Update on the Rule of Law for Human Rights in ASEAN:
The Path to Integration

HUMAN RIGHTS RESOURCE CENTRE

Konrad Adenauer Stiftung

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Human Rights Resource Centre

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FOREWORD

In May 2011, the HRRC published the *Rule of Law for Human Rights in the ASEAN Region: A Base-line Study*, the first regional study on the rule of law. This ground-breaking report presented a snapshot of the legal landscape on rule of law in the context of human rights in each of the ten Member States at that time and provided a comparative assessment on the overall implementation of the rule of law in ASEAN.

Five years on, the ASEAN regional landscape is rapidly transforming as it embarks on a path towards integration as an economic, political and cultural community. Significant milestones that mark a stronger commitment to the rule of law in the region have been reached. This includes the unanimous adoption of the ASEAN Human Rights Declaration in November 2012 and the formal establishment of the ASEAN Community on 31 December 2015. Moreover, the past five years have brought considerable changes in the local landscape for each Member State. With this milieu, the time is undoubtedly ripe to revisit the state of the rule of law in the region and update the *2011 Baseline Study*.

In this light, the HRRC and Konrad Adenauer Stiftung are pleased to present the *Update on the Rule of Law for Human Rights in ASEAN: The Path to Integration*. The present *Update* analyses legislative and substantive changes that have taken place in the ten ASEAN Member States since 2011 and whether changes support or detract from ASEAN's vision of becoming a "rules-based" community. The study further considers how the process of ASEAN integration has influenced activity toward the creation of stronger legal institutions within ASEAN Member States.

This study would not have been possible without the unflagging dedication of our country rapporteurs, lead researcher, advisors, and editors, to whom we express our highest gratitude. We would also like to express our appreciation to the University of Indonesia, WSD Handa Center for Human Rights and International Justice, and East West Center, for generously supporting the endeavours of the HRRC.

It is our hope and expectation that this *Update* would spur further discussions, in-depth research and empirical analysis on this important subject, and encourage policy-makers and leaders to address the gaps reported. Ultimately, we hope this study would provide a vital contribution towards enhancing rule of law in the region, consistent with the ASEAN Community Vision 2025 of a community that thrives in a "just, democratic, harmonious and gender-sensitive environment in accordance with the principles of democracy, good governance and the rule of law."

Jakarta, June 2016

Harkristuti Harkrisnowo
Acting Executive Director
HUMAN RIGHTS RESOURCE CENTRE

LIMITATIONS OF THE STUDY

This descriptive study on the rule of law for human rights in ASEAN is not an attempt at a comprehensive empirical survey of the situation in ASEAN States. Such a study would have been impossible given the limitations of time and resources available to the researchers and to the Centre. Rather, it provides a compilation, categorization and analysis of the published material relevant to the subject, as well as some empirical analysis of the trends identified in those sources.

It is important to note that researchers could only work with materials that are in fact published and made widely available. Whilst they did endeavour, in so far as was possible, to seek feedback from Member State government officials on facts reported, confidential reports and undisclosed statistics held by various government departments are obviously not included unless they were unconditionally made available to the researchers.

The objective of this study was to gather, analyse and assess the depth of information available, both the causes and the impact of legislation relating to rule of law for human rights in each ASEAN country, with a view to providing a comprehensive, objective assessment of the situation as revealed through published literature. Where reports have been made available by State and quasi-State agencies to the researchers, every effort has been made to incorporate them. However, researchers were not obliged to contact such agencies in pursuit of data that are not publicly available.

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Update on the Rule of Law for Human Rights in ASEAN: The Path to Integration

I. INTRODUCTION

In 1967, the founding States of the Association of Southeast Asian Nations (ASEAN) came together to sign the ASEAN Declaration (Bangkok Declaration),[1] establishing an association of States in Southeast Asia.[2] It has been almost 50 years since the declaration. The ASEAN region is now a vibrant and diverse space in the world. As of 2014, its total land area of more than 4.4 million square kilometres is home to a population of over 622 million people.[3] Its total population creates the world's third largest market, after China and India.[4] If it were one economy, it would be the seventh largest in the world and could be the fourth largest by 2050 if trends continue.[5]

The ASEAN region is by no means monolithic. Economies are at different growth stages, gross domestic per capita figures vary across countries, and the standard deviation in average incomes is more than seven times that of European Union Member States. The diversity extends to culture, language, and religion, amongst others.[6] Several political regimes abound, from States under military rule and monarchical rule, to one-party, communist systems, to countries that maintain hegemonic-party regimes, but that are not liberal, and to unconsolidated liberal democracies. Attempts to explain regime change and continuity using existing perspectives do not encompass the region's diversity.[7]

From its beginning, the promotion of "regional peace and stability through abiding respect for justice and the rule of law" in the relationship between countries of the region and adherence to the principles of the United Nations (UN) Charter were amongst ASEAN's avowed aims and purposes.[8] The rule of law was part of the ASEAN States' imagination for an ASEAN region.

To foster thinking about the state of the "rule of law for human rights" in the ASEAN context, the Human Rights Resource Centre (HRRC) undertook a baseline study to inventory its status in 2010 (hereinafter, *2011 Rule of Law Baseline Study*). This was viewed as crucial in having evidence and literature-based support on the rule of law's connection with human rights. It included how each ASEAN Member State defined and

1 The Asean Declaration (Bangkok Declaration), Bangkok, 8 August 1967.

2 The term "Southeast Asia," as used in this Synthesis, and in the succeeding country reports, means the territories of the ASEAN Member States and the region that the Member States comprise.

3 ASEAN Stats, 'Selected basic ASEAN indicators: as of August 2015,' *ASEAN*, http://www.asean.org/storage/2015/09/selected_key_indicators/Summary_table_as_of_Aug_2015.pdf (accessed 1 May 2016).

4 'ASEAN infographics: population, market, economy,' *ASEAN UP*, http://aseanup.com/asean-infographics-population-market-economy/ (accessed 1 May 2016).

5 'ASEAN Economic Community: 12 Things to Know,' *Asian Development Bank*, 29 December 2015, http://www.adb.org/features/asean-economic-community-12-things-know (accessed 1 May 2016).

6 Vinayak HV, Fraser Thompson, and Oliver Tonby, 'Understanding ASEAN: Seven things you need to know,' *McKinsey & Company*, May 2014, http://www.mckinsey.com/industries/public-sector/our-insights/understanding-asean-seven-things-you-need-to-know (accessed 1 May 2016).

7 Gomez, James, and Robin Ramcharan, 'Democracy and Human Rights in Southeast Asia,' *Journal of Current Southeast Asian Affairs*, vol. 33, no. 3 (2014): 3-17, p. 9.

8 *Supra* note 1.

interpreted the "rule of law" and its relationship with "human rights," amongst others.

The study, finalised and published in 2011, provided a snapshot of the state of knowledge about the rule of law at the time based on a range of sources. It was a country-by-country analysis of the state of "rule of law for human rights" in the 10 ASEAN Member States and a comparative assessment of its overall implementation.[9]

In view of the significant milestone of the launch of ASEAN integration in 2015, it is now appropriate to undertake an update of the earlier study. We have employed the same main strands of categories and methods to arrive at conclusions as the earlier study in our update. This research aimed to:

1. Consider whether individual Member States' commitment to establish and maintain the rule of law was being upheld; and
2. Analyse legislative changes that had taken place in the ASEAN Member States and whether they supported or detracted from ASEAN's vision of a rules-based community.[10]

This Synthesis presents the findings of the study. Part I introduces the research. Part II looks at the concept of the "rule of law for human rights" as used in this study. Part III outlines the ASEAN Member States' commitments to upholding the rule of law and each State's understanding of the rule of law. Part IV presents the overall findings through country practices relating to the central principles of the "rule of law for human rights." In the process, we considered whether State commitments with regard to the rule of law are upheld. Legislative changes are also highlighted. Part V sets forth the progress toward establishing a rules-based community and the strengthening (or weakening) of legal institutions. Finally, Part VI imparts some conclusions.

A. Rule of Law in ASEAN: From Rhetoric to Binding Obligations

Although the Bangkok Declaration contains no mention of human rights, the concept of the rule of law is deeply entrenched in ASEAN's genetic make-up. The rule of law was initially seen as a means to achieve regional peace and security.

Nearly 10 years ago, the ASEAN Charter reiterated adherence to the rule of law in the preamble and declared "[t]o strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN,"[11] as a purpose of the regional body.

9 Mahdev Mohan, 'Synthesis,' in David Cohen, Kevin Tan Yew Lee and Mahdev Mohan (eds.), *Rule of Law for Human Rights in the ASEAN Region: A Base-line Study* (Jakarta: Human Rights Resource Centre, 2011), p. 21-22.

10 Two additional questions guided this update: (1) What progress has been made toward establishing a rules-based community of shared values and norms in ASEAN, bearing in mind the legislative and substantive progress in establishing the rule of law in ASEAN Member States?; and (2) How has the process of ASEAN integration accelerated activity toward the creation of stronger legal institutions within ASEAN Member States (if at all)?.

11 Charter of the Association of Southeast Asian Nations, Chapter I, Article 1(7).

In addition, it stated that ASEAN and its Member States should act in accordance with the principle of "adherence to the rule of law, good governance, the principles of democracy and constitutional government."[12] The ASEAN States, in spite of initially treating the rule of law as a means to achieve regional peace and security, transformed it to a destination in its own right, a matter that should be attained through the ASEAN Charter.

This commitment to the rule of law was restated at the crossroads when ASEAN decided to embark on integration in order to form an ASEAN Community by 2020. The ASEAN Member States, "[c]onscious that the strengthening of ASEAN integration through accelerated establishment of an ASEAN Community will reinforce ASEAN's centrality and role as the driving force in charting the evolving regional architecture," accelerated the community's birth to 2015.[13]

Aspirations for the rule of law are part of ASEAN as a regional organisation. The region moved from soft-law declarations involving the rule of law to the inclusion of the concept in binding treaty such as the ASEAN Charter. The ASEAN Charter, which endowed it with international legal personality,[14] proclaimed the rule of law. There are also other documents, such as the "Roadmap for an ASEAN Community (2009-2015)" and "ASEAN 2025: Forging Ahead Together," that reaffirmed the commitment to rule of law. The "ASEAN Way" is to follow a road espousing the rule of law.

B. Assessing the Rule of Law

The ASEAN region provides cases to study the rule of law as an established commitment of States. Scholars have endeavoured to study the rule of law at the regional level in other sub-groupings.[15] Individual Asian States had also been the subject of observations, as authors voice out Asian perspectives and discourses on the issue in works edited by Peerenboom and Spitzkatz, for instance.[16]

In Southeast Asia, scholars have traditionally viewed the rule of law as not a unifying concept amongst States, despite invocations in the Bangkok Declaration, but as a protean one. Asian discourses have characterised the countries as typifying competing notions of the rule of law.[17]

12 *Id.*, Chapter I, Article 2(2)(h).

13 Roadmap for an ASEAN Community (2009-2015), p. 5.

14 *Supra* note 11, Chapter II, Article 3.

15 Illustratively, in Northeast Asia, Ohnesorge made the case that Asia is considered an exception to the general rule requiring the rule of law for sustained economic growth. Randall Peerenboom, 'Law and Development of Constitutional Democracy in China: Problem or Paradigm?' 19 *Colum. J. Asian L.* 185, *citing* John K.M. Ohnesorge, 'The Rule of Law, Economic Development and the Developmental States of Northeast Asia,' in Christoph Actons (ed.), *Law and Development in East and Southeast Asia* (London and New York: Routledge Curzon, 2003).

16 See, *generally*, Randall Peerenboom (ed.), *Asian Discourses of Rule of Law, Theories and Implementation of Rule of Law in Twelve Asian Countries* (London, New York: Routledge Curzon, 2004); Marc Spitzkatz (ed.), *Rule of Law: Perspectives from Asia* (Singapore: Konrad-Adenauer-Stiftung, 2013).

17 *Supra* note 9, p. 8, *citing* Michael Neumann, *The Rule of Law: Politicizing Ethics* (2002), Cass R. Sunstein, *Designing Democracy: What Constitution Do* (2001), and Abhisit Vejjajiva, *The Policy Statement of the Council of Ministers to the National Assembly* (2008).

Conceptually, there have been several metrics used to measure the rule of law, such as the UN Rule of Law Indicators,[18] the World Justice Project's Rule of Law Index,[19] and the Millennium Challenge Corporation's indicators.[20] Other measures flourish.[21] Indeed, the so-called "rule of law era" has given rise to multiple indicators. Approaches to concepts and measurements differ, but notably, the indicators are highly correlated with each other and there is convergence.[22]

The indicators of the *2011 Rule of Law Baseline Study* (see Annex 1) were drawn from the broadly accepted UN definition of the rule of law, and used the binding ASEAN Charter and related developments as springboards for analysis. It identified principles of the "rule of law in relation to human rights in ASEAN,"[23] which are both formal and substantive.

II. OVERVIEW OF 'RULE OF LAW FOR HUMAN RIGHTS'

A. The Concept of Rule of Law

The "rule of law" definition in this study, used in the earlier report as well, is that of former UN Secretary-General Kofi Annan, who described it as a concept that refers to "a principle of governance in which all persons, institutions and entities, public and private, including the [S]tate itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards."[24]

The UN rule of law definition's linguistic backbone consists of the UN Charter and the "four pillars of the modern international legal system: international human rights law; international humanitarian law; international criminal law; and international refugee law." It also includes UN human rights and criminal justice standards developed in the last half-century.[25]

18 United Nations, *The United Nations Rule of Law Indicators: Implementation Guide and Project Tools* (New York: United Nations, 2011), p. 67, v, vi, 4-5.

19 'WJP Rule of Law Index 2015,' *World Justice Project*, http://worldjusticeproject.org/rule-of-law-index (accessed 1 May 2016).

20 'Rule of Law Indicator,' *Millennium Challenge Corporation*, https://www.mcc.gov/who-we-fund/indicator/rule-of-law-indicator (accessed 1 May 2016).

21 See, *generally*, Pim Albers, 'How to measure the rule of law: a comparison of three studies, http://www.coe.int/t/dghl/cooperation/cepej/events/OnEnParle/Albers251007.pdf (accessed 1 May 2016): "An alternative categorization is described by Samuels (2006), 'Rule of law reform in post conflict countries' (World Bank paper), Washington. In this article, rule of law reform projects (for post conflict countries) are broken down in five categories: (1) human security and basic law and order, (2) a system to resolve property and commercial disputes and the provision of basic economic regulation, (3) human rights and transitional justice, (4) predictable and effective government bound by law and (5) access to justice and equality before the law (p. 14)."

22 Versteeg, M. and Ginsburg, T., 'Measuring the Rule of Law: A Comparison of Indicators,' *Law & Social Inquiry*, 2016, p. 1.

23 *Supra* note 9, p. 12.

24 UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General to the Security Council*, S/2004/616, 23 August 2004.

25 *Id.*, at 32.

The *2011 Rule of Law Baseline Study* discussed the different definitions of the "rule of law," the ensuing debate, and related underlying concepts. The reasons for using this UN definition were expounded in the report.[26] The State is the agency put to task on questions of rule of law. The UN definition, widely used and often linked to State-building efforts, provided a foundation for indicators.[27]

B. Rule of Law in Human Rights Law

1. Rule of Law in Universal Human Rights Instruments and Treaties

In 1948, the UN Declaration of Human Rights contained in its preamble a clause that, "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."[28] This made clear that the other human rights listed in the declaration should be equally grounded on rule of law, and their violations should be guarded by the rule of law.[29]

Notably, none of the core human rights instruments mention the rule of law. However, it has been regarded that the rule of law animates them. Corollary to this, subsequent human rights treaties follow the same "rule of law" logic of the declaration.[30]

"Rule of law" has appeared no less than nine times in the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna in 1993.[31] The UN General Assembly also affirmed the link between human rights and rule of law, with the latter as an essential factor in the protection of human rights.[32] Later General Assembly resolutions reflected this. The UN Human Rights Council has maintained the position of its predecessor Commission on Human Rights that democracy, rule of law and

26 *Supra* note 9, pp. 5-12.

27 *E.g.* Altus Global, Alliance, Valley University of the Fraser, University Harvard, Nations United, and Justice Vera Institute of 2011. Supra note 18, v.

28 Universal Declaration of Human Rights, Preamble.

29 Thomas Fitschen, 'Inventing the Rule of Law for the United Nations,' in A. von Bogdandy and R. Wolfrum, (eds.), *Max Planck Yearbook of United Nations Law*, Volume 12, 2008, p. 357, http://www.mpil.de/files/pdf3/mpunyb_10_fitschen_12.pdf (accessed 1 May 2016).

30 *Id.*, pp. 357-358. For example, this is evidenced by:

- Article 2 of the International Covenant on Civil and Political Rights (ICCPR), that requires States to adopt laws or measures to give effect to rights recognised by the convention;
- Article 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), that limitations of economic, social and cultural rights shall be made only through laws;
- Article 2(a) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), that requires the principle of the equality of men and women to be in States' constitutions or other legislation, and ensure its practical realisation; and
- Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), that guarantees the right of everyone to equality before the law in the enjoyment of some rights listed therein.

31 *See, i.e.*, preamble, 30, 34, 60, 67, 69, 74, and 79 of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna in 1993.

32 UN General Assembly, *Strengthening of the Rule of Law*, A/RES/48/132, 20 December 1993, para. 1.

human rights are profoundly interconnected and mutually reinforcing.[33] Provisions on democracy and the rule of law are likewise to be found in regional instruments.[34]

2. Rule of Law in General Comments or Recommendations of Human Rights Treaty-Bodies

The UN Human Rights Committee has highlighted that, "[s]afeguards related to derogation, as embodied in article 4 of the Covenant, are based on the **principles of legality and the rule of law inherent in the Covenant as a whole**."[35] It also submitted that principles of legality and the rule of law require the respect for fundamental requirements of fair trial during a state of emergency.[36]

The UN Committee on the Elimination of Racial Discrimination mentioned that, in the criminal justice system, "even though the system of justice may be regarded as impartial and not affected by racism, racial discrimination or xenophobia, **when racial or ethnic discrimination does exist in the administration and functioning of the system of justice, it constitutes a particularly serious violation of the rule of law**, the principle of equality before the law, the principle of fair trial and the right to an independent and impartial tribunal, through its direct effect on persons belonging to groups which it is the very role of justice to protect."[37] Rule of law is a penultimate lead to human rights.[38]

The fundamental premise of this report, thus, is that there exists a rule of law for human rights, and it was within this framework that all consequential country practices in this report were considered and distilled.

III. LEGAL COMMITMENTS AND MEANING-MAKING: RULE OF LAW DEFINITIONS IN ASEAN STATES

Since the advent of the ASEAN Charter, ASEAN has progressed significantly in committing itself to the rule of law. As mentioned earlier, ASEAN Member States have experienced, at least on paper, what the author calls a "hardening" of the commitment to the rule of law.

There have been movements along two streams: ASEAN, as a regional organisation, continuously referred to the rule of law in declarations, and individual ASEAN States entered into (mainly international or regional) treaties which directly espoused or articulated a rule of law principle.

33 *Supra* note 7, pp. 8-9.

34 Ramcharan, B.G., *The Fundamentals of International Human Rights Treaty Law* (Leiden: Martinus Nijhoff Publishers, Brill Academic Publishers, 2011), p. 64. For instance, the Inter-American Convention on Human Rights, the African Charter on Human and Peoples Rights, and the European Convention on Human Rights and Fundamental Freedoms, which calls for an effective political democracy.

35 UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency,* CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16.

36 *Id.*

37 UN Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, A/60/18, 2005.

38 Cassimatis, Anthony, *Human Rights Related Trade Measures Under International Law: The Legality of Trade Measures Imposed in Response to Violations of Human Rights Obligations Under General International Law* (Leiden: Brill, 2007), pp. 184-185.

A. International Commitments to Uphold the Rule of Law for Human Rights

ASEAN Member States, as parties to the ASEAN Charter, are bound by an obligation to realise the rule of law in the region. The ASEAN Charter's language was unequivocal, declaring strengthening the rule of law and the promotion and protection of human rights and fundamental freedoms, with due regard to rights and responsibilities of Member States, as a purpose.[39] ASEAN Member States have committed themselves to some international treaty instruments relating to the rule of law. These are some treaties that form the "four pillars" of the UN rule of law concept (see Annex 2).

ASEAN Member States also mentioned the concept in declarations and statements. Whilst they did not bear the binding force of a treaty in the strictest sense, they were reflexive of the rule of law commitment in the ASEAN Charter, and a testament to expansive practice. The recent aim at integration has also seen a positive sea change in the trend to include the rule of law in ASEAN instruments.

Apart from this, the rule of law has been directly included in instruments that deal with human rights explicitly, *e.g.*, in the perambulatory clause of the ASEAN Human Rights Declaration (similar to its place in the Universal Declaration of Human Rights or UDHR) and in the principles espoused by the ASEAN Intergovernmental Commission on Human Rights (AICHR). A table collects and shows excerpts of the "rule of law" as mentioned in some key ASEAN instruments (see Annex 3).

Recently, ASEAN Secretary-General Le Luong Minh opined that the importance accorded to the rule of law has been brought to "new heights in the ASEAN Charter where the rule of law is embraced officially as both a purpose and a principle."[40]

But what is the rule of law for human rights as perceived by individual ASEAN States? How do the ASEAN States interpret it? Commentators suggested that the "ASEAN Way" or the adherence to non-interference and consensus principles, also enshrined in the ASEAN Charter, has potentially undermined the rule of law and ASEAN's will to fully integrate.[41]

B. ASEAN Member States' Understanding of the Rule of Law in Domestic Laws and Policies

States are the final arbiter of the meaning of rule of law in their own territories. The ASEAN Secretary-General has observed the lack of an authoritative definition of the rule of law in ASEAN, although its core elements are widely accepted, including human rights.[42] One cannot say, therefore, that the ASEAN Way embodies a consensus on a regionally accepted definition of the rule of law as there is at present, none.

39 *Supra* note 11.

40 ASEAN Secretariat News, 'The Rule of Law – a Fundamental Feature of ASEAN Since Its Inception,' *ASEAN*, 23 May 2013, http://asean.org/the-rule-of-law-a-fundamental-feature-of-asean-since-its-inception/ (accessed 3 May 2016).

