism to address this issue.[68] It was not until the end of the 1990s in Taiwan, when some NGOs started advocacy, that the idea of creating a national human rights commission began to arise. It is a grassroots initiative.[69] In 1999, NGOs led by the Taiwan Association for Human Rights established a Coalition for the Promotion of a National Human Rights Commission in Taiwan. It was stated that the Paris Principles and the experiences of other countries should be consulted in designing a national human rights commission, and the principles of independence, effectiveness, and reflection of the diversity of society be also affirmed.

In the year 2000, the NGOs began drafting a bill for a National Human Rights Commission. However, despite the seeming political popularity of having a National Human Rights Commission, disputes arose concerning the status and functions of the commission. The Executive Yuan opposed the idea of establishing an administrative commission subordinate to the Presidential Office; it only agreed with the president setting an advisory committee in charge of providing information concerning the issue of human rights. The Control Yuan was also critical of the commission's quasi-judicial investigative functions; it argued that the duty to protect human rights lay with itself, and that the establishment of the National Human Rights Commission with such *ultra vires* powers would be unnecessary and even unconstitutional. Up to this date, the dispute around establishing the National Human Rights Commission remains irresolvable.

[67] Freedom of Government Information Law, Art. 1, available at http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=I0020026.

[68] Concerning the latest developments in national human rights commissions, see Richard Carver, "A new answer to an old question: national human rights institutions and the domestication of international law" (2010) 10 *Human Rights Law Review* 1.

[69] For more detailed facts on the following developments, see Fort Fu-Te Liao, "Establishing a national human rights commission in Taiwan: the role of NGOs and challenges ahead" (2001) 2 *Asia Pacific Journal on Human Rights and Law* 90.

IV. CHALLENGES AND PROSPECTS

As Taiwan's experience reveals, transitional constitutionalism and transnational constitutionalism have both been playing important roles, not only in serving as major driving forces, but also in enriching the context of a new democracy. However, conceived as a departure from traditional constitutionalism, the development of transitional and transnational constitutionalism as such has not come without challenge.[70] In prospect, we observe three threads of constitutional development in Taiwan, both as prophecies for constitutional development into the next decade and as solutions to overcome challenges arising from the development of transitional and transnational constitutionalism.

Challenges of democratic deficit, accountability, and the rule of law

The challenges posed by both transitional and transnational constitutionalism can be characterized as the problems of accountability, democratic deficit, and the rule of law.[71] In traditional constitutionalism, decision-makers must be held accountable for their decisions, and they are subject to checks and balances. Furthermore, the democratic thesis of constitutionalism also mandates that all decisions and norms be made and generated with sufficient democratic legitimacy. Finally, the rule of law requires decision-makers to make their decisions pursuant to the law. All these mechanisms purported under traditional constitutionalism prevent decision-makers from abusing their power in decision-making. However, as the development of Taiwan also demonstrates, transitional and transnational constitutionalism both fall short of meeting these requirements. Thus, these challenges must be addressed.

First of all, accountability remains the very issue to be resolved. Continuous rounds of constitutional revision in the 1990s authored a quasi-presidential system for Taiwan, rendering an ambiguous division of power between the president, the premier, and the Legislative Yuan. Concerns of accountability arose especially around the role of the president, who, according to the Constitution, has the power to appoint the premier as the head of government without legislative consent, and hence exerts insurmountable influence upon the government. Yet the text of the Constitution confines the power of the president to national security and foreign

[70] See e.g. Joachim Jens Hesse, "Constitutional policy and change in Europe: the nature and extent of the challenges," in Joachim Jens Hesse and Nevil Johnson (eds.), *Constitutional Policy and Change in Europe* (New York: Oxford University Press, 1995), pp. 3–19. But see Kim Lane Scheppele, "Aspirational and aversive constitutionalism: the case for studying cross-constitutional influence through negative models" (2003) 1 *International Journal of Constitutional Law* 296 (arguing that negative rejection, rather than positive acceptance, plays a major role in transnational exchanges).

[71] See Yeh and Chang, "Transitional constitutionalism," 170–5; Yeh and Chang, "Transnational constitutionalism," 112–14.

policy, excluding other areas of government. As a result, despite the actual influence that the president possesses in all policies, he or she is not held accountable for most of these decisions. Similarly, the concern of accountability is present in the context of transnational constitutionalism, as the need to accommodate global trends grows urgent. The establishment of the first independent regulatory commission, the NCC, is a remarkable accomplishment toward meeting the trend of digital convergence. Yet there are concerns as to whether and to what extent the NCC should be accountable to the Executive Yuan's supervision.[72]

In addition, both transitional and transnational constitutionalism is required to address the problem of the democratic deficit. As Taiwan's experience reveals, constitutional revisions are often undertaken by way of compromise in the democratic transition in order to safeguard the partisan interests of political parties. As a result, these revisions are unable to reflect public opinion. Even after several rounds of constitutional revision, temporary compromise fixed the Constitution to an extent that rendered future revisions quite unlikely. Regional arrangements related to trade and commerce may also pose problems of a democratic deficit. Regardless of potential economic benefits, the ECFA was criticized as having been planned with limited public participation. Hence, fierce dispute has arisen as to whether the ECFA will be open for public referendum. From 2010 to 2011, an anti-ECFA political party, the Taiwan Solidarity Union (TSU), launched four rounds of proposals asking for the ECFA to be subject to referendum. Yet these proposals were overruled by the referendum review committee that was vested with discretionary power to review referendum proposals.

Last but not least, derogation of the rule of law is another challenge posed by both transitional and transnational constitutionalism. During Taiwan's democratic transition, with the advent of the first regime change that gave birth to a divided government, bitter politics ensued and were exacerbated as the Constitution and subsequent revisions were all unable to provide a sustainable framework for an effective mechanism of checks and balances. Ineffectiveness of constitutional provisions in addressing these issues may further undermine the rule of law. For example, in J.Y Interpretation No 585, concerning the constitutionality of the special commission established by the Legislative Yuan to investigate the gunshot saga, the court, while declaring most of the powers conferred on the Commission unconstitutional, recognized to a certain extent the Legislative Yuan's power to investigate, on which the Constitution unequivocally remains silent. The court was thus criticized as making law, a power traditionally vested with the legislature.

Similar problems can be seen in the context of transnational constitutionalism. International treaties are norms derived from other jurisdictions, and their application may derogate the domestic democratic thesis. Rule-of-law concerns may also

[72] The Constitutional Court rendered J.Y. Interpretation No 613 (2006), available at www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=613.

arise, as the court usually references international human rights law. These deficits, however, may be ameliorated by legislative incorporation of international human rights treaties into the domestic legal system, thereby providing democratic legitimacy as well as affirming the rule of law. In Taiwan, the Act to Implement the ICCPR and the ICESCR stands as such an important effort.

Prospects for the next decade: three threads

Unequivocally, conventional understandings of constitutionalism have been insufficient to meet the dynamics of emerging democracies. Challenges need to be faced, as the case of Taiwan demonstrates, in identifying both transitional and transnational constitutionalism. The endeavor to find proper solutions to those challenges, and how well constitutional scholars may render them, are the most pressing issues for the second decade of the twenty-first century. We have proposed that, with domestic and transnational institutional checks and balances, the problems of accountability, democratic deficit, and the rule of law posed by both transitional and transnational constitutionalism may be overcome.[73] As prophecies and solutions for developments in the next decade, we trace the paths of, and identify, three parallel threads: the rise of the judiciary, the role of the president, and the importance of civic engagement.

First, the rise of the judiciary as an effective arbiter and decision-maker may continue. In the transitional context, polarized politics entail the judiciary, especially the Constitutional Court, defusing tensions by wielding its power of adjudication. As the past decade has revealed, the need for courts to resolve controversial disputes during political turmoil has all along been manifest. Besides, in the transnational context, courts may serve as mediators in linking Taiwan to the global community, especially in the application of international human rights law. Despite the fact that the judiciary is often criticized as the least likely decision-maker to be held accountable, the experiences of the last decade in Taiwan showed the indispensable role of courts. While recognizing the court as the vehicle to guide constitutional development, problems cannot be ignored. Politicization of the judiciary and judicialization of politics may continue to shape the next decade. To meet this challenge, some amount of judicial self-restraint and strategic decision-making may be necessary.[74]

The president is another actor that equally takes the helm of the future. The political dynamics after the first regime change in the year 2000 vividly showed the extreme scenario of how the president, under a winner-takes-all presidential system with obscured divisions of power provided by the Constitution, further exacerbated by a divided government, was engulfed in political turmoil.

[73] Yeh and Chang, "Transnational constitutionalism," 115.

[74] This is especially prominent in East Asian experiences; see Chang, "Strategic judicial responses," 885.

Many disputes surfaced concerning presidential powers and institutional conflicts, and the president was usually at the center of the confrontation. Interestingly, however, most such disputes were sent to the courts, especially the Constitutional Court, where the quarrels were either settled or rephrased. Metaphorically, in a ball game, while the president played the pitcher, who hurled the ball, most of the time the court played the catcher.[75] While the courts may have concerns of self-preservation, given the presidential power of judicial appointment, some strategic approaches, in particular those approaches that tended to cultivate dialogue between political branches, have proved effective in both defusing conflict and protecting the legitimacy of the courts.[76] How the president and the court interact will steer the main course of constitutional development in the next decade.

Finally, while recognizing that the judiciary and the president constitute the two primary factors when forecasting the next decade, we would also like to highlight the role of the people and of civil society. We observe, and propose, that civic engagement may provide another force capable of shaping the future, and may be the solution to those challenges generated by the development of transitional and transnational constitutionalism. In fact, recent developments have shed some light on the vitality of an ever-growing civil society in Taiwan. The suspension of martial law in 1987 was the first step to release the strength of civil society; down the road of democratic transition, especially when the Constitution was revised to popularly elect the president, civil society was empowered to unleash its capacity. The passage of the Referendum Act and the referenda that took place tested the strength and ability of Taiwanese citizens to deliberate public issues. In addition, the convergence of domestic constitutional norms and international human rights that occurred in Taiwan would not have been possible without the engagement of local NGOs.[77] Without a doubt, a great deal of effort is and will still be needed for civil society to learn the ropes. Yet a mature and robust civil society deserves all of our efforts, as it may be the ultimate solution to the challenges of accountability, democratic deficit, and the rule of law destined to haunt postmodern democracies in the face of transitional and transnational constitutionalism.

V. CONCLUSION

The functions of constitutions have substantially changed in the last decade or two, producing what are now understood as transitional and transnational constitutionalism. This chapter has analyzed the constitutional development of Taiwan in the

[75] Therefore how constitutional courts adjudicate on contentious presidential politics in new democracies remains a significant issue in comparative constitutionalism. See Yeh, "Presidential politics and the judicial facilitation of dialogue," 911; Chang, "Strategic judicial responses," 885.

[76] Yeh, "Presidential politics and the judicial facilitation of dialogue."

[77] Chang, "Global-minded citizens," 230.

first decade of the twenty-first century in light of these two perspectives. Successful democratic transition in Taiwan took place mainly in the 1990s, and, as a result, constitutional developments during that period were considerably reflective of transitional features. Interestingly, however, due to the scenario of divided government and the resulting political confrontation, constitutional politics in the last ten years still presented many significant characteristics of transitional constitutionalism. First, these attributes include the constitutional revision of 2005 that rendered subsequent constitutional changes extremely difficult, if not almost impossible; second, the divided government for eight years after 2001 and the resulting political stalemate inevitably called for unconventional styles of constitutional adjudication. The role of the Constitutional Court became even more recognizable than it had been during the earlier transitional period of the 1990s. Similarly, due to the extreme difficulty of passing constitutional amendments, quasi-constitutional statutes were enacted only as quick solutions subject to political bargaining.

Meanwhile, the development of transnational constitutionalism was at an apex in this decade. Transnational norms have entered into the domestic legal systems through both trade agreements and international human rights treaties. For example, joining the WTO and signing the ECFA with the Chinese authorities entrenched transnational trade terms in the local law. Largely due to bottom-up efforts, the ratification of CEDAW, the ICCPR, and the ICESCR and the enactment of their respective implementation statutes have rendered these rights, guaranteed in international normative systems, domestically applicable. Not only had the Constitutional Court begun to articulate these international human rights, but also – and most importantly – lower courts were pressured by public-interest litigation and started to embrace these norms. In addition, the convergences of global institutional arrangements have impacted significantly on the creation of new governmental institutions and their delegated missions that are made comparable, if not identical, to their global counterparts.

These developments in transitional and transnational aspects have evidently left footprints in the constitutionalism of Taiwan and beyond. While the divided government ceased in 2008 as a result of the KMT's presidential and legislative victories, the impact that transitional features have had on current constitutional politics and law has remained strong. And the transnational aspect of the development became even stronger with both the executive and legislature in the hands of the same political party. The development of transitional and transnational constitutionalism, however, generated challenges in the aspects of accountability, democratic deficit, and the rule of law. The endeavor to find proper solutions to these challenges and how well constitutional scholars may render them in Taiwan will be most pressing issues for the second decade. In prospect, while we identify the judiciary and the president as two crucial players in the coming period, at the same time we also recognize the role of the people and propose that civic engagement will be an equally important thread that deserves attention.

8

Hong Kong's constitutional journey, 1997–2011

Johannes Chan

PROLOGUE

At midnight on 30 June 1997, the Hong Kong Convention Centre was flooded with political dignitaries, with the Prince of Wales leading the British delegation and President Jiang Zemin leading the Chinese delegation, all waiting eagerly but in entirely different moods to witness the handover ceremony of Hong Kong to China. As the Union Jack was lowered for the last time in Hong Kong, Britain's 150-year reign over her last colony in Asia came to an end. The fading tune of 'God Save the Queen' was soon followed by the marching trumpets of the People's Republic of China's (PRC) national anthem, and immediately the PRC flag was steadily and confidently hoisted, accompanied by the visibly smaller special administrative region (SAR) flag, which was raised at half a pace slower, thus marking the dawn of a new era for Hong Kong. The Hong Kong SAR was born, with the relative positions of the PRC flag and the SAR flag vividly and powerfully conveying the message that 'one country' comes before 'two systems' in the innovative constitutional arrangement of 'one country, two systems'.

I. A HIGH DEGREE OF AUTONOMY: THE ARRANGEMENT OF 'ONE COUNTRY, TWO SYSTEMS'

The arrangement

Pursuant to the Sino-British Joint Declaration of 1984, Hong Kong became a special administrative region (HKSAR) of the PRC on 1 July 1997.[1] It enjoys a high degree of autonomy except in foreign affairs and defence and in areas

[1] For a detailed description of the process of the transfer of sovereignty over Hong Kong, see J. Chan, 'From colony to SAR', in Johannes Chan and C.L. Lim (eds.), *Law of the Hong Kong Constitution* (Hong Kong: Sweet & Maxwell, 2011), Chapter 1.

which are the responsibility of the Central People's Government.[2] It is vested with executive, legislative and independent judicial powers, including the power of final adjudication.[3] The law in force before the change-over remains basically unchanged.[4] National laws shall not apply to the HKSAR except those relating to foreign affairs and defence and they will only apply pursuant to a prescribed procedure.[5] A Court of Final Appeal has been established to replace the Privy Council, which was the highest court of appeal of the former colony.[6] Fundamental rights and freedoms are protected.[7] The prevailing social and economic systems remain unchanged. Socialist policies on the mainland shall not apply to the HKSAR.[8] It retains the status of a free port and a separate customs territory.[9] It has its own independent finances and is allowed to continue to use its currency.[10] It also enjoys varying degrees of freedom in conducting external relations, albeit in the name of 'Hong Kong, China'.[11] These policies, which shall remain unchanged for fifty years, are stipulated and elaborated in the Basic Law, the constitution of the HKSAR.[12] The Basic Law was promulgated by the National People's Congress in April 1990, and came into force on 1 July 1997.

Inherent contradictions

While it is not uncommon to have more than one legal system within a single sovereign country,[13] the co-existence of two systems that are vastly different in ideology and values will give rise to inevitable conflicts. On one side of the border there is a well-established common-law system that rests upon individualism and the doctrine of separation of powers. On the other side of the border there is an emerging legal system that is partly based on socialist ideology, partly based on the civil-law system and increasingly influenced by the common-law system. It subscribes to the supremacy of the soviet and the people's democratic dictatorship, and operates largely on a central planning system. Thus, when the two systems meet, there are bound to be conflicts arising from a difference in culture, values and systems, which difference is further complicated by an absence of clear demarcation of jurisdictions and the absence of any conflict resolution mechanism between the two systems.

[2] The Basic Law of Hong Kong (BLHK), Arts. 13, 14. [3] BLHK, Art 2.
[4] BLHK, Art 8. [5] BLHK, Art 18. [6] BLHK, Art 82. [7] BLHK, Chapter III.
[8] BLHK, preamble. [9] BLHK, Arts. 114, 116. [10] BLHK, Arts. 106, 111.
[11] BLHK, Art. 116. [12] BLHK, Art. 5.
[13] The federal system is a prime example. For a good discussion of different models of autonomous systems, see Marc Weller and Katherine Nobbs (eds.), *Asymmetrical Autonomy and the Settlement of Ethnic Conflicts* (Philadelphia and Oxford: University of Pennsylvania Press, 2010).

II. CENTRAL–LOCAL RELATIONSHIP

Competing for greater autonomy

The conflict between the two systems is best exemplified by the conflict over the interpretation of the Basic Law, which is simultaneously the constitution of the HKSAR and a piece of national law promulgated by the National People's Congress Standing Committee (NPCSC). Under Article 158 of the Basic Law, the power of interpretation of the Basic Law is vested in the NPCSC. Hong Kong courts can interpret any provision of the Basic Law as well. However, if the Court of Final Appeal finds it necessary to interpret any provision of the Basic Law which is an excluded provision, it shall refer the interpretation to the NPCSC before rendering its final judgment, and the interpretation of the NPCSC shall be binding on Hong Kong, except that previous judgments rendered shall not be affected. An excluded provision refers to those provisions concerning affairs which are the responsibility of the Central People's Government or the relationship between the Central Authorities and the HKSAR. In *Ng Ka Ling* v. *Director of Immigration*,[14] the Court of Final Appeal held that it is under a duty to refer a provision to the NPCSC for interpretation if (1) the provision concerned is an excluded provision ('classification test'); and (2) it is necessary to interpret the excluded provision as its interpretation will affect the judgment in the case ('necessity test'). In applying the classification test, if the scope of an excluded provision is qualified or affected by a non-excluded provision, the court will adopt a predominant test, namely as a matter of substance which is the predominant provision that has to be interpreted in the adjudication of the case. In *Lau Kong Yung* v. *Director of Immigration*,[15] the Court of Final Appeal observed that it would have to revisit these tests in light of the interpretation of the NPCSC reversing the decision of the court in *Ng Ka Ling*. However, so far the court has not found an appropriate opportunity to review these tests. Instead, it continues to apply the classification test and the necessity test.[16]

The National People's Congress (NPC) is the legislative assembly of the PRC. It comprises about 3,000 members and meets only once a year. In view of its size and the infrequency of its meeting, the NPC is largely a dignified ceremonial institution that mainly rubber-stamps decisions made elsewhere. When it is not in session, its power is vested in the NPCSC, which comprises about 180 members. In contrast to the legislature in the common-law system, the NPC can exercise legislative, executive and judicial functions. Its power to interpret law is based on both ideological premises and practical necessity. Ideologically, the power to make law is vested in the Supreme Soviet (the NPC), which represents the people, and

[14] (1999) 2 HKCFAR 4. [15] (1999) 2 HKCFAR 300.

[16] *Democratic Republic of the Congo* v. *FG Hemisphere Associates LLC*, [2011] 4 HKC 151, paras. 403–5 ('the *Congo* case').

the power to interpret law is a corollary power that flows from the power to make law. Practically, there is a need to maintain consistency. China experienced a dark period of lawlessness during the Cultural Revolution. When it emerged from the Cultural Revolution in 1978 and began to rebuild the national legal system, a major challenge was to ensure consistency of interpretation of the law promulgated by the central government, given the vast geographical size of China and the varying quality of judicial and government personnel in different parts of the country. The power of the NPCSC to interpret law is a solution to address this problem. It is an efficient means to further clarify the scope of the law or to make supplemental provisions to enable the smooth implementation of the law.[17] In this regard, the distinction between interpretation and amendment is very fine.[18]

Under Article 67 of the PRC Constitution and Article 158 of the Basic Law, the NPCSC has the power to interpret the provisions of the Basic Law. Under the common-law system, the interpretation of law is the sole province of the judiciary, which alone can pronounce authoritative and binding interpretation in the process of judicial adjudication after a rational process of hearing and weighing carefully arguments from both sides. Under the PRC system, the NPCSC, which is a political organ, has the power to issue authoritative and binding interpretation of law, which could in practice amount to an amendment of the law without going through the formal legislative process for amending law. When the two systems must interpret the Basic Law, conflicts regarding the independence of the judiciary and the integrity of the common-law system are inevitable.

Four interpretations of the NPCSC

The first interpretation

The first occasion for interpretation of the Basic Law arose shortly after the change-over, in *Ng Ka Ling* v. *Director of Immigration*.[19] Under the pre-1997 immigration law, children born to Hong Kong permanent residents (HKPR) outside Hong Kong would not acquire a right of abode in Hong Kong. Under Article 24 of the Basic Law, these children, if of Chinese nationality, would fall within the definition of HKPR and hence enjoy a right of abode in Hong Kong. Many of these children came to Hong Kong legally as tourists and overstayed, or simply came to Hong Kong illegally shortly before and after the change-over. They surrendered themselves to the immigration authorities after the change-over and demanded an identity card showing their HKPR status. On 10 July 1997, when the number of

[17] See the Opinion of Professor Lian Xisheng dated 10 August 1999, quoted by the Court of Final Appeal in *Director of Immigration* v. *Chong Fong Yuen* (2001) 4 HKCFAR 211 at 221.

[18] While this may provide a justification for the power of interpretation by the NPCSC in the early days of rebuilding the national legal system, the continued existence of this power in the twenty-first century has indeed been increasingly queried by mainland scholars.

[19] (1999) 2 HKCFAR 4.

such children hit 5,000, the Legislature passed an emergency amendment to the Immigration Ordinance. The gist of the amendment was that any person who claimed to have a right of abode in Hong Kong must produce a certificate of entitlement, which could only be applied for outside Hong Kong. No certificate would be issued unless the applicants (almost exclusively from the mainland) first secured an exit approval from the Security Bureau of the PRC. The constitutionality of this new requirement of a certificate of entitlement was challenged as being contrary to Article 24 of the Basic Law. In response, the director argued that the certificate of entitlement system was justified by Article 22 of the Basic Law, which provided that people from other parts of China must apply for approval for entry into the HKSAR ('the immigration issues').

The plaintiffs also mounted a more fundamental challenge. As a result of a breakdown in negotiation between China and the United Kingdom on the composition of the last Legislative Council before the change-over, the Chinese government declared that it would appoint a Provisional Legislative Council on 1 July 1997, which, among its duties, would be responsible for forming the first Legislative Council of the HKSAR. The amendments to the Immigration Ordinance in 1997 were enacted by the Provisional Legislative Council. There was no provision for a Provisional Legislative Council in the Basic Law. Hence, the plaintiffs argued that the Provisional Legislative Council was unconstitutional, and therefore the laws that it purported to make were of no legal effect unless they could be upheld by the common-law doctrine of necessity ('the constitutional issues').

The court held that the certificate of entitlement scheme was unconstitutional as it has the effect of vesting in the Security Bureau of the PRC the power to determine who has the right of abode in Hong Kong. It also refused to refer a question of interpretation to the NPCSC on the ground that the predominant provision to be determined in this case was a provision within the internal autonomy of the HKSAR. This part of the judgment was effectively reversed by the NPCSC in its interpretation that was rendered in June 1999 at the request of the government.

As a result of the NPCSC interpretation, the Court of Final Appeal remarked in *Lau Kong Yung* v. *Director of Immigration* that it would have to review the classification test, the necessity test and the predominant test. Professor Albert Chen of the University of Hong Kong argued forcefully that the court should apply the necessity test before the classification test because until it has been identified which provision needs to be interpreted, it is not possible to apply the classification test.[20] Instead, the court, by developing the predominant test, held that the predominant provision to be interpreted was Article 24, which was not an excluded

[20] Albert Chen, 'The Court of Final Appeal's ruling in the "Illegal Migrant" children case: a critical commentary on the application of Article 158 of the Basic Law', in Johannes

provision, and therefore it was not necessary to consider further the necessity test. While there is considerable force in Professor Chen's argument, the predominant provision test may simply be understood as the court saying that it is unnecessary to interpret the non-predominant provision. Applying the necessity test first does not resolve the difficulty of applying the test. The problem in this case is that two provisions, one an excluded provision and one a non-excluded provision, are involved. One approach is that whenever an excluded provision is involved, then Article 158 is engaged. The obvious danger of such an approach is that the excluded provision may be of marginal relevance only. Thus the court will still have to develop a requirement of a real need to interpret the provision in applying the necessity test. The other approach is that adopted by the court, namely to determine the predominant provision to be interpreted.

On the constitutional issue, the Court of Final Appeal held that as a piece of national law, the Basic Law bound the central government as well. The Provisional Legislative Council was appointed pursuant to a decision of the NPCSC, which was bound by the Basic Law. Thus, the Hong Kong court had jurisdiction to consider if the decision of the NPCSC was consistent with the Basic Law. Given the limited function and duration of the Provisional Legislative Council, the court further held that it fell within the ambit of the NPCSC's decision and was hence constitutional. Nonetheless, the mere possibility of the Hong Kong court reviewing the constitutionality of a decision of the NPCSC, a power which even the People's Supreme Court does not enjoy, caused alarm to the central government. This part of the judgment of the court was effectively reversed by the interpretation of the NPCSC, which interpretation casts considerable doubt over the independence of the judiciary and the integrity of the common-law system under the notion of 'one country, two systems'.

On representative government: the second and third interpretations

The second and third interpretations of the NPCSC have inflicted a different kind of wound. Both are related to the development of representative government in Hong Kong. The Basic Law has prescribed the composition and methods of formation of the first three Legislative Councils, and a procedure for their amendments after 2007 'if there is a need' to do so. There are similar provisions for the selection of the chief executive of the HKSAR government. In light of the strong public demand for the introduction of direct election by universal suffrage of the Chief Executive and the Legislative Council in 2007 and 2008 respectively, the NPCSC, in April 2004, decided, in the second interpretation, that the power to initiate any constitutional reform was vested in the NPCSC. The Chief Executive of the HKSAR should submit a report as regards whether there was any need to

Chan, H.L. Fu, and Yash Ghai (eds.), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong: Hong Kong University Press, 2000), pp. 113–41.

make an amendment, and the NPCSC should make a determination in light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress.[21] It later decided that there was no need to make any amendment to then prevailing methods of selection of the Chief Executive in 2007 and the formation of the Legislative Council in 2008, and while the size of the Legislative Council might be enlarged in 2008, there should be an equal number of members returned respectively by geographical election and by functional constituency election.[22]

The third interpretation was prompted by the resignation of Mr C.H. Tung, the first chief executive of the HKSAR, who tendered his resignation halfway through his second term of office. The issue was whether his successor should serve the remainder of the second term of office or whether he should serve a full term of five years. Prima facie, this was a relatively straightforward issue of statutory interpretation which could easily have been handled within the Hong Kong legal system. Indeed, an application for judicial review was lodged on 4 April 2005, inviting the Hong Kong court to interpret the relevant provisions in the Basic Law on this matter. However, at the invitation of the HKSAR government, the NPCSC rendered its third interpretation on 26 April 2005, deciding that the succeeding chief executive should only serve the remainder of the term of his predecessor. The reason for the hurried interpretation was that the succeeding chief executive had to be selected by 10 July, and the judicial process would take a long time to conclude, thereby adversely affecting the administration and the normal operation of the HKSAR government. Unfortunately, the impact of pre-empting an ongoing judicial process had not been fully considered.

The *Congo* case and its aftermath

On 26 August 2010, the NPCSC rendered its fourth interpretation of the Basic Law. This interpretation was different from the previous interpretations because there was a referral by the Court of Final Appeal for the first time. In *Democratic Republic of Congo* v. *FG Hemisphere Associates LLC*,[23] the applicant attempted to enforce in Hong Kong two international arbitral awards against the Congo government by asking the Hong Kong court to direct a PRC state-owned enterprise to pay the fees it owed to the Congo government under a mining agreement to satisfy the arbitral award. In defence, the Congo government pleaded state immunity and argued that, as a sovereign government, it was immune from civil suit in Hong Kong. The Court of Appeal rejected this plea of absolute state immunity, holding that, under the common law, state immunity would not apply if the act involved was a purely commercial act. The PRC government submitted

[21] BLHK, Art. 45. [22] See further below. [23] [2011] 4 HKC 151.

through the secretary for justice that the central government subscribed to the policy of absolute state immunity and that Hong Kong, being part of China, had to follow the same foreign policy. The Court of Final Appeal held, by a majority of three to two, that the extent of state immunity fell within 'acts of state such as defence and foreign affairs' under Article 19(3) of the Basic Law and hence, under Article 158(3) of the Basic Law, it was bound to refer the relevant questions to the NPCSC for interpretation, including whether the HKSAR was bound to apply the rules or policies on state immunity as determined by the central government and whether the common-law rule of restrictive state immunity was inconsistent with the Basic Law. A powerful minority judgment held that sovereignty was not invoked in this case as neither the PRC government nor the PRC state-owned enterprise was involved in the case. The issue was purely one of common law, and, under the common law, a state enjoyed only restrictive state immunity. The minority further held that even if a state enjoyed absolute state immunity, it had waived its immunity by subjecting itself to the arbitration proceedings. On the minority view, this would be the end of the matter and there was no need to refer any question to the NPCSC for interpretation.

In its interpretation, the NPCSC stated that the rules or policies on state immunity fell within the realm of foreign affairs of the state and the central government had the power to determine such rules or policies to be given effect uniformly in its territory, including the HKSAR. The determination of the rules or policies of state immunity was also 'an act of state such as defence and foreign affairs' within the meaning of Article 19(3) of the Basic Law and was hence outside the jurisdiction of Hong Kong's courts. Therefore, when questions of immunity from jurisdiction and immunity from execution of foreign states and their property arose in the course of judicial adjudication, the Hong Kong courts must apply and give effect to the rules or policies on state immunity as determined by the Central People's Government and any common-law principles were, to the extent of incompatibility with such rules or policies, not adopted as the laws of the HKSAR. Given the stances of the Ministry of Foreign Affairs that were expressed through the secretary for justice in the course of the legal proceedings in Hong Kong, the interpretation came as no surprise.

While there is much to be said in favour of powerful minority judgments, the majority cannot be faulted for their decision that this is a matter of foreign affairs which should be determined by the central government. Meanwhile, as the first referral from the Court of Final Appeal, it is significant that the court has laid down the following procedural markers:

1. The court will hear full submissions from the parties to the proceedings before it decides whether to make a referral.
2. In hearing submissions from the parties, the court is prepared to consider any submission of the central government through the secretary for justice.

3. The court frames the questions to be referred to the NPCSC for interpretation.
4. The court renders its opinion, tentative in nature, on the substantive issues so that the NPCSC has the benefit of a considered judgment of the highest court of the HKSAR that is well versed in the common-law approach.

From a royal edict to a constitutional convention

The interpretation of the Basic Law has become the natural battlefield for defining autonomy. In the first three incidents of interpretation of the Basic Law, the extent of autonomy is directly at issue. On the first occasion, it was done to address the difficult consequences arising from a decision of the Court of Final Appeal. This situation is not uncommon in many jurisdictions where the government has to deal with a judicial decision that has unpalatable economic, social or political consequences. In a common-law system, the usual manner of resolving this problem is to introduce new legislation or an amendment of the Constitution as appropriate. The legislative process would allow the community through its elected representatives an opportunity to debate the issues fully. In the case of Hong Kong, the power to amend the constitution lies in Beijing and not in Hong Kong. Taking a view that the Basic Law should not be lightly amended, the central government has resorted to the interpretation route to address this problem. As shown above, the first interpretation was done at the expense of the independence of the judiciary and at a great social cost.

On the second and third occasions of interpreting the Basic Law, the NPCSC conveyed a loud and clear message that, while prepared to tolerate a high degree of autonomy in internal affairs, Beijing, and not Hong Kong, is in control when it comes to the democratic development of the political process of Hong Kong. The central government is not content with just having a final veto power to disallow any proposed change to the method of formation of the Legislature or the selection of the Chief Executive, but wants full control to decide whether any change is proposed in the first place.

The NPCSC is obliged, before exercising its power of interpretation, to consult the Basic Law Committee, which has served as nothing more than a rubber stamp. With a highly asymmetrical power relationship, the NPCSC interpretations reaffirm that while Hong Kong enjoys a high degree of autonomy, the extent of autonomy rests on a rather precarious basis and lies at the pleasure of the central government.

Nevertheless, the process of interpretation has been subject to some refinements. In the first interpretation, the NPCSC just made the interpretation and announced it. In the second interpretation, some mainland members of the NPCSC came to Hong Kong to explain the interpretation after it had been made. In the third interpretation, some mainland members of the NPCSC met with some selected people and groups in Shenzhen before it made the interpretation. On the fourth

occasion, the Court of Final Appeal developed some procedural requirements to minimise the occurrence of an arbitrary decision, and these procedures could have the potential of being developed into constitutional conventions governing judicial referral to the NPCSC. It was also encouraging to see that the Ministry of Foreign Affairs was prepared to take part in the Hong Kong proceedings, albeit indirectly, through the submissions of the secretary for justice to the Hong Kong courts, not only on the question of referral but also on the substantive merits of the case. Instead of just handing down a royal edict, the prospect of making the interpretation process more interactive and more participatory seems hopeful.

National security: Article 23 legislation

National security is another controversial issue that may affect the extent of autonomy. For the central government, a major concern is that Hong Kong should not be turned into a counter-revolutionary base that may threaten the authority or legitimacy of the ruling government in the mainland.

Article 23 of the Basic Law provides that

> Hong Kong shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

There is no national-security law as such in Hong Kong, although some of these activities are already prohibited by Hong Kong law. In late 2002, the government proposed to introduce legislation to implement Article 23. The proposal immediately sparked off strong opposition from many quarters, worrying that the proposed legislation had gone well beyond the existing law and could be used as a means to suppress any dissenting views. Those who supported the proposed legislation argued that no country could afford not to have national-security law, and reiterated the threat that Hong Kong could be exploited as a counter-revolutionary base. Those who opposed the proposed legislation criticised the draconian nature of the proposals, and argued that the existing law was more than adequate to protect national security. A highly influential group known as the Article 23 Concern Group, which comprised four former chairpersons of the Hong Kong Bar Association, was formed and soon became the figurative leaders of the opposition. The government's case was not helped by its refusal to publish a White Bill for public consultation (as it perceived that the call for a White Bill was nothing more than a delaying tactic by the opposition) when there was no urgency for the bill, or by its insistence on pushing through the legislation, believing that it had sufficient votes at the Legislative Council to secure its passage.

On 1 July 2003, instead of celebrating the seventh anniversary of the resumption of sovereignty of Hong Kong, about 500,000 people went on the streets to demonstrate against, among other things, the proposed national-security law. The SARS epidemic and the economic depression were among the contributing causes of this large-scale demonstration. Despite the large turnout in the demonstration, the government still decided to push through the legislation until James Tien, chairman of the Liberal Party, resigned from the Executive Council shortly after the demonstration and indicated that his party would not support the proposed legislation. By then the government had to accept that it would not have sufficient votes in the Legislative Council to secure the passage of the bill, and as a result it withdrew the bill.

While the withdrawal of the national-security bill was heralded as a victory of the people's power, the victory was ephemeral. The real issue surrounding Article 23 is not whether Hong Kong is under any threat of activities that may endanger national security, but how far the central government is prepared to tolerate Hong Kong as a base for all kinds of 'politically undesirable activities' against the central government.

III. INTERNAL AUTONOMY AND THE DEVELOPMENT OF CONSTITUTIONALISM

Once we move away from central/local relationships, Hong Kong does enjoy a high degree of internal autonomy (except in the area of democratic development, which will be addressed below). In a common-law system like Hong Kong, the courts, and particularly the Court of Final Appeal, play a pivotal role in constitutional development. Space constraints here will not permit a full analysis of the role of the courts in constitutional development. This section will focus on a few recent decisions that have a bearing on the autonomy of Hong Kong.

Independence of the judiciary

An independent judiciary lies at the heart of the common-law system and the rule of law. For political reasons, it was inappropriate to retain the Judicial Committee of the Privy Council as the court of final appeal for Hong Kong after the changeover. Hence, the Basic Law provides for the establishment of the Court of Final Appeal, which may invite judges from other common-law jurisdictions to serve on the court. Upon its establishment, the first chief justice set up a panel of overseas judges, and established a convention that there will be an overseas judge in every substantive appeal. Hong Kong is fortunate to have the service of some of the most distinguished jurists in the world of common law. Their extensive knowledge and experience have enriched the jurisprudence of the Hong Kong courts, and their stature and undoubted impartiality have strengthened the credibility and

reputation of the Court of Final Appeal and the judiciary of Hong Kong. Independence of the judiciary is further buttressed by various systemic guarantees in the Basic Law, including the system of appointment, promotion and removal of judges.

As discussed above, the first interpretation of the NPCSC posed one of the first major challenges to the independence of the judiciary in Hong Kong. There were concerns that a political organ could easily reverse the considered judgment of the Court of Final Appeal. There were also concerns whether, as a result, a judge would always have to look over his shoulder to take into account how his decision would be received by the central government. In *Chong Fung Yuen* v. *Director of Immigration*, the court dispelled such concerns by emphasising the independent judicial power and its exclusive role of interpreting the law, subject only to the limit on the court's jurisdiction.[24] It was held that these principles flow from the doctrine of separation of powers; they are the basic principles of the common law that have been preserved and maintained in Hong Kong by the Basic Law. The chief justice further explained this common-law approach to interpretation as an objective process that is not influenced or dictated by the intent of the lawmaker or by any extrinsic factors other than the intent of the legislature as expressed through the language of the legislation:

> The courts' role under the common law in interpreting the Basic Law is to construe the language used in the text of the instrument in order to ascertain *the legislative intent as expressed in the language*. Their task is not to ascertain the intent of the lawmaker on its own. Their duty is to ascertain *what was meant by the language used* and to give effect to *the legislative intent as expressed in the language*. It is the text of the enactment which is the law and it is regarded as important both that the law should be certain and that it should be ascertainable by the citizen.[25]

In the same case, the court tried to minimise the influence of the NPCSC by labelling the process a legislative process no different from other legislative processes.[26] Subject to any constitutional constraint, the legislature is free to reverse a judgment of the court that the legislature considers unacceptable politically, socially or economically. This phenomenon is a consequence of a separation of powers, and the check against legislative abuse lies in the representative legislature. Thus, if necessary, the Constitution can be amended. The only difference is that the Basic Law can be amended or 'interpreted' in a way that is not familiar to the

[24] (2001) 4 HKCFAR 211 at 223. [25] Ibid., italics original.

[26] While this explanation of distancing the NPCSC interpretation from the judicial process helps preserve the independence of the judiciary, it does not work well in the case of judicial referral. For more detail, see J. Chan, 'Basic Law and constitutional review' (2007) 37 *Hong Kong Law Journal* 407 at 415–19; Chan and Lim, *Law of the Hong Kong Constitution*, paras. 2.077–2.090, 10.061–10.063 and 16.017–16.022.

common-law system, but this is a political fact that has to be acknowledged, if not accepted. The court, however, should not pay heed to how the legislature or the NPCSC would react to its judicial interpretation, for otherwise the independence of the judiciary would have been compromised.

In *Chen Li Hung* v. *Ting Lei Miao*, the court faced the highly political issue of recognition of Taiwan as a political entity.[27] The issue is whether the Hong Kong court should recognise and give effect in Hong Kong to a bankruptcy order made by the Taiwan court, given that the Taiwanese government was not recognised by the PRC government. The court held that the order would be given effect in Hong Kong as the rights covered by the order were private rights; that giving effect to such order accorded with the interest of justice, the dictates of common sense and the needs of law and order; and that giving the order effect would not be inimical to the sovereign's interests or otherwise contrary to public policy. It drew a distinction between recognition of a usurper or rebellious regime and giving effect to the order of a court with de facto power without de jure authority. Quoting from Lord Donaldson MR that 'it is one thing to treat a state or government as being "without the law" but quite another to treat the inhabitants of its territory as "outlaws" who cannot effectively marry, beget legitimate children, purchase goods on credit or undertake countless day-to-day activities having legal consequences',[28] the court steered skilfully and carefully between law and politics and was prepared to come to a pragmatic decision in accordance with justice and common sense by avoiding high-level politics, even when its decision was to be founded upon a single dictum of Lord Wilberforce in a case forty years ago.[29] Lord Cooke found that, as an overseas judge, he might have a particular role to play. He summed up succinctly the sentiment and approach of the court in his separate concurring judgment:

> Viewing the case from a different perspective, the issue is essentially between the Taiwan creditors on the one hand and Mr Ting, Madam Chen and Mr Chan on the other. It is not an issue with which national politics have any natural connection. They should not be allowed to obtrude into or overshadow a question of the private rights and day-to-day affairs of ordinary people. The ordinary principles of private international law should be applied without importing extraneous high-level public controversy.[30]

Human rights

The most significant contribution of the Court of Final Appeal lies in the area of human rights. On the one hand, the court soon established its reputation as a

[27] [2000] 1 HKC 461. [28] *GUR Corp* v. *Trust Bank of Africa Ltd* [1987] 1 QB 599 at 622.
[29] *Carl Zeiss Stiftung* v. *Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 954.
[30] [2000] 1 HKC 461 at 478.

liberal court, and on the other hand it has displayed great sensitivity in balancing competing demands and values in the community. In *Leung Kwok Hung* v. *HKSAR*, the Court of Final Appeal set out the approach as such:

> It is well established in our jurisprudence that the courts must give such a fundamental right [to freedom of peaceful assembly] a generous interpretation so as to give individuals its full measure. On the other hand, restrictions on such a fundamental right must be narrowly interpreted. Plainly, the burden is on the Government to justify any restriction. This approach to constitutional review involving fundamental rights, which has been adopted by the Court, is consistent with that followed in many jurisdictions. Needless to say, in a society governed by the rule of law, the courts must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be placed on them.[31]

Applying this approach, the court has in the past decade laid down many enlightened and interesting decisions, trying to safeguard cherished fundamental rights and freedoms on the one hand and to recognise the complexity of modern life and governance on the other. Thus, the court has struck down statutory provisions reversing the onus of proof in criminal prosecution,[32] provisions imposing a blanket restriction on legal representation in disciplinary proceedings,[33] unreasonable restrictions on advertising by the medical profession,[34] a provision empowering the police to prevent the holding of a public assembly on the vague ground of *ordre public*,[35] provisions introducing a blanket regime to authorise covert surveillance,[36] various gender-based discriminatory sexual offences,[37] sexually discriminatory restrictions on the right to elect village representatives in the indigenous villages in the New Territories,[38] provisions denying prisoners' right to vote while serving a prison sentence,[39] and the seven-year residence requirement for Comprehensive Social Welfare assistance.[40] In a celebrated decision it held that, given the justification of free speech, the defence of fair comment in defamation was not defeated by the mere presence of malice.[41] In another important decision, the court suspended a declaration of unconstitutionality for eight months to give time to the

[31] (2005) 8 HKCFAR 229, para 16. See also *Yeung May Wan* v. *HKSAR* (2005) 8 HKCFAR 137.
[32] *Hung Chan Wa* v. *HKSAR* (2006) 9 HKCFAR 614.
[33] *Lam Siu Po* v. *Commissioner for Police* (2009) 12 HKCFAR 237.
[34] *Kwok Hay Kwong* v. *Medical Council* [2008] 3 HKLRD 524.
[35] *Leung Kwok Hung* v. *HKSAR* (2005) 8 HKCFAR 229.
[36] *Leung Kwok Hung* v. *Chief Executive of the HKSAR* [2006] HKEC 816.
[37] *Leung* v. *Secretary for Justice* [2006] 4 HKLRD 211.
[38] *Secretary for Justice* v. *Chan Wah* (2000) 3 HKCFAR 459.
[39] *Chan Kin Sum* v. *Secretary for Justice* [2009] 2 HKLRD 166.
[40] *Kong Yunming* v. *Director of Social Welfare*, FACV 2/2013 (17 Dec. 2013) (CFA).
[41] *Cheng Albert* v. *Tse Wai Chun Paul* [2000] 3 HKLRD 418.

government to introduce necessary remedial legislation.[42] At the same time, it upheld the controversial flag desecration offences,[43] the broadcasting licensing regime,[44] the school-based management system,[45] and differential hospital charges for obstetrics services in public hospitals between Hong Kong Permanent Residents and non-Hong Kong Permanent Residents.[46]

Equality and non-discrimination

Common law is weak in offering protection against discriminatory practices. If the discriminatory practices are undertaken by a public authority, public law may offer some protection. However, if the discriminatory measures are taken by a private body, the sacrosanct notion of freedom of contract will leave the victim of discrimination with little remedy. In this regard, both the legislature and the court have made major inroads in cutting through the morass of freedom of contract by offering innovative protection and remedies.

When the Bill of Rights introduced for the first time the general principle against discrimination into Hong Kong domestic law the general principle against discrimination, the anti-discriminatory provisions were opposed by the private sector on the ground that discrimination was such a complex area that it should only be introduced with an elaborate legislative regime carefully balancing the rights and responsibilities of the people affected and should not be introduced as a vague general principle.[47] Ironically, when the government proposed to introduce detailed legislation on this subject a few years later, the proposal was opposed by more or less the same group on the ground that discrimination was best combated by education and not by legislation, and that legislation would impose an undue financial burden on the business sector. When the government showed no intention of introducing legislation, the Hon. Anna Wu decided to introduce by way of a private member's bill a comprehensive non-discrimination bill. This bill put strong pressure on the government, which eventually agreed, as a compromise,

[42] *Koo Sze Yiu* v. *Chief Executive HKSAR* (2006) 9 HKCFAR 441. See also Andrew Li, 'Reflections on the retrospective and prospective effect of constitutional judgments', in Jessica Young and Rebecca Lee (eds.), *The Common Law Lecture Series 2010* (Hong Kong: University of Hong Kong, 2011), pp. 21–55; and Johannes Chan, 'Some reflections on administrative law remedies' (2009) 39(2) *Hong Kong Law Journal* 321.

[43] *Ng Kung Siu* v. *HKSAR* [1999] 3 HKLRD 907.

[44] *Secretary for Justice* v. *Ocean Technology Ltd* [2009] 3 HKLRD F1.

[45] *Catholic Diocese of Hong Kong* v. *Secretary for Justice* (2011) 14 HKCFAR 754.

[46] *Fok Chun Wa* v. *Hospital Authority* (2012) 15 HKCFAR 409.

[47] A London silk was engaged by the banking sector to argue how undesirable it would be to introduce a general principle of non-discrimination in the Bill of Rights. See Andrew Byrnes, 'The Hong Kong Bill of Rights and relations between private individuals', in Johannes Chan and Yash Ghai (eds.), *The Hong Kong Bill of Rights: A Comparative Approach* (Hong Kong, Singapore and Malaysia: Butterworths, 1993), Chapter 5, at pp. 83–8.

to introduce not a comprehensive bill, but a bill to prohibit discrimination on the ground of sex and disability. The Sex Discrimination Ordinance and the Disability Discrimination Ordinance, followed later by the Family Status Discrimination Ordinance and the Race Discrimination Ordinance, were introduced, alongside the establishment of the Equal Opportunities Commission. While these statutes do not cover the full range of discrimination, they do provide a useful statutory framework that begins to change public attitudes and practices.

Mere difference in treatment is not discrimination. It is only when the difference in treatment cannot be justified that it becomes discrimination.[48] In deciding whether the difference in treatment can be justified, the court considers whether the difference in treatment is rationally related and proportionate to the objectives to be achieved. Thus, the court held that an exclusion of the male, but not the female, non-indigenous spouse of an indigenous inhabitant of the New Territories from the election for the village representative was unjustifiable and hence discriminatory.[49] It also found different age requirements for consent to buggery among males and to sexual intercourse between male and female unjustified.[50] The most controversial case is probably *Equal Opportunities Commission* v. *Director for Education*, where the court held that preferential treatment in favour of male students in the allocation of secondary-school places was unjustified and discriminatory, partly on the ground of failure of the government to produce evidence that boys were late bloomers and partly because the system had been in operation for more than twenty years and could not be regarded as a temporary remedial measure.[51]

Social and economic rights

While the courts have a fairly good record in protecting civil and political rights, they have a mixed record in relation to social and economic rights. In *Chan To Foon* v. *Director of Immigration*,[52] the applicants invoked the right to family life under the International Covenant of Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of Children (CRC) in support of a claim that the mother enjoyed a legitimate expectation to remain in Hong Kong and live with her minor children, as did the rest of the family members. The court held, following

[48] *Secretary for Justice* v. *Yau Yuk Lung* (2007) 10 HKCFAR 335.
[49] *Secretary for Justice* v. *Chan Wah* (2000) 3 HKCFAR 459.
[50] *Leung* v. *Secretary for Justice* [2006] 4 HKLRD 211.
[51] [2001] 2 HKLRD 690.
[52] [2001] 3 HKLRD 109 at 131–4. See also *Chan Mei Yee* v. *Director of Immigration* [2000] HKEC 788; *Mok Chi Hung* v. *Director of Immigration* [2001] 2 HKLRD 125. For a useful commentary, see Carole Petersen, 'Embracing universal standards? The role of human rights treaties in Hong Kong's constitutional jurisprudence', in Hualing Fu, Lison Harris and Simon Young (eds.), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (New York: Palgrave Macmillan, 2007), pp. 33–53.

Chan Mei Yee v. *Director of Immigration*,[53] that while ratification of a treaty might give rise to a legitimate expectation, such legitimate expectation would be defeated by the express reservations in the ICCPR and the CRC in relation to the stay of illegal immigrants in Hong Kong. There was no similar reservation in the ICESCR, but Hartmann J held that the ICESCR was promotional and aspirational in nature and thus could not create legally enforceable obligations. This conclusion is odd, as the claimant was relying on virtually the same right in both the ICCPR and the ICESCR. It would be difficult to support a conclusion that the right to family life under the ICCPR is justiciable whereas the same right under the ICESCR is merely aspirational. The judgment attracted strong criticism from the Committee on Economic, Social and Cultural Rights. In its Concluding Observation on the Initial Report of the Hong Kong Special Administrative Region, the committee, in unusually strong language, 'regrets' the view taken that the ICESCR was merely 'promotional' or 'aspirational' in nature. It reiterated that such views were 'based on a mistaken understanding of the legal obligations arising from the Covenant', and reminded the government that 'the provisions of the Covenant constitute a legal obligation on the part of the State parties'. The committee 'urges the Government not to argue in court proceedings that the Covenant is only "promotional" or "aspirational" in nature'.[54] In its reply, the government stated, in a half-hearted manner, that 'we note the Committee's observation that the Covenant is not merely "promotional" or "aspirational" in nature and accept that it creates binding obligations at the international level'.[55]

The first generation of social and economic right cases were mostly related to the right of abode and immigration matters. Given the small vicinity, dense population and economic success of Hong Kong, which attracts a lot of economic migrants, it is understandable that the courts have not been very sympathetic to any argument that may weaken immigration control. These cases were further complicated by the presence of a reservation clause in the ICCPR and the Bill of Rights that essentially exempts from their scrutiny all immigration decisions governing the entry into, stay in and departure from Hong Kong. The second generation of social and economic rights cases, which began to appear after 2006, went beyond immigration matters. While the court was prepared to take social and economic rights more seriously at this stage, it was reluctant to interfere with executive decisions or legislative choices by adopting a wide margin of appreciation or invoking the doctrine of due deference, and, more recently, by adopting a lower level of intensity of review.[56]

[53] [2000] HKEC 788. [54] UN Doc E/C.12/1/Add 58, paras. 16 and 27 (11 May 2001).

[55] Para 2.11–2.12, 2nd Periodic Report of the HKSAR Government.

[56] See *Kong Yunming* v. *Director of Social Welfare* [2009] 4 HKLRD 382 (CFI); *Catholic Diocese of Hong Kong* v. *Secretary for Justice* [2007] 4 HKLRD 483 (CFI). See also Cora Chan, 'Judicial deference at work: some reflections on Chan Kin Sum and Kong Yun Ming' (2010) 40 *Hong Kong Law Journal* 1.

Deference is a controversial, if not also a dangerous, concept.[57] In a system subscribing to the doctrine of separation of powers, there will be areas which are within the exclusive domain of the three branches of government. The court, in exercising its judicial power, should not step into the shoes of the executive. *Wednesbury* unreasonableness is a classic example where the court tries to confine merits review to the more extreme cases. The doctrine of proportionality requires the court to exercise a heightened degree of scrutiny when human rights are at stake. The doctrine of deference tries to put a brake on aggressive judicial review on merits. It is traditionally justified either on democratic grounds, namely that the court lacks the mandate and legitimacy to second-guess the wisdom of a democratically elected body, or on the ground of a lack of expertise and information. While these are powerful justifications, the risk is that whenever the doctrine of deference is invoked, it usually results in a rather loose standard of review, and the court fails to consider the justifications at all. It has been less of a problem in civil and political rights, where the court stressed that 'deference must not be carried to the point of relieving the government of the burden which a constitution places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable'. However, the same degree of vigilance is not seen in social and economic rights.

In *Kong Yunming* v. *Director of Social Welfare*, the issue was whether the introduction of an eligibility requirement of seven years' residence violated the right to social welfare of Hong Kong Residents (who were granted a right to enter Hong Kong for settlement but have not yet acquired the status of Hong Kong Permanent Residents), contrary to Article 36 of the Basic Law. Both the Court of First Instance and the Court of Appeal emphasised that it would be slow to enter into questions concerning the allocation of scarce resources, an issue that is inherent in the adjudication of social and economic rights.[58] Stock JA pointed out that Article 36 of the Basic Law did not specify any particular type or level of social welfare. Article 145 further provides that the government can, 'on the basis of the previous social welfare system', formulate policies on the development and improvement of this system in light of economic conditions and social needs. Thus, the Court of Appeal concluded that the determinations of appropriate kinds of social welfare would be a matter for the executive government. The Court of First Instance suggested that the court should give deference to the decision of the executive government and should not interfere with its decision unless its decision was discriminatory. While Stock JA preferred not to adopt the notion of deference, the learned judge held that the court would adopt a low level of intensity of review

[57] See Jeffrey Jowell, 'Judicial deference: servility, civility or institutional capacity?' (2003) *Public Law* 492–601; T.R.S. Allan, 'human rights and judicial review: a critique of "due deference"' (2006) 63 *Cambridge Law Journal* 671.

[58] CACV 185/2009 (17 Feb 2012).

in matters involving government policy on allocation of resources. Lam J, in his concurring judgment, went further to hold that the court would not intervene unless the decision of the government was *Wednesbury* unreasonable, a test which has long been abandoned in human rights cases. The level of judicial scrutiny is so low that the effect of the judgment would render the right to social welfare nothing more than rhetorical. While it is not argued that the court should step into the shoes of the executive government, it must be remembered that it is for the court to determine legality, and it is not easy to determine legality without scrutinising the justifications put forward by the government in restricting fundamental rights, whether civil and political or social and economic in nature.

In conclusion, on the whole, the courts have adopted a fairly liberal approach towards the protection of civil and political rights. They have adopted a sensible and pragmatic approach that tries to secure a fair balance among competing interests with a bias in favour of individual rights and freedoms. Yet, they have been more cautious and conservative in relation to economic, social and cultural rights. While such caution may be understandable, the prevalent wisdom in international human rights jurisprudence is that while there are some differences between these two sets of rights, the differences are more apparent than real in most cases, as the classification of these rights is not watertight and the scopes of many rights overlap with those of many others.[59] The distinction may be further blurred when rights such as the right to family life are to be found in both the ICCPR and the ICESCR. There are some indications that the court may be prepared to take social and economic rights more seriously in the future, while at the same time affording the government a fairly wide margin of appreciation on the basis that social and economic rights involve the allocation of resources, which is something that falls outside the competence of the judiciary. The full extent of this approach is yet to be tested, as, after all, very few rights are free in the sense that their protection would not involve resources. While the court has advised against adopting the doctrine of deference, the current stage of jurisprudence seems to be a matter of semantics rather than substance in that the term 'deference' is merely replaced by a different formulation of a low level of scrutiny. The difficulty is that a low level of scrutiny will easily result in a failure to exercise any meaningful judicial scrutiny of executive or legislative decisions. It is not easy to draw the dividing line, though a liberal and enlightened approach has recently been adopted by the Court of Final Appeal in the *Kong Yunming* case mentioned above. Here the courts will enter into the difficult task of determining complex questions of fact, degree and value. At this stage, a more promising and practical approach towards litigating social and

[59] For example, the right to self-determination and the right to the family exist in both the ICCPR and the ICESCR. The right to strike and the right to form trade unions are found in the ICESCR, which may also form part of the right to freedom of expression and peaceful assembly and the right to association.

economic rights would be to rely on alternative, more conventional grounds such as the right to equality before the law, although the court is right that social and economic rights encompass more than a right not to be discriminated against in their enjoyment.

IV. DEMOCRATIC DEVELOPMENT IN HONG KONG

Another litmus test of autonomy would be the extent of self-government in Hong Kong.

Article 68 of the Basic Law stipulates that the Legislative Council of the HKSAR 'shall be constituted by election'. The method for forming the Legislative Council shall be specified in the light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. The ultimate aim is the election of all the members of the Legislative Council by universal suffrage. The composition of the second and third terms of the Legislative Council is stipulated in Annex II of the Basic Law, which further provides that if there is a need to amend the method of formation of the Legislative Council after 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the chief executive, and the amendments shall be reported to the NPCSC for the record.

The democratic movement in Hong Kong gathered momentum after the massive demonstration in July 2003 leading to the withdrawal by the government of the controversial national security bill. There was strong public demand for a fully elected Legislative Council in 2008. In April 2004, the NPCSC decided on its own motion in its second interpretation that the power to initiate any democratic reform was vested in the NPCSC, reminding the people of Hong Kong that there could not be any constitutional reform without the consent of the central government. The NPCSC laid down a procedure that the chief executive of the HKSAR shall submit a report regarding whether there is any need to make an amendment to the provisions of Annex II, and the NPCSC shall make a determination in light of the actual situation in the HKSAR and in accordance with the principle of gradual and orderly progress. On the basis that there was no consensus in Hong Kong on the abolition of functional constituency election, the NPCSC subsequently decided that there was no need to change the method of formation of the Legislative Council in 2008. Minor changes to increase the number of directly elected seats were permissible, provided that the proportion between the members returned respectively by geographical election and functional constituency election should remain unchanged.

The Constitutional Task Force of the HKSAR government conducted further public consultations on the further reform of the Legislative Council in 2008, resulting in the publication of its Fifth Report in October 2005. It proposed, among other things, that the membership of the Legislative Council be expanded from sixty to seventy. Half of the ten new seats would be returned by geographical direct

election, and the remaining half would be returned by election among members of the district councillors, who themselves were returned by both geographical election and appointment by the government. The pan-democrats argued that the appointed district councillors (about 20 per cent of all district councillors) should be excluded from the electoral college of district councillors, and that the government should provide a timetable and road map for the introduction of universal suffrage. Negotiations broke down, and the proposal was narrowly defeated as the government was unable to secure a two-thirds majority of the members of the Legislative Council to endorse the proposal – a move that sharply divided the pan-democrats and the pro-establishment forces and reinforced the suspicion and distrust of the central government towards the pan-democrats in Hong Kong.

Having lost the battle for introducing direct election in 2008, the pan-democrats shifted their focus to demand direct elections of both the Legislative Council and the chief executive in 2012. Further consultations were carried out in Hong Kong. Under Article 45 of the Basic Law, the chief executive was selected by an Election Committee, which was supposed to be a broadly representative body comprising members from four major sectors.[60] Similar to the arrangement in Annex II for the Legislative Council, Annex I of the Basic Law provides that if there is any need to change the method for selecting the chief executive after 2007, such amendments shall be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the chief executive, except that, unlike the case for the Legislative Council, such amendments shall be reported to the NPCSC for approval and not just for record. The Election Committee was criticised for its unrepresentativeness, as its members are drawn from elite groups that resemble the functional constituency election.

In December 2007, the NPCSC rejected the claim for direct election in 2012, but laid down a timetable that the chief executive would be returned by direct election in 2017, and the Legislative Council could be returned by direct election thereafter, which means 2020 at the earliest. While this may still be disappointing to many pan-democrats who had been campaigning for direct election since the 1980s, the NPCSC decision at least set down clearly the direction and the time frame to reach the destination.

In 2009, the government published a further consultation document on the selection of the chief executive and the Legislative Council in 2012. It revived the defeated reform package in 2005 with two amendments, namely that the appointed district councillors would be excluded from the electoral college as previously

[60] For the second term onward, the Election Committee comprises 800 members, a quarter of which come from each of the four sectors of (1) the industrial, commercial and financial sectors; (2) the professions; (3) labour, social services, religious and other sectors; and (4) members of the Legislative Council, representatives of district-based organisations, Hong Kong deputies to the NPC, and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference.

demanded by the pan-democrats, and the reduction in size of the Election Committee responsible for the election of the chief executive. This time the pan-democrats split among themselves. The more radical faction insisted on the abolition of functional constituency election in 2012, and attempted to force a de facto referendum with a few directly elected members resigning from the Legislative Council and successfully getting re-elected in a by-election on a single-issue platform of direct election of both the chief executive and the Legislative Council in 2012 – a controversial move which antagonised the central government. The moderate faction preferred to conciliate with a hope to enter into a more constructive dialogue with the central government on the details of implementing the NPCSC's decision in 2009. With the support of the moderate faction, the proposal was able to secure the necessary majority at the Legislative Council.

While the road map to full democracy has been drawn, there are still a number of unsettled issues. As far as the chief executive is concerned, the NPCSC has decided that the chief executive will be returned by universal suffrage in 2017. The challenge for the central government is how far it is prepared to tolerate a genuine election where the outcome will be unpredictable. The only way to ensure a predictable result is to impose restrictions on the nomination process so that only candidates acceptable to Beijing pass through it. The details of the nomination process are still to be worked out. As far as the Legislative Council is concerned, the central government has not committed itself to a definite date for direct election, save that this could not happen before the direct election of the chief executive in 2017. At present half of the Legislative Council is returned by functional constituency election. Debates are still ongoing as to whether functional constituency election is consistent with election by universal suffrage, and whether there are ways to preserve functional constituency election such as having a system of two votes for every eligible elector. Apart from the vested interests of the functional constituencies to prolong their influence in the political process, any reform is plagued by deep-seated mutual suspicion between the central government and the pan-democrats, even when the moderate faction of the pan-democrats have taken the initiative to attempt to mend the relationship.

V. REFLECTIONS ON THE FUTURE

Hong Kong was promised a high degree of autonomy. This chapter has attempted to analyse this promise in light of central–local relationships, internal autonomy on protection of fundamental rights and freedoms, and development of representative government. On the whole, in the last fifteen years, this promise has by and large been fulfilled. There is little interference from the Central Government in relation to the internal affairs of Hong Kong, save in the area of democratic development. Fundamental rights and freedoms are upheld. Independence of the judiciary has been maintained, and the courts have lived up to the expectation of being liberal

and vigilant in safeguarding fundamental rights and liberties. There are inherent problems with the model of 'one country, two systems', notably in the demarcation of jurisdiction between the central government and the HKSAR. Thus, it is not surprising that, in the early days, the court tried to push the extent of its jurisdiction, albeit with limited success. The precise boundaries are still fluid, and can only be worked out with the passage of time. There are also systemic conflicts, arising from the co-existence and interaction of two different legal systems and legal cultures. In the recent *Congo* case, the Court of Final Appeal tried to lay down constitutional conventions to streamline the process of judicial referral to the NPCSC for interpretation of the Basic Law. This laudable attempt to reduce the arbitrariness of the process may shed light on a new direction of development in this asymmetrical model of autonomy.

The picture is less promising in the area of democratic development. The pace of democratic development was tightly controlled by the central government. With a well-established legal system, a high level of education, a high level of civic consciousness, a large and stable middle class, an affluent economy, a highly efficient society, a clean civil service and a relatively stable political environment, Hong Kong has all the necessary attributes to allow universal suffrage. Yet, until now, half of the members of the Legislative Council are not elected by universal suffrage, and the chief executive is still elected by a small privileged group. A major breakthrough was made in December 2007 when the NPCSC decided that the chief executive would be elected by universal suffrage in 2017, as would the Legislative Council thereafter. Yet many people are sceptical whether there will be genuine election by universal suffrage, and such concern is supported for at least three reasons. First, many details are still to be worked out, such as the nomination process for the chief executive and the future role of functional constituencies, if any, in the Legislative Council. Apart from tightly controlling the pace of democratisation in Hong Kong, the Liaison Office of the Central Government in Hong Kong has played an active role in co-ordinating the pro-establishment/pro-China candidates in various elections for the District Council and the Legislative Council in the past. In the election of the chief executive in 2012, the Liaison Office of the Central Government even adopted a high profile in lobbying members of the Election Committee at the final stage of the election.[61] There is no reason to believe that the central government will be indifferent to the outcome of the election whatever the system of election is, or will refrain from exerting influence, if not interference, until its wishes are honoured. Second, Hong Kong has suffered from an awkward political system in that those in power do not have a popular mandate and those who have a popular mandate have no chance to be in power. This has resulted in a rather strenuous relationship between the legislature

[61] The Election Committee comprises 1,200 members.

and the executive government in the past; and loose political coalitions have not proved to work. One of the solutions is to develop party politics, which is in any event necessary for universal suffrage. Yet, there is a strong degree of mutual distrust between the democratic camp in Hong Kong and the central government, which will in turn provide a strong incentive for the central government to interfere with any election to prevent the democratic camp from gaining control of the legislature or the executive government.

This leads to a more fundamental issue on the different understandings of autonomy of the central government and the people of the HKSAR. As perceptively pointed out by Professor Albert Chen, the pro-democrats understand autonomy as a Western liberal concept under which the people of Hong Kong should be allowed to freely elect their own legislature and chief executive, and that the central government should leave Hong Kong alone as long as it stays within the Basic Law.[62] In contrast, Beijing's understanding of autonomy is that democratisation in Hong Kong is acceptable only if it will result in 'patriots ruling Hong Kong'. The concession by the central government is that Hong Kong will be ruled by Hong Kong people, not by cadres sent from Beijing, but these 'Hong Kong people' have to be those who enjoy the trust and confidence of the central government, and not merely the trust and confidence of the people of Hong Kong. Therefore, full democracy will only be allowed if such full democracy produces a legislature and a government dominated by 'patriots'. Until social and political conditions in Hong Kong reach that point, democracy in Hong Kong will only be a contrived form of democracy – or 'semi-democracy', as Professor Chen describes it – where free election is permitted only among candidates who are acceptable to the central government.

Another ideological concern of the central government is that freedom and liberty in Hong Kong are tolerated only to the extent that Hong Kong will not become a counter-revolutionary base that may threaten the legitimacy or authority of the central government. Hong Kong is only a city in China, albeit an important global financial centre. It has an important role to play in the economic reform of China. The central government is pleased to see economic growth in Hong Kong. Democratic development is seen as a necessary means to maintain the stability and prosperity of Hong Kong; that is, democracy is perceived as a means to maintain economic success and should never threaten the thriving economy of Hong Kong which is seen to be supported by the successful business sector. Therefore, the design of the political system is heavily tilted in favour of the business sector, whereas democracy is associated with a welfare state that will pull back economic development. In the final analysis, to the central government, 'one country, two systems' means nothing more than 'one country, two economic systems'.

[62] Albert Chen, 'Development of representative government', in Chan and Lim, *Law of the Hong Kong Constitution*, Chapter 8, at paras 8.081–8.086.

At the same time, the role of Hong Kong in the development of China has changed over time. It was intended to be a showcase for Taiwan, but the significance of Hong Kong in this respect has diminished over time, especially since the Kuomintang, which has adopted a more conciliatory approach towards the mainland, has regained power in Taiwan. In contrast, Hong Kong becomes increasingly important in the overall strategic development of China. In the early days after the handover, Hong Kong was left out of the national strategic development plan. In 2010, Hong Kong was for the first time included in the national strategic development plan and was designated to play a prominent role as a leading international financial centre and to lead the development in this regard in the Pearl River Delta region. This news is good for Hong Kong as it is becoming important to China in its own right, providing that it is able to continue to play a leading economic and financial role and to maintain its competitive edge in the rapid economic development of China. At the same time, as the economic power and global influence of China continue to grow, the success of Hong Kong is increasingly attributed by some quarters close to the central government to the benevolence of the central government and no longer to the legal system and the core values of Hong Kong. It has been said that Hong Kong can only maintain its status as an international financial centre so long as the central government wishes it to. Such an attitude appears to be gaining ground as China becomes more confident of herself after the global financial crisis in the early 2010s when China played a pivotal role in curbing a global currency crisis. Such emerging phenomena, which may be described as a success without an anchor in core values, are a problem that China has to face in her economic and social development and may, if allowed to grow unchecked, ultimately destroy the very concept of 'one country, two systems' itself.

VI. POSTSCRIPT

Since this chapter was completed, the Court of Final Appeal has handed down its judgment in *Kong Yunming* v. *Director of Social Welfare* (FACV 2/2013, 17 Dec. 2013), overruling the Court of Appeal's decision. The Court criticised the Court of Appeal's approach for failing to give any meaning to the right to social welfare. Having scrutinised the justifications put forward by the government, the Court found that the seven-year residence requirement, which replaced the previous one-year residence requirement for Comprehensive Social Welfare Benefit, was not rationally connected to any legitimate aim and was wholly disproportionate in effect, given the contradictory policy consequences, the aim to provide a safety net to those who could not meet their basic needs, and the socially insubstantial benefits. The Court adopted a far more substantial level of scrutiny over the justifications put forward by the government. Due to space constraint, the full implications of this important decision will have to be explored elsewhere.

9

Constitutional developments in Vietnam in the first decade of the twenty-first century

Bui Ngoc Son

I. INTRODUCTION

Under the leadership of the Indochinese Communist Party (currently the Communist Party of Vietnam), the August 1945 Revolution brought perdition upon three-quarters of a century of French colonization in Vietnam, followed by the promulgation of the Constitution of the Democratic Republic of Vietnam in November 1946, the first constitution in the country, as well as in Southeast Asia. In the words of Bernard B. Fall (1926–67), a renowned American journalist and analyst, "the Constitution gives a generally 'Western democratic' impression to the readers ... It appears designed to provide 'reader appeal' in the Anglo-Saxon countries, and particularly the United States."[1] After the 1946 Western-style democratic constitution, Vietnam has experienced three constitutions enacted in 1959, 1980, and 1992, with strong influences of Soviet constitutional culture.[2] Unlike the post-Soviet bloc of Eastern European nations and new democracies in Asia (such as South Korea and Taiwan), Vietnam repudiated the third wave of democratization in the late twentieth century and has consistently retained the Soviet constitutional system established by the 1992 constitution.

The Vietnamese polity fundamentally refutes French political philosopher Montesquieu's idea of separation of power in favor of Marxist–Leninist orthodoxy of unity of state power. Formally, state power in Vietnam is unified and centralized in a hierarchical system, with the National Assembly (NA) defined by the Constitution as the "the highest representative body of the people, the highest State authority in the Socialist Republic of Vietnam."[3] Other institutions locate in

[1] Bernard B. Fall, *The Viet-Minh Regime: Government and Administration in the Democratic Republic of Vietnam* (New York: Institute of Pacific Relations, 1956), pp. 13–14.

[2] For constitutional history in Vietnam in general, see Mark Sidel, *The Constitution of Vietnam* (Oxford and Portland, OR: Hart, 2009).

[3] 1992 constitution, Art. 83.

subordinate positions. The National Assembly Standing Committee (NASC) is the permanent body of the NA principally responsible for legislative affairs when the NA is in recess. The President of State is vested with symbolic authorities.[4] The Government is the highest administrative state body.[5] The people's courts are the judicial bodies.[6] The people's procuracies are authorized to prosecute and supervise judicial activities.[7] All of these central institutions must report, and be accountable, to the NA.[8] Within this constitutional order, the political institutions are required to function in an Apollonian manner to maintain the unison of state power. The corollary is that there are no checks and balances among these institutions.

The current constitution of Vietnam also commits to a wide range of human rights.[9] According to Article 50, "In the Socialist Republic of Vietnam, human rights in all respects, political, civic, economic, cultural and social, are respected, find their expression in the rights of citizens and are provided for by the Constitution and the law." The Constitution appears to be in accordance with international human rights engagement. However, the Constitution fails to provide an independent institution responsible for implementing human rights. Rather, the Constitution delegates the constitutional review power to the legislative and executive bodies. The NA is authorized to abrogate unconstitutional documents enacted by other central institutions while the body itself is subject to no external institutional surveillance. As a subsidiary body of the NA, the NASC is vested with the power to interpret the Constitution.[10] The prime minister is empowered to nullify unconstitutional legal normative documents passed by ministries and the chairmen of provincial people's committees.[11]

Apart from state apparatus, the role of the Communist Party in Vietnam should be mentioned. The pre-eminent leadership of the Communist Party is homologated by Article 4 of the Constitution:

> The Communist Party of Vietnam, the vanguard of the Vietnamese working class, the faithful representative of the rights and interests of the working class, the toiling people and the whole nation, acting upon the Marxist–Leninist doctrine and Ho Chi Minh's thought, is the force leading the State and society. All organizations of the Party operate within the framework of the Constitution and the law.[12]

Functionally, the party leads the state and society mainly by nominating its members to hold key state positions and formulating policy that is subsequently legalized by the state.

[4] 1992 constitution, Art. 101. [5] 1992 constitution, Art. 109.
[6] 1992 constitution, 127. [7] 1992 constitution, Art. 137.
[8] 1992 constitution, Arts. 84, 102, 109, 135 and 139. [9] 1992 constitution, Chapter v.
[10] 1992 constitution, Art. 91. [11] 1992 constitution, Art. 114.
[12] 1992 constitution, Art. 4.

Notwithstanding the ascendance of socialist principles, in the first decade of the twenty-first century, as the result of economic dynamics and the impact of globalization, Vietnam introduced important constitutional reforms. Vietnam amended the 1992 constitution in late 2001, and is once again considering revision. The present chapter examines Vietnam's efforts in modernizing the constitutional system in the last decade. Section II of the chapter analyzes the reasons for and the contents of the constitutional amendments of 2001. Section III considers important movements during the time the revised Constitution was in force. Section IV investigates Vietnam's current plan for further amending the Constitution. Finally, Section V concludes with some reflections on the future of constitutionalism in Vietnam.

II. CONSTITUTIONAL AMENDMENT IN 2001

Reasons for amending the 1992 constitution

In December 2001, the NA adopted, for the first time, important amendments to the 1992 constitution. In fact, in the earlier years of 1998, 1999, and especially 2000, party officials and academics advocated amending the charter to reflect changes in Vietnamese society after ten years of *Doi moi* (renovation).

The state apparatus was out of date after Vietnam's decade of *Doi moi* – an economic reform program initiated by the Communist Party of Vietnam in 1986 – which was meant to transform the centrally planned economy to the socialist-oriented market economy (*kinh te thi truong dinh huong xa hoi chu nghia*). Consequently, the 1992 constitution, which superseded the precedent 1980 charter to institutionalize the *Doi moi* program, was characterized by provisions pertaining to the liberalization of the economic system.[13] As far as the political system is concerned, there were no substantial changes; the governmental structure established by the 1992 constitution is basically analogous to that of the 1980 constitution. The power, the function, and the organization of the legislative, the executive, the courts, the procuracies, and the local governments fundamentally remain intact, except for some slight revisions such as renaming the Council of Ministers as the Government or separating the Council of State into the President of State and the National Assembly's Standing Committee.

