DESIGNING PARTIES OUT OF PARLIAMENTS:

NON-PARTISAN CHAMBERS IN INDONESIA, THE
PHILIPPINES AND THAILAND

A thesis submitted for the degree of Doctor of Philosophy
of The Australian National University

Roland Rich
U9810995
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Declaration

This thesis is my own work. It contains no material previously published or written by another person, except where due acknowledgement is made. Nor does it contain material that has been accepted for the award of any degree or diploma of a university or institute of higher learning.

Roland Rich

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Abstract

Within the space of a few years, Indonesia, Thailand and the Philippines implemented a design for parliamentary representation that proscribed the established political parties from a parliamentary chamber or part thereof. The need to design non-partisan parts of parliament to undertake representation and deliberation responsibilities is an indirect but serious criticism of political parties. The thesis tracks the intentions behind the non-partisan designs and plots the outcomes of the designs. It also investigates the conceptual architecture underpinning the non-partisan designs identifying corporatism as one (discredited) alternative and “championship” (drawing from the Confucian concept of junzi or exemplary persons) as another. While there is a yearning for exemplary people as representatives, the designers have struggled to find a successful means of having these champions elected to office.

The thesis concludes that non-partisan chambers are not viable because political parties will either infiltrate or isolate them. The three case studies demonstrate the limits of what can be achieved by institutional design. Heroic designs responding to problems also of heroic dimensions need to be tackled through an array of devices including civic education and economic reform to complement the design of governance structures. In relation to design issues, the lessons learned are the need to entrust the institutional design negotiation process to an independent body that includes representatives of affected interests to allow them to buy into the resulting compromises; the need to focus on significant and salient features that are capable of being successfully shaped by the structures under design; and the need to ratify the process by a form of public acclamation.


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CHAPTER ONE

A New Institutional Design Option

Investigating a Southeast Asian Innovation

Within the space of a few years, three neighbouring countries of Southeast Asia implemented a design for parliamentary representation that proscribed the established political parties from a parliamentary chamber or part thereof. Although the original design appeared in the 1986 Constitution of the Philippines, it was only with the passage of Republic Act 7941 in 1995 that the legislative basis for elections to the party-list was put in place and the first election for party-list representatives was held in 1998. In Thailand, the 1997 Constitutional provision for an apolitical senate was put into effect relatively quickly and Thailand’s first ever elections for the Senate took place in 2000. The first elected Senate saw out its five year term. While in Indonesia, the 2001 session of the Majelis Permusyaratat Rakyat (MPR) – People’s Consultative Assembly, enacted a raft of constitutional amendments including the establishment of the Dewan Perwakilan Daerah (DPD) – Representative Assembly of the Regions. The first election for the DPD took place in 2004 and its members served their five year term.

As these are the leading democracies of Southeast Asia and the leading members of ASEAN, Indonesia, the Philippines and Thailand form a policy community whose political elites follow each other’s developments and innovations closely. While there is little evidence of conscious borrowing among the three sets of designers1, there are common problems and contexts in which these designs emerged, leading to a Southeast

1 Roland Rich, Pacific Asia in Quest of Democracy, Boulder, Co., Lynne Rienner Publishers, 2007, pp. 57-58. An example, however, is the conscious borrowing of the Constitutional Court from Thailand by Indonesia, Jakob Tobing, interview of 12 April 2010, Theo Sambuaga, interview of 13 April 2010. The Indonesia NGO community was also impressed with the Thai apolitical senate seeing in the idea a means of gaining election without the need to join a political party, Kevin Evans, interview of 11 April 2010.
Asian institutional design innovation to quarantine part of the legislature from politics as usual. Chapter 3 will attempt to put this design innovation in the broader context of institutional design processes with a particular focus on designs intended to impact on political parties and party systems including a brief discussion of the other options available to designers.

Chapter 2 will outline the theoretical and methodological considerations involved. In their famous review essay, March and Olsen explained how political science began to lose faith in its focus on institutions in the 1950s and encouraged a return to a more autonomous role for institutions in a field they labelled the New Institutionalism. Within the New Institutionalism approach, this work will adopt the scholarship of the historical institutionalism which allows for a comparative study of an institutional design that can best be understood from thick descriptions of the individual country contexts in which it emerged. These contexts will allow the research to attempt to discern the intention of the designers and assess the extent to which intentionality is a guide to outcomes.

This research focuses on polities practicing genuine political contestability and protecting freedoms of association and expression. Accordingly, the various systems that proscribe political parties completely or that allow them as window dressing to an otherwise authoritarian system are not the subject of this enquiry. While the Southeast Asian cases form a suitable critical mass for research purposes, there are two European cases that also fit within the parameters of this study and pen portraits will be provided of the Irish Senate and the National Council (upper chamber) of the Republic of Slovenia which drew its design inspiration from the now defunct Bavarian Senate. The research conclusions therefore can be based on an all “n” rather than a small “n” sample.

The research will draw on the literature on institutional design, political parties and party system design as well as relevant country studies. Because significant new institutional designs tend to be adopted in the course of constitutional change, considerable attention

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will be paid to the constitution drafting process. Published debates of the process as well as writings of and interviews with key actors provide a rich source of material. Because constitutions are subject to judicial interpretation, significant judicial cases in each of the three countries of Southeast Asia provide another valuable source.

The Party-List in the House of Representatives of the Philippines

According to the 1986 Constitution, twenty percent of the seats in the House of Representatives are to be decided by means of a second ballot available to vote for political parties in addition to their first vote for a constituency representative. Based on a reading of the constitutional assembly debates, this design was initially an attempt to strengthen political parties. A very similar design attempted a decade later in Thailand had exactly that effect. In the Philippines, the impact was ultimately the opposite.

The original intention of strengthening the party system was subject to a time-bound compromise whereby half the available party-list seats in the first three constituted Houses would be available only to certain disadvantaged groups. Through a tortuous process of Presidential appointments, legislative implementation and judicial interpretation, the exception devoured the rule. Under the resulting redesigns, all major political parties are proscribed from competing for party-list seats. The original intention of the drafters is now long forgotten as the party-list system has morphed, in effect, into a pesky and marginalised sub-chamber of the House of Representatives where quirky mathematical formulae allow a limited array of groups including small parties, consumer associations and regionally dominant political families to have a voice, but little influence, in the House. The best organised of these voices belongs to the communist side of politics giving this irreconcilable political minority a legal public voice and, incidentally, making the system that has elected them the subject of deep criticism by the establishment and in particular the military establishment. While small political parties compete for party-list seats, the exclusion of the major parties means that the design amounts to a total ban on political parties in that it only allows fringe actors from outside the political mainstream to sit in the House.
Tracking this tortuous path allows for an examination of the problems encountered when attempting to put new institutional architecture into practice. Among the issues on which this case study can shed light is a better appreciation of the reliance to be placed on the intentions of the drafters and the factors at play that impact on those intentions. There is now some two decades of practice in the translation of the design of the Philippine party-list system into reality. Chapter 4 presents a case study of many twists and turns that serves as a cautionary tale for institutional designers.

The Senate under Thailand’s 1997 Constitution

Thailand’s 1997 Constitution was designed to change Thai politics. Innovatively designed, deliberatively debated and painstakingly implemented, the ideas in the document were a pointed challenge to the status quo. The drafters accepted the necessity for political parties to perform the major functions assigned to them and therefore concentrated government formation and most of the legislative and budgetary responsibilities in the National Assembly. As noted, the party-list design had its intended effect of strengthening political parties in the lower house in Thailand, though perhaps it worked even better than intended given the arrival of the Thaksin juggernaut just as the constitutional provisions were being implemented leading to the magnification of his party’s victory through the party-list.³

The Constitutional Drafting Assembly saw the problem of Thai politics in terms of the lack of probity in the system and decided to design a process to enhance and perhaps even guarantee probity. To that end it established a host of new oversight institutions consisting of courts and independent commissions to regulate the political process. To make this process effective, the designers needed to take the appointment to and control of these oversight bodies out of the hands of the government, formed by political parties based on their majority in the lower house. The design of the appointment and dismissal

processes for each of these new oversight bodies was elaborate and specially tailored to the specific court or commission concerned but it had one factor in common – the pivotal involvement of the Senate.

This was Thailand’s first elected Senate which had traditionally been a chamber of great privileges and few responsibilities in which to park retired generals and reward faithful civil servants. The designers kept the name of the chamber but little else and transformed it into the guardian of the guardians. To keep the chamber above party politics, the constitution took the radical step of proscribing political parties from the Senate, backed by elaborate rules concerning Senate elections. The Senate served a full term under its 1997 design and in that five year period there were many tests of its guardian function. Chapter 5 describes the historical and political path to the Senate design and how the first elected Senate discharged its functions. The story has many aspects of interest to institutional designers including the degree to which a new design can be expected to lead to different political behaviour and outcomes; the hold of tradition and its impact on new institutions; and the efficacy of the strategy of reliance on wise individuals as opposed to aggregated interests in the form of political parties.

The 2006 coup in Thailand abrogated the 1997 constitution and with it went the non-partisan senate. In the years since the coup, public contestation about Thailand’s political system has continued unabated. One of the critical issues is whether there should be a return to the 1997 constitution.

The First Indonesian Representative Assembly of the Regions

The fall of Suharto in 1998, the vote of no confidence in Habibie the following year and the genuinely free and fair election that also took place in 1999 can plausibly be argued as constituting Indonesia’s process of democratic transition. Yet these events took place within the governance structure inherited from Suharto’s Orde Baru (New Order) when institutions were mere façades and decisions were discretionary. It was in the course of this term of the Dewan Perwakilan Rakyat (DPR) – People’s Representative Assembly
that forms the major segment of the MPR – that the work of the institutional designers took place in the form of four batches of amendments to the 1945 Constitution, quadrupling its length.

Chapter 6 explains the situation Indonesia found itself in and describes the actors taking the key design decisions. Like watching the famous wayang puppets, it is important at times to look beyond the public discourses to try to work out what is being decided in the more shadowy deal making in back rooms. The Indonesian elite managed to iron out a deal by working their way through a particularly difficult set of circumstances. History is not replete with examples of parliamentary chambers that vote themselves out of existence, yet this was what was being asked of the appointed regional and sectoral representatives who joined the elected DPR representatives to form the MPR which is the organ responsible for constitutional amendment. Institutional hierarchies had to be defended which gave the DPR the whip hand in the negotiations. But this power could only prevail if the major political parties within the DPR could find workable compromises.

One decision was the creation of the DPD in which each region would have four elected representatives regardless of its population size and these representatives would be elected by popular vote, but with an important proviso – that only individuals may stand thus disallowing political parties from participation in DPD elections. Unlike the Thai case, the articulation of the reasons behind this decision is not well elaborated. It seems to be a decision that emerged from a series of compromises based on a series of requirements informed by the political positions of the key players. One of the main requirements was to retain the 1945 Constitution and to make the amendments fit in with it as fully as possible. Another was to rid the nation of the system of patronage appointments to the MPR. The story of the creation of the DPD will therefore have something to say about the negotiability of path dependence and the trade-off between political compromises and their reform impact.
The Research Questions

This new design innovation generates important research questions. The most basic question concerns the dichotomy between the necessity for political parties in a democracy and the attempt to design them out of parts of parliament. The general issue therefore relates to the indispensability of political parties in a democracy. The specific research question asks – can successful parliamentary systems in democratic polities be designed to exclude political parties from certain chambers or parts thereof?

This question, or variations of it, has been posed over the years by practitioners and theorists alike in one form or another. Carothers poses it directly:

Perhaps, it can be asked, the widespread weakness of and unhappiness with parties is a sign of some deeper evolution in global politics away from parties altogether, one that should be embraced rather than resisted. The idea of moving beyond political parties – simply jettisoning them with all their accumulated deficiencies – certainly holds appeal to people all around the world exasperated to the point of despair with the parties they have.4

Goodin poses a similar question:

The thought experiment I propose is this: let us try to imagine what it would be like to have a No-Party Democracy. We know what it is like to live in a ‘multi-party democracy’ or in ‘two-party democracy’ or indeed in a ‘One-Party Democracy’. But what would it be like to have a No-Party Democracy?5

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Carothers poses the question as a rhetorical device and Goodin asks it as a philosophical counterfactual. They both come to the conclusion that political parties are an essential component of democracy.

The design innovation emerging from Southeast Asia does not pose the question in rhetorical or counterfactual terms but experiments in its application. Working on the premise of the necessity for parties despite their dysfunctionality, this design feature tries to exclude them from a part of the parliamentary system. Thus, the same parties that are expected to form governments and constitute the majority in passing legislation are excluded from other parts of the parliament. This allows for an empirical examination of the question that Carothers and Goodin are posing. It does not test a system of "no-party democracy" but it does test the essentiality of political parties in all aspects of parliament. If they can be excluded from some parts with positive outcomes, then there can be experimentation in excluding parties from other parts of parliament and their role can be diminished to the point that the proposition supporting their essentiality falls into doubt. The initial question therefore remains whether they can successfully be excluded from certain parts of the parliament.

The research question has a qualitative dimension which requires definition. What constitutes success in institutional design? One way to answer this question is to flip it around and also ask what constitutes failure. Whereas longevity and public acceptance might constitute success, from a design perspective abandonment of the design would clearly constitute failure of that design. Where it is not possible to find a decisive response such as abandonment, success can be judged by reference to the articulated objectives of the design. Did it achieve what its designers set out to achieve? Has it been generally accepted as part of the system? And did its design have negative unintended consequences? Whereas a positive result from the application of this design feature would no doubt lead to further experimentation, negative results would go a long way towards confirming the widely held assertion that political parties are essential, and indeed, they are essential to all parliamentary functions.
The research question has a further research dividend in that the assessment of the specific design feature also requires an evaluation of the resort to design processes as a means of delivering good governance. What can be expected to be achieved by institutional design? Are there propitious circumstances for the use of heroic design solutions? Are there problems that do not lend themselves to a design solution? The subsidiary research question thus becomes: **What are the limits of institutional design?**

**Significance of the Research**

The essentiality of political parties in a democracy is taken as an established fact. This fact rests largely on a process of induction based on the empirical reality that no democracy has found another institution to do the essential tasks set down for political parties. A key task of political parties is to organise the system of representative democracy through recruiting candidates, aggregating interests and forming groups in parliaments. But are there functions of parliament from which political parties can successfully be excluded? It is no longer necessary to answer this question only in theory because there is a critical mass of practice in Southeast Asia, the results of which can be tested by reference to the European cases in which this experiment has also been attempted. The research can therefore provide an empirical response to complement the theory-based response.

By examining one particular design experiment in the three countries subject to the case studies, the research can delve in depth in the examination of a relatively narrow part of each country’s institutional architecture. The historical and contextual depth of the research, though narrowly focused, allows it to gain fresh understandings of the politics of each country under review. While the design feature is relatively narrow and focused, the problems it is trying to address are broad and diffuse. In the Philippines, the problem began as one of strengthening political parties but turned into a related problem of representing marginalized and disadvantaged voters. In Thailand, the problem addressed was how to ensure the mechanisms to fight political corruption were themselves above reproach. In Indonesia, the problem being addressed is how to achieve a fair system of
democratic representation in such a widespread and diverse country—thus reflecting the thorny issues of representation and decentralization. The problems being addressed are therefore particularly weighty and significant.

The research is also significant in examining the theoretical bases of democratic representation. Political parties in all their diversity from personalised vehicles to mass parties are seen as the mediating bodies between the people and their representative institutions. But are there other means of bridging this divide? The research suggests two alternative theories. The first is based on the concept of corporatism in which associations and professional groups are seen as the natural constituencies from which representatives are drawn. The Irish, Slovenian and Philippine cases all have corporatist elements. The new Indonesian design is notable for rejecting the then prevailing corporatist ideas. And while the 1997 Constitution of Thailand rejected corporatism, the subsequent model is considering corporatism as part of a future means of representation. The Thai consideration of corporatism is clearly swimming against the tide of history which has in effect relegated corporatism as an unsuccessful off-shoot of authoritarianism.

The other theoretical basis is again to dispense with political parties and to seek out exemplary persons or champions as representatives. The yearning for exemplary persons to rule societies is widespread and finds expression in the Confucian concept of junzi which entails notions of reasonableness and selflessness. Though never entering Thailand, Indonesia or the Philippines as a formal process or system, certain Confucian ideas had resonance in amplifying traditional notions. As well as seeing the proscription against parties in negative terms, it can also be seen in the more positive vein of seeking out champions as leaders. While corporatism is receding with the outgoing tide of history, the concept of championship may well be sailing on the in-coming tide. The problem faced by each of the designs seeking out such champions as parliamentary representatives is how to engineer that result through universal suffrage.

Chapter 7 will provide the pen portraits of the European case studies and offer some comparative perspectives. It will include a more detailed consideration of the concepts competing with political parties – corporatism and championship.

In the concluding Chapter 8, the research will explain why non-partisan chambers are not a viable design option. Whether intended or not, these chambers compete with political parties but do not have the wherewithal to succeed in such a contest. Parties’ strategies are either to infiltrate the non-partisan chamber or isolate it. The result is either a loss of apolitical innocence or irrelevance.

Finally, the focus on a relatively narrow design of an aspect of a formal organisation will yield dividends on the more general issue of understanding institutional design. The research entails not only three country case studies but also a more general case study of an institutional design feature; the proscription of political parties from parts of parliament. By tracking what this feature was intended to achieve and whether it met these objectives, the research will allow conclusions to be drawn on what can be expected to be achieved by institutional design and what are the limits of institutional design.

While simple designs are easier to deliver, they often lack a reform impact. Complex designs tend to stray from the designers’ intentions because of their many “moving parts”. The challenge for institutional designers is to have a change impact with as simple a design as possible dealing with as focused an issue as possible. One way to investigate the effect of designs is to apply the maxim devised by Louis H. Sullivan in relation to the built environment – Form follows Function. This research hopes to contribute to the institutional designers’ toolkit by tracing the birth, life and probable death of the non-partisan design feature used in Indonesia, Thailand and the Philippines.
CHAPTER TWO

THEORETICAL AND METHODOLOGICAL CONSIDERATIONS

Can there be a Theory of Institutional Design?

The provocative question is not an attack on the applicability of theory but an appreciation of the breadth of meaning of the concept of institution and an acceptance of the multi-faceted nature of the process of design. Can any single theory encompass such breadth and complexity? The meaning of a social institution is particularly broad as, adopting Huntington’s definition, it is “nothing more than...a...stable, valued, recurring pattern of behaviour.” North has a similarly broad definition arguing that institutions constitute the “humanly devised constraints that shape human interaction”. North sees an intricate link between institutions and organizations insofar as organizations are influenced by the institutional framework and in turn influence institutional change. Huntington also sees a connection when he characterises institutionalism as “the process by which organizations and procedures acquire value and stability.” Theories of institutional design must deal with the functioning of organizations within the broader requirements of the political or social system in which they operate. Accordingly, the study of a senate must look beyond its internal functioning to the outcomes that are expected of it within the wider political and governance architecture. It is the stability and predictability of those broad outcomes that make the functioning of the senate institutionalised and an understanding of those outcomes must situate the senate within a wider institutional framework of rules of behaviour of political actors from the voter base to the leadership apex. Institutions can therefore encompass the formal and the informal; can be black letter rule based or custom based; and can function in the public or the private realm. This breadth of subject matter makes theorizing a daunting prospect.

1 Samuel P. Huntington, Political Order in Changing Societies, New Haven Yale University Press, 1968, p. 12
3 Ibid, p. 5
4 Samuel P. Huntington, op cit, p. 12
The process of design is no less problematic. Goodin’s useful definition of the term states that “design is the creation of an actionable form to promote valued outcomes in a particular context.”⁵ A fundamental question is whether these actionable forms promoting valued outcomes are system driven or actor driven. If the former, the researcher must investigate concepts such as the force of efficiency in generating required outcomes or a form of social evolution where trial and error ultimately act as a process akin to natural selection.⁶ A view of design as the product of the interaction of social processes lends itself to broad theories of the workings of society. Actor driven design concepts require an investigation beginning with the more traditional questions of who, when, where, how and why. The ‘who’ can be plural or singular. One could argue that Madison should be seen as the key figure in the drafting of the American Constitution; or that The Founding Fathers are the designers; or the designers may be seen as simply the spokesmen for the elite of their day; or scaling it up another notch, as the representatives of the restive bourgeoisie of colonial America. The ‘when’ may simply be a constitutional convention or it may be seen as a broader period of anti-colonial administration, or perhaps even an intellectual dawning of the modern age. The ‘how’ question seems relatively easier to deal with as there may be a written instrument prescribing the formal workings of the institutional structures. But if institutions are stable, valued, recurring patterns of behaviour, then the written rules about those structures may be an early stage in how certain predictable and stable patterns came into being. The full answer to the ‘how’ question may require explanations of interpretations of the instrument, enforcement of its provisions, and eventual general acceptance of its strictures.

The ‘why’ question clearly divides the system driven from the actor driven explanations. While the former will look to overarching processes that have their own logic, the latter will ask questions about interests, intentions and motives. Yet even within the actor driven theories there is a gulf between those who argue for analyses of situations “in

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⁶ Ibid, p. 29
which actors define their policy interests and consider alternatives" and those who denounce the “Myth of the Institutional Designer” in particular in relation to the capacity to design institutions de novo. Offé joins the “myth” school in rejecting metaphors taken from engineering or architecture in relation to institutional design giving several reasons largely to do with imperfect knowledge of causes and effects in various contexts and concludes that institutions can be “more consistently explained in terms of the balance of social power that they reflect than in terms of the goals and objectives that they are claimed to serve.” Goodin suggests a way forward by rejecting any “creationist” capacity on the part of the designer because they always “work with materials inherited from and to some extent unalterably shaped by the past” thus fine turning the deliberate process of design into one of “redesign”.

The distinction is important in that it cements the designer in his or her social and historical context. It also rescues this “redesigner” from the powerlessness of being mere flotsam in the tide of social forces and thus unable to influence its direction. Another distinction also suggests itself. Institutional “redesigners” can only ever have the ambition of retooling a part of the institutional structure. Of the many moving parts of institutions, designers can refashion some but never all. Public behaviour may be influenced but not designed by command and ultimately the “stable, valued, recurring pattern of behaviour” is always based to some extent on the behaviour of the general public. For example, the institution of democratic representation in modern societies will have many individuals and groups contributing to its functioning and is open to theories of being captive to large social forces that are beyond the reach of the most ambitious designer, but one key component of that institution, the electoral system, is certainly subject to being designed. The formal institutions of governance are clearly more amenable to moulding by designers than the informal ones which are open to influence but resist being controlled by design. If there is some force to the “myth” school, it is

8 Goodin, 1996, op cit, pp. 28-30
10 Goodin, 1996, op cit, p. 30
perhaps in the insuperable difficulty of judging the effectiveness of the design being attempted. Duverger's law may work in Europe but it certainly doesn't in Papua New Guinea. Tests of longevity or efficiency may be posited but the institutional working of human affairs has so many facets that it may not be possible to ascribe direct cause and effect relationships to the specific designs being crafted and the results that ensue.

If the purpose of this research is to contribute to the institutional designer's tool kit, then it would be devastating to conclude that no design tools are available to do the job. The Philippine Constitutional Commission of 1986, the Thai Constitutional Drafting Assembly of 1996-7, and the Indonesian MPR in 2001, all debated large questions about how their societies should be governed and they all attempted to craft institutional structures to bring about certain outcomes. They may be comforted, however, by knowing that their role may yet be significant if never fully decisive. They all strode down their specific unchangeable historical paths but the next steps open to them are nevertheless negotiable. They may not be able to design the entire institutional edifice but they can reshape some important parts of it and in particular the formal and rules-based structures. In this more modest role, there may well be theories that assist the designer and techniques to help craft the desired result. The engineering or architectural metaphor may therefore yet have some value.

**Adopting a Theoretical Approach**

This research belongs to that broad category labelled the New Institutionalism, though the term "New" may no longer be felicitous as the term was coined a quarter of a century ago. In their famous review essay, March and Olsen explain how political science began to lose its faith in institutions in the 1950s.\(^{11}\) In place of the standard studies of the workings of institutions came more contextual, reductionist, utilitarian, functionalist and instrumentalist explanations. Various issues came to the fore such as the wide-ranging effects of social class structures; the aggregation of interest-maximizing individual

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human behaviour; the political actors’ calculated strategies of choice divorced from the ostensible rules supposedly governing those choices; quasi-teleological notions of progress as the hidden hand shaping institutions to perform their assigned tasks to the required levels of efficiency; the allocation of resources as the central concern of politics where articulation of reasons for resorting to required processes is seen as mere administrative ritual. All these explanations for political behaviour tended to downplay the role of institutions, and in particular their formal structures, as coherent and autonomous entities.

The New Institutionalism, March and Olsen explain, does not deny these behavioural approaches to political science, but does return to a more autonomous role for institutions. Political institutions are not simply in thrall to social forces, political actors and aggregated preferences, but autonomously exert an influence on political outcomes. The study of institutions thus becomes a study of that influence, often in association with other influences. Rhodes asks to what extent the New Institutionalism is different from what he is happy to call “Old Institutionalisms”. He disputes the criticism that old institutionalism was atheoretical, pointing to idealist and Marxist approaches, and he points to the sophisticated explanatory power of the best of the formal-legal approach. Rhodes’s argument is strongest when applied to those formal-legal institutional structures. It is the acceptance that institutional behaviour can be informal as well as formal that allows the New Institutionalism to add a dimension missing from many of the works Rhodes cites. That “stable, valued, recurring pattern of behaviour” certainly applies to rules-bound formal institutional structures but it equally encompasses informal social patterns that also influence political outcomes. Perhaps the old institutionalist scholars focused rather narrowly on formal-legal institutional structures even when placing them in their ideational and social contexts, whereas the new institutionalist scholar sees the topic in broader form situating politics more organically in society, in all its behavioural complexity.

The New Institutionalism had considerable impact in the various social sciences and led to three distinct theoretical approaches in political science. Hall and Taylor list these as historical institutionalism, rational choice institutionalism and sociological institutionalism. The rational choice school seeks explanations in game-theoretic terms based on behavioural assumptions whereby individuals pursue their marginal material interests through a strategic calculus. This scaled up, repeated and aggregated calculus lends itself to mathematical analysis. Rational choice institutionalism works best where the assumptions on which it rests are most strongly grounded. But cross-national comparisons over considerable time periods introduce so many variable aspects of what interests individuals are pursuing as to cast doubt on the applicability of rational choice studies for this purpose.

Sociological institutionalism seeks explanations in culturally constructed and transmitted terms. Formal rules may be replicated but their interpretation and implementation remain culturally negotiable. Institutions thus fit into a broader cognitive framework for understanding society and defining what is or is not rational in the particular cultural context. Issues of legitimacy or appropriateness become tied to local understandings of norms and values. Sociological institutionalism thus lends itself to thick explanations of political life as seen by local actors. It makes comparative analysis all the more difficult, however, the thicker and more anthropologically distinct the descriptions become.

This research fits within historical institutionalism. Insofar as it is interested in the structures of institutions, it is a return to old institutionalism. Indeed, historical institutionalists tend to define their subject matter in tighter focus than the overarching definition offered by Huntington. They define them "as the formal or informal procedures, routines, norms and conventions embedded in the organizational structure of the polity or political economy." It is thus a return to organizational structures, formal and informal. The focus on "organization" in historical institutionalism tends to privilege structures associated with the state which is thus seen as more than a blank page on which

14 Ibid, p. 938
others write their scripts. By privileging such structures, historical institutionalism is often best placed to deal with cross-national comparative politics given the similarities in the roles played by states, or at least expected of them. Because of the specific historical context in which it views institutions, historical institutionalism interests itself in concepts of the negotiability of path dependency that can only bedevil rational choice scholars looking for logical and recurring assumptions about behavioural reactions to economic stimuli. Rather than institutions being mere ciphers in the hands of social forces contending for power, historical institutionalism sees a distributive role for the institution itself. Historical institutionalism also looks for critical junctures when change may be facilitated and asks questions about how institutions encourage or hinder change.

Hall and Taylor point out that historical institutionalism is eclectic. In looking for the motivation that fuels political behaviour, historical institutionalism adopts both a calculus approach favoured by rational choice theorists whereby questions need to be asked about the strategic calculus for maximizing benefits, and a cultural approach preferred by sociological institutionalists whereby the "individual is seen as an entity deeply embedded in a world of institutions composed of symbols, scripts and routines." The task of the historical institutionalist is to find the mix of motives and contexts that can best explain the behaviour. Historical institutionalism also deals more forthrightly with the actions of agents in both path establishment and path change. But it does not do so in the same way as historians might, looking for individual personality traits and personal histories, but rather by looking at agents in their institutional capacities and contexts. As Sanders concludes:

If historical institutionalism teaches us anything, it is that the place to look for answers to the big questions about class, power, war, and history is in institutions,

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15 Ibid, p. 940
16 Ibid, p. 939
not personalities, and over the longer landscapes of history, not in the here and now.\textsuperscript{18}

**Applying Historical Institutionalism**

Where do the various schools of the New Institutionalism in political science lead in relation to institutional design? Whereas rational choice would focus its observations on how incentives and constraints are structured to lead to design outcomes, and sociological institutionalism would look for patterns that influence long-term cultural understandings that shape design outcomes, historical institutionalism, with its more organizational and structural focus, would investigate the contexts in which the designs are set, the motives and interests of the key parties or forces involved and the mechanisms employed by the designs. In doing so, historical institutionalism provides a number of intellectual approaches to issues of design. It rejects one-size-fits-all design solutions but insists that design choices must be in consonance with or at least conscious of the entity’s political history. It questions the feasibility of having “laws” of politics and is therefore alive to the consequences, intended or not, of design options as applied to specific polities. It highlights the need to focus on critical junctures as times of change and thus propitious periods for institutional design attempts. It does not deny the actions of individual or groups as influential but it looks beyond those individuals or groups to their institutional and social contexts. Accordingly, it adds yet another qualification to the designer. Not only is he a redesigner, tinkering with one aspect of the overall design, but he is not doing so as a personality but as an individual embedded in an institutional dynamic.

As noted above, historical institutionalism lends itself to comparative scholarship. This is particularly the case when studying countries other than those from which some of the basic theories of political science were generated. For example, one of the most robust theories in political science concerns the predictable electoral impacts of the four basic social cleavages identified by Lipset and Rokkan: centre-periphery, state-church, urban-

\textsuperscript{18} *Ibid*, p. 53
rural and owner-worker. The taxonomy was based on empirical evidence looking at cleavages in European countries and their ‘offspring’ societies which all lived through or were affected by various versions of the national and industrial revolutions which generated these cleavages. When McAllister measured the impact of the Lipset-Rokkan cleavages on six East Asia countries (Australia, Japan, South Korea, New Zealand, Philippines and Taiwan), he found that “at best, there is only weak support for the Lipset-Rokkan paradigm outside of Australia and New Zealand” (i.e. the two European offspring countries). The weakest support came from the Philippines where the only consistent predictor of voting is the centre-periphery cleavage. The European cleavages have limited saliency beyond its borders and indeed, Scott argues that Southeast Asia’s deepest cleavage is between hill people and valley dwellers.

Indonesia certainly has cleavages and many use the term, aliran or ‘streams’, to describe the phenomenon. But its cleavages did not emerge from the forces that shaped European history but rather from those that shaped Indonesian history – Islamification, colonialism and decolonisation, as well as religious, ethnic and archipelagic diversity. Indonesia has a religious-nationalist cleavage, inter-religious cleavages, inter-island cleavages and, according to Geertz, a cleavage within Islam between the santri (pious) and the abangan (nominal). The cleavages in Indonesian society were found to be sufficiently robust to span the pre-Suharto and the post-Suharto generations. Applying theories based on the Lipset-Rokkan analysis would be of little assistance in Southeast Asia. Historical institutionalism provides a framework in which to validate the specific histories of the polities under review and is particularly useful in its application to the non-European world.

19 Seymour Martin Lipset and Stein Rokkan, 1967, op cit
21 Ibid, p. 83
Unpacking the Concept of Intentionality

While rejecting the creationist myth, design remains a historically and socially contextualised creative process even though it may invariably only deal with parts of the institution it is trying to shape. Institutional design entails the creation of actionable forms to promote valued outcomes. Where formal-legal structures are the subject of design as part of a larger institution, the actionable forms take a far more focused quality and the outcomes become correspondingly more measurable. A nagging question arises: What is the place of intentionality in the design process?

In describing models of social change, Goodin posits three alternatives which may work alone or, more likely, in combination – accident, evolution and intentional intervention. Intentional intervention is deliberate, purposive and goal-seeking distinguishing it from the other two models. Yet though distinguishable from the other models, intentionality remains central to them. Theories of accident, chance or karma play down the role of intentionality as a driving force of change and leave explanations to more cosmic or random forces. But intentionality has a role to play even where accident is the explanatory construct. In a positive sense, agents can take advantage of propitious moments, seize the initiative that historical conjunctions present or more randomly, simply be in the right place at the right time saying the right things to the right people. In a more negative sense, agents seeking their particular goals through their chosen actions may be the trigger for unintended consequences that nevertheless fulfil the cosmic plan. The concept is well understood in international relations where the term “blowback” describes the unintended and negative consequences of state actions abroad. But whether taking advantage of situations or blundering into them, the agent armed with intentionality nevertheless has a role in the outcome.

The evolution concept ties in with the system design aspect of the dichotomy between system versus actor design. System design may be seen as historical, social or even

ideational forces using trial and error to naturally and competitively select the best fit for the particular environment. As with the accident model, the evolution model also works through agents armed with intentionality but subsumes their intentions in wider and deeper processes. As in the accident model, the evolution model also explains away agents' intentions as part of the trial and error testing of designs. Intentions, seen in this light, may be misinformed, misguided or misdirected but they will contribute to the ultimate evolutionary outcome.

The accident model has a whiff of fatalism and the evolution model a suspicion of teleology. They also both share one significant weakness – neither can be subjected to empirical disproof and both must be sustained by belief or faith. The intentional intervention model has the advantage of being testable. Intentions are generally articulated, purposes explained and goals envisioned. Intentions, purposes and goals can be tested against results.

Tilly makes clear the human propensity to give reasons for their actions. Tilly's taxonomy of why reasons are given varies from the polite excuse; to stories that try to make the world comprehensible from the perspective of the story teller; to codes that follow set unquestioned patterns; and finally to technical accounts that try to make clear connections between cause and effect. The work of the institutional designer fits into the technical account category with the designer summoning reasons to demonstrate that the design proposed will cause a desired effect. It is the human propensity to give reasons that distinguishes the intentional intervention model as the most useful. By scrutinising the articulation of intentions, one has a means of deliberating over the worth of the design proposal, enquiring about the premises on which the design is based, and the logic of the reasoning leading to the designers' conclusion. Offe's criticism that designers can never have all the necessary information does not invalidate the model but does emphasize the difficulty of the undertaking and the value of deliberation to test the design ideas.

A more telling criticism of intentionality as an explanatory guide is the assumption of honesty on which it appears to be based. What if the designer is not articulating the true intentions of the design? This might be intentional misdirection or sub-conscious pursuit of deeply ingrained but unarticulated goals. Once again, however, the criticism does not invalidate the model but complicates it. Aside from considering the design, one must also consider the designer and determine whether a corrective is required to balance the suspected misdirection or unspoken goal. The corrective process is part of the design process. Deliberation is an essential means of design. The debate on the proposal is a necessary complement to the actual proposal in institutional design. For the researcher, tracking intentional intervention in design is to take into account the ferment of intentions that went into the design. The rejection of creationism is the rejection of the capacity of a sole designer to design *de novo* an institution that is so broad as to establish stable, valued and recurring patterns of behaviour. But it does not reject intentionality. It does require, however, that intentionality be found in diverse voices over periods of time.

Tracking intentionality will have a number of useful results. It will help explore the issue of path dependence. Is there recognition of the path down which the designers journeyed? To what extent do the designers feel compelled to remain on that path? What is the negotiability of future actions? Tracking intentions will help to better understand the values and beliefs of the designers. Did they begin with high-minded principles and look for ways of making them come to pass? Did they see the issue in terms of problem solving and practicalities? Were they motivated by objectives they did not wish to articulate? And tracking intentions provides a tool for measuring outcomes. Are some valued outcomes more achievable than others? Are some processes for turning intentions into outcomes more effective than others? To what extent is intentionality a reliable guide to predicting outcomes?

Belief in the power of intentionality is a necessary assumption of all designers. Individuals may be fungible but they remain distinct. Mere membership of the working class does not qualify an individual to be an effective designer of institutions to benefit that class. Class membership, or *aliran* affiliation, or royal breeding will shape the
designer but will not dictate his designs. Intentionality is a corollary of individuality. Does this reduce design to a stochastic process where each individual can give vent to any intention? Whereas there may be no overarching theory of institutional design, there is a general theory of what constitutes good design. Intentionality requires the application of that general theory.

To arrive at the general theory of design, one must stray outside the social sciences. The disciplines of the built environment, where the concept of design is revered, have provided the basic law of design. Though originally written in prose, Louis Sullivan’s insight, first published in 1896, is nothing short of poetic and is perhaps best rendered in that medium:

> It is the pervading law of all things organic and inorganic
> Of all things physical and metaphysical
> Of all things human and all things super-human
> Of all true manifestations of the head, of the heart, of the soul
> That the life is recognizable in its expression
> That form ever follows function
> This is the law

Abbreviated to its essence, Form follows Function is the first lesson taught in any architectural or industrial design college. It is the contention of this research that Form follows Function is equally the first law of good institutional design. The concept is deceptively simple leading Sullivan to ponder “Is it indeed a truth so transparent that we see through it but do not see it?” Yet for all fields of design whether of the built environment or of social institutions, it provides the correct starting point by simply asking what function is the institution intended to serve. It provides a means of correcting poor design by asking whether the institution is performing its intended functions. And it

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29 Ibid
provides a means of evaluation by, again, asking whether the institution discharged its functions as intended. It is not the contention that these three little words are sufficient to settle all issues in such a vastly complex field. That is not the case in its application to the built environment, nor could it possibly be the case in institutional design. But in all fields it is the launching point and it remains a sturdy point of reference throughout the design process.

Tracking intentionality and the functions intended to be met by the forms crafted by its designers will be a recurring theme of this research.

**Methodology**

Having determined the research questions and identified the theoretical approach to be adopted for their resolution, it remains to map out the methods proposed for this task. As noted above, the research will undertake three thick case studies. Questions arise therefore on the issue of comparability – what is being compared and what is not and what is the significance of the small number of case studies.

**Comparability of the Three Case Studies**

Comparing formal political institutions in Indonesia, the Philippines and Thailand has the advantage of dealing with comparable countries. Anderson describes the comparability of the three countries as “natural”,\(^3^0\) referring to their membership of the same sub-region, their original membership of ASEAN and the role played by Chinese communities in their economies. The three case studies also demonstrate how common forces of colonisation, Japanese occupation, decolonisation, cold war confrontation and third wave democratization shaped each polity.

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Though comparable in many ways, the three countries are distinct in other ways. In terms of social distinctions, suffice it to note that Indonesia is predominantly Sunni Muslim, the Philippines is predominantly Roman Catholic and Thailand is predominantly Theravada Buddhist. Indonesia endured centuries of Dutch colonialism while the Philippines was a Spanish colony for three centuries and an American one for fifty years. Thailand was never colonised but had to survive by accommodating both France and England. King Mongkut described the situation as having to decide whether “to swim upriver and make friends with the crocodile (the French) or to swim out to sea and hang on to the whale (the British)”.

Two have presidential systems while Thailand is a constitutional monarchy with a parliamentary system. Two are bicameral while Indonesia might fit this description but describes itself as unicameral though it could also be described as tricameral. Indonesia has a number of long-established political parties from the Suharto era who have continued their existence in the fragmented post-Suharto era. The Philippines once had a two-party system but Marcos put an end to it. The post-Marcos era has seen fragmentation and lack of coherence in party politics. Thailand on the other hand was seen as being in the grip of fragmented party politics until Thaksin’s Thai Rak Thai Party won handsomely in succeeding elections. It remains to be seen if these victories will have an enduring effect in the post-2006 coup period. From the point of view of this research on constitutionalism, parliamentary structures, and party systems, the three countries must be regarded as dissimilar.

A unique design feature they shared in common is the proscription on political parties in a chamber of parliament, or in the case of the Philippines the proscription on the major political parties to run under the party-list system making up part of the lower house. They have in common this bifurcation by design in the roles assigned to political actors. Accordingly to test the proposition whether successful parliamentary systems can be

32 In its self-description provided to the Inter-Parliamentary Union, http://www.ipu.org/parline-e/reports/2147_A.htm
designed to exclude political parties, John Stuart Mill’s Method of Agreement provides the appropriate means. This Most Different System Design method requires dissimilarities in most parts of the (political representation) system but one commonality (the proscription on political parties) running through all cases. In this research project the conclusion will be generalisable to the entire political and governance system insofar as it will ascertain whether a proscription on political parties is a viable design option in that system. Indirectly, it will contribute to the broader issue of whether political parties are indeed indispensable.

**Boundaries**

The research project is not examining all political systems. It is looking at democratic political systems. There must be genuine political contestability and freedoms of association and expression. Accordingly, the various systems that have only one party, or proscribe political parties completely, or that allow them as window dressing to an otherwise authoritarian system are not the subject of this enquiry. Unfettered monarchies, Leninist systems or military dictatorships are of little interest in this regard. Uganda’s experiment in the 80s and 90s with no-party democracy was on the basis that parties inflamed racial and ethnic conflict but Uganda could not be considered a democracy under this system. Only polities that accept that political parties have a right to contest for political office are the subject of this research.

The three primary case studies concern the Philippines from 1986 to 2007, Thailand from 1997 to 2006 and Indonesia from 2001 to 2009. Each commencement point relates to the adoption of the design feature in constitutional form. The end point covers the last relevant election, or, in the case of Thailand, the coup. In these periods, each of the three countries was judged by Freedom House to be either Free or Partially Free. Thus

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35 The May 2010 election in the Philippines occurred after this research was completed
36 http://www.freedomhouse.org/template.cfm?page=15
while each country remains an unconsolidated democracy, they are sufficiently
democratic in their functioning in these periods to be able to test the research question.
Further, the chamber or part thereof from which parties have been proscribed must
nevertheless be elected. The polities under review are attempting to design democratic
systems of representation based on free and fair elections. Non-partisan or apolitical
chambers filled by appointment or based on status or heredity would not meet this test of
democracy.

The time periods indicated also form a boundary in another sense. In the Indonesian and
Thai cases they allow for the design feature to be tested over the whole of a parliamentary
term, which plausibly constitutes the minimum period to allow the design to be
effectively tested. The five year term in each case provides sufficient empirical
observation to reach a conclusion. Clearly, a negative conclusion can be more easily
supported by empirical evidence over such a short period. A positive conclusion of
institutional embeddedness and acceptance would take a longer period. The Philippine
party-list system is considered through four electoral cycles allowing for a broader
appreciation.

Small N or All N?

This is an inductive piece of research based on relevant case studies. The design feature
being investigated has not been widely used by electoral democracies and it is therefore
necessarily a small n study. It is difficult to extract broad generalisations from such
studies.\(^{37}\) The fact that the research design under review is being used by three politically
linked countries from the same sub-region provides the critical mass to allow for a result
with some degree of robustness. The result would, however, be more robust if the case
studies included all countries employing this design feature.

\(^{37}\) Michael Coppedge, “Thickening Thin Concepts and Theories: Combining Large N and Small in
In consultation with the secretariat of the Inter-Parliamentary Union, a study was conducted of the parline database which contains information on the structure and working methods of 264 parliamentary chambers in all of the 188 countries where a national legislature exists. Applying the boundaries elaborated above to the world’s 264 parliamentary chambers, one finds in addition to the three Southeast Asian case studies only two other parliamentary chambers that fall largely within the purview of the research question.

The Irish Senate (Seanad Éireann) is composed of 60 Members the large majority of whom are elected (though not through universal suffrage):

- 11 nominated by the President
- 43 elected by five panels representing vocational interests namely, Culture and Education, Agriculture, Labour, Industry and Commerce and Public Administration
- Six elected by the graduates of two named leading universities

The National Council of the Republic of Slovenia (the upper house) is the representative body for social, economic, professional and local interests and has forty elected members (though not through universal suffrage):

- four representatives of employers
- four representatives of employees
- four representatives of farmers, crafts and trades, and independent professions
- six representatives of non-commercial fields
- 22 representatives of local interests

This research will include a brief comment on each of these chambers as well as the design of the now defunct Bavarian Senate on which the Slovenian model was based. By including the two other relevant functioning chambers in this study, though in far less

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38 Ambassador Anda Filip, Correspondence of 3 December 2008
39 http://www.ipu.org/parline-e/parlinesearch.asp
detail, the small n study becomes an “all n” study. The European examples also serve as a type of “control” for the study of the Southeast Asian parliaments. Commonalities between the two sets of examples will contribute to demonstrating universally applicable answers to the research question.

Special Sources

The research draws on the theoretical and practitioner literature on institutional design and political parties as elaborated in the foregoing. The next chapter will draw on the literature concerning the design of aspects of the political system and in particular the party system. The discussion of the three countries that are the subject of the major case studies will draw on each country’s respective history and politics literature. There are also a number of more focused sources that contribute to investigating the research questions.

Sources on Writing and Interpreting Constitutions

Critical junctures offer a propitious time for institutional design innovations. A common context for the institutional design process is the drafting of a constitution. Critical junctures may take place at the time of independence from the colonial power, the overthrow of an autocrat or the exercise of a military coup. These are all moments when societies tend to turn to constitution drafting. At these critical junctures there is greater political will on the part of the incoming leadership to turn a new page in the design and functioning of the institutions and structures of governance. New hierarchies come into play, weakening defence of the status quo. Intellectual elites are imbued with recharged deliberative energy as the prospect grows of their debates leading to results. And there is heightened public expectation of change and thus acceptance of new design ideas.

The drafting of constitutions thus provides the context for design innovation and it is to this process that the research will turn. In constitutional discussions there is a dichotomy between open and closed deliberations. The open debates in formal and informal settings
are supported by argument and rhetoric with proponents making known their positions and their reasoning. Open constitutional debate will be characterised by analysis of what is working and what is not, a vision of where the polity should head and the means of getting there. Those means will often incorporate ideas for changes in institutional designs. Importantly, from the perspective of the scholar, these open formal deliberations are usually recorded. For those trying to understand motives and intentionality, there is a nagging worry, however, that a parallel debate is occurring behind closed doors. The concern is that whereas the open debate is focusing on maximising the greatest good for the greatest number, the closed debate is focusing on a far narrower calculus of interests where power holders attempt to strengthen their positions. The research will attempt to bridge this gap by supplementing analysis of formal debates with interviews with participants and observers.

The issue of intentions is of particular relevance for the interpretation of law and therefore the understanding of formal-legal institutional structures. Establishing intention is a necessary element in criminal law and it also finds a place in constitutional scholarship where it is encapsulated in the doctrine of “originalism” giving effect to the original intention of the drafters. The doctrine is seen by some as a safeguard to ensure clarity and continuity of constitutional provisions and by others as a hindrance in adapting the constitution to changed circumstances. Sunstein draws a distinction between hard and soft originalism. The “hard” school sees the original understandings and intentions of the drafters as decisive, while the “soft” school is respectful of these understandings and intentions but sees them simply as the starting point in argumentation. Either way, discerning the intentions of the drafters is of importance for constitutional interpretation. And design innovations are often embedded in constitutional form.

This research will employ a number of means of determining the intentions behind certain institutional designs. The first source is the debate that accompanies the drafting

of the particular piece of design in the constitutional drafting assembly. There are varying views in the legal scholarship as to the exact place of "legislative history" in the interpretation of laws. Purposivists will study the legislative history or constitutional debates while others eschew reliance on the legislators' will all together.\textsuperscript{41} The issue has also been grappled with at the international level in the rule laid down on treaty interpretation in the 1969 Vienna Convention on the Law of Treaties\textsuperscript{42} (emphasis added):

\begin{quote}
Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.
\end{quote}

Lawyers have therefore found a subsidiary place for the debates leading to laws. Political science is less constrained and these primary sources are accepted unequivocally as valuable. Of the three Southeast Asian case studies, by far the most extensive recording of the debates is the Constitutional Commission of the Philippines in 1986. The task of publishing the records of the Commission fell to its Secretary-General, Flerida Ruth P. Romero, whose team compiled a six volume record.\textsuperscript{43} In Thailand, the task of compiling and retaining the records of the 1997 Constitutional Drafting Assembly was entrusted to King Prajadhipok's Institute under the leadership of its first Secretary-General, Bowornsak Uwanno, who retained the records in a database.\textsuperscript{44} The constitutional


\textsuperscript{42} United Nations, \textit{Treaty Series}, vol. 1155, p. 331

\textsuperscript{43} \textit{Record of the Constitutional Commission – Proceedings and Debates}, prepared by the Editorial/Publication Unit under the supervision of Hon. Flerida Ruth P. Romero, Secretary-General, Manila, 1986

\textsuperscript{44} \textit{Database for Thailand’s Constitution Drafting Assembly Records – Constitution of the Kingdom of Thailand B.E. 2540}, unofficial translation by Wendell Katerenchuk and Matumon Katerenchuk
amendment debates of the Indonesian MPR are held by the MPR secretariat. But they
tend to cover the formal adoption of the amendments more than the reasoning behind the
adoption. The supplementary sources required in that case will be discussed below.

Participants' and Observers' Publications

Another useful source drawn on in this research is the publications of participants and
observers. Participant publications may be open to a suspicion of *ex post facto*
justifications or rationalisations, but they nevertheless fill in vital gaps in terms of
identifying the authors' goals and intentions. Observers' publications may at times
provide a more objective and analytical appraisal.

Several members of the Constitutional Commission of the Philippines published their
views on the work they had accomplished. Joaquin Bernas\(^45\) compiled a reader in which
Cecilia Muñoz-Palma\(^46\) and Vicente Foz\(^47\) published chapters. Another commissioner,
Florangel Rosario-Braid\(^48\), also edited a volume, in which fellow commissioner and
future Chief Justice Hilario Davide contributed a chapter.\(^49\) In Thailand, two prominent
participants in the Constitutional Drafting Assembly, Anand Panyarachun\(^50\) and
Borwornsak Uwanno,\(^51\) wrote about the issues. In Indonesia, speeches and writings from
the independence, parliamentary and guided democracy periods can be found in the
 collection edited by Feith and Castles.\(^52\) The New Order and ‘democracy’ periods are
covered by a companion reader edited by Bourchier and Hadiz.\(^53\) Considerable guidance

\(^{47}\) Vicente B. Foz, “Labor Displays its Brawn”, Bernas, ibid, pp. 36-40
\(^{48}\) Florangel Rosario-Braid (ed), *Development Issues: Constitutional Response*, Manila, National
Bookstore, 1987
\(^{49}\) Hilario G. Davide, “The Scope of the Legislative Power”, Rosario-Braid, ibid, pp. 117-123
\(^{50}\) Anand Panyarachun, ‘Transparency and Uncorrupt Society’, *Thailand Development Research Institute
Quarterly Review* (December 2000)
\(^{52}\) Herbert Feith and Lance Castles, *Indonesian Political Thinking 1945-1965*, Ithaca and London, Cornell
University Press
\(^{53}\) David Bourchier and Vedi R. Hadiz (eds.) *Indonesian Politics and Society - A Reader*, London and New
is also provided in the book written by Adnan Buyung Nasution\textsuperscript{54} about the failed attempt to draft a new constitution in the 1950s which explains a great deal about the contextual limitations of constitution making in Indonesia. Detailed accounts of the Indonesian constitutional amendment process were written by the staff of the National Democratic Institute for International Affairs.\textsuperscript{55} One of those staff members, Andrew Ellis has produced several further accounts of the process as have other observers.\textsuperscript{56} There are also numerous commentaries on the various constitutional processes cited in succeeding chapters.

\textit{Judicial Decisions}

The key designs in each of the three countries are laid down in constitutional form and are subject to legislative implementation and judicial review. The Philippines has a rich history of constitutional law being interpreted by its Supreme Court and the party-list provision has come before the court on several occasions. Chapter 4 analyses several of the more influential decisions of the Supreme Court.\textsuperscript{57} The Constitutional Court of Thailand has also found a pivotal place in the interpretation of the complicated designs of


the 1997 Constitution and determined, by a one vote majority, what was probably the most important decision ever to come before the court, the attempt to dismiss and disqualify then Prime Minister Thaksin which will be discussed in Chapter 5.\textsuperscript{58} Until the recent amendments to the 1945 Constitution, Indonesia did not practice the concept of judicial review. With those amendments, however, and the establishment of the Constitutional Court, court decisions have become a rich source for understanding institutional designs and the intentions behind them. The 2008 case determining the effects of the amendment of the electoral law in relation to the DPD is a particularly relevant source which will be examined in Chapter 6.\textsuperscript{59}

**Interviews**

To fill in gaps in the literature and in the public deliberations, interviews were conducted with participants in the constitutional drafting process, current political figures and experts. Some fifty interviews were conducted for this research project. The thirty or so which are cited include interviews with some of the key constitutional designers such as Monsod in the Philippines, Borwornasak in Thailand and Tobing and Sambuaga in Indonesia. In addition, the research draws on the interviews with participants in the debates leading to the establishment of the DPD in an unpublished thesis by Indra Pahlevi, a staff member of the Indonesian parliament.\textsuperscript{60}

Hopefully, all these interviews were conducted soon enough after the events to allow memories to be fresh but with enough time having elapsed to allow for more mature reflections.


\textsuperscript{60} Indra Pahlevi, Master’s Thesis, University of Indonesia, “The House of Representatives of the Regions (DPD) in the parliamentary system in Indonesia: the debate on the process leading to the formation of the DPD in meetings of ad hoc committee no. 1 in the 2001 annual session of the People’s Consultative Assembly (MPR)”, July 2004, Translated by: Mr Denis J Fisher, NAATI No. 60980
CHAPTER THREE

INSTITUTIONAL DESIGN IN CONTEXT

From Effect to Cause

The deliberate design of the institutions of governance has a significant place in the modern age of government. This modern age of institutional design spans over two centuries initiated by the American and French revolutions, but the period of greatest ferment has been the past two decades. Norris noted that when Lijphart conducted his study of established democracies, he found that only one had instituted major changes to its electoral system in the period 1945-1990, but in the decade or so thereafter, five had made major changes and three had undertaken more modest reforms. In retrospect, the paralysing security preoccupations of the Cold War probably provide the best explanation for this period of stultification in institutional design. The post-Cold War period saw the opening of the institutional design floodgates allowing cross-fertilizing flows of practice and scholarship. While the established democracies have of late taken up the process of redesign, the more broad ranging experimentation in design has been undertaken by the transition democracies in the post-Cold War third wave of democratization. These countries have a more open playing field and are able to design their institutions of government at times by borrowing from others and at other times by crafting anew. The current research focuses on the practice and scholarship of this period and draws on the experimentation of some of the less well established democracies. While not claiming to have the exacting tools available to the hard sciences, the early modern designers drew on the tools of criticism, reflection and deliberation. Contemporary designers also have

3 Roland Rich, Pacific Asia in Quest of Democracy, Boulder, Co., Lynne Rienner Publishers, 2007, Chapter one
access to these tools but can supplement them with recourse to precedent, scholarship and comparison.

The design field that drew early attention and continues to be one of the sharpest tools in the designers’ kit is the electoral system. Duverger’s thesis that majoritarian electoral systems tend to lead to two party systems has come to be considered as a law of political science from which other design rules may be derived. Lijphart saw in the design of the electoral system the means of shaping the composition of governments to respond to the needs of their societies and in particular segmented societies with divisions going beyond the more traditional European Lipset/Rokkan cleavages. Accordingly, consociationalism was seen by Lijphart as a way of democratically reconciling segmented societies largely through the design of electoral systems allowing each segment to have formal democratic voice. The effectiveness of Lijphart’s theory as a means of shaping social harmony has since been challenged but his example of using institutional design as a means of resolving fundamental societal problems continues to inspire.

The next great debate in political science concerning the impact of institutional designs was launched by Linz when he provocatively posed the question whether parliamentary systems lend themselves better to democratic consolidation than presidential systems. As Elgie has pointed out the question posed by Linz not only generated a considerable literature on this fundamental choice in the design of democratic governance, but also contributed greatly to the increasing sophistication of the arguments deployed by the academic protagonists. The simple choice between a presidential or a parliamentary

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system did not do justice to the complexity of the design issues involved. Other explanatory variables considered included the party system in which these designs operated and the specific nature of the division of powers between the executive and the legislative branches.\textsuperscript{11} A further layer of enquiry by Tsebelis led to the introduction of the concept of the veto player in analysing the designs\textsuperscript{12} which would be taken up by other scholars as a means of understanding and explaining the flow of decision making.\textsuperscript{13}

The effect of this influential array of scholarship dealing with electoral systems, representational options, governance systems, party systems, allocation of power and its impact on the actors who wield it, was to establish the pivotal importance of the design of formal institutions in governance outcomes. It also generated a powerful corollary suggesting that those wishing to achieve certain governance outcomes should turn to institutional designers as a principal means of doing so. Institutional design is thus transformed into a heuristic means of achieving certain ends. While society’s deliberations would need to begin with a debate about the nature of these ends, these discussions would subsequently turn to the design of formal institutions as the means of delivering them.

There are a number of ways of contributing to the scholarship on institutional design. The issue of ends and means calls for thoughts on the moral basis of institutions and their design. The discussions that need to accompany the design process require commentary on the effectiveness of social deliberation. It is also necessary to understand the political context in which deliberations on these ends and means are taking place. Political context invariably requires an understanding of a polity’s history. Contributions can be made on specific ends or specific means of achieving them, thus sharpening the focus to specific institutional design options. The design option under study may be broad, such as the choice between presidential and parliamentary designs or between unicameral and


bicameral designs. Or it may be a very finely-tuned piece of electoral management design such as counting the vote in provincial centres in Thailand rather than in villages so that the tally for individual villages remains unknown (and therefore cannot be rewarded according to a pre-existing vote-buying deal).  

The broader the design option under consideration, the more difficult it is to be confident about the causalities involved. As the debate on the perils of presidentialism demonstrated, the literature cast doubt on this broad design as a convincing single explanatory variable and searched for contributing explanatory factors. The breadth of the design feature also made it difficult to be confident about identifying the likely dependent variable. Linz began the debate focusing on the survivability of democracy as the dependent variable but his successors widened the debate to include difficult to define issues such as effectiveness in delivering governance results. The narrower the design option, the more specific will be the ends that can be expected to flow from it and the more confidence designers can have in the link between ends and means. But even so, the causalities may remain elusive. Vote-buying in Thailand has evolved beyond the crude early days and the switch in the place of counting may have contributed to this, but the causes of this evolution are complex and continuing, flowing from changes in means of pork-barrelling, the greater sophistication of voters and the impact of Thaksin’s Thai Rak Thai political machine.  

Thus while vote-buying in its various manifestations remains, the finely-tuned design instrument of counting votes in provincial centres ended vote buying in the form of the *ex post facto* payment to the village headman for delivering all the village’s votes to a certain candidate – a relatively narrow result.

It may be posited that the study of broader design features enjoys an advantage over the study of narrower designs in that the broader the design and the issues it is attempting to tackle, the more comparative value it will have for other polities facing these broad


16 Nelson, 2002, op cit, p. 344
issues. The more finely tuned the design feature under study, the narrower will its comparative value be. This point can be demonstrated by a series of cascading design features. The design choice between unicameral and bicameral assemblies will be of interest to all representative democracies. For those selecting bicameral models, the equal representation in upper houses based on standard sub-national units regardless of their population size will be of most interest to federal systems. The granting of differing rights of representation in parliament to entities of lesser status than the standard sub-national unit, will be of interest to a handful of countries like Australia and the United States that grant lesser rights to their non-state territories. It follows that the study of a design feature will be of particular relevance if the design issue is broad enough to be of widespread interest, while the design mechanism is specific enough to allow a sharp focus on its impact. Because political parties are ubiquitous in democracies, a design excluding them from parts of parliament will be of widespread interest.

**Designing Political Party Systems**

The aspects of the political system that were initially seen as capable of being engineered fell broadly into two areas; the electoral system and the system of government institutions. Both had an official quality that lent itself to public decision making. Both areas were seen as appropriate areas for public policy debate and intervention. And neither had private aspects that may have constrained the applicability of public intervention. In other words it was clearly accepted that the design of these aspects of governance was within the public domain. There is, however, another player in the governance system that has a fundamental impact on its successful functioning but that does not quite fit within the same mould, namely the political party. Designers began pointing to the need to engineer political party systems and to shape the type of parties that functioned within them.17

Parties take Charge

The initial dilemma in shaping political parties and engineering the systems in which they operate lies in parties’ informal and unwelcome origins. Strom points out that in the early periods of the first wave democracies, parties or factions were regarded with deep suspicion; slowly emerged simply as clubs of like-minded members of representative assemblies; and only became essential parts of the governance system in the early twentieth century with the adoption of universal suffrage in electorates riven by cleavages flowing from the industrial revolution. The place of parties in the system of governance was therefore clearly not contemplated in the initial institutional design of the first wave democracies, a distant echo of which can be discerned in the fact that only one quarter of countries in the West, where first wave democracies originated, base their party law in their constitutions whereas this figure jumps to 80% in Africa, 71% in Latin America and the Caribbean and 54% in socially similar but historically different Central Europe.

Schattschneider began his book on the role of political parties by arguing that “political parties created democracy”. This appears initially as a curious proposition given the well known antipathy of the American Founding Fathers towards parties. Constitutions were designed without parties as central actors and indeed without mention of parties at all in most first wave democracies. Schattschneider’s phrase refers to the role parties played in shaping the systems of democratic governance familiar today.

An excellent example can be seen in the way the American political parties maintained a process designed by the Founding Fathers and then shaped it to their needs, in effect reversing the impact sought by the original designers. Delegates to the Federal Convention of 1787 struggled mightily with the problem of the method of determining

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19 Kenneth Janda, Political parties and democracy in theoretical and practical perspectives – Adopting Party Law, National Democratic Institute for International Affairs, 2005, Table A, p. 27
the head of state and examined options from popular vote to voting by state legislatures before finally coming to a compromise in the shape of the Electoral College whereby voters elect delegates, based on the number of Congressional seats for each State, who then elect the president. The best explanation of this original design is that voters would vote for 'Electors' who would be well known and well-respected people who would then meet and deliberate on the best choice for president, the candidates being known personally to most Electors.

Perhaps a good rule in the Eighteenth Century, the Electoral College certainly appears anachronistic in the Twenty-First. But it has been maintained and the best explanation for its survival is that the two dominant political parties found it a useful means of maintaining their duopoly. They achieved this by designing a rider to the original rule and introducing it through State legislatures without the need to amend the Constitution. The design rider, unit voting, requires all Electors from a State to vote for the candidate of the party which wins the plurality of votes in that State in the Presidential election. By this means, the deliberative nature of the Electoral College was dispensed with and the meeting of its members was no longer required. The two dominant parties thus swept all the Electoral College votes and maintained their domination, as seen by the fact that Ross Perot won almost twenty million popular votes in 1992 which translated to not a single Electoral College vote. The intention of the original designers has thus been put aside. The idea of electing notables who would responsibly determine the best candidate for the presidency has been hijacked by the two major political parties who tweaked the original design in effect to allow voters only a choice between their two candidates. The 2000 election, where George Bush lost the popular vote but nevertheless won the Electoral College vote, suggests that of the two major parties, the Republicans are the greater beneficiary of the system and in matters such as this the Republican Party can act as an irreconcilable veto player to ensure the system's continuance.

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23 Ibid
24 Ibid, pp. 904-906
25 Ibid p. 904
By organizing themselves in legislatures and pushing through their substantive and procedural agenda, political parties moved from an unseemly afterthought of Founding Fathers and an object of criticism of high-minded early legislators to becoming the dominant player in the political process. Their position of dominance was reinforced by being the recruiters of politicians, the formateurs of executives, and the link between governments and the citizenry giving political parties a privileged position in the ongoing design of the system in which they operate. Political parties in first wave democracies have had a century or more to take advantage of this privileged position and the stability noted by Lijphart in electoral system design up to the end of the Cold War is thus in part testimony to the fact that the systems they helped design suited them admirably. Parties had become a necessary component of democracy.

*Designs for Transition Democracies*

The ferment in institutional design brought on by the end of the Cold War was widely experienced in third wave democracies but had its effects on the traditional democracies as well. Even duopolies can lose their veto power on party system reform if public pressure is sufficient, as seen in New Zealand’s adoption of an element of proportional representation to allow the nation’s social and political cleavages higher quality representation, though at the risk of less stability. The pressing needs of the third wave democracies called for political systems to be crafted in a very short space of time and necessarily without the luxury of political evolution. Unlike the first wave democracies where parties evolved gradually from legislative clubs to, in some cases, cradle to grave social movements, the third wave democracies had to face the need quickly to shape their political parties to meet national political needs. The problems they faced ranged from the need to “de-Leninize” formerly authoritarian parties; put substance behind the façade of weak though officially tolerated parties; turn secretive and combative national liberation movements into open and non-violent political parties; encourage parties to aggregate

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opinion on a policy basis rather than through ascriptive allegiances; encourage national identity rather than geographic fissiparousness; and encourage stability rather than volatility in party systems. The solutions they reached on these questions then had to fit in with their other governance needs of legitimacy, effectiveness, transparency and accountability.

The tool to which the third wave democracies turned to meet these needs in relation to political parties was one that had not traditionally been used in this field – institutional design. The radical transitions flowing from the end of the Cold War called for quick results and accordingly, the instruments to achieve the designs were necessarily top-down rather than the inevitably slower bottom-up methods of civic education and community participation. The key instruments available to the designers were the electoral system, the establishment of party system rules, and the inducements that could be fashioned through the national budget. Certain designs could be brought about by drawing on one of these instruments but often recourse was needed to all three to achieve the ambitious objectives.

The types of effects being sought by the designers have been described as falling under three categories; to aggregate, to articulate and to block.27 To these three effects another should surely be added; to support. Crafting the instruments so as to trigger the required effects is the key work of the institutional designer. To aggregate interests and strengthen the resulting political voice, the designers could, first and foremost, turn to Duverger’s law and establish majoritarian electoral systems that would have the tendency to lead to two-party systems. But tendencies can take time to manifest as voters need to learn through experience how to vote strategically to maximise their influence and so the electoral system was a useful but insufficient tool in many cases.