41 Michael Ewing-Chow and Tan Hsien-Li, 'The Role of the Rule of Law in ASEAN Integration,' *EUI Working Paper RSCAS 2013/16* (Fiesole: European University Institute, March 2013), p. 5, http://cadmus.eui.eu/bitstream/handle/1814/26452/RSCAS_2013_16.pdf?sequence=1&isAllowed=y (accessed 3 May 2016).

42 *Supra* note 40.

What is helpful to note, however, is that ASEAN States have adverted to the rule of law in instruments such as the ASEAN Charter and the ASEAN Socio-Political Blueprint in two ways: an end that needs to be achieved, and a means for other purposes, e.g., regional peace and security.

Some ASEAN States have translations of the term "rule of law" (or its equivalent) in their own language: *niti rath* (Cambodia), *negara hukum*[43] (Indonesia), *rukunegara*[44] (Malaysia), *pananaig ng batas*[45] (Philippines), and *luck nititham* (Thailand).[46] Not all ASEAN States have specific meanings or translations for the term "rule of law." There are possibly no equivalents for the concept in some native languages because they have not had to contend with this concept.

The *2011 Rule of Law Baseline Study* affirmed the differences in concepts of the rule of law in ASEAN States, as follows:

- The "thin" rule of law, "robbed of its central mantra of checking unfettered discretionary power," was exemplified in **Singapore** when its Attorney-General then stated in 1995 that the concept should not be substantially different from the understanding and acceptance by the government of the day.
- **Malaysia** interpreted *rukunegara* as not entailing checks and balances, but "no more than that the rules and regulations made by the government must be followed."
- Although **Cambodia**, **Laos** and **Vietnam** embraced a thin instrumentalist conception of the rule of law in the 1990s, according to literature, the ruling parties in the countries were above the law.[47]
- The report claimed that **Thailand** and the **Philippines** had subscribed to a comparatively thicker definition, which included ideals of human rights and good governance.[48]

This previous permutation is no longer true in view of changes in some ASEAN Member States. For instance, it is now odd to speak of the Thai definition, when the current government has suspended the Constitution containing the concept of the rule of law.

1. Definitions with Institutional Approaches

According to reports, rule of law definitions with institutional approaches are those that highlight the institutional attributes believed necessary to actuate the rule of law (such as comprehensive laws, well-functioning courts, and trained law enforcement agencies).[49]

43 *See*, Country Report on Indonesia, at Part I (Foundation and Evolution of Rule of Law).

44 *Supra* note 9, p. 6.

45 This term more properly connotes that the law prevails, seemingly leaving out the thickened aspects of the rule of law in the translation.

46 *Supra* note 9, p. 6, *citing,* Vitit Muntarbhorn who explained that Asian invocations of the rule of law can be just as mystifying as Western ones. The term is also said to imply a precept of law based upon a sense of justice and virtue, which is not an easy notion to grasp in the concrete sense.

47 *Supra* note 9, p. 6.

48 *Supra* note 9, p. 7.

49 Rachel Kleinfeld Belton, 'Competing Definitions of the Rule of Law: Implications for Practitioners,' *Carnegie Papers: Rule of Law Series*, No. 55, January 2005, p. 3, http://carnegieendowment.org/files/CP55.Belton.FINAL.pdf (accessed 4 May 2016).

In **Singapore**, the government and the judiciary's concept of the rule of law has not changed significantly since 2011.[50] Government has seen it as a fundamental principle, the foundation on which Singapore was built, and a framework for proper functioning. No power could be exercised unchecked, and the court's exercise of judicial review is the "cornerstone" of the rule of law. Critics however questioned and criticised the "narrow conception" and "double standards" which allegedly undermine justice and thwart democratic freedoms.[51]

The same may be said of **Malaysia's** concept. Malaysia's Constitution does not specifically mention rule of law; but in 1970, *Rukunegara* (National Principles) was announced and one of its tenets is the principle of the rule of law.[52] The Malaysian report however described a "paradoxical blend of official adherence and violations," as for instance, the Chief Justice castigated the bar for "unwarranted criticism" that supposedly threatens the foundation of the rule of law.[53] The report also highlights actions of the executive government in recent years, which give rise to the perception of executive overreach.

The **Laotian** Constitution, amended in 2003 and again in 2015, implies greater commitment to the rule of law through, for example, provisions that clarify the role of the different authorities and that provide for a Local People's Assembly. Laos' Legal Sector Master Plan wanted to develop Laos as a "rule of law state" by 2020. Its four central pillars indicate the country's understanding of the rule of law in its legal system: (1) framework of laws, decrees and regulations; (2) law-related institutions that implement the legal framework; (3) means for educating and training on the use of the system; and (4) means for ensuring that all laws and regulations are accessible to both state agencies and citizens. The "completion" of the legal framework, as an institution, was the main thrust of the programme, and a baseline study did say that more work still needed to be done to make the framework "law in action."[54]

2. Definitions with Ends-Based Approaches

Some States appear to put importance on the ends that the rule of law is intended to serve within society, such as upholding law and order, or providing predictable and efficient judgments.[55]

As mentioned in the *2011 Rule of Law Baseline Study*, the **Indonesian** legal system was inherited from the Dutch colonial period, and the "rule of law" tradition (*negara hukum*) was closer to continental Europe's "*rechtsstaat*" tradition. It was included in the 1945 Constitution, which stated that, "Indonesia is based on law (*rechtsstaat*), and not based on mere power (*machtsstaat*)." This was removed by the 1999-2002 amendments. However, due to the third amendment in 2001, it remained in the text of the Constitution.[56]

50 The country report states that there have been significant changes, such as a change in the mandatory death penalty regime, Singapore's ratification of the Convention on the Rights of Persons with Disabilities, and ASEAN integration, but these changes are hardly seismic shifts in Singapore's overall approach to the rule of law.

51 *See*, Country Report on Singapore, at Part I.

52 *See*, Country Report on Malaysia, at Part I (Foundation and Evolution of Rule of Law).

53 *See*, Country Report on Malaysia, at Part I (Interpretation and Use of the 'Rule of Law').

54 *See*, Country Report on Cambodia, at Part I (Interpretation and Use of the 'Rule of Law').

55 *Supra* note 49, p. 3.

56 *See*, Country Report on Indonesia, at Part I (Foundation and Evolution of Rule of Law).

The end of President Suharto's regime in May 1998, which was termed as "*reformasi*" (reform), opened rule of law projects.[57] Government formally acknowledged the rule of law in plans. It was believed that, without rule of law, investors and the private sector cannot operate with confidence. Whilst commitment looked "good on paper," there were challenges on implementation, such as reforming legal institutions that did not have procedures and mechanisms to promote independence and professionalism, and on the rights of minorities.[58] The rule of law in Indonesia has been under continuous attack from various institutions in the last few years.

The **Philippines** also actively linked rule of law with other factors, such as rights, which are deeply entrenched in its Constitution. The Philippine Department of Justice defined it in terms of the UN definition.[59] Its Constitution, not amended since 1987, contained a citation of the rule of law. The concept was lumped together in the phrase "the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace."[60] But again, there are challenges like impunity and the weaknesses of the justice system.

Previously marked by the *2011 Rule of Law Baseline Study* as espousing a thin definition of the rule of law, **Cambodia's** so-called Rectangular Strategy included the "rule of law." Whilst the term is not explicitly mentioned in Cambodia's 1993 Constitution, the commitment to rule of law is reflected in its provisions, along with liberal democracy, separation of powers, and individual rights.[61] Government's understanding of "rule of law" may be gleaned from the Rectangular Strategy. It is understood as part of a cluster of other values and principles, including democracy, human rights, justice, good governance, social order, and respect of the law. The government however still has zero tolerance to so-called "provocative" activities that are characterised by the government as leading to political instability and social unrest.[62]

3. The 'Socialist' Rule of Law: Ideology-Based Definition

Vietnam's brand of the "rule of law" has been avant-garde, seeking to derive its relation to the State's ruling socialist political ideology. It embodied key principles: (1) supremacy of the Constitution and the law; (2) equality of all people before the law; (3) respect of human rights, as well as community values; (4) significance of the social order; and (5) democratic centralisation of State powers. The latter two distinguished this Vietnamese conception.[63]

57 *See*, Country Report on Malaysia, at Part I (Foundation and Evolution of Rule of Law).

58 *See*, Country Report on Indonesia, at Part I (Interpretation and Use of the 'Rule of Law'). The report states that the legal component of the current medium-term development plan focuses on "achieving greater enforcement and awareness of legal norms." The MTDP, in turn, proposes that this be achieved by focusing on three objectives: improved transparency, accountability and speed in law enforcement; improved effectiveness of corruption prevention and eradication; and respect, protection and fulfilment of human rights.

59 *See*, Country Report on the Philippines, at Part I (Interpretation and Use of the 'Rule of Law'). The report quotes that a rule of law framework must include: (1) constitution or its equivalent, as the highest law of the land; (2) a clear and consistent legal framework, and implementation thereof; (3) strong institutions of justice, governance, security and human rights that are well structured, financed, trained and equipped; (4) transitional justice processes and mechanisms; and (5) public and civil society that contributes to strengthening the rule of law and holding public officials and institutions accountable.

60 Philippine Constitution, Preamble.

61 *See*, Country Report on Cambodia, at Part I (Foundation and Evolution of Rule of Law).

62 *See*, Country Report on Cambodia, at Part I (Interpretation and Use of the 'Rule of Law').

63 *See*, Country Report on Vietnam, at Part I (Foundation and Evolution of Rule of Law).

For the first time, Vietnam's 1992 Constitution contained respect for human rights, with Article 50 stating that, "human rights such as political, civil, economic, cultural and social rights, are respected, as expressed in the citizen's rights and enacted in the Constitution and in laws."[64] The Constitution of 2013 reaffirmed the significance of the rule of law as basis of the democratic State. It stated that, "[the] Socialist Republic of Vietnam is a socialist rule of law State of the People, by the People and for the People. […] The State powers are unified and delegated to state bodies, which shall coordinate with and control one another in the exercise of the legislative, executive and judiciary powers."[65]

Nonetheless, it needs to be stressed that the broad enumeration of circumstances of permissible restrictions on rights fostered considerable elbow room for the State to restrict or limit rights.[66] Neither a legal procedure nor a State institution for directly enforcing constitutional norms like the Vietnamese "socialist rule of law" exists.[67]

4. States in Transition: Rule of Law in Flux

Other States, like **Myanmar** and **Thailand**, are in flux, and no reasonable categorisation of State understanding is present, as of this writing.

One cannot assume that the previous understandings of the rule of law still exist since the countries are in transition. In Thailand, the political turmoil and military coup recently led the rule of law to become one of the most contentious issues in society. In 2014, the 2007 Constitution, which explicitly recognised the rule of law, was annulled and circumstances to invoke the rule of law were controlled and limited by the *junta*. The absence of the rule of law was noted.

Since 1932, Thai constitutions continuously recognised the rule of law. However, the "rule of law provisions" under the 2007 Constitution were removed in the 2014 Interim Constitution.[68] Under the Interim Constitution, a commission was tasked to prepare an "efficient mechanism" for the reinforcement of rule of law principles.[69] A proposal from the National Rule of Law Commission was submitted,[70] containing a strict or narrow meaning and a general or broad meaning. The latter mentioned human rights. The adoption of such definition remained to be seen.

Myanmar previously had a military government where rule of law was considered as "rule and order through obedience by everyone on the country without protesting and criticising the government and the military." Since 2011, it has been transforming itself into a democratic country. The government and the parliament are trying to define the rule of law by reviewing functions of the judicial, administrative and legislative organs.[71]

64 Truong Trong Nghia, 'The Rule of Law in Vietnam: Theory and Practice,' in *The Rule of Law: Perspectives from the Pacific Rim* (Mansfield Center for Pacific Affairs, 2000), p. 136, http://www.mansfieldfdn.org/backup/programs/program_pdfs/10nghia.pdf (accessed 4 May 2016).

65 Article 4, Constitution 2013 of Vietnam.

66 *See*, Country Report on Vietnam, at Part I (Interpretation and Use of the 'Rule of Law').

67 *See*, Country Report on Vietnam, at Part I.

68 *See*, Country Report on Thailand, at Part I (Key Rule of Law Structures).

69 *See*, Country Report on Thailand, at Part I (Interpretation and Use of the 'Rule of Law').

70 *See*, Country Report on Thailand, at Part I (Foundation and Evolution of Rule of Law).

71 *See*, Country Report on Myanmar, at Part I (Foundation and Evolution of Rule of Law).

Brunei stands unique, for according to the *2011 Rule of Law Baseline Study,* and reiterated by reports, its unique constitutional structure as well as technically being in a state of emergency for over five decades mean that the Sultan is above the law.[72] The introduction of the Syariah Penal Code Order 2013 (Perintah Kanun Hukuman Jenayah Syariah 2013) had significant implications. It broadened the criminal jurisdictions of the Syariah courts and certain Syariah provisions are applicable to non-Muslims as well, allegedly curtailing the exercise of their freedoms. Reports described the consequences of the Syariah Penal Order 2013 as placing "extensive restrictions on the freedom of thought, conscience, and religion, while also prescribing draconian punishments for their violations."[73]

States exhibited adherence to conceptions of the rule of law that aim to build or strengthen systems and institutions. States also strongly emphasised rule of law that leads to values such as human rights. Others are simply in flux and transitioning to develop their own. It was evident that ASEAN Member States have adopted shared, but differentiated, rule of law meanings, all tending to still show a mixed regional preference for different conceptions of the rule of law.

IV. COUNTRY PRACTICES ON THE RULE OF LAW FOR HUMAN RIGHTS

This discussion of country practices synthesises the findings of the 10 country reports authored by the individual country rapporteurs. This presents the conceptual framework, which is similar to the *2011 Rule of Law Baseline Study*, and does not purport to be a "comprehensive empirical portrait of the concept in the region, nor to act as a single summary score-card which 'ranks' rule of law performance of ASEAN [M]ember states."[74] It is rather hoped that it would be a preliminary sketch or reference point for further empirical studies, programmes, and other initiatives seeking to enhance the rule of law for human rights in accordance with the ASEAN Charter.[75]

A. Central Principle I – The Government and its officials are accountable under the law

1. Definition and Limitation of the Powers of Government in the Fundamental Law

a. Lack of separation of powers

A central feature of the rule of law is that no one, including government officials, is above the law. In institutionalising this principle, the separation of powers amongst the three branches of government is an important prerequisite to hold the government accountable under the law.[76] The *2011 Rule of Law Baseline*

72 *See*, *generally*, Country Report on Brunei.

73 *See*, Country Report on Myanmar, at Part I (Foundation and Evolution of Rule of Law), *citing* Human Rights Resource Centre, *Keeping the Faith: A Study of Freedom of Thought, Conscience and Religion in ASEAN* (Jakarta: HRRC, 2013), 13.

74 *Supra* note 9, p. 5

75 *Id.*

76 *Supra* note 9, p. 13.

Study registered no problem with the separation of powers in ASEAN governments, save for the countries of **Brunei** and **Myanmar**.[77]

Reports on **Brunei** still mentioned the absence of separation of powers in the State. The executive and legislative powers rested with the Sultan, whilst the Cabinet of Ministers and the Legislative Council had subordinate roles. Article 84(2) of the Constitution remained. It has imposed limitations on the Council, stating that:

> … nothing in this Constitution shall be deemed to derogate from the prerogative powers and jurisdiction of [...the Sultan who...] retains the power to make laws and to proclaim a further Part or Parts of the law of this Constitution as [...the Sultan...] may seem expedient.

The State of Emergency declared more than five decades ago cemented further the Sultan's absolute power. Emergency powers in the Constitution and the Emergency Regulations Act, Cap 21, 1984 granted the Sultan absolute discretion to issue orders as long as the Sultan himself considered such orders to be "desirable in the public interest." The Sultan's decisions and acts are final with no judicial review available for them. Since 2011, Syariah Penal Code Order 2013 exposed any person who "contempts, neglects, contravenes, opposes or insults" a *titah* or decree of the Sultan and Yang Di-Pertuan to a prison term of up to five years.[78]

Whilst **Myanmar** is on the cusp of change, as of this writing, no changes or amendments have been made to the powers of government as defined in the 2008 Constitution and related laws. Article 11(a) of the Constitution established the basic principle that "legislative power, executive power and judicial power are separated, to the extent possible, and exert reciprocal control, check and balance among themselves," with the powers further defined by the Union Government Law of 21 October 2010 and the Union Judiciary Law of 2010.[79] Despite these provisions, the *2011 Rule of Law Baseline Study* regarded separation of powers and delimitations as absent since Myanmar then had a government where checks and balances were largely absent. However, many changes have since occurred. On 31 January 2011, a new two-chamber legislature convened for the first time in over two decades. The legislative power has been separated from the executive, although 25 per cent of parliament seats are occupied by representatives of the Defence Services. The country report notes that, in the last five years, the parliament is seen to have matured and power rivalry between the executive department and legislators became stronger than ever. Second general elections were held on 8 November 2015, with the National League for Democracy winning a majority of the seats in parliament.

b. Undue Interference By one Branch of Government with Another

In countries where the separation of powers principle had been deeply ingrained in the legal system, such as **Cambodia**, there were reports of alleged undue interference by one branch of government with another. Not all States surveyed demonstrated concern in this aspect of the rule of law.

In Cambodia, regardless of constitutional safeguards, reports stated that the executive government interfered with the functions of the judiciary. For instance, the government had been vocal in opposing cases beyond Case 002 at the Extraordinary Chambers in the Courts of Cambodia (ECCC). Prime Minister Hun Sen warned that further trials risked plunging the country into civil war. The judicial police refused to arrest

77 *Id.*

78 *See*, Country Report on Brunei, at Part IIA.

79 *See*, Country Report on Cambodia, at Part IIA.

Meas Muth, who was charged in a case for genocide, crimes against humanity, and war crimes—despite the issuance of a warrant of arrest in December 2014. The ECCC's chief of security reportedly said that officials would conduct public opinion surveys before taking action. Meas Muth presented himself to a judge in December 2015.

c. Problems with Judicial Review, including Immunity

A landmark development was **Vietnam's** 2013 Constitution. Whilst article 119 proclaimed the Constitution to be "the fundamental law… and has the highest legal effect," there remained no procedure by which laws can be scrutinised vis-à-vis the Constitution. There is no constitutional court with the authority to declare laws unconstitutional. Instead, the Constitution granted the National Assembly control over ensuring conformity with the Constitution and the duty to abrogate all formal written documents issued by all branches of government.[80]

Another very new development was the promulgation in 2015 of a new **Laos** Constitution. The Constitution introduced amendments that clarified the mandates of the government branches and the roles of top leaders. Many changes were notable, such as the power of the National Assembly to elect or remove key State officials. A Local People's Assembly—the local legislative organisation tasked with approving legislation, decision-making on local issues, and supervising the local State organisation—was also introduced. However, the legislature enjoyed immunity from all criminal prosecution, not only for limited acts committed in relation to public office. The legislature also retained authority to prosecute its own members.[81]

In Thailand, human rights groups raised concerns over the National Council for Peace and Order's (NCPO) conferral of sweeping powers on "Prevention and Suppression Officers" of the Royal Thai Armed Forces. Their actions were not subjected to judicial review.[82]

Though not in constitutional transition, it was positively noted that a Constitutional Commission was recently appointed in January 2016 by **Singapore** Prime Minister Lee Hsien Loong to review the office of the elected presidency in Singapore.[83] At the very least, this showed deliberative processes at work. What this would result into remained to be seen.

2. Amendment or Suspension of the Fundamental Law

a. Extra-Constitutional Partial Cancellation of Fundamental Law

Thailand's 2007 Constitution was "partly cancelled" by the *junta*, after the coup in 2014. This violated the rule of law and democratic principles recognised by the ASEAN Charter, as well as basic political rights.[84]

80 *See*, Country Report on Vietnam, at Part IIA.

81 *See*, Country Report on Laos, at Part IIA.

82 *See*, Country Report on Thailand, at Part IIA.

83 *See*, Country Report on Singapore, at Part IIA.

84 *See*, Country Report on Thailand, at Part IIA.

This was in sharp contrast with the promulgations of new constitutions in **Vietnam** in 2013 and **Laos** in 2015 through established procedures.[85] The new 2015 Constitution of **Laos** provided that only one body, the National Assembly, has the right to amend its Constitution.[86]

Since 2011, aside from the promulgation of new constitutions, several constitutions were also amended. **Myanmar's** 2008 Constitution became fully operational in 2011.[87] The constitutions of **Cambodia** (making the National Election Committee a mandated independent body),[88] **Singapore** (allowing the re-employment of retired judges),[89] and **Myanmar** (on its schedules on taxes and State lists), were amended.[90]

b. Prolonged 'State of Emergency' and Derogation of Rights

The UN Human Rights Committee stated in a general comment on the ICCPR that measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature.[91] Two fundamental conditions must be met: (a) the situation must amount to a public emergency, which threatens the life of the nation; and (b) the State party must have officially proclaimed a state of emergency. The latter, according to the committee, is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. In this respect, although **Brunei** is not a party to the ICCPR, its 50 year-old state of emergency may be reviewed in line with this guidance.

UN Special Rapporteurs consistently recommended the amendment of the **Myanmar** Constitution for it to be in line with international standards. In 2014, the current Special Rapporteur noted, "the military can never be held to account for past and present human rights violations."[92] This was because the Constitution still provided broad powers and responsibilities to the military. On the other hand, provisions on fundamental rights remained to contain "vague and subjective limitations" and are often qualified by the phrase "in accordance with law" or similar language, giving the potential to negate part or all of the right in question. Rights may also be "restricted or revoked through enactment to law" in order for the defence forces personnel or members of the armed forces "to carry out peace and security."

The current Special Rapporteur said that this allowed even non-derogable rights to be restricted or revoked in a state of emergency and possibly in other circumstances.[93]

Related concerns may be voiced with regard to Part XII of **Singapore's** Constitution that contains the provisions on "special powers against subversion and emergency powers" which allowed for derogation of fundamental liberties.[94]

85 *See*, Country Reports on Vietnam and Laos, at Part IIA.