Meanwhile, the dynamics of economic transformation as the result of *Doi moi* policies, especially the speedy diversification of sectoral structures of the economy, in particular the remarkable rise of the private sectors, induced the need for amending the 1992 constitution to reform the state machinery by strengthening the role of law; more clearly distributing public powers; intensifying governmental

[13] 1992 constitution, Chapter II, "Economic System."

responsibility; and alleviating cumbersome, corrupt, and functionary procedures in the administrative system.

Apart from the state institutions, some provisions of the 1992 constitution regarding economy, educational, scientific, and technological policies looked out of date in the new transitional context. Ten years of national transition, coupled with globalization, resulted in the emergence of novel sectors of the economy focused on education, science, and technology. Therefore, although in 2001 Vietnam reformed state institutions, it also wished to reflect economic, educational, scientific, and technological advancements in the Constitution.

Consequently, the NA adopted the constitutional amendments on December 25, 2001, at its plenary session after long deliberation.[14] The amendments were then promulgated by the President of State on January 7, 2002, and were effective the next day.

In concordance with the amended constitution, a number of organic laws were enacted or revised. On the same day (December 25, 2001) that the constitutional amendment was passed, the NA correspondingly enacted the new Law on Organization of the National Assembly, which was later amended on April 17, 2007, and the Law on Organization of the Government, and revised the Law on Selection of Delegates of the National Assembly, which had been previously enacted on April 17, 1997. In the session on April 2, 2002, the NA enacted the new Law on Organization of the People's Procuracies and the Law on Organization of the People's Courts. Finally, we should note the introduction of the Law on the Supervisory Activities of the National Assembly on June 17, 2003, to specify the supervisory power of the NA. Generally speaking, the organic laws describe in detail the relevant constitutional provisions.

Contents of constitutional amendments

Initially, some legislators and radical legal scholars called for a fundamental revision of the Constitution or a new constitution because they believed that the 1992 constitution had been adopted in the early stage of *Doi moi* when Vietnam did not have the necessary conditions to introduce a comprehensively renovating constitution.[15] However, the Party refuted both fundamental revision and a new constitution and instead channeled the amendments toward individual issues mainly associated with the state machinery, which were obviously old-fashioned.

[14] For an excellent elaboration of contentious debates in the process of amending the 1992 constitution in 2001, see Mark Sidel, "Analytical models for understanding constitutions and constitutional dialogues in socialist transitional states: re-interpreting constitutional dialogues in Vietnam" (2002) 6 *Singapore Journal of International and Comparative Law* 42.

[15] Pham Quoc Anh (ed.), *Nhung Van de Co ban cua Hien phap 1992 Sua doi* (Fundamental Issues of the Revised 1992 Constitution) (Hanoi: People's Police Publishing House, 2006), pp. 42–3.

For the party, a substantial change of the Constitution is delicate because this change would open a range of issues, such as party leadership (Article 4 of the Constitution) and other political and economic policies pronounced in the Constitution, which the party and the state were not willing to relinquish.[16] Consequently, even though some Assembly delegates and progressive scholars repeatedly advocated broadening the scope of the revision, the Party has successfully limited revision to the following key issues.

Socialist rule-of-law state and distribution of powers

The amended Article 2 of the Constitution incorporates the ideology of the Socialist Rule of Law State (*Nha nuoc Phap quyen Xa hoi Chu nghia*), reading: "The Socialist Republic of Vietnam is the Socialist Rule-of-Law State of the people, by the people, and for the people." In fact, the concept of rule-of-law state (*nha nuoc phap quyen*) was initially introduced in the Seventh National Congress of the Vietnamese Communist Party in 1991 and repeatedly emphasized in subsequent national congresses of the Party.

Generally, Vietnam's notion of socialist rule-of-law state is a mélange of socialist political and legal principles and Western theory of the rule of law.[17] In contrast to the pre-*Doi moi* centrally planned state, governed by verbal orders, instructions, plans, and criteria, the socialist rule-of-law state characteristically underlines the role of law in governing. More specifically, the socialist rule-of-law state is conceptualized as including the following features:

- state power belonging to the people,
- the distribution of state powers,
- the separation of party leadership and state governance,
- the existence of a sufficient and stable legal system,
- the effective role of the law in administration,
- citizens' equality before law, and
- the independence of judicial adjudication.[18]

The ideological entrenchment of the socialist rule-of-law state amendments into the Constitution in 2001 indicated Vietnam's continued commitment to reform the state and the law in line with modern international standards of institutional

[16] Sidel, *The Constitution of Vietnam*, p. 114.

[17] John Gillespie explains that the ideology of *Nha nuoc phap quyen* is a Vietnamese adaptation of the Soviet *pravovoe gosudarstvo*, which was in turn based on German *Rechtsstaat*. John Gillespie, "Concept of law in Vietnam: transforming statist socialism," in Randall Peerenboom (ed.), *Asian Discourses of Rule of Law* (London and New York: Routledge, 2004), p. 151.

[18] For a comprehensive explanation of principles of the socialist rule-of-law state in Vietnam, see Dao Tri Uc (ed.), *Mo hinh To chuc va Hoat dong cua Nha nuoc Phap quyen Xa hoi chu Nghia Viet Nam* (Model of Organization and Operation of Vietnamese Socialist Rule-of-Law State) (Hanoi: Judicial Publishing House, 2006), pp. 229–315.

arrangement and national governance, such as popular sovereignty, the rule of law, and judicial independence.

Like the socialist rule-of-law state, distribution of powers (*phan cong quyen luc*), another concept appearing in the political documents of the Party's national congresses, was constitutionally regulated in 2001. Article 2 of the Constitution was supplemented with this principle: "State power is in unity with distribution and co-ordination among state bodies in exercising legislative, executive and judicial powers."[19] Some foreign observers seem to underestimate the meaningfulness of the notion of distribution of powers in Vietnam. While commitment to unity and the co-ordination of powers persistently rebuts the Montesquieuian model of tripartite government, the notion of distribution of powers reveals that Vietnam's aversion to the theory of separation of powers is rather appeased. A Party commentator states: "We do not establish our State under the theory of separation of powers but we reference and internalize its reasonable elements."[20] It is conceived that the distribution of governmental labor is an acceptable component of Western ideology.[21] The constitutionalization of the principle of distribution of powers implies commitment to a less concentrated paradigm of constitutional design and practice.

New mechanism of vote of confidence

As a necessary concomitant of the rule-of-law state, the revised constitution introduced a new mechanism of vote of confidence (*bo phieu tin nhiem*), which is inspired by the institution of vote of no confidence prevalently practiced in parliamentary systems[22] and contemplated in the 1946 constitution of the Democratic Republic of Vietnam.[23] The 2001 constitutional reformers in Vietnam have modified the mechanism of the *vote of no confidence* to establish the alternative *vote of confidence*. The modification can be explained by the idea that *vote of no confidence* may be rather strong in the Vietnamese monist political environment because it implies political conflict.[24] According to the Vietnamese version, the NA is authorized to vote confidence in individual officials (not in a collective body)

[19] 1992 constitution, Art. 2 (revised).

[20] Dao Duy Tung, *Qua trinh Hinh thanh Con duong Di len Chu nghia Xa hoi o Viet Nam* (The Genesis of the Path to Socialism in Vietnam) (Hanoi: National Politics Publishing House, 2004), p. 209.

[21] Lê Minh Thông, "Nhung Yeu cau cua Nha nuoc Phap quyen Xa hoi Chu nghia Doi voi Viec Doi moi Mo hinh Bo may Nha nuoc" (Requirements of the socialist rule-of-law state for renovating the model of state apparatus) (2010) 16(177) *Legislative Studies Journal* 10.

[22] Richard Albert, "The fusion of presidentialism and parliamentarism" (2009) 57 *American Journal of Comparative Law* 550.

[23] Art. 54 of the 1946 constitution provides that: "The Minister who has lost the confidence of the People's Parliament must resign . . . the Cabinet which has lost the confidence (of the People's Parliament) must resign."

[24] In fact, there also exists the so-called "vote of confidence." See Andrew Heard, "Just what is a vote of confidence? The curious case of May 10, 2005" (2007) 20 *Canadian Journal of Political Science* 395.

elected or approved by it, including the President and Vice President of State, the chairman of the NA, the vice chairmen and members of the NASC, the prime minister, the deputy prime ministers, the ministers, other members of the Government, the president of the Supreme People's Court, and the head of the Supreme Procuracy.

The significance of the incorporation of the institution of the vote of confidence in the revised constitution is considerable. This new device allows the National Assembly to express its dissatisfaction at the performance of the senior officials and to hold them accountable to the public. Mark Sidel, an expert in Vietnamese law at the University of Wisconsin Law School, considers it "one of the most important accomplishments of the 2001 constitutional amendment process, for it directly reflected popular demand for the accountability of governmental officials."[25]

Adjustment of legislative and executive functions

Some revised constitutional provisions adjust the functions of the NA and the Government to specify the principle of distributing public powers recognized in the amended Article 2.

Article 84, regulating legislative functions, is revised to strengthen the NA's roles in deciding significant national and international affairs. The institution is additionally empowered to decide on the state's policies on nationalities and religions and to ratify or nullify international treaties signed directly by the President of State.[26] The further buttress of the NA's function is due to increasing social pressure to fortify the role of democratic institutions both in important domestic matters and in international relationships.

Moreover, the revised Article 84 decentralized the power to allocate the national budget. Accordingly, powers and functions of the NA are limited for deciding allocation of the central state budget, and local budgets are vested with local representative bodies called people's councils. This allocation mechanism can be explained by the practical tendency toward more autonomous local government as a result of local economic dynamics.

In conjunction with enhancement of the NA's role, the revised constitution introduced some constrictions on the powers of the NASC. During the period of the centrally planned system, and even in the early *Doi moi* years, legislative affairs in Vietnam were largely handled by the NA's standing body, because meetings of the NA were considerably limited. Since the year 2000, however, the role of the NA has gradually increased, which has led to more lasting sessions (more than one month for a session held twice annually). Consequently, even though the reliance on the NASC's activities remains, the revised constitution, while strengthening the role of the NA, also constricted the functions of the NASC. To illustrate, the

[25] Sidel, *The Constitution of Vietnam*, p. 125. [26] 1992 constitution, Art. 84 (revised).

amended constitution introduced a mechanism of veto of all ordinances of the NASC: the President of State can

> propose to the NASC to revise its ordinances within ten days from the date these ordinances were passed; if such ordinances are still voted for by the NASC against the State President's disapproval, the State President shall report it to the NA for decision at its nearest session.[27]

Additionally, the amended constitution withdraws the authority of the NASC to sanction proposals of the prime minister concerning the appointment and dismissal of deputy prime ministers, cabinet ministers, and other members of the Government in the intervals between sessions of the NA.[28] The new constitution exclusively authorized the NA to sanction the appointment and dismissal of senior governmental officials.

Apart from the functions of the legislative branch, there are also some constitutional revisions which adjusted the functions of the executive branch. Since the year 2000, due to the impact of globalization, Vietnam has experienced dynamic international co-operation, both bilateral and multilateral, which has significantly involved the executive role. Meanwhile, the old constitution limited the authority of the Government concerning international law. To allow the Government to more actively participate in transnational legal affairs, the revised constitution has empowered the body to negotiate and conclude international agreements in the name of the State of the Socialist Republic of Vietnam, except for international agreements negotiated and concluded by the President of State.[29]

Challenging a Soviet institution: limiting the procuracy's jurisdiction

The procuracy (*vien kiem sat*), an institution endemic in the socialist pedigree, arguably imputed to V.I. Lenin's contrivance, was introduced in Vietnam as early as 1959.[30] Prior to the 2001 constitutional amendment, the procuratorial system in Vietnam was closely patterned on the Soviet prototype. Organizationally, the Vietnamese procuratorial branch is independent of the three traditional legislative, executive, and judicial branches. The branch consists of the supreme people's procuracy, local people's procucacies arranged parallel to the local governments, and military procuracies. The institution is vested with two categories of authority: general supervision (*kiem sat chung*), and criminal investigation and prosecution. General supervision is the substantial authority of the procuracy. The general supervision function of the procuracy in Vietnam is contemplated to implement the Soviet principle of "socialist legality" (*phap che xa hoi chu nghia*). In the Soviet

[27] 1992 constitution, Art. 103 (revised).
[28] 1992 constitution, Art. 90 (revised).
[29] 1992 constitution, Art. 112 (revised).
[30] For the creation of this institution in Vietnam, see George Ginsburg, "The genesis of the people's procuracy in the Democratic Republic of Vietnam" (1979) 5 *Review of Socialist Law* 179.

tradition, socialist legality requires the uniform application of law on a national scale, and for this aspiration the procuracy is created "to exercise unitary control over compliance with the laws by all segments of the community, the bureaucracy as well as the citizenry."[31] In the case of Vietnam, this authority, named *kiem sat chung* ("general supervision"), compasses two kinds of function: (1) supervising the legality of the activities (*kiem sat hoat dong*) of ministries, organs of ministerial rank, other organs under the government, local governments, economic bodies, social organizations, people's armed units, and citizens; and (2) supervising the legality of legal documents (*kiem sat van ban*) of ministries, organs of ministerial rank, the People's Supreme Court, and local governments.[32] These rather powerful authorities of the procuracy have no direct analogy outside socialist jurisdictions.

With the 2001 constitutional amendment, the organization of the procuracy remains intact but its jurisdiction is substantially truncated. The revised constitution eliminates in significant part the authorities of the general supervision of the procuracy. In the new constitutional framework, the procuracy is limited to supervising only judicial activities and practicing the power of public prosecution. According to the revised Article 137,

> The Supreme People's Procuracy shall exercise the power to prosecute and supervise judicial activities, helping to ensure the strict and uniform observance of the law. The local Procuracies and the Military Procuracies shall exercise the right to prosecute and supervise judicial activities within the scope of their responsibilities prescribed by law.[33]

The revision is for several practical reasons. First, the constriction of the procuracy's powers is due to the overlapping of its function of supervision of activities (*kiem sat hoat dong*) with the functions of the inspectors (*thanh tra*) of the Government. Second, the procuracy was ineffective in practicing its function of public prosecution. Therefore, the reformers wished to compress the procuracy functions to concentrate more on criminal cases by practicing the power of public prosecution.

The limitation of procuratorial jurisdiction is one of the most consequential revisions in the 2001 constitutional reform because to cut off the general supervision authority of the procuracy would challenge its *raison d'être*, thus implying a deviation from socialist legality. In order to constitutionalize the notion of the rule-of-law state, Vietnam introduced an institutional reform centrifugal from the Soviet tradition. The Vietnamese reformers in the new century seemed more concerned with the rule-of-law state than with socialist legality. The important implication of this change is that, in response to the practical demands of social and economic

[31] Ginsburg, "The genesis of the people's procuracy in the Democratic Republic of Vietnam", 187.

[32] 1992 constitution, Art. 137 (unrevised). [33] 1992 constitution, Art. 137 (revised).

reform, Vietnam has been ready to challenge socialist institutions and principles to the extent that this does not provoke substantial changes in socialist polity.

Reflecting in the Constitution new demands for economic and social reform

Apart from the main preoccupation of the state machinery, there are several amendments reflecting the rising demands for economic and social renovation.

The Preamble of the Constitution was revised with more emphasis on the Vietnamese "tradition of patriotism"[34] to rally the Vietnamese people together and advocate for further reform. Moreover, in response to the popular dissatisfaction at cases of serious corruption among state officials, especially in construction projects, Article 8 of the Constitution was revised to strengthen the anticorruption commitment.[35]

Several articles of Chapter 2, "Economic System," were revised in response to the dramatic growth in the private sector of the economy. The amended articles have strengthened the state's commitment to "actively integrate into the international economy" and "carry out the national industrialization and modernization,"[36] as well as introducing a new "foreign-invested economic sector in various forms" to galvanize more growth.[37] Nevertheless, the new constitutional framework of the economy also softens the dogma of "socialist orientation."[38] The amendments acknowledge that "all economic sectors are important constituents of the socialist-oriented market economy"[39] and redefine the role of the state economic sector from a "leading role"[40] to a "firmer and firmer foundation of the national economy."[41]

In Chapter 3, "Culture, Education, Science and Technology," the revisions are designated to further strengthen state and Party commitments to the relevant policies. Regarding culture, due to global predispositions of young people to a more Western-style culture – deemed to tarnish Vietnamese traditional cultural values – the new amendments underline a policy to "deeply imbue [Vietnamese culture] with national identity."[42] Political leaders have also prioritized the development of education as "a primary national policy" for further reform.[43] Similar to education, science and technology in Vietnam were also falling behind other nations in the region and Vietnamese leaders have recognized the important role of science and technology in the nation's ongoing process of modernization and industrialization. The new constitution also accentuates the "development of science and technology [as] a primary national policy."[44]

[34] 1992 constitution, Preamble (revised). [35] 1992 constitution, Art. 8 (revised).
[36] 1992 constitution, Art. 15 (revised). [37] 1992 constitution, Art. 27 (revised).
[38] Sidel, *The Constitution of Vietnam*, p. 122. [39] 1992 constitution, Art. 16 (revised).
[40] 1992 constitution, Art. 19 (unrevised). [41] 1992 constitution, Art. 19 (revised).
[42] 1992 constitution, Art. 30 (revised). [43] 1992 constitution, Art. 35 (revised).
[44] 1992 constitution, Art. 37 (revised).

Implementation of the revised constitution

During the implementation stage of the amended constitution, there were some important practical movements, discussed below.

More open national elections

In a single-party polity like Vietnam where competitive elections are absent, the Communist Party predominantly controls the national election and nominates candidates. However, in the last decade, the country has seen a more complex scenario in which NA elections reflected popular moves which were to a certain extent beyond the domination of the Party.

Edmund Malesky, a political scientist at the University of California, San Diego, observes that Vietnam's elections are relatively more open than those held in other one-party communist states such as Cuba and China. In Vietnam there is a broader range of candidates, more competition for seats and a greater risk of senior officials losing.[45] For example, in the most recent May 2011 NA election the range of 827 candidates was actually very eclectic, with a number of non-Party members, women, ethnic people, religious people, and business candidates. More importantly, the election results indicated a more open, or at least less authoritarian, election system. First, among 500 elected candidates, forty-two were non-Party members. Second, more self-nominated candidates won than before, the number increasing from one in 2007 to four in 2011, all of whom are businesspeople. Third, more senior officials lost elections: a total of fifteen candidates nominated by the central government failed, including some senior incumbents of the NA.[46]

The changing representative democracy

In the first decade of the present century, Vietnam's representative democratic institution has witnessed some unconventional developments. The NA in Vietnam is conventionally viewed as a tractable instrument for the Communist Party to formalize its policies through the channel of the Government. Although signs of the socialist dogma of unity and co-ordination of powers still exist in the National Assembly–Government relationship, the first decade of the present century indicates that representative democracy in Vietnam has been incrementally increasing. The national selected body has proven to be not a totally malleable device in

[45] "Vietnam rulers reach out to business people," www.ft.com/cms/s/0/de6dd360-82fc-11e0-85a4-00144feabdc0.html#axzz1ZDMd7tfh (last visited October 16, 2011).

[46] "Cong bo Ket qua Bau cu Dai bieu Quoc hoi Khoa XIII va Hoi dong Nhan dan cac cap nhiem ky 2011–2016" (Announcement of the result of elections of National Assembly 13th term and People's Councils term 2011–2016), www.nclp.org.vn/thong_tin_cong_tac_lap_phap/cong-bo-ket-qua-bau-cu-111ai-bieu-quoc-hoi-khoa-xiii-va-hoi-1110ng-nhan-dan--cac-cap-nhiem-ky-2011–2016 (last visited October 16, 2011).

the hands of the Party, but a gradually active forum for the public to check Government and Party activities. Concomitantly, legislative–executive interaction has been cacophonic rather than entirely polyphonic, demonstrating the increasingly active role of the democratic institution. Below are some vivid examples.

First, in the last decade, the country has seen contentious interpellations broadcast to the public via live television. Through the congressional forum, a number of active delegates have advocated for more governmental accountability on societal issues such as corruption, inflation, educational degeneration, environmental pollution, and transportation congestion.

Second, in spite of having not yet been practiced since its introduction in 2001, the new tool of the vote of confidence has served as the instrument for legislators to challenge the Government in some cases. To illustrate this point, in dissatisfaction with the government's response to serious socioeconomic issues, some progressive legislators have sought to apply the vote of confidence mechanism to the relevant ministers.[47] Furthermore, in late 2010, frustrated by the Vietnam Shipbuilding Industry Group's failure to repay the laden loans of US$4.5 billion, a senior legislator even called for a vote of confidence in the prime minister.[48]

Third, the new century has witnessed the unprecedented phenomenon of rejection by the National Assembly of several projects initiated by the Government. First worth mentioning is the famous express railway case. On June 19, 2010, with 37 percent for and 41 percent against, the National Assembly rejected the Government's proposed US$56 billion Hanoi–Ho Chi Minh City express railway project.[49] The case drew tremendous attention due to the socioeconomic implications of this huge project. During a month of deliberation, while the government tried to use persuasion to pass the project, a myriad of legislators and the public openly criticized it via mass media, on grounds including its cost and benefits that the majority of the people could not see. Eventually, the concordance of the public and majority of legislators won. That was the first time in modern Vietnamese history that democratic institutions were successful in frustrating a project of the Government.

In another case, on March 29, 2011, with 35 percent for and 44 percent against, the National Assembly rejected the draft Law on the Capital City by the

[47] "Quoc hoi se Bo phieu Tin nhiem Bo truong Le Huy Ngo" (The National Assembly will vote confidence in Minister Le Huy Ngo), http://vietbao.vn/Xa-hoi/Quoc-hoi-se-bo-phieu-tin-nhiem-Bo-truong-Le-Huy-Ngo/10861674/157; "Toi Chinh thuc De nghi Bo phieu Tin nhiem Bon Bo truong" (I officially appealed for a vote of confidence in four ministers), http://vietbao.vn/Xa-hoi/Toi-chinh-thuc-de-nghi-bo-phieu-tin-nhiem-bon-bo-truong/40034148/157.

[48] "Vu Vinashin: Yeu cau Bo phieu Tin nhiem Thanh vien Chinh phu" (The Vinashin Case: appealing for a vote of confidence in members of the Government), http://laodong.com.vn/Tin-tuc/Vu-Vinashin-Yeu-cau-bo-phieu-tin-nhiem-thanh-vien-Chinh-phu/18782 (last visited September 27, 2011).

[49] "National Assembly Rejects Express Railway Project" http://english.vietnamnet.vn/politics/201006/National-Assembly-rejects-express-railway-project-917324 (last visited September 27, 2011).

Government.[50] The bill was challenged on constitutional grounds. During the February 2010 meeting of the NASC to debate the bill, a deputy argued that while the Constitution does not discriminate among provincial units, the bill authorizes special discretion for the capital city.[51] A similar argument was addressed in the plenary session of the NA. The story indicates another dimension in the development of the legislative–executive relationship in Vietnam: the NA had invoked the Constitution to enhance its arguments in a tense dialogue with the Government.

To recapitulate, the function of representative democratic institutions in Vietnam has considerably changed in the last decade. The congressional forum is no longer entirely the marionette of the Party. Rather, the National Assembly has gradually become the public platform reflecting increasing popular demand for greater accountability and legitimacy on the part of the Party and the Government.

Constitutional rights protection

In the popular view of the West, Vietnam's constitution fails as a meaningful source of citizens' rights.[52] Although Vietnam lacks a judicial review system to implement constitutional rights, it is unlikely that judicial review is the *sine qua non* of constitutional rights enforcement. Stéphanie Balme and Michael W. Dowdle, two legal experts at Sciences Po, Paris, point out that "even in the most effective constitutional system, significant aspects of constitutional structure are invariably nonjusticiable."[53] In the case of Vietnam, even though the country has not had a constitutional adjudication system, the Constitution has been invoked to challenge policy proposals and legal documents allegedly violating citizens' rights.

This phenomenon can first be illustrated with the famous "motorbike case." As a result of population growth and the increasing number of imported motorbikes in recent years, Hanoi, Ho Chi Minh City, and other major cities of Vietnam have suffered grave traffic accidents and congestion. One solution was to limit motorcycle registration. In 2003, Hanoi People's Council passed a resolution adopting a policy of "one person one motorcycle" in seven assigned districts. In the same year, the policy was nationally applied when the Ministry of Public Security

[50] See "National Assembly rejects the Draft Law on Capital City," http://english.vietnamnet.vn/en/politics/6528/national-embly-rects-draft-law-on-capital-city.html.

[51] "See Du thao Luat Thu do vuong Hien phap" (The Bill on the Capital is blocked by the Constitution), http://tuoitre.vn/Chinh-tri-Xa-hoi/363514/Du-thao-Luat-thu-do-vuong-hien-phap.html (last visited October 20, 2010).

[52] John Gillespie, "Juridification of state regulation in Vietnam," in John Gillespie and Albert Chen (eds.), *Legal Reform in China and Vietnam* (New York: Routledge, 2010), p. 85; William J. Duiker, "The constitutional system of the Socialist Republic of Vietnam," in Lawrence W. Beer (ed.), *Constitutional Systems in Late Twentieth Century Asia* (Washington, DC: University of Washington Press, 1992), p. 331.

[53] See Stéphanie Balme and Michael W. Dowdle, *Building Constitutionalism in China* (New York: Palgrave Macmillan, 2009), p. 2.

promulgated a circular restricting registration to one motorcycle per resident. In spite of public criticism, the policy went into effect.

The matter became constitutionally relevant in 2005 when the institutions responsible for constitutional supervision entered the fray. The Ministry of Justice argued that the police regulations violated national regulations on administrative sanctions and transportation safety. Remarkably, the Law Committee of the National Assembly went further, to claim that limiting registration of motorcycles to one per person is unconstitutional and illegal as this violates the property rights of the citizen guaranteed by Article 58 of the 1992 constitution and the Vietnamese Civil Code. Consequently, in late November 2005, one day before the Ministry of Justice was scheduled to report formally to the National Assembly on violation of the law by national ministries, the Ministry of Public Security issued a directive annulling the provision in its earlier regulation that limited registration of motorcycles and motorbikes to one per person.[54] This case was the first time in Vietnam that the Constitution was successfully invoked to protect fundamental rights, albeit not by a judicial body.

In 2009, the Ministry of Justice, as a ministrant of the prime minister in reviewing unconstitutional legal documents, challenged the constitutionality of a number of proposed legal normative documents of the Ministry of Construction, the Ministry of Transport, and the Ministry of Medicine for infringing constitutional rights such as freedom of trade and citizens' equality before the law.[55]

The fact that legal normative documents and policy proposals pertaining to individual rights have been rejected on constitutional grounds signals that the Constitution is now, more than ever, becoming a meaningful source of citizens' rights, thereby reflecting citizens' demand to protect their constitutional rights.

III. CURRENT PLANS TO AMEND THE CONSTITUTION AGAIN

Nearly a decade since the Constitution was first revised, Vietnam is now planning to revise the document for the second time. In the August 4, 2011, session, the NA established the Constitutional Amendment Commission and decided on the Proposal for Amending and Supplementing the 1992 Constitution submitted by the NASC.[56] The final draft is scheduled for adoption by the NA in October 2013.[57]

[54] Sidel, *The Constitution of Vietnam*, pp. 198–9. [55] 1992 constitution, Arts. 52, 57.

[56] "Nghi quyet ve Viec Sua doi, Bo sung hien phap nam 1992 va Thanh lap Uy ban Du thao Sua doi Hien phap nam 1992" (Resolution on amending and complementing the 1992 constitution and establishing the Committee for Amending the 1992 Constitution), www.nclp.org.vn/thong_tin_cong_tac_lap_phap/nghi-quyet-ve-viec-sua-1110i-bo-sung-hien-phap-nam-1992-va-thanh-lap-uy-ban-du-thao-sua-1110i-hien-phap-nam-1992 (last visited September 30, 2011).

[57] "Ke hoach So bo Sua doi, Bo sung Hien phap 1992" (preliminary plan for amending and supplementing the 1992 Constitution) of the National Assembly Standing Committee.

Vietnam needs to further revise the Constitution because, in the proposal on amending and supplementing the 1992 Constitution, the NASC explained that the

> 1992 Constitution is the constitution of the initial stage of the *Doi moi* period. Up to now, the country has experienced many changes in the international context where significant, complex, and dramatic developments are happening … Therefore, it is necessary to study amending and supplementing the 1992 Constitution in concordance with the new situation.[58]

The central spirit here is the notion of "in concordance with the new situation" (*phu hop voi tinh hinh moi*). Vietnam wishes to revise the Constitution in line not only with rapid national transition, but also with dramatic international change.

First, in the words of the NASC, the amendment is needed to reflect the accomplishments of twenty-five years of *Doi moi* and to institutionalize the party's directions for developing Vietnam into an industrial country by 2020 put forward in the party's documents in the Eleventh National Congress in early 2011.[59]

Second, the NASC invoked the world's "significant, complex, and dramatic developments" to justify constitutional revision. In the first meeting of the Constitutional Amendment Commission, the chairman of the Commission and the NA, Nguyen Sinh Hung, suggested that the amendments be in concordance with the Party's documents and "the real situation of the era" (*tinh hinh thuc te cua thoi dai*).[60] This statement is a Delphic orientation, but implies that the future revision of Vietnam's constitution is due in significant part to the impact of the global expansion of comparative constitutional law as an important element of constitutional reform.

According to the Constitutional Proposal, on the agenda for future constitutional reform in Vietnam is a more comprehensive revision of the Basic Law. Nearly all sections of the Constitution will be revised. However, like the last reform, the upcoming one also accentuates the state apparatus. Suggestions for revising the economic, social, cultural, scientific, and technological sections are reflections of the relevant Party policies articulated in the documents of the eleventh national congress. In addition, it should be emphasized that the proposal intends to introduce some considerable revisions associated with the constitutional basis of human rights.

[58] "To Trinh Quoc hoi Ve Viec Trien khai Thuc hien Chu truong Nghien cuu Sua doi, Bo sung Hien phap 1992" (The proposal to the National Assembly on implementing the policy of studying, amending, and supplementing the 1992 Constitution) of the National Assembly Standing Committee (hereinafter "Constitutional Proposal").

[59] "Constitutional Proposal."

[60] "Uy ban Du thao Sua doi Hien phap nam 1992 Hop Phien Thu nhat" (The Commission for Amending the 1992 Constitution meets for its first session), www.toaan.gov.vn/portal/page/portal/tandtc/299083?p_page_id=1752999&pers_id=1751940&item_id=9641568&p_details=1 (last visited September 30, 2011).

Controlling state powers

In the first decade of the twenty-first century, the increasing number of corruption cases and similar abuses of public power caused popular dissatisfaction in Vietnam. Reflecting the people's malaise, many legal scholars have chosen the means of constitutionalism to curb arbitrary governance and have raised more general questions of "limiting state power" (*gioi han quyen luc nha nuoc*) or "controlling state power" (*kiem soat quyen luc nha nuoc*).[61]

Due to practical and academic demand, the Communist Party in the 11th Convention in 2011 introduced the new principle that "State power is unity with distribution, co-ordination, and *control* among state bodies in exercising legislative, executive and judicial powers."[62] It can be seen that apart from the established tenets of unity, distribution, and co-ordination of powers, the Party has accepted the constitutionalist idea of co-existence and interaction of the public powers, an intriguing development of constitutional ideology in a single-party polity.

Reflecting the Party's orientation, the Constitutional Proposal suggests that the future constitution should clearly define the mechanism of control among state bodies in exercising legislative, executive, and judicial powers.[63] One may expect that this new concept will ideologically orient the upcoming constitutional amendments.

"Constitutional protection"

How and to what extent the accepted constitutionalist principle of controlling state power will be institutionally articulated is the *ordre du jour*. Related is one of the hottest themes of Vietnam's recent constitutional dialogues: *bao hien*, or "constitutional protection." Literally, the Vietnamese term *bao hien* means protecting the Constitution, but Vietnamese scholars of constitutional law tend to use the term conceptually as equivalent to the European term "constitutional review," or rather the American term "judicial review." In any meaning, *bao hien* is an idea closely associated with modern liberal constitutionalism.

The theme of *bao hien* was widely discussed by Saigon scholars prior to national unification in 1975.[64] Vietnam's re-emerging discussion of *bao hien* traces back to the early years surrounding the 2001 constitutional amendments, but not until 2005,

[61] See, for example, Nguyen Dang Dung, *Su Han che Quyen luc Nha nuoc* (Limiting State Power) (Hanoi: Vietnam National University Publishing House, 2004); Trinh Thi Xuyen, *Kiem soat Quyen luc Nha Nuoc- Mot so Van de Ly luan va Thuc tien o Viet Nam hien nay* (Controlling State Power: Some Theoretical and Practical Issues) (Hanoi: National Politics Publishing House, 2008).

[62] "Bao cao Chinh tri cua Ban Chap hanh Trung Ung Dang tai Dai hoi Lan thu 11 cua Dang Cong San Viet Nam" (Political Report of the Central Committee of the Party in the 11th Convention of the Vietnamese Communist Party) (emphasis added).

[63] "Constitutional Proposal."

[64] Nguyen Van Bong, *Luat hien phap va Chinh tri hoc* (Constitutional Law and Political Science) (Saigon: 1971); Le Dinh Chan, *Luat Hien phap va cac Dinh che Chinh tri*

when the Party and the state manifested their profound concern about the theme, did debates over the theme proliferate.

In May 2005, the National Assembly Office held a conference on "the system of constitutional protection." In the prelude to the conference, Nguyen Van Yeu, vice chairman of the NA, stated that

> So far, we have not had an effective mechanism to supervise the action of the National Assembly and review the constitutionality of the NA's law and resolution. Therefore, it is imperative to research [and] recommend an effective remedy to continuously perfect the system of supervising and protecting the Constitution in Vietnam.[65]

More significantly, the need to establish a new system of constitutional review crystallized in 2006 when the Vietnamese Communist Party, at its Tenth Congress, resolved to "establish a system of adjudicating the constitutionality of the actions of the legislature, the executive and the judiciary" in Vietnam.[66] The ongoing conundrum is whether a constitutional court will be established as per the Austrian or German model or whether the judicial courts will be vested with the power of constitutional review as in the American model. In order to deal with the matter, in 2008 the Standing Committee of Vietnam's National Assembly set up a "Board for research on establishing a system of adjudicating the constitutionality of the actions of the legislature, executive and judiciary," consisting of both influential politicians and distinguished legal scholars.

These advances have further galvanized Vietnamese legal scholars to deepen the study of the prospects for constitutional review in Vietnam. There has been a proliferation of conferences held by the National Assembly Office, the Institute of State and Law, the Vietnam National University Faculty of Law, the Hanoi Law School, and others, discussing potential models for constitutional review for Vietnam. Moreover, academic articles on constitutional review and constitutional protection have been published in profusion in national law journals. Vietnamese legal scholars have discussed a wide range of constitutional review and "constitutional protection" issues in Vietnam.[67] More specifically, they have described

(Constitutional Law and Political Institutions) Vol. 2 (Saigon: 1971); Nguyen Do, *Luat hien phap* (Constitutional Law) (Saigon: 1974).

[65] See proceedings of the conference published as Dang Van Chien (ed.), *Co che Bao Hien* (The Mechanism of Constitutional Protection) (Hanoi: Judicial Publishing House, 2005), p. 8.

[66] Vietnamese Communist Party, *Van kien Dai hoi Dai bieu Toan quoc Lan thu X* (Documents of the Tenth National Congress) (Hanoi: National Political Publishing House, 2006), p. 127.

[67] For some books on *bao hien*, see National Assembly Office and JOPSO, *Ky yeu Hoi thao Quoc te ve Bao hien* (Proceedings of International Conference on Constitutional Protection) (Hanoi: Time Publishing House, 2009); Dao Tri Uc and Nguyen Nhu Phat (eds.), *Tai phan Hien phap va Van de Xay dung Mo hinh Tai phan Hien phap o Vietnam* (Constitutional Adjudication and the Problems of Building the Model of Constitutional

models used for constitutional review in various foreign countries, energetically using a comparative-law approach, discussed the need to establish constitutional review in Vietnam, and reviewed various potential models in the context of Vietnamese politics.

Broadly speaking, among the various judicial review models, the majority of Vietnamese legal scholars and commentators advocate a special constitutional court. Observing the international conference on constitutional protection jointly organized by the National Assembly Office and the Vietbid Joint Program Support Office (JOPSO) in Saigon in 2009, John Gillespie, an expert in Vietnamese law at Monash University, states,

> Few commentators seem [to] want the Supreme Court to review the Constitution. They question the willingness and capacity of judges in the existing judicial system to assert themselves against governmental officials, much less against party officials. Instead they are attracted to [the] German model of constitutional courts that has been successfully adopted in countries as diverse as Korea, Thailand, and Indonesia.[68]

As a positive reflection of a decade of debate, the Constitutional Proposal suggests a "constitutional protection mechanism, building and gradually perfecting the strengthened mechanism for reviewing and supervising the constitutionality and legality of the actions of the legislative, executive, and judicial bodies in concordance with the polity and the reality of Vietnam."[69] Renovating the constitutional protection system is now on the agenda for revising the Constitution. However, which constitutional protection model will be adopted is still unknown. Whether a constitutional court or a constitutional commission will be created or whether the Supreme Court will be authorized to practice judicial review may be decided in late 2013.

Further clarification of political institutions' functions and relationships

In the last constitutional amendments, in concordance with the principle of distribution of powers, the reformers introduced some clarifications of the functions of political institutions. This trend will continue in the next round of amendments. The Constitutional Proposal submits that the Constitution should define more clearly the authorities, the responsibilities, and the relations of political institutions; the scope of significant national affairs decided by the National Assembly; the relations of the President of State to the National Assembly and the Government; the authorities and responsibilities of the Government and the prime

Adjudication in Vietnam) (Hanoi: People's Police Publishing House, 2007). I personally contributed one volume to the debate. See Bui Ngoc Son, *Bao hien o Vietnam* (Constitutional Protection in Vietnam) (Hanoi: Judicial Publishing House, 2006).

[68] Gillespie, "Juridification of state regulation in Vietnam," p. 89.

[69] "Constitutional Proposal."

minister; and the relations of the Government to the National Assembly and the judiciary.[70] These suggestions indicate a movement toward a less concentrated model of constitutional design and practice.

The organizational problem of the procuracy: challenging the Soviet institution?

Once again, the procuracy faces constitutional reform. Yet, unlike the last, 2001, reform that focused on the adjustment of the functions of the procuracy, recent advocacy has substantially challenged the organization of the procuracy.

As mentioned above, the ethos of the procuratorial system in Vietnam is its existence as an independent branch. The rationale of separating the procuracy from the Government and the courts emanates from the aspiration of socialist legality in creating an independent supervisory agency to ensure conformity of executive officials (mainly ministers) and local governments to the central political institutions' higher legal normative documents, such as the Constitution and the laws of the legislature. As the general supervision (*kiem sat chung*) function of the procuracy was significantly truncated by the 2001 constitutional reform, the rationale of reforming the procuracy again has been considerably jeopardized.

The problem of the procuracy is that in court proceedings the line between its two functions (conducting public prosecution and supervising judicial activities) is blurred, and this has significantly affected the independence of judicial activities.[71] One solution is to restrict the procuracy supervising power and concentrate on prosecution. Since the supervising power is limited, there is little rationale for the procuracy to exist organizationally as an independent branch. This idea spurred an appeal for transforming procuracy as an independent system into prosecution (*vien cong to*) arranged inside the Government.[72] Importantly, the matter of organizational metamorphosis of the procuracy is not only a scholarly concern but also a Party direction. Resolution No 49-NQ/TW on Judicial Reform Strategy to 2020 (hereinafter Judicial Reform Strategy) encourages the "study [of] the transformation of the procuracy to the prosecution."[73]

[70] "Constitutional Proposal."

[71] Nguyen Hung Quang, "Lawyers and prosecutors under legal reform in Vietnam: the problem of equality," in Stephanie Balme and Mark Sidel (eds.), *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (New York: Palgrave Macmillan, 2007), p. 168.

[72] See Bui Ngoc Son, "Vien canh Vien kiem sat o Viet Nam" (Prospect of the procuracy in Vietnam) 20(157) (2009) *Legislative Studies Journal* 20. See also Dao Tri Uc, "Ve Vien kiem sat o Viet Nam" (On the procuracy in Vietnam) (2011) 7(192) *Legislative Studies Journal* 5.

[73] "Nghi quyet so 49-NQ/TW ngay 02/6/2005 cua Bo Chinh tri ve Chien luc Cai cach Tu phap Den Nam 2020" (Resolution No 49-NQ/TW dated 02/6/2005 of the Politburo on Judicial Reform Strategy to 2020), at www.moj.gov.vn/ct/thongtinchienluoc/Lists/VanBanThongTin/View_Detail.aspx?ItemID=12&CateID=1 .

This direction has catalyzed further support of independent legal academicians, but also provoked strong resistance among the procuratorial community. To illustrate, in the recent international conference over September 4–5, 2008, jointly held by the People's Supreme Procuracy and the UNDP (Vietnam) in Hanoi, the antagonists not only defended the current independent status, but also called for re-establishing the comprehensive authorities of general supervision (*kiem sat chung*) of the procuracy which had been curtailed by the 2001 constitutional amendments. The main reason of the antagonists was that the independent procuracy, including the full authority of supervision, is necessary to implement the principle of socialist legality.[74]

The influence of the resistance of the procuratorial community is considerable. The Constitutional Proposal enigmatically ignores the organizational matter of the procuracy and ambiguously suggests "clarifying the role and the function of the people's procuracies."[75] In any case, reform of the procuracy will be one of the most controversial matters in the upcoming constitutional amendment debate in Vietnam.

Reorganizing the court system

During the early stage of the last constitutional amendment process, reforming the court system was the main subject. Several years later, court reform has become even more heated, resulting in the Party's reorganization of the court system, articulated in the Judicial Reform Strategy.

Generally speaking, the current court system in Vietnam consists of the People's Supreme Court, the local people's courts at each administrative level, and the limitary courts. The problem is that the local courts are organized parallel to the local administrative levels, giving rise to the interference of local governors and local Party unit leaders in the activities of the courts.[76] Concurrently, social demand for fair and independent judicial adjudication has considerably increased. Consequently, the Judicial Reform Strategy suggests reorganizing the court system, particularly by separating the local courts from local government to guarantee the independence of the courts.

More specifically, the Judicial Reform Strategy suggests restructuring the court system according to the jurisdiction over trial, independent of administrative unit, and consisting of the following four levels:

[74] Nguyen Thai Phuc, "Mot so Y kien Nghien cuu Chuyen doi Vien kiem sat thanh Vien cong to trong Boi canh Cai cach Tu phap o Nuoc ta" (Some ideas on the transformation of the procuracy to the prosecution), in Tai lieu Hoi thao Vien kiem sat Nhan nhan trong Tien trinh Cai cach Tu phap (Proceedings of The People's Procuracies in the Process of Judicial Reform conference), jointly held by the People's Supreme Procuracy and the UNDP (Vietnam) on September 4–5, 2008, p. 17.

[75] "Constitutional Proposal."

[76] Best known is the Do Son corruption case. See Sidel, *The Constitution of Vietnam*, pp. 177–8.

1. The regional courts of first instance (*toa an so tham khu vuc*) established in one or several administrative localities at district level will hear first cases of all kinds.
2. The courts of appeal (*toa an phuc tham*) established in one or several administrative localities at provincial level will hear appeals and some cases of first instance.
3. The high courts (*toa an thuong tham*) established in certain regions will hear appeals from lower courts.
4. The People's Supreme Court (*Toa an nhan dan toi cao*) will be responsible for reconsidering, reviewing, and summing up trial experiences; guiding the uniform application of law; and developing case law.[77]

The above court reform project seems unattainable unless the 1992 constitution is amended.[78] Therefore, court structural reform is a principal concern for the coming constitutional amendment debate. The spirit of the Judicial Reform Strategy is reflected in the Constitutional Proposal. The Proposal restates the Party guidance of "organizing the courts according to jurisdiction over trial and independent of administrative unit."[79]

The proposed court system shares a number of commonalities with judiciaries in the modern democracies. When Vietnam is successful in implementing the court reform proposal, this will be a significant step towards modern standards of the judiciary.

Local government: the problems of local representative and grassroots democracy

Like the court system, the local government system was one of the principal concerns of the last constitutional reform, but remained unchanged eventually. However, recent developments reveal more pressure for reforming local government, which may result in revising the relevant constitutional provisions.

During the initial stage of the last constitutional amendment process, particular attention was paid to the symbolic status of the representative body, the people's council (*Hoi dong nhan dan*), at district level. Some commentators called for eliminating the institution because of its formalist function. However, the argument for any relevant constitutional change was far from cogent. Recently, more practical evidence of the role of the institution has proved its futility, resulting in further demands for its removal.

[77] Judicial Reform Strategy.

[78] "Khong sua Hien phap, kho Cai cach Tu phap" (Without amending the Constitution, it would be difficult to reform the judiciary), http://vnexpress.net/gl/phap-luat/2007/10/3b9fb3fb (last visited October 4, 2011).

[79] "Constitutional Proposal."

However, some argue that elimination of the people's councils at district level is unconstitutional. While the Constitution provides that the people's councils will create corresponding people's committees (*uy ban nhan dan*) – the local administrative bodies[80] – the constitutional problem arises from how the people's committees will be formulated in districts where the people's councils are eliminated. While amending the Constitution was impossible, in 2008 the NA passed Resolution No 26/2008/QH12, in force from April 1, 2009, as a pilot (*thi diem*) for abolishing the people's councils in sixty-seven districts, thirty-two urban districts, and 438 precincts in ten provinces and cities.

Apart from removal of the people's councils at district level, another important issue surfaced about grassroots democracy; that is, the popular election of the governor of the administrative organ at the communal level. In 2008, the NA considered the Government's proposal for a pilot for people's direct vote for the chairmen of the commune people's committees. The proposal was disapproved due to some practical reasons and for the constitutional reason that according to Article 123 of the Constitution, the chairmen of the people's committees at all levels are selected by the corresponding people's councils rather than by the people.

The above description means that local representative and grassroots democracy will receive the attention of future constitutional reformers. Understandably, the Constitutional Proposal suggests reforming the organization of local government[81] and perhaps revising constitutional provisions to stipulate further developments of local governance and grassroots democracy in Vietnam.

Further clarifying the provisions on human rights

During the last decade, Vietnam has witnessed more pressure for human rights implementation. Outside the country, some international organizations and a myriad of overseas dissidents continually criticize the human rights situation in Vietnam.[82] Inside the country, popular consciousness of liberal values has considerably increased due to rapid social change, especially the speedy privatization of the economy. Scholarly "right talk" has been in vogue among legal academicians, which also contributes to rising social awareness of individual rights. Consequently, revising the constitutional basis of human rights is on the agenda. The Constitutional Proposal submits that the future Constitution will "confirm that the State respects and protects human rights by the Constitution" and "define more clearly the scope of citizen's fundamental duties and rights. The amendments and supplements of the provisions of citizen's fundamental duties and rights should be practical."[83]

[80] 1992 constitution, Art. 123.

[81] "Constitutional Proposal."

[82] They particularly focus on Vietnam's arrest and trial of dissidents. See, for example, Carlyle A. Thayer, "The trial of Lê Công Định: new challenges to the legitimacy of Vietnam's party-state" (2010) 5(3) *Journal of Vietnamese Studies* 196.

[83] "Constitutional Proposal."

The important point here is the trend to specify the constitutional provisions concerning human rights so that they will be feasibly implemented. Currently, the Constitution commits to a wide range of rights, but in abstract language, which makes the human rights constitutional provisions largely irrelevant to the people's quotidian activities. To handle this shortcoming, Vietnam intends to define in more detail constitutional rights in the hope that they can be meaningfully put into practice.

Due to the international and domestic factors, Vietnam plans to revise her current Constitution a second time and bring the constitutional framework into line not only with national transition but also with global development. Importantly, the proposal for reforming the constitutional framework of the state apparatus and of human rights manifests the inclination toward some international standards of modern constitutionalism: limited government, judicial review, judicial independence, and human rights protection.

The draft revised constitution

On November 15 and 16, 2012, in its plenary session, the National Assembly discussed the draft revised constitution submitted by the Constitutional Amendment Committee. Subsequently, the draft was further developed by the Constitutional Amendment Committee and then was released to the public for debate from January 2 to March 31, 2013.[84] The draft introduced around a hundred revised or new articles to the current constitution, which has 147 articles. Its important contents are as follows.

Its preamble defined the Vietnamese people as the subject to ordain the constitution. With regard to the political system, the draft introduced the new principle of control among state branches in the practice of legislative, executive and judicial powers, which is relatively similar to the Western principle of checks and balances. Moreover, the draft further strengthened the principle of the distribution of powers by, for the first time, clearly defining that the NA shall practice the legislative power, the Government shall practice the executive power, and the courts shall practice the judicial power. In addition, the draft introduced the Constitutional Council as the special body of constitutional review, but with rather weak power. The draft also further emphasized human rights protection in several ways, such as inserting the term "human rights" (*quyen con nguoi*) into the title of Chapter 2, "Human Rights and Citizens' Rights and Duties," clearly defining rights provisions, and supplementing some important rights, for example the right to life. To enhance the role of the courts in protecting human rights, the draft formally recognized the courts as the bodies authorized to practice the judicial power to

[84] A draft of the revised constitution is available on the website of the National Assembly, http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_NGHIQUYET/View_Detail.aspx?ItemID=32&TabIndex=1. It also appears in most online state media.

protect justice, human rights, and citizens' rights, and at the same time de-emphasized the idea of the courts as instruments to protect the state's interests and socialist legality. The draft further enhanced judicial independence by proving that officials, organs, and individuals are prohibited from interfering in trials by judges and juries.

Public consultation on the draft revised constitution, albeit inevitably under the control of the Party and the state, was unprecedentedly open and participatory. The most controversial issues during the public debates on the draft included the referendum on the revised constitution; the single leadership of the Communist Party versus the alternative multiparty system; the unity of power vesus separation of powers and other forms of checks and balances; the possible change of the name "Socialist Republic of Vietnam" to the former name "Democratic Republic of Vietnam"; the weak power of the proposed constitutional council and the possibility of a stronger constitutional review body; the legitimacy of restrictions on human rights for reasons of national defence, security, and social order; the loyalty of the armed forces to the Communist Party or fatherland; and the state ownership of land and the possibility of multiple ownership of land. Other hotly debated issues were the organization and authority of the courts, the procuracies, local government, the possible introduction of special institutions for human rights protection and against corruption, and the right to same-sex marriage.

IV. CONCLUSION

Constitutionalism continues to be conceived as a necessary indicator of a civilized and modern polity. However, for many, talking about constitutionalism in a socialist system like Vietnam is outlandish. By investigating the constitutional developments in the first decade of the twenty-first century in Vietnam, I contend that, notwithstanding the ascendance of socialist constitutional principles, recent constitutional accretions demonstrate Vietnam's crescent movement to values of modern constitutionalism.

First, Vietnam's constitutional practice has been more liberal, or rather less authoritarian. The Constitution is now more than an embellishment, incorporating a meaningful source of individual liberty with representative democracy witnessing unconventional developments. National elections are more open, thus reflecting popular choice. The NA, rather than a Party marionette, is now a public platform for challenging Government and Party policies.

Second, Vietnam's constitutional design indicates the trend toward internalizing modern constitutional values, as evident in the commitment to the rule-of-law state, the distribution of public powers, governmental responsibility, and liberal economic rights.

Third, Vietnam's constitutional discourses have focused on key components of modern constitutionalism, such as controlling state power or limited government,

constitutional protection or constitutional review, an independent judiciary, and human rights implementation.

However, I am not so starry-eyed as to think that Vietnam has become a mature constitutionalist polity. In *Building Constitutionalism in China*, authors Stéphanie Balme and Michael W. Dowdle conceive the development of constitutionalism in China as "developmental potential, not developmental accomplishment."[85] The same can be said of the construction of modern constitutionalism in Vietnam. Vietnamese modern constitutionalism is in its incipient stages and promises more development.

The future development of modern constitutionalism in Vietnam is ambiguous. Due to globalization, Vietnamese communists will be compelled to be more democratic in order to maintain legitimacy, but at the same time they will certainly not self-destruct by radically internalizing Western liberal constitutionalist values. To handle this dilemma, Vietnamese communist leaders may employ a pragmatic approach to Western liberal constitutionalism. While socialist constitutional theory fails to provide appropriate answers for the topical constitutionalist questions, they will be forced to look outside, to the Western world, to pragmatically internalize some Western liberal products. Concurrently, the communists will control constitutionalist discourse and practices to ensure that these will not invite substantial challenges to the socialist polity.

Finally, labeling Asian socialist political systems as "authoritarianism" or a "constitution without constitutionalism" is too simplistic. The dynamics, both complex and uncertain, of constitutionalism in socialist Asia should be soberly heeded. This chapter will contribute to our comprehensive understanding of the diverse expansion of constitutionalism in Vietnam and the varied globalization of constitutionalism in Asia.

[85] See Balme and Dowdle, *Building Constitutionalism in China*, p. 10.

10

Constitutionalism in Burma, Cambodia and Thailand

Developments in the first decade of the twenty-first century

Kevin Y.L. Tan

This chapter considers the state of constitutionalism and of constitutional law in three Southeast Asian states: Burma, Cambodia and Thailand. In the first decade of the twenty-first century, Burma promulgated a new and heavily criticised constitution, while Thailand discarded yet another constitution amidst much civil unrest and political turmoil. In working through its 1993 constitution, Cambodia continues to struggle with basic rule-of-law issues. Each state adopts different notions of constitutionalism and unique processes of constitution-making. This chapter goes beyond the text of these constitutional orders and the political debates in seeking to understand the place of constitutionalism and constitutional law in the national life of these states.

I. INTRODUCTION

Burma, Cambodia and Thailand are the only non-communist states in mainland Southeast Asia. And while Burma and Cambodia were formerly colonies, Thailand is the only state in modern Southeast Asia that has never been colonised. For the purposes of this chapter, I use 'Burma' rather than 'Myanmar', which is the name the military junta adopted in 1989 on grounds that it was a more ethnically accurate name. One thing these three countries share in their struggle with constitutionalism is that efforts in constitution-making and remaking have occurred against a backdrop of military dominance and the absence of a constitutional culture. In this overview chapter, I consider the different trajectories and approaches taken by these states and consider the factors that continue to undermine the constitutional processes. Although the object is to understand constitutional development in these three states in the twenty-first century, it is necessary to situate such developments in light of the ongoing transitions of the previous century. Thus, I will detail the developments in each country via a historical-chronicle approach and draw conclusions from these developments.

II. BURMA

From colony to union

Britain had acquired what became the Union of Burma, in parts, between 1826 and 1886.[1] The constitutional development of Burma ran parallel to that of India. In 1923 Burma was ruled as a dyarchy[2] and during 1935–7 it received semi-responsible government status with a predominantly Burmese cabinet responsible to an elected parliament[3] and a governor with reserve powers.

Among Britain's colonies, Burma was one of the earliest to advocate independence. On 23 February 1940, the Burmese House of Representatives passed a motion calling for the immediate recognition of Burma 'as an independent nation entitled to frame its own constitution'.[4] British prime minister (PM) Winston Churchill was not pleased, but agreed to grant Burma dominion status after the end of the Second World War.

Japan's invasion of Burma provided a group of young Burmese anti-British intellectuals the opportunity they needed. Aung Sang and his comrades joined the Japanese and marched into Burma with a 'Burma Independence Army'. Yet, after realising that Japanese-backed independence only meant replacing one colonial master with another, Aung San and his followers worked with the British Secret Service in order to attack the Japanese and secure full independence for Burma. Burmese collaboration with the British secured an Allied victory and, in June 1945, Aung San's Burma National Army marched into Rangoon as independent troops under the Burmese flag.[5]

Aung San's Anti-Fascist People's Freedom League (AFPFL) rebuffed all British plans for a gradual evolution towards self-government and instead demanded the election of a national constitutional assembly.[6] The Labour government resumed negotiations and the new British governor, Sir Hubert Rance, reorganised the Executive Council, making Aung San second-in-command with control over defence and foreign policy. In November 1946, the Burmese issued an ultimatum: elections for a constitutional assembly by April and independence for Burma within a year.[7] Elections for the Constituent Assembly were held in April 1947

[1] For coverage of an earlier period in Burma's history, see generally Frank N. Trager, *Burma from Kingdom to Republic: A Historical and Political Analysis* (London: Pall Mall Press, 1966); J.F. Cady, *Political Institutions of Old Burma* (Ithaca: Cornell Southeast Asia Program, 1954); J.F. Cady, *A History of Modern Burma* (Ithaca: Cornell University Press, 1958); and Maung Maung, *Burma's Constitution*, 2nd edn (The Hague: Martinus Nijhoff, 1961).

[2] A 'dyarchy' refers to a system of dual rule under which government functions are shared between two bodies. It was introduced into India under the Government of India Act 1919, and government functions were divided between the provincial legislatures and the governor's executive council.

[3] See Rudolf von Albertini, *Decolonization: The Administration and Future of the Colonies, 1919–1960* (New York: Doubleday, 1971), p. 196.

[4] Ibid., p. 197. [5] Ibid., p. 201. [6] Ibid., p. 203. [7] Ibid., p. 204.

and almost all the seats were won by Aung San's AFPFL. When the assembly convened, Aung San presented his draft constitution for deliberation. However, he did not live to see the constitution adopted as he was assassinated on 19 July 1947. His successor, U Nu, signed the independence treaty with British prime minister Clement Attlee in October 1947 and on 4 January 1948 Burma was proclaimed independent.

The new constitution provided for a republican form of government with three autonomous states: Shan, Kachin and Karenni. The bicameral legislature – Chamber of Deputies and Chamber of Nationalities – jointly elected the president. Akin to other Westminster constitutions, the prime minister was accorded extensive powers and the Supreme Court chief justice and judges were appointed by the president, with parliament's approval.

Post-independence Burma

Post-independence Burma faced several serious problems.[8] The first was ethnic strife and secessionist movements from the minority ethnic groups, especially the Karens and Shans. These minority groups sought independence, opposing the government's insistence on a unified state. A civil war broke out between the minority groups and the central government. The second problem was a poorly trained civil service, which often resulted in failed government initiatives and government incapacity.[9] By 1958, the situation had become so chaotic that President U Nu voluntarily turned over the state's administration to a caretaker military government headed by General Ne Win.

The military government restored law and order, and reorganised the bureaucracy. In 1960, President U Nu was re-elected to power. The highly popular president was committed to democracy and announced his plan to make Buddhism the official state religion. This declaration caused more uprisings among the non-Buddhist ethnic minorities. President U Nu sought to turn Burma into a federation, giving the hill tribes greater autonomy. This proposal upset the military, who felt this would bring greater civil strife. On 2 March 1962, General Ne Win overthrew President U Nu's government in a coup d'état. General Ne Win disbanded parliament, banned political parties and arrested President U Nu for his political failures and restrictions of civil liberty. He then established the Burmese Revolutionary Council (BRC) comprising seventeen military leaders and announced a programme of radical economic and political reforms called the 'Burmese Way to Socialism'.[10]

[8] See generally Clark D. Neher, *Southeast Asia: Crossroads of the World* (DeKalb, IL: Northern Illinois University Center for Southeast Asian Studies, 2000, pp. 95–100; and Tin Muang Muang Than, 'Myanmar: military in charge', in John Funston (ed.), *Government and Politics in Southeast Asia* (Singapore: ISEAS, 2001), p. 203.

[9] On Burma's lack of state capacity, see Neil A. Englehart, 'Is regime change enough for Burma? The problem of state capacity' (2005) 45(4) *Asian Survey* 622.

[10] Neher, *Southeast Asia*, at 98.

These reforms were based on a mixture of Buddhist principles coupled with Marxist economic thinking. In 1974, the BRC handed over power to an elected government in accordance with a new constitution establishing Burma as a one-party socialist unitary state. The state was led by the Burmese Socialist Programme Party (BSPP) which General Ne Win established with his BRC cadres. Under this constitution, representation was based on a four-tier hierarchy elected once every four years. The legislature comprised the people's councils (covering the ward/village, township and state/division levels) and the Pyithu Hluttaw (People's Assembly). As a one-party state, the 'election' of candidates was more akin to a Stalinist confirmation of party nominees. The BSPP ruled Burma from 1974 to 1988.

In September 1987, Ne Win ordered the cancellation of certain currency notes, causing a major meltdown in the economy. This seemingly irrational move was triggered by General Ne Win's superstition. Since the number nine was his lucky number, General Ne Win only allowed forty-five and ninety kyat notes in circulation (since they were divisible by nine). The savings of many Burmese were wiped out overnight. By August 1988, the country was seething with resentment against police repression and the economic miasma. On 8 August, widespread riots broke out throughout the country, and the armed forces, under General Saw Maung, staged a coup d'état to restore order. The 8888 Uprising saw thousands killed by the military. The country once again came under martial law and the 1974 constitution was swept aside. A military government comprising generals loyal to General Ne Win – the State Law and Order Restoration Council (SLORC) – took power and ruled with Saw Maung as chairman and prime minister. All organs of state were abolished, as was the law establishing Burma as a one-party state.[11]

Although the SLORC announced that multiparty elections would be held soon after political stability was restored, it was not till 27 May 1990 that this promise was carried out. A total of ninety-three political parties took part in the 1990 elections, which saw the National League for Democracy (NLD), led by Aung San Suu Kyi, win nearly 60 per cent of the votes cast and 81 per cent of the seats in the National Assembly – which was never convened. The SLORC-backed National Unity Party – successor to the BSPP – won only 2 per cent of the votes and 10 per cent of the seats in the National Assembly. Dejected by these results, the SLORC announced that the Assembly would not be convened until a 'firm constitution' was drafted. Until such time, SLORC would retain power. This new condition clearly went against earlier promises by SLORC chairman and prime minister Senior General Saw Maung to hand over power to the winning party in the elections and return to the barracks.

[11] See Myint Zan, 'Myanmar (Burma): from parliamentary system to constitutionless and constituonalized one-party and military rule', in Clauspeter Hill and Jörg Menzel (eds.), *Constitutionalism in Southeast Asia* (Singapore: Konrad Adenauer Stiftung, 2008), p. 189 at 194.

The international community viewed this *volte face* with consternation and disappointment and urged the SLORC to respect the democratic process. Yet the generals did not budge. In 1991, the Nobel Committee awarded the Nobel Peace Prize to the NLD's Aung San Suu Kyi in what the generals saw as another means to pressure them into surrendering power.

Drafting a new constitution (1993–2008)

On 23 June 1992 the SLORC convened a meeting with all political parties to work out the process of drafting a new constitution. At the conclusion of that meeting, it was announced that a National Convention, made up of delegates of all political parties, would be established to draft the new constitution. Of the 702 delegates appointed by SLORC, only eighty-six were from the NLD. The SLORC laid down six objectives or principles that the Convention was required to follow:

1. preservation of the union;
2. preservation of national solidarity;
3. protection of sovereignty;
4. flourishing of a genuine multiparty system of government;
5. flourishing of justice, liberty and equality; and
6. participation of the *Tatmadaw* (military) in future state political leadership.[12]

The first session of the National Convention was held on 9 January 1993 and adjourned the next day. Over the next three years, the National Convention was convened and adjourned several times. In November 1995, the NLD delegates boycotted the National Convention, protesting the restrictions and predetermined agenda. They were expelled from the Convention. After the Convention adjourned on 30 March 1996, it was not reconvened again for another eight years. In the interim, the military continued its stranglehold on power. For the remainder of the twentieth century, there was no significant constitutional development in Burma.

Meanwhile, the military junta did its best to persuade NLD members to either quit politics or defect from the party.[13] With the weakening of the country's most popular political party, fissures within the *Tatmadaw* began to surface. Senior General Saw Maung stepped down in September 1992 ostensibly for health reasons and was replaced by Senior General Than Shwe, a hardline military leader who was against democratisation in Burma. One of Than Shwe's most powerful rivals for leadership supremacy was General Khin Nyunt, a protégé of General Ne Win and the powerful and influential chief of intelligence who was regarded as a

[12] Ibid., pp. 194–5.

[13] See Tom Wingfield, 'Myanmar: political stasis and a precarious economy' (2000) *South-east Asian Affairs* 203, at 206–8.

political moderate. In 1997, when the SLORC renamed itself the State Planning and Development Council (SPDC), General Khin Nyunt was appointed to the powerful post of first secretary.

In 2003, Khin Nyunt became prime minister and announced a seven-point 'Roadmap' on 30 August 2003 that would lead to the formation of a constitutionally elected government.[14] The seven-point Roadmap included (1) reconvening the National Convention that had been adjourned since 1996; (2) implementing the step-by-step process necessary for the emergence of a democratic system; (3) drafting a new constitution based on the principles agreed at the National Convention; (4) adopting the draft constitution through a national referendum; (5) holding free and fair elections for the Pyithu Hluttaws (legislative bodies) at various levels; (6) convening of the Hluttaws attended by Hluttaw members according to the new constitution; and (7) building a modern, developed and democratic nation with state leaders elected by the Hluttaw.

Prime Minister Khin Nyunt's tenure lasted fourteen months before he was forced to resign 'for health reasons'. Concurrently, his entire intelligence corps – feared and loathed by many – was dismissed.[15] Khin Nyunt was later placed under house arrest, charged with corruption and sentenced to forty-four years in jail. His dramatic fall from grace highlighted the infighting within the *Tatmadaw*. Khin Nyunt's wide-ranging intelligence corps was seen as a major threat to Than Shwe's power since Khin Nyunt had dossiers on all his fellow generals detailing their corrupt acts. He was succeeded by Soe Win (a Than Shwe protégé) as prime minister.

In keeping with the seven-point Roadmap, the National Convention was reconvened in May 2004 and adjourned in July that year. The National Convention assembled intermittently, with meetings in 2005, 2006, 2007 and 2008. In February 2008, a 194-page draft constitution was finalised. Throughout May that year, the draft was placed before the Burmese public for endorsement. It was a highly dubious exercise. As Donald Seekins noted:

> The validity of the referendum was dubious: people were given ballots already marked 'yes', officials voted for them (checking the 'yes' box), and voters in some localities were required to write on their ballots their ID card numbers. In many places ... observers saw very few people actually voting. According to local reports, the 'yes' vote was only 53% of the total in Yenangyaung Township in Magwe Division, 78% in Meiktila Township in Mandalay Division, and even lower in some parts of Shan State. Yet, at the end of May, the SPDC announced that countrywide, 98.12% of qualified voters participated and the 'yes' vote was 92.48%.[16]

[14] See Robert H. Taylor, 'Myanmar: roadmap to where?' (2004) *Southeast Asian Studies* 171; and Kyaw Yin Hlaing, 'Myanmar in 2003: frustration and despair?' (2004) 44(1) *Asian Survey* 90.

[15] On the intrigue and struggles within the Burmese military, see Kyaw Yin Hlaing, 'Myanmar in 2004: why military rule continues' (2005) *Southeast Asian Affairs* 231.

[16] Donald M. Seekins, 'Myanmar in 2008: hardship, compounded' (2009) 49(1) *Asian Survey* 166 at 169.

The sprawling 200-page constitution, with 457 articles and five schedules, was 'adopted' by the SPDC on 29 May 2008.

Distinct features of Burma's new constitution

The Defence Services – continuing influence of the military

Burma's 2008 constitution makes no pretence at being a 'people's constitution'.[17] Article 6 of the Constitution, which sets out the state's 'consistent objects', lists among these objects the 'flourishing of a genuine, *disciplined* multiparty democratic system' (emphasis added).[18] Another key object is to enable the Defence Services to 'participate in the National political leadership of the State'.[19] Article 20 of the Constitution declares the Defence Services to be the 'sole patriotic defence force'[20] that 'is mainly responsible for safeguarding the Constitution'.[21] Article 337 defines the Defence Services as 'the main armed force', while Article 338 provides that 'all armed forces in the Union shall be under the command of the Defence Services', whose job is to take the 'lead in safeguarding the Union against all internal and external dangers'.[22] Beyond these broad powers, the Defence Services are responsible for appointing a quarter of all members of the legislature (see below). As almost all amendments to the Constitution require a more than 75 per cent majority, the military has a de facto veto on any change.[23]

The legislative branch

The legislature consists of the Amyotha Hluttaw[24] or 'House of Nationalities', which has 224 seats, and the Pyithu Hluttaw[25] or 'House of Representatives', with 440 seats. One-quarter of all the seats in both houses are filled by Defence Services personnel, who are directly appointed by the Defence Services.[26]

[17] For criticisms and analyses of the new constitution, see Susanne Prager Nyein, 'Expanding military, shrinking citizenry and the new constitution in Burma' (2009) 39(4) *Journal of Contemporary Asia* 638; and Yash Ghai, 'The 2008 Myanmar constitution: analysis and assessment', available at www.burmalibrary.org/docs6/2008_Myanmar_constitution_analysis_and_assessment-Yash_Ghai.pdf, accessed 1 December 2011.

[18] Constitution of the Republic of the Union of Burma 2008 (Constitution of Burma), Art. 6(d). Cf Constitution of Burma, Art. 7, which provides that Burma 'practices a genuine, disciplined multi-party democratic system'.

[19] Constitution of Burma, Art. 6(f).

[20] Constitution of Burma, Art. 20(a).

[21] Constitution of Burma, Art. 20(f).

[22] Constitution of Burma, Art. 339.

[23] Constitution of Burma, Art. 436.

[24] This legislative body comprises Hluttaw representatives elected in equal numbers from the regions and states and Hluttaw representatives being Defence Services personnel nominated by the commander-in-chief of the Defence Services. Cf Constitution of Burma, Art. 74(b).

[25] This legislative body comprises Hluttaw representatives elected on the basis of township and population and Hluttaw representatives who are Defence Services personnel nominated by the commander-in-chief of the Defence Services. Cf Constitution of Burma, Art. 74(a).

[26] Constitution of Burma, Art. 74.

Elections for membership in both houses are held every five years.[27] To qualify as a candidate for Pyithu Hluttaw elections, the candidate must be aged at least twenty-five years, be born of Burmese parents and have resided in Burma for at least ten consecutive years prior to his/her candidacy.[28] A candidate will be disqualified if he/she is serving a prison term, commits an election offence, is of unsound mind, is an undischarged bankrupt, owes allegiance to a foreign government or is a foreign subject.[29] In the case of the Amyotha Hluttaw, candidates must be at least thirty years old, and are entitled to be elected to the Pyithu Hluttaw.[30]

The executive branch

Under the 2008 constitution, the president serves as both head of state and head of government.[31] The post of prime minister was abolished. The Cabinet is appointed by the president and confirmed by the Pyidaungsu Hluttaw, or the joint houses of the bicameral legislature. The president is selected by an electoral college comprising members of the Pyidaungsu Hluttaw, along with two vice-presidents.

To qualify as a candidate for the presidency or vice-presidency, a person must be at least forty-five years old, be a citizen of Burma and not be a member of any Hluttaw. His or her parents must both have been born in Burma and be Burmese nationals.[32] In addition, he or she must have resided continuously in Burma for at least twenty years.[33] Particularly controversial is Article 59(f), which provides that the candidate:

> himself, one of the parents, the spouse, one of the legitimate children or their spouses not owe allegiance to a foreign power, not be subject of a foreign power or citizen of a foreign country. They shall not be persons entitled to enjoy the rights and privileges of a subject of a foreign government or citizen of a foreign country.

This clumsily drafted provision was seen as directly targeting Aung San Suu Kyi, whose late husband, Michael Aris, was a British national. Under Article 60, the Presidential Electoral College comprises three groups of Pyidaungsu Hluttaw representatives: (a) representatives from the regions and states; (b) representatives elected on the basis of township and population; and (c) representatives nominated by the commander-in-chief of the Defence Services for the two Hluttaws. The president and vice-presidents can each serve a maximum of two terms (of five years each) in office.

[27] Constitution of Burma, Art. 119.
[28] Constitution of Burma, Art. 120(a)–(c).
[29] Constitution of Burma, Art. 121.
[30] Constitution of Burma, Art. 152.
[31] Constitution of Burma, Art. 16 and 23.
[32] Constitution of Burma, Art. 59(b).
[33] Constitution of Burma, Art. 59(e).

At the apex of the executive branch of government is the National Defence and Security Council (NDSC). The NDSC comprises the president; vice-presidents; speakers of both houses, ministers of home affairs, foreign affairs, defence and border affairs; and the commander-in-chief and deputy commander-in-chief of the Burma Defence Services.[34] As can be seen, all these key ministerial portfolios are to be occupied by serving members of the armed forces.

Judicial branch

The president appoints and the Pyidauangsu Hluttaw (joint Houses of Legislature) approve the chief justice and six other judges of the Supreme Court. There are also courts in the states, regions and self-administered zones, and district courts and other courts. The jurisdiction of the Supreme Court does not cover and does not affect the powers of the separate Constitutional Tribunal and the courts-martial. Burma, which theoretically abandoned its socialist state ideology, now claims, through its 2008 constitution, to appoint judges on the basis of merit rather than ideology.[35] However, the Pyidaungsu Hluttaw appoints judges upon the recommendation of the president and the speakers of the Pyithu Hluttaw and the Amyotha Hluttaw. Judges are expected to be at least fifty years of age, and are expected either to have held office as a judge of the High Court for at least five years, to have been a judicial or legal officer for at least ten years, to have practised as an advocate for at least twenty years, or to be, in the opinion of the president, an 'eminent jurist'.[36] Given the illiberal, military-dominated regime in Burma, appointments to the Supreme Court are most likely politicised.

The 2010 elections

On 7 November 2010, more than twenty years after the last multiparty elections in 1990, Burmese once again went to the polls.[37] Touted by the SPDC as a major turning point in the return of power to the people, these elections proved even

[34] Constitution of Burma, Art. 201.

[35] Constitution of Burma, Art. 333(h) still requires the candidate judge to be a 'person loyal to the Union and its citizens', while Art. 333(g) requires him or her to have a 'political, administrative, economic and security outlook'.

[36] Constitution of Burma, Art. 333.

[37] See generally Sean Turnell, 'Myanmar in 2010: doors open, doors close' (2011) 51(1) *Asian Survey* 148. For an analysis of the electoral laws operating in this election, see Michael F. Martin, 'Burma's 2010 elections: implications of the new constitution and election laws', Congressional Research Service, 29 April 2010, available at www.crs.gov, accessed 1 December 2011; Richard Horsey, 'Preliminary analysis of Myanmar's 2010 electoral laws', prepared for the Conflict Prevention & Peace Forum, 31 March 2010, available at http://anfrel.org/country/Myanmar/Political_Overview/2010/Burma%20electons%20law%20analysis.PDF, accessed 1 December 2011.

more controversial than the last ones. It was, as Burma expert and scholar Sean Turnell put it, a 'constitutionalized façade for ongoing military rule'.[38]

Four out of the five parties that dominated the 1990 elections – including the NLD – refused to participate, citing unjust and biased registration laws. To oversee the election, the SPDC established the Union Election Commission, whose seventeen members were either retired generals or had close ties with the SPDC. The commission's decisions were final and there were no avenues for judicial review. The polls were dominated by parties known to be closely linked to the military junta, such as the Union Solidarity and Development Party (USDP), the National Unity Party (NUP) and the Union Solidarity and Development Association (USDA).