To combat fissiparous tendencies, especially those associated with ethnic, secessionist and irredentist forces, rules could be crafted to force political parties to draw from a

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national base. Many countries ranging from Turkey and Russia in Europe, to Nigeria in Africa, to Indonesia and Thailand in Southeast Asia, to Mexico, Columbia and Peru in South America and Honduras, Guatemala and Nicaragua in Central America, have employed various types of spatial registration whereby parties must draw their members from a large geographical area of the country, to engineer broadly-based parties that do not rely for their support solely on a narrow geographic segment of society. Designers can also use rules to block certain parties in a bid to force voters to the larger parties, as Albania and Bulgaria have done in blocking ethnic parties from registering for elections. In financing political parties or at least their campaign costs, rules can favour those that receive the highest number of votes thus rewarding their success in aggregating opinion.

If, on the other hand, the designers believe a consociational model is more appropriate to the circumstances of the country, they can turn to more proportional electoral systems that allow greater political articulation of cleavages, tendencies and ethnicities in a nation. Rules can be devised that require parties to select candidates on the basis of gender or ethnicity to ensure that representation is broadened accordingly. Communal rolls or reserved seats are other design rules to accommodate broad articulation. Where thresholds are used as a blocking device to determine representation or qualification to stand in subsequent elections, low thresholds will favour articulation while high thresholds will favour aggregation.

The various tools at designers’ disposal can also be used to support political parties. Compulsory voting is a means of taking the pressure off political parties “to get out the vote” and placing it on the electoral commission to ensure voting is convenient and accessible. Parties that have not evolved with societal cleavages over decades or

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29 Matthijs Bogaards, op cit, p. 56
30 One count lists 31 countries as employing this design tool – Austria, Argentina, Australia, Belgium, Bolivia, Brazil, Chile, Costa Rica, Cyprus, Dominican Republic, Ecuador, Egypt, Fiji, France (regional Electors of the Senate only), Gabon, Greece, Guatemala, Honduras, Italy, Liechtenstein, Luxembourg, Mexico, Nauru, Paraguay, Peru, Philippines, Singapore, Switzerland (Schaffhausen), Thailand, Turkey,
centuries can find it more difficult to maintain policy coherence and party discipline. One of the more intrusive rules developed to assist parties is intended to deal with party switching by elected representatives often for critical budget or confidence votes. The problem of party switching has been found among both presidential and parliamentary systems. In its most potent form, anti-switching rules can be designed to cause a by-election for the seat in which the Member has switched allegiance in certain critical votes. Financial provisions are perhaps the most widely employed device aimed at strengthening parties. These can take the form of a straight out subsidy from the state based on campaign costs or even the number of members in parliament. A less structured way of supporting incumbents is through parliamentary slush funds, but these tend to focus support on the individual representative rather than the party.

The use of such design instruments to shape the political and party systems may or may not succeed. They are based on the anticipation of voters’ and politicians’ reactions to the design in question. Designers’ prognostications may not pan out. Ethnic parties may be formally blocked but may arise in different guises. The First Past the Post System should over time have an aggregative effect but it did not do so in elections in Papua New Guinea over its first three decades. Pork-barrel policies can quickly become corrupt. Failure, however, is not the worst result of the institutional design process. Failure can often take one back to the original problem and allow for the next design solution to be attempted. Unintended consequences can be even more dangerous than the failure of engineering and this will be one of the issues that this research will attempt to unpack.

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Uruguay. Both Venezuela and the Netherlands abandoned compulsory voting. The last election in which the Dutch were obliged to vote was in 1967. Turnout in the subsequent national poll decreased by around 20%. Venezuela saw a drop in attendance of 30% once compulsion removed, in effect, in 1993. Elliot Frankal, “Compulsory voting around the world”, *The Guardian*, 4 July 2005


Political Parties – Necessary and Evil?

Necessary

Political parties are necessary components of a functioning democracy. There is something approaching a consensus on this point drawn from normative instruments, practitioner testimony and academic theory.

The Normative Basis

The normative basis for this statement has come by gradual and indirect means.34 Article 21 of the Universal Declaration on Human Rights, describes "the will of the people" as "the basis of the authority of government" and calls for that will to be discerned through "genuine periodic elections", requirements that were put in binding treaty form in Article 25 of the International Covenant on Civil and Political Rights (ICCPR) to which 165 nations are parties.35 Caught in the Cold War confrontation, however, Article 25 was not initially given its ordinary and natural meaning, and single-party states were able to produce electoral displays that they claimed met the standards set in the Covenant. It was not until 1996 that the United Nations Human Rights Committee, a body of experts established under the ICCPR to examine the reports of parties to the Covenant and to interpret its provisions, adopted General Comment 2536 elaborating on the rights enshrined in Article 25. The General Comment's interpretation of Article 25 represents a considerable strengthening of the democratic ideal; applied correctly, its provisions would ensure free and fair elections. It requires freedom of expression, assembly, and association (paragraph 12); enshrines non-discrimination with respect to the citizen's right to vote (paragraph 3); rejects any condition of eligibility to vote or stand for office.

36 Human Rights Committee, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) 12 July 1996, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d6b7f023e8d6d9898025651d004be00eh?OpenDocument
based on political affiliation (paragraph 15); calls for voters to be free to support or oppose the government without undue influence or coercion of any kind (paragraph 19); and requires states reporting under the Covenant to explain how the different political views in the community are represented in elected bodies (paragraph 22).

The General Comment provides the jurisprudence that gives teeth to the Covenant's obligation to hold "genuine periodic elections". Yet even Comment 25 does not explicitly require the existence of multiple political parties, though this is the only reasonable conclusion one can draw from it. At its 2000 session, the (then) Human Rights Commission adopted Resolution 2000/47, entitled "Promoting and Consolidating Democracy". The resolution contains a long checklist of the aspects of human rights, rule of law, electoral processes, and civil society participation required to strengthen democracy which for the most part repeats well-known formulations. Its innovation is in operative paragraph 1(d) (ii), which deals with the right to vote in "a free and fair process . . . open to multiple parties." This formulation is an advance on the Human Rights Committee's General Comment on Article 25 of the ICCPR as it asserts the normative indispensability of political parties in electoral contestation. It thus undercuts the argument of single-party states that they have in place the mechanisms for a functioning democracy.

Confirmation has recently come in the form of the Secretary-General’s Guidance Note on Democracy issued on 11 September 2009 which again makes clear that:

Political pluralism requires that more than one political party participate in elections and play a role in governance. Political parties play an essential role in democracy by aggregating interests and integrating citizens into the political process.

38 The resolution was passed by a strong majority of 45 votes to zero, but there were eight abstentions--Bhutan, China, Congo (Brazzaville), Cuba, Pakistan, Qatar, Rwanda, and Sudan
Practitioners’ Perspectives

Three leading practitioner institutions agree on the necessity of political parties.

According to the National Democratic Institute for International Affairs (the international democracy promotion foundation of the United States Democratic Party):

Political parties are an essential component of democracy. By competing in elections and mobilizing citizens behind particular visions of society as well as through their performance in the legislature, parties offer citizens meaningful choices in governance, avenues for political participation, and opportunities to shape their country’s future...Political parties are a central feature of any democracy. They are the vehicles by which citizens come together freely to campaign for public office, express their interests and needs, and define their aspirations for their society. While there are parties without democracy, there can be no democracy without political parties. Parties in many countries may be flawed, but they are also indispensable in democratic governance.40

The inter-governmental International Institute for Democracy and Electoral Assistance echoes these views:

Political parties play a crucial role in modern representative democracy. Despite all their imperfections, the functions they perform cannot be taken on by any other entity. The functions are: (1) to develop policies and programmes, (2) to pick up demands from society and bundle them into different options, (3) to recruit and select people for executive and legislative positions (and other positions in politics) and (4) to exercise control over government.41

40 NDI, Political Parties, http://www.ndi.org/content/political_parties
The United Nations Development Programme adopts a similar view:

Political parties represent a keystone of democratic governance. If one accepts the proposition that multi-party systems are an essential part of a well-functioning democracy, the question for us as development practitioners is how best to work with them in addressing the challenges they face.\(^{42}\)

**Scholarly Perspectives**

Before a theory of the necessity of political parties was in place, Schattschneider made the empirical observation that though he could not conclude that the existence of parties was a necessary condition for democracy, their ubiquity suggested this conclusion. Completing his quote cited above, "political parties created democracy and modern democracy is unthinkable save in terms of parties."\(^{43}\) Sartori had little doubt as to their essentiality.\(^{44}\) Huntington saw them as a prerequisite for political stability.\(^{45}\) Lipset stressed the centrality of institutionalized party competition for a functioning democracy.\(^{46}\) The growing consensus on the essentiality of parties led to the elaboration of the essential roles assigned to political parties:

1. Recruit and nominate candidates for elective office
2. Mobilize electoral support for these candidates
3. Structure the issue choices between different groups of candidates
4. Represent different social groups or specific interests
5. Aggregate specific interests into broader electoral coalitions
6. Form and sustain governments
7. Integrate citizens into the nation’s political processes.\(^{47}\)

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\(^{42}\) Kemal Dervis, “Foreword”, *A Handbook on Working with Political Parties*, UNDP, New York, undated
\(^{43}\) E. E. Schattschneider, *op cit*, p. 1
\(^{45}\) Samuel P. Huntington, *Political Order in Changing Societies*, New Haven, Yale University Press 1968, p. 412
No sooner, however, had parties achieved this position of power and centrality in the politics of democratic countries, than the evidence began to mount that parties in many established democracies were losing their supporters. The mass based workers’ parties that had evolved through the national and industrial revolutions seemed to be coming to the end of their growth cycle amidst electors who no longer saw class struggle as the dominant issue in politics. Diamond nevertheless concludes that “even though their dominance has been eroded . . . political parties remain an indispensable institutional framework for representation and governance in a democracy.” While mass support may have been a requirement in the initial struggles to cement their place in the system of governance, once having assumed this role, political parties have become irreplaceable in the performance of the roles they arrogated unto themselves.

The third wave democracies have by and large accepted the indispensability of political parties in their systems of governance but they are having difficulty translating necessity into reality. In some cases parties have emerged from national liberation movements, a difficult transformation given the almost diametrically opposite philosophies and processes of these two bodies. In others, formerly dominant authoritarian parties have had to confront newly minted opponents fashioned from protest movements. And in different contexts, parties that merely had a façade had to transform themselves into parties of substance. In many of these cases, the European concept of the mass party was adopted even though it was in its death throes in its countries of origin. It therefore comes as little surprise that this essential link in the chain of democratic governance is also seen as the weakest link as noted by Carothers when he argues "political parties are

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49 Larry Diamond, Developing Democracy – Toward Consolidation, Baltimore: Johns Hopkins University Press, 1999, p. 96
the weakest link in many democratic transitions around the world – frequently beset with persistent problems of self-interest, corruption, ideological incoherence, and narrow electoralism."53

...Yet Evil?

The consensus on the necessity of political parties in a democracy is almost matched by a consensus that this feature of democracy is beset with problems, particularly in the third wave democracies. Carothers refers to criticism of political parties as “the standard lament”54 heard throughout the world and in particular in the third wave democracies. He lists the standard critiques as follows:

- Parties are corrupt, self-interested organizations dominated by power-hungry elites who only pursue their own interests
- Parties do not stand for anything, there are no real differences among them
- Parties waste too much time squabbling with each other over petty issues
- Parties only become active at election time, the rest of the time you never hear from them
- Parties are ill-prepared for governing the country and do a bad job of it when they do manage to take power.55

Carothers’ catalogue of criticisms is in addition to his previous critique of many third wave democracies falling into a pattern of “feckless pluralism” wherein “political elites from all the major parties are widely perceived as corrupt, self-interested and ineffective."56 The fecklessness relates to the lack of strong issue-based cleavages on which political parties should be built, rather than the more common ascriptive cleavages on which many parties of the third wave are in fact built.

54 Ibid, p. 4
55 Ibid
Corruption is the commonest generalised criticism of political parties, particularly in third wave democracies and certainly including parties in Asia. Transparency International argues that:

> Failure of political institutions as a result of political corruption remains a fundamental problem across many countries in the Asia Pacific region. The findings of the TI Global Corruption Barometer and other governance indicators highlight the perception in Asia Pacific that political parties are one of the institutions most affected by corruption. 57

Another general criticism levelled at parties, including some in established democracies, is a pattern of patronage-based party-voter linkages whereby support for political parties comes in the form of a transaction in which a vote is exchanged in anticipation of a direct material benefit. 58 The issue of vote buying has particularly strong salience in Thailand where, Jon Ungpakorn argues, it is the hook on which many justified the coup against Prime Minister Thaksin and his party:

> On the Right, and this includes the ruling class, some Peoples Movement leaders and most liberal and N.G.O. academics, there is a belief that Taksin (sic) cheated in the election, mainly by “tricking or buying the ignorant rural poor”. This is a convenient justification for ignoring the wishes of 16 million people. 59

The personalistic nature of political parties in such countries as Thailand and the Philippines has been documented. In Thailand, the Phalang Dharma Party (PDP) would not survive the political retirement of its founder, Major-General Chamlong Srimuang, who created it as a vehicle for his election as Bangkok governor in 1985. General

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Chatichai Choonhavan’s entry into national politics, leading eventually to his ascension to the Prime Ministership from 1988-1991, was with the Chart Thai party. In 1992, however, he fell out with his party colleagues and formed a new party, the Chart Pattana Party which eventually disappeared when it merged with Thaksin’s Thai Rak Thai Party (TRTP). A similar story can be told about the New Aspiration Party (NAP) formed in 1990 as a vehicle for General Chavalit Yongchaiyudh who rode it to the Prime Ministership from 1996-1997. NAP was also eventually swallowed up by TRTP after Chavalit’s political eclipse in the wake of the 1997 financial crisis. In summary: three retired generals, three new parties, and three deceased parties soon after the founder’s passing from the political scene.60

A similar situation occurred in the Philippines where political parties are created as vehicles for presidential ambitions and often do not effectively last beyond the respective incumbency or campaign. This was the case with Marcos’ Kilusang Bagong Lipunan (New Society Movement) and Estrada’s LAMMP (Laban ng Makabayanang Masang Pilipino – Struggle of the Patriotic Filipino Masses) as well as the party of the failed candidacy of Raul Roco, Aksyon Demokratikong, all of which have become small rumps of their original ambitions to be ruling parties.61

The negative view of political parties emerging from the corruption perception surveys is mirrored in the various surveys on trust in political institutions. With very few exceptions, political parties are the least trusted of all the governance institutions, a view that is held in surprising uniformity in nearly all parts of the world. It is the case for Latin America,62 Central and Eastern Europe,63 Africa (particularly in relation to opposition

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60 Rich, 2007, op cit, pp. 137-8
61 Ibid, p. 136
62 Fernando Esteves et al., Democracy and Latin America: Towards Citizen’s Democracy, Statistical Compendium, New York, UNDP 2005
political parties), East Asia, as well as in a survey of 11 longstanding federal democracies.

The negative view of political parties is also a fact of life in Southeast Asia in general and in the countries under review in particular:

One consistent theme of criticisms of the way democracy operates in Indonesia, Thailand and the Philippines is the perceived shortcomings of political parties and the party system. Voters, the press, and politicians themselves have laid the blame for a variety of ills in these countries at the feet of parties and the party system.

The negative public view of political parties is largely reflected in trust surveys in Indonesia, Thailand and the Philippines. Comparing trust in institutions such as the central and local governments, the army, the legal system, the police, the parliament, the media and NGOs, political parties were considered the least trustworthy in Indonesia and the Philippines while in Thailand they beat only the police in lack of trustworthiness.

A Design Dilemma

How are designers to deal with an institution that is indispensable but untrustworthy, necessary yet feckless, and irreplaceable though corrupt? The need for an institution to recruit candidates, mobilize electoral support, structure issue choices, represent cleavages, aggregate coalitions of interests, form governments and integrate citizens into

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68 AsiaBarometer 2004
the political process, remains. The only institution that modern democratic politics has invented to perform these functions is the political party regardless of its faults.

The main design response to this dilemma has been to "cure" the illnesses. The practitioner institutions quoted above are all in the business of strengthening political parties in transition democracies as are many other actors including the German party foundations whose senior members are the doyens of this industry. Strengthening often comes in the form of training workshops, study tours and technical assistance. The technical assistance often comes in the form of advice on institutional design options. These design options are often drawn from precedents in established democracies and adapted to the new environments in which they must operate. Several designs have been employed to strengthen political parties.

*Thresholds*

Electoral systems that moved away the classic majoritarian single member district as the unit of parliamentary representation and adopted more proportional means of electing parliaments, such as a party-list system, faced the dilemma that the means of achieving broader representation would also lead to political fragmentation that could result in political instability. Designers had to find devices to limit the number of parties and thus enhance the parties represented in parliament. The Hare-Niemeyer threshold is perhaps the best known of these designs.\(^\text{69}\) It was designed to exclude small extremist political parties from parliament by setting a minimum percentage of the vote a party would need to attract to qualify for seats. In Germany's mixed member proportional (MMP) system, voters have two ballots; the first is cast for candidates in single member constituencies thereby electing half the chamber, the second is cast for a party list by which the other half of the chamber is elected. The threshold set in Germany where this formula was first

applied was 5% of the second votes cast. Only parties reaching the 5% threshold could win party-list seats.\footnote{One exception is allowed for parties having at least three members elected in the constituency half of the election also qualify for seats in the party list half even if they have not passed the threshold, thus rewarding a party with strong regional though weak national support.}

The major design choice in relation to formal thresholds is its size. Thresholds in use vary from .67% in the Netherlands to 10% in Turkey.\footnote{\textit{Ibid}, p. 83} The higher the threshold the more parties will be excluded and the more votes for these excluded parties ‘wasted’. This phenomenon is expected in single member district majoritarian systems but should be minimized in proportional representation multi-party districts. In the 2002 Turkish legislative elections the 10% threshold caused 46% of all votes to be wasted while in the Polish elections of 1993, with many parties emerging in the post-communist era, even a 5% threshold caused 34% of votes to be ‘wasted’.\footnote{\textit{Ibid}} In the Philippines the 2% threshold for the party-list seats appears to be a relatively enabling design but in combination with other rules and interpretations, it has proven to be quite a formidable barrier. In the 2007 election in the Philippines in results similar to previous elections where less than half the available seats were initially filled, the parties that won party-list seats gained a total of 56% of the vote, leaving 44% as wasted votes, but, as will be explained in chapter 4, subsequent decisions allowing all available seats to be filled largely cured this defect.\footnote{Comelec website, \url{http://www.comelec.gov.ph/2007elections/results/national/PDF/partylist/2007elec_partylist_rep30.pdf}}

\textit{Open or Closed Party Lists}

Thresholds relate to party list systems as a device to limit the number of parties in parliament and thus, in theory, strengthen those that surpass the threshold. Another design to strengthen parties is a device to give party organizations authority over party candidates. Party lists work on the basis of translating votes for a party’s list into candidates elected to parliament. Voters are required to choose the party they prefer and this in and of itself is a device to cause voters to focus on parties and strengthen voter knowledge of and identification with particular parties. The simplest means of
implementing this design is to ask voters to cast a single vote for one of the competing parties, each party having prior to the election provided the electoral administrator with a ranked list of candidates. Candidates are elected in proportion to votes received by the party in line with their rank on the party list.

These closed party lists give the party power to list and rank candidates. Parties thus control the destiny of their candidates with a decision on whether to list them and another decision on the candidate’s place on the list. Some high positions will be regarded as certain winners while below these there may be a few other winnable positions followed by more marginal positions and concluding with unwinnable slots. The decision of listing and rank provides the party organization or its leaders with the means of shaping that party’s representation in parliament. In Thailand, where the 1997 Constitution established an MMP system where 20% of the seats in the lower house were determined by a nationwide party list with a 5% threshold, parties often placed their leaders high on the list to ensure their election and also placed their prospective cabinet ministers high on the list if they were unsuited to the cut and thrust of electoral constituency politics.74

Closed lists may give the impression of compromising the democratic nature of elections by taking the choice of candidates away from the voter and placing it the hands of parties. An innovation to the party list system is therefore to have open lists allowing voters a choice of candidates on the list submitted by the party. In such systems, voters are usually given the option of casting a single vote ‘above the line’ (depending on ballot design) for a particular party and therefore voting for the ranked list submitted by that party, or voting ‘below the line’ and voting for as many individual candidates as there are available seats. Where the choice of above or below the line is offered, most voters accept the simplicity of voting only for a party, with Sweden having the highest percentage, at 25%, of voters choosing to vote for individual candidates.75

75 International IDEA, 2005, op cit, p. 84
In Indonesia, candidates’ places on party lists came to resemble something of an auction with those providing the most money to their party’s coffers far more likely to be placed in winnable slots. While this may tend to boost party coffers, it defeats any notion of meritocracy or popularity in candidate selection. Indonesia offered voters the choice of a slightly more open list in the 2004 elections but it had negligible impact with only 2 of the (then) 550 seats chosen out of their party list sequence. Reformers in Indonesia criticised this aspect of the electoral system and in response, Law 10/2008 was adopted opening the list more widely to voter choice. Considering this concession insufficient, reformist groups took the matter to the Constitutional Court which greatly expanded the scope for opening the list to individual candidate selection by ruling that seats must go to candidates with the greatest number of individual votes regardless of the votes (above the line) for the party or the position of the candidate on the party’s list. This has considerably weakened the party’s influence over its candidates.

Open list systems can at times have unintended and unwelcome results. In Sri Lanka, voters defeated the attempts of Sinhalese parties to elect Tamil candidates on their lists by voting for Sinhalese candidates lower on the list; and in Kosovo, open lists allowed extremist candidates to bypass party vetting and gain election.

**District Magnitude**

If plurality victory through a first past the post system in a single member district or constituency is the epitome of the Duvergerian law leading to two party systems, it follows that changing one of those features will lessen the impact of the law. If a district to elect one representative tends to strengthen the two party system, a district of the entire country to elect all the representatives will tend to weaken it. The election of the senate in the Philippines is conducted on the basis of a Block Vote of the entire country where each

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77 Reilly, 2006, *op cit*, p. 106.

78 Sherlock, *op cit*, p. 6

79 Ibid

80 International IDEA, 2005, *op cit*, p. 84
voter has as many votes as there are seats to fill (half the Senate of 24, where the term of 
office is six years, is elected every three years when full House of Representative 
elections are held). The result is a plethora of strong individual candidates having a 
regional or ethnic constituency or nationwide name recognition with little regard for party 
affiliation. In this system the problem of duelling mandates identified in the discussion on 
presidentialism versus parliamentarism\textsuperscript{81} is compounded by the fact that each senator has 
been elected by a nationwide constituency and has received a vast number of votes 
comparable to those received by presidential candidates and often surpassing it. In the 
2004 elections, Gloria Arroyo received almost 13 million votes for the presidency while 
six of the twelve elected senators received more than fourteen million votes and the 
leading vote winner in the senate, Loren Legarda, received over eighteen million votes.\textsuperscript{82} 
The electoral system thus creates the impression of 26 (the vice-president is also 
individually elected) different national mandates competing against each other.

Large districts electing a large number of representatives will tend to lead to more 
political parties winning seats and, perhaps, more diversity in the types of candidates. The 
greater the number of seats in a district, the lower is the mathematical threshold for 
election such that if nine representatives are elected, the mathematical threshold to ensure 
election is simply 10\% plus one vote. This gives effective voice to a wide variety of 
views and ascriptive cleavages thus challenging the grip of the major political parties. 
Another effect of a large number of seats in a district is to weaken the link between the 
voter and her representative. In Indonesia, a common complaint from the public after the 
1999 elections was that elected representatives seemed to be disconnected from the 
people.\textsuperscript{83} In the 2004 election West Java, the most populous province, 82 
parliamentarians were elected by proportional representation from a single provincial 
district, so a voter in Bandung could be forgiven for not knowing who her representative 
might be. The resolution of this problem was found through downsizing the multi 
member districts, which now have a maximum of 12 and a minimum of 3

\textsuperscript{81} Linz, 1990, \textit{op cit}
\textsuperscript{82} http://www.comlec.gov.ph
\textsuperscript{83} National Democratic Institute for International Affairs, \textit{Advancing Democracy in Indonesia: The Second 
Democratic Legislative Elections Since the Transition}, June 2004 p.4
representatives.\textsuperscript{84} For the 2009 election, district size has been further reduced to a maximum of 10.\textsuperscript{85} The decrease from 82 to 10 (still a comparatively large number) has increased the mathematical threshold for election considerably, thus favouring the larger parties.\textsuperscript{86}

\textit{Subventions}

"Public funding plays a pivotal role in the financing of political parties in newly emerging democracies."\textsuperscript{87} State subsidies for political parties were first introduced in some established democracies in the late 1950s along with other design features such as finance regulations and provision of free access to electronic media in election campaigns, as a means to strengthen political parties and to control political corruption.\textsuperscript{88} By 2005, 59\% of countries ranked by Freedom House as Free of Partly Free were providing for some direct public funding of parties or candidates.\textsuperscript{89} By this stage, public funding had come to be seen as something of a "cure" for the problems associated with money and politics.\textsuperscript{90} This design feature is, however, not without criticism. In its Good Practice Guide, the Inter-Parliamentary Union argues that "public subsidy for political parties is widely unpopular, and can be damaging if it undermines the incentive for parties to seek income from voluntary supporters."\textsuperscript{91} Accordingly, a distinction needs to be made between funding well anchored parties in established democracies and subventions to parties in third wave democracies in that the latter tend to be far more heavily dependent on the state than the former and therefore look to the state for their sustainability rather than on their membership base.\textsuperscript{92}

\textsuperscript{84} Ibid
\textsuperscript{85} Sherlock, \textit{op cit}, p. 12
\textsuperscript{86} Reilly, 2006, \textit{op cit}, p. 107
\textsuperscript{89} Ibid, Table 2, pp. 76-7
\textsuperscript{90} Karl-Heinz Nassmacher, "Introduction: Political Parties, Funding and Democracy", Reginald Austin, Maja Tjernström(eds.) \textit{Funding of Political Parties and Election Campaigns}, Stockholm, International IDEA, 2003, pp. 1-19, p. 9
\textsuperscript{92} Ingrid van Biezen, \textit{op cit}, pp. 39-40
Indonesian public funding for political parties was quite generous in the 2001-2005 period but thereafter was cut drastically.\(^9\) The original vote-based formula administered by an electoral commission initially dominated by political parties was replaced by a simple seat-based formula administered by an independent body leading to a decline of 90% in the subsidies available to parties.\(^4\) Mietzner concludes that the drop in public subventions has had the unintended negative consequence of putting more pressure on rent-seeking behaviour or leading parties to support independently wealthy candidates.\(^5\)

Thailand developed an elaborate formula for funding in section 75 of its Organic Law on Political Parties that rewards voting and also party membership:

The Election Commission shall distribute the subsidy to entitled political parties by allocating forty per cent of the total amount of the subsidy according to the number of votes obtained from an election on a party-list basis, forty per cent of the subsidy according to the number of votes obtained from an election on a constituency basis, ten per cent of the subsidy according to the number of branches of a political party that meet the requirements prescribed by the Election Commission, and ten per cent of the subsidy according to the number of active members who paid annual subscription fees, under the rules and procedures prescribed by the Election Commission. No one political party shall receive more than half of the total allocation granted in a year.\(^6\)

The impact of these rules in Thailand is difficult to measure because of the distortions caused when the nation’s most prosperous person held the prime ministership and

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\(^4\) *Ibid*

\(^5\) *Ibid*

\(^6\) The English translation of the law can be found on the IFES website at http://www.ifes.org/publication/9d0797c11aa80ff64b98315b80a3ade/Organic%20Law%20on%20Political%20Parties.pdf
subsidized his ruling party. The Philippines has no subventions for political parties and, it is generally agreed, has the weakest parties of the three countries under review. It is difficult to see how public funding could gain public acceptance in the Philippines where there is little voter identification with parties which, in any case, are widely distrusted.

**Proscribing Parties from Parliamentary Chambers**

Because political parties are necessary for a well functioning democracy, most of the design energy has gone into methods of strengthening them to play the key roles assigned to them. But because they are widely distrusted and unpopular, clientalistic or patronage based, or personalistic or dynastic, some designers have constructed schemes to keep certain activities or certain spaces free of political parties or at least the major political parties. Carothers acknowledges that this option holds appeal to people all around the world.

Using proscription as a design tool is not uncommon. Many of the party strengthening designs can be seen to be proscriptions. The threshold is basically a proscription on those parties who fail to attain the required percentage of the vote. Proscriptions apply to candidates and voters as well. According to Article II of the United States Constitution, no person who is not born in the United States or is under 35 years of age may be a candidate for the presidency. Citizens of a polity may also be denied the vote, as in many States of the United States because of a felony conviction. Political parties themselves can be disbanded for reasons of misconduct as has been seen most recently in Thailand where the Thai Rak Thai party was banned in 2007 by the Constitutional Court for paying smaller parties to participate in the April 2006 election (and thus attempting to satisfy the constitution’s requirement for electoral contestability in the face of the boycott of the election by the major opposition parties). In December 2008 the court banned its successor, the People’s Power Party, as well as two other parties, Chart Thai Party, and

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98 Carothers, 2006, *op cit*, p. 9
the Matchima Thipatai Party, for electoral fraud. In April 2010, the Electoral Commission sought the dissolution of the ruling Democrat Party because of an undeclared contribution, though this issue remains to be litigated.

The banning of the various Thai parties was a form of punishment for misbehaviour while the proscription on political parties in parts of parliament is a pre-emptive attempt to construct aspects of the system to be free of the negative impact of partisan politics. It is an attempt to insulate certain spaces and decisions from politics as usual and thus an attempt to achieve higher quality representation or enhanced probity. The parliamentary spaces denied to political parties are thus available for the people’s champions to become parliamentary representatives. This design tool can be seen as a means of responding to the popular contempt of “politicians”, a term that has come to have a pejorative taint. In their place, exemplary people are being sought out. As will be noted in the case studies this yearning for “good people” or “the voice of the voiceless” or “local champions” to be parliamentary representatives was crafted into a design tool. The concept flows from local political culture or local political rhetoric which often echoes the Confucian concept of junzi. Each in their own way, the three case studies can be interpreted as attempts to find a place in parliament for the people’s champions while leaving basic politics to political parties. In the Philippines, the party-list representatives were intended as champions of the marginalised and underrepresented. In Thailand, the Senators under the 1997 Constitution were intended as champions of probity. In Indonesia, the DPD was endowed with an electoral system that would produce local champions.

Designing systems to put champions into parliaments turned out to be most complicated. The designs had to be made to fit within a specific historical and political context. And they had to be made to withstand the reality of party politics. Chapters 4, 5 and 6 will map the use of this design idea in the Philippines, Thailand and Indonesia.

CHAPTER FOUR

THE PHILIPPINES: A LEGISLATIVE VOICE FOR THE MARGINALISED

One of the key challenges facing the Philippines is acute economic, political and social inequality. In response to this challenge, the designers of the institutions of the political system eventually settled on the idea of finding mechanisms to give a legislative voice to the marginalised. This chapter is divided into three parts dealing with the design of that mechanism, its implementation and an overview section.

THE DESIGN

The Freedom Constitution of 1986

Epifanio de los Santos Avenue, better known by its acronym of EDSA, is Metro Manila’s eight lane ring road. In February 1986, spurred on by the Catholic Church’s Radio Veritas, over a million people swarmed onto EDSA locking up Manila and forestalling any military attempt to subdue the volatile situation. The ‘people power’ revolution had begun. With breathtaking rapidity the demonstrators held firm, military units defected and President Marcos was whisked out of town aboard an American helicopter.¹

Cory Aquino was the widow of Ninoy Aquino, one of Marcos’ principal political opponents, who was widely believed to have been assassinated in 1983 at Marcos’ behest. She ran for the presidency in the snap elections Marcos called for 7 February 1986. While the official result proclaimed a Marcos victory, the public was more inclined to believe the NGO that had become the most respected domestic election observer, the National Citizens’ Movement for Free Elections (Namfrel) which estimated Aquino had

in fact won the election. When Cory Aquino was sworn in as President on 25 February 1986, she was therefore more than an anti-authoritarian figure; she was generally seen as having the legitimacy of an elected president.

While Aquino’s swearing in as President had features of a revolutionary change of administration given its ‘people power’ fuel, care was taken to maintain some sense of constitutional continuity. Exactly one month after her swearing in, Aquino signed Proclamation No. 3 bringing into effect The Provisional Constitution of the Republic of the Philippines. The other signatory of the 25 March 1986 Proclamation was in fact its drafter, Joker Arroyo, Aquino’s Executive Secretary. The Proclamation begins with the assertion that “the new government was installed through a direct exercise of the power of the Filipino people assisted by units of the New Armed Forces of the Philippines.” The Proclamation then notes that “the heroic action of the people was done in defiance of the provisions of the 1973 Constitution” and that “the direct mandate of the people...demands...the transition to a government under a New Constitution in the shortest time possible.” In the meantime, the Proclamation promulgates the Provisional Constitution which has come to be known in the Philippines as the Freedom Constitution. It is this Provisional Constitution that retains the continuity of constitutionality in the Philippines by declaring that five key articles of the 1973 Constitution, dealing with territory, citizenship, the bill of rights, duties and obligations of citizens and suffrage, “remain in force and effect and are hereby adopted in toto as part of this Provisional Constitution.” Eight further articles are adopted as amended by the Provisional Constitution and only four articles, dealing with the legislature, the Prime Minister and the Cabinet, amendments and transitory provisions, are deemed superseded. The Freedom Constitution thus provides the necessary link between the 1973 Marcos Constitution and the 1987 Aquino Constitution.

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3 Second preambular paragraph, ibid
4 Third preambular paragraph, ibid
5 Article I (section 1), ibid
6 Article I (sections 2 and 3), ibid
Under the authority of the Freedom Constitution, Aquino was required to establish a Constitutional Commission to draft a permanent charter. She had the authority to select up to 50 “natural-born citizens of the Philippines, of recognised probity, known for their independence, nationalism and patriotism”, the only constraint being a requirement that she first undertake “consultation with various sectors of society.” Interestingly, the Commission was not given a firm deadline but was required to “complete its work within as short a period as may be consistent with the need both to hasten the return of normal constitutional government and to draft a document truly reflective of the ideals and aspirations of the Filipino people.”

On 23 April, Aquino and Arroyo signed Proclamation 9 which promulgated the Law Governing the Constitutional Commission of 1986. The law elaborates on the requirements of the Freedom Constitution by noting that the Commissioners shall be “national, regional and sectoral representatives” (emphasis added). The law then lists the sectors from which representatives “shall” be chosen; “farmers, fishermen, workers, students, professionals, business, military, academic, ethnic, and other similar groups.”

Aquino duly appointed 48 members of the Constitutional Commission and they were convoked on 2 June 1986. The Commission undertook public hearings, regional consultations and two and a half months of floor debates before completing its work on 12 October 1986 by adopting the draft Constitution by a decisive vote of 45-2. The 48th member of the Commission, noted film director Lino Brocka, resigned in protest in mid-course. The document was put to popular vote on 2 February 1987 resulting in an equally decisive affirmation by 17 million votes to 5 million. The current Philippines Constitution came into effect on 11 February 1987.

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7 Article V (section 1), ibid
8 Article V (section 2), ibid
10 Section 2 (1), ibid
11 Section 2 (4), ibid
Constitutionalism in the Philippines

Philippine constitutional history began in the nineteenth century. In their struggle against the Spanish colonisers, the independence forces led by Emilio Aguinaldo established a republic in July 1897 at Biak-na-Bato in central Luzon. Strongly influenced by European enlightenment concepts, the republic was endowed with a constitution. The provisional constitution of this Republic was prepared by Felix Ferrer and Isabelo Artacho, who copied, almost word for word, the revolutionary Cuban constitution of Jimaguayu that was also inspired by enlightenment ideas. The republic and its constitution were short-lived as an accommodation with the coloniser was reached returning the Philippines to the colonial status quo.

The next attempt at forming an independent state came with the American defeat of the Spanish in 1898. In June, Aguinaldo again proclaimed the establishment of the Philippine Republic at Malolos in Bulocan and began work on the next constitution. This was not a simple copy but was the subject of careful deliberation. The Malolos constitution promulgated on 21 January 1899 was a remarkably progressive document in which 26 of the 101 Articles were devoted to guaranteeing individual rights. It is a relatively detailed document whose English translation runs to over 5,000 words.

The Malolos Constitution was never put into effect given the American annexation of the Philippine islands as its colony, but certain features of it may have left their mark on Philippine constitutional practice. The first, common to many constitutions, is the enunciation of high minded principles of social justice. Another feature is the conscious borrowing of appropriate foreign ideas. The Malolos constitutional committee listed the influences upon its work: "The work whose results the commission has the honor to present for the consideration of congress has been largely a matter of selection; in executing it not only has the French constitution been used, but also the constitutions of

Belgium, Mexico, Brazil, Nicaragua, Costa Rica, and Guatemala, as we have considered those nations as most resembling the Filipino people."\(^{14}\) Alongside the borrowings were novel features such as the confiscation of the property of the religious orders and the establishment of a permanent commission of the legislature. And finally, there is an unexplained curiosity. Article 58 states "The President of the Republic shall be elected by absolute majority of votes by the Assembly and by the special Representatives, convinced in chamber assembled" (italics added). Then Associate Justice of the Supreme Court of the Philippine Islands, George A. Malcolm, reviewing the Malolos Constitution in 1921, notes this idiosyncratic provision but can shed no light on it stating "as to who these (special representatives) were to be the constitution is silent."\(^{15}\) Perhaps here is a first attempt at balancing electoral results with appointed representatives having a special character.

After a cruel war to subjugate the independence movements from 1899-1902 during which a third of the people of Luzon perished\(^{16}\), the Philippines began its existence as a United States colony in a short-lived and unconvincing American attempt at mimicking European empires. Before too long forms of self-governance were established and by virtue of the Tydings-McDuffie Law ("The Philippines Commonwealth and Independence Act") of 1934, the Philippines was entitled to draft a constitution under its commonwealth status that would lead to independence in ten years. The 1935 Constitution demonstrates the continuation of some Malolos ideas but is more noteworthy for its adoption of American governance designs and values which continue to this day. It needs to be stressed at the outset that this was not the constitution of an independent nation. The United States maintained a tutelary role in Philippine affairs by way of reservations, barriers and controls.\(^{17}\) Foreign Affairs and Defence were reserved subjects handled directly by the colonial power. The assent of the United States Congress

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\(^{15}\) Ibid, p. 99


was required for raising public debt. The United States Supreme Court was designated as a court of appeal for decision of local courts. The President of the United States had reserve powers to suspend any law or contract which "in his opinion"\(^\text{18}\) would not be beneficial.

But within these colonial constraints, the 1935 Constitution continued the Malolos tradition of high mindedness through the elaboration of principles of state, a unicameral assembly, human rights protections and social justice goals. Otherwise, the machinery of government drew much from American designs – presidential and republican with a balance between the legislative and executive branches reminiscent of United States practice including the establishment of a commission of appointments to vet executive appointees. American influence could be seen in large issues and small. Even though the Commonwealth of the Philippines had no competence over foreign affairs and defence, the 1935 Constitution nevertheless followed the terminology of the Kellogg-Briand Pact of 1928 by "renouncing war as an instrument of national policy"\(^\text{19}\) no doubt pleasing the colonial power whose recent Secretary of State, Frank Billings Kellogg (today better known for corn flakes than peace), had been an architect of the 1928 Kellogg-Briand Pact. The draft constitution was put to a plebiscite on 14 May 1935 and received the support of an overwhelming 96.6 per cent of the vote.\(^\text{20}\)

The process of deliberation and adoption of the 1935 Constitution continued an understanding of constitutionality based on popular will that would set a benchmark for the legitimacy of the adoption of future constitutions. The adoption of the United States governance model would also set a course from which the Philippines would not deviate substantially in succeeding years. The borrowing came with all the dirty electoral tricks perfected in the United States in the early twentieth century which then boasted "the most

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\(^{18}\) Ibid  
\(^{19}\) Article II, section 3  
corrupt form of electoralism among all the industrial powers”. Anderson argues that the Philippines was in a weaker position than some other Asian countries because its colonizer had not developed a coherent central bureaucracy, instead following the American spoils system of senior civil service appointment. The debates leading to the 1935 Constitution reflected some ambivalence, with a preference for unicameralism and with many delegates also arguing for a parliamentary system of government. Initially selecting a unicameral system of representation along the lines of the Malolos Constitution, it was amended in 1940 with the return of a 24 member Senate. This tension has continued to surface in the Philippines intermittently over the next seven decades and the establishment of a parliamentary system is again today among the most contentious aspects of governance design reform.

From the earliest period of partial self-governance soon after the turn of the century, through the period of the Jones Act of 1916 which announced the intention to grant the Philippines independence and established the 24 member Senate to join the 90 member House, into the Commonwealth period and right through to the Japanese invasion, the aspect of governance design that least resembled the parent model was the absence of competitive party politics. From 1907 and for the next 40 years, the Nacionalista Party was dominant and may be considered the predominant party in a unimodal system in Sartori’s typology. In the 1920s, an offshoot of the Nacionalista Party, the Democrata Party briefly threatened the Nacionalista’s hegemony, but it quickly mended fences and returned to the Nacionalista Consolidado. Contestation on policy matters was conducted within the Nacionalista Party. The main controversy, inaugurating a policy debate that would continue for half a century, turned on whether long-term US military bases should be hosted in the Philippines. The Nacionalista Party split into ‘pro’ and ‘anti’ factions

22 Powell, op cit, p. 35
24 Powell, op cit, p. 38
26 Powell, op cit, p. 38
with neither willing to give up the legitimacy inherent in the name of a party so closely
tied to support for independence. This pattern would only be broken after the war.

Filipinos tend to discount the 1943 Constitution as merely an instrument of the Japanese
occupation and there is no doubt that the Japanese occupiers oversaw and vetted the
drafting of the document and ensured it was in consonance with their Greater East Asian
Co-Prosperity Sphere ambitions. The Japanese avoided any overt reference to Japan’s
interests but they made clear to the drafters what they considered to be “mandatory
Yet beyond these clear constraints, Steinberg argues that President Jose P. Laurel was the predominant influence on the drafting of the 1943 Constitution. David Steinberg, “Jose P. Laurel: A “Collaborator” Misunderstood”, The Journal of Asian Studies, Vol. 24, No. 4, August 1965, pp. 651-665, p. 655

The key feature of continuity is the strong nationalist rhetoric but in terms of governance design, the 1943 Constitution can be seen as deviating from the path set by its predecessors. The human rights provisions are severely curtailed and a new concept in the form of “duties” is added to balance those remaining rights. The 1940 amendment in favour of bicameralism is rejected. The Supreme Court no longer was granted a right of judicial review and the President’s powers over the legislature were greatly strengthened, all subject of course to the wishes of the Japanese military occupier, a reality not mentioned in the Constitution.

The main reason Filipinos dismiss the 1943 Constitution is that it proved to be a mere interruption of the constitutional process which had begun in the Commonwealth period. The Tydings-McDuffie Act and the 1935 Constitution were both drafted on the basis of the forthcoming independence of the Philippines. The formal process of independence thus rested on an American renunciation of its rights, leaving the newly independent state endowed with a constitution; the 1935 Constitution as amended in 1940. The formal step was taken on 4 July 1946 by President Truman when he signed Proclamation 2695
entitled “Independence of the Philippines”. The United States thus withdrew and surrendered their rights and recognised the independence of the Philippines “under the Constitution now in force” and “subject to the reservations provided for in the applicable statutes of the United States”. The negotiations leading up to the proclamation required the amendment of the 1935 constitution “designed to give Americans even greater commercial rights in the independent Philippines than they had enjoyed during the colonial and Commonwealth periods.” President Roxas, subservient to the Americans because of his collaborationist activities during the war, campaigned hard to secure this amendment and thus achieved both independence as well as trade preferences and war damage assistance.

Roxas won the presidency in April 1946 not as a Nacionalista, under whose banner he had been the last President of the Commonwealth, but as leader of the Liberal Party, an offshoot of the Nacionalistas that formed itself into a party a few months before the election. This alternation of power instigated a period of two party politics thus adding an important piece to the puzzle of governance design. Roxas was succeeded as President by another Liberal, Elpidio Quirino, who lost to Ramon Magsaysay, a Nacionalista, who was succeeded by Carlos Garcia, his Nacionalista Vice President, who lost to a Liberal in the form of Diosdado Macapagal. Ferdinand Marcos began his political career as a Liberal, but unable to defeat Macapagal for the Liberal nomination, he switched to the Nacionalistas in whose livery he won the 1965 and 1969 presidential elections. Robust political party contestation of this type was unique among the newly independent nations of the post-colonial world and drew much admiration, such as William Overholt’s comment that “democracy in the Philippines (during the Third Republic) seemed far more complete and deeply rooted than in India, Malaysia, Colombia and Venezuela.”

30 Ibid, op cit, p. 724
31 Ibid, p. 725
This state of affairs would not last long. On 21 September 21 1972, as his second and final term under the 1935 Constitution was coming to an end, Marcos issued Proclamation 1081, declaring martial law over the entire country. Thereafter, all decisions concerning governance were taken by Marcos and it is in this light that the 1973 Constitution needs to be read. *Time* magazine began its 29 January 1973 report of events in the Philippines, entitled ‘Farewell to Democracy’ as follows:

Bidding a disparaging farewell to democracy, President Ferdinand Marcos last week formally ended the Philippines’ 26-year-old American-style government. In a nationwide broadcast, Marcos announced a new constitution that gives him dictatorial powers for as long as he chooses and declared, “It is easier perhaps and more comfortable to look back to the solace of a familiar and mediocre past. But the times are too grave and the stakes too high for us to permit the customary concessions to traditional democratic processes.”

Flying in the face of established Philippine practice of approving new constitutions by popular plebiscite, Marcos organised citizens’ assemblies at which assent was signalled by a simple show of hands. The 1973 Constitution basically follows the format of its predecessor but lacked any of its authority. In the words of the *Time* editorial, Marcos alone became “President, Premier and Parliament of the Philippines.” The Philippine Interim Batasang Pambansa (House of Representatives) in the martial law period was made virtually irrelevant. Marcos formalised this in his 1976 constitutional amendment, Article 6 of which, allowed the President to rule by decree if, *in the President’s judgment*, the Assembly “is unable to act adequately on any matter for any reason that *in his judgment* requires immediate action” (italics added). Marcos had learned a trick used decades earlier by the colonial power.

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36 *Time*, op cit
The two party system came to an end with the Martial Law banning of political parties. Marcos held an election for the Interim Batasang Pambansa in 1978 and created the Kilusang Bagong Lipunan (KBL: New Society Movement) for his candidates. Some martial law rules were lifted allowing a form of contestation. The main opposition group, Lakas ng Bayan (People’s Power – abbreviated Laban), was headed by former Senator Benigno Aquino Jr. who fought the election while appealing his death sentence for subversion and murder. Predictably, KBL swept nearly all seats either because of lack of opposition or where necessary by fraud thus instantly becoming the predominant party.

By deinstitutionalising the governance structure of the Philippines, Marcos inflicted a serious wound on the process of constitutionality that had been so carefully erected over the preceding decades. Certain forms remained but the entire country was aware of how little the decision making process followed the formal rules. The Freedom Constitution swept away the Marcos structures but the next constitution had to build not just a new governance structure but had to rebuild constitutionalism in the Philippines.

**The Constitutional Commission of 1986**

The 48 members of the Commission assembled in mid-year in an atmosphere of exhilaration and consternation. The Marcos dictatorship had been overthrown through people power. At the same time it was clear that the process of rebuilding democratic structures faced many serious challenges. There remained a number of Marcos holdovers in various positions of power, most significantly in the military, 60% of which would cast their votes against the new constitution. A serious communist insurgency continued in many parts of the country while a Moro rebellion was simmering in Mindanao. The economy was in a parlous state with a soaring external debt the servicing

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38 Ibid
40 Ibid, p. 231
of which was eating up as much as 40% of GNP per year.\textsuperscript{41} One of the key reasons for the insurgencies was the fact that unlike some of its neighbours, the Philippines had not achieved much progress in land reform, an intractable issue which the new administration would need to tackle with urgency. The Aquino administration had thus inherited a crumbling economic and social infrastructure and one of the key weapons wielded in the reform battle was the new constitution.

The commissioners were clearly aware of this burden. Commission President, Justice Cecilia Muñoz-Palma, described the commission's task as "to pick up and sort out the broken pieces of our shattered democracy."\textsuperscript{42} Aquino had invited members of the Marcos camp to join the commission and four, led by Blas Ople, did so. The Iglesia ni Cristo, a popular home-grown Christian church, turned down the two slots left open to it. So while the commission had pretensions at being representative of the entire spectrum of Philippine politics, the vast majority of 48 commissioners were either 'progressives' (including representatives of the labour and peasant sectors) or anti-Marcos members of the establishment, a description that could also cover the President. Accordingly, the commission was conscious of the pressures it faced to find constitutional solutions to the vast problems faced by the Philippines and in doing so there would be continuing friction between the progressives and the establishment representatives.

The result was an ambitious and high-minded document containing many principles to guide the nation. The flavour can be gained from the lofty rhetoric in the Preamble:

\begin{quote}
We, the sovereign Filipino people, imploring the aid of Almighty God, in order to build a just and humane society, and establish a Government that shall embody our ideals and aspirations, promote the common good, conserve and develop our patrimony, and secure to ourselves and our posterity, the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace, do ordain and promulgate this Constitution.
\end{quote}

\textsuperscript{41} Ibid, p. 235
Article II of the 1987 Constitution continues this rhetoric with a long list of principles and state policies dealing with an ambitious range of issues including freedom from nuclear weapons, full employment, improved quality of life, social justice, protecting the life of the unborn, civic efficiency, moral character, the right to health, a balanced and healthful ecology, total human liberation and development, integrity in the public service and the prohibition of political dynasties.

One of the key challenges in drafting this transformative document was to determine to what extent the constitution itself would contain the implementing mechanisms or, alternatively, what aspects of the necessary machinery should be left for determination by future legislatures and interpretation by future judiciaries. Limits of time, space and knowledge would inevitably leave most of the detailed design of the machinery to the legislature. Thus, for example, the prohibition on political dynasties was “as may be defined by law,” and two decades later no legislative action has been taken on the proposed anti-dynasty bills by a legislature heavily populated by political dynasts.

The most fundamental aspect of institutional design undertaken by the commission was to endow the Philippines with a presidential system of checks and balances modelled on the colonial precedent. This design required a legislative branch of considerable power to balance the executive, particularly given the recent history of dictatorship. Accordingly, the designers returned to the 24 member Senate with which the Philippines was familiar and granted Senators a six year term, balanced by a two-term limit. Elected by block vote on a national constituency and thus needing to garner many millions of votes to gain election, the Senate would be “dominated by charismatic nationally known political figures” and would therefore be a match for the popularly elected president.

43 Article II, Section 26, 1987 Constitution
45 Wilfrido V. Villacorta, debate of 25 July 1986, Record of the Constitutional Commission – Proceedings and Debates, prepared by the Editorial/Publication Unit under the supervision of Hon. Flerida Ruth P. Romero, Secretary-General(hereinafter referred to as Record) Volume Two, p. 254
It was in relation to the House of Representatives that the designers innovated. Having balanced the executive through a powerful Senate, the House was the arena to resolve other important aspects of the Philippine political system. The major innovation was the introduction of the unprecedented (in Philippine experience) party-list system.

**Designing the Party List System**

Having contented itself with a recitation of high minded principles in many parts of the Constitution, the commissioners decided to engage in a more detailed design of representation to the lower house. Paragraphs (1) and (2) of Section 5 of Article VI state:

Section 5. (1) The House of Representatives shall be composed of not more than two hundred and fifty members, unless otherwise fixed by law, who shall be elected from legislative districts apportioned among the provinces, cities, and the Metropolitan Manila area in accordance with the number of their respective inhabitants, and on the basis of a uniform and progressive ratio, and those who, as provided by law, shall be elected through a party-list system of registered national, regional, and sectoral parties or organizations.

(2) The party-list representatives shall constitute twenty *per centum* of the total number of representatives including those under the party list. For three consecutive terms after the ratification of this Constitution, one-half of the seats allocated to party-list representatives shall be filled, as provided by law, by selection or election from the labor, peasant, urban poor, indigenous cultural communities, women, youth, and such other sectors as may be provided by law, except the religious sector.

The debates of the Constitutional Commission were detailed and passionate on the issue of the party-list system. In designing this aspect of the electoral system, two broad concepts were at play each elaborated in a document before the commission and each with its supporters and its principal proponent. The first proposal was championed by
Christian Monsod who wanted a part of the electoral system to be designed “to open up the political system to a pluralistic society through a multiparty system.”\textsuperscript{46} This proposal sought to adopt a proportional representation system to favour political parties, encourage them to pitch their messages to a national audience and thus balance the power of local power holders who focus primarily on parochial concerns. It was to be open to all political parties with no reserved seats for sectors because “laborers and farmers can form a sectoral party or a sectoral organization that will then register and present candidates of their own party.”\textsuperscript{47} The list to be submitted to the COMELEC was to be closed, thus permitting voters to use their newly acquired second ballot to vote for a single political party whose nominees would be elected in the order submitted in accordance with the votes received.

The champion of the second position was Wilfrido Villacorta who argued that the electoral system should “enhance the chances of marginalized sectors in electing their Representatives to the National Assembly (and) will keep their hopes alive in the principle of peaceful change.”\textsuperscript{48} This idea was to be implemented by way of sectoral representation in the National Assembly. The idea was argued to have many benefits including:

- To lead to a more dynamic and vibrant democracy
- To engender the rise of non-traditional political parties
- To foster greater participation of people’s organisations
- To encourage interest in politics by a large number of citizens who feel they do not currently have the opportunity to elect satisfactory spokesmen
- To achieve genuine grass-roots consultation
- To give people direct and first hand experience in the electoral process
- To avoid a situation where minority groups are forced to resort to extra parliamentary means to influence government policies\textsuperscript{49}

\textsuperscript{46} Christian Monsod, debate of 25 July 1986, Record, Volume Two, p. 256
\textsuperscript{47} Christian Monsod, debate of 22 July 1986, Record, Volume Two, p. 85
\textsuperscript{48} Wilfrido V. Villacorta, debate of 22 July 1986, Record, Volume Two, p. 84
\textsuperscript{49} Ibid
The wording of section 5 emerged as a compromise between these two positions and an attempt to satisfy all the intentions behind the two positions. In so doing, the commission debated a number of difficult design options.

**Size and Composition of the Party List Segment**

Before he resigned from the Commission, Lino Brocka argued that the bicameral nature of the system of representation should be designed according to the concepts of sectoral representation and territorial representation with each of the two houses based on one method of representation. He immediately noted, however, that “this idea is too unorthodox to be accepted at this time.”

At one point, the representative of labour, Jaime Tadeo, seemed to suggest that as many as 70% of seats should go to the marginalised sectors:

> Our experience, however, has shown that legislation has tended to benefit more the propertied class who constitute a small minority in our society than the impoverished majority, 70% of whom live below the poverty line. This came about because the rich have managed to dominate and control the legislature, while the basic sectors have been left out of it. So, the critical question is, how do we ensure ample representation of basic sectors in the legislature so that the laws reflect their needs and aspirations?

These rather radical proposals did not gain traction. Wilfrido Villacorta tried to introduce the figure of 30% of the House of Representative seats as reserved for the Party List system, but a consensus quickly developed around the figure of 20% and henceforth, all drafts of the section contained this figure.

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50 Lino O. Brocka, debate of 1 August 1986, *Record*, Volume Two, p. 578-579
51 Ibid
52 Jaime S. L. Tadeo, debate of 1 August 1986, *Record*, Volume Two, p. 562
The commission had already decided on a figure of not more than 250 ("unless otherwise fixed by law") for the size of the House and in the subsequent debates the 20% formulation was used interchangeably with the figure of 50 members of the House. Indeed, in the public reports issued by the commission, the decisions reached were expressed by way of the number of seats rather than the percentage of seats:

Villacorta brainstormed with Commissioner Christian Monsod, proponent of the party-list system, and twenty other commissioners on how best to actualize sectoral representation within the purview of the multiparty system. A compromise was struck: In addition to the 200 seats allocated to district representatives, 50 seats will be allocated to party-list representatives. Out of the 50 seats, 25 will be reserved to the less advantaged sectors.54

Commissioner Rustico F. de los Reyes Jr suggested at one point that only 25% of the seats available to the Party List be set aside for sectoral representatives,55 but this received no support and the even split was clearly seen as fair and appropriate. The only aspect of this half/half division that was discussed was the proposal by Monsod that if the number of members of the House was such that it could not be exactly divided by five leaving an odd number of party-list positions open, then the sectoral representatives should obtain one more seat than the other party-list representatives.56

Permanent or Temporary Sectoral Representatives?

What appears at first sight to be an even-handed compromise was actually intended to be a temporary concession by those favouring classic proportional representation. Some of the most passionate speeches were in favour of permanently reserving seats in the House for sectoral representatives. Edmundo G. Garcia saw the "permanentization" of reserved

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55 Rustico F. de los Reyes Jr, debate of 1 August 1986, Record, Volume Two, p. 566
56 Christian Monsod, debate of 8 October 1986, Record, Volume Five, p. 666
seats for sectoral representatives as a means to transform politics and bring social justice to the unfinished political revolution that “we went through in February” because:

The limited sectoral representation we seek is not a gift to the basic sectors. It is an effort to correct the traditional politics of exclusion, a politics which largely excludes the majority.  

Some of the commissioners, such as those representing organised labour, argued that not only should seats be reserved for sectors permanently, but that the elections to fill those seats be held within the sectors themselves rather than by the electorate as a whole.

Jose E. Suarez turned to rhetorical flourishes to argue for permanent representation for sectors:

As one of the voices of the voiceless, the eyes of the blind, the ears of the deaf and the crutches of the crippled, I feel rather strongly that our marginalized sectors deserve permanent representation in the legislature. We can call it “gifting” if we wish. If it be so, should we not present this gift to our people with an open heart and without restrictions? Are we now turning out to be constitutional Indian givers?

The use of the term “Indian givers” was a reference to the concession that was being suggested by influential members of the commission which was to reserve half the seats available under the party-list electoral system for sectoral representatives for a limited number of congressional terms (set at three years). The initial proposal was that the reservation of seats for sectors be allowed for only two terms. One commissioner suggested five terms. The arguments in favour of this temporary measure were

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57 Edmundo G. Garcia, debate of 1 August 1986, Record, Volume Two, p. 670-580
58 Eulogio R Lerum, debate of 25 July 1986, Record, Volume Two, p. 254
59 Jose E. Suarez, debate of 1 August 1986, Record, Volume Two, p. 582
60 Monsod-Villacorta proposal, debate of 1 August 1986, Record, Volume Two, p. 572
61 Rene V. Sarmineto, debate of 1 August 1986, Record, Volume Two, p. 579
formulated either to protect the party-list system or for the ultimate benefit of the sectors themselves. Blas F. Ople argued the first point:

(The amendment) installs sectoral representation as a constitutional gift, but at the same time, it challenges the sector to rise to the majesty of being elected representatives later on through a party list system; and even beyond that, to become actual political parties capable of contesting political power in the wider constitutional arena for major political parties.\(^{62}\)

Several commissioners argued that it was in the sectoral representatives own interest not to have permanent representation. An influential figure among them was Bishop Teodoro C. Bacani:

Even though I am in favor of sectoral representation and of strengthening this, precisely, the perpetuity in the sense that has been described would seem to militate against that strengthening of sectoral representation. It might mean that the representatives of the sectors will become lax in trying to win the approval of the people and may resort to other means by which they can easily gain the patronage of their own constituents.\(^{63}\)

Immediately following the Bishop’s intervention, Felicitas S. Aquino jumped to the defence of permanent seats. She said the arguments for temporary reservation may make sense in theory do not work in the conditions faced by the Philippines.

The principle of self-reliance or self-development in the dynamics of political growth as a democratic idea is beautifully simple, but it is wildly unrealistic...it is only possible if certain conditions are met. Unhappily, these conditions are not present...There should be a high level of development of political movements...the level of political development of these groups must be

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\(^{62}\) Blas F. Ople, debate of 1 August 1986, *Record*, Volume Two, p. 568

\(^{63}\) Teodoro C. Bacani, debate of 1 August 1986, *Record*, Volume Two, p. 580
characterized by no other condition but unity...(and) there is a requirement for a
democratic milieu for the political groups to be able to develop and consolidate. If
there is any peculiar characteristic of Philippine politics, it is that we do not have
a long tradition of popular and democratic politics.\textsuperscript{64}

The debate had thus come to a point where no compromise formula could work. Either
the sectoral representatives were to be a permanent feature of the electoral system or not.
Either the intent of the design was to elect part of the House by proportional
representation and thus favour the consolidation of national political parties or it was to
give the marginalised sectors of society a permanent voice in the legislature. One of the
most basic design aspects of the electoral system was put to the vote in the commission
on 1 August 1986. Curiously, the vote was not on the Monsod-Villacorta compromise
that had kicked off the debate but on Felicitas Aquino's plea for permanent seats.
Nineteen voted in favour of permanent seats, twenty-two voted against.\textsuperscript{65} A (seemingly)
decisive position had been taken on this key aspect of parliamentary design.

There remained only the question of the number of terms for which sectoral
representatives should have reserved for them half the seats available under the party-list
method. Two and Five had been suggested and the ensuing debate was between three and
four terms with the final decision being three.

\textit{Which Sectors should be Represented?}

It is noteworthy that various studies carried out on the Philippine party-list system treat
sectoral representation as an innovation of the 1986 Constitutional Commission.
Certainly its incorporation into the party-list system was a 1986 innovation but the first
use of sectoral representation in Philippine politics comes from the Marcos era. The first
use of the term "sectors" comes from Marcos' Presidential Decree 826 of 1975 dealing
with the membership of local government representative bodies which were to comprise

\textsuperscript{64} Felicitas S. Aquino, debate of 1 August 1986, \textit{Record}, Volume Two, p. 580
\textsuperscript{65} \textit{Record}, Volume Two, p. 584
certain *ex-officio* positions as well as "representatives from other sectors of the community."\(^{66}\) In the implementing Memorandum Circular No. 75-96 of December 1975, the sectors were named as "Capital, Professional, Industrial Labor, and Agricultural Labor."\(^{67}\) The idea of sectoral representation migrated to various other representative, regulatory and consultative boards. In public hearings conducted the following year concerning representation to a new Congress then under design, a groundswell of opinion rose up against the capital and professional sectors because "professionals and capitalists are financially capable of competing in an election unlike farmers and laborers."\(^{68}\) Instead, the consultations led to the addition of the Youth sector "because they are handicapped by their age."\(^{69}\)

The commissioners were aware of the Marcos pedigree because in the pivotal debate of 1 August 1986 one of their members provided a detailed account of how sectoral representation came about.\(^{70}\) Eulogio Lerum, who had been a sectoral representative in 1978 for organised labour from Luzon in the Congress under Marcos, explained the process from the perspective of the demands by organised labour to be represented on various regulatory boards such as the National Labor Relations Commission and the Employees Compensation Commission. Seeing the utility of dealing with organised representatives, Marcos followed up by amending the constitution in 1976 to allow for sectoral representation in congress (referred to at the time as the Interim Batasang Pambansa) and the 1978 Election Code provided for fourteen seats from three sectors; industrial labour (four seats), agricultural labour (four seats) and youth (six seats). The system was further entrenched by constitutional amendments in 1981 and amendments to the Election Code in 1984. The problem being tackled at the time was the method of electing these representatives. The solution devised in Section 28 of the 1984 Election Code was that:

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\(^{67}\) Ibid

\(^{68}\) Ibid, p. 21

\(^{69}\) Ibid

\(^{70}\) Eulogio R Lerum, debate of 1 August 1986, *Record*, Volume Two, p. 563-565
the most representative and generally recognized organizations or aggregations of members of the agricultural labor, industrial labor and youth sectors, as attested by (the relevant Ministries) shall...submit to the President their respective nominees...The President shall appoint from among the nominees...the representatives of the sector.71

The sectors had rejected any notion that representatives be elected by people outside the sectors and could not devise a practical way of having the representatives elected by the broad but unorganised membership of the sectors themselves. Lerum admitted that the method of appointment by the President left the impression that these representatives were “tools of the President” but he argued self-servingly that “they were fiscalizers rather than blind followers of the President”.72

The references to sectors in the Freedom Constitution and in Proclamation No. 9 were therefore examples of continuity in Philippine constitutional practice. Because the baton was passed on by Marcos, this factor has been conveniently set aside flowing from the official vilification of the former President. The sectors bequeathed by Marcos were the starting points in the debates in the commission but they were not the end result. It did not take long before several women members of the commission proposed that women should be a sector for the purposes of having access to reserved sectoral seats under the party-list system.73 As the debate at that time was moving towards the eventual compromise of the intended 25 seats for sectoral representatives, it did not take long for the representatives of the established sectors to realise that this was a zero sum game and that every new sector posed a challenge to “their” seats. Eulogio Lerum made clear that including women “would mean we are going to take some seats from the other sectors” and his solution was “to increase the number of sectoral seats”.74

In the spirit in which the idea of sectoral representation was being championed, namely giving a legislative voice to the voiceless and marginalised members of society, the

71 Ibid, p. 564
72 Ibid
73 Proposed by Ma. Teresa F. Nieva, debate of 1 August 1986, Record, Volume Two, p. 574
74 Eulogio R Lerum, debate of 1 August 1986, Record, Volume Two, p. 575
representatives of the established sectors faced a dilemma of King Canute proportions. As pleas were made for each new marginalised group, so grew the list and, no doubt, the helpless frustration of the representatives of organised labour. The first sector to join the Marcos originals was the urban poor whose ubiquitous presence on the streets of Manila must have been unmistakable to the commissioners. An attempt was made to limit the list to these four sectors and view new categories as mere sub-sectors. But eloquent pleas were made in favour of “indigenous cultural communities who still live by viable customary laws”. Accordingly, women and indigenous cultural communities were added to the list. And so as not to close the door on other sectors, it was also proposed that the legislature may in future add further sectors. The issue of denominating worthy sectors has been and remains a contested aspect of the Philippine political debate, reflecting both politics and political correctness of the era. The following table demonstrates the dynamic results of this ongoing debate:

Table 4.1: Sectors Selected in five Design Documents

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75 Wilfrido V. Villacorta, debate of 1 August 1986, Record, Volume Two, p. 573-574
76 Ponciano. L. Benmaen, debate of 1 August 1986, Record, Volume Two, p. 575
77 Francisco. A. Rodrigo, debate of 1 August 1986, Record, Volume Two, p. 576
**How is the design to be implemented?**

Conscious that the problem of implementation is an endemic weakness of Philippine governance, commissioners questioned Christian Monsod, on the means of putting into effect the intended constitutional design. Monsod provided three alternative means:  

- By an ordinance appended to the Constitution  
- By an Executive Order of the incumbent President  
- By legislation from the Congress after it has been duly elected

The discussion of the various options pointed to a lack of time for the commission to draft an ordinance, though this was clearly Monsod’s preference. As to the second means, it was accepted that there were many higher priorities in the newly installed President’s in-tray. Francisco Rodrigo concluded that it was realistic to expect that it will be the Congress that will enact this provision and that it would be in a stronger position to do so as an elected body, as opposed to the commission which was an appointed body.

