



CONSTITUTIONS & HUMAN RIGHTS IN A GLOBAL AGE: AN ASIA-PACIFIC PERSPECTIVE

CONFERENCE PAPERS

Editor: Tessa Morris-Suzuki

The Australian National University



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TABLE OF CONTENTS

Introduction: Constitutions and Human Rights in a Global Age: an Asia-Pacific perspective <i>Tessa Morris-Suzuki</i>	1
Constitution and Human Rights Provisions in Indonesia: an Unfinished Task in the Transitional Process <i>Bivitri Susanti</i>	5
The Search for Order: Constitutions and Human Rights in Thai Political History <i>Thanet Aphornsuvan</i>	15
Democratisation in Korea and its Influence on the Constitution <i>Park Won-Soon</i>	31
Constitutional Politics in Contemporary Japan <i>Sugita Atsushi</i>	43
The Australian Constitution and Human Rights: A Centenary View <i>George Williams</i>	53
Constitutional Amendments: a brief note on Indonesia's case <i>Jakob Tobing</i>	67
Human rights and the Malaysian Constitution Examined Through the Lens of the Internal Security Act 1960 <i>Poh-Ling Tan</i>	79
Ethnic Chinese in Indonesia: Would it be better? <i>Frans Hendra Winarta</i>	93

Ethnic Minority Citizenship and the Japanese Constitution	
<i>Kang Sangjung</i>	103
Indigenous Rights and the Australian Constitution — a litmus test for democracy	
<i>Larissa Behrendt</i>	109
Recognising a Reinvented Constitution	
<i>Usha Ramanathan</i>	119
East Timor: The Challenges of Drafting a Constitution	
<i>Dionísio da Costa Babo-Soares</i>	123
The Voice of the People Ethnic Identity and Nation Building in Fiji	
<i>Brij V. Lal</i>	135
Post-conflict Human Rights and their Constitutional Implications: the Cambodian experience over the last ten years	
<i>Lao Mong Hay</i>	157
Appendix 1	165
Appendix 2	168
Contributors	169

Introduction: Constitutions and Human Rights in a Global Age: An Asia-Pacific Perspective

Tessa Morris-Suzuki

In the modern world, the constitutions of nation states have come to be seen as the key guarantors of human rights. During the nineteenth and twentieth centuries the national constitution became the basis of the political order in most countries around the world. The extent to which the constitution provides effective protection for the rights of citizens has thus become a major determinant of the political life of nations, including the nations of the Asia-Pacific region.

In the twenty-first century, however, the relationship between national constitutions and human rights faces new complexities. The emergence of international human rights regimes means that national constitutions are neither the sole nor necessarily the most important guarantor of the rights of the people. Debates within international forums have promoted a rethinking, and in some cases a broadening, of the interpretation of human rights. The growing international migration of people, and the presence in many countries of substantial groups of resident non-citizens, has made it increasingly important to ensure the existence of regimes which protect the rights of all residents regardless of nationality. Meanwhile, demands for the recognition of the rights of indigenous people's pose are encouraging a rethinking of some of the historical and political assumptions underlying many national constitutions.

These issues are particularly important in the light of recent moves towards constitutional revision in several countries of the region. In Indonesia, the 1945 Constitution, has recently been undergoing fundamental revision. A first set of amendments was passed in 1999 in the wake of the fall of Suharto. Revisions addressing problems of freedom of thought and religion

have followed. In 2001 the People's Consultative Assembly debated further changes, including greater regional devolution and strengthen the power of the judiciary, and in 2002 major changes were passed, including a provision for the direct election of the President.

In Japan, too, the government was examining possible changes to that country's postwar constitution, unchanged since it was drawn up in 1946. Here the key issue is the famous 'peace clause': Article 9, which renounces the right to maintain a military and use force to resolve international disputes. Could the 'peace constitution' be maintained in the context of Japan's changing international role, and if it was changed, how would this affect Japan's relationship with its Asian neighbours?

Meanwhile, the Philippines constitution faced new challenges in the context of the 'people's power' rising of January 2001, which ousted President Estrada from power. Drawn up in the wake of the first 'people's power' movement of 1986, the Philippines constitution embodies many clauses designed to ensure human rights and social justice, and to encourage the participation of the population in politics. The removal of President Estrada, however, created constitutional dilemmas that are still being hotly debated. Was this an excellent example of popular participation in the political life of the nation, or was it a virtual 'coup' which violated constitutional norms? How should a nation like the Philippines balance the values of 'people's power' with the need for social and political stability?

Similar issues are also addressed by Thai debates around that country's 1997 constitution, which aims to increase popular participation, for example by allowing groups of citizens to submit draft laws to parliament in the form of a petition signed by at least 50,000 supporters. Meanwhile, the new Fijian constitution of 1998 was at the centre of ongoing political controversy in Fiji during the first year of the new millennium.

While older nations wrestled with questions of constitutional change, the world's newest nation, East Timor, was drawing up its first constitution. After decades of conflict, key questions here were the future protection of human rights and the issue of promoting reconciliation between former pro and anti independence groups.

Against this background, a group of scholars, lawyers, NGO members and people engaged in practical politics from around the region gathered in Canberra in December 2001 for a Symposium on constitutions and human rights in the region. The three days of discussion provided scope for an exten-

sive exchange of ideas between participants. The symposium aimed to use the diversity of the region, with its many different forms of constitutional systems, as a basis for stimulating debate around common concerns for the protection of human rights.

As we discussed experiences of constitutional debate in various countries of the region, several questions came into focus. One was the issue of the relationship between written document and political practice. Written constitutions, clearly, only become a living reality when they are supported by a legal, political and social milieu which enables individuals and groups to claim their constitutional rights. This milieu includes educational systems (both formal and informal) that familiarize people with the content of the constitution, independent judiciaries and an active civil society capable of monitoring and influencing political practice.

Another broad question concerns the issue of globalisation, and the resulting worldwide influence of international human rights regimes. In the context of a global age, what are the respective roles of national constitutions and international regimes in protecting the rights of various groups of citizens, and in guarding the rights of those who are not citizens of the countries in which they live? Other issues emerged from an increasing questioning of Eurocentrism. In this climate of intellectual change, how are universalised notions of the protection of human rights being interpreted in constitutional debates in various parts of the Asia-Pacific region?

Meanwhile, discussing these issues in the aftermath of the September 11 attacks, participants were very conscious of the intense pressures on human rights and constitutional safeguards created by the global 'war against terrorism'. Several speakers emphasized the fact that the practice in countries like Malaysia and the South Korea has long been profoundly influenced by the existence of sweeping national security laws. After September 11 2001, it seemed likely that security and emergency laws would play a growing part in determining the scope of human rights throughout the region.

This volume brings together papers presented at the Symposium. The opening papers, by Bivitri Susanti, Thanet Aphornsuvan, Park Won-Soon, George Williams and Sugita Atsushi present overviews of the processes of constitutional change in Indonesia, Thailand, Korea, Australia and Japan, particularly highlighting the implications of these changes for human rights. These papers draw attention to the wide range of contrasting experiences of constitutional development in the countries of the region.

The papers in the second half of the volume take up key themes in the relationship between constitutions and human rights. The papers by Usha Ramanathan and Poh-Ling Tan examine the historical forces that have shaped constitutional debates in China and Malaysia. Kang Sangjung and Frans Hendra Winarta focus particularly on the impact of constitutions on the rights of ethnic minorities in Japan and Indonesia, while Larissa Behrendt considers the implications of the Australian constitution for the rights of indigenous Australians. Focussing on the case of Cambodia, meanwhile, Lao Mong Hay's paper examines the role of the constitution in post-conflict reconstruction and reconciliation.

Constitution and Human Rights Provisions in Indonesia: An Unfinished Task in the Transitional Process

Bivitri Susanti

Introduction

Indonesia is now facing the important moment of constructing a new foundation in a transitional period. After the fall of the New Order regime, there have been efforts to bring Indonesia through the period of 'transition to democracy'. One of the efforts is to reform the 1945 Constitution.

Until now, the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, 'MPR') has promulgated three amendments consisting of 103 new/amended provisions. From the fact that there are three amendments, one may form the opinion that the reform started in 1998 has been going well in terms of constitutional reform.

There are, however, certain issues beyond the quantity of the articles and the 'legality' of the process. Can the amended articles meet the need of democratisation? What are the implications of the inserted new articles to human rights and the political system? Has civil society genuinely participated in the process? Having reviewed the way in which the MPR performed the process, does the MPR have full legitimacy to reform the constitution?

I will address the issues while referring to human rights provisions in the constitution. In addition, because I am here in my capacity as an NGO personnel who has been involved closely with the civil society movement advocating a 'New Constitution through the Constitution Commission,' I will also particularly elaborate that issue in outlining the present state of constitutional debate in Indonesia. It is that capacity too, that places me in the position of merely describing what is happening in Indonesia, and not analysing it from a theoretical point of view.

I. Brief Review on the Amendments of the 1945 Constitution

The 1945 Constitution was drafted before Indonesian independence on 17 August 1945 and promulgated a day after independence. It therefore reflected the need of the society *at that time*, which was the need to have a new independent government to establish an independent country. Therefore, there were only 37 articles concerning basic provisions for a newly established country. As the annotation reads:

'The Constitution is made up of only 37 articles. The clauses merely refer to transitional and additional aspects....

It is adequate if the constitution only contains the fundamental provisions and guidelines as directives for the government and other state institutions to conduct state affairs and create public welfare. *In particular for a new and young country, such a basic law is best to contain the basic provisions only while the operational procedures can be accommodated in laws, which are easier to make, amend and repeal. Hence the system in which the constitution is drafted.'*

All of the 'founding parents' realised, and it is therefore stated clearly in the text, that the Constitution was meant to be a temporary constitution and it should be replaced by a comprehensive and definitive constitution after the transition from a colonial state to an independent one was completed and peace and stability were achieved (Article 3, Additional Provisions, and the Annotations of the 1945 Constitution).

From a legal-formal perspective, however, the 1945 Constitution is definitive, since it was promulgated as a definitive one in 1959 by a Presidential Decree (in Soekarno's administration, known as '*Dekret Presiden 5 Juli 1959*') when the *Konstituante* (Constitutional Body that was assigned by the 1950 Constitution to draft a definitive constitution) was considered to have failed in its task.¹

Although the 1945 Constitution is legally binding, the fact that it was made as a temporary constitution, which has limited provisions, leads to the question of whether it is still sufficient for the present situation. Since it

¹ It should be noted that there is a strong argument stating that *Konstituante* almost finished its duty when the Presidential Decree was enacted. Yet, because of the political reasons, the President issued the Decree. See Adnan Buyung Nasution, *The aspiration for constitutional government in Indonesia : a socio-legal study of the Indonesian konstituante 1956-1959* (1992).

was meant to be a temporary constitution, the content is rather simple and open to multiple interpretations; this is the major weakness of the 1945 Constitution. The basic content of a constitution, which consists of human rights, the division and limitation of power, and the manifestation of state based on the rule of law, were not sufficiently accommodated in it.

Due to the nature of its suitability for those who wanted to abuse and maintain their power at the same time, the 1945 Constitution was treated as a 'sacred document' during the New Order era. Then, as the movement to overthrow the New Order regime reached its peak in 1998, the demand to reform the constitution received a response from the 'new' MPR resulting from the first general election after the New Order regime.²

There have been three amendments since then. The first was in 1999, the second was in 2000 and the third amendment has just been ratified in November 2001.

There are two criticisms articulated by the Civil Society Organisations of the amendments. The first criticism is regarding substance. Even though there have already been three amendments (and will be followed by a fourth next year), there was no clear paradigm on which the amendment should be based. Thus, the provisions are not coherent.

The limitation of presidential power, for example, was the first thing that was enacted in 1999, mainly motivated by the 'bad experience' of the excessive power of the president during the New Order and Guided Democracy regimes. Yet the MPR has not really decided what type of system of government the Constitution should be based on. As a result, there is no clarity in the pattern of interaction between the president and the parliament. In practice, it is difficult to determine whether Indonesia applies a presidential system, parliamentary system, or even a mixed system of government. Therefore, it is wide open for interpretation from whoever has special interests. One of the most obvious results of the lack of clarity was the conflict between the parliament and the president months ago that has ended

² MPR consists of 695 members, 500 members are at the same time the members of DPR (*Dewan Perwakilan Rakyat*, People's Representatives or the Parliament), 130 members are the representatives of provinces elected by the local parliament, and 65 members are representatives of Societal Groups appointed by the Election Committee. Among the 500 members of DPR, 38 seats are allocated for the Military and the Police Force (Police Force in Indonesia is part of the Military Forces) and the rest were elected through the general election in 1999. It has authority to (1) elect the President and Vice President; (2) amend the Constitution; and (3) enact a General Guidelines for State Policy (*Garis Besar Haluan Negara*) every five years.

in impeachment of the president. Despite the fact that there was a strong political conflict behind this case, the endless debate among the constitutional lawyers during the process was a strong indicator of the problems.

The second critique is in regard to the process, which includes the limited time spent in the deliberation process and the lack of public participation. MPR members are divided into three Ad-Hoc Committees; one of them (Ad-Hoc Committee I or *Panitia Ad-Hoc I* in Bahasa Indonesia, 'PAH I') is assigned in particular to prepare the draft of amendments. PAH I worked for approximately nine months before the draft was submitted to the Annual Session of MPR. However, during the session, before it is ratified in a plenary session, the draft will be discussed by a new commission (Commission A) which consists of different persons (200 members). This Commission will discuss the whole draft all over again within five days. As a result, particularly in the second amendment, the full draft that has been prepared by PAH I was not enacted, rather, only certain articles that are considered 'safe' for every faction's interests were enacted.

As for the people's participation, although MPR did conduct a series of seminars in different provinces, they did not involve civil society very much. Whereas the CSOs demand the participation of civil society in the broader term, only academics, government apparatus, local parliament members, and certain organisations (usually those related to political parties) were invited to the seminars.

It is true that every discussion of PAH I preparing the draft amendment was open to the public and broadcast through cable television for people in Jakarta. Nevertheless, at the end of the day, many of the final decisions were made during the five days of Annual Sessions and, because five days with 200 persons involved was not enough, there were many lobbying sessions and discussions done beyond the public eye after the sessions. Therefore, it was almost impossible for the public to really know which articles were going to be ratified at the end of the session.

Based on those critiques, the CSOs are now questioning the 'legitimacy' of MPR in the reform of the Constitution. Furthermore, although monitoring groups considered the 1999 general election to be the first democratic election since 1995, representation in the MPR is still considered problematic. There are still appointed members, especially in the Military faction, whom are not considered to be 'real representatives' of the people. There is also lack of 'communication' between the MPR members and their

constituents. This subject will be discussed further in the third part of this paper.

II. Constitutional Provisions Regarding Human Rights

Now I come to the part that is the important theme of this conference, which is the human rights issue.

The original text of the 1945 Constitution only contains six provisions that explicitly talk about human rights with 15 Human Rights Principles included.³ Human rights provisions in the 1945 Constitution are also problematic because there were too many further regulations delegated to laws/statutes. Thus, they could be easily 'twisted' according to those in power. For instance, there was a law regarding mass organisation (Law No. 8 year 1985) imposing 'Pancasila' as the only principle for every organisation as a further regulatory provision of 'the right to organisation' provided in Article 28 of the 1945 Constitution. Without having 'Pancasila' as its principle, a group was not allowed to establish an organisation.

I am pretty sure that all participants of this conference have been aware that human rights issues were indeed one of the most important concerns in the reform process. There was a national action plan regarding human rights announced in 1998 during President Habibie's government, which was planned to finish in 2003. The MPR also immediately responded to the concern by promulgating an MPR Decree No.XVII/MPR/1998 regarding Human Rights. The next MPR (the 'new' one) then 'modified' and inserted articles in the MPR Decree as parts of the second amendment in 2000.

These articles, however, need to be analysed further as to whether or not they are appropriate in protecting human rights. The most controversial article is article 28I section (1) that says:

The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and *the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances.*

³ See Todung Mulya Lubis, *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966–1990* (1994).

With this provision, it would be impossible to prosecute those responsible for human rights crimes during the New Order that are not considered crimes under the prevailing Criminal Code, such as crimes against humanity and genocide. As Indonesia applies a civil law system and has a legislative hierarchy, no act may contravene the Constitution, and this could have affected the Law on Human Rights Tribunal that was drafted at the time the article was inserted into the Constitution.

It is correct that the non-retroactive principle is universally acknowledged. Nonetheless, there is also an exception of this principle for the gross violation of human rights, as the practice of international law has applied this exception to the Nuremberg and Tokyo Cases in 1946 and 1948 for war crimes during the Second World War.

Prof. Muladi, the former Minister of Justice and Human Rights and an expert in Criminal Law said 'although non-retroactivity is a general principle of the law, it would be better not to include it in the Constitution'.⁴

Opinions concerning this article were also stated by Prof. Suwoto Mulyosudarmo, a constitutional law expert and Prof. Bagir Manan, a constitutional law expert and Chief Justice. As Prof. Mulyosudarmo put it: 'To avoid further problems, the article should be revoked in the next amendment'.⁵

Apparently, however, since the human rights activists and experts strongly opposed this principle and advocated bringing the human rights violators into court, the DPR then ratified the Law on Human Rights Tribunal (Law No. 26 year 2000)⁶ that put aside the non-retroactive principle for gross violation of human rights. The government and DPR agreed that gross violation of human rights in the past should be put under the jurisdiction of the Law on Human Rights Tribunal, but that the settlement should be done by the establishment of an Ad-Hoc Tribunal of Human Rights with consideration to the time and place of the violations (*tempus delicti* and *locus delicti*).

To conclude this case, apart from the fact that it is not proper to put such a principle in a constitution, it should be said that it is peculiar to have one principle in the Constitution while there is a law that actually opposes the principle, especially for a country that applies a civil law system with

⁴ <http://www.ctan.org/et2000c/september/17-23/21ethuma.htm> (cited 24 November 2001).

⁵ *Ibid.*

⁶ There is also Law regarding Human Rights, Law No. 39 year 1999.

stricter hierarchy of legislation.⁷ The question is then, if the government and DPR were able to agree not to recognise this particular principle in the Human Rights Tribunal Law, why did MPR put this principle in the Constitution in the first place? Bearing in mind that almost three-quarters of MPR members are DPR members and that they were supported by experts as well as watched by Human Rights CSOs, how could this 'politically heavy' principle pass? Subsequently, should the amended constitution be 're-amended'? Or should the law be amended according to the constitution and thus let the violators of human rights escape from national trial and/or be tried in the International Tribunal of Human Rights?

I need to add here that there is very strong indication of strong political pressure behind the ratification of this particular provision. This indication resulted from the fact that this specific provision was not endorsed during the formal session; it was a result of a lobbying session among the faction leaders after the formal one.

III. Present Constitutional Debate

The aforementioned debates regarding critiques from CSOs towards the amendments as well as the case of the non-retroactive principle in the Human Rights provision lead to the discussion on present constitutional debate in Indonesia.

At present, there is a civil movement led by CSOs/NGOs advocating the making of a new constitution through a deliberative process involving as many members of society as possible. This movement also particularly advocates the establishment of a Constitution Commission similar to those in Thailand, South Africa, and the Philippines. This demand is based on the following reasons:

1. The societal context within the 1945 Constitution is not relevant any more within the present situation. Indonesian society needs sufficient provisions regarding human rights and governance so as to limit power and be in line with the present societal state. For instance, it needs provisions that can address wealth distribution among the regions, as development has been centred only in Java island, and Jakarta in particular.
2. The way the MPR amended the 1945 Constitution resulted in a vague

⁷ Because there is MPR Decree No. III Year 2000 on the Source of Law and Hierarchy of Legislation, in which the law and other regulations should be based on the Constitution.

system. The people argue that they need a coherent constitution that cannot be interpreted by those in power for their own political interests.

3. There must be participation from as many people as possible, because ultimately the Constitution will affect all people and it is believed that people's participation is an important key in having a constitution that reflects the real need of the society. Moreover, it is likely that such involvement can channel the potential conflicts within the society.

This group has been conducting a series of discussions in many regions, media advocacy, lobbying sessions, and establishing a network among those supportive to this proposal.

This recommendation became a national issue when President Megawati Soekarnoputri mentioned the possibility, in the president's annual speech in 18 August 2001, of setting up a Constitution Commission to reform the Constitution.

The opponents of this recommendation, mainly MPR members, claim that MPR has full legitimacy to reform the Constitution based on the Constitution itself, therefore establishing a Constitution Commission is a violation of the Constitution. They also say that their legitimacy cannot be questioned as the current members of MPR resulted from the first democratic election since 1955.

On the other hand, the proponents' arguments come from the very fact that MPR has not really represented their needs, especially since there is no adequate communication between MPR members and their constituencies apart from those who are within the organisational structure of political parties. Moreover, the reality that the people elected them in the general election brings a consequence that they have to 'hear' what the people say — even if they are only a small part of the whole people — and not just claim their legitimacy while rejecting the people's opinion.

As for the opinion regarding the legal basis of the Constitution Commission, the supporters put forward the fact that it is the same constitution that places MPR as a supreme body, therefore, so long as there is political will from MPR, it can amend Article 37 regarding the amendment and/or

8 This happened in Thailand's constitution-making process. There is no doubt that other countries' experiences in constitutional reform play an important role in enriching this debate. Researches studying on constitutional reform experiences have been conducted by both groups in order to support their arguments.

assign a Constitution Commission to draft a new constitution and ratify the draft afterwards.⁸

Another debate surrounding this issue is on the basis that the amendments were drafted in a proper way so that there is no need of a new constitution. It is enough that MPR assigned a group of experts, invited people to submit the recommendation, and conducted comparative studies by visiting foreign countries.

On the other side, the group which supports the making of a new constitution by a Constitution Commission state that participation is not 'genuine' and experts do not always reflect what the people need. It needs people's genuine participation to have a constitution that reflects the people; and having people's aspiration is crucial for a country like Indonesia that is in the middle of a transition process. Through the involvement of civil society, the trust in the state that was lost since the constitutional provisions have been abused by the authorities in maintaining their power and repressing the people, can be gradually regained.

From the CSOs' viewpoint, indeed, the very large amount of money spent in conducting comparative studies—which is believed have been done by experts and can be done through document study and the Internet—would be better spent building a system that is transparent and open for the people in the whole region.

In addition, the proponents also point out the weaknesses of the amendments as described above. Therefore, there is the need of a new constitution with coherent and clear provisions, which at the same time can guarantee human rights, rather than having the original text of 64 provisions that are amended by the total of 103 provisions and which have resulted in a vague system.

Since this subject was touched upon in a formal speech by a president who is also a leader of a majority party within MPR, the issue became more substantial. Some political parties stated their support and this topic was even discussed during the 2001 Annual Session of MPR. However, because there are some factions that did not agree with this proposal, the campaign and advocacy activities of the civil society movement continue and it even becomes more massive.

Conclusion

To sum up, I need to re-emphasise that 1998, the year when the New Order regime was overthrown, was not the end of the reform. It is, in fact, the beginning of a reform process—a transition to a more democratic Indonesia. Therefore, it should have been started with a fundamental change: constitutional reform involving civil society. Yet changing ‘the persons in power’ seemed to be more important at that time. This resulted in an elite-dominated process of reform and, in turn, political conflicts among the elites rather than addressing the needs of the civil society. Although there has been reform of the 1945 Constitution, it could be said that the amendments have failed to bring about a fundamental reform, that is, constituting clear and coherent provisions regarding the political and legal system as well as guaranteeing human rights. Indeed, constitutional reform in this sense remains unfinished; and it needs civil society’s participation to go through this process.

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The Search for Order: Constitutions and Human Rights in Thai Political History

Thanet Aphornsuvan

In 1997 Parliament passed the new Constitution of the Kingdom of Thailand B.E. 2540 (AD.1997). The new Constitution reflected the crystallisation of 67 years of Thai democracy. In this sense, the promulgation of the latest constitution was not simply another amendment to the previous constitutions, but it was a political reform that involved the majority of the people from the very beginning of its drafting. The whole process of constitution writing was also unprecedented in the history of modern Thai politics. Unlike most of the previous constitutions that came into being because those in power needed legitimacy, the Constitution of 1997 was initiated and called for by the citizens, who wanted a true and democratic regime transplanted on to Thai soil. This popular demand, fuelled by the latest uprising in May 1992 against the military-controlled government, led to the election of the Constitution Drafting Assembly to rewrite the new constitution according to the wishes of the people. To make this Constitution closer to the wishes and aspirations of the people, the Constitution Drafting Assembly organized public hearings to enable concerned citizens and groups to air their opinions on a variety of topics and subjects crucial to the working and efficiency of the Constitution. Finally the new and first popular Constitution was submitted to Parliament with strong support from people of all walks. Its submission was followed by long debates and objections from certain leading members of the House who feared it was overly liberal in its strong support of human rights and liberties of the people. The Constitution of 1997 became the 16th constitution in the 67 years of Thai democracy.

The history of a constitution is necessarily interwoven with the history and development of democracy, and more specifically, with the emergence of the concept of rule by law. The ability to implement a constitution and to guarantee its integrity presupposes strong social and political institutions. Although constitutions were occasionally put in practice by ancient regimes, they are, for the most part, of recent invention. Their fates remain bound to those of the political history of a given country, particularly with regard to the aspirations for democratic rule. The Thai constitution is no exception. Thailand was catapulted into a democratic, or at least a democratising, period following the Coup of 1932. The leaders of this coup were immediately presented with the dilemma of having to adapt the ideals of Western constitutionalism to the realities of Thai society and politics: namely a highly stratified society with a large number of undereducated people and the concentration of political and economic resources in the hands of a small percentage of the population. Additionally the presence of the military in their capacity as 'midwives' of Thai democracy, although not initially perceived as an obstruction to the advancement of democracy, became increasingly problematic as they gained in strength throughout the Cold War period and beyond.

In order to understand the Thai constitution, it is necessary to examine how it developed by drawing upon Thai ideas and adapting the Western 'ideal' to Thai realities.

2.1 The Importance of Constitution in Thai History

In the tradition and understanding of Western constitutionalism, the constitution aims at the limitation and regulation of the government's powers and the protection of private rights and liberties. The significance of the constitution in Thai political history and government is that it is not simply the highest law. Thai constitutions served as histories of political development and conflicts, and in terms of the law, they were the sum total, not the source, of the lesser and organic laws that existed prior to the promulgation of the constitutions. Reflecting the temperament of the times, the Thai constitutions therefore represented the realities of power relations in the process of Thai social and political development.

The historic role of the constitution in Thai politics reflects its unique position in the continuity of the government. After the abolition of

the absolute monarchy, the country had not been able to establish new institutions and customs to legitimise the transfer of power by force. In the old Thai government tradition, the palace coups and the use of force to overthrow or take over the king's power was justified and legitimised by the Buddhist concept of merit and power. According to traditional beliefs, the righteous behaviour of the leaders was a precondition for their possession of power. That meant that those who had power were thought to be good and deserving of it. But the legitimacy of a modern regime stems not only from the elaborate process of having constitutions, calling for new elections, appointing respectable figures in the governments, and declaring loyalty to the monarchy, but more so from the regime's ability to maintain authority and retain power.

Following the Coup of 1932, the first constitutional monarchy regime was established with the aim of creating a democratic government in the kingdom. The coup group (known as the 'People's Party') saw this period as transitional and needed a special plan for the implementation of the new political system, resulting in the National Assembly, composed of a mixture of elected and appointed members. In the wake of the Coup, however, government leaders and political elites attempted to adhere to the idea of constitutionalism. This idea persisted even in the face of many violent conflicts, which erupted from rivalry among elite groups. From 1932 to 1946, there were two unconstitutional changes of government. The first was the forced closure of Parliament by Phraya Mano, the first Prime Minister, in 1933, as a result of disagreement in the Cabinet over the proposed economic plan by Pridi Phanomyong. This led to the coup in the same year by the military wing of the People's Party against Phraya Mano's government. Later there were also two attempted rebellions against the government. One was the Bowaradet Rebellion in 1933, the other was the Songsuradet Rebellion in 1939. The use of force in resolving political conflicts among rival elite groups increasingly became part of the fledgling constitutional regime. The government under Phibun at that time resorted to the use of a special court and executions in order to suppress its political enemies.

After World War II, the meaning of the constitution began to change according to new developments in political factions and conflicts. Maintaining parliamentary politics and the stability of the government proved to be increasingly difficult. In order to cope with the new internal and external political and economic situation, the Constitution of 1946 was

written, this time with a different idea regarding the form of Parliament. The Constitution of 1946 replaced a unicameral form of parliament with bicameral, calling the second house or the House of Elders. From that time on the upper house or later Senate would become another institution in the growth and development of parliamentary government in Thailand. The 1946 Constitution was terminated shortly afterwards by the military Coup of 1947.

From 1947–1958 there were seven attempts to overthrow the government by force; four of them succeeded in changing the governments (1947, 1951, 1957 and 1958). Two rebellions against the regime, the Grand Palace Coup (1949), and the Manhattan Coup (1951) failed and one attempted coup by a group of junior army officers was suppressed before it took place. These overthrows and instances of violent action against the regimes had not yet been polarized into the antagonistic relationship between civilian-military rule. In fact throughout the period from 1932–1957, governments consisted of supporters from both military and civilian groups as did their opponents. As yet there was no strong division between military and civilians in government. Nor did the government leaders use the constitution as a political means to protect and secure their powers. Of those four government changes there were only two governments which wrote new constitutions, the Constitutions of 1948 and 1949. Otherwise the governments simply revised or amended the previous or existing constitutions.

The important point is that in the period from 1932–1947 government leaders still firmly believed in democracy as the most modern and viable form of government. Pridi Phanomyong (r. March 24–August 21, 1946), the most important leader of the People's Party once said, 'a democratic system means democracy with law and order and morality and honesty.' Such a system clearly must be based on a constitution that is the highest law of the country. The problem facing the political elite at the time was how to make the new democratic government work in the context of Thai society rather than trying to redefine the meaning of democracy to fit with the desire of the government holders; a policy which would be anxiously initiated and pursued by government leaders from the late 1950s onwards.

Gradually, but more so after World War II, it became clear that the principles and customs of liberal democracy were inapplicable in the transfer of power and resolution of political conflicts among the elites, who resorted to force and extra-constitutional means to settle their conflicts. Once in power

by extra-constitutional means, government leaders sought legitimisation of their regimes mainly by the holding of elections. To achieve this they had to first promulgate new constitutions, which also gave them the semblance of popular sanction for their regimes. Another reason for writing a new constitution was that after each major change of government institutional structures were also modified to strengthen the new regimes. The constitution thus served as a legal framework and guarantee of stable political structure for the regimes. Politically, the enactment of new constitutions allowed the government to declare its complete loyalty to the monarchy and to demonstrate the king's acceptance and support of the new rulers. The constitution thus retained its acquired symbolic meaning along the way.

In the period from 1957 to 1992 the Thai constitution underwent many redefinitions. With many ups and downs in the lives of the constitutions, the political elites during the Cold War era denounced the Western liberal democratic regime as an 'alien institution' incompatible with the customs of Thai society. Paradoxically this stance was adopted even though the government had close ties with the US government; but such were the mutual needs and interests of the Thai government and the US in their fight against Communism during the Cold War. In order to create a more stable government, political leaders, mainly from the army, turned away from the Western concept of constitutionalism and relied instead on traditional political ideas, namely, paternalism and patron-client relations between government and the people. The growth of indigenous Thai democracy came about as a result of the failure in implementing a liberal form of democracy. First defined in Sarit Thanarat's regime (r.1959-1963) as 'Thai-style democracy', the executive branch of government was emphasized at the expense of the legislature and judiciary. Sarit redefined the role and meaning of the constitution, appointing the Constituent Assembly to function both as the Constitutional Drafting Assembly and the legislature. The Assembly drafted a new constitution while making laws for the government. Other democratic institutions were either curtailed or abolished. Political parties, labour unions, organizations, freedom of the press and expression were greatly prohibited or suppressed in the name of national peace and order. In place of modern democratic theory, Sarit introduced Thai paternalism, invoking what he claimed were the practices and ideas of the ancient Thai kings, in which the government was like a benevolent father and the people were children. Claiming the power to guide and the responsibility to care for the well-being

of the people, the government had no need for Western frameworks of democracy. With full control of government power, Sarit's rule was known as despotic paternalism. Such political ideas and practices continued in the Thanom Kittikachorn regime until the people's uprising in October 1973 which fought for full democratic government. The Constitution of 1974 was promulgated to serve as the fundamental basis for democratic development. Similar to the fate of the 1946 Constitution, however, it was quickly nullified by the military coup of October 1976. Later in the Prem Tinsulanond government in the 1980s, a similar idea of Thai style "half-fruit democracy" was also proposed this time, including some relaxation of restrictions pertaining to political parties, the labour movement, and the media.

The meaning of the constitution changed again after Bloody May 1992, the popular demonstration against the military-led government of General Suchinda Kraprayoon. Advocates for reform and change of the 'half-fruit democracy' called for the rewriting of the constitution. Finally, with the new Constitution of 1997, the idea of constitutionalism was reintroduced into the political system again. The constitution was expected to bring about political reform through the application of liberal democratic government in the country. With these political goals, the Constitution was given extensive power to regulate and control government and the public agencies as well as to provide and protect individual rights and liberties.