The SPDC claimed a voter turnout of 76 per cent, though it has been suggested that it may well have been lower than 30 per cent.[39] Restrictive election laws skewed the election in favour of large parties and it was no surprise that the military-backed Union Solidarity and Development Party won more than 75 per cent of the seats in both the Amyotha Hluttaw and the Pyithu Hluttaw. As Turnell stated:

> Myanmar's 2010 elections were flawed by a number of irregularities on polling day, but their outcome was in any case a foregone conclusion. In the end, some 37 parties contested the elections, but a number of other parties (some genuinely independent, some representing ethnic minorities) as well as individuals were excluded. Among the latter were political prisoners, including the most famous, Daw Aung San Suu Kyi … The NDF faced the obstacles that confronted most participants – high registration fees (around US$300 per party and $500 per candidate). Other impediments were the severe restrictions on freedom of speech and assembly (including election-specific injunctions against criticism of the Constitution and the polling process), a lack of access to the media and an absence of free reporting, and a pervasive environment of fear and intimidation.[40]

The first session of the military-dominated legislature was called on 31 January 2011 and U Thein Sein, a Than Shwe protégé, was elected president. Thura U Tin Aung Myint Oo and Dr Sai Mauk Kham were elected vice-presidents. Less than a week later, on 13 November 2010, the SPDC released Aung San Suu Kyi from house arrest. In August 2011, she held a closed-door meeting with President U Thein Sein and remarked that while Burma was seeing positive changes, it still had a long way to go.[41] In September 2011, the Pyithu Hluttaw passed a law allowing workers to form unions and assemble peaceably. As censorship was relaxed, the state-owned newspaper, *New Light of Myanmar*, ran an article mildly criticising the government.

[38] Turnell, 'Myanmar in 2010, at 148. [39] Ibid.
[40] Ibid., at 149–50. [41] 'Myanmar sees the light', *Straits Times*, 12 September 2011.

At the same time, the ban on websites – YouTube, Reuters, Burmese-language Voice of America, and the exile-run Democratic Voice of Burma – was lifted.[42] At the end of November 2011, US Secretary of State Hillary Clinton visited President Thein Sein and Aung San Suu Kyi in Rangoon, Burma. As the first secretary of state to officially visit Burma since 1955, she appeared optimistic about the 2010 election reforms, yet was not prepared to lift all US sanctions against Burma.

Just before Clinton's visit, the NLB announced its intention to re-register itself as a political party so it could contest the forty-five by-elections to be held after elected parliamentarians vacated their seats upon being given ministerial rank.[43] On 18 January 2012, Aung San Suu Kyi registered to contest the election for a Pyithu Hluttaw seat in Kawhmu township which was held on 1 April 2012. Its previous occupant, Soe Tint, vacated the seat after being appointed deputy construction minister. She easily defeated her opponent, retired army physician Dr Soe Min. The NLD won forty-three of the forty-five contested seats and Aung San Suu Kyi became the unofficial leader of the opposition.

Although the newly elected members of the Pyithu Hluttaw were scheduled to take their oaths of office and to take their seats on 23 April 2012, this did not happen. The NLD, including Aung San Suu Kyi, protested the wording of the oath of office, which, among other things, required the parliamentarians to 'safeguard' the Constitution. This, the NLD argued, was tantamount to requiring their members to sanction and uphold a constitution which they would like very much to change. On 2 May 2012, the NLD members-elect took their oaths of office and on 9 July 2012, Aung San Suu Kyi attended the Pyithu Hluttaw for the first time as a lawmaker.

III. CAMBODIA

From colony to kingdom (1887–1970)

In 1863, Cambodia became a protectorate of France, and in October 1887 it became part of Union Indochinoise (Union of Indochina) along with Vietnam and later Laos, after Laos was annexed by the French from the Siamese in 1893.[44] From that time on, the French controlled all levers of power in Cambodia and even determined the appointment of monarchs. On 25 April 1941, the French crowned Prince Norodom Sihanouk king of Cambodia in preference over his brother, whom they regarded as too independent.

[42] Nirmal Ghosh, 'Winds of change in Myanmar', *Straits Times*, 17 September 2011.

[43] Under Arts. 232(i) and 232(j) of the Constitution, persons who are appointed Union ministers shall be deemed to have resigned or retired from their seats in the Hluttaw.

[44] See generally Jörg Menzel, 'Cambodia: from civil war to a constitution to constitutionalism?', in Hill and Menzel, *Constitutionalism in Southeast Asia*, p. 39.

Capitalising on the weakness of the French during the Second World War, Sihanouk unilaterally declared Cambodia's independence from France. However, this was short-lived and the French returned to Indochina after the war. Due to internal pro-independence pressure, the French introduced multiparty elections in 1946. The Democratic Party, led by Prince Sisowaath Yutevong, won the elections. Prince Yutevong was the main architect of the Khmer Constitution of 1947, which he modelled after the Fourth Republic of France. On 6 May 1947, King Sihanouk proclaimed the birth of the new Khmer Constitution.

Prince Yutevong did not live to see the fruits of his victory, dying on 17 July 1947, aged only thirty-four. His mysterious death ushered in a period of instability, with numerous changes in leadership. In 1953, King Sihanouk went to France to demand full independence for Cambodia, but the French demurred, thinking him an alarmist who exaggerated the anti-French sentiments building up in Cambodia. The king increased the stakes by declaring that until the French granted Cambodia independence, he would live in self-imposed exile in Thailand. The Thais did not welcome him and King Sihanouk left for the autonomous zone of Siem Reap where he collaborated with Lieutenant-Colonel Lon Nol to fight the French.

On 3 July 1953, the French surrendered. The process for independence was swift, and King Sihanouk succeeded in obtaining his demands. Khmer Independence Day was proclaimed on 9 November 1953. The 1947 constitution, which gave tremendous powers to the king, was amended in 1957 to guarantee fundamental rights and liberties to the people.

King Norodom Sihanouk ruled until 1955, when he abdicated in favour of his father to form his own political party, the Sangkhum Reastr Niyum (People's Socialist Community), and become prime minister. King Sihanouk continued to dominate politics in Cambodia until 1970 when Lon Nol – by then his armed-forces chief – overthrew him in a coup d'état. Sihanouk left for exile in China while the American-backed Lon Nol presided over an economically ruined and wartorn Cambodia from 1970 to 1975.

The Khmer Rouge and after (1975–1991)

In April 1975, the communist anti-government insurgent group the Khmer Rouge ('Red Cambodians') overthrew Lon Nol. The Khmer Rouge, under the genocidal Pol Pot regime, began a programme of social reconstruction, plunging Cambodia into the Dark Ages. Throughout this period, the Cambodian constitution was suspended and law and legal institutions hardly existed. On Christmas Day 1978, Vietnamese troops invaded Cambodia and overthrew the Pol Pot regime. A new Vietnamese-backed government headed by Hun Sen was established and ruled with the support of occupying Vietnamese troops from 1979 to 1989. The Hun Sen regime battled against three resistance groups: the royalist Front Uni National pour un Cambodge Indépendant Neutre Pacifique et Coopératif (National United

Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia) or FUNCINPEC, founded by Prince Sihanouk; the Khmer People's National Liberation Front (KPNLF) led by former prime minister Son Sann; and the surviving Khmer Rouge army and leadership.[45]

The 1991 peace accord and the 1993 constitution

In October 1991, the warring political factions signed a major peace accord and invited the United Nations to intervene in Cambodia. The United Nations Transitional Authority in Cambodia (UNTAC) was mandated to create a neutral political environment for free and fair elections. Under Annex 3 to the 1991 Paris Peace Agreement, a constituent assembly consisting of 120 members was to be created within three months of the general election to 'complete its tasks of drafting and adopting a new Cambodian Constitution and transform itself into a legislative assembly which will form the new Cambodian Government'.[46]

UNTAC held general elections for the 120-member Constituent Assembly in May 1993, and FUNCINPEC won fifty-eight of the 120 seats, leaving Hun Sen's Cambodian People's Party (CPP) with fifty-one seats and the KPNLF with ten seats. FUNCINPEC's majority in the Constituent Assembly proved problematic as the CPP – who controlled all the state's institutions and apparatus – were reluctant to surrender control. Negotiations for the drafting of the Constitution proved difficult. In the end, the Constitution was not drafted by the Assembly but instead by a twelve-member multiparty committee[47] formed to draft the Constitution.[48] Menzel describes the difficulties as follows:

> Despite massive criticism by the media and NGOs about the secrecy surrounding the deliberations, they remained widely confidential. The committee had no spokesperson and 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 committee's work and the draft for a 'bill of rights' prepared by the UNTAC Human Rights Component was not even disseminated to the members of the Constituent Assembly. In the end there were two options, one republican (seemingly favoured by CPP) and one monarchic (seemingly favoured by FUNCINPEC). Hun Sen and Ranariddh travelled to consult with former King Sihanouk in Pyong Yang

[45] Sorpong Peou, 'Cambodia: after the Killing Fields', in Funston, *Government and Politics in Southeast Asia*, p. 36 at 38.

[46] Art. 1, Annex 3, Paris Peace Agreement, 23 October 1991.

[47] Of these, six were members of FUNCINPEC, five were members of the CPP and one was a member of the Buddhist Liberal Democratic Party.

[48] Menzel, 'Cambodia: from civil war', at 48.

> (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.[49]

The 1993 constitution is replete with democratic aspirations and values,[50] rejecting political authoritarianism. It can only be reviewed or amended if a quarter of the Legislative Assembly proposes such a review or amendment to the king, the prime minister and the president of the Assembly.[51] Amendments are effected by a two-thirds majority in the Assembly. The first amendment to the Constitution was made in 1994 to allow the king to delegate his duty of signing laws into force to the acting head of state should the king be indisposed and hospitalised abroad.[52]

The 1997 coup d'état and further constitutional amendments

After the Constitution came into force, leadership in the government was divided between two co-prime ministers – Prince Ranariddh and Hun Sen. The intense rivalry between the two men and their followers resulted in a very uneasy and unstable situation in government, especially with both sides attempting to attract defecting Khmer Rouge troops into their respective folds. In 1997, Hun Sen staged a successful coup d'état to oust Ranariddh as his co-prime minister.[53] Ranariddh fled but later returned to stand trial for illegal importation of weapons and for secretly negotiating with the Khmer Rouge. He was sentenced to thirty years' imprisonment and fined US$50 million. His father, King Sihanouk, pardoned him and this paved the way for his return to national politics.[54]

In the general election that followed on 26 July 1998, Hun Sen's CPP were the big winners, with sixty-four of the 120 seats, while FUNCINPEC won forty-three seats, followed by the Sam Rainsy Party's fifteen-seat gain. The CPP and FUNCINPEC agreed to form a coalition government even though Hun Sen and Ranariddh remained hostile to each other. Following the elections, the Legislative Assembly passed an amendment to the Constitution on 8 March 1999; the most

[49] Ibid., at 48–9.

[50] Art. 51, Constitution of the Kingdom of Cambodia (Constitution of Cambodia), 1993, states that 'Cambodia adopts a policy of liberal democracy and pluralism'. Art. 153 forbids any revision or amendment that affects 'the system of liberal and pluralistic democracy and the regime of Constitutional Monarchy'. See Sorpong Peou, 'Cambodia: after the Killing Fields', pp. 41–2.

[51] Constitution of Cambodia, Art. 131.

[52] Constitution of Cambodia, Art. 28.

[53] For details on how things boiled over, see Sorpong Peou, '1997: Back to square one?' (1998) 38(1) *Asian Survey* 69 at 69–71.

[54] See Sorpong Peou, 'Cambodia in 1998: from despair to hope?' (1999) 39(1) *Asian Survey* 20 at 20–1; see also John M Sanderson and Michael Maley, 'Elections and liberal democracy in Cambodia' (1998) 52(3) *Australian Journal of International Affairs* 241.

important until then. The 1999 amendments created a Senate to provide more checks and balances.[55]

The Cambodian constitution in the twenty-first century

The Cambodian constitution was amended several more times in 2001, 2005 and 2006. These amendments were prompted by two ongoing constitutional issues: (a) the frailty of King Sihanouk and his succession; and (b) the requirement that the Royal Government receive two-thirds of the vote in the National Assembly.[56] Under the 1993 constitution, the kingship is elective and not hereditary in nature.[57] Article 8 of the Constitution provides that the king 'shall be the Head of State for life'. By 2001, King Sihanouk was almost eighty years old and was in frail health. The politicians were concerned about an impasse should the king become incapacitated or die. Most of these contingencies had been addressed by the March 1999 amendments, and in 2001 two minor amendments were made to empower the king to appoint the prime minister and the Council of Ministers in accordance with Article 119,[58] and establish and confer national decorations, civil and military ranks and positions.[59]

Despite these amendments, Cambodian politicians were unprepared for King Sihanouk's sudden decision to abdicate as king in October 2004. Perhaps because King Sihanouk had threatened abdication so many times before and never followed through, Cambodians did not take his utterances too seriously. There was a sense of disbelief when it was announced and only later did the politicians realise that he had been very serious. The problem was that the Constitution made no provision for the king's abdication, especially since the king is supposed to be monarch for life. Article 13 provides that a new king will be chosen by the Royal Council of the Throne, the organisation and functioning of which was to be determined by law. There were, however, no laws governing the Throne Council. The National Assembly met hastily to pass relevant laws to regulate the Throne Council, and the nine-member Council chose Prince Sihamoni as the new king of Cambodia.[60]

The issue concerning the National Assembly and the Council of Ministers is rather more complex. Under Article 82, the National Assembly must vote to choose a president, vice-presidents and members of each commission by a two-thirds majority. The original version of Article 100 provided that the king, upon the recommendation of the president of the National Assembly, shall designate a dignitary among the Members of the National Assembly holding the largest number

[55] Sorpong Peou, 'Cambodia: after the Killing Fields', p. 40.
[56] Constitution of Cambodia, Art. 90.
[57] Constitution of Cambodia, Art. 10, provides that the 'King shall have no power to appoint his successor to reign.'
[58] Constitution of Cambodia, Art. 19. [59] Constitution of Cambodia, Art. 29.
[60] See Melanie Beresford, 'Cambodia in 2004: an artificial democratization process' (2005) 45(1) *Asian Survey* 134 at 136.

of seats, to form the Royal Government. In addition, members of the Assembly who intend to form the Royal Government must obtain a vote of confidence from the Assembly, who must pass the vote by a majority of two-thirds.

The difficulty begins with Article 82. If enough anti-government politicians stay away from the Assembly, no president of the Assembly can be elected. Without a president of the National Assembly to recommend a prime minister to the king, no government can be formed. The operation of these provisions was brought into sharp relief in the aftermath of the July 2003 general elections in which Hun Sen's CPP won seventy-three of the 123 seats in the National Assembly. Despite this convincing victory, Hun Sen was unable to form a new government because his party was nine seats short of the constitutional two-thirds majority required to govern. It took him a whole year to win over FUNCINPEC to form a two-party coalition.[61] As Robert Albritton noted:

> Provisions of the Constitution designed to force warring parties to collaborate in forming a government are now an obstacle to democratic consolidation. The two-thirds requirement to organize the Parliament subjects any party to political blackmail, even after winning a substantial majority of the seats … The inability of the majority party to form a government is a source of political, economic, and social instability that will pose a threat not only to democratic progress but to the development of the economy and the ability of Cambodia to integrate into the international community.[62]

Article 82 was amended in March 2006 to provide that the election of the president, vice-president and all members of the various committees be obtained 'by an absolute majority vote of all Members of the National Assembly'. In the July 2008 elections for the National Assembly, the CPP won 58 per cent of the popular vote, translating into ninety of the 123 seats in the Assembly. For the first time, it could form the government of Cambodia without a coalition.

IV. THAILAND

Of the countries discussed in this chapter, Thailand has drafted the most constitutions. Since the Chakri kings surrendered absolute power in 1932, Thailand has promulgated and discarded seventeen constitutions.[63] The first of these was the

[61] See Oskar Weggel, 'Cambodia in 2005: year of reassurance' (2006) 46(1) *Asian Survey* 155 at 155; and Melanie Beresford, 'Cambodia in 2004: an artificial democratization process' (2005) 45(1) *Asian Survey* 134 at 135.

[62] Robert B. Albritton, 'Cambodia in 2003: on the road to democratic consolidation' (2004) 44(1) *Asian Survey* 102 at 109.

[63] For a brief account of Thailand's pre-1932 constitutional history, see Andrew Harding and Peter Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Oxford: Hart, 2011), pp. 1–10.

Constitution of the Kingdom of Thailand, promulgated in the name of King Prajahipok. Under this constitution,

> an Assembly of People's Representatives was established based on indirect elections at the village and sub-district levels (*tambol*), the electors of which were to elect the members of the People's Assembly. Instead of a People's Commission, a Council of Ministers was appointed from among members of the People's Assembly, consisting of a PM and not less than fourteen and not more than twenty-four Ministers.[64]

Chapter II of the Constitution provided for civil liberties and abolished all privileges associated with royalty and rank. It also made education compulsory. Despite its democratic aspirations, the Constitution did not succeed in instilling democratic inclinations among the Thai public and ruling elite. Following several coups and an attempted rebellion, the Thai military emerged as the dominant power broker in Thai politics, and this remains so today.

Vacillating between martial and civilian rule

Thai constitutional development is characterised by periods of military dictatorship and repression of civil liberties, interspersed with periods of liberal democracy.[65] Lieutenant-Colonel Plaek Phibunsongkram, who successfully quelled the 1933 attempted rebellion, became prime minister (PM) in 1938 and took Thailand in a right-wing nationalist direction, forging a military alliance with Japan. However, Japan's defeat in the Second World War sparked off a battle between the left-wing People's Party under former professor of constitutional law Pridi Banomyong and the still powerful Phibunsongkram. Professor Pridi drafted a new constitution in 1946 but this was abrogated after Phibunsongkram staged another coup d'état in 1947. He replaced this with an interim constitution which remained in force only until 1949, when a permanent constitution was drafted.

A military coup in 1951 resulted in the abrogation of the 1949 constitution and the country reverted to the 1932 constitution. Late in 1958, this was abolished by Field Marshal Sarit Thanarak, who promulgated a provisional constitution which lasted till 1968. A more 'permanent' constitution was drafted, but was quickly thrown out by Field Marshal Thanom Kittikachorn, who abolished all political parties and dissolved parliament in 1971. Thanom's regime lasted only until 1973, when student riots brought down his repressive government.

[64] Preben A.F. Aakesson, Marut Bunnag and Rjira Bunnag, 'The development of constitutionalism in Thailand: some historical considerations', in Lawrence Ward Beer (ed.), *Constitutional Systems in Late Twentieth Century Asia* (Seattle and London: University of Washington Press, 1992), p. 656, at 664.

[65] Harding and Leyland, *The Constitutional System of Thailand*, pp. 10–21.

In late 1974, a new liberal constitution was promulgated under the regime of PM Dr Sanya Dharmasakti. However, this democratic hiatus, marked by the prime ministerships of Seni Pramoj and Kukrit Pramoj, lasted only until 1976. In 1977, Thanin Kraivichien, a former Supreme Court justice, was installed as PM. His repressive tenure was followed by the moderate government of General Kriangsak Chommanand, whose tenure lasted till 1980.[66] During Kriangsak's regime, a liberal constitution was promulgated and it lasted until a bloodless coup led by General Sunthorn Kongsompong in 1991. Between 1978 and 1991, Thailand enjoyed relative political stability and the semi-liberal constitution was respected. General Prem Tinsulanond, a former army general, led a broad-based political coalition government. Several general elections were held, but the winning parties always asked Prem to continue as PM, as he enjoyed the support of the military, King Bhumibol and the people. Prem's final term of office ended in 1988 when elections were held and Chatichai Choonhavan, another former general, formed a civilian government.

The Chatichai government lasted only three years before the military staged another coup. Realising that the military coup had little popular support, the generals installed Anand Panyarachun, a career diplomat, as PM. Anand, who lacked political ambitions, is generally acknowledged to have been the best Thai PM in recent times. His tenure lasted just over a year, when elections were again called. Suchinda Kraprayoon, a military strongman, became PM, but his tenure lasted only a few months. The people revolted and there was widespread rioting in Bangkok. In a rare instance of direct intervention, King Bhumibol lectured the feuding parties on national television and told them to work out a peaceful solution. Suchinda resigned and Anand Panyarachun was once again asked to take over as PM. PM Anand set about reorganising the government and left office once he had organised elections. In the second 1992 elections, a new coalition under Chuan Leekpai took power. As with most coalitions, it was difficult to hold everyone together, and Chuan Leekpai took turns with Banharn Siliparcha at the helm of Thai politics.

The 1997 constitution

During this period, a Constitution Amendment Bill was passed in May 1986 to provide for the formation of a ninety-nine-member Constitution Drafting Assembly.[67] The assembly was to conduct a survey of public opinion through hearings and was to finalise a draft for presentation to parliament in 240 days. If it failed to secure a majority vote in parliament, a public referendum would be held and a simple majority of eligible voters would suffice to approve it.

[66] Aakesson, Bunnag and Bunnag, 'The development of constitutionalism in Thailand', pp. 666–7.

[67] One member was drawn from each of the seventy-six provinces, while the others were experts in public law, political science and public administration shortlisted by universities, to be chosen by parliament.

The draft constitution recognised more rights and freedoms than any other previous constitution and was designed to make elected politicians and public officials accountable. Civil liberties, although provided for in previous constitutions, were, for the first time linked to the idea of 'human dignity'. To enhance political participation, access to the media was guaranteed through a number of measures. These included plans to privatise state and private monopolies of radio, television and telecommunications, provisions allowing 50,000 electors to submit a piece of legislation to parliament, and asking the Senate to remove high officials if they appeared 'unusually wealthy' or where they exercised their powers unconstitutionally. Other social and economic rights included in the 1997 constitution were the state's obligations to provide twelve years of free education, health care for the poor, pensions for the elderly without means of support and guarantees of accessible facilities for the handicapped.

Among other innovative provisions are measures to outlaw vote-buying, the establishment of an independent Election Commission (working with non-governmental organisations), the implementation of a German-style party list system of voting, anti-corruption measures prohibiting parliamentarians from receiving state concessions or monopolies, requirements for government ministers to transfer their assets into blind trusts, an asset and liability disclosure mechanism and the establishment of a National Counter-Corruption Commission, a Constitutional Court and a National Human Rights Commission. Parliament passed the Constitution on 27 September 1997 at a joint sitting of the House of Representatives and the Senate with 518 votes for, sixteen against and seventeen abstentions. The king assented to the Constitution on 11 October 1997.

Into the twenty-first century

The 1997 constitution was universally hailed as Thailand's most liberal and democratic ever.[68] As Thai academic Suchitra Punyaratabandhu pointedly observed:

> In recent years, amending Thai constitutions has become a somewhat routine undertaking, with little noticeable impact on the political system. The latest version, however, represents a radical departure from its predecessors, both in substance and in the drafting process. The Constitution was drafted by a 99-person elected Assembly and involved participation from all sectors of society over an eight-month period. Its 339 articles reflect extensive public consultation. In this, the media – in particular the numerous television talk shows and nationally televised public – played a key role. A major design feature of the Constitution is

[68] Harding and Leyland call it 'Thailand's most imaginative, concerted and inclusive effort to settle its constitutional system'. See Harding and Leyland, *The Constitutional System of Thailand*, p. 23.

> the attempt to limit the influence of money in Thai politics. The so-called 'people's constitution' represents a victory of democracy groups over supporters of the old political system based on clique politics.[69]

The first general election to be held under the 1997 constitution was in 2001, since the previous election had been held in 1996. The 2001 general election witnessed the rise and victory of the Thai Rak Thai (Thais Love Thais) Party. Established in July 1998 by telecommunications tycoon Thaksin Shinawatra, the party adopted a populist platform that appealed greatly to Thailand's rural poor. Among its most popular policies have been the thirty baht (US$1.00) per hospital visit scheme, and the 1 million baht (US$32,000) microcredit development fund for all rural districts.[70] The party also favoured an extended debt moratorium for farmers affected by the Asian financial crisis of 1997.

In the 2001 election, Thaksin's new party scored a landslide victory over incumbent Chuan Leepai's Democrat Party, winning 40 per cent of the popular vote and 248 of the 500 seats in the National Assembly, Thailand's parliament. By negotiating a merger with the New Aspiration Party and a coalition with the Thai Nation Party, Thaksin was able to form a government that controlled 325 of the 500 seats. For the first time a political party commanded a majority of seats in the Assembly.

Thaksin's Thai Rak Thai Party gained an even tighter grip on the Assembly after the 2005 general election when it secured 377 of the 500 seats.[71] The period of stability and calm following the drafting of the 1997 constitution was considered remarkable and marked 'a significant achievement for reformers committed to democratic consolidation'.[72] However, Thaksin's victory in the 2005 elections signalled the start of widespread attacks against him. Shortly after his election victory, protests broke out in Bangkok between his supporters and conservative elements close to the palace. The reasons for discontent were many and varied, ranging from cronyism to tax evasion to Thaksin's anti-royalist agenda.[73]

While the Thai Rak Thai Party retained its popularity in the rural regions, it was unpopular among the Bangkok elite and the middle classes, who felt that Thaksin had overstepped his bounds and was becoming increasingly authoritarian and corrupt. Thaksin's opponents – including his highly influential former ally Sondhi Limthongkul – also exploited Thaksin's sale of holdings in his family's flagship company, Shin Corporation, to Singapore sovereign wealth fund Temasek Holdings in early 2006. This highly controversial sale netted Thaksin's family

[69] Suchitra Punyaratabandhu, 'Thailand in 1997: financial crisis and constitutional reform' (1998) 38(2) *Asian Survey* 161 at 165.

[70] Shawn W. Crispin, 'Thailand election trade-off', *Far Eastern Economic Review*, 28 December 2000.

[71] See Robert B. Albritton, 'Thailand in 2005: the struggle for democratic consolidation' (2006) 46(1) *Asian Survey* 140.

[72] Ibid.

[73] See 'A right royal headache', *Far Eastern Economic Review*, 10 January 2002, at 8.

US$1.9 billion, tax-free. Then there was the unrest in the south where the predominantly Muslim population were agitating for greater autonomy and separation,[74] which Thaksin was seen to be handling ruthlessly.

In a desperate bid to stem the rising discontent, Thaksin called snap elections on 2 April 2006. The opposition boycotted the elections, seeing them as a manoeuvre by Thaksin to win an easy victory. Instead, they campaigned for Thais to use their 'no vote' option at the polls. Quite a number of constituencies were uncontested. As the 1997 constitution requires that unopposed candidates obtain at least 20 per cent of the polled votes to win election, many Thai Rak Thai candidates lost their seats. When all the votes were tallied, the Thai Rak Thai Party came in 'second' with 16 million votes whilst 'first place' went to the 'no vote' option. These results meant that Thaksin was unable to form the government within the mandated thirty days following the election. Thaksin then sought an audience with King Bhumibol and pleaded to quit politics. The king appointed him caretaker prime minister. In the meantime, the Constitutional Court was asked to consider the validity of the recent elections and it declared them null and void on account of election malpractices. It further announced that elections to the House of Representatives would be tentatively scheduled for October 2006.

The 2006 coup d'état and the 2007 constitution

On 19 September 2006, while Thaksin was on an overseas trip to the United States, the military deposed him in a coup.[75] General Sondhi Boonyaratkalin, who led the armed forces, promised to restore democratic government within one year and promised the Thais a new constitution.[76] An interim constitution was drafted in 2006 and replaced by a permanent constitution in 2007. The drafters of the 2007 constitution were appointed by the military, and the draft constitution was approved by a public referendum.[77] The narrow margin (58 per cent) by which the Constitution was approved shocked the military who were surprised by the strong support Thaksin continued to enjoy.

[74] On the Muslim separatist movement in southern Thailand, see Duncan McCargo (ed.), *Rethinking Thailand's Southern Violence* (Singapore: NUS Press, 2006); Duncan McCargo, *Tearing Apart the Land: Islam and Legitimacy in Southern Thailand* (Ithaca: Cornell University Press, 2008); John N. Funston, *Southern Thailand: The Dynamics of Conflict* (Singapore: Institute of Southeast Asian Studies, 2008); and Moshe Yegar, *Between Integration and Secession: The Muslim Communities of the Southern Philippines, Southern Thailand, and Western Burma/Myanmar* (Lanham and Madison: Lexington Books, 2002).

[75] See James Ockey, 'Thailand in 2006: retreat to military rule' (2007) 47(1) *Asian Survey* 133.

[76] See Tom Ginsburg, 'Constitutional afterlife: the continuing impact of Thailand's post-political constitution' (2009) 7(1) *I·CON* 83.

[77] On the making of the 2007 constitution, see Chaowana Traimas and Jochen Hoerth, 'Thailand: another new constitution as a way out of the vicious cycle?', in Hill and Menzel, *Constitutionalism in Southeast Asia*, p. 301, at 314–17.

The 2007 constitution was intended to deal with the weaknesses said to be inherent in the 1997 constitution. Among these were cronyism and the politicisation of appointments to national institutions such as the Constitutional Court, the National Anti-Corruption Commission and Election Commission. Some key features of the 2007 constitution were clearly directly targeted at Thaksin: the limiting of the prime minister's term of office to eight consecutive years[78] and the ban on the prime minister's having stakes in private businesses. While the 1997 constitution had provided safeguards for the appointment of key officials in national institutions, Thaksin was able to subvert these safeguards by controlling the Senate, which was responsible for these appointments. Under the 2007 constitution, only half the 150-member Senate would be popularly elected; the other half would be chosen by a Senators Selective Committee[79] comprising the presidents of the Constitutional Court, the Election Commission, the ombudsmen, the National Counter-Corruption Commission, the State Audit Commission, a judge of the Supreme Court and a judge of the Supreme Administrative Court.[80] The size of the House of Representatives was also reduced from 500 to 480,[81] and the threshold for a vote of no confidence in the prime minister was reduced from two-fifths to one-fifth of the members of the National Assembly.

The 2007 constitution was viewed by many as being biased in favour of the armed forces and was thought to lead to greater factionalism and political instability.[82] Elections under the 2007 constitution were held on 23 December 2007. The Palang Prachachon, or People's Power, Party (PPP) – actually the Thai Rak Thai Party in a reconstituted guise – and its allies emerged victorious, securing 233 of the 480 seats in the House of Representatives. Their main rivals, the Democrat Party under Abhisit Vejjajiva, won 165 seats. In January 2008, PPP leader Samak Suntaravej was sworn in as prime minister at the head of a coalition government that included the Chart Thai (Thai Nation), Pue Paendin (For the Motherland), Matchimathippatai (Neutral Democratic Party), Ruamjaithai Chartpattana (Thais United National Development) and Pracharaj (State's Citizens) parties, leaving the Democrat Party the sole opposition party.

Political mayhem and new elections (2008–2011)

Even though the PPP secured electoral victory, the political situation remained volatile. In June 2008, the People's Alliance for Democracy (PAD), headed by Thaksin's chief critic, Sondhi Limthongkul, staged a protest against the PPP government. Wearing yellow shirts, PAD supporters were seen to be anti-Thaksin and royalist. The United Front for Democracy against Dictatorship (UDD), wearing red

[78] The Constitution of the Kingdom of Thailand (Constitution of Thailand), 2007, Section 171.
[79] Constitution of Thailand, Section 111.
[80] Constitution of Thailand, Section 113.
[81] Constitution of Thailand, Section 93.
[82] Erik Martinez Kuhonta, 'The paradox of Thailand's 1997 "People's Constitution": be careful what you wish for', *Asian Survey* 48(3) (May/June 2008) 373.

shirts, formed a rival support group for Thaksin. In September, violence broke out between the two groups and PM Samak resigned. Thaksin's brother-in-law, Somchai Wongsawat, was then sworn in as prime minister and this led to intensified protests by the yellow-shirted PAD supporters. In the next two months, things spiralled out of control as PAD supporters clashed with police, and stormed and occupied airports in Bangkok in an effort to force the PPP from office.

In December 2008, the Constitutional Court ruled that the PPP, Chart Thai and Matchimathippatai parties were guilty of election fraud and dissolved the parties. The opposition Democrat Party was thus tasked with forming the next government and Abhisit Vejjajiiva was sworn in as prime minister. The UDD protestors then stepped up their protests in a bid to oust the new government.[83] PM Abhisit presided over one of the stormiest periods in recent Thai history, with the Red Shirts and Yellow Shirts clashing regularly. One of the most embarrassing moments was when the Red Shirts stormed the ASEAN Summit in Pattaya in April 2009, causing ASEAN dignitaries and delegates to flee the conference. In September, Abhisit established a committee to study the controversial Section 237 of the Constitution, under which a government stands dissolved if its leaders are prosecuted for corruption. The committee recommended repealing Section 237.

From October 2009 to February 2011, Abhisit's government was besieged by constant clashes between the PAD and the UDD. In March 2011, Abhisit announced that he would dissolve the Assembly in preparation for elections. In May, the Assembly was dissolved for elections on 3 July. Yingluck Shinawatra, Thaksin's youngest sister, led her Puea Thai Party to victory, winning 265 of the 480 seats. The Democrat Party only managed 159 seats. Yingluck forged a coalition with the Bhum Jai Thai Party and Chart Thai Pattana Party, adding fifty-three seats to her majority. On 5 August 2011, she became Thailand's first woman prime minister.

Yingluck faced her first major crisis with the flood problem in October 2011. The massive flooding killed 320 persons and made thousands, including many in the capital, Bangkok, homeless. She was heavily criticised for her poor handling of the crisis and her lack of experience. Her next major crisis arose when her Puea Thai Party sought to appoint a ninety-nine-member Drafting Committee to amend the 2007 constitution, which it regarded as anti-democratic. Yingluck's opponents objected that the proposal was unconstitutional and was designed to undermine the monarchy. On 13 July 2012, the Thai Constitutional Court held that the Constitution could be amended section by section but could not be entirely rewritten except by consent of a referendum. Notwithstanding the court's ruling, Yingluck's party announced a moratorium on their constitutional amendment plans for the time being.[84]

[83] See Kitti Prasirtsuk, 'Thailand in 2008: crises continued' (2009) 49(1) *Asian Survey* 174.

[84] Daniel Ten Kate and Suttinee Yuvejwattana, 'Thai ruling party shelves amnesty bills, constitutional changes', *Bloomberg Businessweek*, 31 July 2012, available at www.

V. CONCLUDING THOUGHTS

Outwardly, the three countries considered in this chapter have little in common in their constitutional development, despite their contiguous geographical connection in mainland Southeast Asia. Two of them are former colonies (one British, one French) while the other stands apart as the only Southeast Asian state never to have been colonised. That said, a number of similarities emerge from the recounting of their constitutional journeys.

The most obvious of these is the predominance of the military's role in all these states. In a century where military regimes are viewed with circumspection or disapprobation, democratically elected governments would much prefer it if the army confined itself to the barracks and borders. However, there is no wishing the military away. If we cannot ignore the military, especially when it has played a significant (not necessarily positive) role in a country's government, constitutional arrangements must take the army into consideration. Not to do so would run the risk of being hit by institutions exerting extra-constitutional powers. Take the case of Thailand, for example: the military has traditionally exerted a major influence in politics and government, yet the Constitution scarcely factors it into its constitutional arrangements.

In Cambodia, the presence of the military is much less prominent but that is only because the leading political party, the CPP, is the party commanding the greatest military might. When the CPP lost the 1996 election, Hun Sen and his party were reluctant to surrender the reins of power to Prince Ranariddh's FUNCINPEC. The tensions that ensued led to the CPP's 1997 coup that ousted Ranariddh from power. So long as Hun Sen remains in power, the military will stay out of politics.

Of the three countries, Burma's military dominates most obviously. Since 1962, it has been the most important and significant institution of the state. Its pre-eminence in government for so many years has also meant that outside the military, other state institutions necessary for democratic government have not had an opportunity to develop. It is all too easy to see Burma's case as an aberration but, as I suggested above, one cannot simply wish the military junta away. What the 2008 constitution does is to secure for the military an entrenched role in the political life of Burma. In many ways it is similar to the *dwifungsi* (dual function) of the Indonesian army during the Soeharto era.[85] Indeed, several commentators have noted these similarities.[86] What this means is that Burma will have to live with the military's presence in

businessweek.com/news/2012-07-31/thai-ruling-party-shelves-amnesty-bills-constitutional-changes, accessed 6 Aug 2012.

[85] See generally Nugroho Notosusanto, *The Dual Function of the Indonesian Armed Forces Especially since 1966* (Jakarta: Department for Defence and Security Centre for Armed Forces History, 1970).

[86] See e.g. 'The Burmese road to ruin', *The Economist*, 13 August. 2009; and Aung Naing Oo, 'Clinging to Dwifungsi' (2010) 18(3) *The Irrawaddy*, at http://www2.irrawaddy.org/article.php?art_id=17931.

politics for the foreseeable future; at least until she is able to build up a more stable and resilient state structure that will support democratic processes. The tensions will undoubtedly remain, but there is a possibility to move forward.

The second observation pertains to the role of the monarchy in Cambodia and Thailand. In both cases, personality and prestige matter more than the institution. Cambodia is the only former socialist country to return to monarchic rule. The reason is less ideological than practical and has everything to do with the personality of King Sihanouk, who was the single unifying force among all Cambodians. Despite limiting the power of the monarchy and providing for succession by election rather than by inheritance, Sihanouk remained a potent force in Cambodian politics until his death in October 2012 and his views were followed ardently. In the case of Thailand's King Bhumibol, a combination of a lifetime of exemplary service and lese-majesty laws place him above the law and beyond reproach. In many ways, both these monarchs can play and have played a serious role in the politics of their countries, and in both instances they are seen as being above the law and the Constitution. With one monarch dead and the other in frail health, the question must be whether the institution of the monarchy will live long after them.

My third observation has to do with the drafting of constitutions in these states. Two points may be made in this connection. First, new constitutions are made not merely to rearrange and constrain political power but serve many more legitimising functions, such as ushering in a new era, or establishing a regime's democratic credentials and right to govern. The case of Thailand is the most extreme. Having enacted and discarded seventeen constitutions since 1932, the drafting of a new constitution is a *rite de passage* for all new regimes. It symbolises a break from the past (usually a bleak coup-related one) and offers a blueprint for the future. Burma, on the other hand, took more than fifteen years to draft the current constitution, which, like the Thai example, also symbolises a break from the past, but regularises what has hitherto been unconstitutional military interference in politics. The second point is one which I have made previously in connection with Thailand's constitution-making. It is necessary to take into consideration the true centres of power in drafting a constitution. The failure of so many Thai constitutions results from having not the three traditional main branches of power that have to be constrained and regulated, but five branches of power, when one considers the monarchy and the military.[87]

[87] See Harding and Leyland, *The Constitutional System of Thailand*, p. 30.

11

Constitutional developments in Malaysia in the first decade of the twenty-first century

A nation at the crossroads

*H.P. Lee**

Prime Minister Tun Dr Mahathir Mohamad was at the helm as Malaysia greeted the dawn of the twenty-first century. Before vacating office on 31 October 2003 he had led the Barisan Nasional (BN) to victory in five general elections, cementing his legacy as the longest-serving prime minister of Malaysia (1981–2003). He was succeeded by Prime Minister Tun Abdullah Ahmad Badawi (2003–9), who in turn was succeeded on 3 April 2009 by Prime Minister Dato' Sri Mohd Najib Razak, the eldest son of Malaysia's second prime minister, Tun Abdul Razak Hussein.

A major event that contributed to the changing fortunes of the BN, the ruling coalition, and a reconfiguration of the political map was the general election of March 2008. For the first time since independence from British colonial rule on 31 August 1957, this election resulted in the BN losing its two-thirds majority in the Dewan Rakyat, the lower house of the federal parliament.[1] The victory by the Pakatan Rakyat (PR) opposition in the State of Perak set off a chain of events which thrust constitutional principles into the spotlight when three PR members switched allegiance and deprived the PR government of a majority to govern the State of Perak in its own right. Another event occurring in the period under review was the ongoing prosecution of Datuk Seri Anwar Ibrahim who was once anointed the likely inheritor of the prime ministerial mantle from Mahathir. The period under review was also dominated by pervasive concerns over the erosion of public confidence in the Malaysian judiciary, the state of fundamental liberties and the 'Islamisation' of Malaysia.

In section I of this chapter, I will provide a brief conspectus of Malaysia's parliamentary government. In section II, I will discuss some key aspects of the political struggles leading to the rise of the PR as a viable alternative governing

* I wish to thank Richard Foo and Amber Tan for their assistance in updating this chapter.

[1] James Chin and Wong Chin Huat, 'Malaysia's electoral upheavals' (2009) 20(3) *Journal of Democracy* 71.

party. These political events, including the Perak constitutional crisis, help to explain the current state of constitutionalism in Malaysia. In section III, I consider recent reforms affecting the judiciary and its current standing in the country. In section IV, I will appraise the contemporary role and powers of the hereditary Malay rulers and the constitutionally entrenched body, the Conference of Rulers. Section V considers the state of human rights in Malaysia, particularly the use (or abuse) of the laws of preventive detention and the sedition laws. In section VI, I will examine the phenomenon of rising Islamic fundamentalism and its impact on Malaysian constitutional law. Finally, I will speculate on the future shaping of constitutional rule in Malaysia.

I. MALAYSIAN PARLIAMENTARY GOVERNMENT

Malaysia adopted a Westminster form of parliamentary government. The Federal Parliament is a bicameral parliament, with a House of Representatives (Dewan Rakyat) and a Senate (Dewan Negara). Members of the Cabinet must be members of either house of parliament. The head of state, called the Yang di-Pertuan Agong, operates on a rotational basis and is elected every five years from a list of the nine hereditary Malay rulers placed in order of seniority.

From 1957 to the present day, the Constitution, albeit in highly amended form, continues to provide the underpinning for the Malaysian polity, despite the convulsion in 1969 when racial riots broke out mainly in Kuala Lumpur and a national state of emergency was proclaimed. Since independence in 1957, the federal government continues to be dominated by the Alliance Party, which subsequently metamorphosed into the BN. This dominance was for the first time seriously challenged in the 2008 general elections, carrying interesting and significant ramifications for the state of constitutionalism in the federation.

II. THE NEW DYNAMICS OF MALAYSIAN POLITICS

The March 2008 general election

Under the leadership of Anwar, the PR faced off with the BN in the March 2008 general election, and, for the first time in Malaysian history, denied the ruling coalition a two-thirds majority in the House of Representatives. According to Article 159 of the Malaysian constitution, the requisite majority necessary for effecting amendments to the Constitution is two-thirds. Out of 222 seats, the BN won 140, while the PR won a total of eighty-two. The PR also managed to win control over five of the thirteen Malaysian states (Penang, Kelantan, Terengganu, Perak and the 'jewel in the crown', Selangor), but subsequently lost control of Perak through defections. These landmark election results were unprecedented and contributed to the subsequent demise of Prime Minister Badawi.

III. WHITHER THE MALAYSIAN JUDICIARY

Descending into disrepute

The erosion of public confidence in the Malaysian judiciary has been compounded by several episodes:

1. On 30 May 2000, the Malaysian law minister, Datuk Rais Yatim, in an Australian radio interview, in response to a question about a picture on the Internet showing the chief justice of the Federal Court, Eusoff Chin, holidaying in New Zealand with lawyer Datuk V.K. Lingam, expressed the view that 'such socialising is not consistent with the proper handling or behaviour of a judicial personality' and added that the chief justice displayed 'improper behaviour'. This comment sparked controversy and extensive media coverage. In view of the controversy, the Malaysian Bar Council sought to convene an extraordinary general meeting to consider various resolutions on the matter. On 19 June 2000, a member of the Malaysian Bar, Raja Segaran, commenced action to restrain the Malaysian Bar from holding the meeting. Finally, the plaintiff was held to have no *locus standi*.[2]
2. A Penang High Court judge, R.K. Nathan, publicly attacked a Court of Appeal judge, Gopal Sri Ram, in a written judgment in relation to an unrelated civil matter. Nathan J had on an earlier occasion convicted a lawyer of contempt of court. He resented a remark by Gopal Sri Ram that judges should not 'launch contempt proceedings vindictively and "purely for ego"'.[3] This spectacle was criticised by Param Cumaraswamy, the United Nations Special Rapporteur on the Independence of Judges and Lawyers.[4] There was a call by the Malaysian Bar Council for the establishment of a tribunal to consider the behaviour of Nathan J.[5]
3. On 19 September 2007, the 'V.K. Lingam video clip controversy' erupted from the disclosure of a taped conversation between

[2] *Raja Segaran a/l Krishnan* v. *Malaysian* Bar [2008] 4 MLJ 941. An interesting aspect of the judgment of Mohd Hishamudin J was his remark that he was 'unable to agree with the Court of Appeal's interpretation of [Arts. 125 and 127] to the effect that only Parliament can discuss the conduct of judges' (at 970).

[3] Arfa'eza A Aziz, 'Shaik Daud: Judge Wrong to Raise Personal Grouses in Unrelated Case', *Malaysiakini*, 1 August 2002, www.malaysiakini.com/news/12418, at 29 September 2011.

[4] 'Judge's Outburst Could Malign Judiciary: UN Official', *Malaysiakini*, 2 August 2002, www.malaysiakini.com/news/12434, at 29 September 2011.

[5] 'Bar Wants CJ to Set up Tribunal against Judge', *Malaysiakini*, 3 August 2002, www.malaysiakini.com/news/12446, at 29 September 2011.

V.K. Lingam and the Chief Justice Ahmad Fairuz pertaining to the fixing of a senior judicial appointment. It led to a public outcry and resulted in the setting up of a Royal Commission of Inquiry on 14 January 2008.

Judicial interpretation and 'judicial power'

An amendment to Article 121(1) in 1988 has created doubt about the operational effectiveness of a doctrine of separation of judicial powers in Malaysia. In *Kok Wah Kuan*,[6] Abdul Hamid Mohamad PCA wrote the majority judgment, and after noting that, as a result of the amendment, there would no longer be a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts, said:

> What it means is that there is no longer a declaration that 'judicial power of the Federation' as the term was understood prior to the amendment vests in the two High Courts ... Thus, to say that the amendment has no effect does not make sense. There must be. The only question is to what extent?[7]

Malaljum CJSS (in dissent) said:

> The amendment which states that '*the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law*' should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution ... It must be remembered that the Courts, especially the Superior Courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal Legislature. In the performance of their function they perform a myriad of roles and interpret and enforce a myriad of laws. Article 121(1) is not, and cannot be, the whole and sole repository of the judicial role in this country ...[8]

Richard Foo, a doctoral student at Monash University, in a critique of the majority decision, said that if *Kok Wah Kuan* were to be taken to its logical conclusion, 'Parliament may now freely vest judicial functions in any entity which is not an Article 121 court, remove any present function of an Article 121 court to non-judicial entities, or even direct that any apparently entrenched function may also be performed by non-judicial entities'. He added that, conversely, 'Parliament may now also subordinate them to the other branches to perform *non*-judicial functions,

[6] [2007] 5 MLJ 174 (CA); [2008] 1 MLJ 1 (FC).
[7] [2008] 1 MLJ 1 15 (FC).
[8] Ibid., at 21, Malaljum's emphasis.

without this being unconstitutional either'.[9] On a mission to Malaysia, the Working Group on Arbitrary Detention observed that the amendment to Clause 1 of Article 121 of the Federal Constitution, which eliminated the term 'judicial power', 'seriously affected the hierarchy between the three powers of the State, as the judiciary is no longer at the same level as the executive or the legislative'.[10] In response to the report, the government of Malaysia said that the doctrine of separation of powers is 'not a provision' of the Malaysian constitution. It asserted that neither a provision of the Constitution nor a provision of the law can be struck out on the ground of contravention of the doctrine.[11]

Judicial reforms: a triumph of form over substance

Towards the end of the decade, steps were taken by the Badawi administration to effect reforms to restore public confidence in the judiciary. A Judicial Appointments Commission was established to provide transparency, a Judges' Code of Ethics which had been introduced in 1994 was revamped in 2009, and a Judges' Ethics Committee was set up to deal with complaints regarding ethical breaches which were not serious enough to warrant judicial dismissal.

Under the Judicial Appointments Commission Act 2009, the commission shall consist of the Chief Justice of the Federal Court, who shall be the chairman; the president of the Court of Appeal; the chief judge of the High Court in Malaya; the chief judge of the High Court in Sabah and Sarawak; a Federal Court judge to be appointed by the prime minister; and four eminent persons, who are not members of the executive or other public service, appointed by the prime minister after consulting the Bar Council of Malaysia, the Sabah Law Association, the Advocates Association of Sarawak, the Attorney General of the federation, the attorney general of a state legal service or any other relevant bodies.[12]

The commission is entrusted with the functions of selecting suitably qualified persons who merit appointment as judges of the superior courts for the prime minister's consideration, receiving applications from qualified persons for the selection of judges of the superior courts, formulating and implementing mechanisms for the selection and appointment of judges of the superior courts, reviewing and recommending programmes to the prime minister to improve the administration of justice, making other recommendations about the judiciary, and doing such other

[9] Richard Foo, 'Malaysia: death of a separate constitutional judicial power' (2010) *Singapore Journal of Legal Studies* 253 at 252–3, original emphasis.

[10] Report of the Working Group on Arbitrary Detention on Its Visit to Malaysia (7–17 June 2010), A/HRC/16/47/Add.2.

[11] Ibid. See *Gobind Singh* v. *Yang Dipertua, Dewan Rakyat & Others* [2010] 2 MLJ 674 at 684, where Mohamad Ariff Yusof JC said that the doctrine of separation of powers 'is a feature of our Constitution, and that is recognised even in *Kok Wah Kuan*'.

[12] Judicial Appointments Commission Act 2009 (Malaysia) section 5.

things as it deems fit to enable it to perform its functions effectively or which are incidental to the performance of its functions under this Act.[13]

The commission, after making its selection, submits to the prime minister a report with the selections. After submitting the report, the commission shall provide any further information as may be required by the prime minister.[14] Where the prime minister has accepted any of the persons recommended by the commission, he may proceed to tender his advice in accordance with Article 122B of the federal constitution.

The revamped Judges' Code of Ethics of 2009 provides for norms governing the proper conduct of judges, which are, inter alia, as follows:

5. Upholding the integrity and independence of the judiciary:

   > A judge shall exercise his judicial function independently on the basis of his assessment of the facts and in accordance with his understanding of the law, free from any extraneous influence, inducement, pressure, threat or interference, direct or indirect from any quarter or for any reason.

6. Avoiding impropriety and the appearance of impropriety in all judicial activities:
   (1) A judge shall act at all times in a manner that promotes integrity and impartiality of the judiciary.
   (2) A judge shall not:
      (a) allow any relationship to influence his judicial conduct or judgment;
      (b) lend the prestige of his judicial office to advance his or others' private interest; and
      (c) convey or permit others to convey the impression to any person that they are in a special position to influence him.
7. Performing judicial duties fairly and efficiently:
   (1) The judicial duties of a judge shall take precedence over all his other activities.
   (2) A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.
   (3) A judge shall perform his judicial duties without bias or prejudice.
   (4) A judge shall dispose of all his judicial duties fairly, efficiently, diligently and promptly.

[13] Judicial Appointments Commission Act 2009 (Malaysia) section 21.
[14] Judicial Appointments Commission Act 2009 (Malaysia) section 26.

(5) A judge shall refrain from giving any public comment about pending or impending proceedings which may be heard before the judge's court in a manner which may suggest to a reasonable person the judge's probable decision in any particular case.
(6) A judge shall not disclose or use any non-public information acquired in his judicial capacity for any purpose unrelated to his judicial duties.
(7) A judge shall endeavour to diligently and efficiently hear and complete the cases in his court and promptly write his judgments.
(8) A judge shall not conduct himself in a manner which is not befitting of a judge or which brings or is calculated to bring disrepute to his office as a judge.

In evaluating the state of affairs of the Malaysian judiciary, scant attention has been paid to some High Court judges who put their career on the line by rendering bold decisions which were often overruled on appeal to the Court of Appeal and the Federal Court.[15] There are some recent indications that this bold spirit is permeating through to judges of these higher appeal courts. It will still take considerable effort and time for the judiciary to regain the full confidence of the Malaysian public.

IV. THE HEREDITARY RULERS: A RENAISSANCE OR A FALSE DAWN?

The role of state rulers

The later part of the first decade of the twenty-first century saw a revival in the fortunes of the Malay rulers.[16] It was clear that by the mid-1990s the power of the Malay rulers had been considerably diminished following two major confrontations with the Mahathir government. The rulers were to keep to their role as constitutional monarchs, functioning under advice unless permitted by the

[15] *Borhan bin Hj Daud & Others* v. *Abd Malek bin Hussin* [2010] 6 MLJ 329 (CA) overruling the High Court decision which declared that the arrest and detention of the respondent was unlawful and in violation of his fundamental rights under the Constitution.

[16] The role and powers of a regent as a result of the incapacitation of the sultan of Kelantan were considered by the courts in suits brought before them. A decision of the regent of Kelantan to alter the membership of the Kelantan Council of Succession was held to be a non-justiciable issue in an action brought by the regent's younger brother: *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra* v. *Yang Maha Mulia Pemangku Raja Kelantan and Others* [2011] 1 MLJ 128 (Mohamad Ariff J). A petition brought by the sultan questioning the exercise by his son, the regent, of the powers of revocation and appointment of the members of the council was dismissed by the Federal Court: *His Royal Highness Sultan Ismail Petra Ibni Almarhum Sultan Yahya Petra* v. *His Royal Highness Tengku Mahkota Tengku Muhammad Faris Petra and Another and another suit* [2011] 1 MLJ 1.

constitutional system to exercise discretionary powers. In an address to the Malaysian law conference in 2007 on the fiftieth anniversary of Malaysian independence, I observed the following:

> With the recognition and acknowledgment that they are now constitutional monarchs required to act on advice of the Prime Minister, in the case of the King, and the state Chief Minister, in the case of the state Rulers, the Rulers could be said to have emerged from the Dark Ages. It is clear that the state and federal monarchies post the two crises now command immense respect and support of the Malaysian people from all walks of life. There is even an expectation on the part of the people that the Conference of Rulers can contribute immensely to good governance by providing the government with their collective wisdom and sound counsel.[17]

Kobkua Suwannathat-Pian, a history professor at Universiti Pendidikan Sultan Idris, observed a 'rejuvenation' of the Malay rulers and stated the following:

> On the surface, the rejuvenation of the royalty has considerably brought much credibility and respect to the Rulers. For the first time in the contemporary history of Malaysia, the Malay Rulers have succeeded in presenting themselves to the people as the most credible authority of the land, both in theory and practice. The young generations of Malaysians in particular see the new generation of Rulers and royalty as an impartial non-political power with the ability and credibility to rein in political and administrative excesses committed by discredited and corrupt politicians to the detriment of the common people. However, upon close scrutiny, the resurgence of royal power and its rising credentials among modern Malaysians appear convincing mainly because of the disenchantment of a substantial number of Malaysians, young and not-so-young, by what they consider to be excessive power abuse, disregard for socioeconomic decency and justice, and political leadership bankruptcy. In other words, it is more the politicians themselves who have let self-interests get the better of their social responsibility to the people.[18]

The electoral shock of 2008 and a viable opposition which can form an alternative government have changed the political fortunes of the rulers. The rulers, in July 2007, played an influential role as a collective body in determining not to extend the term of retiring Chief Justice Ahmad Fairuz. In July–August 2007, when Prime Minister Badawi nominated Hashim Yusoff FCJ as chief justice (Malaya) in a move engineered by Fairuz (which meant his overtaking a number of more senior judges),

[17] H.P. Lee, 'The Constitution of Malaysia after 50 years: retrospective, prospective and comparative perspectives' (2007) 9(2) *Australian Journal of Asian Law* 307.

[18] Kobkua Suwannathat-Pian, *Palace, Political Party and Power: A Story of the Socio-political Development of Malay Kingship* (Singapore: NUS Press, 2011), pp. 390–1.

the Conference of Rulers held back and Badawi agreed finally with the rulers to appoint Alauddin as chief justice (Malaya). Another golden opportunity to further enhance the prestige of the Malay rulers was lost when Sultan Azlan Shah resolved the political impasse in the Perak crisis by dismissing the Perak state government (formed by the opposition PR coalition) and endorsing the formation of a government by the BN coalition, following the 'defection' of three members of PR to BN.

The 2009 Perak crisis

In the state of Perak, following the general election of March 2008, PR won thirty-one seats in the State Legislative Assembly while BN won twenty-eight seats.[19] PR formed the new state government. In January 2009, a member of BN made a stunning announcement of his intention to defect to PR, which was followed by three of PR's members announcing their resignations from the Legislative Assembly. The defecting BN member re-defected to BN. In consequence, both PR and BN each had 28 seats in the Legislative Assembly. Later the three defecting PR members said that they had withdrawn their resignations and declared their intention to sit as independents, but also pledged that they would give their support to the BN in confidential matters.

The Menteri Besar (chief minister) from PR, Nizar, requested Sultan Azlan Shah, as Perak's head of state, to dissolve the Legislative Assembly to enable fresh elections to be held. The then deputy prime minister, Najib Razak, as the chairman of the Perak BN, had an audience with the sultan the next day and stated that BN had a majority in the Legislative Assembly. Sultan Azlan Shah subsequently met the twenty-eight BN members and the three defecting PR members and 'was convinced that [Nizar] had ceased to command the confidence of the majority of the State Assembly'. Sultan Azlan Shah, invoking Article XVIII(2)(b) of the Perak constitution, refused to dissolve the Legislative Assembly. Instead Nizar was summoned to the palace and was ordered by the sultan to resign as Menteri Besar, together with the members of the state executive council, with immediate effect. A press statement issued by the sultan's office stated, 'If [Nizar] does not resign from his post as Perak Menteri Besar together with the state executive council members, then the posts of Menteri Besar and state executive councillors are regarded as vacant.'[20] This statement was tantamount to a dismissal of Nizar as the Menteri Besar of Perak.[21]

[19] See Andrew Harding, 'Crises of Confidence and Perak's Constitutional Impasse', The Malaysian Bar website, 8 June 2009, www.malaysianbar.org.my/general_opinions/comments/crises_of_confidence_and_peraks_constitutional_impasse_andrew_harding.html.

[20] Office of DYMM Paduka Seri Sultan Perak Darul Ridzuan, 'Sultan Azlan Shah's statement' (media statement), the *Star* online, 5 February 2009, http://thestar.com.my/news/story.asp?file=/2009/2/5/nation/20090205173703.

[21] The speaker of the Perak Legislative Assembly was subsequently dismissed by the BN-controlled assembly. A challenge to the dismissal was rejected by Azahar

The legality of the actions of the sultan was considered by the courts.[22] At first instance, the High Court in Kuala Lumpur held Nizar's dismissal unlawful,[23] but the decision was reversed on appeal by the Court of Appeal[24] and the Federal Court.[25] The sultan, by virtue of Article XVIII(2) of the Perak Constitution, 'may act in his discretion' in relation to 'the appointment of a Menteri Besar' and 'the withholding of consent to a request for the dissolution of the Legislative Assembly'. However, the Perak constitution is silent on the power of the sultan to remove a Menteri Besar. Article XVI(6) of the Perak constitution states that if the Menteri Besar 'ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council'. Article XXXVI(2) provides that the sultan may prorogue or dissolve the Legislative Assembly.

The sultan, who once occupied the highest judicial office, would have been fully familiar with the case of *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg*.[26] This case reinforces the view that the best test of a failure to command a majority of the members of the House of Representatives is by a vote of no confidence on the floor of parliament. The provision of the Perak constitution relating to the failure to 'command the confidence' of a majority of the Legislative Assembly is substantially similar to that of the constitution of Sarawak under consideration by Harley Ag CJ in the High Court in Kuching in 1966. Given the controversial nature of the political tussle, this would have been the better way to protect the neutral image of the sultan and to enhance constitutional rule in Malaysia.

If the loss of confidence is achieved by defections from the government bench to the opposition and the Menteri Besar chooses not to resign and instead

Mohamed J of the High Court in *Sivakumar a/l Varatharaju Naidu* v. *Ganesan a/l Retanam* [2010] 7 MLJ 355.

[22] See Andrew Harding, 'Crises of Confidence and Perak's Constitutional Impasse', Center for Policy Initiatives, 7 June 2009, http://english.cpiasia.net/index.php?option=com_content&view=article&id=1581:prof-drandrew-harding-on-crises-of-confidence-and-peraks-constitutional-impasse-; Andrew Harding, 'The Perak constitutional crisis: an epilogue', in Audrey Quay (ed.), *Perak: A State of Crisis* (Malaysia: LoyarBurok Publications, 2010), p. 165; N.H. Chan, 'A Prima Facie Farce in Zambry v Nizar', *Malaysiakini*, 8 July 2009, www.malaysiakini.com/news/108046.

[23] *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin* v. *Dato' Seri Dr Zambry Abdul Kadir; Attorney general (Intervener)* [2009] 5 MLJ 108 (HC).

[24] *Dato' Dr Zambry bin Abd Kadir* v. *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin; Attorney General of Malaysia (Intervener)* [2009] 5 CLJ 265 (CA).

[25] *Dato' Seri Ir Hj Mohammad Nizar Jamaluddin* v. *Dato' Seri Dr Zambry Abdul Kadir; Attorney General (Intervener)* [2010] 2 CLJ 925 (FC).

[26] *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg and Tawi Sli* [1966] 2 MLJ 187; *Adegbenro* v. *Akintola* [1963] 3 All ER 544; *Tun Datuk Haji Mustapha bin Datu Harun* v. *Tun Datuk Haji Mohamed Adnan Robert, Yang di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No 2)* [1986] 2 MLJ 420; *Datuk Amir Kahar Tun Mustapha* v. *Tun Mohamed Said Keruak* [1995] 1 CLJ 184.

dissolves the Legislative Assembly, it places the sultan in a quandary. Whether to accede to the request of the Menteri Besar for a dissolution of the state legislature is a matter of discretion. The circumstances here would justify the sultan deciding to dissolve the state legislature and allowing the final say to the people of Perak.

If the Menteri Besar had chosen neither to resign office nor to request a dissolution of the Legislative Assembly, a most undesirable situation would have been re-created and would have unnecessarily drawn the sultan into deciding whether to dismiss the Menteri Besar. A responsible Menteri would not put the sultan in such a dilemma, and in the Perak crisis the sultan was spared such a dilemma. N.H. Chan, a retired Malaysian judge, observed:

> After the Sultan has appointed a Menteri Besar under Article 16(2)(a), then, has he the executive power to remove him? The answer is definitely no, because the only executive power left for the Sultan in which he 'may act in his discretion' – after a Menteri Besar has been appointed under Article 16(2)(a) – in respect of the Menteri Besar can only be found in Article 18(2)(a) and (b). Apart from Article 18(2)(a) and (b) there is no other executive power bestowed on the Sultan concerning the position and status of the Menteri Besar. The Sultan, therefore, has no executive power under the Perak Constitution to remove a Menteri Besar.[27]

Professor Kevin Tan, adjunct professor of the National University of Singapore, criticised the approach taken by the judges in the Court of Appeal and the Federal Court:

> I could not help but note the willingness with which the Court of Appeal judges were prepared to overturn a trial judge's finding of fact. The recounting of facts went on for pages on end, and lamentably, the Federal Court did the same thing. Almost half the Federal Court's judgment was concerned with how the facts should be read ... The Federal Court castigated the High Court judge for being perverse in refusing to believe the evidence of the State Legal Advisor and the documentary evidence before him even though they were not present at the trial.
>
> Reading and re-reading the High Court judgment and those of Raus Sharif and Zainun Ali JJCA in particular, it is not at all obvious that Abdul Aziz J had erred, or if he did, erred to such an extent as to be regarded as 'perverse'... Unless Abdul Aziz J is openly accused of bias (which was never argued), then what he did was perfectly legitimate and professional. At least he did not make the mistake of taking judicial notice of a supposition of his own making, which the Court of Appeal did. Appellate courts should really confine themselves to

[27] N.H. Chan, 'The Federal Court in Nizar v Zambry: a critique', LoyarBurok website, 19 February 2010, http://loyarburok.com/selected-judgments/the-federal-court-in-nizar-v-zambry-a-critique.

doing what they supposedly do best – deliberate on the law, interpret it well and ensure that it promotes the most equitable and just solution in the local context.[28]

The role of the king

The Coalition for Free and Fair Elections, also called Bersih 2.0, held a public rally on 9 July 2011 to demand electoral reforms. On 2 July 2011, the home minister, Datuk Seri Hishammuddin Hussein, issued an order to outlaw Bersih 2.0.[29] To defuse heightened tension, King Tuanku Mizan Zainal Abidin, on 3 July 2011, issued a public statement advising both the Najib administration and Bersih 2.0 'to hold consultations over the issue of free and fair elections'.[30] The intervention by the king placed Bersih 2.0 and its supporters from the PR in a dilemma because, if they held the rally, the government-controlled media could have portrayed it as 'a direct affront to the palace'.

The police responded to the rally held on 9 July by using tear gas and water cannon in attempts to disperse the participants. Nearly 1,700 participants were arrested. In July 2012, High Court judge Rohana Yusuf quashed the declaration by the home minister that Bersih 2.0 was an unlawful association.[31]

V. THE PROTECTION OF HUMAN RIGHTS

Emergencies, preventive detention and sedition

In the arsenal of legal weapons to protect national security and preserve national harmony, the power to detain a person without trial under the Internal Security Act 1960 (generally referred to by its dreaded acronym, ISA) and the power to prosecute a person for the criminal offence of sedition play a prominent role in Malaysia. These legal weapons carried over from British colonial rule were initially rationalised on the basis that they were needed to counter the communist insurgency which had arisen before independence and finally ended in 1960. The justification for retaining such weapons becomes less convincing over the course of time. Given that the communist insurgency had ended and that there is hardly any sign of

[28] See Kevin Tan, 'The final chapter', in Audrey Quay (ed.), *Perak: A State in Crisis* (Petaling Jaya: LoyarBurok Publications, 2010), p. 143, http://thestar.com.my/news/story.asp?file=/2011/9/28/nation/20110928094406&sec=nation.

[29] Clara Chooi, 'Pakatan Condemns Bersih 2.0 ban', The Malaysian Insider website, 2 July 2011, www.themalaysianinsider.com/malaysia/article/pakatan-condemns-bersih-2.0-ban.

[30] Clara Chooi, 'King Intervenes, Tells Putrajaya, Bersih 2.0 to Hold Talks', The Malaysian Insider, 3 July 2011, www.themalaysianinsider.com/print/malaysia/king-intervenes-tells-putrajaya-bersih-2.0-to-hold-talks.

[31] See 'High Court: Bersih 2.0 Is Not Unlawful Society': http://thestar.com.my/news/story.asp?file=/2012/7/24/nation/20120724104741&sec=nation.

tumult or public disorder, the retention and exercise of these legal weapons has increasingly become a matter of grave concern. The gamut of discretion accorded to the executive to deploy these weapons, in most instances against those who are on the opposite side of the political divide and against critics of the government, highlights the fact that these weapons are difficult to reconcile with the notion of liberal democracy. In this connection, despite the valiant efforts of a few judges, the courts, as a whole, have abdicated their judicial role as the guardian of constitutional fundamental liberties. The *Star* newspaper reported: 'Since its inception until 2005, 10,662 people have been arrested under the ISA. A total of 4,139 were issued with formal detention orders while 2,066 were served with restriction orders governing their activities and where they live.'[32] It also reported that as of 12 April 2009, there were twenty-seven people still detained under the ISA.

On 15 September 2011, the eve of Malaysia Day, the prime minister, Datuk Seri Najib Tun Razak, announced his intention to revoke three proclamations of emergency which had been issued many years previously and which, because they had not been revoked by the king (acting on advice of the Cabinet) or annulled by the Malaysian parliament, remained in existence.[33] He also promised the repeal of an infamous piece of legislation, the ISA, and an amendment to the Printing Presses and Publications Act to abolish 'the yearly renewal principle' – 'in lieu thereof a licence will be issued until revoked'.

The three proclamations of emergency referred to by Prime Minister Datuk Seri Najib Tun Razak pertained to proclamations effected in 1966, 1969 and 1977. The prime minister regarded the 1964 proclamation of emergency (to deal with the Indonesian 'confrontation') as having been implicitly revoked. The 1966 proclamation provided the pretext to resolve a constitutional impasse in the state of Sarawak to enable the federal government to oust Stephen Kalong Ningkan (who had lost favour with the federal government) as the Menteri Besar of that state.[34] Likewise the 1977 proclamation was to resolve a crisis in the state of Kelantan arising from the refusal of the state Menteri Besar (a member of Parti Islam SeMalaysia (PAS) who was, however, favoured by the federal government) to resign in the face of a vote of no confidence by the state legislature dominated by PAS members. At that time PAS was a member of the BN coalition but the relationship with the United Malays National Organisation (UMNO) soon turned

[32] 'Time to repeal the ISA', the *Star* online, 12 April 2009, http://thestar.com.my/news/story.asp?file=/2009/4/12/focus/3658721&sec=focus, at 4 October 2011.

[33] BERNAMA, 'Govt to Table Motion to Revoke Emergency Proclamations: Najib', My Sinchew website, 16 September 2011, www.mysinchew.com/node/63745?tid=4.

[34] H.P. Lee, 'The Ningkan saga: a chief minister in the eye of a storm', in Andrew Harding and H.P. Lee (eds.), *Constitutional Landmarks in Malaysia: The First 50 Years 1957–2007* (Kuala Lumpur: LexisNexis, 2007), p. 77.

sour. The proclamation of emergency was to enable the imposition of federal rule over the state.[35]

The 1969 state of emergency, which was proclaimed because of the May Thirteenth racial riots, had, until its recent revocation, an adverse impact on the state of constitutionalism in Malaysia.[36] This proclamation provided the foundations for the constitutional validity of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO). It also provided the constitutional foundations for the amendment to the Sedition Act 1948 which prohibited public discussion of the following 'sensitive' issues: citizenship; the national language and the languages of other communities; the special position and privileges of the Malays, the natives of Sabah and Sarawak; the legitimate interest of other communities in Malaysia; and the sovereignty of the Malay rulers. At first the amendment to the Sedition Act also removed the immunity of state and federal parliamentarians from prosecution under the Sedition Act but this restriction on parliamentary freedom of speech was later removed to enable parliamentarians to criticise the Malay rulers, short of calling for the abolition of the kingship and of the position of the hereditary rulers.[37] Towards the end of December 2011, the Malaysian parliament revoked the 1966, 1969 and 1977 emergency proclamations. The revocation of the 1969 proclamation of emergency by the Yang di-Pertuan Agong (acting on advice of the government), or its nullification by resolution of the federal parliament, would mean that EPOPCO (a law which empowers preventive detention without trial) and the amendment to the Sedition Act would cease to be operative. The prime minister also reiterated his intention to repeal the ISA.

Article 150 of the Malaysian Constitution embodies a framework of emergency powers. Article 150(1) provides that if the king is 'satisfied' that a grave emergency exists 'whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened', he may issue a proclamation of emergency making therein a declaration to that effect. Such a proclamation can be issued even before the actual occurrence of the threatening event as long as the king is satisfied that there is imminent danger of such an occurrence. Article 150(2B) provides that at any time, while a proclamation of emergency is in operation, except when both houses of parliament are sitting concurrently, the king 'may promulgate such ordinances as circumstances appear to him to require'. A proclamation of emergency or an ordinance can be terminated either by express revocation by the king (acting on the advice of the government) or by annulment by resolutions passed by both houses of parliament. In the case of an ordinance

[35] See Khairil Azmin Bin Mokhtar, 'The Emergency Powers (Kelantan) Act 1977', in Harding and Lee, *Constitutional Landmarks in Malaysia*, p. 142.

[36] See Cyrus Das, 'The May 13th riots and emergency rule', in Harding and Lee, *Constitutional Landmarks in Malaysia*, p. 103.

[37] H.P. Lee, *Constitutional Conflicts in Contemporary Malaysia* (Kuala Lumpur: Oxford University Press, 1995), pp. 115–19.

which has not been expressly revoked or annulled, there is a third way of terminating its operation: the ordinance lapses at the expiration of six months from the date on which a proclamation of emergency ceases to be in force.

Although the repeal of the prior proclamations of emergency was regarded as a laudable move, meaningful reform to bolster the rule of law in Malaysia requires substantial reforms to Article 150. Over the course of time, a number of safeguards to prevent an abuse of the emergency powers were eroded. For instance, prior to 1960, Article 150 provided that a proclamation of emergency should cease to have force at the expiration of two months from the date on which it was issued, and similarly, any ordinance promulgated by the king automatically lapsed, and ceased to have effect, at the expiration of fifteen days from the date on which both houses of parliament were first sitting. A constitutional amendment in 1960 altered this position. A proclamation of emergency and an ordinance now have a continuity of life until such time as they are expressly revoked or resolutions are passed by both houses of parliament. A more insidious constitutional amendment occurred in 1981. Under this amendment, the executive is given unbridled power to declare an emergency at will and to perpetuate emergency rule as a result of the excision of the courts' jurisdiction to consider the validity of a proclamation of emergency. The Constitutional (Amendment) Act 1981 provided that 'no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground' regarding the validity of a proclamation of emergency, or an ordinance, or the continued operation thereof. Repealing the proclamations of emergency is not sufficient. Article 150 should be restored to its original position as set out in the 1957 Merdeka Constitution.[38]

The ISA empowered the preventive detention of any person without trial by ministerial order for up to two years at a time, which can be extended for further periods not exceeding two years at a time. The constitutional basis for the enactment of this law is Article 149 of the Constitution, which empowers the parliament to pass laws which may be inconsistent with the Constitution provided that such laws contain a prescribed recital. Prior to 1960, such laws must recite that they are designed to prevent or stop action that has been taken or threatened by any substantial body of persons to cause, or cause a substantial number of citizens to fear, organised violence against persons or property. The grounds to be recited were expanded to include action which has been taken or threatened to be taken to excite disaffection against the king or any government in the Federation; or to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or to procure the alteration, otherwise than by lawful means, of anything by law established; or which is prejudicial to the security of the Federation or any part thereof. It is important to note that the

[38] See 'Law Don: Restore Original Constitutional Provision', *Selangor Times*, 7–9 October 2011, issue 43.

original Article 149(2) provided that a law containing such a recital would automatically lapse on the expiration of one year from the date on which the law came into operation. A constitutional amendment in 1960 removed this safeguard: such a law continues to operate unless and until both houses of parliament have passed resolutions annulling such a law. Furthermore, prior to 1960, if a person was detained under a law made under Article 149, that person could not be detained longer than three months 'unless an advisory board ... has considered any representations made by him ... and has reported, before the expiration of that period, that there is in its opinion sufficient cause for the detention'. This means that a detainee *must* be freed if the board decided that there was not sufficient cause for the further detention of the citizen. This safeguard has been eroded: under the current Article 151(1)(b), no citizen shall be detained 'unless an advisory board ... has considered any representations made by him ... and made recommendations thereon to the [king] within three months of receiving such representations, or within such longer period as the [king] may allow'. There is no requirement for the detainee to be freed even if the recommendation is to that effect. Moreover, the period for the advisory board to make a recommendation can be extended. It is difficult to comprehend why the board would need more than three months to make a decision, especially when fundamental liberties are at stake.

There have been detainees who had been detained for lengthy periods. On a number of occasions the blatant abuse of this power of preventive detention has been justified on grounds of 'national security'. Dr Mahathir, when he was a government backbencher, admitted in 1966 that the ISA 'is in fact a negation of all the principles of democracy'. It is hard to see the justification for the use of this power in 1998 to detain former deputy prime minister Anwar Ibrahim. It was a wild stretch of imagination to envisage a threat to national security posed by the former deputy prime minister and also the then finance minister. The reason for his incarceration was that he had the temerity to exhibit prime-ministerial ambitions and challenge then prime minister Dr Mahathir Mohamad. It is also hard to see the justification for the use of this power to detain a number of leading figures, albeit subsequently released, in the recent public Bersih 2.0 rally calling for fair and clean elections.

The announcement by the Malaysian government of its intention to repeal the ISA and review a number of other draconian laws underlines the deep concerns within the ruling BN that the government may continue to lose electoral support in the wake of the transformation of Malaysian society since the general election of 2008, when BN retained the reins of government but lost its two-thirds majority. For the first time in Malaysian history there exists a viable opposition which is perceived by the people to be capable of assuming the reins of government and which currently is subjecting the government to pressures of accountability regarding allegations of corruption and incompetence. The key aspect of that transformation is that Malaysian civil society has overcome its fear of governmental retribution against those who oppose or express disagreement with the government.

