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Interpretations of the Constitutional Court and the Developments of the Rule of Law and Democratic Constitutionalism in Taiwan

Yueh-Sheng Weng*

Introduction

The development of constitutional laws depends not only upon their contents but also upon their real practices. Constitutional laws will fall into mere formality if there exists a huge gap between constitutional norms and their practices. Constitutional revisions, constitutional interpretations, and constitutional customs all lead to the developments of constitutional laws in modern constitutional states. Taiwan, a country with a written constitution, has developed its distinctive constitutionalism upon constitutional revisions as well as constitutional interpretations. Constitutional interpretations and constitutional revisions are two distinct concepts. The former illuminates the meaning of the constitution while the latter rewrites what the constitution prescribes. The former is understood as a legal judgment that falls into judicial powers while the latter is regarded as the exercise of political powers by the National Assembly or the Legislative Yuan. Both are important and by no means mutually

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exclusive.[1] They usually overlap with each other. The requirements to amend a constitution are often difficult to meet as written constitutions usually emphasize stability. Constitutional interpretations, thus, may play a pivotal role and affect substantively the development of democratic constitutionalism and the rule of law for modern states.

This article provides a brief discussion of the Constitutional Court in Taiwan and its changing functions. Next, it further articulates the influences of constitutional interpretations upon the developments of rule of law and democratic constitutionalism in Taiwan.

The Development of Constitutionalism in Taiwan and the Changing Functions of the Constitutional Court

The Backgrounds of Constitutional Developments

The Constitution of Republic of China (hereinafter the Constitution) was promulgated on January 1, 1947, and put into effect on December 25 of the same year.[2] After the World War II, the Nationalist Government invited 38 representatives of all parties in Chongqing and held the Political Consultative Conference. In the conference, they agreed upon 12 principles of the draft constitution and established the Constitution Drafting Committee. These representatives were also compromised with the dissenters against Kuomintang (hereinafter KMT) and reached three agreements. The National Assembly was held on November 15, 1946 in Nanjing and passed the Constitution on December 25 of the same year. Owing to the failed negotiation between KMT and the Chinese Communist Party (CCP), the CCP boycotted the National Assembly and refused to recognize the Constitution. Intense conflicts burst into flame afterwards.[3] Hence, the Republic of China was factually embroiled in a civil war when the Constitution was promulgated. The National Assembly passed the Temporary Provisions Effective During the

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1 See Yueh-Sheng Weng, "Guardians of the Constitution – Reflection and Expectation", in Fu-Te Liao (ed.), *Constitutional Interpretation: Theory and Practice, Vol. 6, Part l*, Taipei: Academia Sinica, 2009, pp. 61-63, (in Chinese).

2 See *Zhonghua Minguo Xianfa (The Constitution of the Republic of China) (1947)* (Taiwan), *available at* http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p07_2.asp?lawno=36 (last visited Jan. 15, 2011).

3 Shin-Min Chen, *Constitutional Law*, 3rd ed., Taipei: San Min Book Co., 1999 pp.36-46, (in Chinese).

Period of Communist Rebellion (hereinafter Temporary Provisions) on April 18, 1948 and authorized the President to issue emergency decrees without the constraints of Article 39 and 40 of the Constitution. The enactment of Temporary Provisions forced the Republic of China into the era of Mobilization for Suppressing the Communist Rebellion.[4] After that, the Nationalist Government retreated from mainland China to Taiwan in December 1949. The President substantively became the highest administrative officer and the presidential powers were enhanced considerably by the promulgation of the Temporary Provision. The National Assembly also expanded its powers and the original intent of the Constitution was gradually ignored, if not totally discarded.

In addition to the Temporary Provision, the Nationalist Government issued the Martial Law Decree, which was not lifted until July 14, 1987, in accordance with the martial law after the retreat. The martial law period lasted continuously for almost 40 years, which was rare even compared to histories of other nations. The Temporary Provision came into effect from 1949 and was lifted in 1991, and the period of Mobilization for Suppressing the Communist Rebellion lasted for 43 years. During that time, Taiwanese people could not exercise their fundamental rights enshrined in the Constitution due to the Martial Law Decree and the Mobilization, notwithstanding that the Constitution ostensibly remained in force.

Constitutional Interpretations and Justices of the Constitutional Court

The Jurisdictions of the Constitutional Court

According to Article 77 of the Constitution,[5] the Judicial Yuan shall be the highest judicial organ of the State and shall be in charge of civil, criminal, and administrative cases, and over cases concerning disciplinary measures against public functionaries. Article 78 and 173 stipulate that the Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and regulations.[6] Article 79, Paragraph 2 prescribes that the Judicial Yuan

[4] Tzong-Li Hsu, *Law and Governmental Power*, Taipei: Angle Publishing Co., 1999, pp.405-406 (in Chinese).
[5] Zhonghua Minguo Xianfa, art 77.
[6] Ibid., arts 78 & 173.

shall have a number of Grand Justices [hereinafter Justices] to take charge of matters specified in Article 78 of the Constitution, who shall be nominated and, with the consent of the Control Yuan, appointed by the President of the Republic.[7] Article 5, Paragraph 4 of the Additional Articles of the Constitution of the Republic of China prescribes that the Justices shall, in addition to the discharge of their duties in accordance with Article 78 of the Constitution, form a Constitutional Court to adjudicate matters relating to the impeachment of the president or the vice president, and the dissolution of unconstitutional political parties.[8]

The Qualifications for Appointment of Justices

Pursuant to Article 4, Paragraph 1 of the Organic Act of the Judicial Yuan[9], to be eligible for appointment as a Justice of the Constitutional Court, a candidate must: 1) have served as a Justice of the Supreme Court for more than ten years with a distinguished record; or 2) have served as a Member of the Legislative Yuan for more than nine years with distinguished contributions; or 3) have been a professor of a major field of law at a university for more than ten years and have authored publications in a specialized field; or 4) have served as a Justice of the International Court, or have had authoritative works published in the fields of public or comparative law; or 5) be a person highly reputed in the field of legal research and have political experience. In addition, the number of Justices qualifying under any single qualification listed above shall not exceed one third of the total number of Justices.

The Procedures of Justices Appointment

The Justices should be nominated and, with the consent of the Congress, appointed by the President of the Republic. The "Congress" here referred to the Control Yuan at the very beginning and then the National Assembly when members of the Control Yuan were no longer directly elected by popular votes. After 2003, the Legislative Yuan exercised the power of consent. In early days, there

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7 Ibid., art 79, para. 2.

8 The Additional Articles of the Constitution of the Republic of China, art 5, para. 4 (2005) (Taiwan).

9 Organic Act of the Judicial Yuan, art 4, para. 1 (Taiwan*),* available at http:// www.judicial.gov.tw/constitutionalcourt/p07_2.asp?lawno=81 (in Chinese) (last visited Jan. 16, 2011).

were totally 17 Justices who served for a renewable term of nine years. Beginning 2003, 15 Justices, including the President and the Vice President of the Judicial Yuan selected from amongst them, served for a non-renewable term of eight years,[10] independent of the order by which each Justice was appointed to office.

The Revisions of the Procedure Act and Changing Functions of the Constitutional Court

After the implementation of the Constitution, the Judicial Yuan was established on July 1, 1948. The President nominated 17 Justices of the first term in accordance with the Organic Act of the Judicial Yuan. Only twelve of them were consented by the Control Yuan and served as Justices in early August of the same year. They convened formally on September 15 and enacted the Regulations Governing the Adjudication of Grand Justices Council for their handling of cases.

The Constitutional Court, known as the Council of Grand Justices then, promulgated Interpretations No. 1 and No. 2 on January 6, 1949. After the retreat, only two Justices came to Taiwan and the President re-nominated 7 Justices with the consent of the Control Yuan to meet the quorum. On April 5, 1952, the Constitutional Court functioned for the first time in Taiwan and has since issued more than 680 Interpretations by the end of 2010.

In respect to changing functions of the Constitutional Court, we can distinguish roughly each stage in pursuant to their terms:

Era of Legal Counsel: The First Term (1948~1958, Interpretation No. 1 – No. 79)

During the first term, only national and local government agencies could petition to the Constitutional Court, which was known as the Council of Grand Justices, due to the Regulations Governing the Adjudication of Grand Justices Council. A constitutional interpretation should be made with the concurrence of more than half of the Justices present at the meeting having a quorum of more than half of the total number of the Justices. Since the Constitution was barely promulgated and implemented, the Constitutional Court usually played the role of legal counsel: they unified different

[10] Some scholars suggest that the change may lead to more political-biased Justices. See Chien-Liang Lee, "The Systematic Change of the Justices and the Constitutional Role of Judicial Yuan," in *Constitutional Theory and Practice*, 2nd ed., Taipei: New Sharing Publishing Co., 2003, p. 553, (in Chinese).

interpretations of laws and regulations by lower courts and provided constitutional interpretations if government agencies had constitutional concerns with various laws and regulations.

Era of Functional Decline: The Second and Third Terms (September, 1958~ September 1976, Interpretation No. 80 – No. 146)

Interpretation No. 76[11], made by the Justices of the first term, declared that the National Assembly, the Legislative Yuan, and the Control Yuan should all be considered en masse as equivalent to parliaments of other democratic nations. The Legislative Yuan was irritated by this Interpretation and enacted the Grand Justices Council Adjudication Act which noticeably limited the function of the Justices. The Act stipulated that a constitutional interpretation should be made with the concurrence of three quarters of the Justices present at the meeting having a quorum of three quarters of the total number of the Justices. The function of the Constitutional Court was, thus, profoundly affected and went gradually in decline. Nevertheless, the Act had three merits worthy of mentioning: 1) the separation of reasoning of the interpretation from its holding; and 2) allowing individuals to petition to the Council; and 3) the permission of issuing dissenting opinions. However, during this period, the Constitutional Court rendered only one case filed by individuals[12].

The Beginning of Protecting Human Rights: The Fourth Term (October, 1977~ September, 1985, Interpretation No. 147 – No. 199)

Beginning with the fourth term, the Constitutional Court emphasized the protection of human rights instead of solving legal or institutional disputes between government agencies, which was a cardinal and correct shift. As aforementioned, Justices of the second and the third terms adjudicated only one case appealed by individuals. During the

[11] J.Y. Interpretation No. 76, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=76 (last visited Jan. 16, 2011).

[12] See Yueh-sheng Weng, "Die Verfassungskontrolle durch richterliche Fortbildung, die Geschichte von Taiwan's Judicial Activism," in Michael Brenner, Peter M. Huber and Markus Möstl (eds.), *Der Staat des Grundgesetzes – Kontinuität und Wandel, Festschrift für Peter Badura zum siebzigsten Geburtstag*, Tübingen: Mohr Siebeck, 2004, pp. 1224-1226

fourth term, more than half of the interpretations that Justices made were appealed by individuals.[13]

In the past, the effect of interpretations made by the Constitutional Court was not clearly prescribed. However Interpretation No. 177 declared that "[a]n Interpretation given by this Yuan in response to a petition shall also be applicable with respect to the legal action of the petitioner, for which the original petition was made."[14] Thus the interpretations made by the Constitutional Court have a retrospective effect insofar as the petitioned case is concerned. In addition, Interpretation No. 185 confirmed that "[t]he interpretations of the Judicial Yuan shall be binding to every institution and person in the country... the party against whom such final and irrevocable judgment is entered shall be entitled to file for a retrial or an extraordinary appeal on the basis of said interpretation."[15] Moreover, the Constitutional Court began to review the constitutionality of precedents and expanded the meaning of administrative actions (also known as administrative disposition), making easier for individuals to file administrative litigation against government agencies.[16] The Constitutional Court also fired the first shot to the theory of "special power relationship (Das besondere Gewaltverhältnis)" in Interpretation No.187 by permitting a civil servant to file administrative litigation against the government.[17]

Era of Democratic Transition: The Fifth Term (October, 1985~ September, 1994, Interpretation No. 200 – No. 366)

During the fifth term, the Martial Law Decree was lifted on July 14, 1987. The Temporary Provisions and the period of Mobilization for Suppressing the Communist Rebellion were also terminated on May

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[13] See Wen-Chen Chang, "The Role of Judicial Review in Consolidating Democracies – The Case of Taiwan", in *Asia Law Review.*, No. 2 (2005), p. 79.

[14] J.Y. Interpretation No. 177, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=177 (last visited Jan. 16, 2011).

[15] Ibid., No. 185, *available at* http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=185 (last visited Jan. 16, 2011).

[16] See Yueh-Sheng Weng, "Research on Recent Interpretations of the Council of Grand Justices", in Judicial Yuan (ed.), *The Administrative Law and the Judiciary in Rule of Law Countries*, Taipei 2009, p. 387, (in Chinese).

[17] J.Y. Interpretation No. 187, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=187 (last visited Jan. 16, 2011).

1, 1991. The national representatives of the first term ceased to exercise of their power on December 31, 1991, and the second-term election of national representatives was held. The Grand Justices Council Adjudication Act was revised as Constitutional Interpretation Procedure Act on February 3, 1993.[18] Several progresses merit discussions here. First, the requirements for petitions to the Constitutional Court were loosened; one-third of the Legislators or more, the Supreme Court or the Supreme Administrative Court may petition the Constitutional Court to interpret the Constitution. Second, the Constitutional Court was established to adjudicate cases concerning the dissolution of a political party. Third, it requires a majority of two-thirds of the Justices present at a session having a quorum of two-thirds of total number of the Justices for passing an interpretation of the Constitution. Fourth, in addition to dissenting opinions, Justices were entitled to issue concurring opinions. Fifth, on petitioner's motion, or sua sponte, the Justices may order the petitioners, the pertinent parties or agencies to brief –in written or orally– to the Justices. The Justices may also conduct its own investigation. Oral arguments may be held in an open court when necessary. Last but not the least, in its interpretations, the Constitutional Court may designate an agency to execute the judgment and specify the means for execution.

With the emphasis on the protection of human rights, the Constitutional Court now plainly invalidated unconstitutional laws. Many constitutional disputes were solved, including but not limited to the reelection of national representatives (Interpretation No. 261),[19] the constitutionality of budgetary augmentation (Interpretation No. 264),[20] the limit of the investigative power of the

[18] Constitutional Interpretation Procedure Act (1993) (Taiwan), available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p07_2.asp?lawno=73 (last visited Jan. 16, 2011).

[19] J.Y. Interpretation No. 261, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=261 (last visited Jan. 16, 2011).

[20] Ibid., No. 264, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=264 (last visited Jan. 16, 2011).

Legislative Yuan (Interpretation No. 325),[21] and the independence of the Auditor-General (Interpretation No. 357).[22]
The Justices of the fifth term were in session three times per week and made 167 Interpretations during their term of nine years. It was a highly valuable performance under the strict three-quarters voting quorum.

Era of Full-fledged Functions: The Sixth Term (October, 1994~ September, 2003, Interpretation No. 367 – No. 566)

Beginning with the sixth term, the nomination of the Justice no longer took their respective provincial origins into account. The revision of the Constitutional Interpretation Procedure Act contributed to the full-fledged functions of the Constitutional Court. During the nine years, the Constitutional Court made 200 Interpretations which included some cardinal Interpretations that protected the human rights. To name a few, the Gangster Prevention Act was declared unconstitutional twice (Interpretation Nos. 384 & 523).[23] The power to detain was transferred to judges from prosecutors in Interpretation No. 392.[24] In respect to equal protection, Interpretation No. 410 declared that marital property regulations stipulated in the Civil Code violated the gender equality.[25] Interpretation No. 452 struck down Article 1002 of the Civil Code regulating a wife's domicile on the same reason.[26] As to the right of instituting legal proceedings, Interpretation Nos. 224, 321 and 434 declared that Article 23 of the Customs Act was unconstitutional since it deprived a taxpayer, who failed to make full

[21] Ibid., No. 325, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=325 (last visited Jan. 16, 2011).
[22] Ibid., No. 357, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=357 (last visited Jan. 16, 2011).
[23] Ibid., No. 384, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=384 (last visited Jan. 16, 2011); J.Y. Interpretation No. 523, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=523 (last visited Jan. 16, 2011).
[24] Ibid., No. 392, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=392 (last visited Jan. 16, 2011).
[25] Ibid., No. 410, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=410 (last visited Jan. 16, 2011).
[26] Ibid., No. 452, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=452 (last visited Jan. 16, 2011).

payment of the customs duties, of the opportunity in seeking administrative remedy.[27] In Interpretation No. 462, a faculty member who was dissatisfied with his evaluation committee's decision over his career advancement should be entitled to bring an administrative appeal and later an administrative litigation to challenge the decision. In addition, there were many other Interpretations that protected the freedom of teaching, freedom of religious belief, and freedom of assembly and association.

In respect to the rule of law and separation of powers, Interpretation No. 436 declared that a defendant sentenced by the military tribunal should be permitted to appeal directly to a civilian regular court.[28] Interpretation No. 371 articulated that in trying a case where a judge, with reasonable assurance, had suspected that the statute applicable to the case was unconstitutional, he or she should be allowed to petition for interpretation of its constitutionality (concrete review).[29] Moreover, the constitutional amendments were under judicial review in Interpretation No.499.[30] After this Interpretation, the National Assembly was abolished and constitutional amendments would be sanctioned by electors from then on. As a general assessment, the Interpretations made during the sixth term were better in term of quality and the reasoning was much more elaborative.

Era of Stable Development: Beginning October, 2003, Interpretation No. 567 to date

In 2003, an important aspect of reforms for the Constitutional Court was put into place. Among the justices nominated by the President in the year of 2003, eight members served for four years, while seven

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[27] Ibid., No. 224, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=224 (last visited Jan. 16, 2011); J.Y. Interpretation No.321, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=321 (last visited Jan. 16, 2011); J.Y. Interpretation No.434, *available at* http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=434 (last visited Jan. 16, 2011).

[28] Ibid., No. 436, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=436 (last visited Jan. 16, 2011).

[29] Ibid., No. 371, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=371 (last visited Jan. 16, 2011).

[30] Ibid., No. 499, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=499 (last visited Jan. 16, 2011).

others served a term of eight years to facilitate subsequent staggered terms of Justices, each having a nonrenewable term of eight years. The Justices serving as President and Vice President of the Judicial Yuan however do not enjoy the guarantee of an eight-year tenure. Since 2003, the Constitutional Court has 15 justices, and the president and the vice president of the Judicial Yuan shall be selected from amongst them[31].

The following three characteristics must be noted for the practice by the Constitutional Court in the past 7 years. First, the holding was shorter while the reasoning was longer.[32] Second, the number of concurring and dissenting opinions and the number of words in each opinion increased multiply. Thirdly, there were respectively 6 Justices with American academic background and 7 Justices with German academic background. The influence of Anglo-American jurisprudence was in gradual increase. Currently, 7 Justices obtained their Ph. D. degree in Germany and 2 Justices who obtained their Ph. D. degree in Taiwan had spent one or two years for study in Germany. Not surprisingly, therefore, the arguments elaborated by the Federal Constitutional Court of Germany (Bundesverfassungsgericht) and the European Court of Human Rights have had some significant influence upon the Constitutional Court and their interpretations.

The Influences of Interpretations Upon Democratic Politics in Taiwan

There were three waves of constitutional transition that had momentous impact on democratic politics in Taiwan. The Constitutional Court played an essential role in these three waves of transformation.

Interpretation Nos. 31 and No. 85

The first constitutional issue after the retreat was to make the Constitution designed for mainland China suitable for apply to

[31] See Yueh-sheng Weng, "Auf dem Weg zu einer ausgereiften Verfassungsgerichtsbarkeit, Neue Entwicklungen der Verfassungsgerichtsbarkeit in der Republik China (Taiwan) zu Anfang des 21. Jahrhunderts", in Rainer Grote, et al. (eds.), *Die Ordnung der Freiheit, Festschrift für Christian Starck zum siebzigsten Geburtstag*, Tübingen: Mohr Siebeck, 2007, pp. 1061 f.

[32] See Ren-Miau Lee, "The Preventive Proceeding in Judicial Review II", in *National Chengchi University Law* Review, No. 95 (2007), p. 114 (in Chinese).

Taiwan. No constitutional revision by the National Assembly was available at that time. The only way to make this happen was by judicial interpretations. Accordingly, the Constitutional Court, which was known as the Council of Grand Justices, made Interpretation No. 31 on January 29, 1954, and contended that all of the first-term members of both the Legislative and Control Yuan should continue to exercise their respective powers since the state had undergone a severe calamity that made re-election of the second term of both Yuan de facto impossible.[33]

For the same reason, the Constitutional Court made Interpretation No. 85 on February 12, 1960, and argued that under the circumstances, the "total number of National Assembly Delegates" as provided for in the Constitution should be calculated based on the number of those delegates who were elected in accordance with the laws and were still able to convene. Only by this could it exercise its powers in Taiwan.[34]

The extension of the term, though tolerable in extraordinary situations, such as wartime, should not be prolonged indefinitely. Interpretation No. 31 permitted the first-term members to exercise their powers continually and resulted consequently in a constitutional crisis which might not be anticipated by the Constitutional Court.

Interpretation No. 261

The Background and the Content

This Interpretation contributed to the termination of the first-term national representatives and gave birth to the second-term election. In 1980s, the economy was developed miraculously and the national income multiplied in Taiwan. People became conscious of their rights and could not tolerate the extension of the first-term representatives any longer after the repeal of martial law on July 14, 1987. The Legislative Yuan, by resolution of its plenary session which was proposed by 26 legislators, petitioned to the Constitutional Court. The Constitutional Court made Interpretation 261 on June 21, 1990, contending that:[35] first, the regular election of representatives was

[33] J.Y. Interpretation No .31, *available at* http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=31 (last visited Jan. 16, 2011).

[34] Ibid., No. 85, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=85 (last visited Jan. 16, 2011).

[35] See note 19 above.

the only approach to entrench the democratic constitutionalism, and second, Interpretation No. 31 did not intend to permit the indefinite exercise of powers by those first-term national representatives who were not reelected periodically; third, since 1969, the national government had held regular elections of the national representatives to reinforce our national representative bodies incrementally; fourth, the first-term representatives who had not been reelected on a periodical basis should cease exercising their powers no later than December 31, 1991; and finally, the national government was mandated to hold, in due course, a nationwide second-term election of the national representatives, in accordance with the spirit of the Constitution, the essence of this Interpretation and the relevant regulations, so that democratic constitutionalism would be put in place properly.

The Analysis

After the revocation of the martial law, Taiwanese people were dissatisfied with the extension of the first-term representatives and demonstrated their anger publicly. Interpretation No. 261 articulated that regular elections were the foundation of democratic constitutionalism and the national government had indeed held regular elections for supplementary or additional seats in the national representatives. There was no reason, theoretical or practical, to prolong the term of the representatives. This Interpretation was pivotal since it alleviated the political conflict and tension resulting from the indefinite extension of terms for national representatives.

Although Justice Chih-Peng Lee issued his dissenting opinion, he still agreed that the first-term representatives should cease exercising their powers as soon as possible. His dissenting opinion argued that the government should enact the Election and Recall Act first in order to hold the second-term election of the national representatives. The first-term representatives should not cease to exercise their power until the second-term representatives to be elected.[36] On the other hand, the majority opinion maintained that the first-term representatives had exercised the power for more than 40 years and should cease exercising their powers before the end of 1991. This void-with-deadline ruling was rendered for the first time by the fifth term of Justices.

[36] See note 35 above, (Lee, J., dissenting) (in Chinese).

When nominating the Justices of the fifth term, the "provincial origin" was still a factor that needed to be taken into consideration. A four-fifths of the Justices of the Constitutional Court, like the first-term national representatives who must be replaced, came from mainland China. However, when interpreting the Constitution, the Justices rationally and disinterestedly made a fair interpretation without taking this political affinity into account. It was indeed a merit worthy of our praise.

The Impact

Interpretation No. 261 solved the constitutional dispute of the first-term national representatives and led to the termination of the Mobilization for Suppressing the Communist Rebellion, a watershed development in the process of constitutional reforms in Taiwan. Without this Interpretation, it was impossible for the National Assembly to voluntarily abolish the Temporary Provisions or amend the Constitution. After Interpretation No. 261, the National Assembly passed the Additional Articles of the Constitution of Republic of China and abolished the Temporary Provisions. President Teng-hui Lee declared the termination of the forty-year Mobilization era on May 1, 1991, which was another major step towards the development of constitutionalism in Taiwan.

In addition, Interpretation No. 261 reviewed the constitutionality of the article 6, paragraph 2 of the Temporary Provisions and declared it unconstitutional regardless of its constitutional status. It was the first precedent that provisions with constitutional status were subject to judicial review.

Interpretation No. 499

The Background and the Content

The National Assembly was mainly in charge of the election of the president and the vice president, and amendments of the Constitution. After the implementation of the Constitution, the National Assembly gradually expanded its own powers since it monopolized the power to revise the Constitution. Its expansion became another constitutional crisis that needed to be carefully addressed.

On September 3, 1999, the National Assembly passed anonymously a constitutional amendment that prolonged the tenure of the National Assembly itself and the fourth-term legislators. This

amendment immediately resulted in a constitutional controversy and opposition to the amendment voiced out. Some legislators petition the Constitutional Court and the Justices made Interpretation No. 499, elaborating the following:[37] First, the Constitution not only provided Articles 78 and 79 in Chapter 7, but also preserved the language "[t]he Constitution shall be interpreted by the judicial Yuan" as Article 173 in Chapter 14, "Implementation and Amendment of the Constitution." Thus, it is clear that Article 173 was not designed only for general interpretation of the Constitution or unifying the meaning of laws, but it was also to entail the power of the Constitutional Court to cover any issues or doubts on the implementation and amendment of the Constitution. Second, because the process of amending the Constitution is the most direct action that reflects and realizes sovereignty, it must be conducted openly and transparently in order to satisfy the condition of rational communication and, hence, lay the proper foundation for a constitutional state. Third, among the constitutional provisions, principles such as establishing a democratic republic under Article 1, sovereignty of and by the people under Article 2, protection of the fundamental rights of the people under Chapter 2 as well as checks and balances of government powers are some of the most critical and fundamental tenets of the Constitution as a whole. The democratic constitutional process derived from these principles forms the foundation for the existence of the current Constitution and all [government] bodies installed hereunder must abide by this process.

Fourth, both provisions at issue allocated the seats of delegates by relying upon the election result of the Legislative Yuan and the votes received by independent candidates or candidates recommended by respective political parties. Unlike representation by majority or minority, proportional representation based the allocation of delegate seats upon the share of votes received by a certain political party or candidate, and, therefore, violated the constitutional order of democracy. Fifth, the self-granted term extension for National Assembly delegates further violates the principle of disqualification in light of conflict of interests, and is not in conformity with the freedom and democratic state of constitutional rule of law. Last but not the least, the anonymous balloting by which the Third National Assembly adopted to vote on the proposed amendments to Articles 1, 4, 9 and 10 of the Amendment to the Constitution in its 4th Session, 18th Conference on September 4, 1999, violated the principle of

[37] See note 30 above.

openness and transparency and the then-applicable Article 38, Paragraph 2, of the Regulations of the National Assembly Proceedings. The process was clearly and grossly flawed and in violation of the fundamental principles based upon which the provisions of the Constitution would take effect. The aforementioned Articles 1, 4, 9, and 10 should immediately become null and void as of the date this Interpretation was announced, and the text of the Amendment to the Constitution promulgated on July 21, 1997, continued to be effective.