Rodrigo’s prediction prevailed over Monsod’s predilection. Article XVIII of the Constitution entitled Transitory Provisions contains the mopping up provisions to fit the Constitution to the realities of the day, set a calendar for important milestones, and empower other institutions to implement certain provision in a temporary manner. In relation to sectoral representatives, the Article states:

> Section 7. Until a law is passed, the President may fill by appointment from a list of nominees by the respective sectors, the seats reserved for sectoral representation in paragraph (2), Section 5 of Article VI of this Constitution.

There was a final debate on the wording of this provision on 1 October 1986 near the end of the commission’s deliberations. Chito Gascon asked why the provision is worded in a facultative manner by the use of the term “may” rather than the term “shall” which would

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79 Christian Monsod, debate of 1 August 1986, *Record*, Volume Two, p. 572  
80 Francisco. A. Rodrigo, debate of 1 August 1986, *Record*, Volume Two, p. 573
require the President to make the appointments.\textsuperscript{81} The debate turned on whether it was necessary to force the President’s hand in this regard or whether she should be given the flexibility to make up her own mind about the timing and extent of appointments. The issue was put to a vote and resulted in a 15-14 vote in favour of “may”.\textsuperscript{82}

The commission thus completed its work on the design of the party-list electoral system. It decided to devote one fifth of House seats to a proportional representation system that would enhance the role of political parties and force them to present policies pitched to a national electorate. This mixed electoral system combining territorial and proportional methods of representation was to be a harbinger for a distinct trend of mixed electoral system design in the Asia-Pacific region.\textsuperscript{83} At the same time it incorporated a compromise to allow marginalised sectors of society an early preferential position in the system by reserving half the seats for these sectors for the first three congressional terms (a nine year period) during which time they would be expected to strengthen their organisational abilities and broaden their appeal so that they could successfully compete with mainstream political parties when the system was bedded down.

In terms of implementing the design, the commission accepted that “a law” was needed, thus opening the door to Congress to fill in the blanks. The Constitution also, without ever expressly acknowledging the fact, took up the same system employed by Marcos of appointing sectoral representatives. When combined with the wording of paragraph (2), Section 5 of Article VI, and in the event that Congress did not pass the required law in the course of this period, the transitory provision would grant the president the power to appoint sectoral members of the House for three terms.

The commission’s deliberations were public, its debates were closely followed in the media and its record was published soon after the fact. There was little room for misunderstanding the intent of the design. It was now up to the other institutions of

\textsuperscript{81} Jose Luis Martin C. Gascon, debate of 1 October 1986, \textit{Record}, Volume Five, p. 333
\textsuperscript{82} \textit{Record}, Volume Five, p. 336
Philippine democracy, the presidency, the congress and the judiciary to put the design into place.

THE RESULT

**Executive Order 198 and the Sectoral Representatives**

The Constitution was adopted in February 1987, Congressional elections took place in May 1987 and the first sitting of the Eighth Congress was to be on 27 July 1987. For sectoral representatives to sit in the Eighth Congress, the president would have to take action. In any case, it was clearly unlikely that the Congress would turn its mind to a law to implement the party-list system in this very early period of political ferment. On 18 June 1987, the president proclaimed Executive Order 198 (EO198) providing for the manner of nomination and appointment of the 25 sectoral representatives, being half the number of party-list seats then available under the Monsod-Villacorta compromise. Surprisingly, even though the ink on the constitution was hardly dry and the debates over which sectors should be covered had taken place less than a year previously, EO198 added three further sectors to the list in Section 5(2) of Article VI of the constitution, namely, disabled persons, veterans and the elderly. 84 Accordingly, there were now 9 sectors from which the 25 representatives were to come. The process required nominations from groups, mainly trade unions, cause-oriented groups and NGOs.

Violeta Corral divides the sectors into two broad groups:

(a) The basic sectors which are the product of alternative grassroots political processes;

(b) Those sectors which have earned their right to political representation though participation in mainstream politics (emphasis added) 85

The concept of having earned a right to political representation pointed to favouring nominations from the groups that had been active in the people power movement to oust

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85 Ibid p. 10
Marcos. Philippine participatory energy is strong. Mulder believes that “The Philippines may easily count the most NGOs per head of population in the world, and they are spread out all over the country.” Around 900 names were submitted to the president’s office and although no formal record exists of the link between the nominations and the appointments, there can be confidence that groups such as the Trade Union Conference of the Philippines (TUCP), the Labor Advisory and Consultative Council (LACC), the Congress for a People’s Agrarian Reform (CPAR), the Nationwide Coalition of Fisherfolk for Aquatic Reform (NACFAR), the Urban Poor Coordinating Network (UPCN), the Urban Poor Forum (UPF), and various women’s groups including the General Assembly Binding Women for Reforms, Integrity, Equality and Action (GABRIELA) were highly influential in the result given their prominence in the EDSA revolution and its aftermath.

On 4 August 1987, only one week after the convocation of Congress, President Aquino appointed four sectoral representatives: Romeo Angeles representing Peasants, Ramon Jabar representing Labor, Estelita Juco representing both Women and the Disabled, and Dionisio Ojeda representing both Veterans and the Elderly. Of these, only Jabar was clearly associated with the president because, as President of BANDILA (Bansang Nagkaisa sa Diwa at Layunin – One Country in Thought and in Deed), a coalition of cause-oriented groups, he had actively supported President Aquino’s presidential election. The four sectoral representatives took their seats and participated in the work of the Congress as equals.

The next batch of presidential appointees would not have such smooth sailing. By the time the president appointed the second batch of four sectoral representatives on 6 April 1988, the Congress had established its powerful bicameral Commission on Appointments (CA) which was to become one of the main instruments of congressional oversight of the executive branch and which insisted that sectoral representatives to the House of

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87 V. Corral op cit, p. 21
88 Ibid, pp. 14-18
89 Ibid, p. 23
Representatives should first be confirmed by the CA. On 11 April 1988, President Aquino complied and submitted the four names to the CA. Two presidential appointees decided to try their luck in the CA. After four weeks of hearings, Bartolome Arteche representing Peasants was confirmed on 24 May 1988, becoming the fifth sectoral representative, but his fellow candidate for office, Al Ignatius Lopez representing Youth was bypassed.90

The other presidential appointees, Teresita Quintos-Deles representing Women and Rey Magno Teves representing the Urban Poor decided not to submit themselves to the CA process and sought a writ from the Supreme Court prohibiting the CA from dealing with their appointments. The petitioners’ argument was that the Constitution did not specifically require confirmation for sectoral representatives and that the first four appointees were sworn in without confirmation. The Supreme Court heard the case fifteen months later during which time the entire appointment process remained frozen. On 4 September 1989, the court found against the petitioners. Two facts were considered germane: the constitution did not specifically preclude the confirmation process in this case (as it does for some officials such as judicial appointments); and the president had sought confirmation from the CA, which had taken action on two such appointees.91

In December 1989, the Makati coup against the president, the most serious of a series of coup attempts over the previous year, was only barely suppressed. One reaction was the formation of a coalition of cause-oriented groups under the name of KILOS (Kilusan Laban sa Kudeta – Movement against Coups d’Etat) demanding the president implement the necessary reforms, including the appointment of the full complement of sectoral representatives. In May 1990 the president submitted the third batch of names to the CA for appointment including several leaders of KILOS. On 6 June 1990 two non-KILOS nominees were confirmed including Al Ignatius Lopez who had previously been bypassed. On 13 September 1990, seven more nominees were confirmed including four KILOS leaders amongst whom were Jose Luis (Chito) Gascon representing Youth who

90 Ibid, p. 22
had been a constitutional commissioner, and Rey Magno Teves who had initially refused to submit himself to the process, bringing the number of sectoral representatives to 14.⁹²

A fourth batch of nominees was submitted to the CA in 1991 but with the Congress winding down and its members preparing to fight the May 1992 election, the confirmation process did not reach fruition. Of the nine sectors listed in EO 198, all were represented by the 14 successful appointees except the Indigenous Cultural Communities. Among the fourth batch of nominees were five representatives of this sector but they did not find their place in the Eighth Congress before it was prorogued.

The pattern of sectoral representation had thus been set in the first term of congress under the new constitution. It was to be by presidential appointment based on a wide sample of community nominations. The choice by the president of names to submit to the CA was the first step in the process. The next step was an important new piece in the design puzzle, the concurrence of the CA. The views, formal and informal, of the members of the House of Representatives would therefore need to be factored into the decision making process. An important precedent set in the Eighth Congress was not to fill all the available seats, or to represent all the sectors listed in the constitution or EO 198. President Fidel Ramos would follow this system for the next two congressional terms and adopt the Aquino practice fairly closely, though not her selections.

As shown in Annex 4.1 providing the full list of appointed sectoral representatives, Ramos only renewed the nominations of two of Aquino’s 14 appointees from the Eighth to the Ninth Congress with another Aquino appointee successfully nominated as a sectoral representative in the Tenth Congress. On the other hand, ten of the thirteen original Ramos nominees from the Ninth Congress were reappointed by Ramos to the Tenth Congress. Both Aquino and Ramos have been criticised for their appointments. Aquino spent considerable effort on the consultation process but she did not often follow the advice and according to one of the sectoral representatives she appointed, she was

⁹² V. Corral *op cit*, p. 22
more heavily influenced by her brother, Congressman Peping Cojuangco. Ramos appointees were also criticised. Rocamora said “with few exceptions, sectoral representatives were either labor bureaucrats from the TUCP, fake peasants..., or people who bore no recognizable relation to the sectors they were supposed to represent.”

Assessments of the contribution of the appointed sectoral representatives are also uniformly lukewarm at best. One commentator called them “benchwarmers” and “legislative lightweights.” Another noted that they were subjected to “snide remarks regarding their second-class status” which “may have been reinforced by the failure of some sectoral reps to show they were among peers in Congress... Most of the sectoral representatives confined themselves to issues that were solely related to their sector.” Unfortunately, one of the best respected sectoral representatives, Rep. Juco, died two years into her term. The most trenchant term used to describe this group was “ignorable.”

Republic Act 7941

After six years of treading water with Cory Aquino at the helm, the high hopes flowing from the people power revolution were waning and incoming president Ramos was determined to advance the political reform agenda including on some issues close to the hearts of the progressive camp. According to one observer, pressure was placed on Congress to put into law some of the reforms foreshadowed in the 1987 Constitution and the choice before them boiled down to enacting either the anti-dynasty law or the party-list law. They chose the latter. In debating and drafting this piece of legislation, congress had three significant advantages.

93 ‘Chito’ Gascon, interview of 25 April 2007
96 V. Corral op cit, p. 97
97 Garcia Jr, op cit, p. 31
98 Sheila Coronel, interview of 26 April 2007
First, the Villacorta part of the constitutional commission compromise, that “for three consecutive terms after the ratification of this Constitution, one-half of the seats allocated to party-list representatives shall be filled...by selection or election from...sectors as may be provided by law” had been met. The Aquino and Ramos appointees to the Eighth, Ninth and Tenth Congresses had fulfilled this requirement. Congress could now return to the Monsod vision of a party-list system that required the major political parties to campaign on a nationwide basis on the strength of coherent party platforms.

Second, there were now two regional countries that had introduced mixed electoral systems that included “classic” party-list mechanisms. Japan and New Zealand adopted their new electoral systems in 1993. Japan did so because of electors’ frustration at the frozen nature of their political system that led them to challenge the “1955 system” under which Liberal Democratic Party dominance was entrenched. New Zealand changed its system because of calls for fairer representation in the light of the growing diversity of its electorate. While each system has intricacies specific to its own situation, they adhere to the “classic” model of being open to all political parties and distributing seats in line with votes received. In other words they instituted systems of proportional representation within a mixed electoral system though there was a slight bias in both cases towards constituency representation. Congress thus had two recent precedents to inform its work.

Third, members of congress had before them a draft prepared by the Commission on Elections (Comelec). Fortuitously, Christian Monsod was at the time Chairman of Comelec and was able to shape the draft to reflect his original concept for the party-list system. As the main design issues had been settled by the constitutional commission, and the system could reflect its initial conception, the draft was brief and straightforward. There were no limitations on participation by political parties. The term “sectors” did not

101 Würfel, op cit, p. 22
103 Christian Monsod, interview of 17 April 2007
appear at all as Comelec understood that the three term concession to sectoral representatives had been exhausted. No threshold vote requirement was required (unlike the German and New Zealand models) but a five seat per party limit was suggested.

Rep. Michael Mastura filed the original House bill on the party-list law and Sen. John Osmena filed the Senate bill while amendments to these bills were filed by other members of congress including sectoral representative Leonardo Montemayor. The net effect of the horse trading and compromises was to emerge as Republic Act No. 7941 of 3 March 1995; an “Act Providing for the Election of Party-List Representatives through the Party-List System, and Appropriating Funds Therefor”. It states as its purpose in Section 2, the promotion of proportional representation through a party-list system, but then qualifies this by describing it as a means to “enable Filipino citizens belonging to marginalized and under-represented sectors, organizations and parties...to become members of the House of Representatives.” It goes on to describe the task at hand as providing “the simplest scheme possible” for a “full, free and open party system” which again is seen as only a means to the end of attaining “the broadest possible representation of party, sectoral or group interests in the House.”

The Act begins with an extensive set of definitions for political parties, sectoral parties and coalitions of parties (Section 3). This is curious insofar as nothing rides on these distinctions and the same process of registration, nomination and election is set for all these groups. Registration with Comelec is required at least 90 days prior to the election (Section 5). The act includes the list of sectors elaborated in Table 2.1 thus adding 3 sectors to the list in EO 198 (Section 5). Fisherfolk are split off from the Peasant group to form its own sector. Overseas Workers, by now providing the nation’s largest foreign earnings, are added. And the category of Professionals is resurrected. All voters are given two votes, one for their district representative and the other for their preferred party (Section 10). Comelec is given the right to refuse registration on eight grounds including advocacy of violence and, interestingly as a design element to weed out weak parties, failure to pass the threshold required to gain election under the party-list system in the previous two elections (Section 6). Parties are required to submit a list of five names in
rank order, thus constituting a closed list from which successful candidates are chosen and providing replacements for casual vacancies (Section 8). A candidate “who lost his bid for an elective office in the immediately preceding election” cannot be listed, thus constituting another design tool to weed out weak candidates (Section 8). The party-list representatives “shall constitute twenty percentum (20%) of the total number of members of the House” (Section 11), as per the constitution. Like other representatives, individual party list representatives shall not serve more than three consecutive terms (Section 14) and they “shall be entitled to the same salaries and emoluments as regular members of the House” (Section 17).

Thus far, the system under design, though referring to sectors, is close to the Monsod model. Three significant design features are added that distinguish the Act from the more classic model. First, a two percent threshold is included to gain election (Section 11(b)). Second, a cap of three seats is placed on any one party seeking election (Section 11(b)). Third, for the forthcoming election (of May 1998) “the first five major political parties on the basis of...the Tenth Congress...shall not be entitled to participate in the party-list system” (Section 11).

The idea of a threshold had been debated in the constitutional commission. Commissioners had noted its existence in the main model under discussion, that of Germany. Even Monsod had conceded that a threshold might add to the legitimacy of the party list representatives because it would ensure that those elected would have gained a significant number of votes and often more votes than required for election to a district seat.\textsuperscript{104} He and others spoke of a vote of around 400,000 to gain a party-list seat and two million votes to gain five seats. This seemed an easy threshold to leap given the size of some of the sectors listed as noted by one of the commissioner.\textsuperscript{105} Germany had a five percent threshold and so a two percent threshold was seen as appropriate based on the simplistic mathematics of 50 seats being available.

\textsuperscript{104} Christian Monsod, debate of 25 July 1986, \textit{Record}, Volume Two, p. 256
\textsuperscript{105} Jaime S. L. Tadeo, in the debate of 25 July 1986, noted that there were 34 million peasants, 12.235 million in the labor sector, 5 million urban poor, 500,000 teachers, 14.6 million youths, 24 million women etc, \textit{Record}, Volume Two, p. 255
The need for a seat cap was also first discussed in the constitutional commission with Monsod arguing the need to open up the system, noting that “one of the ways to do that is to put a ceiling on the number of representatives from any single party.” Republic Act 7941 sets the cap at three seats on the basis that if filled by the twelve sectors listed, it would only leave a dozen or so seats for others.

The ban on political parties participating in the next election also has its genesis in the debates of the constitutional commission in that the three term reservation for sectors was a design mechanism to allow the sectors time to organise themselves politically and be able to compete with traditional political parties. The bill passed by the House contained a reservation mimicking the constitution whereby the large political parties would be banned for a further three terms. The Senate on the other hand considered such a prohibition to be unconstitutional but in the bicameral Conference Committee discussions to reconcile the two bills, the compromise struck was to make it a one time prohibition applicable to the next election. According to an observer of the process, the champion for this prohibition was noted progressive Representative Edcel Lagman who threatened legislative delays to frustrate passage of this and other bills if the prohibition against major political parties were removed.

President Ramos had pushed for reforms in the political system. He failed to have his proposed Election Code adopted but he achieved the enactment of RA 7941, perhaps as a consolation prize. The law was in place in good time to prepare for the 1998 elections. It required Comelec to draft implementing regulations and to conduct an information campaign to prepare the electorate for this new electoral feature in which each voter would deploy a second vote. It took Comelec over a year to promulgate Resolution No. 2847 of 25 June 1996 setting the rules and regulations for the party list election. It also

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106 Christian Monsod, debate of 25 July 1986, Record, Volume Two, p. 256
107 Würfel, op cit, p. 23
108 ibid
109 Louie Corral, interview of 14 April 2007
produced a primer on the new electoral system that "was not widely distributed." Of even greater concern, the rules and the primer contained two different methods of calculating the result of the vote. The primer stated simply that "a party should obtain 2% ... to be allocated with one seat; 4% for two seats; and 6% for three seats in Congress." Section 13 of Res. 2847 contained an annex suggesting that beyond the two percent threshold allowing for a single seat, additional seats were to be calculated according to a formula of proportional representation to ensure all available party list seats were filled. This unsettled issue was to become of crucial importance in the election results.

With the rules more or less in place, the various sectors and eligible small political parties began to prepare themselves for this electoral contest. While doubts and criticisms about the system were expressed, most opinion leaders were prepared to await the results of the 1998 election before forming a view on this new "experiment."

The 1998 Elections

According to Casiple, "the 1998 election was a comedy of errors, a gallery of self-interpretations and a riot of wild imaginations. Lost in the confusion was the original intention to open the door to marginalized and underrepresented sectors." Apparently catching the system designers by surprise, 123 parties were accepted by Comelec as candidates. While the law ruled out the five big parties for this election, this did not stop seventeen other parties, either of a national or a regional character, from contesting the election. Nor did it stop the ineligible parties from running satellite candidates. The ruling Lakas party was caught out in this regard when an internal memorandum was

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112 Rodrigues and Velasco, op cit, p. 112
113 Ibid, pp. 39-41
116 Rodrigues and Velasco, op cit, p. 16
leaked authorising the establishment of 52 satellite parties.\textsuperscript{117} Perhaps most dispiriting to the designers of the system was the fissiparous nature of the sectors with labour represented by 13 parties, peasants by 9 parties, urban poor by 8 parties, youth by 7 parties, indigenous cultural communities by 6 parties, women by 6 parties, overseas workers by 6 parties, veterans by 3 parties, handicapped and elderly by 2 parties each.\textsuperscript{118}

TUCP, which had supplied several appointed sectoral representatives and which considered that it had a dependable command vote of members and their families, decided that the three cap limit was a limitation on its electoral entitlement and therefore split into five parties hoping for a dozen or so seats. In the event, none of the TUCP affiliated parties crossed the threshold and neither TUCP nor any of the other labor groups gained any seats, though had TUCP run as a single entity, it would have garnered sufficient votes for two seats.\textsuperscript{119} The peasant sector fared slightly better as four of its 9 parties won single seats.\textsuperscript{120} On top of the political parties and sectoral organisations, dozens of single issue groups emerged campaigning on issues such as changing the name of the country or introducing a jury system.

\textsuperscript{117} Casiple (2003), \textit{op cit}, p. 7
\textsuperscript{118} Rodrigues and Velasco, \textit{op cit}, p. 13
\textsuperscript{119} Ibid, p. 17
\textsuperscript{120} They were ABA (\textit{Alyansang Bayanihan ng mga Magsasaka, Manggagawang Bukid at Manggagawang Bukid at Manggagawang Buksang Magsasakang Bukid), SCFO (National Federation of Small Coconut Farmers Organization), BUTIL (Luzon Farmers Party) and Cocofed (Philippine Coconut Producers Association), \textit{Ibid}, p. 17-19
### Table 4.2 Results of the 1998 Party-List Election

<table>
<thead>
<tr>
<th>Parties gaining over 2%</th>
<th>Total votes</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>APEC</td>
<td>503,487</td>
<td>5.50</td>
</tr>
<tr>
<td>ABA</td>
<td>321,646</td>
<td>3.51</td>
</tr>
<tr>
<td>ALAGAD</td>
<td>312,500</td>
<td>3.41</td>
</tr>
<tr>
<td>VFP</td>
<td>304,902</td>
<td>3.33</td>
</tr>
<tr>
<td>PROMDI</td>
<td>255,184</td>
<td>2.79</td>
</tr>
<tr>
<td>AKO</td>
<td>239,042</td>
<td>2.61</td>
</tr>
<tr>
<td>SCFO</td>
<td>238,803</td>
<td>2.60</td>
</tr>
<tr>
<td>ABANSE! PINAY</td>
<td>235,548</td>
<td>2.57</td>
</tr>
<tr>
<td>AKBAYAN!</td>
<td>232,376</td>
<td>2.54</td>
</tr>
<tr>
<td>BUTIL</td>
<td>215,643</td>
<td>2.36</td>
</tr>
<tr>
<td>SANLAKAS</td>
<td>194,617</td>
<td>2.13</td>
</tr>
<tr>
<td>COOP-NATCCO</td>
<td>189,802</td>
<td>2.07</td>
</tr>
<tr>
<td>COCOFED</td>
<td>186,388</td>
<td>2.04</td>
</tr>
</tbody>
</table>

It may be helpful to look more closely at these parties to discern the character of the party-list representatives which set the pattern for the future. As noted, 4 groups from the peasant sector passed the threshold – ABA, SCFO, COOP-NATCCO and COCOFED, though the last named was really an association of landed coconut producers. Two broad based progressive parties in Akbayan! (Citizens’ Action Party) and Sanlakas (One Strength) with links to the labour movement found a place on the list. The Veterans Federation Party won a seat. A women’s party in the form of Abanse!Pinay (Advance Filipinas) is on the list. A party for the urban poor, AKO (Adhikain at Kilusan ng Ordinaryong Tao Para sa Lupa, Pabahay, Hanapbuhay at Kaunlaran or Aspiration and Movement of Ordinary People for Land, Housing, Job Opportunity and Progress), passed the threshold. PROMDI (Progressive Movement of Devolution of Initiatives), the political party of 1998 presidential candidate Lito Osmena from Cebu’s ruling clan won big in its regional fiefdom of the Visayas. Alagad (Partido ng Maralitang Taga-Lunsod or Urban Poor Party), presenting itself as a party of the urban poor, scored well because it is the creature of Iglesia Ni Cristo (Church of Christ) that has often used the discipline of its

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121 COMELEC figures cited in Rodrigues and Velasco, *op cit*, p. 31
members to wade into politics including as a one time strong supporter of Marcos. Thus far, this accounts for 7 sectoral parties, two progressive national parties, a regional party and a church linked party. Yet the surprise winner of the count and the only group to win two seats was APEC (Association of Philippine Electric Cooperatives).

APEC is the brainchild of a political operative who began political life campaigning for the trade union movement but migrated to the cooperatives area. Louie Corral saw the means and had a strong motive for using the party-list system to gain a political voice of some magnitude.\(^{122}\) The means were the hundreds of thousands of households of the government-owned rural electricity cooperatives around the country who were mailed monthly bills. This form of communication allowed a putative party to reach into these homes at little additional cost. All that was needed was a mobilising issue and this was provided by President Ramos in his intention to privatise the electricity industry to respond to the electricity blackouts and brownouts. Corral formed APEC to defeat the electricity privatization legislation arguing, probably correctly, that privatization would simply enrich a slice of the Manila moneyed elite and that the process was bound to be corrupt. Instead, he called for the users to purchase and run the system themselves. This political formula of single hip-pocket issue targeted at a relatively well-heeled slice of the electorate with whom the party could easily communicate would turn APEC into a major force in the party-list system. None of the designers foresaw such an outcome.

While the results of the election were pretty clear by early June 1998, Comelec hesitated in proclaiming the winners arguing, plausibly, that as the party-list election is a national election, the special elections in Mindanao to be held on 4, 18, and 25 July, could affect the outcome. Akbayan and AKO challenged Comelec to proclaim those winners who would surpass the threshold regardless of the Mindanao results, but Comelec refused, and indeed were proved right when Cocofed sneaked over the threshold on the basis of the Mindanao result.\(^{123}\) On 26 June 1998, Comelec proclaimed 13 winners (including 2 from APEC) who were sworn in as members of the House upon its convocation. Once the

\(^{122}\) Louie Corral, interview of 14 April 2007

\(^{123}\) Rodrigues and Velasco, _op cit_, p. 37
Mindanao results were finalised, the 14th party-list representative from Cocofed was sworn in on 8 September 1998.

**The Veterans Case**

Filling only 14 of 52 available seats in the House (the number of district seats having increased) struck many in the Philippines as a failure in view of the lofty ambitions placed in this new “experiment.”\(^{124}\) There was a strong view that all 52 seats available under the party-list should be filled and in response PAG-ASA (People’s Progressive Alliance for Peace and Good Government Towards Alleviation of Poverty and Social Advancement) filed a petition with Comelec on 6 July 1998 requiring it to proclaim further winners to fill all 52 available seats. On 15 October 1998, the Comelec Second Division granted PAG-ASA’s Petition and ordered the proclamation of 38 representatives in rank order from the parties failing to reach the threshold. The Comelec *en banc* confirmed this decision on 7 January 1999 whereupon the thirteen winning parties petitioned the Supreme Court to set aside Comelec’s decision as they considered the balance of the available seats should be divided among only those parties that had passed the 2% threshold.

Having previously decided that the appointed sectoral representatives required confirmation from the CA, the Supreme Court was again required to interpret the design laid down by the constitution and enacted by Congress.\(^{125}\) It summarised the issues under dispute as: whether the 20% of seats allocated to the party list was mandatory or facultative; whether the 2% threshold and three seat cap was constitutional; and flowing from these matters, how should the seats be allocated. In coming to its decision the court reviewed the debates of the constitutional commission and quoted Commissioner Monsod’s support for a 2\(\frac{1}{2}\)% threshold and a ceiling on the number of seats a party could win. It decided that the 20% figure was merely a ceiling, and that the threshold and cap were valid. It then considered a number of mathematical formulae available including the

\(^{124}\) Casiple (2003), *op cit*, p. 9
German Niemeyer formula and discarded them. It decided that a full quote of 2% was required for the first seat and that no rounding up was possible nor could this requirement be ignored as Comelec had done. It also suggested that the result needed to be in line with proportional representation principles based on the vote of the leading party. The formula settled on by the majority gave particular weight to the vote gained by the leading party as all other parties’ entitlements to additional seats would be gauged in relation to the leading party under the following formula:

\[
\frac{\text{no. of votes of the concerned party}}{\text{no. of votes of the first party}} \times \text{(additional seats won by first party)}
\]

or as applied to the first two parties:

\[
\frac{321,646}{503,487} \times 1 = 0.6388 = \text{insufficient for a second seat}
\]

The decision nullified COMELEC’s proclamation of the additional 38 winners and retained the original list of 14 seats of which APEC was the only party to win two. Justice Mendoza and two of his colleagues formed the minority in determining the applicability of the Niemeyer formula and deciding that each of the 13 parties that had crossed the threshold should be granted three seats thus filling 39 of the 52 available seats. The battle of mathematical formulae had begun and would continue for years to come. The application of the formula in the majority decision would limit the capacity to gain three seats only to the leading party even if other parties gained over 6% of the vote and it generally disadvantages all but the leading party. This can be seen by applying the Veterans formula to a situation where the second party in the 1998 vote received exactly 4% of the vote, which would have entitled it to a seat under Comelec’s simple formula:

\[
\frac{366,172}{503,487} \times 1 = 0.7272 = \text{insufficient for a second seat}
\]

There would be some further legal skirmishing with various parties criticising the court’s “home-grown formula” and seeking reconsideration which the court refused. The party-list representatives participated in the work of the House as equals, the fact of their election casting aside the second-class legislator status of their appointed predecessors. They filed 136 bills in the course of the Eleventh Congress of which 10 successfully ran the legislative gauntlet to be passed into law. They needed to build up their support bases because they knew that according to RA7941, they would next time have to face the five major parties that were excluded from the 1998 elections.

The 2001 Elections and the Ang Bagong Bayani Case

The 1998 elections had been a disappointment in a number of respects. Only 14 representatives of a possible 52 were elected. The courts had to sort out the various disputes. And the participation rate among voters at just over nine million was only a third of all voters participating in the well understood presidential, senatorial and district elections. The challenge therefore was to get things right for the 2001 congressional elections. But the fundamental problem of the 1998 elections, the 123 participants registered by Comelec, would be compounded the next time around. While there were eight grounds to refuse registration, the only mathematical reason was a party’s failure to reach the threshold in two previous elections. Given that only a single election had been conducted, this ground was not open to Comelec in 2001 and in Omnibus Resolution No. 3785 of 26 March 2001 it approved a final list of 163 parties and groups from over 200 applicants to contest the 14 May election. This time there were 59 groups representing the 12 sectors, 26 political parties and 78 organisations or coalitions. Various parties protested the Comelec resolution and asked that the list be trimmed down and one group, Ang Bagong Bayani-OFW Labor Party (New Hero-Overseas Filipino Workers Party,

\[\text{[127] Supreme Court Resolution of 14 November 2000,}\]


\[\text{[129] Casiple (2003), op cit, p. 10}\]
sought relief from the Supreme Court on 16 April 2001.\textsuperscript{130} While the matter could not be resolved prior to the election, the court instructed Comelec to conduct the election and count the vote but not to proclaim any winners until the case was decided. Voters went to the polls to sort through the 163 parties and groups knowing that the effect of their choice was subject to review by the courts.

Among the new parties contesting the party-list election was Bayan Muna (People First). There had been a communist insurgency in the Philippines for many years tracing its origins to the unsuccessful Huk rebellion at the end of WWII. The Marcos martial law period had seen an unsuccessful attempt to eradicate it by military means. Upon coming to power, Aquino had extended an olive branch to the communist camp and talks had begun. This process allowed the insurgent camp to have its civilian arm, the National Democratic Front, engage openly in the public debate. Efforts to win electoral office at the 1987 elections were not successful largely because the system was geared towards nationally known candidates for the Senate and local power holders for the district seats in the House. The 1998 party-list election had demonstrated that progressive parties could win seats with a small fraction of the nationwide vote required to win a Senate seat and so the hard left wing of the political spectrum took the decision to participate in the 2001 elections through its party Bayan Muna.\textsuperscript{131}

The vote went ahead with mainstream political parties participating for the first time in accordance with RA7841. President Estrada had already been ousted from office and his fate remained a point of contention. He had at one time been seen as a candidate breaking the hold on power of the elites and many “little” people continued to see him as their champion. His vehicle in the party-list election was Mamamayan Ayaw sa Droga (MAD: Citizens Against Drugs), a group supposedly campaigning to stamp out illicit drugs. It thus combined the anti-drug vote with the pro-Estrada vote and benefited from a major campaign, the stickers from which could be seen on taxis and jeepneys for years after. These two newcomers dominated the voting attracting almost a quarter of the total vote.

\textsuperscript{131} Neri Colmenares, interview of 16 April 2007
between them. Two major political parties, LDP and LAKAS-NUCD UMDP (Partido Laks ng Pao (People’s Power Party) - National Union of Christian Democrats - Union of Muslim Democrats of the Philippines) passed the threshold as did five winners from the 1998 elections.

Table 4.3: The Top 25 Parties in the 2001 Party-List Election

<table>
<thead>
<tr>
<th>Party</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bayan Muna</td>
<td>11.9</td>
</tr>
<tr>
<td>MAD (Mamamayan Ayaw sa Droga – Citizens Against Drugs)</td>
<td>11.1</td>
</tr>
<tr>
<td>Veterans Federation Party</td>
<td>4.1</td>
</tr>
<tr>
<td>Association of Philippine Electric Cooperatives (APEC)</td>
<td>3.9</td>
</tr>
<tr>
<td>Akbayan Citizens’ Action Party</td>
<td>2.9</td>
</tr>
<tr>
<td>PROMDI</td>
<td>2.7</td>
</tr>
<tr>
<td>Laban ng Demokratigong Pilipino (LDP)</td>
<td>2.5</td>
</tr>
<tr>
<td>National Confederation of Irrigators Association (CCIA)</td>
<td>2.4</td>
</tr>
<tr>
<td>LAKAS-NUCD-UMDP</td>
<td>2.4</td>
</tr>
<tr>
<td>Alyansang Bayanihan ng mga Magsasaka etc (ABA)</td>
<td>2.2</td>
</tr>
<tr>
<td>Nationalist People’s coalition</td>
<td>1.9</td>
</tr>
<tr>
<td>Mindanao Federation of Small Coconut Farmers’ Organization (MSCFO)</td>
<td>1.7</td>
</tr>
<tr>
<td>Sanlakas</td>
<td>1.5</td>
</tr>
<tr>
<td>Aklat</td>
<td>1.5</td>
</tr>
<tr>
<td>Philippines Coconut Producers Federation (Cocofed)</td>
<td>1.4</td>
</tr>
<tr>
<td>Citizens’ Battle Against Corruption (CIBAC)</td>
<td>1.4</td>
</tr>
<tr>
<td>Partido ng Maggagawa</td>
<td>1.4</td>
</tr>
<tr>
<td>Butil Farmers Party</td>
<td>1.4</td>
</tr>
<tr>
<td>Cooperative NATCCO Network Party</td>
<td>1.4</td>
</tr>
<tr>
<td>Adhikain at Kilusan ng Ordinaryong Tao (AKO)</td>
<td>1.3</td>
</tr>
<tr>
<td>AHON (Ahon Pinoy or Rise Filipino)</td>
<td>1.3</td>
</tr>
<tr>
<td>Anak Mindanao</td>
<td>1.2</td>
</tr>
<tr>
<td>Pwersa ng Masang Pilipino</td>
<td>1.2</td>
</tr>
<tr>
<td>Pwersa ng Masang Pilipino – Pinatubo Office</td>
<td>1.2</td>
</tr>
<tr>
<td>Buhay (Let Life Blossom)</td>
<td>1.2</td>
</tr>
</tbody>
</table>
The Supreme Court eventually heard the case to decide who should be proclaimed as winners of the 2001 party-list election based on the pre-election petitions and the post-election pleadings. The court boiled the *Ang Bagong Bayani Case* down to two key questions: Whether or not political parties may participate in the party-list elections, and whether or not the party-list system is exclusive to ‘marginalized and underrepresented’ sectors and organizations. Justice Panganiban, writing for the majority as he had in the *Veterans Case*, returned to the oracle and quoted Commissioner Monsod’s comments in the constitutional debates on the party-list issue. He agreed that political parties may participate but decided that this did not apply to “any” political party. He decided that there was a “state policy of promoting proportional representation by means of the Filipino-style party-list system” but that in the Philippines context proportional representation refers to the representation of the “marginalized and underrepresented”:

> It is not enough for the candidate to claim representation of the marginalized and underrepresented, because representation is easy to claim and to feign. The party-list organization or party must factually and truly represent the marginalized and underrepresented constituencies… In the end, the role of the Comelec is to see to it that only those Filipinos who are “marginalized and underrepresented” become members of Congress under the party-list system, Filipino-style. The intent of the Constitution is clear: to give genuine power to the people, not only by giving more law to those who have less in life, but more so by enabling them to become veritable lawmakers themselves… This Court, therefore, cannot allow the party-list system to be sullied and prostituted by those who are neither marginalized nor underrepresented. It cannot let that flicker of hope be snuffed out. The clear state policy must permeate every discussion of the qualification of political parties and other organizations under the party-list system.

Panganiban then laid down eight rules to guide Comelec in its registration of party-list candidates:
1) the political party, sector, organization or coalition must represent the marginalized and underrepresented groups identified in Section 5 of RA 7941
2) political parties must show that they represent the interests of the marginalized and underrepresented if they are to be registered to participate
3) the express constitutional provision that the religious sector may not be represented in the party-list system is to be respected, with a specific mention of the requirement to bar the registration of Buhay (Ang Buhay Hayaang Yumabong – Let Life Blossom), supported by the charismatic Christian religious group El Shaddai
4) candidate organizations or parties must not be disqualified under Section 6 of RA 7941
5) candidate organisations or parties must not be an adjunct of, or a project organized or an entity funded or assisted by, the government
6) candidate organizations or parties must not only comply with the requirements of the law; their nominees must likewise do so
7) not only must the candidate party or organization represent marginalized and underrepresented sectors; so also must its nominees
8) the nominee must likewise be able to contribute to the formulation and enactment of appropriate legislation that will benefit the nation as a whole.

The court decided that Comelec would be given thirty days to hold evidentiary hearings and apply the new set of rules to the parties and organisations that ran in the recently concluded elections. The minority in the Ang Bagong Bayani Case, Justices Mendoza and Vitug, also returned to the debates in the constitutional commission and argued in vain that the intent of the drafters of the constitution should be allowed to stand.

Comelec duly fulfilled the court’s wishes and at the end of its deliberations only 42 of the 163 groups were declared qualified.\textsuperscript{132} Included in the 121 non-eligible groups were seven that had passed or were near the 2% threshold: MAD, APEC, VFP, PROMDI,

\textsuperscript{132} Casiple (2003), \textit{op cit}, p. 11
NPC, Lakas-NUCD-UMDP and CIBAC. Comelc argued that APEC was merely an arm of the Philippine Rural Electric Cooperative and that CIBAC was simply an extension of the Jesus is Lord religious movement. Both challenged this result. In pleadings to the Supreme Court, the Solicitor General, acting on behalf of Comelec, reversed this position and declared that APEC and CIBAC as well Buhay and Cocofed were after all qualified. In its resolution of 29 January 2002, nine months after the elections, the court agreed.

Comelec was left to recalculate the vote and proclaim the winners. While the number of votes for the party-list system had increased since 1998, Comelec decided to treat the votes for non-eligible parties and groups as spoilt and these were not calculated in the total party-list vote from which the 2% threshold is derived. Over nine million party-list votes were recorded in 1998 but only six and a half million were tallied in 2001 after the disqualifications. Accordingly, while over 180,000 votes were required to pass the threshold in 1998, only 135,000 votes would qualify a party for a seat in 2001.

Bayan Muna’s 1.7 million votes shook the Philippine political establishment and if a true proportional representation system had been in place, its 26% of the vote would have won it 13 seats in the House. The three seat cap shaved ten seats off this tally. APEC increased its representation from 2 to 3, and Akbayan and BUTIL doubled their representation. Other newcomers Buhay and CIBAC both won two seats. There would thus be twenty party-list representatives in the Twelfth Congress to speak for the “marginalized and underrepresented.”

133 Casiple (2003), op cit, p. 19
Table 4.4: Proclaimed Result of the 2001 Party-List Election

<table>
<thead>
<tr>
<th>Party</th>
<th>Votes</th>
<th>Percentage</th>
<th>Seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bayan Muna</td>
<td>1,708,253</td>
<td>26.19</td>
<td>3</td>
</tr>
<tr>
<td>APEC</td>
<td>802,060</td>
<td>12.29</td>
<td>3</td>
</tr>
<tr>
<td>Akbayan</td>
<td>377,582</td>
<td>5.79</td>
<td>2</td>
</tr>
<tr>
<td>BUTIL</td>
<td>330,282</td>
<td>5.06</td>
<td>2</td>
</tr>
<tr>
<td>CIBAC</td>
<td>323,810</td>
<td>4.96</td>
<td>2</td>
</tr>
<tr>
<td>Buhay</td>
<td>290,760</td>
<td>4.46</td>
<td>2</td>
</tr>
<tr>
<td>Anak Mindanao (AMIN)</td>
<td>252,051</td>
<td>3.86</td>
<td>1</td>
</tr>
<tr>
<td>ABA</td>
<td>242,199</td>
<td>3.71</td>
<td>1</td>
</tr>
<tr>
<td>Cocofed</td>
<td>229,165</td>
<td>3.51</td>
<td>1</td>
</tr>
<tr>
<td>Partido ng Manggagawa (PM)</td>
<td>216,823</td>
<td>3.32</td>
<td>1</td>
</tr>
<tr>
<td>Sanlakas</td>
<td>151,017</td>
<td>2.31</td>
<td>1</td>
</tr>
<tr>
<td>Abanse!Pinay</td>
<td>135,211</td>
<td>2.07</td>
<td>1</td>
</tr>
</tbody>
</table>

The twenty party-list representatives would author or co-author some 657 bills and 1,050 resolutions in the course of the Twelfth Congress. Of the bills proposed some sixteen would be enacted. What was becoming clear was that unlike the parochial concerns of district members, the party-list members were proposing bills of national significance with a strong reform character. Among the 16 laws that entered into force on the basis of party-list authorship were laws on absentee voting, standardization of public administration, abuse of women, citizenship retention, tobacco regulation and defining money laundering.

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136 Casiple et al (2005), op cit, p. 87
137 Ibid, p. 63-66
138 Republic Act 9189 co-authored by Beltran (BM), Ocampo (BM) and Rosales (Akbayan)
139 Republic Act 9184 co-authored by Ocampo (BM) and Rosales (Akbayan)
140 Republic Act 9262 co-authored by Aguja (Akbayan), Madamba (APEC), Masa (BM), Ocampo (BM) and Rosales (Akbayan)
141 Republic Act 9225 by Rosales (Akbayan)
142 Republic Act 9211 by Villanueva (CIBAC)
143 Republic Act 9160 by Ocampo (BM)
The 2004 Election

By the time the 2004 elections came about, it seemed the design of the party-list system had finally been settled. Both the candidate organizations and the electorate now had a fair idea of what to expect. This marked a new beginning for the politics of the system. The Supreme Court had blocked mainstream political parties from participating overtly in the election, but the legal arm of the communist insurgency could. Bayan Muna’s remarkable showing at the 2001 election announced it as the major player in the party-list system. It was clear to its leaders that some one and a half million Bayan Muna votes had been wasted as surplus to requirements under the three seat cap and they embarked on a strategy that had previously been tried by TUCP with disastrous consequences – splitting its vote by forming splinter parties. Five new parties were formed in the Bayan Muna family – Anakpawis (Toiling Masses), Anak ng Bayan (Child of the People), Gabriela Women’s Party, Migrante and Suara Bangsa Moro, opening the outside possibility that the communist voice in congress could grow to as many as eighteen.

It was also clear that the electorate was finally beginning to participate extensively in the vote because in 2004 the total vote for the party-list system came to 13,241,974. This was a compliment to the industriousness and notoriety of many party-list representatives. But the design of the system repaid this compliment by making re-election twice as hard as before! In 2004 it would require 265,000 votes to scale the 2% threshold.
Bayan Muna’s gamble paid handsome dividends because it was able to increase its total vote from 1.7 million votes in 2001 to 2.7 million for the Bayan Muna family of parties. Its representation thus doubled with Bayan Muna retaining three seats, Anakpawis winning two seats and Gabriela one seat. APEC also increased its vote and was able to maintain its three representatives. Akbayan more than doubled its vote, largely due to the activism of its leading representative Etta Rosales, and was able to claim an additional seat. The three religiously linked parties all won seats with Buhay picking up two while CIBAC lost one and Alagad arrived on the scene. The veterans’ party returned to Congress and the indigenous sector gained its first ever representative in the form of ALIF. BUTIL, PM and AMIN retained their seats and COOP-NATCCO returned to congress. Other newcomers were AVE, the teachers’ party and An Waray, a regional party of Waray speakers from the eastern Visayas claiming to represent the underprivileged (a literal translation of its name is “those who have nothing.”) The thirteenth Congress thus would have 24 representatives from 16 parties. One surprise was the failure of the overseas workers to gain a voice in Congress given their importance to
the Philippine economy, their growing numbers and their inclusion as a sector in RA 7941. Like other sectors, this sector is splintered along the political spectrum and is having difficulty expressing itself electorally. The party-list representatives of the Thirteenth Congress continued their pattern of activism and national legislative focus and several of them became prominent in the media coverage of politics.

The success of Bayan Muna brought the party-list system into national prominence and into the cross-hairs of the Arroyo Administration. Philip Alston, United Nations Rapporteur on extrajudicial, summary or arbitrary executions, who visited the Philippines in February 2007, issued a press statement in which he said:

At the national level, there has been a definitive abandonment of President Ramos' strategy of reconciliation. This might be termed the Sinn Fein strategy. It involves the creation of an opening — the party-list system — for leftist groups to enter the democratic political system, while at the same time acknowledging that some of those groups remain very sympathetic to the armed struggle being waged by illegal groups (the IRA in the Irish case, or the NPA in the Philippines case). The goal is to provide an incentive for such groups to enter mainstream politics and to see that path as their best option. Neither the party-list system nor the repeal of the Anti-Subversion Act has been reversed by Congress. But, the executive branch, openly and enthusiastically aided by the military, has worked resolutely to circumvent the spirit of these legislative decisions by trying to impede the work of the party-list groups and to put in question their right to operate freely.

The methods used to attack the party-list representatives have ranged from vilification to ostracism to prosecution. Two Bayan Muna members, Satur Ocampo and Crispin Beltran have been charged with murder and sedition respectively. Beltran was dismissive of the

legal basis of the charges and argued they were politically inspired.\textsuperscript{145} Supporters of the leftist groups including election observers and canvassers have been harassed and murdered.\textsuperscript{146} The Arroyo Administration and the Office of Speaker have also denied all party-list representatives who voted in favour of opening an impeachment case against President Arroyo because of election irregularities in the 2004 elections,\textsuperscript{147} access to all development funds that had previously been provided to all congressmen, including party-list representatives.\textsuperscript{148}

\textbf{The 2007 Election}

Comelec decided that 93 candidate groups were qualified to run in the 2007 election. The two strikes rule was thus beginning to have its effect, but there being no effective threshold rule to vet newcomers, the list remained unwieldy. The politics of the 2007 party-list election concerned Administration attempts to counter the communist vote and restrict its influence in Congress. What was becoming clear was that the poll administrator, Comelec, was behaving as a partisan instrument of the Arroyo Administration.

An early controversy turned on the Comelec decision not to announce the list of candidates associated with each of the 93 party-list groups accepted on the ballot.\textsuperscript{149} This announcement was based on an unpublicized Comelec resolution (07-0724 of 3 April 2007) that the ranked list of names for each party would only be announced after the election.\textsuperscript{150} The Comelec decision was justified on the basis that the party-list election should not be personalised. This was based on a reading of section 7 of RA 7941 which states:

\begin{flushright}
\textsuperscript{145} Crispin Beltran, interview of 17 April 2007 (conducted while Beltran was in custody in hospital)
\textsuperscript{146} Jae de la Cruz, interview of 11 April 2007, Neri Colmenares, interview of 16 April 2007
\textsuperscript{148} Joel Villanueva, interview of 17 April 2007
\textsuperscript{149} \textit{Manila Bulletin}, 13 April 2007
\textsuperscript{150} \textit{Rosales v Comelec}, Supreme Court of the Philippines G.R. No. 177271/G.R. No. 177314, May 4, 2007
\end{flushright}
Certified List of Registered Parties.- The COMELEC shall, not later than sixty (60) days before election, prepare a certified list of national, regional, or sectoral parties, organizations or coalitions which have applied or who have manifested their desire to participate under the party-list system and distribute copies thereof to all precincts for posting in the polling places on election day. The names of the party-list nominees shall not be shown on the certified list. (Emphasis added.)

In *Rosales v Comelec*\(^{151}\) the Supreme Court rejected Comelec’s interpretation of the statute, noting that it was restricted to what should be posted at the place of balloting for voters to see and did not apply to information provided outside the place of ballot. Of more significance in the view of the Supreme Court was section 7 of the constitution granting a right to information:

The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

While Comelec’s non-disclosure of the names on the list may have been open to the constitutional interpretation placed on it by Comelec chair Benjamin S. Abalos Sr, this had not been the practice followed in the two previous elections. A more convincing political explanation is open. The non-disclosure was to disguise the character of the parties being put forward as representing the disadvantaged. This was to support the tactic of the Administration to field its own parties. Leaked documents from Malacañang showed that funds had been appropriated to support party-list candidate groups favourable to the Administration.\(^{152}\) 22 groups were identified as Administration or

\(^{151}\) *Ibid*

military funded.\textsuperscript{153} This is contrary to point 5 of the qualifications set in the \textit{Ang Bagong Bayani Case} and, according to one commentator, this would be an impeachable offence.\textsuperscript{154} Incidentally, one of the names on the list of the tricycle drivers' party, Biyaheng Pinoy, was a certain Arsenio Abalos, the brother of the Comelec chair.\textsuperscript{155}

Another Administration tactic was to harass the party-list representatives from parties believed linked to the communists. On 24 February 2006, the President declared a State of National Emergency and police arrested Anakpawis party-list member Crispin Beltran the following day eventually to be charged, alongside others, with rebellion. The matter finally found its way to the Supreme Court in June 2007, after the conclusion of the election. The court dismissed all charges against Beltran for lack of probable cause.\textsuperscript{156} Charges against other leftist party-list representatives were also dismissed for various procedural irregularities. The court concluded with a stern admonition:

\begin{quote}
We cannot emphasize too strongly that prosecutors should not allow, and should avoid, giving the impression that their noble office is being used or prostituted, wittingly or unwittingly, for political ends, or other purposes alien to, or subversive of, the basic and fundamental objective of observing the interest of justice evenhandedly, without fear or favor to any and all litigants alike, whether rich or poor, weak or strong, powerless or mighty. Only by strict adherence to the established procedure may be public’s perception of the impartiality of the prosecutor be enhanced.
\end{quote}

Thirty of the forty-three million registered voters cast their ballots in the 2007 election, but only about half of these voted in the party-list election. A party required over 310,000 votes to breach the 2\% threshold and qualify for a seat. After over two months of

\textsuperscript{154} Judge Cleto Villacorta, a member of the Board of Directors of the policy study institution Center for People Empowerment in Governance, quoted in Remollino, \textit{ibid}
\textsuperscript{155} "A party list of Abalos' kin, pals", Malaya, 29 January 2007
\textsuperscript{156} Crispin Beltran v People of the Philippines et al, G.R. Nos. 172070-72/G.R. Nos. 172074-76/G.R. No. 175013, June 1, 2007
counting, Comelec finally released the result which listed seventeen successful parties of which fourteen scored less than four percent and were thus entitled to a single seat. One party, Cibac, achieved a 4.79% vote and was entitled to two seats. Two parties, Buhay and Bayan Muna, scored over six percent of the vote and were entitled, on the basis of the calculations in 2001 and 2004, to three seats each. This should have returned a result of twenty-two seats out of a possible fifty-five available. In fact, Comelec only proclaimed twenty-one elected congressmen from the party-list system.

Table 4.6: Results of the 2007 Party-List Election

<table>
<thead>
<tr>
<th>Posn</th>
<th>Party</th>
<th>Votes</th>
<th>Perc.</th>
<th>Seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Buhay</td>
<td>1,169,248</td>
<td>7.42</td>
<td>3</td>
</tr>
<tr>
<td>2</td>
<td>Bayan Muna</td>
<td>976,699</td>
<td>6.20</td>
<td>2</td>
</tr>
<tr>
<td>3</td>
<td>CIBAC</td>
<td>755,605</td>
<td>4.79</td>
<td>2</td>
</tr>
<tr>
<td>4</td>
<td>APEC</td>
<td>621,211</td>
<td>3.94</td>
<td>1</td>
</tr>
<tr>
<td>5</td>
<td>Gabriela Women's Party</td>
<td>621,086</td>
<td>3.94</td>
<td>1</td>
</tr>
<tr>
<td>6</td>
<td>A Teacher¹⁵⁸</td>
<td>487,354</td>
<td>3.09</td>
<td>1</td>
</tr>
<tr>
<td>7</td>
<td>Akbayan! Citizen's Action Party</td>
<td>466,019</td>
<td>2.96</td>
<td>1</td>
</tr>
<tr>
<td>8</td>
<td>Alagad</td>
<td>423,090</td>
<td>2.68</td>
<td>1</td>
</tr>
<tr>
<td>9</td>
<td>Coop Natcco Network Party</td>
<td>409,812</td>
<td>2.60</td>
<td>1</td>
</tr>
<tr>
<td>10</td>
<td>Luzon Farmers Party (BUTIL)</td>
<td>409,133</td>
<td>2.60</td>
<td>1</td>
</tr>
<tr>
<td>11</td>
<td>BATAS¹⁵⁹</td>
<td>385,654</td>
<td>2.45</td>
<td>1</td>
</tr>
<tr>
<td>12</td>
<td>Alliance of Rural Concerns (ARC)</td>
<td>373,840</td>
<td>2.37</td>
<td>1</td>
</tr>
<tr>
<td>13</td>
<td>Anakpawis</td>
<td>369,366</td>
<td>2.34</td>
<td>1</td>
</tr>
<tr>
<td>14</td>
<td>Abono</td>
<td>339,897</td>
<td>2.16</td>
<td>1</td>
</tr>
<tr>
<td>15</td>
<td>Anak Mindanao</td>
<td>338,125</td>
<td>2.15</td>
<td>1</td>
</tr>
<tr>
<td>16</td>
<td>Agricultural Alliance (AGAP)</td>
<td>328,649</td>
<td>2.09</td>
<td>1</td>
</tr>
<tr>
<td>17</td>
<td>An Waray</td>
<td>319,432</td>
<td>2.03</td>
<td>1</td>
</tr>
</tbody>
</table>

The Administration’s attack on the leftist parties found a new tactic after the elections. Surprisingly, Bayan Muna did not top the polls. That privilege fell to Buhay, the party

¹⁵⁹ Bagong Alyansang Tagapagtugoy ng Adhikaing Sambayanan (New Alliance of Advocates for National Ambition)
linked to the El Shaddai Christian sect. Bayan Muna nevertheless earned over 6% of the vote entitling it to retain its three seats in the House under the Comelec “2, 4, 6” formula used in the 2001 and 2004 elections when APEC had run second but had passed the 6% threshold and thus obtained three seats. Seeing partisan political advantage in restricting Bayan Muna to two seats, Comelec chair Abalos announced that Comelec would abandon its previous practice and revert to the Panganiban formula set out in the Veterans Case. As previously noted, the Veterans Case formula gives undue weight to the party topping the count by granting three seats to that party only. The 2007 results allowed the Administration to revert to this ignored method to further its political objectives.

After the election, APEC, Butil and Coop-Natcco joined the government coalition, while Abono, ARC, A Teacher and Buhay demonstrated support for the administration. The major winner in 2007 was the religious wing of politics. Buhay, the electoral wing of the El Shaddai sect claimed three seats including one for Rene Velarde, the son of its founder. Alagad, the electoral arm of Iglesia ni Cristo retained its seat, while CIBAC, associated with the Jesus is Lord movement, gained a seat. A Teacher claims to represent low-paid teachers but its nominee, Mariano U. Piamonte Jr. is the executive director of the Catholic Education Association of the Philippines which is closely connected with the Catholics Bishops Conference of the Philippines. Other groups have followed APEC and BUTIL's example of trying to turn economic associations into political players.

Coop-Natcco is a member of the Caucus of Development NGOs (Code-NGO), a coalition of reformist non-government organizations, but it is also an agent of Western Union Money Transfer, while AGAP is an association of agricultural corporations. Abono and An Waray are creations of local political clans. The nominees of BATAS are: Daniel Razon, Melanio “Batas” Mauricio, Jr., Jose “Jay” Sonza, Ariel Pacis, and Olivia “Bong” Coo – all popular broadcasters who also ran, unsuccessfully, in the 2004 senate elections under the Alyansa ng Pag-asa (Alliance of Hope) banner, a coalition headed by

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161 Bobby Tuazon, ‘The Traditional Politics of Some Party-list Groups’, Center for People Empowerment in Governance (CenPEG), Issue Analysis No. 16, 16 August 2007
162 Ibid
163 Ibid
progressive presidential candidate Raul Roco who died a few months after that year’s elections.\textsuperscript{164} The 2007 elections therefore allowed only two non-communist linked groups akin to platform based national parties to gain election – BATAS and Akbayan, which lost its second seat.

\textbf{The 2009 Banat Case}

As has come to be expected in Philippine political culture, elections spawn court cases and one such case, by the Barangay Association for National Advancement and Transparency (Banat), a disappointed candidate for a party-list seat in the 2007 elections had a significant impact on the party-list system. Banat argued before the Supreme Court that the current system of determining party-list seats was contrary to the constitutional intent of having 20% of House seats devoted to the party-list, in that the current formula only allowed 21 of the available 55 seats to be filled and indeed could never lead to the full 20% allocation now that the number of constituency seats had gone beyond 200. While this argument had been previously made on numerous occasions, the difference was that the designer of the \textit{Ang Bagong Bayani Case} formula, Chief Justice Panganiban, retired in 2006, clearing the way for a proper reconsideration of the issues.

The \textit{Banat Case}\textsuperscript{165}, for which the majority decision was written by Justice Carpio, decided that the constitution required that all seats comprising the allocated 20% of the House be filled and that this figure was not a ceiling but a necessary condition. The mathematics to achieve this result and nevertheless give effect to RA 7941 is tortuous. The court argued that it could not “legislate” a new formula but could reinterpret its previous formula. It decided that the 2% threshold should be used to determine the first group of party-list representatives, thus the 17 parties that gained at least 2% were given a single seat. The votes used for this calculation (34%) were then discarded and a new count was made of the total remaining votes again using a 2% threshold. This opened the


door to many parties that had failed to reach the 2% ratio but could reach 2% of the total once the first cut of votes was discarded. The court decided to retain the 3 seat limit for any individual party as this was specifically mandated in the legislation. By this method the court was able to fill all 55 seats then thought to be available to the party-list segment of the House as elaborated in Annex 4.2.

The Banat Case also reconsidered previous decisions proscribing the major political parties from contesting seats under the party-list method. Rehearsing the arguments from the Constitutional Commission that this electoral method was a way of strengthening the party system, Justice Carpio’s judgment called for the major parties to be allowed to compete, especially if they had affiliated groups that could be described as representing the marginalised and underprivileged. But on this point he could not carry the majority which voted 8-7 in favour of the Chief Justice Puno’s view that the party-list system was intended to help the marginalised and underrepresented and thus precluded the major parties from contesting:

In ratifying the Constitution, our people recognized how the interests of our poor and powerless sectoral groups can be frustrated by the traditional political parties who have the machinery and chicanery to dominate our political institutions. If we allow major political parties to participate in the party-list system electoral process, we will surely suffocate the voice of the marginalized, frustrate their sovereignty and betray the democratic spirit of the Constitution. That opinion will serve as the graveyard of the party-list system.166

Parallel to this case, another Supreme Court case voided the Muslim Mindanao Autonomy Act No. 201 creating the Province of Shariff Kabunsuan thus reducing the total number of legislative seats to 219 which had the effect of reducing to 54 the number of party-list seats available and Cocofed was therefore not given a seat.167 A dispute over

the Batas party candidature also delayed the swearing in of its representatives. Nevertheless, 52 party-list representatives from 34 parties were sworn in as members of the House of Representatives of the 14th Philippine Congress. The party-list system thus had a victory in finally gaining one fifth of the seats of the lower house that its designers had intended. But far from strengthening the political party system, it contributed to its fragmentation by allowing 34 small groups, only two of which had three representatives and 18 of which had a single representative, to take these seats. As the Supreme Court proclaimed proudly, this was the party-list system, Filipino-style.

OVERVIEW

The party-list system, “Filipino-style”, has had a twenty year journey from the early debates in the constitutional commission, through six Congresses, four elections, and repeated cases in the Supreme Court, to the present point where it is one of the most contested and criticised parts of the Philippine political structure. This section deals with how the original intent was distorted, appropriated and reshaped. It also places this case study within the theoretical and institutional design contexts previously elaborated.

Tactical Errors

Hindsight provides an easy, or perhaps facile, perspective to judge the tactics of those engaged in the passionate debates of institutional design. Those debates require the honesty to identify weaknesses in the existing system and the courage to propose changes to it. Yet applauding the vision of the designers needs to be balanced with a critique of their resourcefulness in articulating that vision, negotiating its acceptance and implementing it. With hindsight, the most glaring issue in explaining the distortion of the party-list concept is that its proponents got their tactics all wrong.

168 Ibid
Lino Broca may have had the better tactical idea when he used as his starting point in the design debate the argument that in a bicameral system, one house should have territorial representation and the other sectoral representation. This would have allowed some negotiating room to rescue the party-list design from the margins of Philippine politics to which it was to be condemned by its size and fractiousness. Twenty percent of one chamber hardly represents political critical mass and yet this was the limit of the proponents of the system with even Broca conceding that his original idea “is too unorthodox to be accepted at this time.”

Christian Monsod was the visionary. But in selling his idea to his fellow commissioners he provided many reassurances concerning thresholds and caps that were to be quoted extensively by future redesigners to reshape the system to their wishes. His compromise with Villacorta to allow sectoral representation alongside the party-list was to prove the most damaging tactical error. Monsod was careful to quarantine this concession to a fixed time period but by doing so he left the door ajar, not realising that this temporary co-habitation would allow the transient parasite to devour its host.

Monsod clearly realised that there was one tactical error to avoid. He argued for the commissioners themselves to attach an ordinance to the constitution to settle the details and thus have their vision properly translated into practice. But lack of time and the commissioners’ Achilles heel of having been appointed and not elected, conspired to defeat this tactic and thus invite others to add their fingerprints to the design. Once the constitution was adopted, the visionaries had to step aside and cede to others their place at the helm of the design process.

Cory Aquino was next at the helm and she continued the tactical errors. By adding three sectors in EO198 to the sectors listed in the constitutional design, she immediately impugned the authority of the constitutional designers. While only the passage of time could bestow on these commissioners a nobility akin to “founding fathers”, it was the
president who appointed them who compromised this possibility a few weeks after their
accomplishment. She unwittingly set a precedent many others would follow.

The constitutional design nevertheless remained that political parties would need to win
electoral support through the party-list system, as opposed to standard personalistic
political practices. The three term compromise in favour of sectoral representatives was
justified as a means of allowing those groups time to build their support base on the
foundation of being serving members of the House. But Aquino bungled again in
accepting the demand of the CA that sectoral appointees first required confirmation. This
compounded their lack of a formal popular mandate and reduced them to second-class
congressmen thus compromising the legitimacy of incumbency that was supposed to be
their greatest asset in the looming electoral contest. Of the 32 sectoral representatives
appointed by Aquino and Ramos only two, Leonardo Montemayor (Peasant) and Ariel
Zartiga (Urban Poor) were able to win seats in the Eleventh Congress.

Perhaps the most egregious tactical error was the TUCP’s decision to run five candidate
groups in the 1998 election, none of which passed the threshold. TUCP never developed
into an electoral force after this first humiliating tactical bungle. As the voice of
establishment organised labour, TUCP was in a position to make the design work. If it
had won seats in 1998 and launched its political role, it might have developed into a
cleavage based workers’ party along Rokkan-Lipset lines. It could thus have challenged
the hold of the hard-line anti-establishment parties over that sector. Instead, TUCP had to
cede its place as leading representative of labour in the political field to others on its left.

**Design Flaws**

In the final days of the constitutional commission, by a vote of 15-14, the authority of the
president to appoint sectoral representatives was described by the term “may” instead of
“shall” with Monsod, curiously, supporting the facultative over the mandatory expression
and thus providing the decisive vote. This turned out to be a serious design flaw

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171 *Record*, Volume Five, p. 336
because it set in train a pattern in which many party-list seats were left unfilled. The closest the appointed sectoral representatives came to filling their allotted seats was the second Ramos batch when 18 of a possible 25 seats were filled in the Tenth Congress. When the petitioners in the Veterans Case argued for the application of a formula that would allow 39 of the 52 seats to be filled in the eleventh Congress by employing the Niemeyer formula, the court was accustomed to the practice of not filling all available seats and was able to continue that practice in adopting its “home-grown” formula. Until the Banat case, in the seven congressional terms since the 1987 Constitution was adopted, party-list representatives did not fill even half of the available seats. This unintended result, flowing from the original design flaw compounded by further design flaws, made the Philippine system unique among its neighbouring electoral democracies in the Asia-Pacific region in allowing parliamentary seats to remain unfilled.