The two-thirds majority has, since the attainment of independence of the Malayan, later Malaysian, federation in 1957, been viewed as the criterion of electoral success by BN, which dominated the political landscape till the election shocks of 2008. A two-thirds majority enables the government to effect amendments to the federal constitution. Many of the constitutional amendments since 1957 diluted a number of fundamental provisions to entrench an overweening executive. They also weakened the role of parliament and the authority of the hereditary Malay rulers and, in the face of the erosion of the independence of a once highly respected judiciary (resulting from the dismissal of the top judicial officer in the land in 1988 based on the most flimsy of grounds), the constitutional amendments have led to a concentration of powers in the executive arm of government.

The repeal of the ISA was described by Home Minister Datuk Seri Hishammuddin Hussein as 'a journey of the country's transformation'.[39] It is too early to hail this bold proposal and the other announced initiatives as a genuine attempt on the part of the Malaysian government to lead Malaysia into the fold of the true democracies of the world. The Malaysian prime minister also said that new legislation would be enacted 'to prevent subversive action, organised violence and criminal acts in order to preserve public order and security'. In April 2012, the Malaysian parliament passed the Security Offences (Special Measures) Act 2012 (which came into force on 31 July 2012). It also passed the Peaceful Assembly Act 2012 (which came into force on 23 April 2012). The litmus test will lie in an examination of the substance of this new legislation. The width of discretion accorded to the executive in the invocation of the powers under the new legislation, the safeguards that are built into the legislation to circumscribe these powers and the extent to which the courts are given a role to provide independent and effective judicial oversight will ultimately determine whether Prime Minister Najib Tun Razak intended to effect genuine reforms. In July 2012, the prime minister also announced that the Sedition Act would be repealed (although it is still being wielded as a weapon against critics of the government) and replaced by a National Harmony Act. There is a general election to be held on 5 May 2013 and the Malaysian public cannot be faulted if they exhibit scepticism that these moves are driven by the need to shore up the electoral stocks of BN. They have heard grand promises by previous prime ministers which have fizzled out miserably. They need to see the reforms truly bedded in before they can believe that the Malaysian polity has reached a higher level of political maturity. If it is a case of 'old wine in new bottles', the public euphoria over the announcement will evaporate rapidly.[40]

[39] BERNAMA, 'Hishamuddin: Repeal of ISA, a Journey of Country's Transformation', *Sun Daily*, 16 September 2011, www.thesundaily.my/news/146412.

[40] See also Kua Kia Soong, 'Old Poison in New Bottles', The Malaysian Insider, 29 September 2011, www.themalaysianinsider.com/print/sideviews/old-poison-in-new-bottles-kua-kia-

VI. THE POLITICS OF 'ISLAMISATION'

Legal and constitutional dimensions

A development which has significant implications for constitutionalism in Malaysia is the 'Islamisation' phenomenon. This phenomenon was described in the following terms by the Malaysian political scientist Professor Chandra Muzaffar: 'Islamisation is that process by which what are perceived as Islamic laws, values and practices are accorded greater significance in state, society and culture.'[41] The Muslims in Malaysia are 'almost entirely Sunni in orientation and follow the Shafi'i school of Islamic jurisprudence'.[42] The first decade witnessed a number of events and court challenges which raised concerns about matters of religion, especially the issue of apostasy[43] and the constitutionally guaranteed freedom to practise and profess a religion. A controversial pronouncement in absolute terms was made on 29 September 2001 by Dr Mahathir that 'Malaysia is an Islamic State'. In 2007, this pronouncement was endorsed by Deputy Prime Minister Najib Razak, who asserted that 'Malaysia is not, was not, and has never been a "secular" state'. This assertion was endorsed by Prime Minister Abdullah Badawi, the successor to Mahathir. Shad Saleem Faruqi, an emeritus professor of the MARA University of Technology, described this phenomenon as follows:

> The opposition Muslim party, Parti Islam SeMalaysia (PAS) agrees with [non-Muslims] that the Constitution is secular. But it says this in an accusatory tone and has made it clear that once in power it will amend the basic law to convert Malaysia into an Islamic state. The ruling Muslim party, United Malays National Organisation (UMNO), dismisses the proposal by PAS on the ground that Malaysia is already an Islamic state and, therefore, no constitutional amendments are needed. It rests its case on the fact that Muslims constitute the majority of the population. The constitutional monarchs at the federal and state levels are Muslims. The political executive, the civil service, the police, the army, the judiciary and the legislatures, while multi-racial, are under the control of Muslims. The Federal and State Constitutions

soong. The Peaceful Assembly Act has been criticised for embodying a more repressive regime: www.eastasiaforum.org/2012/11/05/malaysian-law-reform-a-stocktake.

[41] Chandra Muzaffar, 'Islamisation of state and society: some further critical remarks', in Norani Othman (ed.), *Shari'a Law and the Modern Nation-State* (Kuala Lumpur: Sisters in Islam, 1994), p. 113, quoted in Joseph Chinyong Liow, *Piety and Politics: Islamism in Contemporary Malaysia* (Oxford: Oxford University Press, 2009), at p. 43.

[42] See Liow, *Piety and Politics*, p. 34.

[43] Joshua Neoh, 'Islamic state and the common law in Malaysia: a case study of *Lina Joy*' (2008) 8(2) *Global Jurist*, Article 4, www.bepress.com/gj/vol8/iss2/art4; Mohamed Azam Mohamed Azam Mohamed Adil, 'Restrictions in freedom of religion in Malaysia: a conceptual analysis with special reference to the law of apostasy' (2007) 4(2) *Muslim World Journal of Human Rights*, Article 1.

> are replete with Islamic features. Islamic practices are gaining ground. Islamic economic and religious institutions thrive with state support.[44]

The 'Islamisation' phenomenon has pushed into the vortex of public discourse the place of Islam in the constitutional system, as intended by those involved in the framing of the Constitution. Article 3(1) of the Malaysian constitution declares Islam the religion of the federation. This article has been construed by a number of jurists as intending Islam to be the official religion for ceremonial purposes.[45] The view that it was not intended to preclude a secular polity has also been challenged and ardent Islamists have claimed that it provides the justification for an 'Islamisation' policy.

The stance of these Islamists was convincingly countered by Dr Joseph Fernando from the history department of the University of Malaya, who in a groundbreaking article pointed out that their stand was based on an inadequate examination of the primary documents which pertained to the discussions of the Reid Commission. In a careful evaluation of these primary documents, Fernando established that they provided cogent evidence that the Merdeka Constitution was conceived as the birth document for a 'secular' state.[46] Fernando went back to the primary documents to ascertain the framers' intentions when they inserted Article 3(1) into the Constitution and concluded as follows:

> The primary documents indicate that the Working Party, in providing for Islam to be made the religion of the Federation by the insertion of Article 3(1), had intended the state to be secular. The UMNO and Alliance leaders had no intention of creating a theocratic state or quasi-theocratic state. Article 3(1), the Alliance leaders assured the Colonial Office, would not encroach on the civil and political liberties of the non-Muslims or the freedom of worship. The intentions of these leaders are clear at each stage of the deliberations. The Alliance Party's original proposal in its memorandum to the Reid Commission states: 'The religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and

[44] Shad Saleem Faruqi, 'The Constitution of a Muslim Majority State: The Example of Malaysia', paper presented at the Constitution-making Forum: A Government of Sudan Consultation, Khartoum, Sudan, 24–5 May 2011, http://unmis.unmissions.org/Portals/UNMIS/Constitution-making%20Symposium/2011-05_Faruqi_Malaysia.pdf.

[45] See Mohamed Suffian Hashim, 'The relationship between Islam and the state in Malaya' (1962) 1(1) *Intisari* 8; Salleh Abas in *Che Omar bin Che Soh* v. *Public Prosecutor* (1988) 2 MLJ 55; Ahmad Ibrahim, 'The position of Islam in the Constitution of Malaysia', in Tun Mohamed Suffian, H.P. Lee and F.A. Trindade (eds.), *The Constitution of Malaysia: Its Development: 1957–1977* (Oxford: Oxford University Press, 1978), p. 41 at 53. See also Andrew Harding, 'The *Keris*, the Crescent and the blind goddess: the State, Islam and the Constitution in Malaysia' (2002) 6 *Singapore Journal of International and Comparative Law* 154.

[46] Joseph M. Fernando, 'The position of Islam in the Constitution of Malaysia' (2006) 37(2) *Journal of Southeast Asian Studies* 249 at 250.

> practising their own religions, and shall not imply that the State is not a secular State.' This statement states unequivocally the original intentions of UMNO and Alliance leaders. It was a compromise reached between Alliance parties, hence there was no objection from the Malaysian Chinese Association (MCA) and the Malaysian Indian Congress (MIC) to the inclusion of this provision in their joint memorandum.[47]

The proposed enactment of Article 3 declaring that Islam is the religion of the federation was initially opposed by the rulers of the Malay states

> because they were told by their constitutional advisers that if the Federation had an official religion, the proposed Head of the Federation would logically become the Head of the official religion throughout the Federation and it was thought that this would be in conflict with the position of each of the Rulers as Head of the official religion in his own State.[48]

The Malay rulers were placated by the explanation of the Alliance Party

> that it was not intended to interfere with the position of the Rulers as Head of Islam in their own States and that the intention in making Islam the official religion was primarily for ceremonial purposes, for instance to enable prayers to be offered in the Islamic way on official occasions such as the installation of the Yang di-Pertuan Agong, Merdeka Day, and similar occasions.[49]

The White Paper (Legislative Council Paper No 42 of 1957) dealing with the constitutional proposals stated that the declaration of Islam as the official religion 'will in no way affect the present position of the Federation as a secular state'.[50] Within a year of independence, the first prime minister of Malaysia, Tunku Abdul Rahman, firmly asserted that 'this country is not an Islamic State as it is generally understood, we merely provide that Islam shall be the official religion of the State'.[51] In 1988 in *Che Omar* v. *PP*,[52] the federal constitution was characterised by the Supreme Court as secular in nature.[53]

[47] Ibid., at 265–6. See also Kevin Y.L. Tan, 'The Creation of Greater Malaysia: Law, Politics and Religion', keynote address delivered at the conference on Law and Society in Malaysia: Pluralism, Islam and Development, University of Victoria, BC, 15 July 2011.

[48] Ahmad Ibrahim, 'The position of Islam in the Constitution of Malaysia', pp. 41, 49

[49] Ibid. See Mohamed Suffian Hashim, 'The relationship between Islam and the State in Malaya'.

[50] Malaya, *Federation of Malaya Constitutional Proposals* (Kuala Lumpur: Govt Printer, 1957), pp. 18–19.

[51] Malaya, *Official Report of Legislative Council Debates*, 1 May 1958, cols. 4631 and 4671–2 (Tunku Abdul Rahman).

[52] [1988] 2 MLJ 55.

[53] Li-ann Thio, 'Jurisdictional imbroglio: civil and religious courts, turf wars and Article 121 (1A) of the Federal Constitution', in Harding and Lee, *Constitutional Landmarks in Malaysia*, p. 221.

The issue of apostasy[54] captured international attention as a result of the *Lina Joy* case.[55] Lina Joy was a Malay woman who was brought up as a Muslim by her family under the given name of Azlina bte Jailani. She became a Catholic, met a Christian man and wanted to marry him. Dato' Cyrus Das explains,

> In order for her to contract a non-Muslim marriage, two things concerning her IC [Identity Card] had to be dealt with administratively. The Registrar of Marriages could not marry a person under the civil marriages registry who has a Muslim name. Certainly not if the term 'Islam' is on one's IC.[56]

In February 1997, she applied to the National Registration Department (NRD) to change her name to Lina Lelani, but her application was rejected without any reason being proffered. She applied a second time to change her name to 'Lina Joy' because she had converted to Christianity. Pursuant to advice from the NRD she submitted a new statutory declaration stating that the reason for her change of name was because of mere choice. She subsequently was issued a new identity card with the new name of 'Lina Joy' but the new card stated her religion as Islam. She made her third application to the NRD to have the word 'Islam' removed from her new identity card. That application was rejected 'on the ground that it was incomplete without an order of the Syariah Court to the effect that she had renounced Islam'.[57] It has been pointed out that the NRD regulations do not contain any provision requiring a person to obtain an order from the Syariah Court in the case of a Muslim person who wants to change his or her religion.[58]

A majority of the Court of Appeal had held that the NRD was 'right in law in rejecting [Lina Joy's] application . . . to have the statement of her religion as "Islam" deleted from her NRIC and in requiring a certificate and/or order from the Syariah Court'. Leave to appeal was granted for the Federal Court to consider the following three questions:

(a) Whether the . . . NRD is entitled in law to impose as a requirement for deleting the entry of Islam in the applicant's Identity Card (IC)

[54] Mohamed Azam Mohamed Adil, 'Law of apostasy and freedom of religion in Malaysia' (2007) 2(1) *Asian Journal of Comparative Law* 1.

[55] *Lina Joy* v. *Majlis Agama Islam Wilayah Persekutuan and Others* [2007] 4 MLJ 585 ('*Lina Joy*') 621.

[56] Dato' Cyrus Das, 'Constitutional supremacy and the Lina Joy decision', in Samuel Ang, Lee Min Choon and Lim Siew Foong (eds.), *Religious Liberty after 50 Years of Independence* (Petaling Jaya: NECF Malaysia Research Commission, 2008), p. 44.

[57] *Lina Joy* v. *Majlis Agama Islam Wilayah Persekutuan and Others* [2007] 4 MLJ 585 ('*Lina Joy*') at 621 at [38], per Richard Malanjum CJ (Sabah & Sarawak).

[58] Das, 'Constitutional supremacy and the Lina Joy decision', p. 44.

that she produce a certificate or a declaration or an order from the Syariah Court that she has apostatised?

(b) Whether the NRD has correctly construed its power under the national Registration Regulations 1990, in particular regs 4 and 14, to impose the requirement as stated above when it is not expressly provided for in the 1990 Regulations?

(c) Whether *Soon Singh* was rightly decided when it adopted the implied jurisdiction theory . . . which declared that unless an express jurisdiction is conferred on the Syariah Court, the civil courts will retain their jurisdiction?[59]

The Federal Court, by a 2–1 decision (Ahmad Fairuz CJ, Alauddin Mohd Sherif FCJ and Richard Malanjum CJ (Sabah and Sarawak) dissenting), dismissed her appeal from the decision of the Court of Appeal. The majority (writing their judgment in the Malay language, which is rather surprising for a superior court) answered all three questions in the affirmative while Richard Malanjum (writing in English), dissenting, answered them in the negative.[60] The substantive effect of the majority decision is that a Muslim cannot exit the Islamic faith without obtaining the approval of the Syariah Court. In a critical analysis of the decision, Dato' Cyrus Das remarked, 'what is pervasive in most of the state syariah laws is: if a Muslim wants to exit the religion, he or she can be detained and put in a place called a Faith Rehabilitation Centre'.[61] He highlighted the case of Revathi, a Muslim by birth and a Hindu by choice, who 'was placed in a camp and subjected to a lengthy period of so-called rehabilitation'.[62] The stance of the majority represented an abdication of the role of the highest court of the land as a guardian of the Constitution. The decision derogated from the declared supremacy of the Constitution. It undermined the general guarantee under Article 11 of Muslim Malaysians to invoke the right to practise and profess the religion of their choice by interposing a third party whose approval has to be obtained in order to change religion. It failed to accord with the norms of administrative law by allowing an unwritten policy to prevail over a constitutional guarantee.[63] Pointing to *Lina Joy* and other case authorities,[64] Mohamed Azam Mohamed Adil of the MARA University of Technology said,

[59] [2007] 4 MLJ 585 at 623.

[60] A.L.R. Joseph, 'Unfettered religious freedom hangs by the thread of minority dissent in Malaysia: a review of the dissenting judgment of the Federal Court in the *Lina Joy Case*' (2009) 14(2) *Review of Constitutional Studies* 205.

[61] Das, 'Constitutional supremacy and the Lina Joy decision, p. 46.

[62] Ibid.

[63] Ibid., p. 49. In Abdul *Kahar bin Ahmad* v. *Kerajaan Negeri Selangor (Kerajaan Malaysia, intervener) and Another* [2008] 3 MLJ 617, at 623, the Federal Court held that Article 121 (1A) 'does not confer jurisdiction on the Syariah Courts to interpret the Constitution to the exclusion of the [Federal Court]'.

[64] *Daud Mamat and Others* v. *The Government of Kelantan and Another* [2001] 2 CLJ 161; and *Kamariah Ali and Others* v. *The Government of Kelantan and Another* [2002] 3 MLJ 657.

> the problem arises as no Muslim will dare apply for apostasy declaration if the provision in some states imposes punishments of up to RM3000 fine or imprisonment of up to three years and mandatory detention in the rehabilitation centre for up to 36 months, like the ones provided in Perak, Terengganu and Kelantan respectively.[65]

The strain on national harmony was underlined by the Annual Report 2010 of the Human Rights Commission of Malaysia. The report stated that the commission had received a memorandum from several parliamentarians regarding sixteen attacks on places of worship. These attacks 'had stemmed from the use of "*Allah*" by non-Muslims'.[66] In addition to condemning these attacks, the commission recommended that the police should thoroughly investigate them and ensure the safety of the public in practising their religious rights and that religious leaders should hold an inter-faith dialogue and 'refrain from making statements which could be detrimental to understanding and harmony'.[67]

The politics of religion

The constitutional and legal imbroglios arising from the 'Islamisation' phenomenon were of concern to a coalition government which suffered a severe setback at the 2008 election and which is seeking to recover electoral support at the 5 May 2013 general election. There was much adverse publicity arising from the 'Kartika' controversy[68] and the 'cow's head' controversy.[69] As 'the UMNO leadership is desperate to shore up Malay support for the party' it is beset by difficulties in trying to resolve some of these inbroglios.[70] Prime Minister Datuk Seri Najib Tun Razak made a journey to Rome on 18 July 2011 to meet with Pope Benedict XVI to establish diplomatic ties with the head of the Roman Catholic Church. The report in the *Malaysian Insider* stated that the purpose of the prime minister's personal visit was to 'help repair frayed ties arising from the Catholic Church's legal suit to use "Allah" to refer to the Christian God in its Bahasa Malaysia

[65] Mohamed Azam Mohamed Adil, 'Restrictions in freedom of religion in Malaysia', at 24.
[66] Human Rights Commission of Malaysia (SUHAKAM), Annual Report (2010), 42.
[67] Ibid., 42–3.
[68] In 2008, Kartika Dewi Shukarno, a former model, was caught drinking beer and was sentenced to a fine and whipping by a Syariah Court in Kuantan, Pahang. She indicated her willingness to be whipped publicly. The sentence was subsequently commuted by the sultan of Pahang.
[69] The 2009 controversy arose from a demonstration by some fifty Muslim Malays against the relocation of a Hindu temple in their neighbourhood. The demonstrators were reported to have 'carried a severed and bloody cow's head and threatened the Hindu community with violence': Anthony Milner, 'Contesting human rights in Malaysia', in Thomas W.D. Davis and Brian Galligan (eds.), *Human Rights in Asia* (Cheltenham: Edward Elgar, 2011), p. 95.
[70] See ibid., at p. 96.

publication'.[71] The case is still pending in the Court of Appeal after the church won the right in the High Court on 31 December 2009.

VII. CONCLUSION

The first decade of the twenty-first century was a tumultuous and highly significant period in Malaysian history, with developments on both the political and the constitutional fronts which carry optimistic overtones and simultaneously ominous portents for the future of the Malaysian polity.

The most significant development during the period under review is the transformation in the political dynamics of Malaysia. There is a broad feeling that the aura of electoral invincibility of BN, which had dominated the governance of the country, has lost its gloss. The outcome of the general election in 2008 was a landmark development. It excited the general public that they were witnessing for the first time the possibility of a strong opposition capable of taking the reins of national government. The strong and spectacular showing of the PR in the elections meant that the government had to take issues of accountability seriously. No longer can issues of corruption, maladministration and improper behaviour of public officials be swept under the carpet. This development is definitely for the good of the country and its people. The outcome of the general election on 5 May 2013 will be of fundamental importance to the growth of democracy in Malaysia (see Postscript to this chapter).

The second development, that of establishing or reconstituting Malaysia as an 'Islamic state', has had 'serious implications for multiculturalism, religious pluralism and democracy in Malaysia'.[72] The decade under review has witnessed a marked increase in 'tension and polarisation within Malaysian society', and this can be attributed to 'UMNO and PAS's competitive but erratically inconsistent repudiation or denigration of secularism and the secular in favour of its putative opposite – a Muslim society governed by Islamic law'.[73] Professor Faruqi of the MARA University of Technology proffered this thoughtful reflection:

> Given the multi-racial, multi-cultural and multi-religious composition of Malaysian society, the imperatives of coalition politics, the demands of a federal polity, the power of the non-Malay electorate, the 54-year-old political tradition of compromise and consensus, the increasing democratisation of life, the greater sensitivity to human rights, the

[71] Debra Chong, 'Najib to Meet Pope Benedict, Seeks Diplomatic Links', The Malaysian Insider, 4 July 2011, www.themalaysianinsider.com/malaysia/article/najib-to-meet-pope-benedict-seeks- diplomatic-links.

[72] Othman, *Shari'a Law and the Modern Nation-State*, p. 48.

[73] Amanda J. Whiting, 'Secularism, the Islamic State and the Malaysian legal profession' (2010) 5 *Asian Journal of Comparative Law* 115 at 118.

> emergence of many powerful NGOs including those espousing women's issues, the juggernaut of globalisation, the pulls of secularism and modernism, the glitter of a capitalistic, hedonistic and consumer-based economy, the power of the international media to shape our values, and the overwhelming control that Western institutions wield over our economic, cultural and educational life, it is unlikely that Islam will have a 'walk-over' in Malaysia and will sweep away everything in its path. Malaysian society is, and is likely to remain, a cultural mosaic. Islam in Malaysia will continue to co-exist with modernity, with Malay *adat* (custom) and with the dominant American and European culture that shapes our world-view, our thinking processes and our framework assumptions.[74]

However, Professor Anthony Milner of the Australian National University has highlighted a 2006 survey which suggested that 'Islamic identity was gaining precedence over ethnic identity in the Malaysian Muslim community, with some 73 per cent of respondents choosing Islam as their primary identity marker'.[75] Prime Minister Datuk Seri Najib Tun Razak has sought to ease public concern by articulating a message of 'moderation':

> In Islam we have a concept, *wasatiyyah*, which means moderation or 'justly balanced'. It is this spirit of moderation that has made Malaysia the country it is today, and that I believe will now be the key to overcoming the challenges we face together as a region. That is why, at the United Nations last year, I called for a new global movement of the moderates that would see government, business and religious leaders around the world face down extremism wherever it is found. Just as you cannot make the world a better place by passing a law proclaiming that it will be better, you cannot rid the world of extreme views simply by making them illegal. I have no doubt we can best foster tolerance and understanding not by silencing the voice of hatred, but by making the voice of reason louder and louder.[76]

The third development is the fall and rise in the influence of the Malay rulers, especially the Conference of Rulers, in the political dynamics of Malaysia. Kobkua Suwannathat-Pian concluded that, by the end of 2008,

[74] Faruqi, 'The Constitution of a Muslim Majority State'.
[75] Milner, 'Contesting human rights in Malaysia', p. 92.
[76] Dato' Sri Najib Tun Razak, 'Keynote Address', speech delivered at the 10th IISA Asia Security Summit, the Shangri-La Dialogue, Singapore, 3 June 2011, www.iiss.org/conferences/the-shangri-la-dialogue/shangri-la-dialogue-2011/speeches/keynote-address/dato-sri-najib-tun-raza.

> Malay kingship credentials were definitely on the rise and it would seem to remain that way as long as the political leadership continued to be ineffective in convincing the people of its trustworthiness, its willingness to change, its altruistic desire to serve the people, and its genuine efforts to fulfil the people's aspirations.

However, Kobkua Suwannathat-Pian added the caveat that the Perak political crisis 'applied a reality break on the royal ascendancy over the political sector'.[77]

The fourth major development is the national concern with the plummeting prestige of the judicial institution. The downward trend in public confidence in this institution has yet to be fully arrested. The reforms introduced by the Badawi administration are not convincing enough to eliminate the perception of governmental influence over the judiciary. The long-drawn-out prosecution of Anwar Ibrahim was, until the recent dismissal of the case by the High Court, perceived by the population at large as a governmental strategy to destroy Anwar's reputation and to hamstring his ability to lead the PR, especially at the 5 May 2013 general election.

On a more positive note, the fifth development is that with strong opposition the rule of law is bolstered. Human rights violations, abuse of power by governmental agencies and corruption are now subject to the glare of publicity.

In all, the first decade of the twenty-first century was a decade of mixed achievements for the Malaysian polity. The road ahead for the Malaysian nation will not be easy as the polity has to reconcile conflicting notions of *ketuanan Melayu* (primacy of the Malays) and the declaration of equality under the law, creeping 'Islamisation' and the guarantee of the right to practise and profess a religion of one's personal choice, and the 'right-to-rule' mentality of entrenched UMNO vested interests and new generations of Malaysians from all races who are technically savvy and who have higher aspirations than had their forebears in terms of political liberties. To invoke the cliché, Malaysia at the end of the decade is at a crossroads.

Postscript

At the general election held on 5 May 2013, BN, amidst claims by PR of widespread electoral irregularities and fraud, retained the reins of government. BN, despite securing fewer overall votes than PR, won 133 out of the 222 parliamentary seats while PR increased its number of seats from eighty-two to eighty-nine. For a second time at a general election, BN was denied a two-thirds majority.

[77] Suwannathat-Pian, *Palace, Political Party and Power*, p. 411.

12

'We are feeling our way forward, step by step'

The continuing Singapore experiment in the construction of communitarian constitutionalism in the twenty-first century's first decade

Thio Li-ann

I. INTRODUCTION: TRENDS, CHANGE-OVERS AND MAJOR POLITICAL DEVELOPMENTS: 2000–2011

Constitutions, as a form of political technology, are continuing experiments, establishing fundamental principles, institutions and values undergirding state–society relations. The Singapore constitutional experiment is relatively young, a few years shy of its jubilee in 2015. As of 2009, the relative youth of the nation is again apparent – 'The founding father is still in the House.'[1] Singapore's first premier, Mr Lee Kuan Yew, has been in Cabinet since 1965, only stepping down after the 2011 general elections, while retaining his parliamentary seat. Until then, his intervention in politics had been determinative and his influence in shaping the constitutional architecture lionesque. In terms of leading constitutional actors, the first decade of the twenty-first century ('the first decade') has witnessed significant changes and handovers. The motive force for constitutional change and refinement may be encapsulated in the third prime minister's comment: 'We are feeling our way forward step by step as Deng Xiaoping used to say *mo zhe shi zi guo he* (摸着石子过河), looking for stone … as you cross the river.'[2]

Singapore's third chief justice (CJ), Chan Sek Keong, assumed office on 11 April 2006.[3] Unlike the utilitarian, parochial orientation of the preceding Yong Bench, the jurisprudence from the Chan bench generally evidences a modest 'sea change' in a greater concern towards intrinsic legal values in balancing both efficiency and fairness, and a more nuanced engagement with transnational legal sources, maintaining a 'particularism' without parochialism. CJ Chan signalled an ambition to expend 'a sustained intellectual effort' to develop 'a large body of local

[1] E.H. Ng, 86 Singapore Parliament Reports (SPR), 19 August 2009.

[2] Transcript, Prime Minister Lee Hsien Loong National Day Rally speech, 20 August 2006.

[3] The other chief justices were Yong Pung How (28 September 1990–10 April 2006) and Wee Chong Jin (5 January 1963–27 September 1990).

jurisprudence.'[4] The Bench rejects a blind adoption of rights-based liberalism which valorises rights claims to the exclusion of competing rights, goods and duties. There appears little danger of a 'juristocracy' emerging in the near future, while there is hope of a Bench which defends the rule of law more robustly, as manifest in cases confirming judicial review over prosecutorial discretion and clemency powers.[5]

The first decade saw two presidential elections: that in 2005 was uncontested; while that in 2011 was heavily contested by four candidates, with the establishment candidate, former deputy prime minister Tony Tan, narrowly winning with 35.19 per cent of the votes,[6] and becoming Singapore's seventh president. The preselection qualification criteria[7] have been criticised as resulting in too small a pool of potential candidates (estimated at between 400 and 800), creating the spectre of non-contested elections, as in 1999 and 2005, where only one candidate got a certificate of eligibility from the Presidential Elections Committee.[8] While having contested elections bodes well for democratic accountability, the popular misconception of the president's role as a proxy for parliamentary opposition was disquieting.

Grafted onto the imported Westminster system of parliamentary democracy, the unique innovation of the elected presidency was introduced in 1990,[9] with specific, limited powers primarily designed to check an untrammelled parliamentary executive. This institution is a key pillar of 'fiscal constitutionalism', which emplaces constraints on financial policy primarily through requiring presidential approval for certain transactions and budgets which 'draw down' on 'past reserves'.[10] The president assented to such a budget for the first time during the 2009 global financial crisis. The 'harmonious working relationship', a key Cabinet–president governance standard set out in a White Paper, displayed no spectre of gridlock.[11] Notably, the ruling People's Action Party (PAP) government,

[4] Opening Address, CJ Chan Sek Keong, Developments in Singapore Law 2006–10 Conference, 24 February 2011.

[5] Judicial review of prosecutorial discretion avails for bad faith or violations of constitutional equality guarantees: *Ramalingam Ravinthran* v. *AG* [2012] SGCA 2. Art. 22P regulated pardoning powers are reviewable on grounds of procedural non-compliance and bad faith: *Yong Vui Kong* v. *AG* [2011] SGCA 9.

[6] The closest runner-up, Tan Cheng Bock, a former PAP backbencher, polled 37.85 per cent of the votes.

[7] Article 19, Republic of Singapore constitution.

[8] This constitutional body is established under Art. 18. See Li-ann Thio, '(S)electing the President of Singapore: diluting democracy?' (2007) 5(3) *ICON* 526.

[9] See Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Singapore: Academy Publishing, 2012), Chapter 9.

[10] 'Past reserves' are distinct from 'current reserves', and are not accumulated by the present government: see Art. 142(4), Singapore constitution.

[11] A White Paper set out various non-binding principles for determining and safeguarding the accumulated reserves of the government and the fifth schedule statutory boards and

which commands a parliamentary majority of more than two-thirds, could have invoked a parliamentary override mechanism against a recalcitrant president.[12]

The first decade also saw two general elections in 2006 and 2011, with the PAP winning strong majorities of eighty-two out of eighty-four seats (with 66.6 per cent of the national vote) and eighty-one out of eighty-seven elective seats (with 60.1 per cent of the national vote) respectively. The 'watershed' 2011 general elections ushered in a 'new normal' of a repoliticised political landscape. In addition to nearly all seats being contested,[13] for the first time since group representation constituencies (GRCs) were introduced in 1988, the opposition Workers' Party won the Aljunied GRC ward (54.7 per cent), unseating two Cabinet ministers and ushering five opposition MPs into parliament. The GRC scheme requires parties to field a team comprising at least one member from a stipulated minority group, to ensure multiracial parliamentary representation. Voters in GRC wards cast one vote for a team which they must accept on a 'package-deal' basis. GRCs have ranged in size from the original three to a supersized six, and have historically been used by the PAP to induct fresh blood into parliament,[14] by riding the coat-tails of an established ministerial anchor. The GRCs have been criticised as a means of perpetuating the PAP stronghold and stultifying the growth of a parliamentary opposition, even though, as a vehicle for electoral contests, the GRC is 'neutral.'[15]

The psychological effect of seeing incumbent Cabinet ministers defeated at the polls perhaps explains the post-election admonition of the third prime minister, Lee Hsien Loong, to newly elected MPs: 'There is no tenure or job security in politics.'[16] An unfamiliar humility was evident in PM Lee's apologising to the electorate during the hustings[17] for mistakes made.[18] PM Lee made good on promises at his 2011 swearing-in ceremony to review disquieting millionaire salaries

government companies (Cmd 5 of 1999). It contained ground rules governing institutional relations, formulated after an embarrassing 1999 public dispute between President Ong Teng Cheong and the government.

[12] E.g. Art. 148A, D.

[13] Only Lee Kuan Yew's Tanjong Pagar GRC ward was uncontested, as a potential challenger was unable to raise the deposit funds: 'GE: SDA Pulls out of Tanjong Pagar Contest', Channelnewsasia.com at 25 April 2011.

[14] '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 enter politics 'without some assurance of a good chance of winning at least their first elections'. Senior Minister C.T. Goh, Remarks, South East CDC Appointment Ceremony, 26 June 2006, Arts House.

[15] PM Goh asserted that the GRC scheme was 'objectively, theoretically, if you like, scientifically neutral. The key is who can produce the better team'. 'GRC Changes: Are They Intended to Fix the Opposition?', *Straits Times*, 29 October 1996, 20.

[16] 'PM Lee's Letter to MPs', Asiaone.com, 28 May 2011, para. 34.

[17] 'PM Says Sorry over Mistakes, Pledges to Do Better', *Straits Times*, 3 May 2011.

[18] Mistakes cited including letting detained terrorist Mas Selamat escape and the Orchard Road floodings: 'PM: Why I Said Sorry', Asiaone.com, 5 May 2011.

of high office-holders, with a report released in January 2012.[19] While pledging 'inclusive dialogue', he urged that politics not become confrontational or divisive.[20] The PAP continues to control 93 per cent of parliamentary seats.

PM Lee, since taking office in 2004, has demonstrated an understanding that, in the move from Third to First World in terms of economic development, a more educated citizenry demands greater political participation. Singapore is one of the leading proponents of the 'trade-off' theory, that young nations require stability and social discipline to create economic development, translating into a strong state with weak civil–political rights. This position is not static and the government is managing political liberalisation through incremental concessions and the will to 'become messy selectively',[21] cordoning off exceptional spaces such as Singapore's 'Speakers' Corner', where licensing requirements for public speaking do not apply.

In a speech delivered just before taking office,[22] PM Lee established his vision of a more participatory culture in lieu of a 'nanny state' with a disengaged citizenry, setting a new trajectory for the evolving political culture. The declared intent was to 'raise the level of engagement between government and people'. It was preferable to manage 'honest issues' where people 'debate issues with reason, passion and conviction' rather than have 'an apathetic society with no views', where citizens were 'passive by-standers'. Serious debate should be issue-specific, 'based on facts and logic', not emotionalism, to reach 'correct conclusions'. The government would continue to engage constructive critics seeking to improve policies but would rebut 'destructive' dissenters out to score political points and undermine the government. Even 'long-settled issues', such as the casino issue, would be openly discussed. The ability to discuss 'gut issues of race and religion' and how to 'build trust between Muslims and non-Muslims . . . openly and maturely'[23] was described as a progressive development in the post-9/11 era, when ethnic tensions were exacerbated after the Malay members of the fundamentalist Jemaah Islamiyah group were preventively detained in December 2002 after a bomb plot was uncovered. Political space was opened up for discussing matters pertaining to social mores as the government would pull back from 'being all things to all citizens' and be 'increasingly guided' by community consensus 'on questions of public morality and decency'.[24]

[19] See White Paper, 'Salaries for a Capable and Committed Government' (Cmd 1 of 2012, 10 January 2012). Available at www.psd.gov.sg/content/psd/en/white_paper/white_paper.html

[20] Speech, PM Lee Hsien Loong, Swearing-in Ceremony, State Room, Istana, 21 May 2011.

[21] 'PM Lee Highlights Wild Boars, Graffiti on Need to Be Messy Selectively', Channelnewsasia.com, 13 July 2012.

[22] 'Building a Civic Society', speech, Deputy PM Hsien Loong, Harvard Club of Singapore's thirty-fifth anniversary dinner: http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN015426.pdf.

[23] Ibid.

[24] Thio Li-ann, 'Can We Disagree without Being Disagreeable?', *Straits Times*, 26 October 2007.

Nonetheless, certain matters, such as security, foreign policy and tax, were not 'amenable to public consultation', because of secrecy issues or market sensitivity. This is a far cry from the 1990s when Singaporeans were admonished not to address political authorities as equals in public debate.[25]

The Singapore media, long criticised for its informal government links,[26] was exhorted not to be an adversarial watchdog or inquisitorial bloodhound but to play a 'constructive role in nation-building', necessary if 'freer debate is to lead to consensus and understanding' rather than 'cacophony and confusion'. The media should not presume to 'set the national agenda' or 'pass judgment on the country's leaders', unlike the US model of the 'fourth estate'.[27] Journalists or publishers wanting to participate in the political process should 'join a political party' and 'not use the privileged access to the media to push a political perspective'[28] through 'crusading journalism, slanting news coverage to campaign for personal agendas'. Unlike the Internet, which was 'chaotic ... unfiltered, un-moderated', and carried lopsided 'negative views and ridiculous untruths',[29] it was imperative that the mainstream media engage in serious journalism, marked by 'reliable, verified and insightful'[30] reporting. The courts have observed that 'there is no room in our political context for the media to engage in investigative journalism which carries with it a political agenda'.[31]

Singapore continues to retain preventive-detention laws, like the Internal Security Act (ISA) which it has no plans to abolish. The government issued a statement that it would not follow Malaysia's plan to abolish and replace their ISA with legislation targeting subversive acts and violence, noting that despite shared roots as former British colonies, 'the two countries and their respective societies have evolved differently over time', underlining the differences in Singapore legislation.[32] The ISA had been 'sparingly' used to deal with subversive threats

[25] Then Minister George Yeo, who lost his seat in 2011, said that citizens should preserve a certain deference in public debate, encapsulated in the Hokkien saying *boh tua, boh suay* ('Debate yes, but do not take on those in authority as "equals"', *Straits Times*, 20 February 1994, 19.

[26] Singapore Press Holdings, which basically owns the major newspapers, has had directors with close government ties. In 2011, a former minister for information, communications and the arts was appointed an SPH director: 'Dr Lee Boon Yang Set to Be Next SPH Chairman', Channelnewsasia, 22 September 2011.

[27] Deputy PM Hsien Loong, Harvard Club Speech.

[28] Speech by Minister for Home Affairs and Minister for Law K. Shanmugam, 'A Free Press for a Global Society', Columbia University, 4 November 2010, [40].

[29] PM Lee Hsien Loong, National Day Rally Speech, 14 August 2011.

[30] PM Lee Hsien Loong, 'Role of Media', Speech at the 6th Asian European Editors Forum, 6 October 2006.

[31] *Review Publishing Co Ltd* v. *Lee Hsien Loong* [2010] 1 SLR 52 at 177 [272].

[32] Under the Singapore ISA, a person could be held in custody for thirty days, after which a detention or restriction order must be issued, or else the person must be released without conditions. Since 1991, there has been an additional safeguard in the form of the elected

such as the 2001 Jemaah Islamiyah bomb plot, and no one had been detained 'only for their political beliefs'. The ISA remained relevant and was used in the first half of 2011 to detain three individuals for terrorism-related activities.[33] Rejecting calls to abolish the ISA, the government insists that the ISA, 'as an instrument of last resort', remains necessary 'to keep Singapore safe and secure'.[34] In parliament in October 2011, Deputy PM Teo Chee Hean supported retaining the ISA, with its pre-emptive powers, which a Terrorism Act would not provide, given the nature of contemporary security threats, including radicalised 'lone wolf' Singapore jihadists. Where judicial review would expose sensitive information, disclose intelligence sources or exacerbate a volatile situation, it was not an option.[35]

While Singapore and Malaysia share a common constitutional genealogy,[36] their fundamental-liberties jurisprudence increasingly diverges in practice.[37]

Other important developments concern the continued priority to actively manage racial and religious harmony within a plural society, through the calibrated application of both 'hard' measures like the Sedition Act, and more relational measures where the government invokes 'soft constitutional law'[38] (non-binding norms articulated in a written instrument which shape expectations of constitutional actors) to mediate disputes with a religious dimension.[39] That not all constitutional disputes are litigated or subject to legal regulation reflects a form of

president, who may 'veto' a detention order, where the advisory board recommends release and the detaining authority rejects this, under Art. 151(4).

33 Statement, Ministry of Home Affairs, 12 September 2011 (Further Detentions and Release under the ISA).

34 Statement, Ministry of Home Affairs, 23 September 2011 (MHA Press Statement on ISA).

35 'DPM Teo: Terrorism Act Lacks Pre-emptive Powers of ISA', *Straits Times*, 20 October 2011, 1.

36 The drafters of the Malaysian Constitution drew substantially from English constitutional traditions, with some Indian, Australian and American influences. The Privy Council noted in *Ong Ah Chuan* v. *PP* (1980–1) Singapore Law Reports (SLR) 48 at 61–2, that the Part IV fundamental liberties were 'identical with similar provisions in the Constitution of Malaysia'. See J.M. Fernando, *The Making of the Malayan Constitution* (Malaysia: MBRAS Monograph 31, 2001), p. 212.

37 On divergent interpretations of religious profession rights, compare *Nappalli* v. *ITE*, [1999] 2 SLR 569, with the *Lina Joy litigation*, [2004] 2 MLJ 119; [2007] 4 MLJ 585: Malaysian courts have followed Indian jurisprudence in including the right to livelihood within the 'right to life': *Tan Tek Seng* v. *SPP* [1996] 1 MLJ 261.

38 Li-ann Thio, 'Soft constitutional law in non-liberal Asian constitutional democracies' (2010) 8(4) *ICON* 766.

39 Disputes may involve two religious groups or a mischief-seeking secularist group invoking the spectre of religion against a group with an agenda it disagrees with, to stir disquiet amongst other religious communities: see Thio Li-ann, 'Between Eden and Armageddon: navigating "religion" and "politics" in Singapore' (2009) SJLS 365–405; Thio Li-ann, 'Contentious liberty: regulating religious propagation in a religiously diverse secular democracy' (2010) SJLS 484–515; Li-ann Thio, 'Relational constitutionalism and the management of inter-religious disputes: the Singapore "Secularism with a Soul" model' (2012) 2 *Oxford J. of Law and Religion* 1.

relational constitutionalism, whose concern is for sustainable relationships. Ethno-religious tensions are mediated through dialogue and other non-adversarial methods of persuading compromise and accommodation, as with the 2002 'tudung controversy' which arose after four headscarf-wearing Muslim primary school girls were suspended from public school for breaching the uniforms policy, implicating religious freedom.[40]

Singapore's model of constitutional secularism has also developed, insofar as the government has acknowledged that citizens with religious convictions may legitimately speak on public issues.[41] While acknowledging the volatility of tensions arising from religious conflict or where exercises of the constitutional right of religious propagation stir sensitivities, the 'secularism with a soul' model is anti-theocratic, not anti-religious, in acknowledging religion's beneficial social role.[42] The co-operation of religion and state is evident in government social-services delivery partnerships with religious welfare organisations.[43]

This chapter surveys the major constitutional developments taking place in Singapore during the first decade. Section II deals with constitutional amendments and section III examines major constitutional cases.

II. CONSTITUTIONAL AMENDMENTS AND INSTITUTIONAL DEVELOPMENTS

Under Article 5(2), a two-thirds parliamentary majority is needed to amend the Constitution, which poses no practical bar to government-driven constitutional experimentation within a dominant-party state.

There were various significant amendments in the first decade, relating to citizenship laws which had the effect of promoting gender equality in 2004,[44] and alterations to the composition of the Legal Service Commission in 2007.[45] Primary amendments relate to the political branches, with respect to the composition of parliament, the presidency and associated financial provisions.

[40] Thio Li-ann, 'Recent constitutional developments: of shadows and whips, race, rifts and rights, terror and tudungs, women and wrongs' (2002) SJLS 328.

[41] Li-ann Thio, 'Religion in the public sphere of Singapore: wall of division or public square?', in Bryan Turner (ed.), *Religious Pluralism and Civil Society: A Comparative Analysis* (Oxford: Bardwell Press, 2008), p. 73.

[42] Li-ann Thio, 'Control, co-optation and co-operation: managing religious harmony in Singapore's multi-ethnic, quasi-secular state' (2005) 33(2) and (3) *Hastings Constitutional LQ* 197.

[43] Li-ann Thio, 'The cooperation of religion and state in Singapore: a compassionate partnership in service of welfare' (Fall 2010) *Review of Faith & International Affairs* 33.

[44] The Constitution was amended in 2004 to alter nationality laws to allow citizenship by descent to be conferred on overseas-born children of both Singaporean males and females with a foreign spouse: 77 SPR 19 April 2004, cols. 2792 ff.

[45] 83 SPR 16 July 2007, cols. 1035 ff.

Amendments to the composition of parliament: entrenching the unelected element

In 2010, the government removed the sunset clause associated with the Nominated Member of Parliament (NMP) scheme, which allowed each parliament to decide whether that session should have NMPs,[46] pronouncing the success of an institution which was controversial at inception.

The government, in making the scheme permanent, affirmed the value of having unelected or nominated legislators, an erstwhile feature of the colonial legislative assembly, where nominations were based on race or special trading interests. Introduced in 1990, a Parliamentary Special Committee would select talented and distinguished individuals whom the president would appoint, following Fourth Schedule provisions.[47] From an original six, the number was raised to nine NMP positions in 1997. The public is invited after a general election to submit the names of potential candidates whom the committee interviews in camera. In 1997, the practice was altered insofar as functional constituency groups (labour, business, industry, etc.) were invited to put forward candidates. In 2001, the number of functional groups consulted was doubled to include social and community service organisations, tertiary institutions and media, and arts and sports organisations,[48] to ensure 'a wider cross-section of NMPs into Parliament'.[49] The scheme's original rationale to provide alternative non-partisan views was departed from by opening the door to potential interest-group politics. 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.[50]

NMPs cannot hold membership in political parties and are supposed to present views drawing from their expertise to enhance viewpoint diversity in parliament. They serve a two-and-a-half-year term and play a 'senatorial' function insofar as they raise national rather than parochial issues. While generally acknowledged to have raised the quality of debates, the NMP scheme has been criticised for diluting democratic legitimacy.[51] NMPs have not only questioned government policies reactively, they have been able to proactively put things on the agenda, through

[46] Prior to Act 9 of 2010, the Fourth Schedule provided that within six months after parliament first meets after a general election, it shall resolve whether to have NMPs during that term of parliament.

[47] Section 3(2) provides that potential candidates must 'have rendered distinguished public service', 'brought honour to the Republic' or 'distinguished themselves' in their respective fields.

[48] Wong Kan Seng, 74 SPR, 5 April 2002, col. 572. [49] Ibid., col. 571.

[50] C.T. Goh, 54 SPR Nov. 1989, col. 700; Irene Ng, 74 SPR 5 April 2002, col. 602–3.

[51] 'Quality Debate v Democratic Ideals', *Straits Times*, 5 September 2008, A32.

private members' bills, or requiring government responses to specific issues raised in parliamentary petitions or adjournment motions.[52]

The 2010 amendment also raised the number of non-constituency MPs (NCMPs) from six to nine, with the Parliamentary Elections Act (PEA)[53] amended accordingly. This scheme was introduced in 1984 to guarantee the presence of a parliamentary opposition, even if none were elected.[54] Section 3 of the PEA originally provided for up to three NCMP seats to be offered to the top three losing opposition candidates, provided they won a minimum of 15 per cent of the valid votes in their contested ward. If more than three opposition candidates are returned, no NCMP seats are offered. If two are returned, one NCMP seat is offered and so on. Thus the size of parliament is variable, the scheme assuming that the size of a parliamentary opposition will be minuscule. This scheme continued to operate until the 2006 general election, when only two opposition politicians were elected,[55] and one NCMP seat was offered.[56] Although opposition parties oppose the scheme, they pragmatically accept an offered NCMP seat as a way to gain national exposure and parliamentary experience.[57]

After the 2011 election, three NCMP seats were offered as six opposition politicians were directly elected.[58] Like NMPs, NCMPs enjoy all the privileges and immunities that elected MPs enjoy, but have limited voting rights which do not extend to supply or constitutional amendment bills or no-confidence votes.[59] Unlike NMPs, they are partisan politicians. The NCMP scheme should fall into

[52] NMP Walter Woon and the Maintenance of Parents Act (Cap 167B); NMP Siew's failed petition to decriminalise sodomy; NMPs raising adjournment motions to debate national issues, e.g. Kalyani Mehta (elder care), Thio Li-ann (by-elections) and Viswa Sadasivan (Nation-building). Notably, the High Court affirmed that the PM had discretion under the PEA on when to call by-elections: *Vellama* v. *AG* [2012] SGHC 155. After the Workers' Party MP in Hougang SMC resigned in February 2012, by-elections were called in May, with the Workers' Party retaining the seat: 'Png Eng Huat Wins Hougang By-election', channelnewsasia.com, 26 May 2012.

[53] Section 52, Cap 218.

[54] 'We have sensed people want to have a good government plus a few good people to query the government': Minister C.T. Goh, *Straits Times*, 21 May 1984.

[55] Chiam See Tong (Potong Pasir) and Low Thia Khiang (Hougang).

[56] Sylvia Low (Workers' Party) accepted the seat. She was subsequently elected to parliament in the 2011 general election when her party won Aljunied GRC.

[57] In accepting the NCMP seat after the 2011 election, the Singapore People's Party issued a statement that the seat was critical 'to stay engaged with national issues through parliamentary debates, and to remain publicly visible in the eyes of all Singaporeans for the next five years'. 'Lina Chiam Accepts NCMP Seat', *Today*, 13 May 2011.

[58] The highest-polling opposition candidates were from two single-member constituencies (SMCs): Potong Pasir, where Lina Chiam (Singapore People's Party) polled 7,878 votes (49.6 per cent), and Joo Chiat, where Yee Jenn Jong (Workers' Party) polled 9,278 (49 per cent). The third seat was to go to the five-member Workers' Party team that lost East Coast GRC, polling 49,429 (45.2 per cent) of the vote.

[59] Art. 39(2).

desuetude if a significant political opposition presence in parliament becomes unexceptional.

Amendments to the presidency and financial provisions

The special entrenchment procedure in Article 5(2A) involves a referendum and was developed in 1990 in conjunction with the elected presidency. This article has yet to enter into force. The official reason is the desire to continue making institutional refinements in the light of experience, though it was originally thought that this would be given effect after a few years.[60]

The first decade saw two significant amendments to the presidency. The first continued the trend of reducing the scope of the presidential veto which started in 1994,[61] by exempting 'defence spending' from the veto and transfers of reserves from statutory boards or government companies (SBGCs) to the government from presidential scrutiny;[62] this provided that any transfers from an SBGC to the government would not be taken into account in determining whether an SBGC's past reserves had been drawn down, provided the relevant minister made a written undertaking to add the transferred reserves from the SBGC to the government's past reserves, which may not be spent. Originally, presidential assent was required for any transaction drawing down on past reserves, an exception to the Article 21(1) principle that the president acts in accordance with Cabinet advice. This same 'transfer' regime was, through 2002 amendments, extended to apply to transfers between statutory bodies and the government, and between statutory bodies; in 2004, the regime was extended to transfers between the government and SBGCs and between statutory bodies and government companies, under Articles 22B(9), 22D(8) and 148I respectively.[63] The requirement that the recipient entity place the transferred reserves in their past reserves essentially means that the transferred reserves will not be spent, as they do not form part of the current reserves. Article 22(10) provides that transferred reserves will be deemed to form part of the past reserves of the transferee body – whether the government, government

[60] 82 SPR 12 February 2007 (Art. 5(2A) of the Constitution (Operation of Constitutional Provisions)).

[61] Under Art. 151A: the rationale was that the president had a role over social spending but none over defence and security measures, which fell within the Cabinet's responsibility: 63 SPR 25 August 2004, cols. 417 ff.

[62] A 1994 constitutional amendment introducing Arts. 22B(9) and 22(D)(8) allows transfer of reserves from SBGCs to the government.

[63] Art. 22B was amended in 2004 to enable a Fifth Schedule statutory board to transfer any of its past reserves to the reserves of the government or another Fifth Schedule statutory board, without such transaction being regarded as a draw-down on past reserves. A 2004 amendment allowed similar transfers from the government to Fifth Schedule SBGCs and between Fifth Schedule statutory boards and government companies, without such transfer being regarded as a draw on reserves.

company or other statutory body – on stipulated dates. That is, the transfer will not be regarded as a draw on past reserves and this truncates presidential oversight.

The 2004 amendment bill allows transfer of reserves from the government to statutory bodies (e.g. the Housing and Development Board) or government companies (e.g. Temasek Holdings); this capital injection could potentially fuel the latter's aggressive investment strategies;[64] it was not debated at second reading. The rationale was that this more comprehensive framework for transfer of reserves between protected entities would 'enable more timely responses by the Government to changing economic or business conditions'.[65] Reserves could be transferred speedily from the government to SBGCs 'to seize opportunities in new areas of growth', or SBGCs 'may need to be restructured, merged or corporatised to better deliver public services and manage Government assets'. Government MPs in media interviews stated that this amendment did not compromise the need for checks, even if presidential oversight was removed from these transfers. The reason was that the internal controls of SBGCs remained intact; also, it was urged that 'we should have an implicit trust and confidence in how the Government manages our reserves', as it did not serve the national interest to have 'the specific allocation of the reserves subject to public scrutiny'.[66]

The second amendments relate to complex financial terms necessary to identify what a 'past reserve' is, without which it would be difficult for the president to discharge his functions effectively. A 2001 amendment defined 'net investment income' (NII),[67] relating to how the NII derived from past government reserves during the government's current term of office in a financial year may be spent. Article 142(2)(b) provides that, within a financial year, 50 per cent of NII from past reserves may be spent to fund the government budget, while 50 per cent must be saved and 'be deemed to form part of the past reserves of the Government. This idea reflected the principle that the current government should benefit from its own work'.[68]

This departed from the previous view that NII could be entirely spent as it was accounted for as part of current reserves.[69] This 50 per cent rule of fiscal prudence is based on the concept of intergenerational equity, designed to secure

[64] 'Reserves and Loophole Fears', *Today*, 2 June 2004, 1. Constitutional expert Kevin Tan questioned why the income of statutory boards, raised through fees and licences and charged with fulfilling certain public functions, should be used to help government companies earn profits.

[65] 77 SPR 19 April 2004, col. 2792.

[66] 'Reserves and Loophole Fears'. See Yvonne C.L. Lee, 'Under lock and key: the evolving role of the elected president as a fiscal guardian' (2007) SJLS 290.

[67] This complex formula is defined in Art. 142(4).

[68] Richard Hu, finance minister, 72 SPR 12 January 2001, col. 1303.

[69] Richard Hu, 70 SPR 17 August 1999, col. 2025.

a fair balance between the claims of the present and future generations, as 'something we can pass on to our children'.[70] A 2008 amendment[71] created a different computation of NII, although the 50 per cent savings rule still applies. However, as certain components were carved out of the method of computing past reserves, this 50 per cent savings rule probably applies to a smaller reserves nest, consonant with the government's plan to increase spending to finance various programmes.

Under Article 142, the finance minister must present an annual proposal for the long-term real rates of return (LTRRR) expected to be earned on the 'respective components' of the 'relevant assets', and obtain presidential concurrence. Thereafter, he must certify the spending limit to the president for that financial year, an amount not more than 50 per cent of the total of all amounts taken into the budget. Past reserves 'shall exclude those reserves equal to the amount so certified'.[72]

Incorporating complex financial terms like LTRRR[73] as a method of calculating investment returns into the Constitution is not easy for the layman to grasp and is beyond the competence of a constitutional lawyer. Presidential oversight is implicated in the operationalisation of the LTRRR as applied to the net investment returns (NIRs) as this becomes the formula by which to calculate how much is to be saved. The government determines the NIR every year for spending involving both 'professional expertise on the part of our investment agencies and sound judgment', 50 per cent of which goes to past reserves, of which the president is custodian. There are concerns as to whether the president, with the assistance of the Council of Presidential Advisors (CPA), would have sufficient public financial expertise to make these complex evaluations. Provided with the necessary information, the idea is that the president would be able to form a 'well-reasoned assessment' with the aid of CPA members, composed of highly competent professionals who were familiar with markets and 'know how to assess an argument'.[74]

The approach of having internal checks amongst the experts and government bodies was preferred over submitting the evaluation of proposed rates to parliament; that is, a 'fully transparent' approach. The chosen process is insulated from 'political pressures or mood of the day'. Instead, reliance was placed on having 'the right people in charge', on having robust checks and balances 'within the system'. The finance minister considered that this imperfect model faced less danger of falling prey to an overspending bias, by focusing on professional rather than political judgement.[75]

Should the president not concur with the finance minister's LTRRR proposal, a dispute resolution mechanism is to be implemented and articulated in a White

[70] PM Lee Hsien Loong, 82 SPR 13 Nov 2006, cols. 745–8. [71] Amendment Act 27 of 2008.
[72] Art. 142(1A)(b). [73] Art. 142(1A).
[74] Finance Minister Tharman Shanmugaratnam, 85 SPR 20 October 2008, Second Reading, Constitution of the Republic of Singapore (Amendment) Bill cols. 369 ff.
[75] Ibid.

Paper as a set of principles, indicating a preference for flexibility. If constructive dialogue fails, this mechanism would avail as a 'last recourse'. Pragmatic in conception, it is designed to avoid government paralysis. In this event, the historical real rate of return over the past twenty years will be used, as a 'neutral and pragmatic basis'. This mechanism reflects the presidency's reactive role in offering a second opinion, not a counterproposal, on whether a proposal is reasonable.

III. JUDICIAL REVIEW: INTERPRETATIVE APPROACHES AND A SURVEY OF MAJOR CONSTITUTIONAL CASES

General approach: significant trends

Judicial review in Singapore is not grounded on a presumption of deep combative distrust against the political branches.[76] Nor is it fair to assert that the courts in public-law cases of the past decade merely 'defer' (a complex idea requiring unpacking) to the political branches. What is apparent is a shift in style of judgments, from terse to expository, forgiving of procedural flaws, patient with immature constitutional argument, with a greater willingness to engage with or refer to academic writings and foreign law (whether as a model or anti-model[77]), with more sophistication in handling international-law arguments.[78] A subtle attempt to 'correct' interpretations of past decisions is also apparent in judicial asides.[79] Whether this will translate into substantive rather than semantic changes,[80] and whether conceptual distinctions will be judicially developed,[81] remain to be seen.

[76] See Chief Justice Chan Sek Keong's extrajudicial lecture published as 'Judicial review: from angst to empathy' (2010) 22 *SAcLJ* 474, at 480, 486.

[77] E.g. in *Yong Vui Kong* v. AG [2011] SGCA 9, the court distinguished Indian cases (Indian officials gave pardons as personal favours too readily) and Jamaica cases (Singapore was not party to specific human rights treaties Jamaica had acceded to).

[78] Michael Wood, 'What is public international law? The need for clarity about sources' (2011) *Asian JIL* 205; Thio Li-ann, '"It is a little known legal fact": originalism, customary human rights law and constitutional interpretation – *Yong Vui Kong* v. *Public Prosecutor*' (2010) SJLS 558.

[79] See the Court of Appeal's comment on *Jabar* [1995] 1 SLR(R) 326 in *Yong Vui Kong* v. *PP* [2010] 3 SLR 489 at 501, [19].

[80] E.g. in discussing the offence of 'scandalising of contempt', Loh J, while preferring the more stringently framed 'real-risk' over the 'inherent-tendency' test of speech harming public confidence in the administration of justice, nonetheless opined that the tests did not really differ, as each required contextualised balancing. In *AG* v. *Shadrake Alan* [2011] 2 SLR 445.

[81] The constitutional concept of natural justice: CJ Chan, *Yong Vui Kong* v. *PP* [2011] SGCA 9 [103]–[104].

Communitarianism: the right and the good

The public philosophy judicially espoused is broadly communitarian[82] (statist in some cases[83]), and does not prioritise the individual in the way liberal individualist philosophies do, in treating rights as 'trumps' which override social utility; rights are not considered oppositional but integral to the common good,[84] in a structural rather than an autonomist way. In this conception, rights are not the focal point in judicial balancing; an individual-centric rights-oriented political culture is rejected in favour of a more holistic responsibilities- and public goods-oriented discourse,[85] where the good is more confidently articulated,[86] developed along consciously autochthonous lines.[87] Here, law, or rather its social and symbolic value, is taken seriously 'as a potential source of correct or preferable norms of human conduct',[88] and rights apparently apprehended as defeasible interests, not determinative trumps.

This view is evident in case law, which has rejected the vision of a liberal state supposedly 'agnostic' on the common good, and which propounds a rights-based interpretive method. In *Mohamed Emran* v. *PP*,[89] the High Court found that the decision to prosecute only a drug trafficker who was entrapped and not the undercover police agent did not violate the equal-protection clause, as a reasonable distinction could be made between these two categories of person, one promoting and one curbing the drug trade, an objective under the Misuse of Drugs Act (MDA). The communitarian assumptions underlying various aspects of the decision are instructive. First, the importance of anti-drug-trafficking laws as a public good was affirmed and applied to the doctrine of reasonable classification; the court noted that police officers were not expected to be passive observers in combating the drug trade, otherwise, 'detection and prosecution of consensual crimes committed in private would be extremely difficult' as there is 'usually no victim to report the matter to the police' in drug-trafficking crimes. A public good is served in punishing apparently 'victimless' crimes (harm may be tangible or intangible)

[82] See *PP* v. *Law Aik Meng* [2007] 2 SLR(R) 814 at [24]–[29].

[83] E.g. *Chan Hiang Leng Colin* v. *PP* (1994) 3 SLR 662 at 684 ('The sovereignty, integrity and unity of Singapore are undoubtedly the paramount mandate of the Constitution and anything, including religious beliefs and practices, which tend to run counter to these objectives must be restrained').

[84] *Rajeevan Edakalavan* v. *PP* [1998] 1 SLR 815 (considering fundamental liberties a part of 'our well-being in society').

[85] See *Chee Siok Chin* v. *PP* [2006] 1 SLR 582 at [135].

[86] The High Court noted in *Kalpanath Singh* v. *Law Society*, [2009] 4 SLR(R) 1018 [23] that the secular nature of Singapore society did not preclude having 'shared values', identifying one 'common value' as 'forgiving those who have trespassed against us'.

[87] Phang JC, *Tang Kin Hwa* v. *Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR(R) 604.

[88] Peter Cane, 'Taking law seriously: starting points of the Hart/Devlin debate' (2006) 10 *Journal of Ethics* 21 at 26.

[89] [2008] 4 SLR 411.

involving two consenting adults, as any viable moral theory emplaces limits on consent. In underscoring the social value of the law, entrapment operations were recognised as serving the 'socially desirable and laudable objective of containing the drug trade', a 'grave menace' to society. Such operations were 'necessary' to flush out and deter drug suppliers. Thus the interest of the accused person in being treated 'equally' could not outweigh these competing community considerations.

The non-liberal tenor framing judicial review is evident in the first case extending to cyberspace laws regulating free speech, *PP* v. *Koh Song Huat Benjamin*.[90] The Sedition Act[91] was applied to anti-Muslim and anti-Malay remarks posted online, which was treated as part of the public realm. Richard Magnus SDJ emphasised the 'especial sensitivity of racial and religious issues in our multi-cultural society', and noted how 'callous and reckless remarks on racial or religious subjects' could 'cause social disorder' in 'whatever medium or forum they are expressed', including the Internet with 'its ubiquitous reach'.[92] As such, 'one cannot hide behind the anonymity of cyberspace, as each accused has done, to pen diatribes against another race or religion'.[93] Freedom of expression ('right to propagate an opinion on the Internet') was not to be considered in isolation, but was qualified by 'another's freedom from offence' and 'wider public interests considerations'; that is, not causing racial strife harmful to 'one racial group' (Malays) and 'the very fabric of our society' (all Singaporeans). Giving close contextual consideration to Singapore's historical race riot experiences, Magnus SDJ stressed that Singapore citizens and residents were responsible for respecting other races within a multiracial society and for doing nothing 'which might incite the people and plunge the country into racial strife and violence'.[94] The importance of racial and religious harmony as a social good is reflected in the government's attitude towards the disallowed Prophet Muhammad cartoons or the ban on Salman Rushdie's *Satanic Verses*. Free speech is not valorised but subject to other basic values, like a culture of tolerance and respect for religious beliefs, to secure peace and harmony. However, there is always the danger that constitutional liberties will be unduly discounted or ignored, as in *PP* v. *Ong Kian Cheong*,[95] where religious speech was considered seditious as it promoted 'feelings of ill-will and hostility between different races or classes of the population of Singapore'.[96]

[90] [2005] SGDC 272 (District Court, Singapore).

[91] Notably, the Sedition Act has both 'vertical' and 'horizontal' dimensions, insofar as the understanding of sedition transcends the common-law understanding of inciting violence against government institutions to include the 'horizontal' statutory meaning applicable to tensions between social groups as a threat to state survivability, more broadly conceived. See Thio Li-ann, 'The virtual and the real: Article 14, political speech and the calibrated management of deliberative democracy in Singapore' (2008) *SJLS* 25.

[92] [2005] SGDC 272 (District Court, Singapore), [7]. [93] Ibid., [8]. [94] Ibid.

[95] Ibid. For an analysis, see Thio Li-ann, 'Contentious liberty: regulating religious propagation in a religiously diverse secular democracy' (2010) *SJLS* 484.

[96] Section 3(1)(e), Sedition Act (Cap 290).

The courts, parliament and a question of balance

While committed to ensuring that political branches act within constitutionally prescribed limits,[97] the courts adopt a dialogical rather than confrontational attitude in refusing to lead social reform, while suggesting legal reform to parliament.[98] Singapore courts have demonstrated a consciousness about the red line between 'legitimate interpretation' and 'illegitimate legislation',[99] and refrain from creating new or novel rights from expansive readings of constitutional liberties.

This reticence extends towards a reluctance to find auxiliary rights which would aid the enjoyment of the full measure of an expressly recognised constitutional right. Yong CJ in *Sun Hongyu* v. *PP*[100] refused to read the Article 9(3) guarantee of right to counsel generously to include a right to contact third parties to discover and enquire into an accused's right to counsel or the legal consequences of his arrest. Whether the courts will develop an unenumerated rights jurisprudence by finding implied constitutional rights remains open. A 2009 ministerial statement declared that the right to vote is an implied constitutional right 'arising from the various provisions in the Constitution, including Articles 65 and 66 which provide for a general election within 3 months after every dissolution of Parliament'.[101] It was implied from the general structure of the Constitution and the system of representative democracy it established. In other words, it was functionally necessary to ensure a working system of democratic accountability.[102]

In terms of interpretive method, there are cases which appear to transcend the rhetoric of 'balancing' as accompanied by the two-step mantra: that rights are not absolute and that parliament is constitutionally authorised to enact restrictive laws on stipulated grounds.[103] Loh J in *Shadrake* observed that in balancing rights and competing interests, 'neither can be defined in such a way that renders the other

[97] E.g., rather than a hands-off approach, the High Court in *Lee Hsien Loong* v. *Review Publishing Co. Ltd* [2007] 2 SLR 453 at 490–1 emphasised the importance of a contextualised non-categorical approach in deciding issues of justiciability.

[98] E.g. in relation to media privileges under the Defamation Act (*Lee Hsien Loong* v. *Review Publishing Co Ltd* [2009] 1 SLR 177), and the extra-territorial effect of criminal offences (*Taw Cheng Kong* v. *PP* [1998] 2 SLR 410 at 437 [88]).

[99] Chong J, *Yong Vui Kong* v. *AGl* [2011] 1 SLR 1 at 30 [63]; *Yong Vui Kong* v. *PP* [2010] SGCA 20 at [59], noting that it would not be appropriate 'to legislate new rights into the Singapore Constitution under the guise of interpreting existing constitutional provisions', per Chan CJ.

[100] *Sun Hongyu* v. *PP* [2005] 2 SLR 750. This was an extension of Yong CJ's earlier holdings that there is no right for an accused to be informed of his Art. 9(3) right to counsel: *PP* v. *Mazlan* [1993] 1 SLR 512; *Rajeevan Edakalavan* v. *PP* [1998] 1 SLR 815.

[101] Law Minister K. Shanmugam 85 SPR 13 February 2009 (Budget Head R – Ministry of Law) in response to the question I raised in my capacity as a Nominated Member of Parliament.

[102] See Thio Li-ann, 'Westminster constitutions and implied fundamental rights: excavating an implicit constitutional right to vote' (2009) *SJLS* 406.

[103] E.g. the Public Entertainment and Meeting Act (PEMA) under Art. 14(2), as discussed in *Chee Soon Juan* v. *Public Prosecutor* [2003] 2 SLR 445 at 450, [20].

otiose'.[104] This fact has not translated into a wholesale adoption of intensive review. The High Court expressly rejected proportionality-based review in *Chee Siok Chin* v. *MHA*[105] for being a European rather than common-law principle.[106] In this, Singapore courts are increasingly diverging from Malaysian courts, who have read in qualifiers that restrictions on rights satisfy tests of reasonableness or proportionality.[107]

Some judicial deference is apparent insofar as courts accept that the legislative balance in framing a law which affects fundamental liberties is a constitutional balance. Nonetheless, the Court of Appeal in *Nguyen Tuong Van* v. *PP*[108] held that the meaning of the phrase 'in accordance with law' in Article 9(1), which deals with the deprivation of life and liberty, goes beyond duly enacted legislation to reference a system of law incorporating fundamental rules of natural justice forming 'part and parcel of the common law of England' at the Constitution's commencement.[109] Chan CJ in *Yong Vui Kong* v. *AG*[110] conceptually distinguished natural justice (fair hearing and the rule against bias) as a common-law principle and as an elevated constitutional norm, as accomplished in *Ong Ah Chuan* v. *PP*,[111] where natural-justice rules were incorporated into substantive legislation in the criminal-justice context. The former could be amended by statute, and the latter only by constitutional amendment.[112] Chan CJ clarified that these rules were 'the same in nature and function', but operate at 'different levels of our legal order'. Fairness lies at the core of natural justice, being a term capable of having procedural and substantive dimensions. As far as the constitutional concept has developed, this relates largely to the conduct of a fair trial. Whether this will evolve to assert substantive constraints on government power remains to be seen.

The courts, human rights law and comparative law

Arguments based on customary international law (CIL) and foreign cases have become commonplace in constitutional litigation. These centre on the Universal Declaration of Human Rights (UDHR) and have related to the mandatory death penalty (MDP)[113] imposed for drug-trafficking offences under the MDA, as in

[104] AG v. *Shadrake Alan* [2011] 2 SLR 445, [57]. [105] [2006] 1 SLR 582 at 616.
[106] Justice Bokhary PJ in *Leung Kwok Hung* v. *HKSAR* FACC Nos 1 & 2 of 2005 considered that proportionality was 'not really new' but was a facet of the rule of law and contained in the Magna Carta [178].
[107] The Malaysian courts have held that housed within the equal-protection clause (Art. 8) is the proportionality doctrine: *Sivarasa Rasiah* v. *Badan Peguam Malaysia and Another* [2010] 2 MLJ 333 at 350 [31]; cf *Chee Siok Chin* v. *MHA* [2006] 1 SLR 582, [46]–[51].
[108] [2004] SGCA 47.
[109] Lord Diplock, *Ong Ah Chuan* v. *PP* [1980–1] SLR 48 at 62, [26].
[110] [2011] SGCA 9. [111] [1980–1] SLR 48. [112] [2011] SGCA 9, [103]–[104].
[113] Singapore is currently reviewing the scope of application of the MDP: 'Singapore Completes Review of Mandatory Death Penalty', channelnewsasia.com, 9 July 2012.

Nguyen Tuong Van[114] and *Yong Vui Kong*,[115] and the idea of a fair trial in *Re Gavin Millar QC*.[116]

The courts will apply CIL norms which are 'clearly and firmly established',[117] though these are not self-executing and will have no effect unless first 'accepted and adopted' as part of domestic law by the courts, by declaring or applying CIL norms. Sans judicial recognition, the CIL norm 'would merely be floating in the air'.[118]

While the Court of Appeal in *PP* v. *Nguyen Tuong Van*[119] accepted that Article 5 of the UDHR, which prohibits torture and cruel and inhuman punishment (TCIP), was a CIL rule, it rejected the argument that the method of execution, death by hanging,[120] was unconstitutional as there was no 'settled view'[121] that this violated Article 5. The US decision of *Campbell* v. *Wood*[122] was cited in support, as was a UN report[123] indicating there is no CIL norm prohibiting the death penalty in general. The figures show the number of states retaining the death penalty (seventy-one) was almost equal to the number of abolitionist states (seventy-seven). Further, most states administer the death penalty 'by hanging or shooting'.[124]

The Court of Appeal agreed with the High Court that even if 'death by hanging' violated a CIL norm, a domestic statute like the MDA would prevail against the CIL norm in the event of inconsistency. The Court of Appeal in *Yong Vui Kong* v. *PP*[125] confirmed this implication that CIL within the Singapore legal order has the rank of a common-law norm, lacking constitutional status.[126] Here it was argued that the mandatory death penalty itself violated Article 5 of the UDHR such that MDP legislation was not 'law' for the purposes of Article 9(1), which was read to refer to a law consistent with CIL. It was dehumanising as it prevented the judge in sentencing from considering mitigating factors.

The court distinguished other Commonwealth decisions as these dealt with the interpretation of constitutional clauses prohibiting TCIP, which had no Singapore equivalent, and so did not speak directly to the meaning of 'law' in Article 9(1).[127]

[114] *PP* v. *Nguyen Tuong Van* [2004] 2 SLR 328; *Nguyen Tuong Van* v. *PP* [2005] 1 SLR 103.
[115] [2010] 3 SLR 489 (C.A.).
[116] [2008] 1 SLR 297. Art. 10 UDHR was invoked to argue that the equality of arms was integral to a fair trial: see Thio Li-ann, 'Reading rights rightly: the UDHR and its creeping influence on the development of Singapore public law' (2008) *SJLS* 264.
[117] [2005] 1 SLR (R) 103 at 126, [88].
[118] *Yong Vui Kong* v. *PP* [2010] 3 SLR 489 (C.A.).
[119] [2004] 2 SLR(R) 328.
[120] Section 216 of the Criminal Procedure Code states that death sentences are to be carried out by hanging.
[121] [2004] 2 SLR(R) 328 at 360 [107].
[122] 18 F 3d 662 (1994).
[123] UN Commission on Human Rights, '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).
[124] [2005] 1 SLR (R) 103 at 128, [92].
[125] [2010] 3 SLR 489.
[126] Following the English approach in *Chun Chi Cheung* v. *The King* [1939] AC 160 at 167–8; *Collco Dealing Ltd* v. *Inland Revenue Commissioners* [1962] AC 1.
[127] *Yong Vui Kong* v. *Public Prosecutor* [2010] SGCA 20 at [50].

Many cases cited also dealt with murder rather than drug trafficking, which was motivated by cold, calculated greed. The nub of counsel's argument was that Article 9(1) should be generously read in a prohibition on laws prescribing TCIP, because human values had changed, warranting a departure from precedent.[128]

Many of these decisions were from Caribbean countries whose constitutions were directly influenced by the European Convention on Human Rights (ECHR).[129] While stating that Singapore courts should ensure that domestic law should as far as possible 'be interpreted consistently with Singapore's international legal obligations',[130] the Court of Appeal in *Yong* said there were 'inherent limits' affecting the extent to which the courts could refer to international human rights law norms. These limits were derived from the constitutional text or history and the courts would not overextend their boundaries by enacting new rights through judicial interpretation. A constitutional amendment was needed to bring a new right into being.