2.2 The New Constitution of 1997

A Political Reform

After the Bloody May uprising of 1992, the public was again reminded that the mere existence of Parliament and elections did not always work to the benefit of the people. The unexpected occurrence of the coup in 1991 made people more pessimistic about the progress and development of democracy in the country. Since the control and prevention of military intervention in national politics and government was almost impossible, the last hope therefore was to rely on a sound and efficient democratic system of government. But the general election in 1995, held after the restoration of a civilian government, almost dashed this hope, because of the widespread occurrence of vote-buying all over the country together with other forms of electoral corruption. Electoral politics was becoming increasingly controlled by an alliance of so-called 'professional politicians', provincial Mafia, unsavoury

Table 1: Prime Ministers of Thailand, 1932–1999

1. Phraya Manopakonnitithada	August 28, 1932–June 20, 1933
2. Phraya Phahonphonphayuhasena	June 21, 1933–December 16, 1938
3. Luang Phibunsongkhram	December 16, 1938–July 24, 1944
4. Khuang Aphaiwong	August 1, 1944–August 17, 1945
5. Thawi Bunyaket	August 31, 1945–September 17, 1945
6. M.R. Seni Pramoj	September 17, 1945–January 31, 1946
7. Khuang Aphaiwong	January 31, 1946–March 18, 1946
8. Pridi Phanomyong	March 24–August 21, 1946
9. Luang Tham ongnawasawat	August 23, 1946–November 8, 1947
10. Khuang Aphaiwong	November 10, 1947–April 8, 1948
11. P. Phibunsongkhram	April 8, 1948–September 16, 1957
12. Phot Sarasin	September 21, 1957–December 26, 1957
13. Thanom Kittikachorn	January 1, 1958–October 20, 1958
14. Sarit Thanarat	February 9, 1959–December 8, 1963
15. Thanom Kittikachorn	December 9, 1963–October 14, 1973
16. Sanya Dharmasakt	October 14, 1973–February 15, 1975
17. M.R. Seni Pramoj	February 15–March 6, 1975
18. M.R. Kukrit Pramoj	March 14, 1975–January 12, 1976
19. M.R. Seni Pramoj	April 20, 1976–October 6, 1976
20. Thanin Kraivichien	October 8, 1976–October 20, 1977
21. Kriangsak Chamanand	November 11, 1977–February 28, 1980
22. Prem Tinsulanonda	March 3, 1980–August 4, 1988
23. Chatichai Choonhavan	August 4, 1988–February 23, 1991
24. Anand Panyarachun	March 2, 1991–April 7, 1992
25. Suchinda Kraprayoon	April 7, 1992–May 24, 1992
26. Anand Panyarachun	June 10, 1992–September 23, 1992
27. Chuan Leekpai	September 23, 1992–July 13, 1995
28. Banharn Silpa-archa	July 13, 1995–November 25, 1996
29. Chavalit Yongchaiyut	November 25, 1996–November 9, 1997
30. Chuan Leekpai	November 9, 1997–present

Table 2: Thai Constitutions, 1932–1999

1.	The Constitution of B.E. 2475(1932),	June 27–December 10, 1932
	temporary	
2.	The Constitution of B.E. 2475(1932)	December 10, 1932–May 9, 1946
3.	The Constitution of B.E.2489(1946)	May 9, 1946–November 8, 1947
4.	The Constitution of B.E. 2490(1947),	November 9, 1947–March 23, 1949
	temporary	
5.	The Constitution of B.E.2492(1949)	March 23, 1949–November 29, 1951
6.	The Constitution of B.E.2475	March 8, 1952–October 20, 1958
	revised B.E.2495(1952)	
7.	The Constitution of B.E.2502(1959)	January 28, 1959–June 20, 1968
8.	The Constitution of B.E. 2511(1968)	June 20, 1968–November 17, 1971
9.	The Constitution of B.E. 2515(1972)	December 15, 1972–October 7, 1974
10.	The Constitution of B.E. 2517(1974)	October 7, 1974–October 6, 1976
11.	The Constitution of B.E. 2519(1976)	October 22, 1976–October 20, 1977
12.	The Constitution of B.E. 2520(1977)	November 9, 1977–December 22, 1978
13.	The Constitution of B.E. 2521(1978)	December 22, 1978–February 23, 1991
14.	The Constitution of B.E. 2534(1991)	March 1, 1991–December 9, 1991
15.	The Constitution of B.E. 2534(1991)	December 9, 1991–October 11, 1997
16.	The Constitution of B.E. 2540(1997)	October 11, 1997–

business interests, large companies, and third-rate ex-soldiers and bureaucrats. In order to cope with the new trend of democratisation under a globalised economy, a more responsive and accountable government and Parliament was needed. This could be done through rigorous reform and improving the existing institutions, for example, the House of Representatives, the Senate, the judiciary, political parties and local governments, so that they could become more responsible and accountable to the people. In the long run this political reform would produce an immunity in the political system, so that extra-constitutional interventions could not be justified. Under such hopes and fears, people began to call for a true reform of the political system.

Table 3: Coups, Rebellions, and Revolutions

1.	Military Coup	June 20, 1933
2.	Boworadet Rebellion	October 11, 1933
3.	Songsuradet Rebellion	January 29, 1939
4.	Military Coup	November 8, 1947
5.	Military Coup	October 1, 1948
6.	'Grand Palace Coup'	February 26, 1949
7.	'Manhattan Coup'	June 29, 1951
8.	'Silent Coup'	November 29, 1951
9.	Military Coup	September 16, 1957
10.	Military Coup	October 20, 1958
11.	Military Coup	November 17, 1971
12.	Military Coup	October 6, 1976
13.	Military Coup	March 26, 1977
14.	Military Coup	October 20, 1977
15.	Military Rebellion	April 1, 1981
16.	Military Coup	September 9, 1985
17.	Military Coup	February 23, 1991

2.3 Drafting the New Constitution

The Speaker of the House of Representatives set up the Democratic Development Committee (DDC) on June 9, 1994. The goal was to study the possibility of political reform. The move was precipitated by the hunger strike of Lt. Chalard Vorachat, a former MP and political activist, in front of the Parliament. Chalard started his hunger protest on May 25, 1994 and ended it on July 31, 1994, after the government and opposition conceded to the popular demand of revising the existing constitution which was written in 1991 under the influence of the National Peace Keeping Council. Consequently, Parliament passed the fifth amendment to the Constitution of 1991 in February 1995. It was an attempt to revise and amend some sections of the constitution which were regarded as undemocratic. But further effort to really revise and amend the whole constitution according to the wish of the

people by Parliament seemed to be deadlocked. Then during the new government led by Banharn Silpa-archa (r July 13, 1995–November 25, 1996), the Political Reform Committee was appointed to find a way to achieve the goal of political reform. The solution was finally found in the 6th Amendment of the Constitution passed on October 22, 1996. According to this amendment, the making of a whole new constitution by a special committee outside the National Assembly was stipulated. The National Assembly elected the Constitution Drafting Assembly (CDA), which consisted of 99 members. 76 of them were representatives elected from all provinces and 23 members were chosen from the ranks of academics and qualified persons. This Assembly's duty was to prepare a draft of a new Constitution. In the drafting process, the Assembly paid special attention to the wishes of people all over the country. A process of public consultation took place on a nation-wide basis, coordinated by the public relations committee. Public hearings were held, and input solicited. The proposed ideas and principles to be discussed in the draft Constitution had to do with the essential substance of promoting and protecting rights and liberties of the people. Equally important in achieving electoral reform was public participation in governance and monitoring the exercise of State power. Finally the Constitution Drafting Assembly completed the work within 233 days and the Constitution was promulgated on October 11, 1997.

2.4 The Principles of Government

The Constitution of 1997 is not only the embodiment of the aspirations of Thai people for a democratic system of government, but it also reflects the struggle of the people to advance and achieve the democratic cause in Thai society. The Constitution identifies main principles of government: the form of the state, the structure of government, the separation of powers, the protection of individual rights and liberty, and the amendment of the constitution. The significant change in the Constitution regarding the political structure of the country is seen in the change from representative democracy to participatory democracy. This can be seen in many sections of the Constitution that allow people to participate in the process of appointment of the independent commissions such as the Election Commission, the Administrative Court and the Ombudsman. Furthermore, it also allows people to recall certain members of Parliament and ministers and to propose

draft bills to Parliament. The Constitution makes clear that sovereign power belongs to the people and only the people can legitimately use this power.

The main objectives of the Constitution are to uphold the principle of the democratic regime of government with the king as head of the state and to bring about happiness, prosperity, and dignity to the people. The Constitution also recognizes that sovereign power is derived from the Thai people.

The form of the state is a kingdom. Before the democratic revolution in 1932, the Thai kingdom was ruled under an absolute monarchy. Since then the kingdom has changed into a constitutional monarchical regime. Another important characteristic of the Thai state is that it is a unitary state and an undividable kingdom. This form of the state is unchangeable as stipulated in section 313 paragraph 2: 'any amendment to the Constitution that will result in the modification or change the nature of the constitutional monarchical regime or the form of the state shall not be permitted.' The sovereign power belongs to the Thai people whereas the king as head of state exercises such power through the National Assembly, the Council of Ministers and the Courts in accordance with the provisions of this Constitution.

The structure of government consists of the central administration and the regional administration. The central administration, which operates under the basic concept of centralization, consists of the Office of the Prime Minister, ministries and departments. The regional administration, on the other hand, operates more on the principle of decentralization which means that the central government divides and delegates some of its power and authority in decision-making to its representatives from various departments and ministries who work at the provincial level. These representatives, who are government officials, perform their duties according to the laws, regulations and orders determined by the central government. At this level of administration, there are provinces, districts, sub districts and villages.

The executive, legislature, and judiciary are independent in their respective functions and duties. The House of Representatives exercises its check on the government by initiating motions on members of the cabinet and, in important policy matters, requesting a vote of confidence on the government. The Council of Ministers or cabinet has the duty to administer the country with the approval of the legislature. Finally, the courts perform their duties and responsibilities independently from the other two branches of government.

Another important principle introduced in the 1997 Constitution is the supervision and control of the use of power by the government and its agencies. There are rules and regulations regarding the wealth and behaviour of politicians who are in office. Many new commissions and organizations independent from government and the bureaucracy have been created to monitor the running of the government and public services. The qualifications of members of the National Assembly and the cabinet have been raised to meet the popular demand for better public servants.

The rights and dignity of the people are a major section in the Constitution. In addition to the protection of individual rights and liberty, the Constitution also includes community and children's rights as well as equality of the sexes. The people can monitor and recall certain members of the House and the Cabinet. In order to guarantee justice for people, an administrative court is set up to decide cases between people and government agencies.

2.5 Provision for Amendment

An amendment of the Constitution will be done within the National Assembly. The Constitution section 313 stipulates that the Cabinet or the National Assembly may initiate an amendment of the constitution. One-fifth of the total number of members of the House of Representatives or one-fifth of the total number of members of both the House and Senate are required in order to propose an amendment. The members of the House of Representatives may individually or jointly propose such a motion only in accordance with the resolution of the political party to which they belong. Any amendment that will result in the modification of or change in the nature of the constitutional monarchical regime or the form of the state is prohibited.

To make sure that the political reforms are undertaken by the government, the transitory provisional section of the Constitution stipulates that any change or amendment of this Constitution or its organic laws can be done only after five years from the date of the promulgation of this Constitution. Furthermore, changes or amendments must come from the Election Commission, the Constitutional Court, or the National Counter Corruption Commission which has the power to submit to the National Assembly or the Council of Ministers a report presenting opinions on the amendment of this Constitution or other laws.

2.6 The Bill of Rights

The Constitution of 1997, for the first time, stipulates that human dignity, not only the rights and liberties of an individual, must be protected. There are many new rights introduced in this Constitution. This is a reflection of changes in the political and social environment in the country following the rapid expansion and growth of the economy in the 1990s. It also demonstrates the response of Thai people towards global trends and developments. Chief among these rights are individual rights, community rights, rights of children and the elderly, handicapped people's rights, and equality of the sexes. Freedom of information, the right to public health and education and consumer rights are also recognized. In all, there are 40 rights compared to only nine rights in the Constitution of 1932.

Regarding the rights and liberties of the individual, the new Constitution of 1997 states that a person shall enjoy the right and liberty in his or her own person regarding one's dignity, reputation and privacy, including a person's family rights. A person has the liberty of dwelling, of travelling and the liberty of making a choice about his or her residence within the Kingdom. The right to practice any religion, to private property and inheritance, together with the right of expression, of association, and of information are also recognized.

People have the right to vote, to run in an election, to form a political party, and to have access to government information. The airwaves are also a common resource and cannot be monopolized by the government. People also have the equal right to utilize and make use of the frequencies. People are granted rights to sue the government and public agencies, and to lodge complaints with the Human Rights Commission and the Ombudsman. In criminal cases and other cases, legal procedures must not violate the accused person's rights to a fair trial and investigation.

Another area of rights in the 1997 Constitution is the protection and promotion of individuals' self-development. Section 42 states that 'a person shall enjoy academic freedom. Education, training, learning, teaching, researching and disseminating such research according to academic principles shall be protected provided that it is not contrary to his or her civic duties or good morals.' People shall have equal right to public education for the duration of not less than twelve years without charge.

The new sections on communal rights and liberties are those dealing with community rights, the preservation of natural resources and self-government. For example, Section 46 states that, 'Persons so assembling as to be a traditional community shall have the right to conserve or restore their customs, local knowledge, arts or good culture of their community and of the nation and participate in the management, maintenance, preservation and exploitation of natural resources and the environment in a balanced fashion and persistently as provided by law.'

Furthermore, the Constitution provides a mechanism by which the people can monitor and recall certain members of the House and the Cabinet. In protecting people's justice, an administrative court will be set up to decide cases between people and government agencies and personnel.

Finally, for the first time, the Constitution grants people 'the right to resist peacefully any act committed for the acquisition of power to rule the country by a means which is not in accordance with the modes provided in this Constitution.' (section 65)

2.7 Checks and Balances

One of the major principles of the 1997 Constitution that captured public attention was the supervision and control of the government and its agencies by the people. The executive branch, which is composed of the ministries and departments that receive policies from the government for implementation, is considerably larger than the legislative and judicial branches. The 1997 Constitution, however, creates many new commissions and courts to supervise and control the use of government power and authority. There are six new commissions to perform such duties: the Election Commission, the Ombudsmen, the National Human Rights Commission, the Constitutional Court, the National Prevention and Counter Corruption Commission, and the National Comptroller Commission.

The Ombudsmen have the power and duty to inquire into complaint in the following cases: (a) failure to perform in compliance with the law or performance beyond powers and duties as provided by the law of a government official, an official or employee of a state agency, state enterprise or local government organization; (b) performance of or omission to perform duties of a government official, an official or employee of a state agency, state enterprise or local government organization, which unjustly causes injuries to the complainant.

2.8 The Separation of Powers

The principle of the separation of powers is mainly concerned with the idea of creating a stable government and maintaining the protection of individual rights and freedom from the abuse of government powers. In practice, the separation of powers leads to the introduction of a parliamentary form of government and presidential system. Underlying this is the distribution of power among the executive, legislative and judicial branches. The separation of powers is not the division of sovereign power but the separation of the exercise of that power. In practice there is no government that absolutely separates the three branches of powers from one another mainly because they are all related and dependent upon one another. In fact, the efficiency of parliamentary government lies in the close union, the nearly complete fusion, of the executive and the legislative powers.

This fusion takes place in the Cabinet. The House of Representatives choose the prime minister. Once elected, the prime minister exerts powers of administration by nominating the ministers and selecting the Cabinet over which he presides. Then the cabinet exerts a special control over the House of Representatives through their policies. The Cabinet members cannot at the same time be members of the House of Representatives and government officials. In conducting the government policies, the executive is accountable to the legislature, which can exercise a vote of confidence to check the government. In return the government has the power to dissolve the parliament.

The right of dissolution which the government possesses makes it into an executive which can annihilate the legislature, as well as an executive which is the nominee of the legislature. The stability and efficiency of parliamentary government thus rests on the collective responsibility of the Cabinet combined with the threat of dissolution of the parliament.

2.9 Elections

The Constitution makes it a duty for the people to vote in a general election. Failure to do so is punishable by law. This requirement stems from people's wishes to construct a people's democratic government free from the vote buying and selling which has dominated elections in the past. Thus voting is a compulsory not voluntary act. For the first time, the people will elect the Senate, which is given more power in the National Assembly. People will

directly elect the Senate. The Senate has the power to recall and investigate politicians. To guarantee the neutrality of the Senate, senators are required to not affiliate with any political party, and no campaign for the election is allowed.

MPs come from both direct popular election and from a party-list, which accounts for one fifth of the total number of MPs. The reason for the introduction of party-list MPs is to allow certain professionals to be able to be elected into parliament without having to spend a huge amount of money in the campaign like the ordinary MP. This will open more avenues for some groups of people to be able to have their own representatives through the party-list scheme. Also this is a chance to see whether direct election of executives will work or not because only political parties will nominate the party-list. Another new mechanism is the establishment of the Election Commission, instead of the Interior Ministry, to oversee elections.

In conclusion, it can be seen that the significance of the constitution in Thai political history and government is its function to serve the stability of the regime. In this sense, the Thai constitutions represented realities of power relations more than being the source of political legitimacy. The 1997 Constitution, however, intends to introduce a change from representative democracy to participatory democracy. This can be seen in the establishment of the independent commissions such as the Election Commission, the Administrative Court and the Ombudsman. People's power is recognized so that they can recall certain members of Parliament and ministers and propose draft bills to Parliament. Individual rights and liberties are expanded together with communal rights. The principles and practices of checks and balances and the separation of powers figure prominently in the Constitution. The 1997 Constitution therefore makes clear that sovereign power belongs to the people and that only the people can legitimately use this power.

Democratization in Korea and Its Influence on the Constitution

Park Won-Soon .

1. Introduction

— *a beautiful rose blooming in a garbage can* —

The Constitution is the supreme legal norm of a country. All national institutions should be based upon the Constitution, the standard of interpreting every legal order. However, the Korean Constitution has been only a decoration under the long dictatorship. Although the Korean Constitution protects various basic rights and regulates the separation of the three powers — administrative, legislative and judicial — it has been an abstract proclamation and has not been very effective.

Power holders and the ruling power frequently ignore or violate the Constitution. The Constitution is readily revised for the convenience of those in power and for prolongation of their regime. In the process of revising the Constitution, the opposition parties and peoples are oppressed. As a result, the Constitution is tattered and its dignity is forfeit. However, no oppression or disdain could occlude the passion and desire of the Korean peoples for a democratic Constitution. The struggle to achieve a democratic Constitution for the people, not for a dictator, has been maintained. When people's right to even choose their government and to demand the revision of the Constitution were forbidden in 1986, people united to protest and demonstrate against the dictator. As a consequence, we could achieve the democratic Constitution and legal order.

A foreign journalist, who witnessed the dictatorship and powerlessness and ignorance of people in Korea, mentioned that democracy in Korea was a

rose blooming in a garbage can. It showed the hopelessness of democracy in Korea that cannot fully bloom. Dictatorship through our history such as Japanese colonialism, independence, the disunion, and the confrontation of North and South Korea can't provide a fertile soil to achieve democracy. However, the Korean people's passion for democracy has continued in various forms to oppose and defy dictatorship. Finally, the Grand Struggle in June in 1986 achieved the democracy where dictatorship can no longer settle down. A beautiful rose has bloomed in a garbage can of despair.

2. The History of the Constitution in Korea

(1) Enactment of the Korean Constitution

Korea obtained independence from Japanese imperialism on 15 August 1945. Korea went through US military administration for three years and finally built up a real country in 1948. On 10 May 1948, a general election was conducted to build the Constitutional Assembly. The Constitutional Assembly formed the Constitutional Committee to begin the enactment of the Constitution in cooperation with constitutional experts. Through many processes, finally the Constitution adopted the unicameral system and the President and Prime Minister system was promulgated on 17 July 1948.

The first Constitution of Korea protects basic human rights and the separation of the three powers and includes conviction about the new democracy. The contents of the first Constitution of Korea were superb in that they put Korea on a democratic basis. However, Korean people who were unfamiliar with democracy needed a long time to make the Constitution democratic.

(2) A Brief History of the Nine Revisions of the Constitution

The First Revision

The first revision was done on 7 July 1952. There was a serious conflict between major and opposition parties concerning the revision of the Constitution. After prolonged negotiations, both parties compromised. The main context of the revision is about direct election of the President and Vice-President, a bicameral parliamentary system and so on.

The Second Revision

The second revision was done on 27 November 1954 after prolonged negotiations between government and opposition parties. According to voting

returns of lawmakers, of 203 lawmakers present, 135 supported the revision of the Constitution, so the revision bill was rejected due to the shortage of the necessary numbers to pass a bill. On the following day, the government party insisted 135 was the fixed number for passing a bill according to the rule of rounding off to the nearest integer, and rescinded the rejection. The revision bill was passed. The main content was to retract limits on the second running by the first President in presidential elections, the introduction of a referendum, and the cancellation of the Prime Minister system.

The Third Revision

The autocratic Lee Seung-Man administration finally collapsed due to mass demonstrations initiated by students. In particular, the presidential election on 15 March 1960 was the epitome of absolute vote rigging and faced a widespread resistance from the people. After the collapse of the Lee administration, an interim government was introduced and led the revision of the Constitution. The content of this revision was prohibition of pre- and post-censorship on the freedom of the press, publication, and assembly. The basic rights are strengthened; the fundamental content of basic rights should not be damaged in any case, according to the Constitution.

The Fourth Revision

This was made on 29 November 1960 in order to get the legal background to punish the instigators of vote rigging and the killers who kill and injure people protesting against vote rigging. The special laws were enacted such as an anti-rigged election law and anti-democratic actor punishment law. They were subsidiary laws to provide the background for penalty according to the retroactive law.

The Fifth Revision

This was done after the 5.16 military coup. In 1961, some soldiers carried out a military coup and instituted the Military Revolution Committee. They came into power and proclaimed martial law in the whole country. They made the existing Constitution ineffective and enacted the emergency law for national rebuilding which had the same power as the Constitution. In a year of military dictatorship, the new Constitution was adopted by a referendum. As a result of this adoption, the government has the presidential system, the court has the right to judge constitutionality of laws, and the parliament became the unicameral legislature.

The Sixth Revision

The main content is to allow a president to run up to three times. According to the Constitution at that time, only twice was allowed. So this revision is called the 'three times running for election revision'. On 7 August 1969, the government party submitted the revision bill and only ruling party lawmakers were gathered at night to pass it. This revision was adopted by referendum on 17 October.

The Seventh Revision

This revision is called the Constitution for Revitalizing Reform because it was initiated by the 'Revitalizing Reform' system in October 1972. At that time, President Park Jeong-Hee proclaimed martial law, dissolved the parliament, and prohibited political party and political activities. The emergency Cabinet meeting replaced the parliament, proclaimed the revision of the Constitution, and confirmed its revision on 21 November. The characteristics of the Constitution for Revitalizing Reform are to weaken basic rights and to ensure the system of the president's long-term reign. The article concerning the protection of fundamental contents of basic rights is annulled from the Constitution and the review system of legality for confinement was also erased. The National Conference for Unification was newly instituted and had the rights to elect the President and appoint one-third of the lawmakers. In addition, it had the right to confirm revision of the Constitution. The President has the right to appoint or dismiss all judges as well as the President of the Supreme Court, so judicial power was clearly weakened at that time. The right of the parliament to conduct investigations in relation to government was restricted as well.

The Eighth Revision

After President Park Jeong-Hee, dictator of Korea for 18 years, passed away in October 1979, General Jeon Doo-Hwan became president through a coup against the peoples' fervent hope for a democratic election. He declared martial law in the whole country in May 1980 and instituted the National Emergency Countermeasure Committee. In the same year, the Constitution adopted by the referendum strengthened basic rights such as the pursuit of happiness, environmental rights, freedom and so on. However, this was nothing but nominal. On the other hand, the President was given enormous rights such as the right of dissolution of parliament and of emergency control. The people were deprived of the right to elect a government.

The Ninth Revision

The ninth revision was made as a result of civil protest against the Jeong administration. People collectively protested for direct election of the President and real expansion of basic rights. The people's power was poured into the June struggle in 1986. At that time Ro Dae-Woo, the representative of the ruling party, accepted the demands through the June 29 proclamation. Therefore, the Constitution was revised and proclaimed for the first time in history by mutual agreement.

(3) A History of the Constitution Revision For the Convenience of Power.

All the revised Constitutions, except the third and fourth revisions achieved by student demonstrations and the ninth revision by June struggle, have the same characteristics in the history of the Constitution revision.

First, in almost every case, Constitution revision was done for the convenience of those in power, to strengthen and prolong their power. The rights of the ruling party and the President were expanded, judicial power was weakened, and human rights were seriously infringed. The 18-year dictatorship of the Park administration made the Constitution ineffective in a day. They made a new Constitution arbitrarily and the real Constitution became like a mere scrap of paper.

Second, revision of the Constitution was made by the unilateral power of the ruler. Objection from opposition parties and people was readily suppressed by physical power. Even worse, revision was passed without informing lawmakers of the opposition party. In some cases, lawmakers from the opposition party were expelled from an assembly hall.

(4) Democratisation Movements and Koreans peoples' struggle for Democratic Constitution

As mentioned above, power holders revised the Constitution many times to extend their reign and for convenience in maintaining their power. As a consequence, the Constitution deprived people of election rights and justified limitation of basic rights.

It was natural that the Korean people were against the Constitution justifying dictatorship. The anti-government movement and democratisation movement has the aim of opposing the dictatorship's Constitution and winning a democratic Constitution. The democratic restoration of the

Especially during the Park administration, people were deprived of the right to elect the President directly and instead, the National Conference for Unification elected him. Besides, peoples' basic rights were seriously infringed and people demanding the revision of the Constitution were severely punished. In spite of harsh punishment, a plethora of students, workers, and intellectuals insisted the Constitution for Revitalizing Reform must be rescinded and many of them were jailed. Finally, this Constitution was rescinded after the death of President Park.

Jeon Doo-Hwan's military regime, against the people's fervent hope, produced a Constitution that was a continuation of Revitalizing Reform. Therefore, the people could not elect the President by votes and basic rights were trampled down and restricted. However, the people's demands for democracy and a democratic constitution were getting stronger. In spite of rigorous oppression and punishment, many people including students, workers, intellectuals, and artists protested for democracy and a democratic constitution. In some cases, 1600 students were arrested in a day. Many innocent people were arrested and were tortured and punished severely. In spite of this, the protests of righteous peoples could not be denied. Thousands of people joined the protests, and more came everyday. In the end, the dictatorship regime accepted the people's demands.

3. The Reality of Constitutional Judgement and Its Practice

(1) Titular Constitutional Judgement of the Past

Constitutional Judgement was adopted from the first Constitution and went through vicissitudes. In 1948, the first Constitution instituted the Constitutional Committee to deal with constitutionality of laws and the Impeachment Court to deal with impeachment. However, the Constitutional Committee dealt with six cases of constitutionality of laws for ten years. Its activity was insignificant.

In 1960, in order to correct this kind of situation, the Constitutional Committee was abolished and the Constitutional Court was adopted. The new Constitutional Court dealt with judgement on constitutionality of laws, dissolution of political parties, impeachment, competence disputes and election litigation. Its role was similar to that of the current Constitutional Court. And it was a permanent commission. However, in reality, it was not established because of the 5.16 military coup.

In 1962, the Constitution did not have the Constitution Court but let the Supreme Court deal with judgement on constitutionality of laws, dissolution of political parties, and election litigation. At that time, this system was not fully activated, so that the Supreme Court had only two cases decided as unconstitutional; national reparation law and court organizational law.

In 1972, the Constitution for Revitalizing Reform was made and according to it, the Supreme Court was not entitled to deal with judgement on constitutionality of laws. Instead, the Constitutional Committee was established to deal with judgement on constitutionality of laws. However, there was no case decided as unconstitutional by the Constitutional Committee.

In 1980, the revised Constitution was similar to the Constitution of Revitalizing Reform. The difference is that two-thirds of the judges of the Supreme Court should agree on unconstitutionality of a law before it can be actually screened by the Constitutional Committee. In fact, this made it more difficult to judge unconstitutionality of laws at that time and the Constitutional Committee became a dormant institution.

(2) Establishment of the Constitutional Court in the Ninth Constitution Revision

As a result of people's resistance against dictatorship and struggle for democratisation movements, the new Constitution was instituted and the Constitutional Court was revitalized. From the experience that the Supreme Court couldn't fully function to protect basic rights if they had to deal with judgement on constitutionality of law, the Constitutional Court was instituted to deal with impeachment, constitutionality of laws, dissolution of political party, constitutional complaints and competence disputes. Judgement on Constitutional complaints was newly introduced to Korea and has significant meaning in our history because in cases of basic rights violated by exercise and nonexercise of public powers, people can demand redemption. The Constitution institutionalised the Constitutional Court that became effective on 1 September 1988. On 15 September, nine judges were appointed and it became officially active.

(3) Tensions With the Supreme Court

There was tension between the Supreme Court and the Constitutional Court when judgement rights such as constitutionality of laws was left to the Constitutional Court. It shows that the final interpretation right of the

Constitution was left to the Constitutional Court and because of it, there was friction with the Supreme Court regarding which is the highest institution in the machinery of law. In the process of establishing the Constitutional Court, it was agreed that the president of the Constitutional Court has power equal to the presiding officer of the Supreme Court, and judges of the Constitutional Court have power equal to the justice of the Supreme Court. However, in a concrete case of judgement, the judgement of the Constitutional Court was contrary to that of the Supreme Court and neither of them wanted to yield to the other's view. So there were frictions between them.

(4) The Reality of the Judgement of the Commission Court

As the Constitutional Court was institutionalised and many cases of Constitutional judgements were made, the active period for a Constitution judgement was started in Korea. Due to revitalization of the Constitution judgements, the Constitution was no longer nominal and declaratory and became the concrete norm by which to judge issues. Table I shows the cases of Constitutional judgement. As of 1 September 1988, in nearly 13 years, 7049 cases were filed and 6553 cases were adjudicated. 471 of them have been decided unconstitutional. These figures show that the Court has been very active in safeguarding our Constitution.

The Constitutional Court adopted by the current Constitution deals with five different kinds of judgements: constitutionality of laws, dissolution of a political party, impeachment, competence disputes, and constitutional complaints. Among them, judgements on impeachment and dissolution of political parties are not frequent and cases of competence disputes are likely to increase because the conflict between national institutions and local self-government bodies tends to be increased since local self-government was introduced. However, the most frequent cases are judgements on the constitutionality of laws and constitutional complaints.

Judgement on constitutionality of laws can be done by requests of court with the presupposition that there will be a judgement on constitutionality of laws. The requests of the court can be made by the official authorities of the administration of justice or by individual registrations. If an individual's registration is rejected by the administration of justice, individuals can appeal directly to the Constitutional Court.

The system of Constitutional Complaints is the redemption system in the Constitutional Court for when the basic rights protected by the

Constitution are infringed by public powers of legislation, judicature, and administration. Victims can institute a lawsuit in the Constitutional Court. This was newly introduced by the current Constitution. It is a practical redemption system against infringement of basic rights and is considered the flower of the Constitutional judgement.

4. A Little Momentum in Improvement of Human Rights

The Establishment of a National Human Rights Commission and New Experiments

Kim Dae-Jung, who was a dissident during the dictatorship, was elected president with the public pledge of establishing a National Human Rights Commission. So the National Human Rights Commission was an important task of the new government. However, in reality, the institutionalisation of the National Human Rights Commission was faced with objections and resistance from the national institutions holding power, such as the Ministry of Justice and prosecutors whose rights could be restricted by the National Human Rights Commission. Due to this, the law regarding the National Human Rights Commission was delayed and passed only in the latter half of Kim Dae-Jung's presidency in 2001. This law provides the National Human Rights Commission with legal backing. The National Human Rights Commission has the following rights:

1. Investigation of and research on laws, systems, policies, and practices of human rights. Expression of opinion when improvement is needed
2. Investigation and redemption of human rights infringements
3. Research on and redemption of discrimination
4. Research on the situation of human rights
5. Education and public relations regarding human rights
6. Preventive measures or advice concerning human rights infringements.; provides standard of human rights infringement.
7. Affiliation with International Human Rights Convention; research on its implementation and expression of opinions
8. Support for human rights and cooperation with associations and individuals
9. Cooperation and exchanges with international human rights institutions and international organizations
10. Any items necessary to protect and improve human rights

Although the National Human Rights Commission does not have compulsory subpoena and compulsory investigation right, it can be a restraining power on human rights infringements and has, at the same time, widespread investigation rights on systems and practices of human rights violations and the right to advise. Therefore, it will be able to make a huge contribution to the improvement of human rights conditions.

(2) Involvement in the International Human Rights Community

These are the international conventions that the Korean government acknowledges:

January 1979 International Convention on the Elimination of All Forms of Racial Discrimination

January 1985 Convention on the Elimination of All Forms of Discrimination against Women

July 1990 International Covenant on Civil and Political Rights;
International Covenant on Economic, Social and Cultural Rights

December 1991 Convention on the Rights of the Child

February 1995 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

Among the international conventions mentioned above, in 1990 the Korean government ratified International Human Rights Conventions including A.B norms and even optional protocol. Therefore individual communication can be protected. In addition, since its ratification, the Korean government should submit a country report regularly and civil NGOs can submit counter reports. Through this, there can be disputes over human rights conditions in Korea. In the process, however, Koreans can have opportunities to examine each ministry, laws, and policies about whether they meet international standards and are appropriate for implementing international conventions. Related authorities and civil organizations can evaluate their efforts to protect human rights. Korea just stepped into the international human rights community but these disputes and pressure from NGOs can help to improve human rights conditions in Korea.

5. Conclusion

People's Demands on the New Constitution

Political parties have disputes over the presidential system and the parliamentary system according to their gains from each. Political power whose stronghold is mainly from a certain region espouses a parliamentary government system because the presidential system can ensure nothing for them unless they become president. It shows that politicians can take advantage of the Constitution and political system for their own gains.

People and civil organizations that do not have interests in the matter also ask for revision. Items to be revised are as follows.

1. Insertion of the concept of Participatory Democracy into the Prelude of the Constitution
2. Voting rights should be expanded to the age of 18
3. Introduction of a Public Hearing system on the Occasion of Confirmation of high-ranking public servants
4. The Prosecutor General's duty of being present in Parliament and duty to answer questions

There is no contingency for Koreans to suffer from a military coup in Korea any longer. Democratic changes of regimes between ruling and opposition party have been made. The president is allowed for only a single term and there is no possibility of long-term reign. Therefore the possibility for power abuse has been greatly reduced. However, in the same way as Rome was not built in a day, the Korean people have a long way to go to achieve high quality democracy. And it can't be achieved for free without paying the price of struggle.

Table 4: Case Statistics of the Constitutional Court of Korea*As of 30 September 2001*

Type	Total	Constitutionality of Law ^a	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint Sub-total	\$681	\$681
Filed	7131	414			15	6702	5787	915
Settled	6658	387			12	6259	5450	809
Dismissed by Small Benches	2459					2459	2387	72
Decided by Full Bench								
Unconstitutional ^b	216	68				148	23	125
Unconformable to Constitution ^c	62	24				38	6	32
Unconstitutional, in certain context ^d	32	8				24	6	18
Constitutional, in certain context ^e	27	7				20		20
Constitutional	602	164				438	3	435
Annulled ^f	141				2	139	139	
Rejected	2043				3	2040	2040	
Dismissed	767	18			5	744	665	79
Miscellaneous	3					3	2	1
Withdrawn	306	98			2	206	179	27
Pending	473	27			3	443	337	106

a. This type of 'Constitutionality of Law' case refers to the constitutionality of statutes cases brought by ordinary courts, i.e., any court other than the Constitutional Court.

b. 'Unconstitutional': Used in Constitutionality of Laws cases.

c. 'Unconformable to Constitution': This conclusion means the Court acknowledges a law's unconstitutionality but merely requests the National Assembly to revise it by a certain period while having the law remain effective until that time.

d. 'Unconstitutional, in certain context': In cases challenging the constitutionality of a law, the

Court prohibits a particular way of interpretation of a law as unconstitutional, while having other interpretations remain constitutional.

e. 'Constitutional, in certain context': This means that a law is constitutional if it is interpreted according to the designated way. This is the converse of 'Unconstitutional, in certain context'. Both are regarded as decisions of 'partially unconstitutional'.

f. 'Annulled': This conclusion is used when the Court accepts a Constitutional Complaint which does not include a constitutionality of law issue.

Constitutional Politics in Contemporary Japan

Sugita Atsushi

The Japanese constitution is now at a turning point. Today, first I would like to explain the two major political attitudes toward the constitution. After making clear why and how these attitudes have been developed, I will point out that each of these attitudes has its own contradiction and dilemma within it. Then I will tell you something about my own way of thinking about the constitution. We should think about the constitution within a broader context of politics, rather than sticking to the constitution as a written national law.

1 The present constitution and its creation

The present Japanese constitution was made after World War II, under the occupation by the Allied forces led by the US. In the formal legal context, it was regarded as a modification of the former Meiji constitution made at the end of the 19th century. However, seeing the huge difference between the two, nobody could be persuaded by the simple legal explanation.

The most important differences include, first, the declaration of popular sovereignty. While in the former constitution the Emperor was the sovereign, in the present one, his status has been changed to 'the symbol of the State and the unity of the people'. Second, internationalism and pacifism are positive in the present constitution. In its preface, it declares that 'no nation is responsible to itself alone', and says that the Japanese want to occupy an honoured place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and

intolerance. Furthermore, in its famous Ninth Clause, it renounces war as a means to settle international disputes, and states that the right of belligerency of the state is not recognized. Third, the scope of the protection of human rights is considerably enlarged from the previous constitution.