RA 7941 was the next major design document. It is widely acknowledged to be flawed and there are several amendment bills calling for a radical redesign. As noted, the concept of a threshold was first mooted in the constitutional commission and was then adopted as a requirement in RA 7941. The precedent for a threshold was clearly the German party-list system. But there was no discussion in either the commission or the congressional debate about the reasons for the German threshold. Germany had a small number of well established parties that Sartori might describe as a system of low fragmentation forming bipolar contestation. Germany also had small extreme parties at both ends of the political spectrum. The 5% threshold was intended to allow the mainstream political parties through the gate of representation but deny entry to the extremist parties. The Philippines was not in a comparable position. Political parties are weak and personalistic with little by way of organisational structure or platform beyond the purse strings and opinions of their principal benefactors. Sartori would classify the Philippine party system as a volatile form of high fragmentation. As the 2001 election was to demonstrate before political parties were subsequently disqualified, very few

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172 Mirko Herberg, interview of 17 April 2007
173 Casiple (2003), op cit, pp. 29-32
174 Giovanni Sartori 1976, op cit, p. 128
could reach the 2% threshold. So the need for a threshold required a different rationale in the Philippines. The closest the designers came to articulating a rationale for the threshold was the general idea that party-list representatives should prove their electoral clout vis-à-vis the district representatives.176

A 2% threshold as part of a classic party-list system may have made sense if all political parties were allowed to compete and all seats distributed to those passing it. As applied in the Philippines, it is flawed. Its flaw is obvious from a mathematical perspective once it was settled that each seat required a 2% vote. With 50 seats available for party-list representatives and the three seat cap in place, 50 parties would each need to obtain exactly 2% of the total vote, or 16 parties would each need to obtain exactly 6% and a 17th party exactly 4%, or a combination within this range, in order to fill all the seats. This is improbable to the point of impossibility. But the flawed mathematics is compounded because the Constitution177 does not fix the number of House of Representatives seats at 250 for all time. As the number of House districts has grown, so have the seats available under the party-list system. For the 2007 election there were 222 House district seats178 thus allowing for 55 party-list seats. Now even 50 parties each obtaining exactly 2% of the vote would not fill the available seats. It is clear that the quota of 20% of House seats is unachievable under the 2% threshold as set down in RA7941. From a design perspective, the 2% figure no longer acted as a threshold but became a single seat minimum quota. It would take the Banat Case to manipulate the mathematics to allow all seats to be filled.

The rationale for the threshold – to demonstrate some sort of parity with district seats – is confused. There is no possible parity with district seats as can be seen from the results of the 2004 elections.179 In the smaller districts a plurality of 20,000 votes secured election while in the largest districts a plurality of less than 100,000 votes was required whereas a

176 Christian Monsod, debate of 25 July 1986, Record, Volume Two, p. 256, Blas Ople, debate of 1 August 1986, Record, Volume Two, p. 568
177 Section 5(1) of Article VI
party-list seat required 265,000 votes. In 2007, with the party-list concept prominently before Philippine voters, the quota climbed to over 310,000 votes while the range of required district plurality had not changed appreciably. A party-list representative, on the rationale of requiring the legitimacy of a large number of votes, can now claim to have fifteen times more legitimacy than some district representatives and three times more legitimacy than those with the most votes.

There is yet another perverse design flaw in the 2% seat quota. A well designed electoral system should reward strong electoral performance. Yet the effect of the 2% seat quota is that the more votes attracted by the party-list system, the harder it is to get elected. In 2004, some 30 million people voted in the elections. Had all of them voted in the party-list system, the single seat quota would have been 600,000. One could not expect that the actual winners would have been able to maintain their percentage of the total because their vote generally represents a “command” vote of committed supporters. For example, APEC can only count on the members of the rural electricity cooperatives to support the party electorally. APEC has already mined this source. To double or triple the voter base is to require APEC implausibly to seek to double or triple its vote from among non-members. That achievement would allow it to simply stand still. It is more likely that a larger share of the additional votes would drift to others in the large range of candidate groups. So the reward for more electors participating in the system is to increase the difficulty of getting elected. With mainstream political parties excluded, Bayan Muna would be the only party that may be expected to maintain its seats because it already has a large number of wasted votes (e.g. some 400,000 in 2004) above those required to fill the three seat cap.

The three seat cap is the next serious design flaw. “The rationale underpinning all proportional representation systems is to consciously reduce the disparity between a party's share of the national vote and its share of the parliamentary seats.” Placing a cap on the number of seats a party can win defeats the rationale of proportional

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representation. Leaving aside the limitation created by the 2% threshold, the cap establishes a design where the currently available 54 seats are to be filled by a minimum of 18 parties to a maximum of 54 parties. This is engineering high fragmentation, normally a result sought to be avoided by institutional crafters. The effect of the cap is to splinter sectors and segments of political opinion that could otherwise form a coherent political voice. TUCP anticipated this splintering at its cost. Bayan Muna has handled the splintering requirement more competently.\(^{181}\)

Instead of a cap, the design should have rewarded those groups that can successfully represent a sector, cleavage or opinion segment of society. Yet, among many political commentators, the cap is now seen as essential to disallow the Bayan Muna family of parties from dominating the process.\(^{182}\) In reconciling the six amendment bills that had been lodged by 2003, a group of 15 party-list representatives under the aegis of the Friedrich Ebert Stiftung, settled on a system with a threshold of 1.8% which would then employ the Niemeyer formula to distribute the available seats to all those who pass the threshold up to a seat limit of 6 seats.\(^{183}\) The drafters believed that this formula would allow for all available seats to be filled.

Having criticised various aspects of the design, there is one feature that is positive. The rule to allow Comelec to disqualify parties that have not met the threshold over two elections they have contested. For the 2007 election, Comelec was able to disqualify over thirty parties on this basis.\(^{184}\) This is a clear and fair tool to separate the wheat from the chaff. It is a dynamic tool as its effect can be felt with each succeeding election. Unfortunately, the rule was unavailable for the first two elections when a culture of fragmentation developed.

\(^{181}\) It had two of its three well known representatives elected in 2001, Crispin Beltran and Liza Maza, resign to allow the next two names on the list to take their places in the House while Beltran and Maza organised the campaigns of two other members of the Bayan Muna family of parties in the form of Anakpawis and the women’s party, Gabriela.

\(^{182}\) Etta Rosales, interview of 11 April 2007

\(^{183}\) Casiple (2003), op cit, pp. 103-111

Judicial Design

The Supreme Court has been an enthusiastic redesigner of the party-list system. In the *Deles Case* it accepted the contention of the CA that presidential nominees required approval from their peers thus undercutting their status even further than was already evident from their lack of electoral legitimacy. In the *Veterans Case* the court disallowed Comelec from attempting to fill as many seats as possible. Comelec had disregarded the 2% threshold and distributed as many seats as available to the parties in order of rank. The court ejected this approach and substituted a “home-grown” formula of doubtful mathematical validity. In the *Ang Bagong Bayani Case*, the court adopted its most audacious piece of design and stripped the original concept of its classic political party strengthening ideals to transform it into a means of affirmative action. It was only in the *Banat Case* that the court found ways of undoing some of the harm it had caused by inventing yet another formula.

The depth and detail of the judiciary’s redesign contributions require analysis. In the *Veterans Case* Justice Panganiban, who wrote the majority opinion, decided that proportional representation was one of four parts of the system to determine the winners of party-list seats (the other parts being 20% of the House, 2% threshold and 3 seat cap) and he devised a formula to express the proportional representation part of the formula to determine the allocation of additional seats. The formula does not work as it privileges the leading party unfairly. But the greatest virtue of the formula was seen by its designer as its “home-grown” nature, a point Panganiban highlights in a scholarly publication.185

In the *Ang Bagong Bayani Case*, it was again Justice Panganiban who drafted the majority opinion. This time he drafted the eight rules for Comelec to follow in determining the qualification of candidate groups to stand in party-list elections. These rules privileged one aspect of the legislation, the one-time advantage provided to

marginalised and underrepresented groups, by turning it into the centre piece of the legislation and banning all mainstream political parties for good.

The ostensible basis for both these judgments was implementation of the legislature’s will as articulated in RA 7941. Justice Mendoza, in his minority opinion, argued in favour of implementing the intent of the constitutional drafters: “the Record of the Constitutional Commission shows clearly that the Constitutional Commission rejected sectoral representation in preference to proportional representation.”186 But Panganiban resorted to a piece of legal sophistry in an unusual section of a judgment entitled “Refutation of the Separate Opinions” in which he argued that resort to the constitutional commission’s debates to discern their intentions was unnecessary because the terms of RA 7941 were so clear.187

Until the 2007 election, the Panganiban formula in the Veterans Case had been quietly ignored by Comelec and all other parties and had thus been thought to have fallen into desuetude. In its stead came the simplistic quota formula first formulated in the Comelec primer produced prior to the 1998 election which contradicted the more sophisticated Niemeyer based formula produced by the electoral commissioners themselves. In relation therefore to this particular piece of institutional design concerning seat distribution in a proportional representation system, on which there is a wealth of scholarly material and international practice to draw – the constitutional commissioners abdicated their right to settle the formula in an ordinance; the legislature left the matter too vague to be definitive; the electoral commissioners had their formula set aside; and the judges devised a formula that, at least until the 2007 election, all parties tacitly agreed to quietly ignore; leaving the final design in the hands of the Education and Information Department of Comelec who wrote the “2, 4, 6” public information primer.

Unreliable Intentions

What began as a proportional representation element in the electoral system intended, in Christian Monsod’s original argument before the constitutional commission “to open up the political system to a pluralistic society through a multiparty system” by encouraging political parties to pitch their messages to a national constituency and thus balance the power of local power holders who focus primarily on parochial concerns, has turned into something altogether different. The rider added by the commission to favour “marginalised and underrepresented groups” has taken the reins. What began as proportional representation has mutated into affirmative action. As each election passes and the electorate becomes more familiar with the rules and mechanisms of this affirmative action component of the electoral system, the possibility of returning it to its original design recedes. It is probably beyond the possibilities of the politically attainable to return to a proportional representation system for mainstream political parties unless a new critical juncture arises that allows for political system reform.

Another unintended effect of the design was to give the convenient corporatism of the Marcos era a new lease of life. “Consulting” sectoral representatives that he had himself appointed became Marcos’ alternative to consultation by democratic elections. Drawing on this Marcos innovation, the designers of a high-minded democratic system unintentionally kept corporatism alive through their sectoral representatives. The fragmentation both within each corporatist sector and in the party-list system, however, has worked to defuse this unintended impact.

A design intended to strengthen the party system instead encourages wide fragmentation. The 2007 election was the first time the number of candidate groups fell below the 100 mark. If this is a trend, encouraged by the two strikes and you’re out qualification rule, then future elections may provide voters with a less confusing choice. As things stand, the design of the system does not allow mainstream political parties to participate. Nor does it in practice facilitate the “marginalised and underrepresented” to find a political voice as can be seen from the difficulty faced by the indigenous community in gaining
representation. What it does encourage is groups with “command” support to seek a seat in the House to pursue their perspectives or single issue obsessions. Accordingly, religious groups, economic associations, and local political barons able to muster the votes to meet the quota, fill the party-list benches. Akbayan is the only example of a significant policy based party emerging through the party-list system, but the three term limit disqualifying its most popular representative saw its vote almost halve in the subsequent election of 2007.

A question remains as to why the major parties in the Philippines allowed this state of affairs to transpire. The answer flows from the original rationale for the party-list design – to strengthen the party system. While there are a couple of long standing parties such as the Liberals and the splintered Nacionalistas, they have little meaning beyond their leader of the day. Very few have permanent secretariats. Sustained membership of a party, with the exception of Bayan Muna, is not part of Philippine political tradition. Even government formation does not flow from the logic of party allegiances. Once the Congress is elected, the leading figures engage in a recruitment drive among the elected members to muster a majority. Because the administration of the day holds the power of patronage, the President’s party will become the majority party. Many candidates run with the endorsement of several parties, hedging their bets until the winner emerges. From this perspective, it doesn’t particularly matter whether House members came to their seats by way of constituency or party-list election, they can still be mustered into the majority, and many party-list representatives are. Accordingly, the parties knew that they could by and large continue business as usual.

The one sense in which the design has worked is to bring into the House a handful of representatives who claim not to play politics as usual. The legislative record of some of the party-list representatives is testimony to their focus on progressive issues of national importance. But the most significant aspect of the design was unintended. The greatest beneficiaries of the design – the communist side of politics represented by the Bayan Muna family of parties – were never mentioned in debates in the commission, in the legislative drafting process or in opinions from the bench. Though it has only seven
party-list seats, Bayan Muna may be regarded as the true opposition in Philippine politics while the mainstream groups calling themselves True Opposition should be seen as disaffected members of the elite wanting their hands on the bounty of power. The party-list design has given an irreconcilable political minority a legal public voice.

The journey of the party-list system may not be over but it is already clear that the original intentions turned out to be a poor guide to what eventuated. While specific intentions may be a poor guide to results, certain aspects of the underlying political situation may provide a better source. The Supreme Court’s hostility towards mainstream parties reflects a general contempt for parties in the Philippines. Thus of the two options available to designers – to fix the party system or to quarantine it – the constitutional designers chose the former but the subsequent implementers bowed to popular sentiment and adopted the latter course. And a corollary to the contempt for parties is the yearning for another form of representation, a type of championship to give true voice to the weakest segments of society. To give substance to this sentiment, the Philippines fell back to path dependence, returning to Marcos’ idea of sectoral representation but implemented it in accordance with its political culture of fractiousness, fragmentation and fissiparousness.

Christian Monsod is quite bitter about the experience, made all the more sour by the fact that he was the Chairman of Comelec who failed to get through the reforms he sought. He describes the series of events as the Philippines having lurched “from blunder to blunder.”188 The term blunder privileges the notion of independent agency in the process of design. Proponents of system design may be entitled to muse that regardless of what its many designers intended, the party-list system morphed into its present form because the Philippines needs a “Sinn Fein” solution to its endemic insurgency problem.

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Annex 4.1: Appointed Sectoral Representatives to 8th, 9th and 10th Congresses

<table>
<thead>
<tr>
<th>Period</th>
<th>Sector</th>
<th>Name</th>
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<td>Labor</td>
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Annex 4.2: Distribution of Available 2007 Party-List Seats (from Banat Case)

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<tr>
<th>Party</th>
<th>Votes</th>
<th>Votes over Total Votes for Party List, in % (A)</th>
<th>Guaranteed Seat (First Round) (B)</th>
<th>Additional Seats (Second Round) (C)</th>
<th>(B) plus (C) in whole integers (D)</th>
<th>Applying the three seat cap (E)</th>
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*Disqualified by Comelec
**COCOFED was later denied its seat as only 54 party-list seats were available:
leaving 52 representatives from 34 groups.
CHAPTER FIVE

THAILAND – *QUIS CUSTODIET IPSOS CUSTODES? THE SENATE!*

For over a century, Thailand has been debating the most appropriate form of governance for the Kingdom. The debate has at times taken deliberative form and at other times the more immediate form of the *coup d'etat*. From its earliest manifestation, a key component of the debate has been the issue of the election and appointment of parliamentarians. This chapter will deal with one design adopted to deal with the issue – the Senate under the 1997 Constitution. The intention of the designers was for this newly crafted institution to solve the ancient riddle posed two millennia ago by the Roman poet Juvenal, *quis custodiet ipsos custodes* or who will guard the guardians?

THE DESIGN

**Opting for Constitutional Monarchy**

Crossing Phanfalilat Bridge at Larnluang Road in Bangkok will bring the eager visitor to an attractive three storey building in neo-classical style built by French-Swiss architect Charles Beguelin in the later years of the reign of King Chulalongkorn at the dawn of the twentieth century. Originally used as a stylish haberdashery, the building was later transformed into the parliamentary museum. In the early years of the twenty-first century, it was rededicated to King Prajadhipok, Rama VII (1925-1935), and managed by his eponymous organisation. On its website, King Prajadhipok’s Institute (KPI) describes his significance as flowing from the fact that he was the King who “agreed to introduce constitutional monarchy for the People of Thailand and became the first King in Thai history to rule under a legal constitution.”

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KPI’s delicate wording has a grain of truth. Being crowned in 1925 at the relatively young age of 32, King Prajadhipok was inexperienced in the politics of the court, yet his reign occurred in a period of great contestation in ideas of governance that had begun to shake the kingdom. He formulated a draft constitution limiting the absolute powers he had inherited from his older brother but he did not have the capacities to negotiate this document to adoption.² Events soon overtook the monarch’s hesitations in the form of the 1932 military coup by the self-styled People’s Party, a group that at the time of the coup had only about one hundred members consisting largely of western (mainly French) educated scions of the elite.³ The King eventually agreed to the coup leaders’ demands and ruled as a constitutional figurehead monarch. Prajadhipok’s transformation from absolute to ceremonial monarch is portrayed in the museum as his gift to the people of Thailand. If so, the gift was clearly extracted from the King by the People’s Party which made his subservient role clear in its letter to the King of 24 June 1932, the day of the coup: “We therefore invite Your Majesty to return to the capital (from the summer palace) and continue to reign under the constitutional monarchical system established by the People’s Party.”⁴ The King tussled with the new government for several more years before abdicating in 1935.

The end of absolute monarchy in Thailand is a story of coups and constitutions sprinkled with the occasional election. It would pose some fundamental questions about the governance of Thailand that remain to be answered by the Thai nation. The first of these questions concerns the role of the King in the Thai polity. Thailand traces the absolute monarchy back to the founding of the Sukhothai Kingdom in 1237 and it remained in place for the next seven centuries.⁵ The various coups, palace plots and forced abdications that pepper Thai history during these seven centuries may have been aimed at dethroning individuals but they were not intended to destroy traditional Kingship.

³ Ibid
Nevertheless, while the concept of absolute monarchy was accepted in theory, the wielding of royal power was largely dependant on the personal qualities of the monarch of the day and indeed Kemp advances a theory that the various coups actually strengthened Thai Kingship through a form of Darwinian natural selection eliminating weak monarchs. The theory of absolute monarchy thus coexisted with the reality of individual regal vulnerability. Traditionally, threats to the King came from the nobility and their mandarins and the early contacts with the West did not change this equation as the Western powers were themselves governed as absolute monarchies and accepted Thai Kingship as the legitimate form of government. When King Mongkut received a letter from Queen Victoria in 1856, it marked the point at which the King was “admitted unreservedly into the brotherhood of European royalty.” In the course of the nineteenth century, however, the social and political revolutions of Europe would add a telling new influence on the Thai polity.

The impact of the West on Thailand began to be felt in the second half of the nineteenth century with the advent of King Mongkut (1851-1868). Borwornsak gives particular weight to the Treaty of Friendship and Commerce with Great Britain in 1855 which prised open the doors of international commerce, ended the royal monopoly on external trade and made Great Britain the principal model for Thailand’s political development. The process would accelerate under King Chulalongkorn (1868-1910) with the abolition of slavery, the establishment of a professional army and the enactment of law codes on the Napoleonic model. Chulalongkorn absorbed Western influences from an early stage, famously by way of his governess, Anna Leonowens (the perpendicular pronoun from the play and movie *The King and I*), and perhaps even more pointedly from his travels in 1871 to India, Java and Singapore “to observe the advances made by European influence

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7 Nicholas Tarling, *Nations and States in Southeast Asia*, Cambridge: Cambridge University Press, 1998, p. 113
9 *Ibid*, p. 228
in other parts of Asia.\textsuperscript{10} He encouraged training in Europe for the sons of Thai nobility and by the early twentieth century even talented commoners were studying in Paris, London and Berlin, a process that would accelerate the end of the absolute monarchy. In Paris in 1927, seven military officers and civilians, two of whom would become future prime ministers, established the People's Party that would recruit new adherents in Thailand and ultimately stage the 1932 coup.\textsuperscript{11}

Perhaps Kemp's theory finds some support in the events following Chulalongkorn's death. King Vajiravudh (1910-1925) studied in Cambridge and Sandhurst where he developed his passion for literature and drama and "returned poorly qualified to assume the role of absolute monarch...Upon assuming the throne Vajiravudh promptly removed most of the capable ministers who had served his father...Unlike his father he often treated the national treasury as his own private fund."\textsuperscript{12} While he was also a moderniser, he saw change coming through indigenous institutions and became "an ardent propagandist for Siamese nationalism."\textsuperscript{13} It was he who modified the British motto "king, god, country" to "nation, religion, monarch" that continues to be used in Thailand.\textsuperscript{14} His reforming zeal did not extend to changes in the system of absolute monarchy and he rejected constitutional government, noting "In Siam it is still too soon to attempt the adoption of a parliamentary regime...to the Chinese and Siamese, what do they know of it?"\textsuperscript{15}

It would be Vajiravudh's successor, his younger brother Prajadhipok, who would suffer the consequences of his rule. Also trained in Britain, at Eton and Woolwich, Prajadhipok

\textsuperscript{12} Darling, \textit{op cit}, p. 43-44
\textsuperscript{13} Ibid, p. 45
\textsuperscript{14} Craig J. Reynolds, "Nation and State in Histories of Nation-Building, with Special Reference to Thailand", Wang Gungwu (ed.) \textit{Nation-Building: Five Southeast Asian Histories}. Singapore, Institute of Southeast Asian Studies, 2005, pp. 21-38, p. 27
\textsuperscript{15} Ibid, p. 46
understood the inevitability of the end of constitutional monarchy but was not able to shape developments. Aside from the difficult legacies of his predecessor, the young King came to power as the Great Depression devastated Thailand and his most immediate task was to balance a shrinking budget.\textsuperscript{16} While he contemplated changing the system to one of constitutional monarchy, he did not have the strength to override the vested interests among his ministers and advisers. The concept of constitutional monarchy was therefore less a gift from the King and more an imposition from the People’s Party.

**The People’s Party Constitutions**

The June 1932 coup was a bloodless but nonetheless decisive affair. Overnight the King was theoretically transformed from an absolute ruler to a symbolic figurehead. As noted above, Prajadhipok and his predecessors were in reality always constrained by various factors and as will be noted below, his eventual successor would come to wield power far beyond that of a mere figurehead. At the time of the coup, however, it was the intention of at least some of the plotters to strip the King of virtually all his powers.

The documents and statements of the day point to some of the reasons for the coup. The first and most obvious reason turns on the individual ambitions of the leaders of the People’s Party at a time of limited career opportunities. Prajadhipok recognised this problem and saw it as the main reason for the coup:

> I saw that the first revolution was inevitable. I knew it was coming. The people who were sent home from education were not the same class as in former days. There were not sufficient posts for them to fill. For this reason the body of discontent grew. The bubble was inflated to the bursting point.\textsuperscript{17}

\textsuperscript{16} Chai-Anan, *op cit*, p. 29
\textsuperscript{17} *Ibid*, p. 30
The People's Party manifesto tends to agree with the King's analysis as it begins its list of reasons for the coup with a similar point.\textsuperscript{18}

Ever since ascending to the Throne, the King has ruled as an absolute monarch and has bestowed all the important government positions on his relatives and on favourites who are unqualified for such positions.

The manifesto accuses “the King’s favourites” of corruption, accepting bribes and exceeding their powers. It then suggests the rulers are incompetent because they could not deal effectively with the results of the depression. There follows a veiled threat against the monarch by comparing him with the Czar and the Kaiser who were both “dethroned...because of the same selfish aims.” The manifesto then turns to “the people”, on whose behalf it claims to speak. It argues “the people were not allowed a voice in affairs of state because they, the people, were regarded as fools and incapable of thinking for themselves.” The solution requires that “the people must know and understand their plight and install a government of their own, so that they can have a voice in it. The aim is not to pull down the present regime but to establish some form of limited monarchy.”

The Interim Constitution of 27 June 1932 was drafted by one of the founders of the People’s Party and the head of its civilian wing, Pridi Phanomyong and reluctantly signed into law by the King. The Interim Constitution ensured that power would be firmly in the hands of the People’s Party’s representatives and it had a republican undertone in the derogatory language used in relation to the monarch.\textsuperscript{19} Prajadhipok agreed to sign it as an interim constitution subject to a permanent constitution being presented for his consideration. The coup leaders decided to placate the King because of the popular legitimacy his consent would bring. The Permanent Constitution entered into force on 10 December 1932 and on the surface the King retained powers to advise and to be consulted while the executive, now led by a seasoned official Phraya Manoprakornnittithada as prime minister, held power on behalf of the people. Pridi was the only

\textsuperscript{18} Ibid, p. 31
\textsuperscript{19} Kobkua, \textit{op cit}, p. 33-34
member of the People’s Party to sit on the newly constituted drafting committee yet he succeeded in retaining the power relations established under the Interim Constitution while amending those terms considered offensive to the King. When the People’s Party undertook its second coup a year after its first, it took over the powers of the Mano government and decided to adopt its own interpretation to the constitution. The fact that the powers of the nation were being exercised “on behalf of the King” did not change the reality that they were being exercised by the successful putchists in pursuit of their own ends.

Politics is about numbers and both constitutions of 1932 established the Assembly, representing the people, as the source of government power. Executive power could not be maintained without Assembly support and the King only had a power of delay rather than one of veto. The Assembly was a unicameral chamber with two classes of representatives of equal size. The first group was elected, initially indirectly and then directly by the people, while the second group was appointed. The power to appoint this group to the Assembly would effectively determine where power would reside. The Permanent Constitution stated that the King was the appointing power but that his appointments would need to be countersigned by the Prime Minister. As Kobkua makes clear, in a system of constitutional monarchy, this meant that in effect the appointments were in the hands of the Prime Minister.

Not content with having established the means to power, Pridi tackled the next item on his agenda, the economy. His plan was one of economic nationalism involving land reform and nationalisation of certain finance and transport industries. Clearly there was more than royal dignity at stake and Pridi’s plan united the royalists with the conservative factions and even some military members of the People’s Party in opposition to it. This group staged its own coup in April 1933, prorogued the Assembly, suspended sections of the constitution and passed a law against communism with which to fight the backers of the economic plan. Pridi was forced into exile and with his departure the civilian wing of

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20 Ibid, p. 35
21 Ibid, p. 38
the People’s Party was eclipsed. The military wing of the People’s Party struck back with its own coup in June that year and restored the Permanent Constitution. Colonel Phahonyothin became Prime Minister and wielded power without reference to the king, who abdicated in 1935.

According to Article 65 of the Permanent Constitution, the system of two categories of Assembly members was to last ten years. Thereafter, the Assembly was to be composed of popularly elected members. In effect, therefore, with the second coup in 1933, the leaders of the People’s Party had obtained a decade of uncontested power. Phahon remained prime minister until 1938 whereupon he was succeeded by another military man, Plaek Khittasankha, who took the formal name of Phibunsongkhram. Phibun was in office when the ten year grace period under Article 65 was about to expire. But this was easily dealt with by simply amending this article to allow a further ten years of appointed second-category members of the Assembly and thus assuring the People’s Party continued dominance. Thus while the People’s Party retained the symbols of democracy, even building the Democracy Monument in 1940, and retained the structure of constitutional rule, this period can at best be described as one of “tutelary democracy.”

Prajadhipok, in his letter of resignation, was less generous in his judgment:

> I have never had any objection to handing over to all the people the sovereign power I have held. But I never intended to hand this sovereignty over to an individual or a party who did not listen to the true voice of the people and who tried to wield absolute power.

The 1946 “Liberal” Constitution

Phibun was prime minister when Japan entered World War II and he was powerless to stop the Japanese juggernaut from landing on Thailand’s southern coast and conducting military operations against the British in Burma and Malaya. To maintain the thread of

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22 Murashima, *op cit*, p. 8
23 *Ibid*, p. 33
Thailand’s independence, Phibun collaborated with the Japanese and under pressure from them, declared war against the Allied Powers.\textsuperscript{24} To this point, cleavages in Thai politics had centred on the role of the King, the role of the military and issues concerning economic reform. Phibun’s actions allowed for a new cleavage to emerge in the choice between Axis and Allied Powers. Pridi, by now returned to Thailand and a member of Phibun’s cabinet, surreptitiously organised the Free Thai Movement and was therefore in a position to benefit from the changing tides of war to the benefit of the Allies. Phibun had exercised power as a virtual dictator over the previous years but he accepted the change in power relations and he resigned when his bill to move the capital was defeated in the Assembly in 1944.\textsuperscript{25} He was succeeded, with Pridi’s support, by Khuang Aphaiwong, leader of the conservatives and royalists and later founder of the Democrat political party.

The change in government brought a more liberal flavour to Thai politics with more open contestation of ideas and the establishment of political parties broadly representing the liberal, conservative/royalist and military cleavages. The January 1946 elections saw some thirty percent of the electorate casting votes and two parties supporting Pridi win a sizeable majority.\textsuperscript{26} Despite this position of power, Pridi, holding the post of Regent for the absent King, failed to have his nominee elected prime minister, a position given to Khuang by the Assembly. Within a couple of months, however, Pridi descended from the regency and manoeuvred his way to the prime ministership. The Assembly established a special committee to draft a new constitution and Pridi, the principal drafter of the 1932 constitutions, was again prominent.

The 1946 Permanent Constitution was based on the 1932 precedent in many of its provisions. It maintained the chapter on rights and duties of the Siamese but added the right to form political parties. It did away with the two categories of representatives but reintroduced a similar effect in the establishment of a bicameral system with the upper

\textsuperscript{25} Ibid, p. 45
\textsuperscript{26} Darling, op cit, p. 161
house named the Senate. The balance of powers in the Parliament, rested primarily with the lower house but the Senate possessed important safeguard powers in that the most important decisions, such as votes of no-confidence, royal succession, approval of treaties and consent to declarations of war were to be taken by joint sittings of the two chambers. The House of Representatives was to be popularly elected under the 1946 constitution but the Senate was to be elected by "the method of indirect and secret voting." The qualifications of members of the Senate were restrictive – they needed to hold a university Bachelor's degree or to previously have held a senior position in government. Finally, the transitory provision required the Senate to be elected within 15 days of the entry into force of the constitution by an "organ for the election of Senators...composed of persons who are members of the Assembly...on the last day before this Constitution comes into force." Pridi, well aware that this Assembly was crammed full of his supporters, had thus crafted an insurance policy to maintain his hold on the levers of power. The result was predictable:

The election of members of the Senate, on May 24 (1946) consisted of little more than Pridi's friends in the Assembly voting for the nomination of other friends as Senate members, so that both Houses were solidly manned by his supporters.

In relation to the King, the 1946 Constitution maintained his figurehead status as established in the Permanent Constitution of 1932. His legislative role was to be exercised through Parliament, his judicial power through the courts and his executive power through the Council of Ministers. His roles as head of the Siamese forces and upholder of the Buddhist faith were symbolic. Pointedly, on assumption of office, Senators and members of the House were to make a solemn declaration not of loyalty to the King, but to "uphold and observe this Constitution." It is therefore bitterly ironic that Pridi's downfall, after having constructed a republican flavoured constitutional and governance edifice to maintain his considerable power, came about because of the King.

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27 1946 Constitution, Section 24
28 1946 Constitution, Section 90
29 John Coast, Some Aspects of Siamese Politics, New York, Institute of Pacific Relations, 1953, p. 33, quoted in Darling, op cit, p. 169
30 1946 Constitution, Section 35
Having succeeded Prajadhipok upon the latter’s abdication, Ananda, a nine year old child at the time, continued his education in Switzerland and only returned to Bangkok at the end of the war. In June 1946, with the ink of the constitution hardly dry, the King died from a single gunshot wound to the head in circumstances that remain unexplained. Pridi bore the political brunt of this debacle and lost office soon thereafter.

The 1946 Constitution would not last much beyond Pridi’s political demise. A coup the following year would see its abrogation. But some of its features would have a more enduring effect. It maintained the practice begun in 1932 of having constitutions that reinforced the power of the incumbent drafter. In its transitory provision it stacked the cards in the same way as the 1932 Permanent Constitution had manipulated the appointment of second category representatives and provided for a ten year grace period. It granted wide-ranging rights to the people but, like its predecessor, qualified these as subject to the provisions of law. Finally, it crafted the Senate as a chamber clearly distinct from the lower house, established by a method other than direct election and with certain powers to safeguard the exercise of important national responsibilities and oversee the work of the people’s representatives.

**The Monarchical Constitutions**

Though never colonised, Thailand was certainly not insulated from international developments. The war-time decision to declare war on the Allies was to be punished by the victors in the form of an onerous treaty imposed by the British requiring Thailand, in spite of the post-war role of Pridi, the leader of their wartime partner, the Free Thai Movement, to provide its colonies with free rice as one of its Twenty-One Demands. It was at this point that a change in global politics would begin to have its impact on Thailand. The United States was emerging as the predominant foreign power in Asia and one of its early diplomatic steps was to dilute the British demands on Thailand in its

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efforts to shape the region to its ideals.\textsuperscript{32} The United States was watching warily as "leftist" figures such as Ho Chi Minh, Sukarno and Aung San were leading their nations' post-war nationalist movements and Pridi's earlier characterisation as a communist was cause for wariness. Over the next several decades as the Cold War hotted up in Asia, groups professing anti-communism as their credo would have the blessing of the United States.\textsuperscript{33} The era of conservative and military power would now overwhelm the republican and populist rhetoric of the People's Party.

The November 1947 coup by retired and serving military officers abrogated the 1946 Constitution and replaced it with the 1947 Provisional Constitution which remained in force until the promulgation of the Permanent Constitution of 1949. While the military and royalist persuasions were distinct, the two groups saw advantage in cooperation at this point. The royalists needed to reclaim ground usurped by the People's Party and the military needed the legitimacy that royal approval might bring. The fact that the new monarch, Bhumibol, was studying in Switzerland at the time provided comfort to the military group that effective power would remain in its hands. The 1947 Provisional Constitution confirmed the basic principle of constitutionality in that the sovereign's power had to be exercised in conformity with the constitution, but it elevated the King above the role of figurehead and returned to the King a number of personal powers including the right to appoint a Supreme State Council of five members who would act as the Council of Regency in the King's absence.\textsuperscript{34} It was the King who would appoint the prime minister, a decision that required a counter signature from the President of the Supreme State Council, himself appointed by the King. The constitution retained the Senate but made it the same size as the lower house (100 representatives) and changed the appointing authority by granting that power to the King. "The King exercises the legislative power through Parliament and appoints members of the Senate,"\textsuperscript{35} a task that needed to be accomplished within 15 days from the date of entry into force of the 1947 Provisional Constitution and thus well before the next batch of elected representatives

\textsuperscript{32} Ibid
\textsuperscript{34} Kobkua, *op cit*, p. 49
\textsuperscript{35} Provisional Constitution of 1947, section 6
would take their seats. Another key amendment concerned the right of royal veto. Whereas the People’s Party constitutions had all simply granted the King a right to delay legislation which could eventually be passed by simple majority, the 1947 Provisional Constitution required the King to sign a bill into law thus establishing an effective veto power over legislation.

An astute monarch, armed with these powers, could wield considerable authority as recognised by the American ambassador of the day when he noted that the constitution “provides only nominal and partial curbing of the powers enjoyed by an absolute monarch.” An example of the use of the royal prerogative came as a shock to the coup group when they presented the Regent, Prince Rangsit, with a list of recommended appointees to the Senate. The Regent ignored the list and appointed the one hundred members independently with none appointed from among the coup group.

In 1948 Phibun was reappointed as prime minister despite his wartime activities but the 1947 Provisional Constitution limited his control over the exercise of the new powers of the throne. The Parliament elected in 1948 joined the appointed Senate to establish a constituent assembly to draft a permanent constitution. The draft was presented to parliament which could only accept or reject it and did not have the power to amend it. Bolstered by the members of the appointed Senate and enjoying the support of the King, it was adopted in January 1949 by a comfortable majority, though it is noteworthy that a majority of elected members did not support it. The Permanent Constitution of 1949, drawing inspiration from Western precedents, expanded the rights of citizens from the five brief sections in the 1947 instrument to twenty detailed sections protecting civil and property rights and allowing the formation of political parties, which had been proscribed in 1947. The structure of Parliament was retained but the Senate was made the senior chamber and its Speaker was designated as Speaker of the Parliament. Appointment to the Senate remained in the hands of the King with the counter signer being the President.

36 Provisional Constitution of 1947, section 96
37 Ambassador Edwin Stanton, quoted in Kobkua, op cit, p. 50
38 Darling, op cit, p. 185
39 Kobkua, op cit, p. 50
40 Darling, op cit, p. 223-224
of the Privy Council, as the Supreme State Council was renamed, itself appointed by the King though with a counter signature from the President of the Parliament in a royally virtuous circle.

The Senate had thus become the bulwark of the throne. The design of the constitution was intended to place a form of control over an executive that was largely in the hands of the military group. The mathematics remained the same as in the 1932 version of the two categories of parliamentarians but the power relationship had changed dramatically. Whereas the 1932 model was designed to support the People’s Party over the throne, the 1949 model reversed the situation. It was not by coincidence that the new power relationship represented an attempt by the landed gentry, the titled and their wealthy supporters to maintain their dominance over the peasants, the poor and the low-born, many of whom had found advancement in the military.41

The Military Constitutions

The coup group of 1947 had not reaped the expected rewards and they saw a problem looming with the imminent return of King Bhumipol who had by now completed his studies. Prime Minister Phibun had withstood two earlier coups including a violent attempt by Pridi backed by the Navy, but he succumbed to the Silent Coup in November 1951, led by Army General Sarit Thanarat and Police General Phao Sriyanond. Though he was retained as the coup group’s prime minister, little else remained the same. The 1949 Permanent Constitution was abrogated and replaced by an amended version of the 1932 Permanent Constitution. The bicameral Parliament was abolished and with it went the troublesome Senate. In its place a new Assembly of 123 members, initially appointed but thereafter to return to the two category method with half to be elected in a ballot in which political parties could not participate. 96 army and police officers were appointed to the Assembly.42 The reasons for the coup were stated as communist aggression and widespread corruption which could not be properly addressed under the 1949 Permanent

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41 Ibid, p. 230
42 Ibid, p. 241
Constitution with the Senate cited as an especially serious obstacle.\textsuperscript{43} The Phibun government now became the darling of the United States which “became less interested in assisting the evolution of constitutional government in Thailand and more concerned with providing security for all of Southeast Asia.”\textsuperscript{44} With the stalemate of the Korean War demonstrating the reality of the Cold War, the unarticulated but nevertheless immutable truth of Thai governance for the next two decades was that it would be in military hands.

The young King returned to Bangkok to be confronted by the \textit{fait accompli} of the Silent Coup. The return to the amended version of the 1932 Permanent Constitution meant a return to the figurehead status with no direct power over policy. He was, however, able to extract one concession from the military in return for the legitimacy he could offer in signing into law the Permanent Constitution in March 1952. After several months of negotiations he was able to secure independent jurisdiction over his personal affairs – to appoint his own members of the Privy Council, to run his own household and to command the royal guard.\textsuperscript{45} While politically sidelined, King Bhumipol could at least conduct the affairs of the throne with a degree of confidence that he was not completely in thrall to the military.

Military dominance was now a fact but infighting among its leaders, in particular Phibun, Sarit and Phao, was its corollary. By 1955 Phibun had achieved statesman status internationally and he considered the time had come for a liberalisation of Thai politics in line with the system of his principal backer, the United States. Political parties were allowed to organise and field candidates in the 1957 elections in which Phibun’s party defeated the Democrats by both fair means and foul. The resulting instability ended in August with Sarit seizing power in a bloodless coup and banishing his erstwhile colleagues; Phibun to Cambodia and Phao to Switzerland.\textsuperscript{46} Sarit staged a second coup in 1958 after which he dissolved Parliament and abrogated the 1952 Permanent Constitution

\textsuperscript{43} Ibid, p. 242
\textsuperscript{44} Ibid, p. 197
\textsuperscript{45} Kobkua, \textit{op cit}, p. 46
\textsuperscript{46} Darling, \textit{op cit}, p. 335
and put in its place the Interim Constitution of 1959 providing for a 240 appointed member (single category) Assembly with the dual function of passing Sarit’s laws and drafting a new constitution. By the time he formally assumed the prime ministership in 1959, Sarit had the powers described as “virtually those of an absolute monarch”\(^{47}\) largely by virtue of the 1959 Interim Constitution’s infamous Section 17:

During the enforcement of the present Constitution wherever the Prime Minister deems appropriate for the purpose of repressing or suppressing actions whether of internal or external origin which jeopardise the national security or the Throne or subvert or threaten law and order, the Prime Minister, by resolution of the Council of Ministers, is empowered to issue orders or take steps accordingly. Such orders or steps shall be considered legal.

Sarit was in no hurry to draft a permanent constitution. At one point he argued that it was not possible to promulgate a new constitution until the people achieved “national discipline.”\(^{48}\) The Interim Constitution of 1959 remained in force for almost a decade to be replaced in 1968 by a Permanent Constitution. Bicameralism returned to Thailand with an elected lower house and an appointed Senate, this time effectively appointed by the prime minister who countersigned the King’s recommendations. General Thanom Kittikachorn, initially promoted to the prime ministership by Sarit in 1958 and then replaced by him a year later, returned to the post in 1963 upon Sarit’s death. In November 1971, facing internal difficulties and a changing external environment, Thanom took the well trodden path of staging his own coup. It was accompanied by the usual measures – the abrogation the 1968 Permanent Constitution, disbanding of parliament, banning of political parties and ruling by emergency powers. The 1972 Interim Constitution was enacted mimicking the absolute powers granted under the 1959 Interim Constitution. Once again, the Senate was abolished in favour of the appointed unicameral chamber subservient to the executive’s wishes.

\(^{47}\) US Embassy reporting quoted in Kobkua, *op cit*, p. 55
\(^{48}\) Quoted in Darling, *op cit*, p. 377
Phibun’s brief flirtation with democracy in the latter period of his incumbency was very much an exception within the two decades of military constitutions. Authoritarian rule was the successful formula upheld by two positive foundations – support from the United States expressed in terms of military and economic aid and the blessing of royal legitimacy obtained by respecting and indeed honouring the throne’s apolitical independence. Two further foundations of military rule can be expressed in negative terms – the struggle against the ever useful communist threat and the rhetoric of combating corruption by selfish politicians. In the governance architecture devised by the military in this critical period, the Senate had virtually no role to play.

**Challenge and Compromise**

The military authoritarian formula started losing its traction with the 1971 coup. The Nixon Doctrine of 1969 put Thailand on notice that the future may not simply be business as usual in terms of the United States acting as the military’s backstop. King Bhumipol had now withstood the difficult early years and had built his capital of personal prestige which he could choose to wield with some discretion. The public was tiring of the anti-corruption rhetoric as it was clear that self-enrichment and nepotism were fixed stars in the military constellation. Even the anti-communist rhetoric was becoming stale as it became ever clearer that the Vietnam War was predominantly of a nationalist character while at the same time, China was being welcomed onto the international stage. At this point a new actor appeared on the Thai political stage – the student movement took to the streets, no doubt emboldened by the example of their American and European counterparts. The issue on which the students focused was the demand for a permanent constitution.49 These demands were met by repression and the King decided to step in advising Thanom to leave the country.

King Bhumipol now decided to spend some of his political capital. He selected and appointed Sanya Thammasak, rector of Thammasat University which had been the

epicentre of the student protests, as prime minister of an interim administration. He announced the formation of a National Convention of some 2,346 persons that he and his advisers had selected from all walks of life (though not from the student movement)\(^5\) to act as an electoral college for the selection of a 240 seat National Assembly tasked with drafting within six months a permanent constitution "that would reflect the socio-political aspirations of the people."\(^6\) The result, the 1974 Permanent Constitution, is sometimes called the "King-People joint effort Constitution."\(^7\) It was considered to be the most liberal political charter to date because:

- it deleted the authoritarian provisions such as the infamous Article 17
- it attempted to initiate social re-engineering through initiatives in land reform and local self-government
- it dusted off provisions from the 1946 Constitution to prevent ministers from conducting business while in office
- it established an administrative court to hear grievances against officials
- it re-established a 100 member Senate to be appointed by the King with a counter signature from the President of the Privy Council, himself appointed by the King (Article 107)

Article 107 was intended to bring the King back into the political process as an arbiter between the legislative and executive branches by way of control of the Senate, a formula that had been attempted in the 1947 Interim Constitution. King Bhumipol signed the new charter while making clear his disagreement with this article because he said "it violates the principle that the King is above politics."\(^8\) Several months later this article of the constitution was amended to make the prime minister the counter signing official and thus confirm the Senate as a political institution whose members would have a patronage relationship with the prime minister rather than with the monarch.

\(^5\) Ibid, p. 196
\(^6\) Kobkua, op cit, p. 170
\(^7\) Ibid, 58
\(^8\) Quoted in Kobkua, op cit, p. 59
The political architecture ushered in by the new constitution did not deliver the hoped for stable and competent governance. Thailand’s social and economic problems were too deep; expectations were unrealistically high; the political parties at the helm were too raw and avaricious; the constitutional design did not have time to bed down; and the body politic was polarising at an alarming rate between an increasingly radicalised student body and strident nationalist groups in league with business and military interests. The door to a democratic system was ajar for only a few turbulent years before it was slammed shut. As parliamentary politics in 1975 and 1976 lurched between crisis and stalemate under the alternating prime ministerships of rival brothers Seni, Kukrit and again Seni Pramoj, the military prepared for a coup. The October 1976 violent attack on students at Thammasat University provided the trigger and the King, no doubt disappointed in the results of the parliamentary system he had inaugurated, lent his support.\footnote{Girling, \textit{op cit}, p. 213} The communist bogey together with tacit royal support was sufficient foundation for the coup and its broad acceptance.

The 1974 Permanent Constitution proved to be as much of a misnomer as its 1932, 1949, 1952 and 1968 namesakes. In its place within days of the coup came the Constitution of 22 October 1976 promulgated by royal decree and counter signed by the head of the National Administrative Reform Council that had staged the coup. Harking back to Article 17 of 1959, the 1976 Permanent Constitution authorised the prime minister “to make any order or take any action” he “deems necessary to prevent, restrain and suppress any act subverting the stability of the Kingdom” with the understanding that such actions “shall be considered lawful.”\footnote{1976 Permanent Constitution, section 21} Political parties were again banned and the King, in consultation with the Prime Minister, was authorised to appoint a 360-person unicameral Assembly. For the third time in Thailand’s constitutional history, the Senate was discarded. But as Thailand has come to understand, military action does not imply military unity. The next coup was an internal military affair and an early step was the abrogation of the constitution. The 1977 Constitution was, however, little different save for a few cosmetic changes. The 1977 military drafters saw no need for a Senate.
General Kriangsak Chamanand had by now taken the prime ministership and he saw value in regularising the governance system to give the appearance of constitutionality while cementing his incumbency. The 1978 Constitution returned Thailand to bicameralism as the elected lower house of 301 members was joined by an appointed Senate of 225. The role of the Senate was considerably enhanced in line with previous practice to employ this chamber as a balance to any adventurist legislation against establishment interests that the House may propose. Accordingly, the transitional provisions required no-confidence votes and legislation on issues of national security, national economy, the throne and the budget to be passed by a joint sitting of the two houses. A 225-person Senate would only require a handful of lower house representatives to vote with it to effectively block legislation unappealing to the executive, on the assumption, of course, that the Senators would do the executive’s bidding. This result was achieved by the simple means of having Senators directly appointed by the prime minister without even ceremonial recourse to the King. The result was that whereas the last Senate under the 1974 Permanent Constitution contained no serving military officers, the Kriangsak Senate had 194 serving or retired military men, mainly from the army. Having neatly stacked the deck, Kriangsak was ready to play politics and hold elections. He was eventually forced to resign in 1980 because of an impending censure he could not head off in the legislature triggered by public anger at the petrol price rises international circumstance had forced upon him.

Into the breach stepped Kriangsak’s Defence Minister and Commander-in-Chief of the Army, General Prem Tinsulanonda. Vietnam’s invasion of Cambodia in December 1978 had prepared the Thai public to expect continued military rule, but the new leader was quite dissimilar to his uniformed predecessors. Prem brought a new style to Thai politics. Soft-spoken, polite and modest, he sought consensus and valued merit, particularly in his

56 Girling, *op cit*, p. 223
57 *Ibid*
58 *Ibid*
Cabinet appointments. Perhaps he benefited from the fact that he had not made any of the traditional moves to acquire power like belonging to a military faction or currying favour with wealthy business people. He inherited the constitutional system designed to keep Kriangsak in power and turned it to his own advantage astutely using the appointed Senate to dispense patronage and influence the legislature. He built a close relationship with the King that reflected well on him in the eyes of the public. He oversaw two general elections, put down two coups and survived a number of assassination attempts, all adding to his aura as a leader of competence and results. Under his leadership Thailand enjoyed a sense of normality in a system of constrained democracy accompanied by relatively broad civic freedom and benefiting from a booming economy. It may have been because of that sense of normality that the Bangkok public eventually turned against Prem concerned that he had never sought elected office. In 1988 the office went to another former general, Chatichai Choonhavan, who had left the military and turned to electoral politics. He governed under the 1978 Constitution which was now looking to challenge the 1932 Permanent Constitution record of almost 14 years of effectivity.

The question being asked by the Thai body politic was whether the era of coups was at an end. Clearly the era of the military in politics was still at hand, but had a system emerged whereby the army was prepared to play by a set of rules that seemed to suit them without the need for recourse to extra-constitutional means? If so, had the appointed Senate found a permanent place in this governance architecture as the guarantor of executive dominance? All these questions were to be answered in the negative when General Suchinda Krapayoon and the National Peace Keeping Council (NPKC) staged the next coup in 1991 citing the Chatichai government’s unbridled corruption. The 1978

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63 Warren, op cit, pp. 165-166
Constitution was abrogated and an interim constitution promulgated by the new junta whereby for the fourth time in Thai constitutional history the Senate was abolished and a unicameral legislature put in place composed of 292 appointed members including 148 military officers and their supporters. Suchinda understood that he could not immediately claim the country’s leadership and so he appointed the respected former diplomat Anand Panyarachun to that office with the specific task of drafting a new constitution.

Like previous successful coup leaders, the NPKC intended to shape a constitution consonant with its interests but the growing level of sophistication of the Bangkok public meant that a certain transparency was required of the process. The Legislative Assembly appointed a 20 member drafting committee which was to report back to the Assembly’s Scrutiny Committee. Unlike the usual fait accompli, this more elaborate and transparent process allowed the deliberative segment of the Bangkok public to involve itself. The NPKC began the exercise wanting an outcome whereby a façade of electoral democracy would be subservient to executive decision making in the hands of the NPKC. The usual tool for this outcome was the Senate and accordingly the first draft had a fully appointed Senate that was required to participate in votes by both houses jointly on no-confidence debates. The Scrutiny Committee, however, decided to strengthen further NPKC control by enlarging the Senate to the same size as the House (360 members) and making virtually all important issues subject to a joint vote, as well as allowing military and civilian officials to concurrently hold cabinet posts.

The protest greeting these obvious manipulations of the parliamentary system was conducted by both the political parties and some members of the public with the students in the vanguard. Criticism by Prime Minister Anand tipped the balance and forced the NPKC to back down with Suchinda promising that he would not take the prime

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67 Ananya, op cit, p. 319
68 Ibid, p. 320
ministership after the next elections.\textsuperscript{69} The 1991 Constitution was adopted on 9 December maintaining bicameralism with a National Assembly comprising a House of Representatives and a Senate but limiting the role of that Senate: its size fixed by a nexus to two-thirds the size of the House;\textsuperscript{70} joint sessions were required for censure debates and constitutional amendments;\textsuperscript{71} the Senate only had the power to delay legislation;\textsuperscript{72} and a Senator was described as “not being a member or holding any position or being counsellor of any political party.”\textsuperscript{73} The appointed Senate thus was a powerful tool in the hands of the appointing authority but it still left room for the political parties in the House to exert influence over the affairs of state.

\textbf{Drafting the People’s Constitution}

The elections of March 1992 returned a coalition of parties in support of the Suchinda military clique but in view of the promise by Suchinda a few months earlier not to take the prime ministership, the post was given to Narong Wongwan, who turned out to be on a United States watch list as a suspected drug smuggler and was promptly forced to step aside.\textsuperscript{74} Suchinda then assumed the position triggering massive protests in Bangkok led by another former general, Chamlong Srimuang who resigned his post as Governor of Bangkok to concentrate on blocking Suchinda, and, according to one analysis, to open the door to national leadership.\textsuperscript{75} In what would subsequently come to be known as Black May, the armed forces opened fire on demonstrators of whom nearly 100 were killed.\textsuperscript{76} The King stepped in at this point to summon both Suchinda and Chamlong who had to endure on prime time TV a stern royal lecture while kneeling heads bowed in ceremonial

\begin{flushright}
\textsuperscript{69} Ibid
\textsuperscript{70} 1991 Constitution, Section 100
\textsuperscript{71} 1991 Constitution, Section 160
\textsuperscript{72} 1991 Constitution, Sections 144-151
\textsuperscript{73} 1991 Constitution, Section 100
\end{flushright}
obeisance before the monarch, effectively ending both their political careers.\textsuperscript{77} While the
crisis had been brewing the pro-military legislature had refused to amend the role of the
Senate as demanded by the demonstrators, but after the Black May episode and the
King’s intervention, they had no choice but to appease the public and limit the Senate to a
chamber primarily responsible for scrutiny of legislation.\textsuperscript{78} Anand was brought back by
the King as prime minister to prepare fresh elections in September in which a coalition of
the protesting parties led by the Democrats took power with Chuan Leekpai at the helm.

While the Senate’s powers had been curtailed, its membership remained largely in
military hands as engineered by the NPKC. The ensuing debate on the need for reform of
the governance structure focused, among other issues, on the role and composition of the
Senate as a key issue in a snowballing political reform campaign. Left to the politicians,
the debate would have been stillborn. Chuan was a cautious and legally-minded leader
who preferred not to initiate political steps unless he was confident he knew where they
were heading.\textsuperscript{79} He also understood that obstacles to constitutional reform would come
from within his own four party coalition, from the opposition parties and from the Senate
which remained the channel through which the military could exercise influence over
politics.\textsuperscript{80} The protests against Suchinda had, however, gathered momentum and the
movement was fairly broadly based among Bangkok’s middle class including politicians,
bureaucrats, some former military officers, NGO leaders, business people and veterans
from the student revolts of the 1970s.\textsuperscript{81} Pressure for change was now coming in the
parliamentary process, via the academy, through the media and from activists including
serial faster Chalard Vorachat who had staged a hunger strike as part of the anti-Suchinda
forces and now protested in this manner in calling for a new constitution, supported by up
to 10,000 demonstrators.\textsuperscript{82}

\textsuperscript{77} Ibid
\textsuperscript{78} Surin, op cit, p. 334
\textsuperscript{79} Suchit Bunbongkarn, \textit{Thailand: State of the Nation}, Singapore, Institute of Southeast Asian Studies
(1996) p. 34
pp. 194-200, p. 194
\textsuperscript{81} Sukhumbhand Paribatra, “State and Society in Thailand: How Fragile the Democracy?” \textit{Asian Survey}
(1993) Vol. 33, No. 9, pp. 879-893, p. 888
\textsuperscript{82} Kusuma, \textit{op cit}, p. 195
The pressure for a new constitution was soon matched by Thailand’s deliberative elite: Chai-anan Samudavanija led the Institute for Public Policy Studies in considered criticisms of the existing constitutional system; a parliamentary committee under the unlikely chairmanship of Chumphon Silpa-archa was established in 1993 to consider constitutional revision; Amon Chantasombun published an influential paper in 1994 on the benefits of constitutionalism; and Prawet Wasi was named as chair of the Democracy Development Committee formed by parliament as a way to respond to the growing pressure.83 Prawet’s report contained deep criticisms of Thailand’s political structure and political culture and recommended far-ranging steps to deal with the problems. Among the recommendations were measures to address the problem of parliamentary “dictatorship”, which had replaced the military kind, by way of a redesign of the governance system. The concept underlying Prawet’s recommendations was the need to find means of limiting government power.84 Having lost faith in the military, the politicians and the bureaucrats to limit their own powers, the challenge facing Thailand was to find a means of getting “the people” involved.

The Chuan government comprised of anti-Suchinda parties had appeared to provide the most propitious setting for advancing the constitutional reform agenda. The return of a new conservative government after the 1995 elections led by provincial politician Banham Silpa-archa seemed to many observers to be a step backwards.85 But the fact that the prime minister’s brother Chumphon had chaired a committee recommending constitutional change had an impact. The Banham government announced it would seek a new charter and succeeded in September 1996 in passing the required amendment to section 211 of the 1991 Constitution to formally commence the process two weeks before a no-confidence motion forced it out of office.86 Former General Chavalit Yongchaiyut’s

incoming government could not stop the process of establishing the Constitutional Drafting Assembly (CDA).

The CDA had a broad mandate to reform the political process and a requirement to adopt a participatory approach in developing its draft charter.\textsuperscript{87} It was to have 99 members of whom 76 were to be provincial representatives and 23 to be experts in politics, law and administration. Nearly twenty thousand people registered to be provincial candidates and they held internal elections leading to the eventual nomination of the representatives of each of the 76 provinces, while the 23 experts were selected by parliament from nominations submitted by universities.\textsuperscript{88} Uthai Pimchaichon was elected as its president.

The CDA had 240 days to consult, draft and adopt the text of a new constitution which would then be put to parliament for an up or down vote, and if the latter, to a national referendum in which it could be approved by a simple majority vote.

The possible requirement for a referendum placed particular pressure on the CDA to win popular support because if the parliamentarians believed that a referendum would fail, there would be very little pressure on them to vote for an instrument that threatened their interests. The breadth of public involvement in its drafting distinguishes the 1997 Constitution from all others in Thai history. Although the 99 members came from diverse backgrounds, they proved to the public that they could work together effectively under the intense pressure of a tight timetable.\textsuperscript{89} The drafts were widely disseminated by the press and first round CDA candidates helped to publicise the issues in public meetings.\textsuperscript{90} The preliminary draft was adopted by the CDA by a vote of 89 to 1 and the final version was adopted by 92 to 4 allowing it to be submitted to the parliament in September 1997.\textsuperscript{91}

The draft charter attempted to re-engineer Thailand’s political process thus triggering opposition from certain power holders. The military retreated to barracks after Black May

\textsuperscript{87} Ibid
\textsuperscript{88} Ibid, p. 12
\textsuperscript{89} Suchit Bunbongkarn, “Thailand’s Successful Reforms”, \textit{Journal of Democracy} (1999) Vol. 10, No. 4, pp. 54-68, p. 60
\textsuperscript{90} Klein, \textit{op cit}, p. 12
\textsuperscript{91} Ibid, pp. 12-13
and even five years later were in a weak position to challenge the draft head-on but could
take a swipe at some of its provisions. A military panel singled out for criticism Section
63 which criminalised coup attempts and Section 65 which authorised resistance to
coups.\textsuperscript{92} The Interior Ministry was another major loser in that its powerful position as
manager of elections would now go to an independent authority and many of its direct
powers over provincial affairs would be lost to local officials under the decentralisation
provisions of the draft. Interior Minister Sanoh Thiengthong attempted to whip up
opposition to the draft in the provinces even threatening to resurrect the paramilitary
village scouts organisation.\textsuperscript{93} While a saving provision protected incumbents and their
predecessors from the requirement that they needed to hold a Bachelor’s degree to
qualify as a candidate for election to parliament, many political party officials were
particularly threatened by this provision.\textsuperscript{94} Though serving parliamentarians could run for
office under the new constitution, many nevertheless saw the charter as “a drastic
challenge to their vested interests.”\textsuperscript{95}

In normal circumstances this alliance may have been sufficiently powerful to derail the
process, but parallel with the constitutional drafting process, an acute economic crisis was
building for which “severe governance problems were a key underlying cause.”\textsuperscript{96} The
economic crisis became the new constitution’s key ally because it discredited the current
political orthodoxy and it motivated reform elements to cooperate in pushing for passage
of the charter.\textsuperscript{97} The Chavalit government was left with little option but to acquiesce in its
passage and it was duly passed at a joint sitting of the two chambers by a vote of 518 for,
16 against and 17 abstentions and presented to the King who signed it on 11 October
1997 on which date it entered into force and became Thailand’s sixteenth constitution.\textsuperscript{98}

\textsuperscript{92} Neil A. Englehart, “Democracy and the Thai Middle Class - Globalization, Modernization and
Constitutional Change”, \textit{Asia Survey} (2003) Vol. 43, No. 2, pp. 253-279, p. 268
\textsuperscript{93} Connors, \textit{op cit}, p. 217
\textsuperscript{94} (in Article 107) Borwornsak and Burns, \textit{op cit}, p. 243
\textsuperscript{95} Anand Panyarachun, “Democracy in Thailand”, \textit{Annual Address of the Centre for Democratic
Institutions} (24 November 1999, Australian National University) pp. 1-5
525-547, p. 530
\textsuperscript{98} Borwornsak and Burns, \textit{op cit}, p. 243
Table 5.1 – Effectivity of Constitutions of Thailand, 1932-2007

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<th>No.</th>
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<td>1</td>
<td>The Interim Constitution of 1932</td>
<td>27 June 1932 - 1 December 1932</td>
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<td>2</td>
<td>The Permanent Constitution of 1932</td>
<td>10 December 1932 - 9 May 1946</td>
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<td>The Interim Constitution of 1947</td>
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<td>The Permanent Constitution of 1949</td>
<td>23 March 1949 - 29 November 1951</td>
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<td>The Permanent Constitution of 1952</td>
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<td>The Interim Constitution of 1959</td>
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<td>The Permanent Constitution of 1968</td>
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<td>The Permanent Constitution of 1972</td>
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<td>The Permanent Constitution of 1974</td>
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<td>17</td>
<td>The Interim Constitution of 2006</td>
<td>1 October 2006 - 24 August 2007</td>
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<td>18</td>
<td>The Constitution of 2007</td>
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Reforming Thai Politics through the 1997 Constitution

The CDA set out to reform politics in Thailand and the constitution was the instrument at its disposal. To make this an effective agent of change, they had the problem of elevating the constitution to a point of authority in the Thai system that it had never previously enjoyed. The main means of achieving this outcome was the informal designation of the instrument as the “People’s Constitution” to reflect the role of the “people” in its creation in the hope that this would translate into their defence of their constitution. Accordingly, the CDA was attempting to construct popular constitutionalism.

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The legal foundation of this construction can be found in Section 6 with the assertion that “The Constitution is the highest law of the country” and its corollary that “The provision of any law, act or decree which is contrary to or inconsistent with this Constitution, shall be unenforceable.” This is the basic requirement of constitutionalism and while other constitutions have had similar clauses\textsuperscript{100}, the 1997 Constitution is the first of Thailand’s many constitutions to make the supremacy of the constitution explicit in this way without the usual rider that various aspects are subject to the provisions of subsequent laws.\textsuperscript{101} Other sections reinforce the authority of the constitution. Section 27 in the enlarged chapter on the rights and liberties of the Thai people, binds all branches of government to respect these rights and liberties in making, enforcing or interpreting laws. Section 29 makes clear that any restriction to these rights and liberties must be in accordance with the constitution, though this provision does not apply retroactively to existing regulations (Section 335(1)).

Yet asserting constitutional authority is inadequate without machinery to enforce it. Thailand’s practice since 1932 has basically been one of executive interpretation of the constitution rather than judicial review. The 1997 Constitution attempted to rectify this by vesting in a newly established Constitutional Court the right to determine the constitutionality of any law (Section 262), such finding being binding on all other branches of government (Section 268). The judges of the Constitutional Court were thus made the guardians of the constitution. Who should guard these guardians? The judges were appointed by the King on the advice of the Senate in a process whereby seven of the fifteen judges were selected by their judicial peers and the remaining eight were elected by the Senate after an elaborate nomination process involving university faculties of law and political science (Section 257). Crucially, the Senate was given the power to remove a Constitutional Court judge by a three-fifths majority (Section 260(6)).

\textsuperscript{100} Permanent Constitution of 1946 (Section 87), Interim Constitution of 1947 (Section 95), Permanent Constitution of 1949 (Section 178), Permanent Constitution of 1952 (Section 113), Permanent Constitution of 1974 (Section 5), Constitution of 1978 (Section 5), Constitution of 1991 (Section 5)

\textsuperscript{101} Klein, op cit, p. 16
Having set the foundation stone of constitutionalism, the CDA now had to focus on what it wished to achieve in its re-engineering endeavour. While this extraordinarily long document of 336 sections (the English translation of which runs to over 40,000 words) touches on many aspects of public life, the main thrusts can be identified under three headings – structure of government, citizen participation and, of most interest in relation to the role of the Senate, accountability.

Structure of Government

The most fundamental requirement of a constitution is to set out the mechanics of the system of government. The CDA faced several conundrums in this regard. It had to determine the position of the monarch at a time when the reigning monarch enjoyed unprecedented popular prestige. It had to resolve the issue of whether the prime minister must be an elected official with the distinct memory of the King having wisely appointed a non-elected prime minister in the form of Anand Panyarachun when the nation was in turmoil after Black May. And it had to set out the role of the parliament and decide whether to retain bicameralism, whether to retain appointed Senators and how to construct the relationship of cabinet to parliament.

The basic understanding in relation to the role of the monarch had been settled for some decades – he was to be a ceremonial head of state with autonomy over his household affairs and over the appointment of his Privy Council. The 1997 Constitution retains this understanding and largely follows the terms of the 1991 Constitution. The most significant difference is the deletion of the stipulation in the 1991 Constitution requiring the State (Section 59) and the armed forces (Section 60) to “protect the institution of kingship.” The CDA considered this to be self-evident and was concerned that it may give the armed forces a misimpression about its role and an excuse to conduct coups. Events in 2006 would demonstrate that the armed forces did not require a constitutional provision to assume this role. In any case, the King retained his role as head of the armed forces (Section 10). The CDA debated long and hard as to whether the constitution

102 Borwornsak Uwanno, interview of 5 November 2006
should explicitly name Buddhism as the national religion and decided against this course of action. It nevertheless required the King to be a Buddhist but his constitutional role is not as upholder of Buddhism but as “upholder of religions” (Section 9). In terms of appointments the King acts on the advice of elected officials, be they the Prime Minister, cabinet ministers or the President of the Senate. In relation to legislation, the King has the power of delay but not veto. Like many ceremonial heads of state, the King also has the ultimate power to dissolve the House of Representatives and thus require a new election (Section 116). Interestingly, the provision limits this role to being available “only once under the same circumstances” suggesting that if the same government is returned to power, the King must accept the will of the people.