The Court of Appeal held that the argument that the MDP for serious drug-trafficking offences was inhuman punishment and unconstitutional was 'foreclosed' for two main reasons.[131] First, the Singapore constitution contained no express prohibition against TCIP. It was deliberately omitted from the Malayan constitution (1957); this was 'not due to ignorance or oversight'[132] on the part of the Reid Commission as such a clause already existed in the ECHR, and it is 'a little known legal fact' that between 1953 and 1957 the ECHR was applicable to Singapore and the Malayan Federation by virtue of the UK's declaration under Article 63 ECHR. The ECHR ceased to apply to the British colonies upon independence, or, in Singapore's case, in 1963, when it joined the Malayan Federation.[133] Second, the 1966 constitutional commission had recommended including a prohibition on inhuman punishment which the government ultimately rejected, although no clear reasons were given. This appeal to original intent (or lack of intent) or constitutional history to show that such a clause was considered and 'decisively rejected by the Government in 1969'[134] was thought to shut down any attempt to read into Article 9(1) the content that such a clause would have contained.[135] From the recommendation to include the TCIP clause, it was inferred that the content of the proposed clause was distinct from and did not overlap with Article 9(1) and, as such, it was not legitimate to 'expand via an interpretative exercise'[136] the scope of Article 9(1) to include a prohibition against

[128] Ibid., at [52].
[129] A list of these cases may be found at *Yong Vui Kong* v. *Public Prosecutor* [2010] SGCA 20 at [24].
[130] Ibid., at [50]. [131] Ibid., [49]. [132] Ibid., [62]. [133] Ibid., [61].
[134] Ibid., [72]. Original intent is difficult to discern here insofar as there is no historical record indicating why the government decided to reject the proposed clause.
[135] One could argue that the framers may have thought that Art. 9(1) already included a prohibition against torture and inhuman punishment.
[136] [2010] 3 SLR 489 at 524 [72].

inhuman punishment. The fact that the courts parsed out and differentiated 'torture' and 'inhuman punishment' suggests that in the future they may be amenable to arguments that the reference to 'law' in Article 9(1) refers to a system prohibiting torture, drawing from the CIL prohibition.

In general, the courts have declined to adopt the rights-based reasoning of UK decisions influenced by the ECHR, as in the public-assembly case of *Chee Siok Chin* v. *MHA*.[137] However, the court in *Bertam* v. *Mehta*[138] favourably considered the UK decision of *Fine Robert* v. *McLardy*,[139] Millet LJ observing that the absence of a tort of harassment was a 'serious blot' on UK jurisprudence, soon to be remedied by the incorporation of the ECHR, which guarantees privacy rights through the Human Rights Act. Lee JC in *Mehta* opined that the time had come in Singapore to find such privacy rights, whether at common law or possibly, though the learned judge did not so declare, as implied constitutional rights. The judicial willingness to consider ECHR-influenced cases perhaps is because *Mehta* concerned not the government but two private individuals.

The courts and political speech: political libel and contempt of court

SCANDALISING THE COURT. There have been important developments in readjusting the balance between free speech and the interest of protecting public confidence in the administration of justice that underlies the common-law offence of 'scandalising the court'.

The first relates to the likelihood of occurrence of harm caused by speech critical of the judiciary to public confidence in the administration of justice. The more stringently framed 'real-risk' test was adopted over the prior test of 'inherent tendency', as the Court of Appeal affirmed in *Shadrake Alan* v. *Attorney-General* in 2011,[140] putting to rest conflicting High Court decisions.

Tay J in AG v. *Hertzberg*[141] defended the existing 'inherent-tendency' test articulated in the 1991 decision of AG v. *Wain*.[142] Foreign rights-expansive decisions had been rejected on the basis of 'local conditions' which required robust protection for judicial reputation, as Singapore judges tried both law and fact and warranted more protection. This decision has been criticised as underprotecting the interests of free speech. Subsequently, in AG v. *Chee Soon Juan*,[143] the learned judge added one further local condition, which was Singapore's small geographical size, as this 'renders its courts more susceptible to unjustified attacks'.[144] The 'inherent-tendency' test is 'simply one that conveys to an average reasonable reader allegations of bias, lack of impartiality, impropriety or any wrongdoing concerning a judge in the exercise of his judicial function'.[145] Tay J noted that advocates of the 'real-risk' test preferred this

[137] [2006] 1 SLR(R) 582, [86]–[87]. [138] [2001] 4 SLR 454, [57].
[139] [1998] EWCA 3003. [140] [2011] SGCA 26. [141] [2009] 1 SLR (R) 1103 [54].
[142] AG v. *Wain* [1991] 1 SLR(R) 85. [143] [2006] 2 SLR 650 at para. 26.
[144] Ibid., para. 25. [145] [2009] 1 SLR 1103 at 1125, [31].

because it is 'clearer' and strikes a 'more appropriate balance' between free-speech rights and protecting judicial reputation, with the 'inherent-tendency' test considered to inhibit free speech 'to an unjustifiable degree'.[146] Tay J highlighted two main advantages of the 'inherent-tendency' test as not requiring 'detailed proof' of a threat and as allowing the court to step in pre-emptively 'before the damage' occurs.

However, these factors discount the fact that legitimate criticism could be unduly curbed, in the absence of actual proof of any risk to judicial reputation, and through allowing judicial intervention based on inaccurate speculation.

In contrast, Quentin Loh J's endorsement of the real-risk test in AG v. *Shadrake Alan* (*Shadrake* 1)[147] was approved by the Court of Appeal in *Shadrake Alan* v. AG (*Shadrake* 2) even if it considered the differences in the tests a 'legal red herring'.[148] It was adopted for purposes of clarity, as the 'inherent-tendency' test conveyed the impression that only the intrinsic effect of the relevant words was considered apart from context and because, historically, the test had been contrasted with the 'real-risk' test. Loh J stated that judges did not 'entertain the naïve conceit' that confidence in the courts was to be maintained by sanctioning those who criticise the courts, correctly observing that 'unmerited punishment results in derision and resentment'.[149] Nonetheless, as Singapore judges followed the British practice of demonstrating restraint in response to criticism, the offence of scandalising the judiciary allowed the Attorney-General, as guardian of the public interest, 'to bring to task those who make dishonest, unwarranted or baseless attacks' which would impair confidence in the judiciary 'if left unchecked'. The Court of Appeal considered as 'neutral'[150] the factors of a small island and the judicial role in trying fact and law. After all, it could be argued, with more power comes a greater need for accountability. The American 'clear-and-present-danger' test was rejected as being a test peculiar to that jurisdiction, followed only by one divided Canadian court.[151]

Criticism targeted at judgments rather than denigrating judges warranted protection to avoid 'unduly restricting public discussion on the administration of justice'.[152] The increased protection of free-speech interests was also evident in the robust development of the 'fair-criticism' defence, as articulated by Prakash J in AG v. *Tan Liang Joo John*,[153] affirmed and elaborated upon in *Shadrake* 1 and 2. To be fair, criticism should be 'respectful', made in 'good faith' with a rational basis, and in a temperate manner, which would facilitate rather than thwart rational debate, which is the end free speech serves. Loh J in *Shadrake* 1 affirmed Prakash J's tentative view that there was no substantive limit in criticising courts, rejecting the view in *Hertzberg* that to impute partiality or improper motives to the

[146] [2009] 1 SLR 1103 at 1125, [32]. [147] [2011] 2 SLR 445. [148] [2011] SGCA 26, [56].
[149] [2011] 2 SLR 445 at 456 [18].
[150] *Shadrake Alan* v. *Attorney-General* [2011] SGCA 26 [31].
[151] [2011] SGCA 26, [28], [40]–[45]. [152] [2011] 2 SLR 445 at 456 [19].
[153] [2009] 2 SLR (R) 1132 at 1139 [15].

court was necessarily contemptuous. He recognised the 'powerful public interest' in 'exposing and rooting out impropriety and corruption' by those holding public office,[154] which the Court of Appeal affirmed.[155]

While questioning whether fair criticism was a defence against or element of liability, the Court of Appeal in *Shadrake* 2 recognised that scandalising contempt should not stifle fair, reasonable criticism, referring to a series of Commonwealth cases which emphasised the 'right' of fair criticism.[156] This right is a welcome change from a prior reticence towards affirming free-speech values. In addition, it endorsed the utility of the guidelines on fair criticism articulated in *Tan Joo Liang*.[157]

POLITICAL DEFAMATION. Singapore case law on political defamation has attracted much criticism for unduly chilling free speech critical of political actors and institutions, through the award of astronomically high damages, rejecting a public-figure doctrine and underprotecting free speech, in contrast to highly valued reputational rights. In this context, the free-speech rationale rests on the role of robust and free debate within democratic societies.

There were a spate of cases relating to political libel in the first decade, and extensive consideration of Commonwealth decisions from the United Kingdom, New Zealand and Australia. In 1993 the Court of Appeal in *JB Jeyaretnam* v. *Lee Kuan Yew*[158] rejected the 'actual-malice' test in *New York Times* v. *Sullivan*[159] and the 'public-figure', doctrine which requires a politician to have a thicker skin when it comes to criticism, because of the public interest involved. The fear was that the insufficient protection of reputation would deter honourable and sensitive men from entering politics, to the public detriment. This public good outweighed the public good of free speech in a democracy in relation to speech critical of politicians.

Notably the courts, in balancing competing interests, have begun to develop a theory of reputational rights. Judge Ang in *Lee Hsien Loong* v. *SDP*[160] underscored the importance of reputation, a non-constitutional interest, noting that defamation law 'presumes the good reputation of the plaintiff'. Ang J quoted the Greek rhetorician Isocrates, who noted that 'the stronger a man's desire to persuade his hearers, the more zealously will he strive to be honourable and to have the esteem of his fellow citizens'.[161]

Singapore has adopted a public-figure doctrine of sorts, but one that does not require toleration of more criticism. In *Tang Liang Hong* v. *Lee Kuan Yew*,[162] the court rejected the argument that damages awarded against an opposition politician, who was sued by thirteen members of the PAP government, should be reduced where the successful plaintiff is a politician or the case has a political flavour. Thean JA argued that this was 'untenable and wrong' as it would 'allow a

[154] *Shadrake* 1, [76]. [155] *Shadrake* 2, [84]. [156] *Shadrake* 2, [65]–[66].
[157] *Shadrake* 2, [81]–[82]. [158] [1990] 2 MLJ 65. [159] (1964) 376 US 254.
[160] [2009] 1 SLR 642, [102]. [161] [2009] 1 SLR 642, [102]. [162] [1998] 1 SLR 97.

person more latitude to make defamatory remarks of such personality and to escape with lesser consequences for the defamation he committed'. This would violate Article 12, which states, 'All persons are equal before the law and entitled to the equal protection of the law.'

However, it appears that while politicians and public figures are accorded the same protection as private individuals in relation to defamation laws,[163] in assessing damages the fact that a plaintiff is a 'prominent public figure' may result in the award of higher damages. In *Goh Chok Tong* v. *Chee Soon Juan (No.2)*,[164] Kan J noted that the defamation was serious 'because it constituted a severe indictment against a senior member of the government for the disposal of a large sum of the nation's funds'. Both Chee and Goh, as the secretary-general of an opposition party and the prime minister respectively, were 'prominent public figures' who had the capacity to damage the reputations of those of whom they spoke ill, undermining their effectiveness and standing as public officials by damaging public perception of their integrity. So too, Ang J in *Lee Hsien Loong* v. *Singapore Democratic Party*[165] took into account 'the position, standing and reputation'[166] of PM Lee and Minister Mentor Lee in deciding what quantum of damages was needed to vindicate their reputations. The former was awarded $330,000 and the latter $280,000.[167]

This quantum of damages would discount the public harm caused by chilling free speech and would contravene equal treatment under the law. Nonetheless, the Court of Appeal in *Lim Eng Hock Peter* v. *Lin Jian Wei*[168] insisted that, comparatively speaking, Singapore libel damage awards were not excessive, explaining the basis for computing damages and justifying the differentiation between categories of plaintiff for this purpose, while noting that defamation damages 'appears to be continually misrepresented or misunderstood by some sections of the public in Singapore'.[169] Some of the applicable principles are worth highlighting, as is the Court of Appeal's observation that in foreign jurisdictions such as Australia, New Zealand, Canada and the UK, expanded common-law defences of qualified privilege have not been accompanied by a conscious reduction of damages awarded to defamed political figures. The assessment of damages in such courts turns on all case circumstances, with guidelines to ensure that damages represent neither a 'cornucopia' nor a 'road to untaxed riches'; they must not be lowered to a point 'publishers might with equanimity be tempted to risk having to pay'.[170]

First, the position, standing and conduct of the plaintiff and defendants are relevant factors shaping the appropriate quantum of general damages for libel, whose function is consolation for distress suffered, reparation of reputational harm

[163] *Lee Hsien Loong* v. *Singapore Democratic Party* [2007] 1 SLR 675 at 692 [35].
[164] [2005] 1 SLR 573, 581. [165] [2009] 1 SLR 642. [166] Ibid., [149].
[167] Ibid., [154]. [168] [2010] 4 SLR 357. [169] [2010] 4 SLR 357 at 359, [2].
[170] [2010] 4 SLR 357 at 362, [10], referencing *Gatley*, p. 268.

and vindication of reputation.[171] It is appropriate to consider the deterrent effect, in awarding damages, which distinguishes libel cases from personal-injury damages.

Second, unlike English law, Singapore law did not consider the award of symbolic or token damages sufficient to vindicate the claimant's reputation.[172]

Third, a distinction is to be drawn between 'public leaders' and 'ordinary individuals'; where the former are defamed, higher damages are awarded, because of the 'greater damage' done not only to them personally but also to the institution where they have membership. The Court of Appeal stated that public leaders were generally entitled to higher damages because of their 'standing in Singapore society and devotion to public service'. 'Public leaders' include both political and non-political leaders in the public sector and private-sector leaders 'who devote their careers and lives to serving the State and the public'. 'Public leaders' does not refer to people 'famous in the public eye', like footballers, entertainers or singers. It does cover 'prominent figures in business, industry and professions' insofar as 'the relevant outputs serve to augment public welfare'.[173] With respect to political leaders, any libel or slander suffered 'damages not only their personal reputation but also the reputation of Singapore as a State whose leaders have acquired a worldwide reputation for honesty and integrity in office and dedication to the service of the people'.[174]

Defaming political leaders is a 'serious matter in Singapore' as it damages the 'moral authority' needed to govern and lead the people. In the way that the reputation of a clerk for financial honesty or a solicitor for integrity was 'in a relevant sense, his whole life',[175] the court likened the reputation of Singapore public leaders to being their 'whole life'. Strong criticism for incompetence, insensitivity, ignorance and any number of other human frailties was permitted, but not where it impugned 'their integrity, honesty, honour, and such other qualities that make up the reputation of a person'.[176]

Because of the great weight accorded to reputation as an interest, the court concluded that damages awarded to defamed public figures were 'rather moderate', compared to damages awarded plaintiffs 'of lesser public standing' in other Commonwealth jurisdictions.[177] For instance, to date, damages awarded to ministers in a single suit have not exceeded $500,000; members of parliament, whether opposition or government, have not been awarded more than $210,000. In relation to professionals, damage awards have ranged from $45,000 (architect) to $150,000 (lawyer). Comparatively, authors like Jeffrey Archer in the UK have been awarded £500,000 and MPs have received £150,000.[178]

[171] *Arul Chandran* v. *Chew Chin Aik Victor* [2001] 1 SLR(R) 86.
[172] Referencing Patrick Milmo and W.H.V. Rogers et al. (eds.), *Gatley on Libel and Slander*, 11th edn (London: Sweet & Maxwell, 2008); [2010] 4 SLR 357 at 360, [6].
[173] [2010] 4 SLR 357 at 362, [12]. [174] [2010] 4 SLR 357 at 363, [12].
[175] *Crampton* v. *Nugawela* (1996) 41 NSWLR 176. [176] [2010] 4 SLR 357 at 363, [13].
[177] [2010] 4 SLR 357 at 363, [15]. [178] [2010] 4 SLR 357 at 365, [19].

Reputation is thus tied to social standing and contribution to the public welfare, and the worth of one's reputation affects the quantum of damages awarded in defamation cases. The Singapore public-figure/-leader doctrine does not enhance the scope of free speech, but goes to a higher quantification of damages for harming reputation.

Nonetheless, a possible future development which might moderate damages for political libel lies in the Court of Appeal's suggestion in *Review Publishing* v. *Lee Hsien Loong*[179] to apply the House of Lords test of 'responsible journalism' as articulated in *Reynolds* v. *Times Newspaper*,[180] not as a defence against liability, but as a mitigating factor.[181]

Thus any 'new balance' to be struck does not 'necessarily entail excusing or immunising the defendant from liability'. Responsible journalism would apply to adjust the quantum of damages 'with the exact amount to be paid in each case being calibrated by the court in proportion to the degree of care which the defendant has taken (or failed to take)' to ensure the fitness and accuracy of the publication. This balance would deter irresponsible journalism, there being 'no reason' why a defendant who satisfied the responsible-journalism test 'should be allowed to get off scot-free for injuring the plaintiff's reputation',[182] and serve to promote the objective of free speech in a democratic society, which is not served by misinformation.

IV. CONCLUSION

Singapore may be described as a 'paternal democracy' (not paternalistic),[183] which denotes an evolving relationship between parent and child, as the child grows up and attains maturity. This has been accompanied by demands for greater public participation in government, yielding institutional schemes like the NCMP and NMP, as well as the development of an autochthonous public jurisprudence by the courts, which zealously protect a proceduralist rule of law, reflecting the dominant strain of political constitutionalism which reposes faith in political checks and in the elected branches of governments in directing legal reform. As Singapore matures, the tensions between drawing from global standards and forging an autochthonous constitutional order will continue to define the fundamental law as Singapore works out its unique brand of constitutional salvation, in a third space between the polar extremes of liberalism and illiberalism.[184]

[179] *Review Publishing* v. *Lee Hsien Loong* [2010] 1 SLR 52 at 187–8, [297].
[180] [2001] 2 AC 127.
[181] *Review Publishing Co. Ltd* v. *Lee Hsien Loong* [2010] 1 SLR 52 at 187–8, [297].
[182] *Review Publishing* v. *Lee Hsien Loong* [2010] 1 SLR 52 at 188, [297].
[183] Thio Li-ann, A *Treatise on Singapore Constitutional Law*, p. 122.
[184] See Li-ann Thio, 'Constitutionalism in illiberal polities', in Andras Sajo and Michel Rosenfeld (eds.), *Oxford Handbook on Comparative Constitutionalism* (Oxford: Oxford University Press, 2012) p. 133.

13

Philippine constitutional law

Majoritarian courts and elite politics

Raul C. Pangalangan

Philippine constitutional law in the first decade of the twenty-first century coincided with the presidency of mainly one person, Gloria Macapagal-Arroyo, and ended with the election of her successor, Benigno Aquino III. The two presidencies provide contrasting contexts for constitutional governance on the issue of legitimacy, which is to say that Arroyo lacked it and Aquino did not. Accordingly, Arroyo had to rely on the most literal reading of the constitutional text to buffer herself again myriad political challenges, while Aquino had the luxury of relying on democratic politics rather than countermajoritarian institutions to push forward his reform agenda.

This chapter traces how, in the public sphere, Arroyo's deficit in political legitimacy weakened republican institutions and exposed them at once to populist politics and elite manipulation. By the close of her presidency, the doctrine of separation of powers under the post-Marcos constitution of 1987 had been mangled to consolidate her political power, while the Bill of Rights had been twisted to cover up rent-seeking schemes.

In terms of constitutional structure, January 2001 marked the first distortion: the ouster of the democratically elected President Joseph Estrada through "People Power" protests and the installation of Arroyo as president under a clouded mandate. Arroyo declared an emergency four times in her presidency, but using various labels to evade built-in checks and balances. She also invoked executive privilege and issued gag orders to stifle anticorruption inquiries.

In terms of the Bill of Rights, President Arroyo's party-mates in Congress invoked her right to privacy over bugged cellphone conversations that caught her plotting to rig elections, while she lowered the protection for public protests. The decade also witnessed the manipulation of the doctrine of "state action" to allow the government to wash its hands of extrajudicial killings, in what the United Nations Special Rapporteur called a "passivity bordering on abdication of duty."

In terms of constitutional theory, the nation, in its desperate quest for a fount of legitimacy, turned to "the Constitution" and "the people," as mediated by the Supreme Court. This produced a strange combination. On one hand, reliance on "the Constitution" perpetuated extreme legalism – that is to say, a fixation on constitutional text regardless of historical context – riding on the back of countermajoritarian rhetoric for judicial review of executive decisions. On the other hand, invoking "the people" resulted in populist politics, where courts are in thrall to public opinion and constitutional exegesis is perennially hostage to partisan causes. It was as if the courts, far from silencing the people's voice, became its channel.

Significantly, these two competing tendencies – formalism and populism – persisted even in the private sphere, despite the fact that here the challenge to human rights came not from government but from a dominant church. The Congressional and judicial debates about sexual orientation, reproductive rights, and the right to health exposed threats to *laïcité* posed by the Roman Catholic majority.

A new president, Aquino, took over in mid-2010 with an unquestioned political mandate. He seized back the initiative with the impeachment of the chief justice of the Supreme Court by December 2011. Relying more on democratic politics than on judicial processes, the chief justice was removed from office in May 2012, signaling the unexpected resurgence of republican institutions but posing the very threat that countermajoritarianism had aimed to check, that of unbridled populism.

I. DEFICIT IN POLITICAL LEGITIMACY, EROSION OF LIBERTIES

Arroyo's presidency was hobbled by two nagging challenges to her legitimacy, namely her tainted accession to power in 2001 and election fraud during the 2004 presidential election, that would recalibrate the separation of powers; aggrandize power to the executive, aided by a supportive judiciary; and neutralize constitutional checks and balances.

Uprising and oath-taking in January 2001

In June 1998, a new president, Joseph Estrada, and vice president, Gloria Macapagal-Arroyo, were sworn into office. In January 2001, Arroyo took her oath as president under a "cloud of constitutional ambiguity,"[1] as Estrada, under impeachment trial for corruption and under pressure from massive public protests, left the presidential palace.

The Supreme Court validated her oath-taking but,[2] unlike in the past, did not treat it as an extraconstitutional transition. The 1986 uprising led by Corazon

[1] *Estrada* v. *Desierto*, General Register (hereinafter G.R.) No 146710-15 (March 2, 2001).
[2] Ibid.

Aquino against the Marcos dictatorship had been construed as extraconstitutional and the legitimacy of the new government was placed beyond judicial review.[3] The court had held that Cory Aquino became president "in violation of [the Marcos] Constitution" and that her government was "revolutionary in the sense that it came into existence in defiance of existing legal processes."[4] Since Cory Aquino was in effective control of the entire country, her legitimacy was "not a justiciable matter [but] belongs to the realm of politics where only the people ... are the judge."[5]

In Arroyo's case, however, the court saw the uprising as a mere "intra-constitutional" question, nothing more than an exercise of freedom of speech and of assembly. Yet the court held that Estrada's equivocal "acts of relinquishment" nonetheless showed an "intent to resign," a state of mind divined from his press statements and, remarkably, the diary of his chief cabinet secretary. A side argument was that Estrada had lost the capacity to govern because the rest of the government – especially the military – had already declared a "withdrawal of loyalty." The court thus concluded that the issue was "political in nature and addressed solely to the Congress by constitutional fiat."[6] The court said:

> The recognition of respondent Arroyo as our de jure President made by Congress is unquestionably a political judgment ... This political judgment may be right or wrong but Congress is answerable only to the people for its judgment. Its wisdom is fit to be debated before the tribunal of the people and not before a court of justice.[7]

Bugged conversations on election cheating in 2004

President Arroyo served the remaining three years of Estrada's term and, despite having categorically sworn on television that she would not run for the presidency, declared her candidacy for the 2004 presidential elections. She won those elections, but reports of massive election cheating were confirmed in July 2005 when, on live television, her official spokesman played a taped conversation, allegedly spliced and altered, between Arroyo and an election official wherein they conspired to rig the polls. Arroyo eventually apologized publicly for having made "improper phone calls," but without admitting that it was she who was caught in the tapes despite her spokesman's earlier admission. The purloined recording, now known as the "Garci Tapes" (after Virgilio Garcellano, the election official with whom President Arroyo conspired), triggered two constitutional debates.

[3] *Lawyer's League for a Better Philippines* v. *President Aquino*, G.R. No 73748 (May 22, 1986); *In re Saturnino Bermudez*, G.R. No 76180 (October 24, 1986); *De Leon* v. *Esguerra*, G.R. No 78059 (August 31, 1987); and *Letter of Associate Justice Reynato S. Puno*, Supreme Court Administrative Matter (hereinafter A.M.) No 90-11-2697-CA (June 29, 1992).

[4] *Letter of Justice Puno*. [5] *Lawyer's League for a Better Philippines*.

[6] *Estrada* v. *Desierto*. [7] Ibid.

Effects on civil liberties

The first was on the right to privacy. An impeachment complaint was filed against President Arroyo before the Philippine Congress over the Garci Tapes revelations. However, the Anti-wiretapping Law barred the admissibility of recordings unless authorized by the parties to the conversation. Arroyo's dilemma was that to invoke the right to privacy she would first have to admit that it was she who was caught on tape. She evaded the dilemma by getting her followers in Congress to invoke the right to privacy of anonymous persons who mysteriously claim not to have consented to the recording.

The second pertained to freedom of speech. The telecommunications regulatory agency threatened to cancel the franchise of radio and television networks should they broadcast the Garci Tapes. The secretary of justice, equivalent to the Attorney-General, issued a "media advisory," warning journalists of "criminal liabilities under the law, if [their personnel] disobey lawful orders ... during emergencies which may lead to collateral damage to properties and civilian casualties." The court struck down the "media advisory,"[8] and said:

> it is not decisive that the press statements ... were not reduced in or followed up with formal orders or circulars. It is sufficient that the press statements were made by respondents while in the exercise of their official functions ... The concept of an "act" does not limit itself to acts already converted to a formal order ... *Otherwise, the non-formalization of an act ... will result in the easy circumvention of the prohibition on prior restraint.*[9]

The court saw it as a "classic form of prior restraint" and rejected the excuse that the "advisory" was a mere press statement.[10] This would not be the last time that President Arroyo would resort to the "non-formalization of an act" to evade constitutional constraints. In the next case, she would again resort to this subterfuge to dilute the constitutional protection for freedom of assembly.

The Bill of Rights protects the "right to peaceably assemble and petition for redress of grievances".[11] The statutory standard of "maximum tolerance" was laid down in the Public Assembly Act,[12] which required "the highest degree of restraint that the military, police or other peace keeping authorities shall observe during a public assembly or in dispersal of the same." By a mere press statement, President Arroyo's spokesman proclaimed a new policy, called the "Calibrated Pre-emptive Response" policy, which called upon the police to enforce a strict "no permit, no rally" rule.

The court struck down the new standard because it "serves no valid purpose if it means the same thing as maximum tolerance and is illegal if it means something

[8] *Chavez* v. *Gonzales*, G.R. No 168338 (February 15, 2008). [9] Ibid., original emphasis.
[10] *Chavez* (Carpio J, separate concurring). [11] Constitution Art. III §4.
[12] Batas Bilang 880 (1985) (Public Assembly Act of 1985).

else." The court concluded, "It merely confuses our people and is used by some police agents to justify abuses." Moreover, the "time, manner and place" or "content-neutral" constraints on public assemblies were valid for as long as local governments designated "freedom parks" where people could protest without securing a permit. However, the court noted that, apart from one city in the south, no freedom park was designated in any city or town in the Philippines.[13]

The irony, however, was that what the court struck down was an unconstitutional press release, a phantom "law" which nonetheless caused actual injury to protesters and real violations of the Bill of Rights.

Significantly, the court advanced the freedom of speech when it upheld the use of exit polls during elections and the publication of their results.[14]

II. IN THE PUBLIC SPHERE: EFFECTS ON REPUBLICAN INSTITUTIONS

Arroyo's presidency was hounded by public protests and coup attempts, and she declared a state of emergency four times under various guises in order to evade constitutional checks and balances.

Emergency powers in various guises

Due to the nightmare of one-man rule, the post-Marcos constitution confined the extraordinary powers of the chief executive through institutional checks. It recognized three situations of "national security" emergencies and a fourth situation of economic emergency, all of them subject to Congressional or judicial oversight.

The three "commander-in-chief" powers are listed in succeeding gradations of severity: the power to "call out the armed forces," suspend the writ of habeas corpus and thus authorize warrantless arrests, or proclaim martial law. Significantly, the habeas corpus and martial-law powers are subject to automatic constraints. Congress may automatically review these declarations within fixed time periods "without need of a call." The Supreme Court may be called on by any citizen to exercise its power of judicial review, thus dispensing with the actual injury requirement for judicial standing. Finally, for emergencies of an economic nature, the state may "temporarily take over or direct the operation of any privately-owned public utility or business affected with public interest."

President Arroyo four times invoked her commander-in-chief powers, the third time claiming an economic emergency as well. The first three times, she would evade review by calling the situation a "state of rebellion" or "state of national emergency." Twice, the court upheld her, especially since she would moot the petitions by lifting the emergency before the court had rendered judgment.

[13] *Bayan* v. *Ermita*, G.R. No 169838 (April 25, 2006).
[14] *ABS-CBN Broadcasting* v. *Commission on Elections*, G.R. No 133486 (January 28, 2000).

One dissenting opinion stated that the "state of rebellion" can be used to "skirt the constitutional safeguards" of civil liberties and thus "partakes the nature of martial law without declaring it as such." It was effectively a "subterfuge" to avoid procedural safeguards:

> It is a truism that a law or rule may itself be fair or innocuous on its face, yet, if it is applied and administered by public authority with an evil eye so as to practically make it unjust and oppressive, it is within the prohibition of the Constitution. In an ironic sense, a "state of rebellion" declared as a subterfuge to effect warrantless arrest and detention for an unbailable offense places a heavier burden on the people's civil liberties than the suspension of the privilege of the writ of habeas corpus and the declaration of martial law because in the latter case, built-in safeguards are automatically set in motion.[15]

Another dissent noted President Arroyo's "deviation from the concise and plain" language of the Constitution and her failure to follow the proper procedure.

> To accept the theory that the President could disregard the applicable statutes . . . on the mere declaration of a "state of rebellion" is *in effect to place the Philippines under martial law without a declaration of the executive to that effect* and without observing the proper procedure.[16]

Significantly, the dissenting justice derided the president's pre-emption of judicial review by mooting the case.

The second time, President Arroyo still called it a state of rebellion but the court applied the "capable of repetition, yet evading review" exception to standing doctrine. The court held that the declaration was "utter superfluity" which was "devoid of any legal significance" and is "deemed not written." The dissenting opinion called it a "constitutional shortcut," noting that nowhere does the Constitution grant "the executive the power to declare a 'state of rebellion', much more to exercise on the basis of such declaration the prerogatives which a president may validly do under a state of martial law." When the president resorts to an "unorthodox measure . . . unbounded and not canalized by the language of the Constitution" and "not subject to clear legal restraints,"

> The purpose of the Constitution is not only to grant power, but to keep it from getting out of hand . . . [A]dopting an unorthodox measure unbounded and not canalized by the language of the Constitution is dangerous. It leaves the people at her mercy and that of the military.[17]

The third state of emergency was declared during the coup attempt of February 2006, the culmination of popular protests after President Arroyo was caught in the Garci

[15] *Lacson* v. *Perez*, G.R. No 147780 (May 10, 2001) (Kapunan J dissenting).
[16] Ibid. (Sandoval-Gutierrez J dissenting), emphasis added.
[17] *Sanlakas* v. *Reyes*, G.R. No 159085 (February 3, 2004) (Sandoval-Gutierrez J dissenting).

Tapes conspiring to cheat in the election.[18] The court struck down the violations of the freedom of speech and freedom of assembly, and the warrantless arrests carried out under the emergency declaration, but characterized the declaration itself as within the valid exercise of the "calling-out" powers of the President.[19]

Finally, journalists sued for damages after they were forcibly hauled to a military camp during a military standoff with rebel soldiers. The rebels had taken refuge at the prestigious Manila Peninsula hotel, but government troops could not lay siege until the journalists had vacated the area. However, the journalists would not cede their posts, claiming a duty to report the news. The police contended that they were at best a nuisance, and at worst rebel sympathizers protecting their comrades. The journalists were herded by the police, "handcuffed" with plastic grocery bindings, brought to a military camp to be identified, and finally released. The government equivocated on whether the journalists were merely forcibly evacuated from the siege, or were actually subjected to arrest.[20]

The trial judge dismissed their claim without hearing on the merits, saying they had disobeyed a generic penal law punishing "disobedience to a person in authority":

> The right of the plaintiffs as members of the press as guaranteed under the Constitution was not violated and trampled upon by the respective acts of the defendants. [The order to vacate the premises was] lawful and appeared to have been disobeyed by . . . the plaintiffs, when they intentionally refused to leave the hotel premises for which an appropriate criminal charge [for "resistance and disobedience to a person in authority" under] the Revised Penal Code, which is applicable to all, including the media personalities, could have been initiated against them.[21]

The fourth emergency was in 2009, upheld by the court,[22] when Arroyo finally and candidly invoked her martial-law powers in response to the massacre in the Muslim island of Mindanao, where fifty-seven civilians were gunned down by a local warlord.[23]

Failure of Congressional oversight

Arroyo neutralized Congress as an independent check on executive power through the deft exercise of her budgetary power of the legislators' "pork barrel," her

[18] *David* v. *Arroyo*, G.R. No 171396 (May 3, 2006). Note: the author was counsel for the petitioner in this case.

[19] See also F.T. Hilbay, "Tyrannosaurus Text and the doctrinal slip: PP1017 and the problematics of executive legislation," in F.T. Hilbay, *Unplugging the Constitution* (Quezon City: University of the Philippines Press, 2009), p. 35.

[20] *Tordesillas* v. *Secretary of Interior*, Civil Case No 08-086, Regional Trial Court of Makati City Branch 56 (June 20, 2008).

[21] Ibid.

[22] *Salonga* v. *Executive Secretary*, G.R. No 190307 (March 20, 2012).

[23] Presidential Proclamation 1959, Proclaiming a state of martial law and suspending the privilege of the writ of habeas corpus in the province of Maguindanao except for certain areas (December 4, 2009).

manipulation of the rules to frustrate Congress's impeachment power, and her use of executive privilege to suppress evidence.

Impeachment – the only mechanism to render a president accountable during his or her term – never worked against President Arroyo. The dilution of the impeachment power actually began rather innocuously.

In June 2003, deposed president Estrada filed an impeachment complaint against Supreme Court Chief Justice Hilario Davide Jr for swearing in Arroyo as president. That complaint did not prosper. A few months later, in October 2003, another impeachment complaint was filed against Davide for his questionable use of a special judiciary fund. His supporters saw this as a rearguard action by the Estrada camp, and asked the Supreme Court to block it, citing a constitutional bar on a second impeachment within a one-year period.[24] The question was whether the first impeachment complaint by Estrada, even if it did not prosper, was deemed "initiated" such as to trigger the one-year bar. The court said yes, construed that rule in favor of the accused, and struck down the second impeachment complaint.

The unworthy beneficiary of all this would be President Arroyo. In 2005, in the aftermath of the Garci Tapes crisis, several impeachment complaints would be filed against Arroyo, all of which were defeated by a combination of legal technicality (wherein an Arroyo supporter would be first to file a weak impeachment complaint, thus pre-empting the bona fide challengers) and parliamentary numbers, bolstered by the well-timed releases of pork barrel.[25]

The second failing of Congressional oversight was the impairment of the power of legislative inquiry.[26] In response to public outrage, the Senate investigated government corruption and summoned various officials of the military. However, President Arroyo invoked executive privilege and issued a gag order on the executive branch, including the military. The order required department heads, officers who "in the judgment" of the head of the department are covered by the executive privilege, and "such other officers as may be determined by the President" to secure the consent of the president before testifying to Congress.[27]

The Supreme Court narrowed the scope of executive privilege by requiring the president to extend the privilege expressly in each case, and only to specified personnel. It agreed that certain information must remain confidential for the public interest, and the "necessity [for disclosure] must be of such high degree as to outweigh the public interest."[28]

[24] *Francisco* v. *House of Representatives*, G.R. No 160261 (November 10, 2003). Note: the author was *amicus* counsel in this case.

[25] Juan Miguel de Jesus, "Distorting the rule of law: the Committee on Justice and the 2005 impeachment proceedings," (2005) 80 *Philippine Law Journal* 236.

[26] Constitution Art. VI, §22.

[27] Exec. Order No 464 §§1, 2(b) and 3 (Rule on Executive Privilege and Respect for the Rights of Public Officials in Legislative Inquiries in Aid of Legislation under the Constitution) (September 26, 2005).

[28] *Senate* v. *Ermita*, G.R. No 169777 (April 20, 2006).

However, the court diluted that ruling in a subsequent case involving military generals, by invoking military disciplinary rather than executive privilege. Two marine officers were poised to testify against President Arroyo, but the court upheld the gag order, citing, however, the president's commander-in-chief powers "to control the actions and speech of members of the armed forces," which are "not hampered by the same limitations" as under executive privilege.[29]

Finally, executive privilege was again invoked in 2007, after President Arroyo's own cabinet secretary for economic planning testified that he informed her of a bribe attempt relating to a telecommunications project financed by the People's Republic of China. Summoned by the Senate, he invoked executive privilege when asked about issues that would directly implicate the president, namely whether the president showed undue interest in the project and actually gave her approval even after she had been apprised of the bribe attempt.[30]

The president successfully invoked executive privilege lest the disclosure "impair our diplomatic as well as economic relations with [China, since the cabinet official cannot answer] without disclosing the very thing the privilege is designed to protect," thus impinging upon the "authority of the President to enter into executive agreements without the concurrence of the Legislature [which] has traditionally been recognized in Philippine jurisprudence."[31]

Power grab via constitutional revision

The post-Marcos constitution deliberately installed safeguards against a repeat of the unending extensions of Marcos's presidential terms from 1965 to 1986. The solution was simple: a single six-year term without re-election. But the post-Marcos drafters, to emulate the revolutionary nature of the anti-Marcos uprising, also created a new mode to revise the Constitution, namely "people's initiative," a direct initiative by citizens rather than by government. Just as in many Latin American countries, the battle against ambitious presidents-for-life was fought over the lifting of term limits through constitutional revision.

In 1992, Cory Aquino turned over the presidency to Fidel Ramos, the former general. In 1998, as his six-year term was about to end, there was suddenly a people's initiative to revise the Constitution and lift term limits. The initiative was made by a shadowy group organized specifically to collect the requisite signatures to start the process. The Supreme Court went out of its way to strike down the initiative, laid out every possible technicality, and blocked it altogether.[32]

[29] *Gudani* v. *Senga*, G.R. No 170165 (August 15, 2006).

[30] *Neri* v. *Senate* G.R. No 180643 (March 25, 2008). [31] Ibid.

[32] *Defensor-Santiago* v. *Commission on Elections*, G.R. No 127325 (March 19, 1997); and *People's Initiative for Reform, Modernization and Action* v. *Commission on Elections*, G.R. No 129754 (September 23, 1997).

In 2005, President Arroyo made a similar attempt. She created an appointive commission to propose constitutional changes,[33] which proposed a change in the form of government: from a presidential to a parliamentary system, from a bicameral to a unicameral legislature, and from a unitary to a federal government. These revisions would enable Arroyo to continue in power as prime minister in the new setup. The Supreme Court rejected the petition by applying the rules rather strictly,[34] inter alia the unstated but obvious requirement that the actual proposed amendments be appended to the petition when the citizen affixed his or her signature.[35] The court explained:

> An initiative that gathers signatures from the people without *first showing* to the people the full text of the proposed amendments is most likely a deception, and can operate as a *gigantic fraud on the people*. That is why the Constitution requires that an initiative must be "*directly proposed by the people x x x in a petition*" – meaning that the people must sign on a petition that contains the full text of the proposed amendments. On so vital an issue as amending the nation's fundamental law, the writing of the text of the proposed amendments cannot be *hidden from the people* under a general or special power of attorney to unnamed, faceless, and unelected individuals.[36]

The court also argued that a "people's initiative" can initiate only "amendments" and not "revisions" that "radically alter the framework of government,"[37] which can be initiated only through Congress or a constitutional convention.[38] Otherwise, the court cautioned, the power of direct initiative "becomes easily susceptible to manipulative changes by political groups gathering signatures through false promises. Then, the Constitution ceases to be the bedrock of the nation's stability."[39]

The irony here is that the court purported to defend constitutional democracy from an aspiring dictator by stopping a plebiscite or, in other words, to preserve the people's voice by not letting them speak.

Judicial assertion and co-optation

The 1987 constitution adopted another antidote to Marcos-style dictatorship by expanding the power of judicial review in three ways. First, the drafters curtailed the courts' excessive use of the political-question doctrine to wash its hands and defer to a powerful president. They adopted the existing "grave abuse of discretion" standard, hitherto applied in reviewing judicial decisions, and extended it to open-ended discretion exercised by the political branches of government. Thus the

[33] Executive Order No 453 (Creating the Consultative Commission to Propose the Revision of the 1987 Constitution with Various Sectors of Society) (August 19, 2005).
[34] Constitution Art. XVII §2.
[35] *Lambino* v. *Commission on Elections*, G.R. No 174153 (October 25, 2006).
[36] Ibid., original emphasis. [37] Ibid. [38] Constitution Art. XVII §1. [39] *Lambino*.

courts end up substituting their own policy decisions for those made by the elected branches of government. Second, the drafters transformed the power of judicial review into an ineluctable "duty" of the courts to decide. Finally, they maintained the Supreme Court's rule-making powers over judicial procedure. These three clauses would set the stage for the aggrandizement of judicial power.

In 2007, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions noted the alarming rise of *desaparecidos*[40] in the Philippines and accused the entire executive and legislative branches of "an ["institutional"] passivity, bordering on an abdication of responsibility by government." "On paper [the institutional remedies] remain strong. In practice, they are of all too little use, and often this is the result of official design." He noted how they evaded action despite glaring instances, and how for instance the ombudsman received forty-four complaints between 2002 and 2006 and failed to act on even a single case.

The Supreme Court, as it were to distance itself from such governmental indifference, expansively exercised its rule-making power to create the writ of amparo,[41] which would plug the loopholes of the erstwhile remedy, namely the writ of habeas corpus. The court granted the writ of amparo to two brothers abducted and tortured allegedly by the military, but who were able to escape. Habeas corpus would have been mooted, but the court granted amparo relief, stating that the right to security[42] of a person includes "freedom from threat[s]" to life, liberty, and security, and includes the right to an "effective investigation" and deployment of government resources to extend such protection.[43]

The court flexed its rule-making power further, and issued the rules on the writ of habeas data, for compulsory production of evidence[44] and the guidelines effectively decriminalizing libel.[45] For the latter, the chief justice, by way of a mere circular to lower-court judges, cited an "an emergent rule of preference for the imposition of fine only rather than imprisonment in libel cases." He said that this was a "rule of preference set by the Supreme Court" that should guide all lower courts.

However, the chief justice thus undermined the separation of powers. While expressly affirming that the statutory penalties remain, he prodded lower courts not to apply a penalty that Congress has prescribed by statute. In a sense, he merely mirrored President Arroyo's penchant for interpretive brinkmanship through phantom "non-formaliz[ed] acts."[46]

[40] *Secretary of National Defense* v. *Manalo*, G.R. No 180906 (October 7, 2008).
[41] A.M. No 7-9-12-SC (September 25, 2007).
[42] Constitution Art. III §2. See also Art. III §1. [43] *Secretary of National Defense*.
[44] A.M. No 08-1-16-SC, promulgated January 22, 2008, effective February 2, 2008.
[45] Administrative Circular No 08-2008, Guidelines in the Observance of a Rule of Preference in the Imposition of Penalties in Libel Cases (January 25, 2008).
[46] *Chavez*.

The next showdown occurred with the appointment of a new chief justice before the May 2010 presidential election. The post-Marcos constitution bans "midnight appointments," so that an outgoing president may not reward his loyalists with fixed-term posts in order to cramp his successor. President Arroyo insisted that the ban did not apply to the chief justice, proceeded to make the appointment, and was upheld by the Supreme Court.[47]

Constitutional experiment on party lists and minorities

During this decade, the court further experimented with constitutional innovation allowing party-list representatives to sit in Congress, in addition to those elected via geographically allocated districts. First, the court allocated the 20 percentum of Congressional seats reserved for party-list groups, "translat[ing] the Philippine legal parameters [of representation and proportionality] into a mathematical equation."[48] Second, the court limited the party-list system to those who represent "marginalized and underrepresented" sectors.[49] Ten years later, the court squarely abandoned this requirement and opened the party-list system to groups on the basis of ideology or cause rather than the sector they represent.[50]

The court also struck down a politically unpopular peace agreement with secessionist Muslim rebels in Mindanao since it granted a geographical area a degree of political autonomy that overstepped constitutional boundaries.[51]

The court's sensitivity to popular opinion is further shown by its uncertain rulings on the economic protectionism enshrined in the Constitution. Initially, it struck down portions of the Mining Law that allowed foreign participation that went beyond "technical or financial assistance" and would give foreigners a degree of control in a domain reserved to Philippine nationals.[52] Within one year, the court reversed itself and validated the Mining Law *in toto*.[53] The court also upheld, one vote shy of a majority, the ancestral domain rights recognized in the Indigenous Peoples Rights Act.[54] Finally, the court revised long-standing doctrine on how to determine how corporations may comply with the ownership requirements in protected industries.[55]

[47] *De Castro* v. *Judicial and Bar Council*, G.R. No 191002 (March 17, 2010).
[48] *Veterans Federation Party* v. *Commission on Elections*, G.R. No 136781 (October 6, 2000).
[49] *Ang Bagong Bayani-OFW Labor Party*, G.R. No 147589 (June 25, 2003).
[50] *Atong Paglaum* v. *Commission on Elections*, G.R. No 203766 (April 2, 2013).
[51] *North Cotabato* v. *Government Peace Panel*, G.R. No 183591 (October 14, 2008).
[52] *La Bugal-B'laan Tribal Association* v. *Secretary of Environment and Natural Resources*, G.R. No 127882 (January 27, 2004).
[53] *La Bugal-B'laan Tribal Association* v. *Secretary of Environment and Natural Resources*, G.R. No 127882 (December 1, 2004).
[54] *Cruz* v. *Secretary of Environment and Natural Resources*, G.R. No 135385 (December 6, 2000).
[55] *Gamboa* v. *Teves*, G.R. No 176579 (June 28, 2011).

III. IN THE PRIVATE SPHERE: A MIXED RECORD

In the private sphere, the record is mixed. The cases show an authentic agonizing over values especially when the court has the luxury of debating issues away from the immediacy of political pressures and there is no pressure to engage in the instrumental use of legal argument.

Public regulation of intimate relations

The court validated a "non-compete" clause in employment contracts in a big pharmaceutical firm, at the expense of an employee's right to marry. The firm fired an employee for falling in love with and marrying a woman from a rival company. The court argued that this was merely a reasonable measure to protect an employer's interest to prevent "the undue divulgence of its trade secrets," noting that the policy does not impose an "absolute prohibition," and does not call for "automatic termination." While the Constitution and the Family Code grant "special status and protection" to the institution of marriage, it was "debatable" whether it created "operative and executory rights," especially if the "encumbrance" on the right to marry is for the protection of "third persons."[56]

In the culmination of cases involving motels, or what are known elsewhere as "love hotels," the court struck down a city ordinance prohibiting "short-time" or "wash-up" rates for short-term occupancy. Historically, moral crusaders had targeted motels as places of immorality, starting with the historic *Ermita Motel and Hotel Association* v. *City of Manila* in 1962,[57] which required users to register at a public lobby, in person, by name, and with supporting identification.

A Manila city ordinance recently prevented motels – "notori[ous] as a venue of 'prostitution, adultery and fornication'" – from renting out rooms for less than twelve hours or more than twice a day. The court struck down the ordinance because while it aimed to impede "illicit sex, prostitution, [and] drug use," it stifled even "legitimate sexual behavior among willing married or consenting single adults." Significantly, in doing so, the court invoked the rights of those married and single adults, though none was present before the court and the only party that stood before the court was the corporate petitioner.[58]

Public regulation of personal identity

There were two cases on sex-change operations, leading to opposing rulings by the court. In the first, the court refused to allow the petitioner to change the first name and sex on a birth certificate solely to "make his records compatible" with his

[56] *Duncan* v. *Glaxo Wellcome Phils., Inc*, G.R. No 162994 (September 19, 2005).
[57] G.R. No L-24693 (July 31, 1967).
[58] *White Light Corporation* v. *City of Manila*, G.R. No 122846 (January 20, 2009).

current sex, noting that the status of a person is "more or less permanent in nature," not ordinarily terminable at his own will," and that a person's sex is "determined at birth," by visual examination of the infant's genitalia.[59]

In the second case, however, the court allowed the changes in the birth certificate, stating that the "determining factor" is "what he thinks of his/her sex"; that is to say, the person's choice.[60] The court considered the petitioner as "biologically or naturally intersex," possessing both male and female characteristics. The court ruled:

> The current state of Philippine statutes apparently compels that a person be classified either as a male or as a female, but this Court is not controlled by mere appearances when nature itself fundamentally negates such rigid classification.
>
> ...
>
> In the absence of a law on the matter, the Court will not dictate on respondent concerning a matter so innately private as one's sexuality and lifestyle preferences, much less on whether or not to undergo medical treatment to reverse the male tendency due to [congenital adrenal hyperplasia] ... Respondent is the one who has to live with his intersex anatomy. To him belongs the human right to the pursuit of happiness and of health. [Accordingly], the Court affirms as valid and justified the respondent's position and his personal judgment of being a male.

Finally, the Supreme Court upheld the rights of lesbians, gays, bisexuals, and the transgendered to form a party list to vie for a Congressional seat. One of the post-Marcos reforms was the creation of party-list seats in Congress. These seats are reserved for disadvantaged groups not represented by the major political parties in the usual district elections. The election commission refused to accredit the *Ang Ladlad* LGBT because it failed to establish that having "mixed sexual orientations and transgender identities" had been accepted into "generally accepted public morals," and that the group had therefore lied in its application when it declared that it was not advocating immorality. The court reversed, holding that the "bare invocation" of morality does not constitute a "sufficient government interest" to justify exclusion of homosexuals from participation in the party-list system.[61] The court ruled:

> We are not blind to the fact that, through the years, homosexual conduct, and perhaps homosexuals themselves, have borne the brunt of societal disapproval ... Nonetheless, we recall that the Philippines has not seen fit to criminalize homosexual conduct. Evidently,

[59] *Silverio* v. *Republic*, G.R. No 174689 (October 22, 2007).
[60] *Republic* v. *Cagandahan*, G.R. No 166676 (September 12, 2008).
[61] *Ang Ladlad LGBT Party* v. *Commission on Elections*, G.R. No 190582 (April 8, 2010).

> therefore, these "generally accepted public morals" have not been convincingly transplanted into the realm of law.
>
> . . .
>
> We do not doubt that a number of our citizens may believe that homosexual conduct is distasteful, offensive, or even defiant. They are entitled to hold and express that view . . . However, our democracy precludes using the religious or moral views of one part of the community to exclude from consideration the values of other members of the community.[62]

Finally, after fourteen years of resistance to contraceptives led by the Roman Catholic clergy, Congress passed what is now known as the Reproductive Health Law,[63] reconciling the Constitution's anti-abortion clause[64] with spouses' right to privacy and their autonomy from communal regulation on intimate relations.[65] The law required the government to offer the full range of contraceptive options in its health programs and to subsidize poor couples' access to contraceptive methods of their own choosing. Known church advocates have challenged the law before the Supreme Court, which has temporarily stopped enforcement of this law.[66]

Affirmative action for senior citizens

The Supreme Court also allowed the taking of private property for redistributive justice. It upheld the revision of the tax treatment of the senior citizens' discount that effectively forced the seller to bear the cost of a public subsidy.[67] The original law gave a 20 percent discount to senior citizens in stores, hotels, restaurants, drug stores and funeral homes, but enabled the business owner to recover the full cost through a tax credit. Since tax credits are subtracted from the tax payable, the tax paid to the state was reduced by the entire amount of the senior citizens' discount. The full discount, in effect, was effectively borne by the state.

The new law transformed the tax credit into a mere tax deduction wherein the discount is merely considered an "operating expense" subtracted from the gross income to determine the taxable amount. Accordingly, the seller recovers only a

[62] Ibid.

[63] Rep. Act 10354 (The Responsible Parenthood and Reproductive Health Act of 2012) (December 21, 2012).

[64] Constitution Art. II §12 ("The State recognizes the sanctity of family life [and] shall equally protect the life of the mother and the life of the unborn from conception").

[65] Constitution Art. XV §3 para. 1. ("The State shall defend [t]he right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood").

[66] *Imbong* v. *Executive Secretary*, G. R. 204819 (Order of March 19, 2013).

[67] Rep. Act 9257 §4(a) (February 26, 2004), amending Rep. Act 7432 (Expanded Senior Citizens Act of 2003).

percentage of the senior citizens' discount. In effect, part of the subsidy is accordingly borne by the seller. The drugstores assailed it as the taking of private property without just compensation.

The court held that the state, to promote the health of senior citizens as a "special group of citizens," can impose the "burden of partly subsidizing a government program." Property rights bear a "social dimension" and must accede to "general welfare" and "public good." Finally, the court held that the seller was anyway free to raise prices to cover the cost of the subsidy.

Protection of religious minorities

Philippine constitutional law has historically secured the secular state, and preserves church–state separation through its free-exercise and establishment clauses. However, consistent with the views of the dominant Roman Catholic majority, divorce is not allowed in Philippine law.

In a disciplinary case, the court was asked to dismiss one of its employees for immoral conduct. She had been estranged from her husband and had lived for the past twenty years in a stable, loving union with a man, and their union had been solemnized by their church, the Jehovah's Witnesses. She claimed that their conjugal arrangement was in conformity with her religious beliefs, which allowed a man and a woman to execute a "declaration of pledging faithfulness," which makes their relationship "validated by God." The court threw out the disciplinary case, saying that the court cannot judge non-believers by the moral standards of another religion.[68]

Finally, a Manila trial court confronted the practice by minority religions of "block voting" during elections, wherein they "endorse" candidates to maximize the influence of their flock. A group of law professors, styling themselves the Social Justice Society, asked the court to declare this practice a violation of the constitutional principle that "the separation of Church and State shall be inviolable." The trial court upheld the Social Justice Society, but the case was eventually dismissed by the Supreme Court on the ground that it raised merely a "hypothetical question" and failed to allege the "ultimate facts" that would constitute an actual case or controversy.[69]

Public health, public order, and free speech

In a case involving infant formula, health authorities required the makers of breast milk substitutes to carry the label that "there is no substitute for breast milk."[70]

[68] *Estrada* v. *Escritor*, A.M. No P-02-1651 (August 4, 2003) (Puno J). See also F.T. Hilbay, "The Constitutional Status of Disbelief" (2010) 84 *Philippine Law Journal* 579.

[69] *Velarde* v. *Social Justice Society*, G.R. No 159357 (April 24, 2004).

[70] Department of Health Adm. Order No 2006-012 §26 (Revised Implementing Rules and Regulations of Exec. Order No 51, The "Milk Code," Relevant International Agreements, Penalizing Violations Thereof, and for Other Purposes) (May 15, 2006).

While the court upheld the power of the health department to "protect health" and "instill health consciousness,"[71] the court struck down as *ultra vires* the labeling requirements for milk formula for non-infants.[72]

In a case involving a labor strike, the court allowed hotel management to fire or suspend union members who, after a bargaining deadlock between the hotel and its union, reported for work with shaven heads. The court said it was tantamount to an illegal strike, since the violation of the grooming standards was "clearly a deliberate and concerted action" to "undermine the authority" of, and "embarrass," the hotel, "forcing" it to choose between its reputation and ceasing operations.[73] The court held

> that the act of the Union was not merely an expression of their grievance or displeasure but, indeed, a calibrated and calculated act designed to inflict serious damage to the Hotel's finances or its reputation. Thus, we hold that the Union's concerted violation of the Hotel's Grooming Standards which resulted in the temporary cessation and disruption of the Hotel's operations is an unprotected act and should be considered as an illegal strike.[74]

IV. DE-TERRITORIALIZED NOTION OF CITIZENSHIP

The dominant notion defining membership in the political community is codified through the citizenship clause of the Constitution. That notion was built on a fear of the foreign, and the primacy – jealously guarded – of the native. Recently, however, there has been a fundamental revision on two fronts: first, on discrimination on the basis of illegitimacy and the notion of the "natural-born citizen"; and second, on the emerging consensus to restore the citizenship of overseas migrant workers who are physically absent from the country or who have severed legal ties and taken new citizenship abroad.

Because citizenship is the proxy test of allegiance, the highest public offices are reserved for natural-born citizens.[75] During the 2004 presidential elections, President Arroyo's main opponent was a popular movie actor (friend and ally of deposed president Estrada), Fernando Poe Jr, born an illegitimate child of an American mother and a Filipino father. Under local laws, he would follow the citizenship of the mother and, though he would be subsequently legitimated by the marriage of his parents, he still would not be a "natural-born citizen."

[71] Const. Art. II §15.
[72] *Pharmaceutical & Health Care Association of the Philippines* v. *Health Secretary*, G.R. No 173034 (October 9, 2007).
[73] *National Union of Workers in the Hotel Restaurant and Allied Industries* v. *Court of Appeals*, G.R. No 163942 (November 11, 2008).
[74] Ibid. [75] Const. Art. VII §2.

The Supreme Court refused to disqualify Poe, on, inter alia, the ground that it would be tantamount to exclusion from the exercise of a political right based on impermissible discrimination on account of civil status.[76]

In another election-related case, the court held that a repatriated Filipino – who was born Filipino, was naturalized elsewhere, and then reacquired his Filipino citizenship – is deemed "natural-born" because repatriation merely restores the "original nationality" and does not confer a "new citizenship." The repatriated native is therefore natural-born, not being required to undergo naturalization to reacquire citizenship, and is required only to take an oath of allegiance and register in the proper civil registry.[77]

Foreign-based Filipinos – including immigrants and permanent residents abroad – have also been allowed to vote. The court upheld the Overseas Absentee Voting Act,[78] citing the express constitutional clause allowing absentee voting and which necessarily dispenses with the actual residency requirement for overseas Filipinos.[79]

Despite the constitutional clause that "[d]ual allegiance of citizens is inimical to the national interest and shall be dealt with by law,"[80] the Citizenship Retention and Re-acquisition Act[81] has in fact allowed dual citizenship, as upheld by the Supreme Court.[82]

These statutes and judicial interpretations show the transformation of the notion of allegiance to the motherland to recognize the reliance of the national economy on remittances by migrant workers. The old tests of blood (based on parentage), place (based on physical presence in the country), and formal oaths (based on naturalization) have given way to the test of commitment to the welfare of "the old country." The old tests were seen as largely symbolic, while the new tests would be both principle-based and functional.

V. THE IMPEACHMENT OF A CHIEF JUSTICE AND THE POPULIST BACKLASH AGAINST FORMALISM[83]

In May 2010, a new president was elected on an anticorruption and anti-impunity campaign,[84] and, armed with a widely popular mandate in contrast to his

[76] *Tecson* v. *Commission on Elections*, G.R. No 161434 (March 3, 2004).
[77] *Bengson III* v. *House of Representatives Electoral Tribunal*, G.R. No 142840 (May 7, 2001).
[78] Rep. Act No 9189 (2003).
[79] *Macalintal* v. *Commission on Elections*, G.R. No 157013 (July 10, 2003).
[80] Const. Art. IV §5.
[81] Rep. Act 9225 (August 29, 2003).
[82] *Advocates and Adherents of Social Justice for School Teachers and Allied Workers* v. *Secretary of Justice*, G.R. 160869 (May 11, 2007).
[83] This section is based on the author's Malcolm Professorial Chair Lecture (January 31, 2013), "Counter-majoritarianism and the Populist Backlash in Philippine Constitutional Law."
[84] Inaugural Address of President Benigno S. Aquino III (June 30, 2010).

predecessor's and frustrated by her loyalists in the Supreme Court, succeeded in removing the chief justice by mobilizing public outrage in an impeachment trial.

Arroyo was president for ten years, the first four to complete Estrada's unfinished term (2001–4) and thereafter a fresh six-year term (2004–10). Perennially embroiled in corruption scandals, besieged by coup and impeachment threats, and saddled with her own legitimacy deficit, she relied on the manipulation of constitutional powers to protect herself from popular outrage.

That process now seems to have been reversed with the election of Benigno Aquino III – son of Philippine democracy icon Corazon Aquino – as president. Aquino has relied on the political branch to trump the impunity that has found refuge in the courts through Arroyo's deft manipulation of legal technicality.

Emblematic of this shift is the impeachment by the Philippine Congress of no less than Supreme Court chief justice Renato Corona. In December 2011, the Philippine Congress adopted the Articles of Impeachment indicting the chief justice.[85] In May 2012, after a full trial, the Philippine Senate found him guilty of one of the offenses charged, namely nondisclosure of assets in the required annual declaration. The Senate removed him from office, the first time in Philippine history that a public officer was unseated via the process of impeachment.[86]

This represents a tectonic shift in the constitutional structuring of Philippine governance. It is best understood in the context of two developments. The first is *legal* – the rise of impeachment as a mode of enforcing public accountability. The second is *political* – how a new president, seeing how corruption suspects used the judiciary to block his anticorruption campaign, unleashed the political branch of government against the judiciary's highest officer.

Impeachment as a constitutional device for public accountability

For a long while already, the impeachment power had stood in the books but remained wholly untested.[87] It was used for the first time in the year 2000 against President Joseph Estrada, but the trial was stopped midstream. He was ousted by public protest and a civil society–big business–military conspiracy that installed President Gloria-Macapagal Arroyo. The next several episodes of impeachment all failed on a legalistic ground carried out through the expansive use of judicial review: in 2003 against Chief Justice Hilario Davide for the disputed oath-taking

[85] House of Representatives, Verified Complaint for Impeachment (Articles of Impeachment) (December 12, 2011); see also *Chief Justice Renato C. Corona* v. *Senate of the Philippines sitting as an Impeachment Court*, G.R. No 200242 (July 17, 2012) (hereinafter *CJ Corona* v. *Senate*).

[86] Judgment, *In re: Impeachment Trial of Honorable Chief Justice Renato C. Corona*, Judgment, Senate of the Philippines, Case No 002-2011 (May 29, 2012).

[87] 1935 CONST. Art. IX (Impeachment); 1973 Art. XIII (Accountability of Public Officers) at §§2–4.

of President Arroyo and annually from 2006 to 2009 against Arroyo herself. It was only in the 2012 impeachment of Chief Justice Corona that the impeachment clause was actually implemented.

The legal framework

The 1987 constitution, in response to the excesses of one-man rule under Marcos, contains strong provisions on public accountability. It grandly proclaims: "Public office is a public trust. Public officers and employees must, at all times, be accountable to the people."[88] However, since the highest officers of the land enjoy immunity from suit while in office, they are made accountable only through impeachment, as reproduced below verbatim:

> The President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust . . .[89]

The process consists of two stages, both allocated to the bicameral legislature. It is "initiated" by an indictment approved by at least one-third of the House of Representatives, consisting of 286 members elected by district or by party list.[90] The charges are then heard by the Senate, which has the "sole power to try and decide all cases of impeachment."[91] It can remove an officer by a vote of two-thirds of its twenty-four members, all of whom are elected nationwide.[92]

Impeachable officers are further insulated from frivolous suits through a one-year ban on the filing of a second impeachment charge, stated thus: "No impeachment proceedings shall be initiated against the same official more than once within a period of one year."[93] This hitherto obscure clause would be the centerpiece of impeachment debates for most of Arroyo's presidency.

Impeachment is *sui generis*, simultaneously a legal and a political process. It provides the perfect setting for the clash between formalism and populism, between the highly juridical and the intrinsically political. The legal can be seen in its intricate procedure, and in the legally defined impeachable offenses, namely "treason, bribery, graft and corruption."[94] The political can be seen in the electoral mandate of the legislators who vote to impeach and remove, and the open-ended nature of the remaining impeachable offenses, namely "culpable violation of the Constitution [and] other high crimes, or betrayal of public trust,"[95] which are not defined in any black-letter rule, and the last of which is political to the core.

[88] Const. Art. xi §1. [89] Const. Art. xi §2. [90] Const. Art. xi §3.1.
[91] Const. Art. xi §3.6. [92] Const. Art. vi §2. [93] Const. Art. xi §3.5.
[94] Const. Art. xi §2. [95] Ibid.

Aborted impeachment of President Estrada in 2001

This clause was used for the first time in President Estrada's impeachment in November 2000. However, the trial of the highly popular Estrada, a former movie actor, was aborted over the issue of suppressed evidence, i.e. a sealed envelope of banking records allegedly owned by him. When the Senate upheld the confidentiality of the bank records, thousands of citizens gathered in protest and, after the top military brass joined the protesters, then Supreme Court chief justice Hilario Davide swore in Vice President Gloria Macapagal-Arroyo as new president, purporting to perform the merely administrative act of dispensing an oath while properly reserving the option to rule on any subsequent judicial challenge.[96] That challenge was thrown out by the court in *Estrada* v. *Desierto*, finding that Estrada had "constructive[ly] resigned" from office.[97] In this episode, the law served as handmaiden to popular politics and provided merely the ideological cover to legitimize Estrada's ouster.

Aborted impeachment of Chief Justice Hilario Davide in 2003

The impeachment power having been unleashed, it was next deployed against the chief justice who swore in Arroyo. He was first charged in June 2003 by ousted president Estrada for administering the oath to Arroyo, but the Estrada camp could not muster the requisite votes in Congress, and the complaint was dismissed in October 2003.

The next day, the second complaint was filed against Davide over irregularities in the use of a special, unaudited judiciary fund and, this time, the Estrada camp gathered enough votes to impeach him. However, the Supreme Court nullified the indictment in *Francisco* v. *House of Representatives*,[98] citing a hitherto unused clause, the one-year bar on a second impeachment against the same public officer. The court read this clause strictly in favor of its chief justice and, once again, the court asserted the primacy of judicial review over the political decision to impeach.

Junking the four impeachment complaints against Arroyo

Unwittingly, however, *Francisco* also made it easier for an accused public officer to insulate himself from impeachment simply by getting someone to file a weak impeachment complaint and triggering the one-year bar each year. Ironically, President Arroyo was the main beneficiary of this doctrine. She was the target of four impeachment attempts during her presidency, all of which were dismissed.[99]

[96] A.M. No 01-1-05-SC, *In re: Request of Vice-President Gloria Macapagal-Arroyo to Take Her Oath of Office as President of the Republic of the Philippines before the Chief Justice* (January 22, 2001).

[97] *Estrada* v. *Macapagal-Arroyo*, G.R. Nos. 146738 (March 2, 2001); *Estrada* v. *Desierto*, G.R. Nos 146710-15 (March 2, 2001).

[98] *Francisco*.

[99] See De Jesus, "Distorting the rule of law."

The showdown between the chief executive and the chief justice

The "midnight appointment"

The story of Chief Justice Renato Corona's impeachment actually begins with the questionable circumstances of his appointment a few days before the oath-taking of then President-Elect Aquino.

The post-Marcos charter constitutionalized the long-standing ban on "midnight appointments," so that an outgoing president may not cramp his successor by rewarding his loyalists with fixed-term posts.[100] The ban takes effect two months before election day and until the president's term expires.[101] The Supreme Court had already applied this ban to judicial appointments.[102]

As fate would have it, the outgoing chief justice would reach his compulsory age of retirement within precisely that period; that is, after the new president had been elected but before he was sworn into office. President Arroyo nonetheless insisted on appointing the successor. The court upheld the president, reversed itself, and held that the ban must yield to the president's constitutional duty to fill all judicial vacancies within ninety days of the date of the vacancy.[103] The court said that the mischief sought to be avoided by the ban on midnight appointments, such as "vote buying" and "influenc[ing] the results of the elections," is not present in the judiciary anyway because they are subject to "unhurried and deliberate prior process[es]" before the Judicial and Bar Council, a constitutional body that vets all judges' appointments.[104]

Accordingly, outgoing president Arroyo appointed Renato C. Corona, then the second-most-senior member of the court and seen as her loyal follower, a few days before Aquino's oath-taking. Aquino then defied tradition by taking his oath not before the chief justice but before another Supreme Court justice.

Striking down the Truth Commission

Aquino's first official act was to create a Truth Commission to inquire into corruption committed under his predecessor.[105] However, the Supreme Court struck it down on equal-protection grounds, saying it had "singl[ed] out the previous [Arroyo's] administration" when it should have covered all past administrations.[106]

Significantly, this was the second equal-protection ruling in this period. The court held in another case that appointed officials – just like elected officials – are

[100] *Aytona* v. *Castillo*, G.R. No L-19313 (January 19, 1962).
[101] Const. Art. VII §15.
[102] *In re Appointments Dated March 30, 1998 of Hon. Mateo A. Valenzuela and Hon. Placido B. Vallarta as Judges of the Regional Trial Court of Branch 62, Bago City and of Branch 24, Cabanatuan City, respectively* (*Valenzuela*), A.M. No 98-5-01-SC (November 9, 1998).
[103] Const. Art. VIII §9.
[104] *De Castro* v. *Judicial and Bar Council*, G.R. No 191002 (March 17, 2010).
[105] Executive Order No 1 (*Establishing the Philippine Truth Commission of 2010*) (July 30, 2010).
[106] *Biraogo* v. *Philippine Truth Commission of 2010*, G.R. No 192935 (December 7, 2010).

not "deemed resigned" when they run for public office.[107] The mischief sought to be avoided by the "resign to run" rule – namely the candidate's use of his position to "wield a dangerous or coercive influence" on the election and, conversely, the pernicious "sway [of] political considerations" in the officer's discharge of his official duties – applied to all officials, appointed and elected alike. Within three months, the court reversed itself, saying that the constitutional norm of the political neutrality of the civil service should prevail.[108]

Aborted impeachment of the Arroyo-era ombudsman

The next showdown between Aquino and the Arroyo loyalists in the court was over the impeachment of Ombudsman Merceditas Gutierrez, another Arroyo loyalist. Initially the court flexed its muscles and temporarily stopped it,[109] but, faced with the popularity of the new president, Gutierrez subsequently resigned.

Battle over the watchlist order

The tipping point, however, was the role of the Supreme Court in almost enabling former president Arroyo to leave the country in November 2011 and just as surely evade justice. Arroyo had been under investigation for corruption, human rights violations, and election sabotage. When the indictments were about to be filed, Arroyo and her husband attempted to leave the Philippines.

Arroyo cited her "urgent" and "life-threatening" medical condition,[110] requiring foreign medical treatment in countries that, significantly, were all non-extradition states. The Department of Justice had issued several watchlist orders against the Arroyos that alerted immigration authorities should they try to leave the country. Arroyo impugned the department secretary's power to issue these orders[111] as a violation of her constitutional right to travel.[112] Ironically, that authority was created under Arroyo and used against her political enemies. The Supreme Court issued an order temporarily lifting the watchlist order.[113] That restraining order would subsequently be included in the articles of impeachment against Chief Justice Corona.[114]

Former president Arroyo immediately went to the airport to leave but the secretary of justice barred her departure, initially citing procedural grounds (e.g. that she had not been served yet with a copy of the court's order) and later

[107] *Quinto* v. *Commission on Elections*, G.R. No 189698 (December 1, 2009).
[108] *Quinto* v. *Commission on Elections*, G.R. No 189698 (February 22, 2010).
[109] *Gutierrez* v. *House of Representatives Committee on Justice*, G.R. No 193459 (February 15, 2011).
[110] *Macapagal-Arroyo* v. *De Lima*, G.R. No 199034 (November 15, 2011) (Reyes J dissenting).
[111] Department of Justice Circular No 41 (Consolidated Rules and Regulations Governing the Issuances and Implementing of Hold Departure Orders, Watchlist Orders, and Allow Departure Orders) (June 7, 2010).
[112] Const. Art. III §6. [113] *Macapagal-Arroyo* v. *De Lima*.
[114] Articles of Impeachment, Art. VII, *In re Impeachment of Chief Justice Corona* (December 12, 2011).

substantive grounds (e.g. that the lifting of the watchlist order was saddled with conditions, some of which had not been satisfied).

Impeachment proceedings and verdict

The articles of impeachment

Within barely a month of this showdown, Congress mustered 188 votes to impeach Chief Justice Corona. The votes were apparently mobilized over one weekend, and the signatures were gathered by the afternoon of the following Monday.

Corona was charged with betrayal of public trust or culpable violation of the Constitution through the following: (a) his "partiality and marked subservience" to President Arroyo, including his midnight appointment; (b) his nondisclosure of his statement of assets, liabilities and net worth, a constitutionally required document, and incomplete reporting of such assets; (c) unethical conduct, e.g. "flip-flopping" by the Supreme Court on decisions at the behest of well-connected counsel, partiality to Arroyo, and conflicts of interest; (d) intrusion by the court in the impeachment of the ombudsman (who subsequently resigned) and of a Supreme Court justice found to have plagiarized (who was cleared by the court); (e) intrusion by the court in lifting the watchlist orders against President Arroyo; and (f) his failure to account for special funds entrusted to the judiciary.

The prosecution would eventually drop the following charges: the midnight appointment, "flip-flopping" on some cases, intrusion into the ombudsman's impeachment, the plagiarism cover-up, and the mishandling of the special judiciary funds. Accordingly, the chief justice was tried only on the following charges: first, the non-filing and misdeclaration of assets and liabilities; second, unethical conduct; and third, leading the court to lift Arroyo's watchlist orders.

Chief Justice Corona was found guilty of failing fully to disclose his bank deposits, in particular his foreign-currency deposits, and was removed. Twenty senators voted for a guilty verdict, while three voted to acquit. The Senate held the two other charges to have been moot and did not vote thereon.

Balancing the impeachment power and judicial review

The Supreme Court itself recognized the "concededly political character"[115] of the impeachment process when it said:

> Impeachment, described as "the most formidable weapon in the arsenal of democracy," was foreseen as creating divisions, partialities and enmities, or highlighting pre-existing factions, with the greatest danger that [citing the *Federalist Papers*] "the decision [in impeachment cases]

[115] *CJ Corona* v. *Senate*.

> will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt."[116]

This much was recognized by the Senate president, who presided over the impeachment trial, when he admitted that the impeachment was the "rendition of justice outside our traditional judicial system" and was "political in nature."[117] This constitutional dilemma would arise typically in evidentiary issues wherein the Senate/Impeach Court was called upon to subpoena supposedly privileged or confidential evidence.

The biggest of these debates – indeed the issue which turned the tide against the chief justice – was about the confidentiality of bank deposits under several statutes: the Bank Secrecy Law[118] for all bank accounts; the Foreign Currency Deposits Act[119] for dollar deposits in particular; and the Anti-Money Laundering Act, which carves out an exception in case of money-laundering charges. The Senate, sitting as an impeachment court, ordered the banks to disclose the bank deposits of the chief justice. However, the court maintained the confidentiality of the foreign-currency deposits, and the Senate voted to respect the court's order.[120]

When the prosecution tried to subpoena some court personnel, the Supreme Court maintained confidentiality only for "internal deliberations ... in the adjudicatory functions" of the court but opened non-adjudicatory matters to compulsory process. Significantly, the court invoked equality and comity between the two branches of government, and the Senate itself rejected the prosecution's attempt to subpoena the justices themselves.[121]

Indeed, the key evidence that spelt doom for the defense was the admission by Chief Justice Corona himself, taking the witness stand and testifying voluntarily, despite his right against self-incrimination, that he had not disclosed substantial amounts of dollar deposits, claiming that the confidentiality of foreign-currency accounts shielded these moneys from mandatory disclosure in his annual report of assets and liabilities.