One of the most serious problems concerning the new constitution has been 'who made it?' If you look at the constitution, the Emperor appears in the first sentence and says that he is happy to see the modified constitution. However, just after this sentence, a subject called 'we, the Japanese people' comes up and starts the preface.

In addition to these two subjects, there is another one, a hidden subject invisible in the constitution, which is a group of Americans who actually drafted it. I do not want to go into the complicated background of the process here. At least we can say that one of the characteristics of the Japanese constitution is that it was written by anonymous strangers, rather than by well-known founding fathers as in the case of the US constitution.

Another important characteristic is that this constitution does not stand alone. The constitution and the US-Japan Security Treaty seem to form an undividable set, though that connection is not mentioned anywhere. The treaty made it possible for the US to keep many bases in Japan, in exchange for its promise to militarily protect Japan when necessary. As everybody knows, Japan now has a considerable military force, notwithstanding the existence of the Ninth Clause. However, the military aspect of the sovereignty is still nonexistent in the constitution, and appears to be cared for in the treaty.

2 The Logic and Dilemma of the Protectionists

Because of the way this constitution was created, its legitimacy has always been controversial.

That does not mean that the constitution has been unpopular. On the contrary, it has been extremely popular among the people. Most Japanese people had anti-war feelings after the total war, and they were happy to see many clauses protecting human rights.

Most constitutional and political theorists have also relied on the constitution to establish a liberal democracy in the country. But at least for them, there was a problem to be solved. That is, how to legitimise the constitution.

One solution was to try to imagine that a revolution had taken place in August 1945, and that the revolutionary people had used their constitutive power. Of course, this was a matter of imagination. There was no visible revolution. There was something like a conquest, instead. However, to describe the creation of the constitutions as an institution by conquest (to use a Hobbesian term) looked too dangerous to the constitutional theorists. That kind of explanation might jeopardize the newly born constitution. So they decided to explain the creation in terms of social contract, rather than conquest or force.

The social contract theory was a favourite theme among the post-war Japanese social scientists, for two reasons. First, to criticize the Emperor system. Why were the Japanese people mobilized into a reckless war? According to the post-war theorists, one of the origins was the mystical way of thinking based on the existence of the Emperor as a god. In order to attack this way of thinking, the introduction of the idea of social contract seemed useful. Second was the criticism of Marxist theory. Political theorists were not happy to think of politics as simply determined by economic factors. In that context, the social contract theory was regarded as a means to liberate politics from this structure.

However, the introduction of the social contract theory had side effects. First, we can point out that this contributed to the oblivion of the colonization period. When we say that we got together and used constitutive power, we are likely to forget how that 'we' unit was formed. In fact, the so-called Japanese nation was violently enlarged during colonization, and shrank in 1945. This kind of contingency could never be represented in the social contract theory.

Another side effect was to cause a dilemma for those who tried to protect the new constitution. What is most important in the social contract is voluntary agreement from all participants. But in the case of the Japanese constitution, we cannot be totally sure how voluntary the agreement was, because the constitution was made under the occupation. So, when it was argued that we should make another social contract in order to make sure that the agreement is perfectly voluntary, the constitutional theorists could not easily find logic to resist. On the other hand, seeing that those who were arguing that way actually were opposed to the content of the constitution, theorists who wanted to preserve the principles of the constitution could not join them. This was the dilemma of the protectionists.

3 The logic and the dilemma of the reformists

The people who want to change the constitution are also in a dilemma. Before talking about that, let us briefly look back at the history of this issue.

The Liberal Democratic Party, which has held power almost constantly since 1955, has maintained constitutional reform as part of their platform. However, there was inconsistent opinion within the party regarding that point, to say nothing of the opinion of their supporters. From the 1950s to 1960s, a research committee was active within cabinets, scrutinizing the creation process of the constitution. After a relative silence, new research committees were established, this time within parliaments, in 1999. They have interviewed constitutional and political theorists, and are trying to make reports within a couple of years, though they are not entitled to submit proposals to make another constitution.

The reformists have put forward two points. In the first of these points they insisted that the constitution was forced upon Japan by the Allies. When they talk about forcing, they are not only talking about the creation, but also about the content. They say that the constitution doesn't fit the Japanese very well. The constitution is full of human rights, though the very idea of human rights has been foreign to us. The emphasis on individualism in the constitution has caused a moral disaster, ruining traditional values such as family ties and communal cooperation.

Second, they criticized the Ninth Clause. As I have already mentioned, that clause renounced the war and the right to wage war, although Japan actually has military forces. In order to solve the contradiction between the law and the fact, the law rather than the fact should be changed, they said.

General Japanese public opinion does not tend to agree with the criticism of human rights in their constitution. However, arguments against the Allies forcing the constitution and clauses which prohibit the right of the Japanese to wage war are gradually taking root among the public as well.

First, some people who are not necessarily right-wing in the traditional sense are now coming to support the idea of making another constitution. They insist that only when the Japanese make their own political framework by themselves, can they become purely independent. This kind of argument, which we may call the civic republican way of thinking, may not be dismissed at once. Habermas says in his theory about

Constitutional Patriotism, that we can distinguish between the unit of nation, which is based on some sort of homogeneity like ethnicity, and the unit of demos, which is based on some kind of abstract principle. According to Habermas and his followers, while nationalism based on the unit of nation can be dangerous, constitutional democracy based on the unit of demos is safe. However, I think that those two units quite easily synchronize with each other, if the extensions of the units are almost the same. They can make a harmony even if they seem to be playing different melodies.

Second, the pacifistic way of thinking has been losing support, especially since the Gulf War. At that time, the Japanese government decided not to send forces and concentrated on fiscal support. However, some US elites allegedly criticized this approach. And, when the Kuwait government put an advertisement in leading newspapers saying thank you, there was no mention of Japan. This was quite traumatic for some Japanese. From that time, more and more people have come to believe that sending forces to areas of conflict is a contribution rather than an invasion. They say that if we reject that kind of contribution because of the existence of the constitution, we will be internationally underestimated. It is difficult to say whether the idea of so-called humanitarian intervention is right or wrong. I am not prepared to speak about that here. However, I believe that if the interventions are motivated by national interests or by a sort of nostalgia for sovereign statehood, they cannot be called humanitarian. If somebody desired constitutional reform simply to show off the might of the state, they are trapped in a serious anachronism.

I think that the reformist attitude, which is now gaining force, is also in a dilemma. Reformism is based on the idea that we can show the power of the nation by using constitutive power. However, as I said, the constitution is inseparable from the US-Japan Security Treaty. It is impossible to say what should become of the Ninth Clause without discussing the treaty. However, most of the reformists believe that the alliance is too important to be touched. They therefore cannot think about Japanese defence policy independently, even if they are talking of their own constitutional reform. Of course they will be able to touch the treaty, if Americans ask them to do so. However, in that case, their reforms will once again produce what looks to be another version of the 'forced constitution'. This is the dilemma which they face.

4 Redefinition of constitutional politics

As I have shown, I am not satisfied with the protectionist attitude in some respects. The greatest problem is that protectionists have been too preoccupied with the written constitution. There is no doubt of the importance of the written constitutional law and many important things have been achieved because of its existence. However, if the constitution is regarded as the fixed final instance, that might cause trouble. The constitution is not almighty. It cannot take care of issues which extend beyond the national unit. For example, in order to solve the regional environmental problem, the constitution is not enough. The constitution should be placed in negotiations with other levels of rules, such as local laws and international rules.

With regard to the Ninth Clause, I must say that protectionists have been too passive in promoting and realizing the spirit of the clause. If the Japanese are not hiding away from conflicts, but are trying to create peace in the world through pacifist strategy, then we should have shown more concrete programs and frameworks. Of course, it was best for Japan simply not to send forces abroad just after the notorious war. However, now we must say something about what to do about conflicts in the world. If we say nothing in particular and simply talk about the existence of the constitution, that does not sound plausible.

On the other hand, I am not happy with the reformists either. They talk about the creation of the constitution all the time. But why is this creation process itself so important? They are actually sharing a belief in the social contract theory with the protectionists. All of them believe that social order is made in one instance. On the contrary, I think that social order is made as accumulation of practices, as the result of struggles between different political visions. What is important is what kind of concrete laws and rules are made, and how they are interpreted and executed. Even if a certain written constitution had been forced at first, as far as that is accepted by the people, and many important practices crystallized around it, then there is no need to abolish it. Reformists say that protectionism is a fetish of the constitution. But I think that reformists themselves are fetishist, because they emphasize the importance of changing the written constitution too much.

Japanese politics have been misguided by the alleged conflict between protectionists and reformists. Both sides are too much concerned with the constitution as a written national law. The constitution is not only a written

law, but also the framework of the political society. It means the act of constituting an order and the constituted order at the same time. I think that the most important thing is to make clear what kind of order we would like to have. The actual order will be formed as *modi vivendi* through all the negotiations with people inside and outside the country. Though the word 'constitutional politics' is usually thought to mean the creation or modification of a constitution as a written law, I would like to propose a redefinition of the word as a process of realizing political visions in gradual negotiations.

5 Negotiations toward a new framework

However, when we talk about gradual process, we should be careful about one thing. Something like a 'hollowing out' approach, which transforms the characteristics of the constitution without changing the façade, has already been under way. Our approach should not be confused with that. In 1997, the so-called New Guidelines for US–Japan defence cooperation was added to the alliance treaty. Those guidelines made a wider cooperation between the two forces possible, when a security alert is found in so-called 'situations in areas surrounding Japan'. Though what this 'areas surrounding Japan' meant was not clear from the beginning, the Japanese government at first explained that it did not go far from eastern Asia. But, after 11 September, they have changed the interpretation considerably. Now, Pakistan is regarded as within the areas surrounding Japan! Meanwhile, in Japanese society, security is being tightened. Under a new law, the national government can ask local governments to cooperate with the logistics of US forces in Japan, when necessary. In addition to this, other emergency legislations are being made. Limitations of civil rights seem to be imminent.

Seeing all this, protectionists say that we should stick to the constitutional law further, in order to resist those attacks. They believe that they can fight the government by depending on the authority of the constitution, by blaming the new policies as unconstitutional.

Of course, we should resist the 'hollowing out' approach. And I believe that it is most important for us to fight back against those attacks on civil liberties in the name of the security measures. But I think that in order to persuade the general public, the protectionist approach is not enough, because they do not think now that the constitution has priority over everything though they still pay respect to the constitution. We have to show them

an alternative view with respect to matters like wars, terrorism, and security. If we simply carry on saying that we cannot do certain things because of the constitution, then people will be more and more mobilized by the constitutional reformism.

What is needed is a new approach to the constitution, which is neither protectionist, nor reformist. The new approach should be one which takes political theory and diplomacy more seriously. We start with political debates, especially with the people 'in the areas surrounding Japan', about what kind of order we want to establish. If it turns out that some kind of changing the words is necessary, we will do that. But we do not jump to conclusions. This approach is completely different from the 'hollowing out' being made by the government, in that this approach does not presuppose any conclusions.

Some would argue that especially after 11 September, the superiority of a traditional military approach was proved. But I do not think so. It is true that a feeling of insecurity seems to be permeating the people, and that is not merely a fear of being involved in violent incidents. The fear comes from somewhere deeper. I would say that people are anticipating the transformation of the idea of politics itself.

Politics has been regarded as an activity based on a bordered territory. The sovereignty as the final deciding instance, and the national interest as the benefits of a certain enclosed bunch of people have been presupposed. To protect those within the border was what politics was all about.

However, we can no longer be sure about the border. We cannot protect ourselves at national borders in the first place, when violent attacks can take place deep within the territory.

And people are becoming more and more aware of the existence of differences within the border. The presupposed and forcefully constructed homogeneity of the nation are not plausible anymore. Some people are trying to attribute the origin of crimes and other bad things to the existence of others, 'them'.

In these circumstances, something like a 'politics of security' can easily emerge. As the US, Britain, and other governments including Japan are now trying to do, some will try to create a façade, which allegedly sorts out the chaos. They will try to exclude 'others' from within the border, and will try to create homogeneity inside it.

But these approaches will never be successful. The politics of security is self-destructive, because you cannot stop excluding people until the last person is taken out. To try to eradicate terrorism is another terrorism.

When the border between the internal and external is becoming ambiguous, we have two options. We might be able to call that situation pathetic, and may try to get out of it as soon as possible. But as I said, if we try to be free from insecurity completely, we can end up in a quite horrendous situation.

Another approach is to try to accept the new predicament. If the border is not as reliable as it was, that is not necessarily bad news. Of course, there is a possibility that the borderless globalisation of the economy can impoverish the poor further. However, on the other hand, if we can create a new regional or global system of mutual cooperation and reallocation of wealth, then we can do things the former nation-state systems have never done.

Viewed from this new perspective, the internationalist and pacifist elements within the Japanese constitution appear to take on a new meaning. I am not saying that traditional protectionism is to be preserved. Only that when we can make new practices, the old content will be reactivated. Rather than relying on the very old nation-state framework of the reformists, I think we had better find a way in that direction.

The Australian Constitution and Human Rights: A Centenary View

George Williams

Introduction

Over the course of a century, Australia has developed into a prosperous nation and one of the oldest continuous democracies in the world. The Australian Constitution has played an important role in this. Since 1901, it has withstood crises and the passage of time to produce an effective foundation for economic, social and cultural development and has fostered a stable democracy responsive to and representative of the people. The important role played by the Constitution is perhaps only apparent when our experience as a nation is compared to that of other nations, such as Fiji, where the lack of a stable legal system has led to social and economic discord.

A century is a remarkably long time for any framework of government to endure largely unchanged. This achievement actually says more about the character and cultural values of the Australian people than it does about the text of the Constitution itself. Despite a long standing distrust of and alienation from politicians and politics, Australians generally continue to demonstrate a high degree of respect for their public institutions, such as the High Court, and for the rule of law.

Public support for the constitutional structure should not be taken for granted. It requires an ongoing political commitment to ensuring that the Constitution enables and remains relevant to the realisation of national aspirations and goals. One hundred years ago, the drafters of the Constitution recognised this. They included in the Constitution a mechanism that would enable the Australian people, in partnership with the Federal Parliament, to reform and update the Constitution.

The idea of constitutional reform is thus one that is entirely consistent with the original conception of the Constitution. Under section 128 of the Constitution, an amendment to the Constitution must be:

- passed by an absolute majority of both Houses of the Federal Parliament, or by one House twice; and
- at a referendum, passed by a majority of the people as a whole, and by a majority of the people in a majority of the states.

This process has been invoked 44 times, with only eight proposals succeeding at a referendum.

None of the eight changes was a major revision of the text of the Constitution. Some of the changes have, however, been of political importance. Two stand out. The 1928 referendum added a new section 105A to the Constitution, which is economically significant in enabling the Commonwealth to make agreements with the States to take over their debts. The 1967 referendum extended the federal Parliament's powers to Indigenous peoples and deleted the discriminatory section 127. None of the amendments since 1967 were of any great importance. In 1977, the Constitution amended to, amongst other things, set a retirement age of 70 years for High Court judges.

The Constitution has not been amended according to the vision of its founders to reflect contemporary needs. Hence, it stands much as it did when it came into force in 1901 and continues to reflect the aspirations and values of the framers who drafted it in the 1890s.

In the Beginning

The Australian Constitution was drafted at two Conventions held in the 1890s.⁹ The main issues at the Conventions were financial and trade issues, and how best to weigh the interests of the small states against the interests of the more populous states in the new federal Parliament. The first Convention was held in Sydney in 1891 and was attended by representatives of the colonial Parliaments. The Convention did not include any women, nor representatives of Australia's Indigenous peoples and ethnic communities. The second Convention met in Adelaide and Sydney in 1897, and in

⁹ See generally on the making of the Australian Constitution: JA La Nauze, *The Making of the Australian Constitution* (1972); J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901).

Melbourne in 1898. Popularly elected representatives were sent by New South Wales, South Australia, Tasmania, and Victoria. Queensland was not represented, and Western Australia sent parliamentary representatives rather than popularly elected delegates. As in 1891, there were no women¹⁰ or Aboriginal delegates: 'It was for the most part the big men of the established political and economic order, the men of property or their trusted allies, who moulded the federal Constitution Bill.'¹¹

Under the Leadership of Edmund Barton, later Australia's first Prime Minister and one of the first members of the High Court, the 1897–1898 Convention produced a draft Constitution. This was put to the people of New South Wales, South Australia, Tasmania, and Victoria. No referendum was held in Queensland or Western Australia. The draft Constitution received majority support in each of the four colonies holding referendums, but was nevertheless unsuccessful in New South Wales because the number of people that voted for the draft did not reach the 80,000 threshold required for success by the New South Wales Parliament. The draft Constitution was then amended at a conference in 1899 attended by the Premiers of all six colonies. In 1899 and 1900, it was again put to the voters in the colonies, this time also in Queensland and Western Australia. At the referendums of 1899 and 1900, the draft Constitution was supported by a majority of voters in each colony. Voting was voluntary, with only 60 per cent of the people eligible to vote at the referendums doing so.¹² Large sections of the community were also excluded from voting, including most women and many of Australia's Aboriginal people. Women were able to vote only in South Australia and Western Australia, and Aboriginal people in New South Wales, South Australia, Tasmania, and Victoria. Overall, only a small percentage of Australians actually cast a vote in favour of the draft Constitution. In New South Wales, Queensland, and Tasmania, the figure was below 10 per cent.¹³

After the referendums of 1899 and 1900, a delegation representing the Australian colonies was sent to London to have the draft Constitution

¹⁰ Catherine Helen Spence stood for election as a South Australian delegate to the 1897–1898 Convention. She was unsuccessful.

¹¹ LF Crisp, *Australian National Government*, (4th ed, 1978) at 14. Compare H Irving, 'Fair Federalists and Founding Mothers' in H Irving, ed, *A Woman's Constitution?: Gender & History in the Australian Commonwealth* (1996), 1.

¹² LF Crisp, *Australian National Government* (4th ed 1978) at 12.

¹³ A Twomey, *The Constitution—19th Century Colonial Office Document or a People's Constitution?* (Background Paper 15, Parliamentary Research Service, Commonwealth Parliament, 1994) at 31.

enacted by the British Parliament. However, the British Colonial Office and the Secretary of State for the Colonies, Joseph Chamberlain, were not prepared to have the Imperial Parliament pass the draft Constitution in the form presented by the Australian colonies. Concern centred on clause 74, which restricted appeals from the proposed High Court to the Privy Council. Following Colonial Office changes to clause 74 to allow greater scope for appeals, the draft Constitution was introduced into the House of Commons. The Bill completed its passage through the Parliament on July 5, 1900, was given assent by the Queen on July 9, 1900, and came into force on January 1, 1901. Entitled the *Commonwealth of Australia Constitution Act 1900* (63 & 64 Vict Ch 12), s 9 of the Act reads 'The Constitution of the Commonwealth shall be as follows:' and thereafter contains the entire text of the Australian Constitution.

The Constitution as Enacted

The framers of the Australian Constitution were deeply influenced by their British heritage and assumed that the new system would be steeped in the Westminster tradition of responsible government (under which the executive is answerable to Parliament which is in turn elected by the people). However, the Westminster tradition was inadequate as a model for a federation created by a written constitution. The drafters accordingly looked more widely afield. In the 1890s, the obvious comparative models were the written constitutions of Switzerland, Canada, and the United States. The Canadian Constitution might at first have appeared to be the appropriate model given its creation of a federal structure under the British Crown. However, it was rejected because it was believed to give too much power to the central government.

The Constitution that came into force in 1901 was not a people's Constitution, but 'a treaty between States'.¹⁴ Customs duties and tariffs, and the capacity of the upper house of the federal Parliament to veto money bills, were of far greater concern than the protection of human rights. According to one historian, the drafters 'wanted a constitution that would make capitalist society hum'.¹⁵ The framers were certainly not prepared to insert a Bill of Rights. The Constitution contains few express rights. The main ones are:

¹⁴ JA La Nauze, *The Making of the Australian Constitution* (1972) at 190.

¹⁵ M Clark, 'The People and the Constitution' in S Encel, D Horne & E Thompson, eds, *Change the Rules! Towards a Democratic Constitution* (1977), 9 at 18.

- s 41 – the right to vote;
- s 51(xxxi) – the right not to have the Commonwealth
acquire property, except on just terms;
- s 80 – the right to trial by jury;
- s 92 – the right that ‘trade, commerce, and intercourse among
the States, whether by means of internal carriage or ocean
navigation, shall be absolutely free’;
- s 116 – the right to freedom of religion; and
- s 117 – the right to freedom from disabilities or discrimination on the
basis of State residence.

The drafting of these provisions is in most cases problematic and restrictive. Section 41, for example, only guarantees the right to vote where a person ‘has or acquires a right to vote at elections for the more numerous House of the Parliament of a State’, while s 80 only provides for a jury trial where, confusingly, the ‘the trial [is] on indictment’. Even given such limitations, the High Court’s approach to the civil and political rights in the above list (that is, excluding ss 51(xxxi) and 92) has been extremely narrow, with each of these rights being interpreted almost out of existence.¹⁶ In fact, 1989 was the first time that a plaintiff was successfully able to invoke an express guarantee of a civil and political right in the High Court, in that case, s 117.

The High Court has, however, found that the Constitution does embody a range of implied freedoms. From the entrenchment of a system of representative government in ss 7 and 24 of the Constitution, which require, respectively, that the members of the Senate and the House of Representatives be ‘directly chosen by the people’, the High Court in *Australian Capital Television Pty Ltd v Commonwealth*¹⁷ implied a freedom of political communication. The Court has also explored the possibility that rights can be implied from the separation of judicial power achieved by Chapter III of the Constitution. The Court has held that this separation of federal judicial power prevents the legislature or executive from imposing involuntary detention of a penal or punitive character¹⁸ and that the Constitution requires due process under the law, at least of a procedural kind.¹⁹

¹⁶ See generally G Williams, *Human Rights under the Australian Constitution* (1999) at 96-128.

¹⁷ (1992) 177 CLR 106.

¹⁸ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

¹⁹ *Ibid.*

Instead of a Bill of Rights, the framers sought to give the new federal Parliament the power to pass racially discriminatory laws.²⁰ This is clearly demonstrated by the drafting of certain provisions. For example, the Constitution, as drafted in 1901, said little about Indigenous peoples, but what it did say was entirely negative. Section 51(xxvi) enabled the federal Parliament to make laws with respect to '[t]he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws', while under s 127 'aboriginal natives shall not be counted' in taking the census.

Section 51(xxvi), the races power, was inserted into the Constitution to allow the Commonwealth to take away the liberty and rights of sections of the community on account of their race. Barton stated at the 1898 Convention in Melbourne that the power was necessary to enable the Commonwealth to 'regulate the affairs of the people of coloured or inferior races who are in the Commonwealth.'²¹ One framer, Andrew Inglis Clark, the Tasmanian Attorney-General, supported a provision taken from the United States Constitution requiring the 'equal protection of the laws'.²² This clause might have prevented the federal and state Parliaments from discriminating on the basis of race, and the framers were concerned that Clark's clause would override Western Australian laws under which 'no Asiatic or African alien can get a miner's right or go mining on a gold-field.'²³ Clark's provision was rejected by the framers who instead inserted s 117 of the Constitution, which merely prevents discrimination on the basis of state residence. In formulating the words of s 117, Henry Higgins, one of the early members of the High Court, argued that it 'would allow Sir John Forrest [the Premier of Western Australia]...to have his law with regard to Asiatics not being able to obtain miners' rights in Western Australia. There is no discrimination there based on residence or citizenship; it is simply based upon colour and race.'²⁴

The Constitution and Human Rights

In many countries with a written constitution, constitutional development in the second half of the 20th century was dominated by concepts of human

²⁰ G Williams, *Human Rights under the Australian Constitution* (1999) at 33-45.

²¹ Official Record of the Debates of the Australasian Federal Convention, 1891-1898 (1986), vol 4, Melbourne 1898, at 228-29.

²² Ibid, vol 1, Sydney 1891, at 962.

²³ Ibid, vol 4, Melbourne 1898, at 665.

²⁴ Ibid, vol 5, Melbourne 1898, at 1801.

rights. For example, Canada and South Africa gained Bills of Rights²⁵ while the United States saw an existing Bill of Rights expanded through judicial interpretation. In other nations, international norms and the proliferation of treaties and conventions acted as a catalyst for the examination of domestic human rights concerns. In countries without a written constitution, such as New Zealand and the United Kingdom, international human rights standards were incorporated into domestic law through statutory Bills of Rights.²⁶

Australia stands apart from these developments. As a result, according to Spigelman CJ of the Supreme Court of New South Wales, within a decade, British and Canadian court decisions in many areas of the law may become 'incomprehensible to Australian lawyers'. He has warned that the 'Australian common law tradition is threatened with a degree of intellectual isolation that many would find disturbing'.²⁷ While federal and State Parliaments have enacted important human rights legislation, particularly in the form of anti-discrimination statutes,²⁸ they have not brought about a constitutional or statutory Bill of Rights. Australia is alone amongst comparable nations in not having a domestic Bill of Rights in some form. This is surprising given that international human rights law has had a significant political and legal impact in Australia. Politically, international law has been widely invoked in debates on issues such as euthanasia, mandatory sentencing and the rights of children. Legally, international law is applied by judges in the construction of statutes,²⁹ the development of the common law,³⁰ administrative decision-making,³¹ and, to a lesser extent, constitutional interpretation.³²

²⁵ See Canadian Bill of Rights 1960 (Canada); Canadian Charter of Rights and Freedoms 1982 (Canada); Constitution of the Republic of South Africa 1997 (South Africa), Ch 2.

²⁶ See New Zealand Bill of Rights Act 1990 (NZ); Human Rights Act 1998 (UK).

²⁷ JJ Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141 at 150.

²⁸ See, at the federal level: Racial Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth); Disability Discrimination Act 1992 (Cth).

²⁹ See, for example, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ).

³⁰ See, for example, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 (Brennan J).

³¹ See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

³² See, for example, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 657-8 (Kirby J). His Honour said: 'To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including in so far as that law expresses basic rights'. See generally Amelia Simpson and George Williams, 'International Law and Constitutional Interpretation' (2000) 11 *Public Law Review* 205.

The lack of a domestic Bill of Rights might reflect the fact that Australia's human rights record is comparatively strong and that such an instrument is accordingly not needed. On 18 February 2000, Prime Minister John Howard, in discussing mandatory sentencing on the ABC's AM program, stated that 'Australia's human rights reputation compared with the rest of the world is quite magnificent'. While Australia undoubtedly has a better human rights record than many other nations, any implication that our record could not be significantly improved is not consistent with the historical record. As Brian Burdekin, a former Australian Human Rights Commissioner, commented in 1994: 'It is beyond question that our current legal system is seriously inadequate in protecting many of the rights of the most vulnerable and disadvantaged groups in our community'.³³

Most Australians are secure in the knowledge that their basic rights are well protected and that the rule of law is firmly entrenched in our political culture. However, while middle class white Australia has little to fear from oppressive laws, this is not the correct indicator. What matters is how we treat the vulnerable in the community, such as the poor with little or no economic power, or people living in rural areas with dwindling access to basic services. Examined from this perspective, our human rights record is not strong. There have been many instances since federation, including up to the present day, in which minority groups in the Australian community have suffered violations of their fundamental rights due to action by Australian governments.

For example, over most of the 20th century, Aboriginal children (the 'Stolen Generations') were forcibly taken from their family for adoption or to be placed into institutions. In the 1997 report of the Human Rights and Equal Opportunity Commission, *Bringing Them Home*,³⁴ it was found that: 'Nationally we can conclude with confidence that between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970'. It is possible to point to many other examples, such as the White Australia policy that governed Australian immigration practices, where human rights have been violated due to racist or otherwise inappropriate policies.

³³ B Burdekin, 'Foreword' in Philip Alston (ed), *Towards an Australian Bill of Rights* (1994), v at v.

³⁴ Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997) 37.

Several contemporary controversies also reveal that our human rights record needs improvement. For example, our treatment and detention of refugees, themselves escaping persecution, torture or even execution for political or other reasons, is hardly humane or consistent with commonly held views about human dignity. Also relevant are mandatory sentencing laws under which people, a disproportionate number of whom are Indigenous, are being sent to prison for extended periods without a judge being able to take account of the actual circumstances of their offence. The now repealed regime of mandatory minimum sentencing for minor property offences operating since March 1997 in the Northern Territory³⁵ meant that the imprisonment rates of Indigenous women and children have risen alarmingly, including imprisonment for offences such as the stealing of a packet of biscuits valued at \$3.00. The legislation imposed a 'three strikes and you're in' policy under which a third minor property offence will lead to automatic imprisonment of not less than 12 months. Such legislation is inconsistent with the right to a fair trial and, if convicted, to have a just sentence fixed by a judge possessing the discretion to tailor the penalty to fit the crime.

Even today, political agitators can find themselves faced with jail. In 1996, Albert Langer was imprisoned for 10 weeks for distributing leaflets encouraging voters to put the candidates of the Australian Labor Party and the Coalition equal last. Even though section 240 of the *Commonwealth Electoral Act* 1918 (Cth) stated that 'a person shall mark his or her vote' by numbering every square '1, 2, 3, 4 ...', the vote advocated by Langer was an alternate, legally acceptable method of voting. Section 270 provided that a ballot paper 'shall not be informal' if it includes a sequence of consecutive numbers beginning with '1', even if numbers are duplicated. Thus, a paper numbered '1, 2, 3, 3 ...' would be counted as indicating a preference for candidates '1' and '2'. Langer sought to make voters aware of this option, but the Act, in section 329A, made it an offence to 'print, publish or distribute ... any matter or thing with the intention of encouraging persons ... to fill in a ballot paper otherwise than in accordance with' section 240. Langer challenged this section in the High Court, but failed.³⁶ In a strong dissent, Dawson J described section 329A as 'a law which is designed to keep from

³⁵ Sentencing Act 1995 (NT), as amended by the Sentencing Act (No 2) 1996 (NT) and the Sentencing Amendment Act 1998 (NT).

³⁶ *Langer v Commonwealth* (1996) 186 CLR 302.

voters information which is required by them to enable them to exercise an informed choice'.³⁷ After the High Court finding, Amnesty International released a statement describing Langer as 'the first prisoner of conscience in the country for over 20 years'.

Paths Forward

Australia's record of human rights concerns is not unlike that of other comparable nations, including in the treatment of Indigenous peoples. However, unlike those other nations, Australia has not responded with a Bill of Rights or other like measures. In such circumstances, past and continuing human rights concerns in Australia present a strong case for reform. The Australian legal system ought to offer better protection for human rights and should contribute to the development of a political and community-based culture of rights. The legal system currently fails to achieve this — it does not protect many of our basic rights. Even the right to vote, and freedom from discrimination on the basis of race or sex, exist only so long as Parliament continues to respect them. In the past, this respect has had its limits.

The Australian legal and political system would be stronger for the infusion of human rights concepts. It might prevent some of the human rights violations of the first century of our federation from being repeated. The next century of the Australian Constitution should be about making up for lost time. Developments in other nations in the field of human rights have largely passed us by. We should actively work towards a constitutional system that directly addresses basic human rights issues. This could deepen the roots of our democratic processes by developing a better understanding of the relationship between Australians and their government.

This would require a very different vision of Australian constitutionalism to that of the first century of our federation. Even from the time of the framing of the Constitution in the 1890s,³⁸ our system of government has been dominated by the view of English constitutional theorist AV Dicey that civil liberties are adequately protected through the common law and political processes without the incorporation of guarantees of rights in a written constitution.³⁹ It has been said of the delegates to the Conventions that drafted the

³⁷ Ibid at 325.

³⁸ G Williams, *Human Rights under the Australian Constitution* (1999) at 39-40.

³⁹ AV Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, 10th ed, 1959) 195-202.

Constitution that, '[l]ike anyone else within the English tradition, they must have felt that the protections to individual rights provided by the traditions of acting as honourable men were quite sufficient for a civilised society'.⁴⁰

This view is still strongly asserted in Australia as part of the argument that a Bill of Rights is not necessary because rights are well protected by the system of responsible government. By contrast, other common law nations that once accepted this view have since enacted Bills of Rights. Even the British Parliament has enacted a Bill of Rights in the form of the *Human Rights Act* 1998 (UK). Nations such as the UK have recognised that a modern pluralistic democracy requires more than just faith in the people's elected representatives and that explicit legal protection is required for minorities from majoritarian action, and even for the community at large.

In Australia today, two steps are needed. First, the few express and implied rights in the Constitution should be given a more robust interpretation consistent with the protection of individual liberty. The countervailing principle of parliamentary sovereignty has great weight, but it should not uniformly tip the scales in favour of the executive and Parliament. It should also be recognised that this first step is insufficient to bring about an adequate level of rights protection in Australia. Despite the 'discovery' of a wide range of constitutional rights by Murphy J,⁴¹ the Constitution is not capable of giving rise to an implied Bill of Rights. To interpret the spare text of the instrument in this way would inevitably compromise the legitimacy of, and public support for, the High Court of Australia as the final interpreter of the Constitution.

Second, statute law and the common law, and in time the Constitution, should be reformed by the enactment of a domestic Bill of Rights. This is necessary because the current legal framework is incapable of giving rise to a satisfactory level of rights protection. This second step would focus attention upon parliaments and communities, and offers the chance to involve both in a drafting and consultation process that which would also contribute to a stronger culture of rights protection. Such a culture would involve a tolerance and respect for rights built upon the values held and accepted by the Australian people.

⁴⁰ RCL Moffat, 'Philosophical Foundations of the Australian Constitutional Tradition' (1965) 5 *Sydney Law Review* 59 at 85-6.

⁴¹ See G Williams, 'Lionel Murphy and Democracy and Rights' in M Coper and G Williams (eds), *Justice Lionel Murphy – Influential or Merely Prescient?* (1997), 50.

An Australian Bill of Rights

Only so much can be achieved by broader interpretation of the express rights in the Constitution and by the derivation and development of implied rights. The text of the Constitution is severely limited in its capacity to give rise to the comprehensive rights protection found in other national constitutions. There are also significant institutional constraints, including perceptions of the 'proper' role of the Court in the eyes of the Australian community and the fact that the Court is limited to the cases that come before it, that restrict the capacity of the High Court to shape the Constitution to better protect human rights. Hence, even with the infusion of ideas and concepts from international law, it should be impossible for the High Court to fashion an implied Bill of Rights.

Legislative, and not judicial, innovation is required to bring about a Bill of Rights. Hence, judicial protection of human rights must be accompanied by legal reform initiated by the political system. This is necessary not only because of the limitations imposed by the existing law and the Constitution, but because the people's representatives must be involved in order to ground stronger rights protection in the popular will and bestow upon it democratic legitimacy. Without the support of the people through their representatives, the ultimate effectiveness of any Bill of Rights or like instrument is doubtful. It may possess a level of legal effectiveness, but it would be unlikely to play the more important roles of influencing community and political attitudes and of bringing about a culture of rights protection.

These objectives might be met through a Bill or Bills of Rights at the federal and State levels. Although I believe that better constitutional protection of some rights is warranted, I do not argue that we should immediately move to a referendum that would insert a Bill of Rights into the Constitution. As I have argued elsewhere,⁴² a gradual and incremental approach to better rights protection is both more pragmatic and more appropriate.