In relation to the position of prime minister, the CDA accepted the lessons of Thai history and crafted a situation where the political leader of the nation must be popularly elected but is not subject to the day-to-day requirements of parliamentary representative politics. The King could only appoint a prime minister from the House of Representatives (Section 201). The prime minister must gain a simple majority in a vote of the House (Section 202). The military leader coming from the barracks or the anointed saviour coming from business or the bureaucracy was not a prime ministerial option under the 1997 Constitution. However, once appointed as prime minister, or as a cabinet minister in the Council of Ministers, a Member of the House of Representatives was required to resign this parliamentary position (Section 118). This design, requiring the legitimacy of being elected but then being free from parliamentary responsibilities in the onerous exercise of executive functions, follows the French model about which many of the leading members of the CDA were familiar. An innovation introduced in the constitution to strengthen the position of prime minister from speculative no-confidence motions was that any such motion needed to nominate the next prime minister (Section 185). Another way the design strengthened the prime minister was its psychological impact on appointed members of the cabinet through encouraging cabinet solidarity in that resignation from the Council of Ministers left the former Member of the House of

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Representatives with no official position. The problem with this aspect of the design, however, was the dislocation it may have caused the House in having its Members resign to become members of the cabinet. This problem was tackled by another new feature of the 1997 Constitution, the party-list system.

Having drawn from French practice, the CDA now turned to German precedent in the design of the electoral system. The constitution established a 500 member House of Representatives in which 400 Members were to be elected on the basis of single member constituencies and 100 from a party-list. Voters were thus armed with two votes for the lower house. The party lists submitted by political parties were in priority order (Section 99) and candidates on these lists were elected in proportion to the vote received by the nominating parties that passed the five percent threshold (Section 100). The major distinction between constituency and list representatives insofar as their appointment to the executive branch was concerned was that when a party-list representative was selected, his/her seat in the House was automatically filled by the next name on that party’s list, whereas when a constituency representative was appointed, his/her seat had to be filled in a by-election (Section 119). The system was designed “to allow high quality candidates, who may not be suited to the cut and thrust of electoral campaigning, to be elected and thereby form a pool from which the prime minister can select the ministry.”

The next important piece of the design of governance machinery is the Senate, which will be discussed below. What is noteworthy in the context of delivering sound executive and legislative governance was the limited role accorded to the Senate. Its members could not be selected for cabinet positions while serving their term or within a year of having resigned their Senate seat (Section 127). The Senate had no role in the formation of new governments and was not subject to a double dissolution re-election should the government fall and the House be dissolved. The Senate had powers of consultation and delay in relation to legislation but ultimately, no power of veto (Section 176). Money

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bills had to originate in the lower house (Section 169). Joint sittings of both houses, called the National Assembly under the 1997 Constitution rather than "Parliament" as in some previous versions, were required for issues of appointing a Regent, succession to the throne, the approval of treaties and amendment of the Constitution (Section 193). While all these roles were important, the most critical task of the Senate lay elsewhere.

Citizen Participation

The 1997 Constitution attempts to encourage public participation in the governance of the nation and articulated this stated policy in Section 76 requiring the State to "promote and encourage public participation in laying down policies, making decisions on political issues, preparing economic, social and political development plans, and inspecting the use of State power at all levels." This difficult objective was engineered by various provisions dealing with rights and duties of the citizenry, the machinery of government and, to a lesser extent, access to the necessary resources.

Chapter III of the 1997 Constitution is entitled "Rights and Liberties of the Thai People" and it contains 40 sections.105 It confers an extensive range of rights based on the concept of inherent human dignity. A newly articulated right is "the right to participate in the decision-making process of State officials in the performance of administrative functions which may affect his or her rights and liberties" (Section 60). This right is supported by a right to access to public information in the possession of a State agency (Section 58) with a particular right to information about a national or local government project that may impact on people's quality of life (Section 59). An important piece of information made available to the public under Section 293 concerned the assets and liabilities of the prime minister and the ministers. The right to participate was strengthened by a right to sue State agencies and instrumentalities at the national and local level (Section 62). The constitution also accords a role to certain sectoral groups (children, women, elderly,

105 Chapter III contains 3,200 words. By comparison, the Universal Declaration of Human Rights contains some 1,800 words in 30 Articles and the Canadian Charter of Rights and Freedom contains some 2,500 words in 35 Sections.
disabled and handicapped) when the House dealt with legislation affecting them (Section 190).

The constitution also confers on the public an unusual direct role in both legislation and the oversight of certain categories of officials. A legislative bill could be submitted to the National Assembly by 50,000 eligible voters after which it was to be considered in the same way as other proposed bills (Section 70). The same number of voters could petition the President of the Senate to take action to remove a prime minister, cabinet minister, parliamentarian, prosecutor general or a president of one of the major courts for reasons of malfeasance, unconstitutional behaviour or "unusual wealthiness indicative of the commission of corruption" (Section 304).

These rights are accompanied by provisions listing the duties of Thai citizens. Chapter IV lists the usual duties of upholding the nation, defending the country and obeying the law. The most specific duty is "to exercise his or her right to vote in an election" (Section 68). Compulsory voting was introduced for a number of reasons; prominent among them was the view that the high turn-out would make it too expensive to buy the required number of votes.106 Another important reason was to engineer citizen participation, at least in the electoral process. Compulsion, however, requires enforcement. The CDA considered the imposition of a fine for failure to vote but decided that this was too harsh a measure in a country with many poor people and instead opted for the more lenient penalty of the loss of the right to vote, and the loss of associated rights to run for office and sign petitions.107

Engineering citizen participation was a means of attempting to change the political culture of the Thai people and, in particular the rural people.108 The CDA recognised that re-arranging political machinery would be an insufficient basis to bring about the necessary changes. Changing political culture would require political participation through the new battery of rights and duties provided by the 1997 Constitution.

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106 Borwornsak and Burns, op cit, p. 240
107 Borwornsak Uwanno, interview of 5 November 2006
108 Borwornsak and Burns, op cit, p. 244
Accountability

"Thailand has been unable to moderate the vicious cycle of corruption and malfeasance in office that has become endemic."oten "Corruption has been one of the pretexts used by the Thai military to legitimise coups." The evidence for these statements invariably arises after the strongman has been forced from office. Seizure of wealth occurred after the death of Sarit in 1963, the ouster of Thanom in 1973, the coup against Chatichai in 1991 and in the wake of the coup against Thaksin in 2006. Successful prosecutions while in office have been exceedingly rare in Thailand. Between 1977 and 1994, the Counter Corruption and Malfeasance Commission (CCMC) under the responsibility of the prime minister of the day conducted over twenty thousand case investigations leading to just 15 punitive results. The challenge for the CDA was to devise an integrity system to keep corruption of incumbents down to more tolerable levels rather than relying on political expediency to punish them after they had lost power. To achieve this end, the 1997 Constitution engineered many provisions to combat vote buying and other forms of political corruption, but the most far-reaching step was the creation of a fourth branch of government responsible for oversight functions.

The fourth branch of government took the form of eight new watchdog agencies to work alongside the established courts of justice and the new Constitutional Court:

1. The Election Commission to conduct elections at national and local levels armed with the power to order a new election if it had "convincing evidence" that the election "has not proceeded in an honest and fair manner" (Section 145(4)).
2. The National Counter Corruption Commission (NCCC) to conduct investigations into cases of corruption, malfeasance and unusual wealth and to vet asset

109 Klein, op cit, p. 34
111 Statistics and Evaluation Branch, Planning and Research Division, Office of CCMC, reproduced in unpublished first draft of Borwornsak Uwanno, "Depoliticizing Key Institutions for Combating Corruption: Case Study of the New Thai Constitution" provided by author.
112 Borwornsak(2001), op cit, p. 190
declarations by parliamentarians and high officials. Importantly, the constitution foreshadowed that the NCCC “shall take further action” if it decided that an offence has been committed (Section 301(3)).

3. The State Audit Commission (Section 312).

4. Three Ombudsmen to receive complaints, report to parliament and, crucially, exercise a power to submit a case to the Constitutional or Administrative Courts (Section 198).

5. The National Human Rights Commission to investigate human rights breaches, propose policies to the government or parliament supported by a power “to demand relevant documents or evidence from any person or summon any person to give statements of fact” (Section 200).

6. The Constitutional Court to deal with all cases of constitutional interpretation including advisory opinions (Section 262) and whose decisions were binding on all other branches of government and all other courts (Section 268).

7. The Administrative Courts to hear non-constitutional public law cases including citizens’ charges against state officials (Section 276).

8. A Criminal Division for Persons Holding Political Positions of the Supreme Court of Justice to hear criminal proceedings against a parliamentarian or high government official accused of corruption (Section 308).

The question nagging away at the CDA was how to make these watchdog agencies perform their functions adequately when their various predecessor bodies such as the CCMC had failed so miserably. In response, the CDA adopted four principles to guide them in the design of these agencies: comprehensiveness, depoliticisation and independence, reinforcement of powers, and checks and balances.¹¹³

Comprehensiveness was achieved by the breadth of the watchdog agencies in the fourth branch of government ranging from traditional institutions such as courts, auditors and ombudsmen to muscular adaptations of institutions such as the Electoral Commission

¹¹³ Ibid, p. 186
with independent decision making, the NCCC with the right to initiate investigations, and a human rights commission with the power to compel evidence.

Because the politicisation of appointment processes was the main means by which power holders ensured their control over public decisions, the CDA gave particular attention to devising appointment processes that were based on merit rather than political connections. This was achieved by separating the nomination and selection processes and detailing the steps required. Different processes were devised for the various agencies but they had an underlying logic of diffusing the nomination process into various sets of hands while making most appointments on the basis of the decisions of elected officials. In the case of the NCCC, nominations were made by a committee comprising the three presidents of the major courts, seven academics selected by the rectors of all state universities, and five representatives of political parties (Section 297). Selection committees took decisions by qualified majorities (e.g., three-fourths of committee members in the case of nomination of judges of the Constitutional Court (Section 257(1)) and usually nominated twice as many people as there were positions to fill. The various lists then went to the Senate for election by simple majority. The King made the appointments based on the advice of the Senate.

The guarantee of independence was supported by various mechanisms:

1. Single-term, non-renewable appointments of lengthy duration (9 years for the NCCC, 7 years for the Electoral Commission, and 6 years for Auditors, Ombudsmen and members of the human rights commission). Precluding their reappointment meant they did not have to court incumbents.

2. The requirement that these offices not be held at the same time as any other public or private office (e.g., Section 139 in relation to Electoral Commissioners). This was supposed to deal with the vexed issue of conflicts of interest, a concept that does not have a Thai language translation.¹¹⁴

3. In the case of the Constitutional Court (Section 256(6)) and the NCCC (Section 297) one of the qualifications for membership was not having been a member of a political party for at least three years before taking office.

4. The agencies were to be supported by an independent secretariat run autonomously by the chair of the agency rather than by an overarching civil service supervisor.

5. A constitutional requirement that "the State shall allocate adequate budgets for the independent administration" of the eight listed watchdog agencies (Section 75).

As previously noted, the watchdog agencies are endowed with significant powers to allow them to perform their functions. Previous practice in many cases had been simply to provide such bodies with recommendatory powers with action decisions in the hands of political institutions. The CDA attempted to break this pattern by giving the watchdog agencies the powers necessary to perform their functions effectively.

Finally, the integrity system required a process of checks and balances to ensure it functioned as planned. This was put in place by a system of horizontal accountability. All parliamentarians, ministers and office holders under the constitution were required to submit asset declarations to the NCCC. NCCC office holders submitted their declarations to the President of the Senate. All office holders were subject to investigation by the NCCC and impeachment by a vote of three-fifths of the Senate (Section 307). In addition, the watchdog agencies were subject to supervision by each other by way of audits, complaints to the ombudsman or proceedings under the criminal law.

Thailand's integrity system under the 1997 Constitution relied heavily on the fourth watchdog branch of government. The agencies were given enhanced powers, endowed with independence and had their financial and administrative autonomy protected by the constitution. The key to safeguarding that independence and ensuring they performed as designed was the selection, oversight and impeachment role accorded to the Senate. So in response to Juvenal's question in the title to this chapter, the answer provided by the
CDA was that the Senate would guard the guardians. The next step was to design a Senate that could faithfully discharge this responsibility.

**Designing the Senate**

In the course of Thailand’s constitutional history, the Senate had been used as an instrument of power in the hands of the various strongmen at the helm of national affairs. Apart from the various requirements of crafting a new system of governance, the CDA was acutely aware of the “need to revive public faith in the Senate.”

The CDA’s Scrutiny Committee discussed the structure of the Senate at length during several meetings in June 1997 after having received initial public feedback. Its chairman, Anand Panyarachun, set the goal at the outset of the discussions – to achieve a system whereby “wise people” would sit in the Senate to be able to review the legislation proposed by the lower house as well as to examine and, if necessary, impeach politicians. The question grappled with was how to achieve this outcome. In the course of several meetings, issues discussed included the number of Senators, their term of office, how they were to become Senators, their exact role and their relationship to the other institutions established under the constitution. At various points, the secretariat led by Borwornsak Uwanno would produce drafts for consideration.

The most vexing issue was the method of election or selection of Senators and in the course of the debates, several options were proposed:

1. Appointment by the King or the prime minister as in previous practice.

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116 Scrutiny Committee of Constitution Development Assembly, meeting 02/06/97, *Database for Thailand’s Constitution Drafting Assembly Records – Constitution of the Kingdom of Thailand B.E. 2540*, unofficial translation by Wendell Katerenchuk and Matumon Katerenchuk, hereinafter referred to as CDA Database

117 CDA Database, Scrutiny Committee meetings of 2 June 1997, 3 June 1997 and 17 June 1997
2. Self-nomination followed by province based election with the nominated persons acting as an electoral college, in the same way as the CDA itself had come into being.

3. Other forms of indirect election by electoral colleges or ex-officio positions.

4. Corporatism with election by professional associations, academic bodies, chambers of commerce, civil service categories, farmers and labourers.

5. Mixed systems blending corporatism with other forms of indirect election.

6. Direct elections.

The discussions of these options demonstrated an acute sense of the constraints under which the designers were working. Problems of history militated against an appointed Senate and there was no way to cut through this particular Gordian knot. Indirect methods of election were supported by many committee members but there was the nagging doubt that the lack of direct endorsement by the voters would undercut the legitimacy of the representatives which would in turn weaken their capacity to impeach elected politicians. Public consultations had demonstrated that there was a clear majority in favour of direct elections largely to ensure that representation from the capital did not swamp voices from the provinces. But direct elections posed other dilemmas. If political parties were involved then the upper house would be too similar to the lower house and would not have the moral authority to act as the impeaching body in the public’s eyes. This boiled down the issues to whether there might be a way to hold direct elections without involving political parties and whether a system could be engineered whereby directly elected representatives did not become “politicians”.

In relation to numbers and term of office, the calculation under scrutiny was the need to have a sufficient number of Senators that might join with opposition representatives from the lower house to be able to match the government numbers in joint sittings. Discussion ranged from a high of ratios of three quarters and two thirds of the number of lower house members to a low of 100 Senators as in the United States. Eventually, the committee settled on the figure of 200. There was also discussion of the length of a
senatorial term. This was one of the few issues on which a vote was taken in committee and resulted in a very slim majority for a six year rather than a four year term.\textsuperscript{118}

The 1997 Constitution designed a new type of Senate. It was designed to be the central pillar against corruption by exercising “control over political figures and high-ranking officials”\textsuperscript{119} and to achieve this role it had to somehow be made to be above politics. Senators were therefore to be directly elected by single non-transferable vote in either single-senator provincial constituencies (of which there were 22) or multi-senator provincial constituencies (Bangkok with 18 Senators had the most and Nakhon Ratchasima with eight senators had the next largest number) to reflect population distribution (Section 122).\textsuperscript{120} Whereas a candidate for election to the lower house was \textit{required} to be a member of a political party (Section 107(4)), a candidate for the Senate was \textit{precluded} from being a member of a political party (Section 126(1)). A candidate for the Senate was not allowed to campaign for this position beyond the “equal introductions” to be provided through state funding (Section 129). Senators were discouraged from becoming professional politicians because they could not stand for re-election at the next election (Section 126(3)). Their status above politics was reinforced by the provision that Senators could not be appointed to the Ministry (Section 127). Importantly, the political leadership of the day did not have the power to dissolve the Senate, nor could the lower house move to dissolve the upper house (Section 185).

Shielded from day-to-day politics, unable to introduce budget bills and thus unable to participate in pork barrel politics, cut off from the agenda setting contestation of executive government or the parliamentary majority, and realistically anticipating a tenure of only six years in parliament, Senators were placed in a position to discharge the oversight role the constitution drafters had in mind for them. The Senate’s first duty under this new integrity system was to participate in the selection of office holders in the fourth branch of government:

\textsuperscript{118} CDA Database, Scrutiny Committee meeting of 17 June 1997, p. 38
\textsuperscript{119} Borwornsak(2001), \textit{op cit}, p. 182
\textsuperscript{120} Secretariat of the Senate, \textit{Senate in Thailand}, Bangkok: Secretariat of the Senate of the Kingdom of Thailand, p. 69
1. Electing five Electoral Commissioners from the nominations received by the selection committee (Sections 138(4) and 143).

2. Electing three Ombudsmen (Section 196).

3. Electing a President and ten other members of the National Human Rights Commission (Section 199).

4. Electing five lawyers and three political scientists from the list submitted by the selection committee to sit on the Constitutional Court (Sections 257(2) and 261).

5. Electing two officials to sit on the fifteen-member Judicial Committee of the Courts of Justice that had responsibility for appointing and removing judges (Section 274(3)).

6. Approving appointments to the Supreme Administrative Court made by the Judicial Committee of the Administrative Courts (Section 277), approving the appointment of the President of the Supreme Administrative Court (Section 278), and electing two members to the thirteen-member Judicial Committee of the Administrative Courts (Section 279(3)).

7. Electing members of the NCCC from a list submitted by the selection committee (Section 297) and approving the appointment of the Secretary-General of the NCCC (Section 302).

8. Electing a Chairman and nine other members of the State Audit Commission and an Auditor-General (Section 312).

Accompanying selection responsibilities, the Senate was given the onerous impeachment duty. In designing this function, the drafters followed a good international practice of linking the Senate decision-making with an expert body’s investigative skills, in this case the NCCC. Having received an NCCC report that a prima facie case existed (Section 305), the Senate could vote for the impeachment by a three-fifths majority (Section 307). By creating a non-partisan chamber and insulating it from the politics of the day, by making it the “monitoring council”\textsuperscript{121} for the fourth branch of government comprising

\textsuperscript{121} Anand (2000), \textit{op cit}, p. 6
independent watchdog bodies, the 1997 Constitution intended to post the Senate as the guard who would oversee the guardians.

THE RESULT

**From the Drawing Board...**

The proof of the pudding is in the eating, not the cooking. The designers had consulted, debated, compromised, reconciled and finally settled on their blueprint. They were not unaware of the politics of their situation. For the 240 days in which they were charged with the task of reordering Thai politics and society, the 99 CDA members held decisive power. They knew, however, that their formal collective power would evaporate the moment the King promulgated their constitution. The riddle they needed to solve was how to protect the results of their decision making. Their constitutional answer was in Chapter XII under the heading “Transitory Provisions”. Six thousand of the Constitution’s forty thousand words are devoted to this section.

While the constitution was intended to transform Thai politics, it entered into force amidst the very institutions it was intended to transform. The 1997 financial crisis had forced these reluctant reformers to adopt the constitution, but how could they be forced to be faithful to it particularly in the many cases when the individuals sitting in these institutions were likely to be disadvantaged by its implementation? The CDA response was to devise a particularly prescriptive set of transition provisions. Firm deadlines were set: 45 days for the election of judges to the Constitutional Court (Section 320); 240 days to bring onto force laws on elections, the Electoral Commission and on political parties (Section 323); two years for the establishment of the NCCC (Section 321); two years for a raft of organic and structural laws (Sections 329, 334); three years for the Judicial Commission (Section 318), and five years for the implementation of certain other provisions (Section 335). Demonstrating suspicions that the existing parliament may distort the intent of the constitutional drafters, several transition provisions were quite prescriptive as to what should be the contents of the implementing legislation. Section
331 on the minimum contents of the organic law on counter corruption has 13 paragraphs. Section 326 on the organic election law has 9 paragraphs as does Section 327 on the required law to establish the Electoral Commission. Recognising that the sitting parliament would have a key role in the appointment of the first office holders of the watchdog bodies and perhaps considering that these bodies would have greater legitimacy and effectiveness if appointed through the Senators elected under the new constitution, Section 322 made clear that those elected under the “acting” institutions shall only serve half of their set terms, though these individuals would not come under the single term rule and would be able to be re-appointed for a succeeding single full term.

The CDA had thus attempted to stack the political cards in favour of reform through the 1997 Constitution. But this did not settle the battle. The opposition to the constitution remained strong and it held an important bastion in the sitting parliament. Anand Panyarachun described the state of play as follows:

Of course, there was considerable opposition. At the beginning, it came from the parliamentarians because they saw in this…revolutionary document, not a gradual erosion of their power, not a gradual erosion of their vested interests, but a drastic reduction of their power and responsibility and a drastic challenge to their vested interests. They saw this therefore as a revolutionary document precisely because it was approved through constitutional means, with public participation. They saw it as a threat, a threat to their wellbeing. They engaged in a vigorous campaign to oppose the adoption of the draft, but, for the first time in our history, public opinion prevailed.¹²²

Over the two years after the constitution was adopted, Thai politics witnessed many battles great and small over the many reform issues mandated by the constitution. The battle spaces were the chambers of parliament where the required legislation needed to be passed, the selection committees which were to seek good candidates to fill the posts

¹²² Anand (1999), *op cit*, p. 3
established under the constitution, and the deliberative spaces of the public conversation where the issues were debated and pressure exerted. One of the advantages of the forces for reform in this battle was the return of Chuan’s Democrats to power in November 1997. Because he replaced Chavalit who was seen as hostile to political reform, Chuan had little choice but to support the revolutionary instrument of reform even though this grated against his cautious temperament. As Anand put it, these parliamentarians “swallowed hard and reluctantly voted for ... the mandated reforms.”

A particularly difficult struggle occurred over the establishment of the National Human Rights Commission (NHRC). It took vigorous action from civil society groups to stop the executive from emasculating the role of the commission. The Senate’s successful involvement in finding an acceptable compromise was one of the first indications that it could play a constructive role “above politics”. Similar battles were fought over the other institutions mandated by the constitution. The antipathy of sitting parliamentarians allied to the conservatism of senior bureaucrats was a formidable force for inertia which needed to be challenged by civil society activists amongst whom were many CDA members. Ultimately, the public’s expectations abetted by a feisty free printed press triggered sufficient reform momentum to allow the watchdog institutions to be put in place in accordance with the constitution’s timetable.

**Thailand’s First Elected Senate**

On 4 March 2000, the first election took place under the provisions of the 1997 Constitution, administered by the first independent Electoral Commission, for Thailand’s first elected Senate. This was therefore a test of the design, a blooding of one of the key watchdog institutions and an early indication whether the system could produce “a new

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type of politician" as intended. A positive indication was the 72% voter turnout, well above the usual voter turnout around the 50% mark which augured well for the first test of the compulsory voting provision and also suggested that the public was interested in participating in political decision making.

Unfortunately, controversy surrounded the 2000 Senate elections from the initial registration rules to the final round of voting over a year later. Contradictory rules and interpretations by the Electoral Commission left it unclear whether incumbent parliamentarians could run for the Senate even though the transitory provisions appeared quite clearly to allow it (Section 315). Also, there was lack of clarity on what was the meaning of "other State official" as a prohibition on candidacy in Section 109 (11). The Commission had classified as part of the apparatus of State such groups as the Law Society of Thailand, the Islamic Committee of Thailand and the Science and Technology Institute of Thailand. These questions had to find their way to the Constitutional Court for resolution, in each case the decision went against the more restrictive interpretation of the Electoral Commission.

The Electoral Commission took seriously its role of combating vote buying by using its power to call a rerun of the election. The Commission suspended 78 candidates from 35 provinces. The Constitutional Court found, however, that the Commission did not have the power to disqualify candidates and the accused candidates tended to win in subsequent rounds – it eventually took five rounds of voting to elect the 200 Senators at a cost of 2.3 billion baht and then a sixth round had to be held in April 2001 in eight provinces because of subsequent complaints filed against ten elected Senators. In all,

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127 Pasuk and Baker (2000), op cit, p. 235
129 Ibid
130 Ibid
131 Ibid
132 Ibid, pp. 208-209
the 2000 Senate elections required not 76 contests, one for each province, but 306 contests!\textsuperscript{133}

The persistent urban/rural divide was again manifested in the results of the Senate elections. In Bangkok the designers seemed to get things right with many of the anticipated “new type of politician” being elected. Pramote Maiklad, long associated with the King’s development projects, topped the list while many NGO leaders (Suphon Suphaphong, Chirmsak Pinthing, Meechai Viravaidya, Khru Yui, Pratheep Ungsongtham Hata and Jon Ungphakorn) were also elected, as were academics (Kaewsan Atibhodi), Lawyers (Sak Kosaengrueng, Seri Suwanpanond) a banker (Wichian Techaphaibun) and a single politician (Chumphon Silpa-archa) who had initiated the constitutional review process in the National Assembly while his brother held the prime ministership.\textsuperscript{134}

Similar results were evident in other urban centres.

Voting in rural areas, on the other hand, demonstrated the continuing hold of local political families. One third of the Senate seats were won by spouses, children or close associates of leading politicians.\textsuperscript{135} Famous political families like the Choonhavans, the Chidchobs and the Asavahame clan all found themselves with members in the Senate.\textsuperscript{136}

The balance of the elected Senators comprised retired government officials and military officers such as former Army chief Gen. Arthit Kamglang-ek.

Among the 200 Senators was a core group of 30-40 academics and NGO activists who were able to take the lead in the first months of sittings and actively monitor the government’s actions.\textsuperscript{137} The Electoral Commission had eventually stumbled to the finish line and by asserting itself as serious about combating money politics, had put the jao pho (political godfathers) on alert that it may not be business as usual in future. Its anti-

\textsuperscript{134} Pasuk and Baker (2000), \textit{op cit}, pp. 235-236
\textsuperscript{135} Sombat, \textit{op cit}, p. 208
\textsuperscript{136} Paul Chambers, “Good governance, political stability, and constitutionalism in Thailand 2002: The state of democratic consolidation five years after the implementation of the 1997 Constitution”, unpublished paper of King Prajadhipok’s Institute, 10 August 2002, pp. 27-28
\textsuperscript{137} Pasuk and Baker (2004)\textit{ op cit}, p. 174
corruption work won the Commission the award of Best Government Reformer by the then weekly magazine * Asiaweek*.\textsuperscript{138} Thailand had thus taken some important steps towards implementing its reformist constitution and consolidating its democracy. The watchdog agencies were in place and the dog watcher in the form of the Senate had been popularly elected and was undertaking the functions assigned to it. The next step was the election of a new government and prime minister.

**Enter Thaksin**

Thaksin Shinawatra was not a veteran politician like his predecessors and many of his competitors. He had entered politics in the mid-1990s as one of Thailand’s richest businessmen having emerged from a Chiang Mai family of Chinese immigrants who had succeeded both in the silk business and in local and national politics and having spent his early career in the police where he rose to the rank of Lieutenant Colonel and married a General’s daughter.\textsuperscript{139} His business success was the result of a series of concessions from governments of the day initially in leasing computers to the police and operating paging services and eventually moving to mobile telephony and managing Thailand’s satellite communications.\textsuperscript{140} He chose as his vehicle for entry into politics the Phalang Dharma party of Chamlong, not because of its strong anti-corruption policies but because the communications portfolio was assigned to this party under the division of spoils of the coalition government of the day.\textsuperscript{141} He successfully stood for the House in the 1995 elections but stepped aside in the elections the following year and concentrated on his party leadership role inherited from Chamlong. His party was decimated at the 1996 polls losing all but one of its 23 seats but Thaksin was soon drafted into Chavalit’s ministry and appointed Deputy Prime Minister before that government collapsed in the wake of the 1997 financial crisis. In 1998 Thaksin decided to form his own political party, a luxury his wealth enabled him to indulge. The Thai Rak Thai Party (TRTP) attracted elements of Chamlong’s fallen party as well as academics and business people who

\textsuperscript{138} Sombat, *op cit*, p. 209
\textsuperscript{139} Pasuk and Baker (2004) *op cit*, chapter 2
\textsuperscript{140} Ibid
\textsuperscript{141} Ibid, p. 54
understood the impact globalisation was having on Thailand.\textsuperscript{142} The new constitution had opened the door to new ideas of governance and to new politicians who could contest the election under the party list system and did not require the connections and means to recruit rural voters by traditional means. Thaksin thus prepared to fight the 2001 elections.

Thaksin adopted a four pronged strategy to prevail in 2001.\textsuperscript{143} The first step was to attempt to lure incumbent MPs to TRTP and to have them run in TRTP livery. In this, Thaksin was spectacularly successful. While the Democrats were able to maintain party loyalty, the New Aspiration Party lost two-thirds of its 125 MPs to TRTP including political king-maker Sanoh Thiengthong and his 60-70 strong Wang Nam Yen faction.\textsuperscript{144} By the time the election came, TRTP which had not stood candidates in the previous election, presented itself to the electorate as the party with the largest number (110) of sitting MPs. Perhaps it was Thaksin's magnetism or his policy ideas that drew them in, but in the light of the money politics so prevalent in Thailand, an explanation based on his wealth is more convincing. In the recriminations following the party switches, it emerged that Chart Thai Party MPs who normally received 30,000-50,000 baht per month from the party patron to secure their loyalty had their allowance increased to 100,000 baht to fortify their resolve in resisting TRTP's blandishments.\textsuperscript{145} One can only conclude that those blandishments had a pecuniary tinge.

The second tactic concerned the recruitment of politicians from local government. Whereas the previous elections had been fought out on the basis of many relatively large multi-member districts requiring broad community name recognition, the 1997 Constitution's restriction of the electoral unit to 400 single member districts of generally equal size to divide Thailand's 40 million registered voters, established a different

\textsuperscript{142} Ibid, pp. 66-69
\textsuperscript{144} Sombat, \textit{op cit}, p. 215
\textsuperscript{145} Ibid
electoral dynamic rewarding candidates well known locally. A raft of these newcomers recruited by TRTP won seats in 2001.\textsuperscript{146}

Perhaps allowing his ambition to reflect his financial resources, Thaksin's third tactic was to establish a mass party targeted at Thailand's villages. Chavalit had pioneered this strategy in the early 1990s to find a more secure base for electoral incumbency. TRTP relied on traditional vote canvassers to secure party memberships in much the same way as they delivered votes and by this method, TRTP was ultimately able to claim some eleven million members.\textsuperscript{147} While TRTP had many members, it did not have many branches, suggesting that party membership did not follow traditional political practice.\textsuperscript{148} As an electioneering tactic, this recruitment process, no doubt at additional cost, proved to be effective.

The final tactic is often the most criticised though it is the only one that concerns substantive policy matters – the formulation of the so-called populist policies. Thaksin was able to formulate, package and sell a number of attractive policies aimed at the rural community: Debt Suspension for Farmers; the Village and Urban Community Fund; the 30 Baht Health Scheme, the One-Tambon-One-Product scheme; and the People's Bank. All this was delivered under the heading of “Think New, Act New.” Many criticised these policies as unfunded consumer led populism that could only lead to unsustainable national and personal debt.\textsuperscript{149} Others pointed out their essentially imprecise and rhetorical meaning.\textsuperscript{150} But an economic assessment by a reputable commentator after two years of implementation gave these policies a good report card.\textsuperscript{151} Gaining votes by formulating attractive policy proposals is what legitimate campaigning is supposed to be about.

\textsuperscript{146} Nelson (2001) \textit{op cit}, p. 289
\textsuperscript{147} \textit{Ibid}, p. 291
\textsuperscript{148} By the 2001 election, TRTP had 4 branches compared to the National Aspiration Party's 193, the Democrat's 172, Chart Patthana Party's 33 and Chart Thai Party's 10, \textit{ibid}, p. 411
\textsuperscript{149} Thitinan Pongsudhirak, “Thailand: Democratic Authoritarianism”, \textit{Southeast Asian Affairs} (2003)
\textsuperscript{150} Pasuk Phongpaichit and Chris Baker, “the Only Good Populist is a Rich Populist’: Thaksin Shinawatra and Thailand’s Democracy” (October 2002) Southeast Asia Research Centre, \textit{Working Papers Series No. 36 City University of Hong Kong}, pp. 1-2
\textsuperscript{151} Worawan Chandoewwit, “Thailand’s Grass Roots Policies”, \textit{TDRI Quarterly Review}, Vol. 18, No. 2, June 2003, pp. 3-8
The four pronged strategy delivered the hoped for result. TRTP almost won a parliamentary majority in its own right (Table 5.2), an outcome long thought impossible in Thailand’s fragmented party system. The greater concentration of political parties was emphasised by the party-list element of the system where the five percent threshold allowed only five parties to gain party-list seats and eliminated the four other parties who won constituency seats. The single member constituency aspect of electoral system design along with the first past the post count had its impact in that this classic majoritarian model tends to encourage a concentration of political parties and indeed, a two-party system.\textsuperscript{152} TRTP and the Democrats, largely concentrated in Bangkok and the south, emerged from the 2001 election as those two parties.

The remaining parties of significance became parties of local “favourite sons”: Chart Thai were reduced to three islands of local support around the Silpa-archa family in Suphanburi, the Chidchob family in Buriram, and the Khunpleum clan around Chonburi; the New Aspiration Party was also left only with the fiefdoms of its two leaders, Chavalit in Nakhon Phanom and Wan Muhammed Noor in the far south; while Chart Patthana won seats based on support for its leader, Chatichai, around his Khorat stronghold.\textsuperscript{153}

Concentration of political parties was further enhanced when the only other party of significance, Seritham, whose leaders ran unsuccessfully on the party-list, merged with TRTP within a month of the election, delivering to Thaksin his notional parliamentary majority. TRTP consisted of some 90 former MPs recruited from other parties, 110 newly elected MPs with an average age of only 42, and 48 close associates of Thaksin on his party list from which he could chose his new cabinet.\textsuperscript{154}

\textsuperscript{152} Maurice Duverger, \textit{Political Parties: Their Organisation and Activity in the Modern State}, London: Methuen, 1954
\textsuperscript{153} Pasuk and Baker (2004) \textit{op cit}, p. 91
\textsuperscript{154} \textit{Ibid}, p. 92
Thus far, the political system designed by the CDA was benefiting Thaksin’s brand of “Think New, Act New” politics. But there was one aspect that posed a mortal danger to his political career – the watchdog agencies and in particular the NCCC. On 26 December 2000, ten days before the elections, the NCCC voted to indict Thaksin on charges of intentionally trying to conceal his wealth when submitting his asset declaration following his appointment as Deputy Prime Minister in the Chavalit government in 1997.\footnote{Nelson (2001) \textit{op cit}, p. 367} The effect of this ruling would be a trial before the Constitutional Court and, if found substantiated, a ban on Thaksin’s participation in politics for five years. This was not an empty threat as the Constitutional Court had already dealt with several similar cases. In the highest profile case, it had examined the asset declaration of Deputy Prime Minister Major-General Sanan Kachornprasart, Secretary-General of the then ruling Democrat Party, and in August 2000 held that Sanan had falsely represented part of his wealth as a repayable loan. Sanan was forced to resign his official positions and serve his five year expulsion from politics.\footnote{James R. Klein, “The Battle for Rule of Law in Thailand: The Constitutional Court of Thailand”, Cavan Hogue (ed.) \textit{The Development of Thai Democracy since 1973} (2003) Canberra: National Thai Studies Centre, The Australian National University, pp. 67-173, p. 137} Thaksin faced the grim reality that the Constitutional
Court had ruled on nine similar cases, each time upholding the charge levelled by the NCCC.\textsuperscript{158}

The facts on which these charges were laid were not inconsequential. It was not a matter of the country’s richest man forgetting to list a small asset, it was a case of concealment of over $US1 billion in shares held beneficially for Thaksin but listed in the names of his housekeeper, maids, driver, security guards and business colleagues.\textsuperscript{159} The deception would have implications for tax purposes and stock market rules in addition to the political fall-out. Clearly, Thaksin’s mammoth electoral victory in the period between the laying and hearing of the charge must also have played on the judges’ minds. Thaksin’s camp leveraged this fact and fought the battle in the court of public opinion arguing that he had made his money before he entered politics, that the use of nominees was normal business practice and that, in any case, he was unaware of the particular matter which was handled by his wife through her secretaries who had asked him to sign forms he had not read.\textsuperscript{160} There were also reports that the fight was waged in a less open forum in trying to sway judges of the Constitutional Court privately – two judges made last minute decisive changes in their verdicts in favour of Thaksin.\textsuperscript{161} One judge said he had been unsuccessfully lobbied.\textsuperscript{162} On 3 August 2001 the Constitutional Court ruled by a majority of 8 to 7 that Thaksin was not guilty of having submitted a false declaration. Curiously, the majority was comprised of two incompatible views. Four judges said the provision did not apply to Thaksin because his term in office predated the entry into force of the 1997 Constitution, though the court had found others liable in similar circumstances; while the four other majority judges ruled that the provision was applicable but that there was insufficient evidence that Thaksin had intentionally provided false information.\textsuperscript{163}

Thaksin’s political career was saved. But a clue to his future intentions may be gleaned from his public musing over a system that had almost snatched away his prize:

\textsuperscript{158} \textit{Ibid,} p. 135
\textsuperscript{159} Pasuk and Baker (2004) \textit{op cit,} pp. 1-2
\textsuperscript{160} \textit{Ibid,} pp. 3-4
\textsuperscript{161} Nelson (2001) \textit{op cit,} pp. 430-431
\textsuperscript{162} Pasuk and Baker (2004) \textit{op cit,} p. 4
\textsuperscript{163} Klein (2003) \textit{op cit,} pp. 138-139
It's strange that the leader who was voted by 11 million people had to bow to the ruling of the NCCC and the verdict of the Constitutional Court, two organisations composed of only appointed commissioners and judges, whom people do not have a chance to choose. This is a crucial point we have missed.\(^{164}\)

**Neutralising the Guardian Institutions**

Thaksin’s confidence grew with his power which increased with his incumbency. Having barely survived the “attack” by the NCCC he was clearly concerned not to allow these unelected officials to derail his political plans. Within a couple of years of his election, virtually all the independent institutions found themselves under some sort of attack or take-over bid. The first to feel the pressure was the outspoken Auditor-General Jaruvan Maintaka who was elected to the post by the Senate in 2001 and began investigations of corruption including some with political connections.\(^{165}\) In 2003 a Senator challenged the constitutionality of her appointment and prevailed on a technicality concerning the process of her election in the Senate forcing Jaruvan into a two year contest to retain her position in which she eventually prevailed.\(^{166}\)

The next target was the NCCC itself. The case was initiated by 203 MPs and Senators who accused the commissioners of awarding themselves monthly allowances of about US$1000 each leading prosecutors to bring a case of malfeasance against them in 2004 which led the Supreme Court to bring down two year suspended sentences.\(^{167}\) The commissioners had little option but to resign which brought a halt to ongoing investigations against several powerful political figures including two ministers in Thaksin’s government. The next batch of nominees were largely selected by a legislative committee and in 2005 the Senate considered the 18 nominees in a heated debate in which a small group of protesting Senators staged a walkout, but after two rounds of...
voting the Senate selected nine new commissioners “closely associated with senior government figures” and in particular the prime minister. The chair of the NCCC was eventually taken by General Wuthichai Srirattanawut who had been Thaksin’s mentor at police cadet school and who had overseen Thaksin’s early computer leasing contracts with the police department.

Electoral commissioners, having been appointed by the unelected Senate only served half their full terms. When it came time to replace them, the two who stood for re-election were rejected, clearly unforgiven for the many run-off elections they had caused. Their replacements included General Sirin Thoopklam who was briefly to become the commission chair. The choice was surprising to outside observers as Sirin had been a candidate in the 2000 Senate elections who had been yellow carded by the Electoral Commission. Another new commissioner, Parinya Nakchatree, had once been investigated for electoral fraud. With incumbents of this type, the commission had been effectively rendered tame.

A similar fate awaited the Constitutional Court. When in 2003 four of the judges were to be replaced, three of those elected by the Senate were directly associated with the prime minister and one of the judges who found for Thaksin was appointed as president of the court. The four government representatives on the 13 member selection committee held an effective veto over nominations because the committee took its decisions by a vote of three-quarters, thus requiring ten votes for nomination. In this way the government was able to weed out any candidate not to its satisfaction.

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168 Ibid, p. 310 and fn. 33
169 Pasuk and Baker (2004) op cit, p. 175
172 Pasuk and Baker (2004) op cit, pp. 175-176
173 Klein (2003) op cit, p 149
Apart from its oversight role over the watchdog institutions established under the constitution, the Senate was also given similar responsibilities under other pieces of legislation. One field it was to oversee was the liberalisation of the telecommunications market under a plan enacted in 1997. Further pressure for liberalisation came from the WTO and two free trade area partners, Australia and the United States. Here then was a field in which Thaksin had direct interests as his Shin Corporation was the largest player in the mobile telephone and satellite markets. Inertia would suit Shin Corp’s interests and delay became Shin Corp’s best tactic. The first attempt at appointing members of the National Telecommunications Commission failed when the Administrative Court voided the process leaving its next iteration in the hands of the incoming prime minister. Thaksin’s government was accused of manipulating the selection process for his benefit. In the event, virtually all decisions on liberalisation, privatisation and opening the telecommunications market to foreign competition tended to favour the interests of Shin Corp. The small group in the Senate trying to perform their task as required under the constitution only had some power to delay proceedings, but in this field, that outcome suited the commercial interest of the prime minister admirably.

Thaksin had found the surest way to control the watchdog bodies – control their guardian, the Senate. Whereas the Senate was intended to be non-partisan and to behave as an apolitical body of exemplary people, slowly but surely it fell under Thaksin’s spell. A study of the voting records of the Senate showed that while Thaksin could count on only about 60 Senators when he came to office, within a couple of years this number had swelled to 130. By August 2002, Thaksin was able to have an associate of his numbers man Sanoh Thiengthong, a relatively unknown Senator, Sahat Pintuseni, elected as deputy president. Six months later another associate of Sanoh, Suchon Chalikrua, was elected as second deputy president and elevated to be president when the original

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175 Mutebi, op cit, pp. 311-312
176 Ibid, p. 314
177 Pasuk and Baker (2004) op cit, pp. 205-210
178 Niyom, op cit, p. 49
179 Pasuk and Baker (2004) op cit, p. 174
incumbent was forced from office.\textsuperscript{180} As their term was coming to an end, the number of Senators prepared to stand up to the government was down to only about twenty.\textsuperscript{181} This allowed Thaksin to elect his favourites to the oversight bodies, to deal with any unhelpful complaints about their conduct, and to head off any action against the supposedly independent watchdogs those in the Senate he did not control may contemplate. There is broad agreement about Thaksin's capture of the Senate and his control over the watchdog bodies among the academic commentators:

- "TRTP has...quietly built a majority in what is supposed to be a politically neutral Senate."\textsuperscript{182}
- "Thaksin systematically emasculated the various independent watchdog bodies."\textsuperscript{183}
- "Key accountability institutions, including the NCCC, were rendered impotent by the former prime minister's interference and manipulations."\textsuperscript{184}
- "The blatant manipulations worked on bodies such as the Election Commission have dashed earlier hopes that the new agencies could make politics significantly more honest."\textsuperscript{185}
- "Thaksin and his allies also undermined Thailand's nascent democratic institutions, many of which were created in 1997 to foster rule of law."\textsuperscript{186}
- "More disturbing to some is the possibility that a government may be able to undermine the independence of the Senate."\textsuperscript{187}
- "It is undoubtable that the new institutions have become battlefields for a fight within and outside the state about the appropriate state form and use of power."\textsuperscript{188}

\textsuperscript{180} Ibid
\textsuperscript{181} Kraisak Choonhavan, interview of 22 August 2007
\textsuperscript{182} Muteti, \textit{op cit}, p. 315
\textsuperscript{184} Surin Maisrikrod, "Learning from the 19 September Coup: Advancing Thai-style Democracy?"
\textsuperscript{185} McCargo (2002), \textit{op cit}, p. 125
\textsuperscript{187} Niyom, \textit{op cit}, p. 48
\textsuperscript{188} Michael Kelly Connors, "Goodbye to the security state: Thailand and ideological change", \textit{Journal of Contemporary Asia}, Abingdon, Oxfordshire: 2003, Vol. 33, Iss. 4, pp. 431-446, p. 439
• “Thaksin was an authoritarian leader dressed up as a democrat...he had abused power by usurping constitutional mechanisms.”

• “He bypassed or subverted the parliament and watchdog agencies, warding off horizontal accountability.”

• “Thaksin...has worked to centralize power...(by) measures such as...the marginalization of semi-autonomous supervisory agencies.”

• “Thaksin and TRTP set out to remake Thai politics...they neutralized the principal independent bodies established under the constitution.”

The 2006 Coup in “Post-Coup” Thailand

Thaksin was the first elected Thai prime minister to complete a full term in office and he soon became the first party leader to win consecutive elections and indeed the first to win an absolute majority. He had developed a form of “democratic authoritarianism” in his first term as prime minister. The combination of Thaksin’s popularity, the Democrat’s longevity and the first-past-the-post single member constituencies was turning Thailand into a two party system (table 5.3). TRTP, having swallowed up most of the other parties and turned them into internal factions, won three-quarters of the seats on offer. By winning 32 of the 37 MPs from Bangkok, Thaksin managed to reconcile the urban/rural divide, at least in electoral terms.

The Democrats held on to their support in the South and won 96 seats. Mahachon which had broken away from the Democrats failed to reach the party-list threshold and were left with only two constituency seats. Only Banharn, among the old-style politicians, resisted Thaksin’s entreaties and maintained local support. Having already re-engineered the

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191 Allen Hicken, “Constitutional Reform, Constitutional Crises, and the Politics of Economic Recovery in Thailand and the Philippines”, paper delivered at the workshop East Asia Ten Years After the Crisis, the Australian National University, 21-22 July 2006, p. 20
192 Pasuk and Baker (2004) op cit, pp. 172-173
193 Thitinan (2003), op cit
system of governance by undermining the design in the 1997 Constitution, Thaksin could now concentrate on emulating Mahathir in Malaysia and Lee Kuan Yew in Singapore in consolidating his hold on society.

**Table 5.3: House of Representatives Composition – 2005 Elections**

<table>
<thead>
<tr>
<th>Party</th>
<th>Total</th>
<th>Party-list</th>
<th>Constituency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thai Rak Thai (TRTP)</td>
<td>377</td>
<td>67</td>
<td>310</td>
</tr>
<tr>
<td>Democratic Party (DP)</td>
<td>96</td>
<td>26</td>
<td>70</td>
</tr>
<tr>
<td>Chart Thai</td>
<td>25</td>
<td>7</td>
<td>18</td>
</tr>
<tr>
<td>Mahachon</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td>500</td>
<td>100</td>
<td>400</td>
</tr>
</tbody>
</table>

From where would the checks and balances on Thaksin come? The Democrats did not have the numbers to mount a no-confidence motion which required two-fifths of the House to initiate (Section 185). The Senate majority was firmly in Thaksin’s hands but a small group of Senators could maintain criticism though without any prospect of follow up action. “The independent accountability-promoting institutions (were) still in disarray, lacking the credibility and volition to rein in Thaksin.”

The military, still not recovered from the 1992 Black May debacle, had been successfully courted by Thaksin who also appointed many of his friends to key posts including his cousin Chaisit Shinawatra as Chief of Army. The media had been either purchased by Thaksin or successfully sidelined leaving only a few pesky critics on whom Thaksin could sool government auditors. This left civil society activists and courageous public intellectuals to take on the oversight role. It also left one other actor who held significant but undefined reserve powers.

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194 IPU Parline database, [http://www.ipu.org/parline-e/reports/arc/2311_05.htm](http://www.ipu.org/parline-e/reports/arc/2311_05.htm)
197 *Ibid*, pp. 149-155
With parliamentary and institutional oversight compromised, opposition to Thaksin inevitably turned to the street. Unlike the public protests against Suchinda in the early 1990s, there was no figure like Chamlong around whom the protesters could rally. The closest to that role was played by one of Thaksin’s former business colleagues, the publisher Sondhi Limthongkul whose vitriol intensified as Thaksin’s power grew. Whatever the accusations of political crimes and misdemeanours levelled at Thaksin, he had been washed clean politically by the magnitude of his electoral victory, winning the support of all levels of Thai society from the Bangkok middle class to the Isan villager. He was vulnerable only if the magnitude of the protest movement somehow outweighed the formal support he had received at the polls. This could only happen if an issue were to arise around which the protesters could rally. In Thailand’s political culture, that issue would have to be one of personal “shameless” conduct by Thaksin.

What finally brought Thaksin down was the characteristic which had almost been his undoing in the Constitutional Court – greed. It was greed that had led him to disguise his assets and submit a false declaration and it was greed that made him cash in on all the financial benefits he had secured for himself in his years in business and politics. He had long delayed the reforms in the telecommunications sector to allow the dominant player, Shin Corp, to multiply its profits. With his political back apparently covered by his massive parliamentary majority in both chambers, Thaksin now decided to cash in as profitably as his powers would allow. The government rushed through a provision to allow 49% foreign ownership in telecommunications and Thaksin proceeded to sell that much of Shin Corp to the Singapore Government’s investment arm, Temasek Holdings, for the princely sum of $US2 billion. Perhaps the issue that outraged the Thai public more than the sale of security sensitive hardware like satellites to a foreign buyer was that as an “over the counter” transaction, the sale attracted no tax liability.
From this point, events started moving fast. The protest movement snowballed and took more coherent form under the name of the People’s Alliance for Democracy. Feeling the heat, Thaksin sought once again to wash himself politically clean with a renewed electoral mandate by calling a snap election for 2 April 2006 which would disadvantage the opposition by giving them very little time to prepare. The opposition parties eventually decided to boycott the election which went ahead regardless and drew 16 million votes for Thaksin’s TRTP party. The election, however, could not lead to the convocation of parliament as many seats could not be filled because of the boycott and the electoral law requirement that in a single candidate race, at least 20% of the registered vote is required to secure the seat. TRTP paid for minor candidates to stand against some of its own candidates to get around the rule. By-elections were required to be held in 38 constituencies but some of these again failed to yield a result. While the Democrat party and its 96 seats was sidelined by the rules of the game in parliament, its ability to preclude the proclamation of electoral results in constituencies it controlled, turned it into an effective veto player according to the electoral rules. The election Thaksin had hoped would end the crisis was effectively stalemated.

The King now stepped in. After he spoke to Thaksin, the latter took leave though he remained caretaker prime minister in name. The King called on the courts to sort out the mess and in response the courts took the initiative and voided the election, jailed the electoral commissioners and appointed judges to run the next election. Former Prime Minister General Prem, in his capacity as the head of the King’s Privy Council, began speaking to the troops explaining their ultimate loyalty was to the King, not to the government of the day. Before the next election could be held, the military stepped in. On 19 September 2006, while Thaksin was overseas, and with the apparent blessing of the monarch, the military removed the government, suspended the constitution, abrogated the two chambers of parliament, promulgated the Interim Constitution of 1 October 2006 and eventually appointed a respected former General and current member of the Privy

Council, Surayud Chulanond, as prime minister. Among the reasons given for the coup, apart from allegations of corruption against Thaksin, were conclusions that the 1997 Constitution had not fulfilled its intended reforms and that the independent agencies had been dominated by politics.  

For the fifth time in Thailand’s history the Senate was abolished. It had become a part of Thaksin’s ruling majority and had abdicated its oversight functions. The rump of NGO senators who wished to fulfil this role were reduced to the status of demonstrators, trying to round up the 50,000 signatures required to begin an impeachment process. The second election for the Senate occurred on 19 April 2006 with hardly any public interest in the light of the battle of wills being played out between the King and the Prime Minister. The election turned out to be moot as the Senate was never reconvened and the newly elected batch of 200 would-be senators was never sworn in. The only conclusion open was that the architects of the 1997 Constitution had failed in their quest to build a viable system of checks and balances by creating a fourth branch of government overseen by the Senate.

OVERVIEW

Seven centuries of absolute monarchy came to an end in 1932 but how should the system of government that has followed be described? Eighteen constitutions, eighteen coups or coup attempts, twenty-five prime ministers and fifty-three governments but only three kings later there remains a lively debate in the literature about whether Thailand is a “bureaucratic polity”, a militarily dominated political system, a state under “constitutional authoritarianism”, a nation in transition to liberal democracy, or a

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204 Thitinan (2006) op cit, pp. 299-300


nation that has simply mutated from absolute monarchy to “network monarchy.”

Central to this debate is the place of the constitution in Thai politics.

**Inchoate Constitutionalism**

As noted in chapter 2, a constitution is the design instrument that allocates the levers of governance power in a society. Constitutionalism speaks to the issue of the effectiveness of that instrument. Are the hands designated in the design instrument actually holding those levers? Do the described levers in fact control the powers assigned to them by the design instrument? Does the design as a whole work as intended by the designers? Do the electorate and the elite accept the decisiveness of the instrument?

McCargo has been the most scathing critic of the constitutional process in Thailand:

> I have previously argued that Thailand is afflicted by a ‘disease’ of ‘permanent constitutionalism’, and that a cadre of ‘professional constitution drafters’ have successfully perpetuated a dysfunctional legalism that disables the country’s political development.

Eighteen constitutions in seventy-five years provide powerful grist to McCargo’s mill. According to this view, there is no constitutionalism as such in Thailand but rather elite power continually shaping the system to its own needs employing coups and constitutions as the need arises. According to this perspective, political parties are an appendage of the elite. The 1997 Constitution was intended to be directly employed by the people and defended by them to change politics. That particular aspect of the design did not function as planned as the labour sector would learn to its cost. The labour sector had attempted to trigger the people’s constitution by collecting 50,000 signatures as foreshadowed by

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210 McCargo (2006), *op cit*, p. 1
Section 170 to introduce occupational health and safety legislation. While this exercise was in mid-stream, the National Assembly passed implementing legislation which required the list of names to be accompanied by a signature, a copy of the national ID card and a copy of the individual’s house registration certificate. Even as well-organised a sector as the labour movement was unable to comply with this onerous obligation. Labour organisers were left with the "perception that this is a case of deliberate obstruction by the Ministry of Interior (that drafted the implementing bill) to scuttle a constitutional provision that it disagrees with." No legislation emerged under the 1997 Constitution initiated under Section 170. This episode provides ammunition for McCargo’s scepticism about the decisiveness of the 1997 Constitution, as well as support for Riggs’ ‘bureaucratic polity’ thesis.

But to justify this scepticism, constitutions would need to be mere instruments of expediency for power holders and arcane intellectual exercises for their designers. Thailand’s constitutions have been more than that. Thailand’s constitutional history has been an iterative process, each new constitution conscious of its predecessors either in the hope of improving on them or, occasionally, emasculating them. For example, learning from the problems associated with the use of the petition mechanism, the 2007 Constitution makes significant changes requiring only 10,000 people to propose a new law, as compared with 50,000 under the 1997 Constitution. And a minimum of 20,000 persons will be able to petition the Senate to dismiss the Prime Minister and other officeholders.

The history of the Senate demonstrates a similar process of experimentation and calculation. The tension between selection and election is at the heart of this process. After decades of using the Senate as an instrument to dilute the power of elected representatives by selecting for loyalty to incumbent power, the 1997 Constitution

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212 Ibid, p. 120
attempted to swing the pendulum to the other extreme by crafting a system whereby the people would elect their representatives outside the confines of “corrupt” politics. The 2007 Constitution has sought a half-way house by designing a senate half elected and half selected. The attempt to create a chamber of parliament above politics which is so central to the 1997 Constitution was in fact the brainchild of Section 100 of the 1991 Constitution with its prohibition on being a “member or holding any position of being counsellor of any political party”. And the idiosyncratic educational qualification for parliamentarians in the 1997 Constitution flows from a similar provision for the qualification of senators in Section 25 of the 1946 Permanent Constitution. A common diagnosis of the ills of the first elected Senate was the preponderance of wives and children of established politicians who won provincial seats. The 2007 Constitution attacks this problem head on by precluding election to the Senate of “a spouse, son or daughter of a member of the House of Representatives or other political office holder” (Section 115(5)).

The concept of “permanent constitutionalism” can only be sustained by demonstrating bad faith. A more realistic construct is that Thailand is caught in the grip of inchoate constitutionalism. Both the design and the culture of constitutionalism are being constructed in a non-linear but nevertheless iterative basis. Accordingly, Pridi’s first draft has had a lasting impact in relation to the formal position of the sovereign and each draft along the way has had its own impact, either precedential or cautionary, in how Thailand approaches governance design. Without subscribing to a teleological view that this process will eventually lead to a form of consolidated liberal democracy, one can nevertheless assert with some confidence that the process is building on knowledge gained along the path. The 2007 Constitution can be seen as almost path dependent on its immediate predecessor. It retains many of its innovations and exceeds its extraordinary length. Its human rights provisions attempt to improve on the elaborate construction of 1997 including by giving the NHRC a power to initiate proceedings before the courts. It departs from the predecessor model insofar as in 1997, the diagnosis was of weak governments that needed to be given more backbone by design features strengthening the

214 James R Klein, interview of 2 November 2006
powers of the prime minister, while ten years later, the designers have guarded against the arrival of another Thaksin. A term limit on the prime ministership has been included, the asset declaration is tighter and neither the prime minister nor his immediate family are allowed to direct companies, especially those in the media and telecommunications industry. A minimum of one fifth of MPs can propose a no-confidence vote against the prime minister, a lower number than the two-fifths rule in 1997. This suggests that the 2007 model is intended as an improvement on 1997 rather than being a cynical exercise in deceiving the public as McCargo might have it.

If the problem is one of inchoate constitutionalism, what are its causes? The number of constitutions, the elaborate means by which many of them were prepared, the length and complexity of the recent constitutions and the idealism and innovation in the 1946, 1974 and 1997 Constitutions, point perhaps to an underlying attitude that may be a critical cause of the problem – an over reliance on the power of design to resolve governance issues. Ockey makes the point that the 1997 Constitution “represents the culmination of the belief that effective constitutional engineering can overcome all the problems of Thai society.”\(^{215}\) When McCargo criticizes the 1997 Constitution as having been “over-engineered”, in danger of causing gridlock and having unintended effects, he may be closer to the mark.\(^{216}\) Thailand’s belief in the power of design goes back to its early borrowing from the French, British and Germans in the days of absolute monarchy. Pridi was influenced by French designs in his formative input on the first three constitutions. The progressive 1946 Constitution included a new chapter entitled “State Policies” drawn from Irish, Indian and Burmese precedents.\(^{217}\) The Interim Constitution of 1959 under which Sarit instituted his paternal despotism was claimed to be based on the then constitutions of France, Egypt and Pakistan.\(^{218}\) The CDA preparing the 1997 Constitution also drew heavily on comparative constitutional analysis. The 1997 Constitution and its amended 2007 version is very much based on a premise that political institutions can be so finely designed that they will effectively perform the task intended for them and thus

\(^{215}\) James Ockey, *op cit*, p. 151
\(^{217}\) Darling, *op cit*, p. 224
\(^{218}\) Ibid, p. 364
settle the governance question posed at the commencement of this chapter. But Nikomborirak points out:

While the intention of the (1997) Constitution is clear, it failed to provide concrete measures to assure that the envisioned participation would be realized. As a result, some policies are still made behind closed doors, most laws are still passed without public hearings, and concessions continue to be granted without public scrutiny of their terms and conditions. Consumers’ representatives, academia or NGOs rarely find their way into key administrative processes.219

Intentions turned out to be a poor guide to effects. Too much weight was placed on the power of design; too little attention was devoted to the underlying factors – economic, social and cultural – that make Thailand tick. One of those underlying factors is particularly challenging to the designers because the continuing popular perception is that good governance is a function of good leaders, not good institutions.

Looking for a Few Good Men

Inherent in the concept of governance is a necessary dichotomy between the roles of individuals and the place of the system in which they work – the prime minister is both an individual and an office of state. In relation to the design and functioning of political processes, however, it is the office that is given the sharper focus as the individual is seen as ultimately fungible. Systems should not be designed around the qualities and characteristics of particular incumbents. It is the incumbent that must fit within the political system in which he or she operates, though those incumbents may well be able to shape the implementation of aspects of the systems to suit their individual requirements. In other words, the aim of the institutional design process is to craft good systems of governance in which incumbents will be bound and through which their actions will be constrained. A system that calls for finding good people to put in office in

order to rely on their competence, integrity and community spirit will pose fundamental dilemmas for any design process.

Thai politics is open to the observation that it places inordinate weight on the qualities of the individual to the detriment of reliance on the effectiveness of the system of governance. Thai politics thus becomes a search for a few good (invariably) men, rather than for a good system of governance. The underlying reasons for this are steeped in Thailand's animist and Buddhist heritage and converge with the Confucian traditions of the powerful Chinese community. According to Niels Mulder, "Power (decha) is the most spectacular, beguiling, and central manifestation of Thai life". Because power is such a mysterious and capricious force, it is beyond the ambition of the ordinary person to control it. But power can be complemented by khuna or moral goodness. "Whereas power is aggressive and largely masculine, moral goodness is powerless and its symbols are usually familiar and feminine." Buddhism fitted neatly into this world view as it offered a path to personal goodness. The realms of decha and khuna can then come together in the form of the "good leader" often taking as its model the early Sukhothai King Ramkhanhaeng who went to great efforts to "legitimate his claim to the throne and to advertise the righteousness and efficacy of his rule." Ockey translates the decha and khuna styles of leadership in Thailand in his description of the nakleng-style of traditional Thai leadership that is tough, charismatic and loyal to his friends and closely associated with decha and manliness; and phudi-style leadership that is associated with khuna and refers to well-mannered good people not linked with gender stereotypes. In terms of recent Thai history, one could class Phibun and Sarit as nakleng-style leaders while Prem and Chuan are seen as phudi-style leaders. Employing Buddhist morality, a similar distinction is drawn between leadership based on Mara (human baseness and evil) and that based on Dhamma (righteousness guided by Buddhist precepts) with some

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221 Ibid, pp. 35-36
222 Ibid, p. 39
223 Richard Basham, "Political Authority in Thailand", (1992) Research Institute for Asia and the Pacific Occasional Paper No. 20, University of Sydney, pp. 3-4
commentators seeing the struggle between Thaksin and the King in these terms. If society’s focus is primarily on the qualities of the leader as the decisive factor in governance, it is understandable that the processes in which that leader must work hold a subsidiary status.

Coming from this political culture that seeks out the “good man” and having lived through decades of rule by various strong men, the CDA sought to change direction and seek governance by a good system. McCargo points out that “the idea of a divide between good and bad people was at cross purposes with the notion that the new Constitution would establish ‘rules of the game.’” Yet the CDA was sufficiently sophisticated to understand this problem and tried to establish “rules of the game” that curbed bad people and benefited good people. Politicians considered as worthy of ministerial positions would run on the party list and thus escape the taint of corrupt provincial politics. On the other hand, the “bad” provincial politicians paid a heavy premium if they were to be appointed to the ministry. Their supporters would have to fight a by-election to retain the seat and they would have to meet the official costs of that election. The Senators under the 1997 Constitution were considered particularly “good”. Though not expected under the design to be competent managers of government policy and thus not eligible for a ministerial position, they were to play the role of wise elders and ensure the system’s checks and balances operated correctly. Though never articulated in these terms, the design was intended to ensure more “good” people than “bad” were in the National Assembly because if one adds the 200 Senators and the 100 party-list MPs to representatives in the lower house elected from Bangkok and other urban centres, the total number of “good” parliamentarians will outnumber the remaining “bad” provincial MPs. The design recognised the role of political parties but looked beyond them to find the people to make the system work.

Events showed that the moral dualism underpinning the design does not hold. Politicians from both urban and rural constituencies fell under Thaksin’s sway. Polished and

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226 McCargo (2006), op cit, p. 2
sophisticated party-list politicians were more than happy to serve as Thaksin’s ministers and do his bidding. The military often portrayed themselves as the good guys cleaning up the mess in their incessant coups. With the take-off of the development process, it was experts who were venerated. Competent technocrats, like those put together by the unelected Anand in his cabinet, were next seen as the answer. The senators were to be another such group watching over the polity from their apolitical Olympian heights but only about ten percent of the wise Senators ultimately resisted Thaksin. Thaksin is now seen as corrupt and the epitome of being “bad” and yet so many supposedly “good” people followed him. And while Banham Silpa-archa is mocked as a vote buying country bumpkin who stumbled through his prime ministership, it was, after all, he who legislated the means for the 1997 Constitution to be drafted. The 2007 Constitution establishes the judges, who dealt themselves in at the King’s request to disallow Thaksin’s 2006 election, as the current group to ensure political integrity. Many Thais might now believe, however, that their octogenarian monarch is the last “good” man in power. The biggest casualty in this search for the “good” is the political system itself which is neglected, held hostage or even sacrificed in favour of government by the “good”.

The Flawed Design of the Senate

The process for designing the system of government under the 1997 Constitution can be argued to be a best practice model. Drawing on academic commentary, debated in a deliberative manner, and engaging in public consultation, it is how a constitution should be written. But that does not guarantee that it will come up with the best answer. The Senate under the 1997 Constitution was a failure. It did not guard the guardians effectively. While an explanation based on agency, and in particular the towering figure of Thaksin, is open, the reason also lies with flaws in the design of this chamber.

The ambition to put this chamber beyond the reach of partisan politics was an unrealistic design flaw. The flaw begins with the impossibility of electing Senators who are not associated with politics. Even with the educational qualification and the ban on political

227 Nidhi, *op cit*, pp. 1-2
party affiliation, candidates for the senate will inevitably have links with politics and with politicians. The ban on campaigning was the design mechanism to solve this problem but its effect was that candidates with the family names of the clans of provincial notables would have the strongest name recognition in the province-wide election. Is it therefore surprising that the spouses, siblings and children of these provincial notables would secure election to the Senate?