The Analysis

a. Procedural Analysis

Interpretation No. 499 averred that the amendment violated the Article 174 of the Constitution as well as the Regulations of the National Assembly Proceedings. However, article 174, paragraph 1 stipulated that "Upon the proposal of one-fifth of the total number of delegates to the National Assembly and by a resolution of three-fourths of the delegates present at a meeting having a quorum of two-thirds of the entire Assembly, the Constitution may be amended." None of these was literally violated. The violation of Regulations of the National Assembly Proceedings could not be labeled as major constitutional flaw since it was in the realm of what was jurisprudentially called self-regulation or parliamentary autonomy. Anonymous balloting per se was not unconstitutional. "Open balloting" is neither the only way to supervise members of the National Assembly nor a universal principle around the globe when amending constitutional laws.[38] In other words, the existence of procedural flaws in this case would not necessarily render the unconstitutional declaration. And this was also known by the Justices, and that way why they continued to review this case into its substantial violation of the Constitution.

b. Substantive Analysis

Scholars have been debating if there is any limit to constitutional revision and if there is any difference between constitutional revision

[38] *ibid.*, No.499 (Chen, J., dissenting) (in Chinese); See also Chien-Liang Lee, "The Anatomy of the 1999 Constitutional Amendments", in *2 Constitutional Theory and Practice* (2000), pp.493-533, (in Chinese).

and constitutional making.[39] In Interpretation No. 499, Justices of the Constitutional Court were deeply influenced by Article 79, Paragraph 3 of the German Basic Law (Grundgesetz) and believed that there was a limit to constitutional revision.[40] It is inadmissible to "alter the existing constitutional provisions concerning the fundamental nature of governing norms and order and, hence, the foundation of the Constitution's very existence destroys the integrity and fabric of the Constitution itself."[41] This interpretation was beneficial to the entrenchment of human rights and conformed to the development of modern constitutional theories after World War II.[42]

The Impact

The National Assembly was frustrated by Interpretation No. 499 and held the sixth conference for constitutional amendments on April 8, 2000. During the conference, the National Assembly was replaced with mission-oriented National Assembly, and most of its power and authorities were transferred to the Legislative Yuan. It was stipulated that the mission-oriented National Assembly would be composed by three hundred members appointed from among different political parties and proportioned in accordance with the ratio of votes received by each such political party and independent candidates in the election for members of the Legislative Yuan. The power to ratify bills of constitutional amendments proposed by the Legislative Yuan was still retained by the National Assembly. In addition, as a revengeful response to Interpretation No. 499, added Article 5, Paragraph 1 to the Additional Articles of the Constitution of the Republic of China, which regulated that "the provisions of Article 81 of the Constitution and pertinent regulations on the lifetime holding of office and payment of salary should not apply to justices of the Constitutional Court who were not transferred from the post of a judge."

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[39] *See* Tzu-Yi Lin et al., *Constitutional Law: Separation of Powers* (2008), pp.570-76, (in Chinese).
[40] Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], 23 May 1949, BGBI. I (Ger.).
[41] See note 38 above.
[42] Geng Wu, *The Interpretation and Application of the Constitution* (2003), pp.572-76, (in Chinese).

On June 7, 2005, the Constitution underwent its seventh revision. The emphasis was placed at the reform of the Congress. The mission-oriented National Assembly was nullified thoroughly and "amendment of the Constitution shall be initiated upon the proposal of one-fourth of the total members of the Legislative Yuan, 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 sanctioned by electors in the free area of the Republic of China at a referendum held upon expiration of a six-month period of public announcement of the proposal, wherein the number of valid votes in favor exceeds one-half of the total number of electors."[43] The development of constitutionalism in Taiwan has entered a new stage and the task that Justices faced with will be even more challenging than before.

The Influences of Interpretations upon Rule of Law in Taiwan

The Protection of Human Rights

No matter there are three or five powers, judicial power has always been the least dangerous. After World War II, the protection of human rights has become a universal value. The first and foremost duty of the judiciary in modern rule of law countries is to protect human rights.

The changing functions of the Constitutional Court have been discussed above. Before the annulment of the Martial Law Decree, the jurisdiction of the Justices was strictly constrained. During that era, Justices rendered interpretations regarding the protection of personal freedom (Interpretation No. 166) and the right of instituting legal proceeding (Interpretation Nos. 89, 115, 128, 156, 177, 185, and 187). After the annulment, cases concerning the protection of human rights became the major part of the Court's docket. In addition to equal protection, enumerated rights or liberties were gradually indicated and entrenched in interpretations, such as personal freedom (Interpretation Nos. 384, 392, 523, 535, 588, and 636), freedom of speech and freedom of express (Interpretation Nos. 407, 417, 445, and 509), freedom of residence and of change of residence (Interpretation Nos. 454, 497, 517, and 535), freedom of teaching (Interpretation Nos. 380 & 450), Freedom of religious belief (Interpretation Nos. 460 & 490), freedom of assembly and

[43] The Additional Articles of the Constitution of the Republic of China, art 12.

association (Interpretation Nos. 303, 445, and 479), right of property (Interpretation Nos. 400, 437, 440, and 516), principle of taxation by law (Interpretation Nos. 367, 397, 420, 458, 508, and 515), right to work (Interpretation Nos. 373, 411,456, and 514), and right of instituting legal proceeding (Interpretation Nos. 416, 418, and 442). Furthermore, rights not clearly enumerated in the Constitution were protected as well, including but not restricted to freedom of marriage (Interpretation No. 242), privacy (Interpretation Nos. 393, 509, 535, 585, and 603), and human dignity (Interpretation Nos. 372, 490, 550, 567, and 603). The following briefly discusses major doctrines or principles that Justices used to strike down statutes or regulations that infringed human rights.

Principle of Constitutional Reservation (Verfassungsvorbehalt)

Article 8 of the Constitution articulates the protection of personal freedom thoroughly by stipulating "except in case of flagrante delicto as provided by law, no person shall be arrested or detained otherwise than by a judicial or a police organ in accordance with the procedure prescribed by law. No person shall be tried or punished otherwise than by a law court in accordance with the procedure prescribed by law. Any arrest, detention, trial, or punishment which is not in accordance with the procedure prescribed by law may be resisted. When a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall in writing inform the said person, and his designated relative or friend, of the grounds for his arrest or detention, and shall, within 24 hours, turn him over to a competent court for trial. The said person, or any other person, may petition the competent court that a writ be served within 24 hours on the organ making the arrest for the surrender of the said person for trial."[44]

This article discloses many constitutional principles including non-delegation doctrine, due process of law, and judicial reservation. The judicial reservation and the 24-hour limit fall in the realm of constitutional reservation, which means that it is unalterable except by a constitutional amendment. Due to this provision, the Constitutional Court declared that the Act Governing the Punishment of Police Offences unconstitutional in Interpretation Nos. 166 and 251. In addition, the Justices also declared that the detention power

[44] Zhonghua Minguo Xianfa, art 8.

should be vested exclusively to the judges, but not the prosecutors in Interpretation No. 392.

Non-Delegation Doctrine (Vorbehalt des Gesetzes/Gesetzesvorbehalt)

Non-delegation doctrine is the basic principle of rule of law, which requires that a government cannot limit any person's rights without a statute enacted by legislature. Article 23 of the Constitution stipulates that "All the freedoms and rights enumerated in the preceding Articles shall not be restricted by law except such as may be necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare."[45] Article 5 of the Central Regulation Standard Act enumerates the objects that shall be stipulated by a statute.

However, the statute may authorize a government to limit individual freedoms or rights by enacting administrative regulations. In the reasoning of the Interpretation No. 443, the Constitutional Court elaborated that "the determination of which freedom or right shall be regulated by law or by rules authorized by the law shall depend on regulated intensity. Reasonable deviation is allowed considering the party to be regulated, the content of the regulation, or the limitations to be made on the interests or freedom. For instance, depriving people's lives or limiting their physical freedom shall be in compliance with the principle of definitiveness of crime and punishment and stipulated by law; limitations concerning people's other freedoms shall also be stipulated by law, in the case where there is authorization by the law to the administrative institutions to make supplemental rules, the authorization shall be specific and precise. The competent authority, on the ground that such limitations shall not be inconvenient for the people, may make only those limitations concerning details and technical matters of law enforcement. For policies concerning benefit to the people, the law governing such policies may be constructed more loosely compared to laws governing limitations on people's rights. Nevertheless, in the case

[45] Ibid., art 23.

where such policies are related to major public interests, they shall be made by law or rules authorized by law."[46]

Principle of Proportionality (Verhältnismässigkeitsprinzip)

At the beginning, the principle of proportionality was an administrative principle developed during the practicing of the police power in Germany. It can be further divided into three sub-principles: first, the method adopted must be helpful to the achievement of the objectives; second, where there are several alternative methods which will lead to the same result in achievement of the objectives, the one with the least harm to the rights and interest of the people shall be adopted; and finally, the harm that may be caused by the method to be adopted shall not be clearly out of balance against the interest of the objectives anticipated to be achieved. After its introduction to Taiwan, it was soon accepted by scholars and judges since its essence is closely related to the Article 23 of the Constitution – an Article which has been frequently cited by Justices and prescribes that "All the freedoms and rights … shall not be restricted by law except such as may be *necessary*" (*emphasis* added). Then the principle of proportionality was codified in article 7 of the Administrative Procedure Act[47]. In Interpretation No. 436 which was made fourteen years ago, Justices firstly recognized principle of proportionality as an important constitutional principle in its holding and reasoning. After that, it became the most frequently cited criterion by the Constitutional Court in judging if a statute or regulation unconstitutional.

Due Process of Law

Article 8 of the Constitution originates from the concept of "due process of law" embedded in the Anglo-American jurisprudence. In Interpretation No. 384, Justices articulated that "the contents of the law must be proper in substance…The above substantive due process of law covers substantive law as well as procedural law. In substantive law, it must comply with the principle of legality. In procedural law, examples are as follows: except in the case of

[46] J.Y. Interpretation No. 443, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=443 (last visited Jan. 16, 2011).

[47] Administrative Procedure Act, art. 7 (Taiwan), *available at* http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=A0030055.

flagrante delicto, the arrest of a suspect shall follow necessary judicial process; the accused's confession shall be voluntary; a conviction shall be based upon evidence; no person shall be subject to punishment for the same offence twice; the parties have the right to confront and cross-examine their witnesses; the separation of the judiciary and prosecution; trials shall be public in principle; and the right to appeal the lower court's decision. Unless in the permissible exception that martial law is declared in accordance with the law, or when the state or the people are in a state of emergency, all statutory provisions are deemed to contradict the substantive due process of law if they are inconsistent with the above said principles."[48] In accordance with Article 8 of the Constitution, the Constitutional Court declared the Act for Eliminating Hoodlums partly unconstitutional because it violated substantive due process of law (Interpretation Nos. 384, 523, and 636). The Act for Eliminating Hoodlums was finally repealed on January 21, 2009.

In addition, the Constitutional Court also elaborated in many interpretations that all constraints upon fundamental rights and freedoms should be subject to review in accordance with due process of law (for example, Interpretation Nos. 418, 436, 446, 488, 491, 523, 574, 582, 585, 610, 631, 636, 639, and 653).

Principle of Reliance Protection/ Principle of Legitimate Expectation (Vertrauenschutzprinzip)

Rule of law is one of the prime principles in constitutional law. A constitutional state emphasizes primarily on the protection of human rights, the stability of legal order, and the principle of reliance protection. People believe what the government does is legal and effective and the government must in turn protect this belief. This is the legal foundation for the principle of reliance protection. In Interpretation No. 362, the Constitutional Court articulated that "where a person's first marriage is dissolved by a final court decision, and a third party, in good faith and without negligence, trusting in the validity of such final court decision, enters into marriage with a party of the previous marriage, and subsequently such final and binding judgments reversed, the latter marriage (between that person and the third party), thus becomes bigamous. This situation differs from general bigamy, and thus, according to the principle of legitimate

[48] See note 23 above.

expectation, the validity of the latter marriage should be maintained."[49]

Furthermore, Article 8 of the Administrative Procedure Act, which was implemented on January 1, 2000, prescribes that "all administrative acts shall be performed in good faith and shall be aimed at the protection of the legitimate and reasonable reliance of the people." Chapter II of the Act also specifies the circumstances under which a beneficiary deserves or loses the protection of reliance when an administrative disposition is withdrawn or annulled. Moreover, the Constitutional Court elaborated that the principle of reliance protection should be applicable when a law was revoked or revised. In Interpretation No. 525, the Constitutional Court argued that "once an administrative ordinance is proclaimed effective, the authority responsible for drafting or proclaiming such regulation shall protect the legitimate expectations of subjects affected by the regulation when seeking to amend or abolish such regulation pursuant to legal procedures. So unless the regulation has a predetermined period for application or there is a change of circumstance which leads to its ineffectiveness, in which instance there is no legitimate expectation, authorities seeking to abolish or amend the regulation for public interest, to the effect that such action abridges the privileges of those who had a legitimate expectation of enjoying these privileges, shall provide reasonable measures of remediation or transition period clauses with a view to minimize loss, thus complying with the Constitution's objective to protect the people's rights."[50]

After that, the principle of reliance protection has become one of the cardinal principle in the protection of constitutional rights. It has been continuously emphasized in other interpretations, such as Interpretation Nos. 529, 547, 574, 577, 580, 589, 605, 620, 629, among others.

Separation of Powers

During the authoritarian regime, the Constitutional Court, known as the Council of Grand Justices then, made interpretations elaborating the equal status of the five powers in the Constitution and that each

[49] J.Y. Interpretation No. 362, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=362 (last visited Jan. 16, 2011).

[50] Ibid., No. 525, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=525 (last visited Jan. 16, 2011).

Yuan should have the power to propose and present statutory bills in Interpretation Nos. 3 and 175.[51] At the time, the Constitutional Court emphasized little, if any, on checks and balances between the powers. After the democratization, the Constitutional Court began to stress checks and balances among the powers. In Interpretation No. 264, the Constitutional Court asked the Legislative Yuan to fulfill its role of supervising government finance. In Interpretation No. 391 when the Legislative Yuan would add, delete or adjust the amount of individual items within each or among different government agencies without changing the total amount of the general budget, the Justices said " it involves the revision and adjustment of the contents of policy implementation and planning, which can easily result in the successfulness or failure of a policy being unaccounted for, and politics of accountability being difficult to establish, hence violating the separation of Executive and Legislative power and the principle of checks and balances, which shall not be permitted by the Constitution."[52] From then on, we may conclude that the Justices no longer resisted interpreting the separation of powers from the perspective of checks and balances.

There are plenty of interpretations with regard to separation of powers and some are much more eye-catching than others, such as:

(1) Interpretation No. 342 (April, 8, 1994)

The Constitutional Court argued that "whether the review of the bills of act that are submitted by the Legislative Yuan to the President for promulgation follows the review procedures shall not be subject to scrutiny by the authority responsible for interpretation of the Constitution unless it is in clear contravention to the Constitution since it is an internal matter which falls within the scope set by the Legislative Yuan by virtue of the principle of parliamentary autonomy."[53]

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[51] Ibid., No. 3, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=3 (last visited Jan. 16, 2011); ibid., No. 175, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=175 (last visited Jan. 16, 2011).

[52] Ibid., No. 391, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=391 (last visited Jan. 16, 2011).

[53] Ibid., No. 342, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=342 (last visited Jan. 16, 2011).

(2) Interpretation No. 387 (Oct. 13, 1995)

The Constitutional Court reasoned that "since the premier has to receive consent from and be politically accountable to the Legislative Yuan, the premier has to resign before the first session of each new Legislative Yuan so as to fulfill the doctrine of government by the people and his/her political accountability."[54]

(3) Interpretation No. 419 (Dec. 31, 1996)

The Constitutional Court ruled that "while the nature of the duties of the two offices is not apparently incompatible, in case the office of the President should become vacant or the President is incapable of carrying out his/her duties, the situation [of the same individual holding two offices] will affect the very design of power acting or succession under the Constitution, hence it will not be completely in conformity with the Constitution's objective of having separate individuals assume the duties of the offices of Vice President and Premier, respectively."[55]

(4) Interpretation No. 461 (July 24, 1998)

The Constitutional Court interpreted that "the Chief of the General Staff, who is the chief staff member for, and reports directly to, the Minister of National Defense in the administrative system, is not a head of ministry under the Constitution." Therefore, he did not have the duty to present to the Legislative Yuan a statement on its administrative policies and a report on its administration.[56]

(5) Interpretation No. 520 (Jan. 15, 2001)

The Constitutional Court decided that "in light of its effect on energy reserves, the environment, and related industries … the present

[54] Ibid., No. 387, available at http://www.judicial.gov.tw/CONSTITUTIONAL COURT/en/p03_01.asp?expno=387 (last visited Jan. 16, 2011).
[55] Ibid., No. 419, available at http://www.judicial.gov.tw/CONSTITUTIONAL COURT/en/p03_01.asp?expno=419 (last visited Jan. 16, 2011).
[56] Ibid., No. 461, available at http://www.judicial.gov.tw/CONSTITUTIONAL COURT/en/p03_01.asp?expno=461 (last visited Jan. 16, 2011).

statutory budget item that the Executive Yuan meeting resolved to withhold is indeed a change of a critical national policy that the … Having received the above report from the Executive Yuan, the Legislative Yuan is obligated to listen [to it]. … It should also be pointed out that if the Legislative Yuan should decide to oppose or form other resolutions, depending upon the contents of the resolution, all related agencies should then negotiate a solution based upon the meanings and purpose of this Interpretation, or to select a proper channel within the current constitutional mechanism to end the stalemate."[57]

(6) Interpretation No. 585 (Dec. 15, 2004) and No. 633 (Sep. 28, 2007)

In Interpretation No. 585 which was filed by a number of legislators, the Constitutional Court declared that part of the Act of the "Special Commission on the Investigation of the Truth in Respect of the 319 Shooting" were unconstitutional and thus void.[58] The Legislative Yuan revised the Act on April 11, 2006. Some legislators still thought that it violated the separation of powers and petitioned to the Constitutional court again. The Constitutional Court made Interpretation No. 633 and declared some articles were still "contrary to the principle of separation of powers and checks and balances, and shall become null and void as of the date of the promulgation hereof."[59]

(7) Interpretation No. 613 (July 21, 2006) and No.645 (July 11, 2008)

The Executive Yuan believed that the Organic Act of the National Communications Commission was unconstitutional and petitioned to the Constitutional Court. In Interpretation No. 613, the Constitutional Court argued that the provisions at issue "practically deprive the Executive Yuan of substantially all of its power to decide on personnel affairs, which transgresses the limits on the checks and balances exercisable by the legislature on the Executive Yuan's

[57] Ibid., No. 520, available at http://www.judicial.gov.tw/CONSTITUTIONAL COURT/en/p03_01.asp?expno=520 (last visited Jan. 16, 2011).

[58] Ibid., No. 585, available at http://www.judicial.gov.tw/CONSTITUTIONAL COURT/en/p03_01.asp?expno=585 (last visited Jan. 16, 2011).

[59] Ibid., No. 633, available at http://www.judicial.gov.tw/CONSTITUTIONAL COURT/en/p03_01.asp?expno=633 (last visited Jan. 16, 2011).

power to decide on personnel affairs, thus violating the principles of politics of accountability and separation of powers … shall become void no later than December 31, 2008."[60]

By the same token, in Interpretation No. 645, the Constitutional Court again declared that "the provision with respect to the appointment of such members has virtually deprived the Executive Yuan of its power to make decisions on personnel appointment under the Constitution and has obviously transgressed the limit of check and balance of powers, it is clearly contrary to the principles of separation of powers and must be made inoperative not later than one year as of the date of issuance of this Interpretation."[61]

(8) Interpretation No. 632 (August 15, 2007)

The Constitutional Court elaborated that "given that the Chief Commissioner, Deputy-Chief Commissioner and Commissioners are all legal positions preserved by the Constitution, it behooves all constitutional agencies, as regards their respective duties, to maintain the functional existence and normal operations of the Control Yuan … the President should nominate candidates to fill these positions in a timely manner and seek the Legislative Yuan's consent. The Legislative Yuan, in turn, should exercise such consent power in a timely manner to maintain the normal operations of the Control Yuan. The Constitution does not allow for the event in which either the President or the Legislative Yuan fails to nominate or consent to the nomination of candidates so that the Control Yuan cannot exercise its power or function, thereby jeopardizing the integrity of the constitutional system."[62]

Based upon the aforementioned interpretations, it is clear that the Constitutional Court tried hard to strike a delicate balance in making decisions relating to the Executive Yuan, the Legislative Yuan, and all political parties. This attitude, however, was often criticized. To mention a few, many critics contended the issue of whether the Vice-President could constitutionally assume the duties of Premier was not

[60] Ibid., No. 613, available at http://www.judicial.gov.tw/CONSTITUTIONAL COURT/en/p03_01.asp?expno=613 (last visited Jan. 16, 2011).

[61] Ibid., No. 645, available at http://www.judicial.gov.tw/CONSTITUTIONAL COURT/en/p03_01.asp?expno=645 (last visited Jan. 16, 2011).

[62] Ibid., No. 632, available at http://www.judicial.gov.tw/CONSTITUTIONAL COURT/en/p03_01.asp?expno=632 (last visited Jan. 16, 2011).

clearly declared in Interpretation No. 419.[63] While the Constitutional Court did advise the Vice President not concurrently serve as Premier, it expressed it in a rather cautioned way. Eventually, the then Vice-President Lien Chan resigned as Premier after this interpretation. Another example was Interpretation No. 520.[64] Both the two parties, the Legislative Yuan and the Executive Yuan, thought they won. Despite certain degree of ambiguity, this interpretation nevertheless solved the conflict between the government and the legislature.

The challenges faced by the Constitutional Court have become more and more severe owing to the escalating political conflicts between political parties. After 2000, the Premier and the majority of the Legislative Yuan belonged to different parties, and this discord resulted in many interpretations, such as Interpretation Nos. 520, 585, 613, 632, 633, and 645. Notwithstanding the judicial prudence, the Constitutional Court was still retaliated by the Legislative Yuan. After the Interpretation No. 585, the Legislative Yuan suspended the budget appropriated as a specialty premium for the Justices. Petitioned by some legislators, the Justices made Interpretation No. 601 and declared the suspension unconstitutional.[65] Four concurring opinions were issued in this interpretation.

Judicial Independence

Judicial independence is part of cardinal principles in checks and balances among powers in constitutional democracies. Article 80 of the Constitution prescribes "judges shall be above partisanship and shall, in accordance with law, hold trials independently, free from any interference."[66] Article 81 guarantees that "judges shall hold office for life. No judge shall be removed from office unless he has been guilty of a criminal offense or subjected to disciplinary measure, or declared to be under interdiction. No judge shall, except in accordance with law, be suspended or transferred or have his salary reduced."[67] The constitutional status of judicial power in Taiwan is

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[63] Ibid., No. 419, available at http://www.judicial.gov.tw/CONSTITUTIONAL COURT/en/p03_01.asp?expno=419 (last visited Jan. 16, 2011).

[64] See note 57 above.

[65] Ibid., No. 601, available at http://www.judicial.gov.tw/CONSTITUTIONAL COURT/en/p03_01.asp?expno=601 (last visited Jan. 16, 2011).

[66] Zhonghua Minguo Xianfa, art 80.

[67] Ibid., art 81.

no less venerable than that of other countries. However, after the promulgation of the Constitution, Taiwan entered into the era of Mobilization and Martial Law Decree. Whether the current judicial system has conformed to the essence of the Constitution still merits further discussion. In the following, I would analyze this issue from the perspective of some interpretations rendered by the Constitutional Court.

The Establishment of Judicial Independence

a. Interpretation No. 86

This interpretation was the greatest contribution that the Constitutional Court made to the judicial reform in Taiwan. This case was appealed by 51 members of the Control Yuan. On August 15, 1960, the Justices made Interpretation No. 86, elaborating that "in view of the fact that different levels of courts and subsidiary courts below the High Court inclusively hold the judicial power over trials of civil and criminal litigation, these courts shall be subordinate to the Judicial Yuan."[68] In its reasoning, the Constitutional Court further demanded that "all relevant acts and regulations shall respectively be amended to comply with the concept of Article 77 of the Constitution."[69] The Constitutional Court implicitly declared the judicial system operated at the time as unconstitutional because an explicit declaration was almost not possible given the background of authoritarian regime. In response, the Judicial Yuan and then Ministry of Judicial Administration negotiated several times for the implementation of this interpretation. On July 1, 1980, all different levels of courts and subsidiary courts below the High Court became subordinate to the Judicial Yuan. It was 20 years after the release of Interpretation No. 86. The difficulty of the judicial reform was evident[70].

b. Interpretation No. 436

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[68] J.Y. Interpretation No. 86, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=86 (last visited Jan. 16, 2011).

[69] Ibid.

[70] See Yueh-Sheng Weng, "Die neuere Entwicklung des national-chinesischen Verfassungsrechts", in *Jahrbuch des öffentlichen Rechts*, Neue Folge 27 (1978), pp. 561 ff.

On October 3, 1997, the Constitutional Court made this interpretation, arguing that "the initiation and operation of the military trial, which is within the power of punishment of the nation, shall meet the minimum requirement of the due process of law, which requirement includes an independent and just tribunal and procedure and the compliance with constitutional principles as stated in Articles 77 and 80 of the Constitution…In light of the spirit of protecting physical freedom and the right of instituting legal proceedings and the provision of Article 77, the defendant receiving the sentence of imprisonment in a final and conclusive judgment made by the military tribunal in peacetime shall be permitted to appeal directly to a normal court on the ground that the judgment received is in violation of the law."[71] This interpretation led to the reform of military trials and military courts, which was meaningful to the protection of human rights.

c. Interpretation No. 530

The Control Yuan believed that the Judicial Yuan and the Ministry of Justice did not have the authority to enact subsidiary judicial rules or supervisory regulations and thus petitioned to the Constitutional Court. The Justices made Interpretation No. 530 on October 5, 2000, arguing that "to realize the principle of judicial independence, the judiciary shall preserve judicial autonomy. Based on judicial autonomy, the highest judicial organ shall retain the power of rulemaking governing its practice and judicial matters … Based upon judicial autonomy, the highest judicial organ may prescribe and amend rules governing the details and technical matters of judicial procedures …judicial rules shall not be inconsistent with laws and these rules shall not add any further restrictions on the people's freedoms and substantive rights without the concrete and detailed delegation of law."[72]

Following that, the Constitutional Court continued to criticize that "the Judicial Yuan, other than Justices with the aforesaid adjudicative powers, has become merely the highest judicial administrative organ, resulting in the separation of the highest adjudicative organ from the

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[71] J.Y. Interpretation No. 436, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=436 (last visited Jan. 16, 2011).

[72] Ibid., No. 530, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=530 (last visited Jan. 16, 2011).

highest judicial administration. In order to be consistent with the intent of the framers of the Constitution that considered the Judicial Yuan as the highest judicial adjudicative organ, the Organic Act of Judicial Yuan, the Court Organic Act, the Organic Act of Commission on the Disciplinary Sanction of Public Functionaries must be reviewed and revised in accordance with the designated constitutional structure within two years after the date of this Interpretation." In response to this constitutional demand, the Judicial Yuan proposed the draft amendments of the Organic Act of Judicial Yuan twice, but none was passed. Consequently, Interpretation No. 530 has not been implemented fully and became problematic.[73]

The Role of Judges and the Principle of Judicial Reservation (Grundsatz des Richtervorbehaltes)

Judicial independence will not be achieved without judges. Who is the "judge" stipulated in the Constitution? Article 8 of the Constitution plainly protects personal freedom and elaborates parameters of such protection including especially the principle of judicial reservation. The definition of a "court" in Article 8 has been deeply connected with the implementation of the principle of judicial reservation. The followings are some important interpretations on this issue.

a. Interpretation No. 13

Some members of the Control Yuan doubted whether the judge specified in Article 81 of the Constitution included the prosecutor and petitioned to the Constitutional Court, known as the Council of Grand Justices at the time. The Justices made Interpretation No. 13 on January 31, 1953, arguing that "the Judge referred to in Article 81 of the Constitution means the Judge that Article 80 of the Constitution refers to and does not include the Prosecutor. However, the guarantee of tenured prosecutors, according to Article 82 of the Constitution and Article 40, Paragraph 2, of the Court Organic Act, apart from their transfer, is the same as that of tenured judges."[74] Based on the

[73] See Chien-Liang Lee, "An Analysis of the Relationship between the Judicial Independence and the Supervisory Power of Judicial Administration", in *Taiwan Law Journal*, No. 32 (2002), p. 43, (in Chinese).

[74] J.Y. Interpretation No. 13, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=13 (last visited Jan. 16, 2011).

separation of powers in a constitutional state, a judge should be passive, independent, disinterested while a prosecutor must actively investigate in each case and be subject to orders of Prosecutor General and chief prosecutors. This interpretation not only correctly distinguished the differences between the judicial power and the executive power but also conformed to constitutional rule of law and separation of powers given that it was made in authoritarian regime and the Constitution was still in its infancy.

b. Interpretation No. 162

c.