In the first instance, any Bill of Rights ought to be in the form of a statute. This instrument would not be constitutionally entrenched and would protect only a narrow range of rights about which there is a general community consensus, such as the need for freedom from racial discrimination. The Bill of Rights should be drafted by Parliaments in consultation with the

⁴² G Williams, *A Bill of Rights for Australia* (2000).

Australian people, such as through the formation of an open inquiry body constituted by members of Parliament and the community. As an Act of Parliament, the Bill of Rights could be developed and refined over time, perhaps through a provision that mandated review of the Bill every five years. New rights might be added and established rights redrafted for greater effectiveness. The Act could also be amended to enable Parliament to respond to judicial interpretations of the listed rights. Parliaments would interact with the rights listed in the Bill on an ongoing basis through the creation of a Joint Parliamentary Committee that would assess legislation for compliance with the Bill.

The role of the courts under the Bill of Rights would be an important but carefully limited one in what would be primarily a Parliament and community centred model. The courts ought to be given the power to interpret statutes and the common law in accordance with the Bill, as occurs under the New Zealand model, and to find that statutes are incompatible with the rights listed in the instrument, as in the UK model. Ideally, courts would also have the power to declare legislation to be ineffective where it breaches the listed rights, although this would not be strictly necessary and the UK model of a declaration of incompatibility would be a satisfactory starting point.

As community understanding of the rights protection process deepens and as courts develop a more sophisticated approach to such issues, it may be appropriate to insert some or all of the rights in the statutory Bill of Rights into the Constitution. In any event, it is only at this stage that it is possible to imagine that the Australian people would support such entrenchment at a referendum. The failure of the 1988 referendum, in which nationally only 30.33 per cent of voters registered a 'yes' vote, on a very narrow and limited set of rights issues, strongly suggests that considerable work remains to be undertaken at the political and community level before another referendum is held upon human rights issues.

A possible exception to this is in regard to freedom from racial discrimination. Protection of this kind has existed in the *Racial Discrimination Act 1975* (Cth) for many years and its use in political discourse and on a number of occasions by Australian courts means that it would be an appropriate topic for a referendum in the short term. The discriminatory treatment of Australia's Indigenous peoples under the Constitution as enacted in 1901, and since the 1967 referendum, the silence in the Constitution on their status

and history, would make such a referendum an important part of any reconciliation process.⁴³

Conclusion

There are many unexplored opportunities for better rights protection as part of the Constitution. Refinement and development of the High Court's interpretive methodology could enable the growth of a more sophisticated human rights jurisprudence, enriched by developments in comparative jurisdictions and by international human rights norms. This would be a very desirable development over the second century of the Constitution. However, constitutional development should not only focus upon the judicial sphere but should also involve significant reform initiated by the legislative sphere in partnership with the community.

⁴³ G Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38 *Osgoode Hall Law Journal* 639.

Constitutional Amendments:

A brief note on Indonesia's case

Jakob Tobing

The 2001 Annual Session of the People's Consultative Assembly (Majelis Permusyawaratan Rakyat, MPR) was convened from 1–9 November. On the last day of the session, it was agreed that 23 articles — consisting of 68 clauses and three new chapters — were to be changed or added to the constitution. With this third amendment, changes have been made to almost all important topics of the constitution, such as: to secure the ultimate sovereignty of the people; to reaffirm the supremacy of law; to assert a workable check-and-balance mechanism; to clarify and to assert the presidential system, including direct presidential elections; to guarantee human rights; to secure fair and accountable general elections, etc.; and accordingly, to build new institutions such as the Regional Representatives Council (Dewan Perwakilan Daerah, DPD), the Constitutional Court, and the Judicial Committee. So far MPR has amended nine articles — 16 clauses, another 25 articles — 59 clauses, and two new chapters in 2000. In all cases, the amendment was made on 57 articles, changed or added, consisting of 129 clauses and five new chapters.

What is left for the 2002 Annual Session are a couple of topics such as how or who will execute the second round of the direct presidential election, religion (Article 29), education (Article 31), social well-being (Article 33) and amendment to the constitution (Article 37). All are believed to be much less complicated than the previous topics. We are optimistic that through these four consecutive amendments, after the 2002 Annual Session, we will have a more comprehensive, democratic and workable constitution that highly respects human rights.

Actually, from the outset, the debates on the amendments have been comprehensive and systemic and the process has involved participation from people in many ways.

We understand that a constitution is and should be a holistic system.

However, although preparation was comprehensive in nature, unavoidably the finalization was done in phases, article by article, clause by clause. And, since many of the articles and/or the clauses are interrelated, it was almost impossible to conclude the primary part of the constitution in the initial phase of the process.

In regards to this, I must admit that there have been accusations that the amendment process was done partially, was very elitist and exclusive, and was done behind closed doors without people participation.

The term 'amendment' used is easily interpreted as partial adjustment and is misleading.

The results of each annual session were very partial. The preparation process was not fully transparent to the public, thus resulting in distorted reporting on what was really occurring. Subsequently, there is doubt in society regarding the sincerity of the MPR's resolve to conduct the reformation of the constitution.

Actually, all the plenary meetings of the ad-hoc committee were open to the public and attended by journalists, as well as by researchers and representatives from international organizations, though not much was considered interesting enough to be covered by newspapers and other mass media. When the MPR had no budget allocated to broadcast the meetings, the secretariat general of the MPR managed to cooperate with UNDP to help finance the program. Hundreds of public discussions were held, including at least one in each of the 350 districts in the country, attended by activists from political parties, mass organizations, NGOs, prominent figures, members of the local house of representatives, academic communities, head of districts, etc. Similar public discussions were also conducted in every provincial capital city. A series of public hearings involving prominent figures, institutions and NGOs were also conducted in the MPR building. In cooperation with the academic associations, a series of seminars with topics on law, the economy, politics, autonomy, religion, and education were organized in several cities with participants from almost all universities and research centers from throughout the country. We are open to and have support from international institutions such as NDI (National Democratic Institution), UNDP, IFES

(International Foundation for Electoral Reform), IDEA, as well as from foreign embassies, which provided literature, invited scholars, organized discussion, or just gave comments and/or analyses.

We sent teams to countries in Asia, Australia, Europe, America, and Africa for comparative studies.

We also had a team of 29 senior experts to work with us, who had backgrounds in economics, political science, law, religion and education.

Besides this, we received hundreds of letters of written input and feedback from society. Obviously, not all input and proposals are acceptable. However one will see the significant influences of this involvement upon the substance of the amendments.

On the other hand, although the present MPR was formed following a democratic election, the MPR (the Assembly) still bears the unfortunate image of being a supreme institution with unlimited authority, as stipulated in the original constitution. It was a symbol of power abuse and anti-democratic practices of the past. It is not easy for the people to believe that this superior political body will voluntarily and willingly give away its own power, or to see it in a position to make the significant changes necessary for democratization. So it is understandable that many people are in doubt over the amendment process and its results.

However I must disclose that there are groups in society that are trying to disparage and stop the amendment process and have an 'independent' constitutional committee draft a totally new constitution instead.

The political consensus in 1999, after the general election — which was acknowledged internationally as a just, free, and accountable election — was to have the constitution amended while preserving the Preamble of the 1945 constitution, and the form of the unitary republic and the presidential cabinet system in the 1945 constitution. According to the constitution, the amendment should be done, and is the responsibility of the MPR.

Therefore, what we can do and must do is to optimize the opportunity brought forward by the amendment. To make use of the opportunity this country right now possesses, instead of wishing for something else, such as making a totally new constitution, which had no political consensus at all to begin with. What matters the most is the process and the substances of the amendment, and not the formal forms of the process and the result.

Indonesia is an archipelago country with 210 million people. The demography is very imbalanced. More than 50% of the people live in Java

and Bali islands which constitute merely 20% of the entire land. The rest inhabit other islands, more than 17,000 in total. Indonesia is a developing country with an income-per-capita of around US\$400 (down from almost \$1000 before the monetary crisis), with very poor infrastructure. There is indeed a thin layer of people with modern/rational values, but in general the society is a transitional-prismatic type. We still have nomadic tribes, people who live in the early stage of agriculture, even people who have been just recently exposed to the rest of the society. We have large tribes and small tribes, with Javanese as the largest. Every world religion exists in this country, while Muslims constitute about 85 % of the population.

This part of the world was under Dutch colonial rule for about 350 years and under Japanese Imperial colonial rule for three-and-a-half years.

With these multiple diversities as background, Indonesian nationhood grows as an amalgamation of shared humiliation and sufferings under Dutch and Japanese colonialism, and a shared dream of a just, bright and prosperous future for all.

The main elements of Indonesian nationalism are created by: the emergence of a thin layer of new Dutch-Indies elites resulting from the ethical policy under Dutch colonial government; the defeat of the Russian Emporium (West) navy by the Japanese Imperial navy (East) at Tsushima Straits in 1905, which awakened Asian pride against Western superiority; the spread of ideas of democracy and equality in Europe which subsequently infected the Dutch Indies; and the emergence of a new generation of Western-educated leaders who were able to articulate and organize colonized people's aspirations in a modern way. In short, the main elements of Indonesian nationalism are the spirit of unity after suffering together under colonial rulers, the vision of sharing a free, just, and wealthy future, and the ability to organize those aspirations in modern ways. Framed by economic, communication, (colonial) political and government structures, this nationalism grows within a diverse society. In such a process, values such as inclusiveness and equality become an integral part of our nationhood, as manifested in our coat of arms: *bhinneka tunggal ika*, which literally means: diverse, yet one.

At the end of the long struggle for independence, the Preamble of the 1945 constitution was drafted during the later months of Japanese occupation. Yet the ideas contained in it are very surprisingly democratic. It adheres to the supremacy of law and the ultimate sovereignty of the people, asserting

respect for human rights, years before the United Nations' declaration of human rights in 1948. (The Preamble is attached to this paper).

This is the nation that then proclaimed its independence in August 17, 1945. It has fought to defend its integrity for years, undergone difficult times and is now endeavoring to move toward democracy and prosperity.

The above facts are obviously pertinent factors to consider in the amendment process. It is to our interest that the amendment processes and changes will not damage our nationhood and our integrity.

But, as asserted in the Preamble, it is obvious that we should have the amended constitution functioning as a driving power toward modernization, democracy and to respect human rights.

In Article 1 of the amended constitution it is reasserted that the sovereignty is in the hand of the people and shall be executed according to the constitution and that the country is a unitary republic that is based on law. Before, it was asserted that the sovereignty shall be in the hands of the people and shall be exercised in full by the MPR.

With amendment of Article 3, the MPR is repositioned to be a political body with high but limited competencies, such as the ability to amend or to draw up a constitution, as an electoral college (if the MPR decides that the second round of a presidential election should be done by the MPR), and as an institution to impeach the president. Before, the MPR was a superior, and the highest political body. It had unlimited power and competence, and functioned as the alter ego of the people — as elaborated in the Elucidation of the Constitution. The MPR will no longer have the competence to set up the broad lines of policy of the state. In case of impeachment, the MPR has no exclusive rights to impeach the president, but only to respond to the accusation proposed by the DPR if and only if, prior to that, the Constitutional Court has decided the President or/and the Vice President is proven to be guilty. A president cannot be impeached on political bases, but only over high crimes.

In the future, there will be no Annual Sessions like we have now, and no MPR decision will be a part of the legal system. It is agreed already that the MPR will consist of members of the DPR (House of Representatives) and members of the DPD (Regional Representatives Council). The debate on the existence of another group of members in the MPR, that is, the appointed members from functional groups, is postponed to the next period. As for the military and police representatives, it is agreed that they will have their repre-

sentatives in the MPR until 2009 at the latest, and it is agreed to have it stipulated in the transitional provision of the constitution. After that time, the law will reactivate the voting right of the military and the police in general elections. It had been agreed previously that the armed forces and the police will have their members in the House of Representatives until 2004 at the latest.

The original Article 5 stipulated that the President should hold the power to make statutes with the approval of the House of Representatives. This has been amended, and it is the House of Representatives which has the power to make statutes and the President shall have the right to submit bills to the House.

In the original text of Article 6, the President should be a native Indonesian. Now it has been changed so that the President should be an Indonesian by birth, in line with the principles of human rights. It is also regulated that the candidates for presidency should be nominated in pairs and should be proposed by a political party or by a coalition of political parties.

We will have the President and the Vice President elected directly by the people, simultaneously in the general election for the members of the House. The pair who receives more than 50% of the total (national) popular vote, which is distributed in more than half of the provinces with at least 20% vote in each province, wins the election. The MPR will then automatically install the winner as the President and the Vice President.

We have not agreed on how or who will elect the President if there is no pair that meets the above requirements. However, it is agreed that only the first and the second winner are eligible for the second round.

There are two alternatives for the second round to be debated for the 2002 Annual Session. The first alternative is to have the finalists elected by the MPR. In this case, the MPR will act as an electoral college. The second alternative is to have another round of elections throughout the country. The pair who wins the popular vote will take the oath before the MPR plenary meeting as President and Vice President.

However, this process is still open to other options.

Amendment of Article 7 has clarified that the country should have a presidential system. The president shall hold office for a term of five years (fixed term) and shall be eligible for re-election only for one more term.

In this part of the constitution, amendment has been made to underline that a dismissal of an incumbent President and/or Vice President is an

extraordinary measure, an exception that can be processed only in accordance with the procedures regulated in the Article 7B of the constitution. It is stipulated that a President cannot be dismissed because of his or her policy or other political reasons. He or she can only be impeached if he or she is proven, in prior by Constitutional Court, to have committed high crimes such as bribery, treason, money laundering, narcotics, etc., or if he or she can no longer meet the prerequisites of being a President or Vice President, such as health conditions.

In the Elucidation of the original constitution it was explained that the MPR appoints the President and the Vice President and the President is subordinate to and responsible to the MPR.

There are some amendments made of Articles 8 to 17. But it is agreed to postpone two issues in this part until next session. The first one is the question of who will take charge temporarily if the President and the Vice President are simultaneously incapacitated.

The second issue is on the existence of the Supreme Advisory Council (*Dewan Pertimbangan Agung* — DPA). Should it be a high-level political body or should it be an ordinary advisory body — though a prestigious one — subordinate to the President?

Amendment of Article 18 on Local Government has asserted that the province and the district or the municipality shall administer and manage their governmental affairs by themselves, according to the autonomy principles. With the amendment, the hierarchical relationship between the national government and the regional government will be asserted, and it will be made clear which authority is maintained in the hands of the central government and which will be delegated to the autonomous regions.

The newly added clauses underline that the state should recognize and respect the units of traditional society with their traditional rights, as long as they exist, and in accordance with the community development and principles of a unitary state.

The amendment has asserted the full functions of the DPR (House of Representatives). The House shall hold the authority to make statutes. Furthermore, the House has the budgetary and supervisory functions. The House has the full authority to supervise the government, and for that purpose, the House has the rights of interpellation, inquiry, and statement of views and immunity for its members. It is stipulated that the President cannot dissolve the house, while the House cannot topple the President. The House

has the right to propose to the MPR to impeach the President, but only if the Constitutional Court has proven, in prior, that the President is guilty.

This empowered legislative branch is supported by an independent and empowered Supreme Audit Board (Badan Pemeriksa Keuangan, BPK), which will be the only external auditing body with the exclusive right to issue opinions on auditing outcomes.

In this section, two new chapters on the DPD (Regional Representatives Council) and on General Elections have been added.

As stipulated in Article 22C, the country will have a new institution, the Regional Representatives Council (Dewan Perwakilan Daerah, DPD). The DPD has rights to introduce bills to the DPR which are related to autonomy, relations between national and regional authorities, formation of a new province or district/municipality, and on management of economic resources in regards to the financial relationship between national and regional authorities. The DPD participates in debating the drafts on autonomy, and other materials related to the relationship between national and regional authorities. The DPD can supervise the implementation of laws regarding autonomy matters and the BPK (Supreme Audit Body) will provide the DPD with its findings.

Members of the DPD are elected in the provinces on individual bases and each province has a similar number of representatives, despite respective sizes and populations, and they are automatically members of the MPR.

The presence of the DPD is aimed to enrich the political process at the national level, so that the aspirations of the people and the diversity of the country will be much better represented and absorbed.

The amended constitution has Article 22E on General Elections added, which stipulates that the country shall have direct, general, just, transparent, accountable and regular general elections for members of the House of Representatives, at national and regional levels, for members of the Regional Representatives Council, and for electing the President and the Vice President.

The constitution does not include regulations for the general election system as it is agreed by MPR to be regulated in law(s), because the election system might be more changeable than the constitution.

In Article 24 on Judiciary Power, the amendment has reasserted that the judiciary power is an independent power and should be free from any interventions. The recruitment process for judges and justices is improved by

setting up a judicial committee that is accountable to the public. This judicial committee shall also function as an ethical council for the judges. The Supreme Court is the highest court and has competence for judicial review on lower laws. The chairperson and the deputies of the Supreme Court should be elected from and by the justices.

The idea of having the integrated judiciary system incorporated in this chapter has also been discussed.

The amendment has also introduced a new institution within this judiciary cluster, that is, the Constitutional Court.

This is a very important institution for upholding the supremacy and the integrity of the law. Among others, the Court has competences to test the constitutionality of laws and to judge disputes on competences of institutions with authority entrusted by the constitution.

In 2000, two new chapters on national territory and on citizen and inhabitants were also inserted. There are three articles with four clauses.

A full chapter on Human Rights was also added in the MPR 2000 Annual Session. The chapter consists of ten articles and 26 clauses.

The first article is on the right of every person to live and to defend his or her life and livelihood. Another article stipulates that every child shall have the right to live, to grow, and to be protected against violence and discrimination. It is also stipulated that every person shall have the rights of recognition, guarantee of protection, and a just legal certainty as well as equal treatment before the law.

Another article asserts that every person shall be free to adhere to his or her respective religion and worship performance, according to his or her religion, to choose his or her education and learning, to choose his or her work, to choose citizenship, to choose to reside within the nation's territory and to depart from it, and is entitled to return. Every person shall have the right to have the freedom of belief, to express his or her thoughts and attitudes, in accordance with his or her conscience.

The article also states that the protection, advancement, upholding, and fulfillment of human rights shall be the responsibility of the state, especially the government. For this purpose, the constitution instructs that, in order to uphold and to protect human rights in accordance with the principles of a legal democratic nation, the practice of human rights shall be guaranteed, arranged, and embodied in statutory laws.

There are critics of these articles on human rights, especially of Article 28I Clause 1, which underlines the right of living, the right to not be tortured, the right of freedom of thought and conscience, religious rights, the right of not being enslaved, the right of being recognized as an individual before the law, and *the right to not be prosecuted based on retroactive laws* shall be the rights as humans that *may not be diminished in any situation whatsoever*.

The critics say that this article might be used to protect those who are committed for human rights violations in the past. But in Article 28J it is asserted that in carrying out rights and freedoms, every person is required to obey the predetermined limitations regulated by the law for the sole purpose of guaranteeing recognition and respect over the rights and freedoms enjoyed by other people and to fulfil the just demands in accordance with considerations of morals, security, and public order within a democratic society.

With this article, limitations are set up in laws, including in the international conventions that we ratified, and the constitution will not let those who are committed for gross violations against human rights be concealed from the court. (Please see Appendix 1 for the full chapter on human rights.)

Amendment is also made on Chapter XII Article 30 on defence. The title of the chapter is changed to National Defence and Security. It is stipulated that the state's defence and security efforts shall be conducted through a system of total people's defence and security by the Indonesian National Army (TNI) and State Police of the Republic of Indonesia, as the main component, and the people, as the supporting component.

The Indonesian National Army (TNI) shall consist of the Army, Navy, and Air Force as the nation's forces in their duty of defending, protecting, and maintaining the integrity and sovereignty of the state.

The State Police of the Republic of Indonesia as the national apparatus in preserving security and public order shall have the duty to protect, shelter, and serve the public, and to uphold the law.

At this stage, it is already apparent that the amended constitution has guaranteed civil participation in political life and human rights.

And, it is valuable to note that although the debates were in-depth and serious, the MPR has decided all amendments in unison and that all amendments have been officially enacted.

As mentioned before, the time limit to complete the amendment process is the MPR Session in 2002.

There are still some important topics to decide, such as the composition of the MPR (Article 2 clause 1), on religion (Article 29), on education (Article 31), on social well being (Article 33) and on the alteration procedures of the constitution (Article 37). But it seems that those topics are not as complicated as the other topics that have been settled.

However, we will continue our effort to involve the public in the whole amendment process. While in the past we had an experts' team from various backgrounds of academic skills to assist the Ad Hoc I Committee, the Committee plans at least to organize another series of public hearings with the academic community, NGOs and others. We also will organize discussions in every district, as well as in Jakarta and in provincial capitals as we did before, both to encourage the participation of the public in the process and to disseminate the outcomes of the previous amendments.

We will still need support from international organizations and from other countries.

Considering the topics to be finalized, the spirit that has been shaped among the members of MPR, and the ample time the MPR still have until the 2002 annual session, we are optimistic that this amendment process, at the end of the day, will produce a comprehensive, democratic, and workable constitution, as desired.

Human rights and the Malaysian constitution examined through the lens of the Internal Security Act 1960

Poh-Ling Tan

The context

With its ethnic, cultural and religious diversity, Malaysia is typical of countries in South-East Asia. Although there are 16 major ethnic groups and 48 minor ethnic groups in the country, official statistics list the main people groups as the Malays and indigenous people (65.1%), Chinese (26%), and Indians (7.7%).⁴⁴ The country's pluralist society arises both from a slow filtering of people probably from south-western China into south-east Asia dating from 2500 BC, and policies of the British colonisers in the mid-19th century.

Among the factors that set this country apart from its neighbours is the ethnic and religious identity of the Malays, its main group, as enshrined in the Constitution. The constitutional definition of this group as persons who profess the religion of Islam, habitually speak the Malay language and conform to Malay custom⁴⁵ is evidence that Islam is considered an integral part of the Malay persona and a questioning of one part is considered an attack on the other, leading to a heightened sensitivity.⁴⁶

In addition, this main group does not form an overwhelming majority of the population. In spite of the relative balance between groups, communalism is a distinct factor in the nation's political and economic

⁴⁴ The statistics are based on the Population and Housing Census 2000, <http://www.statistics.gov.my> (6 November 2001)

⁴⁵ Article 160 Federal Constitution.

⁴⁶ There are many studies to this effect including that by S Husin Ali. *The Malays: Their Problems and Future*, Heinemann Asia, Kuala Lumpur, 1981 and H Mutalib, *Islam and Ethnicity in Malay Politics*, Oxford University Press, Singapore, 1990.

institutions.⁴⁷ The ruling coalition, known as the Alliance in early years and the Barisan Nasional in later years comprises the United Malaysian National Organisation (UMNO), their Chinese and Indian partners, and a number of small (and weak) political parties. Despite UMNO's role as the leader of this ostensibly multi-ethnic coalition, it is frequently at the forefront of communal politicking.⁴⁸ Riots in Kuala Lumpur, the nation's capital city, and elsewhere in 1969 mark a low in communal relations.

Coinciding with other parts of the Muslim world, the 1970s saw the re-assertion of Islamic thought in Malaysia. Islamic institutions such as the Bank Islam and the International Islamic University were set up in 1983. From time to time calls by the opposition Partai Islam (PAS) for the foundation of an Islamic state are heard.

Through an analysis of the ISA the paper shows how executive acts have cast a pall over all of the human rights mentioned in the Constitution. This paper refers to the original purpose of the ISA and contrasts this with the characterisation of present detainees. It outlines the legislative scheme and examines the lack of safeguards within the Act. This paper concludes that the ISA is unlikely to be repealed, although this Act is now unacceptable to many groups within Malaysia. Until informed debate takes place to resolve old and new tensions within this pluralist society, the observation of human rights will continue to be superficial as will be the practice of constitutionalism.

Human rights under the Constitution

In many ways Malaysia's constitution was adopted to strike a balance between diverse groups in the nation. H P Lee, a respected commentator on the Malaysian constitution, writes that negotiations over the federal Constitution in 1957 were concerned 'not so much with the distribution of federal and state powers, but... the tortuous hammering out of acceptable terms and compromises among the various racial components of the Malaysian society, especially on matters of communal interests.'⁴⁹

The main features of the 1957 Constitution were: a bi-cameral government; a strong central government; Westminster-style separation of

⁴⁷ See T Gabriel, *Hindu and Muslim Inter-religious Relations in Malaysia*, Studies in Religion and Society Vol 47, Edwin Mellen Press, Lewiston, 2000.

⁴⁸ See Mutalib, 1990 note 2 at 162.

⁴⁹ HP Lee, *Constitutional Conflicts in Contemporary Malaysia*, Oxford University Press, Kuala Lumpur, 1995, 4.

powers with the executive being part of the legislature, and an independent judiciary; a monarch elected by a constitutionally protected group of sultans; Islam as the official religion of the country; special privileges for Malays and natives of Sabah and Sarawak; and provision of sweeping emergency powers.

Part 2 of the Constitution protected 'fundamental liberties' including liberty of the person, equality before the law, freedom of movement, freedom of speech, expression, assembly and association, and freedom of religion. All of the liberties mentioned are not guaranteed but are subject not only to express limits within the Constitution but in practice also subject to ordinary laws. More of this later. Liberties which are relatively unrestricted are those against slavery and forced labour, against retrospective criminal laws and repeated trials and the protection of property.

The Federal Constitution has been amended numerous times since 1957, some amendments of which were made to accommodate the inclusion of new States into the federation in 1963. Others were made in response to various political tensions. Constitutional amendments require the vote of not less than two-thirds of the total members of each House of Parliament.⁵⁰ Notwithstanding this seemingly difficult amendment procedure, the Constitution has been amended 41 times from 1957 to 1996 because the political alliance in power since independence has, through its coalition of political parties, held two-thirds majority in both Houses.⁵¹

Numerous regressive measures since 1957

There has been little progress in the area of human rights since 1957. Malaysia has not ratified major international human rights instruments except for the Convention for the Elimination of all forms of Discrimination against Women and the Convention on the Rights of the Child.⁵² Along with China and Singapore, Malaysia has argued that the country's social context should determine the context of its laws.⁵³ Despite this argument,

⁵⁰ Art 159(3) Federal Constitution.

⁵¹ PL Tan, 'Malaysia' in PL Tan (ed), *Asian Legal Systems: Law, Society and Pluralism in East Asia*, Butterworths, Sydney, 1997, p 271.

⁵² See SS Rachgan and R Tikamdas, 'Human rights Commission of Malaysia Act 1999: A Critique', in R Tikamdas and SS Rachgan (eds), *Human Rights and the National Commission*, Hakam, Kuala Lumpur, 1999, 174 at 185.

⁵³ Shad S Faruqi, 'Human Rights and the Constitution' in R Tikamdas and SS Rachgan (eds), *Human Rights and the National Commission*, Hakam, Kuala Lumpur, 1999, 128 at 131.

some 50 non-governmental organisations endorsed a Malaysian Human Rights Charter in 1993 which mirrors the UN documents.⁵⁴

Following the examples of the Philippines, Thai and Indonesian governments, the Malaysian government established a National Commission of Human Rights in 1999. However this was done without public consultation or even knowledge of the contents of the draft bill by NGOs despite their request.⁵⁵ The Commission consists of retired politicians, judges, social scientists and professionals and has been criticised for its lack of independence. Its members are appointed by King on recommendation by the Prime Minister, hold office for 2 years, and make their decision by a two-thirds majority.

On the other side of the ledger, there have been many regressive measures. Four particular types of measures stand out. First, there has been an erosion of the principle of the separation of powers and the independence of the judiciary. Decisions of Malaysia's judiciary have been conservative and have supported executive actions until the mid-1980s.⁵⁶ Following judgements which were not favourable to the executive, and on the eve of a decision that could have seen the elite in UMNO ousted from their political office within the party, the Lord President of the Supreme Court was dismissed in 1988, followed shortly by the sacking of two Supreme Court judges.⁵⁷

Secondly, state laws and administrative action have made inroads into the freedom of religion. Communal and political issues cloud the arguments,

⁵⁴ See 'Malaysia Charter on Human Rights' December 1994 at <http://www.suaram.org>. Its twenty articles relate to (1) the universality of human rights (2) the indivisibility of economic, social, cultural, civil and political rights (3) women's rights (4) the right to holistic development (5) the right to participatory democracy (6) the right to access to, and redress by international institutions (7) the right to a sustainable environment (8) to right to equality and non-discrimination (9) acknowledgement of basic needs and equal access (10) rights to employment and fair working conditions (11) rights to education, one's own language, culture and religion (12) rights to personal safety (13) rights to freedom of association and assembly (14) rights to freedom of expression and access to information (15) rights of children (16) rights of indigenous people (17) rights of the disabled (18) rights of refugees and foreign workers (19) human rights training and education (20) the limiting of emergency powers and the support of an independent judiciary.

⁵⁵ See Lim Kit Siang, 'Will the Human Rights Commission be Irrelevant?' in Tikamdas and Rachagan n 3.

⁵⁶ R Yatim, *Freedom under Executive Power in Malaysia: A Study of Executive Supremacy, Endowment*, Kula Lumpur, 1999, 186 and chapter 4 generally.

⁵⁷ There are numerous accounts of this. See for example, R Yatim n 6 at chapter 7, HP Lee n 2 at Chapter 3, A Harding, *Law, Government and the Constitution in Malaysia*, Kluwer Law, The Hague, 1996, 142-148.

but essentially non-Muslims find it difficult to construct new places of worship because of planning restrictions; those who want to leave the Islamic faith face ostracism by the Malay/Muslim community and in some states jail and flogging; and those not of the majority Sunni school of Islam have been detained.⁵⁸

Thirdly, there has been a neglect of the rights of indigenous people. Although the conferring of special privileges for Malays and indigenous groups may have been justified on historical grounds,⁵⁹ not all indigenous groups in Sarawak receive special privileges under the Constitution.⁶⁰ Indigenous groups are worst affected by forced resettlement for dam development.⁶¹ Even for those with special status granted to many of the indigenous groups, the struggle for land rights has had limited success.⁶²

In contrast the *orang asli* (the original people) of peninsular or western Malaysia have not been accorded special privileges but allowed protection or advancement under Article 8(5) of the Constitution. The Department of Orang Asli Affairs was set up in 1954 to look after their welfare and this practice continues under the *Aboriginal Peoples Act* 1954. Policies carried out by the Department have tended towards assimilation of the *orang asli*.⁶³ Although

⁵⁸ K Boyle and J Sheen, *Freedom of Religion and Belief: A world Report*, Routledge, London and New York, 1997, 218–223; MC Lee, *Freedom of Religion in Malaysia*, Kairos Research Centre, Kuala Lumpur, 1999; PL Tan, 'Prime Suspect or Potential Witness? Paying the price for Religious Freedom: A non-Muslim Perspective' in MA Wu (ed), *Public Law in Contemporary Malaysia*, Longman, Kuala Lumpur, 1999.

⁵⁹ Article 153 of the Constitution provides for the reservation for these groups of quotas in respect to jobs in the public service, scholarships, educational privileges, permits and licences and other matters.

⁶⁰ 'Natives' of Sarawak are named in Article 161A (7) of the Constitution and this is said to be an incomplete and inaccurate list: see RK Dentan et al, *Malaysia and the 'Original People': A case study of the impact of development on indigenous peoples*, Allyn and Bacon, 1997 and R Bulan, 'Native Status under the Law' in Wu n 8 at 248, 261.

⁶¹ Coalition of concerned NGOs on Bakun, *Empty Promises, Damned Lives*, Final Report of the Fact Finding Mission 7–14 May 1999, Suaram Komunikasi, Kuala Lumpur, 1999.

⁶² See *Jok Jau Evong v Marabong Lumber* [1990] 3 MLJ 427 where the High Court dismissed the claim for native customary title to land because it was filed beyond the statutory time period of 36 months; *Ara binte Aman v superintendent of Land and Mines, 2nd Division* [1974] 1 MLJ 208 where the High Court dismissed a claim of customary rights over Government reserve land; and *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd* unreported Kuching High Court decision, 12 May 2001, Justice Datuk Ian HC Chin (under appeal) where the court allowed some form of native title to land.

⁶³ See RK Dentan, 'The Persistence of Received Truth: How the Malaysia Ruling Class constructs Orang Asli', in RL Winzeler (ed) *Indigenous Peoples and the State: Politics, Land, and Ethnicity in the Malayan Peninsula and Borneo*, Yale University South East Asian Studies, New Haven, 1997 and Hooker, 'Case Note: Native title in Malaysia: Adong's Case' in 2000 *Australian Journal of Asian Law*.

recent Court of Appeal and Federal Court decisions have acknowledged that the *orang asli* have a form of native title to customary land,⁶⁴ they continue to suffer day to day violations of their social, economic and cultural rights.⁶⁵

Finally, regressive measures taken since independence mostly stem from legislation which impacts on constitutional liberties. Under emergency provisions of the Constitution, once a state of emergency is proclaimed, the executive may invoke powers to override constitutional provisions. Judicial review of the proclamation of a state of emergency is extremely limited because of amendments to the Constitution in 1981.⁶⁶

Five separate emergencies have been declared in the country, one pre-independence, the others post-1957. The first was declared in 1948 at the start of a twelve-year communist insurgency when 11,000 people were killed, 22,000 were injured, and the British High Commissioner assassinated. It was lifted in 1960. The others declared in 1964, 1966, 1969 and 1977 have not been lifted.⁶⁷ As a result, two parallel legal regimes exist in our country — laws are made under the general regime and also under the emergency regime.

Since 1960 there has been an increase of laws made under both regimes which abrogate constitutional liberties. Numerous examples exist. They include a requirement for annual licences under the *Printing Presses and Publications Act* 1948 (amended in 1988) that may be revoked at any time. This power was exercised in 1987 when licences of three national newspapers were revoked. Another example is the *Sedition Act* 1948. Amendments in 1970 were made under the executive's emergency powers making it an offence to question certain 'sensitive' matters namely Malay privileges, citizenship, the national language and sovereignty of the rulers.⁶⁸

⁶⁴ *Adong bin Kuwau v Kerajaan Negeri Johor* [1997] 1 MLJ (High Court); [1998] 2 MLJ 158 (Court of Appeal).

⁶⁵ Colin Nicholas, *The Orang Asli and the Contest for Resources: Indigenous Politics, Development and Identity in Peninsular Malaysia*, International Working Group for Indigenous Affairs, Copenhagen, 2000 and Colin Nicholas, 'Suhakam and the Indigenous People's Question', <http://www.malaysia.net/people/aliran/monthly/2001/4i.html> (20 November 2001).

⁶⁶ See K Tan and LA Thio, *Constitutional Law in Malaysia and Singapore*, 2 ed, Butterworths Asia, Singapore, 1997, 665.

⁶⁷ The 1964 emergency was over the Indonesian confrontation; the 1966 emergency was limited to Sarawak for events following the dismissal of the Chief Minister; the 1969 emergency related to racial riots and the 1977 emergency was limited to Kelantan for dealing with political crisis. For details see CV Das, *Government & Crisis Powers: A Study of the Use of Emergency Powers under the Malaysian Constitution and parts of the Commonwealth*, Malaysian Current Law Journal, Kuala Lumpur, 1996.

⁶⁸ Sections 2(1f) and 3(2) of the *Sedition Act* 1948 were amended vide *Emergency (Essential Powers) Ordinance* 35 of 1970. These provisions were later incorporated into Art 63 of the Federal Constitution.