The method of election was also flawed. In the eight provinces with five or more senatorial slots, victory was secured with very small pluralities. Of the 18 Senators elected in Bangkok, 13 were elected with less than 3% of the vote and, of these, 7 were elected with less than 2%. Among the cohort of Bangkok Senators was a child rights activist, an AIDS activist and a representative of organised gambling. As events would demonstrate, representatives with single issue concerns had difficulty standing up to a politician with a vast electoral mandate. Was there a more appropriate electoral system? A block vote on a national constituency may have resolved this problem by bolstering the votes of each successful candidate, but it would have created the insuperable technical problem of requiring a selection of 200 senators from thousands of candidates. Perhaps the compromise would have been block voting for a designated number of senators from the six regions that are very familiar to all Thais. But because Thailand is a highly centralised polity where the capital has easily been able to deal with 76 small and weak provinces, there has always been a reluctance to give the regions any administrative or electoral personality lest they cohere sufficiently to challenge the centre.

Another design flaw that did not play out because of the coup was the single six year term. This was intended to dissuade professional politicians from running for the Senate. While six years is a relatively long parliamentary term, the fact that an incumbent could not run for immediate re-election meant that the expertise built up in the first term in

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229 Ibid
230 North, Northeast, Central, East, Bangkok, South
231 The fact that the Northeast is dominated by Lao-speaking or Isan people has been another reason not to give regions formal personality as it might risk emphasising ethnic distinctions
office would be lost. No mentor relationships could thus form. There would have been no chamber elders to sustain administrative practices and traditions. Every legislative and committee wheel would have needed to be reinvented. This was a recipe for a weak senate that could have been resolved by staggered elections or by a two-term limit for senators.

Banning political parties from the Senate had another unfortunate effect, it atomised its members. While there was a natural tendency for Senators to work with their regional colleagues, this was discouraged as contrary to the intent of the constitution. Without the organisational structure of political parties, it was difficult for Senators to specialise in certain policy areas while leaving other areas to their party colleagues. There was a degree of specialisation inherent in committee membership but this did not absolve the Senators from having to come to grips with policies in other committee domains. They could not rely on party colleagues to brief them in party meetings on respective areas of specialisation. The overriding concern among conscientious Senators was that they could not come to grips with the complex legislative agenda they needed to review, nor could they properly vet the hundreds of candidates for official positions they needed to vote on. The atomisation of the Senate because of its strict non-partisan character was an important cause for its ineffectiveness. It also left Senators easy prey to the entreaties of pressure groups and patrons.

"The People are not Ready"

The coup of 1932 was not a popular revolution. The People’s Party was a small group of ambitious men from the military and civilian elite who employed the rhetoric of democracy and claimed to speak for the people. In its manifesto the People’s Party stated:

>The people were not allowed a voice in the affairs of state because they, the people, were regarded as fools and incapable of thinking for themselves...The

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232 Interviews with Senators Prof Dr Boonton Dockthaisong, Dr. (Mrs) Malinee Sukavejworakit, Mrs. Maleerat Keawka, Mr. Niwes Phancharoenworakul, Khunying (Mrs) Chodchoy Sophonpanich on 2 December 2002 in Canberra
people must know and understand their plight and install a Government of their own, so that they can have a voice in it.\textsuperscript{233}

While this rhetoric was useful in justifying the overthrow of the absolute monarchy, it proved to be inconvenient in designing the form of the subsequent government. The Assembly was given almost unfettered power and pro-People’s Party majority in the Assembly was achieved by giving the prime minister the effective appointment power over half its members. Why not allow the people to elect the Assembly directly? Because, according to the drafters of the 1932 Permanent Constitution, the people were not ready for this onerous responsibility. Full direct elections could only take place when more than half the population had completed four years of primary education.\textsuperscript{234} When this temporary provision was about to elapse in 1941, it was simply extended for a further decade. This was to set a pattern in Thai politics that elites were to employ for the following half century by arguing “the Thai people are not yet ready for democracy.”\textsuperscript{235}

The supporting evidence for this assertion would become more sophisticated beginning with the handicap of low levels of education in Pridi’s constitution, the lack of “national discipline” according to Sarit, and eventually migrating to the argument that rural people were not ready because they accepted money for their votes. The 1997 Constitution attempted to give substance to this idea that democracy and its most public manifestation, elections, was a way of changing the concept of waiting till the people were “fit for democracy” by making Thailand “fit through democracy”.\textsuperscript{236} It intended, finally, to have the machinery of democracy match its rhetoric.

The history of the Senate runs parallel to this history of democracy in Thailand. Until 1997, the Senate was a chamber used by elite incumbents to swamp the people’s representatives and control their power. The precedent set by the People’s Party in appointing half the Assembly was returned to repeatedly in subsequent constitutional iterations. The appointed Senate served the purposes of a safeguard device against

\textsuperscript{233} Chai-Anan, \textit{op cit}, p. 32
\textsuperscript{234} Girling, \textit{op cit}, p. 105
\textsuperscript{235} Chai-Anan, \textit{op cit}, p. 33
parliamentary threats to the elite incumbents and a prestigious retirement home for supporters. The appointing authority was the strong man of the day. The Senate was thus an instrument in the hands of the political rulers.

The CDA broke with this history and, after looking at various options, decided that a people’s constitution required its representative chambers to be directly elected by the people. But there was another element of Thai political history that the CDA drew on – a deep suspicion of political parties. Competing political parties were not tolerated under the People’s Party hegemony, nor were they welcomed by Thailand’s various military leaders. As Niyom Rathamarit notes in relation to the first fifty years after absolute monarchy:

Political parties were not usually authorised, except in cases when the ruling groups were under great pressure or needed political parties to strengthen their eroding military power base. Even with this pressure, political parties would survive only when they were obedient to the ruling group. Political parties in this period were not mass-based organizations, but rather parliamentary groups.237

Over the following two decades political parties bloomed but they remained shallowly based and organised on the basis of patronage. In analysing the reasons for Thailand’s fragmented party system, Hicken concludes that a combination of the electoral system (including many elections with multi-seat constituencies), the highly centralised nature of administration including appointed rather than elected provincial governors, the urban-rural divide expressing itself in disparate local political bastions and the disincentive for formal cooperation in favour of opportunistic wheeling and dealing caused by the uncertainties of securing a majority to gain the prime ministership, caused this deep-seated fragmentation that led to a general disdain for political parties.238

237 Niyom, op cit, p. 4
With this hesitant history of political party development, the CDA took into account both the problem of party weakness and the continuing negative attitudes towards parties in its design of parliament. The lower house would be the house of political parties in which the prime minister would be greatly strengthened by various provisions to help him maintain his majority and thus achieve stability. The Senate, however, would be protected from political parties and made into a non-partisan chamber above politics. Thaksin’s TRTP’s successes in 2001 and particularly in 2005 as well as his subornation of the Senate, threw out the original calculations on which the design had been based and created a hitherto unknown dynamic in Thai politics – a popularly elected prime minister dominating both chambers of parliament.

The 2007 Constitution tells us a great deal about the traditional establishment’s reaction to Thaksin’s successful power play. Most members of the 2007 CDA wished to abolish the senate for good but were restrained in this course by public expectations. Nevertheless, the idea of a fully elected senate was deemed too dangerous and, as if Pridi has been perpetually present in every constitutional drafting committee, the half elected-half appointed solution was seized upon. In relation to the lower house, the 2007 Constitution goes against any notion of best practice in political party development by encouraging party fragmentation through freeing MPs from party discipline (Section 162), lowering the threshold to propose a no-confidence motion (Section 158) and preventing party mergers (Section 104). It was not drafted to achieve certain outcomes as in 1997; it was drafted to prevent a certain outcome – the re-emergence of a Thaksin-like figure. It is to a large extent an anti-Thaksin constitution.

Alongside the elite’s ambivalence towards “the people” and the establishment’s suspicion of political parties, the 1997 Constitution also had to deal with the low status of the constitution in Thai politics. Thailand has known written law for several centuries with five codifications being identified before that of Rama 1 in 1805 including the Laws of

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239 Charas Suwanmala, interview of 22 August 2007, Canberra
the Three Seals as part of a constitution of Ayutthaya.\textsuperscript{240} But in any contest between the constitution and an absolute monarch, the latter must prevail. This tradition continued into modern Thai history though the monarch was replaced by the strong man of the day. The 1997 Constitution attempted to reverse this result. It failed. First Thaksin was able to circumvent the constitution and thereafter the King's military abolished it.\textsuperscript{241} The popularly elected Senate under the 1997 Constitution was in many ways more dependent on the authority of constitutionalism than other legislatures because of its novelty, its complexity in terms of its structure and role, and its responsibility to guard the guardians. The weakness of constitutionalism in Thailand was thus an Achilles heel of the Senate.


\textsuperscript{241} A strong argument that the 2007 coup was a "royalist coup" is provided by Patrick Jory in the Roundtable of 19 September 2006 at the Asia Research Institute, Singapore. http://www.ari.nus.edu.sg/showfile.asp?eventfileid=189
CHAPTER SIX

INDONESIA: POLITICAL REPRESENTATION IN A DISPARATE ARCHIPELAGO

The vastness of the Indonesian archipelago is complemented by the diversity of its citizenry. Living among its seventeen thousand islands are 240 million people from 300 ethnic groups speaking 250 distinct languages.¹ A fundamental and recurring question for the Indonesian body politic has been how to represent this populace effectively in the nation’s political architecture. The most recent institution to attempt an answer is the Dewan Perwakilan Daerah (DPD) – Representative Assembly of the Regions. The DPD is more than an Assembly of the Regions because its members, together with the members of the Dewan Perwakilan Rakyat (DPR) – People’s Representative Assembly, form the Majelis Permusyaratatan Rakyat (MPR) – People’s Consultative Assembly, the organ responsible for constitutional amendment as well as for initiating the process of impeachment of the president. In other ways the DPD is less than an Assembly of the Regions because its powers are constrained and its status is subservient to that of the DPR. The DPD is a uniquely designed chamber that emerged in the course of the debates on amendment of the 1945 Constitution. As in the Philippine and Thai cases, the intentions of the designers need to be discerned in the context of Indonesian constitutional history.

THE DESIGN

Driving down Jalan Gatot Subroto in central Jakarta will bring into view the startling parliament building constructed in the early Suharto period. Resembling an open upside down oyster shell in green, the building saw little excitement until Suharto’s fall. Today it is at the centre of Indonesian politics – though one of its constituent parts remains

politically becalmed. Understanding the DPD and its design needs to be located in the context of Indonesian constitutional history. Certain themes running through this history such as the emphasis on national unity, the suspicion of federalism and the tension with political parties have had a deep impact on the design. Certain structures emerging in this period including corporatism, *dwifungsi* militarism and a hegemonic ruling party have also influenced the design. Before coming to the specific design of the DPD, the themes and structures dominating Indonesian constitutional history require some discussion.

**The Glue of Nationalism**

Perhaps more pronounced than in most other decolonisation processes, nationalism was both goal and glue in the case of Indonesia. Not only did the small indigenous intellectual elite have to struggle to evict the coloniser, but in many ways it had the more onerous task of building the idea of a nation in a far-flung archipelago. From the earliest period of anti-colonial awakening it was clear that nationalism was the most powerful weapon in the indigenous armoury. Speaking in his own defence before the Bandung District Court in 1930, Sukarno argued:

> that in the consciousness of nationality, in nationalism, lies the strength which can pave the way to future happiness...Our nationalism must be a positive nationalism, a creative nationalism, a nationalism which builds, creates, and sacrifices...This nationalism makes our people see the future as a sunrise bright and glimmering and fills their hearts with rising expectations.²

This argument, however, was not without weaknesses. Only a tiny percentage of the inhabitants of this “unity” had at that time ever seen a map of the archipelago and its position in the world. The next problem for Sukarno was historical. Was there an Indonesia in past history upon which the intellectuals could base the contours of a modern state? Sukarno’s response was to return to the kingdoms of Shrivajaya and

The third problem flowed from a political contradiction. Indonesian nationalism took strong anti-colonial form. Yet Indonesia as a nation imagined in the minds of these self-same nationalists was based on the Netherlands East Indies whose “arbitrary frontier delineating the area of Dutch political control in the East Indies was decisive in determining the boundaries of the Indonesia which absorbed the attention of Indonesian nationalists.” But would the diverse inhabitants of this colonial construct also see it as their new nation?

There were several factors working in favour of the nationalist project. The first was a common language – bazaar Malay was transformed into a Romanized Bahasa Indonesia which became the lingua franca throughout the territories under Dutch rule. A second common bond was Islam. Though practiced with various degrees of devotion and faithfulness to doctrine, Islam was a powerful symbol of anti-colonialism. Islam created a rallying point for discontent and a religious base for opposition to the Dutch which at times turned to armed resistance. Ironically, perhaps the sturdiest foundation on which to build nationalism was the widespread anti-colonial sentiment whereby the stubborn and unwelcome Dutch presence became the fuel for nationalism.

Kahin adds a further factor favouring nationalism in the existence of the Volksraad (People’s Council), which brought together Indonesians from throughout the archipelago. The Volksraad was an advisory body of little practical consequence other than to make clear the superiority of the Dutch position. The Volksraad did, however, demonstrate the difficulty of establishing forms of representation in Indonesia. Some 10% of the native population was allowed to vote for 937 electors who were joined by 515 Dutch appointed electors who between them elected the sixty members of the

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3 Ibid, p. 43
5 J. D. Legge, Indonesia (1964) Englewood Cliffs, New Jersey, Prentice-Hall, p. 52-54
6 Kahin, op. cit, pp. 39-40
Volksraad. This tortuous method had the advantage, from the coloniser’s perspective, of cutting any direct link between the people and their representatives. This design also meant that the members of the Volksraad could not claim to have any sort of mandate. The blending of the elected with the appointed had a similar effect in diluting the popular voice, an outcome with which the Dutch would not have been displeased. But in defence of the colonial administration, democratic representation posed particularly difficult logistic and design problems in Indonesia as would be demonstrated by many of the debates and models on representation that would subsequently occur in independent Indonesia.

The nationalist movement developed briskly in the early decades of the twentieth century supported by common bonds and overcoming various constraints. It took form in meetings and groups, both secular and Islamic. Pilgrims to Mecca would influence its course as would returning students from Amsterdam. Nationalism’s secular expression began in 1908 with the formation of Budi Utomo which advocated a synthesis between Javanese culture and Western systems. Sarekat Islam, founded several years later, would have a wider impact as it developed into Indonesia’s first mass movement. The colonisers were blind, or at least unseeing, to the development of local nationalism. Their attitude summarised in the oft-quoted dismissive remark by a Dutch administrator that although they had been in the East Indies for three hundred years, it would take a further three hundred years before the local people would be ready to govern themselves.

Dutch repression and contempt was an important ingredient in the nationalist mix but the next coloniser posed a very different set of problems.

The Japanese invasion in WWII required a new set of responses from Indonesians. The Japanese came with the rhetoric of liberation and independence. They rejected the

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7 Ibid
9 Ibid, p. 3
colonial comparison, though their rule was as predatory and their repression as brutal. The result was an agreement among the nationalist leaders to adopt the tactics of cooperation with and opposition to the Japanese in tandem. Sukarno and Mohammad Hatta would stay within the legal fold and give the impression of collaborating with the Japanese while Sutan Sjahrir would continue the revolution underground with the secret support of the above ground leaders. Though the Japanese were occupiers, aspects of their presence in Indonesia were appealing to locals. The value the Japanese placed on spiritual power and selflessness had echoes of traditional Javanese concepts that stood in contrast to the Dutch concepts based on "the rationalist calculus of marginal advantage." Anderson makes the case that the impact was particularly strong on the youth of the nation and that these pemuda added an important dynamism to the Indonesian revolution. In the final analysis, it was the pemuda who had a decisive impact on the date and form of the independence proclamation. They rejected any suggestion that independence be by way of a gift from the Japanese, as events to that point were flowing, and insisted that independence be expressed with an Indonesian voice and be declared independently of the occupier. It was thus amid the chaos of occupation, Japanese surrender and political intimidation and kidnapping of the nationalist leaders that independence was declared and Indonesia had to begin to think of itself as a self-governing nation.

Because nationalism was so central to the Indonesian national project, there was pressure on the leadership of the movement to discern and disseminate distinctive features of the Indonesian nation and integrate them into the design of their institutions of governance. Nationalism therefore needed to be translated into more than simply love of country. It needed to provide a conceptual integrity sufficiently coherent to be able to support justifications for the original design of the institutions of the new state. Thus, aside from the difficulty inherent in governing so diverse an archipelago, another recurring theme of

11 Kahin, op cit, p. 105
13 Ibid
institutional design in Indonesia was to be the inapplicability of foreign models and the consequent need for indigenous designs. While elements of the foreign models could be borrowed and integrated into the Indonesian version, local designers carried the burden of identifying unique aspects of Indonesian life and crafting institutions to respond to them. Proponents of these designs would point to their originality; critics would focus on their idiosyncrasy.

**The 1945 Constitution**

It was under Japanese auspices that the formal authority for independence, and the corollary authority for the drafting of a constitution, was granted. They established the Investigating Committee for the Preparation of Independence (*Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia*: BPKI) on 1 March 1945 with a membership of 62 including local leaders such as Sukarno and Hatta and several Japanese mentors. The committee members met briefly in May to debate the character of the future Indonesian state with the main issue being whether it would have an Islamic or secular orientation. A great deal of the efforts of the committee and the literature analysing it was devoted to this knotty problem. Sukarno’s famous Pancasila speech was a key component of that debate as was the unimplemented Jakarta Charter that endorsed the five principles elaborated by Sukarno but added the important rider of “the obligation for adherents of Islam to carry out Shari’ah.”

Parallel with this discussion and in a sense overshadowed by it was the work of preparing a constitution. It was drafted by a sub-committee under the chairmanship of Professor Supomo, a noted scholar of local *Adat* law, and presented to the BPKI at its plenary session from 10-17 July 1945. Other than the issue of secularism, the committee decided by a vote of 55-6 that Indonesia should be a republic rather than a monarchy; that the boundaries of the new state, in a vote of 45-19, should be those of greater Indonesia encompassing Malaya, Borneo and the Portuguese Timor; and in the sub-committee by a

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vote of 17-2, that Indonesia would be a unitary rather than a federal state. The draft was then passed to a Committee for the Preparation of Indonesian Independence (Panitia Persiapan Kemerdekaan Indonesia: PPKI) that the Japanese had hurriedly put together to complete the work of the BPKI. The PPKI was seen by the revolutionary youth as too close to the Japanese but the only compromise they could extract was for the declaration of independence to be read prior to the Japanese timetable and that it only be signed by Sukarno and Hatta rather than all the members of the PPKI. The PPKI adopted the constitution with small but significant changes; the passages situating Indonesia as part of the Japanese East Asian Co-prosperity Sphere were deleted; the preambular reference to Muslims following the Shari’ah was also deleted so as not to alienate Christians who might otherwise support the return of the Dutch and a transitional provision was amended to strengthen the president’s hand in the six months following the end of the war. Formally, Indonesia declared its independence on 17 August 1945 armed with a provisional constitution.

In determining the character of the Indonesian state in the minds of its founding fathers, it is worth noting that “nearly all the composers of the Constitution had been educated in Western Europe, or had attended schools which were based on the Dutch version of the Western European educational system.” Clear evidence of this can be found in the official Annotations to the Constitution of 1945 which are peppered with French, German and Dutch legal terms. The western education of the drafters shaped the form of the document but its substance was claimed to be specific to the Indonesian situation. The articulation of this sentiment can be found in the speech by Professor Supomo to the BPKI on 31 May 1945 in which he assesses various models on which the state could be based: Western European individualism and liberalism were seen as leading to imperialism and exploitation and were thus unsuited to the Indonesian situation; Soviet

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16 Reid, *op cit*, p. 20
17 *Ibid*, p. 29
20 Supomo, “An Integralist State, speech of 31 May 1945 to the BPKI”, Feith and Castles, *op cit*, pp. 188-196
dictatorship of the proletariat was seen as in conflict with the character of indigenous Indonesian society; Germany's national-socialism, on the other hand, was seen to have two appropriate characteristics – the idea of political unity of the people ("or integralist theory") and the principle of leadership in unity with the people; Japanese concepts of the Emperor as the spiritual centre of the entire people was also seen as appropriate to Indonesian society. Supomo's idea on leadership in the Indonesian context was that "officials are leaders who are one with the people and are always obliged to maintain the unity and harmony of their society." It follows, in Supomo's vision that "there is no need to guarantee the fundamental rights and liberties of the individual against the state, because the individual is an organic part of the state." Armed with these notions, Supomo directed the drafting of the constitution without needing to be too troubled by human rights provisions or detailed processes for representation and oversight.

The result of the drafting process was a brief and unusual document. Supomo's integralist idea found its most concrete expression in the first article which vests sovereignty in the people who are to be represented by the MPR, an unusual institution which, Article 2 explains, consists of the members of legislature, the DPR, and "delegates of the regions and other groups." The concept of "groups", which was subsequently to play a significant part in Indonesian constitutional history, was left undefined in the Constitution but was given slightly more elaboration in the accompanying Annotations:

The term "groups" refers to such bodies as cooperatives, labour unions and other collective organizations. This provision fits with the conditions of the time. In conjunction with the idea of creating a cooperative system in the economy, the first section of this article is a reminder of the existence of such groups in economic organizations.

Although the MPR holds the nation's sovereignty in trust for the people, the constitution required it to meet but once every five years, while the DPR was required to meet

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21 Ibid, p. 190
22 Ibid, p. 191
annually. This situation left the executive arm of government in a powerful position with "the President's powers almost unlimited." The Annotations make clear that "The President is not accountable to the Dewan Perwakilan Rakyat" but he "must obtain the approval of the Dewan to make laws" The drafters saw the relationship of these institutions as in balance noting in the Annotations:

The Dewan cannot be dissolved by the President unlike its position in a parliamentary system. Moreover, members of the Dewan Perwakilan Rakyat are concurrently members of the Majelis Permusyawaratan Rakyat. Hence the Dewan Perwakilan Rakyat can always control the actions of the President and if the DPR is of the opinion that the President has acted in contravention of the state policy as laid down in the Constitution or as determined by the MPR, the Majelis may convene a special session and request the President account for (sic).

The integralist notion required great confidence to be placed in leaders and in the president in particular. Because Indonesia was one big family, the president was equated to the head of the household with important duties and vague constraints. The drafters recognised that this could be a problem and prophetically mused in the Annotations that "individualistic" leaders could render the constitution meaningless:

The important thing in government and state life is the spirit of the authorities, of the government leaders. Even though a constitution is characteristic of the family system, if the spirit of the authorities and the leaders of government is individualistic, then the constitution is in reality meaningless. On the other hand, even if a constitution is imperfect, but the spirit of the government leaders is right, such a constitution will in no way hinder the process of government. Thus, what is most important is the spirit. It must be a living and dynamic spirit.

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The 1945 constitution did not have time to embed itself. It was overwhelmed by events before its provisions could be given any effect beyond the appointment by the PPKI of Sukarno as President and Hatta as Vice-President. Sukarno and Hatta established the Central Indonesian National Committee (Komite Nasional Indonesia Pusat: KNIP) incorporating the PPKI members amongst others as an advisory group to deal with the fast moving circumstances. Under pressure to appease the allies and present a non-collaborationist leadership to the outside world, the KNIP assumed legislative power in October 1945 under the leadership of Sutan Sjahrir and Amir Sjarifuddin, elected to head the standing KNIP working committee. While the 1945 Constitution provided legitimacy and Sukarno’s presidency provided some measure of popularity, the system of government quickly morphed into one of parliamentary democracy with Sukarno reconciled to playing the role of a “parliamentary president.”

The end of WWII ushered in a period of war and revolution in Indonesia. The remnants of the Japanese presence, the invading allies and the returning Dutch all had to be dealt with in one way or another. The fledgling Republic of Indonesia proclaimed in the 1945 Constitution, existed in the minds of its nationalist leaders and the youth militias fired up by the prospect of independence, but had little governmental presence beyond central Java and parts of Sumatra. Nationalism was the only glue to hold the republic together and its adhesive power was sorely tested in this period. Political cleavages had taken shape in the 1920s with groups dividing according to their Marxist, nationalist or religious orientation. These cleavages persisted in the revolutionary period though tempered by personal relations among the leading figures. The issue on which all the groups had to take a stance was the strategy for dealing with the complex situation, the most pressing aspect of which was the demand of the Netherlands, backed by growing military capacity, for the return of their empire. The choice was between negotiations (diplomasi) and resistance (perjuangan) and every individual, group or political party had to steer their way between these strategic poles. The leading politicians adopted militant

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24 Reid (1974), op cit, p. 70
25 Ibid, p. 73
rhetoric but understood that the best prospects for success were to convince the United States and the United Nations to use their influence on the Netherlands.

Reid concludes that some foundational aspects of Indonesian political culture have their origins in this 1945-50 revolutionary period. The dominance of the army can be traced to its role as saviour, not of the nation, but of political leaders from attack by the forces of the left. The fear of Marxism and indeed contempt for any form of left wing politics can find its origins in the challenge posed by communist forces culminating in the bloody Madiun affair in which the fledgling army prevailed. The tension over the place of Islam in society continues to be framed by the eclipse of the Jakarta Charter. And the impotence of constitutional rule of law can also be traced back to this period.

The drafting of the 1945 Constitution provided a context for imagining the new nation and a vehicle for discussions of the sort of society the new nation should become. But upon its adoption, the constitution slipped into irrelevance, its provisions ignored and its structures replaced by the pragmatic needs of the day. In some ways, this result was not completely unexpected. Sukarno made clear the provisional nature of the 1945 constitution in his speech to BPKI in 1945:

> The constitution we are now drafting is a provisional one. If I may say: this is a constitution made in a flash of lightning. Later if we have already established a state and are in a peaceful situation, we will certainly call the MPR which will frame a complete and perfect constitution.27

Other ideas were challenging Supomo's notions of an integralist state with Muhammad Yamin unsuccessfully championing the need for greater checks and balances in the design. Supomo's model, national-socialist Germany, lay defeated and in ruins. The Americans and their allies had triumphed and their ideals, expressed in the Atlantic Charter and the United Nations Charter, were seen as increasingly attractive. Sjahrir had

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26 Ibid, p. 170
27 Nasution, op cit, p. 29
effectively taken the reins of government and, though signed by Hatta, was the main drafter of the Political Manifesto of November 1945 which undertook to implement these ideals and foreshadowed that “the elected representatives of the people may call for far-reaching constitutional changes” perhaps having in mind a change to the parliamentary system that would in fact operate in Indonesia over the next decade.

There was also another governance design being proposed for Indonesia – federalism. Though already rejected by the local designers, it had strong support from the Dutch side.

**The 1949 Constitution of the Republic of the United States of Indonesia**

From the Dutch perspective, three centuries of colonialism may have suggested an impression of permanence. Retaining possession of Indonesia was important to the Netherlands’ self-image and to its economy. The wartime Prime Minister of the Netherlands argued:

> If the bonds which attach the Netherlands to the Indies are severed there will be a permanent reduction in the national income of the Netherlands which will lead to the country’s pauperization.²⁹

Given this incentive, it is understandable that the Netherlands would see the Japanese war as a mere interlude in the colonial process and that the Allied victory over Japan should lead to a return to the *status quo ante*. This view was bolstered by some supporting circumstances. Key aspects of the economy such as banking, shipping and plantation agriculture were dependent on Dutch expertise and involvement. Dutch military capacity could be augmented in support of this view and indeed by mid-1947 the Dutch had 150,000 soldiers in Indonesia.³⁰ And critically, the Dutch held a low opinion of native capacities for self-government, believed Dutch administrative talents to be indispensable to the archipelago, and belittled the popularity of nationalist leaders, many of whom were

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²⁸ “Political Manifesto of November 1945”, Herbert Feith and Lance Castles, *op cit*, pp. 50-55, p. 55  
²⁹ Quoted in Reid (1974), *op cit*, p. 43  
³⁰ Feith, *op cit*, p. 10
regarded as collaborationists. The problem they faced was that in their absence, the Indonesian political elite had declared independence, adopted a constitution and begun administering parts of Java and Sumatra as the newly proclaimed Republic of Indonesia.

Under the guidance of its proconsul, Hubertus van Mook, the Netherlands developed strategies and tactics to ensure continuation of their colonial position. In broad, the strategy was to return to and begin exercising authority over all the islands outside Java and Sumatra, as well as the main cities of Java and Sumatra thus isolating and encircling the Republic of Indonesia which would eventually also crumble and fall back into colonial hands. This was to be achieved by employing the same tactics available to the Republic: negotiations and force. Negotiations would be useful to buy time, claim symbolic victories and placate an international community disenchanted with colonialism. Force was to be employed to coerce locals into the Dutch camp or to scatter enemies when deemed timely. While perhaps not as dramatic as the contestation within the nationalist camp between diplomasi and perjuangan, the Dutch side, led at this period by the more progressive parties of the left in The Hague, also struggled to find the right balance.

Dutch military superiority against the Republic’s modest armed forces, at times supported by undisciplined pemuda groups and various party militias, ensured that the option of force would be resorted to from time to time. On two occasions, in 1947 and 1948, major attacks were launched with territorial objectives. The extent of Dutch use of force can be seen from the December 1948 “police action” which was bolstered by artillery and air support and met its objective of capturing Jogjakarta, the capital of the Republic, and banishing its leaders. The military actions were largely intended to influence the negotiations that were continuing in this period, encouraged by the fledgling United Nations. British and Australian troops had recaptured the Indonesian outer islands and allowed their Dutch allies to persuade them to treat these separately from Java and Sumatra. The Netherlands organised the Malino Conference in July 1946 at which selected representatives from the eastern islands accepted the Dutch idea of building a

31 Kahin, *op cit*, provides a very detailed account of this period, pp. 332-444
federal structure in Indonesia which would, in the distant future, lead to independence. In the meantime, the Dutch followed a path that in another part of the world would later become infamous as the Bantustan strategy. The first tame ‘state’ to be established was the State of East Indonesia (Negara Indonesia Timur: NIT) and the Dutch began work on following this pattern in Borneo and other parts of the “liberated” colony in which various new ‘states’ were created which between them formed a Federal Consultative Assembly (Bijeenkomst Federaal Overleg: BFO). The Dutch now had a counterpart to the Republic to aid their negotiations. Various talks were held resulting in the Linggajati Agreement in November 1946 in which the Dutch recognised the \textit{de facto} Republican authority over parts of Java and Sumatra and the Republic agreed to work with the Dutch to establish a federal United States of Indonesia. The Renville agreement in January 1948 confirmed the basic structure. It required a vote to take place in contested areas and shrunk the Republican controlled areas to reflect Dutch military successes.

In the contest between the Netherlands and the Republic of Indonesia, it would be fair to conclude that the former had greater success in both the military and diplomatic fields. Their military preponderance leveraged their divide and rule strategy. In territorial terms, Dutch-held territory grew, and in diplomatic terms, Republican leaders were forced to make painful concessions that led to much internal feuding and bloodshed to keep in check those rallying behind the simplistic war cry of One Hundred Percent Independence. But these tactical victories were swimming against the tide of history as well as the waves of nationalism that would swell on both sides of the disputed borderline between the Republic and the Dutch. The apparent Dutch victories over the Republic would be fleeting.

The international community, led by the United States and working through the UN Security Council, could not accept a Dutch military victory and insisted that the Republic be a party to the negotiation on the creation of a federal entity. After their expulsion in the “police action”, Sukarno and Hatta returned to Jogjakarta in triumph, a fact not lost on the people of the Dutch controlled territories. To Dutch surprise, when the Round Table Conference was convened in The Hague from August to November 1949, both the
Republican and the BFO delegations pushed hard for immediate independence. The outcome, as the Netherlands insisted, was for its establishment in federal form. On 27 December 1949, the Netherlands transferred sovereignty to the Republic of the United States of Indonesia (RUSI) which came into existence under a new constitution adopted at the Round Table Conference. Yet in its very moment of foundation, the ceremony of transfer, it was clear that this entity suffered from a multiple personality disorder. There was not one ceremony of transfer but three: Hatta received sovereignty in The Hague from Queen Juliana; Sultan Hamengku Buwono received it from the Dutch High Commissioner in Jakarta; and Sukarno as the new President of RUSI received it in Jogjakarta from a hastily installed acting president of the Republic.\(^\text{32}\)

The most striking initial distinction between the 1949 Constitution and its 1945 predecessor is its length and complexity. It has 197 articles compared to less than 40. The articles are detailed in their prescriptions compared to the tendency of the 1945 Constitution to leave key architecture of government for future legislative elaboration. And, of course, it is a federal constitution as opposed to its unitary predecessor, a distinction made clear in its first article that describes the “independent and sovereign Republic of the United States of Indonesia” as “a democratic state of federal structure, governed by justice.” Indeed, it is clear that there is no inherent conceptual or linguistic continuity between the two documents, one having been made in a “flash of lightning”, the other in coolly calculating manner. The major similarity between the two instruments is that they were both regarded as provisional.

The 1945 Constitution begged the question of the extent of its territory by simply describing it in its preamble as “the whole of the land of Indonesia”. Article 2 of the 1949 Constitution had to go in far greater detail to accommodate the complex structures Dutch policies had fashioned in the BFO areas. Three types of structures are referred to:

- a) The states (*negara*) of RUSI. Among the BFO there were six states: NIT; Pasundan or West Java (including Jakarta); East Java; Madura; East Sumatra

\(^{32}\) Feith, *op cit*, p. 57
(subject to the maintenance of a special status for two sub-entities therein); and South Sumatra. The seventh state was the Republic of Indonesia (though limited to the areas described in the Renville agreement).

b) Autonomous constitutional entities or territories (daerah), of which there were nine: the political entity of Central Java; the "neolands" of Bangka, Billiton, Riau and Dajak Besar; the "special territory" of West Kalimantan; and the two "federations" of East Kalimantan and Southeast Kalimantan.

c) Other territories which had not yet been fitted into the Dutch jigsaw puzzle (and which Republican leaders expected would include West Irian).

While this might give the impression that the Republic was merely one of 16 or more entities comprising RUSI, the reality is that the 1949 Constitution was a compromise between the Republic and the Dutch ostensibly acting on behalf of the BFO areas. In this compromise, the Dutch, once again, appeared to get the better deal. The main reason is that the states and territories retained considerable powers and the federal entity is limited to the basic powers enumerated in the constitution (Article 51). The federal government could only exercise other powers "at the request of the participant territory" (Article 54). The concurrence of the Senate was required for "matters referring particularly to one, several or all participant territories" (Article 127). And it is noteworthy that each participant territory had two members in the Senate, meaning that the Republic was greatly outnumbered in that chamber (Article 80). But the Republic did achieve certain negotiating victories. The Republic obtained one third of the 150 seats in the main legislative chamber, the House of Representatives (Article 99). And only the federal government could maintain armed forces (Article 185). Nevertheless, one can see that this design would have allowed for powerful state governments to emerge and thus permit the Dutch to maintain considerable influence over the mines and plantations in the BFO areas.

What the Dutch did not calculate was the speedy collapse of those state governments in the nationalist tsunami that would welcome the end of colonialism. On 15 February 1950, the first parliament of the RUSI was convoked in Jakarta. A BFO leader was elected to
head the Senate given that the Republic held only 2 of the 32 seats. And the same result should have occurred in the House where the BFO held two-thirds of the seats. Instead, the positions of Speaker, Deputy Speaker and chair of every parliamentary committee went to Republican politicians reflecting the reality that many BFO politicians had by now joined political parties emanating from the Republic. At the same time, former Republican soldiers were dominating the new RUSI army. The Republic’s cards from the 1949 Constitution were proving to be trumps. The Dutch cards folded. A strong move immediately developed to do away with state and territory governments whose only strength had been the Dutch administrative and military presence, and one by one these entities collapsed.

On 19 May 1950, the Prime Ministers of RUSI and the Republic of Indonesia agreed to establish a new Republic of Indonesia which would be a unitary state with a unicameral chamber and a parliamentary system under a new constitution, to be ratified by the parliaments of the two entities.

**The 1950 Constitution of the Republic of Indonesia**

The drafting of the new, though once again provisional, constitution was placed in the hands of a 14 member committee chaired by the RUSI Justice Minister and formerly chair of the committee that drafted the 1945 Constitution, Professor Supomo. After two months of deliberation, a draft was presented to the two governments which sent it for ratification to the respective assemblies in slightly amended form. Though peeved that the assemblies were not given any right of amendment, they nevertheless ratified the document: 90 to 18 in the RUSI House; unanimously in the RUSI Senate; and by a vote of 31 to 2 with 7 abstentions in the KNIP working committee which had taken on the Republic’s legislative functions. The 1950 Constitution came into force, not coincidentally, on 17 August 1950, the fifth anniversary of the proclamation of independence.

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33 *Ibid*, p. 63  
34 *Ibid*, p. 93  
The constitutional drafting committee had two precedents on which to draw and chose to borrow from each. The format closely followed the 1949 precedent while doing away with all its federal trappings. The long enumeration of states and territories was replaced by the simple though unclear territorial formulation from 1945 (Article 2). The 1949 bicameral chambers with their many intricate balances were replaced by a single House of Representatives with one member for every 300,000 residents. Until elections could be held, the initial composition of the House would be the 236 members drawn from RUSI House, the RUSI Senate, the KNIP working committee and the pre-RUSI Republic’s Supreme Advisory Council. It was to be a strong parliamentary system with no possibility for the President to appoint a non-parliamentary cabinet in times of emergency, a practice that had developed in the Republic of Indonesia in the revolutionary period. The reasons for this may, however, have had more to do with personalities than principles as most thought that any such presidential cabinet would be run by Hatta, the holder of the re-established Vice-President position.36

Among the various comparisons that can be made:

- Each of the three constitutions has a form of *pancasila* in its preamble
- The 1949 Constitution contains an extensive set of provisions to safeguard human rights modelled on the Universal Declaration of Human Rights. The 1950 Constitution adopts the almost identical set of provisions (Section V of Chapter 1)
- The 1949 Constitution reserves House seats for the Chinese (9), European (6) and Arab (3) minorities (Article 100). The 1950 Constitution maintains the same reservation in the same ratios (Article 58)
- As previously noted the 1945 Constitution excludes the Jakarta Charter concerning the duty of Muslims to follow Shari’ah but contains an article on religion basing the state on the belief in “One, Supreme God” and guaranteeing freedom of religion (Article 29). The 1949 Constitution only mentions “the Divine Omnipotence” in its preambular recitation of *pancasila*. The 1950

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36 *Ibid*, p. 97
Constitution includes as one of its fundamental principles an article on religion similar to that in the 1945 Constitution.

Armed with its new constitution, the Republic entered what is commonly called its parliamentary period. This is a period often criticised for its political instability and policy drift though Feith makes a case for its achievements in the face of many challenging circumstances. One of the most damning indictments is that there were six different cabinets in nearly seven years, most lasting a year or less and only the government of Ali Sastroamidjojo lasting for two years. Reid notes, however, that this nevertheless compares well with the ten different cabinets in the much vaunted revolutionary period. The greatest political continuity was provided by the presence of Sukarno as president who, together with Hatta his vice-president, acted as a diarchy of legitimacy until the latter’s resignation in 1956 because of policy differences with the president.

It was a period in which the political parties dominated until their ultimate eclipse at its conclusion. Indonesian political history and its social cleavages gravitated towards a multi-party system in which the nationalist party (PNI), the Islamic party (Masjumi), the socialist party (PSI) and the communist party (PKI) along with a host of other splinter parties and confessional parties vied for influence. Because no single party could dominate, Indonesian politics became an arena for shifting alliances with both ideological and personality bases. Masjumi, the largest political party in terms of membership, had seats in all six cabinets, initially with PNI as its most common ally. Other party leaders as well as non-party notables would complete the rosters. Party factionalism and changing party tactics kept the system in a permanent state of imbalance. Masjumi had at its core a partnership between the two largest Islamic groups in Indonesia: Nahdatul Ulama (NU) and Muhammadijah, representing traditionalist and modernist Islamic tendencies.

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37 *Ibid*
38 Reid (1974) *op cit*, p. 77
39 Masjumi claimed 13 million members but conceded that only 400,000 had been given membership cards. Feith, *op cit*, p. 126
respectively. Feeling slighted at its modest role in various cabinets, NU split from Masjumi in 1952 creating new possibilities for alliance formation.

The PKI underwent a strategic transformation shedding its internationalism and embracing nationalism. While not included in any of the cabinets of this period, the PKI as the party with the best organised political machine was able to play a pivotal role in either supporting or undermining incumbent governments. The PSI, on the other hand, though holding the considerable asset of Sjahrir as leader, was not able to break out of its urban intellectual confines.

Sukarno was later to portray the ills of this period as entirely associated with the “disease of parties”40. But this analysis plays down the difficulties of the issues being faced by the various governments of a nation only now emerging from revolution and war. The economic issues were daunting and not helped by constant recourse to strikes to protest political and economic setbacks. Compounding the economic difficulties, the terms of trade moved to Indonesia’s disadvantage in this period. And the situation was not helped by continuing economic disputes with the Netherlands, which considered the jettisoning of the 1949 compromises as an act of bad faith. One of the main Dutch responses was to refuse to cede sovereignty of West Irian to Indonesia, creating a popular cause that Indonesian leaders had difficulty containing. There were also numerous regional uprisings in this period that required delicate handling in view of their Islamic or federalist origins. The Darul Islam uprising in West Java and Aceh was particularly troublesome in this regard. Finally, foreign policy issues were far from straightforward with contradictory pressure being applied by the United States, the Soviet Union and China while in Asia and Africa the non-aligned movement was developing. In hindsight, it is perhaps understandable that these inexperienced parties did not acquit themselves well in dealing with these many complications.

Ironically, the holding of the long anticipated election, far from curing the problems being faced, exacerbated them. Elections had been promised in 1946 and thereafter were

40 Ibid, p. 517
a common ingredient of diplomatic agreements and constitutional arrangements. The political elite of this period were not pressing for early elections which many understood would mean their political demise. The delay meant in effect that there was a three year election campaign contributing to the friction between parties even when their representatives formed common cabinets. At least the campaign provided an outlet for activism but the results of the election, far from being the panacea some expected, simply marked an end to this phase and opened the way to more direct action. In the event, the 1955 election went off relatively smoothly with over 90% of the 39 million registered voters casting ballots.\textsuperscript{41} The results confirmed the major streams of Indonesian politics and provided a strong indication of their respective strengths.

\textbf{Table 6.1: Four Largest Parties – 1955 Election\textsuperscript{42}}

\begin{center}
\begin{tabular}{|l|c|c|c|}
\hline
Party & Valid Votes & \% Vote & Seats (257) \\
\hline
PNI & 8,434,653 & 22.3 & 57 \\
Masjumi & 7,903,886 & 20.9 & 57 \\
Nahdatul Ulama & 6,955,141 & 18.4 & 45 \\
PKI & 6,176,914 & 16.4 & 39 \\
\hline
\end{tabular}
\end{center}

Several conclusions flowed from the election results. The strong showing of the Islamic parties brought back to centre stage the controversial issue of the moral basis of the Indonesian nation – should it be \textit{pancasila} or Islam? PNI emerging as the major party demonstrated that nationalism remained a rallying issue. PKI re-emerged as a political force to be reckoned with. No other party gained even 3% of the vote though 24 others, among them several regional parties, gained some level of representation.

The 1955 election was intended as a necessary step in the construction of Indonesia’s constitutional democracy but it proved to be the harbinger of its demise. A casualty of this process was constitutionalism itself though an opportunity presented itself to reverse this course in the Constituent Assembly of 1956-59.

\textsuperscript{41} \textit{Ibid}, p. 429
\textsuperscript{42} \textit{Ibid}, p. 434
The Constituent Assembly of 1956-59

As all three constitutions were provisional, they each envisaged a mechanism for the adoption of a definitive document. The 1945 Constitution simply contained an Additional Provision noting that “within six months after the Majelis Permusyaratan Rakyat has been set up, the Majelis shall sit in order to determine the Constitution” The 1949 and 1950 Constitutions had far more elaborate machinery. The 1949 Constitution required the formation of a Constituent Assembly to adopt a constitution by basically doubling the membership of the bicameral parliament with members elected or appointed in the same way (Article 188) thus maintaining the primacy of BFO representation and, so the Dutch thought, safeguarding their interests. The 1950 Constitution followed a number of the ideas in the 1949 version but opted for a separate election for the membership of the Constituent Assembly.

Having waited almost a decade to hold a national election, the Indonesian people were now confronted with two within three months. On 15 December 1955, almost 90% of registered voters again cast ballots for the members of the Constituent Assembly (which abbreviated to *Konstituante*) maintaining the high level of enthusiasm demonstrated at the September legislative election. 514 members were elected representing 41 parties indicating the fragmentation of politics in Indonesia but also confirming the strong position of the four major parties who gained 75% of the seats between them.

Table 6.2: Four Largest Parties in the *Konstituante* 43

<table>
<thead>
<tr>
<th>Party</th>
<th>No. of seats</th>
<th>% of seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>PNI</td>
<td>119</td>
<td>23</td>
</tr>
<tr>
<td>Masjumi</td>
<td>112</td>
<td>22</td>
</tr>
<tr>
<td>NU</td>
<td>91</td>
<td>18</td>
</tr>
<tr>
<td>PKI</td>
<td>60</td>
<td>12</td>
</tr>
</tbody>
</table>

43 Drawn from Nasution, *op cit*, pp. 32-34
An excellent account of the work of the *Konstituante* is provided by Adnan Buyung Nasution. Reid praises this work as a rare and thorough critique of New Order official historiography. Nasution does not accept that the *Konstituante* was so gridlocked as to justify its dissolution by Sukarno. Rather, he argues, its deliberations were a threat to the plans being laid by Sukarno and the army leadership. The main cleavage at the *Konstituante* was not so much as between the political parties but between the three blocs that they formed in support of their vision of the national philosophy. The Pancasila bloc led by PNI comprised 274 delegates from 24 parties including, surprisingly PKI, and, not surprisingly, all the Christian parties. The Islamic bloc comprised 230 delegates from 8 parties led by Masjumi and NU. The Social-Economic bloc advocated a form of Marxist economy, but, without PKI, comprised only 10 members from 3 parties. Because decisions required a two-thirds majority, the Pancasila and Islamic blocs held effective veto power over all major decisions. The issue of whether the national philosophy would be *pancasila* or Islam remained in deadlock though it was extensively debated. One of the final acts of the *Konstituante* was the vote of 1 June 1959 on an Islamic bloc amendment to return to the Jakarta Charter. The vote gained 201 votes in favour with 265 against, thus falling far short of the two-thirds majority required. Nasution argues, however, that the possibility of a compromise remained open because of the “sense of realism prevailing among the Islamic leaders” and as the *Konstituante* had given itself a 26 March 1960 completion date, compromises would most likely come at the final stages.

Nasution puts forward two key achievements of the *Konstituante*: an elaboration of applicable human rights and a commitment to constitutionalism and the rule of law. Human rights were much debated throughout the *Konstituante* process flowing in part from the prominence of the issue in both the 1949 and 1950 Constitutions and also because the Universal Declaration of Human Rights (UDHR) had been adopted in 1948 and served to inspire constitution drafters around the world. Professor Supomo’s place as

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44 Perhaps better known as one of the founders of the Indonesian Legal Aid Foundation (*Lembaga Bantuan Hukum*: LBH)
46 Nasution, op cit, pp. 32-34
47 Ibid, p. 397
48 Ibid, p. 57
chair had been taken by former Prime Minister Wilopo of PNI and the concepts underpinning the integralist notions of state were no longer in favour. There was wide agreement on including most of the human rights in UDHR the most controversial of which was related to religion as it required equal rights within marriage.⁴⁹

Commitment to constitutionalism was the other powerful concept pursued by the Konstituante. Wilopo emphasized that the work of the Konstituante was to establish a system where "government was limited by law."⁵⁰ The revolutionary period had been one of emergencies and exceptions. The parliamentary period had begun the process of adhering to basic written rules of political conduct. This issue was given an early test when the more radical nationalist parties argued that the Konstituante should be understood as having been constituted on the basis of the 1945 Constitution, but the large majority adhered to the view that the legal basis flowed from the 1950 Constitution.⁵¹ Following the rules was therefore important in itself and this also applied to the rules of procedure which were generous in giving space to all the parties represented, slowing the proceedings but giving them greater legitimacy.

The slow, deep and deliberative process of constitution drafting was taking place against an increasingly difficult domestic situation. With the collapse of the second Sastroamidjojo government in 1957, the parties lost control of the national agenda even though they were now bolstered by a popular national vote. The president had himself formed the next cabinet and the army declared martial law to deal with regional insurgencies. At a certain point, Sukarno reversed his earlier position and supported, along with the army, a return to the 1945 Constitution. The neatest means of achieving this result was to have the Konstituante itself decide to return to the 1945 Constitution, perhaps adding some of the agreed articles as transitional provisions.

The Konstituante debated this proposition but though the president had many supporters, the Islamic bloc’s support was tied to the acceptance of the Jakarta Charter and when, as

⁴⁹ Ibid, referring to UDHR Article 16(1)(b)
⁵⁰ Ibid, p. 411
⁵¹ Ibid, p. 41
noted above, that vote failed, the bloc voted against the return to the 1945 Constitution. On 30 May, 1 June and 2 June 1959 the Konstituante voted 269 in favour of the 1945 constitution to 199 against, 246 to 204, and 263 to 203 respectively, each time falling short of the two-thirds requirement thus defeating the president’s proposal. This would be the Konstituante's final act. A presidential decree of 5 July 1959 dissolved the Konstituante, abrogated the 1950 Constitution and reinstated the 1945 Constitution as the definitive constitution thus losing its provisional status.

Whether the reason was exasperation with its pace, its refusal to comply with Sukarno’s wishes or Sukarno’s fear that it would soon succeed and submit a finished document threatening his plans, the result was the same. The Konstituante ultimately failed to protect parliamentary democracy or constitutionalism.

**Guided Democracy relies on the 1945 Constitution**

From the beginning of the parliamentary period to its end, a remarkable change in the distribution of power in Indonesia took place. Leading up to the much anticipated election, the parties had been powerful with PNI and Masjumi jockeying for the leading position while the PKI was tactically content to play a subordinate waiting game. President Sukarno, though popular and influential throughout the parliamentary period, was constrained by the parliamentary system and initially tied down through partnership with Vice President Hatta. The army was focused on reorganisation after the sudden collapse of RUSI and initially played little role in politics. When some army leaders launched themselves onto the political scene in the 17 October 1952 affair, attempting to intimidate the president into taking power, they were notably unsuccessful.

By the end of the parliamentary period much had changed. The regional rebellions had brought the army into a far more central position. The declaration of martial law in 1957, and extended in the following years, had placed in their hands broad government powers which they were loathe to return. The split of NU from Masjumi had weakened the latter

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52 *Ibid*, pp. 397-398
beyond the simple loss of voters because the NU support was largely from Java leaving Masjumi looking like the party of Sumatra, then the epicentre of regional conflict. The resignation of Hatta, himself a Sumatran favourite son, further crystallised the sense of division between Java and the outer islands, and freed Sukarno from the constraints of the diarchy. And, of course, by the end of the period the parties were in retreat, though PKI was resurgent.

In this political context, the work of the Konstituante held little appeal to the president or the army. Sukarno had started talking about guided democracy in 1956 in criticising the role of the parties under the parliamentary system. Its philosophy was always vague except for the insistence on leadership and its mechanisms were unclear except for a non-party Goton Rojong (mutual help) cabinet and an appointed National Council of Advisers.\(^5\) Neither the 1950 Constitution nor the draft emerging in the Konstituante would allow Sukarno the room to play out his political experiment while the attraction of the 1945 Constitution was its vagueness and flexibility.

For the army, led by General Nasution, the reasoning in support of the 1945 Constitution, first elaborated in his 1957 speech,\(^5\) was similar to the president’s anti-party views, with the addition of a specific feature which had been omitted from subsequent versions. In constituting the MPR, the 1945 Constitution referred to “groups” alongside delegates of the regions. The army could see itself fitting within this term which had a pleasing corporatist tone. From an army perspective this opened the possibility of a more formal role in the country’s politics to reflect the new reality. The work of parliament was in any case being deprived of its authority as key decisions affecting the country were being taken at the martial law conferences of the army commanders.\(^5\) Under martial law, the regional military commanders were given great discretion and little oversight, if they showed the correct political fealty, creating a type of “unacknowledged de facto federalism.”\(^5\) And with political power came wealth, at least for the senior officers.

\(^{54}\) Nasution, \textit{op cit}, p. 45
\(^{55}\) Feith, \textit{op cit}, p. 592
\(^{56}\) \textit{Ibid}, p. 596
The parties, on the other hand, fell on hard times. The elected parliament was dissolved by decree in March 1960 cutting the parties from the institution through which they had their greatest link to the people. Masjumi and PSI were banned a few months later and in 1961 with the exception of ten parties, including PNI, NU and PKI, all parties were banned. Civil liberties were curtailed and the press was controlled.

With Hatta gone and the 1945 Constitution firmly in place, Sukarno assumed executive powers and appointed Nasution as Defence Minister. Sukarno’s power in this period has been described as that of the “chief legitimator of government.” He was the only president Indonesia had ever known and he used his position, his oratory and his genius at symbolism to cement his position. In his years as president, Sukarno had relied on his personal prestige as his main attribute. He had long ago drifted away from PNI and his relationship with the army, though at times mutually beneficial, often resembled a test of wills. In the immediate post-parliamentary period the group that was most supportive of the president was the PKI.

The New Order Embraces the 1945 Constitution

The Guided Democracy period that succeeded the parliamentary period was initially marked by Sukarno’s dominance but with the turn of the decade it became increasingly clear that the President’s will could not of itself plot the future direction of a nation facing deep economic problems and hyperinflation. Indeed the President himself was subsumed in the growing competition between the two forces that emerged in the post-parliamentary period with the ambition and the belief in their capacity to rule – the armed forces (Angkatan Bersenjata Republic Indonesia – ABRI) though in effect it may be more accurate to speak of the army, and the PKI. The army had a sense of entitlement to political office because it had held the Republic together, and the PKI had a sense of historical inevitability of success. Sukarno’s effort to play the role of balancer between these two forces was ultimately forlorn.

57 Ibid, p. 591
The showdown came on 1 October 1965 when Major-General Suharto, according to the official version, was spared the fate of assassination of his seven fellow generals in an ostensibly pro-Sukarno coup by the PKI and in retaliation decimated the PKI and its supporters. Although this aspect of Indonesian history awaits honest analysis, many argue that over half a million communists were killed by the army and its youth groups and Muslim militias. The PKI, which in 1955 had attracted six million votes, was eliminated from Indonesian politics. The army was now the dominant power and Suharto eventually eased Sukarno aside as the dominant figure in Indonesian politics, a position he would hold for the next three decades, a period known as the New Order.

Bourchier and Hadiz divide the New Order period into three phases. The first phase in 1965-73 entails the search for a political format. That format was successfully implemented in the 1973-88 phase, while from 1988-97 the New Order faced contestation and contradictions. Underpinning all three phases was the New Order’s support for and reliance on the 1945 Constitution which served the important purposes of continuity and legitimacy while allowing for unfettered control on the part of the fatherly ruler. The document, drafted in a flash of lightning and unpretentiously described as a provisional instrument whose main value was as an expression of nationalism, because having a constitution was an essential appurtenance of independence, would provide an accommodating legal foundation for the New Order.

In the first phase of the New Order, Suharto wrapped the 1945 Constitution tightly around his regime. Two aspects were of particular use: the reference to the elements of pancasila in the preamble; and the reference to the powers of the President in Article 4. This unfettered power of Presidential paternalistic (known in bahasa Indonesia as “bapakism”) government guided by the five broad principles was named Pancasila.

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58 Reid (2005) op cit, p. 80
democracy by Suharto. The Interim DPR of the day echoed these sentiments returning to Supomo’s vision of the family-state concept and arguing that all aspects of the 1945 Constitution need to be read in that context.

But while the philosophy of the regime was being articulated in these vague and convenient terms, the machinery of government was being established in an iterative fashion. Suharto’s Pancasila democracy knew what it didn’t want – parliamentary democracy, mass-based political parties and indeed any involvement by the masses in politics – but it was not initially as clear on what it did require. The key issue was the role of the army of which Suharto was the leader and in which resided the view that safeguarding the nation meant much more than defending its borders. Suharto declared the army to be the “kernel and the vanguard in struggling for the demands that come from the heart of the peoples.” Accordingly, the military had two functions; the traditional defence function as well as that of “a functional group to achieve the goals of the revolution”, and Suharto went on to proclaim that:

The Dual Function (dwifungsi) is not a temporary arrangement; on the contrary, it is an integral part of the Indonesia political system. As long as the Pancasila and the Constitution of 1945 are maintained by the People’s Consultative Assembly, the Dual Function of the Armed Forces will continue to exist.

The 1945 Constitution left the door slightly ajar for the army in its reference to groups as members of the MPR. In the Annotations, the concept of groups is explained “This article implies that all the people, all groups and all regions are represented in the Majelis such that this assembly can really be considered as the manifestation of the people.”

While the Annotations focused on the economic character of the groups, the constitution did not. In the early shaping of the institutions of Guided Democracy, Armed Forces

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61 Suharto, speech to the Interim DPR of 16 August 1967, Bourchier and Hadiz, ibid, pp. 37-41
62 Abdulkadir Besar, Secretary-General of Interim DPR, document dated 18 April 1968, ibid, pp. 41-43
64 Ibid
leader Nasution began to speak of functional groups as a replacement for political parties and of the army as working shoulder to shoulder with these functional groups. These functional groups, the most significant of which were for youth, labour, women, press and Islamic scholars, were brought together in the late 1950s under the wing of the armed forces and by 1959 the term for functional groups, golongan fungsional, was changed to the more colloquial golongan karya, from which the compound abbreviation of Golkar would be derived.

The vagueness of the concept of functional groups was one of its attractions to the architects of the New Order. Articulation of interests would be channelled through these groups under the guidance of the armed forces. But this required considerable management and in 1964 the Joint Secretariat of Functional Groups (Sekretariat Bersama Golongan Karya or Sekber Golkar) was established by the armed forces to coordinate these groups and ensure their orthodoxy in relation to their anti-communism and their commitment to pancasila. The number of groups grew steadily. By the end of 1966 there were 128, and by the end of the following year there were 262, many led by army officers. One of these was KORPRI, the civil service corps, thus creating a link between the joint secretariat and the administrative services and as all district and village leaders were civil servants, Sekber Golkar penetrated down to the villages, in sharp contrast to the political parties which had been proscribed from operating at the village level. The New Order machinery benefited from the postponement of the 1968 elections to 1971. By then the army was fully mobilised for its assault on the elections and benefiting from many privileges and resources and facing those political parties not yet banned but hobbled, Sekber Golkar achieved a solid victory garnering over 60% of the vote.

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65 Reeve, op cit, p. 143
66 Ibid, p. 148
67 Juoro, op cit, p. 197
68 Reeve, op cit, p. 293
Table 6.3: Party Performance in % of Vote in New Order Elections 1971-1997

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Golkar</td>
<td>62.8</td>
<td>62.1</td>
<td>64.3</td>
<td>73.2</td>
<td>68.1</td>
<td>74.5</td>
</tr>
<tr>
<td>PNI</td>
<td>6.9</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>NU</td>
<td>18.7</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>PPP</td>
<td>-</td>
<td>29.3</td>
<td>27.8</td>
<td>16.0</td>
<td>17.0</td>
<td>22.3</td>
</tr>
<tr>
<td>PDI</td>
<td>-</td>
<td>8.6</td>
<td>7.9</td>
<td>10.9</td>
<td>14.9</td>
<td>3.1</td>
</tr>
<tr>
<td>Others</td>
<td>11.6</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

The next step in the design was to deal with the remaining political parties. As could be seen from the 1971 election, both Islam and nationalism remained potent cleavages for political parties to exploit, so rather than deny this potency, the New Order sought to harness it and render it harmless. In 1973 the four Muslim parties were asked to form one faction in the DPR under the vague title of Development Unity Party (Partai Persatuan Pembangunan or PPP). Next, the nationalist and Christian parties were merged into the Indonesian Democratic Party (Partai Demokrasi Indonesia or PDI). Lacking cohesion, constrained to operate as facades of parties without any grass roots, and controlled by the government in various ways, PPP and PDI were perfect opposition parties from the New Order perspective. The final step was to formalise the structures and name of the hegemonic state party. After the 1971 victory, its name was shortened to simply Golkar and its structures were simplified and regularised.

With the philosophy settled and the architecture in place the New Order moved onto its next phase in total control of virtually all aspects of Indonesian public life. In the name of unity and development, contestation of policy was discouraged and the press was censored. A 1985 law even required all community and religious groups and

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associations to acknowledge *pancasila* as their sole ideological foundation. Elections were held, the parliament sat, and laws were passed. But looking at these public actions was misleading because all the important decisions were taken by the President, the army and their shadowy advisers and funders. Schwarz points out for example that in this era, the DPR never drafted a bill or rejected one from the executive and accordingly suffered from the Indonesian genius for playing on words when its parliamentarians’ role was described as the five D’s: “*latang, duduk, dengar, diam, duit,*” which roughly translated, means show up, sit down, listen up, shut up and collect your pay check.”

The final phase of the New Order saw tensions develop as Indonesian society modernised and the middle class and urban working class expanded. Suharto grew less dependent on the military allowing the influence of civilian advisers, technocrats and Chinese financiers to grow. At the same time, globalization was making Indonesia more sensitive to international calls for greater openness. Various forces, with the NGO community in the lead, tested the limits of the regime’s tolerance. The ban on *Tempo* in 1994 showed those limits and two years later Megawati Sukarnoputri was clumsily ousted from the leadership of PDI which she had surprisingly captured at the 1993 party congress. The legitimacy of the New Order regime by then rested solely on its economic development credentials and in 1998 they devalued along with the currency.

**Transition – the 1945 Constitution Brought Up To Date**

The MPR elected/appointed in 1997 nominated Suharto for a seventh term as president in March 1998. This followed the standard pattern in view of the fact that the president controlled appointment to over 80% of the one thousand seats, including those of 576 Golkar members, 113 ABRI members, and 149 regional representatives. But the financial crisis had hit Indonesia hard and the calls for the president’s resignation

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71 Juoro, *op* cit, p. 202
73 Rustam Ibrahim (ed.) *The Indonesian NGO Agenda- Toward the Year 2000,* Jakarta: CESDA-LP3ES 1996
multiplied. When he finally resigned in May 1998, Vice President Habibie was sworn in as his successor, in spite of one of Suharto’s final gambits to hold on to power by publicly casting doubt on the capacity of his deputy to carry out the duties of office.\textsuperscript{75} In his 500 days in office, Habibie achieved a great deal: he freed all political prisoners; allowed freedom of speech and assembly; granted East Timor its act of self-determination; and championed a radical decentralization law that in theory severely limited Jakarta’s powers over local issues. He also swept aside a galvanising fear of both the Guided Democracy and the New Order periods by allowing the participation of political parties and their mass followings in the politics of the nation. Law No. 2 of 1999 led to the registration of 181 political parties of which 48 met the criteria to contest the 1999 election.\textsuperscript{76} While allowing far greater openness than under the New Order, some vestiges of that thinking remained. All parties had to accept \textit{pancasila} as the state ideology; parties were not allowed to propagate communism; and, concerned that liberation movements may take the guise of political parties, the law required parties to be national parties by demonstrating support in one-third of the nation’s provinces.\textsuperscript{77}

While broadly speaking the 1999 election reflected the cleavages evident in the previous free election 44 years earlier,\textsuperscript{78} certain specific phenomena became evident. Even in the late New Order period, PDI had begun to seek greater popularity and legitimacy by emphasizing its lineage from the party founded by Sukarno which crystallized with his daughter Megawati’s election as head of the party.\textsuperscript{79} Suharto then provided Megawati with an unintended political gift. By having her evicted from her seat, he transformed her from the girl brought up in the presidential palace to the leading opposition figure. Her party cashed in this prize in the 1999 election by easily winning the largest plurality. Golkar was also transformed from the hegemonic party to the party of the outer islands\textsuperscript{80}

\begin{flushright}
\textsuperscript{75} \textit{Ibid}, p. 19
\textsuperscript{76} \textit{Ibid}, p. 467
\textsuperscript{79} Juoro, \textit{op cit}, p. 205
\textsuperscript{80} Leo Suryadinata, “The Decline of the Hegemonic Party System in Indonesia: Golkar after the Fall of Suharto”, \textit{Contemporary Southeast Asia}, Vol. 29, Iss. 2 (Aug. 2007) pp. 333-358
\end{flushright}
– a function of its national presence, the greater weight given to outer island votes in the electoral system and the fact that the financial crisis and the collapse of the rupiah hurt Java far more than the outer islands. PPP survived but had to share the Islamic vote with several other parties including PKB and PAN, headed respectively by the former heads of NU and Muhammadiyah. Five major parties emerged from this fragmented party system.