Just like Interpretation No. 13, Interpretation No. 162 was appealed by the Control Yuan. The Control Yuan held doubts as to whether the President of the Administrative Court and the Chief Commissioner of the Public Functionaries Disciplinary Commission should be considered to be judges under the Constitution. The Constitutional Court made Interpretation No. 162 on April 25, 1980, arguing that "the President of the Administrative Court and the Chief Commissioner of the Public Functionaries Disciplinary Commission are the administrative heads of the respective agencies. Therefore, the provisions set forth in Article 81 of the Constitution are not applicable to the President of the Administrative Court or the Chief Commissioner of the Public Functionaries Disciplinary Commission. The adjudicator of the Administrative Court and the commissioner of the Public Functionaries Disciplinary Commission have authority to adjudicate or deliberate administrative cases independently and impartially pursuant to the law without political interference. Therefore, the adjudicator of the Administrative Court and the commissioner of the Public Functionaries Disciplinary Commission should be considered as judges under the Constitution in accordance with Articles 78 and 80 of the Constitution."[75]

The Constitutional Court hesitated to make this decision since many adjudicators of the Administrative Court and commissioners of the Public Functionaries Disciplinary Commission were government officials rather than judges. In fact, what really mattered was the function of a judge under Articles 78 and 80 of the Constitution. The principle of judicial reservation entrenched the protection of human rights by assuring a fair and transparent judicial process.

[75] Ibid., No. 162, available at http://www.judicial.gov.tw/CONSTITUTIONAL COURT/en/p03_01.asp?expno=162 (last visited Jan. 16, 2011).

d. Interpretation No. 392

On October 19 and November 2, 1995, the Justices held oral arguments twice in the Constitutional Court and made Interpretation No. 392 on December 22, 1995, declaring that "the Code of Criminal Procedure … which empowers a prosecutor to withdraw, suspend, resume, continue detention, or to take any other measures in conjunction with a detention … violates the aforementioned Article 8, Paragraph 2, of the Constitution. … the abovementioned unconstitutional provisions of the Code of Criminal Procedure and the Habeas Corpus Act shall lose effect within two years from the date of promulgation of this Interpretation."[76]

This was a cardinal interpretation pertaining to the protection of human rights. In its reasoning, the Constitutional Court elaborated that "judiciary of a restrictive definition is the common meaning for the judiciary. It refers to state functions in civil and criminal trials, and the capacity to carry out this function is called judicial power or adjudicative power. … Whereas in this state, the administrative litigation, the disciplinary measures against public functionaries, judicial interpretation, the trial for dissolution of unconstitutional political parties and any sort of "state functions of adjudication" shall also be included. … As to those state functions to further the purpose of the judiciary of a restrictive definition (i.e., state functions with a judicial nature), they are included in the category of the judiciary of an expansive definition. … Therefore, in a procedural sense, a court (a court of a restrictive definition) is equated with a judge."[77]
In addition, this was the first time that Justices of the Constitutional Court were evidently regarded as the judge under the Constitution in interpretations.

e. Interpretation No. 601

As aforementioned, this interpretation discussed whether it was unconstitutional for the Legislative Yuan to suspend the budget appropriated as a specialty premium for the Justices of the Constitutional Court. The Constitutional Court maintained that "in order to realize the people's right of instituting legal proceedings, to protect their constitutional or legal rights, and to preserve the constitutional order, the Justices, based on the petitions made by the

[76] See note 24 above.
[77] Ibid.

people or the governmental agencies in respect of individual cases, will render final and conclusive judgment on the constitutional dispute or doubt as to such cases, whose interpretations will bind all the agencies, as well as all the people, of the State. The effects are, in nature, the adjudicative function of the State, which is the core area of the judicial power. Therefore, the Justices, like ordinary judges, are judges in the constitutional context, as has been made clear by this Court in J.Y. Interpretations Nos. 392, 396, 530 and 585."[78] This interpretation best elucidated the characteristics of the judge under the Constitution.

f. Interpretation No. 631

The appellant of this case, after exhausting all legal remedies, argued that the Communication Protection and Monitoring Law infringed the freedom of privacy of correspondence and petitioned to the Constitutional Court. The Constitutional Court made this decision on July 20, 2007, confirming that "Article 5-II of the Communication Protection and Monitoring Law … did not require that the writ of communication monitoring be in principle issued by an impartial and independent judge. It charged the prosecutor and judicial police officers, who are responsible for criminal investigations, with the concurrent duties of applying for and issuing the writ of communication monitoring. Such provision cannot be regarded as reasonable and legitimate and is in violation of Article 12 of the Constitution that guarantees the freedom of privacy of correspondence."[79] Here the Constitutional Court emphasized the differences between a judge and a prosecutor again.

The Independence of Judges

a. Constitutional Review of Administrative Regulations and Judicial Precedents

1) Interpretation No. 38

[78] See note 65 above.

[79] Ibid., No. 631, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=631 (last visited Jan. 16, 2011).

On August 27, 1954, The Constitutional Court, known as the Council of Grand Justices at the time, explained in Interpretation No. 38 that "the aim of Article 80 of the Constitution is to ensure independent adjudication of judges, free from any interference. The term 'in accordance with law' denotes that statutes are the primary basis of adjudication. It does not exclude ordinances and regulations that do not contradict the Constitution and statutes as a source of law."[80] In other words, the Constitutional Court thought what the "law" was should be interpreted substantively. Regulations enacted by local governments should be applied if they were held consistent with the Constitution or statutes. However, if the regulations contradicted the Constitution or statutes, a judge should decline to apply them.

2) Interpretation No. 137

After the Interpretation No. 38, the Control Yuan still held doubts as to whether a judge was bound by administrative orders issued by government agencies in accordance with their respective authorities. The Constitutional Court made Interpretation No. 137 on December 14, 1973, arguing that "with regard to the administrative orders of statutory interpretation handed down by the government agencies in accordance with their respective authorities, the court may not refuse to apply them if they are applicable to the case. However, a judge shall, based on his or her fair and honest belief in the accurate interpretation of the law, give a lawful and legitimate legal opinion on a controversy which requires an accurate judicial interpretation."[81]

This conclusion may be worthy of further debate since the fourth-term Constitutional Court believed that a judge was obligated to apply administrative orders in principle, a conclusion that was consequently not strictly followed.

3) Interpretation No. 216

During the fifth term, several young scholars with learned legal backgrounds were appointed and became Justices of the Constitutional Court. The authoritarian environment gradually became open and democratized. On June 19, 1987, the Constitutional

[80] Ibid., No. 38, available at http://www.judicial.gov.tw/CONSTITUTIONAL COURT/en/p03_01.asp?expno=38 (last visited Jan. 16, 2011).

[81] Ibid., No. 137, available at http://www.judicial.gov.tw/CONSTITUTIONAL COURT/en/p03_01.asp?expno=137 (last visited Jan. 16, 2011).

Court made Interpretation No. 216, the last interpretation made before the annulment of the Martial Law Decree. In this interpretation, the Constitutional Court articulated that "administrative rules adopted under the duty of seeking proper construction of laws by various government agencies may be applied by judges in the course of adjudication, who, not being bound thereby, may in a proper manner, express their opinion in light of the law, as stated in Interpretation No. 137 of this Court. Ordinances issued by a judicial administration involving legal issues in the business of adjudication are merely references for judges, who again, are not bound thereby in the course of adjudication."[82]
In its reasoning, the Constitutional Court emphasized that "the provision that administrative ordinances issued by a judicial administration shall not intervene in adjudication is specifically prescribed in Article 90 of the Court Organic Act. Judicial administrations shall not put forth their own legal views and order judges to follow such views in the course of adjudication."[83] Some criticized that it violated the prohibition of ultra petita rulings.[84] Nevertheless, after this interpretation, the Judicial Yuan no longer issued any of these kinds of interpretive ordinances.

b. Constitutional Review of Legislative Statutes without the Power of Invalidation

1) Interpretation No. 371

After the Justices of the sixth term took office on October 1, 1994, they made Interpretation No. 371 on January 20, 1995, arguing that "a judge shall have no capacity to hold a statute unconstitutional, and shall not refuse to apply a statute for that reason. Nonetheless, since the Constitution's authority is higher than the statute's, judges have the obligation to obey the Constitution over any other statutes. Therefore, in trying a case where a judge, with reasonable assurance, has suspected that the statute applicable to the case is unconstitutional, he shall surely be allowed to petition for

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[82] Ibid., No. 216, available at http://www.judicial.gov.tw/CONSTITUTIONAL COURT/en/p03_01.asp?expno=216 (last visited Jan. 16, 2011).

[83] Ibid.

[84] But See Tzu-Yi Lin, "Judicial Independence and Administrative Interpretations – Should A Judge be Bound by Administrative Interpretations Issued by Government Agencies?" in *The Development and The Inheritance of Rule of Law*, Taipei 2009, p. 55 (in Chinese).

interpretation of its constitutionality. In the abovementioned situation, judges of different levels may suspend the pending procedure on the ground that the constitutionality of the statute is a prerequisite issue. At the same time, they shall provide concrete reasons for objectively believing the unconstitutionality of the statute, and petition to the Grand Justices of the Yuan to interpret its constitutionality."[85]

This interpretation was the borrowing of "concrete review" stipulated in Article 100, Paragraph1 of the German Basic Law. Nevertheless, in Taiwan, the Constitutional Court introduced it in Interpretation No. 371 by relying on the principle of judicial independence.

2) Interpretation No. 572

After the Interpretation No. 371, judges of district courts began to petition to the Constitutional Court. However, lower court judges have not understood fully relevant requirements in making such requests. The Constitutional Court made Interpretation No. 572 on February 6, 2004 as a supplementary interpretation to Interpretation No. 371. In this interpretation, the Constitutional Court mentioned that the "prerequisite issue" was the matter "when the court presiding over the pending case believes that the law at issue violates the Constitution and may clearly affect the ruling of the case."[86] And "to provide concrete reasons for objectively believing the unconstitutionality of the statute" meant that "in the petition, the petitioning court is required to describe in detail its interpretation of the statute that violates the Constitution, explain the standard used to interpret the Constitution, and accordingly, provide evidence that it believes the statute is unconstitutional and is objectively without obvious mistakes. If the petitioner only has doubts about whether the statute is unconstitutional or the statute may possibly be reconciled with the requirement for requesting a constitutional interpretation, this is not sufficient to constitute concrete reasons for objectively believing that the statute is unconstitutional." [87] After this

[85] J.Y. Interpretation No. 371, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=371 (last visited Jan. 16, 2011).

[86] Ibid., No. 572, available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=572 (last visited Jan. 16, 2011).

[87] Ibid.

Interpretation, the requirements for judges to petition to the Constitution Court became more perspicuous.

3) Interpretation No. 590

After the Interpretation No. 572, a judge of Miaoli District Court petitioned to the Constitutional Court, requesting whether it was allowed for judges to take some preventive measures during the suspension of a trial when petitioning to the Constitutional Court. The Constitutional Court made Interpretation No. 590 on February 25, 2005, complementing that "after the suspension of a trial or non-trial procedure, a judge shall, in urgent circumstances, look into legislative purposes, balance the rights and welfare of parties with public interests, and consider all related matters of the case so as to maintain necessary safeguards, protection or take other appropriate measures."[88] Hence, the function of a court will not be influenced during the petition.

In the past decades, this concrete review system has developed stably. If a petition is filed by a judge who is undoubtedly a legal expert, the provision at issue will be more likely to be held unconstitutional by the Constitutional Court. The establishment of the system is advantageous to the development of constitutionalism in Taiwan.

Conclusion

Taiwan is a country with a written constitution. However, the Constitutional Court has from time to time exercised its power without clear constitutional or statutory authorization. For example, as discussed before, the legal effect of the interpretations rendered by the Constitutional Court has not been stipulated clearly in any statute. The Constitutional Court had to render interpretations pertaining to the legal effect of its own interpretations.[89] The situations concerning other disputes, such as the concrete review system (Interpretation No. 371), the preliminary injunction (Interpretation No. 599),[90] the limit

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[88] Ibid., No. 590, available at http://www.judicial.gov.tw/CONSTITUTIONAL COURT/en/p03_01.asp?expno=590 (last visited Jan. 16, 2011).

[89] See Yueh-Sheng Weng, "Research on the Validity of the Interpretations", in *The Public Law and the Political Theories*, Taipei, 2004, pp.1-36 (in Chinese).

[90] See Ren-Miau Lee, "The Preventive Proceeding in Judicial Review I", in *National Chengchi University Law Review*, No. 94 (2006), p.1 (in Chinese); Lee, note 30 above, p.91.

of constitutional revision (Interpretation No. 499), are also similar. Has the Constitutional Court transgressed the boundary of judicial power and infringe upon the legislative realm? Should the Constitutional Court be self-restraint or embrace certain degree of judicial minimalism?[91] Without any doubt, the Constitutional Court recognized the boundary of judicial power.[92] In Interpretation No. 328, for instance, the Constitutional Court contended that the issue of national territory was a political question with which the Justices had no jurisdiction. With the changing political environment, more and more political disputes are appealed to the Constitutional Court. From the early party-state era to a new democracy, from indirect democracy to direct referendum, Taiwan has experienced a major transition in democratic constitutionalism, a velvet revolution.[93] It will be difficult, if not impossible, for the Constitutional Court Justices to embrace the judicial minimalism or insulate themselves from the changing dynamics. Undoubtedly, the judiciary has its own limit and the Constitutional Court must exercise more cautions to highly political issues after the democratization. Unanimous decisions may be required in these cases to maintain the authority of the Constitutional Court and win the confidence of the people.[94] In respect to the protection of human rights, a sacred duty of the judiciary, the Constitutional Court must function actively as the cardinal realm of fundamental rights should not be violated by the majority.

The Constitutional Court has functioned for more than sixty years and is closely connected with the constitutional development in Taiwan. There are 683 interpretations rendered till January 15, 2011. Each of these interpretations is a collective work of all Justices. Some interpretations are opposed while others are appraised by citizens. Having worked hard on its own, the Constitutional Court as the guardian of the Constitution and human rights has gradually won the

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91 See Jau-Yuan Hwang, "The Practice of Judicial Passivism – Reflection on Prof. Sunstein's Judicial Minimalsim" in *Modern Theories of Public Law I*, Taipei, 2002, p. 875 (in Chinese).

92 See note 1 above, p. 51.

93 See Jiunn-Rong Yeh and Wen-Chen Chang, "The Changing Landscape of Modern Constitutionalism: Transitional Perspective", in *National Taiwan University Law Review*, No. 4 (2009), p. 145.

94 Yueh-Sheng Weng, "The Expectation of the Constitutional Litigation System in Taiwan" in *Academia Sinica Law Journal*, No. 1 (2007), pp. 36-40 (in Chinese).

respect of the people. History will tell if it will continue to be so in the future.

Constitutional Rights in Multiethnic States – The Case of Malaysia

Claudia Derichs·

Introductory Remarks

The constitution of a modern nation-state is one of its core institutions. It covers the fundamental normative orientations of a country and reflects the values that guide administration and society in their interaction. Institutions in comparative politics can be seen as a variable in the theoretical setting of system comparison. They serve the purpose of structuring the analytical framework, but their impact on the unfolding of certain types of political systems should not be overestimated. Accordingly, comparative politics and its extension to comparative policy analysis in particular, tend to emphasize political processes and procedures instead of focusing exclusively on institutions.[1] Yet 'institutions matter' and they provide for an important analytical approach to the analysis of polities, politics and policies. In the present paper, I will try to shed a light on the political outcomes institutions generate with respect to rights of freedom (our panel topic), and relate them to the situation in a multiethnic Southeast Asian society, namely Malaysia. I will not deal with 'classical' examples of political institutions like the bureaucracy, parliament, or political parties, but concentrate on the constitution.[2] The ethnic and hence cultural dimension of codified norms is obvious in the Constitution of Malaysia, albeit not always expressed explicitly in its respective articles. Malaysian politics has always been determined and performed along ethnic communal lines. The institutional manifestation of the administration of multiethnic

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1 See, for instance, Klaus von Beyme, *Die politischen Theorien der Gegenwart* [Contemporary Political Theories], 7th ed., Opladen: Westdeutscher Verlag, 1992.

2 I am using a "c" as first letter when I talk about the constitution as an institution in general, and "C" when I refer to the Constitution of Malaysia.

relations is quite unique in its kind and merits a closer look. My overall assessment of the provisions in the Constitution and the outcomes that have been generated in Malaysia's 'everyday politics' is ambivalent. On the one hand, Malaysia's political stability over decades is remarkable and has been pointed out by many scholars and comparativists. On the other hand, communal tension and articulated worries about violations of the constitution have increased in recent years. They have not come about by chance, but as a result of

(a) a rather authoritarian policy implementation and
(b) the 'hijacking' of control over law and order by one segment of society.

The paper consists of four sections plus some concluding reflections. In the first section, I will introduce Malaysia as a research subject and highlight some aspects that merit attention in respect to the topic of our panel. The second section addresses the constitutional setting. It discusses the articles and clauses which refer to ethnic relations, cultural markers and privileges for the biggest ethnic group, *i.e.* the Malays. These clauses have a direct impact on the regulation of citizens' rights of freedom. The third section illustrates how the constitutional provisions have worked out in the shape of the country's New Economic Policy and how they have been received by the country's citizens. In the fourth section, I wrap up the central aspects of the preceding paragraphs and give a concrete example of an outcome of the New Economic Policy in the field of education. Another example of policy outcome refers to a civil society coalition that strives to preserve the status of the Constitution as the country's supreme law. The coalition epitomizes the communal tensions that have apparently increased during recent decades. The conclusion draws a question mark concerning the power of the constitution to guarantee citizens' rights of freedom.

Malaysia as a Research Subject

Malaysia may not seem to be a very spectacular case study for cross-cultural comparisons at first sight, but it becomes an increasingly interesting subject for research when we look at how it has dealt with the ethnically and culturally heterogeneous composition of its population. There have been no major upheavals and social unrests for four decades, although prophecies of doom have been articulated

frequently. [3] Malaysia belongs to the predominantly Muslim-populated countries in the Southeast Asian region. It displays a fairly stable political and societal order, although we find numerous challenging situations that lead observers to doubt the peaceful surface.

Malaysia gained independence and became a sovereign state in 1957, released from the colonial status as part of the British Empire, which had only been interrupted shortly by a Japanese occupation between 1942 and 1945. It was not yet called *Malaysia* in 1957, but *Federation of Malaya*, and it had not yet achieved the final stage of territorial rearrangements. Singapore joined the Federation in 1963, together with Sabah and Sarawak on Borneo island.[4] This whole entity was called *Malaysia* then, indicating that it was not only ethnic Malays who belonged to the 'nation', but also ethnic Chinese, Indians, and several groups of indigenous people.[5] Singapore's integration into the Federation, however, lasted but a mere 23 months. In 1965 the tiny peninsula was compelled to leave the Federation; it declared

[3] The reform movement which was mobilised in the wake of the sacking of Deputy Prime Minister Anwar Ibrahim in September 1998 may be regarded as a form of social unrest, but it was cooled down by the government authorities relatively quickly and has rather turned into a peaceful-but-demanding social movement. After the general elections of March 2008, this social movement made heavy inroads into formal politics: Its followers in the opposition parties won an unexpectedly high number of votes and got to control five out of 13 States.

[4] For Malaysia's international relations in those days, which directly shaped domestic policymaking, see Mohamed Noordin Sopiee, *From Malayan Union to Singapore Separation: Political Unification in the Malaysia Region 1945-1965*, Kuala Lumpur: Penerbit Universiti Malaya, 1974. Ahmad Abdullah, *Tengku Abdul Rahman and Malaysia's Foreign Policy 1963-1970*, Kuala Lumpur: Berita Publishing, 1985.

[5] Malaysia: Official Yearbook 1997 gives absolute figures, but the proportions are well detectable: The estimation of the total population for 1997 was 21,665,400. 9,802,400 count as Malays, 4,631,900 as Chinese, 1,524,100 as Indians, and the rest as aborigines (*Orang Asli*) and indigenous races. Roughly calculated then, the three major groups would show figures of 45% Malays, 21% Chinese, and 7% Indians. "Others" would thus comprise 26% of the population. Other official estimates, however, tell figures of 55% Malays, 35% Chinese, 10% Indians and other minorities. The figures differ because of different categories utilized in the census to distinguish between Malay, Chinese, and natives. Statistically it makes an difference, *e.g.*, when *bumiputera* in Sabah and Sarawak are counted as Malays or not, or when persons of mixed origin like Sino-Orang Asli or Sino-Iban are counted as Chinese. Both figure combinations are officially accepted. In determining the quota for Bumi and non-Bumi in the tertiary sector of higher education, the ethnic breakdown of 55:35:10 is taken as the relevant base.

its separation from the mainland to become a sovereign state. Ever since, ethnic Malays form the majority of Malaysia's population (appr. 60 to 65%). They are followed by ethnic Chinese (appr. 25-30%) and ethnic Indians (appr. 7%). The remaining percentage is made up of various indigenous communities.

The ethnic constellation changed considerably through the dissociation of Singapore, which is mostly inhabited by citizens of Chinese origin. Malaysia had in fact insisted on the incorporation of Sabah and Sarawak into its territory because it sought to prevent a Chinese majority in Malaysia.[6] From the very beginning of its existence as the entity *Malaysia*, the country has had to handle the fact of ethnic rivalry, potential racial clashes, and diverse cultural nationalisms. Research thus refers to the childhood period of the young Malaysian state as a period of striking *communalism*. Like Ongkili (1985) states in the preface of his great work on nation-building in Malaysia between 1946 and 1974, communalism has been the fundamental problem of nation-building in Malaysia. Communal groups can be political parties, ethnic minorities, or communities who just strive for representation in the nation. Communalism had to be taken into account while shaping the nation; it determined the social, political and economic policy at length.[7]

The challenge for politicians in 1957 lay in the task of inventing and implementing a political system and social order that would prevent communal clashes and enhance stability. The situation today seems not much different, for we still find a vaguely balanced ethnic composition, a political party system that represents the major ethnic groups and their concerns, and a state-sponsored concept of reformist Islam which is designed to be progressive and moderate (*Islam Hadhari* or "civilizational Islam"), but has not succeeded in convincing the country's non-Muslims of its integrative capacity. Despite the government's ambitions to shape Malaysia as a knowledge-based, IT-savvy and business-oriented society, questions of equal access to education and profession, shared goods and shared meanings in a multiethnic society still occupy the political agenda. The post-colonial government has been successful in establishing formal democratic structures and some form of 'unity through

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[6] Albert Lau, *A Moment of Anguish: Singapore in Malaysia and the Politics of Disengagement*, Singapore: Times Academic Press, 1998, pp. 11 f.

[7] James P. Ongkili, *Nation-building in Malaysia 1946-1974*, Oxford and others: Oxford University Press, 1985, p. V.

diversity' with comparatively few disruptive incidents.[8] This has been achieved through a combination of at least three vividly pursued goals:

- rapid economic growth,
- cultivation of a culture of 'developmentalism' (accompanied by middle class growth),
- consolidation of a strong, one-party dominated state[9] (which resorted to coercive laws to maintain its rule).[10]

In the following paragraphs I will look at how the ethnic and cultural diversity is reflected in the constitutional arrangement of the Malaysian state. A central observation is that social, political, and economic inequalities are institutionally stipulated, but functionally levelled in that an alternative system of institutional organisation evolved from the sheer need of the 'minorities' to offset the disadvantages deriving from Malay dominance. The Malaysian Constitution will be looked at to convey an idea of how critical the issue of Malay dominance was in the vision of the 'plural society' that Malaysia's founding fathers planned to create.[11] A second area to examine will be the concept of *bumiputera* ('sons of the soil'), which applies to ethnic Malays and indigenous people or 'natives'. It will be raised as an example for the institutionalisation of difference. Both the second and the third topic are wrapped in the framework of the so-called New Economic Policy (NEP, 1971-1990), which stands out

8 For comparative cases in the Asia-Pacific region see Michael E. Brown and Sumit Ganguly (eds.), *Government Policies and Ethnic Relations in Asia and the Pacific*, Cambridge MA and London: The MIT Press, 1997. Ganguly, "Ethnic Policies and Political Quiescence in Malaysia and Singapore" in M.E. Brown and S. Ganguly (eds.), *Government Policies and Ethnic Relations in Asia and the Pacific*, eds., Cambridge MA and London: The MIT Press, 1997, pp. 233-272, puts the particular case of Malaysia into perspective.

9 Strictly spoken, it is not one single party that dominated during Malaysia's post-colonial time, but a coalition of roundabout 14 bigger and smaller component parties. The strongest party within this coalition is the United Malays National Organisation or UMNO, which is generally considered the ruling party.

10 Francis Loh Kok Wah, "Managing Ethnic Conflict and Violence in Malaysia: Development, the Strong Developmental State and Developmentalism", in A. Croissant, B. Martin, and S. Kneip (eds.), *The Politics of Death: Political Violence in Southeast Asia*, Berlin: LIT Verlag, 2006, pp. 251-281.

11 See also A.B. Shamsul, "The Making of a 'Plural' Malaysia", in D.Y.H. Wu, H. McQueen, and Y. Yamamoto (eds.), *Emerging Pluralism in Asia and the Pacific*, Hong Kong: Hong Kong Institute of Asia-Pacific Studies, 1997, pp. 67-83.

as the most elaborate affirmative action policy of post-colonial Malaysia.

The Constitutional Setting

The Constitution of Malaysia, as it is called since *Malaysia Day* (16 September) 1963, is an extended version of the Constitution of 1957, which is also referred to as the *Merdeka Constitution* (Independence Constitution). The *Merdeka Constitution* was ratified shortly before the independence of the Federation of Malaya was proclaimed on 31 August 1957 and is therefore still the reference.[12] The term 'Federation' was retained in the Constitution of Malaysia and is used throughout its text; Art. 1(1) states that the "Federation shall be known, in Malay and in English, by the name Malaysia".[13] The Malaysian Federation accordingly consists of 13 States and two Federal Territories (the capital Kuala Lumpur and the island Labuan on the East coast). The States enjoy the legislative rights of local government entities in a federalist state, *i.e.* they are sovereign in every regard except for issues belonging to the 'Federal List' and the 'Concurrent List' of lawmaking. It is worth mentioning that Malaysia was for a long time the only nation state in Southeast Asia that subscribed to a federalist state organisation. (Myanmar, which would be a second example, cannot really be called federalist). Indonesia implemented a decentralization scheme since 2001, but it differs from Malaysia in that it has elevated the autonomy of the local districts (*daerah*) rather than endowing the provinces with effective powers of self-government.

The organisation of the State governments in Malaysia reveals some peculiarities which are directly related to some 'Malay legacies' of the past. With the Sultans as Heads of State[14] we find an institution that dates back to the old times of a dynastic polity. The Sultan

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[12] Barbara Watson Andaya and Leonard Y. Andaya, *A History of Malaysia*, Houndmills and others: Macmillan, 1982, p. 262.

[13] For this and other clauses of the Constitution in this paper see full text internet version of the 1957 *Constitution of Malaysia* at http://en.wikisource.org/wiki/Constitution_of_ Malaysia.