86 *See*, Country Report on Brunei, at Part IIA.

87 *See*, Country Report on Myanmar, at Part IIA.

88 *See*, Country Report on Cambodia, at Part IIA.

89 *See*, Country Report on Singapore, at Part IIA.

90 *See*, Country Report on Myanmar, at Part IIA.

91 *Supra* note 35, para. 2.

92 UN General Assembly, *Situation of human rights in Myanmar*, A/69/398, 23 September 2014, par 65.

93 *See*, Country Report on Myanmar, at Part IIA.

94 *See*, Country Report on Singapore, at Part IIA.

3. Laws Holding Public Officers and Employees Accountable

a. Promulgation of Anti-Corruption Laws

A number of positive changes have occurred in the domestic laws of ASEAN States since 2011. For instance, **Brunei's** 2015 Prevention of Corruption (Amendment) Order 2015 was enacted following several "high profile" cases including "the jailing of the surveyor-general on four counts of corruption, and the indictment of a high-ranking police officer for accepting a luxury car from a convicted criminal." It focuses on the integrity and honesty of public officers, and aims to comply with the UN Convention Against Corruption, amongst others.[95] Criminal Asset Recovery Order 2012 was also passed to strengthen the efforts to fight financial crimes, including corruption.[96]

Although written permission is still required to initiate investigations against high-ranking officials in **Indonesia**, Law No. 17 of 2014 and Law No. 23 of 2014 on Local Government contained exceptions to the requirement of securing written permission for the prosecution of members of the House of Representatives and local leaders, respectively.[97]

Laos also amended the anti-corruption law in 2012 and its Constitution introduced a chapter on state audit.[98]

In the last few years, **Myanmar's** laws on anti-corruption, the establishment of the Myanmar National Human Rights Commission, the civil service personnel, and the procedure for writs application, were enacted. The President also promulgated guidelines on accepting gifts. However, as discussed below, these endeavours may still be inadequate. Myanmar's previous parliament voted in January 2016 to pass the Former Presidents Security Law, which granted former presidents immunity from prosecutions for actions committed during their time in office.[99]

b. Establishment of Institutions against Misconduct

To enhance systems of accountability, **Malaysia** established the Enforcement Agency Integrity Commission (EAIC) in April 2011 to develop integrity among enforcement officers and law enforcement agencies. Since then, it received a total of 1,461 complaints against various enforcement agencies. Although there is no information if it had investigated all these complaints, some of its investigations yielded positive results. For example, the EAIC found that the death of Dharmendran a/l Narayanasamy in 2013 resulted from the use of physical force by the police, and as such, they (the said police officers) were responsible for his death. [100]

95 Speech by the then Attorney-General Yang Berhormat Datin Seri Paduka Hajah Hayati binti POKSDSP Hj Mohd Salleh, *Opening of the Legal Year 2016*, 4 February 2016, http://www.malaysianbar.org.my/speeches/speech_by_yang_berhormat_datin_seri_paduka_hajah_hayati_binti_poksdsp_hj_mohd_salleh_attorney_general_of_brunei_at_the_opening_of_legal_year_2016_brunei_4_feb_2016.html (accessed 10 April 2016).

96 *See*, Country Report on Brunei, at Part IIA.

97 *See*, Country Report on Indonesia, at Part IIA.

98 *See*, Country Report on Laos, at Part IIA.

99 *See*, Country Report on Myanmar, at Part IIA.

100 *See*, Country Report on Malaysia, at Part IIA.

c. Actual Prosecutions under Laws relating to Accountability

The **Philippine** report noted that the power of impeachment was exercised multiple times in recent years. In 2011, the House of Representatives found sufficient cause to impeach then Ombudsman Merceditas Gutierrez for culpable violation of the Constitution and betrayal of public trust for failure to act on major graft and rights cases involving a former president. She resigned from her office. In the same year, the House of Representatives impeached then Chief Justice Renato Corona, resulting to his removal from office after being convicted for failure to disclose in official documents certain owned high valued properties. President Benigno S. Aquino III had been the subject of impeachment complaints as well.[101]

In **Singapore**, there has been one high profile prosecution of a public official. In 2013, the former Singapore Civil Defence Force chief Peter Lim Sin Pang was found guilty of obtaining sexual favours from a private sector employee in exchange for furthering the business interests of her employer. A few other prosecutions of high-ranking public officials who abused their position of power for private gains also featured prominently.[102]

In 2014, Akil Mochtar, the Chief Justice of **Indonesia's** Constitutional Court (*Mahkamah Konstitusi*), was sentenced for life after being found guilty of accepting a bribe to influence the court's ruling on an election dispute in Central Kalimantan. The Supreme Court sustained his sentence in 2015.[103]

Nonetheless, it bears stressing that a system may at times be too inaccessible or onerous for prospective complainants. For instance, according to a report on **Brunei**, in line with the absolute power of the Sultan, the Sultan receives immunity in his private and public capacity. Actions are not subjected to judicial review. Further, officials working on behalf of the Sultan are granted immunity for actions conducted in their official capacity, although legal provisions can exceptionally allow the initiation of proceedings against them.[104]

Findings from the 2014 **Vietnam** Provincial Governance and Public Administration Performance Index showed that Vietnamese citizens still witnessed the prevalence of nepotism for State employment, bribery in the public sector, and a lack of willingness to stop corruption from both the local government and citizens themselves. These caused loss of confidence in the system and in the whistle-blowers programme.[105]

4. Special Courts and Prosecutors of Public Officers and Employees

a. Lack of Special Courts and Prosecutors in Many States

Not all ASEAN States have dedicated special courts and prosecutors for public officers and employees. General courts and prosecutors undertake such functions, respectively. There seems to be no change in this landscape since 2011.

101 *See*, Country Report on Philippines, at Part IIA.

102 *See*, Country Report on Singapore, at Part IIA.

103 R. Suharsanto Raharjo and Pamela Kiesselbach, 'Indonesia: Bribery and Corruption,' in Jonathan Pickworth and Jo Dimmock (eds.), *Bribery and Corruption*, 3rd ed. (Global Legal Insights, 16 November 2015).

104 *See*, Country Report on Brunei, at Part I.

105 *See*, Country Report on Vietnam, at Part IIA.

In the **Philippines**, the Office of the Ombudsman investigates any public employee or agency for acts or omissions that appear "illegal, unjust, improper, or inefficient" and prosecutes them. They are tried before the *Sandiganbayan*, a special anti-graft court.[106]

In **Thailand**, the Supreme Court's Criminal Division for Persons Holding Political Positions is the court that handles criminal cases against persons who hold political positions**.** Apart from that, the Administrative Court has competence to try and adjudicate administrative cases.[107]

Indonesia's Anti-Corruption Commission (*Komisi Pemberantasan Korupsi* or KPK) continued to deal with corruption prevention and investigation, as well as prosecution of corruption cases involving law enforcement agencies, state apparatus, and other persons.[108]

The efficiency and independence of institutions were put to question. Case in point was the former Philippines' Ombudsman whose perceived (or real) political alliances were viewed to have undermined institutional functions.

This is not to say that other States had no mechanisms to seek redress for acts of public officers. They may be charged, *inter alia,* before general courts or national human rights institutions, in certain cases.

B. Central Principle II – Laws and procedure for arrest, detention and punishment are publicly available, lawful and not arbitrary.

1. Publication of and Access to Criminal Laws and Procedures

a. Launch of New Online Platforms To Publish Laws

Remarkably, in accordance with **Laos'** Law on Legislation, the Lao PDR *Official Gazette* was launched online in October 2013. Prior to this, Lao laws were not readily available, and there were at times uncertainty on the existence of or prevailing version of laws or decrees. Despite this, the level of awareness of the Official Gazette website amongst the general population is still unknown. No data to determine if requirements for dissemination under the law are being implemented, especially at the local levels.[109]

Singapore Attorney-General Chamber's plan to launch a new portal that includes subsidiary legislations, as mentioned in the *2011 Baseline Study,* has since been implemented.[110]

106 *See*, Country Report on Philippines, at Part IIA.

107 *See*, Country Report on Thailand, at Part IIA.

108 *See*, Country Report on Indonesia, at Part I.

109 *See*, Country Report on Laos, at Part IIB.

110 *See*, Country Report on Singapore, at Part IIB.

2. *Accessibility, Intelligibility, Non-retroactivity, Consistency, and Predictability of Criminal Laws*

Problems of arbitrary implementation of the laws also arise when laws are so vaguely framed that it facilitates their arbitrary application. Whilst a law is clear, its application may also be attended by arbitrariness.[111] Even before 2011, almost all legal systems in ASEAN contained guarantees for access to laws, their intelligibility, and non-retroactive application in general. However, there were still problems in this regard.

a. A 'Language Problem' Affecting the Intelligibility of Some Laws

Some reports noted that the way some laws had been written presented problems of understanding by the layman. For example, the country report on **Cambodia** mentioned that part of the difficulty with regard to intelligibility was that, whilst laws were in Khmer, the root words of certain terms used in some laws were borrowed from Indian ancient languages such as Pali or Sanskrit. This presented problems of understanding. In the last few years, efforts were however made to compile a legal lexicon and to standardise legal terminology.

b. Unwarranted Retroactive Applications Found

In at least two countries, the problem of retroactive application of laws was found. In **Brunei**, article 40 of the Prevention of Corruption Act, Cap 131, 1984 specifically allowed for the Act to be applied retroactively. This observation does not apply to other Bruneian laws. The **Cambodian** Centre for Human Rights (CCHR), according to its latest trial monitoring report covering 1 January 2012 to 30 June 2012, found two cases where the Criminal Code, which came into effect in December 2010, was improperly applied retrospectively by judges. The acts occurred before the effectivity of the Code. The Code provided that it may be applied retroactively only when less severe sentences were imposable. However, a Phnom Penh court allegedly imposed a heavier sentence by applying the Criminal Code retrospectively.[112]

c. Unpredictability and Inconsistency of Some Decisions

Reports indicated that predictability and consistency of criminal laws remained a challenge in some States. Corruption was seen as contributing to this. There was no indication if **Laos** had completely freed itself from –

> a complex difficulty for those who actually implement the laws, because many laws are generally defined and require the implementing decrees for detail(ed) elaboration on one hand, and on the other hand the law is effective from the date of promulgation.[113]

111 *Supra* note 9, p. 16.

112 *See*, Country Reports on Brunei and Cambodia, at Part IIB.

113 *See*, Country Reports on Laos, at Part IIB.

In its submission to the Human Rights Council for the 21st session of the Universal Periodic Review, Laos acknowledged that the "awareness and understanding of some officials and the general public about laws and regulations as well as the human rights obligations and commitments of the Lao PDR remain limited and are not sufficiently in depth."[114]

No official data or statistics that measure the level of understanding of laws in the different countries were found. It was however noted that as **Myanmar** grapples with a transition, more than 400 pre-independence laws have not been republished. Many of these laws are out-dated, but have not been amended or repealed. Neither are all newer laws available online and there is no central database for all published laws. The newer laws are not all known to many in the legal profession, so consistency is an issue, amongst others.[115] Challenges were also recorded in **Vietnam** and the **Philippines**.[116]

3. Preventive Detention and Rights of the Accused

a. Mixed Positive and Negative Changes in Law that Affect Rights of the Accused in Many States

Similar to the situation in 2011, almost all ASEAN States outlaw arbitrary arrest and detention, and provide for the rights of the accused.

Positive developments were seen, such as **Laos'** 2012 insertion in the law on criminal procedure of a stipulation that prohibited the detention of a person without an order from the head of the investigation-interrogation organisation or of the chief of office of the prosecutor. Its 2015 Constitution also provided, amongst others, that "[t]he right of Lao citizens in their lives, bodies, honour, and houses are inviolable."[117] **Singapore's** Misuse of Drugs Act was amended in 2012 to replace the mandatory death sentence with a discretionary one.[118] The new 2013 **Vietnamese** Constitution continues to guarantee all subsisting rights of the accused.[119] The **Philippines** passed the Anti-Enforced or Involuntary Disappearance Act of 2012 or Republic Act No. 10353, which served to further strengthen the protection of citizens against improper State intrusion and action.[120]

The **Malaysian** report however strongly noted that since 2011, the most noticeable change in the Malaysian legal system as regards rule of law for human rights was the repeal in 2012 of the Internal Security Act 1960 (ISA), a preventive detention law which Singapore also has. However, the positive development was short-lived as the executive promulgated a number of laws that allowed detention without trial outside a genuine state of emergency, such as the Prevention of Terrorism Act 2015 (POTA) and amendments to Prevention of Crime Act 1959 (PCA). This also impacted the rights of the accused.

114 *See*, Country Reports on Laos, at Part IIB.

115 *See*, Country Reports on Malaysia and Myanmar, at Part IIB.

116 *See*, Country Reports on Vietnam and Philippines, at Part IIB.

117 *See*, Country Report on Laos, at Part IIB.

118 *See*, Country Report on Singapore, at Part IIB.

119 *See*, Country Report on Vietnam, at Part IIB.

120 *See*, Country Report on Philippines, at Part IIB.

On a related note, the **Myanmar** report reflected controversy in recent years over arrests of those accused of violating the Law of Peaceful Assembly and Peaceful Procession, which was promulgated in December 2011 and amended in June 2014. The law required prior permission from local police before peaceful procession or assembly is conducted.[121]

Additionally, the **Thai** country report stated that after the coup, the junta replaced martial law with its new protocol. The Interim Constitution significantly broadened its authority while still retaining the power to crush political dissent with arrests and detentions. It added that all orders so issued are considered lawful and final, and all public discussions about the Interim Constitution are prohibited.[122]

b. Allowed Preventive Detention in Some States

Periods of preventive detention are allowed in certain ASEAN States. Laws that allow preventive detention are presented in Annex 4.

The most recent development in this regard involved **Brunei**. Brunei's Chief Justice declared the rights of the accused to be part of its legal system, even though the Constitution contains no explicit rights as such. Whilst the law prohibits arbitrary arrest and detention, preventive detention remained possible under two legislations. The problem, as pointed out by the country report, was that rights of the accused were not applicable to detainees under the Internal Security Act. Under the Criminal Law (Preventive Detention) Act, Cap 150, 1984, the Minister of Home Affairs can make an order to detain a person for up to a three-year period. No detention incidents in 2013 and 2014 were recorded, but in 2015, at least two police officers and a non-national was ordered detained or restricted for years.[123]

c. Other Controversial Issues on the Rights of the Accused

Several controversial rights-linked issues are worthy of mention. Themes that highlight the problems arising from reports are presented below.

i. Reports of Arbitrary or Extra-legal Treatment or Punishment, and Extra-Judicial Killings

The **Philippine** country report said that, despite constitutional and legal protections, impunity for extrajudicial killings, torture, unlawful disappearances, warrantless arrests, and detentions is still considered a major problem. For example, according to human rights group *Karapatan*, during President Aquino's six-year term, there were 294 victims of extrajudicial execution; 28 victims of enforced disappearance; 172 victims of torture; 3,237 victims of illegal arrest; and 551 victims of illegal search and seizure. Torture was still rife, according to Amnesty International's study,[124] with the so-called "wheel of torture" scandal in the

121 *See*, Country Reports on Malaysia and Myanmar, at Part IIB.

122 *See*, Country Report on Thailand, at Part IIB.

123 *See*, Country Report on Brunei, at Part IIB.

124 Amnesty International, *Above the Law; Police Torture in the Philippines,* https://www.amnesty.org/en/documents/asa35/007/2014/en/ (accessed 28 February 2016).

Philippines. Positively, a national monitoring mechanism had been put up to guard the right to life, which would hopefully be more active in the coming years.[125] The issue of enforced disappearances, particularly of activists, is mentioned in the report on Thailand.[126]

ii. Reports of Violations of the Presumption of Innocence, and Violations of the Rights to Legal Counsel and Assistance and to Knowing the Nature and Cause of the Accusation

Under **Brunei's** Internal Security Act, the accused is not presumed innocent and denied the right to counsel. The **Cambodian** report revealed that it is not mandatory to be legally represented when appearing before a court for a misdemeanour offense (unless a juvenile). From January to June 2012, CCHR's trial monitors identified that in four out of 244 felony trials, the accused was not assisted by counsel. Accused in misdemeanour cases were not represented by a lawyer in 61.5 per cent of the trials observed. The CCHR also uncovered that details such as the relevant law, the date of the offense, or the location of the offense were not consistently disclosed to the accused during trials.[127]

iii. Report of Lack of Guarantees during Trial

In **Laos**, a 2015 report noted that the accused may request to view evidence against him or her only if the arresting authority has completed its investigation report. In more serious cases, the arresting authority generally does not allow the accused to examine government-held evidence.[128]

iv. Reports of Corporal Punishment

Corporal punishment exists in many ASEAN States. In **Singapore**, the constitutionality of caning was unsuccessfully challenged in court in 2015. The court did not appreciate the argument that, even if Singapore law does not prohibit torture, the prohibition of torture was nevertheless imported into domestic law in two ways: through the *jus cogens* norm of the prohibition of torture, and through the prohibition of torture at the level of the common law.[129]

Malaysia's human rights commission, *Suhakam,* received complaints in the last few years alleging violations of the rights of the accused, including deaths in custody and police brutality.[130] In like manner, **Cambodian** prevalence of pre-trial detention, torture or ill-treatment, general non-mandatory right to counsel in case of a misdemeanour, and right-to-appeal issues, amongst others, were recorded.[131] Problems related to torture of prisoners also hounded **Indonesia**, **Myanmar**, and **Vietnam**, according to the respective country reports.[132]

125 *See*, Country Report on Philippines, at Part IIB.

126 *See*, Country Report on Thailand, at Table 1.

127 *See*, Country Reports on Brunei and Cambodia, at Part IIB.

128 U.S. Department of State, 'Laos 2104 Human Rights Report,' 2015, 10, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper (accessed 27 February 2016).

129 *See*, Country Report on Singapore, at Part IIB.

130 *See*, Country Report on Malaysia, at Part IIB.

131 *See*, Country Report on Cambodia, at Part IIB.

132 *See*, Country Reports on Indonesia, Myanmar and Vietnam, at Part IIB.

C. Central Principle III – The Process by which the Laws are Enacted and Enforced is Accessible, Fair, Efficient, and Equally Applied

1. Law Enactment

The *2011 Rule of Law Baseline Study* stated that there is broad consensus on the principles of access to justice and the administration of justice, but there were differences in practice.[133] This remains the case in this update and may be attributed to a thesis of a shared but differentiated notion of the rule of law for human rights in ASEAN.

a. Positive and Negative Developments on Access to Law Enactment

A positive development in **Myanmar** has been the announcements of draft laws in the daily government newspaper since 2012. Attendance at the sessions of the Legislative Council in **Brunei** is reserved to members, with the Sultan or the Speaker having the power to summon a person to address the Council. Moreover, there is no provision for public participation and feedback on draft legislation, although bills are required to be published in the *Gazette* except in cases of urgencies.[134]

In **Cambodia,** National Assembly President Heng Samrin issued a circular prohibiting commissions of the National Assembly from inviting civil society or the public to attend its meetings. The UN Development Programme and the Ministry of Justice of **Laos** reported that there were still no meetings or workshops of the drafting bill committees in the legislature that were opened to the public at large in Laos.[135]

This practice is in strident divergence with countries like **Malaysia**, **Singapore**, **Vietnam**, **Thailand**, **Indonesia**, and the **Philippines**, all of which showed openness in legislative proceedings, albeit in varying degrees. For example, **Malaysia** requires submission of an application at least five working days prior to the date of visit to Parliament, and an official application letter must accompany the application in order to witness law enactments. The parliamentary sessions in **Singapore** are noted to be open to even non-nationals.[136]

2. Law Enforcement

a. Inordinate and Patchy State of Law Enforcement Amongst ASEAN States

ASEAN States present an inordinate and patchy state of law enforcement. From the viewpoint of efficiency, **Singapore** constantly employed new measures towards the effective, fair, and equal enforcement of the law. It was largely perceived as having strong law enforcement. This is not the case for some other ASEAN states. Although Brunei has a low crime rate, the Sultan has censured the police for corrupt practices and questioned "why only 21 per cent of criminal cases were solved in 2014."[137] Others with inconsistent law enforcement efficiency, according to reports, were **Laos** and the **Philippines.**

133 *Supra* note 9, p. 19

134 *See*, Country Reports on Myanmar, Brunei, and Cambodia, at Part IIC.

135 *See*, Country Reports on Cambodia and Laos, at Part IIC.

136 *See*, Country Reports on Malaysia and Singapore, at Part IIC.

137 *See*, Country Reports on Singapore and Brunei, at Part IIC.

UN Special Rapporteur for **Cambodia**, Professor Rhona Smith, issued a statement in March 2016, stating that, "The political situation (in Cambodia) which includes renewed threats, judicial proceedings and even physical beatings of members of the opposition, is worrying." Facets of discrimination were a challenge in **Indonesia**, as with minorities and the lesbian, gay, bisexual, transgender/transsexual, and intersexed (LGBTI) community. **Malaysia** and **Thailand** also faced problems of unequal and unfair enforcement, especially the laws on associations and sedition. Procedures were an issue for **Vietnam**. Socio-ethnic and religious dimensions were a problem for the report on **Myanmar**, reflecting the discrimination of the Rohingya in law and policy.[138]

D. Central Principle IV – Justice is Administered by a Competent, Impartial and Independent Judiciary and Justice Institutions

In the *2011 Rule of Law Baseline Study*, a wide range of perceptions and attitudes as regards judicial independence and impartiality, as well as development and professionalism within judicial institutions in ASEAN countries, was observed.[139] The same still seems to ring true today. There had been notable changes, however, and the same are emphasised.

1. Appointment and Other Personnel Actions in the Judiciary and the Prosecution

a. Mixed Positive and Negative Changes in Law that Affect Appointment and Other Personnel Actions in the Judiciary and the Prosecution

Marked changes occurred in several States.