The impact of the ISA on human rights

The most insidious example of the executive's power is the *Internal Security Act 1960 (ISA)*. It is one of the three major preventive detention laws in force and by far the most detrimental to political dissent and public debate.⁶⁹ Much has been written about the ISA, almost all of which is critical. This paper does not discuss the evolution of the ISA neither recount issues which have been raised except in a general manner. A number of cases now before the courts may allow fresh analysis.⁷⁰

The purpose of this paper is to outline how the ISA stifles public debate; and to emphasise that unless debate occurs regarding social and political issues, a robust and mature view of constitutionalism will not result. The ISA is thus a key piece of the complicated jigsaw comprising human rights and the Constitution. Its critical role is well recognised by Malaysia NGOs which have made it the target of a public education campaign.⁷¹

The ISA's immediate predecessor was emergency regulations of 1948.⁷² After that emergency was lifted, the ISA was introduced in 1960. Designed to be used solely against the communists, the Prime Minister at that time, Tunku Abdul Rahman, assured Parliament and the nation that the immense powers given to the government under the ISA would never be used to stifle legitimate opposition and silence lawful dissent.⁷³

Bearing in mind that it is difficult to get accurate numbers and details of detainees, a characterisation of detainees as at 30/11/2001 shows that the ISA was used on a variety of grounds. They range from alleged involvement with illegal immigration (21 persons); arms heist from the military (15 persons);

⁶⁹ The other two are the Emergency (Public Order and Prevention of Crime) Ordinance 1969 and the Dangerous Drugs (Special Preventative Measures) Act 1985. The pattern of the three acts are similar although the measures have different target groups. For details see R Yatim.

⁷⁰ Although the grounds for review are narrow, on November 17, 2001 the High Court ruled the detention under the ISA of a leading opposition politician in 1988 was unconstitutional. Justice Abdul Hamid Said said that Rule 3 Internal Security (Advisory Board Procedure) Rules 1972 meant that the Advisory Board should have heard the representations of the detained person by March 15, 1988 but did so only on August 2, 1988. The judge ordered costs and damages against the government. See <http://thestar.com.my/courts/> (November 17, 2001).

⁷¹ See the website of the Abolish ISA Movement <http://www.suaram.org/isa/info-memorandum.html> (22 November 2001).

⁷² Preventive detention powers were used by British colonisers from 1914. R Yatim, 250.

⁷³ See the website of the Abolish ISA Movement <http://www.suaram.org/isa> (22 November 2001); see also Rais Yatim p 256.

counterfeiting (eight persons), 'militant' support of reform activities and of Anwar Ibrahim former Deputy Prime Minister (five persons); and activities linked to terrorism (16 persons who are members of an Islamic political party).

Legislative scheme of the ISA

1. Arrest by police under s 73 for interrogation

The considerable powers of arrest without warrant mean that almost any person involved in public debate has reason to fear the ISA. Any police officer may, provided that he or she has reason to believe that a person may be prevented from acting in a manner prejudicial to the security, or the maintenance of essential services, or the economic life of Malaysia or any part of the country, carry out an arrest without a warrant. If the arrest is subsequently authorised by an officer with the rank of Deputy Superintendent, and reported to the Inspector General of Police, then the person may be detained for 60 days without a detention order being issued by the Minister under s 8.

In this period it is not uncommon for the person to be refused access to lawyers or visits by family. Many personal accounts tell of prisoners being interrogated for long periods, sometimes while stripped naked and humiliated, threatened with physical harm, or asked to shoot themselves, or told that if they did not confess, drugs or firearms would be planted in their homes or cars.⁷⁴

2. Detention order by Minister under s 8

The Minister for Home Affairs may issue a detention order for a period up to two years. In addition the Minister may direct where the person is detained, and make rules for the discipline and treatment of such persons. In the case of Syed Husin Ali, an academic and member of an opposition party (PRSM) who has been detained for six years since 1994, on some occasions when he was moved his wife did not know where he was held.⁷⁵

The detention order may be renewed indefinitely. A trade unionist was detained in 1969 and held for nine years. Detainees are often placed in solitary confinement for periods up to five years.⁷⁶

⁷⁴ See affidavits filed by detainees in support of their applications of *Habeas corpus* in www.suaram.org/

⁷⁵ S Husin Ali, *Two Faces (Detention without Trial)*, Insan, Kuala Lumpur, 1996, 22, 121.

⁷⁶ See statement of Koh Swee Yong at <http://www.suaram.org/isa/statement20011025.htm> (8 January 2002).

3. *Restriction order under s 8(5)*

Alternatively the Minister instead of issuing detention may order that the person be restricted in terms of

- activities, place or residence and employment
- times of personal curfew
- requiring the person to report to authorities
- political activities
- travel either within or outside of Malaysia.

A bond may be required for compliance with the restrictions. The order may be issued for up to two years and again indefinitely extended for two years at a time.

4. *Death penalty for firearms offences under s 57*

Persons who have in their possession unlicensed firearms or ammunition or explosives shall be punishable by death.

5. *Miscellaneous controls on printing and publication under s 22.*

Publications may be banned for several reasons including if the Minister views them as prejudicial to national interest, or that they may promote feelings of hostility between different races or classes of the population.

Lack of safeguards under the ISA

The ISA allows detainees a few rights relating mainly to information as to grounds of detention and the allegations of fact on which detention orders are based.⁷⁷

Besides this, one of the initial safeguards to the arbitrary exercise of power was the review of all detention orders by a Special Advisory Board within three months of the order.⁷⁸ This power was removed in 1960. The present provisions allow for an indefinite time of detention to elapse before a review by an Advisory Board. Further, the Board now only has the power to make recommendations to the Yang di-Pertuan Agung, the head of state, who is constitutionally obliged to act on the advice of the Cabinet.

More recently, amendments to the ISA in 1989 have removed even the smallest of safeguards to the Act. S 8B(1) reads:

⁷⁷ Art 151(1)(1)(a) Federal Constitution and ISA s 11.

⁷⁸ Article 151(1)(b) Federal Constitution.

There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of any act done or decision made by the Yang d-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with *any procedural requirement* (emphasis added) in this Act governing such act or decision.

This amendment goes further than the already conservative stance taken by the Malaysian courts in hearing applications for *habeas corpus*. For example the Federal Court in *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 restricted their review of the detention order to procedural matters and adopted a subjective approach, that is, that the Minister had complete discretion to his subjective satisfaction whether the allegations of fact were sufficient grounds for detention.⁷⁹

Apart from narrow procedural arguments, the courts have recognised that Article 11 of the Constitution places limits on the ISA. The article provides for freedom to profess and practice one's own religion subject to State laws which disallow proselytisation of Muslims. In *Minister for Home Affairs v Jamaluddin bin Othman* [1989] 1 MLJ 418 the detainee was born a Malay Muslim but had converted to Christianity about 10 years before his arrest and detention under the ISA. Allegations made against Jamaluddin in his detention order related to his religious activities. Both in the High Court and on appeal to the Supreme Court, it was ruled that the detainee's constitutional right to practice his religion could not be restricted by the ISA. The judgements confirmed that the power given to the Minister under the ISA was wide but had to be exercised within the scope provided by Article 149 of the Constitution.⁸⁰

Relativism rejected and pluralism accepted by Malaysians

The arguments in support of the ISA in essence rest on those of cultural relativism. Framed in terms of 'Asian values', the country's leaders have argued

⁷⁹ For a concise account of the subjective test see K Tan, 'Recent Developments in the Law and Practice of Preventive Detention' in MA Wu (ed) note, and for a more detailed account see K Tan and LA Thio Note 591–654, and Rais Yatim note p 262–295.

⁸⁰ The list of situations in which Article 149 may be used is long and the emergency powers extremely wide. For a concise but illuminating discussion of Article 149 see A Harding *Law, Government and the Constitution in Malaysia*, Kluwer, London 1996. See C Das for a full discussion of emergency powers.

that in the country's social context, it is more important to preserve social harmony and collective welfare than to uphold a 'western' notion of human rights which focuses on an individual's right against the state.⁸¹ The writer accepts that much legal (and human rights) analysis has been Eurocentric and has sought to impose a set of values on societies without acknowledging that the law is value-laden. However, many Malaysian NGOs have accepted the universality of the human rights discourse, and specifically called for the ratification and effective implementation of UN human rights documents. In doing so they have rejected the foundation of cultural relativism that the ISA rests on.

One of the results of the severe restrictions on human rights is the relative lack of ethnic unrest in the country. Although there are eruptions of violence, as recently as 2001 in Kuala Lumpur between Indians and Malays, these are fairly quickly contained. But it is not easy to erase the memory of communal riots of the 1960s from the public minds.⁸²

A complex and evolving pluralist or mixed legal system exists in Malaysia with differentiations between peninsular Malaysia, Sabah and Sarawak because of historical and social factors. Indigenous law is more observed in the last-mentioned states. Throughout the country Islamic law plays a large role in specified areas (mainly of a personal nature such as marriage, divorce and the practice of religion). In relation to these areas, Chinese and Indian customary laws were recognised until 1976 when they were abolished after a report of a Royal Commission on the matter and substituted for 'western' concepts of personal law.⁸³

The open debate that accompanied the change in the customary law for minority groups in the 1970s has not been carried through in relation to other matters. Through the dominant political alliance, the Barisan Nasional, which is avowedly multi-ethnic, compromises between people and interest groups are made behind closed doors often with limited policy debate. For example, Islamisation of the country's legal system is one such concept which

⁸¹ See discussion in Shad S Faruq, 'Human rights and the Constitution', in Rachgan and Tikamdas (eds) note 6.

⁸² For a recent and lucid analysis of plural politics see D Seah, 'Malaysia: Dilemmas of Integration' in M O'Neill and D Austin (eds), *Democracy and Cultural Diversity*, Oxford, Oxford University Press with the Hansard Society for Parliamentary Government, 2000.

⁸³ See PL Tan, 'Malaysia' in PL Tan, *Asian Legal systems: Law, society and pluralism in East Asia*, Butterworths, Sydney, 1997, p 288.

has been raised from time to time, both by PAS, an Islamic opposition party, and by UMNO, the dominant party in the ruling coalition. In the most recent wave of arrests under the ISA (from 1998–2001) PAS members have featured prominently.

Effective practice of pluralism has also by-passed the *orang asli*, who in political terms are the country's weakest group. Until landmark decisions in 1998, their legal claims to native rights to land were denied and even now receive limited recognition. Their administrative protectors have carried out policies designed for assimilation not integration. Several Malaysian NGOs have taken up the cause of indigenous people⁸⁴ but have been hampered by the use of the ISA against protestors of dam and logging projects which affect the land rights and livelihood of tribal people.⁸⁵

Tensions between groups may be dealt with in different ways.⁸⁶ One option may be a strict separation of religion and state, and the country's constitution providing a neutral framework overseen by the courts. This is not the case in Malaysia. The model adopted in Malaysia tends towards compromise by trading between political elites, with resulting relative ethnic harmony which has come with a price. It appears that the control measures under this model are no longer acceptable to many groups within the country who have adopted abolishing the ISA as a rallying point. D Seah in his assessment of Malaysia's political pluralism states that 'ironically, such measures may indeed bring communities together if those who are aggrieved jointly challenge the authorities by collaboration across the ethnic-racial boundary'.⁸⁷

⁸⁴ The NGOs include Sahabat alam Malaysia (Friends of the Earth), Consumers Association of Penang, International Rivers Network, Save our Sungai Selangor, Coalition for Orang Asli Concerns (COAC): see more details on http://www.oneworld.org/ips2/may99/04_31_003.htm (20 November 2001).

⁸⁵ This occurred in a wave of ISA arrests in October 1987 codenamed 'Operation Lalang': see PL Tan above at p 297 footnote 204.

⁸⁶ See discussion by R Bellamy, 'Dealing with difference: four models of pluralist politics' in O'Neill and Austin above.

⁸⁷ Seah above, at p 195.

Conclusion

The ISA has been used against trade unionists, members of the Barisan Nasional government who have fallen from favour, those in opposition politics, conservationists, religious groups, etc. Because the grounds of review of the power of detention are extremely limited, few have successfully challenged that the detentions have been made other than for reasons of national security.

Even if the arrests and detentions are made on the grounds of national security, the Bar Council, the association of Malaysia lawyers and one of the loudest critics of the ISA, has for years said that those detained deserve to be brought to trial. Numerous non-government organisations have called for removal of the Act. Within the government, from time to time there have also been calls for the removal of the ISA.⁸⁸

Cultural, social and political tensions are not able to be debated because of laws such as the ISA. Until ideas are able to be freely debated and tensions between groups resolved by informed negotiation, the state of human rights in Malaysia is likely to continue to deteriorate. To achieve informed debate, the ISA should not be allowed to remain on the statute books in its present form.

⁸⁸ Rais Yatim, a former Minister in the Mahathir government, when in temporary retirement from active politics in 1995 unequivocally called for the revocation of the ISA, p 296.

Ethnic Chinese in Indonesia: Would it be better?

Frans Hendra Winarta

Introduction

The New Order regime under Soeharto, after the abortive communist coup on 30 September 1965, promoted anti-Chinese politics in which minority ethnic Chinese were not given opportunities for political expression. They were only allowed to be active in the business sector, so they became an exclusive group segregated from indigenous Indonesians. They were coerced into a situation similar to what they experienced in the Dutch Colonial era. The New Order implemented a policy akin to that in the Dutch Colonial era, which divided all persons living in Indonesia into one of the three groups, namely (i) Europeans; (ii) the Foreign Orientals, particularly, the ethnic Chinese; and (iii) Indigenous Indonesians.

The laws and regulations introduced by the New Order curtailing the civil and political rights of the ethnic Chinese were not only in the form of presidential instructions but also circulated in letters from the Cabinet and ministerial decrees.⁸⁹ For more than three decades, the New Order created antagonism and conflict between indigenous (*pribumi*) and non-indigenous people (*non-pribumi*). The ethnic Chinese connection with the power elite

⁸⁹ For example, the Presidential Decree No. 240 year 1967 which strongly requests the ethnic Chinese to forego their Chinese names and adopt the Indonesian name, and even more strictly, the Presidential Instruction No.14 year 1967 which basically bans the use of Chinese symbols and many other Chinese cultural traditions were restricted.

further accentuated the problem, and caused anger amongst indigenous businessman who did not enjoy the same benefits.⁹⁰

Finally, linked to the economic downturn resulting from the 1997 currency crisis, the conflict culminated and burst into the holocaust of the May 1998 riots,⁹¹ in which more than 1,200 people were reported killed and more than 160 women were gang-raped. Regardless of their mistakes, if any, in dominating the economy — the conglomerates created extremely high social envy among indigenous Indonesians — the minority ethnic Chinese did not deserve to be slaughtered and gang-raped. Furthermore, the violation of the right to life, right to property and right to liberty is a serious violation of very basic human rights. The May 1998 riots were inhuman and disrespectful of the human rights of those ethnic Chinese.

The protection of a citizen's life is basically the responsibility of the state, and a right guaranteed in the Indonesian 1945 Constitution. According to the preamble of the 1945 Constitution, the state is obliged to protect every citizen, regardless of his ethnicity, socio-economic strata, religious background and political stance. However, as frequently debated, the 1945 Constitution is not sufficient to protect and uphold human rights, particularly, those of the minority ethnic Chinese. Not to mention that the 1945 Constitution itself stipulates that the president of the Republic of Indonesia must be an indigenous Indonesian.⁹²

In this paper I will try to discuss how the Indonesian 1945 Constitution promotes and encourages respect for human rights vis-a-vis constitutional rights and fundamental freedoms of the Indonesian ethnic minority, particularly ethnic Chinese. Is the recent Second Amendment to the 1945 Constitution, which adds new Chapter XA on Human Rights, sufficient

⁹⁰ While only 3.5 percent of the Indonesian population is Chinese, they hold 80 percent of the country's privately owned assets, in Chin Ling Ho, 'The Chinese of South-East Asia', London, MRG, 2000 as quoted by Mieke Kooistra, 'Indonesia: Regional Conflicts and State Terror', London, Minority Rights Group International (MRG), 2001.

⁹¹ See the Final Report of *Tim Gabungan Pencari Fakta* (Coordinated Team for Finding Facts or 'TGPF') for further details on the May 1998 riots. This Coordinated Team reported that approximately 1,217 people were dead and 91 people were injured during May 1998 riots. The Coordinated Team further reported that most of the victims of the gang rapes were from the ethnic Chinese.

⁹² This is due to the fact that one of the Vice Chairmen of the *Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan/BPUPK* (Committee for the Examination of Efforts for the Preparation of Independence or '*Dokuritu Zyunbi Choosakai*'), which was formed to draft the 1945 Constitution, was a Japanese. Thus, the wording of 'the President is an indigenous Indonesian' was deliberately incorporated into as to prevent a Japanese becoming an Indonesian president.

to cover human rights protection and fundamental freedoms? Do the discriminative laws and regulations still exist in the amended 1945 Constitution?

Human Rights as the Constitutional Rights of Ethnic Chinese

Discussing human rights, one should first refer to the state based on law, (*rechtsstaat*) as the state based on law is an ideal home for human rights. *In the state based on law the human rights guarantees, namely the independence of the judiciary, due process of law and judicial review, shall prevail.*⁹³

Unfortunately, the Indonesian 1945 Constitution does not provide any specific article with regard to the state based on law, except for a statement in its Elucidation, 'Indonesia is a state based on law (*rechtsstaat*) not merely based on power (*machtstaat*)'. No further explanation of this statement is available in the 1945 Constitution. However we can refer to the three main characteristics of a state based on law :

1. The acknowledgment and protection of human rights which guarantees equality in the areas of politics, law, socio-economy, culture and education;
2. The legality principle in all kinds of law;
3. An independent, impartial judiciary, free from interference from any branch of power.

Oemar Seno Adji once stated that the state based on law (*rechtsstaat*) of the Republic of Indonesia is based on a national philosophy, Pancasila.⁹⁴ The characteristics of Pancasila are almost the same as the principles applied in 'Rule of Law' countries, particularly defined by the International Commission of Jurists, which pinpoint the importance of respect for human rights. Those characteristics are also in line with the separation of powers. The state's power should be allocated to distinct legislative, executive institutions and judiciary, yet the 1945 Constitution does not completely separate those institutions. In fact, an independent and impartial judiciary is *a conditio sine qua non* to the principle of a state based on law (*rechtsstaat*). However, in this paper I will not elaborate further on the separation of powers. Rather I will put special emphasis into the upholding of human rights as the constitutional rights in the state based on law Indonesia.

⁹³ Todung Mulya Lubis, *The Rechtsstaat and Human Rights*, in *Indonesia Law and Society*, Timothy Lindsey (ed.), (Sydney: the Federation Press, 1999), pp.171-172.

⁹⁴ Pancasila means 'five pillars', which are (1) belief in one god; (2) justice and civility among peoples; (3) the unity of Indonesia; (4) democracy through deliberation and consensus among representatives; and (5) social justice for all.

Human Rights in the 1945 Constitution

The 1945 Constitution was drafted by Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan (Committee for the Examination of Efforts for the Preparation of Independence or 'BPUPK')⁹⁵ and was eventually adopted as the Constitution for the newly independent state of the Republic of Indonesia on 18 August 1945 by Panitia Persiapan Kemerdekaan Indonesia (Committee for the Preparation of Indonesia's Independence or 'PPKI').

It is interesting to note that even though the 1945 Constitution was drafted well before the adoption and proclamation of the Universal Declaration of Human Rights (10 December 1948), the 1945 Constitution does contain a number of provisions promoting and ensuring respect for some basic human rights and fundamental freedoms, including:

1. Article 27 paragraph (1) envisions that 'All citizens are equal before the law and in the government and obliged to respect the law and government without exception';
2. Article 27 paragraph (2) declares that 'Every citizen is entitled to work and a reasonable standard of living';
3. Article 28 provisions that 'The freedom of association and assembly, to express opinion orally, in writing or otherwise stipulated by law';
4. Article 29 paragraph (2) reiterates that 'The state guarantees the freedom of every resident to profess and practice their own religion and belief';
5. Article 30 paragraph (1) provides that 'Every citizen has the right and is obliged to take part in the national security and defence';
6. Article 31 paragraph (1) guarantees that 'Every citizen has the right to education'.

⁹⁵ The draft of the 1945 Constitution was completed on 16 July 1945 by BPUPK. BPUPK was established on 1 March 1945 under the leadership of Mr. Radjiman Wedioningrat as the Chairman and one Japanese Mr. Ichibangase Yoshio together with Mr. Suroso as the Vice Chairmen. On 7 August 1945, the Japanese allowed the establishment of *Panitia Persiapan Kemerdekaan Indonesia/PPKI* (Committee for the Preparation of Indonesia's Independence or 'Dokuritsu Zyunbi Inkai') whose entire members were Indonesians under the leadership of Soekarno (Chairman) and Mohammad Hatta (Vice Chairman). On 18 August, PPKI Congress officially promulgated the 1945 Constitution. See Adnan Buyung Nasution, *Aspirasi Pemerintahan Konstitusional di Indonesia: Studi Sosio-Legal atas Konstituante 1956–1959* (The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante 1956–1959), (Jakarta: PT. Intermasa, 1995), pp.10–15.

In view of the circumstances and period in which the 1945 Constitution was drafted, the very brief provisions on human rights in the 1945 Constitution are reasonable. It was drafted in a very short time when Indonesia was still under the Japanese occupation and struggling for independence. The Indonesian founding fathers promised to draft a new constitution for the independent Republic of Indonesia after a certain degree of stability has been achieved. Thus, it only contains the most basic provisions whilst other implementing rules will be stipulated in lower laws and regulations.⁹⁶

Perhaps it is also important to briefly discuss, in comparison, the human rights provisions in two other constitutions which were promulgated during the period of 1949–1959 prior to the reinstatement of the 1945 Constitution.

The Constitution of the Federal Republic of Indonesia 1949⁹⁷

Following the transfer of sovereignty from the Netherlands to the newly formed Republik Indonesia Serikat (Federal Republic of Indonesia or 'RIS'), an appropriate constitution was drawn up and promulgated.

In contrast to the 1945 Constitution, the Constitution of the Federal Republic of Indonesia 1949 ('RIS Constitution') was a long document and its provisions were drafted in detail. Of the total 197 articles, 35 articles were devoted to human rights and fundamental freedoms including duties and responsibilities of the national authorities to promote and protect the welfare of the people. It could be concluded that the RIS Constitution was intended to incorporate human rights and fundamental freedoms originating from the Universal Declaration of Human Rights 1948 and ensure that those rights and freedoms were constitutionally-based.

The Interim Constitution of the Republic of Indonesia 1950⁹⁸

The RIS Constitution ceased with the enactment of Undang-undang Dasar Sementara Republik Indonesia (Interim Constitution of the Republic of

⁹⁶ Soekarno was the one who reiterated that the 1945 Constitution constituted an interim constitution. He emphasized that the constitution currently drafted by BPUPK was a temporary constitution. Later on when the country reached a more stable situation, a more complete and perfect constitution would be drafted through *Majelis Perwakilan Rakyat* (People's Representatives Assembly). Adnan Buyung Nasution, *Op. Cit.*, pp. 28–29.

⁹⁷ Enny Soeprapto, 'Various Possible Ways to Address Human Rights and Fundamental Freedoms in the Constitution', paper presented at the Legal Reform Program (LRP) Launch, Jakarta, November 2001.

⁹⁸ Ibid and See Adnan Buyung Nasution, *Op. Cit.*, p. 28.

Indonesia) on 15 August 1950 ('Interim Constitution'). Similar to the RIS Constitution, in the Interim Constitution out of 146 articles, 37 articles were devoted to address human rights and fundamental freedoms. The Interim Constitution took over all provisions on human rights stipulated in the RIS Constitution, and even added one provision regarding the right to demonstrate and strike in Article 21, which was not granted in the RIS Constitution or in the Universal Declaration on Human Rights.

The Interim Constitution ceased to apply on 5 July 1959 with the reinstatement of the 1945 Constitution as of this date.⁹⁹

Second Amendment to the 1945 Constitution

In the Annual Session of the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or 'MPR') 7–18 August 2000 with the agenda Amendment to the 1945 Constitution, the 'Second Amendment to the 1945 Constitution' has been promulgated, which added a substantial new Chapter XA comprising Articles 28 A through 28 J on Human Rights including:

- The right to life (Article 28 A);
- The right to recognition, security, protection of law and equality before the law (Article 28 D paragraph 1);
- The right to work and remuneration (Article 28 D paragraph 2);
- The right to equal opportunity to take part in the government (Article 28 D paragraph 3);
- The right to a nationality (Article 28 D paragraph 4);
- Freedom of religion, speech, education, employment, citizenship, place of residence, association and expression (Article 28 E);
- The right to be free from torture and freedom from slavery (Article 28 I paragraph 1);
- The right to be recognized as a person before the law and freedom from prosecution under retrospective legislation (Article 28 I paragraph 1);

⁹⁹ On 22 April 1959, Soekarno on behalf of the government made a speech before the Konstituante. In his speech he proposed to reinstate the 1945 Constitution. He also provided four basic reasons to support his proposal, namely (i) the 1945 Constitution was the ultimate solution for such critical situation at that time; (ii) the 1945 Constitution was rooted in the Indonesian culture and ideology so that it would be able to unify the country; (iii) the structure of state organs provided in the 1945 Constitution would greatly enhance an effective government; (iv) the implementation of the 1945 Constitution would be justified according to the law. Adnan Buyung Nasution, *Op. Cit.*, pp. 319–324.

Protection of traditional cultural identities and non-discrimination, including freedom of conscience (Article 28 I paragraph 3)

Specifically, one provision upon which we could rely in the context of non-discrimination, namely Article 28 I paragraph 2 which states:

Everyone has the right to be free from any discriminative action on whatever basis and is entitled to a protection from such discriminative action.

However, as frequently debated, such a new chapter has no significant contribution to the future upholding of human rights due to the fact that those new articles in Chapter XA of the 1945 Constitution are similar to the provisions of Law No. 39 Year 1999 regarding Human Rights, a lower regulation than the 1945 Constitution.¹⁰⁰ The 1945 Constitution is supposed to provide more basic principles of human rights and fundamental freedoms than its lower implementing regulation.

In fact, despite the new articles on human rights and fundamental freedoms as explained above, the discriminative provisions do still exist in the 1945 Constitution. The Second Amendment only amended and made changes to Chapter X on Citizens and Residents paragraphs 2 and 3:

2. Residents are Indonesian citizens and foreigners residing in Indonesia.
3. Any other matters with respect to the citizens and residents will be further stipulated by law.

Yet no change was made to paragraph 1 of Article 26 of the original 1945 Constitution:

A citizen is the indigenous Indonesian peoples and those people of other races who are confirmed as 'citizens by law.'

Thus, to ethnic Chinese disappointment, the very basic article on Citizens and Residents in the 1945 Constitution still retains the term 'Indonesian indigenous people' which is seen by the Chinese community as a way to provide justification for discrimination. Even during the heated debate on this Chapter in Commission A of the Annual Session in *August 2000*, one member asked rhetorically 'Who are truly indigenous Indonesians?'¹⁰¹

¹⁰⁰ Satya Arinanto, 'Pengaturan Hak Asasi Manusia dalam Rangka Perubahan UUD 1945' (Regulation on Human Rights within the Framework of the Amendment to 1945 Constitution), paper presented at Seminar on the Amendment to the 1945 Constitution held by *Badan Pembinaan Hukum Nasional* (National Board of Legal Development), Jakarta, October 2001.

¹⁰¹ Mieke Kooistra, *Op. Cit.*, pp. 7–8.

Conclusion

As a state which does not have great experience in legal reform, it is not an easy task for Indonesia with its pluralistic society to amend the constitution, particularly amendment to the constitution in respect of human rights and fundamental freedoms. Every legal problem and policy should be handled and analysed carefully on a case to case basis.

The members of the People's Consultative Assembly probably should take more time in amending the constitution. Perhaps they need to review the provisions on human rights stipulated in the previous RIS and Interim Constitutions as a comparison, and further, international treaties, among others, (i) Universal Declaration of Human Rights 1948; (ii) Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities 1992; (iii) International Covenant on Civil and Political Rights 16 December 1966; (iv) International Covenant on Economic, Social and Cultural Rights 1966; (v) International Labour Organisation No. 169 Indigenous and Tribal Peoples Convention 1989.

The members of the People's Consultative Assembly must also bear in mind that as a member of the United Nations and adoptee of the Charter of the United Nations, Indonesia has reaffirmed its faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. Those should take first place in the Indonesian Constitution.

The above is to ensure that the Indonesian Constitution definitely upholds human rights and fundamental freedoms of all Indonesian people, particularly the ethnic Chinese, and there will be no more discriminative provisions in the constitution. I believe that any attempt to repeal the discriminative laws and regulations should begin from the constitution itself as the supreme law of the country, and therefore, any laws and legislation repugnant to it will be considered void.

Thus, it is a high time for the newly established government under the leadership of President Megawati to seriously consider implementing legal reform — not only placing priority on economic and political reform — but to repeal discriminative laws and regulations, and eventually come in line with the spirit of the founding fathers, namely the state based on law (*rechtstaat*) and not based on power (*machtstaat*). Last but not least, we must have a serious, clear and conducive agenda on how the integration of the ethnic

Chinese into society must be developed if Indonesia wants to be considered as a modern and civilized state.

Note

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities:

Article 1 (1) States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity;

(2) States shall adopt appropriate legislative and other measures to achieve those ends;

Article 2 (1) Persons belonging to national or ethnic, religious and linguistic minorities... have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.

(2) Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life...

International Covenant on Civil and Political Rights:

Article 1 (1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 20 (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

International Covenant on Economic, Social and Cultural Rights:

Article 13 (1) The States Parties ... agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups,...

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Ethnic Minority Citizenship and the Japanese Constitution

Kang Sangjung

Recently, we have witnessed scenes of yet more waves of refugees wandering amidst the bleak landscapes of Afghanistan, reminding us again of the vast numbers of people being thrown out into 'No man's land' where no rights are enjoyed, nor any laws or rules of any kind pertain. The aerial bombardment by the United States has done nothing but add to the already large numbers of displaced people resulting from civil war in Afghanistan.

We have also recently seen how the adoption of a hard line towards refugees contributed to the governing party's recovery of strength in the lead-up to the Australian general election. Thus, while the American-led military intervention in Afghanistan is causing more and more people to be abandoned in a situation without rights, we also have the government of a country that supports and takes a part in that military intervention (i.e. the Australian government) using refugees as mere pawns in a political game of inter-party competition. How can one explain the fact that denial of rights to refugees is so rife in an age when there is so much talk about the protection of human rights? This use of military force in the name of human rights and democracy has deprived large numbers of desperately impoverished people of the benefits of life as citizens in a nation state, while at the same time denying them even the right of asylum. Furthermore, the numbers of people so deprived are increasing as the world becomes more 'globalised'.

This deeply contradictory aspect of the contemporary 'globalised' world is far from being a new phenomenon. In *The Origins of Totalitarianism*, the political philosopher, Hannah Arendt, who herself was an exile, wrote as

follows regarding the problems posed by the existence of refugees or stateless people resulting from the civil wars that followed World War I:

No paradox of contemporary politics is filled with a more poignant irony than the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as 'inalienable' those human rights, which are enjoyed only by citizens of the most prosperous and civilized countries, and the situation of the rightless themselves. Their situation has deteriorated just as stubbornly, until the internment camp—prior to the Second World War the exception rather than the rule for the stateless—has become the routine solution for the problem of domicile of the 'displaced persons'.

The postwar term 'displaced persons' was invented during the war for the purpose of liquidating statelessness once and for all by ignoring its existence. Nonrecognition of statelessness always means repatriation, i.e., deportation to a country of origin, which either refuses to recognize the prospective repatriate as a citizen, or, on the contrary, urgently wants him back for punishment. Since nontotalitarian countries, in spite of their bad intentions inspired by the climate of war, generally have shied away from mass repatriations, the number of stateless people — twelve years after the end of the war — is larger than ever. The decision of the statesmen to solve the problem of statelessness by ignoring it is further revealed by the lack of any reliable statistics on the subject. This much is known, however: while there are one million 'recognized' stateless, there are more than ten million so-called 'de facto' stateless; and whereas the relatively innocuous problem of the 'de jure' stateless occasionally comes up at international conferences, the core of statelessness, which is identical with the refugee question, is simply not mentioned. Worse still, the number of stateless people is continually on the increase. Prior to the last war, only totalitarian or half-totalitarian dictatorships resorted to the weapon of denaturalisation in regard to those who were citizens by birth; now we have reached the point where even free democracies, as for instance, the United States, were seriously considering depriving native Americans who are Communists of their citizenship. The sinister aspect of these measures is that they are being considered in all innocence.¹⁰²

¹⁰² (p.280) *The Origins of Totalitarianism*, Hannah Arendt, London, Allen and Unwin, 1967 (3rd Edition).

As Arendt points out, during the war the 'Jewish Question' was seen as a problem confined only to the Jewish people. However, even after this problem seemed to have been solved by the migration of Jews to Palestine and the violent acquisition of territory there, a new category of 'displaced persons' was born, and the problem of ethnic minorities and statelessness arose in a new form, and has remained unresolved to this day. Notwithstanding the Oslo Accords, the problem of large numbers of Palestinian refugees is still unresolved, and indeed has become increasingly serious. Furthermore, what has happened in Palestine was repeated in the Indian sub-continent, and now in the vast lands of central Asia. Ever since World War I, the formation of new national states has been accompanied persistently by stateless people as if burdened by a curse. This is because of the requirement that all citizens in a nation-state be equal before the law. Should any people fall outside the jurisdiction of any state, and thus be effectively denied any legal protection, the continued existence of the state itself is placed in doubt. Thus, the problem of stateless people is a matter of crucial importance posing serious questions about the institution of the nation-state itself, and about the meaning of membership in it (i.e. citizenship). In addition, we cannot completely separate the problem of ethnic minorities from the issue of statelessness (which means in effect the denial of all legal rights). This is because ethnic minorities have been denied the mutual recognition and capacity for action in public life, which in Arendt's view defines the 'human condition'. The problem posed by the existence of stateless people and ethnic minorities has become even greater as a result of the current 'globalisation' of civil war. As the developed country least willing to open its doors to refugees, Japan is no exception to this issue.

The initial publication of Arendt's *The Origins of Totalitarianism* coincided with the escalation of the Korean War. This event marked a decisive point in the development of the Cold War, casting a deep shadow over the development of Japan following its defeat in the Pacific War. It also had a decisive effect on the Korean Peninsula and the fate of the Korean ethnic minority in Japan. At the end of the Pacific War, well over a million people from what had been the Japanese colony of Korea were resident in Japan with the status of 'subjects of the Japanese Empire'. The existing nationality laws defined such people as 'Japanese'. The issue of what to do with them became an important concern of postwar policy, both for the Japanese government, and for the occupying American military administration.

The policy adopted by the Japanese government just before the 1946 general election (the first postwar election) was to suspend the right of Japanese nationals from the former colonies of Korea and Taiwan to vote and stand for election. This policy made use of an existing distinction in the household registration system between people whose families were registered in the 'inner territories' (*naichi* — i.e. Japan proper) and those registered in the 'outer territories' (*gaichi* — i.e. the colonies including Korea and Taiwan). After the war, being registered in the 'inner territories' and thus ethnically 'Japanese' was made a condition for the right of political participation. In this way, 'Japanese' from the former colonies were effectively robbed of their citizenship. This meant that they were placed outside the bounds of the national community. They remained nevertheless 'Japanese nationals' until Japan regained its independence under the San Francisco Peace Treaty. After enactment of this treaty, people from the former colonies were forcibly deprived of their Japanese nationality, and as foreign nationals were placed under the management and domination of the Immigration Bureau. This was equivalent, in Arendt's terms, to abandoning them as ethnic minority 'pariahs' to a condition in which they enjoyed no rights at all.