[14] Yang di-Pertuan Negeri refers only to the Heads of State in Malacca, Penang, Sabah and Sarawak, which are cited in the Constitution as 'States not having a Ruler' (Art. 3(2)) and which do not have a "history" as Islamic Sultanates. For these four States (and for the Federal Territories), the Supreme Head of the Federation (Yang di-Pertuan Agong; monarch) can be authorized to represent the Head of the religion of Islam when Islamic religious matters extend to the Federation as a whole (Art. 3(2)).

system itself is informed by the concept of *raja*, or royalty, and connotes "communitarian assumptions that underpinned the old kerajaan [Malay kingdom; C.D.]".[15] The Head of State is also Head of the religion of Islam in that respective State, so that Islamic religious affairs can be linked to the notion of Malay-Muslim tradition, and political order can be traced to Malay royal tradition as well as to the modern federalist system. Indeed, the States themselves as administrative entities, called *negeri* in Malay language, resemble the *kerajaan* model of Sultanates in today's Peninsular Malaysia. Integrating the system of Sultans and *negeri* into a modern polity increased the credibility of the nation-state model introduced in 1957 and attended to the narrative of Malay religious and political tradition. On the national level, the Supreme Head of the Federation (*Yang di-Pertuan Agong*) is elected as king by the *Conference of Rulers* for five years. This form of electing the monarch is also unique to Malaysia. Although the *Conference of Rulers* includes both the dynastic Sultans and the non-Sultanic Heads of States (see note 6 below), the latter are not eligible for the status of king. The *Conference of Rulers* is exclusive to the Sultans in cases of "any proceedings related to the election or removal of the Yang di-Pertuan Agong or relating solely to the privileges, position, honours and dignities of Their Royal Highnesses [*i.e.* the Sultans; C.D.] or to religious acts, observances or ceremonies".[16]

There are more hidden messages in this small passage of the Fifth Schedule of the Constitution than apparent at first glance. The Malay bias is obvious in that the Malay Muslim Rulers of the States, hence the Sultans, are the only persons entitled to assume the position of the Supreme Head of the Federation (king). In the States not having a Sultan, a modified form of the Sultan system has been installed to create a structural similarity between all States of the Federation. The monarch's oath of office – in Malay language – contains the phrase "We shall at all time protect the Religion of Islam".[17] It clearly prescribes a full commitment to the religion of Islam. Since 'Malayness' is defined by the three keywords *bahasa* (language), *agama* (religion = Islam) and *raja* (royalty), it is clear that the sultan-monarch system underscores an important feature of Malay cultural

[15] Anthony Milner, "Ideological Work in Constructing the Malay Majority", in D. C. Gladney (ed.), *Making Majorities: Constituting the Nation in Japan, Korea, China, Malaysia, Fiji, Turkey, and the United States*, Stanford: Stanford University Press, 1998, p. 161.

[16] Constitution of Malaysia 1957, Fifth Schedule, Item 7.

[17] Constitution of Malaysia 1957, Fourth Schedule.

nationalism: A Malay is a Muslim, speaking the Malay language and showing loyalty to the king. A concession to liberal democratic ideas of the separation of powers and checks and balances was made by establishing in every State an elected Legislative Assembly and an Executive Council with a Chief Minister at the top to avoid a concentration of power.

The constitution does not preclude the possibility of non-Malay rule through these legislative and executive institutions – in the States as well as on the federal level. In this regard, it displays fidelity towards the 'plural society' vision. In political reality, a non-Malay ruler is inacceptable.[18] 'Malay dominance' and the preservation of 'Malayness' are recognized and nurtured in politics and society; Malay hegemony is firmly consolidated in the political world. But the commitment to a 'plural society' concept is nevertheless allowed for by the Constitution. Moreover, in terms of economic skills and performance we still find Chinese Malaysians in the forefront. The dualism of the Constitution – in the sense of its dual commitment to the features of Malay-Muslim primacy and to the plural society concept – reflects a special attention to one particular ethnic community in the multiethnic state, while recognizing the reality of ethnic pluralism. Following both orientations at the same time means to walk a tightrope. In the Constitution, the effort to cater to both requirements condenses in a peculiar provision of 'special rights' for Malays in exchange for a citizenship status for non-Malays – an inter-ethnic 'social contract', so to speak.

The primacy of Malays and 'natives' is expressed in Article 153 of the Constitution. The Article symbolizes the successful struggle of UMNO[19] partisans in the mid-1940s to mobilize support for their idea of a 'Malay' nation state. It guarantees special rights for Malays – rights that automatically accompanied the Sultan system when it was (re-)installed at the time of the Federation of Malaya in 1948. After declaring these rights a part of the *Merdeka Constitution* and hence declaring them Article 153 of the current Constitution, they could be utilized in party politics to legitimize communally oriented party programs. In the case of UMNO for instance, Shamsul speaks of four phases of implementation of the UMNO-sponsored model of a plural

[18] The discussion of a non-Malay prime minister gained momentum after the elections of 2008. The opposition coalition *Pakatan Rakyat*, which is composed Malay and non-Malay parties alike, agreed on a Malay prime minister in case this issue came up at some point in future (*Malaysia Today*, June 8, 2010).

[19] United Malays National Organisation, see above note 9.

society nation.[20] The model was based on the notion of a special position Malays enjoy and ought to enjoy, while acknowledging the reality of a multiracial Federation. Emphasis on Malay interests became particularly strong from up the second phase, which began with the rule of Prime Minister Tunku Abdul Rahman. The Tunku, as people commonly called him, advocated a purely 'Malay UMNO'. This meant that he was "retaining it as a communal party and thus emphasizing the primacy of Malay ethnic interests while recognizing the interests of other ethnic groups".[21] After the 1969 racial riots, Tunku's successor Tun Abdul Razak continued to appreciate the framework of the 'plural society nation', but at the same time promoted Malay political hegemony. Abdul Razak's rule can be considered the third phase; his views became reflected in an amendment of the Constitution and "subsequently incorporated as a principle in the formulation of public policies and institutions, particularly in the form of the NEP (New Economic Policy; C.D.), popularly known as the *bumiputera* policy".[22]

Until today, Article 153 has not been repealed, although the NEP project formally ended in 1990. Through this Article, the Constitution assures Malays and natives of Sabah and Sarawak prior recognition in respect to education and training, positions in public service, and permits and licences for trade and business. The terms 'Malay' and 'natives' are separately defined in the Constitution:

> 'Malay' means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and –
>
> (a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or
>
> (b) is the issue of such a person.[23]

[20] A.B. Shamsul, "Debating about Identity in Malaysia: A Discourse Analysis", in *Southeast Asian Studies* Vol. 34, No. 3 (1996), pp. 476-499.
[21] Ibid., p. 487.
[22] Ibid.
[23] Constitution of Malaysia 1957, Art. 161(2).

Art. 161A.(6) then explains that 'native' means

(a) in relation to Sarawak, a person who is a citizen and either belongs to one of the races specified in Clause (7) as indigenous to the State or is of mixed blood deriving exclusively from those races; and

(b) in relation to Sabah, a person who is a citizen, is the child or grandchild of a person of a race indigenous to Sabah, and was born (whether on or after Malaysia Day or not) either in Sabah or to a father domiciled in Sabah at the time of the birth.

Clause (7) mentions 20 different races as indigenous to Sarawak, among them Malays. The inclusion of the natives into the group of constitutionally privileged persons is important not because the smack of sole and absolute preference of Malays is diminished through it, but rather because the concept of *bumiputera* relies on the image of natives and Malays as 'sons of the soil' of Malaysia (see below).

Special provisions for Malays and natives as *bumiputeras* mean that the king is responsible for safeguarding the special position of Malays and natives, but also for safeguarding "the legitimate interests of other communities".[24] All the provisions mentioned in the Article, *e.g.* the ensurance of positions in the public service (national level), of scholarships or other educational privileges, of permits or licences for the operation of trade or business when required by federal law, can be determined "as he [= king; C.D.] may deem reasonable".[25] In political practice the reasonability is not determined by the monarch, but by government and bureaucracy. Interesting though in the context of institutions and multiethnic society is the close conjunction of special rights and king. It confirms that the royalty is considered a central element of Malayness, and that the special rights for Malays and natives are ultimately tied to the institution of the monarchy and the Sultan system. The interrelation between cultural and political elements is meant to reconcile an ethnic primacy demand with a plural society vision. If the constitutional monarchy and the federalist-turned Sultan system were abolished, the whole construction of this institutional arrangement would probably collapse. The very fact that Malaysia's federalism is based upon if

[24] Constitution of Malaysia 1957, Art. 153(1).
[25] Constitution of Malaysia 1957, Art. 153(2).

not legitimized by the traditional concepts of *raja* and *negeri* reveals how manifold the background of the institutional setting is. The cultural contestations hidden behind the curtain of the plural society model and the constitutional provisions are to a certain extent reflected in the category of *bumiputera*, which will be discussed in the following paragraphs.

The Concept of Bumiputera and the NEP

The cognitive definition of the concept of *bumiputera* and on how it was shaped as a political category is an essential element of the politics of multiethnic Malaysia. Lacking a judicial binding, the category of *bumiputera* is principally a mere a policy instrument, although it generates law-like authority as seen in the stipulation of special rights for Malays and natives. Shamsul reasons that *bumiputera* has never been a real legal category because it was never defined directly and clearly in the Constitution.[26] Nobody (of the *bumiputera* population) could, for instance, sue the government for not being accorded a particular privilege, claiming that he or she deserves it through the provisions in the Constitution. The *bumiputera* concept could rather be deemed a kind of 'by default' or 'by implication' legal concept, while certainly being used in policy formulation. What was the *bumiputera* concept initially meant to stand for and how did it affect the plural society model of the nation? I will turn to the early years of independence again to examine these questions.

Two outstanding facts have penetrated the history of independent Malaysia from the beginning until present. On the one hand, Chinese predominance in the economic and business world formed a matter of fact. On the other hand, Malay hegemony in politics had never been seriously questioned, be it because of a very 'generous' attitude of the non-Malays or because of the acceptance of a legitimate claim of the Malays to be the ethnic community or race with the longest history of inhabiting the state territory. The racial cleavage issue has to be put into perspective, though. The idea of distinguishing people along the lines of 'race' had been introduced through European colonisation.[27] Applied in the census taking of the colonial period, the categories of

[26] Personal conversation, 23.3.1999.

[27] A.B. Shamsul, "Identity Construction, Nation Formation, and Islamic Revivalism in Malaysia", in R. W. Hefner and P. Horvatich (eds.), *Islam in an Era of Nation States: Politics and Religious renewal in Muslim Southeast Asia*, Honolulu: University of Hawaii Press, 1997, p. 209.

race and ethnicity became consolidated in the Malaysian world view. Shamsul states that the social construction of difference through the official census initiated and established a countrywide trend toward minority and majority discourse, especially at the official level.[28] This "was particularly true after the 1921 census, when Malays came to realize that they were outnumbered by the immigrant Chinese and Indian population and hence were a minority in their own 'motherland'".[29]

One can easily imagine that the Malays' feeling of belonging to a minority and backward to other communities in terms of economic skills and proficiency was an unfavourable condition for a take-off as the leading community ('sons of the soil') of the country at the time of de-colonisation.[30] The *Merdeka Constitution* thus provided special rights for Malays. But when Singapore, Sabah and Sarawak joined the Federation in 1963 – and also after Singapore left it again in 1965 – it stood to some reason that the communities most deprived of economic well-being were longing to be accorded some channels and tools to get access to the sources of economic wealth. The factual economic gap between the poor Malay peasants, paddy farmers and petty traders in rural areas and the Chinese shopkeepers and owners of small, family-based enterprises in the urban areas also lead to a perception gap, making it difficult to imagine a dynamic money-making Malay businessman. In Sabah and Sarawak, the indigenous people had their own system of passing native land on to the members of the community (communal landholding), whereas in the Malay Peninsula the land was passed on to and divided between the offspring. Both mechanisms did not promote the experience of growth or develop management skills. Moreover, money was considered merely "a convenience, used as a substitute for goods in bartering". [31] Prime Minister Mahathir (1981-2003) in his retrospective of the situation of the Malays in Malaysia before the racial riots of May 1969 recalls that money as capital was not appreciated. Malay farmers rather "agreed to surrender their next

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[28] A.B. Shamsul, "Bureaucratic Management of Identity in a Modern State: 'Malayness' in Postwar Malaysia," in D. C. Gladney (ed.), *Making Majorities: Constituting the Nation in Japan, Korea, China, Malaysia, Fiji, Turkey, and the United States*, Stanford: Stanford University Press, 1998, pp. 135-150.

[29] Ibid., p. 137.

[30] This (alleged) 'backwardness' became most prominently spelled out in Mahathir Mohamad's book *The Malay Dilemma*, Singapore: Asia Pacific Press, 1970.

[31] Mahathir Mohamad, *The Way Forward*, London: Weidenfeld & Nicolson, 1998, p. 113.

harvest to the local Chinese shopkeeper or rice mill-owner, as an advance to meet their daily needs and the requirements of the next planting season".[32] Accounts, value of harvest or goods, or any proofs of the accurate calculation of the shopkeeper or mill-owner was not a big concern to them. They were just happy with the money they got for their goods. For interest they did not care as well, because as a Muslim you do not care for interest anyway.

A similar attitude towards money and accumulating capital could be described for the indigenous communities. Hence, the value of possessing land and keeping it in the hands of one's own community was regarded as more important than creating wealth with it. This cultural feature was something the Malays and the natives had in common, so that they were named *bumiputera*: "They might be poor in financial terms, but they had land, and land ownership symbolised their right to the country, their 'special' position as bumiputeras, or 'sons of the soil'".[33] The symbolic meaning of 'land' and the attitudinal, customary and behavioural dimensions underpinning it functioned on the positive account as something that generated the *right* of the *bumiputeras* to the country, and on the negative account as something that underscored the *backwardness* of the *bumiputeras* in comparison to the economic achievements of the non-*bumiputera*. Against this background, Mahathir stresses that it is culture and not ethnicity that distinguishes people.[34] One has to admit though that only certain ethnic communities have developed and cherished a truly shared culture that would make it reasonable to talk of the *bumiputeras* as one group of people that can be distinguished from others.

The term *bumiputera* contains the notion of the soil (*bumi*), and the notion of the son as the male descendant (*putra*) who inherits the land from his father and is therefore the legitimate inhabitant of the country (the native, the aborigine). The term *putra* in Malay carries several connotations, reaching from its original meaning in Sanskrit, which is 'prince' (*putri* then means 'princess'), to the reminiscence of Malaysia's first Prime Minister Tunku Abdul Rahman Putra. In the PM's name, 'Putra' indicated the royal lineage of the Tunku. The word is widely used in names of vehicles, buildings, public places and so on – last but not least the newly constructed government site south of Kuala Lumpur is called *Putrajaya* ('prosperous city of Putra') to honour Tunku Abdul Rahman. Shamsul dates the first

[32] Ibid., p. 113.
[33] Ibid., p. 115.
[34] Ibid., p. 121.

official application of the concept back to 1965, when UMNO held a Malay economic congress as a result of which the Bank Bumiputera was established as a financial institution to support and encourage Malays' business efforts and to break the Chinese and foreign monopoly of the banking segment of commerce.[35] After the congress, the term *bumiputera* came into popular use.[36]

The term became internalised in the wake of a huge policy shift took that place after the racial clashes in the capital Kuala Lumpur in May 1969 (see below). A New Economic Policy (NEP) was formulated immediately after the clashes and launched in 1971. The NEP became quickly referred to as *bumiputera* policy. Why is this so and why is the concept of *bumiputera* a policy instrument rather than a legal category? The main objectives of the policy as such can be summarized as follows. The *bumiputeras*, comprising 56% of the population in those days, controlled only 2.4% of the nation's economic wealth, whereas the non-*bumiputera* controlled over 34%. Foreigners, *i.e.* non-citizens (predominantly the former colonists), controlled a share even larger than the Malaysians altogether (60%), primarily because they had still had prime access to the sources of wealth. In the framework of the NEP, a new key figure for the distribution of national wealth was agreed upon by representatives of all major ethnic groups. The proportional allocation to be reached in 20 years (1970-1990) was 30% for *bumiputeras*, 40% for Chinese and Indians, and 30% for foreigners.[37] That Chinese and Indians would be able to increase their share was beyond doubt, but the *bumiputera* community would well need special incentives, privileged access and preferential treatment. Capital, opportunities, education and knowhow were deemed necessary to narrow the gap between *bumiputeras* and non-*bumiputeras*.

The *bumiputeras* were encouraged to participate in the world of business through several preferential measures, like government contracts, licences, set-up of state-owned companies to exploit the timber and mineral resources, a 30% allocation of shares of every new or expanding company, and others. After 30 years since the launching of the NEP, the objectives had been met to a considerable extent; at least there is no race that were completely underrepresented

[35] A.B. Shamsul, "The Construction and Transformation of a Social Identity: Malayness and Bumiputraness Re-examined" in *Journal of Asian and African Studies* Vol. 52 (1996), p. 27.
[36] Ibid., p. 27; Mahathir, above note 31, p. 46.
[37] Ibid., pp. 11, 24 f., 56, 80 f., 90.

in Malaysia's economic performance. The relation between race and policy formulation shall yet be looked at a little closer.

Since events overlapped in the period between 1965 and 1971, we may speak of a multi-layered functional concept of *bumiputera*. First, there was the need for UMNO to fulfil what it had promised for years: pro-Malay politics and the implementation of pro-Malay policies. When Sabah and Sarawak became part of Malaysia, it was of course necessary to somehow include the indigenous people of East Malaysia in the process of building the Malaysian nation. The cultural affinities of Malays and natives of Sabah and Sarawak facilitated the invention of the idea of a united segment of *bumiputeras* in the Malaysian nation. The fact that the *bumiputeras* in general occupied very low positions in the scaffold of the economy could have had a uniting function like it is known from the theory of class struggle, but the already heated-up atmosphere of 'race talk' (Shamsul A.B.) fuelled the particular confrontation of Malays and Chinese in the capital Kuala Lumpur. The clashes of May 1969 in the city evolved in the wake of demonstrations of a proclaimed Chinese victory in the elections (primarily on the State level) which in turn lead the Malays to demand permission of a procession, too. The parades of both groups ended up in violence and mutual aggression; people were attacked and killed. By attacking and killing Chinese, "the Malays were confident that they were destroying Chinese property".[38] The emergency situation – declared by the king – required a quick and effective strategy to resolve the tension between the races. This was the birth of the New Economic Policy.

The tension had mounted mainly between Chinese and Malays, but the subsequent analysis of the riots brought forth a more specific identification of the causes: Economic disparities were depicted as the source of tension, although nobody could ignore the element of race that was linked to it. Since racial differences were hardly to eliminate, reducing the economic disparities became the objective of policymaking. The idea of assembling the different native, indigenous, aborigine and Malay ethnicities collectively under the roof of *bumiputera* had derived from the *cultural* dimension of similarity and difference. The similarity of the *economic* position of the *bumiputeras* in Malaysian society had contributed substantially to defining the *political* concept of *bumiputera*, or, in other words, to provide the cognitive definition of collective identities under the NEP.

[38] Ibid., p. 50.

For the Malaysian government, or more correctly for UMNO, the concept of *bumiputera* set it free of being accused of a too strong Malay bias, because it could claim that the category favoured not only the interests of Malays but of all economically deprived communities in the country. With the distinction between *bumiputera* and non-*bumiputera*, the prominent polarisation of Malays and Chinese could be blurred a little. The non-Malay natives (*i.e.* aborigenes on the Peninsula and natives/ indigenous groups in Sabah and Sarawak) should not feel excluded from the politics of lifting up the positions of economically backward groups, and, finally, the non-*bumiputeras* (Chinese and Indians in particular) should not feel exploited for the cause of the *bumiputera* population. The NEP accordingly had two central targets, namely the eradication of poverty irrespective of race, and the elimination of the identification of race with economic function. The policy was called *bumiputera* policy though, because the setting of these goals was intended to move the *bumiputeras* into the mainstream of economic activity by discriminating them positively. According to the prime minister, there was no fitting model of a policy in history that could have been applied in Malaysia, so the NEP was quite a specific creation. Others concede that there have well been examples during the colonial period, like the enactment of the Malay Reservation Act in 1913 or the introduction of the Rural Industries Development Authority (RIDA) in 1950.[39] After 1957, the policy of affirmative action in the United States of America served as point of orientation, but differences are easy to detect, for instance in regard of the political power of the native Americans, which is simply not existing.

Although differences cannot be denied, the similarity of US-American affirmative action and Malaysia's NEP is pointed out clearly by Mahathir Mohamad. In Mahathir's eyes, affirmative action in the US is "an attempt to counter the results of negative action, in the form of the enslavement and decades of prejudice against the blacks and, more recently, the Hispanics too".[40] The result does not

[39] Personal interview with A.B. Shamsul, 23.3.1999. – The Malay Reservation Act (1913) by law protected the Malays from becoming displaced in their own native land. It reserved certain areas of land for Malays only. – RIDA had been started by the British and was tasked largely with helping the rural Malays financially, *e.g.* through scholarships to study in commercial schools in Kuala Lumpur. After 1957, training institutions for Malay entrepreneurs were established. In 1965, RIDA was renamed 'Majlis Amanah Rakyat' (MARA), or 'Council of Trust for the People'; its tasks were expanded, but it did not perform very well (see Mahathir, above note 31; Shamsul, above note 28).

[40] Mahathir, above note 31, p. 71.

always justify the means, but "to reject the means and so perpetuate an unjustice would seem to be carrying out a principle without political or common sense".[41] The NEP was a moderate form of affirmative action. The proponents of the NEP regard the policy as fair and just, whereas critics point to several imbalances the policy generated over the years. These were, however, rarely discussed in public during the decades of the 1970s and 80s. The late-coming discussion of the pros and cons of the policy, its background – the race riots – and its several episodes of failure have only become more openly and publicly debated since the late 1990s. At the time of the NEP's launching it was prohibited to conduct 'race talk'. The so-called Sedition Act of 1970 "declared seditious and punishable any public discussion on Malay special rights"[42] and was a legislation especially introduced "to ensure that bumiputeras' interests be regarded as non-negotiables and [that] 'politicking' on bumiputera-related issues was deemed illegal".[43] Malay privileges were declared non-debatable. Since the critique directed against the NEP was coercively subdued, no official justification of the preferential treatment of *bumiputeras* was needed. Today, Malays and non-Malays can discuss 'sensitive issues' in public; students at universities learn about ethnic relations in a special module devoted to the ethics of multiethnic interaction. While this development may be regarded a welcome outcome of Malaysia's affirmative action policy, critics point to the fact that inter-ethnic tensions have increased through the years and that the constitution should be referred to not only with regard to Malay privileges but also with regard to the rights of freedom for all Malaysians. I will discuss this critical view in light of the *Article 11* movement. Before attending to this movement, I will summarize how the constitutional provisions of *primacy cum plurality* translated into *realpolitik* and brought about the NEP as the core policy that has shaped Malaysia's political, social and economic development for several decades.

Politics, Institutions and Ethnic Relations

British imperial rule in Malaya and the Straits Settlements introduced the category of 'race' to the region and constituted it as an element of distinction in census taking, administration, politics and economics. Indian and Chinese labour influxes into the state territory created

41 Ibid.
42 Shamsul, above note 35, p. 29.
43 Ibid.

complex and heterogeneous race/ ethnic realities, soon mirrored in the spheres of administrative, commercial and educational performance. As a result, the Malays found themselves economically and socially disadvantaged and even backward after the British had left and Malaysia obtained independence. Disparities and unequal distribution of wealth and power were reflected in 'race talk' and culminated into ethnic violence in 1969. At the cost of discursive and political liberty, a political strategy was formulated to keep the country in peace, eradicate poverty and achieve economic growth. Colonial legacies, economic factors, demographic, geographic and cultural patterns, developmental agendas, and government policies all contributed to what we comprehend as 'multiculturalism' in today's Malaysia.

The constitutional setting contains a clear ethnic bias in that the Malays and the natives of East Malaysian Sabah and Sarawak enjoy 'special rights' which are guarded by the Supreme Head of the Federation, the king. The same Constitution then subscribes to the model of a plural society nation, hence stresses ethnic plurality and equality. The ethno-cultural and political contestations underlying the process of formulating the text of the *Merdeka Constitution* reveal that the Malays were only endowed with special provisions thanks to the struggle of the United Malays National Organisation (UMNO), which served as the single influential organisation to articulate and aggregate *Malay* interests at that time. Since independence UMNO has dominated the multi-ethnic ruling coalition *Barisan Nasional* (National Front); it is de facto *the* ruling party of the state. UMNO's partisans managed to bridge tradition and modernity as well as ethnic pluralism and Malayness. Albeit not in every State of the Federation, the (re-)installation of the Sultan system at least in the majority of the States symbolizes the peculiar combination of modern federalist principles and traditional royalty. To legitimize the rule, polity, and administration of a state, the Malaysian governments since 1957 have well succeeded in adjusting tradition to modern demands. The Heads of State may be called a traditional-modern institution, feeding the concept of Malayness and being part of the country's historical heritage.

Education

The politics of education reveal an area where the special rights provided for in the Constitution have been translated into a tangible policy within the framework of the NEP. Education stands for only

one of the various areas touched by the NEP. As a platform for the fundamental preparation for a person's life in a competitive surrounding, the institutions of primary, secondary and tertiary education were of prime concern for every ethnic community in Malaysia. Ethnic plurality was recognized in private primary schools, where the native tongue could be taught. But all state-run schools had, from 1969 onwards, to use Malay as the language of instruction – at all levels including higher education. This regulation only became softened in the mid-1990s.[44] In the public sector of post-secondary education, a quota system of admission to universities was installed to secure constant access to higher education for a certain percentage of Malays and natives. This seemingly harsh way of institutionalising the preferential treatment of *bumiputeras* was watered down in 1995 by allowing the non-*bumiputeras* to establish their own institutions in the private sector. Since then, such private institutions have spread rapidly and their reputation is very good.[45] Regarding the vast expansion of the private sector of higher education, we may reason that the demand must have been high and that equal access to education for all ethnic communities was not perceived as given under the NEP. The question remains, however, whether cross-cultural relations have thereby been improved or not, because the majority of private institutions in the tertiary sector are run by Chinese Malaysians.

The concept of *bumiputera* may be seen as one attempt to escape the tone of 'race talk' by dividing the Malaysian society in only two groups, namely *bumiputeras* and non-*bumiputeras*. The discussion of the development and the cultural background of the concept shows that the notion of *bumiputera* had a uniting function for all the communities suffering from educational and economic deprivation. What became institutionalised, for instance in the field of education, was something rather Malay-biased, but at the same time the connotation of race was pushed aside by simply distinguishing between only two types of citizens. 'Race talk' eventually became prohibited with the Sedition Act, and only recently it seems that more open discussions are dared despite the Act. Employing the concept of

[44] Molly N.N. Lee, "Education Reforms during the Mahathir Era: Global Trends and U-Turns", in B. Welsh (ed.), *Reflections: The Mahathir Years*, Washington DC: John Hopkins University Press, 2004, pp. 437-449; Molly N.N. Lee, "Public Policies on Private Education in Malaysia", in K.S. Jomo (ed.), *Rethinking Malaysia: Malaysian Studies*, Hong Kong: Asia 2000, 1999, pp. 70-83.

[45] Lee, "Education Reforms during the Mahathir Era", 2004.

bumiputera for the policy of lessening racial tension was a clever gambit of the ruling coalition. The *bumiputeras* themselves could trace the concept back to the very culture of cherishing land ownership and could legitimize the right to the country and the soil – a *special* right indeed. The non-*bumiputeras* were certainly discriminated against by this form of affirmative action, but, as the proliferation of private universities demonstrates, they were still able to get their piece of the pie. On the whole, the NEP deserves respect in terms of implementing the idea of the redistribution of national wealth. Redistribution did not mean a mere transfer of a part of the existing wealth from one stratum of society to another (like in the theories of class struggle), but a more equitable share of the wealth that had to be produced jointly in the years to come. Aside from the merits of the NEP, its cultural policy elements promoted a strong sense of Malaysia as a primarily Islamic nation.[46] Islamic values became the predominant guideline of the government's ideational orientation and Islam was supposed to become the core of the Malaysian nation.[47] As the example of the *Article 11* coalition illustrates, not all citizens are happy with the repercussions of Islamization in their private and public lives.

Article 11 Movement

Islamic resurgence in Malaysia commenced in the 1970s among students and the Muslim and youth was subsequently promoted by the government. The government's Islamization policy was combined with a call directed at the Malays to care for economic advancement and a business-oriented, entrepreneurial mindset. "In Malaysia, advancing the Islamic agenda, in effect, advances a Malay agenda, and ethnic politics has dominated Malaysian politics before and since

[46] This development is ultimately linked to the long-term political leadership of Prime Minister Mahathir Mohamad (1981-2003). For detailed analyses of this period see Robert Stephen Milne and Diane K. Mauzy, *Malaysian Politics under Mahathir*, London and New York: Routledge 1999; Hung Yong Hng, *CEO Malaysia: Strategy in Nation-building*, Subang Jaya: Pelanduk Publications, 1998. Boo Teik Khoo, *The Paradoxes of Mahathirism*, Kuala Lumpur and New York: Oxford University Press, 1995.