In this light, both the Senate and the Supreme Court were careful not to tread on each other's powers, taking care not to provoke a constitutional crisis. However, it is also clear that the rules were bent by the prosecution. No less than the trial's presiding officer, the Senate president (who voted to remove the chief justice), lamented the evidentiary shortcuts aimed at shaping the public mind:

[116] Ibid. [117] Senate president Juan Ponce Enrile, Opening Statement (January 16, 2012).
[118] Rep. Act 1405, Secrecy of Bank Deposits Act. [119] Rep. Act 6426.
[120] *Philippine Savings Bank* v. *Senate Impeachment Court*, G.R. No 200238 (Order of February 9, 2012, preserving the confidentiality of foreign-currency deposits); and *In re Impeachment Trial of Honorable Chief Justice Renato C. Corona*, Case No 002-2011 (notice dated February 13, 2012, the Senate voting to respect the SC order).
[121] *In re Production of Court Records and Documents and the Attendance of Court Officials and Employees as Witnesses under the Subpoenas of February 10, 2012 and the Various Letters for the Impeachment Prosecution Panel Dated January 19 and 25, 2012*, Resolution (SC Resolution dated February 14, 2012).

> the indiscriminate, deliberate, and illegal machinations of some parties who have been less than forthright with this court and its members in presenting dubiously procured and misleading documents which were spread to the media obviously to influence this court and the public's opinion.[122]

Another senator–judge (who voted to acquit) similarly criticized the constant appeal to public opinion at the expense of evidentiary strictures:

> The crucial issues that have piqued the interest of the Senator–Judges, as well as the public, were outside the original ambit of the impeachment complaint and have been brought forth only after its filing. Evidence in some of these issues came from questionable sources, beginning with the unidentified little lady to documents anonymously left on gates and in mailboxes.
>
> At the expense of the *sub judice* rule, evidence had been presented to the public on several occasions even before they were formally offered before this Court. Worse, information was grossly exaggerated with the apparent intention to predispose the public mind against the chief justice.[123]

Even after the Senate had already voted to remove Chief Justice Corona, there remained pending challenges to the validity of the impeachment charges and the integrity of the proceedings, but the court declared them moot and declined to exercise its power of judicial review.[124]

On the surface, this might appear merely as history's karmic revenge, the use against an Arroyo ally of precisely the same legalistic maneuvers as she had deployed against her enemies. In constitutional law, however, it was not just more of the same thing. It marks a possible turning point toward the enforcement of public accountability through political – not judicial – processes and toward political leadership, with genuine political mandate, making the constitution work.

VI. RECOURSE TO FORMALISM, AND PROSPECTS FOR SUBSTANTIVE DEBATE

In 1928, Holmes chastised the Philippine Supreme Court in *Springer* v. *Philippine Islands* for its mechanistic notion that constitutional powers are drawn in "black and white" and designed with "mathematical precision [in]

[122] Speech of Senate president Juan Ponce Enrile explaining his verdict on Chief Justice Renato Corona (May 29, 2012).

[123] Speech of Senator Ferdinand Marcos Jr explaining his verdict on Chief Justice Renato Corona (May 29, 2012).

[124] *CJ Corona* v. *Senate*; *Lihaylihay* v. *House of Representatives*, G.R. 199509 (September 11, 2012).

watertight compartments" rather than in a "penumbra shading gradually from one extreme to the other."[125]

That formalist tendency lamented by Holmes persists today and manifests itself in Arroyo's frequent recourse to the manipulation of doctrine as subterfuge, and the equally formalist backlash by those who oppose her. The past decade did not flourish the Filipino's commitment to constitutional values but rather merely confirmed his deep-seated aversion to open-ended substantive debate and his preference for the false security of textual literalness.

The new government of Aquino has opened the door to a more candid debate not about what is constitutional or not, but about what is or is not socially or morally desirable, and has carried this out not just through unelected judges but even more actively through the elected deputies of the people. However, this does not necessarily reaffirm constitutional norms but may in fact expose these norms to being buffeted by the shifting winds of public opinion.

One role of constitutions is to connect us with our nobler selves and, through the logic of precommitment, structure our choices so that we are forced to balance narrow self-interest, construed day by day, against a broader self-interest that is both enlightened and long-term. To this extent, constitutional discourse in the Philippines has largely failed because it was seen as merely as an instrument of the petty politics of power, and the challenge is to enlarge the arena where it serves as the lodestar of a deeper politics of norms.

[125] 277 U.S. 189 (1928).

14

Promoting democracy and finding the right direction

A review of major constitutional developments in Indonesia

Nadirsyah Hosen

Indonesia is a nation of 246 million people in search of a path to political, social, economic and legal reform. The democratic transition began in 1998 when President Soeharto resigned after thirty-two years in office, following the economic crisis which hit Indonesia in mid-1997, mass demonstrations, student demands for reform and international pressure. Reform of the 1945 constitution has been one of the most important aspects of the transition to democracy in Indonesia. The amendments have changed the political game by establishing democratic principles of separation of powers, checks and balances, and revising the constitutional framework for executive–legislative relations. Moreover, these amendments have fundamentally altered the rules under which the state relates to its citizens; the three branches of government deal with one another; civilians and the military interact, and the national, provincial, district and village authorities relate to each other.

There is a fear that free and fair elections as a requirement of democracy in lands where Islam is a majority religion would produce Islamic theocracy, instead of democracy. For instance, in 1992 the Islamic Salvation Front (Front Islamique du Salut – FIS) won the majority in Algeria and in 2006 Hamas won the elections for the Palestinian Legislative Council.[1] Western dominant views of Islam and politics are also shaped by Saudi wahabism, Taliban militancy and Iranian 'theocracy'. However, Indonesia – the largest Muslim country in the world – shares a different experience of 'Islamic democracy' in the Muslim world.

The 1999, 2004 and 2009 elections in Indonesia have demonstrated that Indonesian people have exercised their constitutional rights to rotate elites, to select

[1] See William Quandt, *Between Ballots and Bullets: Algeria's Transition from Authoritarianism* (Washington, DC: Brookings Institution Press, 1998) and Graham Usher 'The democratic resistance: Hamas, Fatah, and the Palestinian elections' (2006) 35(3) *Journal of Palestine Studies* 20.

leaders and to express grievances and desires in free and fair elections. The Arab Spring developments have raised interest in whether Indonesia's emergence as the third-largest democracy can show how to reform movements elsewhere in the Muslim world.[2] Indonesia remains the only country in Southeast Asia to be rated 'free' in Freedom House's annual survey of political rights and civil liberties. In the wider context of the Muslim world, certainly, this rare experience is a significant way to show that the compatibility of Islam and constitutionalism leads to 'checks and balances' mechanisms that are vital to democracy. This annual survey confirms the statement of US Secretary of State Hillary Clinton: 'As I travel around the world over the next years, I will be saying to people: if you want to know whether Islam, democracy, modernity and women's rights can co-exist, go to Indonesia.'[3]

While democracy opens the opportunity for the establishment of Islamic political parties, in the last three elections (1999, 2004 and 2009) Islamic political parties have failed to win the majority of seats. It is worth noting that not a single Islamic political party proposed the idea of the *khilafa* (caliphate) as the form of Indonesian government. They did not even propose that Indonesia become an Islamic state, despite the fact that more than 80 per cent of the Indonesian population is Muslim. General elections and constitutional reform in Indonesia rejected the call for the inclusion of sharia in Article 29 of the Constitution.[4] According to the 1998–2002 amendments, Indonesia remains a republic, with a presidential system and three branches of government.[5] Indonesian experience demonstrates that Islamic political parties assign religious meanings to national institutions and tend to more readily endorse the state's policies and practices, and interestingly 'secular' political parties adopt Islamic issues in their political strategy. For instance, sharia-inspired by-laws have been adopted in some districts by 'secular' parties in order to bolster their political machines.[6]

This chapter will provide a review of major constitutional developments in Indonesia since 1998. In section 1, I will evaluate the outcome of constitutional

[2] Peter Alford, 'Indonesia "a Model for Arab Uprisings"', *The Australian*, 27 August 2011.

[3] 'Indonesia Shows Islam, Modernity Coexist: Clinton', *Reuters* (London, 18 February 2009), available at www.reuters.com/article/politicsNews.

[4] More information can be found in Jimly Asshiddiqie, *The Constitutional Law of Indonesia* (Singapore: Sweet & Maxwell Asia, 2009); and Harun Alrasid, *Naskah UUD 1945 Sesudah Tiga Kali Diubah oleh MPR* (Jakarta: UI Press, 2002). Tim Lindsey, 'Indonesian constitutional reform: mud towards democracy' (2002) 6 *Singapore Journal of International & Comparative Law* 244; Todung Mulya Lubis, 'Constitutional reforms', in Hadi Susatro et al., *Governance in Indonesia: Challenges Facing the Megawati Presidency* (Singapore: ISEAS, 2003); and Slamet Effendy Yusuf and Umar Basalim, *Reformasi Konstitusi Indonesia: perubahan pertama UUD 1945* (Jakarta: Pustaka Indonesia Satu, 2000).

[5] See, for example, Nadirsyah Hosen, *Shari'a and Constitutional Reform in Indonesia* (Singapore: ISEAS, 2007).

[6] Michael Buehler, 'The rise of Shari'a by-laws in Indonesian districts: an indication for changing patterns of power accumulation and political corruption' (2008) 16(2) *South East Asia Research* 255.

amendments that took place during 1999–2002, focusing particularly on the new structure of Indonesian government, human rights and freedoms, direct elections and multiparty systems. I will also examine three new institutions: the House of Regional Representatives, the Judicial Commission and the Constitutional Court. Major developments in political laws will be examined as well.

In section II, I will briefly discuss the intersection of religion and Constitution. As the largest Muslim country in the world, this issue is very important in Indonesia. Finally, I will offer my observations of whether the developments discussed in this chapter will bring Indonesia to uphold constitutionalism, democracy and the rule of law.

I. CONSTITUTIONAL AMENDMENTS

Despite the weaknesses in the 1945 constitution as the basis for democracy, it was explicitly, or implicitly, accepted by most major political forces as the framework for the transition in Indonesia, beginning in 1998. As a result, during the 1999–2002 constitutional amendments, thirty-one articles (83.79 per cent) were amended or modified and only six articles (16.21 per cent) were unchanged.

Checks and balances

The amendments to the 1945 constitution have clarified the presidential nature of the system and continued the process of establishing greater separation of powers and checks and balances between the three branches of government. The amendments provide citizens with the right to change their government peacefully, and citizens exercise this right in practice through periodic free and fair elections, held on the basis of universal suffrage. Prior to the amendments, the president of Indonesia served for a five-year term and could be re-elected without limitation. Thus, Indonesia had President Soekarno, who governed from 1945 to 1966, and President Soeharto, who led the country for thirty-two years (1966–98). This past was not a healthy democracy, and in fact both leaders were considered to be dictators. Therefore, the first constitutional target in enacting the First Amendment was to limit the term of office to two five-year terms for both the president and the vice-president. The Indonesian political parties are of the view that if the leader stays in power for life or for too long, power corrupts him, which could lead to the collapse of the government, as in the cases of Presidents Soekarno and Soeharto, and people become jealous of the leader, because they want to share power.[7]

Articles 4–5 and 10–15 of the amendments grant the president authority to act as both head of state and head of government, as in a pure presidential system.

[7] Jimly Asshiddiqie, 'Telaah Akademis atas Perubahan UUD 1945' (2001) 1(4) *Jurnal Demokrasi & HAM* 17.

There is no position akin to a prime minister as in a pure parliamentary system. The president is not accountable directly to the parliament. The president, however, was not, prior to 2004, elected directly by the citizenry, as is typical of pure presidential systems, but rather indirectly by the the People's Consultative Assembly (Majelis Permusyawaratan Rakyat – MPR). An indirectly elected president has less legitimacy and is often also easier to remove from office, as in the case of President Abdurrahman Wahid.[8]

In this context, during the 2001 session, the MPR amended the 1945 constitution to provide for direct presidential and vice-presidential elections. In 2002 the MPR approved the Fourth Amendment, which requires presidential and vice-presidential candidates to run together on a single ticket. The amendment provides for a second round of direct voting if no one candidate gets a clear majority of votes cast, as well as at least 20 per cent of the vote in at least half of the provinces.

Direct election will strengthen the presidency for two reasons. First, it will raise the democratic legitimacy of the presidency to be on a par with that of the People's Representative Assembly (Dewan Perwakilan Rakyat – DPR). Second, an amendment for direct election will have to be accompanied by changes in the presidential impeachment procedures, which will most likely make it harder to remove the president mid-term than under earlier procedures. Direct election is seen as more democratic and as fostering greater accountability of the president to the people, as well as reducing the possibility of vote-buying in the presidential election process. The 1999–2002 amendments made the president and the vice-president directly accountable to constituents.

One of the most significant amendments is the revised Article 2(1), which stipulates that the MPR is composed of DPR members and DPD (the House of Regional Representatives) members, who are all elected in the general elections. Unlike in the Soeharto era, the MPR has no appointed members who are regional representatives, organisational representatives or military representatives. All members of the MPR are elected directly by the people. Institutionally,

[8] See Kevin O'Rourke, *Reformasi: The Struggle for Power in Post-Soeharto Indonesia* (Sydney: Allen & Unwin, 2002), p. 402. The experience of President Abdurrahman Wahid gives weight to this caveat. Based on the accountability and removal procedures associated with indirect election, he was removed by the MPR in July 2001, when he lost the political support of the vast majority of MPR members. Since the majority of the members of the MPR were also members of the DPR, President Wahid alleged that in reality the DPR, not the MPR, deposed the president, and that this was against the Constitution. Wahid then issued his presidential decree to dismiss the MPR and called for new legislative elections. Although consistent with the parliamentary logic under which he was being removed, under the existing rules of the political game in Indonesia these actions were illegal. Unlike Soekarno's presidential decree in 1959, Wahid's decree was not supported by the military, leading to his removal from office. This threat of removal meant that the Indonesian president was not as free to make use of his or her extensive powers as a directly elected president with those same powers.

the MPR is not the highest state organ any more, but one of the high state organs, along with other state organs.

Article 20A, a new provision of the 1945 constitution, states that the DPR has the following functions and rights: making laws, examining state budgets, checking administration activities and interpellating (*hak interpelasi*) and investigating government affairs (*hak angket*). In addition, DPR members have the rights to submit questions, deliver proposals, express opinions and present views with immunity (*hak imunitas*).

Three new institutions: the House of Regional Representatives, the Judicial Commission and the Constitutional Court

Following the 1999–2002 amendements to the 1945 constitution, there are three new institutions created to support Indonesian democracy. First, the establishment of the House of Regional Representatives (Dewan Perwakilan Daerah – DPD) is regulated in Article 22C and 22D. With this provision, regional representatives are directly elected in each province, forming an independent legislative assembly. The DPD has the authority to discuss, supervise and submit laws on regional autonomy or central–local relations. In addition, the DPD possesses the right to submit considerations to the DPR on the state budget and to draft laws relating to tax, education and religion. The members of the DPD may not exceed one-third of the numbers of the DPR.

The DPD was created with one main expectation: to provide a new kind of regional representation to enter into national-level decision-making in order to allow the voice of the regions to be heard in the making of laws and the oversight of central executive government. However, the structural features built into the DPD make it very difficult for the assembly to have its voice heard in lawmaking, oversight and accountability of government and the provision of both popular and regional representation. The major concern is that the DPD does not pass legislation. Despite the fact that it has strong legitimacy that comes from being a fully elected chamber, it can only introduce or give advice on a certain range of bills in the DPR.

Stephen Sherlock of the Australian National University correctly points out that the DPD could be seen as only an advisory body since the DPR is under no obligation to pass or even to consider seriously laws drafted by the DPD, or to accept its advice.[9] The DPD is not a true 'upper house' because its limited powers mean that it merely complements, rather than supplements, the DPR. As a matter

[9] Stephen Sherlock, 'Indonesia's Regional Representative Assembly: Democracy, Representation and the Regions: A Report on the Dewan Perwakilan Daerah (DPD)', CDI Policy Papers on Political Governance 2006/1, available at www.cdi.anu.edu.au/_research/2005-06/D_P/2006_05_PPS_1_SS.pdf.

of fact, it is in no way comparable to the US Senate or to upper houses in the bicameral parliaments that exist in both the Westminster tradition and in many presidential systems of government.[10] A further potential problem regarding the DPD may be found in the absence in the amended constitution of any detailed stipulation of the DPD's rights and, in particular, the rights of its members. This is seen, for example, in the absence of any provisions granting immunity for DPD members matching that granted to members of the DPR.

Second, Clause 3 of Article 24A, and Article 24B, regulate the newly established independent Judicial Commission (*Komisi Yudisial*). It has the role of proposing candidates to the DPR, the DPR then selects its preferred candidates from the commission's list and they are confirmed by the president. The Judicial Commission is also empowered to guard and enforce judicial ethics (Article 24B(1)).[11]

The Judicial Commission's members are appointed by the president with the agreement of the DPR. The precise authority of the Judicial Commission, outlined by Law No 22 on the Judicial Commission, was subject to disagreement between the Judicial Commission and the Supreme Court.[12] In May 2006, the Judicial Commission questioned a judgment of the Supreme Court in a case involving the arrest of a businessman and also recommended that the judges who had found the directors of Bank Mandiri not guilty of corruption should be suspended. It made five recommendations to the Supreme Court that sanctions be imposed on errant judges but none were implemented and at least six judges refused to appear before the Judicial Commission. By mid-2006, the Supreme Court had failed to respond to eighteen recommendations.[13] Members of other branches of the legal system, such as Supreme Court judges, were reported to have taken the view that the Judicial Commission was exceeding its powers in attempting to summon judges and this was directly against judicial independence.

The commission suffered a major blow to its authority when the Constitutional Court in August 2006 granted a request filed by thirty-one judges of the Supreme Court to drop activities that gave the commission the power to investigate alleged violations by Supreme Court and Constitutional Court justices. Following the Constitutional Court decision, it was agreed that the powers of the Judicial Commission needed to be clarified.[14] Thus Law No 18 of 2011 gives more power

[10] Susi Dwi Harijanti and Tim Lindsey, 'Indonesia: general elections test the amended constitution and the new Constitutional Court' (2006) 4(1) *International Journal of Constitutional Law* 138.

[11] See Denny Indrayana, *Indonesian Constitutional Reform 1999–2002: An Evaluation of Constitution-Making in Transition* (Jakarta: Kompas Book Publishing, 2008).

[12] Nicola Colbran, 'Courage under fire: the first five years of the Indonesian Judicial Commission' (2009) 11(2) *Australian Journal of Asian Law* 273.

[13] Harold Crouch, *Political Reform in Indonesia after Soeharto* (Singapore: ISEAS, 2010), p. 222.

[14] See Simon Butt, 'Banishing judicial accountability? The Constitutional Court's decision in the dispute between the Supreme Court and the Judicial Commission', in Andrew

to the Judicial Commission, permitting the Supreme Court to impose sanctions on judges and to tap the phone calls of judges if there is suspicion of corruption.

Third, the last institution created by the amendment is the Constitutional Court (*Mahkamah Konsitusi*). According to Article 24C, the Constitutional Court has the authority to conduct judicial review of legislation, to decide on conflict of interest within state institutions relating to the constitutional powers of state institutions, to regulate activities for the dissolution of political parties, and to decide on objections to the results of general elections. Since the Constitutional Court was established, legislative institutions are no longer able to formulate laws based on political strength alone. Despite having been stipulated democratically, the entire law or part of its substance can be annulled by the court if the procedure or substance is contradictory to the Constitution. The Constitutional Court has reviewed seventy-four laws, of which four have been nullified in their entirety and twenty-three have been nullified in part.[15]

One of the main reasons why the 2009 general election by and large was peaceful was because of the role of the Constitutional Court in dealing with election disputes. Conflicting interpretations of the election law by the Election Commission (KPU) and the Supreme Court led to several delays in the release of the official results of the legislative elections, but the credibility of the Constitutional Court as the final interpreter of the Constitution and the quality of its decision-making ensure that all parties comply with the court's decision.[16] Even foreign observers of elections, such as the Carter Center in the US, commended Indonesia's Constitutional Court for efficiently handling disputes relating to the 9 April 2009 legislative election results. In all, 595 cases relating to disputed election results were filed during a seventy-two-hour filing period after the announcement of results on 9 May 2009.[17] It could be stated safely that the Constitutional Court has contributed greatly to the development of democracy and the enforcement of law in Indonesia.

The court does not restrict itself to the text of the Constitution in its decisions, but also refers to international human rights law. With respect to former members of the now-defunct Indonesian Communist Party, the court declared that every citizen shall have an equal right to elect and to be elected and to participate in vowing his/her aspiration by referring to Article 25 of the International Covenant on Civil and Political Rights (ICCPR). The Universal Declaration of Human

MacIntyre and Ross McLeod (eds.), *Indonesia: Democracy and the Promise of Good Governance* (Singapore: ISEAS, 2007), p. 178.

[15] Simon Butt, 'Judicial Review in Indonesia: Between Civil Law and Accountability? A Study of Constitutional Court Decisions 2003–2005', PhD thesis, University of Melbourne, 2008.

[16] Chief Justice Moh. Mahfud MD, 'The Role of the Constitutional Court in the Development of Democracy in Indonesia', paper presented in the World Conference on Constitutional Justice, Cape Town, 23–4 January 2009.

[17] See the press release here: www.cartercenter.org/news/pr/indonesia-062609.html.

Rights has been used repeatedly as a reference for justices to make their considerations for deciding such cases as the case of the Corruption Court (Article 12 (2)), the case of former president Abdurahman Wahid (Article 21), the case of Agus Miftach and the case of the Human Rights Court (Article 29 (2)).

The Constitutional Court consists of nine justices: three presidential appointees, three Supreme Court appointees, and three House of Representatives appointees. The term of office of judges is five years and they can be re-elected for another term. The current chief justice of the Constitutional Court is Professor Mahfud MD. He is down-to-earth and he is well known as having the courage to alter laws deemed inconsistent with the 1945 constitution and defended by political elites. The former National Awakening Party politician and defence minister is also credited for his rigorous efforts to promote transparency in the Constitutional Court, as started by his predecessor, former chief justice Jimly Asshiddiqie, who, like Chief Justice Mahfud, has a penchant for media exposure. When two court judges, Akil Mochtar and Arsyad Sanusi, were implicated in bribery allegations while handling a local election dispute in 2010, Chief Justice Mahfud personally assisted the Corruption Eradication Commission (KPK) in investigating the scandal. Chief Justice Mahfud also encouraged the public to participate in safeguarding the institution's integrity by reporting any corruption they knew of to the court.

In 2011, the chief justice reported a General Elections Commission (KPU) official for allegedly masterminding the falsification of Constitutional Court documents from a 2009 electoral dispute that resulted in the appointment of a politician to the House of Representatives. Critics say that, as chief judge of the Constitutional Court, Mahfud should talk less to the media. He should be able to control his penchant for public comment on every political and public issue. It seems that he enjoys his status as a newsmaker or perhaps celebrity. However, his supporters rebut that, saying that Mahfud is brave to talk to the media because he is clean and smart and has no political interest. His public comments are needed not only to educate the public, but also to get the attention of public policy makers and persuade them to do the right things for the country. There is speculation that Chief Justice Mahfud will be a presidential candidate in the 2014 elections.

During the 2009 corruption, which the media labelled the battle between the lizard (i.e. the Corruption Eradication Commission – KPK) and the crocodile (i.e. the Police), the Constitutional Court played wiretapped conversations obtained from the KPK, which demonstrated that the bribery charges involving the two KPK deputies, Bibit Samad Rianto and Chandra M. Hamzah, were engineered. The Constitutional Court made an outstanding breakthrough in Indonesia's legal history. As a result, nine Police officials, escorting the chairman of the Constitutional Court, resigned. The wiretapped conversations allegedly involved Anggodo Widjojo (the younger brother of the suspect, Anggoro Widjojo, who had escaped to Singapore), and implicated several top officials at the National Police and Attorney General's Office (AGO). The recordings verified

public assumptions of a 'judicial mafia' that was engineering legal cases, especially corruption-related cases.

Members of parliament and the government were not happy with the 'progressive' position of the Constitutional Court. They are of the view that the court has gone beyond its basic mandate. For instance, a court ruling in 2010 that annulled the result of a district election in West Kotawaringin, Central Kalimantan, went too far because it also awarded victory to the runner-up. Accordingly, the court should have annulled the results and called for a second round of voting, as it did with the South Tangerang elections. In two other different cases concerning the Law on the Truth and Reconciliation Commission and the Law on Electrical Power, the court cancelled the entirety of laws, although only several articles of those laws were petitioned for review. This is an issue of *non ultra petita*, meaning 'not beyond the request', that a court may not decide more than it has been asked to. A new law has been passed to limit the power of the Constitutional Court (Law No 8 of 2011).

Former Constitutional Court chief justice Jimly Asshiddiqie said that the changes were unconstitutional and would deny the court its main function. 'The term "ultra petita" is only applicable to the civic court, and not to constitutional [issues]', Chief Justice Jimly said. 'Judicial reviews are born from *ultra petita*'.[18] Several academics were also not happy with this new law, and challenged its validity before the Constitutional Court.

In the first case (No 48) the court decided to declare some of the Articles invalid. In particular, Article 45A and Article 57, paragraph 2a, of Law No 8, Year 2011, were declared against the Constitution.[19] In the second case (No 49), the court decided that 'Article 4 paragraph f, g, h, Article 10, Article 15 paragraph (2) letter h along the phrase "and/or was a public officer", Article 26 paragraph (5), Article 27A paragraph (2) letter c, d, and e, subsection (3), paragraph (4), subsection (5), and paragraph (6), Article 50A, Article 59 paragraph (2), and Article 87 Law No. 8 of 2011 are invalid'.[20]

The court decided to allow *ultra petita*, stating its ability to invalidate the whole Act if the core section of the Act is against the Constitution, despite the fact that the court was asked to examine only those sections or articles. In addition, the court believes that *ultra petita* court decisions have commonly been conducted in other countries.

Attempts have been made to examine provisions relating to the executive, parliamentary and judicial branches in the 1945 constitution. The amendments to the 1945 constitution have transformed the Constitution from a vague and incomplete document rooted in an anti-democratic political philosophy of organic

[18] Anita Rachman and Ulma Haryanto, 'Constitutional Court's Power to Be Limited', *Jakarta Globe*, 15 June 2011.

[19] See Constitutional Court Decision No 48/PUU-IX/2011 on 18 October 2011. [20] Ibid.

statism into a more coherent, complete, democratic framework for a pure presidential system with separation of powers and checks and balances.

Human rights and freedom

On 23 September 1999, a month before the presidential election, President Habibie signed Human Rights Law No 39 of 1999. This law implemented MPR Decree XVII on Human Rights, which decree had been adopted by the MPR at its session in November 1998. Law No 39 of 1999 sets out a long list of internationally recognised human rights, which Indonesia is obliged to protect. The law contains provisions on human rights and fundamental freedoms, the responsibilities and obligations of the government in the promotion and protection of human rights, and the plan to set up a Human Rights Court. Law No 39 of 1999 also strengthens the powers of the National Commission on Human Rights (Komnas HAM), which had been established by presidential decision in 1993, to monitor and report on human rights abuses. Most importantly for its future investigative role, the new law gave the commission the legal power to force the attendance of witnesses, including those against whom complaints have been made.[21]

However, those regulations are not adequate to protect human rights, since they could easily be replaced by whoever is in power. Laws and other regulations should be based on the Constitution, whereas too many of the key clauses of the original 1945 constitution end with an injunction for further specification in law, opening the door to subsequent manipulation. The original constitution also lacked guarantees of basic civil and political rights. Therefore it was essential to insert articles in the 1998 MPR Decree as part of the Second Amendment to the 1945 constitution in 2000.

This section deals with human rights provisions in the Second Amendment to the 1945 constitution. According to Tim Lindsey of the University of Melbourne, Articles 28A–J in Chapter XA are 'lengthy and impressive, granting a full range of protections extending well beyond those guaranteed in most developed states'.[22] In the same vein, Gary Bell of the National University of Singapore takes the view that the inclusion of human rights provision in the Second Amendment to the 1945 constitution which adopts a long list of individual rights 'has brought a significant change in the orientation of Indonesian constitutional law'.[23]

[21] For a full account see Nadirsyah Hosen, 'Human rights and freedom of press in the post-Soeharto era: a critical analysis' (2002) 3(2) *Asia-Pacific Journal on Human Rights and the Law* 1; Hikmahanto Juwana, 'Special report: assessing Indonesian's human right practice in the post-Soeharto era' (2003) 7 *Singapore Journal of International & Comparative Law* 644.

[22] Tim Lindsey, 'Indonesia: devaluing Asian values, rewriting rule of law', in Randall Peerenboom (ed.), *Asian Discourses of Rule of Law* (London: RoutledgeCurzon, 2004), p. 301.

[23] Gary F. Bell, 'Minority rights and regionalism in Indonesia: will constitutional recognition lead to disintegration and discrimination?' (2001) 5 *Singapore Journal of International and Comparative Law* 784.

The principle of equality is a primary principle of human rights. Human rights are for everyone – as much for people living in poverty and social isolation as for the visible and articulate. By international law, the principle of non-discrimination prohibits discrimination in the enjoyment of human rights, on any ground, such as race, skin colour, gender, language, religion, politics or other opinion, national or social origins, property, birth or other status. The term 'or other status' might include personal circumstances, occupation, lifestyle, sexual orientation or health status.

The Second Amendment forbids discrimination on the basis of gender, race, disability, language or social status. It stipulates equal rights and obligations for all citizens, both native and naturalised. Article 28I(2) stipulates, 'Each person has the right to be free from discriminatory treatment on any grounds and has the right to obtain protection from such discriminatory treatment.' Article 28D(1) states, 'Each person has the right to the recognition, the security, the protection and the certainty of just laws and equal treatment before the law.' This article guarantees the right to equal treatment 'before the law' and to the protection of human rights and freedoms, without discrimination.

Under Article 28D(2), anyone, without discrimination, has the right to work and to receive just and appropriate rewards and treatment in their working relationships. Moreover, the members of the MPR retained Article 27 of the original 1945 constitution. This article clearly guarantees the right to equality by stating, 'All citizens have equal status before the law and in government and shall abide by the law and the government without any exception.'

In order to see whether the equality provisions in the Second Amendment provide full protection of equality rights, it is necessary to examine religious liberties. Under the title 'Religion', Article 29 of the Indonesian constitution provides to 'all persons the right to worship according to his or her own religion or belief', and states that 'the State is based upon belief in the one supreme God'. The text actually does not refer to any particular belief. The language used in this Article 29 postulates a universal value. In this sense, Gary Bell explains that

> even though the Republic of Indonesia 'is based on the belief in the One and Only God', freedom of religion is protected and Islam, the religion of the majority, has no special constitutional status. The secular nature of the State can be seen again as an effort at unity: there is no minority religion in law if there is no recognition of the majority religion by the law. Religion becomes an individual matter and all Indonesian individuals are treated equally. One could therefore say that the way the constitution mentions religious freedom without mentioning Islam is meant to afford constitutional protection to religious minorities.[24]

I will return to the issue of religious freedom later.

[24] Ibid., 792.

The Second Amendment to the Indonesian constitution firmly guarantees freedom of opinion. It is based on the principle that freedom of opinion is a manifestation of the people's sovereignty. In other words, freedom of opinion is guaranteed as a basic right for citizens. One of the consequences is that the press is free from any form of prevention, prohibition and/or pressure, so that the public right to information is guaranteed. It goes further to state that the press is free from censorship and is not subject to publication and broadcasting bans. In exercising its social-control function, the press may criticise a government's policies and people may engage in public debate on political and economic issues. Based on the provisions above, the press may provide wide access to the public to obtain information. Moreover, the provisions above have opened the door for the press to act as the Fourth Estate.

Prior to the amendments, the Soeharto government followed the concept of 'development journalism' or 'Asian journalism'. His government described the news media as the 'government's partner' in the process of nation building and urged journalists to be vigilant and attentive, in an effort to discourage the growing elements of narrow individualism, and to protect the spirit of unity. President Soeharto called for the press to be 'free but responsible' (*bebas tapi bertanggung jawab*) – in contrast to liberal Western values, seen as libertine and irresponsible – in guarding a dynamic national stability, maintaining the strength of national unity and speeding development from a base of *Pancasila* (the five pillars that eventually became the state foundation: Belief in one God, Humanitarianism, National Unity, Representative Democracy, and Social Justice) and the Constitution. This explains why it was that, during the President Soeharto era, 'development journalism' was known as the '*Pancasila* Press'.[25]

During President Soeharto's New Order regime, the press was stripped of political power, tightly controlled and blatantly co-opted. The press was depoliticised, except in matters such as providing support for the then government and justifying the latter's use of repression. The number of licensed publishers was limited to 289. Bans, and repeals of licences, occurred periodically, in tune with the political climate of the day. Dissidents who challenged the government's decisions on matters related to the press were harassed, prosecuted or even murdered. Hence reform in this area was overdue when President Soeharto resigned in May 1998. At least 1,200 registered newspapers and magazines are now published in Indonesia. The actual number of periodicals is much higher, since many do not bother to register or to publish as bulletins. The Indonesian press has faced a new challenge – lack of professionalism. This condition led many press outlets to publish fiction and gossip rather than facts, with negative consequences for the standing and safety of journalists and the press generally.

[25] Krishna Sen and David T. Hill, *Media, Culture and Politics in Indonesia* (South Melbourne, Vic.: Oxford University Press, 2000), p. 53.

The Second Amendment to the 1945 constitution does not specifically mention women's rights. However, there is no single article which restricts or limits women's rights. Women's rights are mentioned in both the 1998 MPR Decree on Human Rights and Law No 39 of 1999 on Human Rights. For instance, Article 39 of MPR Decree No XVII/MPR/1998 mentions that women's rights are similar to men's rights. In addition, women's rights are to be considered as human rights in Law No 39 of 1999 (see Article 45). The law stipulates that a fair representation of women in public appointments in the executive and judiciary, and in the electoral process, must be ensured (see Article 46). Other rights include the right to obtain teaching and education, to vote and to be elected, and rights covering property in marriage. Article 49 provides a right to be 'appointed in work, posts and professions in accordance with the requirements and regulations'. In addition, women have a right to 'special protection in performing their duties, against matters which can threaten their safety and/or health, relating to the reproductive function.' Those rights highlight the notion that Indonesia takes the view that women have the same rights as men.

The human rights provisions in the Second Amendment were the result of a long process which started during the MPR Session of 1998. From the 2000 MPR Session meeting minutes,[26] it is safe to state that all Islamic parties supported the human rights provisions in the Second Amendment. All Islamic political parties agreed with the provisions since they satisfied the 'religious values' mentioned below in Article 28J (2) (emphasis added):

> In the enjoyment of their rights and freedoms, each person is obliged to submit to the limits determined by law, with the sole purpose of guaranteeing recognition and respect for the rights of others and to fulfil the requirements of justice, and taking into consideration morality, *religious values*, security, and public order, in a democratic community.

Hamdan Zoelva (a politician from the Crescent and Star Party, now a justice at the Constitutional Court) specifically interprets this as 'no articles on human rights in the Second Amendment may contradict religious values'.[27] That is why his party accepts the human rights provisions in Chapter X of the 1945 constitution. It is worth noting that the phrase 'religious values' is placed alongside justice, morality, security, public order and the concept of a democratic country. This phrase shows that the practice of human rights may well take into account these elements, and that the only limitation is the law itself. This phrase also indicates a pluralistic and inclusive approach, since 'religious values' can also be interpreted according to the other religions which exist in Indonesia.

[26] See Sekretariat Jenderal MPR, Risalah Rapat ke-6 Badan Pekerja MPR RI, 23 May 2000 (Jakarta Setjen MPR, 2000).

[27] Nadirsyah Hosen, *Shari'a and Constitutional Reform in Indonesia* (Singapore: ISEAS, 2007), p. 128.

Another reason why Islamic political parties support the human rights provisions is for their own protection. All Islamic political parties in Indonesia refer to the situation in the Soeharto era particularly, when many Muslim activists were sent to jail without human rights protection. Therefore it is in the interests of Islamic political parties to ensure that such abuse does not occur in the post-Soeharto era. This explains why they have given full support to the inclusion of human rights provisions in the amendment to the 1945 constitution. Their position is different from that of other Muslim groups who openly reject the concept of human rights as based on alien Western notions or as a conspiracy against Islam, and from that of those who take pains to establish a specifically Islamic human rights scheme within an ideological framework devoid of legal reform in Islam. Full acceptance of human rights provisions has shown that Indonesia has provided a model for other Islamic countries to acknowledge the compatibility of human rights and Islamic law. Mashood A. Baderin of the School of Oriental and African Studies, London, observes, 'the scope of international human rights can be positively enhanced in the Muslim world through moderate, dynamic, and constructive interpretations of the Shari'a rather than through hardline and static interpretations of it'.[28]

Elections and a multiparty system

An electoral system is a technique for casting votes, counting votes and allocating legislative seats.[29] It is the method by which votes cast in an election are translated into the seats won in parliament, by parties and candidates. Another important function of an electoral system is to act as the conduit through which citizens can hold their elected representatives accountable. In addition, an electoral system helps to structure the boundaries of acceptable political discourse, by giving incentives to party leaders to couch their appeals to the electorate in distinct ways.[30]

Free and fair general elections are important in democracy. A democratic election requires that the legal framework regulating national elections, and the implementation of the election itself, should be in conformity with the existing rules and regulations, from beginning to end, including the electoral process – political party registration, campaigning, vote casting and counting. If there are no free elections, there will be no democracy.[31] To choose one electoral system means to determine the best system for casting and counting votes, with regard to the

[28] Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003), p. 219.

[29] Andre Blaiss and Louis Massicotte, 'Electoral systems', in Lawrence LeDuc, Richard G. Niemi, Pippa Norris et al., *Comparing Democracies: Elections and Voting in Global Perspective* (Thousand Oaks: Sage Publications, 1996), p. 49.

[30] Ibid.

[31] Austin Ranney, *Governing: An Introduction to Political Science* (Englewood Cliffs: Prentice Hall, 1990), p. 174.

situation in the country concerned, such as its geography, ethnic composition, demography, political formats, legal systems, and so on. Unfair elections will produce a government which manipulates the people's voice.

When President Soeharto stepped down in May 1998, he left political laws which had been used to support his regime. The legislature was a controlled and subservient body, elected every five years. Ten parties contested the first New Order elections held in 1971. In preparation for those elections, President Soeharto transformed Golkar, founded in 1964 by the Army as a loose coalition of anti-communist organisations, into a political party. Golkar, with heavy backing from the military, won 63 per cent of the vote in the 1971 elections, surpassing even its own expectations.[32] In 1973, Soeharto forced the other parties to merge into two separate parties: Nationalist (PDI (the Indonesian Democracy Party)) and Islamic (PPP (the United Development Party)).[33]

The Soeharto regime held general elections in 1977, 1982, 1987, 1992 and 1997, in which only Golkar, the PDI and the PPP were permited to compete. Elections used a proportional-list system, based on Indonesia's then twenty-seven provinces, with complete central party control over the choice of candidates. There was no system through which voters could adjust the ranking of the individual candidates on the list. There was no requirement that candidates reside in the region where they were competing. Political campaigning was regulated for content as well as for time and place. Access to media was limited, candidates' broadcast speeches had to be vetted and the final tabulation of results was a closed process. Only Golkar had party offices at the village level throughout Indonesia.[34] In the Soeharto era, Golkar won more than 60 per cent of the vote in each of six heavily stage-managed elections between 1971 and 1997.[35]

When Habibie took over the presidency from Soeharto, his government opened opportunities for new political parties. In the 1999 general elections there were forty-nine out of 148 political parties that met the eligibility criteria and the legal requirements to compete. Only twenty-four political parties contested the 2004 general election. The reduction was due to stricter criteria outlined in a new law issued after the 1999 election. In order to contest elections, parties needed established organisations in two-thirds of the provinces instead of only one-third, as in 1999, and the electoral threshold required of parties in the 2004 elections in order to be eligible to contest in 2009 was raised to 3 per cent of seats in the

[32] Kenneth Egerton Ward, 'The 1971 Election in Indonesia', Centre of Southeast Asian Studies, Monash University, 1974, 15.

[33] Kenneth Janda, *Political Parties: A Cross-national Survey* (New York: The Free Press, 1980), pp. 707–9.

[34] R. William Liddle, 'The 1997 Indonesian elections: personal power and regime legitimacy', *Muslim Politics Report*, 14 July–August 1997, 1–6.

[35] H.D. Haryo Sasongko, *Pemilu'99: Komedi atau Tragedi* (Jakarta: Pustaka Grafiksi, 1999), p. 28.

national DPR and 4 per cent in the local DPRDs, with seats in at least half the provinces and districts throughout Indonesia.

In the 1999 elections, only six political parties qualified to contest in 2004 on the basis of the 1999 result. The solution, adopted by several parties, was to merge and change their name enough to satisfy the national election commission, but not to confuse the voters. For instance, Partai Keadilan (PK) changed its name to Partai Keadilan Sejahtera (PKS); and the Crescent and Star Party (Partai Bulan Bintang – PBB) of 1999 became the Star and Crescent Party (Partai Bintang Bulan – PBB) of 2004 – both contested the 2004 election as 'new' parties.

One of the main objectives of the various thresholds was to limit the number of parties in the arena of electoral competition. In the 2009 elections, however, thirty-eight parties contested. The number of eligible parties increased, but the number of parties that can sit in the parliament was reduced due to Law No 10 of 2008 that stipulates that a political party must win more than 2.5 per cent of the total votes in order to receive seats in the House – eleven small parties challenged this regulation in the Constitutional Court but they failed. The results show that only nine parties are able to have seats in the parliament. After long debate, the parliament agreed to increase the legislative threshold from 2.5 per cent to 3.5 per cent while maintaining an open electoral system and the method of using all votes in electoral areas (Law No 8 of 2012).

As can be seen, there are three different levels: first, anyone can form a political party; but, second, in order to contest an election such party must meet the eligibility criteria; and third, if such party cannot obtain the minimum number of votes then it cannot have seats in the parliament. Based on the 2009 elections. the downside is that more than 19 million votes, or 18 per cent of the total, were 'wasted' because they went to the twenty-nine parties that failed to make it to the House.

While President Soeharto allowed three political parties to contest elections, the Indonesian reform era has been struggling to reduce the number of political parties gradually. This struggle is because the combination of presidential system and multiparty system is a bad choice. A strong presidency requires a simpler political-party system. No single political party in the reform era can obtain a majority of seats in the parliament. President Yudhoyono's political party only won 20.85 per cent, which forced him to create a large coalition and to deal with other political interests. Yudhoyono became a minority president trapped by different political parties' interests and ideologies. He effectively became a *dealer*, not a *leader*, as he needs to negotiate, compromise and calculate his policy and position. This 'bad combination' also means that the country spends too much money on election campaigns and that various political voices have become too fragmented. But certainly Indonesia could not use President Soeharto's dictatorial model to reduce the number of political parties. The last three elections (1999, 2004 and 2009) were a long and painful process.

As a result of the democratisation era, now Indonesia has a very complex election system. The 2009 general election is illustrative. In one day, the elections were held to select candidates for four different legislative bodies: 560 legislators for the DPR (House of Representatives), 132 legislators for the DPD (House of Regional Representatives), and 16,253 legislators for parliament at provincial and district/municipality levels. There were 171,265,442 eligible voters, 519,920 polling stations, 76,711 village election committees and 6,471 sub-district election committees with 471 General Election Commissions (KPUs) at district/municipality level and thirty-three KPUs at provincial level. Voter turnout was 70.99 per cent for the legislative election, and 72.56 per cent for the presidential election.[36] The April 2009 general elections indicate an ability to organise complex, multiple elections without violence.[37] There was an overall sense that people had been allowed to have their say, as anything less could have threatened the process of democratic consolidation in Indonesia.

II. RELIGION AND STATE

Unlike the constitutions in Iran, Egypt and (the Basic Law of) Saudi Arabia, no single word in the Indonesian Constitution refers to Islam as the state ideology, despite the efforts to include among the amendments the legal basis for the implementation of sharia, known as the Jakarta Charter.[38] In fact, the text of the Constitution does not give Islam special rights and provisions; at the same time there is no provision which states that the state shall not interfere in religious affairs, nor that religion shall not interfere in the affairs of the state. The lack of such a provision leads T.B. Simatupang, a Protestant scholar, to interpret this as meaning that 'The *Pancasila*-state is responsible not only for ensuring religious freedom, but also for promoting the role of religions in society'.[39] It is in this sense that the Department of Religious Affairs was founded in 1946. It supervises religious education, Muslim marriages and the *Hajj* (pilgrimage). It also has separate directorates for the other religions, such as Catholicism, Protestantism, Hinduism and Buddhism.[40]

[36] The data is taken from Komisi Pemilihan Umum, 'Pemilu 2009 dalam angka' available at www.kpu.go.id/dmdocuments/angka_26_30.pdf.

[37] See 'A Decade of Democracy in Indonesia: The 2009 Legislative Election', Report of International Election Observation Mission, The Asian Network for Free Elections (ANFREL), available at www.anfrel.org/report/indonesia/2009/Indonesia_General_Election_2009.pdf.

[38] Robert Elson, 'Another look at the Jakarta Charter controversy of 1945' (2009) 88 *Indonesia* 105.

[39] See Robert Lumban Tobing, 'Christian Social Ethics in the Thoughts of TB Simatupang: The Role of Indonesian Christian in Social Change', PhD thesis, University of Denver, 1996.

[40] For a full account see Arskal Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia* (Honolulu: University of Hawaii Press, 2008).

The problem comes when religious organisations other than those of the six recognised faiths are not able to register with the government: they can only register with the State Ministry for Culture and Tourism, as social organisations. Practically, the six religions have been set as official state religions. Since the government recognises only six major religions, persons of other faiths frequently experience official discrimination, often in the context of civil registration of marriages and births, or the issuance of identity cards. Those who chose not to register their marriages or the births of children risked future difficulties. For example, many children without a birth certificate cannot enrol in school or may not qualify for scholarships. Individuals without birth certificates do not qualify for government jobs.

Animism and other types of traditional belief system, generically termed *Aliran Kepercayaan* ('streams of belief'), are still practised by sizeable populations in Java, Kalimantan and Papua. Many of those who practise *Kepercayaan* describe it as more of a meditation-based spiritual path than a religion. The law requires adult citizens to carry a national ID card (KTP), and this card lists the citizen's religious affiliation. Animists, Confucians and followers of the indigenous religion of the Dayak people in Indonesia found it difficult or impossible to obtain a KTP which accurately reflected their faiths, and consequently many were identified incorrectly as adhering to one of the six religions – they were 'forced' to identify themselves with one of the state-recognised religions. However, with the introduction of the 2006 Population Administration Law, citizens who adhere to religions or beliefs outside the six religions mentioned above now have the right to leave the religion column blank on their identity cards.

The government requires the six official religions to comply with Ministry of Religious Affairs and other ministerial directives, such as the Regulation on Building Houses of Worship, the Guidelines for the Propagation of Religion, Overseas Aid to Religious Institutions in Indonesia, and Proselytising Guidelines. All these regulations are allegedly aimed at supporting and protecting Muslim affairs. For instance, many members of minority faiths complain that the government has imposed unequal treatment regarding the building of houses of worship. It is more difficult for non-Muslims to acquire a building licence than for Muslims.[41]

Another problem is that the government has been involved in determining which school of teachings of a particular religion can be accepted in Indonesia. The Constitution does not provide any criteria for deciding whether a certain religion is based on belief in one God, or which authority would make such a decision. Quite often the government acts as a 'judge', by having the right to decide which faiths and beliefs are classified as legitimate sects. In order to secure this role,

[41] Melissa Crouch, 'Implementing the regulation on places of worship in Indonesia: new problems, local politics and court action' (2010) 34 *Asian Studies Review* 403.

the government established the Bureau for Supervision of Religious Movements (Pakem) under the Ministry of Religious Affairs, which comprises people from the Attorney-General's office. For example, smaller Christian groups like the Jehovah's Witnesses, who claim an active membership of approximately 17,100, are not officially recognised in Indonesia. Thus problems of defining 'religion' occur not only between religions, but also within almost any particular religion.

In the case of Ahmadiyah, Indonesia's minister of religious affairs, Suryadharma Ali, called for the Ahmadiyah to be banned.[42] Several provinces across Indonesia have also brought in local regulations restricting the group's activities. The decrees include prohibiting the Ahmadiyah from distributing pamphlets, putting signs in front of their offices and places of worship, and forbidding them from wearing anything to indicate that they are Ahmadiyah members. Three members of the Ahmadiyah community were beaten to death in February 2011 when a thousand-strong mob wielding rocks, machetes, swords and spears stormed the house of an Ahmadiyah leader in Cikeusik, Banten. The government's solution is that Ahmadiyah should declare themselves as a new religion, no longer part of Islam. The problem is whether Law No 1 of 1965 will allow for the establishment of Ahmadiyah as the seventh religion in Indonesia. If not, then what is the minister's legal justification for Ahmadiyah's establishing a new religion? This is a problem with regard to intra-religious pluralism.

Several human rights activists, NGOs and also former president Abdurrahman Wahid have challenged the validity of Law No 1 of 1965. They took the view that this law has restricted the word 'religion' in Article 29 of the Constitution to only six religions, and has encouraged discrimination against small sects or groups which have different interpretations than those of the six 'official' religions, and has put the government in a position to determine which interpretation, sect or group is legitimate or not. However, in April 2010, the Constitutional Court rejected the legal challenge, and instead upheld Law No 1 of 1965. Eight of the judges found that the law is necessary to maintain public order and is respectful of the principle of religious freedom in Indonesia. Dissenting judge Maria Farida, the first ever female member of the court, reasoned that the law should be revoked because it is at odds with the constitution, since it recognises only six religions, and is used arbitrarily to suppress all other religions. Mahfud CJ stated that the law itself is not contrary to the basic articles in the Constitution, but he admitted that it needs to be made clearer, and stated that it is up to the parliament to amend it.[43]

Since the Indonesian 'middle position' (neither secular nor Islamic) allows for law and religion to overlap, there is scope for legal religion and religious law. This brings difficulties as legal expectation is not always in line with religious

[42] Bernhard Platzdasc, 'Religious Freedom in Indonesia: The Case of the Ahmadiya', ISEAS Working Paper: Politics & Security Series No 2 (2011).

[43] See Constitutional Court Decision No 140/PUU-VII/2009 on 19 October 2010.

commands. For instance, the Indonesian Constitutional Court takes the view that one of the principal differences of the rule of law between Indonesia and the West is that 'the basis of Belief in God and teaching, as well as religious values, serves as a benchmark to determine whether or not a certain law is good, or even whether or not a certain law is constitutional'.[44] Has the court gone too far?

III. CONCLUDING REMARKS

An examination of major constitutional development in Indonesia reveals that there has been increasing commitment to support democracy and the rule of law. Amendments to the 1945 constitution (1999–2002) demonstrate that Indonesia has taken a hard lesson and there will be no turning back to the old Soeharto model of governance. However, it would be misleading to assume that the amendments to the 1945 constitution would automatically bring the Indonesian people out of economic, political and legal crisis, especially when corruption remains endemic. Reform not only strengthens the structure of the three arms of government, but also creates new institutions, such as the House of Regional Representatives, the Judicial Commission and the Constitutional Court. A new key player also emerges: the political party.

Political parties may be the weakest link in the electoral process if they are undemocratic, underdeveloped and nonconstructive.[45] Political parties cannot be trusted to have democratic ideas or programmes if they are tolerant of corruption (if not, indeed, active in it), self-centred, inward-looking, exclusive and, therefore, unrepresentative and unresponsive to voters' real interests and citizens' real needs for development.[46] In other words, how parties behave toward one another, and in their internal organisation, tells their fellow citizens how democracy works. The Indonesian party system is characterised by charismatic leaders. The 'patron–client relationship' still influences Indonesian politics, where economic rewards and political patronage flowed downward in the system, whilst political loyalty flowed upward, in what resembled a giant pyramid of patrimonial relationships. Even before the introduction of the *pilkada* (short for *pilihan kepala daerah*, 'election of regional heads'), political thuggery and 'money politics' were on the rise.[47]

For instance, MPs act as brokers for private companies, businessmen take over party chairmanships, and billionaire financiers determine policies behind the scenes. According to Rinakit, 87 per cent of regional elections in 2005 were won

[44] Ibid.

[45] See Ed Aspinall and Marcus Mietzner, *Problems of Democratisation in Indonesia* (Singapore: ISEAS, 2010).

[46] Ivan Doherty, 'Democracy out of balance: civil society can't replace political parties' (April–May 2001) *Policy Review* 29.

[47] N. Choi, 'Local elections and party politics in post-reformasi Indonesia: a view from Yogyakarta' (August 2004) *Contemporary Southeast Asia* 280.

by the incumbents, local bureaucrats and military personnel.[48] The political parties are centralised but at the same time not fully elitist. The lack of transparency of the whole transition process and the incalculability of its outcomes exacerbate the institutionalisation of parties.

President Yudhoyono has been trapped into dealing with political parties due to the fact that his own party only has 20.85 per cent of seats in the parliament. Ideally, Indonesia should have only two big political parties and two or three small parties. It will be a long and painful process to consolidate this ideal arrangement. During the reform era, every time Indonesia has a new government and parliament as a result of a general election, it always proposes and then issues a new electoral law. This not only shows that Indonesia is still in the process of finding the right direction, but also demonstrates how Indonesian elites are in a battle to benefit from the new electoral laws. However, the fact that key political and social actors are committed to solving their disputes and pursuing their interests non-violently, through the constitutional process, is encouraging.

Furthermore, the role of the military and of Islamic organisations to support democracy is important. The military's role in politics has been reduced significantly. Active generals are no longer allowed to hold cabinet posts and other key positions in the government. The drop in the number of governors and mayors with a military background from 80 per cent in the Soeharto era to less than 10 per cent in 2005 reveals the new face of the Indonesian political game.[49] The two most important religious organisations in the country, Muhammadiyah and Nahdlatul Ulama, rejected the insertion of sharia during the process amendment.[50] Both Islamic organisations have supported democracy and have participated in preserving and consolidating the democratisation process. In the Muslim world, this is important since the Indonesian experience has demonstrated that it is possible to reconcile Islam and democratic constitutionalism.

[48] Sukardi Rinakit, *Indonesian Regional Elections in Praxis* (Singapore: IDSS Commentaries, 2005).

[49] More information on the role of the Indonesian military can be read in Marcus Mietzner, *Military Politics, Islam, and the State in Indonesia: From Turbulent Transition to Democratic Consolidation* (Singapore: ISEAS, 2009).

[50] The Nahdlatul Ulama, established in 1926, is the biggest Islamic organisation in Indonesia, numbering 30 million supporters. Muhammadiyah, established in 1912, is the organisation which represents modernist Muslims. It has 28 million supporters in Indonesia, and has built many schools, universities and hospitals. More information on Indonesian fatwas can be found in Nadirsyah Hosen, 'Collective Ijtihad and Nahdlatul Ulama' (2004) 6 *New Zealand Journal of Asian Studies* 5; Nadirsyah Hosen, 'Behind the scenes: fatwas of Majelis Ulama Indonesia (1975–1998)' (2004) 15 *Journal of Islamic Studies* 147; see also Nadirsyah Hosen, 'Revelation in a modern nation state: Muhammadiyah and Islamic legal reasoning in Indonesia' (2002) 4 *Australian Journal of Asian Law* 232.

15

The Indian constitution in the twenty-first century

The continuing quest for empowerment, good governance and sustainability

*Surya Deva**

I. INTRODUCTION

This chapter offers critical insights into the constitutional developments in India that have taken place in the first decade of the twenty-first century. In order to provide context to this examination, major political developments that had a bearing on these constitutional developments will also be reviewed. Since the roots of these political developments lie in the twentieth century, it will be necessary to revisit that period.[1] This chapter will focus on three examples to illustrate this point. The first example concerns socioeconomic inequalities and the exclusion of certain backward sections of society from the mainstream: the constitution framers inherited this social matrix and tried to remedy this with multiple constitutional measures. A gradual change-over from a socialist to a free-market economy since the early 1990s provides the second example. This change-over also impacted the erstwhile socioeconomic inequalities and exclusions. The third and final example relates to the era of coalition governments, which firmly emerged at the national level after the 1989 elections and has continued since then. These and other transformations of the twentieth century impacted constitutional developments that we have witnessed since the year 2000.

India faces numerous social, economic and political challenges, some of which stem from its being the largest democracy and the second-most populous country. It is relatively easier to introduce economic reforms and implement government policies in a largely authoritarian state like China, or to govern a city-state like Singapore. This chapter focuses on the three most critical challenges currently

* I would like to thank Ms Xin Xin Silvia for her assistance in revising the footnote style.

[1] The following two books provide useful snapshots of major constitutional and political developments over the years: Subhash C. Kashyap, *Indian Constitution: Conflicts and Controversies* (New Delhi: Vitasta Publishing Pvt. Ltd, 2010); A.G. Noorani, *Constitutional Questions and Citizens' Rights: An Omnibus Comprising Constitutional Questions in India* (New Delhi: Oxford University Press, 2006).

faced by India: socioeconomic inequalities, governance gaps and environmental pollution. The challenge of 'governance gaps' should be understood to encompass a range of issues such as corruption, law and order, gender discrimination, lack of accountability, and endemic delays in the administration of justice.

An attempt will be made to analyse the post-2000 constitutional developments – i.e. constitutional amendments, legislative reforms or reform proposals and prominent judicial decisions – as a response to these three challenges. These responses were arguably underpinned by a dominant remedial strategy. So 'empowerment' is the tool employed to overcome socioeconomic inequalities, while the notion of 'good governance' is considered the antidote to counter various governance gaps. Similarly, 'sustainable development' is the mantra to remedy environmental pollution.

The three branches of the government have responded variedly to the three major challenges confronting the country. Whereas the legislature and the executive have been seemingly more active in bridging socioeconomic inequalities, the judiciary has been relatively more active in redressing corruption and the problem of environmental pollution. Although all three branches suffer from governance gaps, the judiciary has sought to be seen both as free from these governance deficits and also as the leader in fixing such gaps.

Apart from understanding how the constitutional jurisprudence has tried to respond to the major challenges faced by India, the analysis undertaken in this chapter can also be used to glean the promises and perils that constitutional law offers in dealing with societal challenges faced in a democracy. The Indian experience shows how constitutional provisions can be invoked to deal with day-to-day issues faced by 'We, the people of India'. This implies, among other things, that the values embedded in the Constitution (such as substantive equality and inclusive development) have neither trickled down fully to the plethora of laws nor been embraced in the right spirit by people implementing these laws.

Section II begins with the constitutional scheme and the political system of India, so as to facilitate navigation for those who may be entering this area for the first time. Section III outlines the contours of the three identified challenges and situates the post-2000 constitutional developments as a remedial response to these challenges. Section IV offers some concluding remarks.

II. CONSTITUTIONAL SCHEME AND POLITICAL SYSTEM: AN OVERVIEW

The Indian constitution, which came into force on 26 January 1950, is the longest constitution in the world, with 395 articles and twelve schedules. Apart from the length of the Constitution, in over six decades there have been 119 constitutional amendment bills introduced, of which ninety-seven have been enacted.[2] These

[2] 'The Constitution (Amendment) Acts', http://indiacode.nic.in/coiweb/coifiles/amendment.htm.

figures do not include several judicial decisions that, in effect, have amended the Constitution. Many amendments only made a cosmetic change,[3] merely ensured continuance of temporary constitutional measures[4] or were introduced to provide a constitutional plank to government policies declared unconstitutional by the Supreme Court.[5] Moreover, these amendments might have kept the Constitution so 'fresh and alive' that no major need was felt to adopt a new constitution. Even the National Commission to Review the Working of the Constitution (NCRWC), which was established in February 2000, only recommended amendments to the existing constitution in its voluminous report submitted in March 2002.[6]

Another reason for the lengthy constitution is the adoption of an inclusive approach to recognise the separate existence and identity of diverse groups of people. Since states in India (with the exception of Jammu and Kashmir[7]) do not have their own constitutions, the Indian constitution lays down the governance structure for all twenty-eight states and seven union territories. The Constitution establishes a federal system with a strong centre. It allows the central government to take over the functions of the state government if it is satisfied that the government of a given state cannot be carried on in accordance with the constitutional provisions.[8] In the past, this provision was misused for political reasons and consequently affected centre–state relations. However, the situation has improved significantly after the Supreme Court decision in *S.R. Bommai* v. *Union of India*[9] and the evolution of coalition governments, which has made the party in power at the centre dependent on the support of state or regional political parties. Current issues that trigger centre–state frictions include law and order, counterterrorism measures, sharing of taxes, implementation of development projects, environmental protection, devolution of power, and inter-state water disputes.[10]

The constitution of a country reflects its *past* in the *present* for a better *future*. The journey of the Indian constitution can also be described in the context of

[3] See, for example, the Constitution (96th Amendment) Act 2011, which substituted the word 'Oriya' with 'Odiya' in the Eight Schedule to the Constitution.

[4] Extending reservation for SCs and STs in legislative bodies every ten years provides a good example. See the Constitution (8th Amendment) Act 1959; the Constitution (23rd Amendment) Act 1969; the Constitution (45th Amendment) Act 1980; the Constitution (62nd Amendment) Act 1989; the Constitution (79th Amendment) Act 2000; and the Constitution (95th Amendment) Act 2010.

[5] See, for example, the Constitution (81st Amendment) Act 2000; the Constitution (82nd Amendment) Act 2000; and the Constitution (85th Amendment) Act 2001.

[6] 'Ministry of Law, Justice and Company Affairs Department of Legal Affairs', http://lawmin.nic.in/ncrwc/ncrwcreport.htm.

[7] The Constitution of India, Art. 370.

[8] The Constitution of India, Art. 356.

[9] (1994) 3 SCC 1.

[10] See 'Report of the Commission on Centre–State Relations (March 2010)', Vol. 1, http://interstatecouncil.nic.in/ccsr_report_2010.htm, pp. 87–93.

this 'past–present–future' matrix. It reflects the past in two respects. First, the Constitution borrowed heavily from the Government of India Act of 1935 and British constitutional conventions, thus signifying that colonisation resulted in internalisation of certain British constitutional traditions over a period of time. There was, however, no total or blind adoption of British traditions, as the Constitution emerged from the shadow of the colonial past by making certain departures.[11] Second, it took cognizance of the challenges faced both by India and by Indian society before independence, e.g. national disintegration; communalism; untouchability; discrimination against women and weaker sections of society; unequal distribution of economic resources; and diversity in matters of religion, language, tradition and culture. To overcome these challenges, the Constitution is built on the bedrock of fundamental rights (FRs) and the directive principles of state policy (DPs), special provisions empowering women and weaker sections, the rule of law, the separation of powers, secularism, parliamentary democracy, judicial review, an independent judiciary, and federation with a strong centre. Granville Austin, a leading historian, describes the philosophy of the Indian constitution as a 'seamless web' of three 'mutually dependent and inextricably intertwined' strands: 'protecting and enhancing national unity and integrity; establishing the institutions and spirit of democracy; and fostering a social revolution to better the lot of the mass of Indians'.[12]

The Preamble of the Constitution provides guidance on how post-independence India should chart its future.[13] The Preamble embodies the vision of 'wiping every tear from every eye' by deconstructing the existing socioeconomic inequalities. Constitutionalising the social revolution was the means chosen to attain this end:[14] the Indian constitution not only confers equality of status and opportunity but also provides for the taking of positive steps to rectify existing inequalities, injustices and historical prejudices. The Preamble manifests this vision by securing its citizens *justice* (social, economic and political), *liberty* (of thought, expression, belief, faith and worship), *equality* (of status and of opportunity), and by promoting fraternity amongst citizens, assuring the dignity of the individual and the unity and integrity of the nation. These aspirations appear throughout the Constitution, especially in provisions dealing with FRs and DPs. The Constitution establishes an independent judiciary as guardian of people's rights and liberties and embodies

[11] For example, the Objectives Resolution presented by Pandit Nehru in the Constituent Assembly on 13 December 1946 highly influenced the drafting of the final document. *Constituent Assembly Debates*, Vol. 1, p. 57.

[12] Granville Austin, *Working a Democratic Constitution: The Indian Experience* (New Delhi: Oxford University Press, 2000), pp. 6, 7–8.

[13] See Aparajita Baruah, *Preamble of the Constitution of India: An Insight and Comparison with Other Constitutions* (New Delhi: Deep & Deep Publications Pvt. Ltd, 2007).

[14] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Clarendon Press, 1966), p. 26.

the principles of the rule of law. It also incorporates the principle of separation of powers in a parliamentary form of government.[15]

The Preamble declares India to be a 'sovereign socialist secular democratic republic'.[16] An explicit declaration of sovereignty was imperative to show a departure from the colonial past. However, by declaring India to be a republic, the constitutional framers refused to accept a hereditary head of state even for ceremonial purposes. The term 'socialist' was not part of the original preambular intent, but the socialist bias of the Constitution is manifested in its provisions, especially in Part IV containing DPs.[17] The commitment to adopt socialist policies has faced new challenges since the adoption of the new economic policy of privatisation, liberalisation, disinvestment and deregulation. Although the Supreme Court has found no apparent conflict between constitutional commitment to socialism and governmental policies of privatisation and disinvestment,[18] doubts persist whether the state can still discharge its mandatory obligations laid down in Part IV of the Constitution.[19]

The Constitution departed from the British policies of communal representation and 'divide and rule' and established a secular polity, though this was made explicit in the Preamble only in 1976. The judiciary has given 'secularism' a higher position by declaring in the *Bommai* case that it is a basic feature of the Constitution,[20] meaning thereby that India can never become a theocratic state under the *existing* constitution. However, neither the adoption of the non-Western conception of secularism,[21] nor its judicial uplifting in *Bommai*, has been able to attain the desired objective completely. The religious animosity between Hindus and Muslims, the two major religious communities in India, reached its zenith in the destruction of Babri mosque by Hindu fundamentalists in 1992 and the consequent riots, bomb attacks and the Godhra train carnage that followed the demolition. Despite strong judicial reminders,[22] religion has been continuously misused for

[15] Article 50, a DP, lays down that the 'state shall take steps to separate the judiciary from the executive in the public services of the state'.

[16] The terms 'socialist' and 'secular' were inserted in the Preamble by the Constitution (42nd Amendment) Act 1976.

[17] See also Austin, *The Indian Constitution*, pp. 41–3; Austin, *Working a Democratic Constitution*, pp. 70–4.

[18] *Delhi Science Forum* v. *Union of India* AIR 1996 SC 1356; *Balco Employees Union* v. *Union of India* AIR 2001 SC 350. See also M.P. Singh, 'Constitutionality of market economy' (1996) 18 *Delhi Law Review* 272.

[19] Surya Deva, 'Human rights realisation in an era of globalisation: the Indian experience' (2006) 12 *Buffalo Human Rights Law Review* 93 at 124–5.

[20] *S.R. Bommai* v. *Union of India* AIR 1994 SC 1918.

[21] As opposed to the Western 'anti-religion' or 'separation of church and state' notion of secularism, the Indian conception is based upon *sarva dharma sambhava* (equal respect for all religions). See Shariful Hasan, 'Nehru's secularism', in Rajiv Dhavan and Thomas Paul (eds.), *Nehru and the Constitution* (Bombay: N.M. Tripathi Pvt. Ltd, 1992), p. 182.

[22] See, for example, *S.R. Bommai* v. *Union of India* AIR 1994 SC 1918; *Ismail Faruqui* v. *Union of India* AIR 1995 SC 605; *Manohar Joshi* v. *Nitin B.R. Patil* (1996) 1 SCC 169; *Ramesh Yeshwant Prabhoo (Dr)* v. *Prabhakar K Kunte* (1996) 1 SCC 130.

ulterior political gains. Nevertheless, the secular fabric of the Constitution has been able to withstand such temporary but periodic dangers posed by non-secular deeds promoted by certain political parties or sections of society.

The Indian constitution firmly institutionalises parliamentary democracy. It not only provides for adult suffrage on the principle of equality[23] and guarantees political freedoms to citizens as FRs, but also establishes an independent Election Commission to ensure free and fair periodic elections.[24] The Constitution also reserves a certain percentage of seats in legislative bodies as well as in *panchayats* (village-level governance bodies) and municipalities for the Scheduled Castes (SCs) and Scheduled Tribes (STs) in order to ensure that various disadvantaged sections of society get their share in the decision-making process.[25] Since 1992, 33 per cent of the total number of seats have been reserved for women in *panchayats* and municipalities,[26] while a constitutional amendment to have a similar reservation for women in legislative bodies is currently being considered by the parliament.[27]

Several problems engulf democracy in India, e.g. corruption, violence, criminalisation, caste- and religion-based politics, opportunistic political defections, unparliamentarily behaviour, (mis)use of official position and black money in election campaigns, lack of internal democracy within parties, and general lack of accountability of elected representatives – thus justifying demands for substantive electoral reform.[28] Despite these shortcomings, India, unlike its peers in South Asia, has been able to stay on the democracy road with the exception of a short period in the mid-1970s.[29] Democracy, which is now part of the basic structure of the Constitution,[30] has been taken to the grass roots since the introduction of *panchayats* and municipalities by the 73rd and 74th constitutional amendments in 1992. The Constitution deserves some credit for being able to keep people, parties and governments sticking to democratic traditions. It is no small achievement that regular elections, albeit not

[23] The Constitution of India, Arts. 325 and 326. The right to vote has been held to be merely a legal right and not a fundamental or constitutional right. *A.C. Pradhan* v. *Union of India* (1997) 6 SCC 1.

[24] The Constitution of India, Art. 324.

[25] The Constitution of India, Arts. 243D, 243T, 330 and 332.

[26] The Constitution of India, Arts. 243D(3) and 243T(3).

[27] In March 2010, the Rajya Sabha, the upper house of the parliament, passed the Constitution (108th Amendment) Bill providing for such reservation. 'Rajya Sabha passes Women's Reservation Bill', *Times of India*, 9 March 2010, http://articles.timesofindia.indiatimes.com/2010-03-09/india/28137030_1_unruly-scenes-women-s-reservation-bill-constitution-amendment-bill.

[28] Soutik Biswas, 'Why India is in dire need of electoral reform', BBC News, 28 June 2011, www.bbc.co.uk/news/world-south-asia-13692575. See also Election Commission of India, 'Proposed electoral reforms', 2004, http://eci.nic.in/eci_main/PROPOSED_ELECTORAL_REFORMS.pdf; Law Commission of India, '170th report on reform of electoral laws', 1999, www.lawcommissionofindia.nic.in/lc170.htm.

[29] On 26 June 1975, a national emergency, which lasted up to March 1977, was imposed which is widely regarded as black day for Indian democracy.

[30] *Indira Gandhi* v. *Raj Narian* AIR 1975 SC 2299; *Kihoto Hollohan* v. *Zachillhu* AIR 1993 SC 412.

in perfect ways, took place at both federal and state levels with significant voter turnout – ranging from about 45 per cent in the first general election of 1951 to more than 58 per cent in the general elections of 1999, 2004 and 2009.[31]

Parliamentary democracy requires a framework in which political parties can garner and galvanise the support of people around diverse political agendas. Any association or body of individual citizens of India can apply to the Election Commission for registration as a political party under Section 29A of the Representation of the People Act 1951. Depending on a certain percentage of votes received and the number of candidates returned, political parties may be divided into national, regional and state parties.[32] However, the designation of a political party as a national party is not always an accurate reflection of political reality. For example, out of six political parties currently recognised as national parties, only the Indian National Congress (Congress) and Bharatiya Janata Party (BJP) have significant national presence.

Although a number of national and state-level political parties have participated in each general election since 1951, Congress, which led the struggle for independence, has ruled the country for most of the time. The dominance of Congress was dented at the state level only in the late 1960s and at the national level in the mid-1970s. This led to an era of multiparty coalitions at both pre- and post-election stages. The era of coalition governments also meant that political parties had to adopt flexible ideologies and the party in power had to rely on several smaller parties with diverse (sometimes conflicting) vested interests. To ensure political homogeneity, coalition parties generally draw a common minimum agenda for governance, which has often proved to be a difficult exercise.

One distinct feature of Indian political parties has been the perpetuation of hereditary leadership. Congress is often cited as an example of this trend – starting with the first prime minister, Pandit Nehru to Indira Gandhi, Rajiv Gandhi, Sonia Gandhi and finally Rahul Gandhi. However, implantation and nurturing of family relatives in politics and positions of power is quite widespread in almost all political parties.

III. CONSTITUTIONAL DEVELOPMENTS AS A RESPONSE TO MAJOR CHALLENGES

Understanding major challenges

One thing that any outside observer will notice about India is the prevailing poverty and vast socioeconomic inequalities. Despite recording robust yearly

[31] See Election Commission of India, 'Election results: full statistical reports', http://eci.nic.in/eci_main1/ElectionStatistics.aspx.

[32] Centre for Indian Political Research and Analysis, 'Political parties in India', www.cipra.in/paper/polparties.html.

economic growth since the introduction of economic reforms in the early 1990s, a vast amount of the Indian population still lives in extreme poverty: it is estimated that 42 per cent of the total population is still living on less than US$1.25 a day.[33]

Equally worrying is the growing income inequality in the last two decades.[34] Inequalities are not, however, limited to income. There are disparities and exclusions related to gender and social status. Despite many legislative measures and development schemes,[35] women continue to experience all types of discrimination and disadvantage – from higher infant mortality rate to infanticide, malnutrition, sexual harassment, sexual and domestic violence, human trafficking and lesser employment opportunities. In 2001, the overall literacy rate was 65.38 per cent, while it was only 54.16 per cent for women.[36] Similarly, there was a gap of about 11 per cent between the literacy rate of the total population and that of SCs. The rate of dropout from schools is also higher among girls and SCs.[37] As the Sachar Committee Report highlights, Muslims in India, a minority community, suffer from disadvantage and deprivation in all aspects of development – education, nutrition, health, housing, sex ratio, employment, access to bank credit, safety and consumption.[38]

From 2001 to 2007, the government spent between 3.36 and 3.81 per cent of GDP on education every year.[39] Although the dropout rate from primary and elementary schooling declined during this period,[40] the literacy rate is still around 74 per cent.[41] The record of state expenditure on health (and the consequent situation concerning access to health facilities) is worse: between 2005 and 2009, the government only spent between 0.96 and 1.09 per cent of GDP on health every year.[42]

Two issues illustrative of governance gaps are delay in access to justice, and corruption. In spite of several judicial pronouncements on speedy

[33] OECD, 'Divided We Stand: Why Inequality Keeps Rising', 2011, www.oecd.org/dataoecd/40/13/49170475.pdf, p. 48.

[34] 'The top 10% of wage earners now make 12 times more than the bottom 10%, up from a ratio of six in the 1990s.' 'India's income inequality has doubled in 20 years', *Times of India*, 7 December 2011, http://timesofindia.indiatimes.com/india/Indias-income-inequality-has-doubled-in-20-years/articleshow/11012855.cms. See also OECD, 'Divided We Stand', above, n 33.

[35] Planning Commission of India, *Mid-term Appraisal: Eleventh Five Year Plan (2007–2012)* (New Delhi: Oxford University Press, 2011), pp. 234–47.

[36] Ibid., p. 167. [37] Ibid.

[38] Prime Minister's High Level Committee, 'Social, economic and educational status of Muslim community in India: a report' (November 2006).

[39] Planning Commission of India, *Mid-term Appraisal*, p. 119.

[40] In 2001–2 the dropout rate was 39 per cent at the primary level (class I–V) and 54.6 per cent at the elementary level (class I–VIII). In 2007–8 these figures were 25.55 per cent and 43.03 per cent respectively. Ibid., 122.

[41] Government of India, 'Census 2011', www.censusindia.gov.in/2011-prov-results/indiaat-glance.html.