Table 6.4: Election Result for the DPR, 1999

<table>
<thead>
<tr>
<th>Political Party</th>
<th>Total Votes</th>
<th>Votes (%)</th>
<th>Seats</th>
<th>Seats (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partai Demokrasi Indonesia-Perjuangan (PDIP)</td>
<td>35,706,618</td>
<td>33.73</td>
<td>153</td>
<td>33.12</td>
</tr>
<tr>
<td>Partai Golongan Karya (Golkar)</td>
<td>23,742,112</td>
<td>22.43</td>
<td>120</td>
<td>25.99</td>
</tr>
<tr>
<td>Partai Kebangkitan Bangsa (PKB)</td>
<td>13,336,963</td>
<td>12.60</td>
<td>51</td>
<td>11.04</td>
</tr>
<tr>
<td>Partai Persatuan Pembangunan (PPP)</td>
<td>11,330,387</td>
<td>10.70</td>
<td>58</td>
<td>12.55</td>
</tr>
<tr>
<td>Partai Amanat Nasional (PAN)</td>
<td>7,528,936</td>
<td>7.11</td>
<td>34</td>
<td>7.36</td>
</tr>
<tr>
<td>Partai Bulan Bintang (PAN)</td>
<td>2,050,039</td>
<td>1.94</td>
<td>13</td>
<td>2.81</td>
</tr>
<tr>
<td>Partai Keadilan (PK)</td>
<td>1,436,670</td>
<td>1.36</td>
<td>7</td>
<td>1.52</td>
</tr>
<tr>
<td>Partai Keadilan dan Persatuan (PKP)</td>
<td>1,065,810</td>
<td>1.01</td>
<td>4</td>
<td>0.87</td>
</tr>
<tr>
<td>Partai Nahdlatul Ulama (PNU)</td>
<td>679,174</td>
<td>0.64</td>
<td>5</td>
<td>1.08</td>
</tr>
<tr>
<td>Partai Demokrasi Indonesia (PDI)</td>
<td>655,048</td>
<td>0.62</td>
<td>2</td>
<td>0.43</td>
</tr>
<tr>
<td>Partai Persatuan (PP)</td>
<td>590,995</td>
<td>0.56</td>
<td>1</td>
<td>0.22</td>
</tr>
<tr>
<td>Partai Demokrasi Kasih Bangsa (PDKB)</td>
<td>550,856</td>
<td>0.52</td>
<td>5</td>
<td>1.08</td>
</tr>
<tr>
<td>Partai Politik Islam Indonesia Masyumi (PPIIM)</td>
<td>456,750</td>
<td>0.43</td>
<td>1</td>
<td>0.22</td>
</tr>
<tr>
<td>Partai Daulat Rakyat (PDR)</td>
<td>427,875</td>
<td>0.40</td>
<td>1</td>
<td>0.22</td>
</tr>
<tr>
<td>Partai Syarikat Islam Indonesia (PSII)</td>
<td>376,411</td>
<td>0.36</td>
<td>1</td>
<td>0.22</td>
</tr>
<tr>
<td>Partai Nasional Indonesia Front Marhaenis (PNI FM)</td>
<td>365,173</td>
<td>0.36</td>
<td>1</td>
<td>0.22</td>
</tr>
<tr>
<td>Partai Nasional Indonesia (PNI)</td>
<td>364,257</td>
<td>0.34</td>
<td>1</td>
<td>0.22</td>
</tr>
<tr>
<td>Partai Nasional Indonesia Massa Marhaen (PNI MM)</td>
<td>345,665</td>
<td>0.33</td>
<td>1</td>
<td>0.22</td>
</tr>
<tr>
<td>Partai IPKI (IPKI)</td>
<td>328,440</td>
<td>0.31</td>
<td>1</td>
<td>0.22</td>
</tr>
<tr>
<td>Partai Kebangkitan Ummat (PKU)</td>
<td>300,049</td>
<td>0.28</td>
<td>1</td>
<td>0.22</td>
</tr>
<tr>
<td>Partai Katolik Demokrat (PKD)</td>
<td>216,663</td>
<td>0.20</td>
<td>1</td>
<td>0.22</td>
</tr>
<tr>
<td>Subtotal (excluding parties without seats)</td>
<td>101,854,891</td>
<td>96.23</td>
<td>462</td>
<td>100</td>
</tr>
<tr>
<td>Political Parties without seats (27 parties)</td>
<td>3,991,046</td>
<td>3.77</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>TOTAL</td>
<td>105,845,937</td>
<td>100</td>
<td>462</td>
<td>100</td>
</tr>
</tbody>
</table>

81 Adapted from King, op cit
In spite of his many achievements, Habibie could not shake free from his intimate associations with the New Order and had to take responsibility for Indonesia’s humiliation in being rejected by the people of East Timor. The constitutional ritual of the President’s five-yearly accountability speech was transformed into an annual life or death vote of confidence. The 19 October 1999 vote in the MPR went against Habibie by 355 to 322. Habibie accepted the political consequences and did not put himself forward as a candidate for the presidency. Instead, with Golkar unable to agree on any candidate, its votes went to former NU leader Abdurrahman Wahid (better known as Gus Dur) who thus outmanoeuvred Megawati who had to settle for the vice-presidency. Gus Dur’s unpredictability, his demeaning comments about the elected parliamentarians and his attempt to declare a state of emergency to protect his position, managed to unite the MPR against him, with the result that the final formal vote ending his Presidency taken on 23 July 2001 was 591 in favour and none against with members of his PKB party, seeing the writing on the wall, boycotting the vote.\(^\text{82}\) Vice-President Megawati, perhaps befittingly, inherited the presidency.

One of the reform tasks that Habibie left to his successors was to bring up to date the 1945 Constitution which he described as “too short, and permitted the possibility of too much power being concentrated in the way of the president.”\(^\text{83}\) The same post-1999 election MPR session that voted down Habibie’s accountability speech, also agreed by consensus to review the 1945 Constitution. While some voices in the NGO community, and later among the military as a delaying tactic, called for a constitutional commission to draft a new constitution, the place of the 1945 Constitution was too deeply ingrained in Indonesia’s founding mythology for that instrument to be abandoned.\(^\text{84}\) The task of drafting was conferred to an *ad hoc* committee (PAH 1) under the leadership of PDIP’s Jakob Tobing and in the course of the next several years, ending with the 2002 annual session of the MPR, in four separate sets of amendments, the 1945 Constitution was...


\(^{83}\) Habibie, *op cit*, p. 467

transformed. The impact of the amendment process can be discerned from a simple observation: the constitution almost quadrupled in length.\textsuperscript{85}

Among the key amendments to the Constitution, the following are noteworthy:

- Sovereignty is exercised directly by the people through the Constitution, no longer in trust by the MPR (Art. 1)
- The President and Vice-President are directly elected (Art. 6A) and are limited to two terms (Art. 7)
- The concept of judicial review is introduced and a Constitutional Court established (Arts. 24 and 24C)
- The police is separated from the military which is limited to defend “and maintain the integrity and sovereignty of the state” (Art. 30)\textsuperscript{86}
- Decentralization is given constitutional form by granting “wide-ranging autonomy, except in matters specified by law to be the affairs of the central government” (Art. 18)
- A new chapter (Ch. XA) on human rights based on the UDHR is added thus returning to the practice of the 1949 and 1950 Constitutions. Controversy developed over the provision against retrospective prosecutions (Art. 28I) which appeared to exculpate the military from facing punishment for past wrong doing.\textsuperscript{87}
- The MPR and DPR are restructured and a new chamber, the DPD is established (Chpts. II, VII and VIIA)

The 2004 Legislative election was conducted under these new provisions and confirming the deep cleavages in Indonesian society, it demonstrated the impact of ongoing politics as PDIP bore the voter backlash for President Megawati’s lacklustre performance.

\textsuperscript{85} From 1,789 to 5,942 words in its English translation
\textsuperscript{87} Blair A. King, “Constitutional Tinkering: The Search for Consensus is Taking Time”, Inside Indonesia, Issue 65. UDHR contains a similar provision but, unlike the Indonesian version, allows for prosecutions under international law. It should be noted, however, that neither the 1949 Constitution (Art. 14(2)), nor the 1950 Constitution (Art. 14(2)) refers to international law in the related articles.
Table 6.5: Election Result for the DPR, 2004

<table>
<thead>
<tr>
<th>Political Party</th>
<th>Total Votes</th>
<th>Votes (%)</th>
<th>Seats</th>
<th>Seats (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partai Golongan Karya (Golkar)</td>
<td>24,480,757</td>
<td>21.58</td>
<td>127</td>
<td>23.09</td>
</tr>
<tr>
<td>Partai Demokrasi Indonesia-Perjuangan (PDI-P)</td>
<td>21,026,629</td>
<td>18.53</td>
<td>109</td>
<td>19.82</td>
</tr>
<tr>
<td>Partai Kebangkitan Bangsa (PKB)</td>
<td>11,989,564</td>
<td>10.57</td>
<td>52</td>
<td>9.45</td>
</tr>
<tr>
<td>Partai Persatuan Pembangunan (PPP)</td>
<td>9,248,764</td>
<td>8.15</td>
<td>58</td>
<td>10.55</td>
</tr>
<tr>
<td>Partai Demokrat (PD)</td>
<td>8,455,225</td>
<td>7.45</td>
<td>56</td>
<td>10.18</td>
</tr>
<tr>
<td>Partai Keadilan Sejahtera (PKS)</td>
<td>8,325,020</td>
<td>7.34</td>
<td>45</td>
<td>8.18</td>
</tr>
<tr>
<td>Partai Amanat Nasional (PAN)</td>
<td>7,303,324</td>
<td>6.43</td>
<td>53</td>
<td>9.63</td>
</tr>
<tr>
<td>Partai Bulan Bintang (PBB)</td>
<td>2,970,487</td>
<td>2.62</td>
<td>11</td>
<td>2.00</td>
</tr>
<tr>
<td>Partai Bintang Reformasi (PBR)</td>
<td>2,764,998</td>
<td>2.44</td>
<td>14</td>
<td>2.54</td>
</tr>
<tr>
<td>Partai Damai Sejahtera (PDS)</td>
<td>2,414,254</td>
<td>2.13</td>
<td>13</td>
<td>2.36</td>
</tr>
<tr>
<td>Partai Karya Peduli Bangsa (PKPB)</td>
<td>2,399,290</td>
<td>2.11</td>
<td>2</td>
<td>0.36</td>
</tr>
<tr>
<td>Partai Keadilan dan Persatuan Indonesia (PKPI)</td>
<td>1,424,240</td>
<td>1.26</td>
<td>1</td>
<td>0.18</td>
</tr>
<tr>
<td>Partai Persatuan Demokrasi Kebangsaan (PPDK)</td>
<td>1,313,654</td>
<td>1.16</td>
<td>4</td>
<td>0.72</td>
</tr>
<tr>
<td>Partai Nasional Banteng Kemerdekaan (PNBK)</td>
<td>1,230,450</td>
<td>1.08</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Partai Patriot Pancasila</td>
<td>1,073,139</td>
<td>0.95</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Partai Nasional Indonesia -Marhaenisme</td>
<td>929,159</td>
<td>0.81</td>
<td>1</td>
<td>0.18</td>
</tr>
<tr>
<td>Partai Nahdlatul Ulama Indonesia (PNUI)</td>
<td>895,610</td>
<td>0.79</td>
<td>2</td>
<td>0.36</td>
</tr>
<tr>
<td>Partai Pelopor</td>
<td>878,932</td>
<td>0.77</td>
<td>1</td>
<td>0.18</td>
</tr>
<tr>
<td>Partai Penegak Demokrasi Indonesia (PPDI)</td>
<td>855,811</td>
<td>0.75</td>
<td>1</td>
<td>0.18</td>
</tr>
<tr>
<td>Partai Merdeka</td>
<td>842,541</td>
<td>0.74</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Partai Syarikat Indonesia (PSI)</td>
<td>679,296</td>
<td>0.60</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Partai Perhimpunan Indonesia Baru (P-PiB)</td>
<td>672,957</td>
<td>0.59</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Partai Persatuan Daerah (PPD)</td>
<td>657,916</td>
<td>0.58</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Partai Buruh Sosial Demokrat</td>
<td>636,397</td>
<td>0.56</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>113,448,398</td>
<td>100</td>
<td>550</td>
<td>100</td>
</tr>
</tbody>
</table>

The 2004 legislative election was followed by the first presidential election which was won convincingly in the second round by former General Susilo Bambang Yudhoyono (SBY as he is widely known), though his newly formed Partai Demokrat only gained 7.45% of the legislative vote. SBY had already contributed to the Indonesian democratization process when, as Coordinating Minister for Security, he refused to implement then President Gus Dur’s declaration of emergency attempting to stave off

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88 KPU, final result after Constitutional Court rulings
impeachment. The impact of political performance on electoral results was again demonstrated in the 2009 legislative election where satisfaction with the president’s performance was rewarded with a vote of over 20% for his party making it the largest in the DPR and seeing Golkar and PDIP each reduced to 14% of the vote. SBY subsequently won a three cornered race for the presidency in the first round with a vote of 60%.

Table 6.6: Election Result for the DPR, 2009

<table>
<thead>
<tr>
<th>Political Party</th>
<th>Votes</th>
<th>%</th>
<th>Seats</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partai Demokrat</td>
<td>21,703,137</td>
<td>20.85</td>
<td>150</td>
<td>26.8</td>
</tr>
<tr>
<td>Golkar</td>
<td>15,037,757</td>
<td>14.45</td>
<td>107</td>
<td>19.1</td>
</tr>
<tr>
<td>PDI Perjuangan</td>
<td>14,600,091</td>
<td>14.03</td>
<td>95</td>
<td>17.0</td>
</tr>
<tr>
<td>Partai Keadilan Sejahtera</td>
<td>8,206,955</td>
<td>7.88</td>
<td>57</td>
<td>10.2</td>
</tr>
<tr>
<td>Partai Amanat Nasional</td>
<td>6,254,580</td>
<td>6.01</td>
<td>43</td>
<td>7.7</td>
</tr>
<tr>
<td>Partai Persatuan Pembangunan</td>
<td>5,533,214</td>
<td>5.32</td>
<td>37</td>
<td>6.6</td>
</tr>
<tr>
<td>Partai Kebangkitan Bangsa</td>
<td>5,146,122</td>
<td>4.94</td>
<td>27</td>
<td>4.8</td>
</tr>
<tr>
<td>Gerakan Indonesia Raya</td>
<td>4,646,406</td>
<td>4.46</td>
<td>26</td>
<td>4.6</td>
</tr>
<tr>
<td>Partai Hati Nurani</td>
<td>3,922,870</td>
<td>3.77</td>
<td>18</td>
<td>3.2</td>
</tr>
<tr>
<td>Partai Bulan Bintang</td>
<td>1,864,752</td>
<td>1.79</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>86,915,884</td>
<td>100.00</td>
<td>560</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Indonesia had thus negotiated its path to a vibrant though fragmented party system, a functioning electoral system, and a constitution that tackled the substantive governance design issues affecting the nation. The constitution designed a system of representation for the Indonesian people going well beyond the paternalism and authoritarianism of the past. One of the key changes was the establishment of a new chamber of parliament, the DPD.

90 KPU, final result
91 KPU, final result
The Constitution Amendment Process

Influenced by the popular *reformasi* sentiment among their constituents, the politicians elected in 1999 certainly felt the pressure to take steps to put an end to certain aspects of the New Order system. When they met as the MPR in 1999, they rejected Habibie’s accountability report and they also decided immediately to amend certain aspects of the 1945 Constitution. After Suharto’s six terms as president, the first change was to establish a two-term limit for the president. The next change was to elevate the DPR as an equal partner of the executive in the law making process. It was clear by then that many other changes were also required to make the 1945 Constitution meet current needs.

PAH 1, which had the task of shepherding through the amendment process, reflected the political balance of the new MPR. PAH I appointed an expert assistance team of some thirty academics and commentators to assist it in its work.92 As the realisation grew of the importance of its work, the MPR established a committee, Komisi A, also chaired by Tobing, comprising 162 members in which the largest groups were Golkar (43) and PDIP (42) followed, interestingly, by the faction of Functional Group delegates (16) as well as representatives from 8 other factions, to debate and review the work of PAH 1.93 Both committees worked by deliberation and consensus. This process led to the four amendments to the constitution, the third of which established the DPD. Each amendment was adopted by the annual meeting of the MPR culminating in the fourth amendment in 2002 requiring the president and vice-president to be directly elected by the two round method.

In this period, the MPR was itself undergoing a transition. It had been a large body of up to one thousand members in Suharto’s time whose only task was to celebrate each new presidential term. After the 1999 elections it was a far more independent body made up of 695 members comprising:

- 500 members of the DPR of whom
  - 462 were elected by province wide proportional representation
  - 38 were appointed from the military (known as Tentara Nasional Indonesia, Indonesian National Forces or TNI and the police, Polisi Republika Indonesia, Police of the Republic of Indonesia or Polri and known collectively in the DPR as the TNI/Polri faction)

- The 500 DPR members were joined by
  - 130 regional representatives chosen by elected Regional Representative Assemblies or Dewan Perwakilan Rakyat Daerah (DPRD), on the basis of five representatives from each of the then 26 provinces in existence in 1999
  - 65 representatives of Functional Groups ranging from Islamic scholars and intellectuals to accountants and film stars.

The Debate on the Establishment of the DPD

While individual views were no doubt relevant in the decision making process, Indonesian parliamentary culture is based on reaching a common position within the various parties/factions and then negotiating these among all the factions through to a consensus. The various factions entered the debate with a range of views. The main

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94 The MPR was intended to have 700 members but the five delegates from the former province of East Timor no longer sat

95 National Democratic Institute for International Affairs, Indonesia’s Change of President and Prospects for Constitutional Reform, October 2001, p. 8
http://www.accessdemocracy.org/library/1319_id_presconstref102001.pdf

96 The positions were noted on the basis of interviews by the author and observation of the debates within the committee and interviews with key members of each faction in Indra Pahlevi, Thesis, University of Indonesia, “The House of Representatives of the Regions (DPD) in the parliamentary system in Indonesia: the debate on the process leading to the formation of the DPD in meetings of ad hoc committee no. 1 in the
supporter of a chamber representing the regions was Golkar whose principal negotiator in the committee, Dr Theo Sambuaga, summarized his party's position as follows:

Our intended representative system ... is based on the principle of bicameralism, though many definitions and other aspects of bicameralism can still be debated. But, basically, the two-chambered representative system will undoubtedly give us a surer framework for and guarantee of checks and balances including checks and balances between legislative bodies representing the people and those representing regional interests.97

Golkar delegates thus wanted a relatively strong second chamber that would qualify the Indonesian system as one of bicameralism. They saw in this chamber a means for the regions to have a direct voice in parliament and to play the balancing role traditionally played by second chambers representing a contradistinctive voice to that represented in the first chamber – in this case directly representing the regional voice. While this position is unexceptional, based on common practice in many countries, it was seen as a radical option for Indonesia. The seeds of a compromise could be seen in the further elaboration of the Golkar position by another of their members on the committee, Dr Happy Bone Zulkarnain:

Members of the DPR are legislators, whereas members of the DPD do not act fully as legislators. But members of the DPD can be involved in the drafting of legislation which is in their domain, and they can also carry out oversight, as is done by the DPR.98

Accordingly, Golkar wanted the DPD involved in the discussion of legislation; in oversight of the implementation of legislation; participation as a chamber in the process of impeachment; and other actions to strengthen the voice of the regions.

2001 annual session of the People's Consultative Assembly (MPR)**, July 2004. Translated by Mr Denis J Fisher (NAAT1 No. 60980).
97 Ibid, p. 95
98 Ibid, p. 95
The Golkar position was bolstered by that of the Reform faction comprising the National Mandate Party (PAN) and the Justice Party (PK) which introduced into the debate the idea of federalism and which therefore saw the DPD as a states' house, much like the US Senate. One of the points made by the Reform faction was to resist the term “delegates” being used in the debate as too narrow, arguing that it should remain “representatives” and the chamber should not be called the “Assembly of Delegates of the Regions” but that it should have a name in line with that of the DPR and be called the “Representative Assembly of the Regions.”

The PDIP position was far more circumspect. While acknowledging Indonesia’s diversity and the need for adequate representation of regional interests, PDIP was adamant that Indonesia must remain a unitary state whose sovereignty should continue to be exercised through the national government. It saw decentralization as the means of dealing with regional aspirations on the basis that the powers were voluntarily devolved from the centre where they naturally resided. PDIP saw bicameralism as an aspect of federalism which it regarded as anathema.

PDIP was prepared to have regional representation in the national parliament but only within the context of reinforcing Indonesia’s status as a unitary state. Further, DPID was unenthusiastic about the concept of checks and balances taking the view that the legislative system already contained the difficulty of finding the balance between the DPR and the executive branch without adding a further player into the equation. Tobing was prepared to compromise by adopting a concept of soft bicameralism in which the DPD could be given limited functions such as a limited oversight role and the ability to propose draft bills to the DPR and to participate in discussion of draft bills concerning regional autonomy without being given a significant legislative role.

99 Ibid, p. 108
100 Ibid, p. 120
PDIP had staunch support in maintaining the unitary state principle from the TNI/Polri faction, one of whose representatives, General Afandi argued that “the DPD should be a balancer in the context of achieving perfection, but always within the framework of the unitary state of the Indonesian Republic,”\textsuperscript{101} while another, General Sutjipno, noted more gruffly, “…from the beginning we have never come up with the bicameral concept, let alone gone on to talk about strong or soft (bicameralism). Why on earth are we continuing to talk about becoming bicameral?”\textsuperscript{102}

The various Islamic party factions that participated in the debate also tended to take a narrow view of the role of the DPD with particular concern to avoid overlap of functions between the DPD and the DPR and between the DPD and such constitutional bodies as the state auditor.\textsuperscript{103}

An interesting aspect of the debate was the view adopted by the Functional Group delegates. These 65 MPR members were clearly an endangered species. The reformasi movement could not tolerate a return to any appointed parliamentarians and accordingly the TNI/Polri members would also disappear after the 1999-2004 parliamentary term. The Functional Group representatives would clearly not survive the amendment process. Yet, it is a rare institution that consents to its own extinction and the Functional Group members held up the amendment process in trying to preserve their place in the legislative system leading to the only time the amendment process resorted to a vote.\textsuperscript{104} Once having accepted their imminent demise, the group participated actively in the debate on the DPD arguing for a chamber similar in status to that of the DPR. Their argument was that the DPD should have duties commensurate with its status as a popularly elected chamber. Indeed, they pointed out presciently, that under the proposed voting system, many DPD members would be elected by larger votes than their DPR counterparts.\textsuperscript{105}

\textsuperscript{101} Ibid, p. 111
\textsuperscript{102} Ibid, p. 92
\textsuperscript{103} Ibid, pp. 111-114
\textsuperscript{104} Ellis, \textit{op cit}, p. 30. The vote was 575 in favour to 122 against with 3 abstentions.
\textsuperscript{105} Pahlevi, \textit{op cit}, pp. 107-109
Chapter VIIA of the Constitution

The compromise presenting itself to the committee members was to accept a bicameral format but to ensure that it would not have a bicameral effect: A new Representative Assembly of the Regions (DPD) was established; provinces were recognized as the electoral district; and, mimicking federal structures, equal representation was accorded to each province regardless of population size.\(^{106}\) But the powers of the new chamber and the subject matter under its purview were severely limited. The DPD could participate in the discussion of laws but only in relation to those laws related specifically to regional matters. On other issues relating to taxation, education and religion, the DPD has the power to “provide consideration to the IPR”. The DPD appears to have a more promising role in the oversight of the implementation of laws, but, once again, its formal role is simply to “submit the result of such oversight to the DPR”. The text of the relevant provisions in the amended constitution is as follows:

Article 22C

1. Members of the Representative Assembly of the Regions shall be elected from each province in a general election.
2. The number of members of the Representative Assembly of the Regions from each province shall be the same and the total membership of the Representative Assembly of the Regions shall not exceed one third of the total membership of the People’s Representative Assembly.
3. The Representative Assembly of the Regions shall hold a session at least once a year.
4. The structure and position of the Representative Assembly of the Regions shall be regulated by law.

Article 22D

\(^{106}\)Although the negotiators didn’t realize this was a federal feature at the time, Theo Sambuaga, interview of 13 April 2010
(1) The Representative Assembly of the Regions may propose to the People’s Representative Assembly draft bills relating to regional autonomy; to relations between the centre and the regions; to the formation, expansion and merger of regions; to the management of natural resources and other economic resources; and to the financial balance between the centre and the regions.

(2) The Representative Assembly of the Regions shall participate in the discussion of draft bills relating to regional autonomy; to the relationship between the centre and the regions; to the formation, expansion and merger of regions; to the management of natural resources and other economic resources; to the financial balance between the centre and the regions. It shall also provide consideration to the People’s Representative Assembly of draft bills related to the national budget and of draft bills on taxation, education and religion.

(3) The Representative Assembly of the Regions may exercise oversight of the implementation of laws concerning: regional autonomy; the formation, expansion and merger of regions; relations between the centre and the regions; the management of natural resources and other economic resources; the implementation of the state budget; taxation; education; and religion. It may submit the results of its oversight to the People’s Representative Assembly as material for further consideration.

(4) Members of the Representative Assembly of the Regions may be removed from office according to requirements and procedures which shall be regulated by law.

The dominance of the DPR as the legislative chamber is clear. That dominance is confirmed by the nexus created in Article 22C(2) whereby the membership of the DPD cannot exceed one third of the membership of the DPR. This provision has its significance when one considers that Article 2 of the constitution states that “The MPR shall consist of the members of the DPR and the members of the DPD”. The MPR is not a joint sitting of the two chambers, but is a distinct institution whose membership draws
from the membership of the two chambers. Accordingly, in terms of institutional powers, the DPR retains the dominant numbers in the MPR where DPR members will have at least three-quarters of the seats and thus can, as a group, defeat any proposed amendment to the constitution challenging its primacy.

Finally, the subordinate position of the DPD is emphasized in the July 2003 Law relating to the Structure and Position of the MPR, DPR, DPD and DPRDs (UU Susduk) which makes clear that any legislative discussions in the DPD must precede and contribute to the deliberations of the DPR which is under no obligation to take these views into account. Furthermore, while the DPD has a role in oversight matters, it does not have the right of summons granted to the DPR.

"members of the DPD are individuals"

Surprisingly, neither of the Indonesian studies on the establishment of the DPD (Susanti and Nurbayanti (2006) and Pahlevi (2004)) reports on discussions concerning the proscription of political parties from contesting elections to the DPD. This proscription appears in Article 22E which makes clear that participants for election to the DPR and the DPRDs are political parties while participants “for the election of members of the DPD are individuals.” In the course of interviewing designers, politicians and political commentators, three explanations were proffered – one based on institutional design considerations; one based on the need to appease public opinion; and one based on naked political calculation. It is perhaps because of the last explanation that the open articulation of the motives is so faint.

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107 Susanti and Nurbayanti, op cit
http://www.accessdemocracy.org/library/1621_id_lawstructurePDF.pdf
109 Pahlevi does, however, provide the following recommendation in his conclusion: “To improve the quality of democracy, the process of electing DPD members in the future should not be predicated on the individual, but also based on political parties.” P. 134
The explanation based on institutional design, proposed by Yudhini,\(^{110}\) is the most elegant. She argues that the institutional design of political representation developed by the drafters was intent on retaining Indonesia as a unitary state and not giving openings for fissiparous regional tendencies. Accordingly, party laws established a strong bias in favour of national political parties requiring parties to have branches in more than one third of the provinces and in more than half the districts within these provinces.\(^{111}\) The legislation also explicitly required political parties to have a national focus as articulated in Article 6 of Law 31 of 2002 on Political Parties which was adopted in the same period as the amendment establishing the DPD\(^{112}\):

(1) The general objectives of a political party are:

a. the realisation of national sentiment as defined in the Preamble to the 1945 Constitution;

b. the development of democratic life based on Pancasila and respecting highly the sovereignty of the people in the Unitary State of the Republic of Indonesia;

and

c. the realisation of prosperity for all the people of Indonesia.

The DPD election is conducted as a national election but those elected are intended to represent their provinces and are expected to reflect the specific perspective of each province. That being the case, according to Yudhini, it was not consistent to let national parties with their required nationwide perspective contest the seats in the DPD elections.

Deputy President of the DPD Laode Ida,\(^ {113}\) believes that the MPR decision to proscribe parties from DPD elections was a reflection of the growing public distrust of parties at that time. This view was shared to some extent by Tobing.\(^ {114}\) The orderly Suharto years

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\(^{110}\) Etsi Yudhini, interview 15 March 2007


\(^{112}\) Though superseded by Law 2/2009, the section dealing with the objectives of political parties contained the same provisions but added an additional objective to “protect and preserve the integrity of the Unitary Republic of Indonesia.”

\(^{113}\) Laode Ida, interview of 11 June 2007

\(^{114}\) Jakob Tobing, interview of 12 April 2010
of single party hegemony plus two decorative parties in permanent opposition had been replaced by a bewildering period of political party activism with dozens of parties contesting elections. There was also disquiet over aspects of the electoral system. The 1999 election had been conducted on the basis of proportional representation in each province with the result that the most populous province had over eighty representatives but voters did not know who their specific representative might be. There was also criticism of the effectively closed nature of the party list whereby the key decision of placing the candidate in a winnable position on the party’s list was taken by the party leadership, often for pecuniary considerations.115 There was therefore a sentiment that voters were cut off from the democratic process by the machinations of political parties and that voters wished to have a more direct link with “their” member of parliament. The design of the DPD aimed to appease this sentiment by allowing voters to vote for local champions who stood as individuals and not as part of the machinations of political parties.

Ellis116 believes the answer lies in the political strengths and weaknesses of the two major parties at that time. PDIP was reluctant to introduce a bicameral system and adamant that the chamber of the regions could not challenge the supremacy of the unitary state. The compromise they accepted was that of bicameral form with no bicameral effect. The reality of post-Suharto Indonesia was that Golkar had lost much of its support in Jakarta and many other parts of Java but had remained popular in the outer islands. In the 2004 elections, Golkar received more votes than other parties in twenty-six out of (the then) thirty-two provinces.117 This trend towards outer island dominance was also reflected within Golkar where the leadership battle at the time was between the Sulawesi group led by Jusuf Kalla and the Sumatra group led by Akbar Tanjung with the Java group led by Agung Laksono sidelined.118 Ellis argues that PDIP blocked parties from contesting election to the DPD because “if there had been parties in the DPD, Golkar would have

116 Andrew Ellis, interview of 15 October 2008
117 Aris Ananta, Evi Nurvidya Arifin and Leo Suryadinata, Emerging Democracy in Indonesia, Singapore, Institute of Southeast Asian Studies (2005) p. 40
118 Suryadinata, op cit, pp. 256-7
been in control of it.” Sambuaga of Golkar demurred from this explanation pointing out that PDIP also had considerable support outside Java.¹¹⁹

Each of these views on the reasoning behind the proscription on political parties in the DPD has weight. While nationally based parties can still be sensitive to provincial concerns, the design of the party system required them to behave fundamentally as national parties leading to at least a perception of inconsistency in having these national parties speak for the specific concerns of the provinces. The reaction against the hegemony of party leadership through closed party lists was to take several forms including a Constitutional Court decision interpreting the 2009 electoral law as establishing an open list electoral system.¹²⁰ Laoda Ida discerns an early reaction among the politicians in the MPR redesigning the system of political representation to concede some ground to this sentiment by facilitating champions as representatives through the proscription against parties in the DPD, with the consolation that the real power remained in the DPR. But fear of Golkar dominance of the DPD was also a decisive factor. The designers, led as they were by a prominent PDIP member, catered to their partisan interests and preferred a no-party chamber to a Golkar dominated one.

Added to these three reasons is another supplementary institutional explanation.¹²¹ Keeping parties out of the DPD would be yet another way to isolate and weaken the chamber. Even with the limited functions of the chamber, if it were filled with party members who could participate in the parliamentary party caucuses, the DPD would in effect have an informal channel through which to contribute to policy formulation. By proscribing parties from the DPD, this possible channel was cut off. This design impact flows from the underlying institutional logic of keeping the DPD fully subordinate to the DPR.

¹¹⁹ Theo Sambuaga, interview of 13 April 2010
¹²⁰ Sherlock, op cit, pp. 6-7
¹²¹ Kevin Evans, interview of 11 April 2010
THE RESULT

Indonesia had designed a new system of political representation with parties in one chamber and regional champions in the other. Soon after the changes had been made, they were put into effect.

The Elected DPD

On 5 April 2004, 124 of the 148 million eligible voters cast 113 million valid votes for election to the DPR, the DPD and the regional and district DPRDs. It is fair to say that the DPD election attracted the least interest. Decentralization processes had put the spotlight on local assemblies and cashed-up party machines had campaigned for DPR elections, leaving the 1200 individuals campaigning for the newly established DPD, to fend for themselves. According to opinion polling, only 58% of voters were aware of the DPD and even less knew how to vote in the DPD election. The results of the 2004 DPD elections are in Annex 6.1.

With voting numbers as high as in Indonesia and with a geography as dispersed, there is a premium on simplicity, both for the voter and the administrator. With four elections taking place simultaneously, the simplest method is to assign four ballots to the voter, one for each election, and indeed this was the method adopted in 2004. In relation to the three chambers being contested by political parties, the single ballot allowed voters to vote for an effectively closed party list, a well established practice in Indonesia and internationally. In relation to the DPD, however, the ballot design only allowed the voter to cast a single non-transferable vote for one candidate though four would be elected in each province. This single first-past-the-post method has a number of drawbacks in relation to a multi-seat district that tend to weaken the legitimacy and authority of those

122 Ananta et al, op cit, p. 22
124 KPU, final result
elected. It leads to a large percentage of “wasted votes” and it tends to elect members with small pluralities. Both problems manifested themselves in the 2004 DPD election.

The problem of wasted votes was particularly evident. Of the 32 provinces, the four elected DPD representatives received a combined vote over 50% in only five. Accordingly, in 27 provinces, the majority of voters did not support any of the elected representatives. The problem of small pluralities was also clearly present. Of the 128 elected DPD representatives, 78 or 61% received a plurality of less than 10% of the vote, the smallest plurality being that of Benyamin Bura in South Sulawesi who received just 4.2% of the vote. Only three elected DPD representatives received pluralities of over 20%, the highest being that of G.K.R. Hemas in Jogjakarta with 43%.

The electoral system for the DPD had one significant advantage over the 2004 DPR election. The effectively closed list in the DPR election did not allow voters to determine their own individual representatives. The DPD elections, on the other hand, allowed voters to elect their champions and thus to identify politically with the individuals elected. Adding to this aura of electing popular champions was an effect flowing from the system of equal number of representatives per province. In sparsely populated provinces, a low winning plurality could be gained by a limited number of votes, the smallest number of votes to gain election in 2004 being the 36,392 votes obtained by Djamila Somad in Bangka Belitung. In the populous provinces, however, even low pluralities amounted to high vote numbers. Only one of the 16 DPD representatives elected in Java received less than one million votes with Mahmud Ali Zain in East Java receiving almost two million. Based on a notional national average by dividing total votes by the number of seats, each DPR seat was won with 206,000 votes. 40 of the 128 DPD representatives won their seats with a higher vote than the notional average required for DPR election.

The first DPD was convoked on 1 October 2004 and a veteran former Golkar politician, Ginandjar Kartasasmita of West Java, was elected the inaugural President of the DPD with 72 of 128 votes in a run-off against Irman Gusman of West Sumatra who with Laode Ida of Southeast Sulawesi, became his deputies. The next several years were
focused on two activities. First, the newly arrived DPD members had to fight for their conditions of service seeking to match the housing, staffing and car privileges enjoyed by the long-established DPR members. According to commentators this struggle consumed much of the early energies of the DPD.\textsuperscript{125} The other preoccupation of DPD members was an attempt to increase their powers through a further constitutional amendment.\textsuperscript{126} They lobbied the political parties in the DPR to that end without success. Though an initial positive signal had been given by President Yudhyono’s Democrat Party, this support was not sustained as the President was unenthusiastic about further constitutional debates.\textsuperscript{127}

The most significant design changes to the DPD in the course of its first term came not through constitutional amendment but through constitutional interpretation.\textsuperscript{128} The Constitutional Court case concerned a challenge by the DPD to Articles 12 and 67 of Law 10/2008 regarding the General Elections of the Members of the DPR, DPD and DPRDs which did not include a provision that DPD members must be domiciled in the province in which they seek election, nor a provision that DPD members must not be members of political parties. Both the executive and the DPR argued in favour of the law as written. The majority of the court held that the Constitution implied that DPD members must be domiciled in the province in which they seek election and that the lack of a domicile provision in law 10/2008 was unconstitutional. The majority also held, however, that whereas the constitution requires that individuals continue to be the candidates for DPD elections and that they must not be nominated by a political party, it does not forbid them from being members of a political party when standing for election to the DPD.

It was therefore on this basis that the 2009 DPD elections took place. In the event, very little changed from the 2004 vote as DPD members were not supported by political parties, nor were elections to the DPD considered any more significant than in the

\textsuperscript{125} Marcus Mietzner, interview of 14 May 2007
\textsuperscript{126} Laode Ida, interview of 11 June 2007
\textsuperscript{127} Ibid
previous campaign, nor was the public any better informed.\footnote{Jakarta Post, “City Residents Overlook DPD Election”, 21 March 2009} The election took place on 9 April 2009 with 104 million valid votes cast (though only 95.5 million valid votes were tabulated for the DPD elections).\footnote{KPU, final result} The results of the 2009 DPD elections are in Annex 6.2.\footnote{Ibid} The results followed the same pattern as in 2004. In 29 of the 33 provinces (the new province of West Sulawesi had since been established), the four representatives were elected by less than 50% of the vote. 88 of the 132 representatives (67%) had pluralities lower than 10%. The lowest vote for election was by Bahar Buasan in Bengkulu with 21,700; the lowest plurality for victory was by Hossein Effendy in Southeast Sulawesi with 2.99%; the highest vote count was by DPD President Ginandjar in West Java with over three million votes; and the highest plurality was by G.K.R. Hemas in Jogjakarta with an impressive 52.61%. The lower voter turnout in 2009 and the higher number of DPR seats (up to 560 from 550) meant that the notional national average vote required for election to the DPR was 186,000. 41 of the 132 DPD representatives obtained a vote higher than this average.

Indonesia therefore has a constitutionally designed Representative Assembly of the Regions with popularly elected individual representatives. Some were elected with huge pluralities that dwarf the average number of votes for DPR members but there is no relationship between their popular support and their public responsibilities. The DPD has been designed to be little more than an advisory chamber with very limited legislative authority. The DPR is the dominant chamber to the point that it is questionable whether the Indonesian system can be described a bicameral. The information provided by the Indonesian parliament to the Inter-Parliamentary Union (IPU) and available on that website\footnote{Parline data for Indonesia, Inter-parliamentary Union, http://www.ipu.org/parline-e/reports/2147_A.htm} has all the updated information from the elections in 2004 in which the first DPD was elected and from 2009, but it has no information about the DPD. Instead, the Indonesian system is described as unicameral.
By the end of its first term of existence, some of the leaders of the DPD began to accept that there were very limited prospects for a constitutional amendment to increase the DPD’s powers.\textsuperscript{133} There were some signs that greater attention was being paid to the oversight function assigned to the DPD with public seminars and discussions devoted to issues of concern to the regions.\textsuperscript{134} This may well be the area where the DPD will be able to carve out as its niche in Indonesia’s system of democratic representation.

OVERVIEW

The foregoing brief political history of the Indonesian constitution dealing principally with the issue of representation with a particular focus on the establishment of the DPD, raises a number of issues about Indonesian political behaviour that has considerable impact on the question of institutional design and the intentions behind it.

\textbf{Constitutionalism}

There is a remarkable continuity in the professions of loyalty to the 1945 Constitution among Indonesia’s leaders. Sukarno’s involvement in its drafting and its later resurrection imbued the document with a near mystical aura. The return to the 1945 Constitution in the late 1950s was portrayed as the single solution to the country’s many problems. Sukarno’s political opponent and successor, General Suharto, rather than allow the 1945 Constitution to be replaced, continued the Sukarno tradition. All the resources of the Suharto era – military, civil service, educational and intellectual – were deployed to protect the constitution. In the post-Suharto period, calls for a return to a \textit{Konstituante} were easily dismissed and the 1945 Constitution was retained as the central instrument of Indonesia’s institutional design of governance.

It would be an error, however, to read into the support for this constitution a corresponding commitment to constitutionalism. Constitutionalism requires a system

\begin{footnotes}
\item[133] Laode Ida, interview of 11 June 2007
\item[134] Marcus Mietzner, interview no. 2 of 13 October 2008
\end{footnotes}
based on the rule of law. There are many ways that Indonesia prior to 1998 could not be said to fit within that description. The lack of any mechanism for judicial review provides the clearest signal that the law was not intended to be supreme. The poor human rights record in this period is another indication for which there is clear evidence in Suharto’s own writings. In his 1991 autobiography, Suharto admitted responsibility for extra-judicial execution of “criminals” and explained that “this was meant as shock therapy so that people would realize that loathsome acts would meet with strong action.”

The 1945 Constitution was not about constitutionalism, it was about legitimacy. The 1945 Constitution was the living link to the heroic national independence myths. All Indonesia’s leaders have benefited from this link. The 1945 Constitution is also a potent symbol of Indonesian nationalism which was long seen as the means to create national unity. While its symbolism was traditionally more significant than its content, the document had one particularly useful section – its preamble – because it is from this short passage that the doctrine of *pancasila* derives its authority. In the Suharto period, *pancasila* became the nation’s abiding philosophy and its derivation from the 1945 Constitution was sufficient reason to venerate the document.

Suharto had other reasons to be pleased with the 1945 Constitution. In the drafting process, Supomo had overcome Yamin’s ideas of the constitution as a means of limiting executive action by insisting on the integralist philosophy that saw the nation as a family that could have no internal fissures. This paternalistic philosophy was translated into a design of governance that allowed the president unlimited discretion. Suharto, however, respected one type of limitation – the need to follow certain forms and formalities. Constitutionalism in Indonesia in the New Order period took the shape of bureaucratic formalism.

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135 When criminality came to be perceived as a particular problem, Suharto authorized extra-judicial methods to deal with it. In 1983-85 some five thousand suspects were executed in the streets of various Indonesian cities where their bodies were left for others to contemplate. Schwarz, *op cit*, p. 249

136 *ibid*

137 Nasution, *op cit*, p. 122
Suharto was not a revolutionary. He was not prepared to stage a coup, though he was probably sufficiently powerful to do so. He preferred to adopt the far more proper course of putting down a coup. He did not believe in checks and balances between the branches of government but he liked the correctness of having those branches of government in place. As noted, the legislature in this period was little more than decoration. The judiciary did not have independent powers but nevertheless had to look like a judiciary. Suharto repealed the laws that allowed a president to interfere directly in judicial matters, but achieved the same result by making judges civil servants who were thus ultimately responsible to the president. Suharto did not ban all political parties but created the illusion of a multi-party system which nevertheless had difficulty disguising the reality of unchallenged executive rule.

Accordingly, it was not commitment to constitutionalism or the rule of law that explains the support for the 1945 Constitution but the need for legitimacy, unity and orderliness. Rule by law was seen as a useful mechanism but rule of law was ignored. When the time came to move towards a society of laws, the 1945 Constitution, though completely inadequate to the task, could not be jettisoned. Instead it was amended comprehensively, yet aspects of the first draft were bound to exercise a certain tyranny over the end product.

**Representation**

Indonesia’s complexities have long compounded the problem of democratic representation. Indonesia has struggled to find a design that suits its situation. Supomo’s notion of the integralist state should not be seen as an attempt to find a solution but rather as a way of avoiding the question. Sheltering behind romantic ideas of the principles of discussion and consensus underpinning traditional Indonesian *Adat* law, the integralist

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notion left no room for formal contestation on policies or leadership and opted instead for a paternalistic and supposedly therefore necessarily benevolent despotism.¹³⁹

Though comfortable with these ideas, the formalism of the Suharto years required more structure in the design of the institutions of representation. The reality was that under the New Order the army was firmly in control and saw itself as performing dual functions of providing security and “as a functional group ... to take an active part in all the efforts of the state and of the people in the fields of politics, economy and social affairs.”¹⁴⁰ New Order formalism, however, required a structure of political representation that looked like it involved the people. Political parties were deemed untrustworthy and mass movements were feared and so the New Order strategists turned to Article 2(1) of the 1945 Constitution which noted that the MPR shall comprise members of the DPR “augmented by the delegates from the regional territories and groups.” The idea of “groups” was already a favourite of the military as the concept provided its legal entry point for involvement in politics. Now it was seen as supporting another useful idea – organising popular representation by way of groups “to channel political participation ... into various state-designated functional organisations.”¹⁴¹ And thus Indonesian corporatism was born, not as a means of interest mediation but rather to contain and absorb the demands of the public. The drafters of the 1945 Constitution had foreseen “groups” as economic entities but the New Order went well beyond this thinking and established youth, women, civil servant, teachers, business, intellectual, Islamic scholars groups and eventually even movie star groups. The New Order was careful in establishing sympathetic leadership of these groups. Initially organised directly by the military, the system matured into Golkar, the political expression of the sum of groups.

New Order corporatism in the MPR outlived the Suharto era because it required the constitutional amendment process to finally dispense with the functional group delegates

who sat through the 1999-2004 MPR term. Golkar, however, survived, but only by transforming itself into a true political party seeking to represent its supporters. The system of representation returned to its pre-Guided Democracy form – through political parties, this time shaped by intricate design rules intended to weed out the small, the weak and the narrowly based.

The current design rules shaping political parties should be seen as part of an ambivalent posture towards political parties in Indonesia's modern history. Parties were central to the growth of the independence movement yet their militias proved to be a threat to central government in the revolutionary period. Parties then played the key role in undermining the Dutch divide and rule strategy by infiltrating the BFO through the recruitment BFO politicians. The lead up to the 1955 elections saw the parties in a dominant position as an essential instrument for the conduct of an election and the establishment of democratic representation. When the elections disappointed those seeing in them a panacea, the stature of parties plummeted with Sukarno identifying Indonesia's problems as one of the disease of parties. There followed four decades with true political parties in eclipse until the return to free and fair elections in 1999. The return of parties to their central place in politics has, however, been accompanied by historical misgivings and growing unpopularity. The current design rules concerning parties should be seen as responding to these issues.

**Regionalism**

The puzzle of representation requires a specific solution to a particular problem. The Indonesian reality was to find a solution that dealt with its archipelagic shape compounded by the reality of the population bias favouring Java. But Javanese domination was not the only complication. Reducing the problem to broad descriptions, the islands of eastern Indonesia had a greater representation of Christians while areas of

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Sumatra had more devout adherents of Islam. Indonesian modern history has seen several attempts to deal with these issues.

The Netherlands' method was federalism and for several months after the adoption of the 1950 Constitution Indonesia had senators representing states. But while the federal model could be defended on theoretical grounds, the Dutch were clearly using it for their own advantage. If the Dutch could not remain the sovereign, it would try to impose a type of suzerainty through its preponderant influence in many outer islands.

The parliamentary period relied on political parties to aggregate interests based on shared ideological leanings generally following Indonesia's classic political cleavages. The process of doing so was far from orderly and at times these cleavages expressed themselves along broad geographic and regional divides, as occurred following the Nahdatul Ulama split from Masjumi. It was probably the Communist Party, able to enlist organized labour and others to its ranks beyond its Javanese base, and the Nationalists who were the most successful of the parties in spanning the regional divides. That being so, there is no reason to believe that this process would necessarily have failed to achieve a legitimate system of political representation had Sukarno not put an abrupt end to it.

The Guided Democracy and Pancasila Democracy periods that followed required unity to be enforced by the military – in other words by waging war against regional independence movements. While provinces and districts existed in this period, they were seen as convenient structures for top-down governance delivery rather than as entities for political expression. Governors and district *bupatis* were appointed on the basis of either political loyalty or, especially in the later years of the New Order, on business decisions of who could extract the most from the corruption franchise they were being conferred.

Where regionalism is accepted as a basis for political expression, the obvious form of institutional design to adopt is federalism. Hatta, coming from Sumatra and alive to the problem of Javanese domination of the nation, was sympathetic to the idea of
federalism. Tan Malaka, a noted nationalist, and a contemporary and competitor of Sukarno, called for a federal republic of the various islands of Indonesia. Had unity of the nation not been a concern, and had an imagined community of Indonesia existed in the minds of all its inhabitants, then federalism would have been the logical construct for so widespread a polity. But the problem in this design is that it assumes and accepts the previous existence of coherent entities to form the various states of a federal nation. The Indonesian nationalists feared this very state of affairs and were intent on giving it no grounds to develop. Added to this problem was the history of Dutch imposition by force of arms of a federal Republic of the United States of Indonesia thus placing “a permanent blemish on the notion of federalism.”

Fear of federalism has had an enduring effect on Indonesia. When the next critical juncture opened for fundamental reform in the relationship between the centre and the periphery, Habibie was in power. Law 22/1999 granted extensive power to the districts or regencies of Indonesia bypassing the provinces. The central government would retain responsibility only for foreign policy, defence, monetary policy, the judicial system and religious affairs. Habibie defended his decision by arguing that “granting autonomy to the regions (i.e. districts) is not identical to opening the door to federalism.”

Seen in this context, the third amendment to the constitution establishing a Representative Assembly of the Regions, in which each province would have equal representation, appears at first blush to cut across the flow of Indonesian history and political culture. It requires further explanation.

**Interests and Power**

Arrayed among the forces insisting on keeping Sukarno’s 1945 Constitution in the reformasi period was his daughter Megawati. As leader of the largest party in the DPR

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143 Reid (1974), *op cit*, p. 72
145 *Ibid*, p. 147
146 Habibie, *op cit*, p. 266
after the 1999 elections, she had expected to become president, but Gus Dur outmanoeuvred her and she had to settle for the vice-presidency. Gus Dur’s conduct, however, provoked the political elite to remove him from office in July 2001 leaving Megawati as president. Her legitimacy as a leader rested in large part on her father’s legacy and she considers herself to be an expert on this issue. The unitary nation was at the heart of this legacy and its principal formal articulation was the 1945 Constitution. While the integralist ideas had to be abandoned as not in keeping with the times, the notion of Indonesia as a unitary state remained strongly entrenched in the PDIP ideology.

Pancasila was a distinctive feature of the 1945 Constitution and this philosophy would survive its misappropriation by Suharto. The preamble could therefore not be tampered with and it is retained unamended even though odd references to colonialism remain and the text continues to read as if independence has just been proclaimed. The other unique feature of the 1945 document, distinguishing it from other constitutions of the world, is the MPR chamber. In its original form, it is not a legislature but it determines the guidelines of the policy of the state. It is not a parliament but it elects the head of state. It is the guardian of the constitution and the overseer of the president, yet it is required to meet only every five years. To do away with the MPR would be to reject the architectural spine of the 1945 Constitution and its most distinctive institutional design. Like pancasila, the MPR had to be retained or else it would be more logical to convocate a Konstituante and begin the design process anew. Megawati was in this period at the peak of her power and her attachment to the 1945 Constitution was decisive. She gave her PDIP negotiators strict instructions to retain the MPR in the amendment of the 1945 Constitution.

Golkar had survived the transition under reformasi by transforming itself into a civilian party supported strongly by the outer islands making it the second party in parliament with over 25% of the seats. Its then leader Akbar Tanjung was rewarded with the presidency of the DPR. Golkar was no longer hegemonic but it remained a veto player in

147 Jakob Tobing, interview of 12 April 2010
148 Ibid
Indonesian politics. Golkar’s interests were to press for a strong DPD which it would have dominated, but its New Order reputation and corruption allegations against Akbar weakened its hand.\textsuperscript{149}

It stands to reason that the design of the DPD had to fit within a compromise between the two then dominant parties and their leaders. The MPR had to be maintained but the existing method of supplementing the DPR members had to be changed. The functional groups concept had to be consigned to corporatist history. It would have been logical to retain the other method used in 1999 – having the elected provincial assemblies elect or select their delegates to the MPR. But there were several problems with this idea from a PDIP perspective. First, it would greatly favour Golkar. Second, it would weaken the unitary state concept by having elected provincial assemblies send their own representatives to the MPR resembling a federal structure. Finally, it didn’t seem in keeping with the reformasi momentum to revert to any form of indirect election or appointment – a sentiment that would also lead to the direct election of the president. Megawati strongly supported the direct election of the president on the (mistaken) basis that it would lead to her re-election and she had to be consistent in respect of direct elections to the MPR.\textsuperscript{150}

The compromise seemed to meet most requirements at least part way. The 1945 Constitution’s most distinctive institutional design feature was retained. Golkar got its provincial chamber, but was denied ownership of it by the proscription on parties. The MPR became a democratic chamber comprising members of two fully elected chambers. The public demand for more control over the election of their representatives was appeased through the method of election to the DPD, though not, initially, to the DPR. The DPR retained the dominant position it had so recently gained. The number of DPR members was increased to 550 (and later 560), while a nexus was established limiting the size of the DPD to one third of the number of DPR members. The one group which did

\textsuperscript{149} Theo Sambuaga, interview of 13 April 2010
\textsuperscript{150} Etsi Yudhini, interview of 15 March 2007
not have its interests met were the prospective members of the new chamber, the toothless DPD.

Conclusion

A disconcerting irony befell the first elected DPD members. They joined the MPR at the moment when its powers were fundamentally curtailed. Prior to the constitutional amendments, Indonesian sovereignty was held in trust by the MPR and its members could on that basis have claimed a reserve power to intervene in moments of crisis. After the constitutional amendments, sovereignty rested with the people through the constitution. Had they joined the MPR in its previous term they would have participated in fundamental debates about Indonesian governance and contributed to the most far reaching constitutional changes in a generation. By the time they did join, it seemed clear that the deliberative energy had waned and that the task had moved from constitutional amendment to legislative implementation, a task for the DPR. Further, by the time the DPD was formed and its members became concurrently members of the MPR, the impeachment process had also changed. No longer could a vote in the MPR unseat a president as the previous MPR had done twice in the space of two years, the process had become far more difficult with the impeachment power shared with the new Constitutional Court. Were the DPD a powerful upper chamber, the newly elected members could have tackled the great issues of state through their involvement in legislative, budgetary and oversight functions. But the DPD had very few powers in these fields and its newly minted representatives found themselves becalmed in a billabong after the great wave of change had passed by.

From the individual DPD representative's perspective a further depressing irony presented itself. They were popularly elected representatives having gained election as individuals through their own efforts, not because of internal party processes as was the case in the DPR. Many saw themselves as popular champions and the true representatives of provincial people in the capital.¹⁵¹ Not having a party behind them, the DPD

¹⁵¹ Laode Ida, interview of 11 June 2007
candidates had to run their own signature drives and election campaigns at considerable cost, but with a highly constrained mandate, the traditional means of recouping the costs were more difficult for them. Only 27, including those in leadership positions, of the 128 original members won re-election to the DPD in 2009. All in all, the first DPD term and the two elections to date do not suggest that becoming a member of the DPD is a good career move.

Ironies aside, however, the DPD has met its design objectives. The MPR remains. The DPR retains its powers. The chamber is popularly elected. Golkar cannot dominate it. The unitary state of Indonesia is not compromised. There is an appearance of bicameralism but without its encumbrances. The provinces are given a voice in national politics but that voice cannot make demands. The one objective that was never set for the DPD was to establish an effective and powerful house.
### Annex 6.1: DPD Members Elected in 2004

<table>
<thead>
<tr>
<th>No.</th>
<th>Province</th>
<th>Name</th>
<th>Votes received</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>North Sumatra</td>
<td>Drs. H. ABD. HALIM HARAHAP</td>
<td>810,232</td>
<td>15.38</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Ir. NURDIN TAMPUBOLON</td>
<td>321,570</td>
<td>6.10</td>
</tr>
<tr>
<td></td>
<td></td>
<td>RAJA INAL SIREGAR</td>
<td>316,358</td>
<td>6.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Drs. H. YOPIE SANGKOT BATUBARA</td>
<td>277,649</td>
<td>5.27</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Total valid votes</td>
<td>5,269,646</td>
<td>32.75</td>
</tr>
<tr>
<td>2</td>
<td>West Sumatra</td>
<td>H. H. IRMAN GUSMAN, S.E., MBA</td>
<td>348,200</td>
<td>17.59</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Drs. H. ZAIRIN KASIM</td>
<td>171,962</td>
<td>8.68</td>
</tr>
<tr>
<td></td>
<td></td>
<td>AFDAL. S.Si</td>
<td>170,872</td>
<td>8.63</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Dr. MUCHTAR NAIM</td>
<td>116,795</td>
<td>5.90</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Total valid votes</td>
<td>1,979,973</td>
<td>40.80</td>
</tr>
<tr>
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# Annex 6.2: DPD Members Elected in 2009

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CHAPTER SEVEN

COMPARATIVE PERSPECTIVES: YEARNING FOR EXEMPLARY REPRESENTATIVES

The design of non-partisan chambers of parliament can be situated in a comparative appreciation of questions concerning the process of institutional design such as approaches to constitutionality and electoral systems, and the reliability of intentionals as a guide to outcomes. It also allows for a comparative understanding of the conceptual architecture underpinning the institutional design proscription on political parties in parliamentary chambers. But before addressing these issues, it is necessary to supplement the Southeast Asian examples with others adopting the same approach of accepting the necessity of a multi-party system but proscribing parties from part of the parliament.

THREE EUROPEAN CASES

The three major case studies represent a Southeast Asian attempt to find means of achieving democratic representation other than through political parties to respond to particular political needs. Because of their regional specificity, conclusions to be drawn from these case studies may be open to suggestions that they represent geographic or cultural peculiarities. For that reason, three pen portraits of similar cases in Europe are also presented to allow the conclusions to be tested against a more universal set of cases. The three European cases concern the Irish Senate, the (abolished) Bavarian Senate and the Slovenian National Council. The two existing European chambers when combined with the two continuing Southeast Asian cases comprise, according to the Inter-Parliamentary Union, 1 all the cases in electoral democracies where chambers are constituted with political parties either totally or partially proscribed. Accordingly, the conclusions to be reached have an “all n” as opposed to a “small n” character.

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1 Ambassador Anda Filip, correspondence of 3 December 2008
The Irish Senate

The Irish Senate (Seanad Eireann) is a creation of 1930s social thinking and was greatly influenced by the papal encyclical *Quadragesimo Anno* written by Pope Pius XI in 1931. The Vatican was struggling with ways of combating the division of society along Marxist class lines and suggested instead that “a bond of union is provided both by the production of goods or the rendering of services in which employers and employees of one and the same vocational group collaborate.” This led to the notion of forming one of the chambers of parliaments along vocational lines. Article 18 of the Constitution of Ireland identifies five vocational categories: language and culture; agriculture and fisheries; labour; industry and commerce; public administration. In addition, Ireland’s major universities are also allocated seats. The current composition of the Senate is 60 members of which eleven are appointed by the Prime Minister and 49 are elected by vocationally divided electoral colleges.

The 2004 Report on Senate Reform has the distinction of completing an even dozen of such reports dating back to a previous iteration of the Senate in 1928. The Report puts the Senate’s problem starkly:

- It has no distinctive role in the Irish political system; and
- Its arcane and outdated system of nomination and election diminishes senators’ public legitimacy.

The lack of legitimacy was mainly due to the indirect nature of elections:

The electorate for most Seanad seats currently numbers around 1,000 people and comprises county councillors, county borough councillors, outgoing Senators, and incoming Deputies. As long as the majority of citizens are excluded from the

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3 *Ibid*

4 *Ibid*, p. 8
Seanad’s electorate, it will lack the essential ingredient of public legitimacy and the gap between it and the average citizen will remain.\textsuperscript{5}

The Irish political system recognizes that although in theory the Senate has no party allegiances, in practice the make-up of the special electorate combined with the Prime Minister’s nominations, has led to the Senate becoming a political reflection of the lower house and indeed acting like it in dividing along party lines between government and opposition senators.\textsuperscript{6} The net result in the eyes of many mirrors that of a blogger who argued that “no body of well paid and intelligent people is as irrelevant to Irish society as the upper house of parliament.”\textsuperscript{7} The recommendations in the 2004 study, still making its way through the parliament, are to abandon the corporatist ideas introduced in the 1930s, abolish the vocational nature of the election, and instead elect political party representatives by universal suffrage.

\textbf{The Bavarian Senate}

The drafters of the Bavarian Constitution of 1946 ignored the advice of the then US military government that corporatist systems have been associated with authoritarian governments and nevertheless designed a Senate along corporatist lines.\textsuperscript{8} The conservative Christian Social Union party was strongly in favour of the design arguing firstly that it was a means of bringing expertise and professionalism to the parliament which otherwise was subject to frequent changes of membership, and secondly that it should be a non-political chamber that should balance the political forces in the lower house.\textsuperscript{9} Accordingly, members of the Bavarian Senate were nominated by various social groups including labour unions and employer organisations, economic sectors such as

\textsuperscript{5} Ibid, p. 26
\textsuperscript{9} Ibid
agriculture and industry as well as representing the Church. The chamber had certain limited legislative powers, including the right to return bills to the lower house for reconsideration, but ultimately could not block bills.

By the late 90s, the Bavarian Senate was facing abolition. It was dominated by elderly men (only 4 of the 60 members were women, the average age of its membership was 60) who had spent many years warming Senate seats and it was the only upper house among all of Germany's 16 states. Conformity with the rest of Germany in its integration with Europe, criticism of the Senate especially from the Green Party and a general disenchantment with corporatist models combined to leave the Senate with few defenders and in 1998 a referendum decided on its abolition which occurred on 1 January 2000. Its relevance to this study lies largely in the fact that the Bavarian Senate was a model for the only other surviving corporatist upper chamber in Europe, the Slovenian National Council.

The Slovenian National Council

The wave of democratization that swept through Eastern Europe in the early 1990s had Slovenia at its crest. Slovenia asserted its independence and sought international recognition requiring a constitution to strengthen both claims. Slovenia formed a Constitutional Commission that debated issues through 1990 and 1991 which was the subject of a three volume study, the third volume of which deals with the National Council. The debate on the form of parliament was one of the final issues resolved and the participants concede that the pressure of time led to a rushed decision. There was a division of opinion between proponents of unicameral and bilateral models; the former

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11 Ibid
14 Dr Miro Cerar, correspondence of 23 March 2009
arguing that Slovenia's small size lent itself to unicameralism and the latter arguing the merits of a house of review. Among the bicameralists, one group proposed a house representing local interests while the other sought a more corporatist model in the Yugoslav political tradition and based on the precedent of the Bavarian Senate.\textsuperscript{15}

The compromise that was rushed through at the eleventh hour was for a bicameral system with the upper chamber or National Council seen as "rather weak and inactive"\textsuperscript{16} and which contained both the local representation idea and the corporatist idea. The 40 person chamber elected by appropriate interest groups or local communities comprises:

- 4 representatives of employers
- 4 representatives of employees
- 4 representatives of farmers, crafts and trades, and independent professions
- 6 representatives of non-commercial fields
- 22 representatives of local interests.

In comparison to certain other upper chambers, the Council has fairly significant powers to:

- Propose to the National Assembly the passing of laws
- Convey to the National Assembly its opinion on all matters within the competence of the National Assembly
- Require the National Assembly to decide again on a given law prior to its promulgation (a suspensive veto power)
- Require the calling of a referendum
- Require inquiries on matters of public importance.

According to the official description of the parliament, "the composition of the National Council is designed to neutralise the influence of political parties, which are involved in legislative processes primarily through the National Assembly."\textsuperscript{17} Thus the idea was to keep "politics" to the lower house and have the Council function as a house of review, of

\textsuperscript{15} Dr Dusan Strus, correspondence of 23 March 2009
\textsuperscript{16} Ibid
\textsuperscript{17} Official Slovenian parliamentary website, http://www.ds-rs.si/en/?q=about_NC
deliberation and enquiry, and to be the initiator of referendums. However, "in practice, political parties managed to infiltrate the Council through representatives of local interests. The candidates for the National Council are elected through municipal councils where political parties are present. 22 representatives of local interests are mainly political parties’ members."18

While the Council has earned itself a role beyond the humble “weak and inactive” expectations, it is nevertheless the subject of a debate about its retention. Miro Cerar, Secretary of the 1990/91 Constitutional Commission, launched the debate in an article in 2006 raising the possibility of abolishing the National Council in which he argued that “the National Council was not an absolute necessity and our political institutions would have functioned just as well without it” and that at the time of its design “there was neither the time nor political wisdom for a real discussion about the constitutional nature and purpose of the National Council.”19 Others have been more scathing arguing that the Council is an “obsolete institution” which was “an unnatural combination of the Yugoslav corporatist system and a modernized upper house...what we got was an institutional deformity in which the representatives of local interests ... actually represent the interests of the political parties they belong to.”20

THE PROCESSES AND TOOLS OF INSTITUTIONAL DESIGN

Armed with the three major case studies and the three European pen portraits, this study can now turn to certain comparative issues concerning the process of design.

Critical Junctures and the Centrality of Constitutions

An observation to be drawn from comparing the case studies is that critical junctures in a nation’s history allow for heroic innovation in institutional design. In all cases under

18 Dr Dusan Strus, correspondence of 23 March 2009
review the context for the initiative in institutional design was a turning point in that nation’s history whether it was the end of the war for Germany or the end of the Cold War for Slovenia; the fall of Marcos in the Philippines or the fall of Suharto in Indonesia. In Thailand the impetus for change came in the aftermath of the bloody suppression of protests following a coup and the political will to put it into practice flowed from the 1997 financial crisis. In Ireland it was a response to the fundamental challenges flowing from Marxism. These types of critical junctures generate enthusiasm for change and weaken the forces defending the status quo. The page of a new chapter being turned beckons to be filled with original or at least different content from that in the previous chapter. The usual reasons for inertia – caution and stability – are swept away leaving open the possibility of heroic institutional design options.

This is not a particularly surprising or remarkable finding. The case studies, however, also support a corollary conclusion – that outside critical junctures the process of institutional change becomes far less heroic and tends to become more tentative, marginal and iterative. Thus Ireland is considering its twelfth reform study for the Senate, none of the previous ones being able to generate sufficient deliberative energy and public support to effect basic change of a system that is accepted as dysfunctional. The Philippines adopted its heroic design in 1986 and has spent the next two decades tinkering with it. Slovenia took advantage of the end of the Cold War to redesign its system of governance but does not seem able now to correct acknowledged errors. Thailand, unfortunately, has had further critical junctures since the 1997 Constitution was adopted each leading to further broad design choices but none able to find a consensus among either the public or the elite. Indonesia’s constitutional reform process has come to an end for the moment leaving iterative change in the hands of specialist bodies like the constitutional court. Bavaria provides an example of taking advantage of a new critical juncture, the further integration into Europe, to take decisive action to abolish an institution that had outlived its utility.

While the distinction between critical junctures and periods of relative political equilibrium and continuity is of importance in understanding the process of institutional
design, it does not necessarily follow that only the former leads to significant change. Incremental changes may also lead to weighty results. The many incremental steps in the two decades following the passage of the 1986 Constitution of the Philippines including presidential appointments, legislative action and repeated judicial retooling have had a far more significant effect on the party-list system than the 74 words laid down by the constitutional drafters in Paragraph (2) of Section 5 of Article VI. Thus one must not discount the possibility of “revolution in slow motion” as a result of incrementalism. But while not a guide to significance per se, critical junctures can be distinguished as those times that facilitate single heroic attempts at institutional design – large-scale, radical, original, untested, experimental – all being synonyms for heroic in this case.