[47] For an account of the political process of Islamization led by UMNO and PAS see Joseph Chinyong Liow, *Piety and Politics: Islamism in Contemporary Malaysia*, New York: Oxford University Press, 2009.

independence."[48] Islam is a marker of an ethnic identity (as stated in the Constitution's definition of 'Malayness') as well as an area of political engagement. Islamic moral principles, ethics and virtues reach out into such mundane spheres as shopping and personal consumption.[49] In spite of Islam's superior position among Malaysia's religions, Article 11 of the Constitution reads as follows:

> 11. Freedom of religion.
>
> Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.
> No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own.
>
> Every religious group has the right –
>
> (a) to manage its own religious affairs;
> (b) to establish and maintain institutions for religious or charitable purposes; and
> (c) to acquire and own property and hold and administer it in accordance with law.
>
> State law and in respect of the Federal Territories of Kuala Lumpur,
> Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.
>
> This Article does not authorise any act contrary to any general law relating to public order, public health or morality.

Julian Lee has examined the nexus between the political face of Islam and what he calls the "failure of legal challenges to Islamically founded restrictions on freedom of religion".[50] I take the freedom of religion a case in point to show how the unwritten 'social contract'

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[48] Julian C.H. Lee, *Islamization and Activism in Malaysia*, Singapore: Institute of Southeast Asian Studies, 2010, p. 16.

[49] Johan Fischer, *Proper Islamic Consumption: Shopping among the Malays in Modern Malaysia*, Copenhagen: NIAS Press, 2008.

[50] Lee, above note 48, p. 83.

between Malaysia's ethnic communities as enshrined in the Constitution (special rights in exchange for citizenship) has become very porous. I consider this a worrying tendency which was certainly not intended by the founding fathers and mothers of the Malaysian nation-state.

In June 2004, a coalition of lawyers and civil society activists formed an advocacy group in order to raise awareness for "the erosion of constitutionally enshrined liberties".[51] Their alert derived from several episodes involving non-Muslim citizens, Muslim citizens who decline to follow state sanctioned interpretations of Islam or women who suffer from Family Laws that are rooted in Islamic law. The pluralism of legal systems in Malaysia renders certain cases of jurisdiction particularly difficult. One example is the question whether a Syariah[52] court is authorized to summon a non-Muslim woman just because her husband converted to Islam without her knowing about it. Aside from the gender-related hierarchy involved here, the constitutionality of the act is at stake: Article 8(1) of the Constitution guarantees equal treatment of all persons before the law. The civil courts increasingly tend "to confer away jurisdiction on matters pertaining to Islam"[53] and declare that jurisdiction rests with the Syariah court even if the person involved is a non-Muslim. The activists of *Article 11* were thus concerned that "Islamic law is gaining greater legal weight than the Constitution".[54] A telling example is the following one, which Lee recalls from an *Article 11* forum that he attended. It is a story told by a non-Muslim person called Singh:

> He (= Singh) also explained that in some areas of Malaysia, there are restrictions on the architectural appearance of certain religious buildings. Sikh temples (*gurdwara*) around the world have domes. According to Singh, however, in some places, authorities say that temples should not have domes because Muslims may mistake them for mosques. Singh went on to note that this restriction has been enforced even though there was

[51] Ibid., p. 84. The subsequent statements are primarily based on Julian Lee's chapter "Social Activism and the Article 11 Coalition" in J. Lee, ibid., pp. 83-97. There are other sources to refer to, but for the exemplary discussion of this issue Lee's analysis and findings serve the purpose perfectly.

[52] I stick to the Malaysian way of spelling the term *shari'a*.

[53] J. Lee, above note 48, p. 88.

[54] Ibid., p. 88.

> no law to that effect. He went on to note that before a religious building can be built, it must be proved that there are five thousand people of the given faith in a given area. Singh related that there had been no such 'catchment area' in the past. […] The causes of these restrictions and impositions on non-Muslims were owing, according to Singh, to political pressures. The declaration that Malaysia was an Islamic state allowed civil servants and law-makers to create and enforce laws that impinged on the rights of non-Muslims. [55]

Appalled by such occasions, *Article 11* activists toured the country in 2006 and advocated the acceptance of the Constitution as Malaysia's supreme law. However, the attempt to mobilize support for this idea was forcefully interrupted by protestors who raided the forum halls and were not stopped by the police.[56] Consequently, *Article 11* has stopped its 'physical' mobilizing efforts and resorts to digital information.[57] The message of *Article 11*'s fate is nonetheless clear: The result of the government's affirmative action policy, which was based on the agreed-upon provision of special rights for Malays and natives in the Constitution (Art. 153), has led to an erosion of constitutionally guaranteed rights *for all* Malaysians such as the right of freedom of religion. Moreover, it has led to the curtailing of civil advocacy in favour of the Constitution, thus curbing citizens' freedom in a double sense. Along with accounts by other authors of the country's politicised version of Islamization[58], the situation as described above leads to the impression that Malaysian Islam has ceased to be inclusive, progressive, and tolerant.

Concluding Remarks

Institutionalised cultural and ethnic hegemony of the Malays is criticised by the non-Malays or non-*bumiputeras*. Throughout the

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55 Ibid.

56 Ibid., 2010, pp. 91-93; see also 'Demonstrators cause Article 11 Forum to end abruptly' on the Malaysian Bar's website, http://www.malaysianbar.org.my /bar_news/berita_bada n_peguam/demonstrators_cause_article_11_forum_to_end_aburptly.html (retrieved Oct. 6, 2010).

57 See, for instance, http://aliran.com/282.html (retrieved Oct. 6, 2010).

58 See, for instance, Liow, above note 47, or Jan Stark, "Beyond 'Terrorism' and 'State Hegemony': assessing the Islamist mainstream in Egypt and Malaysia", in *Third World Quarterly* Vol. 26 (2005), pp. 307-327.

history of independent Malaysia, the non-*bumiputeras* have had alternative options to constitute their own 'institutions' to compensate discrimination. The supremacy of Malay-Muslim interests in recent decades, however, has apparently made it difficult to sustain this mechanism of compensation.

In the Constitution, the commitment to the Sultan system and royalty is institutionalised, but since the Sultans and the king cannot be said to possess real political power, they do not endanger the plural society model. The notion of royalty and its institutionalisation reflect the *cultural* dimension of the polity rather than an element of real political power. Real political power rests with the elected powers that be, which are dominated by the United Malays National Organisation or UMNO. Hence the capacity to endanger or to preserve a plural society lies with politics.

In education, non-*bumiputeras* have passed the *bumiputeras* in lifting up the level of knowledge, especially in the private institutions of higher learning. Albeit Malay has been declared the national language, the requirements of global international communication lead to increased usage of English. In the internationally oriented business sector, Malay has become relegated to second rank. Affirmative action in the shape of the New Economic Policy has not brought the desired 30% share of the nation's economic wealth for the *bumiputeras*, but it has at least reduced poverty and enabled Malaysia to remain politically stable. Without the economic and business skills and the knowhow of the non-*bumiputeras* though, Malaysia would never have reached growth rates of around 7% during the last three decades (except for the period of the financial crisis mid-1997 to mid-1999).

From the perspective of comparative politics, the case of Malaysia merits attention for several reasons. One of these reasons is the striking antagonism of ethnic discrimination and ethnic integration. Asked about the success or failure of ethnic integration in Malaysia, the people in the street would simply respond that there is no ethnic integration. On the institutional as well as on the policy level, we do not find too much of a devotion towards *equity*, but rather an equity-labelled yet *bumiputera*-biased output of procedures taking place in the black box of the political decision-making. Despite this bias, political stability has remained to a great extent, and upheavals like in Indonesia, Yugoslavia, the Baltic states or elsewhere have been prevented.

I have concentrated on just one realm of institutional frameworks that have contributed to keep tensions from exploding: the provisions

of the Constitution and its translation into concrete policies. The translation of constitutional provisions into policies renders the prediction of the actual effects of institutions impossible. As the discussion above has shown, the 'good intention' of a policy can easily shift into shallow waters when certain segments of a society manage to hijack the interpretation of law and order and gain normative authority over others. The constitutionalization of rights of freedom does, therefore, not guarantee the possibility to actually use these rights. Securing the possibility to use the rights that are granted in legal institutions such as the constitution, necessitates the concerted engagement of both judicial, political and civil society actors and authorities.

Constitutionalism as Development

Jörg Menzel

Introduction

This short article asks the question, if and how constitution-making, constitutional design and constitutionalism contribute to the "development" of nations. Whereas "Law and Development" has been an issue for half a century, the more specific question concerning "Constitutional Law and Development" has rarely been explored.[1] In order to discuss this issue, I will first briefly discuss the main terms, constitutionalism and development (B.). I will then address the potential contributions of constitutionalism to the development of a nation (C.), the process of constitution-building (D.) and finally the implications of globalization and increased internationality in this field (E.), before drawing some conclusions (E.). Regionally, examples used here will mostly be taken from Asia and more specifically, Southeast Asia, a region of mostly developing countries with dynamic constitutional developments over recent decades.[2]

Basic Concepts

Constitutionalism

There is no generally accepted definition of the term constitutionalism.[3] In Germany the word *"Konstitutionalismus"* sounds like a precise translation of the term, but actually stands for the period of *pre-democratic* constitutions of the 19th century. The

1 However, see Brun-Otto Bryde, "Constitutional Law in 'old' and 'new' Law and Development", in *Verfassung und Recht in Übersee*, Vol. 10 (2010),pp. 10-15.

2 See generally Clauspeter Hill and Jörg Menzel, *Constitutionalism in Southeast Asia*, 3 volumes, Singapore: Konrad-Adenauer-Stiftung, 2008/2010.

3 See Sajó, *Limiting Government*, Budapest: Central European Press, 1999; Alexander, *Constitutionalism*, Cambridge: Cambridge University Press, 1998; Giovanni Sartori "Constitutionalism: A Preliminary Discussion", in *American Political Science Review*, Vol. 56 (1962), pp. 853-864.

term for the modern democratic version would be "Verfassungsstaat", literally meaning "constitutional state" but avoiding the Latin terminology. "Verfassungsstaatlichkeit" therefore is the German translation for "constitutionalism." Furthermore, a political and legal system based on a constitution might be called constitutionalist. The German "Konstitutionalismus" was a step on that path, as it limited the monarchies of the time through concepts of rule of law, protected (weak) human rights concepts and allowed for pre- or semi-democratic [4] participation of elected representative assemblies. [5] Historically, most systems called constitutionalist were not democratic, but aristocratic.[6] Today, formal special privileges for any kind of nobility are nearly taboo for any system that wants to be labeled as constitutionalist, though notable exceptions still exist.[7] Nowadays, limited government, defined by democracy, human rights and rule of law, are often mentioned as conditions for "real" constitutionalism.[8] But constitutionalism is not only about "having a constitution" or even the textual substance of a "good" constitution embracing those principles. Properly defined, constitutionalism is not (only) about law in the book, but law in life. It is about the actual *practice* of "limited government."

Modern constitutionalism has been on the rise in recent decades,[9] yet there remains no global standard for what this encompasses.

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4 The electoral system in Prussia between 1849 and 1918 not only excluded women but often also formalized the inequality of men's votes depending on their tax-payments or other classifications (see e.g. the Prussian three-class franchise system).

5 Good analysis by Werner Heun, "Constitutionalism in Germany" in *East Asian Law Journal*, Vol. 1 (2010), pp. 91-104; short summary also in Werner Heun, *The Constitutional System of Germany: A Contextual Analysis*, Portland OR: Hart Publishing, 2011, pp. 13-21.

6 For an historical account see Scott, Gordon, *Controlling the State: Constitutionalism from ancient Athens to Today*, Cambridge MA: Harvard University Press, 1999.

7 See e.g. Samoa, where the right of Samoans to be elected to parliament is still limited to chiefs ("matai").

8 The Venice Commission has repeatedly labeled constitutionalism "the key to democracy, human rights and the rule of law".

9 See the famous dictum of Bruce Ackermann, "The Rise of World Constitutionalism" in *Virginia Law Review*, Vol. 83 (1997), pp. 771-797; for overviews on all constitutions see Gerhard Robbers (ed.), *Encyclopedia of World Constitutions*, 3 volumes, New York: Facts on File, 2007.

Written constitutions have become the norm, but interestingly the very few states who traditionally do not have written constitutions as a matter of principle (Great Britain, New Zealand) are mostly labeled as "constitutionalist" despite this because they rely on unwritten constitutional conventions which are based on those principles of democracy, basic rights and rule of law. Within the many states that have written constitutions, there are a few formally established systems which quite openly are not based on those concepts (e.g. Brunei with its absolute monarchy), but much more often the text of the constitution will not reveal the problem immediately, at least not to the "naive" reader. Constitutions have often been (to the full extent or in parts) rhetoric or programmatic at best, cold blooded lies at worst.[10] In daily life, some constitutions are completely ignored or only followed in some parts. Obviously one can have a formal separation of power with an executive, legislative and judicial branch, but have a practice in which all the branches are in fact effectively controlled by one person or one political group and in which, for example, rule of law and basic rights will only be used to protect the "honor" of the political leaders, but not the freedom of expression of those criticizing them. Democracy, rule of law, and even basic rights are all concepts which are open for misinterpretation or even systemic abuse.

Constitutionalism, as it is understood here, does not necessarily require full judicial review (particularly the review of democratically adopted statutes). This should be stressed, as the debate about constitutionalism in the USA is obviously much about this question. Internationally the "if and how" of judicial review of legislation is open for debate and is only one of the choices that a constitutionalist state can make. In Europe, the Netherlands will typically be qualified as a constitutional state, for example, despite the fact that its constitution explicitly prohibits judicial review of statutes by the courts. It has to be acknowledged, however, that judicial review has gained significant ground in recent decades, be it in the common law version of review by the ordinary courts or in the German-Austrian version of review by constitutional courts.[11] Such specialized courts

10 Among the numerous attempts to classify constitutions with respect to their legal relevance the best known one is probably Loewenstein's distinction of normative, nominalistic and semantic constitutions.

11 For a good recent book see Andrew Harding and Peter Leyland (eds.), *Constitutional Courts: A Comparative Study*, London: Wildy, Simmonds & Hill, 2009; on developments in Asia see also Andrew Harding and Penelope

are clearly on the rise, not only in Europe but around the globe and even many "Constitutional Councils" rooted in the French tradition now often have significant judicial roles.

Development

Development is as difficult a term to define as is constitutionalism. It has often been linked mostly to economic development. The German ministry in charge of developmental cooperation was established as the "Federal Ministry of Economic Cooperation." Internationally, gross national product (GNP) per capita has often been seen as a main indicator for development levels.[12] Today it is widely acknowledged that development is a more complex term. The United Nations Development Program uses the term "Human Development" in which economic growth is only a means to an end.[13] More than two decades ago UNDP started their "Human Development Reports" by adding life expectancy, literacy to the criteria; acknowledging that this extension was not broad enough. Most notably Nobel Laureate Amartya Sen famously wrote about "Development as Freedom", arguing that freedom is the ultimate raison d'être of development, substantially changing the global discourse on development.[14]

It needs to be emphasized again however, that even economical development cannot be measured simply in terms of GDP or GNP. Historically, "economies" have often been quite successful for some time on the basis of fundamental inequality and exploitation. Ancient Egypt, Greece and Rome all were slaveholder societies, as were many centuries later the Khmer Empire in Cambodia and the early United States. European dominance in the colonial era was also based on severe exploitation of cheap labor in the colonies. Apartheid-South Africa did not formally know "slavery" during the 20th century, yet its society was based on the discrimination and exploitation of the native African population. All those systems were quite successful in

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Nicholson (eds.), *New Courts in Asia*, Abingdon: Routledge, 2010; on judicialization in Asia see also the contributions in Tom Ginsburg and Albert H.Y. Chen (eds.), *Administrative Law and Governance in Asia: Comparative Perspectives*, Abingdon: Routledge, 2009.

12 See Hirsch, "Developing Countries," 2012.

13 For a comprehensive discussion see Alkire, "Human Development," 2010.

14 Sen, *Development as Freedom*, 2000; on Sen's approach see e.g. Chimni, "The Sen Conception of Development," 2008.

their economic wealth, but obviously at the immediate cost of many in their own spheres of power. Economic development, properly defined, needs to take into account the distribution of wealth. Development has to be a shared success, not a pleasure for a few at the extreme expense of the most. The Universal Declaration of Human Rights and other global documents on fundamental rights therefore connect human dignity to economic and social conditions for a dignified living, as do most modern constitutions. Many decades after such promises were first made, they are still unfulfilled for billions of human beings. As the example of slavery shows clearly as well, freedom as an essential part of human dignity is also more than (economic) prosperity. Substantial freedom might depend to some extent on some economic and social preconditions,[15] but one is not free or happy just because one has enough to eat. Freedom means having choices and being respected on the basis of equality of all human beings. South Africa's apartheid system was often defended by its apologetics with the argument that the black population in South Africa was economically better off than Africans in most of the rest of Sub Sahara Africa. This argument did not convince black South Africans and it did not convince the global community (at least in the later part of the 20th century).[16] But a somewhat similar argument is still around, defending different versions of authoritarian government and claiming that (economic) "development" should come first undisturbed by too much influence of "Western" concepts like democracy or individual freedoms and rights. However, such tradeoffs are not only questionable within their inner logic, but also seem to be too narrow in defining development. Freedom should not be seen as some luxury good for the rich, but as a basic value for all humankind.

15 The importance of a guaranteed subsistence minimum for the guarantee of human dignity has just recently (9 Feb 2010) been emphasized by the German Constitutional Court (BVerfGE 125, 175, also available at www.bverfg.de); see Egidy, "Casenote," 2010.

16 On the international condemnation of apartheid see Julia Gebhard, "Apartheid", in *The Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum, Oxford: Oxford University Press, 2012, Vol. I, pp. 461-468.

Constitutional Promises for Development

Nation and State Building

There is a lot of "building" literature published these days in the academic world of political science, international relations and law. Books promise to explain how to escape the mess of failed communities by building nations and states. Some seem to be outright manuals, given their titles,[17] and there is even a "Beginner's Guide to Nation Building,"[18] which seems to be the ideal present for any aspiring leader of a coup d'état in a failed polity. Other book titles are more careful, indicating the difficulties.[19]

On the most fundamental level, making constitutions and establishing constitutionalism can be part of nation and state building endeavors.[20] The adoption of a constitution can be a founding moment or a milestone in nation or state building.[21] The constitutions

17 See Ashraf Ghani and Claire Lockhart, *Fixing Failed States: A Framework for Rebuilding a Fractured World*, Oxford: Oxford University Press, 2008; Simon Chesterman, Michael Ignatieff, and Ramesh Chandra Thakur (eds.), *Making States Work: State Failure and the Crisis of Governance*, Tokyo: United Nations University Press, 2005; Charles T. Call, and Vanessa Wyeth (eds.), *Building States to Build Peace*, Boulder CO: Lynne Rienner, 2008; Francis Fukuyama, (ed.), *Nation Building: Beyond Afghanistan and Iraq*, Baltimore: John Hopkins University Press, 2006.

18 James Dobbins, Seth G. Jones, Keith Crane and Beth Cole DeGrasse, *The Beginner's Guide to Nation Building*, Santa Monica CA: Rand Corporation, 2007.

19 See Roland Paris and Timothy D. Sisk (eds.), *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations*, New York: Routledge, 2009; Carolyn Bull, *No Entry without Strategy: Building the Rule of Law Abroad*, Washington DC: United Nations University Press, 2008; Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law after Military Interventions*, Cambridge: Cambridge University Press, 2006.

20 See Armin von Bogdandy, "State-building, Nation-building and Constitutional Politics in Post-conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches", in *Max Planck Yearbook of United Nations Law*, Vol. 9 (2005), pp. 579-613.

21 To be clear, not every adoption of a new constitution qualifies as what one might label a "constitutional moment" (Ackermann). On the other hand, constitutional amendments – normally not seen as fundamental in this sense –

of the United States, Australia and the German constitution of 1871 are classical examples of constitutions that effectively created new states. The South African constitution of 1997 might be seen as exercises in nation building, as the "state" was pre-existent, but a "nation" had to be rebuilt. Constitutions can even become symbols of the nation or statehood. Many countries try to utilize such potential by celebrating a "constitution day" as a national holiday. In Germany, there is not such a public holiday, but "constitutional patriotism" has become a (controversial) concept, according to which identification with the state is mainly based on the common belief in the values and structures laid down in the constitution.[22]

Nowadays it seems standard procedure that whenever a Nation or State needs to be (re-)built after a period of crisis, failure, or dictatorship, the drafting of a new constitution is one of the most immediate tasks. This is considered to be crucial in the process of reconstruction. Prominent examples of much discussed constitution making can be found in the successor states of the former Yugoslavia, in Afghanistan and Iraq, as well as currently in Nepal. As those examples illustrate, constitution making regularly is an integral and early part of state and nation building.

Controlled and Limited Government, Democracy

A constitution's foremost role is to provide rules for the political process. Its promise therefore is an orderly, limited and (now mostly accepted) democratic government. A constitution is a pre-commitment on rules for the political process. Some would argue that this is actually all a constitution has to do. Even such a limited definition of the role of constitutions is developmental in its core: Political stability and accountability might be seen as everything needed for internal peace and security to be guaranteed as well as the economy to prosper. Older constitutions are often based on this concept. Australia's Constitution is such a basic "organizational code", as was the German Constitution of 1871 and even the original Constitution of the United States of America, which was largely organizational until the adoption of the first ten amendments.

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occasionally are such moments, as exemplified in the Indonesian constitutional amendments between 1999 and 2002.

22 The term was invented by political scientist Dolf Sternberger but became internationally influential because of its endorsement by philosopher Jürgen Habermas.

As mentioned above, European constitutionalism was not necessarily democratic in the 19th century and even today some constitutions are still substantially monarchic or otherwise non-democratic by concept, particularly in the Arab world. Some of them might claim to be constitutionalist, as they embrace some (more or less serious) separation of powers and limitation of government and mostly provide for some kind of elected or semi-elected body as a legislative body. In that sense they can be to a certain extent compared to the typical German "constitutionalist" constitutions of the 19th century. As mentioned before, it is clear, however, that since the end of the Cold War the standard model of constitutionalism has become that of a substantial democracy.

There have been debates if the "Western" concept of democracy actually facilitates (economic) development. Research seems to support the assumption that democratic governance indeed has competitive advantages,[23] although there are obviously examples of economically progressing non-democratic countries as well as examples of poorly-performing democracies. Most discussed is the comparison of development in China and India. At least democracy seems to prevent the worst forms of failure, if Amartya Sen's argument is still correct that there have been no major famines in democracies.[24]

Fundamental Rights

Modern constitutions typically guarantee individual rights. The Twentieth Century Constitution[25] has overcome the concept of the organizational statute. Not only traditional "negative" rights, but also social and economic rights are a standard content of modern constitutions. They promise development in the sense that they promise freedom and perspectives for *individual* development. The idea seems so compelling that even the most dictatorial regimes

23 See Georg Sorensen, *Democracy and Democratization: Processes and Prospects in a Changing World*, 3rd ed., Boulder CO: Westview Press, 2008; Adam Przeworski, Michel E. Alvarez, José Antonio Chaibub, and Fernando Limongi, *Democracy and Development: Political Institutions and Well-Being in the World, 1950-1990*, Cambridge: Cambridge University Press, 2000.

24 See Amartya Sen, *Development as Freedom*, New York: Anchor Books, 2000.

25 Peter Quint, "What is a Twentieth-Century Constitution?", *University of Maryland School of Law, Legal Studies Research Paper*, No. 2008-7 (available at www.ssrn.com).

typically provide them as lip service.

As with democracy and the rule of law there have been discussions concerning whether the constitutional guarantee of rights facilitates development. This question is in fact too broad to be answered in this paper. With the end of the Cold War, economic reform was on the agenda in many countries, the global financial organizations such as the World Bank and IMF and others focused much on contract law, property rights and effective judicial structures (Washington Consensus).[26] Interestingly however, fairly unsecure property rights have not prevented the amazing economic growth and investment activities in some countries like China. Furthermore, basic rights have sometimes been interpreted in ways fundamentally in contrast to developmental needs or even human dignity in its core.[27] Constitutional property rights are not a passe-partout to good developmental policies, as the ideology of the Washington Consensus suggested, they can also block development by hindering reasonable allocation of land rights and land development,[28] as well as fair labor law protections for workers and so on. Basic rights protecting employers and basic rights protecting employees or their unions can be disruptive for economic progress alike, if drafted and interpreted in the wrong way.

With respect to basic political rights the situation is equivalent to the question of democracy in general. Evidence seems to suggest that in general more freedom will have a positive effect on the long run, although "well organized" or otherwise lucky authoritarian regimes (sitting on vast natural resources or having mighty friends for geo-strategic reasons) might be successful for some time and seem to be the exception to the rule. Over time demand for basic rights and

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26 On these issues see e.g. Kenneth W. Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development*, Washington DC: Brookings Institution Press, 2006, pp. 91-133.

27 See e.g. the infamous US Supreme Court case of Dred Scott v. Sandford, 60 U.S. 393 (1857), where slaves were considered just as any "merchandise". See Don Edward Fehrenbacher, *Slavery, Law and Politics: The Dred Scott Case in Historical Perspective*, New York: Oxford University Press, 1981. Today the decision is widely considered the worst ever delivered by the United States Supreme Court.

28 This is the reason why Singapore abolished constitutional property rights in the early phase of its remarkable development; see Li-ann Thio, "The passage of a generation: Revisiting the report of the 1966 Constitutional Commission", in *Evolution of a Revolution: Forty Years of the Singapore Constitution*, ed. Li-ann Thio and Kevin YL Tan, Abingdon: Routledge, 2009, pp. 19-20.

democracy will increase with development anyway, as stable development relies on an educated people and education typically brings with it the demand for freedom and democracy. In Asia, states like Japan, Taiwan and South Korea have proven this assumption to be true.

Rule of Law

Constitutionalism embodies and demands the rule of law. This is another link to development, as the rule of law is widely considered to be among the key requirements for sustainable development.[29] "Law and Development" is therefore a field with history, although it has had its fair share of crisis.[30] The linkage between constitutionalism and the rule of law is obvious[31] and thus so is the connection between constitutionalism and development.

In Germany, constitutionalism is said to be the crowning of rule of law *(Verfassungsstaat als Krönung des Rechtsstaats)*. This might sound somewhat over the top, but at least one can say that if a constitution is in place and respected, this surely is a strong indication of the rule of law, as the supreme law of the land is not only supreme on paper but in reality. But it should be stressed that in today's world of developing countries there is no typical sequencing in the sense that first a more or less perfect legal system is established and afterwards, as a topping, a good constitution is added. In fact it is often to the opposite: Facing the legacy of a desolate legal system, a new constitution is made first, promising everything from efficient and non-corrupt administrations to independent and competent courts. In other words: The constitution is not the lofty rooftop of the legal system, but its foundation. Constitutions promise (and have to deliver

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29 See Michael J. Trebilcock and Ronald J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress*, Cheltenham: Edward Elgar, 2008; Thomas Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge*, Washington DC: Carnegie Endowment for International Peace, 2006; Dam, above fn. 26.

30 See David M. Trubek and Alvaro Santos, *The New Law and Economic Development: A Critical Appraisal*, Cambridge: Cambridge University Press, 2006; Brian Z. Tamanaha, "The Primacy of Society and Failures of Law and Development: Decades of Stubborn Refusal to Learn", *Washington University in St. Louis Research Paper*, No. 10-03-02, 2010 (available at www.ssrn.com).

31 See Michael Rosenfeld, "The Rule of Law, and the Legitimacy of Constitutional Democracy", in *Cardozo Law School, Public Law Research Paper*, No. 36, 2001.

on) the rule of law; they are not based on it. Under such circumstances the relevance of constitutional provisions in this field obviously cannot be measured on the basis of their immediate fulfillment, but only on the seriousness with which a system tries to work towards it after adoption.

Constitutions will often invoke the "rule of law" explicitly. Such general clauses can be the basis of comprehensive doctrine, but lack precision at the outset, as the rule of law is one of those principles on which everybody agrees because everybody can have his own interpretation of it.[32] There are formal and substantive theories varying in degree of depth. The relevance of general rule of law clauses will very much depend on the question of whether or not they are filled with life through interpretation (for example by a constitutional court). The development of an appropriate doctrine of the rule of law will often be facilitated by the fact that certain aspects are addressed specifically in basic rights provisions, general provisions on the legal system and chapters on the judiciary. If taken seriously, most modern constitutions adopted in developing countries do provide more or less comprehensive work plans for legal and judicial reform.