In **Cambodia**, judges and prosecutors are appointed through decrees issued by the King upon the proposal of the Supreme Council of Magistracy. The Council also takes disciplinary action against delinquent judges and proposes the transfer or removal of judges. However, three laws pertaining to the judiciary were promulgated in 2014, giving the Minister of Justice "undue influence" over the court system and the judiciary. For example, the Law on Organisation and Functioning of Supreme Council of Magistracy included members of the executive (particularly the Minister of Justice) and the National Assembly in the Council. Considering that the Council is charged with assisting the King in guaranteeing judicial independence, the role of the executive in their functions has been criticised.[140]

In **Laos**, under the 2015 Constitution, the appointment and removal of members of the judiciary and the prosecution involve the National Assembly, the President of the State, the National Assembly's Standing Committee, and the Supreme Public Prosecutor (for prosecutors). The system of judicial appointment requiring legislative and executive agreement is to ensure a check-and-balance between the State powers, at least in theory. Interestingly, Article 48 of the Amended Law on People's Court provides that judges can only be arrested or investigated on the approval of the Standing Committee, except in case of a "flagrant offense

138 *See*, Country Reports on Cambodia, Indonesia, Malaysia, Thailand, Vietnam, and Myanmar, at Part IIC.

139 *Supra* note 9, p. 19.

140 *See*, Country Report on Cambodia, at Part IID. The two other laws are the Law on Judges and Prosecutors and the Law on Organisation of Courts.

and urgency of the matter," amongst others.[141]

Whilst this provision is intended as a safeguard for judges, the country report observed that this system might also compromise judicial independence and possibly shield errant judges from investigation or prosecution. The report added that although institutionally differentiated from the legislative and executive branches under the Constitution, the judiciary is still not independent of the ruling party as most judges are party members.[142]

The country report tells us that **Malaysia** is still hounded by the 1988 judicial crisis, which resulted to the sacking and replacement of Supreme Court judges. Perceptions that judges are not promoted or appointed based on merit or seniority still persist. According to reports, the former United Nations Special Rapporteur on the Independence of Judges and Lawyers has urged the Judicial Appointments Commission (JAC), which has been operating since 2009, to be more transparent and accountable in the elevation of judges.[143] The JAC recommends candidates to the Prime Minister, who may reject its recommendations. While prior to the establishment of the JAC the Bar Council was consulted with regard to appointments, this practice has been discontinued.[144]

In **Myanmar**, the UN Special Rapporteur has recommended that measures be instituted to guarantee judicial independence.[145] It should be pointed out, nonetheless, that in 2012, the publication *The Rule of Law in Myanmar* said that it "heard no evidence to suggest that the current President and Supreme Court are actually misusing their extensive powers of appointment, but the possibility of future abuse should be forestalled by the more robust safeguards."[146]

2. Professional Development of the Judiciary and the Prosecution

a. New or Developed Institutions on Judicial and Prosecution Training

There were positive changes in **Malaysia**, **Vietnam**, and **Singapore** in the last few years. **Malaysia's** Judicial Academy was established in December 2011 and was charged with the function of providing coherent training for Superior Court judges. There was no significant change in the training, resources and compensation of prosecutors, judges and judicial officers in Malaysia, as they were seen as adequate. The Malaysian Bar continued to provide training and workshops for lawyers through its Continuing Professional Development (CPD) programme. "CPD points" were removed in 2013, and then were restored after the Bar Council passed a resolution requiring lawyers with less than five years experience to obtain a minimum amount of trainings per cycle.

141 *See*, Country Report on Laos, at Part IID.

142 *Id.*

143 UN Human Rights Council, Working Group on the Universal Periodic Review, *Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21 – Malaysia*, A/HRC/WG.6/17/MYS/3, 25 July 2013, para. 43.

144 *See*, Country Report on Malaysia, at Part IID.

145 Including reforming the judicial appointment process by creating a judicial appointments committee; increasing the salaries and pensions for judges to make them commensurate with the status and responsibility of their office; creating a specialized, independent body to investigate allegations of judicial corruption; and improving continuing education and training for the judiciary.

146 *See*, Country Reports on Indonesia, Malaysia, and Myanmar, at Part IID; International Bar Association's Human Rights Institute (IBAHRI), *The Rule of Law in Myanmar: Challenges and Prospects*, December 2012, 60.

Vietnam's judicial training is carried out by the Judicial Academy. Since 2015, judicial training has also been provided by the Vietnam Court Academy (for judges and court personnel), and the Hanoi Prosecutor College (for public prosecutors). However, judges' salaries, as civil servants, were regarded as very low, based on a 2012 study in Vietnam.

In 2015, the Supreme Court of **Singapore** established the Singapore Judicial College dedicated to the training of judges and judicial officers. As part of its international training program, the College conducts workshops on court excellence in other ASEAN countries in conjunction with the Ministry of Foreign Affairs' Initiative for ASEAN Integration. The Attorney-General's Chambers (AGC) has also set up training schemes for its officers. In 2014, the AGC Academy was set up with one school for prosecutors. Both the Malaysian and Singaporean programmes were seen as adequate.[147]

Capacity-building and training programmes were likewise described to be present in **Cambodia** (since 2003 through the Royal School of Judges), **Indonesia** (Judicial Training Centre), **Laos** (Judicial Research and Training Institute under the People's Supreme Court), **Myanmar** (specific professional training provided by Attorney General's Office and the Supreme Court), the **Philippines** (Philippine Judicial Academy for judges and various partners for the prosecutors), and **Thailand** (Judicial Training Institute for judges and the Training and Development Office of the Attorney-General for prosecutors). In terms of facilities, the Philippines' academy launched a Global Distance Learning Centre in 2013 with videoconferencing and other equipment. All these programmes have remained active since 2011, but concerns for low salaries in Indonesia – with judges' threats to strike in 2012 – unfamiliarity with the law and procedures in Myanmar, and inadequate training in Thailand, abound.[148]

b. No regular or Systematic Training Curriculum in a State

It is most striking that there does not appear to be any regular or systematic training curriculum for the continuous development of prosecutors and judges in **Brunei**. Training is given on an ad hoc basis, presumably based on perceived needs.[149] In some countries, such as **Laos**, authoritative data on compensation of judges and prosecutors are lacking.

3. State's Budget Allocation for the Judiciary and Other Principal Justice Institutions

a. Reports of Continued Low Budget Levels for Justice Institutions in General that Affect Independence

Judicial and other related institutions need to be provided with adequate funds to ensure the prompt and proper dispensation of justice. The schemes also have to safeguard the independence of institutions. Almost all ASEAN States had budgetary allocations for the judiciary and other principal judicial institutions at around one or less than one per cent of the countries' respective budget portfolios. Authoritative information on the budget allocated for the judiciary and other principal justice institutions in **Laos** is however not readily available. Further studies must be made on whether adequate resources are provided to justice-related institutions.

147 *See*, Country Reports on Malaysia, Vietnam, and Singapore, at Part IID.

148 *See*, Country Reports on Cambodia, Indonesia, Laos, Myanmar, Philippines, and Thailand, at Part IID.

149 *See*, Country Report on Brunei, at Part IID.

There are concerns that budget allocations are undermining judicial independence. **Vietnam's** current regime of budget allocation has raised doubt on the independence of the judiciary from the executive. The budget for the judicial system comes from two sources: (1) the central judicial budget, proposed by the government and approved annually by the National Assembly; and (2) the local budget, allocated by the provincial government. The National Assembly approves the central judicial budget to the People's Supreme Court and the latter then allocates the budget for the local courts and judicial agencies. The local courts may, in addition, receive additional budget from the local government.[150]

4. Impartiality and Independence of Judicial Proceedings

Judicial neutrality and independence are necessary for the dispensation of justice. Not only must the judge be impartial and independent, but he or she must be perceived as such, as must the institutions and judicial proceedings themselves. Of course, as stated in the *2011 Rule of Law Baseline Study*, in every ASEAN country there is criticism of aspects of the administration of justice.[151] No State has been free from criticism in reports. The most important matter is that institutions are enabled to cope with, address if needed, and rise above the criticisms in order to foster the rule of law.

a. Reports of Corruption, Strong Executive Influence, Politics, and 'Party' Influence that Undermine Independence and Impartiality

The concept of judicial independence and impartiality is embedded in different degrees in the various ASEAN constitutions. However, the main impediments of corruption, strong executive influence, and party affiliation persist. For instance, Article 19 of the **Myanmar** Constitution included "to administer justice independently according to the law" as a "basic judicial principle," however the Constitution also grants the executive wide influence over the judiciary. Corruption was reportedly rampant and people lack trust in the legal system. The International Commission on Jurists (ICJ), for example, reported that -

> [t]he lawyers with whom the ICJ spoke about this issue noted that while the degree of corruption varies (being at its worst at the lower rungs of the system), it is never absent from the equation: it is so deeply embedded into the legal system that it is essentially taken for granted.[152]

Another case is **Thailand**, whose Interim Constitution guarantees judicial independence but provides no adequate safeguards to guarantee impartiality of judicial proceedings and freedom from improper influence. In practice, after the 2014 coup, the *junta* government was reported to have influenced some cases, particularly those against politicians and anti-coup activists.[153]

150 *See*, Country Report on Vietnam, at Part IID. A related scheme also exists in the Philippines.

151 *Supra* note 9, p. 20

152 *See*, Country Report on Myanmar, at Part IID.

153 *See*, Country Report on Thailand, at Part IID.

Similarly, the **Cambodian** Constitution provides for judicial independence, but there are also reports of corruption,[154] as in the **Philippines.**[155] The Cambodian case is interesting since there were reports on the strong executive influence on justice institutions by, for example, allowing the Minister of Justice to be involved in the appointment and disciplinary process. In **Indonesia**, corruption was also a problem. A case that attracted significant attention involved the Chief Justice of the Constitutional Court, Akil Mochtar, who was arrested by the anti-corruption commission in 2013. He was found guilty for corruption and money-laundering in 2014 and sentenced to life imprisonment. The Supreme Court upheld the decision in 2015.

Reports also indicate that politics, internal to the judiciary or on the whole, and party affiliation weaken independence. For example, in **Malaysia**, concerns over the independence of judicial proceedings have not abated since 2011, particularly in cases concerning leaders of the opposition party. In February 2015, the Federal Court upheld the Court of Appeal's ruling that Anwar Ibrahim (an opposition leader) was guilty of sodomy, and the court was criticised in literature for its lack of independence and for pandering to government's interference. Assertions of influence by senior members of the judiciary on lower-ranked judges were recorded. This was also seen in **Laos**, where not the Constitution, but the 2012 Law on Civil Procedure and the 2012 Law on Criminal Procedure articulate the requirement for judicial tribunals to be impartial and independent. Aside from reports indicating that corruption continued to be a problem in the judiciary, it was also reportedly not independent of the ruling party. Most judges and senior officials of the Ministry of Justice are party members.[156]

Similarly, showing no remarkable change since 2011, the **Vietnam** report emphasised the fact that judges should be members of the ruling party might affect their impartiality when the case is related to issues sensitive to the interests of the party or its leadership.[157]

Brunei courts were seen as independent, but it has been noted that they "have yet to be tested in political cases."[158]

b. Actual Prosecutions under Laws relating to Accountability

On a positive note, the **Myanmar** government has begun taking some action against judges accused of corruption, as when a township judge was found guilty in 2014 for extorting bribes.[159]

154 According to a study, a group of lawyers in 2015 was convinced that 90 per cent of cases heard by the courts involved payment of bribes in one form or another, either to judges or to judicial clerks. They revealed that less than five per cent of cases with which they have been involved in did not involve payment. *See*, Cambodian country report, at part IID.

155 The Ombudsman surveyed families who actually transacted with the institutions, and it noted that there was a decrease in the incidence of solicitation of bribe money from 2010 (which showed 9.9% of respondents giving "grease" money or bribes) to 2.3% in 2013. Families giving bribe money when asked by the government official increased, with the greatest increase record in accessing justice. *See*, Philippine country report, at part IID.

156 *See*, Country Reports on Malaysia and Laos, at Part IID.

157 *See*, Country Report on Vietnam, at Part IID.

158 *See*, Country Reports on Singapore and Brunei, at Part IID.

159 *See*, Country Report on Myanmar, at Part IID.

5. Provision of Competent Lawyers or Representatives by the Court to Witnesses and Victims-Survivors

Two tracks are related to this as an indicator of the rule of law for human rights in ASEAN. First, reports have focused on the competence of lawyers in the individual ASEAN States. Second, a report has shown concern over access to competent lawyers, even if they are present in a State.

a. Mixed Levels of Competencies of Lawyers in ASEAN States

Although the **Singapore, Thai** and **Vietnamese** reports noted that lawyers have been adequately trained and criteria for entry to the legal profession are strictly observed, in **Myanmar**, the severe shortage of legally-trained professionals was a concern of a UN Development Programme report in 2014. The UN reported that, for new legal professionals, their foundational legal education has been limited, and the country offers no systematic continuing legal education for private lawyers. However, on a positive note, some observed a "new, merit-based reliance" on lawyers, *inter alia,* because of increasing awareness that a good lawyer can advance one's cause. Another positive development is the inauguration of a unified Independent Lawyers' Association of Myanmar in January 2016 as the first national, independent, and professional organisation of lawyers in the country.

b. No Requirement for Witnesses and Victims-Survivors to have a Lawyer in a State

Laos has no requirement under the law to provide lawyers for witnesses or victims.[160]

6. Safety and Security of the Judiciary, Prosecutors, Litigants, Witnesses, and Affected Public

a. New Witness Protection and Whistleblower Protection Laws and Programmes

For many countries in ASEAN, the safety and security of personnel at trial were not much of a concern. One positive development in **Malaysia** was the Witness Protection Act 2009, which set up the Witness Protection Program. Any witness may apply to be included, instilling confidence in would-be informants to lodge reports of corruption. This program, together with the Whistleblower Protection Act 2010, affords necessary protection to them.[161]

b. New Law on Security Mechanisms

Even before 2011, security measures had already been instituted in the criminal procedure law of **Laos**, in the serious screening protocols of **Singapore** courts, and by the judicial police in **Vietnam**. A law in **Thailand** in 2009 empowered justice-related officials to hire security companies to protect themselves or

160 *See,* Country Report on Laos, at Part IID.

161 *See*, Country Report on Malaysia, at Part IID.

otherwise make arrangements.[162]

C. Persistence of Safety-Related Issues of Judges, Witnesses, and Litigants in Some States

Countries like the **Philippines** and **Indonesia** have had safety-related issues. As mentioned in the *2011 Rule of Law Baseline Study*, there have been cases where victims and witnesses and their families were attacked physically and verbally during trial in Indonesia. Though there was no change in the law and in the situation since the 2011 report, there have been measures in place to ensure security.[163]

In **Brunei**, like in **Myanmar**, no information was found that details measures to ensure the physical safety of court participants and the judiciary. Neither were there reports of recent violence committed against judges, prosecutors, or accused persons by reason of a judicial or administrative proceeding. However, the **Cambodian** report noted a disparity. Safety and security for the accused, prosecutors, judges, and judicial officers are well provided in the cases before the ECCC through a supplementary agreement between Cambodia and the UN. On the other hand, no comprehensive mechanism in special law exists to ensure the protection of actors before regular courts. However, there are laws allowing screens and courtroom television-linked testimonies for children and vulnerable victims in criminal cases, amongst others.[164]

7. Specific, Non-Discriminatory, and Unduly Restrictive Thresholds for Legal Standing

a. 'Liberalisation' and Clarification of Legal Standing Thresholds

In order to access justice, the thresholds for legal standing must be specific, non-discriminatory, and not unduly restrictive. In the last few years, **Malaysia's** law on *locus standi* has veered towards liberalisation as the courts realised that taking a restrictive view would have "many grievances unremedied." The **Singapore** Court has also clarified the thresholds, holding that an applicant has legal standing only when there had been a breach of a public duty.[165]

Reports on **Brunei**, **Cambodia**, **Indonesia**, **Laos**, **Thailand,** and the **Philippines** claimed that the respective thresholds for legal standing in their jurisdictions are specific enough. The Philippine report mentioned that it was not the issue of standing that deterred people from accessing formal judicial avenues, but rather the cost of the suit.[166]

162 *See*, relevant Country Reports, at Part IID.

163 *See*, Country Reports on the Philippines and Indonesia, at Part IID.

164 *See*, relevant Country Reports, at Part IID.

165 *See*, Country Reports on Malaysia and Singapore, at Part IID.

166 *See*, Country Report on the Philippines, at Part IID.

8. Publication of and Access to Judicial Hearings and Decisions

a. Open Access to Court Proceedings and Decisions, but with Exceptions

Generally, all new ASEAN constitutions contain provisions to ensure open court proceedings, and all country reports noted open court proceedings.

Laos' 2015 Constitution, however, carved the exception of "where otherwise provided by the laws." The same wording is found in **Myanmar's** Constitution. Its court handbook, issued in October 2015, reiterated the principle of conducting proceedings in open court and allowed journalists to receive copies of judgments after applying for access and paying photocopying costs. The report considered it a positive development since copies of judgments were previously not easily available to media. However, public access is still prohibited in the trial of cases which the presiding judge assumed to be "special proceedings." The anti-terror laws of **Malaysia** can be used to restrict public access to judicial hearings.[167]

Vietnam's Constitution requires defendants to be tried in public but court decisions are not publicly available. Much like in many other ASEAN States, only parties to the case may obtain copies of the decision from the court. The Vietnamese court has started developing a casebook system, which should help improve public access to court decisions.[168]

9. Reasonable Fees and Non-Arbitrary Administrative Obstacles to Judicial Institutions

a. New Initiatives and Institutions that Promote Access to Justice and Address Administrative Obstacles

In general, there were no reports that courts in ASEAN require unreasonable fees or create arbitrary obstacles to justice, except the ones mentioned earlier. This was so even pre-2011. There have since been some more improvements in this area.

Laos' new Constitution provides for equality of access to justice. In **Brunei**, the last five years saw a visible move to adopt measures to avoid the high cost and inconvenience of lengthy litigation. The Small Claims Tribunal was established in 2013 to hear and determine small claims, with parties not having to engage the services of lawyers, relating to contract disputes not exceeding the amount of BN$10,000. The Judiciary Case Management System was also launched in March 2015 for an e-filing system that now allowed court users and lawyers 24-hour access to case documents and case schedules. Lawyers can file court documents online. In the same year, an announcement that court-annexed mediation would be introduced was made.[169]

Under the leadership of Chief Justice Maria Lourdes Sereno of the **Philippines**, several innovative projects had come out to increase access to justice. For instance, the Enhanced Justice on Wheels (EJOW) project involves a bus with two courtrooms deployed to different areas to conduct trials. The program now includes additional components, such as mobile court-annexed mediation; free medical, dental, and legal aid to

167 *See*, Country Reports on Laos, Myanmar, and Malaysia, at Part IID.

168 *See*, Country Report on Vietnam, at Part IID. The Indonesian report also mentioned a project to make decisions available online, and make them more readily available for the parties.

169 *See*, Country Reports on Laos and Brunei, at Part IID.

inmates; information dissemination campaign for barangay (village) officials; dialogue amongst Supreme Court officials and stakeholders in the Philippine judicial system; and a team-building seminar for court employees.[170]

Court-annexed mediation is now generally required as an alternative dispute resolution mechanism that provides swift access to justice. If the same is not successful, then the case proceeds to the trial phase. In 2013, the court also started "Judgement Day" wherein simultaneous hearings and decision-making were done in five jail facilities with the highest inmate population. There are small claims courts and other decongestion programmes.[171]

b. Persistence of Some Access to Justice Administrative Obstacles

In **Indonesia**, the main problem lies with "unofficial" fees that occur during the pre-trial process, especially during police custody and investigation by prosecutors. As the US Department of State noted, "Police commonly extracted bribes ranging from minor payoffs in traffic cases to large bribes in criminal investigations." Or, as stated in the **Myanmar** report, police officers reportedly do not receive adequate budget to conduct investigations, resulting in officers seeking investigation funds from complainants. Filing fees for some cases may also be high. Besides this, corruption in the judiciary is "chronic," as admitted by President Thein Sein, and the judicial process in general was seen as expensive.[172]

10. Assistance for Persons Seeking Access to Justice, including Available and Fair Legal Aid to All Entitled

a. New Assistance Programmes in Some States (Aside from Legal Aid)

Most programmes to assist persons seeking access to justice in the ASEAN States consist in providing legal aid. States with other programmes include **Myanmar**. In 2012, the President's Office announced the setting up of a "People's Voice" section on its website where people could send complaints, suggestions or appeals. The Parliament's Fundamental Rights of the Citizen, Democracy and Human Rights Committee has received complaints that are recorded and compiled. Some are sent to relevant ministries. No comprehensive data mapping access to justice assistance programmes delivered by NGOs and lawyers groups is available. In 2012, the International Bar Association's Human Rights Institute reported that many people interviewed suggested that access to justice remained poor. As with other countries, those seeking justice in **Indonesia** may ask for assistance from government institutions such as the police, Ombudsman, National Commission of Human Rights and National Commission on Violence against Women. This has been unchanged since 2011.[173]

170 *See*, Country Report on the Philippines, at Part IID.

171 *Id*.

172 *See*, Country Reports on Indonesia and Myanmar, at Part IID.

173 *See*, relevant Country Reports, at Part IID.

b. New Laws, Policies, and Programmes on Legal Aid

Since 2011, there have been new laws or programmes on legal aid in ASEAN States. Because the developments are fairly new, however, their full positive effects have yet to be realised.