The motivation for this forced removal of citizenship rights and reduction to 'pariah' status was the fear that such 'exogenous outsiders' would publicly raise the issue of abolishing the emperor system if given the right to participate in politics. It is this sense of fear about any threatened dissolution of the 'communitarian democracy' (*kyōdōtai minshūshugi*) centred on the emperor system which lies at the basis of the discriminatory exclusion of people from the former colonies.

The Korean minority in Japan were dealt a further blow when they became the subjects of assimilationist pressure. In 1948, the then Ministry of Education imposed an obligation on Korean families to send their children to Japanese schools. An attempt was thus made to end the existence of separate 'ethnic schools' (*minzoku gakkō*) where the language, history and culture of ethnic minorities was taught. This heavy-handedness was further instanced in the use of a 'declaration of a state of emergency' by the occupying American military in order to force the closure of the Korean schools in the Osaka-Kobe region.

The disaster of the Korean War brought about a further worsening of the already desperate situation suffered by the Korean minority. Many people fleeing from the civil strife in the Korean Peninsula were forced to enter

Japan by whatever means possible (including 'illegal entry'). Such people became, both *de facto* and *de jure*, stateless persons existing in a condition without rights and without the legal protection of citizenship. With the partition of the Korean Peninsula, the Korean minority in Japan lost even its internal unity, and became divided among itself between those with links to the two states of North and South respectively. Thus, the problem of stateless people was reproduced in postwar East Asia in the form of 'illegal immigrants' and 'refugees'.

Nearly fifty years after the Korean War and Japan's regaining of independence, the Korean ethnic minority now constitutes less than 50% of the total number of foreign nationals in Japan (including short stayers). This minority has over the years become 'permanently settled' and several new generations have been born since the first Koreans came to Japan before the war. Members of that first generation at present account for less than 10% of the minority population, and there is even a fourth and fifth generation. Nevertheless, there are still about 600,000 Koreans without Japanese nationality who remain as permanent 'guests' in the 'host' society of Japan.

In Japan, there is no legally recognized category of 'denizen'. The only legal category mediating the dichotomy between the possession of full Japanese nationality and being a complete foreigner is that of 'permanent resident'. To the extent that it guarantees the right of continuous residence, and economic, social and labour rights, 'permanent residency' has come to bear some resemblance to the full citizenship enjoyed by 'Japanese'. However, one cannot say that it amounts to anything like 'denizenship'. If 'denizenship' is taken to include some degree of political rights besides residency and social rights, then the 'permanent residency' of the Korean minority falls far short of it. So far they have not been granted the right to represent themselves in the public sphere.

Recently, there was a movement to enact a law allowing Korean 'permanent residents' the right to participate in local politics. However, opposition from the ruling party and from the majority population eventually led to this being abandoned. In its place, plans have emerged to relax the conditions required for the acquisition of Japanese nationality. By making it easier for 'permanent residents' to become 'Japanese nationals', the aim is to speed up the process of 'assimilating' ethnic minorities. This goes against any idea of opening up the category of citizenship to include 'non-Japanese' nationals through the recognition of 'denizenship' or 'dual nationality'. This closed

system of 'communitarian democracy' is founded on the idea that the three elements of Japanese nationality, Japanese ethnicity, and the sense of identity as a member of a cultural community form an indivisible totality. Any movement towards a multilingual, multicultural, or multiethnic society is thus blocked.

Indeed, the section of the Japanese constitution dealing with 'cultural life' (Article 25) merely speaks of promoting the material advancement of a homogenous nation. It does nothing to protect cultural diversity arising from different ethnic identities.

Thus, ethnic minorities in Japan remain like 'pariahs' lacking what Arendt calls a 'public life', and are therefore denied any footing in the human world. How can one possibly find a way out of this situation in which so many people lack even the basic 'human condition' and are without publicly secured human relations in general? It could be said that an infringement of human rights occurs not only 'when at least one of the rights listed as a human right is violated', but also 'when people lose their footing in the human world'. If this is so, it will be necessary to create a more open public sphere in order to guarantee human rights. As a first step, the rights of citizenship must be made more accessible by having them accrue not only to a single exclusive state community, but also to multiple communities. In concrete terms, this means the establishment of a system and form of citizenship which positively guarantees 'plural nationalities' (i.e. the possession of more than one nationality by a single individual). In order to make this possible, there must be a regional order in Northeast Asia, in which more than one state community can share the principle of national sovereignty. Korea and Japan would form the initial core of such a regional order. Exactly how this can be achieved and what form it should take are matters for investigation henceforth.

Indigenous Rights and the Australian Constitution — A litmus test for democracy

Larissa Behrendt

Indigenous people are often seen as being the special situation in Australia and in discourse about law, in particular the Constitution, we tend to be treated as a special case. It is true that we are in a unique position in Australian society given that we are the original owners of Australia. It is true that issues of colonisation, dispossession and the implementation of assimilationist policies continue to place Indigenous people on the periphery.

This 'special category' approach to Indigenous rights overlooks the very important and central role that Indigenous people can play in assessing the performance of our Constitution. I argue that, as the poorest socioeconomic group in Australia, and the most marginalized cultural group, Indigenous people become the litmus test of whether the Constitution and the system of governance that it sets up works. To put this test of democratic standards another way — if our laws and institutions fail the most vulnerable sector of our society, how effective are they? This is the question we need to ask ourselves when we look at issues of human rights protection under the Constitution.¹⁰³

I. Looking back

Indigenous people provide a powerful example of this litmus test in the 1997 case of *Kruger v. the Commonwealth*.¹⁰⁴ This was the first case to be heard in

¹⁰³ See Larissa Behrendt. 'Indigenous Self-Determination: Rethinking the Relationship between Rights and Economic Development'. *The University of New South Wales Law Journal*. Vol.24, No.3, 2001. 850–861.

¹⁰⁴ *Kruger v. the Commonwealth* (1997) 190 CLR 1.

the High Court that considered the legality of the Federal Government's assimilationist policy of removing Indigenous children from their families. The plaintiffs had brought their case on the grounds of the violation of various rights by the effects of the Northern Territory ordinance that allowed for the removal of Indigenous children from their families. The plaintiffs had claimed violations of the implied rights to due process before the law, equality before the law, freedom of movement and the express right to freedom of religion contained in s.116 of the Constitution. They were unsuccessful on each count, a result that highlighted the general lack of rights protection in our system of governance and the ways in which, through policies like child removal, there was a disproportionately high impact on Indigenous people as a result of those silences.

Ideologies of white racial superiority, prevalent at the time of federation, still continue to imbue the Constitution and the contemporary experiences of Indigenous people bear this legacy out.

The issue of whether the race power (s.51(xxvi)), which allows the Federal Government to make laws with regard to Aboriginal people, could be used to deprive Indigenous people of their rights was raised by the plaintiff in *Kartinyeri v the Commonwealth* (the Hindmarsh Island Bridge case).¹⁰⁵ In that case, brought in a dispute over a development site that the plaintiff had claimed was sacred to her, the government sought to settle the matter by passing an Act, the *Hindmarsh Island Bridge Act 1997 (Cth)*. That Act was designed to repeal the application of heritage protection laws to the plaintiff. The plaintiff argued, *inter alia*, that when Australians voted in the 1967 referendum to extend the federal race power to include the power to make laws concerning Aboriginal people it was with the understanding that the power would only be used to benefit Indigenous peoples. The Court did not directly answer this issue, finding that the *Hindmarsh Island Bridge Act 1997 (cth)* merely repealed legislation. The majority held that the power to make laws also contains the power to repeal or amend them.¹⁰⁶

The failure to answer the question has caused much reflection on the argument of a race power that can be used to infringe upon the rights of Indigenous people. Many were shocked to find that Australia's Constitution

¹⁰⁵ [1998] HCA 22

¹⁰⁶ For further discussion on the races power see, George Williams. 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38 *Osgoode Hall Law Journal* 643.

could be read as offering no protection against racial discrimination but one need only look at the intention of the drafters to see why it remains this way.

The drafters believed that entrenched rights provisions were unnecessary in the Constitution and that the protection of rights was the proper domain of the legislature (the legislature that can pass the Heritage Protection Act and then repeal it so it doesn't apply to a particular individual — ditto the Racial Discrimination Act).

Also, it was considered desirable to ensure that the Australian states would have the power to continue to enact laws that discriminated against people on the basis of their race.

If one is aware of these attitudes held by the drafters of the Constitution then it comes as no surprise that the Constitution is a document that offers no protection against racial discrimination today. It was never intended to do so and the 1967 referendum in no way addressed or challenged those fundamental principles that remain entrenched in the document. It also shows how legislated rights can be withdrawn by the whim of legislature.

Conversations about citizenship, cultural diversity and institutions, including the Constitution, in Australian society all raise questions about the assumptions of the 'settlement' of Australia and about the contemporary relationship between Indigenous and non-Indigenous Australians. Here I want to step back from the legal document as a structure of government and look at the Constitution in its symbolic role.

The issue of the acquisition of Australia by the British has become an issue of increasing and recurring discomfort in the debates about reconciliation, Indigenous rights and a treaty. The uncertainty about this issue has resurfaced strongly in the decision in the *Mabo* case.¹⁰⁷ The High Court of Australia, in overturning the legal fiction of *terra nullius* refused to pronounce definitively on the issue of the British claim to sovereignty. Instead, it held that the legitimacy of the acquisition of sovereignty was an issue that had to be taken up in an international court. This was an outcome that has meant that questions concerning the status of the legality of claims to sovereignty remain unanswered, creating a grey area of law and an uncomfortable legal silence.

The questioning of 'settlement' also arises in the context of the extent to which Indigenous peoples have been included in, participated in and given consent to the processes that have brought about the creation of

¹⁰⁷ *Mabo v Queensland (No.2)* (1992) 175 CLR 1

the modern Australian state. In this context, much is rightly made of the fact that Indigenous people at the time of federation were substantively excluded from debates surrounding the terms, conditions and visions of our society and their translation into our document of governance, the Constitution.

The notion of 'settlement' also raises questions about the extent to which the colonisation process has really finished in Australia. The argument, stated quite simply, is that until steps are taken to rectify the historical exclusion of Indigenous peoples in the nation-building processes of the Australian state, our system of governance will continue to be a colonial regime. That is, it will remain a system of laws and governance imposed upon the nations that have lived in Australia before that dubious assertion of sovereignty.

In fact, what the recurring appearance of this debate about 'settlement' shows is that these unstable and questionable beginnings of nationhood continue to raise unresolved and unsettled issues. The questioning of institutional legitimacy challenges assertions that we have moved into a post-colonial era. Instead, it views the power structures of the modern Australian nation as a continuation of its colonial legacy.

II. Looking forward

To rectify this historic exclusion, many have called for constitutional change. These claims have included:

A new Preamble to the Constitution: a Preamble is important because it sets the tone for the rest of the document. It can be used to give assistance in interpreting the Act that follows. Particularly in our Constitution, a new Preamble will offer an opportunity to articulate our shared goals, principles and ideals as a nation. If recognition of prior sovereignty and prior ownership were contained in a Constitution Preamble, courts may be able to read the Constitution as clearly promoting Indigenous rights protection, clearing up the unanswered question left by the *Hindmarsh Island Bridge* case.

A Bill of Rights: As the *Kruger* case showed, very few rights are protected by our Constitution. Those that appear in the text have been interpreted in a minimal manner. Although members of the High Court have implied some rights, this is a precarious approach to rights protection. A Bill of Rights that granted rights and freedoms to everyone would be a non-contentious way in

which to ensure some Indigenous rights protection. Public discussion needs to be focused on whether we should have a constitutional or a legislative Bill of Rights. A legislative Bill of Rights could be viewed as an interim step towards a constitutionally entrenched Bill of Rights.¹⁰⁸

A Non-Discrimination Clause: Such a clause could enshrine the notion of non-discrimination in the Constitution. Such a clause must also adhere to the principle that affirmative action mechanisms aid in the achievement of non-discrimination.

Specific Constitutional Protection: An amendment could be made to include a specific provision. In Canada, a comparable jurisdiction with a comparable history and comparable relationship with its Indigenous communities, the *Constitutional Act 1982* added the following provision to the Constitution:

Section 35 (1): the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Some of these steps to improve the Australian rights framework for Indigenous people — a Constitutional Preamble, a Bill of Rights — would have benefits for all Australians. This reinforces the point that comes out of the litigation in the *Kruger* case, namely, that many of the rights of Indigenous people that are infringed are not 'special rights' but rights held by all people. On the flip side, measures that protect the rights of all Australians will have particular relevance and utility for Indigenous people.

III. Looking outside

While I have, to this point, concentrated on Indigenous rights achievable within the existing structures of the state, I want to now turn to the arena of international law.

With its agenda up until World War I of asserting claims of colonisation and negotiating disputes between colonial powers, international law developed as a Eurocentric body of law. This Eurocentrism was compounded by the agenda set by the (primarily European) world wars that moulded international law through European politics, European stability and European control over the world order.

¹⁰⁸ For a full discussion of the legislative Bill of Rights model, see George Williams. *A Bill of Rights for Australia*. Sydney : UNSW Press, 2000.

We, as Indigenous peoples, provided one of the greatest impetuses for the development of international law. It was in what is sometimes referred to as 'the colonising period' that Europeans relied on an international law — or rule of general understanding between states — to agree between themselves on the appropriate way to acquire colonies. Thus, the doctrines of 'discovery', conquest and *terra nullius* were all developed as norms and rules of international law during this period. All to the disadvantage of Indigenous peoples.

International law may have been a tool to justify colonisation but colonised people, after World War II, adopted the rhetoric of international human rights law and sought to gain access to the institutions of the United Nations to assert claims of sovereignty, autonomy and the protection of human rights. Much of the assertions for independence and recognition of Indigenous rights focused on the principle of self-determination. And it is erroneous to think that we, as Indigenous people, have not challenged these assertions and then sought to rebut, counter or subvert the claims to our sovereignty and land that our colonisers have cloaked in the rhetoric of international law.

The right to self-determination is recognised under international law in Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Although the right is clearly recognised in two of the canonical human rights instruments, there is much debate about the applicability and content of self-determination as it applies to Indigenous people.

I would argue that we, as Indigenous peoples, do not need to feel confined by the semantic debates under international law. Rather, the key to the way forward is in the concepts and rights that we have implied into the terms 'self-determination' and 'sovereignty' when we use those words to describe a vision of what we would like our communities to be like and the way we want to live our lives as Indigenous peoples.

The rights enmeshed in the concept of 'self-determination' includes, I would argue, everything from the right not to be discriminated against, the rights to enjoy language, culture and heritage, our rights to land, seas, waters and natural resources, the right to be educated and to work, the right to be economically self-sufficient, the right to be involved in decision-making processes that impact upon our lives and the right to govern and manage our own affairs and our own communities.

These rights that can be unpacked from the concept of 'self-determination' point to a vision that has been described as internal self-determination. It sees increased Indigenous autonomy within the structures of the Australian state. The challenge to Australia is to alter our institutions to incorporate that vision.

This debate shows the way that international concepts can be transformed and take on new meaning in the domestic political sphere for the furtherance of rights protections in a way that is not reliant upon active international intervention.

Having said that, it is important to make the following point about Indigenous participation at the United Nations, and that is that Indigenous peoples have understood how the international arena can provide a springboard for substantive changes that will allow greater respect for the rights of Indigenous peoples within our own states.¹⁰⁹

Some avenues for action by individuals have opened up in recent times in relation to the human rights covenants. For example, if a state has signed the optional protocol to the International Covenant on Civil and Political Rights it opens an avenue of redress for an individual who claims state violation of their individual rights under that instrument. Convention for the Elimination of all Forms of Discrimination against Women is developing a similar mechanism.

In the absence of rights protection in the Constitution, it is the reporting and monitoring mechanisms under international law that have created the most effective method of monitoring human rights in Australia. A recent example of this role can be seen in the United Nations Committee on the Elimination of All Forms of Racial Discrimination. In 2000 it issued a report critical of Australia and claiming that our country, and our government, had failed to meet certain obligations that we, as a nation, have agreed to uphold under the Convention to Eliminate All Forms of Racial Discrimination.¹¹⁰ The Committee's report expressed concern about the

¹⁰⁹ For example, lawyer Loretta Kelly notes the importance of recognition of rights in an international context, understanding that the recognition of rights internationally as being only the first step towards the recognition of greater rights at the domestic level: 'If the United Nations General Assembly agrees to a Charter of Indigenous Rights that recognizes the right of political self-determination, then that will add a great deal of weight to our claim to sovereignty'. Interview with the author.

¹¹⁰ Committee on the Elimination of Racial Discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/56/Misc.42/rev.3, (2000).

absence of any entrenched law guaranteeing against racial discrimination, provisions of the Native Title Amendment Act of 1998, the failure to apologise for the stolen generations and its refusal to interfere to change mandatory sentencing laws.

The Federal Government's response to the report is to be noted as it signals an emerging resentment towards external monitoring of human rights standards. The Howard Government's response to the report was one of outrage, which labelled the report unbalanced and unfair. They rejected the notion that we are bound by the United Nations and asserted that a country like ours is capable of looking after our own affairs. They added sincerely that we have a good record on human rights, especially compared to other countries in our region. This comparison with worse human rights violators to negate international scrutiny of Australia promotes a method of assessing human rights standards against worst practice rather than aspiring to best practice.

I would assert, however, that it is precisely because our domestic arena contains so few avenues of rights protection that we will need to rely on the developing norms and standards of international law in order to hold governments accountable for their actions. This antagonism towards outside interference in domestic matters stands in stark contrast to the internationalisation of trade policy and the embrace of neo-liberal economic policy that has seen increased interference with domestic matters through trade agreements.

This neo-liberal economic regime is also a challenge to Indigenous human rights. It is an economic regime unsympathetic to the cultural concerns and specific historical and contemporary legacies facing Indigenous communities as a result of the colonisation process. The cold rationale of neo-liberal economic policy impacts most heavily on sectors of the community that are vulnerable to economic shifts — and the Indigenous community is perhaps the most vulnerable of these. The erosion of hard-won workers rights, the erosion of land rights, degradation of the environment which leads to a loss of cultural heritage and the lack of protection from the agendas of multinational corporations are just some of the signs of this vulnerability.

III. Looking inside

I want to conclude by reflecting upon three lessons from the Indigenous experience under the Australian Constitution:

The protection of Indigenous rights does not occur in a lineal progression. There is often an assumption that as time goes on, rights protections will gradually improve. Recent experience in Australia should highlight the fact that rights that have been recognised in the past — native title and heritage protection — can be extinguished. So it is more accurate to view Indigenous rights — and indeed rights in general — as something that has high and low water marks. It is an important observation in terms of strategy as it means more diligence must be exercised in the way which gains in protection are made at moments of increased support for these issues.

The Constitution is just one arm of a strategy for rights protection. Rights must be placed in a respectful environment so any constitutional agenda needs to be matched with legislative political and educational strategies about rights protection.

We have yet to have a moment of inclusive nation-building. These issues of reconciliation, treaty and self-determination will remain recurring themes on Australia's domestic agenda until there has been some step to counter the exclusion of Indigenous peoples from the creation and development of the modern Australia nation-state.

The way forward is one that moves away from the zealous embrace of neo-liberal economic policy and instead seeks to match economic sustainability with the protection of fundamental rights. It is a model that measures quality of life by considering and valuing non-economic factors such as cultural heritage and environmental protection alongside the economic factors that are taken as indicators of our performance.

Indigenous people can offer this aid to a better and fairer Australia: if laws, institutions and policies do not work for us, the most vulnerable, socio-economically disadvantaged cultural minority in the country, they are not working. We are the litmus test, not the special case. This test for our performance as a nation would move Indigenous people from the periphery, where we stood at the moment of federation, to the centre, where we need to be to ensure that Australia's nation building processes become inclusive. This is the role we need to have in Australia's political, legal and psychological life to ensure we move from a neo-colonial to a post-colonial Australia.

Recognising a Reinvented Constitution

Usha Ramanathan

The text of the Indian Constitution remains largely unchanged; it is the context that has changed. Liberalisation, globalisation and the expanded connotations given to ‘terrorism’ have altered the conception of human rights. They have also set rights in conflict. And a lexical prioritising of rights has come into being.

This lexical priority is propositioned on malleable concepts that include:

- the interests of national security
- public purpose
- the public interest
- and, increasingly, the market.

Anti-terrorism laws are an instance of the use of national security concerns as justification for arrogation of powers in the hands of the agencies of state. the arbitrary detentions, ‘encounter’ killings (or extra-judicial executions), ‘disappearances’, harassment and alienation of populations that may result — and are known to have occurred under the dispensation of the Terrorist and Disruptive Activities (Prevention) Act 1985 and 1987 (commonly referred to as TADA, and which lapsed in 1995) — are explained as mere aberrations while in pursuit of national security interests. And the more recent Prevention of Terrorism Ordinance, 2001, which is a version of the TADA, is, for instance, justified on the basis that ‘terrorists aren’t human beings’ and therefore human rights aren’t relevant while dealing with them, and that extraordinary situations require extraordinary measures. The exorcising from the Constitution of terrorists, suspected terrorists, protestors,

dissenters, extremists, secessionists, those asserting their right to self-determination ... is, then, accompanied by the reduced responsibility of the state and its agents for violations of human rights and breaches of constitutional norms.

The logic of public purpose is like the image in a funny mirror. In this, the development debate presents large masses of project-displaced people in front of the mirror, and 'development' is said to stare back at them, in reflection. The displacement of whole communities of people is, then projected as a cost of development; and development is a public purpose. So, too, 'public interest'. The public interest requires cities to be clean, environmentally friendly, with living spaces, and safe and healthy for the 'legal' resident. The 'illegal' residents, of slums and squatter settlements, for instance, therefore have their housing demolished en masse; they are divided into the eligible and the ineligible. And, while the eligibles are relegated to the periphery of the city, where they may stay till they are held to have breached any condition of the licence under which they are permitted residence, the ineligibles disappear from the view of public policy and state responsibility. The 'rule of law' then acquires a threatening presence especially for those in whom may be detected the inability to purchase legality.

With the market as reigning deity, the rights against exploitation have necessarily had to be reconstructed. The escalating demands that the 'protective' laws concerning the employment of contract labour, night work for women, and minimum wages be amended, allowing capital to meet the market and find profit in their ventures is illustrative of the changes afoot. The entry of multinational corporations into the mining sector, the dispossession of the land of tribal people based on a calculus of opportunity costs, globalisation and the market, is another illustration.

Conflicts among rights have begun to witness a prioritising of interests among non-state actors who, till not very long ago, shared perceptions of having, broadly, a common denominator of interests. When an environmental group approached a High Court asking for the demolition, and possible re-settlement (an exercise that has been known, almost inevitably, to fail, and to impoverish the displaced) of the 'encroachers' in a part of a National Park, this conflict rose to the fore. The ARENA where such contending priorities will be debated and resolved has acquired significance.

The language of globalised concerns has lent itself to an ordering of priorities among rights (e.g., when environmental groups exclude the rights of the immediately affected from their discourse), or in edging out rights even

including the right to life and personal liberty (as in 'anti-terrorism' laws). The free movement of capital, the less-free movement of goods, and the restricted movement of populations in a 'globalised' world have had their impact on the understanding of human rights, including the right over resources, right to livelihood and the right to shelter.

The pragmatism of constitutional interpretation is not-so-subtly suggestive of a reconstruing of human rights as not being 'practical' or 'realistic', or even relevant. There is a task at hand: to halt, and reverse, a tide of opinion that holds that human rights are redundant in a country in the throes of economic growth, or where political dissent, militancy or manufactured terrorism is resident.

East Timor: The Challenges of Drafting a Constitution

Dionísio da Costa Babo-Soares

Introduction

On 30 August 2001, the East Timorese voted to elect members of the Constitutional Assembly (CA) to draft a Constitution for the new nation. The CA has now completed the ninety days plus one month debate on the matter and approved the provisions in that document. At the time of this writing, the draft is being socialised in the 13 districts before its formal promulgation on 20 May 2002, the date set for the official hand-over from UNTAET to the first government of East Timor.

Since September 2001, the Constitution has been at the centre of debates, discussions and seminars around East Timor. Political debates have centred very much on administrative systems (presidential, parliamentary or quasi systems), Human Rights and power structure issues. Little attention has been given to the substance of the draft, or particularly the process, including consultation, drafting mechanisms and power sharing. As a result, instead of reflecting a balanced approach, the draft seems to give more weight to certain powers of the state. Likewise, it is seen by many East Timorese to be a one-party draft rather than reflecting the aspirations of all members of the Constitutional Assembly (CA), since small parties' voices were somehow ignored in the drafting process.¹¹¹ This article does not address specific provisions in the draft but provides a general assessment of some substantial issues related to the draft Constitution.

¹¹¹ See East Timor Newspaper, *Suara Timor Lorosae* 12–20 December 2001. A number of articles published in *Timor Post* during that period also voiced the same pessimism as far as the debates on the Constitution are concerned.

Approved Articles: Symbolic Provisions

On 9 February 2002, the East Timor CA completed a draft Constitution containing 168 articles. The draft outlines issues ranging from the fundamental principles of the state, the division of power, the electoral system to issues of constitutional revisions. Section 1 point 1 of the Constitution states that 'The Democratic Republic of East Timor is a democratic, sovereign, independent and unitary State based on the rule of law, the will of the people and the respect for the dignity of the human person'.¹¹² To expand on this section, the draft outlines issues related to the sovereignty of the country (section 2) and citizenship (section 3), and determines the territory of the new country (section 4). In general, 'the 168-clause document establishes a semi-presidential system of government [and] [u]nder [which] an elected president can dismiss the Prime Minister and veto legislation, but in a framework of strong checks and balances'.¹¹³

The Assembly has also passed articles regarded as 'sensitive' such as the issue of Flag, National Anthem and Date of Independence, issues that have been at the centre of debates and discussions during the drafting process. One view is that the country should use neutral symbols such as icons of the state, but another is that the proclamation of Independence in 1975 should be reinstated and its symbols should be recovered as state symbols. Indeed, since Fretilin members constitute almost 65 percent of the CA and are supported by conservative parties such as Associação Democrática de Timor Leste (ASDT), the National Republican Party (Parentil) and the Christian Democratic Party (PDC), they faced no serious challenge in reinstating the symbols of the short-lived República Democrática de Timor Leste (RDTL) proclaimed unilaterally on 28 November 1975. The flag¹¹⁴ and the national anthem of RDTL, *Foho-*

¹¹² The East Timorese refer to the Constitution as LEI-INAN (lit., Law-mother) or the mother of all laws. It is understood locally as the source of all state laws, meaning that future (organic) laws of the nation will have to adhere to Lei-Inan. Traditionally, Lei-Inan is believed to originate from Lia-Tuan (lit., old/sacred words), locally revered for their sacred status in the forms of ritual chants and ritual narratives. These form the basis for *ukun ho bandu* (lit., regulate and forbid) or the foundation on which decisions regarding lineage, clan or society's life are based upon.

¹¹³ Jill Jolliffe, Sydney Morning Herald Correspondent in Dili — SMH 11 February 2002.

¹¹⁴ Section 15 of the Constitution states that: (1) The National Flag is rectangular and is formed by two isosceles triangles, the bases of which are overlapping. One triangle is black and its height is equal to one-third of the length overlapping the yellow triangle, whose height is equal to half the length of the Flag. In the centre of the black triangle there is a white star, meaning the light that guides. The white star has one of its points turned towards the upper right end of the flag. The rest of the flag is purple-red. (2) The four colours mean Golden-yellow – the wealth of the country; Black – the obscurantism we had to overcome; Purple-red – the struggle for national liberation; White – peace.

Ramelau (lit., Mount of Ramelau) thus remain the national symbols of the nation. The date of the proclamation of RDTL (28 November 1975) has now been approved as the date of Independence (Section 1 point 2) despite the fact that most of the opposing parties wanted more discussion to be held on the issue. The latter also argued that the new nation should use the symbols of the former resistance body, CNRT which were used to represent East Timor during the referendum in 1999. However, this demand fell on deaf ears since the Fretilin-dominated CA decided otherwise.

Another fundamental point is that section 152 of the Constitution automatically transforms the current National Assembly into the first Parliament of the new nation. This decision has its basis in the United Nations Transition in East Timor (Untaet) regulation 2/2001 section 2 point 6 on the establishment of the Constitutional Assembly, which states that ‘the Constitutional Assembly shall become the legislature of East Timor, if so provided in the Constitution’. The next section will discuss this issue in detail.

Between late February and mid March 2002, the Assembly members embarked on a nationwide ‘socialisation’ and gathered public feedback on the draft Constitution. The full Assembly hopes to sign the final draft on 16 March 2022 after debating any concerns or suggestions arising from the ‘socialisation’ campaign.

General Summary: Fundamental Principles

There are several fundamental principles in the Constitution which will be addressed briefly in this section. Highlighting these is important because they constitute the main parts of the document and have been the subject of debates throughout East Timor. Let me begin with the issue of ‘rights’ and then discuss other substantial issues in the document.

Perhaps, being a new country in the third millennium, East Timor has several advantages as far as drafting a Constitution is concern. The success and weakness of earlier Constitutions can be taken as points of reflection, and countless numbers of International Conventions on Human Rights had served as the foundation for writing the new nation’s Constitution. Thus, the interpretation of fundamental rights in the Constitution follows what is enshrined in the Universal Declaration of Human Rights and International Conventions. For example, the Constitution guarantees basic civil liberties

and advocates a mixed economy for the new state. Provisions to strengthen human rights protection are significant in the Constitution, which include the assurance of equality to all citizens and no restrictions on East Timorese with acquired citizenship. It also guarantees the extension of certain legal rights to foreigners as well as citizens; the precedence of ratified international conventions, treaties and agreements over national laws; clearer rules on judging the constitutionality of legislation; and the renaming of the independent national ombudsman the 'Provider of Human Rights & Justice' and strengthening of the office's powers (see sections 16–28).

On Universal Suffrage, the Constitution guarantees that the people have the right to exercise political power through universal, equal, direct, secret and periodic suffrage and through other forms laid down in the Constitution (section 8). In addition, it also guarantees the rights of citizens (section 16), gender equality (section 17), child protection (section 18), and the rights of disabled people (section 19). Such sections, which owe much to the existing International Human Rights documents, were approved unanimously by factions despite fears that traditional groups might refuse to back them since the issue of women and children has a unique place in traditional customary law.

Another important issue is the revision of the Constitution. Contrary to demands from Fretilin opponents that the Constitution should remain as an *ad interim* document pending its promulgation after a period of three to four years, section 154 states that a revision may be initiated by the Members of Parliament and Parliamentary Groups (sub-section 1) subject to certain conditions. For instance, sub-section 2 states that the Constitution may be revised by the National Parliament after six years have elapsed since the last date on which a law revising the Constitution was published. Such a revision, however, should be accepted by a majority of four-fifths of the Members of Parliament in full exercise of their functions (sub-section 4). This issue nevertheless, encountered fierce opposition from anti-Fretilin factions within the CA. They reasoned that the first draft Constitution has been drawn up in a rush and still needs further revision. Thus, in the first five years there should be a period of transition for correction to take place. In addition, the people have not had the chance to be consulted on issues concerning their rights, giving the impression that the Constitution lacks consultation and participation.

However, after securing the decision on revision and blocking any possible change to issues considered 'sensitive' in the Constitution, the

Assembly — in which Fretilin constitute the majority — successfully approved section 156. This section proposes that Laws revising the Constitution shall respect the fundamental provisions in the Constitution. Those included in sub-section 1 underline: (a) the independence and the unity of the State; (b) the rights, freedoms and guarantees of citizens; (c) the republican form of government; (d) the separation of powers; (e) the independence of the courts; (f) the multi-party system and the right of democratic opposition; (g) the universal, direct, secret and regular suffrage of the office holders of the organs of sovereignty, as well as the system of proportional representation; (h) the non-existence of an official State religion; (i) the principle of administrative deconcentration and decentralization; (j) the National Flag and (k) the date of proclamation of national independence.¹¹⁵

On the system of Government and the Presidency, the Assembly is in favour of the semi-Presidential system and the need to have power sharing between the President and the Prime Minister. In this system, the president will be elected through a separate election in a free and direct ballot. The Supreme Court can remove the President for ‘clear violations of his or her constitutional obligations.’ Thus, the grounds for removal are not limited to criminal behaviour only. If a President dies, resigns or has a permanent disability, the Parliament is equipped with the power to elect a new President from among its members during ‘exceptional situations of war or protracted emergency’ or if there is ‘an insurmountable difficulty of a technical or material nature ... preventing the holding of an election.’ A President can only be selected by a national election¹¹⁶ and is allowed to stand again for a second election.

The state respects the principle of decentralisation of public administration and that a law should be established to determine the administrative characteristics and competencies of the different territorial levels. Since the territorial organisation of the state acknowledges the particularity of the enclave of *Oe-cussi/Ambeno* in West Timor and the island of *Ataúro* to the north of Dili, the special administrative and economic treatment for both regions is determined by law (section 7). The peculiarity of *Oe-cussi* was an

¹¹⁵ In sub-section 2, the same section states that paragraphs c), h) and j) may be reviewed through a national referendum, in accordance with the law.

¹¹⁶ UNTAET Daily Press Briefing Media Notes, 13 February 2002. Source: <http://www.un.org/peace/etimor/DB/UntaetDB.htm>. See also article 76 of the Constitution.

interesting point during the drafting process. Being located in an enclave and within another country, speaking a rather different language and inheriting different cultural characteristics from those on the mainland, the administration in this enclave will be run in an autonomous format. This means that the administration of this region inherits the power to make decisions of its own as long as they do not contravene the Constitution. This particular emphasis on Oe-cussi requires particular attention since it concerns not only transportation but also international border arrangements with Indonesia. Any passage to and from the enclave would have to go through Indonesian territory.

The issue of language possesses a unique status. After a marathon debate, members of CA agreed to adopt Tetum and Portuguese as the official languages. In this regard sub-section 2 of section 13 states that Tetum and the other national languages should be valued and developed by the State as languages to be used in communication between different linguistic groups. English and Bahasa Indonesia were declared working languages (section 159). There is some uncertainty about how these discussions will be put into effect since Tetum is not a standardised language, leaving Portuguese to fill the vacuum, although it is spoken by less than 10 percent of the population whereas the former is spoken by almost 90 percent of the East Timorese. Likewise, it remains to be seen how much English and Bahasa Indonesia will be used since they will be treated as foreign languages when the United Nations has completed its activities in the territory.

The draft Constitution also permits police uninvited, night-time entry into private residences if there is a 'serious threat to life or physical integrity' — a clause expected to aid victims of domestic violence, a major social issue in East Timor.

Challenges

While in general, the draft provides a comprehensive basis for the functioning of a state, the process of drafting the Constitution has itself been haunted by dissatisfactions and protests by opponents of Fretilin. Thus, some provisions in the draft still require further explanation as far as the rights of the people are concerned. The CA is being haunted by the lack of consultation, apart from other issues such as claims that Fretilin unilaterally imposed its will, thus 'undermining' the view of smaller parties during the drafting process. The following paragraphs list some of these problems.

a) Non-Technical Problems

In contrast to the drafting of modern constitutions such as those of South Africa, Fiji, and Ghana, which took a great deal of time to come up with a final version of the Constitution, the CA was given only ninety days with one month extension, to finalise a draft Constitution for the new nation. The speed of drafting the Constitution — forty days — remains a concern to East Timor's civil society and the people at large. There is growing discontent not only among factions within the CA which oppose Fretilin but also among sections within the population who are concerned about the one party dominance of the process¹¹⁷. Opponents of Fretilin claim that, being the majority, the latter undermined the efforts of others and thus used all possible means to advance its opinion. For example, the adoption of the procedure that every resolution was to be voted on by 'hand raising', as requested by the speaker of the Assembly who is also the General Coordinator of Fretilin, and not through secret ballot compelled party members to follow the party line rather than deciding on the basis of individual conscience. Party members risked 'recall' should they disagree with the party line throughout the drafting period.