Development, Welfare and Prosperity

After all, the establishment of a constitutionalist system based on democracy, the rule of law and fundamental human rights ideally should provide a basis for the development of a prosperous economy. However, in order to support such an effect, modern constitutions often address the subject of development, welfare and prosperity directly. They formulate policies regarding these issues or even individual social and economic rights like the right to health, to minimum living standards, to education, to work etc. Constitutional experts from some developed countries which do not have such rights in their constitutions will sometimes be critical about such rights. Even in Germany you will often find skepticism, although the modesty of the German constitution in this regard has its reason in the very specific post war situation of 1949.[33] The critics basically

32 For the range of definitions see e.g. Trebilcock and Daniels, above fn. 29.

33 Social and economic rights were part of the Weimar Constitution of 1919 and currently they are also part of many of the constitutions of the German states (Bavaria, Rhineland-Palatinate, Hesse, Brandenburg etc.). On the federal level the German Constitutional Court has found significant social rights within the

believe that such provisions, particularly if formulated as "rights", either will give government too much power ("big government") or curtail it too much (limiting policy choices of democratically elected governments), or that they are in risk of being ineffective due to budgetary constraints (which might lead to a decline of respect for the whole constitution). Obviously one can find plenty of constitutions in which social rights seem not to be matched by reality (not least the constitutions in the socialist tradition), whereas some "wealthy" states provide welfare without constitutionally guaranteeing it. When asked about the lack of social rights in her state's constitution, a Singaporean constitutional law scholar simply replied: "Do you want a right to a house or do you want a house?" However, despite such skepticism, some interesting examples illustrate that provisions on social rights can have very meaningful consequences, without being dangerous, both within developed and developing countries.[34]

International Openness

One big pillar of modern constitutionalism is international openness. Just by adopting the concepts of democracy, basic rights and rule of law in a constitution a state will make a significant step to being considered an appropriate member in the society of states. Commitment to constitutionalism opens doors with regard to foreign assistance, as most bilateral and multilateral donors insist on constitutionalist policies. Commitment to international openness itself is a regular topic at least in European constitutions nowadays, with provisions on international law, European integration etc. constitutions in developing countries are often somewhat quiet on this topic,[35] which might be a result of more recently achieved

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principles of human dignity in combination with the principle of the social state (Art. 1 and 20 of the German Constitution).

34 See e.g. Dennis M. Davis, "Socio-economic rights: has the promise of eradicating the divide between first and second generation rights been fulfilled?", in *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon, Cheltenham: Edward Elgar, 2011, pp. 519-531, reporting case studies from South Africa, India and Brasil; see also Cass, Sunstein, *Designing Democracy: What Constitutions do*, Oxford: Oxford University Press, 2001, pp. 221-238, referring to South Africa as an example for possible positive effects of social and economic rights.

35 With respect to Southeast Asia see Jörg Menzel, "Constitutionalism in Southeast Asia: Some Comparative Perspectives", in *Constitutionalism in Southeast Asia*, above fn. 2, pp. 27-29.

sovereignty in many cases. Sometimes constitutions indicate even some opposition to international openness, e.g. with restrictive provisions on franchise for naturalized citizens and residence requirements or with restrictions on landownership for foreigners.[36] Regarding the latter, it's obviously a matter of circumstance and standpoint, if such provisions are obstacles or guarantees of proper development. Generally speaking it is obvious that the modern state in the 21st century needs to address questions of regional and international openness to allow proper development. It seems appropriate to formulate at least some principles regarding this challenge in a modern constitution.

Building Constitutions and Constitutionalism

As mentioned, "Constitution Building" is a fairly new term. However, in recent years, a few organizations and authors have presented themselves as promoters of the concept. Constitution making is now an area of intensive comparative research and advice.[37]

Extraordinary Times and Places

Times of constitution making are regularly extraordinary times in the history of a state. When reviewing the literature on constitution building, the impression of exceptionality is further strengthened by the fact that it focuses mostly on particularly difficult situations. Most of the current literature on state, nation, and constitution building is about countries with very special circumstances, in other words about

36 Foreign landownership is constitutionally forbidden in Thailand and Cambodia, for example.

37 See International IDEA publications (Stockholm) including e.g. Markus Böckenförde, Nora Hedling, and Winluck Wahiu, *A Practical Guide to Constitution Making*, Stockholm: International IDEA, 2011; Yash Ghai and Guido Galli, *Constitution Building: Processes and Democratization*, Stockholm: International IDEA, 2006; Kirsti Samuels, *Constitution Building Processes and Democratization: A Discussion of Twelve Case Studies*, Stockholm: International IDEA, 2006; for a recent collection of good insightful case studies see also Laurel Miller, *Framing the State in Times of Transition: Case Studies in Constitution Making*, Washington: United States Institute of Peace, 2010.

"extraordinary places"[38] or "battlegrounds places."[39] Constitution making is not always as troublesome as in these places, but obviously most of the attention goes where most of the problems are. The problems themselves are quite diverse. In recent years questions of constitution making in the context of foreign occupation or international administration have been under discussion.[40] The debate is often around "post conflict settings"[41], although in many of the cases the terminology seems questionable, as the conflicts are regularly far from being resolved. Specific questions also arise in some countries with inhomogeneous populations which are divided along cultural, ethnic, linguistic or religious lines.[42] Furthermore, problems obviously arise in countries which have experienced times of harsh dictatorship, general lawlessness or even failed statehood as well as in countries with traditions of military coups.[43]

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38 Esin Örücu, "Comparatists and Extraordinary Places", in *Comparative Legal Studies: Traditions and Transitions*, ed. Pierre Legrand and Roderick Munday, Cambridge: Cambridge University Press, 2003, pp. 467-489.

39 Karol Edward Soltan, "Constitution Making at the Edges of Constitutional Order", in *Mary and William Law Review*, Vol. 48 (2008), pp. 1409-1442, at. p. 1409.

40 See Zachary Elkin, Tom Ginsburg, and James Melton, "Baghdad, Tokyo, Kabul …: Constitution Making in Occupied States" in *William and Mary Law Review*, Vol. 49 (2008), pp. 1139-1178; Zaid Al-Ali, "Constitutional drafting and external influence", in in *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon, Cheltenham: Edward Elgar, 2001, pp. 77-95.

41 Jennifer Widner, "Constitution Writing in Post-Conflict Settings: An Overview", in *William and Mary Law Review*, Vol. 49 (2008), pp. 1513-1541; Kirsti, Samuels, "Post-Conflict Peace-Building and Constitution Making", in *Chicago Journal of International Law*, Vol. 6 (2006), pp. 1-20; Michele Brandt, *Constitutional Assistance in Post-Conflict Countries – The UN Experience: Cambodia, East Timor & Afghanistan*, United Nations Development Programme, 2005. International IDEA, *Constitution building after conflict: External support to a sovereign process*, Stockholm, 2011.

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

43 Two examples for coup traditions in Asia-Pacific are Thailand and Fiji. The general problem is particularly obvious in Africa. For a somewhat apologetic assessment of coup-traditions in Africa see Paul Collier, *Wars, Guns, and Votes: Democracy in Dangerous Places*, New York: Harper Perennial Collier, 2009.

Constitution Making Process

Within the past several decades of massive change around the world, many nations have attempted to re-establish a new national identity, making a complete break with the past, and setting a course to a new future. The constitution making process in South Africa after the end of apartheid probably was the most inspiring of these endeavors. Here was a nation that transformed itself from a disgraceful, oppressive system to a modern democracy. The process was well thought through and produced first an interim constitution and afterwards a final constitution. With Nelson Mandela, there was a man who after decades of incarceration became the first President of the new South Africa, being modest and peaceful and not sticking to power after his original term was finished.

Looking at case studies, there seems not that much evidence that (apart from the model case of South Africa) a long, participatory and transparent process necessarily leads to more successful results. It should be remembered that one of the most successful democratic constitutions in Asia, the Japanese constitution of 1946, actually is the antipode of adequate constitutional process.[44] Kenya is sometimes mentioned as an example for strong and inclusive process but seems not to be such a strong case since the post electoral violence in 2008. Thailand's constitution of 1997 was the result of a long and comparatively transparent process, but its history ended in accordance with the country's very specific tradition with another military coup in 2006. Despite such reasons for caution, recent literature generally suggests that inclusiveness and participation are crucial. A significant part of the expert community of constitution builders strongly emphasizes this point, maybe not surprisingly, as there is a job-market for constitution-building-consultants to create and defend. On a more serious level, there is obviously an argument to be made, that under the presumption of a democracy and the people's sovereignty in the participatory process, good discourse has an advantage in giving legitimacy, and there might be a hope that such a process increases the acceptability of results for those involved. The right to participate in constitutional process also is in line with

44 For a short summary on the constitutional oktroi by the USA and the question of legitimacy of the constitution see Shigenori Matsui, *The Constitution of Japan: A Contextual Analysis*, Oxford: Hart Publishing, 2011, pp.7-21.

the general tendency to a right to democracy in international law.[45] There is a risk, however, that long and exhaustive processes may cause the loss of momentum, which might have been there in the initial phase of political transition which is behind the constitution making process. In other words: There is a risk that discussion does not lead to agreement, but to heavier disagreement. There are also two possible outcomes of extensive process when it comes to the substantial quality of a constitution: Discussion might lead to improvement due to elimination of weak points, but it might also lead to additional inconsistencies, vagueness (provisions which only veil disagreement) or over-regulation (as consequence of mutual distrust). It is evident anyway that good substance needs a logical, systematic and well informed approach. The political process and public participation typically create a certain amount of chaos and compromises that might not be very well thought through. You simply cannot draft a good law or a good constitution in an assembly of hundreds of people, being under the pressure of even more external groups, demonstrations, media, etc. You need a draft (or several drafts) first and for that you need a small group and within that a very small group of knowledgeable people who provide a first basis for discussion. Maybe ninety percent of a constitutional text will often be undisputed; if a wisely selected small team prepares a first draft. The framers must concentrate on the "hot" issues. It is not so much about "Proposals vs. Processes,"[46] it is about combining both.

Constitutional Design

What should a constitution look like in order to have a positive effect on development? Should it be short or long, easy or difficult to amend, contain rights or not (and which), be monarchic or republican, presidential or parliamentarian, majoritarian or consensual, unicameral or bicameral, federal or not, establishing judicial review

45 See Thomas M. Franck and Arun K. Thiruvengadam, "Norms of International Law Relating to the Constitution-Making Process", in *Framing the State in Times of Transition*, ed. L.E. Miller, Washington DC: United States Institute of Peace, 2010, pp. 3-19. Vivien Hart, "Constitution Making and the Right to Take Part in a Public Affair", in *Framing the State in Times of Transition*, above fn. 45, pp. 20-54.

46 Donald L. Horowitz, "Constitutional Design: Proposals versus Processes", 1999 (available at www.ssrn.com); idem, "Conciliatory Institutions and Constitutional Processes in Post-Conflict States", in *Mary and William Law Review*, Vol. 49 (2008), pp. 1213-1248.

or even have a constitutional court?

Constitution writing involves a huge number of choices and there is plenty of literature concerning this issue.[47] A lot of cases have been made in favor of one or another model. The most important rule seems to be that each and every country needs some tailor made solution. Constitutions cannot be "xeroxed" and there is no worldwide "model constitution" available as a free download for local use.[48] There are however, components available for use and this finds its expression in what has been labeled the "IKEA-theory" of constitution making.[49] Any implication that something is wrong with this should be rejected. Why should not constitution builders around the world try to assemble best parts from around the world to construct their own constitution? The assumption that constitutional concepts are about culture and therefore unsuitable for transposition is misleading. To the knowledge of this author, no state has ever claimed intellectual property rights with respect to constitutional provisions. Furthermore, the migration of concepts and the "import" of new thoughts should not be generally rejected as being anti-traditional. New constitutions will often be based on the idea that some traditions and aspects of legal or political culture need change. E.g. women's rights are guaranteed because they are not yet respected or anti-corruption bodies are established because of the existent of a culture of corruption. It is true that borrowing from other

47 For a few recent publications see Donald S. Lutz, *Principles of Constitutional Design*, Cambridge: Cambridge University Press, 2006; Edward Schneier, *Crafting Constitutional Democracies: The Politics of Institutional Design*, Lanham MD and Oxford: Rowman & Littlefield, 2006; Walter F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order*, Baltimore: John Hopkins University Press, 2007; Giovanni Sartori, *Comparative Constitutional Engineering: An Enquiry into Structures, Incentives and Outcomes,* 2nd ed., New York: New York University Press, 1997.

48 "Model constitutions" have been developed within certain federal states etc. A "model state constitution", promoted by the National Municipal League, exists since 1921 in the United States, see Alan G. Tarr, *Understanding State Constitutions*, Princeton: Princeton University Press, 1998, p.152. Much more consequently, the States within the former Soviet Union were mostly provided with standardized constitutions.

49 See Günter Frankenberg, "Constitutional Transfer: The IKEA Theory Revisited", in *International Journal of Constitutional Law*, Vol. 8 (2010), pp. 563-579, at p. 563. "IKEA" is the largest furniture store chain in the world, mainly selling furniture to "take away" and assemble it by "do it yourself" at home.

systems should be done under careful consideration of all circumstances, but that's the same as at IKEA: Intelligent people will buy bookshelves if they fit into their imagination for the interior design of their homes, not just because they look good in a furniture shop.

From Constitution to Constitutionalism

A constitution must be implemented before a nation truly adopts constitutionalism. From the day a constitution becomes law, it has to prove that it works. This often proves difficult. Even the oldest of all written constitutions, the Constitution of the United States of America, has had its fare share of crises. In Germany, the initial attempts to establish constitutionalism failed altogether, the first 1848/9 within short a very short time, the second after Second World War within little more than a decade. With decolonization many countries got democratic constitutions in the first place, just to experience authoritarianism subsequently. Constitutions were changed or abused to accommodate the need of dictators, or they were simply ignored. Southeast Asia's history in the second half of the 20th century has some examples for constitutions without constitutionalism, from the abusive formalism in the Philippines of General Marcos to the meaningless constitution of Indonesia under Suharto to the absurdity of the Cambodian constitution under the Khmer Rouge. Here and elsewhere the early generations of post colonialism constitutions was not very successful.[50] But since the late 1980s things have changed. New constitutions have been adopted and the old ones have been amended. In some cases, basic rights have been added. Constitutional courts have been established and have started operating (with varying success). Although things are still far from perfect, it is clear that the relevance of constitutions and constitutional discourses has increased in many places. And the more constitutions are taken seriously as commitments, the more they might contribute to development. Constitutional texts alone are without relevance, only when taken seriously do they matter. If taken seriously, they can not only be legal texts, but also function like policy papers, directing governments to pursue proper development and providing help to civil society in the often difficult public discourse with state authorities. It is clear, however, that constitutions do not fulfill any of such roles by themselves. They need

50 See Bryde, above fn. 1.

implementation in political and legal life, which regularly is the more demanding and more time consuming process, compared to drafting and adoption.

International Cooperation for Constitutionalism

Constitutions are constructed based on experiences from home and abroad. One only needs to read the Federalist Papers to realize to what extent the U.S. Constitution is based on experiences from throughout history and many other nations. The first democratic national constitution drafted in Germany (1848) as well was much influenced by experiences of the United States, France, Belgium, and elsewhere. Obviously, the "migration of constitutional ideas"[51] is nothing new. It has always been helped by traveling experts, but whereas a hundred years ago it was quite an effort to embark on a ship for overseas travel, today a delegation from a Southeast Asian country planning to establish a constitutional court might be able to visit four or five such courts in Europe on a two week "study trip" sponsored by an international agency.

International Standards for Constitutionalism, "The Rise of World Constitutionalism", as described by Bruce Ackermann, [52] is undeniable. Even where the rise of democracy has no firm ground yet, talk about the constitution is typically abundant. To have a constitution and to give it some appearance of legitimacy seems to be the litmus test of modern statehood. Regarding process, there might be no strict international law provisions on how to organize constitution making, but there are certain standards evolving which define legitimacy from an international perspective.[53] Furthermore, the contents of constitutions increasingly have strong similarities.[54] There may still be exceptions to this trend (Myanmar 2010), but more and more constitutions follow the pattern of democracy, basic rights and the rule of law, separated powers of the legislature, executive and judiciary, as well as provide for some vertical structure in state organization (federalism, decentralization, local government etc.).

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51 Sujit Choudhry (ed.), *The Migration of Constitutional Ideas*, Cambridge: Cambridge University Press, 2006.

52 Ackermann, above fn. 9.

53 See Franck and Thiruvengadam, above fn. 45.

54 See Cheryl Saunders, "Towards a Global Constitutional Gene Pool", in *National Taiwan University Law Review*, Vol. 4 (2009), pp. 1-38.

However, despite a convergence based on such general concepts there is still much variety and nothing prevents local constitution builders from looking for local solutions. As with human beings, the common gene pool does not and should not prevent differences in many details.

Internationalized Constitution Building

From the very early times the theory of the constitution maker being independent form outside influences (autochthonous) was often just that: a theory. Napoleon Bonaparte, who had installed his brother Jérome as a king of Westphalia in the early 19th century, sent him a letter saying: "Mon Frère, vous trouverez ci-joint la Constitution de votre royaume" (My brother, please find attached the Constitution for your kingdom). Ever since there have been cases of fairly evident imposition of constitutions from outside. Some famous cases are the Japanese Constitution of 1946 and again the Constitution of Bosnia-Herzegovina of 1992.[55] The drafts for the Japanese and the Bosnian Constitution were both made in English and even submitted to the local bodies in English. Recently, constitution making has been an internationalized enterprise on a few occasions. Philipp Dann and Zaid Al-Ali[56], who have taken East Timor, Iraq and Sudan as case studies, speak of an "internationalized pouvoir constituant." Elkin, Ginsburg and Melton[57] have chosen Iraq, Japan and Afghanistan to discuss the more specific question of constitution making in occupied states. Obviously the topic of sovereignty and acceptance are at the core of the problems arising in such circumstances.

International or foreign influence is not always as "forceful" as discussed above and the situation is typically quite different where no foreign occupation, previous military intervention or international administration is part of the setting. But even where "sovereignty" of the state is not in doubt, international "help" in the constitutionalization process might be abundant. A current showcase is Nepal, where numerous international and non-governmental

55 For a balanced account on the latter see James C. O'Brien, "The Dayton Constitution of Bosnia and Herzegovina", in *Framing the State in Times of Transition: Case Studies in Constitution Making*, above fn. 37, pp. 332-349.

56 See Philipp Dann and Zaid Al-Ali, "The Internationalized Pouvoir Constituant – Constitution Making Under External Influence in Iraq, Sudan and East Timor", in *Max Planck Yearbook of United Nations Law*, Vol. 10 (2006), pp. 423-463.

57 See Elkin, Ginsburg and Melton, above fn. 40.

organizations have been trying for years to assist a difficult process of drafting a new constitution. Local constitution makers here and everywhere will have to decide, which concepts are helpful and suitable under local circumstances. To ignore them, just because they are "from outside", would be as wrong as just copying them without further thought.

Conclusion

Constitutionalism is a concept of limited and controlled government, ideally based on the principles of democracy, human rights and the rule of law. To achieve a system roughly based on these concepts or even seriously aiming for it, is a major development success as the fulfillment of each of these concepts is not only an enhancement of human freedom in itself, but will by most accounts typically create a better environment for a socially balanced economic and human development on the long run as well. As mentioned before, nearly all states with "first world" wealth are constitutionalist today, if one does not take into account the few states with wealth based on oil. In Asia, Singapore is often mentioned as an exception, but it should be noted that although Singapore probably cannot be called fully constitutionalist with regard to standards of democracy and political liberties, it has a constitution which is quite strictly followed (although often amended) and it has a good reputation for its high rule of law standards.[58] The idea, that what has been possible in the small city state of Singapore can also be possible in China, is likely to be unrealistic anyway. In Asia, which is often seen as the region most fundamentally opposed to some of the values of Western constitutionalism, there is plenty of evidence that increased development will finally reinforce just those ideas and concepts. Taiwan and South Korea are striking examples,[59] Singapore might follow sooner than often assumed.

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58 For excellent accounts and analysis of Singapore's constitutional development see Li-ann Thio and Kevin YL Tan (eds.), *Evolution of a Revolution: Forty Years of the Singapore Constitution*, Abingdon: Routledge, 2009.

59 See Jiunn-rong Yeh and Wen-Chen Chang, "The Emergence of East Asian Constitutionalism: Features in Comparison", in *American Journal of Comparative Law*, Vol. 59 (2011), pp. 805-839.

The development of constitutionalism (properly defined) is a direct contribution to the development of a modern national society. To ask only about constitutionalism's contribution to economic development is misleading. Constitutionalism (like more generally the rule of law) is an end in itself, as its main achievement is the enhancement of freedom in the framework of the modern state. Constitutionalism is an evolutionary achievement.[60] The difficult question is how to develop constitutionalism, particularly under the conditions of a developing state. The obvious three steps are the constitution making process, constitutional design and (most challenging) the constitutionalization of the legal and political system. Solutions in each step of the process can be different depending on circumstances, and weaknesses in the first two steps can turn out to be less dramatic if step number three works well. Recently, in Myanmar a very flawed process has produced a flawed constitution by any international standards. However, since its adoption a promising process seems to have gained momentum and even this flawed constitution might end up as a strange evolutionary link between military dictatorship and constitutional governance. Undoubtedly Myanmar will have to replace or fundamentally reform this constitution in the future. In retrospective, its initial version will then probably be seen as the failed attempt of a regime to cement its power despite the forces of history, which turned out to facilitate necessary transition.

Even more than law in general,[61] constitutions are bridges in many ways. They are bridges between politics and law and between the past and future. They are often deeply rooted in a country's legal, political and societal traditions, but their job is to make the countries fit for the future. A good constitution will combine realism with vision. It will build on good traditions and it will (try to) break with bad ones. But as real bridges sometimes collapse under the burden of everyday traffic or remain empty, constitutions are often in danger of not being up to the needs of the people. Constitutional promises are not self-fulfilling; they need people and institutions filling their promises with life. If those do not exist or emerge, they will be bridges to nowhere.

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60 Niklas Luhmann, "Die Verfassung als evolutionäre Errungenschaft", in *Rechtshistorisches Journal*, Vol. 9 (1990), pp. 176–220.

61 Edgar, Bodenheimer, "Law as a Bridge between Is and Ought", in *Ratio Juris*, Vol. 1 (1988), pp. 137-153.

Priorities and Prospects of the New Politics of Transformation in Malaysia

Noor Sulastry Yurni Ahmad

Introduction

Before 1963, the country we now call Malaysia, was known as Malaya. In the years leading up to independence, the people of Malaya were trained and given adequate preparation to implement a form of British-system based of parliamentary democracy and constitutional monarchy. In principle, the concept of democracy in Malaysia is similar to the concept of democracy practiced in countries around the world that uphold the idea of democracy. However, Malaysia has its own ways to adapt the concept with the plurality of cultural and ethnic groups of the nation state of Malaysia.

For the most part, Malaysia, in theory, meets the basic requirements of a democracy such as freedom of the media, freedom of expression, the independence of the judiciary and so on, which are spelled out in the Federal Constitution For example, article 10 of the Federal Constitution has provided for the freedom of expression and freedom of media for Malaysians. Unfortunately, this freedom is not able to work properly due to constraints placed by the ruling government (National Front or *Barisan Nasional*). The *Barisan Nasional* (BN) government is often seen as blocking these freedoms and has slowed down the process of democratization in Malaysia as described by Harold Crouch.

The Malay-dominated ruling elite constructed an electoral system that virtually ensured that it could not be removed from power — assuming that it remained united. It was not just the electoral system that favored the ruling elite. That domination was backed by a wide range of mechanisms of political control that restricted the scope for criticism and opposition. The government took the view that because the people elected the government in 'democratic' elections, it therefore represented the will of the people. Thus, it was unnecessary for opposition parties and interest groups to 'interfere' in the government's work. If the people were unhappy about government policies, they would have their chance again in the next election. In the meantime, to ensure that the opposition did not disrupt the working of the government, political control was instituted. Often justified as necessary to maintain order in a communally divided

society, this control also hindered the efforts of the opposition to mobilize political support."[1]

The world today needs a new, comprehensive and holistic model of governance that involves all sectors as equal partners in development. The aim is solely for the attainment of a better quality of life and happiness for all. Apart from information and communication technologies, other contemporary factors like the expansion of a world without borders, globalization and liberalization also require a nation's government and political system to reassess their position, role and function. Indeed, politics as the primary institution for government is also evolving. This can be seen through the application of the Internet and SMS as a new political stage that is changing the political rules and style, including in this country and particularly in the previous general election.[2]

Moreover, even the concept of the state is evolving. Christopher Person, in his book *The Modern State*, claims that a state today is subjected to the process of continued change in terms of its activities and functions, as well as faced with the possibility of being substituted by other powers. What is needed today is a new model of governance, one that involves all sectors as partners in development.[3]

This paper will focus on cyber politics in Malaysia with reference to blogs and websites. It will be divided into four main parts, elaborating on the reason for people's transition to alternative media in pursuing issues of national politics, the role of alternative media in democratization, the advantages of blogs and websites in the political arena in general as well as the importance of blogs and websites in the political arena in Malaysia.

Malaysian 'State' Ruling System

Even within a modern constitutional monarchy, there still exist some traditional elements from the feudal past. However, in most nations, this feudal system has also been through a visible transformation process. Malaysia seems to have missed out on this transformation. This can be seen in most official gatherings. For example, at the king's birthday or at weddings, the monarch's *'cukur jambul'*

1 Harold Crouch, *Government and Society in Malaysia*, Singapore: Talisman, 1996, p. 77.

2 Abdullah Saifuddin, *New Politics: Towards A Mature Malaysian Democracy*, Kuala Lumpur: Institut Terjemahan Negara Malaysia, 2009, p. 53.

3 Ibid.

ceremony is still greeted with pleasure by a *'kompang'*, huge gatherings, *'kenduri'*, celebritory gun fire and young women singing are still done as it was practiced by the Malays in feudal times. These traditions obtain the force of law through the Constitution of the Malaysian Federation which enshrines the role of the *Yang di Pertuan Agong* and Sultan as a leader in every state.

These elements of feudalism still exist today because the monarchs are seen as the protectors of the people and are very powerful and have *'daulats'*. For example in traditional Malay politics the phrases or words that picture a king as a powerful symbol and have a connection with God were also used, such as "a king is a reflection of God on earth." This phrase is a reminder to the people that the king is of a higher position and possesses a special spiritual relationship. These words caused the people to be more afraid of their king. The level of loyalty of the common people at that time was a sort of blind-acceptance which accepted whatever was said by their leaders. This fear and loyalty kept them in their place.

Syed Hussein Al Attas agrees with the above statement, and he asserted that the states and federal government spend lots of money in giving titles like *'Tun'* and *'Dato'* to the experienced political leaders and bureaucrats who act as honest protectors in this monarchical constitutional system. The amount of honors given has increased since the independence of Malaysia 51 years ago.[4]

Position, status and awards have replaced the traditional practices from the Melaka Sultanate in the era of feudal Malay politics. This situation pictures the United Malays National Organisation (UMNO) leadership as a 'hero' and 'saviour' in the Malay community. In this neofeudal era, UMNO is able to influence the governing country's decisions. Mahathir felt that there is no difference between the people's loyalty during feudal times and the people's loyalty towards their current leaders.[5]

According to him, the level of loyalty given towards the government is a reward for the government's protection. This is a main factor of the undying loyalty that has been formed during this neofeudal era. Mahathir's thoughts have been seen as very interesting

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[4] Syed Hussein Alatas, *Feudalism in Malaysian society: A Study in Historical Continuity in Modernization and Social Change*, Sydney: Angus & Robertson, 1972, p. 109.

[5] Mohamad Mahathir, *Dilema Melayu*, Kuala Lumpur: Federal Publications, 1982, pp. 5-8.

when he denies that loyalty given by the people is not a form of political hegemony. As long as the people love and are loyal to their king, leaders, *'penghulu'*, principals and also the *'wakil rakyat'* children, it is not a big issue. They are loyal because they know and trust their leader. As long as they do not feel oppressed, pressured, abused, it means that they are comfortable with their positions.