In **Indonesia**, in 2011, the government enacted Law No. 16 of 2011 on Legal Aid, which regulated government-funded legal aid for the first time. With this law, which has been effective since 2013, the government began providing funds for accredited legal aid organisations based on the type of cases that they handle. The Supreme Court issued Regulation No. 1 of 2014 on the Guidelines to Provide Free Legal Services for the Poor, which replaced the previous one. As the previous baseline study noted, the earlier circular was not well-implemented.[174]

The new regulation of 2014 simplified the procedure for justice seekers to be freed from any court fees, and they would know immediately if they are eligible to undergo a "prodeo" (fee waiver) procedure because the regulation provides a system that allows court clerks to decide the matter directly. The system has been generally fair as it requires legal aid organisations to file reimbursements claims from government. However, there are weaknesses in the law. For example, marginalised groups such as women and children are not included in the scheme. These groups may still have no access to justice despite their financial conditions.[175]

Myanmar does not fund a national programme on free legal aid, but in January 2016, it passed a new legal aid law. Legal aid has been provided by several civil society and lawyers' organisations operating throughout Myanmar, and they began rendering services only in 2011. The rights of the accused may suffer if there is no legal aid programme that provides access to counsel.[176]

In **Singapore**, to allow legal redress despite the high cost of litigation, in 2014, the Community Justice Centre, in collaboration with the State courts, the Law Society and other justice stakeholders, set up the Primary Justice Project, which aims to provide "paid, basic legal services at a fixed fee and is geared towards helping parties to resolve their disputes, and at much lower costs, through the use of alternative dispute resolution services at the pre-filing stage." The centre was set up in response to statistics showing that the number of litigants in person had risen over the years. Traditionally, there are three forms of legal aid available in Singapore: legal aid for civil cases administered by the Legal Aid Bureau, a department of the Ministry of Law; the Legal Assistance Scheme for Capital Offences provided by the State through the Supreme Court; and the Criminal Legal Aid Scheme (CLAS) provided by the Law Society of Singapore.[177] One key change is that the State now provides funds for the CLAS scheme which used to be funded entirely by the Law Society. In May 2015, it was announced that, while the Law Society continues to run the scheme, the government would provide the bulk of the funding for initial start-up costs and contribute to annual operational costs, honoraria, and disbursements.[178]

174 *See*, Country Report on Indonesia, at Part IID.

175 *Id.*

176 *See*, Country Report on Myanmar, at Part IID.

177 *See*, Country Report on Singapore, at Part IID.

178 'Enhanced Criminal Legal Aid Scheme set to provide greater access to justice,' *Ministry of Law Singapore*, 19 May 2015, https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/Enhanced-CLAS-to-provide-greater-access-to-justice.html (accessed 1 June 2016).

Malaysia established the National Legal Aid Foundation in 2011 to provide free legal aid and advice on criminal matters, including Syariah criminal matters, to all Malaysians. There is an income requirement to be entitled to its services.[179] Offences that carry the death penalty are not covered as the court provides assigned counsel to persons so charged. Legal aid may also be availed from the Legal Aid Department and Bar Council.

In **Thailand**, a new law was enacted in 2015 under which the Ministry of Justice set up the Justice Fund to support and protect rights and freedoms in accessing justice. The objective is to provide money for aid and other expenses in litigation. As the law is new, its effects have yet to be felt.[180]

c. Reports on the Insufficiency of Some Legal Aid Systems

The situation in many ASEAN states has remained unchanged.

While there are other organisations rendering legal assistance, legal aid in **Brunei** is provided by the government only to those who cannot afford legal representation in court and are charged with capital punishment offences.[181]

Cambodia and the **Philippines** shared a problem with the absorptive capacity of legal aid systems. The Cambodian report stated that free legal representation remained limited. The Law on the Bar and the Internal Regulations of the Bar Association of the Kingdom of Cambodia oblige all lawyers to provide legal aid to the poor. Despite these provisions, the Bar Association is nowhere close to meeting the high demand for legal assistance, as confirmed by Ministry of Justice officials. A report noted that the practice of limiting the number of lawyers in the country restricted access to lawyers and access to justice.[182]

The country's legal aid budget remained insufficient to provide adequate legal assistance to those in need. The Bar Association has a department that provides free legal assistance, but its resources are very limited. The Association is also viewed as too politicised and closely allied with the government.[183] NGOs are thus the main source of free legal aid in Cambodia, but fear of reprisals and the desire for more stable and lucrative employment have caused many lawyers working for NGOs to resign and move to private practice. The lack of lawyers contributes to the problem.

In the Philippines, legal aid providers include the bar association, public attorneys (who suffer from the so-called "overloading" of their system), law schools, and law groups. The demand for legal aid exceeds the supply of aid. Public attorneys suffer from heavy workload and the legal requirement that an organised branch of a court should have one public attorney is not fulfilled. There was an overwhelming caseload for a thinly organised public office system.[184]

179 *See*, Country Report on Malaysia, at Part IID.

180 *See*, Country Report on Thailand, at Part IID.

181 *See*, Country Report on Brunei, at Part IID.

182 *See*, Country Report on Cambodia, at Part IID.

183 Siena Anstis, 'Access to Justice in Cambodia: The Experience of Grassroots Networks in Land Rights Issues,' *Legal Working Paper Series on Legal Empowerment for Sustainable Development* (Montreal: Centre for International Sustainable Development Law, 2012), 14.

184 *See*, Country Report on the Philippines, at Part IID.

Vietnam has 64 provincial legal aid agencies, with five offices specialising on women affairs, 127 district branches, and 928 commune-level legal aid clubs. The State-run legal aid system proved to be helpful in facilitating access to justice, although commentators observed that the increasing need for legal aid is "overloading" the system. This happens when the demand for free legal aid from the poor, war veterans and their families, national minorities, and others exceed the supply.

d. Varying Levels of People's Awareness of Pro Bono Initiatives

Figures on people's awareness of free legal aid and assistance were hard to come by. In a rare case of an access-to-justice survey in **Laos** in 2011, 14.8 per cent of the respondents claimed to be aware of legal aid services. Of these, 16.2 per cent mentioned the services' availability in their respective areas, but only 1.5 per cent has availed of the services. According to the **Singapore** country report, people have become aware of the various legal aid initiatives in Singapore due to efforts of the providers, such as the Legal Aid Bureau and Law Society, to disseminate information about their services through websites, brochures and public awareness activities.[185]

11. Measures to Minimise Inconvenience to Litigants and Witnesses, and their Families, Protect their Privacy, and Ensure Safety from Intimidation/Retaliation

a. New Law to Minimise Inconvenience and Protect Witnesses and Families in a State

Many ASEAN States do not have a unified law on protecting litigants, witnesses and their families, but a handful of laws operate to provide protection for certain vulnerable groups such as women and children. This is the case in **Brunei**, **Cambodia**, **Indonesia**, **Malaysia**, **Myanmar**, and **Thailand**. The National Human Rights Commission Law of 2014 in Myanmar provides witness protection and non-retaliatory measures against victims. However, it is still not known to what extent these provisions are fully complied with and how effective they have been. The **Philippines'** Witness Protection, Security and Benefit Program, administered by the justice department, had been admitting witnesses and their families for security and financial assistance, amongst others.[186]

185 *See*, relevant Country Reports, at Part IID.

186 *See*, relevant Country Reports, at Part IID.

V. Rule of Law for Human Rights in Integrating into a Rules-Based ASEAN

In 2011, the baseline study suggested that large-scale efforts and improvements were necessary to promote common standards and best practices as well as enhance the capacity and competence of judicial institutions in the ASEAN region. Such efforts, according to the study, are essential to achieve ASEAN's goals and objectives in support of its rules-based political-security and economic integration.[187] Since then, ASEAN, both as individual Member States and as a regional grouping, undertook numerous changes to pursue integration or to promote the rule of law.

The following discussion focuses on developments and endeavours within the ASEAN States with specific "rule of law" implications as they move towards regional integration.

A. The Envisioned Rule of Law in Integration

Even before the 2004 Vientiane Action Programme, ASEAN laid down goals and strategies towards realising the ASEAN Community. Under a so-called ASEAN Security Community, in terms of political development, ASEAN States wanted to establish programmes for mutual support and assistance amongst ASEAN Member States in the "development of a strategy for strengthening the rule of law, judiciary systems and legal infrastructure, effective and efficient civil services, and good governance in public and private sectors."[188]

After a mention of the "rule of law" in the ASEAN Charter in 2007, the ASEAN Political-Security (APSC) Blueprint embodied the characteristics and elements of the APSC, which shall promote political development in adherence to rule of law, amongst others. The vision was for a *rules-based community of shared values and norms*, in which States cooperate for political development. Under political development, a goal was to establish "programmes for mutual support and assistance amongst ASEAN Member States in the development of strategies for strengthening the rule of law and judiciary systems and legal infrastructure."[189] The sections below discuss the steps that have been identified in reports which ASEAN States had taken to pursue this.

187 *Supra* note 9, p. 21.

188 Vientiane Action Programme (2004-2010), 29 November 2004 (Vientiane, Laos), II(1)(1.1)(iv).

189 Roadmap for an ASEAN Community 2009-2015, ASEAN Political-Security Blueprint, A.1.3.

B. Progress Towards Achieving a Rules-Based ASEAN Community

1. On Mutual Support and Assistance on the Rule of Law

a. New Ratifications of the ASEAN Mutual Legal Assistance Treaty

ASEAN Member States have been pursuing mutual support and assistance on rule of law, especially in terms of extradition, mutual legal assistance (MLA), and recovery of proceeds. Several counties have had laws governing extradition long before plans for regional integration took shape. This includes, for example, **Philippines** (1977),[190] **Malaysia** (1992),[191] and **Singapore** (original enactment in 1968, revised in 2000).[192] **Brunei**, **Malaysia,** and **Singapore** have also had extradition arrangements with each other for decades, with the law of Brunei indicating the "commencement" of its extradition arrangement as regards the two other countries in 1984.[193] **Myanmar** enacted an Extradition Act in 1903, which however is not used in practice.[194]

Progress has occurred since ASEAN Member States expressed a collective will to push this area of cooperation further through the signing of the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters in 2004. Since 2011, Thailand has ratified the treaty. A table showing the respective dates of ratification of the ASEAN Member States is found below.

TABLE 1

RATIFICATIONS OF THE ASEAN TREATY ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS[195]

State	Date of Ratification
Brunei Darussalam	15 February 2006
Cambodia	08 April 2010
Indonesia	09 September 2008
Lao PDR	25 June 2007
Malaysia	01 June 2005
Myanmar	22 January 2009
Philippines	12 December 2008
Singapore	28 April 2005
Thailand	31 January 2013
Vietnam	25 October 2005

190 Presidential Decree No. 1069, "Prescribing the Procedure for the Extradition of Persons Who Committed Crimes in a Foreign Country" (Philippines).

191 Extradition Act 1992 (Malaysia).

192 Extradition Act (Cap. 103) (Singapore).

193 Extradition (Malaysia and Singapore) Act, Cap. 154 (Brunei).

194 Htu Htu Ngwe, 'International Cooperation: Mutual Legal Assistance and Extradition in Myanmar,' presented during UNAFEI's Sixth Regional Seminar on Good Governance for Southeast Asian Countries, (Tokyo, Japan) 2012. www.unafei.or.jp/english/pdf/PDF_GG6_Seminar/05-5_Myanmar.pdf accessed 3 June 2016.

195 'ASEAN Legal Instruments: Instruments of Ratification,' *ASEAN*, http://agreement.asean.org/agreement/detail/56.html (accessed 5 June 2016).

b. Absence of Mutual Legal Assistance Laws in Some States

Whilst **Singapore** enacted its Mutual Assistance in Criminal Matters Act in 2000, **Malaysia** its Mutual Assistance in Criminal Matters Act in 2002, and **Myanmar** its Mutual Assistance in Criminal Matters Law in 2004, several ASEAN countries passed similar laws only after the ASEAN Treaty on Mutual Legal Assistance was signed. This included **Brunei's** Mutual Legal Assistance in Criminal Matters Order (2005), **Indonesia's** Law Number 1 of 2006 regarding Mutual Legal Assistance on Criminal Matters and Law Number 19 of 2008 regarding the Ratification of the Treaty of Mutual Legal Assistance in Criminal Matters, and **Vietnam's** Law on Mutual Legal Assistance (2008).[196]

On the other hand, despite signing up for integration and becoming a party to MLA treaties, there are countries in ASEAN like the **Philippines** and **Cambodia**, which do not have a stand-alone MLA Law that provides legal basis for assistance.[197] **Laos'** domestic law on MLA is still under consideration, although it passed a law on extradition in 2012, which has enforced the extradition treaties that it signed with two other ASEAN countries, Thailand and Cambodia.[198]

ASEAN States have continued to receive and act upon MLA and extradition requests from each other and from other States.

c. Forming ASEAN Education Networks

Since education has been outlined as an action point for mutual support and assistance in line with integration, it is most worthy that ASEAN States like **Malaysia** have hosted and took part in a few activities under the ASEAN University Network in the last years. The Malaysian report listed five universities[199] in Malaysia as part of the ASEAN University Network. Three universities[200] were listed by the **Philippine** report.[201] It however remains to be seen how cooperation would play out in this regard.

d. Initiatives amongst ASEAN Judiciaries and Legislatures

In terms of the judiciary, ASEAN judicial systems had participated in several meetings. In one of these, for instance, the Chief Justices agreed to establish a working group on judicial education and training amongst ASEAN judiciaries on cross-border topics of common legal interest and create a standard and formatted mechanism, as well as share best practices to facilitate the service of civil processes within ASEAN.[202] ASEAN law meetings have also been held. **Myanmar** joined the ASEAN Law Association and established

196 *See*, Country Reports on Myanmar and Vietnam, at Part III.

197 *See*, Country Report on the Philippines, at Part III; Kuy Chhay, 'International Cooperation: Mutual Legal Assistance and Extradition,' presented during UNAFEI's Sixth Regional Seminar on Good Governance for Southeast Asian Countries, (Tokyo, Japan) 2012, http://www.unafei.or.jp/english/pdf/PDF_GG6_Seminar/05-1_Cambodia.pdf (accessed 1 June 2016).

198 *See*, Country Report on Laos, at Part III.

199 Universiti Kebangsaan Malaysia, Universiti Putra Malaysia, Universiti Malaya, Universiti Sains Malaysia, and Universiti Utara Malaysia.

200 Ateneo de Manila University, De La Salle University, and University of the Philippines Diliman

201 *See*, Country Reports on Malaysia, the Philippines, and Laos, at Part III.

202 *See*, Country Report on Malaysia, at Part III.

a National Committee in 2013. Parliamentarians have also been active. One of the activities of the ASEAN Parliamentarians for Human Rights was a fact-finding mission to Myanmar in 2015 to learn about key political and human rights issues facing the country, and to learn how ASEAN and members of parliament from around the region can support Myanmar.[203]

2. On Legislative and Substantive Changes Specifically Promoting the Rule of Law in Pursuit of Integration

a. Lack of Information on Changes Specific to Rule of Law to Pursue Integration

Researchers had difficulty in ascertaining whether a particular legislative or substantive change in respective countries was designed specifically to promote rule of law in pursuit of integration. For instance, no official information was found in **Indonesia**, **Brunei**, and **Malaysia**. No law that promotes the principle by design was found in **Cambodia**.

Whilst there had been various positive changes in the countries' legal frameworks since 2011, observations on **Myanmar** and **Brunei** seem to resonate throughout the region. According to the Myanmar report, these developments were designed primarily to address the needs of the country as Myanmar pursues its rebirth as a democratic State and establishes ties with the international community after five decades of isolation. The Brunei report suggested that the country has made improvements regarding legislation on corruption, but these changes seem to have been adopted primarily to support the country's drive against graft. Thus, the nation-State's interest in pursuing rule of law for human rights has pushed reforms at the national levels, but it is not the case that the changes specifically promoted rule of law in pursuit of integration. As indicated above, mention of rule of law for human rights as a philosophy of integration in legal and policy documents has been wanting.[204]

3. On Enactment of Laws relating to the ASEAN Community Blueprints and Similar Plans

a. New Laws on Economic Integration Policy

Over the past years, ASEAN States have enacted domestic laws in active pursuit of the economic integration policy. Various reviews had also taken place. As an example, in 2014, **Vietnam's** Ministry of Justice reviewed and assessed legal normative documents to ensure that the national legal system meets the requirements for Vietnam's participation in the ASEAN Economic Community, and some laws were passed.[205]

Philippine laws governing the different professions in the fields of chemistry, geology, interior design, and psychology, were made to comply with the blueprint's intention of allowing reciprocity between professions. A competition law to promote free and fair trade as well as outlaw monopolies was enacted to bring the

203 *See*, Country Report on Myanmar, at Part III.

204 *See*, relevant Country Reports, at Part III.

205 *See*, Country Report on Vietnam, at Part III. In 2014, the National Assembly adopted new Laws on the Organisation of the People's Court and People's Procuracy, Law on Referendum, Law on Real Estate Business, Law on Investment, and Law on Enterprises. In 2015, the National Assembly passed the new Civil Code and Criminal Code, the leading legislations governing all civil and penal relations in the society, which will take effective and replace the current one on 1 January 2017.

Philippines in line with the ASEAN Economic Community blueprint's goal of a single market with free flow of goods and services. Like the Philippines, **Malaysia** worked on an anti-competition law and amended the law on legal professions. Reforms in **Myanmar** were mainly economic in nature,[206] whilst **Laos** worked on realising tariff commitments in local law, and **Cambodia** amended its customs laws. Presidential instructions/decrees in **Indonesia** were about aligning itself with the economic community.[207]

b. Other Positive Developments Not Related to Economic Integration Only

Not all changes in law were economic in nature only. In **Thailand**, legislation on extradition and immigration—along with laws relating to copyright, engineering, trademarks, foreign business, and foreign workers—were in the pipeline. Besides these anticipated legislative developments, the Preparedness Centre for the ASEAN Community was set up.

Brunei amended its law on preventing corruption and enacted a law on criminal asset recovery in 2012.[208] As the country report noted, the aims of these laws overlap with those of the ASEAN Political-Security Community Blueprint, the Treaty on Mutual Legal Assistance, and the ASEAN Convention Against Trafficking in Persons, Especially Women and Children. Further, as mentioned above, several ASEAN Member States have recently enacted laws relating to mutual legal assistance in criminal matters.

4. On Integration as Encouraging Steps Toward Building the Rule of Law and Stronger State Institutions

a. Lack of Information on the 'Encouraging' Role of Integration on Rule of Law in Member States

It cannot be unequivocally stated that ASEAN integration has encouraged the ASEAN States to take steps in building the rule of law. What was certain is that at the State level, ASEAN States have passed laws, in line with State sovereignty, in pursuing their aims and directions. At the same time, the ASEAN instruments have encouraged the region as a bloc to take steps to manifest its economic integration.

As stated in the **Brunei** report, the impact of integration on the state of rule of law in the country is unclear. While Brunei has actively participated in regional initiatives, the configuration of Brunei's rule of law institutions has not changed dramatically since plans to create an ASEAN Community took shape in 2003 at the ASEAN Summit in Bali. To illustrate further, as **Myanmar** is going through several internal transitions that are impacting the rule of law landscape in the country, it becomes doubly hard to precisely assess to

206 *See*, Country Report on Myanmar, at Part III. President Thein Sein's second wave of reform focused on socio-economic development and alleviating poverty by half by 2015; these reforms took shape in the context of the regional move towards establishing the ASEAN Economic Community by 2015. The country adopted a managed float for its currency and unified its multiple exchange rates in April 2012, it passed the Myanmar Special Economic Zone Law in 2014, and the government approved the Mining Regulations Law in December 2015. Parliament is also reviewing a draft Myanmar Investment Law, which would combine the 2012 Foreign Investment Law and the 2013 Myanmar Citizens Investment Law, as well as a revision of the Myanmar Companies Act. While these efforts aim to make the country more attractive to foreign investors in general, they do align with the aims of ASEAN to generate economic activity and encourage freer flow of investments. In line with implementing the AEC Blueprint, the country is also working with the Asian Development Bank to establish trade facilitation indicators and review customs regulatory framework and operations.

207 *See*, relevant Country Reports, at Part III.

208 *See*, Country Report on Thailand and Brunei, at Part III.

what degree positive changes have been influenced by ASEAN integration. At least one commentator has argued that the overall process serves to encourage rule of law in Myanmar.[209]

In the **Cambodian** report, it appears that whilst Cambodia's efforts appear to mostly concentrate on the economic aspect of ASEAN integration, integration has nonetheless encouraged the government to introduce improvements in its policies, laws and procedures that contribute to the country's rule of law. However, in general, there is no available data for many countries to suggest that integration has led to the building of rule of law in the country at this stage, although nascent positive steps have been taken.

b. Nascent Effects of Integration on the Building of Stronger State Institutions

Likewise, it can be argued that there seems to be no direct link between ASEAN integration and the strengthening of ASEAN's State institutions. At best, the effects are minimal at this stage. However, at the very least, strategies towards that direction are in place. Integration influences State-centred efforts that are driven primarily by State interests or priorities. **Cambodia's** Rectangular Strategy has as a priority "improvements in good governance and efficiency of public institutions." **Brunei's** National Vision 2035 points to institutional development. Whilst countries with new constitutions, such as Vietnam, have included rule of law in their respective charters, its relation with regional integration is unclear. A shift in the political system, such as the current shift to democracy in **Myanmar**, as well as **Thailand's** transition, may prove opportunities to strengthen institutions and reflect upon the rule of law in pursuit of integration. This is because institutions are capable of being changed in a transition.

Interestingly, an observation in the **Singapore** report finds much relevance. In general, the Singapore government tends to accede to or ratify treaties, which obligations are already in line with Singapore's domestic laws, and embed treaty obligations into existing legislation. For example, after enacting the Prevention of Human Trafficking Act on 1 March 2015, Singapore went on to accede to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children on 28 September 2015, and then ratified the ASEAN Convention against Trafficking in Persons, Especially Women and Children on 25 January 2016. As such, it concluded that Singapore's regional or international treaty commitments do not influence its domestic legislation as much as its domestic legislations forms the basis on which Singapore chooses which treaties to ratify.[210]

At the regional level, ASEAN States have formed bodies that reflect the relation between human rights and the rule of law, such as the ASEAN Intergovernmental Commission on Human Rights (AICHR), the ASEAN Commission on the Promotion and Protection of Rights of Women and Children (ACWC), the ASEAN Committee on Women (ACW), and the ASEAN Committee on Migrant Workers (ACMW).

209 *See*, Country Report on Myanmar, at Part III, *citing* Moe Thuzar, 'Myanmar in the ASEAN Economic Community: Preparing for the Future,' in Sanchita Basu Das (ed), *ASEAN Economic Community Scorecard: Performances and Perception*, Singapore: Institute of Southeast Asian Studies, 2013, 208.

210 *See*, relevant Country Reports, for this sub-section, at Part III.