Being the minority in the CA, opponents of Fretilin were powerless and had no chance to have their submissions approved. Interestingly, the debates that took place during the drafting process were aired through the local Television and radio stations throughout East Timor, thus giving the people the opportunity to see how these debates were being conducted. Dissatisfaction has been voiced about the fact that while thousands of submissions were forwarded by the population in general, the CA failed to consider or even read any of these submissions (Cidadaun 2002, No 22). The Constitution relies heavily on a number of documents provided by some Portuguese experts, such as the Constitution of Portugal and the Constitutions of the former home countries of some political leaders while in exile, such as Mozambique.

In view of the above, it remains to be seen whether the Constitution will represent or accommodate the 'true wishes' of the people. Indeed, accusations against the dominant party for failing to consider earlier submissions and the ideas of other parties during the drafting process is one issue of much contention. Some members of CA held demonstrations to protest against Fretilin-orchestrated decisions regarding the Constitution and to complain that it does not reflect the nation's interest (Cidadaun, 2002: No.II).

¹¹⁷ See Pro-Kontra Pemilu Parlemen Nasional (Pro-Anti National Parliament Election), *Cidadaun*, No. 22, Minggu II Januari 2002

Interestingly, although controversially, the CA—with the majority of Fretilin — voted to transform itself into the first Parliament of East Timor (section 166). With the exception of Fretilin and its traditional allies—ASDT, Parentil and PDC — almost all other political parties abstained in the voting. They insisted that a new election should be held since the CA's mission was only to write the Constitution. The decision however, had the backing of Untact regulation 2/2001 article 2.6, which states that the CA may transform itself into the future Parliament, if so provided in the Constitution.

b) Technical Challenges

After browsing the general issues, let us now move into some more substantial debates concerning the provisions within the Constitution.

First, there are a number of gaps that still need to be debated further, for example, on the system of government. While the draft Constitution agrees that a semi-presidential system be adopted, in which a president is elected directly by the people and enjoys a status almost equivalent to the parliament, the domination of the Prime Minister is emphasised in almost all aspects of state affairs. The prime minister even limits the position of the president in that even those powers which are the prerogative of the president are required to have approval from the government, making the latter, in some instances, more powerful than the president. For example, section 85 point (g) states that 'to declare a state of emergency or a state of siege, the president requires the authorisation of the National Parliament, *after consultation with the Council of State, the Government* (emphasis is mine) and the Supreme Council of Defence and Security'. In fact, in contemporary democratic states, with a popularly elected president, such an act is not usually scrutinised in strict terms since the president is elected directly by the people and has the power above the government. In reality, the president needs only to consult the Parliament after hearing the advice of the Supreme Council of Defence and Security, and not the Prime Minister or the council of ministers. In a state of siege or emergency, the president should not even need the approval of the Parliament, provided that the declaration is conducted in line with the Constitution and is reported back to the parliament after the state of siege or emergency has ended.¹¹⁸

¹¹⁸ Please refer to the Constitutions of the United States, France and Fiji for comparison.

Another example is section 87 point (b) regarding the competence to appoint and dismiss ambassadors, permanent representatives and special envoys, following *proposal by the Government* (emphasis is mine). This is generally an absolute prerogative of the president, even in a semi-presidential system, and instead of waiting for any proposal from the government, the president may initiate any appointment or dismissals provided that they do not contravene the Constitution. The government might be consulted but it is usually a state business and does not require too much government intervention.

Second, since the Prime Minister is elected, and since the Constitution is written by the dominant party in the parliament, there is a tendency for the UK Westminster style parliamentary system as it applies in Australia to be doomed to be repeated in East Timor. Thus it means the 'President [is] carrying out little more than the functions of an Australian Governor General, making the office of President effectively totally subordinate to the office of Prime Minister'.¹¹⁹ For example, section 80 of the Constitution of East Timor requires the president to remain in the country during the parliamentary recess period and not to leave the country without the consent of the Parliament. This raises questions as to how much 'flexibility' a president can have in times of siege or emergency when the Parliament is in recess and does not have time to reconvene itself, despite the fact that the president's trip abroad may be necessary to prevent external threat. Therefore, should the president be required to wait until the parliament reconvenes itself to ask for its permission or should he/she be allowed to take the necessary steps to prevent such a threat?

Third, discontent with the voting system during promulgation of some provisions is widespread, particularly in relation to certain 'sensitive' issues, as mentioned before. For example, on 3 December 2001, the CA adopted a motion from Fretilin to apply a nomination voting system for three specific provisions: the name of the country, the flag and the date of Independence. This means that to vote on these articles the CA-president calls the names of the individual members one by one. Each has to say whether they are in favour or against the motion or abstain. In this way, the party, rather than individual interest featured much in the voting system, and members of a political party had no chance to oppose the leadership or challenge the party's line.

¹¹⁹ Commentary on the Draft Constitution proposed for East Timor by the Constitutional Assembly. Australian Section International Commission of Jurists, Sydney, November 2001,

Fourth, the party political system entrenched in the Constitution is not a system that comes naturally to the East Timorese people and deprives many of them of the opportunity of having elected members representing the particular region of East Timor from which they come. The party voting system means that you vote for a party ticket not the person. In the proposed Constitution it is even more difficult for any independent or smaller parties to be elected as the quota has been enlarged and there is no requirement for geographic representation at all. Even the thirteen regional representatives have been eliminated in the draft Constitution (sections 62–66)¹²⁰.

Five, with regard to the issue of land, there are currently three different law regimes governing land and properties in East Timor (Adat, Português and Indonesia). The three systems have different legal consequences as far as land titles are concerned. Land has traditionally had the potential to destabilise the security of the nation. Lots of claims, both from groups and individuals, are being made at the moment, and the local courts find it difficult to resolve these since there is no legal framework to solve conflicts among these law regimes when it comes to land disputes. Some political leaders are big landowners, and some of the lands are alleged to have been acquired illegally in the past. Likewise, some people have sold their lands more than three times since ownership of land has changed with the introduction of new administrations and new law regimes in the last 20 years. The draft Constitution has not mentioned anything at all about this issue.

Six, while East Timor falls under the civil law system, it is not known how the courts will be structured since both the Portuguese and Indonesian law systems which have been applied previously in East Timor have few similarities. The Constitution offers a very general structure that allows any government to adopt whatever might suit its interest, thus making the judiciary vulnerable to executive intervention.

Seven, in relation to the economy, the draft Constitution gives the state absolute power to control natural resources (section 139) but at the same time ignores the rights of the indigenous people. East Timor is a society which places high value on its tradition and culture. Veneration of land and ritual sites is part of daily life. In each ethnic group, land is considered 'sacred' (*lulik*) and constitutes the traditional heritage of the clan (*knua*). Exploration

¹²⁰ See also Australian Section International Commission of Jurists, Sydney, November 2001, unpublished document.

of resources in these areas requires close consultation with the locals, yet in the Constitution, not one single provision is designated to give protection to these local heritage issues. The control of the state over resources is almost absolute, resembling that of former communist countries or the most questioned Indonesian 1945 Constitution¹²¹.

Some political problems

While from an academic point of view, the constitution of East Timor resembles other modern Constitutions in the world, much remains to be done in terms of adjusting it to suit local needs.¹²² In addition, East Timor is a Small Island country. Traditionally, the survival of its people depends very much on their relation to the land. Thus, while the Constitution might be guaranteeing the fundamental rights of the people, it needs to accommodate local exigencies and adopt policies that suit local characteristics.

If these are ignored, political implications might follow since it is widely perceived that:

The Constitutional Draft seems to have been driven by certain personalities in the parliament and — according to some internal sources — there has been heavy reliance on the models from Portugal and Mozambique. Indeed, the prominent leaders of Fretilin — the dominant party in the CA — were formerly residents in both countries and are very familiar with the Constitutions of these countries.

In the drafting process, the debate has concentrated very much on the ideas of several personalities, thus it is feared that the Constitution might represent only the interests of certain sections of the community and ignore the interests of the population as a whole. Examples can be seen in section 139 mentioned above.

Uncertainties and inconclusive decisions have plagued the drafting process. For example, the consultations about the document are scheduled to finish on 10 March 2002, and the final approval date for the Constitution has been adjourned to the 16 March 2002. This has raised concerns as to the time

¹²¹ See section 33 of the Indonesian 1945 Constitution. It states that the country has absolute control over the natural resources which will be used for the well-being of the nation. This allows the government to seize both movable and immovable properties that are considered to fit into the above category without giving any right to claim by those who owned them.

¹²² See Untaet press releases from 12–15 February 2002. Source: <http://www.un.org/peace/etimor/DB/UntaetDB.htm>

given to hearings and discussions. Will the six days left for discussion and debates suffice to summarise the feedback gathered during the Consultation period? Will they represent the wishes of the East Timorese?

Concluding remarks: Some Strengths

Despite all the above problems and misgivings, let me point out that East Timor can benefit from various universal and international human rights documents and expertise. Nevertheless, many problems still need to be dealt with in the Constitution. The points presented in this paper are only a few of them, and if not resolved to the satisfaction of all will only aggravate the situation of human rights in a country where the last 25 years has witnessed criminals acting with impunity. Discontent will put the Constitution in a vulnerable position and encourages different regimes to repeatedly revise it since the Constitution does not meet their criteria.

Despite all these drawbacks, it is unlikely that the East Timorese will be drawn back into another civil war. A strong nationalist vision is a guarantee of the stability of this new country. Having been colonised for almost five centuries and having suffered a brutal occupation during the 1975-1999 period, the East Timorese seem to prefer peaceful resolution to physical confrontation when resolving differences. Various sections in the society are working actively to promote reconciliation among the people and political leaders also actively encourage the population to avoid violations of the law.

Strong national leadership is another key factor of unity. During the years of struggle, national leadership has been one determining factor in bringing East Timorese together. The involvement of the Church and the strong faith in the Catholic Church has added to this point of strength. In addition, the long tradition of customary practices and the institutions affiliated with such a tradition seem to provide a strong basis for arguing that there is no room for confrontation in East Timor. What is needed here is political maturity and professional undertaking in order to bring the country forward. Likewise, a good Constitution that is backed up by strong organic laws could guarantee stability and uphold the rule of law in the new nation.

The Voice of the People: Ethnic Identity and Nation Building in Fiji

Brij V. Lal

Ethnically divided societies present complex challenges of nation building to political theorists and constitutional engineers, not to mention their own citizens. Primordial loyalties, based on a combination of religion, race, custom and language run deep. Social cleavages are often institutionalised, impeding national integration and cohesive political development. The search for shared common space is invariably overshadowed by deeply contested claims about the true character of the nation's soul. People invoke different metaphors and allude to different cultural and historical experiences to validate their particular claims to a proper — and sometimes prior — consideration in the nation's affairs. Which rituals, symbols, ceremonies and cultural practices get publicly recognised and rewarded are matters of more than passing importance; they go to the core of how people define themselves — and how they are perceived — within the wider polity.

Different states at different times have adopted different strategies to resolve the tension between institutionalised diversity and division on the one hand and unifying political integration on the other. Sometimes the question is resolved through explicit recognition of difference through consociational structures and policies¹²³. Sometimes it is resolved through non-democratic means. Sometimes the dominant group manipulates the democratic system and its legislative processes to impose its will on the populace¹²⁴. Violence, or the threat of violence, is another powerful enforcer of conformity. While these mechanisms may succeed in achieving an uneasy

¹²³ Lijphardt, 1977.

¹²⁴ Horowitz, 1985.

peace in the short term, they do not, indeed cannot, provide the foundation for enduring political stability. That is achieved only through consensus among citizens about the basic premises and purposes of government, not through coercion.

The question to be asked, then, is: What kind of constitutional arrangement is appropriate for ethnically divided societies to establish lasting peace and stability, an arrangement which will enlarge the common space without doing undue violence to the legitimate interests, concerns and aspirations of important sectional cleavages within the polity? There is an added dimension to the question in societies with large indigenous populations demanding recognition of their unique, and uniquely rich, traditions in the body politic. All these in addition to the usual questions which confront constitution makers, about the rules and procedures of government, about the balance of rights individuals want to keep to themselves and those that they cede to the state in the collective interest, about the rules governing the distribution of public goods and services.

This paper shares the experience of devising a constitution for an ethnically divided state in the South Pacific. The Republic of the Fiji Islands is a multi-ethnic state whose population (in 1996) of 780,000 is divided between indigenous Fijians (now 51 per cent of the population) and Indo-Fijians (43 percent). It gained its political independence from the United Kingdom in 1970 under a Westminster system of government which accommodated special Fijian interests and concerns through specific legislative provisions within an overarching framework of parliamentary democracy¹²⁵. The assumptions and understandings which underpinned that order came under increasing challenge from forces of social and economic change in the tumultuous years following independence¹²⁶. A military coup in 1987 removed from power a government whose ideology questioned the foundations of the post-colonial state, and installed a political order which reinstated the status quo. This found expression in the constitution decreed in 1990. The provisions of this constitution were controversial for reasons that will become clear in due course.

In 1995, an independent Commission was appointed by the Fijian parliament to review the 1990 constitution. The Commission was asked to recommend constitutional arrangements which would meet the present and

¹²⁵ Lal, 1992.

¹²⁶ Taylor, 1987.

future needs of the people of Fiji, and promote racial harmony, national unity and the economic and social advancement of all communities living in Fiji. Those arrangements had to guarantee full protection and promotion of the rights, interests and concerns of the indigenous Fijian and Rotuman communities; have full regard for the rights, interests and concerns of all ethnic groups in Fiji; and to take into account internationally recognised principles and standards of individual and group rights. In accomplishing this task, the Commission was expected to have scrutinised the constitution, facilitated the widest possible debates on its terms, and after ascertaining the views of the people, suggest how the 1990 constitution could be improved upon to meet the needs of Fiji as a multi-ethnic and multicultural society (Report, 1996).

It is not necessary here to discuss how the Commission interpreted the task it was entrusted to accomplish. What I want to share with you — and in this presentation I am talking as a member of the Commission — are some of the things we heard as we travelled around the country to listen to the peoples' views about their deep concerns and fears and about the kind of constitutional structure they wanted for themselves. I will do so by reference to a few specific issues to illustrate the great, and sometimes it seemed, unbridgeable, gulf between what the two main ethnic groups wanted. Their divergent, not to say diametrically opposed, demands were articulated in their submissions to the Commission. Some of these are reproduced here to give the reader a sense of the gulf that divided the two communities in Fiji, and the difficulty that faced the Commission in devising an acceptable constitutional framework for Fiji.

Paramountcy vs Parity

To start with, there was disagreement among the main parties about the meaning of the word 'review'. To the Fijian side, including Sitiveni Rabuka, a review was just a review, not a requirement to reform. To his political opponents, though, it was — as it had to be — a prelude to reform, otherwise the whole exercise was an expensive waste of time. The overwhelming majority of the Fijian submissions said that the 1990 constitution was perfect or near-perfect, and should, therefore, be retained. 'The 1990 constitution is here to stay,' the SVT declared in a long, emotionally-charged written submission. 'It should be reviewed to make its provisions more considerate of the position and sensitivities of all communities in Fiji's multi-ethnic and multicultural

society.' But that would be acceptable only on the understanding that the control of the government and parliament of Fiji remained in Fijian and Rotuman hands; the chiefs were given a prominent constitutional and national role; and the constitutional guarantee for affirmative action policies already in place for the two indigenous communities was retained. The Fijians, the SVT told the Commission, 'want to be assured that nothing they have gained through the coups of 1987 and in the 1990 Constitution is undermined or compromised.' Manasa Lasaro, fire-breathing, hard-line general secretary of the powerful Methodist Church, echoed the same feeling in equally non-compromising terms: 'The Fijians are not here to negotiate but to re-assert their authentic position and identity that governance and leadership rights are solely theirs for the simple and clear fact that they as the original inhabitants of this land are the true owners.'

The Fijians invoked both culture as well as history in support of their claim for political control, in addition to a rather strained interpretation of international covenants on indigenous rights. Cultural right to political supremacy was justified in terms of the *Taukei-Vulagi* concept. The *taukei* were the indigenous owners of the land, having got there first. That fact of prior arrival had conferred upon them an inalienable right to rule the country. *Vulagi*, foreigners, later arrivals, could never aspire to full rights with the *taukei*. Instead, they had to learn to accept their humble position, know their proper place in the social hierarchy, and serve the needs of the *taukei*. As the Fijian nationalist scholar Asesela Ravuvu put it, 'The *vulagi* are generally the work-horses of the physical and social settings in which they are established. They generally provide their best in order to be acceptable to the *taukei*'¹²⁷. If the *vulagi* asserted their rights or demanded recognition for their services, they were asking for trouble. 'All is well if the *vulagi* is humble, respectful, tolerant and cooperative.' But if the 'guest does not comply with the host's expectations then he may very well leave before he is thrown out of the house.' Ravuvu continued: 'The Fijians believe the *taukei* have a pre-eminent right to political rule in Fiji by virtue of being the descendants of the people who have settled these islands for the last 3,500 years before the Indians and Europeans arrived. That belief may offend modern principles of equality but the Fijians have never accepted equal right to political power as relevant to the future well-being of this multi-racial country.' No ill-feeling, no problem: that is the way things are, and have always been, and that is the way they should remain.

¹²⁷ Ravuvu, 1992:58.

Many Fijians also asserted their right to political supremacy by invoking the concept of the 'paramountcy of Fijian interests'. As the Cakobau family submitted to the Commission, Fiji was ceded 'with the understanding and recognition that Fijian interest will remain paramount [and that] this paramountcy [would] be safeguarded by Great Britain.' The words 'Fijian paramountcy' entered the colonial vocabulary in the early 20th century, though common understanding attributes their origin to the Deed of Cession which formalised Britain's acquisition of Fiji as a Crown Colony on 10 October 1874. In fact, the words do not appear in that document, which recorded that the chiefs had 'determined to tender unconditionally' the sovereignty of the islands to Queen Victoria and her successors, 'relying upon the justice and generosity' of Her Majesty in dealing with her subject people. Cession, the chiefs hoped, would promote 'civilisation,' and 'Christianity' and secure good and stable government. In response, Sir Hercules Robinson, who had accepted Cession on behalf of the British crown, gave the undertaking that 'the rights and interests of the said Tui Viti and other high chiefs the ceding parties hereto shall be recognised so far as is and shall be consistent with British Sovereignty and Colonial form of government.'

Many Fijian submissions also noted that as the Deed of Cession was signed between leading Fijian chiefs and the British monarchy, no other third party should have therefore been entitled to have any role in its termination. When Fiji became independent, the argument went, Fiji should have been returned to the Fijian chiefs and their people who had ceded the islands in the first place. Because this had not taken place, independence granted in 1970 did not represent true decolonisation of the country. If Fijian people had been asked for their opinion, they would have voted overwhelmingly for Fijian political control of the country at the time of independence, with only a marginal participation, not full partnership, for other ethnic communities. Some argued that the Fijian chiefs who were at the helm of indigenous and national leadership at the time had deliberately kept their people uninformed about the true nature of what was taking place.

The colonial government asserted the principle of paramountcy in part because of a genuine concern for the interests of the indigenous community. In part, it was a rhetorical device to protect the interests of the colonial government itself. And in part, it was used as a device to stall the progress of political change, on the basis of a common roll, demanded by the Indo-Fijians. Be that as it may, there is no doubt that the colonial government had

used the concept in a protective sense. At the time of cession, Sir Arthur Gordon, the first governor and a man unusually sensitive for his time to the welfare of indigenous people, had created special institutions to shield the Fijian people from the challenges and pressures of the modern world. A separate Fijian Administration was created to cater to the special needs of the Fijians. The pattern of land ownership was deciphered and entrenched to restrict land alienation and to secure permanent, inalienable, Fijian right to landownership. The principles of customary usages and practices were recognised. Separate native regulations were devised to structure the mobility and progress of the people and to keep intact the fabric of the traditional society. In colonial parlance, the term 'paramountcy of Fijian interests', referred to matters of internal governance of Fijian society. Over these matters, Fijian views would prevail.

This 'protective' interpretation was unquestioned until the advent of decolonisation in the Pacific in the 1960s. Then, the Fijian chiefs re-opened the question in the now-famous Wakaya Letter in 1964 where they laid down certain preconditions for independence¹²⁸. These included iron-clad guarantees on Fijian landownership, Fijian veto power over legislation pertaining to Fijian issues, and declaration of Fiji as a Christian state. The lop-sided 1966 constitution, enacted after a controversial constitutional conference in London a year earlier, secured for the Fijian people the outcome they desired, and the matter was not raised. From 1966 to 1987, a Fijian dominated party, with a high chief at the helm, had been in government, which Fijians saw as only natural and proper. After independence, for a variety of reasons, Fijian paramountcy had been transformed from a protective principle into an assertive one. That is, the view that Fijian interests could only be secure if Fijians controlled power. The paramountcy of Fijian interests thus came to mean the paramountcy of Fijian political interests. At every post-independence election, whenever the results seemed close and the dominant Fijian party threatened, violence was threatened. 'Blood will flow' became a common expression on the hustings.

From the Fijian point of view, then, the coup was entirely predictable. The argument went that Fijians accepted the rules of the game as long as they were winning. The moment they lost power, they masterminded the coup to return the government back to the Fijians. The 1990 constitution decreed

¹²⁸ La1, 1992.

into existence by the then President Ratu Sir Penaia Ganilau, was a logical attempt to realise the 'aims of the coup'. Even moderate Fijians saw its racially discriminatory provisions in favour of the indigenous Fijians as a necessary interim measure, to enable Fijians to 'catch up' with other communities. Any change to the constitution had to be moderate and incremental. Many Fijians wanted Indo-Fijian participation in national decision making, but a full and equal partnership was another matter. This view was shared by many General Voters and some other minority groups, including a section of the Muslim community, which was prepared to recognise the principle of Fijian political paramountcy in return for a number of separate seats in parliament for themselves.

For the majority of the Indo-Fijians, however, the 1990 constitution was not a solution to the problems facing Fiji; instead, it was the principal cause of many of the difficulties facing the country. They made its review by an impartial body a central plank in the election campaigns in 1992 and 1994¹²⁹. They called the document divisive and destructive, reducing the Indo-Fijians to second-class citizenship. The constitution had excluded Indo-Fijians from power, discriminated against them in the public sector and in the allocation of public resources, and had spawned a political culture unconducive to national development and united progress. In the words of the Fiji Youth and Students League, 'The 1990 constitution is a racist and an undemocratic document. Many find this document strongly detestable and only worthy of incineration. We abhor this document. Our conscience tells us only to have it removed. It is a shame on the people of Fiji. It smacks of racism and oppression of a large section of the people of Fiji. It relegates Indo-Fijians from their rights to stand on equal footing with the rest of the people, particularly Fijians.'

While Fijians had stressed their indigeneity as the basis for their claim for political control of the country, Indo-Fijians invoked their contribution to the country as the basis of their claim for political equality. As the Arya Samaj put it, 'The Indo-Fijians did not come here as colonizers or conquerors but brought as indentured labourers (which is an euphemistic word for slavery). They have contributed immensely to the development of this country. It is most humiliating to be told four generations later that their rights are inferior to that of the other communities, in one's own country of birth.'

¹²⁹ Lal 1998.

The Indo-Fijian understanding of the concept of the paramountcy of Fijian interests was different from the Fijian. The Indo-Fijian leaders argued that Fijian interests, such as the role and status of the Bose Levu Vakaturaga, Fijian ownerships of land, and the meaning and interpretation of customary practices, should continue to be entrenched in the constitution, and that over these matters the Fijian chiefs or their elected or nominated representatives in parliament should continue to exercise the power of veto. But they disagreed that Fijian paramountcy meant keeping a Fijian government perpetually in power. They continued to view the paramountcy of Fijian interests in its original protective role, assuring the *taukei* that there would be no interference with their land, their culture or their separate system of administration (at the provincial and district levels). They expressed sympathy for the social and economic difficulties facing the indigenous community and wanted them alleviated, but they rejected the idea that the paramountcy of Fijian interests meant an ongoing commitment to secure the re-election of a predominantly Fijian government.

Just as some Fijian leaders had invoked the Deed of Cession to support their claim for a privileged position in the Fijian polity, Indo-Fijians, for their part, used another historical document to support their claim for political parity. That document was the Salisbury's Despatch of 1875 which had stated that 'an indispensable condition' of continued indentured emigration was the undertaking by the colonial governments that those indentured migrants who chose to remain in the colony 'will be in all respects free men, with privileges no whit inferior to those of any other class of Her Majesty's subjects resident in the Colonies'. The policy suggested in this document was never implemented which, in the view of some, negated its practical significance. Nevertheless, as the Crewe Commission said in 1910, 'The whole tenor of the correspondence between India and the colony shows that it was on this condition [enjoyment of equal rights] that indentured immigration in Fiji has been allowed in the past, and any measures leading towards lowering the political status of the immigrants or reducing their leading freedom would, in our opinion, involve a breach of faith with those affected.' The moral undertaking of equality was beyond doubt¹³⁰.

The Indo-Fijians pressed that point about equality to the Commission. As one submission said, echoing the sentiments of many others:

¹³⁰ Lal, 1997.

'The Constitution should reaffirm the equal rights of all the citizens of Fiji, irrespective of race, colour, creed, religion, or gender, to live in peace and harmony, without prejudice and with due regard to the UN declarations on freedom of human /individual rights.' This was a perfectly sound proposition to those whose ears and minds were attuned to modernist and universalist discourses. But the main Fijian party saw it differently. First, the SVT argued, 'Inequality of political representation in Parliament need not be regarded as undemocratic or a deprivation of the human rights of other communities. What is important is that people have opportunities to participate in decision making or to influence Government decisions with competing interests weighed in the balance.' In any case, the SVT continued, 'there has been little Fijian identity with or sympathy for the Indian people's demands for political equality because the Fijian view of political rights is hierarchical and collectivist, rather than individualist. It is people oriented and people concerned rather than individual concerned.'

That being so, the SVT saw no difficulty in arguing that the Bose Levu Vakaturaga should also become supreme body of Fiji as a whole. 'The people of Fiji must acknowledge that the Bose Levu Vakaturaga is the repository of power as far as the Nation of Fiji is concerned. It is the wellspring, the fount from which the power to govern is derived. It is the supreme forum of this land and remains always the fount of power, the fount of mercy, and the fount of honour.' The BLV was nothing less than the instrument of God's leadership and, as such, to be respected by everyone, including non-Fijians. Most Indo-Fijians respected the BLV for what it was, the supreme umbrella organisation of the indigenous Fijians, and most wanted it to be strengthened and constitutionally protected. They acknowledged the role it had played in contemporary Fijian history, but they demurred at the grand and significantly enlarged role envisaged for it by the SVT. Had it not endorsed the coups and the constitution that they had rejected as being racially discriminatory? Even some Fijians questioned its partisan role in sponsoring a particular political party, the SVT, to the exclusion of other Fijian parties. Many Indo-Fijians wanted an indigenous Fijian to be President of the Republic, as a symbolic recognition of the indigeneity of Fiji, but they wanted a hand, however indirect, in choosing the occupant of the office. In this, they received support from some unexpected quarters. The Fiji Council of Churches: 'This is an age of democracy and accountability. We are a society in a stage of transition.

Traditional leaders do have a role to play. There is no going back to the stage of nominating and appointment to leadership from the top. People should elect their decision-makers. Democratic and accountable leadership reflecting the will of the people must be the basis of governance.'

International conventions were invoked by both sides in support of their particular claims. The paramouncy seekers invoked the ILO Convention No 169 on Indigenous and Tribal Peoples as well as the draft Declaration on the Rights of Indigenous People. Article 3(1) of Convention 169 provides that 'Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance and discrimination,' while Article 1 of the Declaration provides that 'Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.' Article 4 of the same document provides that 'Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal system, while retaining their rights to participate fully, if they choose, in the political, social and cultural life of the state.' The intent of these provisions is to ensure that at the national level, the indigenous people have the same rights and privileges as other citizens. There is no suggestion in the instruments themselves that indigenous people have a superior or paramount right in taking part in the government of their country. The Commission accepted the view that concepts such as 'sovereignty' and 'self-determination' cannot be invoked by indigenous communities to claim a position of dominance over other groups forming part of the same national society.'

There was a clear tension between the claims for paramouncy and indigenous rights on the one hand and parity and acceptance of universal values of human rights on the other. The deeply held convictions on these issues and the passion with which they were articulated were moving in their apparent transparency and sincerity. What was startling was the discovery that after a hundred years of living together, the positions were so divergent. There seemed to be little common ground among the principal communities, such little common understanding about the nature and purpose of a life lived together.

Religion

Another issue which aroused considerable controversy was religion. Both the SVT and the Methodist Church, to which about 80 per cent of the indigenous Fijians belong, demanded that Fiji be declared a Christian state, although it has to be said that not all Christian denominations — Catholics, Anglicans and others — shared this sentiment. Nor did some leading members of the Methodist Church itself, though they were in the minority. The SVT's case for declaring Fiji a Christian state was based on a number of grounds. Christianity had become an integral part of Fijian culture and way of life. Its elevation 'has to be part of the larger argument of paramountcy and sovereignty of the interests of indigenous Fijians as the *taukei*, descendants of the first settlers.' Another reason was the 'respect for the contribution of Christianity to the civilisation of this country, the contribution to education and social well-being of the indigenous Fijian, the deep and sincere belief that we [indigenous Fijians] have been blessed through reverence of the Lord, the only way to cement this commitment is through the declaration of Fiji to be a Christian state.' O Baba echoed the same view: 'It was the Christians who brought civilisation into this country, which ended tribal wars, cannibalism and brought peace to the inhabitants of this nation. All the other religions came later, and only after peace had already been established in this nation.' Hence the case for special recognition of Christianity in the constitution.

Most Pacific island constitutions acknowledged Christianity's contribution in their Preambles, and was it not true that the British monarch herself was the 'Defender of the Faith,' and head of the Anglican Church, many vocal supporters of the Methodist church argued? Malaysia had declared Islam as the State religion while other faiths were allowed freedom of religion and worship. Manasa Lasaro put another reason before the Commission: 'We are merely asking that since we recognise the Deed of Cession to be a covenant not only between Fiji and Great Britain, but beyond this a spiritual covenant between our forefathers and God as personified in the Lord Jesus Christ, that this recognition that Fiji be a Christian State be formally declared in the Constitution.' The Bible was quoted: 'Blessed is the nation whose God is the Lord; and the people who he hath chosen for his own inheritance.'

The demographic argument was advanced in support as well. Fijians and Rotumans had become the majority community in Fiji and the constitu-

tion should reflect the values, wishes and aspirations of the majority of the country's people. Honouring the SVT's request would simply reflect the current practice where Christianity was given the pride of place on state occasions, such as the Fiji Day on 10 October. There were others who genuinely believed that making Fiji a Christian state would facilitate the evangelical goal of Christianity to convert all non-Christians to that faith. Sitiveni Rabuka himself had declared that to be a goal at the time of the military takeover¹³¹. Some presenters had another agenda. In recent years, many new sects have entered Fiji, mostly from the United States, causing dissension in the villages with their preaching. These had to be stopped. Making Christianity (of the Methodist variety) a state religion would assist in that process.

Most non-Christian faiths — and some Christian denominations as well — opposed the idea of making Fiji a Christian state. Ratu Jone Madraiwiwi, a high chief and spokesman for the Interfaith organisation, said: 'Separation of church and state should be upheld because Fiji is now home to many faiths. Christianity ought not to seek to impose itself by association with the state. It influences by example through divine guidance and the loving power of the Holy Spirit. Christ's life speaks for itself and for us.' The Arya Samaj agreed. As they put it, 'specific emphasis on one particular religion, to the exclusion of other major religions followed by large segments of Fiji's population, negates the Human Rights provisions as to the Freedom of conscience and that is not conducive to creating an atmosphere of trust and understanding amongst major religious groups and cultures in Fiji. The new constitution must treat all cultures and religions with equal respect, just as it must aim to reconcile communal and group differences and have political stability. The State should not take sides with particular religious groups.' Fears were also expressed about the practical implications of making one faith the state religion. Might not that decision require practical support, to the detriment of the other faiths? In Malaysia, non-Islamic faiths had complained of discrimination and victimisation, and the conversion of Muslims to other faiths was forbidden and punishable at law. As some people put it thoughtfully, it was better to live a Christian way of life than to impose Christianity on others. That, it was said, would be an un-Christian act.

¹³¹ Rabuka, 1998.

Language

Language was another issue which aroused considerable debate. Many Fijian submissions talked eloquently about the uniqueness of Fijian culture and heritage and the need for all the people of Fiji to embrace their core values. As Jonetani Kaukimoce, a SVT parliamentarian put it, 'I believe that the Fijian's value, tradition, customs, way of life are unique to ourselves. This means that the Fijian race is a special race that needs to be preserved.' To that end, among other things, many Fijians wanted the Fijian language to become the national language of Fiji, the language of government. It would be a symbolic recognition of the indigeneity of Fiji. Many Indo-Fijians agreed that they should have done more to learn the Fijian language; indeed, in rural areas of western Viti Levu, many were fluent in the local dialects. And some Sangam schools had plans to teach Fijian in their schools. But as with religion, there was disquiet about what making Fijian a national language would actually mean in practical terms. Would it mean the relegation of other languages in the public sphere? The fears were heightened in the overall context of the Fijian demand for political paramountcy. Most Indo-Fijians felt that privileging one language would be contrary to the idea of Fiji as a multiracial, multi-cultural society. Learning another language should be encouraged, but all the three principal languages of Fiji, Fijian, Hindi and English should be accorded equal status in the constitution. This was the Commission's recommendation and it was incorporated into the new constitution.

Common Name

Common name was another subject which was taken up in a number of submissions to the Commission, particularly but not exclusively by non-Fijians. Its absence was seen as a serious shortcoming, a stark reminder of lack of an overarching national consciousness unifying the country. How can you build a cohesive multiracial nation if the citizens were kept in racial compartments and could not agree among themselves about their common identity? As Vijay Naidu and Ganesh Chand put it in a private paper, 'The absence of a common National Name coupled with the promotion of sub-national identities and loyalties have been at the detriment of the development of national goals and objectives which are accepted by all of Fiji's people. Indo-Fijians do not feel that they have any affinity with the state or its apparatuses as these are perceived as belonging to and for the benefit of Ethnic Fijians, Indo-Fijian

public servants are viewed as serving the interests of the latter.' The Fiji Council of Churches said much the same thing. A common name 'will take on a new meaning centring upon a common task, that of breaking barriers, so that we can together progress. It would mean that the word Fijian, which is seen by many people to rightfully belong to the first people of Viti who broke through the barrier breakers to make these islands their home and developed their language, custom and culture in special relationship with the vanua and the surrounding ocean, would be extended to include all subsequent to include all subsequent 'barrier breakers' as well as envisioning and defining our identity as a nation.' For good measure, the Council quoted Ephesians 2:4 'For he himself is at peace, who has made the two one and has destroyed the barrier, the dividing wall of hostility.'