Therefore, the system of governance in Malaysia has been formed through a social bargaining process that proves the ability of the earlier patriots intelligently forming a *'daulat'* country which has been inherited by the leaders since then. The concept of nasionalism is seen as a tool of firm hegemony in governing Malaysia combined with the spirit of patriotism and loyalty to the country. In the era of the 1940s and 1950s, the spirit of patriotism was transparent through the Gagasan Malayan Union, which was considered as a challenger of the sovereign right of the Malay king with the Malay community in *Tanah Melayu*. Here, the society started to believe in UMNO's fight towards obtaining independence. On the next level, the various political parties through UMNO, the Malaysian Chinese Association (MCA) and the Malaysia Indiean Congress (MIC) united to form *Persekutuan Tanah Melayu*. As a result of winning the General Election 1955, *Tanah Melayu* was given absolute sovereignty and freed from the British colony on 31 August 1957. In the 1960s, the spirit of patriotism was further instilled through the education sector with the objective of forming a national identity.

In the 1970s and 1980s, the economic factor becomes an important element and the government took steps to introduce *Dasar Ekonomi Baru* or New Economic Policy. The more intrusive the Malaysian political system appears to be, the stronger the loyalty of the people. The difference is, the level of loyalty of today's society is more complex. Now, the Malay community is a more open minded society wanting to participate in politics.

The Malaysian government uses the sovereignty of law when consolidating the country's symbols. Loyal subjects are willing to protect the country when threatened by enemies both foreign and domestic. The government also instituted a National Service Program *(Program Latihan Khidmat Negara)* to nurture a patriotic spirit. This is because the education sector has become an important state agent. This sentiment not only needs to be nurtured through formal education in school but also in every process of socialization. Serious and popular patriotic songs are being aired over radio stations and the main television stations. The media presents reports about the government as being a perfect party, full of charitable features, the

executor of justice and always caring for the people. Writings which oppose the government will not be published or actions will be taken against the editor for not protecting the government's interests. Any efforts to oppose or to be critical of the government will be regarded as subversive.

Obviously the elements applied by the government are difficult to change as they are firmly fixed by laws, government policies, *Rukun Negara* (National Principles) and so forth. The state has not given any space for free participation. The competition is so narrow and the state was always used by the government to put pressure on opponents.. Besides that, the ruling party has taken the opportunity to draft and amend Acts to protect the government from any threatening challenges. For example, the Internat Security Act (ISA) can detain anyone without trial and was officially introduced in Article 149 of the Malaysian Constitution. This Act is also used to prevent opposition leaders or any other organization from challenging the status quo.[6]

As their position became more consolidated and difficult to challenge, it became easier for them to gain more interests in the economic sector. Further, in the current democratic governing system, there are laws to control and protect the higher class's position. However, most Malay political leaders are of the view that the enforcement of laws has permitted the taking over of individuals' land for the purpose of development and this should be restricted and be more transparent to guarantee the people's right to property.

Besides the Incitement Act and the Organization Act 1966, the Official Secrets Act (OSA) is regarded as a powerful tool to control the political process in Malaysia. The OSA is always criticized for being used by certain parties to protect any important information from being made known to the public. The information concerned is usually about scandals and nepotism, and is closely connected to the media playing a role as an agent controlled by the state.

Results from the discussion of the political figures have never given any direct and satisfiable answer to support and prove the involvement of the economic and political elites on the issues of acquiring the public's lands. Perhaps this is a sensitive question and involves certain individuals. Perhaps the culture of fear lurks not only in the souls of the common people, but in the hearts of the Malay political figures as well.

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[6] James Jesudason, "Statist democracy and the limits to civil society in Malaysia", in *Journal of Commonwealth and Comparative Politics* Vol. 33 (1995), pp. 335-356.

With much ease the hegemony proceeds well and is obvious for there is no collision between these two relationships.

The Growth of New Media in Malaysia

Transition to Alternative Media

With the state dominating the old media, the people have transitioned to alternative media to get information about politics in Malaysia. This situation has been obvious since the 12th general elections in 2008, at which time politicians began using blogs as well as websites to carry out their campaigns to win the vote. The ruling party (Barisan Nasional) failed to adapt and only won 140 seats out of 220 seats contested.[7]

The issue of *hudud*, Valentine's day celebration, diamond ring, corruption, death of Teoh Beng Hock, water consumption in the Klang Valley and Kelantan and any other issues that can be politicized were used to influence people in the election campaign. Anything that could be used to emotionally manipulate the voter's thinking was used. However, with the advent of new media, the people were able to get multiple views of each issue. In addition to that they are given the opportunity to voice their opinions about an issue through the comment space provided by bloggers in order to obtain views. Roth stated that an "online network of political blogs used to express and circulate opinions, in which pieces of information are synthesized and connected in new ways and act as checks against the mainstream media, and where public dialogue and debate on public issues can occur and eventually inform decision makers."[8]

In this regard, most Malaysians are tired of news published in the mainstream media such as *Utusan Malaysia*, *Berita Harian*, *The Star* and television networks such as RTM 1, TV2, TV3, TV9, NTV7 and *Bernama*. This is because the news portrayed in the media accentuates the good administration of the ruling party. The young people nowadays, are more open minded (although most of them are

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[7] Saahar @ Saabar Suhaimee, "Isu-isu utama sebelum, semasa dan selepas PRU 12: satu analisis kandungan blog-blog politik Malaysia terpilih", in *Jebat: Malaysian Journal of History, Politics and Strategic Studies* Vol. 35 (2008), pp. 81-96.

[8] Marci McCoy Roth, "How journalists see the blogosphere", 2004, at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.121.9805&rep=rep1&type=pdf, accessed 15 August 2013).

categorized as "voters on the fence") and prefer to see issues through a different perspective which is more open, balanced and transparent.

In the turn from old media to new media Malaysians tend to read and pursue the latest news from alternative media such as blogs and websites as most issues written were not published in the mainstream media. Therefore, the presence of blogs and websites should be monitored but not controlled by the government. Blogs and website serves to tell parts of the story that are not highlighted in the mainstream newspapers and media.

Alternative Media and Democratization

Blogs and websites are made by individuals or members of the political parties usually from the opposition, as their space for free speech. This is because they are never directly given the opportunity to appear in the flagship media to carry out their political campaigns or explain their side of the issues. Therefore, the presence of blogs and websites has helped to explain to the people, especially supporters, the real situation taking place. In this way, Malaysia can defend the characteristics of democracy which have been practiced for a long time and a positive impact in the political arena of the country. As Farah Eliana noted in an *Antarapos.com* article on October 22, 2012, "the Chief Editor of *Bernama*, Datuk Azman Ujang stated that if not the election season, nothing continues with their policies. But in the election, if it is not equally gained I think at least 30 per cent to be given to the opposition as well. So, this is a healthy practice of democracy for which we need to 'check and balance', the characteristics of democracy should we defend."[9]

Although this country is practicing democracy, but it has yet to reflect the actual character, especially in terms of freedom of speech and freedom of the media. For instance, as Khairul Azlan stated in a *harakahdaily.net* article on 29 December 2012 the PAS President Datuk Seri Tuan Guru Abdul Hadi Awang had asked to be given the opportunity to talk in live telecast on any television stations.[10] Unfortunately, the request was rejected by the government and he

[9] Farah Eliana and Mohad Adnan, "Jangan jadikan media sebagai senjata hadapi PRU", *Antarapos.com*, Oct 22, 2012; at http://antarapos.com/v1/index.php?, accessed 30 July 2013.

[10] Mohamad, Khairul Azlan, "Amanat: 'beri ruang saya jawab live di TV1, TV3'", *Harakahdaily.net*, December 29, 2012; at http://bm.harakahdaily.net/index.php/berita-utama/15561/, accessed on 30 March 2013.

was given another option to appear on television by recording for ten minutes. Thus, it is clear that the emergence of alternative media was able to play its role as the "voice agents" for members of opposition political parties.

Because of the dominance of the Government *(Barisan Nasional)* in the use of media, opposition parties do not obtain a fair opportunity as noted by Nizam Zain in an article in *Sinar Harian* on 31 January 2013 that Professor Datuk Dr Mohamad Agus, who does not see the opposition had a chance to get good news coverage in the mainstream media in our country. That is why many scholars say elections in Malaysia are free but not fair.[11]

Blogs are also used by individuals as a medium to deliver opinions about any issue. Writing ideas might be biased and seem to support either the ruling party or the opposition party but writers can be virtually independent without any influence from any party. This situation shows a new paradigm in the political culture of Malaysia in which active participation among the people,on issues like economic, political, administrative and social welfare of the people as a whole.

Blogs and websites are also created by a politician or opposition party as an efficient medium of campaigning as well as spreading influence. The use of virtual infrastructure (internet, blogs & website) is a campaigning strategy. Some even claimed that the defeat of *Barisan Nasional* in the 12th General Election is a consequence of the cyber war.[12] For example, *MediaRakyat.net* is a website which belongs to the opposition, which is loaded with videos of political talks by the opposition, especially Dato' Seri Anwar Ibrahim, which has opened the eyes of the people on his perspective of political strategy.

The Advantage of Blogs andWebsites in the Malaysian Political Arena

The advantage of blogs and websites is the medium of the cyber which is easily accessible in any form at any time required by the followers as long as they have internet access. Unlike news published through newspapers and television-owned subject at times, readers can easily read an article or posting over and over again because each

[11] Zain Nizam, "Agus: 'kedudukan menjelang PRU13 sengit", *Sinar harian*, January 31, 2013; at online: http://www.sinarharian.com.my/wawancara/agus-kedudukan-menjelang-pru13-sengit-1.126857, accessed on 28 February 2013).

[12] See Suhaimee, above note 7.

article or post will be stored in the virtual memory.

The transmission of information through blogs and websites is faster than the existing mainstream media. There are no restrictions or censorship by any other person, any issue can be written and published in their space without having to wait for a certain time. In other words, every issue, and the news is relayed from the cyber space is more up to date. The community is able to find out the details of an issue without having to listen to the news from the controlled media television channel or read mainstream newspapers. Furthermore, politicians (whether from the ruling party and opposition parties) who have a blog can give feedback or their views as soon as possible in respect of each issue raised.

The advantages of blogs and websites are the extensive network of its relationship, both at the local and the international level. Regardless of whether one is in West Malaysia, East Malaysia or overseas such as in the United Kingdom, Australia and Korea, they still can keep track of Malaysian politics and issues of national politics as long as they have internet access and each article or post made by the blog owners or website is shared in social media channels such as Facebook, Twitter and YouTube.

The Importance of Blogs and Websites in Malaysia

It is undeniable; the emergence of virtual media today is accepted by people from all walks of life in this country because it has a value of its own. Through the presence of alternative media, political leaders are able to communicate with people (especially their advocates) more easily and quickly while the dissemination and promotion of information and campaigns to their parties can be done more effectively. The people can communicate with their leaders closely through online. The emergence of web sites and blogs launched by political parties such as the MediaRakyat.net was spearheaded by the opposition party *(Pakatan Rakyat)* which has seen the opposition party inundated with the increasing numbers following the campaign.*MediaRakyat* is dedicated to improving the freedom of information in Malaysia. *MediaRakyat,* which is owned by the opposition party, believes that the Universal Declaration of Human Rights indicates: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference, and import information and ideas through any media regardless of frontiers.”

The ruling party is also interested in the use of cyber campaigning

as a medium as well as a means for the dissemination of information. For example, the formation of BN cyber troopers was set up for closer relations between the leaders and the people. The establishment of this website was done to gain support from the people (especially young people) who has been inundated. In this way, the ruling government was able to maintain majority seats in the election and it continues to be relevant in the eyes of the people. Therefore, alternative media can be a tool for communication between the leaders and the people to communicate and disseminate information.

The disestablishment of the controlled mainstream media is one of the prerequisites for Malaysian democratization. However, the people and the ruling government should cooperate to ensure the healthy growth of alternative media. Noor Azlin and Normah mentioned that even though the practice of digital democracy has its challenges, they also added that government today are confronted not just by guerrillas and armed machineries with deadly weapons, but also by cyber troopers who wage viral warfare with the power of their keyboards, keypads and smart phones.[13] The purpose of displaying such news is to advise the public to be careful with the voting process and is not illegal.

Media: The 'Perfect' Hegemony Agent

According to the Printing Presses and Publications Act 1984, Section 7(1), the Ministry of Home Affairs has the authority to grant, deny and withdraw any publication permit as they wish.[14] As far as the public is concerned, every Malaysian citizen has the rights of freedom to obtain knowledge and the freedom to obtain various opinions and views. However, the Malaysian government lately has strictly controlled the media activities and has been restrictive in granting media license. The reason for this is to block or evade groups and free organizations from publishing and broadcasting issues that portray bad images on the government. Whether directly or indirectly there are individuals with interest in perserving the

[13] Bidin Noor Azlin and Normah Mustafa, "Blogosphere: How youth perceived blogs credibility", *Malaysian Journal of Communication* Vol. 28 (2012), pp. 33-54.

[14] Tohid Rosidah, *Faktor kestabilan politik Malaysia: satu analisis dalam era kepimpinan Dato' Seri Dr. Mahathir 1981-1996*, Latihan ilmiah, Jabatan Politik, Universiti Kebangsaan Malaysia, 1997, p. 99.

status quo by using the media as their hegemony agent.

According to Shaukat Ajmeri, the revolution of information makes it harder for the common people to differentiate between the truth and propaganda. He is of the opinion that this situation arises because of poweful groups who try to control certain narratives. Those who control political and economic power also control information. In other words they control the levers of knowledge and idealogy.[15]

The question here is what information to those in power choose to reveal through the media. The government has played a dominant role in ensuring what sensitive issues or political issues are shown, and filter any information before it is made known to the public. This filtering by the media responsible for reporting such events and the media are subjected to several rules and regulations and Acts which bar them from reporting the truth. The media should, but often does not, operate as a source of information and not to persuade the public to act as such when any information is reported.

In the event the public obtains favourable and positive news or information, their thoughts concerning those in power will be more optimistic. It is true that information reported by the media to public is not parallel with the context and actual meanings to be made known. According to Shaukat, the capsules of information we get are often detached from their contexts and meanings and are essentially packaged for quick and easy consumption. For instance, before we are told about the real causes of a riot, another riot, plague, plane crash, or war is upon us.[16] The media control is a smart route which benefits the government as a hegemony agent to provide information that will distract or influence the public's thinking.

When the media is strictly controlled it deters the public from their rights of freedom as stated in the Malaysian Constitution. The media is prone to broadcast and promote the elite political and economic agenda while ignoring the real needs of the public. In reality, the role of mass media should be parallel with the theory of social responsibility that gives freedom to the press, for example an individual's freedom of speech and both basic freedom is seen as a moral right which cannot be disrupted by the government.

From the government's perspective, the public need not know how

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15 Ajmeri Shaukat, "The age of disinformation", *Panjabilok*, April 10 2004, at online: http://static.panjabilok.net/misc/education/ageof_disinfo.htm, accessed on July 15, 2013.

16 See ibid.

or why decisions are made. Unfortunately, the national media has been complicit in this line of thinking. However, with with alternative media, this is not relevant anymore because society can find out about national and world events on their own. As long as the government still has the power to control any information that can be used to control society, they will keep on using their weapon, i.e to use the media to attack public's thinking and further hegemonized their culture to always support and be loyal to the government. However, as we have seen, that power is weakening.

In order for the government to maintain the status quo, however, they can use the old media as their agent of defense. The mainstream media will play an important role in controlling the public's mind and will not support any reports from alternative parties and will always label them as defectors, destroyers of a country's future, traitors, pompous, etc. This sentiment further strengthens the status quo of the government for managing to gain support and trust from the public. It is undeniable that the role of schools and universities are used to further strengthen the hegemonies politics of the government among students and educators. The information about the governance system are provided without a flaw in accordance with the readymade system and executed all orders given by the government efficiently. Shaukat further is of the opinion that the action of labeling them as a traitor is not a good sign and the media or the government should be more tolerance towards this defector and be more objective in settling any problems faced. He is also of the opinion that the information needed is a user's commodity that attracts and packaged to protect the public from knowing the truth. The main role of the media however is only "to join the karaoke of talking a lot and saying nothing."[17]

Conclusion

The Malaysian government's use of the old media as an agent of hegemony continues to this day, yet that power is weakening. The new media, in the form of blogs, social media and other alternative forces, while not professional journalists, still exert a strong counterforce to the establisment. The government, through its agents, claim that such an unregulated source of information can lead to societal upheval and ethnic and religious strife. However, for those that utilize the new forms of media counter that government restrictions on the desimination of media is used only for the

17 See ibid.

maintenance of power and propaganda. With the advent of the new forms of media, the Malaysian public has benefited from ability to explore all sides of the various issues and finally come to their own conclusions based on their own reasoning, not from what the government told them to believe.

Research material: CPG Translation of the Thai Constitutional Court Ruling

No. 52/2546, 30th of December 2003

Ruling No. 52/2546

The Constitutional Court

Dated 30th December B.E. 2546 (2003)

Re: The Election Commission requested for a Constitutional Court ruling under section 266 of the Constitution on to the powers and duties of the Election Commission under section 145 paragraph one (3) of the Constitution.

The Election Commission, the applicant, submitted an application dated 26 June B.E. 2545 (2002) to the Constitutional Court in request of a ruling under section 266 of the Constitution with respect to Order of the Supreme Administrative Court No. 84/2544, dated 30 October B.E. 2544 (2001), which ruled that the Election Commission and Constituency Election Commission, having made rulings on the administration of elections, could be subject to an action in the Administrative Court by virtue of section 271 and section 276 of the Constitution in conjunction with section 3, section 9 and section 42 of the Act on Establishment of Administrative Courts and Administrative Court Procedures B.E. 2542 (1999).

1. The facts under the application and documents in support of the application could be summarized as follows.

1.1 Mr. Kowit Surasawadee, a candidate in the election of a member of the House of Representatives for the 30th Constituency (Bangkok Noi), filed actions against the Election Commission and the Election Commission for Bangkok's 30th Constituency at the Central Administrative Court. It was alleged that the Election Commission for Bangkok's 30th Constituency showed

conduct which indicated an intention to cause election irregularities. The Election Commission for Bangkok's 30th Constituency, in its capacity as the competent authority, issued Order of the Election Commission for Bangkok's 30th Constituency No. 17/2543 Re: Appointment of Vote-Counting Committee for the Election of a Member of the House of Representatives for the 30th Constituency, such order being repeatedly issued 3 times, unlawfully, containing false texts and dishonestly. The plaintiff thus suffered a detriment and therefore requested for a judgment or order of the Central Administrative Court that Order No. 17/2543 was unlawful, and requested for a revocation of such order. It was claimed that the Election Commission, consisting of Mr. Teerasak Kannasut, Mr. Yuwarat Kamolvej, Mr. Sawat Chotipanich, Mr. Gothom Arya and Mr. Jira Boonyapochanasoonthorn, should be jointly accountable with the Election Commission for Bangkok's 30th Constituency, consisting of Mr. Arun Sakuldeaw, Miss Duangporn Watkawanich, Mr. Amornthat Pijitrkadeepol, Mr. Pratuengwit Deejai, Mr. Pornwut Methawutikorn, Mr. Pisawong Chob-ngam, Mr. Chalern Tunsakul, Mr. Sophon Heanchasri, Mr. Klong Klomkleang and Mr. Panya Na Chiang Mai, for its failure to conduct a thorough review which resulted in a resolution that no offences were found in relation to the election in Bangkok's 30th Constituency in the general elections on 6 January B.E. 2544 (2001)

1.2 The Central Administrative Court ruled that the law did not authorize individual Election Commissioners to issue regulations, orders or any resolution that would affect a person. Therefore, the Election Commissioners and Election Commissioners for Bangkok's 30th Constituency, in their individual capacities, were not state officials under section 3 of the Act on Establishment of Administrative Courts and Administrative Court Procedures B.E. 2542 (1999). The Central Administrative Court was thus unable to admit the plaints in relation to all of the Election Commissioners and Election Commissioners for Bangkok's 30th Constituency in their individual capacities. A plaint was filed against the Election Commission and the Election Commission for Bangkok's 30th Constituency, in their capacities as the Election Commission or a Constituency Election Commission, which were state officials under section 3 of the Act on Establishment of Administrative Courts and Administrative Court Procedures B.E. 2542 (1999), and possible defendants in a case at the Administrative Court. In this case, Mr. Kowit Surasawadee filed a protest against the administration of the election by the Election Commission for Bangkok's 30th

Constituency and filed a complaint to the Election Commission requesting the latter to withhold approval of the election results for Bangkok's 30th Constituency. In this regard, the Election Commission already ruled that no offences were found and a recount was not ordered. It could be held thus that the Election Commission had exercised its adjudicative powers as authorized under section 145 paragraph one (3) of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). Such powers were absolute and final. The Court therefore did not have the competence to admit the plaint for trial or issue an order otherwise.

1.3 Mr. Kowit Surasawadee filed an appeal against the Central Administrative Court Order to the Supreme Administrative Court, stating that he had the intention of filing a case against the Election Commission and the Constituency Election Commission for jointly issuing overlapping orders to appoint a vote-counting committee and thereby constituting a probable cause for irregularities. The appellant stated that he did not have the intention of filing a case against the Commissioners in their individual capacities, and thus requested that the Supreme Administrative Court order the Central Administrative Court to admit the plaint for trial.

1.4 The Supreme Administrative Court issued Order No. 84/2544, dated 30 October B.E. 2544 (2001), in the case between Mr. Kowit Surasawadee and the Election Commission and Election Commission for Bangkok's 30th Constituency, that with regard to the Administrative Court of First Instance's ruling that the ruling of the Election Commission under section 145 paragraph one (3) of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) was absolute and final, being a cause which prevented the Administrative Court of First Instance from admitting the plaint for trial and judgment or order otherwise, the Supreme Administrative Court found that there were no provisions in any section which provided clearly as such. The decision of the Administrative Court of First Instance was an interpretation of the law by way of filling in provisions, a method that was inconsistent with the statutory interpretation principles as laid down by a precedent of the Constitutional Court in Ruling No. 24/2543, dated 15 June B.E. 2543 (2000), that "Rules of the Election Commission on Issuance of a Re-Election Order Prior to the Announcement of Senatorial Election Results (No. 2) B.E. 2543 (2000), dated 1 May B.E. 2543 (2000), was unconstitutional." The Supreme Administrative Court found as follows.

(1) The Supreme Administrative Court sitting

en banc found that section 271 of the Constitution laid down the principle that "the Courts of Justice have the power to try and adjudicate cases except those specified by the Constitution or by law to be within the jurisdiction of other Courts," and section 176 of the Constitution provided that "the Administrative Courts shall have the power to try and adjudicate cases of disputes between a government agency, state agency, state enterprise or local government organisation, or between a state official under the command or supervision of the government and a private individual…" Section 9 of the Act on Establishment of Administrative Courts and Administrative Court Procedures B.E. 2542 (1999) provided that "the Administrative Courts have the competence to try and adjudicate or give orders over the following matters: (1) a dispute in relation to an unlawful act by an administrative agency or state official…" Section 42 paragraph one provided that "a person who is aggrieved or injured or who may inevitably be aggrieved or injured in consequence of an act or omission by an administrative agency or state official… shall have the right to file a case at the Administrative Court." Upon consideration of the provisions of the Constitution of the Kingdom of Thailand and the provisions of such law, it was thus found that this case was within the Administrative Court's competence to admit for trial and adjudication.

(2) On the issue of whether or not the Election Commission or Constituency Election Commission could be subject to an action in the Administrative Courts, the Supreme Administrative Court sitting *en banc* considered the provisions of section 276 of the Constitution which stated that a government agency, state agency, state enterprise or local administration or state official who could become a party or be subject to an action in the Administrative Courts had to be an agency or state official under the command or supervision of the Government. It was found that the Election Commission or Constituency Election Commission was a state official under section 3 of the Act on Establishment of Administrative Courts and Administrative Court Procedures B.E. 2542 (1999), which provided that "'state official' referred to… (2) … a committee or person authorized by law to issue a regulation, order or any resolution which affects a person," and that all state officials must at least be "under the supervision of the Government", where the term Government had a wider meaning than the Council of Ministers, referring to the "Government in its representative capacity of the nation", not merely the "Council of Ministers or Minister of a Ministry or Sub-Ministry." Therefore, the Election Commission and

Constituency Election Commission were subject to potential actions in the Administrative Court.

2. The Election Commission did not concur with the Supreme Administrative Court's ruling to admit the action against the Election Commission and Constituency Election Commission for trial, according to the Confidential Letter No. Lor Tor 0101/192, dated 26 June B.E. 2545 (2002), for the following reasons:

2.1 The Election Commission was an organ established under the Constitution of the Kingdom of Thailand B.E. 2540 (1997), which provided the Election Commission with the powers and duties of managing and holding or arranging for an election of a member of the House of Representatives, senator, local assembly member and local administrator as well as a referendum in an honest and just manner, investigating facts and making rulings, announcing election results, taking other actions as provided by law, including the appointment of a person, group of persons or representative of a private organization to perform delegated duties under section 144, section 145 and section 147 of the Constitution. A ruling of the Election Commission was equivalent to the exercise of judicial powers. The powers of the Election Commission were therefore absolute and final in relation to the legislature, executive and judiciary.

2.2 The Election Commission and Constituency Election Commission were not state agencies or state officials under the command or supervision of the Government as provided under section 276 of the Constitution. In this regard, the Constitutional Court had ruled as precedent in Ruling of the Constitutional Court No. 24/2543, dated 15 June B.E. 2543 (2000) that "the Election Commission is an organ established under Chapter 6, Part 4 of the Constitution, not an agency or official of the State that was under the command or supervision of the Government."

2.3 The provisions of section 3, section 9 and section 42 of the Act on Establishment of Administrative Courts and Administrative Court Procedures B.E. 2542 (1999) provided the scope of competence of the Administrative Courts which exceeded the provisions of the Constitution. Such provisions were therefore unenforceable pursuant to section 6 of the Constitution.

As the Election Commission disagreed with Order of the Supreme Administrative Court No. 84/2544 dated 30 October B.E. 2544 (2001), the Constitutional Court was therefore requested to make a ruling on the powers and duties of the Election Commission and Constituency Election Commission with respect to the

administration of elections.

2.4 Thereafter, the Election Commission sent an opinion in Most Urgent Letter No. Lor Tor (Kor Kor Tor) 0101/7579 dated 24 October B.E. 2545, in summary as follows. The Election Commission wished to amend certain erroneous texts in the Election Commission's application submitted to the Constitutional Court on 26 June B.E. 2545 (2002), and the Election Commission wished to abandon certain requests in the final part of the application to the Constitutional Court submitted on 26 June B.E. 2545 (2002) by deleting the texts: "and the provisions of section 3, section 9 and section 42 of such Act on Establishment of Administrative Courts are provisions of law that are applicable beyond the scope of the Constitution. Therefore a ruling is requested as to whether or not such provisions are unenforceable pursuant to section 6 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997)."

The Constitutional Court deliberated on 29 October B.E. 2545 and resolved to admit the opinion or statement of the Election Commission into the proceedings, as well as granted leave to withdraw (abandon) the request in the final part of the application submitted to the Constitutional Court on 26 June B.E. 2545 as requested by the Election Commission.

3. The Supreme Administrative Court submitted an opinion and statement in writing, as follows.

3.1 The Supreme Administrative Court submitted a statement according to Letter of the Supreme Administrative Court No. Sor Por 0008.1/48 dated 15 August B.E. 2545 (2002), along with a copy of the judge-commissioner's statement presented to the Supreme Administrative Court, the essential substance of which could be summarized as follows.

3.1.1 The proceedings of the Election Commission pursuant to the powers and duties provided by the Constitution constituted exercises of administrative powers or administrative acts, and were therefore subject to legality reviews by the Courts. In this case, there were no provisions in any section of the Constitution, which neither provided for the finality of the exercise of powers by the Election Commission nor its non-justiciability.