[42] Planning Commission of India, *Mid-term Appraisal*, p. 147.

justice,[43] the judicial process in India is a good example of delayed justice. As of 1 November 2011, a total number of 56,383 cases were pending before the Supreme Court.[44] More worrying, however, is the number of pending cases before the high courts and lower courts. At the end of December 2012, a total number of 31,927,263 cases were pending before these courts.[45] The Law Commission recently noted that in 'the present set-up it often takes 10–20–30 or even more years before a matter is finally decided'.[46] This situation definitely discourages people from approaching courts and thus denies them their right to access to justice.[47]

Corruption is rampant in India, and people have started losing patience with the status quo, as illustrated by the mass support for the anti-corruption movement led by Anna Hazare, a social activist.[48] The 2011 Corruption Perceptions Index placed India in 95th position out of a total of 183 countries reviewed.[49] It is reported that more than 50 per cent of Indians have paid bribes.[50] Due to the operation of a parallel 'black' economy, it is estimated that India has lost more than US$460 billion since independence 'because of companies and the rich illegally funnelling their wealth overseas'.[51] It is fair to say that corruption – which in political and public offices has grown to 'alarming proportions'[52] and pervades all institutions that make, implement and adjudicate the law[53] – seems to have become a 'fact of life'.[54] Numerous scams involving members of parliament, ministers, civil servants, police officers and judges have been reported over the years. The introduction of a free-market economy has seemingly not curbed corruption.[55]

[43] *Hussainara Khatoon* v. *State of Bihar* AIR 1979 SC 1364; *Common Cause* v. *Union of India* (1996) 4 SCC 33 and (1996) 6 SCC 775; *All India Judges' Association* v. *Union of India* (2002) 4 SCC 247.

[44] Supreme Court of India, 'Summary: types of matters in Supreme Court of India', http://supremecourtofindia.nic.in/outtoday/summary.pdf.

[45] Ibid. Of these cases, 26 per cent are more than five years old.

[46] Law Commission of India, '230th report on reforms in the judiciary: some suggestions' (August 2009), para. 1.16.

[47] See Marc Galanter and Jayanth Krishnan, '"Bread for the poor": access to justice and the rights of the needy in India' (2004) 55 *Hastings Law Journal* 789.

[48] See 'India against corruption', www.indiaagainstcorruption.org/index1.html.

[49] Transparency International, 'Corruption perceptions index 2011', http://cpi.transparency.org/cpi2011/results.

[50] 'India tops list of countries where bribery is way of life', *Times of India*, 9 December 2010, http://timesofindia.indiatimes.com/india/Corruption-on-the-rise-54-Indians-paid-bribe-last-year/articleshow/7071768.cms.

[51] 'India lost $462bn in illegal capital flows, says report', BBC News, 19 November 2010, www.bbc.co.uk/news/world-south-asia-11782795.

[52] K.N. Gupta, *Corruption in India* (New Delhi: Anmol Publications Ltd, 2003), p. 2.

[53] C. Raj Kumar, *Corruption and Human Rights in India: Comparative Perspectives on Transparency and Good Governance* (New Delhi: Oxford University Press, 2011), pp. 15–18.

[54] N. Vittal, *Corruption in India: The Roadblock to National Prosperity* (New Delhi: Academic Foundation, 2003), p. 17.

[55] Mohan R. Pillay, Paul R. Sandosham and Nandakumar Ponniya (eds.), *Doing Business in India* (Singapore: Sweet & Maxwell, 2004), pp. 17–18.

Finally, the challenge concerning environmental pollution is often caused by growing population and economic growth. India, which is one of largest emitters of greenhouse gases, is no exception, e.g. data indicate that many cities (including major cities like Mumbai, New Delhi and Kolkata) fail to meet the World Health Organization (WHO) standards as to safe air quality.[56] Most of the urban waste ends up in the country's rivers, making the water unsuitable for drinking or even bathing. Mining activities (including illegal ones) have resulted in environmental pollution, deforestation and displacement of tribal people. India also faces serious groundwater shortage in certain parts and the challenge of preserving biodiversity. Although the country has a rich corpus of environmental laws,[57] their implementation and efficacy remain suspect.

Constitutional developments

Constitutional amendments

Since January 2000, nineteen constitutional amendments have been made.[58] Only amendments which introduced far-reaching changes will be noted here. As mentioned above, the Constitution reserves seats for SCs and STs in legislative bodies at both federal and state levels.[59] This reservation was originally meant to cease ten years after the commencement of the Constitution; that is, in 1960. However, this reservation has been maintained continuously through periodic amendments, the 79th Amendment (2000) and 95th Amendment (2010) being the latest in this series.[60] The rationale behind the continuance of reservation was explained by the 79th Amendment as follows: 'Although the Scheduled Castes and the Scheduled Tribes have made considerable progress in the last fifty years, the reasons which weighed with the Constituent Assembly in making provisions with regard to the aforesaid reservation of seats and nomination of members, have not ceased to exist.'[61] Looking at this explanation, at past trends and at the present situation, it is unlikely that the reservation for SCs/STs will be discontinued in the near future, if at all, especially because of the politics behind reservation.

The power to levy taxes and their distribution between the centre and the states is always a ticklish issue in a federal country. The Constitution makes detailed

[56] Planning Commission of India, 'Eleventh five year plan: environment and climate change', p. 195, http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v1/11v1_ch9.pdf.

[57] See Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India: Cases, Materials, and Statutes* (New Delhi: Oxford University Press, 2002).

[58] From the Constitution (79th Amendment) Act 2000 (which came into force on 25 January 2000) to the Constitution (99th Amendment) Act 2011 (which came into force on 12 January 2012).

[59] The Constitution of India, Art. 334.

[60] Constitution (8th Amendment) Act 1959; Constitution (23rd Amendment) Act 1969; Constitution (45th Amendment) Act 1980; and Constitution (62nd Amendment) Act 1989.

[61] 'Statement of objects and reasons', http://indiacode.nic.in/coiweb/amend/amend79.htm.

provisions in this regard.[62] Among other things, it provides for the constitution of a Finance Commission to recommend the distribution of taxes between the centre and states.[63] Based on the recommendation of the Tenth Finance Commission, the 80th Amendment proposed an alternative scheme of sharing between the centre and the states the proceeds of certain taxes and duties imposed by the central government.[64] A new provision was inserted in the Constitution by the 88th Amendment to provide for the imposition of service tax by the central government and its collection and appropriation by both the centre and the states.[65]

As noted above, the Constitution expressly authorises the government to take affirmative action to remedy past socioeconomic inequalities. Article 15(4) provides that the government may make any special provision for the advancement of any socially and educationally backward classes of citizens, or for the SCs and STs. Article 16(4) enables the government to make reservation in employment for any backward class of citizens who are not adequately represented in the government services. In *Indra Sawhney* v. *Union of India*,[66] the Supreme Court – while upholding the additional reservation of seats in government services for other backward classes (OBCs) as per the recommendation of the Mandal Commission – ruled that the number of vacancies to be filled up on the basis of reservations in a year (including carried-forward vacancies) should in no case exceed the limit of 50 per cent. The 81st Amendment sought to overcome this bar by inserting clause 4B in Article 16. This new provision, in essence, provided that 'backlog vacancies' will not be counted towards the 50 per cent yearly ceiling imposed by the court.

The affirmative-action provisions of Articles 15 and 16 have been a ground of constant tussle between the government and the judiciary.[67] While the government has tried to introduce reservations in employment and/or educational institutions (often to appease certain sections of society rather than driven by a genuine empowerment concern), the Supreme Court – on being approached by people aggrieved by such allegedly unmeritorious policies – has struck them down as unconstitutional on several occasions. A few constitutional amendments (such as

[62] The Constitution of India, Arts. 268–90.

[63] The Constitution of India, Art. 280.

[64] Constitution (80th Amendment) Act 2000, http://indiacode.nic.in/coiweb/amend/amend80.htm.

[65] The Constitution of India, Art. 268A.

[66] AIR 1993 SC 477. For an analysis, see Mahendra P. Singh, *Shukla's Constitution of India*, 11th edn (Lucknow: Eastern Book Co., 2008), pp. 91–6.

[67] See Mahendra P. Singh, '*Ashoka Thakur* v. *Union of India*: a divided verdict on an undivided social justice measure' (2008) 1 *NUJS Law Review* 193. This battle has also unfolded in relation to agrarian reforms aimed at redistribution of land versus the protection of the right to property. Surya Deva, 'Does the right to property create a constitutional tension in socialist constitutions: an analysis with reference to India and China' (2008) 1 *NUJS Law Review* 583 at 599–601.

the 82nd and the 85th Amendments) in the last decade were made to lend constitutionality to affirmative-action policies.[68]

In *Vinod Kumar* v. *Union of India*,[69] the Supreme Court held that the relaxation of qualifying marks and standards of evaluation in matters of reservation in promotion for SCs and STs were not permissible in view of Article 335 of the Constitution. Article 335 states that the claims of SCs/STs in appointments to government services 'shall be taken into consideration consistently with the maintenance of efficiency of administration'. The 82nd Amendment introduced a proviso to Article 335, which provided that nothing in the article shall prevent the making of any provision in favour of SCs/STs for relaxation in qualifying marks in any examination or lowering the standards of evaluation for reservation in matters of promotion.

The 85th Amendment amended clause 4A of Article 16 of the Constitution – which was introduced by the 77th Amendment in 1995 to extend reservation in promotion for SCs/STs, something that *Indra Sawhney* had prohibited – to ensure that promoted SCs/STs retain their seniority after promotion. This amendment was again made to reverse the effect of the Supreme Court decisions in *Ajit Singh II* v. *State of Punjab*.[70] In this case, the court had held that a reserved-category promotee cannot be considered senior to a general-category promotee who was promoted later but was senior at the lower level.[71]

Another affirmative-action provision was introduced by the 93rd Amendment in 2006.[72] The newly inserted Clause 5 of Article 15 provides that nothing contained in Article 15 or Article 19(1)(g)[73] shall prevent the state from making any special provision for admission to educational institutions for the advancement of any socially and educationally backward classes of citizens or for the SCs/STs. The unique (and somewhat radical) aspect of this amendment was that it covered even 'private educational institutions, whether aided or unaided by the state'; only the minority educational institutions under Article 30(1) were exempted from the scope of this provision.[74] As expected, the constitutional validity of this amendment was challenged before the Supreme Court in *Ashoka Kumar Thakur* v. *Union of India*.[75] The Supreme Court in *Thakur* held Article 15(5) to be valid, though it

[68] The constitutional validity of the 81st, 82nd and 85th Amendments was challenged before the Supreme Court, which upheld their validity. *M Nagaraj* v. *Union of India* (2006) 8 SCC 212.

[69] (1996) 6 SCC 580. The same view was taken by the court in *Indra Sawhney* v. *Union of India* AIR 1993 SC 477.

[70] (1999) 7 SCC 209.

[71] Singh, *Shukla's Constitution of India*, p. 112.

[72] The government enacted the Central Educational Institutions (Reservation in Admission) Act 2006 to provide reservation for SCs, STs and OBCs in central educational institutions.

[73] Article 19(1)(g) confers an FR on all citizens 'to practice any profession, or to carry on any occupation, trade or business'.

[74] It is worth noting that the Supreme Court in *P.A. Inamdar* v. *State of Maharashtra* (2005) 6 SCC 537 has held that private unaided educational institutions are not subject to the requirement of reservation.

[75] (2008) 6 SCC 1.

ruled that the 'creamy layer' within OBCs should not get the benefit of such reservation.[76] Subsequently, the Supreme Court ruled that the minimum eligibility/qualifying marks for OBCs should not be more than 10 per cent of the minimum eligibility/qualifying marks prescribed for general-category candidates.[77]

In *Unni Krishnan* v. *State of AP*,[78] the Supreme Court held that every child has an FR to education until the age of fourteen years implicit in the right to life under Article 21. Following this judicial lead, the parliament in 2002 passed the 86th Amendment and inserted Article 21A in the Constitution to expressly recognise an FR to free and compulsory education of all children between the ages of six and fourteen years.[79] This constitutional amendment also introduced Clause (j) in Article 51A to impose a fundamental duty on parents or guardians of children between the ages of six and fourteen years to provide them opportunities for education. This provision is significant because it responds to socioeconomic realities that encourage parents to withhold young children from receiving school education.

Article 338 of the Constitution had originally provided for a National Commission for SCs and STs, which was required, among other things, to advise on the planning process of socioeconomic developments of SCs/STs, investigate as well as monitor all matters relating to the safeguards provided for SC/STs under the Constitution or other laws, and inquire into specific complaints concerning deprivation of their rights. The 89th Amendment bifurcated this institution into two separate bodies: one National Commission for SCs under Article 338 and another National Commission for STs under Article 338A. Both commissions have the same composition and are vested with identical powers in relation to SCs or STs.

In 2003, the 91st Amendment introduced a unique provision in the Constitution. It provided that the total number of ministers – including the prime minister (at the centre) or chief minister (in states) – in the council of ministers shall not exceed 15 per cent of the total number of the members of the relevant legislative body, the Lok Sabha (the lower house of the parliament) or the legislative assembly of a given state.[80] It was further stipulated that a legislative member belonging to any political party who is disqualified under the Tenth Schedule to the Constitution for breaching the anti-defection law shall also be disqualified from being appointed as a minister during the said term of the legislature.[81] The genesis of these amendments lies in the early phase of coalition politics in which the allurement

[76] For a critical analysis, see Singh, '*Ashoka Thakur* v. *Union of India*'.

[77] *P.V. Indiresan* v. *Union of India* (2009) 7 SCC 300, as clarified in *P.V. Indiresan* v. *Union of India*, Civil Appeal No 7084 of 2011 (decided on 18 August 2011).

[78] (1993) 1 SCC 645.

[79] The amended Article 45, a DP, stipulates that the state 'shall endeavour to provide early childhood care and education for all children until they complete the age of six years'.

[80] The Constitution of India, Arts. 75(1A) and 164(1A).

[81] The Constitution of India, Arts. 75(1B) and 164(1B).

of a berth in the council of ministers was used to cause a split in opposition parties and to secure the support of splintered groups.[82]

The 92nd Amendment to the Constitution included four more languages (Bodo, Dogri, Mathilli and Santhali) in the Eighth Schedule to the Constitution, thus taking the number of total official languages to twenty-two. It should be noted here that although Hindi has been declared the official language of the central government and the government is directed to promote the spread of Hindi,[83] in practice English is used (in conjunction with Hindi or otherwise) for official purposes at the central level, something that is permitted by the Constitution as well as the Official Languages Act 1963.[84] As far as states are concerned, Article 345 allows them to adopt Hindi or any other language(s) in use there as official language(s). In other words, learning quickly from the protests witnessed in the mid-1960s against the uniform imposition of Hindi throughout the country, India has since adopted diversity of languages as a tool to maintain unity.

After the Supreme Court decision in *Kesavananda Bharati* v. *State of Kerala*,[85] an amendment to the Constitution can be declared unconstitutional by the court on the ground that it violated the 'basic structure' of the Constitution.[86] This was a unique pronouncement virtually amending the Constitution, because Article 368 of the Constitution does not contemplate any limitation on the constituent power of the parliament to amend the Constitution.[87] Although the validity of some constitutional amendments has been challenged on this ground over the last decade, no such attempt has proved successful so far.

Other legislative reforms

India established the National Human Rights Commission (NHRC) under the Protection of the Human Rights Act in 1993.[88] Section 12 of the Act confers wide powers on the NHRC to protect and promote human rights (i) guaranteed by the Indian Constitution or (ii) embodied in the 'international covenants' and enforceable by courts in India. This Act was amended in 2006 to expand the definition of 'international covenants': in addition to the International Covenant on Civil and

[82] See 'Constitution (91st Amendment) Act 2003: statement of objects and reasons', http://indiacode.nic.in/coiweb/amend/amend91.pdf, p. 4.

[83] The Constitution of India, Arts. 343 and 351.

[84] Article 348 further states unless otherwise provided by the parliament, all proceedings in the Supreme Court and the High Court shall be conducted in English. It is, however, possible to adopt a language other than English for the high courts.

[85] AIR 1973 SC 1461. [86] Singh, *Shukla's Constitution of India*, 1002–11.

[87] The judiciary is the sole and final judge of what constitutes the basic structure of the Constitution. Over a period of time, various provisions have been recognised as a basic structure of the Constitution, e.g. independence of judiciary, judicial review, the rule of law, secularism, democracy, free and fair elections, harmony between FRs and DPs, the right to equality, and the right to life and personal liberty.

[88] Act No 10 of 1994.

Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the government may also specify other conventions to be included within the ambit of this term. Furthermore, this amendment provided that the NHRC can inquire into complaints of violation of human rights or negligence in the prevention of such violation by a public servant also 'on a direction or order of any court'.

To implement the newly inserted FR right to primary education under Article 21A of the Constitution, the parliament enacted the Right of Children to Free and Compulsory Education Act 2009, which came into force on 1 April 2010.[89] Section 3 provides: 'Every child of the age of six to fourteen years shall have a right to free and compulsory education in a neighbourhood school till completion of elementary education.' Section 10 obligates every parent or guardian to admit his or her child to elementary education in the neighbourhood school. Schools are also prohibited from collecting any capitation fee and subjecting the child or his or her parents or guardian to any screening procedure.[90]

The National Rural Employment Guarantee Act 2005 (NREGA) is another landmark law that the government enacted in the last decade. The NREGA sought to enhance the livelihood security of people in rural areas of the country by providing 'at least one hundred days of guaranteed wage employment in every financial year to every household whose adult members volunteer to do unskilled manual work'.[91] It also makes provision for a daily unemployment allowance if the government fails to provide employment to an adult who is willing to work.[92] This law adopts a decentralised model of providing employment and encourages government bodies to devise development schemes or projects that can generate employment.

The Supreme Court in *Vishaka* v. *State of Rajasthan* had recognised sexual harassment of women in the workplace as a violation of FRs under Article 14 (the right to equality), Article 19(1)(g) (the right to carry on any profession, trade or business) and Article 21 (the right to life and liberty) of the Constitution.[93] The court relied on international conventions ratified by India to lay down detailed guidelines to prevent sexual harassment.[94] Although this judgment enhanced awareness of the problem of sexual harassment, it might not have gone far in preventing and redressing sexual harassment. More than a decade after the *Vishaka*

[89] The Supreme Court upheld the constitutional validity of this law, under which the state could require unaided private schools to reserve 25 per cent of seats for disadvantaged sections of society, in *Society for Un-aided Private Schools of Rajasthan* v. *Union of India*, Writ Petition No 95 of 2010 (12 April 2012).

[90] Right of Children to Free and Compulsory Education Act 2009, Section 13.

[91] National Rural Employment Guarantee Act 2005 (Act No 42 of 2005), Long Title.

[92] Ibid., Section 7.

[93] AIR 1997 SC 3011. See also *Apparel Export Promotion Council* v. *Chopra* AIR 1999 SC 625.

[94] AIR 1997 SC 3011, para. 7.

judgment, the government introduced the Protection of Women against Sexual Harassment at the Workplace Bill in the parliament in December 2010. The bill, which seeks to ensure a safe environment for women in the workplace, in both the public and the private sectors, whether organised or unorganised, requires every employer to establish an Internal Complaints Committee.[95]

Another law that deserves mention here is the Protection of Women from Domestic Violence Act, which came into force on 26 October 2006. Section 3 of the Act defines 'domestic violence' in a wide manner to include physical, sexual, verbal, emotional and economic abuse caused by an act or omission. Any woman who lives, or has lived, together in a shared household when they are related by consanguinity, by marriage or through a relationship in the nature of marriage, adoption or a joint family can seek protection against domestic violence. This law empowers magistrates to pass a wide range of protective, injunctive or monetary orders to protect aggrieved women.

In 2005, the government enacted the Right to Information Act to enable citizens to access the information under the control of public authorities so as to enhance transparency and accountability in governance. Any person may make a request to seek information in writing to the designated public information officer, who should provide the requested information (or reject the application on any specified ground) within thirty days.[96] Sections 8 and 9 of the Act prescribe several commonly accepted circumstances in which access to information may be denied. In recent years, this law has been increasingly used by non-governmental organisations (NGOs) and individuals to expose corruption or challenge maladministration.

In order to deal with cases related to environmental pollution in an effective and expeditious manner, in June 2010 the Indian parliament enacted the National Green Tribunal Act, which establishes a new quasi-judicial body comprising both judicial and expert administrative members at the national level.[97] The Green Tribunal will deal with all environment-related civil cases not only under the Environment Protection Act 1986, but also under water and air pollution laws and the laws dealing with forest conservation and biodiversity.[98]

In 2006, the government also introduced mandatory environmental-impact assessment for certain types of development project.[99] However, striking a balance

[95] Press Information Bureau, Government of India, 'Protection of Women against Sexual Harassment at Workplace Bill, 2010', 4 November 2010, http://pib.nic.in/newsite/erelease.aspx?relid=6678.

[96] Right to Information Act, Sections 6 and 7.

[97] The National Green Tribunal was formally constituted in October 2010, with Justice Patna (a former Supreme Court judge) being appointed as its first chairman. Ministry of Environment and Forests, 'National Green Tribunal', http://moef.nic.in/modules/recent-initiatives/NGT.

[98] National Green Tribunal Act 2010, Section 3.

[99] Ministry of Environment and Forests, 'Environmental clearances', http://moef.nic.in/modules/project-clearances/environment-clearances.

between preservation of the environment and economic development has not proved easy or uncontroversial, as the Vedanta and Posco project operations in the state of Orissa show.[100] The Planning Commission has set the following targets for the eleventh five-year plan: to increase forest and tree cover by five percentage points, to attain the WHO standards of air quality in all major cities by 2011–12, to treat all urban waste water by 2011–12 in order to clean river waters, and to increase energy efficiency by 20 per cent by 2016–17.[101]

Acquisition of land by the government for development purposes raises a number of human rights issues and has proved to be quite controversial in the recent past, e.g. the acquisition of land by the West Bengal government in Singur for Tata's car manufacturing unit.[102] Currently, this power is governed by the Land Acquisition Act of 1894. This law empowers the government to acquire private land 'for public purposes' or 'for companies' by following the procedure laid down therein and on payment of compensation. The government had introduced a bill in 2007 to address some of the criticisms levelled against its land acquisition practices.[103] The bill, however, lapsed. The government has now introduced the Land Acquisition, Rehabilitation and Resettlement Bill 2011.[104] This bill seeks

> to ensure a humane, participatory, informed, consultative and transparent process for land acquisition for industrialisation, development of essential infrastructural facilities and urbanisation with the least disturbance to the owners of the land and other affected families and provide just and fair compensation to the affected families whose land has been acquired.[105]

It also proposes 'to make adequate provisions for such affected persons for their rehabilitation and resettlement'.

There are several other bills on important issues that have been introduced and/or passed in parliament in the last few years. The National Food Security Bill 2013 seeks to provide adequate and safe food to the selected groups of people 'throughout the life cycle' (i.e. from pregnancy to old age). Special provisions are proposed to ensure a supply of free food to destitutes, homeless people, those affected by disaster or people living in starvation. If properly implemented, this law should go a long way toward providing food to a significant population that stands to be excluded from reaping the benefits of the free-market economy.

[100] See International Commission of Jurists (ICJ), *Access to Justice: Human Rights Abuses Involving Corporations – India* (Geneva: ICJ, 2011), pp. 44–7, 70–2.
[101] Planning Commission of India, *Mid-term Appraisal*, p. 453.
[102] See Suchita Mazumdar, 'Development through displacement: a study of Singur, West Bengal', in K.R. Gupta (ed.), *Special Economic Zones: Issues, Laws and Procedures* (New Delhi: Atlantic Publishers, 2008), p. 88.
[103] See ICJ, *Access to Justice*, p. 67. [104] Bill No 77 of 2011. [105] Ibid., Long Title.

India is a signatory to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In order to ratify this convention, the government introduced the Prevention of Torture Bill 2010.[106] This bill provides that any public servant who inflicts torture, or any person who inflicts torture with the consent or acquiescence of any public servant, shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to a fine. The bill has been passed by the Lok Sabha, the lower house of parliament, and is currently being considered by the upper house, the Rajya Sabha.

Since the 2003 Central Vigilance Commission Act did not seem to prove very effective in dealing with corruption by public servants,[107] one of the major demands of the anti-corruption movement led by Anna Hazare has been the enactment of a robust *lokpal* (ombudsman) law to deal with endemic corruption in the country. Since Hazare's team was not satisfied with the government's draft of the bill introduced in the parliament in August 2011,[108] they have come with their own Jan Lokpal Bill. The major areas of controversy relate to whether the *lokpal* should have the jurisdiction to deal with corruption allegations against the prime minister, members of parliament who take bribes to speak or vote in the parliament, all government servants, and judges. Difference of opinion also exists on the modus operandi for appointing the *lokpal* and its investigation and punishment powers. Subsequent to the report submitted by a parliamentary standing committee, the Lok Sabha passed a revised version of the Lokpal Bill in December 2011.[109] Nevertheless, the fate of the bill remains uncertain, because the opposition parties and NGOs consider it to be extremely weak. Although the Hazare movement has compelled the government to initiate the enactment of a robust law to fight corruption, it seems that civil society has overestimated the power and effect that the *lokpal* law can have on curbing corruption.

In the judiciary it is not uncommon to hear allegations of certain Supreme Court and high-court judges acting in an improper manner or indulging in some kind of corrupt behaviour. Nevertheless, apart from a virtually ineffective impeachment process laid down in the Constitution[110] and a voluntary code of conduct, no robust mechanism of accountability exists for judges of the higher judiciary. The Judicial Standards and Accountability Bill 2010 seeks to change this situation by proposing

[106] Bill No 58-C of 2010.

[107] In fact, in *Centre for PIL* v. *Union of India* (2011) 3 SCALE 148, the Supreme Court quashed the appointment of Mr P.J. Thomas as the Central Vigilance Commissioner.

[108] Lok Pal Bill 2011, http://164.100.24.219/BillsTexts/LSBillTexts/asintroduced/Lokpal%20%2039%200f%202011%20English.pdf.

[109] 'Lokpal Bill passed in Lok Sabha, but no constitutional status', NDTV News, 28 December 2011, www.ndtv.com/article/india/lokpal-bill-passed-in-lok-sabha-but-no-constitutional-status-161294.

[110] The Constitution of India, Arts. 124(4) and 217(1).

judicial standards expected of judges and requiring them to declare their assets.[111] It also proposes establishing the National Judicial Oversight Committee and a Complaints Scrutiny Panel in the Supreme Court and in each high court to deal with complaints of misbehaviour or incapacity against judges.

Landmark judicial decisions

Considering that the Supreme Court delivers hundreds of landmark judgments every year, it is next to impossible to review all such decisions. Apart from some affirmative-action cases that have already been noted above, selected cases concerning corruption and environmental pollution are analysed below.

Since the mid-1990s, the higher judiciary has been quite active in entertaining public-interest litigation (PIL) cases that question corruption by public servants.[112] This trend of trying to ensure good governance has continued in the twenty-first century.[113] In *Parkash Singh Badal* v. *State of Punjab*,[114] the Supreme Court ruled that former public servants cannot avail themselves of the protection of Section 19 of the Prevention of Corruption Act 1988, meaning thereby that no prior sanction of the government is required to prosecute them for indulging in corruption.

In 2008, there was a major scandal concerning the allotment of 2G licences to private telecom operators at a throwaway price, which has reportedly cost the government approximately US$39 billion.[115] This scam has led to the arrest of several politicians (including a union minister), bureaucrats and businessmen. After investigations by the Central Bureau of Investigation (CBI), the Centre for Public Interest Litigation filed a petition in the Supreme Court seeking a court-monitored investigation by the CBI, after their PIL on this matter was dismissed by the high court.[116] Since the government did not object to a 'court-monitored investigation', the Supreme Court did not feel the need to establish a special

[111] Bill No 136 of 2010.

[112] S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (New Delhi: Oxford University Press, 2002), pp. 140–7, 221–2. The Indian Supreme Court is a busy court. It disposed of 61,850 cases from May 2008 to April 2009 and 79,621 cases from May 2009 to April 2010: Supreme Court of India, 'Summary: types of matters in Supreme Court of India', http://supremecourtofindia.nic.in/outtoday/summary.pdf. Despite this, as of 1 November 2011, a total of 56,383 cases were pending before it. Of these pending cases, about 71 per cent were not ready for hearing on account of preliminaries being incomplete, e.g. process fee not paid, notice not yet served.

[113] A simple search of 'corruption' and 'prevention of corruption' of the Supreme Court decisions delivered between 1 January 2000 and 11 December 2011 and available online on its official website came up with 552 and 378 hits respectively. To provide context for these numbers, it is worth noting that the term 'sustainable development' got only forty-three hits during the same period. Judgment Information System of the Supreme Court, http://judis.nic.in/supremecourt/chejudis.asp.

[114] 2007 AIR 1274: (2007) 1 SCC 1.

[115] 'What is 2G spectrum scam?', NDTV, 5 May 2011, www.ndtv.com/article/india/what-is-2g-spectrum-scam-66418.

[116] Arising out of SLP (C) No 24873 of 2010 (decided on 16 December 2010).

investigation team; rather, the court gave detailed directions as to what the CBI should investigate and requested it to submit a report.[117] Later on, the central government opposed the continuous monitoring of investigation by the Supreme Court: it argued that once a charge sheet has been filed in the court, such monitoring should come to an end.[118] It is worth noting that in relation to corruption allegations concerning the 2010 Commonwealth Games, the court had declined to monitor the investigation conducted by the CBI.[119]

In the mid-1990s, the Supreme Court also developed the 'polluter-pays' principle and the 'precautionary principle' as part of sustainable-development jurisprudence.[120] It would be useful to revisit a case decided in 1996 on a writ petition filed in 1989 – *Indian Council for Enviro-Legal Action* v. *Union of India*[121] – because the court had to deal with this matter again in July 2011. In the instant case, the question before the Supreme Court was the nature of the remedy available for hazards to health and the environment caused by private chemical manufacturing plants in Bicchri village in the state of Rajasthan. Since the plants were operating without having obtained clearance from the Pollution Control Board, the court found them absolutely liable for the harm caused. It applied, moreover, the 'polluter-pays' principle and ruled that the responsibility for repairing the damage is that of the offending industry. The polluting companies were thus ordered to bear the costs of remedying the damage caused by their business activities. The Supreme Court also ordered closure of these polluting units because they had continuously violated the law, did not implement court orders and tried to conceal the sludge.

Although the court gave detailed directions in this case more than fifteen years ago, these directions were not complied with – something that the court noted in its July 2011 order.[122] Lamenting the abuse of process resorted to by the involved companies, the court directed them to pay 373,850,000 rupees (about US$7.4 million) along with compound interest since the original order date of November 1997 and also pay costs of 1 million rupees (about US$20,000). As analysed below,

[117] Ibid., paras. 14 and 15.

[118] J. Venkatesan, 'Don't cross Lakshman Rekha, Centre tells court', *The Hindu*, 22 September 2011, www.thehindu.com/news/national/article2476730.ece.

[119] 'Supreme Court refuses plea to monitor CBI probe into CWG scams', *Times of India*, 16 September 2011, http://articles.timesofindia.indiatimes.com/2011-09-16/india/30164628_1_cbi-probe- corruption-cases-gyan-sudha-misra.

[120] *Indian Council for Enviro-Legal Action* v. *Union of India* (1996) 3 SCC 212; *Vellore Citizen Welfare Forum* v. *Union of India* AIR 1996 SC 2715. See Harish Salve, 'Justice between generations: environment and social justice', in B.N. Kirpal et al. (eds.), *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (New Delhi: Oxford University Press, 2000), p. 360 at 369–73.

[121] *Indian Council for Enviro-Legal Action* v. *Union of India* (1996) 3 SCC 212.

[122] *Indian Council for Enviro-Legal Action* v. *Union of India*, IA Nos. 36 and 44 in Writ Petition (C) No 967 of 1989, decided on 18 July 2011, para. 4.

this case illustrates the limitations of judicial activism in overcoming challenges that should ideally be dealt with by the executive or the legislature in a democracy.

In *Narmada Bachao Andolan* v. *Union of India*,[123] while the Supreme Court declined to reduce the height of a dam on the Narmada river (as requested by the petitioner, an NGO that has led the mass movement against the construction of the dam), it gave directions to the concerned state governments to rehabilitate the project oustees. On other occasions, the court has directed the government to ensure that no hazardous industry is established within a ten-kilometre radius of certain reservoirs,[124] that there is an adequate supply of compressed natural gas for buses and taxis operating in Delhi,[125] that no unsustainable mining activity takes place near the Aravalli hill[126] and that illegally imported waste oil stored in containers is expeditiously destroyed by incineration.[127] In *Tirupur Dyeing Factory Owners Association* v. *Noyyal River Ayacutdars Protection Association*,[128] the court directed the association of dyeing factory owners to not cause any pollution to the Noyyal river in the state of Tamil Nadu, to bear the expenses of removing the sludge from the river and dam, and to pay compensation to people affected by pollutants.

In the facts and circumstances of a given case (i.e. deaths by starvation and/or suicide of employees have taken place by reason of non-payment of salary for a long time), the Supreme Court held that the state of Bihar is vicariously liable for payment of arrears of salaries to the employees of state-owned corporations, public-sector undertakings or statutory bodies. It also upheld the constitutional validity of a law that disqualified a person with more than two children from contesting, or holding, elective office in *panchayats*.[129]

In order to curb the menace of ragging in educational institutions, the Supreme Court issued several guidelines in 2001 in exercise of its power under Articles 32 and 142 of the Constitution.[130] The court offered a definition of ragging, prescribed detailed steps to curb this practice and laid down diverse modes of punishment that educational authorities may take. In November 2006, the court constituted the Raghavan Committee to suggest remedial measures to tackle the problem of ragging in educational institutions. In its order of 11 February 2009, the Supreme Court stated that ragging is a human rights abuse[131] and directed all state

[123] (2000) 10 SCC 664. The court recognised that there is an FR to drinking water.
[124] *AP Pollution Control Board (II)* v. *M.V. Nayudu* (2001) 2 SCC 62.
[125] *M.C. Mehta* v. *Union of India* 2002 AIR 1696: (2002) 4 SCC 356.
[126] *M.C. Mehta* v. *Union of India* (2004) 12 SCC 118. See also *M.C. Mehta* v. *Union of India* (2006) 11 SCC 582.
[127] *Research Foundation for Science Technology & Natural Resources Policy* v. *Union of India* AIR 2005 SC 1162.
[128] Civil Appeal No 6776 of 2009 (decided on 6 October 2009).
[129] *Kapila Hingoroni* v. *State of Bihar* (2003) 6 SCC 1; *Javed* v. *State of Haryana* (2003) 8 SCC 369.
[130] *Vishwa Jagriti Mission* v. *Central Government* AIR 2001 SC 2793.
[131] *University of Kerala* v. *Council of Principals of Colleges of Kerala*, arising out of SLP(C) 24295 of 2004, paras. 8 and 12.

governments as well as universities to act in accordance with the guidelines formulated by the committee.[132]

Article 19(1)(a) of the Constitution guarantees an FR to freedom of speech and expression. In *Harish Uppal* v. *Union of India*,[133] the court held that lawyers have no right to go on strike or make a call for boycott, since strikes interfere with administration of justice. It is the duty of every lawyer who has accepted a brief to attend trial and s/he cannot refuse to attend court because a boycott call is made by the Bar Association. Considering the number of pending cases before various courts and the frequency of strike calls by various associations of lawyers, this was a positive decision, also because it encouraged lawyers to resort to other means to raise their legitimate demands.

The last decision mentioned here is one delivered by the Delhi High Court in *Naz Foundation* v. *Government of NCT of Delhi*.[134] Naz Foundation challenged the constitutional validity of Section 377 of the Indian Penal Code 1860 – which criminalises homosexual acts as 'unnatural offences' – on the ground that criminalising consensual sexual acts between adults infringes FRs under Articles 14, 15, 19 and 21 of the Constitution. The high court observed that 'inclusiveness' in every aspect of life is one of the underlying tenets of the Constitution, and therefore 'Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is contrary to Articles 21, 14 and 15 of the Constitution'.[135] Rather than striking down Section 377 as unconstitutional, the high court narrowed down its scope so as to continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. An appeal against this decision is currently being heard by the Supreme Court.

Linking constitutional developments to challenges

Since the Indian government is mandated by the Constitution to take various initiatives to overcome the three challenges outlined above, it is logical to examine whether constitutional developments in the last decade have responded to these challenges. I have already alluded to how the Constitution makes extensive provisions to overcome socioeconomic inequalities. Reference to Article 38, a DP, will make this point clearer. It provides, among other things, that the state 'shall strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations'.[136]

[132] Ibid., para. 26. [133] 2003 AIR 739: (2003) 2 SCC 45.
[134] WP(C) No 7455/2001 (decided on 2 July 2009).
[135] Ibid., paras. 130 and 132. For a critique of this decision, see Mahendra P. Singh, 'Decriminalisation of homosexuality and the Constitution' (2009) 2 *NUJS Law Review* 361.
[136] Art. 38(2). See also Article 39 and other provisions in Parts III and IV of the Constitution.

Although the Constitution does not explicitly deal with governance gaps, two aspects are worth noting. First, a combined reading of Articles 12 and 13 means that all government actions, both legislative and executive, must conform to FRs – implying thereby that the government should not, for instance, treat similarly placed people in an unequal manner; indulge in arbitrary arrests or detentions; allow the practice of child labour, gender discrimination or untouchability; and discriminate against minorities. Second, Article 37 declares that DPs are 'fundamental in the governance of the country' and that the government is obliged to apply them in making laws. This provision again infuses good governance in the formulation of laws and arguably also, by implication, in their implementation.

As far as remedying environmental pollution is concerned, Article 48A provides that the state 'shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country'.[137] Even citizens have a fundamental duty 'to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures'.[138] The judiciary has also recognised the right to a pollution-free environment as an FR.[139]

How can one analyse the relationship between constitutional developments and the three challenges identified in this chapter? Two broad points can be made. First, there has been no dearth of executive, legislative and judicial measures tackling socio-economic inequalities, governance gaps and environmental pollution. However, despite these measures, not much progress has been made in overcoming the challenges. One should then ask questions about the implementation efficacy of the legislative and executive measures. The propriety and efficacy of judicial measures in strengthening good governance or promoting sustainable development should also be evaluated. As I have argued elsewhere, PIL should not be used by the Supreme Court to govern the country on a day-to-day basis by trying to do everything by itself – from legislating to monitoring the execution of laws and adjudicating disputes.[140] The Supreme Court lacks the means, resources, legitimacy and authority to fix all social problems. It is also ill-equipped to understand the complex socioeconomic conditions prevailing in the country. Nor does it fully understand the resource implications or practical feasibility of implementing its decisions.

Second, one can also note that whereas the executive and legislature have been more active in bridging socioeconomic inequalities, it is the judiciary that has shown greater zeal in fighting governance gaps. One explanation for this difference

[137] This provision was inserted by the Constitution (42nd Amendment) Act 1976.

[138] The Constitution of India, Art. 51(g).

[139] See, for example, *Vellore Citizens Welfare Forum* v. *Union of India* (1996) 5 SCC 647; *Narmada Bachao Andolan* v. *Union of India* (2000) 10 SCC 664.

[140] Surya Deva, 'Constitutional courts as positive legislators: the Indian experience' in Allan Brewer-Carias (ed.), *Constitutional Courts as Positive Legislatures: A Comparative Law Study* (New York: Cambridge University Press, 2011), p. 587.

may be that until the recent mass movement against corruption, only socio-economic inequalities were at the core of the political agenda and thus attracted the attention of politicians. The dysfunctional response of the executive and the legislature when handling corruption and environmental pollution has provided the judiciary an opportunity to fill this vacuum and occupy centre stage: the Supreme Court in particular has presented itself as an institution that has low (if not zero) tolerance of corruption and environmental pollution.

IV. CONCLUSION

This chapter has offered a critical review of the most salient constitutional developments that have taken place in India in the twenty-first century. I have tried to show how the post-2000 constitutional developments can be seen as a response to the three challenges faced by India: socioeconomic inequalities, governance gaps and environmental pollution. The executive, the legislature and the judiciary have responded to these challenges in different ways. Whereas the judiciary has directed its attention to tackling governance gaps and environmental pollution, the other two wings of government have primarily focused on removing socioeconomic inequalities. In the absence of noble constitutional values trickling down to the formulation and implementation of laws and policies, the judiciary has sought to 'wipe every tear from every eye'. In that process, it has ended up becoming an all-in-one governance institution tasked with ruling the country on a day-to-day basis. This course is not only unrealistic but also constitutionally impermissible and indefensible in a democracy. Rather than continuously usurping the power of the executive and the legislature, the Indian Supreme Court should help in infusing accountability in these vital institutions. At the same time, both the legislature and the executive should discharge their constitutional obligations more seriously.

16

The old order is dying, the new order is not yet born

Politics of constitution demolishing and constitution building in Nepal

*Yash Ghai**

For over two centuries Nepal has been governed by three upper-caste communities: Brahmins, Chhetris and Newars. Under the influence of Hinduism and the monarchy, 'untouchables' (Dalits, in modern parlance), women, indigenous peoples (Janajatis), and the people of the southern parts were marginalised. Struggles for democracy in the 1950s were less about social justice than about the access of the elite communities to the spoils and administration of the state, reflected in constitutional changes and fully achieved in the 1990 constitution. The Maoist rebellion in the mid-1990s seriously hampered the working of the constitution, although not the hegemony of the upper-caste communities. The uprising of the people against the king in April 2006 changed the context of that rebellion, accelerated the achievement of the ceasefire, and introduced a new constitutional agenda, based on social justice and the inclusion of the marginalised community in the affairs and institutions of the state. However, despite the overthrow of the monarchy and a multiparty government of parties committed to fundamental state restructuring, progress towards a new dispensation has been slow. A new constitution should have been adopted before April 2010 by an elected, representative constituent assembly. However, disagreement between, and among, the former elites, Maoists (still firmly in control of politics), and the marginalised communities, who are now conscious of their rights, has diverted attention from the constitution-making process, and Nepal is still left with an interim constitution.

The chapter begins by discussing the 1990 constitution (in force at the start of the twenty-first century) and the challenges to it. It then turns to the popular uprising against the monarchy in 2006, and reviews developments relating to the repeal of the constitution; the establishment of interim constitutional arrangements; and the

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procedure for making, and attempts to make, a new constitution. Finally, it reflects on the role of constitutions in conflict resolution and the outcomes of Nepal's struggles for a new constitution.

I. INTRODUCTION

On 1 June 2001, Nepal's popular monarch, King Birendra, with eight other members of his family, was murdered in mysterious circumstances, allegedly by his own son, Crown Prince Dipendra, who then shot himself (and died four days later, after a brief reign). He was succeeded by his less popular uncle, King Gyanendra, whose son, the new crown prince Paras, was even more detested. This family and national drama (the 'palace massacre') took place as the country was torn apart by the Maoist insurgency driven by demands for constitutional and social reform. The intrigues within the royal family which surfaced (with many Nepalis doubting whether Dipendra had killed his parents or could have shot himself) greatly delegitimised the monarchy. Meanwhile, the autocratic tendencies of King Gyanendra were manifested in his suspension of the Constitution and assumption of state powers inappropriate in a constitutional monarchy. Before the decade was over, he was dethroned and the monarchy abolished. This family drama was reflected in the demise of the old national political order and the struggle of Maoists, political parties and people's movements for a new order based on inclusive democracy, equal citizenship and social justice.

The decade in which these events took place, and which is the topic of this chapter, is by far the most important for constitutions and constitutionalism in Nepal since the establishment of a unified and centralised country in the latter half of the eighteenth century under the first monarch of Nepal, King Prithvi Narayan Shah, the ancestor of King Birendra. Then, there was no concept of a written constitution. The country was governed by some rules based on the norms, values and teachings of Hinduism prescribed in the *Dharamasastras* and by some rules based on the norms and values of local communities. Under these systems the king was to be a strong ruler, recognising the supremacy of the *dharma* (righteous conduct) as a form of higher law. The rules governing the *Raj dharma* (righteous conduct for the king) were to guide the king in his executive, legislative and judicial functions; the subjects in turn had obligations to uphold the king's authority.

The Hindu system envisaged no conflict if the king and the subjects upheld their respective statuses in society, observing their responsibilities and duties. There were no set methods to govern the relationship between subjects and the state, or to resolve conflicts of interest between them. The legal and the political systems and the various social and communal traditions that the king was bound by lacked any theory of rights that could form the basis of constitutionalism. The so-called *varna* (caste) system discriminated against a large segment of the people, especially those known then as untouchables. Women were subordinated to men, and

suffered various forms of discrimination and disadvantage. Brahmins dominated society, and by that token the state. Individuals and communities were defined by prescribed status and roles, not rights.

The start of the first decade of the twenty-first century posed the greatest threat to the monarchical and Brahmanic hegemony, which had by then shaped Nepal, to some extent, as a modern state. One could say with some plausibility that that process (with intimations of constitutionalism) began with Nepal's first written constitution in 1948 – a development influenced by the independence of India. That constitution was followed by four others (1951, 1959, 1962 and 1990) and an interim constitution in 2007. The conflict that led to these constitutions did not threaten the fundamentals of the state; in a sense they were a sort of Nepal Magna Carta, redefining the relationship between the king and the dominant castes – Brahmins, Chhetris and Newars – the beginnings of bourgeois democracy. The decade saw the first real challenge to the incipient and uncertain bourgeois democracy. It started with a civil war, the ostensible cause of which was the 1990 constitution and its rejection by the Maoists. By the end of the decade, the 1990 constitution had been buried, social conflict had become complex, society was disoriented and further fragmented, and the search for a new constitution and political order had failed.

Issues facing Nepal in the first decade of the twenty-first century include ten years of conflict in which about 17,800 people died and others had disappeared or were raped, dispossessed, displaced, bereaved or traumatised.[1] Nothing that underlay that conflict has been resolved, nor have most of the results of the conflict been addressed. Poverty; discrimination on the basis of caste and ethnicity, among other factors; marginalisation by reason of remoteness as well as by the multiple bases of discrimination; lack of acknowledgment of identity; and humiliation are among the factors that led some to embrace conflict. Ineffective government, internally displaced persons, frustrated ex-combatants, and a population suspended between cynicism and hope were among the consequences. And the period since the end of the conflict, and the signing of various accords, have done little to enhance faith in national institutions, or in leaders of any stripe, or a sense of national identity, while some low-level conflict continues.

Nepal is faced simultaneously with problems of nation building and of state building. For example, it is undergoing a transition from a hierarchical society, one in which one's place in society was dictated by gender, caste and ethnicity, to one in which human dignity and equality are the underlying principles. Most of these transitions implicate the 'national question' or the place of ethnic communities in the nation and state. Nepal is also undergoing transitions involving state building:

(a) from monarchy to republic,
(b) from authoritarianism to democracy and human rights,

[1] See nepalnews.com, 18 June 2012, for the exact number of casualties.

(c) from a hegemonic to a participatory system of governance,
(d) from a state underpinned by one dominant religion to secularism, and
(e) from a centralised unitary system to decentralisation and autonomy.

II. THE 1990 CONSTITUTION AND ITS DEMISE

The 1990 constitution of Nepal declared the country 'multi-ethnic and multi-lingual' (Article 4(1)). Yet it described the state as indivisible and sovereign and created a highly centralised government. It declared Hinduism the official religion and made Nepali in the Devanagari script the sole official language (Article 6(1)). The king, closely associated with a particular religion and social structure, was described as the symbol of the Nepalese nation and of the unity of the Nepalese people. The king thus personified the exclusionary nature of the state, oriented towards the majority religion, language and culture. The 'first-past-the-post' electoral system restricted marginalised communities' access to, and participation in, institutions of the state. The hegemony of the high-caste elite, in control of major political parties, was to be preserved by prohibition of sectarian and ethnic parties (Article 112(1) and proviso 3 of Article 12(2)). The people of Nepal were envisaged as a 'collectivity' and the assertion of identity on the basis of religion, caste or language was sidelined, rather than celebrated in any way (Article 2). A principal task of the state, as highlighted in the Preamble, was to promote 'amongst the people of Nepal the spirit of fraternity and the bond of unity on the basis of liberty and equality'.

Nepal was not unusual in using the state to establish the hegemony of a particular elite or community and to create the entire population in its image (and in this respect the Constitution carried on a much older tradition of state formation in Nepal[2]). However, in recent years the legitimacy and fairness of this 'nation-state' model has come under severe challenge in many parts of the world. The roots of discontent lie in the economic, social and political exclusion of communities and their members. There is a close correlation between poverty and ethnic minorities. Although a powerful case for a more inclusive state system is based on the threat to the culture of minority communities and therefore to their identity, self-respect and social orientation, many ethnic protests and insurgencies are less about the preservation of culture, religion or tradition than about lack of access to the state and the economy. In this way, ethnicity itself becomes a social and political force, a means to mobilise and organise members of the community, as its leaders advance claims for full participation in the affairs of the state.

[2] See, for example, Werner Levi, 'Government and politics in Nepal: I' (1951) 21(18) *Far Eastern Survey* 185; Werner Levi, 'Government and politics in Nepal: II' (1952) 22(1) *Far Eastern Survey* 5.

In the present times, states find it exceedingly hard to resist such claims, which now find support in both moral and legal theories, on the bases of justice and self-determination. The international community urges political leaders to agree on measures of self-government or power sharing, putting both the government and the insurgents under considerable pressure, as a way to resolve internal conflicts. Internal conflicts are fuelled by a deep sense of grievance and sustained by easy access to a supply of arms in international and regional markets. It is difficult today to suppress ethnic sentiments, demands and organisations – paradoxically, the more one attempts to suppress them, the stronger they become, with increasing capacity for disruption. In this context Nepal embarked on the making of a new constitution in 2006, with reconciliation among the warring political groups, on the one side Maoists and on the other 'democratic' parties committed to a parliamentary system of government, and the repeal of the 1990 constitution, then in force.

Nepal has changed much politically from the time the 1990 constitution was negotiated. At that time, the principal preoccupation of political parties was the enactment of a 'multiparty' parliamentary democracy and constitutional monarchy. Democracy was based on universal franchise, even though there were differences on the question who were entitled to be treated as citizens. There was broad agreement on the restrictions on the power of the king, on the inclusion of a bill of rights and directive principles to guide state policy, on the establishment of an independent judiciary with the power to enforce the Constitution as the supreme law of the country, and on independent institutions to discharge politically sensitive functions like elections and the audit of state accounts.

The Constitution was also preoccupied with maintaining the traditional social character of Nepal, as a Hindu state (Article 1). It stipulated that the king must be an 'adherent of Aryan Culture and Hindu Religion' – at the same time the king was the 'symbol of the Nepalese nation and the unity of the Nepalese people' (Article 27). The cow, sacred to Hindus, was declared the national animal and only Nepali in the Devanagari script was recognised as the official language. Proposals that Nepal should be declared a secular state, in which the state and religion are separate, and all religions are treated equally, were rejected. Even the freedom of religion was restricted in order to preserve the dominance of Hinduism and traditional practices (such as untouchability): what is guaranteed to a person is belief or practice as 'coming down to him hereditarily having regard to traditional practices' (which seems both to deter conversion as well as to safeguard practices which may be offensive to many, adherents and non-adherents alike). Proposals for minority rights, particularly related to their social advancement, were also rejected, because the commission that drafted the Constitution feared that their inclusion would promote ill feelings between different communities, threatening national unity. Instead the constitution enjoined the

government to promote 'amongst the people of Nepal the spirit of fraternity and the bond of unity on the basis of liberty and equality'.

The Constitution prohibited any political party based on religion, community, caste, tribe or regionality (Article 112(3)). An elaboration of this rule was the prohibition of any party which 'prejudicially restricts' membership on the basis of religion, caste, tribe, language or sex. Article 113(3) also prohibits a party if its 'name, objective, symbol or flag indicates it as belonging to any particular religion or being communal or of a nature tending to disintegrate the country'. Such was the concern with communal harmony that even the right to move freely in the country and to reside in any part of Nepal could be denied if it 'disturbs harmonious relations subsisting among various castes and communities' (Article 12(2)(4)). The unitary nature of Nepal and the centralisation of power accentuated the consequences of the existing dominance of traditional caste and regional elites, and denied others the possibility to determine policies at the local level or to use their language for official purposes.

The 1990 constitution may be categorised as liberal-democratic in form but hegemonic in practice. It sought to set out universal values and protect individual rights (particularly of speech, expression and association) and formal equality before the law; it provided universal franchise, the separation of powers, checks and balances, and other artefacts of democracy. It shared with many liberal states the tendency to equate the beliefs and culture of the elite with the universal values and aspirations of the total populace, and it is perhaps less tolerant of civil-society initiatives in the private sphere than constitutions in some liberal states. But by creating democratic space, putting parties under the pressure of competitive democracy and attempting to guarantee democratic rights of the people it opened up possibilities of progressive change. The question whether it had the potential to grow into a social and inclusive democracy, as its supporters claim, or to condemn various communities to a further period of marginalisation and exploitation (and the ultimate delegitimisation of the state), as its critics claim, must remain unresolved, interrupted as it was by the Maoist insurgency.

In a society which is neither liberal nor egalitarian, the formal equality that a constitution ensures is not sufficient to achieve these objectives. The Constitution was planted in social structures whose dominant values were antithetical to its liberal predispositions. Nor were political parties, its main beneficiaries, committed to a meaningful and participatory democracy; dominated by Brahmins and Chhetris (and to a lesser extent Newars), they entrenched themselves even more as bastions of caste and sectarian privilege. The lesson of its failure is that for a liberal constitution to succeed in a multiethnic society there must be real equality of opportunity and access. That requires proactive policies and affirmative action on the part of the state, the redistribution of resources, and the empowerment of the disadvantaged, particularly when the real problem is neither legal nor political, but social. The marginalised communities constitute a majority and have enjoyed

the right (and power) of franchise for a considerable period. Yet they have remained marginalised – because they have been socially dominated.

The aim of the Maoist insurgency (which started in 1996 and ended in 2006) was to challenge this dominance. At first the Maoist analysis of social injustices was based on the traditional communist concept of class domination. However, because this had little resonance with the dominated, it shifted its analysis to ethnic discrimination. Among the forty-point demands that heralded the insurgency, Maoists did include a new constitution drafted by the people's representatives; the declaration of secularism; rights of succession to property of women; an end to all kinds of exploitation and prejudice based on caste; abolition of the status of Dalits as untouchables and the prohibition of untouchability; the equal status of all languages, with education in the mother tongue up to middle high-school level; and decentralisation and local autonomy. These were not their central demands at the time, but by about the year 2000, formal links were established with Dalits, Janajatis and Madhesis (from the lowland strip bordering India), and various fronts were formed. Considerable emphasis was placed on a system of regional and ethnic autonomies and the right of cultural communities to keep or modify traditional religions and customs (perhaps inspired by Lenin's ideas).

Demise of the 1990 constitution

It is now generally acknowledged that certain communities and regions have been marginalised and excluded from the state, society and the economy. The mandate of the revolt by the people against the king's regime (described as Janaandolan II, or the second people's movement, as opposed to the first in 1989, which led to the 1990 constitution) is interpreted as a new regime of inclusion and social justice, to be introduced through a new constitution adopted by a constituent assembly. The first reference to the ethnic and minority issue was in the twelve-point agreement between the SPA (Seven Party Alliance) and the Communist Party of Nepal (Maoists) on 22 November 2005, which emphasised the need for full democracy 'to resolve problems related to class, caste, gender, region and so on of all sectors including the political, economic and cultural'. The term used to describe how this would be achieved was 'restructuring of the state'. The strategies for restructuring and the designation of its beneficiaries were elaborated in subsequent documents (particularly the Comprehensive Peace Accord, 21 November 2006) and consolidated in the interim constitution (IC), enacted on 15 January 2007.[3]

[3] Interrim Constitution of Nepal, 2063 (2007), as Amended, with English Translation, UNDP (2007), www.unmin.org.np/downloads/keydocs/Interim.Constitution.Bilingual.UNDP.pdf, visited 22 June 2010.

III. MAKING THE NEW CONSTITUTION

Interim arrangements

When a country emerges from a state of conflict and state institutions have either collapsed or been discredited, or are unacceptable to one or more groups, an interim constitution (IC) is usually adopted both to provide for the governance of the country until a new government under a new constitution is established and to set out the road map (goals, institutions and procedures) for the making of the new constitution. Sometimes the interim arrangements are short (when they focus on drafting a new document) and sometimes long (when they provide a complete constitutional framework for the interim period). Sometimes interim arrangements take the form of a political agreement among the key actors. In Nepal, the arrangements were long and elaborate, dominated by the Maoists and three of the seven political parties, with little room for Dalits, indigenous peoples, people of Tarai (the southern part of Nepal) and women, who had been instrumental in the removal of the authority of the king.

The making of the 2007 interim constitution

Although many differences divided civil-society leaders and Maoists, they were united on the way forward, through a constituent assembly and a broad social agenda. The king and the other parties wanted reform through parliament and within the more restrictive framework of the 1990 constitution. The advocates of the latter approach wanted only cautious reform, clarifying the legal provisions for the power of the king which had enabled the monarchy to intervene actively in politics. The proponents of the constituent assembly wanted new foundations of constitutional authority, derived directly from the people, a more inclusive participation than is possible in parliament, and the realisation of the vision of Nepal as a truly multiethnic, multi-religious and multi-lingual state with a strong commitment to social justice. Although at first all forces opposed to monarchy and authoritarianism (the seven political parties, including the Nepali Congress, the Communist Party of Nepal (UML) and smaller parties; the Maoists; and the disadvantaged groups) wanted democracy, their real positions surfaced soon enough to complicate the way forward. Maoists had a different conception of democracy from the other political parties while the disadvantaged groups (Dalits, indigenous peoples, women and people of Tarai – the lowland strip adjacent to India) wanted greater inclusion in all sectors of state and society.

The Maoists and the other parties had major differences on how to proceed to a new constitutional order once a ceasefire had been agreed. The seven parliamentary parties that had negotiated a political alliance with the Maoists in 2005 were in favour of using the 1990 constitution, with its unsuitable provisions modified or

deleted, as an IC. The House of Representatives would be restored (it had been dissolved by the king in 2002 after differences with the political parties), and Maoists would appoint additional members to it. These parties not only would enjoy a majority but also were comfortable with parliamentary politics. Maoists, on the other hand, were opposed to any association with the old regime, including the monarchy, and wanted instead a round table for decisions on the steps towards a new constitutional order (although few details on the round table were given), with a tailored IC. The hardline elements in the other parties, particularly the Nepali Congress, proceeded with the recall of the parliament, and the appointment of the leader of the Congress as prime minister, thus ending fourteen months of direct rule by the king. Consistent with the 1990 constitution, the recall of parliament and the appointment of the prime minister were announced by the king in a proclamation.[4]

Several changes were made to the Constitution by the reconvened parliament, stripping the powers of the king. The king's consent was not sought. Thus the modified older constitution became the IC (although doubts had been raised by some about the legality of this procedure), for the period leading up to the inclusion of Maoists in the legislature (and ultimately the government). The Maoists never joined this body or the cabinet, although it was agreed that the decisions of the cabinet and effectively the decisions of the House of Representatives would be in consultation and agreement with the Maoists. Concurrently, a three-member negotiating team was formed by both the government of Nepal and the Maoists, and a ceasefire agreement signed on 26 May 2006.The negotiators signed an eight-point agreement on 16 June. Included in the agreement was a request that the United Nations (UN) monitor the behaviour of the two armies and arms use; in addition, the agreement announced the decision to dissolve both the parliament and the government, with interim measures taking their place. A week later, the Interim Constitution Drafting Committee (ICDC) was formed to draw up a draft interim constitution. Chaired by a respected retired judge of the Supreme Court, the ICDC consisted largely of members of the upper class (contrary to the agenda of the Janaandolan). Under pressure, some members of the less advantaged communities were appointed, but the influence of the upper classes remained crucial. Although expected to be independent, its members were appointed by political parties and took instructions from them.

[4] The full statement by King Gyanendra was: 'Beloved Countrymen, Convinced that the source of State Authority and Sovereignty of the Kingdom of Nepal is inherent in the people of Nepal and cognizant of the spirit of the ongoing people's movement as well as to resolve the on-going violent conflict and other problems facing the country according to the road map of the agitating Seven Party Alliance, we, through this Proclamation, reinstate the House of Representatives which was dissolved on 22 May 2002 on the advice of the then Prime Minister in accordance with the Constitution of the Kingdom of Nepal-1990. We call upon the Seven Party Alliance to bear the responsibility of taking the nation on the path to national unity and prosperity, while ensuring permanent peace and safeguarding multiparty democracy. We also summon the session of the reinstated House of Representatives at the Sansad Bhawan, Singha Durbar at 1 P.M. on Friday, 28 April 2006.'

The ICDC published its proposals for the IC on 25 August. Some essential issues were missing – primarily because political parties were unable to agree on them. The people who had expected to be consulted were disappointed: although a large number of submissions were presented, the ICDC made little attempt to encourage the people to come forward with proposals, and no public hearings were held. Although the ICDC claimed to have studied the written submissions, the public was sceptical – and the submissions remained confidential, even though in some cases their authors gave them to the media.

The basis of the IC had been provided for in the Comprehensive Peace Agreement (CPA) between the political parties signed on 21 November 2006. It provided for a permanent ceasefire and a constituent assembly, to be elected in mid-June 2007. An IC would be enacted to provide the framework for the administration of the country as well as for the adoption of a new constitution. Nominees of the Maoists were to be added to the House of Representatives, in addition to another forty-eight members to broaden representation. The future of the monarchy would be resolved at the first meeting of the Constituent Assembly. The CPA committed the parties to the protection of human rights, transitional justice, the management of arms and the integration of armies under UN supervision, and social and economic transformation.

The IC that resulted from this enterprise was lengthy, with 167 articles and several schedules, including one annexing the CPA. This IC was inevitable given the Maoists' position that the 1990 constitution had to be repealed. The IC served two principal purposes. First, it became the foundation of government with detailed provisions on the executive, legislature and judiciary, as well as a few independent commissions. In this respect it bore a remarkable resemblance to the 1990 constitution. But it had a more elaborate bill of rights, responding to the concerns of the disadvantaged communities – and an even more substantial set of principles and aspirations. The second objective of the IC was to provide the framework for the making of the new constitution. Not much was said about the values of the new constitution, but it was implicit that the provisions for human rights and other principles which formed part of the transitional arrangements would be reflected in the new constitution. However, no agreement could be reached on two crucial issues: the future of the monarchy and the methods for electing the Constituent Assembly. The IC provided for no formal role for the monarchy.

The IC was approved by the House of Representatives (still operating under the 1990 constitution) and endorsed under the IC by the new parliament, which now consisted of all the members of that house and, additionally, nominees of the Maoists – the former in the morning and the latter in the afternoon, in both chambers with limited opposition (mostly from parties loyal to the monarchy). No fresh elections were held. The IC was amended several times before the election of the Constituent Assembly (CA).

Abolition of the monarchy

The IC granted the king's functions under the 1990 constitution to either the prime minister or the speaker, but did not abolish the monarchy. There were serious divisions among Maoists and other political parties on the future of the monarchy (although the latter had been pressed to agree to its eventual abolition). The third amendment to the IC provided that Nepal would become a republic, a task to be fulfilled by the first sitting of parliament. However, the next amendment itself declared Nepal a republic (in fact a 'federal democratic republic'), and created the post of president as head of state, a vice-president and a national trust to which royal property would be transferred. This left the IC the formal role of declaring Nepal a republic, as its first act.

The interim constitution

The IC follows the 1990 constitution in many respects. However, a ceremonial president replaces the king. The legislature is unicameral (having incorporated members of the previous second chamber in it – except for nominees of the king). Its title, 'legislature–parliament', is a compromise made necessary by, on the one hand, the Maoists' preference for the term 'legislature', and, on the other, the SPA's inclination toward the label 'parliament' (which the Maoists objected to as being too bourgeois). There were specific provisions for the disadvantaged communities, including autonomy for backward regions, local self-governing bodies and social inclusion in the army. The state became secular and there was a new definition of the nation which emphasised its diversity but committed the people to unity and common values.[5] More liberal, inclusionary rules defined citizenship. Consensus was emphasised (e.g. in the election of the president, prime minister, appointments to the cabinet, no vote of no confidence – until amended by the second amendment in June 2007).

The rules governing the administration of the state and the making of the new constitution show a clear intention of the major parties both to control the running of the country during the interim period and to dominate the constitution-making process.

Executive

With the transfer of the king's powers to the Council of Ministers, the executive was potentially very powerful. However, the principle of consensus and the differences

[5] 'Having multi-ethnic, multi-lingual, multi-religious, multi-cultural characteristics with common aspirations, and being committed to and united by a bond of allegiance to national independence, integrity, national interest and prosperity of Nepal, all the Nepali people collectively constitute the nation' (Art. 3).

among the parties (particularly the Maoists and the others), and constant demands for participation by the marginalised communities, meant that the executive was frequently divided, unable to agree on policy, and rather ineffective. This was compounded by the fact that whenever there were differences, the resolution was worked out in meetings of the key leaders of major parties, instead of the Council of Ministers, which also worked to the disadvantage of disadvantaged communities. There were also major differences about the control and management of the armed forces, and the integration of the Maoist army in the state army – and the ability and willingness of Maoists to undermine state authority whenever they did not get their way.

Legislature

The legislature had 330 members. Political parties or individuals who opposed the April 2006 reform movement were excluded from participation in the interim arrangements (IC, Article 45(2)). Only parties that were already in the interim legislature were allowed automatically to compete in the elections to the Constituent Assembly, while all other parties had to re-register by securing the signature of at least ten thousand voting supporters (Art. 142 (5)). For the first time a significant number of members of the disadvantaged communities were included, although they had been elected under a system which effectively gave power to the older parties to determine which individual would be elected (a kind of mixed member system). Unlike the executive, the legislature would give way to this new body.

The CA has responsibility both for the functions of an ordinary legislature – lawmaking, passing of the budget, and supervision of the government – and for those of a constituent body to make the new constitution. Whether the same body should be both legislature and constituent assembly has proved vexing in other countries as well, although the trend seems to be toward separate bodies (because different bases of representation apply to each, and also in order to avoid a lengthy period for the making of the constitution as parliamentary business can consume a fair bit of time). The rules that applied to the interim legislature were to be carried over to the Constituent Assembly, with, indeed, the authority to pass legislation that has long-term effects. In terms of the kind of legislation that can be passed, it is only with regard to the executive's sole responsibility vis-à-vis 'finance bills' that a distinction between different categories of legislation is drawn (Article 84(2)(3)).

The IC tried to balance the protagonists and opponents of a combined body by enabling the CA to set up a legislative-affairs committee (Article 83 (1)). This body (which could be as large as a hundred members or more) would deal with parliamentary and budgetary business, leaving other members to concentrate on making the constitution. The CA did not use this option and has now exceeded its original tenure by several years.

Drafting the new constitution

The IC is more detailed than the 1990 constitution, with new understandings of the nation and the state. Certain reforms had indeed been undertaken by the executive and the parliament, like affirmative action in public-service recruitment, but the period up to (and indeed after) the CA elections was used to resolve various transitional issues. The IC guarantees that the CA will 'formulate a new constitution by the people themselves' (Article 63).

Fundamental binding constitutional principles that underlie the mandate of the CA

There are considerable advantages in adopting fundamental constitutional principles in order to bind or guide the constitution-making process, in terms of the contents of the new constitution. Agreement on some fundamental principles had emerged from the 2006 Janaandolan, the Comprehensive Peace Agreement and the IC. The IC does not clearly specify that the CA is bound by any fundamental principles, except decentralisation of state power in the form of federalism. But the IC does contain many fundamental principles of state policy and directive principles, and it could be argued that these principles are intended to be the guidelines for the CA.

The most important of these principles pertains to the restructuring of the state, which appears in several places in the IC. For example, Article 138 calls for the 'inclusive, democratic and progressive restructuring of the state' to bring about 'an end to the discrimination based on class, caste, language, sex, culture, religion and region by eliminating the centralised and unitary form of the state'. Articles 33 and 34 contain many broad principles just as the Preamble of the IC does. Many of these articles are concerned with democracy, inclusiveness, participation, human rights and self-governance.

High-level commission on state restructuring

The IC also provided for a high-level commission to restructure the state (Article 138). In Nepal the term 'restructuring' refers to changes to the structure and institutions of government, measures necessary to advance historically disadvantaged communities, methods of governance to ensure a greater degree of public participation, etc., although it is not clear whether in Article 138 it means only the elimination of the 'centralised and unitary form of the state', a response to the demand for a federal or devolved system. It was expected that the commission would be composed of experts who would make recommendations for consideration by the CA. The commission was not established until after the third extension of the CA's tenure, the delay being due to the other major political parties' fear of losing control of the agenda to the Maoists.

Membership of the CA

The interim constitution failed to delineate clearly the type of electoral system that would determine the make-up of the CA. Although a mixed system of first-past-the-post (FPTP, electing 205 members, finally raised to 240), proportional representation (PR) (electing 204 members) and appointments (sixteen members selected by the Council of Ministers) is presented, the precise system is not included in the sense that it was not specified whether it was mixed member proportional or a parallel system. They eventually decided on the parallel system.[6] When nominating the FPTP candidates the parties should take 'the principle of inclusiveness into consideration' (Article 63(4)), whereas for the proportional part the parties should 'ensure the proportional representation of women, Dalit, oppressed tribes/indigenous tribes, backward regions, Madhesi and other groups'. The first requirement was too vague to be enforced but the second was further specified in the election law and enforced based upon census data. Most members came under the auspices of the older political parties (dominated by the same social class) – except for representation from the Tarai. Originally meant for distinguished persons and ethnic and indigenous groups who failed to be represented as a result of the elections, the twenty-six Council of Ministers appointments became another source of party patronage.

The CA finally consisted of 601 members. Such an assembly is undoubtedly very large and did not prove conducive to holding detailed discussions or to building consensus. To ensure proper participation in so large an assembly, careful thought needs to be given to the procedures that must be followed in the CA: the procedures should not unduly prolong the proceedings, and yet they should offer proper opportunities for debate – a goal which has eluded the IC. A number of committees were also established.

Public consultation and participation

As stated in the preamble, a primary goal of the IC is to guarantee 'the rights of the Nepali people to frame a constitution for themselves'. The preamble also guarantees persons qualified to vote the right to participate in 'free and impartial election of the Constituent Assembly in a fear-free environment'. The IC does not give the people the right to participate in the process of the CA, though the original version of the IC had provided for creating an awareness-raising committee to inform the public about the process and to collect their views and recommendations to assist in the drafting of the Constitution. However, the CA's road map and plans did include such consultations.

[6] Under this system, allocation of PR seats to parties takes no account of seats won in the constituencies.

Might the CA also require the new constitution to seek public approval in a referendum? Article 157 authorises the CA, through a vote of two-thirds of members present, to refer to a referendum matters of 'national importance' on which it is necessary to make a decision ('except as otherwise provided elsewhere in the Constitution'). The purpose and scope of this article is not immediately clear, but some clues regarding its function may be gleaned by noting where the article has been placed in the IC and by parsing the definition of what constitutes conditions under which the article can be used: the article is located in the chapter titled 'Miscellaneous', just before the article dealing with the 'power to remove difficulties', and the referendum is to deal with a matter not 'otherwise provided elsewhere in the Constitution'. This treatment accorded the article suggests that a referendum may be used for deciding the outcome of something unexpected, something sufficiently critical that it must be decided by the people, regardless of the cost or complexity of a referendum. As the procedures for the adoption of provisions of the new constitution are set out at some length in Part 7 of the IC, it is unlikely that the referendum can be used to resolve an issue relating to the new constitution. However, the general view seems to be that the referendum may be used on important issues that failed to win a two-thirds majority.

Decision-making by the CA

The IC establishes a very complex decision-making system. While determination of the future of the monarchy is kept simple – a majority verdict on whether to retain the institution or not – all remaining decisions on the new constitution must be adopted by unanimity (Article 70(2)). Failing such an outcome – even if there is just one vote in opposition – the procedures for finding a new compromise come into effect, requiring that the party political leaders engage in consultations with each other over the following fifteen days, with a further vote then taking place seven days after the completion of the consultation. If unanimous agreement is still not reached, the decision can be made when two-thirds of the members of the CA are present and if two-thirds of them vote in support of the original proposal (Article 70(6)). It is a cumbersome and time-consuming process, but the intentions seem to be honourable.

Time lines

On the question of the length of time allowed for the conclusion of the process, there are generally two opposing views. One is that constitution-making is so critical to the future of the country that it should not be rushed, that people must be given ample opportunities to participate in the process, and that there must be enough time provided for educating the people and consulting with them. Others argue that if too much time is allowed, the members of the CA,

not wanting to let go of the prestige and financial benefits of membership, will drag out the process as long as possible – and lose the opportunity for change. On the other hand, given the kinds of purpose served by the process (for example, the people and the representatives will have to educate themselves on the purpose and structure of the state and questions of public policy), the presumption must be against a rushed process. What constitutes a happy medium between too long and too short a process depends on the context, and on whether the people are knowledgeable enough to engage in the process. In the event the assessment must be that the process has taken too long – though not as a result of the process design.

The IC provided for up to two years for the CA to make and adopt the Constitution, but provided for a one-off extension for another six months, by a resolution of the CA, if the Constitution is not ready due to 'an emergency situation in the country' (Article 64). The extension would require a resolution passed by a simple majority of members present and voting. In the case of failure, the CA would automatically be dissolved.

The actual process in the CA

After elections to the CA had twice been postponed, voters went to the polls in April 2008. The Maoists emerged as the strongest political force, though without an overall majority. Girija Prasad Koirala (of the second-largest party, the Nepali Congress) made way for Pushpa Kamal Dahal (Prachanda), leader of the Maoist party, as prime minister. The CA sat first on 28 May 2008 and declared Nepal a republic and on 11 June 2008 the king left the royal palace, which was converted into a museum.

The IC gave the CA two years from its first sitting to complete the Constitution. Progress was extremely slow. Serious differences arose among the major parties, and the CA did not meet again for a considerable time after its inauguration. When it did meet, it was in its capacity as the legislature (having opted against setting up a special committee for this purpose). It did not address constitutional issues for a long time. Eventually it set up ten committees to deal with different matters: system of government, human rights, rights of minorities and federalism. The CA did not provide civic education (some of this was done by non-governmental organisations and by the UN), nor did it set up a commission for public consultation and and for making recommendations for a draft constitution. But the committees of the CA sought the views of the public by going round the country, with a questionnaire which the audience were requested to fill in at a meeting (though answers delivered later were accepted). The committees distributed a number of responses to each member of the committee for study and summary, and presumably in the expectation that members would use the responses, and other considerations, for drafting the relevant chapter of the constitution.

This process of consultation and analysis was conducted without a prior, plenary discussion by the CA. This meant that different committees were pursuing different agendas, and there was some overlap. But most committees worked diligently and were able to negotiate a set of recommendations. The recommendations were to go to the constitution committee, which was to harmonise and integrate them. For various reasons, principally continuing rivalries among the major political parties, that committee was able to achieve little. The CA failed to meet the two-year deadline for the new constitution and, at the last minute (28 May 2010), the IC was amended to extend its life. This delay resulted in the resignation of the prime minister, but it proved difficult to choose a successor – it took seven months and seventeen rounds of voting (and a secret pact between two political parties) to elect a successor. It took another three months to fill all the Cabinet posts. The twelve months were running out, without any real progress on the Constitution. Another extension, of six months (to November 2011), was voted. Disagreements among parties continued and another extension of six months was secured for the CA by an amendment of the IC (on 29 November 2011), after the resignation of the prime minister and the election of another. These extensions were made not in reliance on Article 64, as it could not be argued that the delay was due to an emergency. Instead the IC was amended each time. The requirement for amendment is relatively easy (see below).

Although by now considerable work had been done on the Constitution, at this point the Supreme Court declared that any further extension would be unconstitutional. Even this threat did not propel the leaders into making final decisions, and the CA was dissolved on 27 May 2012 without completing its task. Plans made by the CA's Public Opinion Co-ordinating Committee to consult the public on drafts had by then dwindled to nothing.