This temporal discussion concerning institutional design is paralleled by the textual discussion. When examining the instruments through which institutional designs are put in place, the case studies demonstrate the centrality of constitutions. In all the case studies, the initial redesigns of the institution of democratic representation that are the subjects of this study were accomplished though constitutions. Though having ancient roots, the modern practice of a founding document setting down rights and limitations in the governance of a polity was pioneered in the United States. It represents the written articulation of the founding bargains on which the state is based. In that sense, it can be seen as the formal “contract” in the social contract. Because the institution of political representation is one of the most difficult and contentious of these founding bargains, it is to be expected that constitutions will tackle it with considerable specificity. Means of representation do not lend themselves to being described through broad hortatory pronouncements but rather require quantitative descriptions and lists of assigned powers. For example, the 15 articles devoted to the Senate in the 1997 Constitution of Thailand contain over one thousand words. And though the Indonesian constitution devotes less than 300 words to the DPD it nevertheless sets out method of election and powers of the chamber in considerable detail. Perhaps one reason why the party-list system in the

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Philippines constitution has been open to so much subsequent redesign is because only 74 words were devoted to its description.

This conjunction of the temporal and the textual provide those “rare moments in a nation’s history when deep, principled discussion transcend the log-rolling and horse trading of everyday majority politics, the object of these debates being the principles which are to constrain future majority decisions.”\textsuperscript{22} The design of the institution of representation must be one of the areas that is difficult to change in order to constrain future majorities; otherwise majorities of the day would have it in their power to chop and change the representation rules to suit their immediate needs. Proscribing parties from parts of parliament must be seen as a radical step amounting to a heroic design concept best accommodated in a critical juncture and requiring the authority of a constitution to bring it about.

\textbf{Tracking Intentionality}

The next observation that jumps out from the case studies is the impact of the country specific context on the design debate and outcome. Having traversed the long path of the Marcos and Suharto periods or the return of the culture of coups d’État in Thailand, the designers’ intentions were to design systems that would disallow a return of these particular ills. Their designs were therefore intended to right wrongs. The designers did not consider that the problem lay only in the implementation of the existing structures of governance; new structures were required that heeded the lessons of the past. The Irish case may be seen as something of an outrider but it was nevertheless an attempt to deal with what it considered a wrong – the impact of Marxism.

The articulation of intentions therefore takes both negative and positive perspectives. In the Philippines the discussions turned on the perfidies of the past and the need to ensure there was no return to an authoritarian kleptocracy. Further, in relation to the institution

of representation, articulation focused initially, on the need to strengthen political parties and, later, on the need to find ways to allow the marginalized and underrepresented a voice in parliament. In Thailand there was an honest and wrenching analysis of the corruption of Thai politics and in relation to representation, a discussion of how to use the Senate as an instrument for probity. While in Indonesia, there was a recognition that the discretionary nature of politics as practiced required reform and, in relation to representation, a rejection of appointment processes in favour of elections as well as a need to give a parliamentary voice to the different parts of the far-flung archipelago.

In relation to these intentions, a question arises as to what reliability to place in the articulation of intentions as a guide to eventual outcomes. Monsod’s intention to strengthen the party system in the Philippines was clearly not a reliable indication of what was to follow. Villacorta’s championing of sectoral representation provided a better indication of what would unfold but neither of these visions encompasses the current situation Nor was the elaboration of sectors a sturdy guide to developments. The party-list part of the chamber comprises groups linked to religions which were thought to be constitutionally precluded from contesting these seats; communists, who have the largest single representation; an array of consumer groups; powerful regional families; and some sectoral representatives as envisaged. The heroic Thai design to ensure probity through a non-partisan Senate was put in place far more faithfully than its Philippine counterpart and the designers’ intentions therefore must be given greater currency even though the design ultimately failed to achieve its objective. Of the three case studies, the modest Indonesian design for a regional chamber that would allow for the retention of the unique architecture of the MPR while not raising it to the status of a veto player can be seen as the most faithfully executed of the original intentions though only if one links the intentions to the compromise result and not the ambitious original Sambuaga vision of a more balanced bicameral system.

If the intentions of individual designers are a doubtful predictor of eventual outcomes, perhaps a better guide is the interests of institutional structures. In each of the three cases, the determination of one part of the institutional architecture to retain or maximize its
power serves as a more reliable form of intentionality. In the Philippines and Indonesia the will of the lower chamber had a decisive impact. RA7941 of 1995 drafted by the House of Representatives of the Philippines hobbled the party-list system by imposing the 2% threshold and the three-seat limit. The resulting fragmented segment of the House would therefore pose far less of a challenge to the politics-as-usual of the constituency-based majority of the House. A very similar process took place in Indonesia where the DPR-dominated MPR ensured that DPR primacy remained unchallenged. In the parliamentary system in Thailand, it was the executive branch along with the lower house in which it had a majority that manoeuvred the Senate away from its assigned oversight responsibilities.

Parallel to the will of these structures another good guide to outcomes is the will of that other key collective player – political parties. They also saw these non-partisan chambers as a challenge to their authority. Whether one considers the Thai Rak Thai party as an autonomous actor or merely as Thaksin’s personal vehicle, its interests remained to minimize oversight constraints on its room for manoeuvre. It therefore worked to emasculate the Senate’s oversight role. In Indonesia, the issue presented itself in the form of inter-party competition as it was in PDIP’s interest to ensure that Golkar was not able to gain an advantage by dominating one of the chambers of a strong bicameral system. PDIP therefore ensured that there was a weak second chamber and for good measure agreed to disallow political parties from participating in its work. Parties have far less coherence in the Philippines and bending to the will of designers, the major parties accepted their exclusion from the party-list system but tried to undermine the system by running offshoot parties in these elections – a tactic that the courts challenged. As noted above, in Slovenia “parties managed to infiltrate the Council” which had been designed to be a deliberative chamber above politics; and though the Irish Senate was intended to be a non-partisan chamber, the logic of local politics “has led to the Senate becoming a political reflection of the lower house.”

These case studies led to the conclusion that designers’ intentions are a less reliable guide to subsequent developments than projections based on the interests of institutional
actors affected by these designs. Designers cannot impose their will by fiat. Institutional
design alone is an insufficient guarantor of change. Effective designs must either take
into account the interests of those affected, find ways to temper them, or design
institutional changes that are sufficiently modest to sneak under their radar.

**Something Borrowed, Something New**

Are there any conclusions to be drawn based on the provenance of the design ideas? Are
there tried and tested designs that have universal applicability? Or must each polity begin
with a blank page and design *de novo*?

The history of constitutional drafting in the Philippines, elaborated in Chapter 4, has
many examples of borrowing: its first constitution in 1897 was copied word for word
from the revolutionary Cuban constitution of Jimaguayu; the Malolos Constitution of
1899 adopted a more nuanced borrowing technique and balanced these with features
specific to the Philippine situation; the 1935 Constitution adopted under American
tutelage drew inspiration from American designs; the 1943 Constitution was clearly an
instrument of the Japanese occupation; and the 1973 Marcos constitution drew its
inspiration from fellow regional autocrats. The party-list design of the 1986 Constitution
drew its inspiration from the German model but subsequent tinkering by all three
branches of government turned it into the unique "Filipino-style" party-list.

The long and involved history of Thai constitution drafting sketched out in Chapter 5 can
be described as borrowing certain forms but crafting much of the substance to suit local
needs. Issues such as the role of the monarchy and the constraints to be placed on the
executive branch often turned on the composition and duties of the senate. The 1997
constitution was by far the most elaborate in attempting to craft this process and have
rules in place for all eventualities thus contributing to its originality and its length.
McCargo implicitly criticizes this level of original constitutional crafting when he
describes it as “over engineered” and in danger of causing gridlock and having unintended effects.\(^{23}\)

The Indonesian case is clearly one of idiosyncratic drafting. The 1945 constitution eschews basic concepts such as checks and balances between the branches of government and even dispenses with the institution of judicial review. In creating the MPR, the designers drew on integralist theories that placed “the people” at the centre of politics but gave them little means of controlling their representatives. The amendments to the 1945 constitution had to find a way of providing higher quality representative governance while sticking to the basic form of the constitution and in particular maintaining the MPR. The DPD was the structure that allowed the MPR to be maintained. It mimics federal structures without adopting standard bicameral balances.

The Irish Senate drew its inspiration from the Pope while the Slovenian National Council followed a dead end in the form of the soon to be abolished Bavarian Senate though, as a participant in the drafting process notes, “if we had known that (it) would be abolished in the near future, we probably would not have adopted this model.”\(^{24}\)

While the practice of constitutional borrowing has a lengthy pedigree, “the existing literature has not addressed systematically the methodology of constitutional migration, nor the normative underpinnings of this enterprise.”\(^{25}\) And indeed one of the conclusions drawn from this literature confirms the intuitive: “historical, cultural, political, and institutional factors play an important part in determining the viability, scope, and possible depth of any possible adaptation of imported constitutional norms.”\(^{26}\)

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\(^{24}\) Dr Miro Cerar, correspondence of 23 March 2009


The Electoral Architecture

The electoral architecture employed in the three case studies can be compared by reference to Diamond’s four normative trade-offs:27

- Governability v. Representativeness
- Representativeness v. Constituency Accessibility
- Party Coherence v. Voter Choice
- Simplicity v. Appropriateness

In relation to the party-list election in the Philippines, the system provided the voter with a relatively simple system by grafting it on to the existing electoral architecture through the provision of an additional vote. Voter choice was limited to the party or group on the list with no option of voting for an individual candidate and the link to the voter was therefore through this party or group. Because only 20% of the House is elected by the party-list, the issue of governability is more muted but the system as implemented certainly increased the fragmentation of the chamber. The greater complications in the Philippines were those grafted onto the system through the enabling legislation which proscribed participation by the major parties, introduced an effective 2% quota and limited any single party or group to 3 seats. One of the starkest design weaknesses in this system is that the greater the number of electors participating, the higher the number of votes required to pass the threshold, making it a disincentive to campaign for greater participation in the party-list election. Another is the three seat limit which necessarily leads to either wasted votes or fragmentation. While fragmentation is a criticism from a party system and governability perspective, it does allow from broader representativeness and given the candidates of “marginalised and underrepresented groups” standing for election, it created broader options for representation.

27 Larry Diamond, Developing Democracy – Toward Consolidation, Baltimore: Johns Hopkins University Press, 1999, pp. 100-103
Election to the Thai senate under the 1997 constitution was based on the province (changwat) as the electoral district with the number of senators per province based on population size thus giving 22 of the 75 provinces a single senator while Bangkok as the largest electoral district had 18. The geographic dispersion of the 200 senators thus reflected the same distribution as the 400 constituency members of the House, also elected on the basis of the provincial electoral district. While this would often be regarded as a design weakness given the normal requirement to elect the two houses by different means, in the case of the 1997 design, the existence of the 100 party-list members of the House added an additional dimension to the quality of representation. The system provided a strong degree of voter identification with the elected senator and was relatively simple to understand and implement. The specificity of the Thai design was less in its electoral method than in its qualification process. Candidates had to hold a university degree, could not be members of a political party, and were not allowed to campaign for office to the point of not being permitted to use a microphone.

Indonesia also used a province-based electoral district for the DPD elections allowing voters a single vote to elect the four representatives from each province. While of commendable simplicity, this system has the disadvantage of generating many wasted votes and also establishing widely different electoral mandates as between the elected DPD members. As in Thailand, the system provided a strong degree of voter identification with the elected DPD member and was relatively simple to understand and implement. The limited responsibilities of the DPD meant that the electoral method had little impact on governability. Given the non-partisan nature of this chamber as with the Thai senate, the electoral system clearly did not directly strengthen political party coherence.

30 Section 125(3), Constitution of 1997
31 Section 126, Constitution of 1997
32 Section 129, Constitution of 1997
33 Inter Parliamentary Union, praline database, http://www.ipu.org/parline-e/reports/arc/2312_00.htm
The three electoral designs under review contributed little to governability or party system coherence but they have in common the effect of creating a strong link between the voter and her representative. In the Thai and Indonesia case the link is spatial while in the Philippine case it is more ideological. The link is not mediated through any political parties in the Thai and Indonesia cases and in the Philippines it is nurtured through minor parties and groups with which the voter feels a strong affinity. In this sense the design of these electoral systems is attempting to have a particular type of person elected – an individual champion.

**The Balance of Institutional Rights and Responsibilities**

Another means of comparing the case studies is to review the rights and responsibilities each chamber was endowed with. The purpose of the chamber should be reflected in its powers and functions which should also serve as a guide to design. These rights and responsibilities may be summarized for this purpose under four headings:

- Legislative function
- Budgetary functions
- Oversight function
- Constitutional review function
- The relationship between the chambers and the balance of the parliament.

The following table encapsulates these issues:
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<th>Indonesian DPD</th>
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</thead>
<tbody>
<tr>
<td><strong>Legislative Powers</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legislation</td>
<td>Same powers as balance of House</td>
<td>More limited role than House</td>
<td>More limited role than DPR</td>
</tr>
<tr>
<td>Budget</td>
<td>Same powers as House, but limited access to slush funds</td>
<td>Budget introduced in House, may only be delayed by Senate</td>
<td>Limited role in relation to financial issues concerning regions</td>
</tr>
<tr>
<td>Oversight</td>
<td>Same powers as House but not membership of commission on appointments</td>
<td>Both chambers have interpellation power, Senate has enhanced powers of appointment</td>
<td>No powers of interpellation or investigation, limited oversight of legislation</td>
</tr>
<tr>
<td>Constitutional amendment</td>
<td>Same powers as other members of Congress</td>
<td>More limited role than House</td>
<td>Equal role in MPR, but outnumbered by DPR members</td>
</tr>
<tr>
<td>Balance between chambers/segments</td>
<td>Informal discrimination by House constituency members</td>
<td>Detailed division of responsibilities</td>
<td>Inferior to DPR, nexus limits size of DPD to one third of DPR</td>
</tr>
</tbody>
</table>

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34 Section 169, Constitution of 1997, “a bill or an organic law bill may be introduced only by members of the House of Representatives or the Council of Ministers”; Senate may only delay legislation, Section 176, Constitution of 1997
35 Article 22D(1)(2), Constitution of 1945 as amended. DPD may introduce on Bills on certain subject matters and only has the right to discuss these Bills. Whereas “The DPR shall hold legislative, budgeting and oversight functions” – Article 20A(1)
36 Joel Villanueva, interview of 1 April 2007
37 Section 180, Constitution of 1997
38 Article 22D(1), Constitution of 1945 as amended – “Bills related to the financial balance between the centre and the regions”
39 Joel Villanueva, interview of 1 April 2007
40 Section 183, Constitution of 1997
41 E.g. in relation to Electoral Commission, Section 136, Constitution of 1997
42 Article 22D(3), Constitution of 1945 as amended – “The DPD may oversee the implementation of laws concerning regional autonomy, the formation, expansion and merger of regions, the relationship of central and local government, management of natural resources and other economic resources, implementation of the State Budget, taxation, education, or religion and shall in addition submit the result of such oversight to the DPR in the form of materials for its further consideration”
43 Section 313, Constitution of 1997
44 Articles 2 and 3, Constitution of 1945 as amended
45 Louis Corral, interview of 14 April 2007
46 Article 22C(3), Constitution of 1945 as amended – “the total membership of the DPD shall not exceed a third of the total membership of the DPR”
The members of the party-list element of the Philippines House have all the powers of other members of the House in terms of the various functions of the chamber. Where an element of discretion is possible through the interpretation of internal regulations, these decisions tend to favour the constituency members. Electorally, the significance of the party-list members is in the marginalized communities they are supposed to represent. Politically, some party-list members (communist affiliated) are clearly distinguishable as they are considered threats to regime stability.

From an institutional design perspective, the other two chambers are more interesting. The comparative thread comes in the form of their specialization. Each has been given distinct functions but while the Thai Senate's functions are detailed and significant, the DPD's functions are more amorphous and inconsequential. The Thai design emphasizes the oversight issues, while the Indonesia design focuses on regional responsibilities but only gives equal individual powers in relation to constitutional amendment.

The issue that binds these case studies together is that all three institutional structures are divorced from the political mainstream. They are designed to perform functions or represent constituencies not already covered by the political architecture. Their separation from the mainstream political parties is intended to enhance the roles assigned to them – in the case of the Philippines and Indonesia, to provide an additional and qualitatively different layer of representation in a system where many are seen to be underrepresented; while in the case of Thailand to inject a force for probity in a system diagnosed as corrupt. These are roles that were seen by the designers to be beyond the competence or confidence of political parties. Accordingly, they needed a different conceptual architecture to justify their designs.

THE CONCEPTUAL ARCHITECTURE

Held notes that "participation in political life is sadly but inescapably limited in a large-scale, complex, densely populated society."\(^{47}\) If individuals can not speak for themselves,

who should speak for them? Indonesia, for example, saw in the course of its early history youths, regional groups, generals and religious figures all claiming the right to act on behalf of the people. But while “there (is) no desirable alternative to representative democracy”\textsuperscript{48} the solution to the riddle of how to engineer representation has in the modern era turned to the political party as the best design.

**Political Parties**

Mass societies practice representative democracy. The normal means of doing so is through political parties. As noted in chapter 3, the normative, practitioner and scholarly views converge on the essentiality of political parties playing the roles assigned to them. Those roles may be summarized as the representative, deliberative or policy formulation and executive formateur tasks. All the case studies under review accept the essentiality of political parties playing these roles. But all the case studies under review also considered that there were some roles that were either not being effectively played by political parties or that should more appropriately be in other hands. Table 7.2 summarizes the reasons for the design of these chambers and their current situation.

### Table 7.2: Non-Partisan Chambers in Six Polities

<table>
<thead>
<tr>
<th>Rationale</th>
<th>Current Position</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Ireland</strong></td>
<td>Avoid class cleavage politics</td>
</tr>
<tr>
<td><strong>Bavaria</strong></td>
<td>Deliberative chamber above politics</td>
</tr>
<tr>
<td><strong>Slovenia</strong></td>
<td>Deliberative chamber above politics</td>
</tr>
<tr>
<td><strong>Philippines</strong></td>
<td>Represent marginalized groups</td>
</tr>
<tr>
<td><strong>Thailand</strong></td>
<td>Force for probity above politics</td>
</tr>
<tr>
<td><strong>Indonesia</strong></td>
<td>Represent archipelago, maintain MPR without establishing federal structure</td>
</tr>
</tbody>
</table>

The common theme running through these six cases is that the structures established were somehow to go beyond the day-to-day practice of politics. The non-partisan structures

\textsuperscript{48} Ibid
have little or no role in forming executives. This is clearly the field of mainstream politics. But they do have representative functions and policy functions that overlap with those of chambers in which the mainstream political parties operate. These designs were therefore seen as somehow completing the representative architecture by discharging roles that political parties were not performing effectively. Accordingly, they were not intended as replacements for political parties but as complementary structures. Yet even the need to complement political parties requires an alternative concept of representation.

**Corporatism**

According to Kamrava "corporatism denotes the convergence of varied and disparate interests within and alongside a state for the furtherance of common goals that happen to coincide."49 This happy coincidence of converging interests allows individuals a means of representation within the state other than through political parties. Where this coincidence does not occur, the state might decide to facilitate it as noted by Stepan in his more realistic definition of corporatism, which though focused on Latin America, nevertheless applies more generally:

Corporatism refers to a particular set of policies and institutional arrangements for structuring interest representation. Where such arrangements predominate, the state often charters or even creates interest groups, attempts to regulate their number, and give them the appearance of a quasi-representational monopoly along with special prerogatives.50

Adding the elements of state strategy to the definition, Schmitter takes the definition a step further by painting a picture of state manipulation of the process:


A system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection or leaders and articulation of demands and supports.  

It is the granting of "a deliberate representational monopoly" which holds attractions for certain types of leadership. By this means they can claim to be consulting affected interests but they do so from a position of strength as the creators or at least the licensors of that process. The alternative is to deal with the issues through the processes of competitive multi-party politics which holds the disadvantage for incumbents of possibly leading to the loss of incumbency. Corporatism thus became associated with authoritarian regimes wishing to hold on to their monopoly of political power.

Reviewing the cases under study, corporatism, in one iteration or other, formed the conceptual architecture for many of the institutions of representation intended to complement political parties. Ireland’s constitution elected 49 of the 60 senators in five vocational categories. Members of the Bavarian Senate were nominated by various social groups including labour unions and employer organisations and other economic sectors as well as seats representing the Church. Eighteen of the 40 person Slovenian National Council represented employers, employees, farmers, crafts and trades, and independent professions as well as representatives of non-commercial fields. Corporatist structures were first introduced to the Philippines by Marcos but they found their way into the 1987 constitution which listed the sectors as labour, peasant, urban poor, indigenous cultural communities, women, youth, and such other sectors as may be provided by law, except the religious sector. The Annotations to the 1945 Indonesian constitution lists the groups to be represented in the original MPR as cooperatives, labour unions and other collective organizations. The one case study not resorting to a form of corporatism, the Senate

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under the 1997 constitution of Thailand, has now gone in that direction as the 2007 constitution requires half the Senate to be selected under the categories of academic institutions, public sector, private sector, professional organizations and other organizations (of which a good number have military or police titles).

Corporatism was thus seen as a means of filling the gaps not covered by political parties. Whether one interprets it as a convenient way for those in power to determine who would be their interlocutors (in Indonesia's case this was seen as a way "to pre-empt the development of effective independent associations") or as a means of designing structures to give voice to otherwise poorly represented groups, the systems established had a degree of artificiality. In this sense, corporatism is a creature of institutional design by seeking to shape politics to the needs of the designers. It represents dissatisfaction with or even fear of the uncertainties and caprices of multi-party politics.

There has been some debate about the regional origins and spread of corporatism. The suggestion is that it is a peculiarly Iberian phenomenon enthusiastically taken up by the Iberian settler societies of the New World. O'Donnell refutes this notion and sees in corporatism a doctrine of convenience for autocrats everywhere. A possible re-interpretation is that its origin in modern politics derives not from a region but from a religion. Its encouragement can be traced back to Quadragesimo Anno written by Pope Pius XI in 1931. It is that influence which weighed heaviest in Ireland. It is perhaps no coincidence that Bavaria is a predominantly Catholic Land and that Slovenia falls within the Hapsburg Catholic side of the Balkan divide with Byzantine Orthodoxy. The Philippines is the most Catholic country in Asia and while Marcos was hardly close to the church, he may nevertheless have drawn inspiration from that source. Indonesia is more difficult to categorize in this way. One view tends to see the development of corporatist

52 Section 114 of the Constitution of Thailand of 2007
55 Ibid, pp. 1-2
ideas as indigenous Indonesian thinking. 56 But Bourchier 57 traces this line of thinking back to Supomo's days at Leiden University perhaps providing the link with the other cases as the Dutch "pillar system" which kept each group within their confessional boundaries had a distinct Catholic pillar. 58

Returning to table 7.2, one can see that the corporate structures built in these cases have not fared well. The corporatist Senate in Bavaria has been abolished as has the corporatist aspect of the MPR in Indonesia. The corporatist elements of the Irish and Slovenian structures have been swamped by political parties and are unlikely to survive impending reforms. The sectoral concept in the Philippines has been largely taken over by non-mainstream political parties and other interest groups based on narrow economic or parochial interests. Even Indonesia's corporatist political party, Golkar, is trying to transform itself from an association of groups into a true political party supported by regional and business interests. Thailand's tinkering with corporatist ideas is swimming against the tide of history and indeed one of the most contentious issues in Thai politics is the possible return to the structure of the senate outlined in the 1997 constitution. 59 The reason for this retreat from corporatism is its fundamentally undemocratic nature by imposing a system of representation rather than allowing people full associational freedom and political expression.

Whatever its derivations or its prospects, corporatism provides one of the alternative or complementary pieces of conceptual architecture to the view that "political parties created democracy and modern democracy is unthinkable save in terms of parties." 60 It has a considerable pedigree but an uncertain future because its reputation is mixed at best and it has not been successfully integrated into liberal democracy. The other alternative concept though it has a far older pedigree has only recently begun to inspire designers.

56 David Reeve, Golkar of Indonesia – An Alternative to the Party System, Singapore, Oxford University Press, 1985
59 “Charter Change is no guarantee”, Bangkok Post Editorial, 23 July 2009
Championship and the Confucian Concept of Junzi

The depth and breadth of dissatisfaction with political parties has been documented by Carothers in what he describes as “the standard lament”. The alternative corporatist temptation has not been successfully grafted onto democratic system. Designers have been searching for other conceptual approaches to deal with the perceived corruption, fecklessness and pettiness of party politics. It is understandable that Asian nations might look to non-Western constructs in their search for an alternative and in particular to seek out other ideas from the region including from Confucianism.

Societies throughout history and across the globe have had notions of the exemplary person as a leader. Plato’s philosopher king and Sunni Islam’s counsellors to the imam are examples of exemplary persons involved in governing their polities. Another example is the Confucian concept of junzi. Though this term has not been specifically referred to in the local designers’ articulation of their intentions, its impact can nevertheless be discerned. In many parts of Asia, Confucianism has had an enduring impact either because of China’s historical suzerain status over large swaths of Asia or due to the influence of Chinese Diasporas. Though never entering Thailand, Indonesia or the Philippines as a formal process or system, certain Confucian ideas had resonance in amplifying traditional notions.

Junzi has several translations including “superior person”, “noble person” or “cultivated person”. Others have translated it as “profound person”, “consummate person” or the

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term that has come to be most often used, "exemplary person".\textsuperscript{65} In addition, the concept entails notions of reasonableness and selflessness.\textsuperscript{66} Another element grafted onto \textit{junzi} is "working for the common good".\textsuperscript{67} Schell explains the concept as follows:

Confucius held that a \textit{junzi} ruled not by means of harsh laws, coercion and autocracy but through benevolence, virtue and the projection of a stellar ethical example that would inexorably radiate throughout the land. "If you desire what is good, the people will be good," he said. "The moral power of a \textit{junzi} is like the wind, while the moral power of the common people is like the grass. When blown, the grass cannot but bend before the wind.\textsuperscript{68}"

Contrasted with the ills of party politics there is a yearning for the qualities encapsulated in the notion of \textit{junzi} – reasonableness, selflessness, profundity, and working for the common good. The problem facing the designers was how to identify these people and bring them into the political process without having them tainted by political parties? Each of the three Southeast Asian cases attempts to craft just such an outcome.

The exception that devoured the rule in the Philippine design was intended to give the marginalised and underrepresented a voice in politics. A common assumption at the Constitutional Commission was that the major political parties had failed at this task and what was needed were different types of parliamentarians who, to quote the fulsome language of the debates, would be "the voices of the voiceless, the eyes of the blind, the ears of the deaf and the crutches of the crippled".\textsuperscript{69} The design attempts to engineer a new type of representation that would not be politics as usual.

\textsuperscript{65}David Jones, “Teaching/Learning through Confucius: Navigating our way through the Analects”, \textit{Education About Asia}, vol. 5, no. 2, Fall 2000, \url{http://www.aasianet.org/eaa/jones.htm}
\textsuperscript{67}\textit{Ibid}, p. 93
\textsuperscript{68}Orville Schell, “China’s Quest for Moral Authority”, \textit{The Nation}, 20 October 2008
\textsuperscript{69}Jose E. Suarez, debate of 1 August 1986, \textit{Record of the Constitutional Commission – Proceedings and Debates}, prepared by the Editorial/Publication Unit under the supervision of Hon. Flerida Ruth P. Romero, Volume Two, p. 582
In Thailand, the *junzi* concept paralleled the *phudi* leadership style that many locals appreciate. The 1997 Constitution designed a new type of senate as the central pillar against corruption by exercising “control over political figures and high-ranking officials” and to achieve this role it had to somehow elevate it above politics. Once again, a new type of representative was being sought, a “good” person whose chief attribute was probity. The main disqualifying factor was to be a “politician”.

The design discourse in Indonesia is not as clear cut in this regard but there was a sentiment that voters were cut off from the democratic process by the machinations of political parties and that voters wished to have a more direct link with “their” member of parliament. The design of the DPD aimed to appease this sentiment by allowing voters to vote for local champions who stand as individuals and not as part of the machinations of political parties.

The problem in a democracy with engineering a system to produce a new type of representative is accommodating universal suffrage. The designers in each case had to find ways of putting their exemplary representatives in office through a popular vote which would give them the necessary legitimacy. Having accepted the indispensability of political parties, each of the designs attempts to quarantine one part of the parliament from the contagion of parties. Proscription was therefore the first and most basic aspect of the design. Beyond proscription, the Philippine design was to give the marginalised sectors a head start by allowing their appointed representatives to sit for three terms of office. Bolstered by the considerable weapon of incumbency, these sectoral representatives would then be able to be elected by popular vote. The Thai method was to proscribe campaigning even to the point of disallowing the use of microphones. Candidates would already have to be well and favourably known to the community to be elected. A similar idea was put in practice in Indonesia where, cut off from the support of a political party, the candidate had to win election as an individual to become the province’s local champion in Jakarta. Each of these methods attempts to produce an...
elected representative who is not a politician, the latter being simply seen as someone from a major political party. Each of these methods allows for universal suffrage either in a national or provincial electoral district. And in each case the desired result is the election of a champion – either for a sector, for a province or for a cause.

Given time and perseverance, each of these designs may have eventually approached the designers’ intentions. Among the organizations with party-list seats after the 2007 election and the subsequent *Banat case*, are groups representing indigenous people and veterans which are sectors listed in the constitution or the legislation. But a closer look at *Ang Laban ng Indiginong Filipino* (ALIF) or the Veterans Freedom Party (VFP) shows that they are little more than fronts for the Macapagal-Arroyo administration. ALIF’s representative is former Malacañang’s Office of Muslim Affairs Executive Director Acmad Tomawis and VFP also had strong support from the president. Indeed it is difficult to point to any of the 36 groups elected through the party-list system which meet the “voice of the voiceless” image that the designers were looking for. Instead, there are leftist political parties, consumer and producer organisations and some local notables from political families portraying themselves as the voice of minority language groups.

There is so little political action that can be attributed to the DPD in its first term, dominated as it was by the futile struggle for constitutional review as well as the manoeuvring for individual allowances and privileges, that it is difficult to reach a judgment about the quality of the representatives. The best that can be said is that some saw themselves as local champions and were frustrated at their lack of influence. The most significant event that may undermine even this notion of championship and move the DPD representatives more towards the “politician” side was the decision of the constitutional court to allow future candidates to be members of political parties even if they are disallowed from running in this livery.72

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Of the 200 Thai senators elected under the 1997 constitution, it is possible to identify a small group that did meet the design ideals. A study of the voting records of the Senate showed that while Thaksin could count on only about 60 Senators when he came to office, within a couple of years this number had swelled to 130.\textsuperscript{73} Among those not suborned was a core group of 30-40 academics and NGO activists who might fit quite neatly in the \textit{junzi} mould.\textsuperscript{74} They at least were able to form a coherent minority voice. The closest articulation to the concept of \textit{junzi} has come from Thailand. A noted Thai commentator has described a new style of Thai politician that differs from the \textit{nakleng} or tough feudal lord model and gravitates towards “a new style (that) has roots which are more Chinese than Thai…The two key attributes of this style are strategy and fairness”.\textsuperscript{75}

One of the key distinctions of this new monk-like politician is that “he dispenses justice with fairness and morality, in spite of pressure from bad men and influential friends”.\textsuperscript{76}

As noted, the problem of designing democratic systems that bring exemplary people into leadership roles is the election process which is inherently political and lends itself to that indispensable creature of mass modern democracy, the political party. Some designers are therefore looking for ways of putting exemplary persons in office that avoid elections. One of the 2007 Thai constitution’s most important changes from its 1997 predecessor concerned “selection” to the Senate:

It shies away from the idea of a totally selected (appointed) Senate by opting instead for a mixture of selected (seventy four in number) and elected (seventy six in number) Senate, partly to appease those who feel that a totally selected body would simply not be credible.\textsuperscript{77}

\textsuperscript{76} Ibid, p. 18
The system of selection is through the judiciary and other senior office holders as Section 113 states the decisions will be made by a:

Senators Selective Committee consisting of the President of the Constitutional Court, the Chairperson of the Election Commission, the President of the Ombudsmen, the Chairperson of the National Counter Corruption Commission, the Chairperson of the State Audit Commission, a judge of the Supreme Court of Justice holding the position of not lower than judge of the Supreme Court of Justice as entrusted by the general meeting of the Supreme Court of Justice and a judge of the Supreme Administrative Court as entrusted by the general meeting of the Supreme Administrative Court.

Selection by worthy people is thus one method of avoiding the uncertainties of elections. An alternative method is to draw on yet another Confucian idea – the examination. Bell examines China's move from communism to Confucianism and asks how the Chinese system can identify leaders who have qualities “not just for fair representation and local solidarity” but also the quality of “deliberators”. He responds by drawing on Jiang Qing’s idea for a House of Exemplary Persons and, rejecting the acceptability of open national elections in the near term, argues instead for a system of examinations for a seat in a “meritocratic legislature”. Bell’s view is that a Confucian examination process will have popular credibility because of its cultural acceptability.

But whether by selection or examination, it is difficult to reconcile these concepts with generally accepted ideas of representative democracy. The case studies, on the other hand, remain true to democratic processes. They describe attempts to find champions through the ballot box but as will be shown in the next and final chapter, the non-partisan chamber cannot be considered a success thus providing a doubtful foundation from which champions can accomplish their work.

79 Ibid, p. 180
80 Ibid, p. 17
CHAPTER EIGHT

CONCLUSION: THE LIMITS OF INSTITUTIONAL DESIGN

Historical institutionalism has provided a sturdy framework for this research. It privileges examination of the deep context in which a polity deals with political decisions. It allows for an understanding of the mindset and interests of the actors involved in the deliberation and implementation stages of the political process. And it allows for a sharp focus to be directed at the critical junctures in which key decisions are taken. This approach has allowed for an examination and comparison of all the situations in which democracies have attempted to quarantine parts of parliament from political parties. Firm conclusions can be drawn on the question posed at the outset of the research concerning the viability of non-partisan chambers of parliament. There are also conclusions to be drawn on the broader issue of institutional design. What can be expected to be achieved by institutional design? Are there propitious circumstances for the use of heroic design solutions? Are there problems that do not lend themselves to such design solutions? What are the limits of institutional design?

Non-Partisan Chambers

The polities under study adhere to Schattschneider’s dictum: "political parties created democracy and modern democracy is unthinkable save in terms of parties".¹ In each case, political parties, warts and all, are intended to play the central role in politics. Yet in each case designers decided to attempt to quarantine a chamber of parliament or part thereof from what they considered to be the pernicious aspects of political parties practicing politics as usual. What conclusions flow from the case studies about the rationale for this design and its viability?

The Rationale for Non-Partisan Chambers

Reviewing the various case studies including the European cases does not disclose a single rationale for non-partisan chambers. There are a variety of reasons for this design:

- To avoid class cleavage as the sole basis of political organisation (Ireland)
- To have a non-partisan deliberative chamber (Bavaria and Slovenia)
- To give the marginalized a political voice (the Philippines)
- To oversee the oversight agencies (Thailand)
- To give regions higher quality representation (Indonesia)

The tasks being assigned to the non-partisan chambers reflect significant aspects of the political system. These tasks can be aggregated as follows by reference to the principal rationale for their design though in practice each of the chambers has responsibilities in each of these categories:

- Representation responsibilities (Ireland, the Philippines and Indonesia)
- Deliberation responsibilities (Bavaria and Slovenia)
- Oversight responsibilities (Thailand)

The need to design non-partisan parts of parliament to undertake these responsibilities is an indirect but serious criticism of political parties and thus dovetails with the "great lament" Carothers reports.² It flows from the rationale for these designs that parties are failing to adequately represent the electorate; do not deliberate sufficiently; and cannot be trusted to manage the oversight agencies. As noted in Chapter 3, there are two possible responses in a democratic context to the failings of political parties – to reform them or to bypass them. In each of these cases resort was had to the latter.

Recalling the essential roles assigned to political parties:

1. Recruit and nominate candidates for elective office
2. Mobilize electoral support for these candidates
3. Structure the issue choices between different groups of candidates
4. Represent different social groups or specific interests
5. Aggregate specific interests into broader electoral coalitions
6. Form and sustain governments
7. Integrate citizens into the nation’s political processes.

These roles encompass at least two of the basic responsibilities assigned to non-partisan chambers. Parties are required to represent the electorate (2, 4 and 7) and deliberate over the issues of the day (3 and 5). They are only indirectly involved in the oversight process through their role as formateurs of executives (1 and 6) which are themselves the subject of the oversight process. In relation to these broad responsibilities, therefore, the non-partisan chambers in performing their representation and deliberation roles may be argued to be complementing the role of parties but another interpretation is that they are competing directly with political parties which are more than likely to view the situation as one of de facto competition. It is difficult to see how the non-partisan chamber can effectively compete with political parties in these roles. Without the clear advantages of direct links with executives, mass bases of support, and experience based on longevity, these newly hatched non-partisan chambers are competing well above their weight. If they resign themselves to the outer margins of politics, the political parties may tolerate them, but if they directly challenge political parties as they inevitably must to perform their assigned responsibilities effectively, then they will need to brace themselves for the backlash from the parties. In relation to representation and deliberation, perhaps the designers should have opted to try to reform and strengthen political parties to better perform these roles instead of setting up competing structures.

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In relation to the oversight responsibility, a different equation emerges that nevertheless points to a similar result. Political parties are a target of oversight mechanisms – electoral commissions, auditors and courts are intended to enforce laws and regulations dealing with parties. The 1997 constitution of Thailand was designed to make the non-partisan senate the guardian of these oversight bodies. The other non-partisan chambers have far more limited roles in this regard and the party-list representatives in the Philippines have effectively been denied access to the Commission on Appointments. The oversight responsibility does not create competition between parties and the non-partisan chamber but it nevertheless generates tensions. Judicial and constitutional oversight bodies have certain guarantees of tenure and perhaps of budget to help them deal with these inevitable tensions. They also have a rhetoric and supposedly a culture of independence. It is very difficult to replicate this level of independence in a newly designed and elected chamber of parliament. The non-partisan chamber is therefore not in a strong position to engage in a contest with the partisan chamber or the partisan executive when conducting its intrusive oversight role. If it is ineffective in the oversight role, executive branches may choose to ignore the non-partisan chamber. But if it is seen as posing a significant challenge to the executive, it will surely come under political attack.

Whether competing against political parties or challenging their powers, non-partisan chambers are in an inferior position of power and influence. It is difficult to see how this intrinsic mismatch can be remedied by better design.

The Viability of Non-Partisan Chambers

Examining the rationale for non-partisan chambers shows how they are necessarily thrown either in competition or in conflict with political parties. The next question is therefore to examine the relationship in practice in the various case studies.

In Ireland, the Senate has become a political reflection of the lower house and acts like it in dividing along party lines between government and opposition senators. The Slovenian National Council was intended to be above politics but in reality has been “infiltrated” by
political parties through the category of local council representation. In the Philippines, though the courts tried to prevent the larger parties from running proxies in the party-list election, there was clearly a limit to their enforcement capacity and there are several examples of party-list representatives who are in reality part of the Administration. Even religious groups who were explicitly excluded in the constitution from the party-list system are now represented in the party-list, once again demonstrating the limits of Comelec and Supreme Court vigilance in this area. In Thailand, the number of senators who were subject to Thaksin’s influence rose to 130 out of 200. The pressures that Thaksin and his Thai Rak Thai Party were able to deploy ranged from inducements to intimidation and the large majority of individual senators were no match for his minions and billions. In Indonesia, the parties were able to ignore the DPD because of its impotence. The Constitutional Court decision giving the green light for DPD candidates openly to be members of political parties, but not to stand in that capacity, may open the door to the infiltration process.

In all existing non-partisan chambers political party infiltration has occurred to a greater or lesser degree. The regularity and extent of the use of this tactic by political parties suggests that it follows what is tantamount to a law of nature. Just as nature abhors a vacuum, parties abhor a political vacuum; especially in an institution, the parliament, which they consider to be their fiefdom. Apart from infiltration, the other tactic employed by political parties is to ignore a powerless chamber. The DPR simply ignores the DPD and will not countenance sharing any of its legislative or oversight powers with the other chamber.

This casts a rather long shadow on the viability of the non-partisan chamber. It is the very feature that distinguishes it from the balance of parliament that is its Achilles heel. It is its non-partisanship that will attract either infiltration or segregation from its powerful partisan competitor. By designing chambers “above politics” the designers have not given them the wherewithal to play the politics needed for self-defence. In that most political of houses, non-partisan chambers are no match in their competition with the masters of parliament.
The future of the various non-partisan chambers is quite bleak. The Irish Senate is already under the sway of parties. It is perennially under review and if it is to stave off abolition it will eventually need to accept universal suffrage and succumb to the reality of political party participation. The Slovenian National Council has also been surreptitiously drawn into the party system and is unlikely to survive in its present non-partisan form. The Thai Senate was abolished and its successor is a partially selected chamber without the special responsibilities for oversight which have largely been transferred to the judiciary. The Indonesian DPD continues to search for a role which, if not found, will continue to condemn it to irrelevance and segregation.

Of all the case studies, the Philippine party-list system has shown the greatest robustness. It has survived and has finally fulfilled its numerical allocation of 20% of the House. It suffers from fragmentation and infiltration but it provides an official platform for an irreconcilable political minority whose other option is insurgency. It has therefore to some extent fulfilled the secondary intention of the designers to be a voice for the politically marginalized – though perhaps not as originally envisaged along sectoral lines.

Perhaps Schattschneider’s dictum that "political parties created democracy and modern democracy is unthinkable save in terms of parties" should be taken literally: that the parliamentary process, the heart of modern democracy, is unthinkable save in terms of parties. There is no example to refute this contention.

**Institutional Design**

The concept of path negotiability provides a useful template for examining the use of institutional design as a means of bringing about political change. Issues such as the complexity of the negotiation, the parties involved in and affected by the negotiation, the scope and depth of the change being sought, and the nature of the package deal being negotiated, all have an impact on the applicability and viability of institutional design processes.
Complexity

The issue of complexity arises in both the identification of the problem and its proposed solution. Governance problems tend to be complex as they involve both the governors and the governed and the relationship between them. The first lesson for the institutional designer suggested by the case studies is to try to disaggregate a complex governance problem to identify a strategically salient aspect capable of being affected by institutional design solutions.

The drafters of the 1997 constitution of Thailand tried to resolve the problem of political corruption. This is a most complex issue involving the rule of law and its enforcement, the attitudes of the elite and the electorate as a whole, and the nation’s economic and social incentives and disincentives in relation to corruption. It is difficult to see how institutional design can be used as the main weapon in the armoury unrelated to other longer-term weapons such as law enforcement, civic education and the nurturing of social capital.

The drafters of the 1987 constitution of the Philippines initially wished to strengthen the party system, a daunting objective faced by many countries but one for which the party-list electoral design option is a known response. But the rationale was switched to giving a voice to the marginalized. This can be a sufficiently focused objective capable of finding an institutional design option that would contribute to a solution. In Asia for example, several polities have quotas for tribal minorities or rules for candidate eligibility to ensure tribal representatives are elected. In the Philippines six sectors were initially identified but these became lost in the broad and rather amorphous category of “marginalized and underrepresented” thus losing focus on a strategically salient issue capable of being affected by institutional design.

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In Indonesia, on the other hand, the drafters of the 2001 third amendments to the 1945 constitution dealing with the DPD had very specific objectives in mind. They had to find a way to maintain the MPR, maintain DPR dominance within it and allow the balance of the MPR to be elected by universal suffrage. Their design was constrained by a political culture hostile to federalism and by growing public antipathy towards political parties. The objectives and constraints were therefore well focused and allowed for a specific solution to the problem.

Complexity also bedevils institutional design solutions. Electoral processes often offer options for design solutions that are relatively simple to implement. The 1997 constitution of Thailand attempted to deal with political corruption in various ways. One was to calibrate eligibility rules for candidates for political office. The constitution required candidates for the House (section 107(3)) and Senate (section 125(3)) to hold a Bachelor’s degree. The rationale behind this very elitist provision was to keep provincial gangsters out of parliament.5 Another way was to make voting compulsory based on the argument that the higher the voter turnout, the more expensive it would become to gain election by vote buying thus acting as a deterrent to money politics.6 The academic qualification eligibility design has the clear advantage of simplicity and implementability. Compulsory voting is also a relatively simple design though more difficult to translate to reality and of doubtful value as an antidote to vote buying.

At the opposite end of the complexity spectrum, the constitution established a fourth branch of government intended for enforcement of the rules of probity. This was a complex undertaking requiring the construction of new bodies endowed with some exceptional powers. The Electoral Commission, for example, had the power to disqualify a candidate because of perceived corrupt practices in the course of the campaign, a tool it used initially with some gusto.7 The Senate stood at the centre of this design as the guarantor of the probity of the officials of this fourth branch. Each of the seven structures

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5 Borwornsak Uwanno, interview of 5 November 2006
6 Ibid
7 The Electoral Commission suspended 78 candidates standing for Senate elections in 2000, Michael Nelson “The Senate elections of March 4, 2000” King Prajadhipok’s Institute Newsletter Volume 1, Number 3, August 2000
forming part of this fourth branch of government had its own appointment process. The Ombudsman Office\textsuperscript{8}, the Audit Commission\textsuperscript{9} and the Human Rights Commission\textsuperscript{10} were basically appointed on the advice of the Senate. The Constitutional Court\textsuperscript{11}, the Administrative Courts\textsuperscript{12}, the Electoral Commission\textsuperscript{13}, and the national Counter Corruption Commission\textsuperscript{14} each had elaborate "selective committees" or judicial commissions which either included the Senate or made recommendations to the Senate. Many individual senators participating in this process were bewildered to the point of paralysis with the dozens of c.v.'s being submitted to them and often deferred to the wishes of the professional politicians pursuing party lines influencing these committees.\textsuperscript{15}

The level of complexity in the system was beyond the coping capacity of an individual senator and ultimately defeated its underlying purpose.

Indonesia kept things fairly simple. Initially, they used the same electoral system as had been used in the Potemkin elections under Suharto because the public was familiar with it. Reforms to this system have come iteratively – directly elected president and vice-president by the two round method; individuals elected to the DPD through a single vote within established provincial electorates; the opening of the party lists for election to the DPR (perhaps the most complex of the electoral developments). The role of the DPD also lacked complexity – basically to make up the numbers in the MPR through universal suffrage.

While simple designs are easier to deliver, they often lack a reform impact. Complex designs tend to stray from the designers intentions because of their many "moving parts". The challenge for institutional designers is to seek a way to have a change impact with as simple a design as possible dealing with as focused an issue as possible.

\textsuperscript{8} Section 196
\textsuperscript{9} Section 312
\textsuperscript{10} Section 199
\textsuperscript{11} Section 255
\textsuperscript{12} Section 279
\textsuperscript{13} Section 138
\textsuperscript{14} Section 297
\textsuperscript{15} Samart Rattanaprateeporn, interview of 5 November 2006
Negotiation, Implementation and Participation

The concept of negotiability also facilitates an analysis of the process of design and the subsequent implementation of the institutions under review. What light do the three major case studies cast on the format and locus of institutional design negotiations? What do they have to offer on the issue of the breadth of participation in these negotiations? And what lessons may be drawn from the subsequent implementation and interpretation of the product of the negotiations? In dealing with these issues three difficulties arise. As Horowitz notes, "most constitutional drafters and reformers are, at best, only vaguely informed by anything resembling an articulate theory of their enterprise." Categorizing constitutions and shoe-horning them into theoretical approaches is something that invariably occurs after the negotiations. The second problem of analysis flows from the reality that these constitutional moments are triggered by crises when understandings based on business as usual do not apply and exceptions become the norm. Third, drawing on individual examples presents its own difficulties because "however similar (constitution drafting) problems might be, the differences will be even more startling." Accordingly, there is an inevitable 'messiness' in dealing with these issues and conclusions must be tentative.

Process will significantly influence outcomes and the key issue that arises in institutional design conducted as part of constitution drafting is who the drafters should be. The basic options are the establishment of a constituent assembly, employing the legislature or entrusting the process to the executive as well as combinations of these three approaches. The adoption of the instrument by referendum is an additional option. The Comparative Constitutions Project categorizes 460 constitutional processes and finds that 117

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involved a constituent assembly though only 53 used a constituent assembly alone; 225 employed the legislature but only 89 used the legislature alone; 250 involved the executive but only 40 had the executive alone adopting the constitution; and 108 cases involved a referendum. Different situations may require different processes but perhaps the most forthright “best practice” commentary on these processes comes from Elster who argues that “constitutions ought to be written by specially convened assemblies and not bodies that also serve as ordinary legislatures.” This, Elster argues, will reduce the scope for institutional interests to prevail.

Looking at South and South-East Asia since the end of WWII, it is clear that constituent assemblies are a quite popular method of constitution drafting. Two of the three major case studies, the Philippines Constitutional Commission of 1986 and the Thai Constitutional Drafting Assembly of 2006-07 fall into this category. The exception is the Indonesian case where the constitutional amendments were adopted by an existing chamber, the MPR.

**Table 8.1: Constituent Assemblies held in South and East Asia to 2009**

<table>
<thead>
<tr>
<th>Country</th>
<th>Year(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bangladesh</td>
<td>1970-71</td>
</tr>
<tr>
<td>Cambodia</td>
<td>1993</td>
</tr>
<tr>
<td>China/Taiwan</td>
<td>1946</td>
</tr>
<tr>
<td>East Timor</td>
<td>2001-02</td>
</tr>
<tr>
<td>India</td>
<td>1947-48</td>
</tr>
<tr>
<td>Indonesia</td>
<td>1945, 1955-59</td>
</tr>
<tr>
<td>Nepal</td>
<td>2008-continuing</td>
</tr>
<tr>
<td>Pakistan</td>
<td>1953, 1956, 1970</td>
</tr>
<tr>
<td>Philippines</td>
<td>1898, 1934, 1971-72, 1986</td>
</tr>
<tr>
<td>Thailand</td>
<td>1996-97, 2006-7</td>
</tr>
</tbody>
</table>

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20 *Ibid*  
The three major case studies tend to support Elster's conclusion concerning institutional interests. The Indonesian case in which the existing MPR chamber adopted the constitutional reforms alone can be interpreted as reflecting the interests of the major institutional players in the MPR. The 695 participants comprised 500 members of the DPR, 130 regional representatives and 65 sectoral representatives. The outcome was to entrench the power of the DPR by increasing its size, establishing a nexus entrenching the inferior size of the DPD, and assigning a near monopoly of legislative and oversight powers to the DPR. The 130 regional representatives had some success in that the DPD, though elected and not appointed, nevertheless replicated their provincial constituency and allowed for the equal representation of the provinces irrespective of population size. The smallest group in these negotiations, the appointed sectoral representatives, emerged empty handed.

The constituent assemblies in the other two case studies comprised many more experts and notables than established politicians. The outcome of their negotiations does not reflect institutional interests and may be interpreted as being beyond the sway of such interests. The proscription against politicians in the Thai Senate is an example. The establishment the Philippine bicameral system by a single vote and with only 24 senators again speaks against any feathering of future nests by the drafters.

Looking beyond institutional interests, leaving institutional design in the hands of the legislature will also bring partisan interests into play. Whereas political parties had no formal representation among the drafters in either the Philippine or Thai cases, the MPR that adopted the Indonesian constitutional reforms was riven by partisan interests. While each polity emerged with the similarity in their designs of proscribing parties from a chamber or part thereof, the reasoning behind these designs were very different as noted above. One of the key pieces of reasoning in the Indonesian case was highly partisan: to disallow the newly established chamber to be dominated by Golkar. In the other cases,

22 By a vote of 23-22, Record of the Constitutional Commission – Proceedings and Debates, prepared by the Editorial/Publication Unit under the supervision of Hon. Flerida Ruth P. Romero, Secretary-General, Vol. II, p. 69
some of the basic reasoning involved attempts to strengthen the party system, through the introduction of the party list in Thailand and the original intention of the party list in the Philippines, but not to benefit or disadvantage any particular party.

The involvement of political parties in the institutional design process has not been the subject of significant commentary even though “it is with political parties that constitutions have their principal conversation”. The Comparative Constitutions Project has little to say on the subject. Austin argues that though a process “hijacked by partisan interests” must be avoided, political parties should be actively involved in that process, balanced by civil society organizations and other individuals. Among the reasons for involving political parties in the design phase is the harsh reality that they will be involved in the interpretation and implementation phases of the institution building process.

Ghai makes clear that “a constitution cannot guarantee its own protection.” As the case studies amply demonstrate, once the negotiations are crowned with the adoption of the document, it falls into others’ hands. The executive, the legislature and the courts are all actors in the interpretation and implementation process. The party-list system in the Philippines is probably the broth that had the most cooks. Presidential appointments and non-appointments, legislative re-design of the system and repeated judicial interpretations of its meaning led the eventual outcome to stray far from the original design. In Thailand additional actors need to be added to the branches of government in the form of a coup-oriented military possibly pursuing the interests of the monarchy. Even in Indonesia where the design was relatively straight forward, the courts have begun the process of interpretation which may eventually lead to the evolution of the DPD chamber.

Processes leading to change in the designs laid down in constitutions are inevitable and indeed necessary to meet changing times. Design processes should nevertheless take

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24 Reginald Austin, “Constitutional Reform Processes”, NIMD Knowledge Centre, op cit, pp. 10-13, p. 12

25 Ghai and Galli, op cit, p. 239
some steps to safeguard the negotiated compromises. Courts, coups and kings may be
difficult to guard against but the future involvement of legislatures can be anticipated.
Without kowtowing to partisan interests, it stands to reason that political parties, the
denizens of legislatures, should have some involvement in institutional design processes
so as to take part in these compromises. This level of "buy-in" may protect those
compromises once the institutional designs get to the legislature for implementation.

The other way to protect design intentions is for the designs to be described in fine detail
thus leaving little room for re-interpretation. It was Monsod's intention to follow this path
by drafting an ordinance to give effect to the party-list design but lack of time defeated
him. This opened the door to the legislative redesign in RA7941. But this method is not
without problems. The Thai drafters believed that drafting the constitution in slavish
detail would be its best protection but it fell foul of the problems of complexity leading to
iatrogenic outcomes.²⁶

A powerful tactic to protect the institutional designs laid down in a constitution is to
adopt it with broad participation. Two questions arise in this regard: how broad and
representative should the negotiating body be, and, what degree of public participation is
required? The literature suggests that the constituent assembly should be broadly
representative but not too large. The involvement of a large number of drafters may
undermine textual coherence and introduce an unwieldy number of veto players²⁷ The
failure of the constitutional drafting process in Kenya was in part due to the large number
of representatives (629) at the National Constitutional Conference.²⁸ The Philippines
Constitutional Commission had 48 members and the Thai Constitutional Drafting
Assembly had 99 members which provide a good span for an effective process.

Engineering public participation is a difficult enterprise. Too much participation in the
drafting stage will exacerbate problems of coherence and may compromise progress. But

4 October 2002, pp. 112-126, p. 114-115
²⁷ Ginsburg, Elkins and Blount, op cit, p. 214
²⁸ Patrick Lumumba “Kenya’s Quest for a Constitution”, NIMD Knowledge Centre, op cit, pp. 14-24
public participation in terms of consultation and adoption by referendum will endow the constitution with legitimacy. The 1987 Philippines constitution has withstood many attempts at redrafting in part because it was popularly adopted in a plebiscite by over three-fourths of the electorate. Thailand’s 1997 constitution was “made after perhaps the most participatory process in Asia” leading to its sobriquet as “the people’s constitution”. A referendum was built in as a backstop to ensure its adoption. Being the people’s constitution did not protect it from the coup but it may explain why several years after the coup with Thailand’s political problems unresolved there remains a strong push to return to the 1997 constitution. No process will enhance legitimacy as much as genuine popular endorsement.

Form Follows Function

It was previously asserted that the phrase “form follows function” provides the correct starting point by simply asking what function is the institution intended to serve. It also provides a means of evaluation by asking whether the institution discharged its functions as intended. The concept therefore is useful as an analytical aid.

Returning to the major case studies, it is possible to describe the functions intended to be served in narrow mechanistic ways. The Philippine designers put in place the rules to fill one-fifth of House seats; the Thai designers crafted the eligibility rules for the upper house; and the Indonesian designers established a new chamber of parliament. But this mechanistic description does not encompass the intended function of the one-fifth of House seats, the upper house or the new chamber. Nor is it sufficient simply to describe their functions in generic terms as encompassing representation, deliberation and oversight. Each of the designs is far from generic and may even be described as idiosyncratic.

29 Often by incumbents wishing to rid themselves of the bothersome single presidential term provision, Rich, 2007, op cit, pp. 209-10
30 Ghai and Galli, op cit, p. 242
Intentionality is the best guide to the functions designed to be performed by these specific forms of parliamentary structures. Through intentionality, as elicited from the articulation of the designers, it is possible to become more specific about the intended functions. Ultimately, the Philippine party-list system evolved into a system to give political voice to the marginalized and underrepresented. The Senate under the 1997 constitution of Thailand was a means of oversight over the structures ensuring administrative probity. The Indonesian DPD was a means of giving a form of representation to the provinces and of filling seats in the MPR chamber by universal suffrage. All three cases involved a proscription on the involvement of political parties.

But unpacking the intentions expressed in the debates leading to the design of the structures suggests that the functions expected of these forms went well beyond these specific objectives. Recalling the context of the design process in the Philippines, with the overthrow of the autocrat and the determination to ensure that the system would disallow any return to authoritarianism, the designers were not in ‘business as usual’ mode. The single term in office permitted for the President, even though general international practice is for a two term limit, spoke eloquently of this broader function of the design. The designers didn’t simply wish to change political structures, they wished to change politics. The party-list system and the anti-dynasty provision were central to the objective of changing Philippine politics. This context allows for a conclusion that the underlying function of these designs was far broader than giving voice to the voiceless; it was to change politics itself, to entrench democracy and to stave off threats to democracy.

A similar conclusion presents itself in the Thai case. The 99 designers were intent on drafting a people’s constitution different from its 15 predecessors. It was to be a genuinely permanent constitution rather than a document catering to the interests of the day. There is much evidence pointing to this intention. By drafting 40,000 words, the designers wished every major piece of the governance puzzle to be in place. No amendments were permitted for five years and even when the five year period arrived and experts pointed to a number of unclear or even dysfunctional provisions, there was a strong sentiment among the core of the original designers not to seek any amendments
lest the floodgates be thereby cracked open. The intention of the designers was therefore to go beyond the crafting of rules for the system of governance, it was a far more ambitious goal: to entrench constitutionalism itself. Henceforth, according to the designers, Thailand would live by rule of law, not by the whim of the powerful. The non-partisan Senate was a key provision in this permanent constitution. On it rested responsibility for the probity of the entire system – a particularly weighty function.

The Indonesian case has a critical distinction. Its design of the DPD also flowed from a time of crisis, and public sentiment also called for a fundamental change from "New Order" politics. But the drafters were not experts and idealists but politicians and, for the most part, members of large political parties. These designers had an eye to the next election. Under the system in place at that time, the parties would have a dominant say in these politicians’ future prospects. The drafters were also members of institutional structures and had in mind the future responsibilities of these structures – in particular to safeguard the powers of the DPR, itself only very recently freed from executive control. Accordingly, the functions of the new chamber were modest. The DPD had to make up the numbers of the MPR by means of universal suffrage without giving rise to federalist pressures. This could have been achieved by a design incorporating a partisan DPD but several arguments, and in particular Golkar's likely domination of a partisan chamber, militated in favour of the non-partisan design. The elected members of the new DPD may have been seen as local champions by their constituents but this was not particularly significant among the functions for which the new chamber was designed. Whereas the underlying function in the Philippines and Thailand was to effect deep political change, in Indonesia there was an institutional sentiment in favour of continuity: the continuation of the 1945 constitution; the maintenance of its most distinctive structure, the MPR; the continuing relevance of the major political parties; and the ambition for the DPR to continue to wield its new found influence.

32 Author's observation at the 2002 KPI Annual Assembly, 8-10 November, which focused on the constitution's fifth anniversary.
What should one dare hope to achieve by institutional design? The sharpest tool in the designer’s kitbag remains the electoral system. There are a number of reasons why this instrument lends itself to institutional design. It is relatively easily deliverable because there is an electoral administration to manage the process. The results are pretty much instantaneous. The effects are more or less predictable. The design of the electoral system may not yield the impact its designers intended because the outcomes are mediated by political negotiations and accommodations, or lack thereof, but it is nevertheless an effective tool. But even with this very sharp tool, if the intended function is overly ambitious, the electoral system alone will not be a sufficient tool. Other forms, such as the parliamentary structure, the party system and the judicial system, come into play. And even redesigning these structures may not be sufficient if the polity’s history, economy and political culture are not in sympathy with the intentions of the designers.

Institutional designs in and of themselves can only be expected to achieve rather narrow and focused intentions. The more ambitious the function to be performed, the less confidence one can have in the capacity of the redesign of governance structures to achieve its purpose. The more elaborate the function, the more complex the form that seeks to assure its delivery. The structures under redesign are, after all, embedded in society and therefore subject to social, economic and political influences. It is not reasonable to expect that an institutional redesign alone can have far-reaching societal impact.

Non-partisan chambers are an original and daring refinement of the institution of democratic representation. But the case studies suggest that where their designers’ intentions were that these designs play a central role in achieving deep political change, then the design alone has not been able to fulfill these ambitions. The Philippine party-list system has incidentally allowed an irreconcilable political minority to have a lawful public voice, but its broader intention to reform the political system has not been achieved. Instead, the party-list representatives find themselves at the periphery of Philippine politics. The Thai Senate which was intended to be a guarantor of political probity instead found the majority of its members suborned by a powerful prime minister.
The designers of the Indonesian DPD had far more modest expectations. These were achieved but the lack of ambition in this case means that the design has had negligible political reform impact. None of the case studies can be considered examples of positive precedents or best practice.

The concept of the non-partisan parliamentary chamber has not been a success. Its philosophical underpinning can no longer be sustained by the discredited concept of corporatism. The concept of championship whereby exemplary individuals sit in parliamentary bodies offers a more promising philosophical basis, particularly in societies familiar with the Confucian idea of junzi. But the design problem that none of the case studies has cracked is how to get these exemplary people elected by universal suffrage. In large electorates where name recognition is critical, non-partisan politics will tend to reward celebrity and notoriety rather than championship. This leaves the designers with difficult options of putting in place restrictive eligibility criteria or dispensing with elections in favour of selection or examination. But these ideas stray too far from the basic requirements of representative democracy and must eventually lose popular legitimacy.

The exclusion of political parties thus comes at an unacceptable cost. No alternative to political parties has proven successful. Designing structures to complement parties will inevitably lead to these being considered as competing against parties. Placing those structures in parliaments is to leave them at the mercy of competitors who dominate this institution. Parties abhor a political vacuum and will infiltrate it or, failing that, isolate it.

The three case studies present a cautionary tale of the limits of what can be achieved by institutional design. Heroic designs responding to problems also of heroic dimensions need to be tackled through an array of devices going well beyond structural governance designs and extending to vast areas such as civic education and economic reform. Critical junctures do not come often and it is understandable that designers will see in them opportunities to achieve more than mere iterative change, usually through constitutional renewal. The case studies suggest that institutional designers need to temper their
enthusiasm for root and branch reform and find ways of increasing the chances of the sustainability of structures under design. Among the lessons that need to be learned are the need to entrust the constitutional negotiation process to an independent body that includes sufficient representatives of affected interests to allow them to buy into the resulting compromises; the need to focus on significant and salient features that are capable of being successfully shaped by the structures under design; and the need to ratify the process by a form of public acclamation.

The best that can be said about the attempts to construct non-partisan structures in parliaments is that they represent a positive story of experimentation and ambition. The lesson that presents itself is of the necessity to keep the experimentation and ambition within the bounds of the politically feasible.
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Crispin Beltran, Anakpawis party-list representative, Philippines
Miro Cerar, Associate Professor, Faculty of Law, University of Ljubljana; Secretary of the Commission on Constitutional Affairs, National Council of the Republic of Slovenia (1991/1992)
Kraisak Choonhavan, former Senator (2000-2006), Thailand
Neri Colmenares, Bayan Muna party-list candidate, Philippines
Sheila Coronel, former head Philippine Center for Investigative Journalism, Philippines
Louis Corral, APEC Secretary-General, Philippines
Jae de la Cruz, Akbayan party official, Philippines
Boonton Dockthaisong, former Senator (2000-2006), Thailand
Andrew Ellis, former staff of National Democratic Institute for International Affairs, Indonesia
Kevin Evans, former UNDP adviser to Indonesia government
Anda Filip, Permanent Observer to the United Nations, Inter Parliamentary Union, New York
‘Chito’ Gascon, member of Constitutional Commission of 1986, Philippines
Mirko Herberg, representative of the Freidrich Ebert Stiftung, Philippines
Laode Ida, Deputy President, DPD, Indonesia
Maleerat Keawka, former Senator (2000-2006), Thailand
James R Klein, Representative Asia Society, Thailand
Marcus Mietzner, academic, Australian National University, re Indonesia
Christian Monsod, member of Constitutional Commission of 1986, Philippines
Niwes Phancharoenworakul, former Senator (2000-2006), Thailand
Samart Ratanapratheeporn, former Senator (2000-2006), Thailand
Etta Rosales, Akbayan! Party-list representative, Philippines
Theo Sambuaga, former Golkar member of the DPR, Indonesia
Chodchoy Sophonpanich, former Senator (2000-2006), Thailand
Dusan Strus, Senior lecturer, University of Ljubljana; Head of Legal and Analytical Affairs Department at the National Council of the Republic of Slovenia
Malinee Sukavejworakit, former Senator (2000-2006), Thailand
Charas Suwanmala, member of the 2007 Constitutional Drafting Assembly, Thailand
Jakob Tobing, former PDIP member of the DPR, Indonesia
Borwomsak Uwanno, Secretary-General of King Prajadhipok’s Institute, Thailand
Joel Villanueva, CIBAC party-list representative, Philippines
Etsi Yudhini, former staff of National Democratic Institute for International Affairs, Indonesia

* Interviewees most relevant position and/or that held at the time of interview