But not everyone wanted a common identity, preferring instead the security and comfort of their own separate ethnic identity. And most Fijians did not want the common name of Fiji citizens to be 'Fijian'. Jone Duicagi Tuiwai, chief of the yavusa Nuburayi, put the issue this way, capturing a widely held sentiment among his people: 'The name Fijian must not be used as a common name for all the people of Fiji. Fijian is the inheritance of the indigenous Fijian people. We do not want to share it with those people who migrated to Fiji and are still practising their own custom and culture and speak their own language. These people just want the name to become native. One day they will claim as their birth right a share in our land. The Review Commission must find a common name for all, and each race must treasure and honour his name, e.g. Great Britain: British for all; England maintain English; Wales — Welsh; Scotland — Scots, and Ireland — Irish. These people are proud and they protect their races in a multi-racial country.'

Tuiwai's submission raised two issues. One was the puzzlement, bordering on irritation, among some people about why Indians wanted to be called Fijians? Why couldn't they be happy being what they were, why weren't they proud of their racial identity? In any case, a common name was not a panacea for Fiji's problems as people like Naidu and Chand argued. As Jone Banuve put it to the Commission, 'by having a national name would not stop disunity among races in a country like Fiji.' India, Ireland, Indonesia, Egypt and Somali all had a common name for their citizens, but that had not necessarily helped the cause of national unity. The second issue was the fear that appropriating 'Fijian' as a national name was but the first step in a grander scheme by non-Fijians to appropriate other things Fijian, including,

especially, land. As one person said, the appropriation of the Fijian name by other groups 'would diminish the image of the indigenous race and their cultural heritage in the eyes of the world.'

Whatever our own views about these feelings, and however irrational or unfounded they may sound to western, rational minds, they were, and still are, widely held by many ordinary Fijians. But there were some genuine objections to the usage of Fijian as national name. A number of institutions that deal with specifically Fijian issues and concerns are named 'Fijian', such as the Fijian Affairs Board, the Fijian Administration, to name just two. To use the word to include non-Fijians as well would create unnecessary confusion. In the end, the Commission recommended that Fiji be named the Republic of the Fiji Islands, thus allowing its citizens to call themselves Fiji Islanders, if they chose to. The compromise seems to have been generally well accepted.

Citizenship

Citizenship was another issue on which opinion varied greatly. Many Fijians opposed the idea of dual citizenship, except for the indigenous people. All Fijians are registered in the *Vola ni Kawa Bula*, the Register of Native Births. By that deed, they are registered as belonging to a particular landowning clan. Once properly registered, they are its members for life. Irrespective of where Fijians live, they can still lay claim to a parcel of land of their *matagali*. That being the case, many Fijians argued that a Fijian will always be a Fijian even if he or she took up another citizenship. Many wanted that fact to be constitutionally recognised. The fact that a Fijian had accepted another citizenship did not eradicate his or her emotional, spiritual links to the land. But many Fijians were not keen to allow other ethnic groups the right of dual citizenship. The fear was that this would be manipulated by the other groups to their political advantage and to the detriment of the Fijian people. The fact that a sizeable number of Indo-Fijians lived overseas, and who could conceivably apply for dual citizenship, reinforced Fijian resistance. The Fijian view allowing the indigenous people dual citizenship but denying it to others did not seem contradictory to its proponents even as it appeared blatantly discriminatory to others.

There were divergent views also on the citizenship rights of women. The 1990 constitution, like its predecessor, disadvantaged women in one

important respect. Whereas foreign wives were entitled to automatic citizenship upon marrying a Fiji national, foreign husbands were not. They could apply for citizenship after a period of residence in the country. How widespread a problem was this in Fiji it was difficult to tell, but for most women, the symbolism of discrimination in the citizenship provisions of the Constitution was the most problematic issue. The demand for gender equality would appear eminently sensible to most people. But consider, for a moment, the views of those who — admittedly a minority — argued against it. One argument reflected fear of exploitation of local women by foreign men. These men, the argument went, would use local women, who had little experience or knowledge of the world, to become citizens. Once in, they would use their superior skills and knowledge to displace local men from their jobs.

There was a deeper cultural argument as well. In traditional Fijian society women accompanied their husbands upon marriage. It was the husband's responsibility to look after their wives and families. Women who married foreigners knew what they were doing. To bring their husbands to live with them was something culturally alien to the values of traditional society. Some men of the older generation pleaded with us not to use the wedge of western culture and values to break open the culture of the traditional society. However, the Commission, bound by its terms of reference to bear in mind international conventions about human rights, decided in favour of gender equality, much to the delight of women's organisations, but not before giving serious consideration to the cultural context.

Compact

The Commission was convinced after listening to the submissions that the people of Fiji wanted all communities to play some part in the Cabinet, and that voters should be able to cast votes for at least some candidates belonging to communities other than their own. They disagreed on the means of achieving that end and the pace of direction of multi-ethnicity, but the broad goal was widely shared. The Commission agreed that progress towards the sharing of power among all communities was the only way to attain racial harmony, national unity and the social and economic advancement of all communities. The promotion of multi-ethnic governments for multi-ethnic societies should be the goal of constitutional arrangements. Such arrangements should protect the rights, interests and concerns of all citizens,

particularly of the indigenous communities. And they should provide incentives to political parties to strive for the goal of multi-ethnic cooperation, and for the political process to move gradually but decisively away from the communal system of political representation. The principle that Fijian interests are paramount should be recognised, as in the past, in its protective role, in securing effective Fijian participation in a multi-ethnic government, along with members of other communities, and in securing the fruits of affirmative action programs of social and ethnic justice based on a distribution of resources broadly acceptable to all. Fijian interests should not be subordinate to the interests of the other communities, but ultimately the best guarantee of the interests of all ethnic communities was a constitution that gave all political parties strong incentives not to espouse policies that favour the interests of one community over the interest of others. Instead, it should encourage them to see the important interests of each community as national interests which have to be met through the concerted effort of all.

This goal of achieving an inclusive, democratic, open and free multi-ethnic society is reflected in a number of the Commission's recommendations. Fiji should be renamed the Republic of the Fiji Islands to enable all who live there to call themselves Fiji Islanders. All the three principal languages of Fiji, Fijian, Hindustani and English should be accorded equal status. Fiji should not be declared a Christian state, but there should be a special mention of its importance and contribution to the nation, along with that of the other faiths. The Commission also recommended, and the parliament accepted, that there should be a compact that enshrines certain values and principles which every government should take into account in formulating policy. The principles in the Compact state that:

The rights of all individuals, communities and groups are fully respected.

The ownership of Fijian land according to Fijian custom, the ownership of freehold land, and the rights of landlords and tenants under leases of agricultural land are protected.

All persons have the right to practice their religion freely and to retain their language, culture and traditions.

The rights of the Fijian and Rotuman people include their right to governance through separate administrative systems.

As citizens, members of all communities enjoy equal rights, including the right to make their permanent home in the Fiji Islands.

The rights of a citizen include the right to form and join political parties, to take part in political campaigns, and to vote and to be a candidate in free and fair elections of members of the House of Representatives held by secret ballot and ultimately on the basis of equal suffrage.

The formation of a government has the support of a majority in the House of Representatives on the electoral support received by the various political parties of pre-election coalitions, and, if necessary or desirable to form a coalition from among competing parties, depends on their willingness to come together to form or support a government.

In the formation of a government, and in that government's conduct of the affairs of the nation through the promotion of legislation or the implementation of administrative policies, full account is taken of the interests of all communities.

To the extent that the interests of the different communities are seen to be in conflict, all interested parties negotiate in good faith in an endeavour to reach agreement.

In those negotiations, the paramountcy of Fijian interests as a protective principle continues to apply, so as to ensure that the interests of the Fijian community are not subordinated to the interests of other communities.

Affirmative action and social justice programs to secure effective equality of access to opportunities, amenities or services for the Fijian and Rotuman people, as well as for other communities, for men as well as for women, and for all disadvantaged citizens or groups, are based on an allocation of resources broadly acceptable to all communities.

The equitable sharing of political power amongst all communities in the Fiji Islands is matched by an equitable sharing of economic and commercial power to ensure that all communities fully benefit from the nation's economic progress.

Each of the three commissioners brought to the review exercise their own views and understandings of justice, fairness, equality. There was unanimity on most of the important points. We not only recognised the role of the Bose Levu Vakaturaga but specified its role and function in the constitution. We recommended that it should be an independent body with its own administrative staff so that it could discharge its functions independent of political interference from the party in power. That recommendation was rejected in favour of the status quo, which provided for the operation of the BLV within the terms of the Fijian Affairs Regulation.

We also recommended that the Head of State should be an indigenous Fijian. We had little hesitation in making this recommendation because the overwhelming majority of people in Fiji had expressed support for it. But since the Head of State was to be a symbol of unity of the entire nation, the people should have some participation in his or her selection. To that end, we recommended that both houses of parliament should constitute an electoral college and select the President (and his or her running mate, as in the United States) from a list of 3–5 names submitted to them by the BLV. It was, in our view, a sensible and workable compromise, addressing the concerns and interests of all communities in Fiji. That proposal was rejected in favour of the status quo where the BLV appointed the President.

On the most basic question of all, the Commission adopted the view, after long and thorough reflection, that multi-ethnic societies ought to have multi-ethnic governments. Excluding one major ethnic group from power in favour of another purely on the grounds of ethnicity (or religion or language) would be a recipe for instability and continuing unhappiness in the country. Communalism had not resolved Fiji's political and economic problems; it had compounded them by placing people in separate ethnic compartments. It had fostered a culture of distrust and division, and nurtured the sense that one community could progress only at the expense of the other. We felt that it would be best for Fiji to move gradually but decisively away from the politics of race and ethnicity to inclusive non-racialism, to enlarge the common space of national consciousness, to bring the nation together. The future of Fiji lay in political integration, not political dis-aggregation.

The Commission's view was rejected in favour of a dominantly ethnically based electoral system where two thirds of the seats in the House of Representatives would be contested along racial lines, with each ethnic group voting for its own ethnic candidates, and one third on a non-racial basis. Political leaders had become so accustomed to communal politics that they could not imagine an alternative system based on non-racial foundations. Voting in Fiji has always been on ethnic lines, it was said in defence of this view. That is certainly true, but the reason was an ethnically based electoral system which rewarded ethnic behaviour. I fear this narrow preoccupation with ethnicity permeating other levels of society, with people thinking first and foremost of their own cultural, provincial and regional identities before national identity.

The work of the Fiji Constitution Review Commission is now part of the history of Fiji, open to the scrutiny and interpretation of scholars. What the final judgement will be I cannot predict. All that I can say is that I am as intellectually convinced now as I was when we submitted our report to the President of Fiji, that the course we charted for Fiji was the correct one. In time, it may come to be viewed as the touchstone against which future political progress of the country may be judged.

When we began our journey, we had no sense of our final destination, no sense of what the final outcome of our work might be. There were many days of despair along the way, times of intense pressure and moments of deep doubt about our ability to square the circle. But as Abraham Lincoln once said, 'The probability that we may fail in the struggle ought not to deter us from the support of a cause we believe to be just.' For me personally, the exercise was a deeply humbling experience, a student of history participating in a historic process of change and renewal. The faces of people who appeared before us have faded from memory, the faces of hundreds of ordinary citizens who told us their deepest fears and their hopes for the future for themselves and their children. The look of sadness and despair in the eyes of some and of triumph and defiance in the eyes of others. The tension between the fear, on the one hand, that nothing will come of the exercise and the anxiety, on the other, that something might indeed result from our work. The faces have faded, but the voices continue to haunt. 'Things past belong to memory alone; Things future are the property of hope'.

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Note: For obvious reasons, I have referenced the paper lightly. The texts which provide the context for the account given here are listed below. The quotes from the submissions to the Constitution Review Commission come from papers in my possession. A full set has been microfilmed by the Pacific Manuscript Bureau and is available to researchers.

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Post-conflict Human Rights and their Constitutional Implications: The Cambodian Experience over the Last Ten Years

Lao Mong Hay

Since World War II Cambodia has experimented with all major systems of government: absolute monarchy, constitutional monarchy with parliamentary democracy, republic with an army general as president, Maoist communist republic, soviet communist republic, and now back to constitutional monarchy with parliamentary democracy. Cambodia's recent tragic history led to its re-adoption of the system it had abandoned in 1970.

In 1970 the constitutional monarchy was overthrown when the ruling elite led by an army general decided to go to war to rid Cambodia of the communist Vietnamese sanctuaries in the regions bordering Vietnam, at the end of the Ho Chi Minh Trail. Cambodia was then engulfed in the Vietnam War. A communist group, commonly known as the Khmer Rouge, seized power in April 1975 at the end of that war and imposed a harsh communist rule. Under the Khmer Rouge rule well over one million Cambodians were killed or died of starvation or diseases. Cambodians then had neither rights nor rice. The United Kingdom intervened at the United Nations High Commission for Human Rights, only to be resisted by the Khmer Rouge regime and by the Soviet Union. The American President called the Khmer Rouge then the world's worst violators of human rights. An American Senator called for the dispatch of troops to attack the Khmer Rouge. At the end of 1978, following protracted border conflicts, Vietnam sent its troops to oust the Khmer Rouge. These troops occupied Cambodia and installed another, less harsh communist regime to rule it.

An armed conflict ensued when the Khmer Rouge and two non-communist groups were fighting side by side against the Vietnamese occupation. The Cambodian conflict had gone on for some ten years. At the

initiative of Indonesia, a peace process started in 1988 in Jakarta and, with Australia's final push, concluded at an international conference in Paris with the signing in October 1991 of the Agreements on a Comprehensive Political Settlement of the Cambodia Conflict. Four Cambodian warring factions¹³² representing Cambodia and 18 other countries¹³³ including the five big powers participated in that international conference and signed those agreements.

It was recognized in those agreements that 'Cambodia's tragic recent history requires special measures to assure protection of human rights, and the non-return to the policies and practices of the past.' Provisions were then specified to assure such protection. They included undertakings by Cambodia itself, the other state signatories and the United Nations to protect human rights in Cambodia.

It was perhaps the first time in the history of international treaty that the signatories' undertakings to assure protection of human rights were a key part of an international agreement¹³⁴: All persons in Cambodia including all returnees 'shall enjoy the rights and freedoms embodied in the Universal Declaration of Human Rights and other relevant international human rights instruments.'

To this end, Cambodia undertakes:

1. To ensure respect for human rights and fundamental freedoms in Cambodia; to support the right of all Cambodian citizens to undertake activities which would promote and protect human rights and fundamental freedoms
2. to take effective measures to ensure that the policies and practices of the past shall never be allowed to return
3. to adhere to relevant international human rights instruments.

For their part, the other signatories undertake to promote and encourage respect for and observance of human rights and fundamental freedoms in Cambodia. The United Nations Transitional Authority in Cambodia

¹³² The State of Cambodia (SOC) (communist), the Khmer Rouge (communist), Front Uni pour un Cambodge Neutre, Pacifique et Cooperatif (FUNCINPEC) (non-communist), and the Khmer People's National Liberation Front (KPNLF)(non-communist).

¹³³ Australia, Brunei, Canada, China, India, Indonesia, Japan, Laos, Malaysia, the Philippines, Singapore, the Soviet Union, Thailand, United Kingdom, USA, Vietnam, and Yugoslavia (representing the Non-Aligned Movement).

¹³⁴ Agreement on a Comprehensive Settlement of the Cambodia Conflict: Part II: Human Rights, and Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia: Article 3.

(UNTAC) shall be responsible for fostering an environment in which respect for human rights shall be ensured. After the end of the transitional period, the United Nations Commission on Human Rights should continue to monitor closely the human rights situation in Cambodia, including if necessary, by the appointment of a Special Rapporteur who would report his findings annually to the Commission and to the General Assembly.

No less a key part was the determination of a set of principles for a new constitution for Cambodia including those regarding human rights and fundamental freedoms, Cambodia's status of neutrality, and the pluralistic liberal democratic system of government and the rule of law with an independent judiciary as its core¹³⁵.

Under the same peace agreements the UN dispatched a peacekeeping force called the United Nations Transitional Authority in Cambodia, commonly known as UNTAC, to maintain peace, rule Cambodia and organise election of a new Cambodian government. At the beginning of 1992 UNTAC began to deploy its force. As part of its organisation of the election, UNTAC launched a nation-wide programme of education in human rights. A few human rights NGOs began to emerge to participate in that programme and also to monitor the electoral process¹³⁶. The Supreme National Council of Cambodia (SNC), which embodied Cambodia's sovereignty during the transitional period, began to discharge Cambodia's obligations by signing all relevant international human rights instruments, including the Convention on the Rights of the Child. (see Note)

The election took place in May 1993, and later on in September Cambodia adopted a new constitution. This constitution reflects fully Cambodia's human rights undertakings, affirming its adherence to all relevant international human rights instruments and its guarantee and protection of human rights, woman's rights and the rights of the child. The UN Centre for Human Rights opened an office in Phnom Penh to monitor the human rights situation and assist the government and NGOs in the human rights and human rights-related fields. Furthermore, the UN Secretary-General has since appointed his Special Representative for Human Rights in Cambodia¹³⁷. More

¹³⁵ Agreement on a Comprehensive Settlement of the Cambodia Conflict: Annex 5.

¹³⁶ The Khmer Institute of Democracy was among the first founded at that time (1992).

¹³⁷ The first was Justice Michael Kirby of Australia, the second was Ambassador Thomas Hammaberg of Sweden, and the third and current Special Representative is Prof. Peter Leuprecht of Austria now Professor at McGill University in Canada. All have had tenuous relations with the two successive Cambodian governments and especially with their prime

human rights NGOs were created. The old and new NGOs have ever since been engaged in education and training in human rights, and in monitoring their violations.

Since its creation in 1993 the National Assembly, the Lower House of the Parliament, has created a Commission for Human Rights and Reception of Complaints. Likewise the Senate, the Upper House, also created the same Commission when this house was created in 1999. For its part, the Cambodian government has set up its own National Commission for Human Rights since 1997.

The constitutional guarantee, those state institutions and those human rights NGOs have contributed to the improvement of the human rights situation in Cambodia. However, they have not been effective in protecting human rights when those commissions are political institutions and are subject to control by powerful politicians and when NGOs do not have any power to enforce human rights. Violations have continued, through to a lesser extent than before UNTAC times. Two particular rights have been violated continuously: (1) the right to decent wages to live on, as now government officials are paid below-survival salaries; (2) the right to security or freedom from fear as now many people, especially in the countryside, do not dare exercise their freedom of expression, especially during election times.

The ineffectiveness in the enforcement of human rights seems to come from the powerlessness of the institutions of the rule of law that have constitutional duties to protect human rights. The Paris Peace Agreements have spelled out clearly that 'Aggrieved individuals will be entitled to have the courts adjudicate and enforce these human rights' and that 'An independent judiciary will be established, empowered to enforce the rights provided under the constitution.'

In fact, Cambodia's Constitution has provided for the separation of powers and the independence of the Judiciary. It has further specified that the 'King shall be ...the guarantor of the respect for the rights and freedoms of the citizens.'¹³⁸ and that the 'Judiciary shall...protect the rights and freedoms of the citizens.'¹³⁹

Actually the King cannot provide such a guarantee however much he might want to, as he does not have executive powers and institutions under

¹³⁸ Art.8.

¹³⁹ Art 128 New.

his command to help him ensure respect for the rights and freedoms of Cambodian citizens. As to the Judiciary, whose organisation and practices have been inherited from the communist days, it has neither independence nor human rights expertise yet. Furthermore, the Cambodian judicial system is a civil law system and courts can adjudicate only on the basis of the laws and legal procedures in force. And thus far those legal procedures and laws are still lacking, especially the ones for the protection of human rights, redress for violations and punishment of violators.

Recently there have been talks about the creation of an independent human rights commission for protection of human rights. It is doubtful whether that commission, even if it can be made independent, could do its job when the courts are not independent and lack human rights expertise, and when legal procedures and laws are insufficient to ensure the protection of each of the human rights Cambodia's constitution has guaranteed. Furthermore there would be a need to amend the constitution for that commission to have the power to prosecute human rights violators, as at the moment only the Public Prosecution Office has the exclusive constitutional powers to prosecute.

Considering Cambodia's present Constitution and based on past experience, the effectiveness of the protection of human rights require a number of contributing factors:

A. Direct Contributing Factors:

1. All constitutional institutions are created and discharge fully their constitutional duties, which is not the case up to now, as the leadership, system and practices are still very much there;
2. A clear-cut adoption of either the principle of the supremacy of international law or the principle of the supremacy of constitutional law for the incorporation of international law, in this case, the international human rights law, into municipal law;
3. Enactment of legal provisions for the enforcement and protection of each of the human rights guaranteed by that constitution and also of the procedure for cases of human rights violations;
4. Empowerment of the Public Prosecution Office to take up cases of human rights violations directly;
5. Actual independence of the same Office and the courts of law and the provision of expertise and resources to deal with human rights cases;

6. Continued education in human rights for the whole of the population, and compulsory training in human rights for all government officials, especially members of the army and security forces.

B. Continued External Pressure:

7. The UN, international and national human rights organisations, continued to assist and monitor the human rights situation in Cambodia;
8. The discharge of their international obligations under the Paris Peace Agreements of 1991 were to discharge their obligations under those Agreements and did not hesitate to raise their legitimate concern over the human rights situation in Cambodia;
9. Donor countries' tying of human rights conditionality to their aid to Cambodia.

C. International Environment Favourable to Human Rights:

10. Recognition of and actual respect for all human rights including the rights of ethnic minorities and indigenous peoples by donor countries and state signatories to the Paris Peace Agreements of 1991;
11. Adoption of a human rights charter for Asia or the Asia-Pacific region and creation of mechanisms including a regional human rights court to enforce human rights, and better still,
12. Compulsory ratification of all international human rights instruments and provision of proof of good human rights records by all permanent and other members of the UN Security Council.

Factors 3, 4 and 5 would fit in very well with the King's constitutional duty to guarantee respect for human rights when He is constitutionally the guarantor of human rights and of the independence of the Judiciary, and when, at the same time, according to the Constitution, He is the Chairman of the Supreme Council of the Magistracy. This Council is the supreme judicial body whose responsibilities include assistance to the King to guarantee the independence of the Judiciary, selection of judges and public prosecutors for appointment by the King and the supervision of the work of both judges and public prosecutors.

It would be more cost-effective and easier to build on what the constitution has provided for, instead of creating a new institution whose independence from political control cannot be assured for the foreseeable

future. Considering the limited resources of the country, there is no need to proliferate public institutions when there are so many human rights institutions around already. As has been said, when the responsibility is shared among so many, no one is responsible in the end.

It would be better to get the existing institutions to function and fulfil their constitutional duties first and foremost. If they were proven inadequate to protect human rights, then the creation of another institution to complement them would be justified.

As to contributing factors 7 to 12, like-minded states, together with their academic institutions and NGOs, or these academic institutions and these NGOs alone to start off with, could join forces and work together to attain the objectives set forth above.

Note

To date Cambodia has ratified the following international human rights instruments:

1. The Charter of the United Nations;
2. The Universal Declaration of Human Rights;
3. International Covenant on Economic, Social and Cultural Rights;
4. International Covenant on Civil and Political Rights;
5. International Convention on the Elimination of All Forms of Racial Discrimination;
6. International Convention on the Suppression and Punishment of the Crime of Apartheid;
7. ILO Convention (No.100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value;
8. ILO Convention (No.111) concerning Discrimination in Respect of Employment and Occupation;
9. Convention on the Prevention and Punishment of the Crime of Genocide;
10. Convention against Torture and Other cruel, Inhuman or Degrading Treatment or Punishment;
11. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery;
12. ILO Convention (No.29) Concerning Forced Labour;
13. ILO Convention (no.105) Concerning the Abolition of Forced Labour;

14. Convention relating to the Status of Refugees;
15. Protocol relating to the Status of Refugees;
16. ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize;
17. ILO Convention (No.98) concerning the Application of the Principles of the Right to Organize and Bargain Collectively;
18. ILO Convention (No.122) concerning Employment Policy;
19. Convention on the Elimination of All Forms of Discrimination against Women;
20. Convention on the Rights of the Child;
21. ILO Convention (No.138) concerning Minimum Age for Admission to Employment;
22. Geneva Convention for the Amelioration of the Convention of the Wounded and Sick in Armed Forces in the Field;
23. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea;
24. Geneva Convention relative to the treatment of Prisoners of War;
25. Geneva Convention relative to the Protection of Civilian Persons in Time of War;
26. Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the protection of Victims of International Armed Conflicts (Protocol I);
27. Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the protection of Victims to non-international Armed Conflicts (Protocol II).

Source: UNESCO, *Human Rights, Major International Instruments, Status as at 31 May 2001*.

In November 2001, the Cambodian Lower House, the National Assembly, ratified the International Criminal Treaty.

APPENDIX 1

Attachment 1; unofficial translation from *Constitution of the Republic of Indonesia*

Decided on 18 August 2000.

CHAPTER XA

HUMAN RIGHTS

Article 28A

Every person shall have the right to live and to defend his/her life and livelihood.

Article 28B

- (1) Every person shall have the right to build a family and to have descendant through a legal marriage.
- (2) Every child shall have the right to live, to grow, and to be protected against violence and discrimination.

Article 28C

- (1) Every person shall have the right to improve himself/herself through fulfilment of basic needs, and entitled to basic education and to obtain benefit from science and technology, art and culture, in order to enhance his/her life, for the sake of human welfare.
- (2) Every person shall have the right to advance himself/herself by defending his/her rights collectively and develop his/her society, nation, and country.

Article 28D

- (1) Every person shall have the right for recognition, guarantees, protection, and a just legal certainty as well as equal treatment before the law.
- (2) Every person shall have the right of employment opportunities and receive a just and reasonable compensation from the employment relationship.
- (3) Every citizen shall the right to obtain equal opportunities in governance.
- (4) Every person shall have the right of citizenship status.

Article 28E

- (1) Every person shall be free to adhere to his/her respective religion and performance worship according to his/her religion, choose his/her education and learning, choose his/her work, choose citizenship, choose to reside within the nation's territory and depart from it, and is entitled to return.
- (2) Every person shall have the right to have freedom of belief, express his/her thought and attitudes, in accordance with his/her conscience.
- (3) Every person shall have the right of freedom to organize, assemble, and express opinions.

Article 28F

Every person shall have the right to communicate and to obtain information to develop his/her personality and social environment, as well as the right to seek, obtain, possess, keep, process, and convey information by utilizing all available kinds of channels.

Article 28G

- (1) Every person shall have the right of self-protection, family, honour, dignity, and property under his/her authority, as well as entitled to a feeling of safety and protection from threats of fear to do or not to do anything according to the basic rights.
- (2) Every person shall have the right to be free from torture or any derogatory treatment demeaning human dignity and is entitled to political asylum from another nation.

Article 28H

- (1) Every person shall have the right to live in welfare both physically and spiritually, have a place to reside, and receive a proper and healthy environment, as well as receive medical care.
- (2) Every person shall have the right of facilities and special treatment for equal opportunities and benefits in order to achieve equality and equity.
- (3) Every person shall have the right of social security guarantees that enable him/her to develop completely as a dignified human being.
- (4) Every person shall have the right of personal possessions and any person whatsoever shall not confiscate those possessions arbitrarily.

Article 28I

- (1) The right for living, the right for not being tortured, the right for freedom of thought and conscience, religious rights, the right for not being enslaved, the right for being recognized as an individual before the law, and the right for not being prosecuted based on retroactive laws shall be the rights as human that may not be diminished in any situation whatsoever.
- (2) Every person shall have the right to be free from discriminatory treatment on the basis of any pretext and is entitled to receive protection from that discriminatory treatment.
- (3) The cultural identity and traditional society rights shall be respected in line with age progress and human civilization.
- (4) The protection, advancement, upholding, and fulfillment of human rights shall be the responsibility of the state, especially the government.
- (5) To uphold and to protect human rights in accordance with the principles of a legal democratic nation, the practice of human rights shall be guaranteed, arranged, and embodied in statutory laws.

Article 28J

- (1) Every person shall have the duty to respect the others' human rights within the orderly context of living in a community, nation, and state.
- (2) In carrying out rights and freedoms, every person is required to obey the predetermined limitations regulated by the law for the sole purpose of guaranteeing recognition and respect over the rights and freedoms enjoyed by other people and to fulfil the just demands in accordance with the considerations of morals, security, and public order within a democratic society.

APPENDIX 2

Attachment 2; unofficial translation.

Decided on 18 August 1945.

THE 1945 CONSTITUTION OF THE REPUBLIC OF INDONESIA

PREAMBLE

Whereas Independence is natural right of every nation, colonialism must be abolished in this world because it is not in conformity with humanity and justice.

And the struggle of the movement for the independence of Indonesia has now reached the hour of rejoicing by leading the People of Indonesia safe and sound to the gateway of independence of an Indonesian State which is free, united, sovereign, just and prosperous.

Thanks to the blessing of God Almighty and impelled by the noble desire to lead their own free national life, the People of Indonesia hereby declare their independence.

Following this, in order to set up a government of the State of Indonesia which shall protect the whole of the Indonesian People and their entire native land of Indonesia, and in order to advance the general welfare, to develop the intellectual life of the nation and to contribute in implementing an order in the world which is based upon independence, abiding peace and social justice, the structure of Indonesia's National Independence has the structural state form of a Republic of Indonesia with sovereignty of the People, and which shall be based upon Belief in the One Supreme God, just and civilized humanity, the unity of Indonesia, and democracy which guided by the inner wisdom in the unanimity arising out of deliberation amongst representatives, as well as creating a condition of social justice for the whole People of Indonesia.

Contributors

Professor Larissa Behrendt is Professor of Law and Indigenous Studies at the University of Technology, Sydney, and Director of the Jumbunna Indigenous House of Learning. She has worked as a practicing lawyer in the areas of Aboriginal land claims and family law and has spent time working in Canada and at the United Nations with First Nations organizations.

Professor Kang Sangjung, University of Tokyo, is a researcher and public commentator on political thought and practice in Japan, international relations in the East Asian region and human rights issues (with particular reference to the rights of the resident Korean community in Japan). His principal publications include: *Futatsu no Sengo to Nihon* (Japan and the Two 'Postwar' Eras) (1995) and *Orientalizumu no Kanata e* (Beyond Orientalism) (1996).

Professor Brij Lal was a member of the three-person committee which drafted Fiji's multiracial constitution. He has researched and published extensively on Fijian history and politics and on the Indian Diaspora. His publications include *Another Way: The Politics of Constitutional Reform in Fiji* (1999) and *The Pacific Islands: An Encyclopedia* (2000).

Dr Lao Mon-Hay is a lecturer in political theory at the University of Phnom Penh and is executive director of the Khmer Institute of Democracy, a Cambodian non-governmental organisation. He was formerly head of the Khmer People's National Liberation Front Human Rights Unit. His publications include *The Unfinished Settlement of the Cambodian Conflict* (1995) and *Cambodia: The Tasks Ahead* (1992).

Mr Park Won-Soon has been involved in legal support activities for political prisoners and in the 1980s made a great contribution to the democratisation movement in Korea. The PSPD, which Mr Park Won-Soon helped form in 1994, monitors power abuse or corruption, presents alternative policies, and encourages social participation by the people. In 2000, Mr Park Won-Soon acted as representative of the 'Citizens' Alliance for the 2000 General Election' in the nationwide campaign for a fair election.

Ms Usha Ramanathan is a human rights lawyer in India who is known particularly for her work on the displacement of peoples and on the rights of tribal (indigenous) people.

Professor Roland Simbulan has been teaching full-time at the University of the Philippines in Manila for the past 20 years (1981-2001). He is currently Full Professor in Development Studies at the Department of Social Sciences, College of Arts and Sciences, U.P. Manila. He teaches courses in Development Planning, Development Economics, Economic Theory, Development Theory, Program Implementation and management and Research Methods. He is married to Chit Estella, former Managing Editor of the *Manila Times* and currently Editor in Chief of the political daily, *Pinoy Times*. He is an anti-nuclear activist and the convenor of the Nuclear-Free Philippines Coalition.

Mr Dionísio Babo Soares was Vice-Dean for Social and Political Studies at the University of East Timor, and is currently completing a doctorate at the Australian National University, focusing on the transition to independence in East Timor.

Professor Sugita Atsushi teaches and researches in the Faculty of Law at Hosei University. He is well known for his writings on political thought and constitutional issues in Japan. His publications include *Kenryoku no Keifugaku* (The Genealogy of Power) (1998) and *Kenryoko* (Power) (2000).

Ms Bivitri Susanti is a legal researcher working in a non-governmental organisation focusing in public interest research, namely the Centre for Indonesian Law and Policy Studies (PSHK). She is the Head of the Constitutional Law Division in PSHK and an active member of the Non-Governmental Organisation Coalition for New Constitution. She has been taking part in most of the research conducted by PSHK as well as that organised by other institutions. She conducted public advocacy activities on the

issues of a new constitution, bicameral parliament, a Bill on foundations (charity organisations), and direct presidential election.

Ms Poh-Ling Tan has legal qualifications from both Malaysia and Australia. From 1978 to 1987 she practised law in Malaysia where she helped establish one of the country's first private legal aid clinics in Kuala Lumpur. She now lectures at the Law Faculty, Queensland University of Technology. Her teaching and research interests include property law, environmental law and comparative law, and her publications include an edition of essays entitled *Asian Legal Systems: Law, Society and Pluralism in East Asia*. Poh-Ling has also recently submitted a PhD thesis on Australian law reform which introduced a property right regime for the management of water resources.

Professor Thanet Aphornsuvan, Faculty of Liberal Arts, Thammasat University, Thailand, works on issues related to democracy, freedom and human rights in Thailand. His numerous publications include *Rabob that kab amnaj kanmuang nai prawatsat sangkhom thai* (Slavery and Political Power in Thai Social History) (1990), *Pok Pluek prachathipatai nai amerika* (Peeling American Democracy) (1992), and 'Slavery and Modernity: Freedom in the Making of Modern Thailand', in David Kelly and Anthony Reid eds, *Asian Freedoms* (1998).

Mr Jakob Tobing is a Member of Parliament and Chairman of the People's Consultative Assembly's Ad Hoc Committee, Indonesia.

Professor George Williams is the Anthony Mason Professor and Director of the Gilbert & Tobin Centre of Public Law at the Faculty of Law, University of New South Wales. He is the author of books including *A Bill of Rights for Australia* (UNSW Press, 2000), *Human Rights Under the Australian Constitution* (OUP, 1999) and *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 2nd ed 1998, with Tony Blackshield), and is an editor of the forthcoming *Oxford Companion to the High Court of Australia* (with Michael Coper and Tony Blackshield). Professor Williams also practises as a barrister and has appeared in High Court cases, such as the Hindmarsh Island Bridge Case, raising issues such as freedom of communication, freedom from racial discrimination and the separation of powers. In 2000 he appeared in the High Court of Fiji and in 2001 in the Court of Appeal of Fiji (with Geoffrey Robertson QC) in the matter of *Fiji v Prasad*, in which the legality of the 1997 Fijian Constitution was upheld. He

has been employed as a consultant by several organisations, including the Australian Broadcasting Corporation and the Federal Parliament. Professor Williams is a well-known media commentator on constitutional law issues and the High Court.

Mr Frans Hendra Winarta is a lawyer with particular interests in human rights issues (including issues related to the rights of ethnic minorities in Indonesia). As well as being a member of the newly formed National Law Commission, he is founder of the GANDI (Indonesian Anti-Discrimination Movement).