5. Commitments and Plans/Initiatives in relation to ASEAN-wide Commitments and the ASEAN Declarations on Human Rights

a. ASEAN Convention Against Trafficking in Persons, Especially Women and Children

Through the years, ASEAN has made declarations on human rights, *e.g.*, ASEAN Human Rights Declaration, the ASEAN Declaration on the Elimination of Violence Against Women, and the ASEAN Declaration on the Elimination of Violence Against Children. Recently, ASEAN as a regional organisation initiated steps to conclude treaties, thus binding itself to adhere to the principles therein on human rights. The ASEAN, true to the progressive nature of international law, is now forging treaty commitments, not just issuing declarations.

Foremost among these is the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP), signed by all Member States in November 2015, taking off from the wide ratification or accession by ASEAN States of the conventions relating to the human rights of women and children. It aims to prevent and combat trafficking in persons, to ensure the just and effective punishment of traffickers, to protect and assist victims, and to foster cooperation amongst the parties.[211] The Convention is not yet in force and, so far, only Cambodia and Singapore have ratified the same.[212]

The fact that all ASEAN States are parties to the conventions relating to the human rights of women and children was most helpful in consolidating support for the regional anti-trafficking treaty. The matter was thus in part largely viewed as a consolidation of common obligations of ASEAN States, which became the rallying point for the birth of the treaty.

As mentioned above, **Singapore** generally ratifies treaties only when its domestic legislations already reflect the terms of those treaties. As the Minister for Law stated, Singapore's focus is on the "full and effective implementation of treaty obligations." This suggests that ASEAN States, instead of formulating new norms for Member States to follow, have consolidated norms present in existing legislation that reflect international law. **Thailand** has initiated the Regional Plan of Action to Combat Trafficking in Persons in the ASEAN Senior Officials Meeting on Transnational Crime in 2012 to support the UN Global Plan of Action to Combat Trafficking in Persons and initiated the ASEAN Convention on Trafficking in Persons during the ASEAN Ministerial Meeting on Transnational Crime in 2013.[213]

In several countries, including **Malaysia, Indonesia,** and the **Philippines**, initiatives by the government with regard to ASEAN-initiated human rights commitments and declarations are not so pronounced. These States do not prominently announce plans or initiatives on ASEAN-initiated instruments on human rights.[214] However, there are on-going efforts to further negotiate and conclude other treaties on human rights in the ASEAN region, which are participated in by all ASEAN States.

211 *See*, Country Report on Thailand, at Part III.

212 'ASEAN Legal Instruments,' *ASEAN*, http://agreement.asean.org/agreement/detail/330.html (accessed 4 June 2016).

213 *See*, Country Reports on Singapore and Thailand, at Part III.

214 *See*, Country Report on Malaysia, at Part III.

VI. CONCLUSIONS

A. Nexus of the Changes to the Overall State of the Rule of Law for Human Rights

It is not possible to neatly encapsulate the status of the rule of law for human rights in the ASEAN region. As in the 2011 baseline study, States have taken steps, at varying levels, to uphold the rule of law. Some conclusions, reflecting on the rule of law are, however, in order.

1. Syncretism and Shared, but Differentiated, Notions of Rule of Law

A rules-based community should be premised on and operate according to a highly developed set of rules and norms.[215] The rule of law however remains essentially a contested concept amongst ASEAN States. Individual constitutions and laws have defined the concept, albeit with common strands that overlap across borders. As explained in one country report, one challenge is in defining exactly what constitutes the "rule of law."

The ASEAN Charter indeed sets out rule of law as a purpose of ASEAN, obliging the regional organisation to act in accordance with the fundamental principle of adherence to the rule of law. At a theoretical level, debates as to whether the States of ASEAN abide by a thick or thin conception of rule of law would not be easily resolved.[216] However, from a normative standpoint, we are already seeing that the ASEAN Charter has a revolutionary potential for entrenching the rule of law across all of ASEAN's diverse polities.[217] Further, reports showed how ASEAN States have related the rule of law to human rights and fundamental freedoms, in the same breath as good governance, amongst other concepts. The question is how this rule of law is envisioned in the national frameworks and whether the national frameworks share common ground.[218]

2. 'Hardening' of the Rule of Law Principles in ASEAN for Human Rights

ASEAN States have moved from merely incorporating the term "rule of law" into declarations to including it in binding treaties that require compliance. However, there has been the concern that some ASEAN States have signed on to the conventions only when they conform with local law. It is an ASEAN approach that may need to be revisited, but the process of consensus in ASEAN shows already a deep commitment to rule of law principles. Recently, the rule of law was mentioned in the ASEAN Convention Against Trafficking in Persons, Especially Women and Children. The importance of the regional instrument that is legally binding

215 Phan, Hao Duy, 'Towards a Rules-Based ASEAN: The Protocol to the ASEAN Charter on Dispute Settlement Mechanisms,' *Yearbook on Arbitration and Mediation*, vol. 5 (2013) 254.

216 *See*, Country Report on Brunei, at Part IV.

217 Desierto, Diane, 'ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter,' *Columbia Journal of Transnational Law*, vol. 49 (2011) 268.

218 Some country reports mention concepts similar to the rule of law in their constitutions. For example, the General Elucidation in the Constitution of Indonesia states that 'Indonesia is a State based on law (*Rechtsstaat*) not on power (*Machtstaat*).' Rechtsstaat is a continental civil law concept translated in Indonesian as *Negara Hukum*, a term that literally means 'law state,' but is often understood to imply 'rule of law.' *See* Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Oxford: Hart Publication, 2012). To cite another example, Articles 2(1), 8(1) and 4(3) of the Constitution of the Socialist Republic of Vietnam of 2013 defines Vietnam as a "socialist state ruled by law."

and would assist States to deal with diverse national challenges, priorities, and strategies, was recognised.[219] It is expected that the rule of law would be mentioned in future ASEAN human rights instruments.

3. *ASEAN Nation-State as Final Arbiter of the Rule-of-Law Meaning and Implementation*

Proceeding from a strong tradition of sovereignty amongst ASEAN States, it is ultimately the States, influenced by socio-political and even cultural factors, who decide on how to uphold the rule of law. This results in disparity of meanings and ascriptions to the strands of the rule of law, as well as their implementation. For instance, a conservative interpretation of fundamental liberties could pose a challenge in strengthening the rule of law, especially when a country is hesitant about engaging with international human rights norms.[220]

4. *Prospects, Challenges, and Other Contributing Factors to the Conception and Implementation of Rule of Law*

Rule of law takes time to "grow" as it cannot be imposed by decree or will.[221] A rule of law ecosystem has developed in the last few years in ASEAN. The description of an ecosystem befits the development, as it is capable of further growth, but at the same time, affected by external factors that influence the system. Some of such factors are:

i. Constitutional Setups, Separation of Powers, and Checks and Balances

The position of the rule of law in the constitutional and legal order affects the operationalisation of its core principles. Thus, the country reports revealed that the foremost challenge to the rule of law is the erosion of the principle of separation of powers. Separation of powers amongst the executive, legislative, and judicial branches of government is important as it serves the ends of the rule of law in checking the unrestricted and arbitrary exercise of power by any of the branches of government in a State.[222] The role that judges and lawyers play in this regard is important. In their exercise of judicial review, the reluctance of courts to challenge executive and legislative decisions that contravene the law, and the heavy influence of the politics of populist movements, threaten the rule of law.[223]

ii. Political Ideology and Approaches

Many country reports revealed that strengthening the rule of law is challenged by the political ideology and old approaches in State management by the leaders. For instance, in Vietnam, the single party system helps

219 ASEAN Convention Against Trafficking in Persons, Especially Women and Children, Preamble.

220 *See*, Country Report on Malaysia, at Part III.

221 Thio, Li-ann, 'Implementing Human Rights in ASEAN Countries: 'Promises to Keep and Miles to Go Before I Sleep," *Yale Human Rights and Development Law Journal,* vol. 2 (1999) 1.

222 *See,* Country Report on Myanmar, at Part III.

223 Peerenboom, Randall, 'Law and Development of Constitutional Democracy in China: Problem or Paradigm?' 19 *Columbia Journal of Asian Law* (2005) 185.

maintain stability, but also creates certain challenges in developing the rule of law.[224] However, Vietnam has developed an approach to incorporating the rule of law principle with a socialist lens.

iii. Transitions and Periods of Change

States in transition, such as Myanmar and Thailand, have greater elbow room to provide less limiting treatments of the rule of law as institutions are (re)formed. For instance, the Cambodian experience pointed to a chance in history to accommodate rule of law conceptions in the State. A change in leadership, especially at the helm of government, may also signal a change of direction.

iv. Corruption and Plays of Power

As many of the country reports show, there may be a causal link between high levels of corruption—particularly amongst judicial and prosecution officers, and law enforcement agents—and violations of rights related to upholding the rule of law. Endemic corruption invariably saps at the impartiality and efficiency of State institutions, allowing those in power to manipulate and abuse systems.

B. Role of the ASEAN Declaration on Human Rights in Strengthening Rule of Law for Human Rights

It is difficult to tell if the ASEAN Human Rights Declaration, adopted in Phnom Penh in 2012, has impacted or directly influenced country practices on the rule of law for human rights. Indeed, this Declaration has rarely been cited in official State documents and policy instruments. However, the Declaration has been referred to in subsequent instruments at the regional level. It has definitely moved regional processes forward, and has now become a foundation for regional developments. It can be said, moreover, that there is now stronger cooperation amongst States, international organisations, and/or non-governmental actors in order to drive the principles in the Declaration. Further, whilst there appeared to be no direct causal connection between the Declaration and changes in national laws and judicial institutions, it clearly served as an indicator of ASEAN's continuing commitment to human rights as nuanced therein.[225]

It should be emphasised that in ASEAN, there remains a strong belief in the value of consensus, rooted on the "ASEAN Way," and the Declaration signalled a wave for the future as ASEAN integrates. As ASEAN would soon celebrate its 50th anniversary, it would be interesting to see how central the rule of law will be as it lurches towards greater regional integration.

224 *See,* Country Report on Vietnam, at Part IV.

225 For example, paragraph 8 of the Declaration states that human rights should be exercised with 'due regard to the human rights and fundamental freedoms of others,' subject to limitations as are determined by law, amongst others, to meet the just requirements of national security, public order and public morality.

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Annex 1

INDICATORS

I. COUNTRY PRACTICE IN APPLYING THE CENTRAL PRINCIPLES OF RULE OF LAW FOR HUMAN RIGHTS

A. Central Principle 1: The Government and its officials and agents are accountable under the law.

1. Are the powers of government defined and limited by a constitution or other fundamental law?
2. Can the constitution/fundamental law be amended or suspended only in accordance with the rules and procedures set forth in such fundamental law?
3. Are there laws that hold public officers and employees, including the police and judicial officers, accountable for private gain, acts that exceed their authority, and violations of fundamental rights?
4. Are there dedicated courts and prosecutors that handle cases against public officers and employees?

B. On Central Principle 2: Laws and procedures for arrest, detention and punishment are publicly available, lawful and not arbitrary.

1. Are criminal laws and procedures (including administrative rules that provide for preventive detention or otherwise have penal effect) published and made widely accessible in a form that is up to date and available in all official languages?
2. Are these laws accessible, understandable, non-retroactive, applied in a consistent and predictable way to everyone equally, including government authorities? Are they consistent with other applicable laws?
3. Do these laws authorize administrative/preventive detention without charge or trial during or outside a genuine state of emergency?
4. Questions on the rights of the accused
    a. Do these laws protect accused persons from arbitrary or extra-legal treatment or punishment, including inhumane treatment, torture, arbitrary arrest, detention without charge or trial and extra-judicial killing by the State? Is the right to *habeas corpus* limited in any circumstance?
    b. Do these laws provide for the presumption of innocence?

c. Do all accused persons have prompt and regular access to legal counsel of their choosing and the right to be represented by such counsel at each significant stage of the proceedings, with the court assigning competent representation for accused persons who cannot afford to pay? Are accused persons informed, if they do not have legal assistance, of these rights?

d. Do these laws guarantee accused persons the right to be informed of the precise charges against them in a timely manner, adequate time to prepare their defense and communicate with their legal counsel?

e. Do these laws guarantee accused persons the right to be tried without undue delay, tried in their presence, and to defend themselves in person and examine, or have their counsel examine, the witnesses and evidence against them?

f. Do these laws adequately provide for the right to appeal against conviction and/or sentence to a higher court according to law?

g. Do these laws prohibit persons from being tried or punished again for an offense for which they have already been finally convicted or acquitted?

h. Do these laws provide for the right to seek a timely and effective remedy before a competent court for violations of fundamental rights?

C. On Central Principle 3: The process by which the laws are enacted and enforced is accessible, fair, efficient and equally applied.

1. Questions on law enactment

   a. Are legislative proceedings held with timely notice and are open to the public?

   b. Are official drafts of laws and transcripts or minutes of legislative proceedings made available to the public on a timely basis?

   c. Are all persons equal before the law and are entitled, without discrimination, to the equal protection of the law?

   d. Do the laws provide for adequate, effective and prompt reparation to victims/survivors of crime or human rights violations for harm suffered? Do these victims/survivors have access to relevant information concerning violations and reparation mechanisms?

2. Question on law enforcement

   a. Are the laws effectively, fairly and equally enforced?

D. On Central Principle 4: Justice is administered by competent, impartial and independent judiciary and justice institutions.

1. Are prosecutors, judges and judicial officers appointed, reappointed, promoted, assigned, disciplined and dismissed in a manner that fosters both independence and accountability?
2. Do prosecutors, judges and judicial officers receive adequate training, resources, and compensation commensurate with their institutional responsibilities?
3. What percentage of the State's budget is allocated for the judiciary and other principal justice institutions?
4. Are judicial proceedings conducted in an impartial manner and free from improper influence by public officials or private corporations?
5. Are lawyers or representatives provided by the court to witnesses and victims/survivors competent, adequately trained, and of sufficient number?
6. Do legal procedures and courthouses ensure adequate access, safety, and security for accused persons, prosecutors, judges, and judicial officers before, during, and after judicial, administrative or other proceedings? Do they ensure the same for the public and all affected parties during the proceedings?
7. Are thresholds for legal standing before courts clearly specified, not discriminatory and not unduly restrictive?
8. Are judicial hearings and decisions public and made readily available to affected parties?
9. Do persons have equal and effective access to judicial institutions without being subjected to unreasonable fees or arbitrary administrative obstacles?
10. Are persons seeking access to justice provided proper assistance?
11. Do the laws provide for and do prosecutors, judges and judicial officers take measures to minimize the inconvenience to witnesses and victims/survivors (and their representatives), protect them against unlawful interference with their privacy as appropriate, and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during, and after judicial, administrative, or other proceedings that affect their interests?
12. Is legal aid available in the country? If yes, who provides legal aid, who are entitled to receive such aid, and is the system of providing legal aid fair and available to all entitled to receive it? If no, are there plans related to the provision of legal aid?
13. Is the general public aware of pro bono initiatives/options for obtaining legal aid or assistance?

II. INTEGRATING INTO A RULES-BASED ASEAN

A. Progress towards Achieving a Rules-Based ASEAN Community

1. Are there programs for mutual support and assistance among ASEAN Member States in the development of strategies for strengthening the rule of law and judiciary systems and legal infrastructure?[1]

2. Have there been legislative and substantive changes in the State that promote the rule of law in ASEAN (at a regional level)?

3. Did the country enact laws that adhere to or promote compliance with the ASEAN community blueprints and other similar plans?

4. Does integration encourage taking steps towards building the rule of law in the country?

5. Has integration led to the building of stronger State institutions? If so, how has this been done or how is this apparent?

B. Prospects and Challenges

1. What are the challenges towards the State's strengthened commitment to the rule of law? What are the reasons for this?

2. Are there plans or future initiatives currently under discussion or about to be implemented wherein the State conforms to ASEAN-initiated/formed commitments and declarations on human rights? Has the State signed, ratified or acceded to binding legal documents within ASEAN that relate to the rule of law on human rights (such as the ASEAN Convention Against Trafficking in Persons, Especially Women and Children)? In line with such commitments, what changes has it made in its jurisdiction and domestic legislation, if any?

1 ASEAN Secretariat, ASEAN Political-Security Community Blueprint, 2009, 3. Under the ASEAN Political-Security Community Blueprint, the following are the actions that relate to mutual support and assistance in relation to rule of law: "i. Entrust ASEAN Law Ministers Meeting (ALAWMM), with the cooperation of other sectoral bodies and entities associated with ASEAN including ASEAN Law Association (ALA) to develop cooperation programmes to strengthen the rule of law, judicial systems and legal infrastructure; ii. Undertake comparative studies for lawmakers on the promulgation of laws and regulations; iii. Develop a university curriculum on the legal systems of ASEAN Member States by the ASEAN University Network (AUN) by 2010; and iv. Enhance cooperation between ALA-WMM and ALA and other Track II organisations through seminars, workshops and research on international law, including ASEAN agreements."

Annex 2

Commitments to Some International Treaty Instruments relating to Rule of Law[2]

Instrument	Brunei	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)		(R)	(A)	(A)			(R)	(S)	(A)	(A)
International Covenant on Civil and Political Rights (ICCPR)		(A)	(A)	(R)			(R)		(A)	(A)
International Covenant on Economic, Social and Cultural Rights (ICESCR)		(A)	(A)	(R)		(S)	(R)		(A)	(A)
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	(A)	(A)	(R)	(R)	(A)	(A)	(R)	(A)	(A)	(R)
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	(S)	(A)	(R)	(R)			(A)		(A)	(R)
Convention on the Rights of the Child (CRC)	(A)	(A)	(R)	(A)	(A)	(A)	(R)	(A)	(A)	(R)
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)		(S)	(R)				(R)			
International Convention for the Protection of All Persons from Enforced Disappearance (CPED)		(A)	(S)	(S)					(S)	
Convention on the Rights of Persons with Disabilities (CRPD)	(R)	(R)	(R)	(R)	(R)	(A)	(R)	(R)	(R)	(R)
Convention Relating to the Status of Refugees		(A)					(A)			

2 The list is not exclusive.

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; Convention (IV) relative to the Protection of Civilian Persons in Time of War	(A)	(A)	(A)	(A)	(A)	(A)	(R)	(A)	(A)	(A)
Convention on the Prevention and Punishment of the Crime of Genocide		(A)		(A)	(A)	(R)	(R)	(A)		(A)
Rome Statute of the International Criminal Court		(R)					(R)		(S)	

S – Signed; R – Ratified; A – Acceded

Annex 3

Rule of Law in Some Key ASEAN Instruments

Date	Instrument	Excerpt
29 November 2004 (Vientiane, Laos)	Vientiane Action Programme (2004-2010)	"II. GOALS AND STRATEGIES TOWARDS REALISING THE ASEAN COMMUNITY 1. ASEAN Security Community xxx 1.1 Political Development xxx iv. Establish programmes for mutual support and assistance among ASEAN member countries in the development of a strategy for strengthening the rule of law, judiciary systems and legal infrastructure, effective and efficient civil services, and good governance in public and private sectors;"
20 November 2007 (Singapore)	ASEAN Charter	"PREAMBLE xxx ADHERING to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms; xxx CHAPTER I PURPOSES AND PRINCIPLES ARTICLE 1 PURPOSES 7. To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN; xxx ARTICLE 2 PRINCIPLES xxx 2. ASEAN and its Member States shall act in accordance with the following Principles: xxx (h) adherence to the rule of law, good governance, the principles of democracy and constitutional government;"

1 March 2009 (Cha-am/Hua Hin, Thailand)	ASEAN Political-Security (APSC) Blueprint	"II. CHARACTERISTICS AND ELEMENTS OF THE APSC xxx 7. The APSC shall promote political development in adherence to the principles of democracy, the rule of law and good governance, respect for and promotion and protection of human rights and fundamental freedoms as inscribed in the ASEAN Charter… A. A Rules-based Community of Shared Values and Norms 12. ASEAN's cooperation in political development aims to strengthen democracy, enhance good governance and the rule of law and to promote and protect human rights and fundamental freedoms… A.1. Cooperation in Political Development xxx 15. Efforts are underway in laying the groundwork for an institutional framework to facilitate free flow of information based on each country's national laws and regulations; preventing and combating corruption; and cooperation to strengthen the rule of law, judiciary systems and legal infrastructure, and good governance. xxx A.1.3. Establish programmes for mutual support and assistance among ASEAN Member States in the development of strategies for strengthening the rule of law and judiciary systems and legal infrastructure Actions: i. Entrust ASEAN Law Ministers Meeting (ALAWMM), with the cooperation of other sectoral bodies and entities associated with ASEAN including ASEAN Law Association (ALA) to develop cooperation programmes to strengthen the rule of law, judicial systems and legal infrastructure; ii. Undertake comparative studies for lawmakers on the promulgation of laws and regulations; iii. Develop a university curriculum on the legal systems of ASEAN Member States by the ASEAN University Network (AUN) by 2010; and iv. Enhance cooperation between ALAWMM and ALA and other Track II organisations through seminars, workshops and research on international law, including ASEAN agreements."
20 July 2009 (Phuket, Thailand)	Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights	"2. PRINCIPLES The AICHR shall be guided by the following principles: 2.1 Respect for principles of ASEAN as embodied in Article 2 of the ASEAN Charter, in particular: xxx d) adherence to the rule of law, good governance, the principles of democracy and constitutional government;"