The lack of progress in concluding the Constitution is due almost entirely to the inability of leaders of major political parties to resolve differences, even when their deputies might have reached agreement. While it is true that integration of armies took longer than expected, more attention should have been paid to progress on the Constitution. As it is, the marginalised groups are likely to interpret the delays as lack of concern for constitutional recognition of their rights. Indeed, soon after the CA dissolution, a large number of Janajati leaders left the main parties to form their own, but have been divided over what ideological focus, other than inclusion and federalism, it should have, with the result that the new party is not yet in existence.[7]

The new government, led by Maoist leader Baburam Bhattarai, promised elections to the CA by November 2012, but that did not happen. In fact, Bhattarai had mooted the idea of recalling the dissolved CA briefly to promulgate a constitution

[7] 'New Janajati party likely before Tihar', *Kathmandu Post*, 11 October 2012.

when the party leaders agreed on it. He consulted six retired chief justices, who poured cold water on the idea, one of them telling him that the only possibility was to summon the CA as legislature to amend the IC to prepare for new elections. And even this step required consensus among the parties, under the IC.[8] It was reported that the other major parties would not talk to the Maoists other than about forming a government of national unity – a new government was eventually formed in March 2013.[9]

Amending the IC

An amendment of the IC can be passed by the CA sitting as the legislature if it is voted for by at least two-thirds of all the existing members. Since members of parties are subject to party discipline, and because all important decisions are taken by party leaders, the leaders of the three main parties have been able to change the IC at will, on several occasions, including, as we have seen, to extend the life of the CA. The use of this procedure has somewhat devalued the IC and its image as a supreme constitutional document.

Normally, an important function of an IC is to entrench decisions in the road map, and in this way to give to the people a sense of security and predictability about the process. While there is an advantage to having a flexible IC, that flexibility is only desirable for provisions that pertain to the interim arrangements rather than for the road map to the new constitution. A culture of changing the IC may allow more dissatisfied groups to advance their own claims for amendment. Yet it is unlikely that this 'flexibility' is good for the overall process – and so it has turned out to be, as shown above.

Nor is the procedure whereby these changes are negotiated good for the process. These negotiations took place between the four major political groups – Congress, UML, Maoists and Madhesi Morcha – on the one hand and the 'agitating' community on the other. Negotiations of this sort are inconsistent with the notion of a CA, where all interest groups get together to examine all claims and to settle differences. This mode of negotiation also gives the impression that it is within the authority and grace of these groups (for the most part representing the old elite) to make concessions to the marginalised communities – thus reinforcing forms of relations that are to be eliminated. This is, of course, not to deny the substantial following of these four groups, and that their views are bound to have major influence on CA decisions. However, the philosophy of the IC is inclusiveness.

[8] 'Former CJs brush off CA revival idea', *Kathmandu Post*, 29 October 2012. The wisdom of the CJs has not been followed later (see below).

[9] See the final paragraph below.

Excluded by these squabbles among the traditional elites, the response of these marginalised group (coming from all political parties) was to form a caucus to agree on provisions relevant to them and to lobby for them. At first this initiative was resisted by party leaders, but eventually most groups had their own caucus. Their lobbying was done in the thematic committees of the CA and seems to have been quite effective. The reports of committees are detailed, and responsive to concerns of the marginalised groups (there is some overlap and the occasional conflict, but nothing that could not be resolved). Unfortunately the committee to consider and harmonise the recommendations of the committee and produce the draft constitution for adoption by the plenum of the CA failed to complete its work (allegedly due to differences between its chair and the chair of the CA). This also hindered the civic education function that the CA had decided on.

The marginalised groups' strategy of caucus did achieve some success. It undoubtedly empowered them and gave them confidence to participate in the deliberations of the committees. But it had some problems. One was that there was no overall strategy for the marginalised groups, as each group formed its own committee without much effort at co-ordination. The party leaders themselves did little to have dialogue with the caucuses, to establish some consensus on what were in some cases very bold (and sometimes unrealistic or unwise) recommendations of the groups (such as the schemes for autonomy by the Janajatis). If the reports had been considered by the harmonising committee, it is very likely that with the keen eye of party leaders, major differences would have emerged between them and these groups, at a stage when consensus building would have been very difficult.

IV. REFLECTIONS ON A DECADE OF CONSTITUTIONAL DEBATE AND CHANGE

Why did Nepal need four extensions of its interim constitution (and not a constitution in sight)? Nepal's experience throws considerable light on the necessity, as well as the difficulties, of a political and constitutional settlement to end conflict. Even without the narrow-mindedness of its political leaders (and the intense politicisation of society by them) Nepal would have had difficulties developing a consensus on a new political and social order.

Nepal is not the only country which has had to search new foundations of state and society as it comes out of intense internal conflict. Perhaps even a majority of recent constitutions have been enacted in countries coming out of conflict. It is not possible in this chapter to discuss the issues raised by processes of ending conflict, making peace and establishing new constitutional order. Many scholars and practitioners argue that constitutions should be drafted and enacted only after the causes and consequences of conflict have ended. Those who disagree say that constitution-making is part of the process to end conflict and restore peace and

harmony. What can we learn from Nepal's experience? Debates on constitutional reform had preceded the armed conflict; it was their dissatisfaction with the 1990 constitution that led Maoists to their rebellion. Their agenda and that of the Janaandolan raised fundamental questions about the restructuring of the state and of society. A new constitution seemed indispensable if the agenda were to be fulfilled. But one can still raise the question whether Nepal rushed too quickly to constitution-making – and is now paying the price in the difficulties of agreeing on a new dispensation.

It is not as if Nepali politicians and others were not aware of the difficulties of moving from war to peace. I have mentioned that there was a general feeling that a comprehensive peace accord was necessary before turning to the constitution, and a CPA was indeed agreed, and was later incorporated in the IC. It is clear that constitution-making cannot start unless some disputed issues have been resolved, or the modality of doing so has been agreed. These include some of what we call the technical aspects of peace making, as well as fundamental issues of ideology. The former include the cessation of war, the disarming of militias, the disposal of arms, integration of armies, and the return of refugees and internally displaced persons.

Before the warring factions sit down to settle differences, it is important that they should build trust between them (by, among other things, developing an agenda for transitional justice), and agree on how the country is to be governed pending permanent arrangements. It cannot be said that this was not attempted in Nepal. Interventions by India and later the UN helped to bring the warring factions (in the form of Maoists and seven 'democratic' political parties) together and, in a series of meetings, agreements were negotiated which preceded serious consideration of the agenda and process of constitution-making. In the peace-making and agenda-setting processes, a question often arises: who are the appropriate and legitimate parties to negotiations? Often it is the warring factions, who resist the inclusion of civil society and other interests. One can see the dangers of overcrowding the agenda and making agreement difficult by including too many parties. Equally there may be a deficit of legitimacy if the negotiators are drawn from a narrow section of society. It may be, as I argue below, that this has happened in Nepal, especially given that the real trigger for change came not from these negotiators, but from the popular revolution brought about by the people (mostly from marginalised communities). The aspirations of this revolution were not reflected in the agreements that the parties made among themselves, and were not evident in earlier versions of the IC. They were reflected in the CPA, but under pressure from the marginalised communities. The delay in reaching agreement gave space and time to the marginalised groups to promote awareness among their members of their exploitation and oppression, and to sharpen their demands. It is as if two unconnected dialogues were going on: one between the political parties on the sharing of spoils, and the other among the oppressed.

In post-conflict situations, a principal purpose is reconciliation of parties in conflict as well as of communities which have been torn apart by the conflict. When the conflict arose out of the exploitation of one or more regions or sectors of society, the emphasis is on social justice and on inculcating self-confidence in marginalised groups.[10] When a country is coming out of dictatorship, the process should seek to empower people and educate them in the values and mechanisms of democracy. In almost all these cases, the country, or sections of the people, may be going through a crisis of identity, engaged in acts of redefining the nation and the state, balancing identities and concerns of different communities. Most of these objectives are best achieved through inclusive and participatory processes where all communities are able to advance and negotiate their claims – and a national consensus can emerge. Inclusiveness is often difficult, at least in the early stages of the process, when a country is coming out of internal conflict, as the parties to the conflict tend to dominate the process, with the help of their arms and their capacity to inflict violence and damage national peace and harmony. Such restricted participation often produces a narrow agenda, that of special concern to the warring factions, often ignoring fundamental problems of the country. Consequently, lasting solutions are unlikely to be found if others are not brought in as speedily as possible.

The Maoists and other parties paid great homage to the sovereignty of the people and the role of the people in the making of the new constitution. This fact was not surprising since they needed popular support to fight the monarchy, which had assumed the powers of the state. The twelve-point agreement invited the participation of the people in the movement for the restoration of democracy. Their later agreement to elect a constituent assembly to make the Constitution also seemed to reflect people's participation. Maoists had agitated for a CA for a long time; as representing the people, it was the only vehicle for progressive constitutional change. The Preamble of the IC refers to the 'basic rights of the Nepali people to frame a Constitution for themselves and to participate in the free and impartial election of the Constituent Assembly in a fear-free environment'.

But the framework for the making of the Constitution as established by the IC fell well short of these statements. The process of drafting the IC itself was exclusionary, secretive and dominated by political parties whose legitimacy was increasingly questioned (the original drafting committee consisted of a small number of Brahmin, male lawyers).

[10] This and the following paragraphs are taken from my article, 'Ethnic identity, participation and social justice: a new constitution for Nepal?' (2011) 18(3) *International Journal on Minority and Group Rights* 309. In the present chapter I have not had space to discuss social and economic issues underlying differences within Nepali society, which the article tries to tackle.

When it came to the crunch – that is, the composition of the CA – political parties made the decision directly themselves, and took refuge in an exclusionary system, using a voting system which would perpetuate the dominance of these parties. The delegates were to come into the CA through the goodwill of the parties and would be subject to their directions and discipline. Some amendments were made after protests (which included violence and even a mild degree of ethnic cleansing) by the excluded groups, but these have not satisfied them. Civil-society leaders have also been excluded (even though, in the rules whereby the old House of Representatives was transformed into the interim legislature, parties were obliged to bring in forty-eight members from civic, social and professional sectors as well as from the marginalised communities and regions, no party, with the partial exception of the Maoists, honoured this, merely bringing in more party people as an exercise in party patronage).

Nor was the procedure whereby these changes were negotiated with the 'agitating' marginalised communities good for the process of forming national identity or the national constitution. These negotiations took place between four major groups (but effectively only two), on the one hand, and the 'agitating' community on the other. This sort of bilateral negotiation was inconsistent with the notion of a CA where all interest groups get together to examine all claims and to settle differences. Neither these political groups nor the interim government had any electoral mandate or legitimacy to negotiate these claims. This mode of negotiation also gave the impression that it was within the authority and grace of these parties (for the most part representing the old elite) to make concessions to the marginalised communities – thus reinforcing the very forms of relations and hierarchies that were meant to be eliminated. And the willingness of the parties to change the constitution whenever it suited them, as well as to challenge publicly and vociferously the principles and procedures they had enshrined in it, debased the very idea of a constitution (and of agreements laboriously and earnestly negotiated). The resistance of these groups to the participation of the marginalised communities in decisions about the future or to acknowledge the legitimacy of the claims of these communities prompted vigorous development of ethnic politics and organisations (and disrupted the national unity of the Janaandolan). In this way the traditional elites, by their intransigence, created a situation which was their worst fear.

Smarting under their exclusion, Dalits, Janajatis, Madhesis and women formulated their own agenda and recommendations for the new constitution: fair and effective representation in state institutions, equality, affirmative action including 'reservations' or quotas, secure citizenship, a secular state, political recognition of the diversity of cultures and languages, and self-government through a federal-type autonomy, preferably based on language and ethnicity. Self-determination became the leading principle of state reorganisation for many of them, understood in terms of group rights. Understandably the elite hitherto in positions of

power was uneasy with this agenda, and not only because it would chip away at its privileges. Yet the factors and circumstances underlying this reform agenda are at the heart of Nepal's problems and will not go away. For stability and development, the constitution-making process must deal with them. Nepal faces the challenge of squaring the recognition of diversity with the benefits of the 'nation-state' (community cohesion, common values, willingness to sacrifice for the common good, prospects of democracy, a common public space, the expression and development of culture).

In a word, the constitution-making process is about developing and recognising a new identity which emphasises common bonds and interests while being respectful of difference. The new identity cannot be imposed but has to be negotiated. This is why the constitution-making process should have been a great deal more participatory and transparent than has been the case so far. To a considerable extent the political leadership of the elites nurtured during the former regime has been able to resist challenges to the social order of that regime, while pretending to engage in the search for a new order. They have effectively marginalised the CA but have been unable to resolve differences among themselves – about power, fairness and justice for all communities.

Why has Nepal had so much difficulty agreeing on a constitution? Maoists and other political parties had substantial agreement on political and social reforms, which the people supported, and the monarchy was disabled early. Was the problem merely the obduracy of the old political leaders and the intransigence of the new political players, the Maoists? Or was there a fundamental problem with the sequencing of peace and constitutional processes after conflict? Should the parties have waited until the all the peace issues were out of the way (disarmament, truth and reconciliation, the phasing out of the Maoist army and the integration of the national army, and firm agreement on the principles and procedures to make the constitution)? In a way all these matters were discussed at length and were dealt with in the IC and more conclusively in the CPA. At one level it seemed as if the SPA and Maoists had reached enough consensus to move on to a more definitive solution through a new constitution.

It is tempting to say that the real problem was the style of Nepali politics which has bedevilled the country since it first adopted the parliamentary system – the style of leadership and the constant intrigues to grab power, manifested in internal struggles for party leadership and external undermining of other parties for control of government. The re-entry of Maoists and the end of the monarchy introduced fluidity in power and politics that opened the field for competitive politics before the constitutional framework was agreed on. At every stage of the process each of the major parties was competing to displace the others, despite an early agreement on power sharing and working through consensus. The Janaandolan brought into being new social and political forces that the old style of exclusionary politics could not deal with. Major progress by these new forces required the

deployment of violence before concessions were made – not negotiated, which might have helped to lead to more realistic, therefore more lasting, solutions. The major parties repeatedly rejected well-tried strategies for dealing with divisions and disagreements in peace- and constitution-making. They squandered the opportunities opened up first in the drafting of the IC and then in the CA process. Having committed themselves to consensus building and power sharing, they both tried to exclude the newer players, and continued to fight each other. Ultimately they were not really inspired by the new vision of Nepal which animated the people. Perhaps the fundamental problem was that Nepali politics had revived before a suitable constitutional framework had been put in place.

At the end of 2013, Nepal is still without a constitution. The Interim Constitution is still in force. Endless negotiations between the major political parties which have controlled the entire political and constitutional process since the 2006 ceasefire agreement led to an agreement on the formation of a multi-party government, curiously under the chief justice of the Supreme Court, to remain in office while elections were held for a new CA to adopt a new constitution. To accommodate this, and various later developments, the Constitution has been amended by presidential decree (with Cabinet approval) several times. The elections, eventually held in November 2013, produced results which were very different from those in 2008: the Maoists, the Nepali Congress and the UML remain the largest parties, but the Maoists came well behind the other two in both the FPTP and the PR races. The CA promises to be significantly less inclusive than its predecessor. Only ten women, sixty-three Janajatis and two Dalits were elected to FPTP seats as opposed to thirty, seventy-four and seven in 2008. After some persuasion, the Maoists agreed to participate in the CA, but, it seems, not to form part of government (supporting the government by remaining in opposition, it was reported). The main parties reached a 'four-point agreement', one point of which is to complete the Constitution within a year. This agreement out of the way, the parties say they can finally proceed to identify the individuals to occupy the PR list seats, and presumably to form a government headed by the Congress, and the CA will be summoned – provided a new source of disagreement is resolved: whether the IC should be amended again to provide that the president rather than the prime minister will do the summoning. Meanwhile a splinter group of Maoists, with no seats, is saying that the CA should be dissolved to make way for a people's revolution, while the major Maoist party (UCPN-M), disconcerted by the realisation that the two other big parties hold well over two-thirds of the seats, is reported to be preparing to reconsider its 2006 commitment to peace. So little or nothing seems to have changed. Jockeying for position and status, or 'power games', continue to dominate the public sphere. Nepalis have reason to wonder whether they will have a new constitution, prepared by an inclusive and consultative process, any time soon.

17

The impact of internationalisation on national constitutions

*Cheryl Saunders**

I. INTRODUCTION

Over at least the past thirty years there has been a degree of convergence of the national constitutional systems of the world, for reasons that are attributable to a variety of transnational forces, which I characterise collectively as internationalisation. The purpose of this chapter is to examine more closely how internationalisation affects constitutional arrangements, the extent of its impact and the implications of this development for comparative constitutional law.

It is convenient here to provide a further explanation of the concept of internationalisation as I use it. On any view, internationalisation describes the impact of international and supra-national norms, institutions and processes on domestic constitutional arrangements.[1] Understood in this way, the international or any relevant supra-national sphere is treated as a distinct order and its relationship with domestic constitutional systems is vertical, although not necessarily hierarchical, in character and operation. I also use the term, however, to refer to the constitutional effects of a multitude of forms of horizontal interaction between states, between state institutions or between their respective peoples. There is considerable cross-fertilisation between the constitutional arrangements of states through, for example, judicial engagement or the practices compendiously described as transplants.[2]

* I am grateful to Anna Dziedzic for her assistance with this chapter, in both research and editing.

[1] This is the sense in which Albert Chen uses the term in 'International human rights law and domestic constitutional law: internationalisation of constitutional law in Hong Kong' (2009) 4 *National Taiwan University Law Review* 237 at 240. Cf Anne Peters, 'The globalization of state constitutions', in J. Nijman and A. Nollkaemper (eds.), *New Perspectives on the Divide between National and International Law* (Oxford: Oxford University Press, 2007), p. 251 at 252–4.

[2] Both the vertical and this horizontal relationship are described as 'transnational' in Jiunn-Rong Yeh and Wen-Chen Chang, 'The emergence of transnational constitutionalism: its

In addition, the thick network of dealings between peoples, irrespective of borders, which sometimes is characterised as globalisation, brings an array of influences to bear on the constitutional arrangements of states, which also encourage convergence.[3]

In the next section of this chapter, I examine the vertical and horizontal dimensions of internationalisation separately, in order to identify more precisely the various forces that bear on the constitutional arrangements of states.[4] This part confirms that convergence is occurring to a degree that differs from earlier times in global scope, intensity and substance. Closer scrutiny of the mechanisms of internationalisation in section III, however, shows that its effects are uneven and that convergence is incomplete. Internationalisation thus has reduced some differences between the constitutional arrangements of an increasing range of states, but has far from eradicated difference altogether. Each constitution remains distinctive in form and operation, in degrees that vary between states. While internationalisation has eased the comparative task by enhancing the chances of comparing like with like, it has also complicated it in other ways. One is by conveying an impression of similarity that may be misleading, causing false conclusions to be drawn. Another, ironically, is by contributing to the fragmentation of earlier patterns of influence. In section IV, I consider the implications of these conclusions for comparative method. In doing so, I reflect on the extent to which regional groupings offer comparative insights, with particular reference to the region of Asia.

II. INTERNATIONALISATION

The internationalisation of constitutional law is not new. From the latter half of the twentieth century, however, internationalisation gathered both pace and scope. It was stimulated initially by geopolitical events, including the aftermath of the Second World War and the collapse of communism in Europe from 1989. It has been a catalyst for waves of reaction against authoritarian rule in other regions of the world. Its effects have been augmented by the increase in the number of states: the membership of the United Nations has increased from the fifty-one original members in 1945 to 159 in 1990 and 193 in 2012.[5] And it has been fuelled by the

features, challenges and solutions' (2008) 27 *Penn State international Law Review* 89 at 92, 97–8.

[3] For use of the term 'globalisation' in the context of transnational economic activity see David S. Law, 'Globalization and the future of constitutional rights' (2008) 102 *Northwestern University Law Review* 1277. Cf Mark Tushnet, 'The inevitable globalization of international law' (2009) 49 *Virginia Journal of International Law* 985, where 'globalisation' is used to encompass all three processes identified here.

[4] In reality, however, the division is by no means so neat.

[5] United Nations, 'Growth in United Nations membership, 1945–present', www.un.org/en/members/growth.shtml (viewed 5 March 2012).

extraordinary revolutions in the ease of travel and communications technology. The almost instant availability of information about constitutional arrangements elsewhere, coupled with the ability to seek speedy clarification, is the *sine qua non* of the current phenomenon. Its impact is further enhanced by the creeping spread of English as a common language for this purpose, as a growing number of states make constitutional information available in English online.[6]

It is impossible to provide an exhaustive account of the complex effects of internationalisation on the constitutional arrangements of the states of the world, but it is also necessary to move beyond generalisation. The remainder of this part examines the principal paths along which internationalisation occurs and how they contribute to convergence.

Vertical dimensions of internationalisation

The impact of international arrangements on domestic constitutional systems is considerable and increasing. In their contribution to this volume, Yeh and Chang argue for a condition of 'transnational constitutionalism' in which international norms have 'complemented – or even been substituted for – domestic constitutions'.[7] It is attributable largely to international human rights norms and their supporting infrastructure, but other international institutions, including the International Monetary Fund, the World Bank and the World Trade Organization, also may influence constitutional ideas and standards.[8] Most states are parties to the core international human rights instruments, albeit with reservations, and thus formally subscribe to the values that they represent.[9] To the extent that international

[6] For example, the Constitutional Court of Korea: http://english.ccourt.go.kr/ (viewed 5 March 2012); the Judicial Yuan of the Republic of China: www.judicial.gov.tw/en/ (viewed 5 March 2012); the Constitutional Court of the Republic of Indonesia: www.mahkamahkonstitusi.go.id/index.php?page=website_eng.Home (viewed 5 March 2012); the Federal Constitutional Court of Germany: www.mahkamahkonstitusi.go.id/index.php?page=website_eng.Home (viewed 5 March 2012); the Constitutional Council of France: www.conseil-constitutionnel.fr/conseil-constitutionnel/english/homepage.14.html (viewed 5 March 2012).

[7] Jiunn-rong Yeh and Wen-Chen Chang, 'A decade of changing constitutionalism in Taiwan: transitional and transnational perspectives', Chapter 7 of this volume.

[8] For example, loans may be conditioned on measures to promote the rule of law: Ibrahim F. Shihata, *The World Bank in a Changing World* (Dordrecht: Martinus Nijhoff, 1991), Vol. 1, Chapter 2; Vol. 2, Chapters 3 and 4.

[9] International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966, in force 4 January 1969, 660 UNTS 195 (175 parties); International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 993 UNTS 3 (160 parties); International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171 (167 parties); Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979, in force 3 September 1981, 1249 UNTS 13 (187 parties); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

human rights standards affect domestic law, they have a homogenising effect on institutional arrangements as well as on substantive rights. Judicial independence and fair elections are examples.

International human rights norms penetrate domestic constitutional law in different ways. Anecdotally, there is a trend to give them direct effect in or through the constitution.[10] This practice may now be *de rigueur* for new constitutions. In any event, it is reinforced in the course of constitution-making processes that rely on assistance from the United Nations or international NGOs.[11] Even so, direct effect may be achieved in different ways with different consequences. Most obviously, in monist states international treaty commitments automatically take effect in domestic law as long as they are self-executing. Such states may make different decisions about which treaties are self-executing, however.[12] They may also have different understandings of the legal status of international norms vis-à-vis legislation and the national constitution.[13] Where international norms co-exist with domestic rights the question of supremacy may be important.

In addition, there are alternative techniques through which international human rights norms may be given a form of direct domestic effect. International instruments may provide the model on which the drafters of a domestic constitution draw, more or less faithfully; the reliance of the Hong Kong Bill of Rights on the International Covenant on Civil and Political Rights is a case in point.[14] In such cases, international norms take effect as constitutional provisions and there is unlikely to be a separate, competing suite of domestic human rights norms. In a variation, as in Argentina, a constitution may specifically confer constitutional effect on particular treaties, in terms that prescribe their relation to existing constitutional rights protections.[15]

Punishment, New York, 10 December 1984, in force 26 June 1987, 1465 UNTS 85 (150 parties); Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 1577 UNTS 3 (193 parties). For the particular position of Taiwan, see Yeh and Chang, Chapter 7 of this volume.

[10] Cf the findings on explicit references to international treaties in Tom Ginsburg, Svitlana Chernykh and Zachary Elkins, 'Commitment and diffusion: how and why national constitutions incorporate international law' (2008) *University of Illinois Law Review* 201, at 207–10.

[11] Guidance Note of the Secretary-General, 'United Nations Assistance to Constitution-Making Processes', identifying 'compliance with international norms and standards' as the second principle guiding UN assistance, with the need for 'national ownership' as the third.

[12] Curtis A. Bradley, 'Self-execution and treaty duality' (2008) *2009 Supreme Court Review* 131.

[13] Compare, for example, the position in the Netherlands and France: Constitution of the Kingdom of the Netherlands 1983, Art. 94; Constitution of the Fifth French Republic 1958, Art. 55: see generally, Antonio Cassese, *International Law*, 2nd edn (Oxford: Oxford University Press, 2005), pp. 228–31.

[14] Chen, 'International human rights law', at 243–6. The transcription may not, of course, be entirely faithful: in relation to various Latin American states see Janet Koven Levit, 'The constitutionalization of human rights in Argentina: problem or promise?' (1998–9) 37 *Columbia Journal of Transnational Law* 281, at 298–9.

[15] Constitution of the Argentine Republic, Art. 75(22).

There are many dualist states in which international treaties do not apply directly in domestic law until transformed by domestic legislation. In these cases, convergence does not depend solely on transformation, although transformation is the most likely avenue for it. Even without transformation, international commitments may influence government policy, systemically or through the suasion of human rights advocates, including national human rights institutions applying the Paris Principles.[16] International commitments may also affect the understanding of domestic law through, for example, the interpretation of legislation or the constitution and the development of other legal norms with encouragement, in the case of Commonwealth states, from the Bangalore Principles.[17] The manner and extent of the harmonisation of domestic with international law vary between states and represent an intricate branch of public law.[18]

Once incorporated into domestic law, by whatever means, international norms necessarily rely on local institutions for application and interpretation. There is potential for fragmentation at this point, but there are also forces of convergence at work. International mechanisms to encourage domestic compliance include monitoring committees, UN rapporteurs and optional protocols establishing bodies to handle individual complaints.[19] And while national courts have varying views about the relevance of international law to the interpretation of domestic constitutional norms, recourse to international legal sources is inevitable where domestic norms are sourced in human rights treaties.[20]

Supra-national or regional arrangements in Europe, Africa and the Americas potentially penetrate the constitutional systems of their member states more deeply.[21] The human rights standards they prescribe are interpreted and applied

[16] Principles Relating to the Status of National Institutions (The Paris Principles). See, for example, Nadirsyah Hosen, 'Promoting democracy and finding the right direction: a review of major constitutional developments in Indonesia', Chapter 14 of this volume; and Jongcheol Kim, 'Upgrading constitutionalism: the ups and downs of constitutional developments in South Korea since 2000', Chapter 4 of this volume.

[17] These resulted from a Judicial Colloquium on the Domestic Application of International Human Rights Norms in Bangalore, India, 24–6 February 1988. (1989) 1 *African Journal of International and Comparative Law/RADIC* 345, [6]–[7]. The practice applies outside the Commonwealth: in relation to Indonesia, for example, see Nadirsyah Hosen's chapter in this volume (Chapter 14).

[18] For a detailed examination of the position in one country, Australia, see Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Oxford: Hart Publishing, 2011), pp. 104–6.

[19] Office of the United Nations High Commissioner for Human Rights, 'The core international human rights instruments and their monitoring bodies', www2.ohchr.org/english/law (viewed 6 March 2012).

[20] And sometimes expressly mandated: Constitution of South Africa, sec. 39(1)(b).

[21] For Europe, see Helen Keller and Alec Stone Sweet, 'Assessing the impact of the ECHR on national legal systems', in Helen Keller and Alec Stone Sweet (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2008), p. 677. For Africa, see Charles Manga Fombad, 'Internationalisation of

by a shared regional court, whose decisions are highly persuasive.[22] The more sophisticated the institutional framework for shared decision-making about rights and governance more generally, the greater the likelihood of cross-fertilisation of constitutional principles and practices. Procedures for accession may provide another catalyst for convergence, as applicant states adapt their constitutional arrangements to meet membership criteria. Compliance may be reinforced in other ways as well: the work of the Venice Commission in advising on questions about democracy and human rights arising from the constitutions of the member states of the Council of Europe is a significant case in point.[23] As the example of the European Union shows, regional arrangements can become integrated to a point where they are at least quasi-constitutional in character. Their impact is not necessarily confined to the region alone, but may flow on to other states in the zone of influence of individual members.[24]

Horizontal dimensions of internationalisation

The horizontal movement of constitutional phenomena happens in many ways and for different reasons. Most obviously, states look beyond their own borders for solutions to common problems that seem effective and attractive. The spread of freedom-of-information legislation; the institution of the ombudsman; proportional electoral systems; independent election and audit commissions; and a host of other institutions, principles and practices can be attributed to this process.[25] Equally, the interaction of peoples is a catalyst for horizontal convergence across jurisdictional lines.[26] Ideas about democracy, liberty, equality of opportunity and human rights are disseminated naturally by these means. The globalisation of commerce, trade

constitutional law and constitutionalism in Africa' (2012) 60 *American Journal of Comparative Law* 439 at especially 458–63.

[22] Europe: Council of Europe and the European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 222; America: Organization of American States and the American Convention on Human Rights, San José, 22 November 1969, in force 18 July 1978, 1144 UNTS 123; Africa: African Union and African [Banjul] Charter on Human and Peoples' Rights, Nairobi, 27 June 1981, entered into force 21 October 1986, 1520 UNTS 217.

[23] European Commission for Democracy through Law (Venice Commission), www.venice.coe.int (viewed 6 March 2012).

[24] Venice Commission members outside the Council of Europe include the Republic of Korea, Chile, Mexico, Tunisia and Morocco. European arrangements also may indirectly affect the public law of Commonwealth countries through the medium of the United Kingdom.

[25] See Yeh and Chang, 'A decade of changing constitutionalism in Taiwan: transitional and transnational perspectives', Chapter 7 of this volume.

[26] For example, domestic social movements tap into transnational networks of NGOs and other non-state actors, to bring both domestic and international pressures to bear on state policies: Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders* (Ithaca: Cornell University Press, 1998), pp. 12–16.

and investment exerts pressure on other aspects of constitutional arrangements, including impartial adjudication of disputes, guarantees against expropriation, and the transparency and predictability associated with the rule of law.[27]

There are two more specific avenues through which horizontal convergence may occur. One encompasses different types of bilateral and multilateral arrangements between states. Sanctions imposed by one state on another may be designed to influence constitutional behaviour.[28] Development assistance from a donor to a recipient state also may have constitutional implications. Assistance programmes may be conditioned on general political reforms: progress with participatory democracy, human rights and the rule of law.[29] Assistance of a different kind offers scholarships to undertake tertiary study in the donor country, with the potential to influence the constitutional views of future leaders. Assistance to a recipient state that is making or substantially changing its constitution may affect the choices that are made more directly. The experts provided, field trips offered, NGOs funded and other forms of technical advice made available are likely to promote the constitutional experience of the donor state, whether deliberately or not. There is growing awareness of the need for donors to be sensitive to questions of local ownership and constitutional fit in providing assistance for these purposes.[30] For the moment, however, this remains an avenue for the adoption or adaptation across jurisdictional lines of constitutional institutions and principles ranging from the relationship between executive and legislature to the manner of a federal division of power to the form of constitutional review.

A second discrete avenue for constitutional transfers of a different kind is constitutional adjudication. Reference to decisions of foreign courts, which United States scholar Vicki Jackson has termed judicial 'engagement',[31] is most common in cases involving constitutional rights protection but is familiar also in other contexts: the meaning of judicial independence, the propriety of prospective overruling, and the unconstitutionality of constitutional amendments, to identify only a few. Engagement is a deliberately neutral term and its outcomes

[27] Such 'bottom-up' forces are examined in Tushnet, 'Inevitable globalization', drawing on Law, 'Globalization and the future of constitutional rights'.

[28] Under the Australian Autonomous Sanctions Act 2011, for example, travel, financial and other sanctions can be imposed on selected countries for purposes that may include promotion of democracy and the rule of law: Craig Emerson MP, 'Australia removes 82 people from the Zimbabwe sanctions list', press release, 5 March 2012, www.foreignminister.gov.au/releases/2012/ce_mr_120305.html (viewed 6 March 2012).

[29] Andrea Schmitz, 'Conditionality in development aid policy', SWP Research Paper 7 (Berlin 2006), 8–10, www.swp-berlin.org/fileadmin/contents/products/research_papers/2006_RP07_smz_ks.pdf (viewed 7 March 2012).

[30] International IDEA, 'Constitution building after conflict: external support for a sovereign process', policy paper, May 2011, www.idea.int/publications/constitution-building-after-conflict/index.cfm (viewed 7 March 2012).

[31] Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2010).

may vary. Foreign decisions are at best persuasive, foreign experience may be rejected as inapplicable, and a principle applied by a foreign court is likely to be adapted to local needs. The extent to which judges refer to legal experience outside their own jurisdiction also differs greatly, between states in which the practice is common and those in which it is extremely rare. Judicial engagement may be increasing, but differences in judicial practice make it difficult to trace in a reliable way. Some courts provide elaborate reasons for decisions in which they canvass foreign legal experience even if, finally, they reject it. Others may take foreign experience into account but do not habitually publish lengthy reasons so that the opportunity to acknowledge a foreign source explicitly does not arise.[32]

Procedural differences between courts also affect the way in which foreign experience is introduced during deliberation, the point at which it is taken into account in reasoning and its source. In some it is introduced through the arguments of parties and other interested groups where wider intervention is allowed.[33] In others it is introduced by the judge rapporteur during the deliberative phase or by a decision of the court to call on comparative expertise.[34] Knowledge of foreign experience may be held within a court as a result of the education path of individual judges,[35] through the presence of foreign clerks,[36] through international networks in which judges participate,[37] as a result of the presence of foreign judges on a court[38] or through an avenue of appeal to a foreign court.[39] Historically there have been multiple spheres of influence within which judicial engagement occurs, centred on the more prominent constitutional courts of the world.[40] While this remains the case, internationalisation

[32] See Cheryl Saunders, 'Judicial engagement with comparative law', in Tom Ginsburg and Rosalind Dixon (eds.), *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011), p. 571.

[33] Tushnet, 'Inevitable globalization', at 989. The scope of the right to intervene varies. In Australia, for example, it is relatively restricted: Susan Kenny, 'Interveners and amici curiae' (1998) 20 *Adelaide Law Review* 159.

[34] Saunders, 'Judicial engagement with comparative law', at 579.

[35] David S. Law and Wen-Chen Chang, 'The limits of global judicial dialogue' (2011) 86 *Washington Law Review* 523 at 558.

[36] For example, the Constitutional Court of South Africa has a specific clerkship programme for foreign clerks.

[37] Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004), pp. 65–103.

[38] For example, foreign judges may sit on the Hong Kong Court of Final Appeal; courts in some Pacific island nations; and the Constitutional Court of Bosnia and Herzegovina.

[39] For example, an appeal lies to the High Court of Australia from the Supreme Court of Nauru. See also the proposed arrangements for appeals from Honduras to the Privy Council in London: *The Guardian*, 22 July 2012, www.guardian.co.uk/law/2012/jul/22/honduras-london-courts.

[40] These have included at least the Constitutional Court of Germany, the Supreme Court of the United States and the House of Lords.

is increasing their number, bringing them in closer contact with each other and cutting across lines of traditional influence in ways that may encourage convergence of both principle and process.[41]

Convergence

The varied processes of internationalisation thus contribute to a significant degree of constitutional convergence. This section provides an overview of what might be said to have converged as a result of this complex phenomenon and of the extent to which it has done so. It draws on the perception that any constitutional system operates at multiple levels: constitutional theory, principles or values, text and structure, institutional design, and operation in practice.

First, there is evident convergence of constitutional principles at the highest level of generality: democracy, the rule of law, separation of powers, judicial independence, human rights protection and constitutionalism, including the need for constitutional control through judicial review or a mechanism of some other kind. Convergence at this level can co-exist with significant constitutional difference at others. Its effect, nevertheless, is to narrow the range of competing constitutional models.

Second, there is considerable convergence of human rights standards, extending beyond the particular rights that attract protection to the terms in which they are expressed and their meaning and scope. The widespread reliance on proportionality to determine the legality of a limitation on a constitutional right is an example, which nevertheless may take different form in different states.[42] The expansion of constitutional rights-bearers beyond citizens to people also reflects the ascendancy of international human rights norms.[43]

Third, there is now a relatively standard suite of familiar options from which to choose for key aspects of constitutional design.[44] Options for the form of government typically range between presidentialism on the one hand and parliamentary government on the other, with two relatively distinct approaches to semi-presidentialism in between.[45] Electoral systems are variations on proportional

[41] Others that now exercise considerable influence, if they did not do so before, include the Supreme Court of Canada, the Constitutional Court of South Africa, the Supreme Court of India and the Constitutional Court of Korea. The list is not intended to be exhaustive.

[42] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012), Chapter 7.

[43] David Weissbrodt, 'Prevention of discrimination: the rights of non-citizens', Report of the Special Rapporteur to the United Nations Subcommission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2003/23.

[44] For a critique, see Günter Frankenberg, 'Constitutional transfer: the IKEA theory revisited' (2010) 8 *International Journal of Constitutional Law* 563.

[45] Matthew Søberg Shugart, 'Semi-presidential systems: dual executive and mixed authority patterns' (2005) 3 *French Politics* 323.

representation and majority voting.[46] The functions of constitutional review tend to be conferred either on a specialist constitutional court or on superior courts in the general court system, offering a choice between concentrated and diffuse review.[47] Most federations are variants on US dualism or German integration.[48] States are prepared to mix and match different options from different constitutional traditions in ways that may further blur systemic distinctions.[49]

Finally, some convergence of constitutional theory is apparent too, although its extent is difficult to measure. In some instances it is attributable to dissemination of the constitutional principles that the theories seek to explain. The widespread acceptance that constitutional legitimacy rests on the authority of the people of the state can be explained in this way.[50] In other instances, shared constitutional theories reflect similar tensions within constitutional systems following institutional convergence. The debate on the limits of judicial interpretation is ubiquitous, for example, and follows broadly familiar lines.[51] In a few cases, theories forged in response to historical conditions in one constitutional tradition prove attractive in others once they become known. The burgeoning interest in theories about the limits of a constitutional amending power is a case in point.[52] The phenomenon of the internationalisation of constitutional law encourages the emergence of new theories that transcend jurisdictional boundaries, seeking to explain the relevance of the international sphere either by rationalising its interface with the state or by reconceiving constitutionalism.[53]

[46] Andrew Reynolds, Ben Reilly and Andrew Ellis, *Electoral System Design: The New International IDEA Handbook* (Stockholm: International Institute for Democracy and Electoral Assistance, 2005), pp. 27–9.

[47] Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1989), pp. 133–49.

[48] Cheryl Saunders, 'Comparative conclusions', in Katy Le Roy and Cheryl Saunders (eds.), *Legislative, Executive and Judicial Governance in Federal Countries* (Montreal and Kingston: McGill-Queen's University Press, 2006), p. 361.

[49] For example, the South African Constitution combines an integrated federal system and specialist constitutional court along German lines with a British-style parliamentary system. New Zealand, also with a British-style parliamentary system, has modelled its electoral system on proportional representation in Germany.

[50] Although the identity of 'the people' may be understood in different ways: see Martin Loughlin and Neil Walker, *The Paradox of Constitutionalism: Constituent Power and Constituent Form* (Oxford: Oxford University Press, 2007), pp. 5–6.

[51] In this volume, it is a theme in the chapters on the Republic of Korea, Indonesia, India and the Philippines and also, with reverse emphasis, in the chapters on Japan, Singapore and Malaysia.

[52] The 'basic structure doctrine', which implies a limitation on the power to amend constitutional provisions considered to be fundamental to the constitution, was developed by the Supreme Court of India drawing on constitutional theory and practice developed in Germany: *Kesavananda* v. *Kerala* 1973 SCR 1461.

[53] See Mattias Kumm, 'The cosmopolitan turn in constitutionalism: on the relationship between constitutionalism in and beyond the state', in Jeffrey L. Dunoff and Joel P. Trachtman (eds.), *Ruling the World? International Law, Global Governance,*

Even if claims of constitutional convergence are taken at face value, however, convergence is not comprehensive. Most obviously, internationalisation affects some segments of constitutions to a greater extent than others. Rights protection has converged significantly, institutional design less so. Further, internationalisation affects different states to different degrees. It has a profound impact on the constitutional arrangements of two types of state: those in a tightly integrated supranational arrangement such as the European Union and developing countries in receipt of significant international assistance or subject to sanctions of certain kinds. Its effect on other states is much less dramatic. Finally, internationalisation is always partial, in the sense that it never applies evenly to an entire constitutional system, much less to the context in which it is embedded, so that an appearance of convergence may be misleading. Even where a constitutional text is identical with that of another state or of an international instrument it may nevertheless operate differently for a host of reasons, including differences in the institutional arrangements through which the constitution is interpreted and takes effect or differences in values affecting priorities. Conversely, general constitutional principles on which there is broad agreement may be understood in different ways and may operate differently once translated into action in a particular textual and institutional framework: separation of powers and judicial independence are examples. The distinction between constitutional form and operation is familiar in comparative constitutional law and is considered further in the next part.

III. FORCES FOR DIFFERENCE

The function of constitutions

The extent of constitutional convergence in consequence of internationalisation cannot be assessed without taking account of some competing forces. One, which is the subject of this section, stems from the functions that constitutions perform. Two others, which are examined in the sections that follow, point first to the changes in the operation of a principle, institution or legal rule when it moves from one context to another, and second to the effects of the powerful continuing influence of states.

A constitution is made for a particular state and, in most cases, by the institutions and people of that state, albeit with varying degrees of international influence.[54] At the very least, a constitution prescribes in general terms the institutions through

Constitutionalism (Cambridge: Cambridge University Press, 2009), p. 258; Anne Peters, 'Humanity as the A and Ω of sovereignty' (2009) 20 *European Journal of International Law* 513, arguing that the principle of humanity is now the basis of state sovereignty.

[54] See in this volume (Chapter 3) Sakaguchi's analysis of the making of the constitution of Japan in conditions of occupation.

which the state is to be governed and the framework of principle within which they are required to operate. These choices now generally are shaped by a desire for a system of government based on democracy and respect for human rights. But for such a form of government to be effective, both the institutions and the limits on them must be adapted to the social, political and economic circumstances of the state, acceptable to its leaders and consistent with the expectations of its people. Of course, the attitudes of both elites and people are influenced by principles and practices elsewhere, made more familiar through internationalisation. But they are moulded by other influences, which include the state's own history and current conditions. Local ownership of a constitution, which is critical to its implementation in practice, also is affected by such influences.[55] The effectiveness of a constitution that is not responsive to the context in which it rests is inevitably impaired.

Most constitutions perform additional functions that further reinforce their local credentials. A variety of terms describes these, the use of which, tellingly, differs between constitutional traditions. The meanings are not identical. They have in common, however, the role of a constitution as a symbol of the state that strengthens the bonds of allegiance.

The idea of the expressivist function of a constitution was popularised by Mark Tushnet in an influential article in 1999.[56] The use of the term in this context is consistent with more general theories about the expressive function of law. Just as law 'makes statements' as well as rules and thus may both influence and regulate behaviour, so too may constitutions: indeed, their status as the highest legal norm makes them peculiarly suited to the purpose.[57] In performing this function, constitutions may reflect the nature or values of a society in ways that shape and reinforce the society's understanding of itself and that also may distinguish it from others, in its own eyes and in those of the rest of the world. Insofar as, in doing so, it strengthens social cohesion, the constitution's role may also be described as constitutive or integrative: both terms that place greater emphasis on the constitutional function of creating and uniting a people. Following Frankenberg, the constitutive function of a constitution may 'imagine' political unity and collective identity by simultaneously drawing on and shaping the cultural context in which the constitution operates.[58] In somewhat similar vein, the integrative function of a constitution supports the process described

[55] In this volume, see the efforts made to ensure that Islamic political parties supported the inclusion of human rights provisions in Indonesia's constitution (Chapter 14); the compromises made in Hong Kong in relation to direct election by universal suffrage (Chapter 8); and the concerns expressed by Yash Ghai regarding the need for greater public participation in the current constitution-making process in Nepal (Chapter 16).

[56] Mark Tushnet, 'The possibilities of comparative constitutional law' (1999) 108 *Yale Law Journal* 1225; see also Mark Tushnet, *Weak Courts, Strong Rights* (Princeton: Princeton University Press, 2008), Chapter 1.

[57] Cass Sunstein, 'On the expressive function of law' (1996) 144 *University of Pennsylvania Law Review* 2021.

[58] Frankenberg, 'Comparing constitutions', 450.

by Dieter Grimm whereby 'the members of a polity develop a communal spirit and a collective identity that differentiates them from other polities'.[59] As a theoretical explanation of the transition from people to citizens, this way of understanding a constitution may be losing its appeal, in a world in which the aspiration for democracy and human rights increasingly is shared.[60] This dimension of the constitutional function nevertheless has practical importance in societies that lack the cohesive forces of ethnicity, language and religion, which also are a feature of our times. It bears a greater burden still in societies with deep internal divisions that provide a source of tension that threaten the continued viability of the state.[61] In contemporary practice it is reinforced by the emphasis on the need for an inclusive process of constitution-making, as a means of developing and strengthening the cohesion of members of the polity as citizens of the state.[62]

Lack of consistency in the literature in the use of these and related terms makes some additional observations necessary. First, they refer here to the functions of constitutions as forces that compete with those of internationalisation. They do not assume the outcome of this competition or describe the characteristics of constitutions. These terms thus should be distinguished from, for example, particularism or exceptionalism, insofar as these claim national constitutional difference or imply that it must always be so. I note in passing that expressivism may be used also in a methodological sense, to encapsulate the way in which constitutional comparison can enable self-understanding, in the light of practice elsewhere.[63] Again, that is not the sense in which I use it here, although there is some synergy between the two.

Second, the expressivist function is achieved in a variety of ways. The most obvious is through use of a constitutional preamble to recite shared history, identify shared values and expound shared goals.[64] Thus in this volume the chapter on India identifies the preamble as embodying the framers' 'vision of "wiping every tear from every eye"'.[65] But expressivism is a function of the whole constitution that may be manifested in, for example, the selection and composition of institutions,

[59] Dieter Grimm, 'Integration by constitution' (2005) 3 *International Journal of Constitutional Law* 193 at 193.

[60] Mattias Mahlmann, 'Constitutional identity and the politics of homogeneity' (2005) 6 *German Law Journal* 307.

[61] Sujit Choudhry, 'Old imperial dilemmas and the new nation-building: constitutive constitutional politics in multinational polities' (2005) 37 *Connecticut Law Review* 933.

[62] Vivian Hart, 'Democratic constitution making' (2003) Special Report 107 *United States Institute of Peace* 3.

[63] Tushnet, 'The possibilities of comparative constitutional law', at 1307–8; Tushnet, *Weak Courts, Strong Rights*, at p. 12.

[64] Liav Orgad, 'The preamble in constitutional interpretation' (2010) 8 *International Journal of Constitutional Law* 714 at 731–7.

[65] Surya Deva, 'The Indian constitution in the twenty-first century: the continuing quest for empowerment, good governance and sustainability', Chapter 15 of this volume.

the detail of non-centralisation, the inclusion or omission of particular rights, constitutional architecture, and the nuance of text.[66] The protection of language rights in Canada,[67] the right to secede in Ethiopia,[68] the centrality of dignity in Germany,[69] the particular conception of secularism in India,[70] and the role of the referendum in Switzerland[71] are merely some of the more obvious examples. The expressivist function of a constitution may be more significant in some states than in others in which, for example, social cohesion is a given, the constitution is overshadowed by other norms of a cultural kind[72] or the circumstances were such that little thought was given to the symbolic potential of the constitution at the time it was made. However phlegmatic an instrument appears, however, a degree of expressivism is likely to be latent and in any event to emerge over time, if the constitution endures.

Third, the expressivist message of a constitution is not static. There may be a contested understanding of it at any particular point in time, within the polity itself. The debate in Japan over the significance of Article 9 is a case in point.[73] In any event, understanding is likely to evolve over time, with changes in the context in which the constitution operates. By way of example, the theory of transitional constitutionalism developed by Yeh and Chang assumes a change in self-understanding of a kind in which the constitution necessarily plays a role.[74] In a different vein, the self-understanding of the Australian polity, as reflected in the virtually unamended national constitution, has changed over a hundred-year period from that of a union of states to that of a single people governed under federal arrangements.[75] It may be that the expressivist understanding of many constitutions now involves the perception of the polity as a member of a supra-national or the international community, as both contribution and response to the processes of internationalisation.[76] Even so, however, it constitutes only part of the picture, which for the moment does not dominate the rest.

[66] Frankenberg, 'Comparing constitutions', 456–8.
[67] Constitution Act 1867, s 133; Canadian Charter of Rights and Freedoms 1982, ss 16–23.
[68] Constitution of the Federal Democratic Republic of Ethiopia 1995, Art. 39.
[69] Basic Law for the Federal Republic of Germany 1949, Art. 1.
[70] Vijayashri Sripati, 'Toward fifty years of constitutionalism and fundamental rights in India: looking back to see ahead (1950–2000)' (1998) 14 *American University International Law Review* 413 at 425–7.
[71] Federal Constitution of the Swiss Confederation, Arts. 138–42.
[72] See in this volume (Chapter 10) the discussion of the constitution of Thailand by Kevin Tan.
[73] See Sakaguchi, 'Major constitutional developments in Japan in the first decade of the twenty-first century', Chapter 3 of this volume.
[74] Jiunn-Rong Yeh and Wen-Chen Chang, 'The changing landscapes of modern constitutionalism: transitional perspective' (2009) 4 *National Taiwan University Law Review* 145 at 165–6.
[75] *Victoria* v. *Commonwealth* (1971) 122 CLR 353, 396 (Windeyer J).
[76] Albert Chen argues that this is the case in Hong Kong: 'International human rights law and domestic constitutional law', 271–4.

Insights from transplant theory

A second force that militates against convergence through internationalisation in practice, if not in form, is the influence of context on the operation of constitutional arrangements.

At one level the point is obvious. The operation of any institution, legal principle or rule is affected by the context in which it operates. Context includes any facet of a state that may impinge on the operation of the constitutional system, broadly conceived. Thus, to take an example, the operation in practice of a parliamentary system of government is highly dependent on disparate factors that include history and tradition, population size, geography, political party configuration, the electoral system and the rest of the constitutional framework. The institution of Parliament in the United Kingdom, in consequence, not only operates somewhat differently from its counterparts in, say, Australia or India, but also has more gravitas as a component of the constitutional system, despite the similarity of the template on which all three are based.

Additional insights into the relevance of this phenomenon for present purposes can be derived from the theory and practice of legal transplants.[77] I use the term 'transplant' here loosely,[78] to cover movement of any constitutional institution or doctrine between states, whether gradual or sudden, voluntary or involuntary, wholesale or specific, and irrespective of whether the prime movers are constitution-makers, peace-builders, occupiers, legislators, governments, judges, scholars or influential actors of any other kind.[79]

The early literature on legal transplants featured a famous divide between Alan Watson, who argued that they were both common and 'socially easy', and Otto Kahn-Freund, who warned of the limits of transferability.[80] The debate took place almost entirely by reference to private law, however. Watson appears specifically to have excepted constitutions from it, quoting an observation by Milsom that '[s]ocieties largely invent their constitutions'.[81] Kahn-Freund also placed

[77] For a recent critique of the use of the 'transplant' metaphor, both generally and with particular reference to 'globalization', see Sheldon Bernard Lyke, '*Brown* abroad: an empirical analysis of foreign judicial citation and the metaphor of cosmopolitan conversation' (2012) 45 *Vanderbilt Journal of Transnational Law* 83 at 124–7.

[78] Cf William Twining, 'Social science and the diffusion of law' (2005) 32 *Journal of Law and Society* 203 at 207.

[79] A range of other terms is also in use to describe one or more of these types, including transfer, reception, adaptation, circulation, diffusion, migration, importation, engagement, conversation and 'irritant': Gunther Teubner, 'Legal irritants: good faith in British law or how unifying law ends up in new divergences' (1998) 61 *Modern Law Review* 11.

[80] Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd edn (first published 1974) (Athens: University of Georgia Press, 1993); Otto Kahn-Freund, 'On uses and misuses of comparative law' (1974) 37 *Modern Law Review* 1.

[81] S.F.C. Milsom, *Historical Foundations of the Common Law* (London: Butterworths, 1969), p. ix, quoted in Watson, *Legal Transplants*, p. 8, see also 98. Watson argued, at p. 96, with

constitutions at the 'organic' end of a spectrum at which laws are 'most resistant to transplantation'.[82]

In fact, transplants are equally familiar in the field of public law and more so in conditions of internationalisation. The very notion of a written constitution is, originally, a transplant. The characteristics of public law that gave both Watson and Kahn-Freund pause are relevant nevertheless. Constitutions that last tend to evolve organically, so that their components are interdependent on each other. Any constitution necessarily is affected by the political, legal, economic and social circumstances of the state in which it functions. Many constitutions are deeply rooted in the history of the state, symbolising its most significant national moments. The greater the expectations that are placed on constitutions for the purposes of state building, transformation and the reconciliation of deep social divisions, the greater their dependence on context is likely to be.

While these features of public law do not preclude transplants, they suggest that whatever challenges transplants present may be more pronounced. Some fail or partly fail, however failure is identified. Many are likely to have consequences that were not predicted. All can be expected to operate in a manner that is distinctive in some degree. This is so even when an institution or principle is adopted from elsewhere without modification; and a fortiori where it is adapted to meet local needs or preferences. The differences in the operation of the institution of diffuse judicial review, chronicled in several of the chapters in this volume, are a case in point. In Japan, judicial review is typically restrained, although, as Sakaguchi notes, its effects may often be achieved through statutory construction.[83] In India, the Supreme Court is famously activist, with a caseload of more than 60,000 cases a year.[84] In Singapore, courts display 'reticence', employing what Thio describes as a 'dialogical rather than confrontational attitude'.[85] These variations are attributable to a range of factors: legal and social culture; practical circumstances; and the interdependence of judicial review with other constitutional institutions including, in Japan, the Cabinet Legislation Bureau.[86]

There is a question that can be noted only in passing about whether the same challenges apply to the incorporation of international human rights standards into domestic law. The presumed universality of international human rights norms

reference to private law that 'usually legal rules are not peculiarly devised for the particular society in which they now operate and ... that this is not a matter for great concern'.

[82] Kahn-Freund, 'On uses and misuses of comparative law', at 17.

[83] Sakaguchi, 'Major constitutional developments in Japan in the first decade of the twenty-first century', Chapter 3 of this volume.

[84] Deva, 'The Indian constitution in the twenty-first century: the continuing quest for empowerment, good governance and sustainability', Chapter 15 of this volume.

[85] Thio Li-Ann, '"We are feeling our way forward, step by step": the continuing Singapore experiment in the construction of communitarian constitutionalism in the twenty-first century's first decade', Chapter 12 of this volume.

[86] Sakaguchi, 'Major constitutional developments in Japan', Chapter 3 of this volume.

suggests not. A transplant effect in any event is likely to be tempered by the typical generality of such norms and the growing availability of mechanisms for their interpretation and enforcement at the international level. On the other hand, the same generality leaves scope for variation in understanding and implementing human rights standards between states, even in the absence of formal reservations. The inevitability of some variation in the implementation of human rights norms even between states with significant levels of shared culture is recognised in the use of a margin of appreciation in some regional human rights systems.[87] There is room for further empirical work in this area.

One final issue arises from the way in which transplants occur in conditions of internationalisation. Alan Watson argued that the process of transplants in private law was framed by legal culture: the way lawmakers think about law, 'their knowledge of concepts, and the parameters of legal reasoning that they have unconsciously set for themselves'.[88] Another obvious criterion was 'accessibility' in terms of form, language and availability.[89] As long as these admittedly loose constraints pertain, transplants tend to occur between jurisdictions that are familiar to each other, limiting the degree of variation and the element of surprise. Under present conditions, however, the possibilities are expanded. A vastly wider range of constitutional arrangements is accessible; sometimes in the disembodied form of 'systematic information on design options', complete with 'constitutional text'.[90] And the choice is not always made by local lawmakers, acting alone or sometimes at all. The involvement of international actors in constitution-making processes further diversifies the likely range of transplants and makes it less likely that local context and culture will be taken into account. While, again, more detailed work is needed,[91] it seems logical to suppose that, even if this form of internationalisation is a catalyst for superficial convergence, there may be considerable operational diversity underneath.

Countertrends

The link between constitutions and the state with which, typically, each is associated is the source of a dynamic that not only explains the kinds of difference in form and operation described in the two earlier parts but that also, in some cases, actively works against convergence.

[87] European Court of Human Rights; African Commission on Human and Peoples' Rights: *Prince* v. *South Africa* 255/02, 7 December 2004.

[88] Watson, *Legal Transplants*, at p. 108.

[89] Ibid., at pp. 112–13.

[90] Constitutionmaking.org: www.constitutionmaking.org/default.html (viewed 23 March 2012).

[91] For recent empirical work, see Benedikt Goderis and Mila Versteeg, 'The transnational origins of constitutions: an empirical investigation', 6th Annual Conference on Empirical Legal Studies (2011) http://ssrn.com/abstract=1865724 (viewed 7 May 2012).

The effective erosion of state autonomy is a familiar reality that shows every sign of continuing. Even so, the degree of loss is variable and states remain a significant and powerful force. They are still the primary actors in the international legal system. Recognition as a state involves, at least in principle, a system of government that applies across the territory of the state and the allegiance of its people.[92] In practice, a system of government is framed by a constitution of some kind, which is likely to be conceived or to develop as a symbol of the state. The institutions through which government is delivered derive their legitimacy from the people of the state. Typically, they are conscious of their significance and jealous of their prerogatives.

Of course, it may be that state actors seek international approval, embrace international values and adopt institutions, rules and practices that further convergence on international norms. But states themselves make these choices and capitulation is unlikely to be complete. Experience in Europe, where regional integration is relatively advanced, illustrates the point. The margin of appreciation that has emerged through the jurisprudence of the European Court of Human Rights leaves national authorities what may be considerable 'room to manoeuvre' in meeting the requirements of the European Convention on Human Rights where circumstances suggest that the judgments in question are better made at the national level.[93] Despite criticism, this and a companion doctrine of subsidiarity arguably have been strengthened in recent years by decisions in sensitive cases[94] and by agreement in the Brighton Declaration to explicitly mention both doctrines in a revised preamble to the European Convention.[95] In a parallel development, the national jurisprudence of key European states has placed 'counter-limits' of various kinds on the primacy of European law vis-à-vis aspects of domestic constitutional law,[96] sparking new theoretical inquiry into the 'pluralism' of constitutional law.[97] Time will tell whether this represents merely a transitional phase in the progressive integration of the member states of the Union. For the moment, however, it serves to demonstrate both the continued vitality of underlying state

[92] Christopher W. Morris, *An Essay on the Modern State* (Cambridge: Cambridge University Press, 1998).

[93] Dean Speilmann, 'Allowing the right margin – the European Court of Human Rights and the national margin of appreciation doctrine: waiver or subsidiarity of European review?', CELS Working Paper Series, February 2012.

[94] For example, *Lautsi* v. *Italy* [GC], no 30814/06, 18 March 2011 (crucifixes in state schools in Italy); *Austin* v. *UK* [GC], no 39692/09, 15 March 2012 (police 'kettling' following the London riots); *Von Hannover* v. *Germany (No 2)*, no 40660/08, 7 February 2012 (balancing freedom of expression and respect for private life).

[95] High Level Conference on the Future of the European Court of Human Rights Brighton Declaration, 19, 20 April 2012, Clause 12, www.coe.int/en/20120419-brighton-declaration (viewed 30 July 2012).

[96] Luis I. Gordillo, *Interlocking Constitutions* (Oxford: Hart Publishing, 2012), pp. 19–39.

[97] Neil Walker, 'The idea of constitutional pluralism', (2002) 65 *Modern Law Review* 317.

constitutional traditions and the willingness of state institutions to assert their own authority in the face of supra-nationalisation.

Other less ambiguous signs of a backlash against internationalisation are provided by regional arrangements, with longer-term implications for the extent of convergence. Examples include the threat by Venezuela to withdraw from the Inter-American Commission on Human Rights;[98] the effective dissolution of the South African Development Community Tribunal following refusal by Zimbabwe to comply with a ruling;[99] and a variety of debates within the United Kingdom about how to enhance the 'Britishness' of the Human Rights Act 1998, whether by enacting a specifically UK bill of rights,[100] reducing the effective authority of the European Court of Human Rights,[101] or accepting that a 'distinctively British human rights jurisprudence' might develop through the interpretation of the rights incorporated by the Human Rights Act.[102] The UK has always been exceptional in the European rights debate and the motives of both Venezuela and Zimbabwe are questionable in these cases. Nevertheless, collectively, these examples point to nascent discomfort of some member states with supra-national rights protection in three different regions of the world. Similar reactions can be traced in the field of constitution-making. Again in Zimbabwe, there has been criticism of 'interference' by the United Nations Development Programme in the constitution-making process because of the involvement of a South African as a 'technical expert',[103] Hungary effectively ignored criticism of its new constitution by the Venice Commission before bringing it into effect,[104] and a spokesman for the Muslim Brotherhood was reported to have rejected foreign 'help' in drawing up the new constitution in Egypt.[105] At the very least, these and other similar examples illustrate a continuing tension between the authority of a state and the forces for internationalisation that sometimes, at least, is resolved in favour of local difference.

[98] Doug Cassel, 'Will Chavez remove Venezuela from the Inter-American Commission?', *Opinio Juris*, 11 May 2012.

[99] Ariranga G. Pillay, 'SADC Tribunal dissolved by unanimous decision of SADC leaders', www.osisa.org/sites/default/files/article/files/Speech%20by%20former%20President%20of%20SADC%20Tribunal.pdf.

[100] Commission on a Bill of Rights, 'Do we need a UK bill of rights?', discussion paper, August 2011.

[101] Draft Brighton Declaration presented to the High Level Conference on the Future of the European Court of Human Rights, 23 February 2012.

[102] Brenda Hale, '*Argentoratum Locutum*: is Strasbourg or the Supreme Court supreme?' (2012) 12 *Human Rights Law Review* 65 at 78.

[103] 'New Zimbabwe constitution in limbo following UNDP interference', *Africa Legal Brief*, 7 March 2012.

[104] European Commission for Democracy through Law (Venice Commission), Opinion on the New Constitution of Hungary, opinion no 621 / 2011 and Position of the Government of Hungary on the Opinion on the new Constitution of Hungary, available at www.venice.coe.int/site/dynamics/N_Opinion_ef.asp?L=E&OID=621 (viewed 30 July 2012).

[105] Hussien Mahmoud, 'Heshmat rejects foreign interference in drafting Constitution', *Ikhwanweb*, 23 February 2012.

IV. COMPARATIVE CHALLENGES

The new paradigm

The challenge for comparative constitutional law that has been sketched in this chapter may be summarised as follows. Internationalisation has caused significant convergence of constitutional phenomena in recent decades. International law, international and regional institutions and horizontal transplants are the principal vehicles, although the homogenisation of culture and public expectations also plays a part. But convergence is far from complete. If overstated, it hinders comparative understanding. Internationalisation affects different countries to different degrees. Convergence is often superficial and is likely to be partial. The dynamics of internationalisation may give rise to a new constitutional mix, rather than a facsimile of a standard model. Despite predictions of its decline, moreover, the state remains the most likely setting for the implementation of democratic government, at least for the moment, in consequence of its relationship with its people. Constitutions have an umbilical relationship with the states for which they respectively were made that in varying degrees affects their form, status and operation in practice.

In the second decade of the twenty-first century there are almost 200 states, each with its own constitution. Many subscribe to shared constitutional values, including democracy, respect for human rights and the rule of law. The processes of internationalisation have tended to standardise the content of these values and pare down the principal institutional options through which they are delivered. There are evident textual similarities between parts of many constitutional documents. But differences remain, not only between the principal institutional models but in a myriad of important details, including the relationship between domestic and international law. These are exacerbated by the eclecticism of transplants, creating new combinations of institutions, norms, theories and cultures; by the emergence of new questions that constitutions are expected to resolve; and by the continuing diversity of all aspects of the contexts in which constitutions work in practice. Despite internationalisation, for the moment, at least, it is impossible to grasp the constitutional arrangements of different states without employing comparative tools.

There is a question about which comparative tools now are most suitable for the purpose. Old taxonomies based on legal or constitutional families or traditions also have been eroded by internationalisation.[106] While these always were vulnerable to critique, if context was taken seriously, they facilitated some predictions about the form and operation of state law, which now are less reliable. By contrast, convergence of values may enhance the possibilities of functional comparison, subject to

[106] Mariana Pargendler, 'The rise and decline of legal families' (2012) 60 *American Journal of Comparative Law*, available at SSRN: http://ssrn.com/abstract=1975273 (viewed 27 July 2012).

the endemic dangers of overestimating similarity of function and underestimating contextual difference.[107] Historical method, as always, remains a useful approach, although the rapid pace of contemporary developments and the multiplicity of influences make relevant historical connections more difficult to trace.[108]

The remainder of this part examines one further possibility: the potential of regionalism as an additional taxonomic ordering that assists with constitutional comparison.

The potential of regionalism

The United Nations divides the states of the world between six macro-regions: Africa, Latin America and the Caribbean, North America, Asia, Europe, and Oceania.[109] All but North America are further subdivided into geographical sub-regions, making twenty-two sub-regions in all. Logically, regions or sub-regions offer insights for comparative purposes. Regional groupings of states are likely to share a history and some cultural influences that pre-date westernisation, which have continuing significance. They may also share contemporary social, economic, political or environmental problems that affect constitutions in form and operation. The mere fact of geographic proximity encourages cross-fertilisation and mutual influence and demands interaction to deal with transborder problems, which in turn can encourage convergence.[110]

I do not mean to suggest that regions or sub-regions are homogeneous. Even within an apparently defined region cultural similarities may be impeded by natural borders: the division between northern and sub-Saharan Africa illustrates the point. In some regions, of which Latin America is an example, colonialism has added an additional layer of shared experience. In others, however, colonialism has been a source of constitutional division, as francophone, anglophone and lusophone Africa shows. Other vicissitudes of history have left their marks in various ways that affect constitutional arrangements: the divisions between communist and non-communist states in Europe and Asia, the development of Christian and Muslim spheres of influence in Africa, the different paths to independence in Northern America. While these and other differences need to be taken into account in any comparative

[107] Ralf Michaels, 'The functional method of comparative law', in Mattias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), p. 339.

[108] James Gordley, 'Comparative law and legal history', in Reimann and Zimmermann, *The Oxford Handbook of Comparative Law*, 753.

[109] United Nations Statistics Division, 'Composition of macro geographical (continental) regions, geographical sub-regions and selected economic and other groupings', http://unstats.un.org/unsd/methods/m49/m49regin.htm.

[110] In the African context, Fombad, 'Internationalisation of constitutional law and constitutionalism in Africa', at 472–3, argues that cross-fertilisation within regions is preferable to reliance on imperial models and authorities.

exercise that seeks insight from regional groupings, regionalism nevertheless offers a pointer, both to similarities between neighbouring states and to features that distinguish them from states in other regions.

The potential of regionalism as a comparative tool also has been affected by internationalisation. The global spread of ideas may further erode the remnants of regional culture. Conversely, however, national and regional cultures may reassert themselves as constitutional confidence grows. And the constitutional cohesion of a region may be further strengthened by the establishment and operation of regional organisations, whether for economic and strategic purposes or for defence of human rights. While such arrangements also may be a catalyst for internationalisation, their immediate effect is to consolidate regional standards, as they draw on the constitutional perspectives of the member states.

Asia

Few regions of the world are precisely delineated by geographical features and none is entirely internally cohesive. In both respects, however, the treatment of Asia as a region about which generalisations can be made is more problematic than most. In geographical terms, Asia comprises the southern and more eastern portions of a huge continent shared with Europe along lines of demarcation that have varied over time. On any view of its precise limits, the area is both huge and extraordinarily diverse. The United Nations statistics division identifies fifty countries or distinct polities as lying within the greater Asian region.[111] Twenty-three of these fall within 'Western' and 'Central' Asian sub-regions, where there is so marked a pull between east and west that I exclude them, admittedly arbitrarily, from further consideration here.[112]

Even with these states excluded, hyperbole about diversity is justified. The remainder of the region includes at least two discrete areas, centred on India and China, both of which are the sites of great and very different civilisations, consciousness of which remains. While all parts of Asia were colonised or significantly influenced by colonisation, the colonisers themselves were diverse. Even if attention is confined to colonisers outside Asia itself they included the French, British, Dutch, Germans, Portuguese and Americans, all of whom have left traces on systems of law and government. More generally, Asia is characterised by a rich mix of ethnicities, religions and cultures. As the chapters in this volume show, its systems of government range from communist to monarchical and from authoritarian to democratic,

[111] They include Hong Kong and Macau, but not Taiwan.

[112] These countries are Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan (Central Asia); Armenia, Azerbaijan, Bahrain, Cyprus, Georgia, Iraq, Israel, Jordan, Kuwait, Lebanon, Occupied Palestinian Territory, Oman, Qatar, Saudi Arabia, Syrian Arab Republic, Turkey, United Arab Emirates, Yemen (Western Asia).

in each case with regional variations on categories found elsewhere. In economic terms, a few Asian states are extremely prosperous, a few are extremely poor, but most are developing economically, with evident success.

The very diversity of Asia might be regarded as a distinguishing characteristic for the purposes of comparison between regions. To quote Black and Bell, Asia offers a 'laboratory of operative comparative law'.[113] There are shared regional experiences, moreover, which underpin broadly shared approaches to constitutionalism, at the highest level of generality. Both the Second World War and its aftermath took a distinctive form in Asia, forcing decolonisation, leading in many cases to a period of authoritarianism, which in turn has evolved progressively into more democratic forms of government. Western conceptions of the state, of law and of the legal and symbolic functions of written constitutions have been superimposed on existing approaches to law and government throughout Asia. In some cases the veneer is thin but in most it is thickening, encouraging the conception of 'transitional' constitutionalism[114] and sometimes employing experimental forms.[115] As Yeh and Chang note, in much of Asia there was no constitutional founding moment. Rather, constitutions were part of a story of modernisation, providing an umbrella for democratisation rather than, necessarily, a catalyst for it.[116]

In Asia, of all places, it is risky to purport to identify shared characteristics of constitutionalism itself. An attempt to do so in the 1990s that linked 'Asian Values' with the justification of authoritarian regimes discredited the concept and may also, ironically, have enhanced the attraction of universalism. Nevertheless, with due caution, it is possible to identify some differences of emphasis in the constitutional arrangements of most Asian states, in contrast with most of those elsewhere in the world. Thus, by and large, Asian constitutionalism responds to societies that are less inclined to individualism than their Western counterparts and more inclined to value consensus; is more receptive to the constitutionalisation of social rights; and relies less on judicial review as a creative constitutional force. These features are not static, however, and there are notable exceptions to them.[117]

[113] Ann Black and Gary F. Bell, 'Introduction', in Ann Black and Gary F. Bell (eds.), *Law and Legal Institutions of Asia: Traditions, Adaptations and Innovations* (Cambridge: Cambridge University Press, 2011), p. 22.

[114] Yeh and Chang, 'The changing landscapes of modern constitutionalism'.

[115] Examples abound in the chapters in this volume: the innovations to the electoral system to accommodate minority representation in Singapore, the deliberate departures from British constitutional traditions to accommodate diversity and pluralism in India, the distinctive co-existence of two very different legal systems in Hong Kong, and the developing notion of the socialist rule of law in Vietnam.

[116] Jiann-Rong Yeh and Wen-Chen Chang, 'The emergence of East Asian constitutionalism: features in comparison' (2011) 59 *American Journal of Comparative Law* 805 at 816–20, writing about Japan, South Korea and Taiwan. Bui Ngoc Son's chapter in this volume (Chapter 9) also explores this theme in relation to constitutional change in Vietnam.

[117] These include the scope of matters subject to judicial review by the constitutional courts of India, Indonesia and Korea, as described in this volume.

The Asian experience also is distinctive from the standpoint of constitutional convergence. All Asian constitutions have been influenced by constitutional arrangements that developed elsewhere and international experience is a continuing force, through a familiar variety of means. By and large, however, the reception of influence now is voluntary and the hegemonic pressures that presently are evident in Africa and the Pacific are less apparent in the Asian region. Typically, Asian states have a considerable and growing measure of constitutional self-confidence, which enables borrowing without subjugation and encourages theorisation that draws on local as well as international understandings.[118] Notably also, unlike much of the rest of the world, there are no developed Asian arrangements for regional integration or human rights monitoring, and none are imminent.[119] There is, however, a growing consciousness of regional constitutional identity, which encourages close comparison and enhances the cross-fertilisation of ideas. The influence of the Constitutional Court of Korea both generally and on the establishment of the new Constitutional Court of Indonesia is a case in point.

Not surprisingly, greater cohesion can be identified in sub-regions: such as those of Eastern, Southern and Southeastern Asia. Yeh and Chang have demonstrated the synergies between the constitutional arrangements of key East Asian states in a considerable body of work over several years.[120] There are regional organisations in both Southeast Asia and South Asia, although neither is deeply integrated, and both stipulate a principle of non-interference in the internal affairs of member states.[121] On the Indian subcontinent, there is evidence not only of cultural similarities, reinforced by a shared colonial experience, but also of considerable cross-fertilisation in constitutional design, principle and practice. Inevitably, intra-regional links and influences compete with the forces of internationalisation, but they are significant factors nevertheless.

There can be little doubt that sub-regional groupings in Asia assist constitutional comparison. For obvious reasons, an Asia-wide perspective is less of a guide. Even at this level, however, there are insights to be gained from using regional affiliation as a factor for comparative purposes. The value of doing so can be expected to increase over time, as regional ties strengthen under the influence of internationalisation.

[118] See, e.g., Chaihark Hahm, 'Conceptualizing Korean constitutionalism: foreign transplant or indigenous tradition?' (2001) 1 *Journal of Korean Law* 151.

[119] Tom Ginsburg, 'Eastphalia and Asian regionalism' (2011) 44 *University of California Davis Law Review* 859.

[120] Yeh and Chang, 'The emergence of East Asian constitutionalism'; Yeh and Chang, 'The emergence of transnational constitutionalism'; Yeh and Chang, 'The changing landscapes of modern constitutionalism'.

[121] Association of Southeast Asian Nations (ASEAN); South Asian Association for Regional Cooperation (SAARC). The principle of non-interference in the internal affairs of one another is enshrined in ASEAN's 1976 *Treaty of Amity and Cooperation in Southeast Asia* (1976) and in Article 1 of the SAARC *Charter* (1985).

V. CONCLUSIONS

This chapter has sought to demonstrate that, while internationalisation is affecting national constitutional systems, causing some convergence, the process is complex, convergence is patchy and fragmentation is occurring as well. While patterns of constitutional difference between states have changed, differences nevertheless remain, many of which are substantial. Even where these lie only in matters of relative detail, they affect both the theory and the practice of constitutional law. Comparative constitutional method in the twenty-first century must accommodate the twin realities of convergence and difference.

The situation is not static, as internationalisation and its impacts wax and, occasionally, wane. There is more to be done to test the depths of apparent similarity and difference across the constitutional systems of the world. Amongst the many issues that could usefully be pursued to this end is whether and to what extent regional groupings of states now offer a useful taxonomy for the purposes of constitutional comparison. A volume dedicated to Asia, as one of the most constitutionally diverse regions in the contemporary world, makes an important start on this project.

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