3.1.2 All Courts, whether the Constitutional Court, Courts of Justice, Administrative Courts or Military Courts, were not organs within the meaning of section 266 of the Constitution since they were organs exercising judicial powers. Therefore, organs under section 266 incorporated only independent

organs, such as the Election Commission, National Human Rights Commission, State Audit Commission, etc.

3.1.3 Once the Court was not an organ under section 266 of the Constitution, the Election Commission could not make a referral to the Constitutional Court for a ruling on a problem in relation to the respective powers and duties of the Administrative Courts and the Election Commission. In any event, a problem in relation to the respective powers and duties of the Courts and the Election Commission or other independent organs could not occur since the Courts were organs which exercised judicial powers in the name of the King. Courts performed the powers and duties of reviewing the legality of the exercise of powers by independent organs. Courts were not organs which exercised "administrative" powers as in the case of independent organs. Thus, there was no way in which such exercise of power could be contrary to or inconsistent with the exercise of powers by an independent organ. Similarly, the exercise of legislative powers by the legislature could not in any way be contrary to or inconsistent with the exercise of judicial powers by the Courts. The powers and duties which could encounter a problem of contrariness or inconsistency had to have the same characteristics, such as between a Court and another Court, an administrative agency and another administrative agency, or an independent organ and another independent organ. Nevertheless, an independent organ subject to an action in Court could argue that the provisions of statutory law applicable to the case were contrary to or inconsistent with the Constitution so that the Constitutional Court could make a decision under section 264 of the Constitution. The decision of the Constitutional Court would give a restricted ruling only on whether or not such provisions of law were contrary to or inconsistent with the Constitution, and not a ruling on the powers and duties as between the Court and independent organ.

3.1.4 After finding that proceedings of the Election Commission pursuant to its powers and duties provided under the Constitution or other laws were subject to review by the Courts, therefore on the issue of the court having the competence to carry out such a review it was found that the case was not within the competent jurisdiction of the Constitutional Court. Such a case, however, was the competence of the Committee for the Resolution of Competent Jurisdictions between Courts under section 248 of the Constitution.

3.2 The Supreme Administrative Court submitted a supplemental opinion according to Letter of the Supreme

Administrative Court Sor Por 0008.1/7 dated 26 March B.E. 2546 (2003), the essence of which could be summarized as follows:

3.2.1 The Supreme Administrative Court found that the Election Commission's application raised significant questions of law since it requested a Constitutional Court ruling on a final order of the Administrative Court which could lead to precedents in at least 3 issues, namely:

(1) In the event the Constitutional Court found that the application constituted a conflict between the powers and duties of an organ exercising executive powers (the Election Commission) and the Administrative Court, and admitted the application for further proceedings, there could also potentially be similar subsequent referrals of conflicts between the powers and duties of a legislative organ and an organ exercising executive powers, or an organ exercising legislative powers and the Court, or a legislative organ and another legislative organ, to the Constitutional Court for trial as in the case of the conflict between the powers and duties of the Election Commission and the Administrative Courts.

(2) Whether or not there was a right to file an application in the Constitutional Court by a state organ under section 266 of the Constitution, and the right of a person who was a plaintiff or defendant or a party in the Courts of Justice, and a plaintiff or defendant or party in the Administrative Courts to file an application via the Ombudsman under section 198 of the Constitution for a Constitutional Court ruling that a judgment of the Court was unconstitutional, and whether or not the Constitutional Court had the competence to admit the application for trial and the competence to revise or amend a final judgment or order of the Court?

(3) Whether or not there was a right to file a case in Court under section 62 by a person suffering a loss as a result of the exercise of powers by the Election Commission in order to enable the Court to review such exercise of powers by the Election Commission, or whether the exercise of powers by the Election Commission was deemed as absolute and not subject to legal proceedings in Court?

3.2.2 The Supreme Administrative Court provided additional information, as follows:

(1) If it was conceded that the application of the Election Commission filed in the Constitutional Court in this case was a problem in relation to the powers and duties between organs as provided under section 266, one organ being the Election Commission (in its capacity as an organ exercising the power to

manage and hold or arrange for elections as well as referendums, being the exercise of a form of executive power) and the other being the Court (in the capacity of an organ exercising judicial powers), an undesirable consequence could result as follows:

Questions on the competent powers and duties of the legislature and Courts, or the legislature and independent organs exercising executive powers or as between the Courts, or between the Courts and other State agencies, would all be raised in the Constitutional Court proceedings. The constitutional principle which provided for the exercise of sovereign powers through the National Assembly, the Council of Ministers and Courts, which was intended to separate powers and organs exercising sovereign powers from one another, in order to achieve mutual checks and balances would not be realizable, especially with respect to the review of executive powers carried out by any organ by the Courts, which was at the heart of the legal state system or the principle of the rule of law.

(2) Order of the Supreme Administrative Court No. 84/2544 was an order which made a ruling on the issue of the right to file suit in the Administrative Courts pursuant to section 276 of the Constitution, which was the issue of the case, and the order was final on the issue of the right to file suit as provided under section 73 of the Act on Establishment of Administrative Courts and Administrative Court Procedures B.E. 2542 (1999).

(3) Whether or not the exercise of powers by the Election Commission to manage and hold or arrange for an election of a member of the House of Representatives, senator, local assembly member and local administrator, as well as a referendum, was deemed as the exercise of executive powers, and whether or not the Election Commission was subject to a review of the exercise of powers by the Courts?

The exercise of powers by the Election Commission was not an exercise of judicial powers in the same manner as the Courts. On the contrary, such a case was an exercise of executive or administrative powers to manage and hold or arrange for an election, including a referendum, on behalf of the Executive, and was subject to a review of the exercise of powers by an organ exercising judicial powers in accordance with the principle of separation of powers. An example was when the Constitutional Court once exercised judicial powers to review the exercise of powers by the Election Commission.

(4) Which court had the competence to try and adjudicate a dispute arising from an act of the Election Commission?

3.3 The case under this application involved a review of an act of the Election Commission. The case was therefore within the competent jurisdiction of the Administrative Court. In summary, the Supreme Administrative Court found as follows:

3.3.1 The Election Commission was an organ which exercised executive powers to manage or arrange for an election, as well as a referendum, on behalf of the Executive. Therefore, the Election Commission's exercise of powers was subject to review by the Courts as recognized under section 62 of the Constitution, and the Constitutional Court had also reviewed the exercise of powers by the Election Commission in Rulings No. 5/2543 and No. 24/2543.

3.3.2 A problem on the competent powers and duties of organs under section 266 probably involved a problem arising between organs exercising executive powers, but did not include problems on the competent powers and duties of an organ exercising legislative powers and an organ exercising judicial powers, or between an organ exercising judicial powers and an organ exercising executive powers.

3.3.3 The application filed by the Election Commission in the Constitutional Court had the characteristics of an objection that the Administrative Court did not have the competent jurisdiction to try and adjudicate the matter pursuant to application no. 13/2544 (Supreme Administrative Court Order No. 84/2544), which was therefore an objection on the powers and duties of the Courts, a matter under the competent jurisdiction of the Committee for the Resolution of Competent Jurisdictions between Courts under section 248 of the Constitution in conjunction with the Act on Resolution of Competent Jurisdictions between Courts B.E. 2542 (1999). Proceedings had to be undertaken as provided by the Act on Resolution of Competent Jurisdictions between Courts B.E. 2542 (1999).

3.3.4 The case according to Supreme Administrative Court Order No. 84/2544 was an action filed in the Administrative Court seeking for the Administrative Court's review on the legality of the acts of the Constituency Election Commission and the Election Commission. In this regard, the Supreme Administrative Court had already passed a final order, being the exercise of judicial powers under section 249 paragraph one of the Constitution. The Constitutional Court therefore did not have the power to admit the application filed in the Constitutional Court for trial and did not have the power to review or revoke a final judgment

or order of the Court as provided under section 73 of the Act on Establishment of Administrative Courts and Administrative Court Procedures B.E. 2542 (1999).

4. The Election Commission submitted an opinion and statement in writing which could be summarized as follows:

4.1 The Election Commission submitted an opinion pursuant to Urgent Letter No. Lor Tor (Kor Lor Tor) 0101/7579 dated 24 October B.E. 2545 (2002), the essence of which could be summarized as follows:

4.1.1 On the matter which was viewed and explained by the Supreme Administrative Court that the proceedings of the Election Commission pursuant to its powers and duties provided under the Constitution was an exercise of administrative powers or the carrying out of an administrative act, and were therefore subject to a legality review by the Court, and that there was no provision in any section of the Constitution which provided for the finality of the exercise of powers by the Election Commission and barred an action in Court, the Election Commission had the following opinion.

(1) The administration of elections was previously the powers and duties of the Ministry of Interior, which was charged with the powers and duties of holding elections of members of the House of Representatives. In the event of a problem pertaining to the dishonesty or unfairness in an election, the law provided that the voter, candidate or political party had the right to file an action of protest against the election in court. At present, however, the Constitution provided for exclusive powers of the Election Commission and there was no provision in the Constitution which provided for the eligible voter, election candidate or political party to have the standing to file an action against the Election Commission and Constituency Election Commission in the Administrative Court.

(2) On the Supreme Administrative Court's opinion that a consideration of the competence of the Administrative Court must also take into account the provisions of law, the Election Commission was of the opinion that the consideration of the provision of law, in this case referring to the Act on Establishment of Administrative Courts and Administrative Court Procedures B.E. 2542 (1999), with respect to the interpretation of the term "state agency" or "state official" under section 3 of such provisions had to be consistent with the provisions of section 276 of the Constitution which provided that "the Administrative Court has the competence to

try and adjudicate cases of disputes between a government agency, state agency, state enterprise or local administration or state official under the command or supervision of the Government and a private person, or between government agency, state agency, state enterprise or local administration or state official under the command or supervision of the Government themselves."

(3) On the Supreme Administrative Court's interpretation of the term "Government" under section 276 of the Constitution as meaning the State in its capacity as the representative of the nation, the Election Commission was of the opinion that this interpretation was incorrect. It was stated that if the Supreme Administrative Court's legal interpretation was followed; all state agencies would be subject to the competent jurisdiction of the Administrative Court for trial and adjudication, including legislative agencies and judicial agencies. Even the Constitutional Court would be subject to the competent jurisdiction of the Administrative Court for trial and adjudication without exception. If such was the case, it would not be necessary for the Constitution to specify the text "under the command or supervision of the Government" in section 276 of the Constitution.

(4) On the Supreme Administrative Court's opinion that a person under section 197(1) of the Constitution encompassed all of the administrative bodies, without restriction to only administrative bodies under the command of the Government (in its narrow meaning) since the Constitution used the terms "government officials, employees or hired workers of a government agency, state agency or state enterprise or local administration, the Election Commission was of the opinion that a person under section 197(1) referred only to a person who was a government official, employee or hired worker of a government agency, state agency or state enterprise or local administration. As for the Election Commission and Constituency Election Commission, such entities were not government officials, employees or hired workers of a government agency, state agency, state enterprise or local administration. They were therefore not persons under section 197(1).

(5) Each organ had powers and duties as provided by the Constitution. An organ could not interfere with the management directions or order changes to the ruling of another organ except where the Constitution provided for such an authority. In this case, however, the Constitution did not authorize the Administrative Court to admit the actions that were filed against the Election Commission and Constituency Election Commission for

trial.

4.1.2 The Supreme Administrative Court expressed the opinion and gave a statement that the Administrative Court was not a constitutional organ under section 266 of the Constitution since it exercised judicial powers. A constitutional organ under section 266 incorporated only the independent organs, such as the Election Commission, National Human Rights Commission, State Audit Commission, etc. The Election Commission could not submit to the Constitutional Court to rule on a problem pertaining to the competent powers and duties of the Administrative Court and the Election Commission. In this regard, the Election Commission held the following opinion.

(1) On the Supreme Administrative Court's opinion that the Administrative Court was not an organ within the definition of section 266 of the Constitution, reasoning that "such provisions applied only to independent organs newly created under the Constitution, not intended to include the Courts, thus giving rise to a legal interpretation to exclude the Administrative Court from the scope of application of such provisions", the Election Commission held the opinion that the Administrative Court was an organ created by and whose powers and duties were provided under section 276 of the Constitution. Therefore, it was deemed that the Administrative Court was a constitutional organ, similar to the Election Commission, National Human Rights Commission, State Audit Commission, etc. The Constitution merely provided for differing powers and duties for the various organs.

(2) The Administrative Court invoked the statement given by the Secretary to the Constitution Drafting Committee, stated in the explanatory letter of the Supreme Administrative Court No. Sor Por 0008.1/48 dated 15 August B.E. 2545 (2002), paragraph 1.1, that "this section deals with organs in the Constitution such as the Ombudsman, National Human Rights Commission, State Audit Commission, National Counter Corruption Commission, on their overlapping powers and duties," in support of the argument that a matter referred to the Constitutional Court for trial and adjudication had to be a matter involving the overlapping powers and duties of organs in the Constitution, and that the Administrative Court was not a constitutional organ. Thus, it was asserted that the matter for which a decision of the Constitutional Court was requested was within the competence of the Committee for the Resolution of Competent Jurisdictions between Courts under section 248 of the Constitution. In this regard, the Election

Commission was of the opinion that the Administrative Court was incorrect. The Election Commission reasoned that the statement given by the Secretary was a concept raised in the Constitution Drafting Committee stage, in which a resolution had not yet been reached. Subsequently, the Working Group and Constitution Drafting Subcommittee resolved to delete the words "overlapping". It was thus discernable that the Working Group and Constitution Drafting Subcommittee found that apart from matters of organs in the Constitution having overlapping powers and duties, there were other issues which could be submitted to the Constitutional Court for trial and adjudication, not necessarily restricted only to a matter of overlapping powers and duties between constitutional organs, such as a problem involving an organ's objection that a matter was not within its competence.

(3) In a similar case, the Constitutional Court had ruled as precedents in Ruling No. 13/2543 that "the Election Commission exercised powers under section 145(3) of the Constitution, thus the case had to be enforced in accordance with the ruling of the Election Commission since such powers were conferred by the Constitution, which was the supreme law of the country," and "the exercise of powers of the Election Commission under the Constitution was an exercise of powers equivalent to judicial powers." In addition, the Constitutional Court decided in Ruling No. 24/2543 dated 15 June B.E. 2543 (2000) that "the Election Commission was not under the command or supervision of the Government; this case was therefore not within the jurisdiction of the Administrative Court."

4.1.3 The Supreme Administrative Court held that the review of proceedings undertaken pursuant to the powers and duties of the Election Commission was not subject to the adjudicative powers of the Constitutional Court, but the powers of the Committee for the Resolution of Competent Jurisdictions between Courts.

The Election Commission was of the opinion that, in this case where the Supreme Administrative Court held that the Election Commission's application to the Constitutional Court for a ruling under the provisions of section 266 of the Constitution was an application relating to the powers and duties of the Court, thus the matter was not governed by section 266 since there were already specific provisions in section 248, the Supreme Administrative Court's opinion was incorrect since this case was a matter arising from Mr. Kowit Surasawadee's plaint that was filed against the Election Commission and Election Commission for the 30th

Constituency, therefore affecting the powers and duties of the Election Commission and Constituency Election Commission. The Election Commission therefore requested for a Constitutional Court ruling under section 266 of the Constitution.

In summary, the Election Commission was of the opinion that the Election Commission and Constituency Election Commission were not state agencies or state officials under the command or supervision of the Government as provided under section 276 of the Constitution. The Administrative Court therefore did not have the competence to admit the case of Mr. Kowit Surasawadee filed against the Election Commission and Election Commission for Bangkok's 30th Constituency for trial.

4.2 The Election Commission submitted a supplemental opinion according to Letter of the Election Commission No. Lor Tor (Kor Kor Tor) 0605/2960 dated 30 April B.E. 2546 (2003), the essence of which could be summarized as follows:

4.2.1 Section 276 of the Constitution did not empower the Administrative Court to try and adjudicate a case filed against the Election Commission in the Administrative Court since the Election Commission was not a state agency or a state official under the command or supervision of the Government. Moreover, Supreme Court Order No. 84/2544 was merely an order of the Administrative Court to admit the case for trial, which was not yet an absolute judgment on the case. The order was therefore not a final judgment of the Court under section 264 of the Constitution.

4.2.2 The Administrative Court had to take into its principal consideration the scope of its jurisdiction under section 276 of the Constitution. However, if the Election Commission committed an unlawful act, the affected person under section 62 of the Constitution would in any event have the right to file an action against the Election Commission in the Courts of Justice.

4.2.3 The Election Commission's submission of an application to the Constitutional Court was not a matter involving overlapping powers and duties under section 248 of the Constitution, but a matter of a problem involving the powers and duties of the Election Commission. The Election Commission had already made a ruling under section 145 paragraph one (3) of the Constitution, thus the case should be enforced in accordance with the ruling pursuant to the exercise of judicially-equivalent powers.

4.2.4 Section 249 paragraph one of the Constitution provided that judges and justices should try and

adjudicate cases as provided by the Constitution and laws. In addition, the right to file a lawsuit had to be recognized by a law entitling the applicant to file a lawsuit in court, and only where the law conferred competence on the Court to try and adjudicate the case.

The facts and opinions of the Election Commission, the applicant, and the Administrative Court were already sufficient for the Constitutional Court to make a ruling. The preliminary issue which had to be considered by the Constitutional Court was whether or not the Constitutional Court had the competence to admit this application for trial and adjudication pursuant to section 266 of the Constitution.

Section 266 of the Constitution provided that "in the case of a problem involving the powers and duties of various organs under the Constitution, such organ or the President of the National Assembly shall submit the matter together with an opinion to the Constitutional Court for a ruling."

After consideration, it was found that the Election Commission and Administrative Court were organs established under section 136 and section 276 of the Constitution respectively, and whose powers and duties were provided by the Constitution. The Election Commission and the Administrative Court therefore had the status of constitutional organs as defined under section 266 of the Constitution. A question which followed was whether or not this was a case of a question involving the powers and duties of the Election Commission, being a questing involving the powers and duties of a constitutional organ and a problem that had already occurred. On this issue, it was found that this case was a question involving the exercise of constitutional powers and duties of the Election Commission, such powers and duties having already been exercised. There was, however, a subsequent objection on whether or not such exercise of powers and duties by the Election Commission could be subjected to an action in the Administrative Court. This case was therefore a problem on the respective powers and duties of the Election Commission and the Administrative Court. The Constitutional Court had once ruled on the term "problem in relation to the respective powers and duties" in Ruling No. 54/2542 dated 28 December B.E. 2542 (1999) that a problem in relation to the respective powers and duties of organs under the Constitution could either have the characteristics of a problem in relation to the respective powers and duties of a constitutional organ as to whether or not a constitutional organ had the power to perform an act and to what extent, or two or more constitutional organs having a dispute on

one constitutional organ exercising powers and duties which overlapped or prejudiced the powers and duties of another organ. The case in this application was a problem in relation to the constitutional adjudicative powers and duties of the Election Commission. As the Election Commission, a constitutional organ, whose exercise powers and duties under the Constitution resulted in a problem in relation to such powers and duties, this case was therefore a problem on the powers and duties of a constitutional organ under section 266 of the Constitution. This case was not within the competent jurisdiction of the Committee for the Resolution of the Competent Jurisdictions between Courts as provided under section 248 of the Constitution. The Constitutional Court therefore had the competence to admit the Election Commission's application for trial and adjudication under section 266 of the Constitution.

The next issue which had to be ruled upon by the Constitutional Court was whether or not the Election Commission's exercise of powers and duties in relation to the factual investigation and ruling on legal problems or objections as provided under section 144 paragraph two of the Constitution would be deemed as final under section 145 paragraph one (3) of the Constitution.

Section 144 of the Constitution provided that "the Election Commission manages and holds or arrange for an election of a member of the House of Representatives, senator, local assembly member and local administrator, including a referendum, in a fair and honest manner.

The Chairman of the Election Commission has charge and control of the execution of the organic law on elections of members of the House of Representatives and senators, the organic law on political parties, the organic law on referendum, and the organic law on elections of local assembly members or local administrators, and shall be the Political Parties Registrar."

Section 145 of the Constitution provided that "the Election Commission has the following powers and duties:

(1) to issue various notifications as necessary for compliance with section 144 paragraph two;

(2) to order a government official, employee or hired worker of a government agency, state agency, state enterprise or local government agency or other state officials to perform such acts as required by law under section 144 paragraph two;

(3) to carry out factual investigations and rule on legal objections under section 144 paragraph two;

(4) to order a new election or new referendum votes in any

polling station or all polling stations where there is reasonable evidence to believe that an election or referendum in such polling stations has not been carried out in an honest and fair manner;

(5) to announce the result of an election or referendum;

(6) to carry out other acts as provided by law.

In the performance of duties, the Election Commission has the power to summon relevant documents or evidence from any person, or to summon a person to give a statement, including to request a court, state attorney, investigation official, government agency, state agency, state enterprise or local government agency to carry out proceedings in the interest of such performance of duties, investigation, interrogation or ruling.

The Election Commission has the power to appoint a person, group of persons or representative of a private organization to perform delegated duties."

After consideration, the Constitutional Court found that section 144 paragraph one of the Constitution provided for the Election Commission to have the powers and duties of managing, holding or arranging for an election of a member of the House of Representatives, senator, local assembly member and local administrator, including a referendum. Section 144 paragraph two provided that the Chairman of the Election Commission had charge and control of the execution of the organic law on elections of members of the House of Representatives and senators, organic law on political parties, organic law on referendum and organic law on elections of local assembly members or local administrators. It could be seen that the Election Commission had the powers, duties and responsibilities of administering elections under such organic laws in an honest and fair manner. In arranging for an election, there were steps and details that had to be followed by the Election Commission, e.g. under section 145(1) of the Constitution, notifications had to be made as necessary for compliance with the law, and under section 144 paragraph two (2), orders could be made to a government official, employee or hired worker of a government agency, state agency, state enterprise, local administration or other state officials in order to carry out acts as necessary under the law pursuant to section 144 paragraph two. When a problem occurred during the arrangement for an election as provided by law under section 144 paragraph two, the Election Commission would have the powers and duties to conduct an investigation to find facts and make rulings on legal problems or objections as provided under section 144 paragraph two. The exercise of powers and duties of the Election Commission in

conducting an investigation and making rulings under section 145 paragraph one (3) was an exercise of judicially equivalent powers. The Constitution had granted such powers and duties of conducting fact-finding investigations and rulings to the Election Commission in order to enable the organ entrusted with the powers and duties of arranging for an election to make its own rulings in the interest of expeditiousness, honesty and fairness.

In the case of this application, the performance of duties by the Election Commission for Bangkok's 30th Constituency by issuing Order No. 17/2543 Re: Appointment of Vote-Counting Committee for the Election of a Member of the House of Representatives amounted to the performance of duties in order to establish a vote-counting committee to carry out duties in relation to the counting of votes in vote-counting stations of each election constituency. Upon knowing the final results, the election results would be announced pursuant to the election process. In due course, when there was an objection, the Election Commission had to conduct a fact-finding investigation and rule on the problems or objections under section 145 paragraph one (3) of the Constitution.

Therefore, in the case of this application, the Election Commission's exercise of powers and duties to conduct a fact-finding investigation and rule on legal problems of objections pursuant to section 144 paragraph two had the characteristics of the exercise of powers and duties under the Constitution. Thus, the ruling of the Election Commission made pursuant to the exercise of powers and duties under section 145 paragraph one (3) of the Constitution was deemed as final, and not an exercise of executive or administrative powers as claimed.

For to the foregoing reasons, the Constitutional Court, by unanimous vote, finds that the exercises of powers and duties by the Election Commission pertaining to the fact-finding investigations and ruling on legal problems or objections under section 144 paragraph two, as provided under section 145 paragraph one (3) were deemed as final.

Mr. Kramol Thongthammachart	President of the Constitutional Court
Mr. Jumpol Na Songkhla	Constitutional Court Justice
Mr. Mr. Suchit Bunbonkarn	Constitutional Court Justice
Mr. Preecha Chalermvanich	Constitutional Court Justice
Mr. Suthee Suthisomboon	Constitutional Court Justice
Mr. Pan Chantarapan	Constitutional Court Justice
Pol. Gen. Suwan Suwanwecho	Constitutional Court Justice
Mr. Mongkol Saratun	Constitutional Court Justice
Mr. Suvit Theerapong	Constitutional Court Justice
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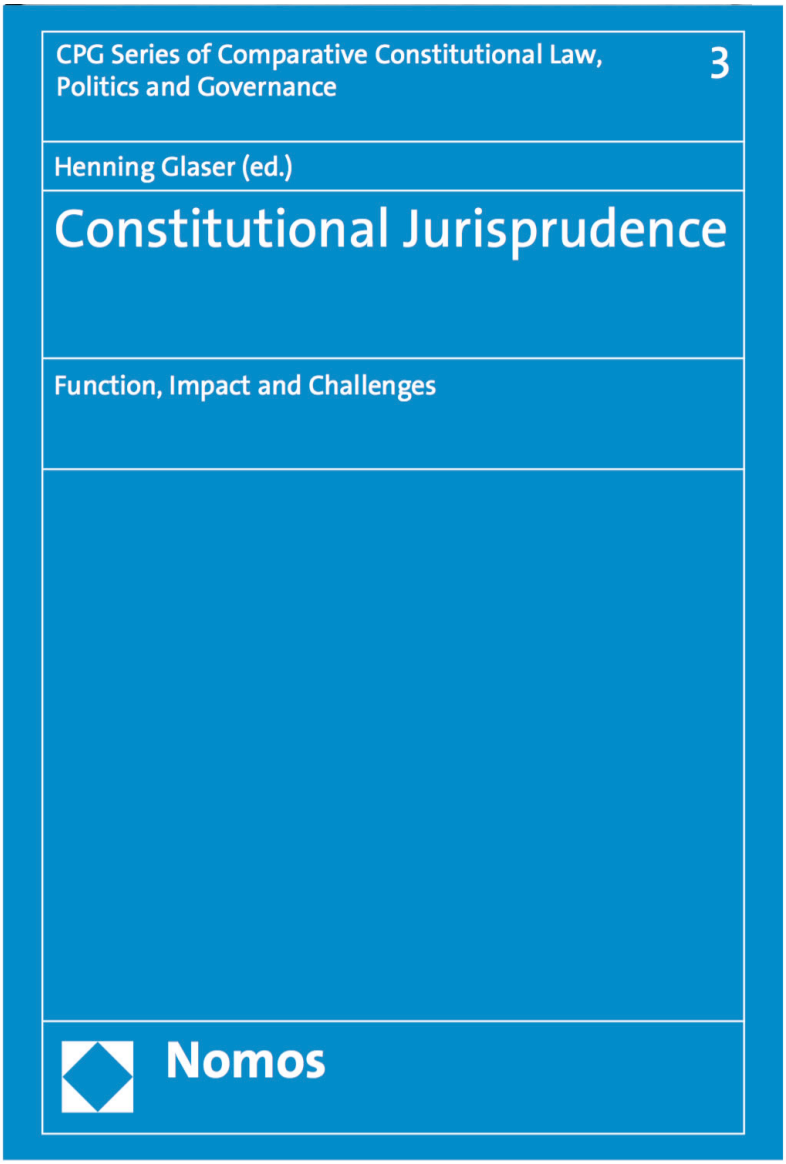
Mr. Sak Techacharn	Constitutional Court Justice
Mr. Ura Wang-Orm Klang	Constitutional Court Justice

Book release



Constitutionalism and Good Governance: Eastern and Western Perspectives, ed. Dirk Ehlers, Henning Glaser and Kittisak Prokati, Baden-Baden: Nomos, 2014, 395 p., hc., 98,– €, ISBN 978-3-8329-6987-5, (CPG Series of Comparative Constitutional Law, Politics Governance, Bd. 1)

About the book

The volume addresses current issues and developments of European and Asian constitutionalism in 19 articles pertaining to 12 different constitutional regimes including topics like the constitution making and the design of constitutions, the judicialization of politics and constitutional courts, human rights in national law and the constitutionalization of national law by regional human right regimes, different concepts of the rule of law, electoral law, federalism, the majority principle and democracy, and ASEAN. Highlighting an interdisciplinary and comparative approach, the book resembles historical accounts, analytical studies, and political assessments by reputed legal and social science scholars including five (former) judges from the constitutional courts/council of Cambodia, Germany, Taiwan as well as the Supreme Administrative Court of Thailand.

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