18 November 2012 (Phnom Penh, Cambodia)	Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration ASEAN Human Rights Declaration	"REAFFIRMING ASEAN's commitment to the promotion and protection of human rights and fundamental freedoms as well as the purposes and the principles as enshrined in the ASEAN Charter, including the principles of democracy, rule of law and good governance;" "REAFFIRMING our adherence to the purposes and principles of ASEAN as enshrined in the ASEAN Charter, in particular the respect for and promotion and protection of human rights and fundamental freedoms, as well as the principles of democracy, the rule of law and good governance;"
14 June 2012 (Bali, Indonesia)	ASEAN Security Community Plan of Action	"ACTIVITIES I. Political Development xxx c. Strengthening the rule of law and judiciary systems, legal infrastructure and capacity building;"
11 May 2014 (Nay Pyi Taw, Myanmar)	Nay Pyi Taw Declaration on Realisation of the ASEAN Community by 2015	"DO HEREBY AGREE: xxx 2. To further enhance ASEAN cooperation in promoting democracy, good governance and the rule of law, and promotion and protection of human rights and fundamental freedoms, with due regard to the rights and responsibilities of the ASEAN Member States, so as to further enhance a rule-based community of shared values and norms; 3. To promote and uphold the rule of law in the conduct of relations, including in the peaceful resolution of disputes in accordance with universally recognized principles of international law;"
27 April 2015 (Langkawi, Malaysia)	Langkawi Declaration on the Global Movement of Moderates	"FURTHER ACKNOWLEDGING that a commitment to democratic values, good governance, rule of law, human rights and fundamental freedoms, equitable and inclusive economic growth, tolerance and mutual respect, and adherence to social justice are vital to countering terrorism, violent extremism and radicalism, which pose a challenge to ASEAN, and address their root causes; xxx DO HEREBY AGREE TO: 4. Further promote the approach of moderation and uphold the rule of law in the conduct of relations among states, including in the peaceful resolution of disputes in accordance with universally recognised principles of international law;"
27 April 2015 (Kuala Lumpur, Malaysia)	Kuala Lumpur Declaration on a People-oriented, People-centred ASEAN	"WE HEREBY AGREE TO: xxx Political-Security Continue to promote the principles of democracy, rule of law and good governance, social justice, as well as to promote and protect human rights and respect for fundamental freedoms;"

21 November 2015 (Kuala Lumpur, Malaysia)	ASEAN Convention Against Trafficking in Persons, Especially Women and Children	"RECALLING the purpose and principles of the Charter of the United Nations, the Universal Declaration on Human Rights, the Charter of the Association of Southeast Asian Nations ("ASEAN Charter"), the ASEAN Human Rights Declaration, the United Nations Convention against Transnational Organized Crime, and where applicable, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and other international agreements and resolutions of the United Nations on the eradication of trafficking in persons, in the promotion and protection of human rights, fundamental freedoms, fair treatment, rule of law and due process;"
22 November 2015 (Kuala Lumpur, Malaysia)	ASEAN 2025: Forging Ahead Together	ASEAN COMMUNITY VISION 2025 "8. We, therefore, undertake to realise: xxx 8.2. An inclusive and responsive community that ensures our peoples enjoy human rights and fundamental freedoms as well as thrive in a just, democratic, harmonious and gender-sensitive environment in accordance with the principles of democracy, good governance and the rule of law;" ASEAN POLITICAL-SECURITY COMMUNITY BLUEPRINT 2025 "II. CHARACTERISTICS AND ELEMENTS OF ASEAN POLITICAL-SECURITY COMMUNITY BLUEPRINT 2025 A. RULES-BASED, PEOPLE-ORIENTED, PEOPLE-CENTRED COMMUNITY A.2. Strengthen democracy, good governance, the rule of law, promotion and protection of human rights and fundamental freedoms as well as combat corruption xxx A.2.4. Establish programmes for mutual support and assistance among ASEAN Member States in the development of strategies for strengthening the rule of law, judicial systems and legal infrastructure i. Entrust ASEAN Law Ministers Meeting (ALAWMM), with the cooperation of other Sectoral Bodies and Entities associated with ASEAN, including the ASEAN Law Association (ALA), to develop cooperation programmes to strengthen the rule of law, judicial systems and legal infrastructure;"

Annex 4

Laws Relating to Detention without Charge or Trial

Country	Law	Reason	Maximum Duration
Brunei	Criminal Law (Preventive Detention) Act, Cap 150, 1984	"2. (1) Whenever the Minister is satisfied with respect to any person, whether such person is at large or in custody, that such person has been associated with activities of a criminal nature, the Minister* may — (a) if he is satisfied that it is necessary that such person be detained in the interests of public safety, peace and good order, by order under his hand direct that such person be detained for any period not exceeding one year from the date of such order; or (b) if he is satisfied that it is necessary that such person be subject to the supervision of the police, by order direct that such person be subject to the supervision of the police for any period not exceeding 3 years from the date of such order."	3 years
	Internal Security Act (ISA), Cap 133, 1984	"3. (1) If His Majesty the Sultan is satisfied with respect to any person that, in order to prevent that person from acting in any manner prejudicial to the security of Brunei Darussalam or any part thereof or to the maintenance of public order or essential services therein, the Minister shall make an order — (a) Directing that such person be detained for any period not exceeding 2 years; …"	Renewable two-year periods
Cambodia	Criminal Procedure Code, 2008	Police custody (Article 96) The police may detain a person suspected of a crime. They may also detain any person who may be able to provide relevant facts but refuses to provide such information, provided a prosecutor has given written authorization for such detention.	48 hours, extended for another 24 hours with permission of prosecutor

	Criminal Procedure Code, 2008	Provisional Detention (Article 205) Provisional detention may be ordered when it is necessary to: (1) Stop the offense or prevent the offense from happening again; (2) Prevent any interferences on witnesses/ victims or prevent collusion between accused persons and accomplices; (3) Maintain evidence or material leads; (4) Ensure the accused is kept for the court; (5) Protect the security of the accused; and (6) Maintain public order.	18 months for felonies; 6 months for misdemeanour, and 3 years for crimes against humanity, genocide or war crimes. The investigating judge at the closing of an investigation may keep the accused under pre-trial detention until he/ she appears in court for maximum of four months.
Indonesia	Law No. 8 of 1981 on the Criminal Procedure	The Criminal Procedure allows investigators to detain without trial for the purpose of investigation. (Articles 20 and 24)	20 days, may be extended by a prosecutor for a maximum of 40 days. After the 60-day period, the investigator must release the suspect.
	Law No. 15 of 2003 on the Eradication of Terrorism	Section 28 allows investigators to detain without trial any person suspected of committing a criminal act of terrorism for seven days. For the "purpose of investigation and prosecution," a person may be detained for a maximum of six months.	Detention without trial: 7 days
	Law No. 23 of 1959 on the State of Emergency	According to Article 32, the Military Emergency Authority may arrest someone and detain him for at most 20 days on the basis of a "letter of order." (Grounds for arrest and detention are not articulated in the law.) If within 20 days the examination of the arrested person is not yet done, the detention may be extended to at most fifty days.	Preventive detention for a maximum of 50 days without charge

Lao	Law on Criminal Procedure, 2012	Under Art. 135, in relation to Art. 136, the issuance of warrants, detention, arrest, remand, or house arrest can be used as a preventive measure "in order to timely prevent the offence or when there is the basis leading to the belief that the accused person will create difficulties to the investigation-interrogation." Under Art. 138, a suspect may be detained for 44 hours to allow investigation-interrogation. Within 48 hours, the investigator or public prosecutor must issue finding and may request the chief of the office of prosecutor for, among others, an order of remand (or temporary imprisonment before the final imprisonment of the court), to proceed with the investigation-interrogation.	44 hours for investigation-interrogation. Article 111 gives time limits for temporary remand in conducting investigation-interrogation: (a) two months, which may be extended up to an aggregate of six months, for minor offences; and (b) three months, which may be extended up to an aggregate of one year, for major offences.
Malaysia	Prevention of Terrorism Act 2015	The Prevention of Terrorism Board finds reasonable grounds for believing that a person, who is the subject of the inquiry, is engaged in the commission or support of terrorist acts. (Sections 13(1) and (2))	Two years
	Amendments since 2011 to the Prevention of Crime Act 1959	The new section 19A of the PCA 1959 allows the PCB to "direct that any registered person be detained… if it is satisfied that such detention is necessary in the interest of public order, public security or prevention of crime."	Renewable two year periods
Myanmar	Constitution, 2008	Article 376 states: "No person shall, except matters on precautionary measures taken for the security of the Union or prevalence of law and order, peace and tranquillity in accord with the law in the interest of the public, or the matters permitted according to an existing law, be held in custody for more than 24 hours without the remand of a competent magistrate."	24 hours; period for exception not specified

	Law to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts, 1975	This law allows "[t]he Cabinet… to pass an order, as may be necessary, restricting any fundamental right of any person suspected of having committed or believed to be about to commit, any act which endangers the sovereignty and security of the state or public peace and tranquillity."	Five years
Philippines	Rules of Court, 1997	Preventive detention without a warrant of arrest is allowed: 1. When the person to be arrested has committed, is actually committing, or is attempting to commit an offence; 2. When an offence has just been committed and there is probable cause to believe based on personal knowledge of facts or circumstances that the person to be arrested has committed it; and 3. When the person to be arrested is a prisoner who has escaped	Persons arrested are to be delivered to judicial authorities within 12 hours for offences punishable by light penalties; 18 hours for offences punishable by correctional penalties; and 36 hours for offences punishable by afflictive or capital penalties.
	Republic Act 9372 or Human Security Act of 2007	A person is charged with or suspected of the crime of terrorism or the crime of conspiracy to commit terrorism.	3 days; in the event of "an actual or imminent terrorist attack," suspects may be detained for more than 3 days with written approval of specified officials
Singapore	Internal Security Act (Cap. 143, 1985 Rev. Ed.)	"8.—(1) If the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore or any part thereof or to the maintenance of public order or essential services therein, it is necessary to do so, the Minister shall make an order — (a) directing that such person be detained for any period not exceeding two years."	Renewable 2 year periods

	Criminal Law (Temporary Provisions) Act (CLTPA) (Rev. Ed. 2000) (Renewed for another five years in 2015.)	Section 30 authorizes the Minister to make an order for the preventive detention of any person with respect to whom he is satisfied that the person "has been associated with activities of a criminal nature," and that "the person [should] be detained in the interests of public safety, peace and good order."	12 months
Thailand	2005 Emergency Decree on Public Administration in Emergency Situation, B.E. 2548	According to Section 11, when an emergency situation has been declared, the Prime Minister may "issue a Notification that a competent official shall have the power of arrest and detention over persons suspected of having a role in causing the emergency situation, or being an instigator, a propagator, a supporter of such act or concealing relevant information relating to the act which caused the emergency situation, provided that this should be done to the extent that is necessary to prevent such person from committing an act or participating in the commission of any act which may cause a serious situation or to foster cooperation in the termination of the serious situation."	7 days, with possible extensions for up to 30 days
	Interim Constitution, 2014	Section 44 states: "In the case where the Head of the National Council for Peace and Order is of opinion that it is necessary for the benefit of reform in any field and to strengthen public unity and harmony, or for the prevention, disruption or suppression of any act which undermines public peace and order or national security, the Monarchy, national economics or administration of State affairs, whether that act emerges inside or outside the Kingdom, the Head of the National Council for Peace and Order shall have the powers to make any order to disrupt or suppress regardless of the legislative, executive or judicial force of that order. In this case, that order, act or any performance in accordance with that order is deemed to be legal, constitutional and conclusive, and it shall be reported to the National Legislative Assembly and the Prime Minister without delay."	Period not specified

Vietnam	Decree No. 112/2013/ ND-CP on the Regulation on sanction of expulsion, temporary custody of people according to administrative procedures, and the management of foreign violators of Vietnamese law pending the completion of expulsion procedures	Temporary custody on the basis of administrative procedures shall be applied when it is necessary to immediately prevent or stop acts that disturb public order; immediately prevent or stop acts injuring other individual(s); or immediately prevent or stop domestic violence.	12 hours; may be extended up to 24 hours or 48 hours (for violations of border regulations or administrative violations in remote mountainous areas or islands)
	Criminal Procedure Code (No. 19/2003/ QH11 of November 26, 2003)	Under Article 81, urgent arrest may be made (i) when there exist grounds to believe that such persons are preparing to commit very serious or exceptionally serious offenses; (ii) when victims or persons present at the scene of the offence confirm that such persons are the very ones who committed the offenses and it is deemed necessary to immediately prevent such persons from escaping; (iii) when traces of offences are found on the bodies or at the residences of the persons suspected of having committed the offenses and it is deemed necessary to immediately prevent such persons from escaping or destroying evidences.	12 hours from receipt of request for approval by appropriate procuracy

The State of Brunei Darussalam

BRUNEI

TABLE 1
SNAPSHOT

Formal Name	Negara Brunei Darussalam
Capital City	Bandar Seri Begawan
Independence	1 January 1984
Historical Background	Brunei is one of the longest surviving continuous monarchies. The Sultanate, which once extended from Borneo to the Philippines, had been steadily declining since the late 16th century. Since the arrival of the European colonial powers, Brunei had faced colonial aspirations of Spain, Holland and Portugal as well as Britain. It was the latter that was to dominate Brunei's future. In 1888, Brunei entered into a formal agreement to become a British Protectorate and in 1905 a Resident was appointed. In 1950, reforms started which were designed to lead Brunei toward self-government while maintaining the authority of the Sultan. At the same time, the first political party, Partai Rakyat Brunei (PRB), was founded in 1956. It was largely comprised of non-aristocratic Malays dissatisfied with colonial and monarchic rule. In 1959, the first Constitution was proclaimed which abolished the position of British Resident, but the British maintained jurisdiction over external affairs, defence and internal security. Although Executive, Legislative and Privy Councils were established under the Constitution, it did not provide for separation of powers or any "meaningful checks" on the Sultan's powers. In 1962, the PRB's military wing revolted, but was quickly suppressed by British troops and a state of emergency announced. On 19 December 1962, the Legislative Council was dissolved and replaced by an Emergency Council. The Emergency Order that suspended the Legislative Council was lifted in 2004 after further Constitutional amendments broadened the Sultan's powers. In 1984 Brunei gained independence. Yet, the state of emergency has been renewed continuously since then and in 2012, Brunei marked the 50th anniversary of being under emergency rule.
Size[1]	5,765 km2
Land Boundaries	Two unconnected parts situated on the northwest coast of the island of Borneo, with Malaysia bordering its south and 161 km of coastline on its north.
Population[1]	429,646 (July 2015 est.)

1 Data from the CIA World Fact Book, <https://www.cia.gov/library/publications/the-world-factbook/geos/bx.html> accessed 19 March 2016.

Demography[1]	0-14 years: 23.82% (male 52,750/female 49,579) 15-24 years: 17.13% (male 36,485/female 37,127) 25-54 years: 46.9% (male 97,228/female 104,286) 55-64 years: 7.88% (male 17,366/female 16,470) 65 years and over: 4.27% (male 8,925/female 9,430) (2015 est.)
Ethnic Groups[1]	Malay 65.7%, Chinese 10.3%, other indigenous 3.4%, other 20.6% (2011 est.)
Languages[1]	Malay (official), English, Chinese dialects
Religion[1]	Muslim (official) 78.8%, Christian 8.7%, Buddhist 7.8%, other (includes indigenous beliefs) 4.7% (2011 est.)
Adult Literacy[1]	definition: age 15 and over can read and write total population: 96% male: 97.5% female: 94.5% (2015 est.)
Gross Domestic Product[1]	$32.9 billion (2015 est.) $33.28 billion (2014 est.) $34.08 billion (2013 est.) note: data are in 2015 US dollars
Government Overview	Brunei is a constitutional monarchy and one of the few absolute monarchies in the world. In an absolute monarchy the ruler claims full power as both head of state and head of government. It is the only absolute monarchy in Asia.
Human Rights Issues[2]	Brunei does not have a constitutional or legislative bill of rights. Moreover, Brunei has not ratified most of the international core human rights treaties. The most discussed human rights issues in Brunei are freedom of religion, discrimination against women, freedom of speech, freedom of the press and freedom of assembly. The start of the implementation of the Syariah Penal Code Order in 2013 attracted significant international attention and several human rights concerns were raised in connection with this.

2 Please note that the collection of material for Brunei is extremely difficult, as it is not covered in numerous reports that have been used for the other countries, i.e. neither Amnesty International nor Human Rights Watch have a country report on Brunei, <https://www.amnesty.org/en/countries/> and <https://www.hrw.org/publications> accessed 15 March 2016.

With Laos, these are the only two ASEAN country not ranked in the World Justice Project's *2015 Rule of Law Index*, which provides and ranks data on how the rule of law is experienced in a particular country. See generally World Justice Project, 'Rule of Law Index 2015,' <http://data.worldjusticeproject.org/#> accessed 15 March 2016

Brunei is also not included in The Economists *2015 Democracy Index* <http://www.eiu.com/public/topical_report.aspx?campaignid=DemocracyIndex2015> accessed 25 April 2016.

For more information, see the 2nd cycle of the Universal Periodic Review for Brunei Darussalam completed in 2014, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BNSession19.aspx> accessed 20 March 2016 and in particular the Report of the Working Group on the Universal Periodic Review A/HRC/27/11.

Membership in International Organizations[3]	*Asia Cooperation Dialogue (ACD) *Asia-Middle East Dialogue (AMED) *Asia-Pacific Economic Co-operation (APEC) *Asia-Europe Meeting (ASEM) Asian Development Bank *Commonwealth, Forum for East Asia-Latin America Cooperation (FEALAC) International Labor Organization (ILO) International Maritime Organization (IMO) International Monetary Fund (IMF) New Asia-Africa Strategic Partnership (NAASP) *Non-Aligned Movement (NAM) *Organization of Islamic Cooperation (OIC) World Bank Word Trade Organization (WTO) *United Nations (UN)

3 Source for entries with*, see the Ministry of Foreign Affairs, <http://www.mofat.gov.bn/Pages/Regional-And-Multilateral.aspx> accessed 20 March 2016; all other, Human Rights in ASEAN, <http://humanrightsinasean.info/brunei-darussalam/general-information.html> accessed 19 March 2016.

Human Rights Treaty Commitments[4]

Brunei is not party to some of the core international human rights law instruments, i.e. International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR).

It has the following commitments under international human rights treaties:

International Document	Year of Signature	Year of Ratification/ Accession	Reservations / Declarations
UN Convention on the Rights of the Child (CRC)		1995	Articles 14, 20 and 21 Reservations to paragraphs 1 and 2 of Article 20, as well as paragraph (a) of Article 21, were withdrawn in 2014.
Optional Protocol to the Convention on the Rights of the Child on the Sale of Child Prostitution and Child Pornography (CRC-OP-SC)		2006	
UN Convention on the Elimination of All Forms of Discrimination Against women (CEDAW)		2006	Article 9(2) and Article 29(1)
Convention of the Rights of Persons with Disabilities		2006	
Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT)	2015		

4 Data for UN Human Rights Treaties, <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=BRN&Lang=EN>, accessed 19 March 2016.

I. INTRODUCTION

Brunei Darussalam, also called the Nation of Brunei, the "Abode of Peace" or Negara Brunei Darussalam in Malay, is located on the north-west coast of Borneo in Southeast Asia. It was the sixth member of ASEAN, joining shortly after Brunei gained independence in 1984. It is a member of the ASEAN Community (AC), which was launched officially at the end of 2015.

The Constitution was first promulgated in 1959 while under British colonial rule. Full powers were vested in the Sultan under the terms of the Constitution of 1959 thereby replacing the colonial residency system. The Constitution had "granted internal self-government to the Sultan, not to the people. There was no elective majority on the Legislative Council and no direct elections [...]."[5] In fact, elections were not held until 1961, and all electoral seats were won by the Partai Rakyat Brunei (Brunei People's Party, PRB). However, only 16 seats of 33 were designated for elected members and PRB was thus unable to form a government. As tensions rose over the Sultan's proposal to merge with Malaya, rebels of the military wing of the PRB, calling themselves the North Kalimantan National Army, staged a revolt against the government. The Sultan proclaimed a state of emergency and British troops from Singapore quelled the revolt within days. The PRB was banned, and the leaders were arrested or fled.

Technically, Brunei remains in the same state of emergency declared in 1962, with that declaration renewed every two years since then. Thus in Bruneian legal terminology, "Orders" are legislation instituted by the Sultan under his emergency powers in Section 83(3) of the Constitution, while "Acts" are those enacted through normal processes involving the Legislative Council. The intention is that the Emergency Orders will be eventually promulgated as Acts over time.[6] However, Acts are also frequently replaced by Orders, so it is difficult to recognise any trends to these institutional changes.

According to the Constitution, the Sultan is the Head of State with full executive authority and thus one of the few absolute monarchies in the world.[7] The executive and legislative powers of the Sultan are neither separate nor independent but form a *Personaleinheit*.[8] In his role as both Head of Government and Head of State, the Sultan is assisted and advised by five councils – the Council of Cabinet Ministers, the Privy Council, the Legislative Council, Islamic Religious Council and the Council of Regency, commonly also referred to as the Council of Succession.[9]

The Council of Cabinet Ministers, including the Sultan, forms the executive branch of government. As of 23 October 2015, the current Sultan, Hj Hassanal Bolkiah Mu'izzaddin Waddaulah, is at once King, and holds the "posts of Prime Minister, Minister of Defence and Minister of Finance while also taking over the post of Minister of Foreign Affairs and Trade."[10] Ministers are appointed by the Sultan, in line with Articles 4(3) and 11 of the Constitution. Following the 2004 constitutional reforms, the power of the Cabinet is further

5 A. Graham Saunders, *A History of Brunei* (Kuala Lumpur: Oxford University Press, 1994), 138.

6 Then Attorney-General of Brunei Darussalam, Yang Berhormat, Dato Seri Paduka Haji Kifrawi bin Dato Paduka Haji Kifli, *Opening of the Legal Year*, 18 March 2008, <http://www.agc.gov.bn/AGC%20Site%20Pages/AGCspeechesview.aspx> accessed 5 April 2016.

7 The few states still ruled by absolute monarchies where the ruler claims full power as both Head of State and Head of Government include Vatican City, Oman, Saudi Arabia, Qatar and Swaziland.

8 The German term 'Personaleinheit' refers to an amalgamation of roles and powers in one person.

9 The Council of Succession or Regency existed prior to the Constitution of 1959 and is formed whenever the sultan is under the age of 18 when he ascended to the throne. This happened for instance when Ahmad Tajuddin succeeded his father Sultan Muhammad Jamal Alam in 1924. The Council of Regency temporarily held the reign until Ahmad Tajuddin reached the age of 18 in 1931. Jatswan S. Sidhu, *Historical Dictionary of Brunei Darussalam* (Maryland: The Rowman & Littlefield, 2010) 67, 68.

10 Hakim Hayat, 'His Majesty reshuffles Cabinet,' *The Borneo Bulletin*, 23 October 2015.

limited as the Sultan is neither bound by the decision of the Council,[11] nor are the decisions by the Council valid without the consent of the Sultan.[12]

This absolute power of the Sultan is also evident when it comes to the legislative powers of the Sultan and his central role in changing the law, that is constitutional and law making procedure.

The Privy Council advises the Sultan in matters concerning constitutional reforms and the appointments of persons to Malay customary positions.[13] The control the Sultan has over this Council is evident in the rules regarding the establishment of the Council. According to Article 5 of the Constitution, Privy Councillors are appointed by the Sultan and the tenure is held at the Sultan's pleasure.

Article 39 of the Constitution states that the Sultan makes laws, and while the Legislative Council may reject a bill, the Sultan after considering the negative resolution, can still pass the bill.[14] Therefore the role and influence of this body is tenuous at best.[15] It was suspended in early 1984, was only reinstated in 2004 following constitutional reforms which broadened the Sultan's powers. Tey summarises the effects of the amendments as having:

> provided for the Sultan's unfettered legislative authority, rendered the Legislative Council a meaningless rubber stamp chamber, centralized and accentuated the executive authority in the person of the Sultan, enhanced protection of the Sultan's status as an absolute sovereign and ousted judicial review. The Sultan was now clearly made 'above the law', with the effect that the Constitution is certainly not a superior law in Brunei. Instead, the Sultan has become the state's *Grundnorm.*[16]

In September 2004, the Legislative Council was revived and 21 members appointed, with no immediate timetable for election of the proposed 15 directly elected members. The Sultan has the power to suspend any of those members "for such reason as may appear [...] to be good and sufficient."[17] Members of the Legislative Council are furthermore precluded to introduce or propose any legislation that might have the "effect of lowering or adversely affect directly or indirectly the rights, position, discretion, powers, privileges, sovereignty or prerogatives" of the Sultan.[18]

One year later, the Sultan dissolved the existing Legislative Council and appointed 29 new members.[19] The theme of disbanding the Legislative Council continued in the following years. In March 2011, after its first five-year term, the Legislative Council was disbanded and replaced by a newly appointed and expanded

11 Article 19 of the Constitution.

12 Article 19A of the Constitution

13 Article 6 of the Constitution.

14 Article 43 (3), (4) and (5) of the Constitution.

15 Tim Lindsey and Kerstin Steiner, *Islam, Law and the State in Southeast Asia, Volume III: Malaysia and Brunei* (London: IB Tauris, 2012), 373.

16 Tsun Hang Tey, 'Brunei's Revamped Constitution: The Sultan as the Grundnorm?' *Asian Law*, Vol. 9, No. 2 (2007).

17 Article 31(5) of the Constitution.

18 Article 42(1)(d) of the Constitution.

19 According to Article 1, 2nd Schedule of the Constitution, the Legislative Council consists of no more than 45 members, 30 of those members are appointed by the Sultan and up to 15 members who are elected in accordance with the laws relating to elections in force in Brunei Darussalam. Freedom House, *Freedom in the World: Brunei Report 2013*, <https://freedomhouse.org/report/freedom-world/2013/brunei> accessed 27 March 2016.

33-member council in June 2011.[20] In March 2014, the council included 19 appointed members, 11 cabinet members, the Sultan as well as royal family members including Prince Al-Muhtadee Billah, and Prince Mohamed Bolkiah. The 19 appointed members represented Brunei's four administrative districts, *cheteria* (titled officials), and professional, social, and religious groups.[21] Commentators such as Kershaw made an observation in 2007 that the Council is tightly controlled by the Sultan, and this still holds true today.[22]

In addition to the executive and legislative powers, the Sultan wields religious power as head of religion.[23] The Islamic Religious Council, as provided in Article 3(3) of Brunei's Constitution, is "responsible for advising His Majesty the Sultan and Yang Di-Pertuan on all matters relating to the Islamic Religion." Its very broad general authority is granted in Section 38 of the Religious Council and Kadis Court Act, Cap 77, 1984:

> [t]he Majlis shall, on behalf of and under the authority of His Majesty as Head of the Religion of Brunei Darussalam, aid and advise His Majesty on all matters relating to the religion of Brunei Darussalam, and shall in all such matters be the chief authority in Brunei Darussalam, save in so far as may be otherwise provided by this Act.

In consultation with the Sultan, the Religious Council is the highest religious authority in Brunei. The Religious Council has broad authority to independently initiate policies regarding Islamic law. As Müller stated, "in the absence of democratic institutions or an influential civil society, the Islamic bureaucracy [comprising the Islamic Religious Council and the Ministry of Religion as well as the State Mufti Department] has become the sultanate's most powerful political actor outside of the royal family."[24] Yet its powers are not unfettered as the Sultan has the power to veto any of its decisions.

As the Sultan has these five councils at his disposal, they are not providing any checks and balances on his power. Therefore "there is no alternative locus of power to the 'soft authoritarianism' of the Sultanate."[25]

In addition to the constitutional framework, the authority of Brunei's absolute monarchy is formally enshrined in the state ideology of "*Melayu Islam Beraja*" (MIB, "Malay Muslim Monarchy"), which explicitly equates sovereignty and political legitimacy with the Sultanate, Islam and Malay identity[26] and which, arguably, are sacrosanct.[27]

20 Freedom House, *Freedom in the World: Brunei Report 2015*, <https://freedomhouse.org/report/freedom-world/2015/brunei> accessed 27 March 2016.

21 Ibid.

22 Roger Kershaw, 'Brunei: Malay, Monarchical, Micro-State' in John Funston (ed), *Government and Politics in Southeast Asia* (Singapore: ISEAS, 2001), 12; Tsun Hang Tey, 'Brunei's Revamped Constitution: The Sultan as the Grundnorm?' *Asian Law*, Vol. 9, No. 2 (2007).

23 Article 3(2) of the Constitution.

24 Dominik Müller, (2015), 'Sharia Law and the Politics of ‹Faith Control› in Brunei Darussalam: Dynamics of Socio-Legal Change in a Southeast Asian Sultanate' 46(3) *International Quarterly for Asian Studies*, 320.

25 Tim Lindsey and Kerstin Steiner, *Islam, Law and the State in Southeast Asia, Volume III: Malaysia and Brunei* (London: IB Tauris, 2012), 323.

26 Ann Black, 'Informed by Ideology: A Review of the Court Reforms in Brunei Darussalam' in A. Harding & P. Nicholson (eds.), *New Courts in Asia* (London, New York: Routledge, 2011), 329.

27 Members of the Legislative Council are not allowed to introduce or propose a bill without the approval of the Sultan that "may have the effect of lowering or adversely affect directly or indirectly the standing or prominence of the National Philosophy of *Melayu Islam Beraja* (known in English as Malay Islamic Monarchy)", Article 42 (1)(e) of the Constitution. The members are also not allowed to speak or make comments that "directly or indirectly derogatory of the rights, status, position, powers, privileges, sovereignty or prerogatives of His Majesty the Sultan and Yang Di-Pertuan, his Successors, His Consort or other members of the Royal Family or the National Philosophy of Malay Islamic Monarchy", Article 53(1A)(a) of the Constitution.

The central role that Islam plays in the make up of Brunei is evident in the new Syariah Penal Code Order 2013 (*Perintah Kanun Hukuman Jenayah Syariah* 2013), which had in particular far-reaching consequences on the judicial structure in Brunei. Previously, Brunei's legal system could be described as a dual legal system with Islamic law and civil law[28] side by side. The civil legal system is based on English Common Law with the UK Privy Council, Supreme Court, Intermediate Court and Subordinate Courts. The new additions to the civil legal system are:

- the Juvenile Court which was established in 2011 and has jurisdiction over criminal offences committed by juveniles below 18 years of age, juveniles who are beyond parental control and juveniles who are in need of care and protection orders;[29]
- the Small Claims Tribunal established in 2013 which hears private summons based on either contract or tort law and have claims under $10,000.00 BND;[30] and
- the Commercial Court which came into operation in 2015.[31]

As stated above, the Islamic legal system operated alongside the civil legal system. The Syariah Courts Act, Cap 184, of 2000 introduced a three-tier Islamic court system consisting of the Syariah Subordinate Courts, the Syariah High Court and the Syariah Appeal Court. Originally the jurisdiction of the Syariah courts was limited to Muslims. In civil law matters, its jurisdiction was confined mostly to family law, and in criminal matters to specific religious offenses mentioned in the Religious Council and Kadis Court Act 1984; the Islamic Family Law Emergency Order 1999; the Syariah Courts Act 2000; and the Syariah Courts' Civil Procedure Order 2005.

The new Syariah Penal Code Order 2013 broadened the criminal jurisdictions of the Syariah courts and certain provisions are applicable to non-Muslims as well, for instance

- the public consumption or advertisement of alcohol by non-Muslims can result in imprisonment not exceeding two years and/or a fine not exceeding $8,000 BND (Sections 104(5) and 104(6));
- non-Muslims are also prohibited from using certain words deemed to be reserved for the exclusive use of Muslims, except for citation or reference (Section 217(2)). These appear in Part II of the Fifth Schedule and include "Allah," "fatwa," "hadith," "haji," "hukum syaria," "imam," "mufti," "solat," etc. The punishment is a fine of $12,000 BND and/or imprisonment of up to three years.

28 To call this law "secular" or "state" law would arguably be a misnomer. According to Article 3(1) of the Constitution, "[t]he official religion of Brunei Darussalam shall be the Islamic religion." Unlike in neighbouring Malaysia, there has not been a discussion as to whether this would make Brunei an Islamic state or a not. The answer has always been affirmative for the former. Therefore no law in Brunei is secular. Furthermore, Islamic law in Brunei is state law as *syariah* (Islamic law) is encapsulated in Acts and Orders. The term civil legal system is therefore adopted to describe the non-Islamic legal system.

29 Homepage of the Juvenile Court, <http://www.judiciary.gov.bn/SJD%20Site%20Pages/Juvenile%20Court%20(Subordinate%20Court).aspx>, accessed 5 April 2016.

30 Homepage of the Small Claims Tribunal,

<http://www.judiciary.gov.bn/SJD%20Site%20Pages/Frequently%20Asked%20Question%20(Small%20Claim%20Tribunal).aspx>, accessed 5 April 2016.

31 Speeches by then Chief Justice Dato Seri Paduka Haji Kifrawi bin Dato Paduka Haji Kifli at the *Opening of the Legal Year*, 14 March 2013, <http://www.judiciary.gov.bn/SJD%20Site%20Pages/Speeches.aspx> and *Opening of the Legal Year*, 23 April 2015, <http://www.judiciary.gov.bn/SJD%20Site%20Pages/Speeches.aspx> accessed 5 April 2016.

The introduction of the Syariah Penal Code Order 2013 has had significant implications for the behaviour of non-Muslim Bruneians and how they exercise their freedom of religion. In 2014, for example, "the religious police ordered shops and restaurants to remove trees, decorations and even Santa Claus hats on pain of five years' in jail."[32] In a press release issued a few days later, the Ministry of Religious Affairs reaffirmed that "'public displays' of Christmas cheer - or any other non-Islamic religious festival - were prohibited under sharia."[33] Educational institutions are also affected by the new rules, with "[c]hurch schools [...] banned from teaching Christianity and compelled to teach Islam." It has even been reported that St Andrew's school, a Christian school in Bandar Seri Begawan, the capital, "had to drop its school hymn because of its reference to "the Lord"".[34] The consequences of the Syariah Penal Order 2013 has been described as placing "extensive restrictions on the freedom of thought, conscience, and religion, while also prescribing draconian punishments for their violations."[35]

Given the punishments envisioned in the Syariah Criminal Order 2013, it is quite interesting to note that Brunei ratified the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) in 2015. The government of Brunei did make a broad reservation to the Convention, stating that

> [t]he Government of Brunei Darussalam reserves the right to formulate and communicate, upon ratification, such reservations, interpretative understandings, and/or declarations which it might consider necessary.[36]

Interestingly, no specific reservation has been made in regard to the application of Islamic law and the punishments carried out under it.[37]

In relation to international human rights treaties in general, Brunei has been described as the "most reluctant ratifiers" of the AC countries, together with Singapore and Myanmar.[38] This might be because MIB has been elevated to the official state ideology and, since independence, the governments consistently rejected in particular ideas of liberalism which are arguably closely connected to international human rights.[39]

32 Richard Lloyd Parry, 'Fear of Sharia stalks opulent Brunei: Homosexuals face being stoned to death after sultan's legal changes, writes Richard Lloyd Parry', *The Times*, 6 June 2015.

33 Adam Minter, 'Sharia shakes up Southeast Asia - Nowhere is the tension between modernity and fundamentalist Islam more on display', *Pittsburgh Post-Gazette (PA)*, 25 January 2015.

34 Richard Lloyd Parry, 'Fear of Sharia stalks opulent Brunei: Homosexuals face being stoned to death after sultan's legal changes, writes Richard Lloyd Parry', *The Times*, 6 June 2015.

35 HRRC (2015), *Keeping the Faith: A Study of Freedom of Thought, Conscience and Religion in ASEAN*, 13.

36 UN Human Rights Treaties database,

<https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en#EndDec> accessed 5 April 2015.

37 As discussed below, news regarding the implementation of the Syariah Penal Code Order 2013 are scarce and so far only convictions for minor offences have been handed down.

38 Ricardo A. Sunga (2014), 'Judicial Training in Brunei' in HRRC Report, *Judicial Training in ASEAN: A Comparative Overview of Systems and Programs*, 29.

39 Speech of Sultan Hassanal Bolkiah, 1 Jan 1984, quoted in 'Brunei Seeks To Uphold "Correct" Islamic Teachings,' *Borneo Bulletin*, 10 Sep 2013; see also Anthony Reid (2001), 'Understanding Melayu (Malay) as a Source of Diverse Modern Identities,' 32(3) *Journal of Southeast Asian Studies* 295–313. For the nexus of MIB and freedom of religion as see HRRC (2015), *Keeping the Faith: A Study of Freedom of Thought, Conscience and Religion in ASEAN*, 57.

TABLE 2
ADMINISTRATION OF JUSTICE GRID

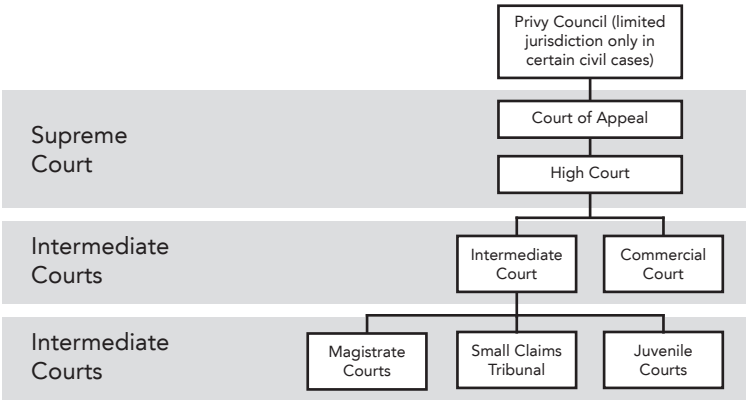
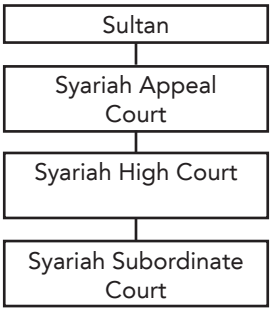
Indicator	Figure
No. of judges in country[40]	Supreme Court • 1 Chief Justice • 2 High Court judges Intermediate Courts • 8 Intermediate Court judges Subordinate Courts • 1 Chief Magistrate • 3 Senior Magistrates • 5 Magistrates
No. of lawyers in the country	According to a statistic provided by the Prime Minister's Office, there are 34 law firms operating in Brunei in 2016[41] and 107 advocates with a practising certificate.[42]
Annual bar intake (including costs and fees)	Not applicable as Brunei accepts qualifications from a variety of institutions, including from outside the country.
Standard length of time for training/ qualification	Qualifications can be obtained from numerous jurisdictions, on average about 4 years, though less for Syariah advocates.
Availability of post-qualification training	Ad hoc training appears to be available.
Average length of time from arrest to trial (criminal cases)	No data available.
Average length of trials (from opening to judgment)[43]	No data available. However a new Judiciary Case Management System (JCMS) was implemented in 2015 in order to streamline and speed up procedures, implying there is room for improvement. This electronic management system was implemented by the State Judiciary Department for civil courts in all four districts in order to establish and maintain an efficient way to manage court documents as well as provide access for both the public and legal community.
Accessibility of individual rulings to public	Judgments are available.

40 Profiles available at http://www.judiciary.gov.bn/Theme/Home.aspx, accessed 20 March 2016.

41 See <http://www.judiciary.gov.bn/SJD%20Images/Lawfirms2016.pdf> accessed 5 April 2016.

42 See <http://www.judiciary.gov.bn/SJD%20Site%20Pages/Practising%20Certificates.aspx> accessed 5 April 2016.

43 See <http://www.judiciary.gov.bn/SJD%20Site%20Pages/JCMS.aspx> accessed 5 April 2016.

Appeal structure	*For the civil legal system*  *For the Islamic legal system* 
Cases before the National Human Rights Institution	Not applicable as there is no such institution

<table>
<tr><td>Complaints filed against the police, the military, lawyers, judges/justices, prosecutors or other institutions (per year)[44]</td><td>
<table>
<tr><th></th><th>Number of persons investigated for corruption</th><th>Number of persons prosecuted for corruption</th><th>Number of persons convicted for corruption</th><th>Number of public officers convicted for corruption</th><th>Number of public officers disciplined for corruption</th></tr>
<tr><td>1982-2013[45]</td><td>2,469</td><td>284</td><td>231</td><td rowspan="2">209</td><td>*260</td></tr>
<tr><td>2014[46]</td><td>63</td><td>62</td><td>8</td><td>NA</td></tr>
<tr><td>2015[47]</td><td>530</td><td>0</td><td>8</td><td></td><td>*210</td></tr>
</table>
</td></tr>
<tr><td>Complaints filed against other public officers and employees</td><td>No other data available apart from the above.</td></tr>
</table>

44 Table partially based on David Seth Jones (2016), 'Combatting corruption in Brunei Darussalam', 5(2) *Asian Education and Development Studies*, 148. Please note that the table has been updated based on the following sources.

Please also note that some date seems to be conflicting and given the lack of official statistics impossible to reconcile. The data is marked with*. The data for 2014 and 2015 in the source is an aggregated total for the years the Anti Corruption Bureau (ACB) has been operative. The newspaper article states that there have been 210 reprimands implying this was over the total operative number of years of the ACB. This however appears to contradict the information from the ACB's website which states that in total 260 disciplinary actions were taken. If there were 210 disciplinary actions in 2015, this would indeed be a significant increase in actions compared to the pervious years.

45 See the Anti-Corruption Bureau, <http://www.bmr.gov.bn/SitePages/Statistics.aspx> accessed 10 April 2016. Please note that the website has not been updated since 2013.

46 Numbers based on newspaper article by Quratl-Ain Bandidal, 'Brunei stands firm against corruption', *The Brunei Times*, 10 December 2014.

47 Numbers based on newspaper article by Quratl-Ain Bandidal, 'Fight against corruption must be a collective effort', *The Brunei Times*, 10 December 2015.

II. COUNTRY PRACTICE IN APPLYING THE CENTRAL PRINCIPLES OF RULE OF LAW FOR HUMAN RIGHTS

As noted in the *2011 Rule of Law Baseline Study,* Brunei's unique constitutional structure as well as technically being in a state of emergency for over five decades mean that for every indicator that will be discussed below, the Sultan is above the law.

A. On Central Principle 1 (Government and its officials and agents are accountable under the law)

Definition and Limitation of the Powers of Government in the Fundamental Law

As stated above, there is no separation of powers. The executive and legislative powers rest with the Sultan, while the Cabinet of Ministers and the Legislative Council have subordinate roles. When the Legislative Council was reinstated in 2004, the newly added Article 84(2) of the Constitution made the limitations of this Council clear, stating that "nothing in this Constitution shall be deemed to derogate from the prerogative powers and jurisdiction of [...the Sultan who...] retains the power to make laws and to proclaim a further Part or Parts of the law of this Constitution as [...the Sultan...] may seem expedient."

The absolute power of the Sultan is further cemented by the State of Emergency declared more than five decades ago. The emergency powers in Article 83(3) of the Constitution (and Section 3(1) of the Emergency Regulations Act, Cap 21, 1984) grant the Sultan absolute discretion to issue Orders as long as the Sultan himself considers such Orders to be "desirable in the public interest" and thus there are no external limits to these powers according to the Constitution.

The decisions, acts, etc. of the Sultan are final with no judicial review available for them, Article 84C of the Constitution makes this explicitly clear. Moreover the newly introduced Syariah Penal Code Order 2013 under Section 230 exposes a person who "contempts, neglects, contravenes, opposes or insults" (sic) a *titah* or decree of the Sultan and Yang Di-Pertuan to a prison term of up to five years. This provision is applicable to Muslims and non-Muslims alike.[48] No similar provision existed in the civil Penal Code, Cap 22, 1951.

Amendment or Suspension of the Fundamental Law

Article 85(1) of the Constitution grants the Sultan the exclusive power to amend the Constitution. Based on the amendments made in 2004 to the Constitution, the Sultan has to submit the draft of the constitutional amendment to the Privy Council but is not bound to act in accordance with the advice of that Council.[49]

The only judicial review of the Constitution can be carried out through an International Tribunal with members being appointed by the Sultan.[50]

48 Section 3(1) Syariah Penal Code Order 2013.

49 Articles 85(3) and (4) of the Constitution.

50 Article 86 of the Constitution.

Laws Holding Public Officers and Employees Accountable

Internationally, Brunei signed and ratified the United Nations Convention against Corruption (UNCAC)[51] and is a member of the Asia/Pacific Group on Money Laundering (APG),[52] but is not a member of the Asian Development Bank (ADB)/OECD Anti-Corruption Initiative for Asia and the Pacific.[53]

In the *2013 Corruption Perception Index*, the latest that included Brunei, the country had a score of 60, with zero being very corrupt and 100 very clean. In terms of perceived "cleanliness," it was ranked 38th out of 177 countries—second in ASEAN only after Singapore.[54] There is, however, no data provided in the 2014 or 2015 reports.[55]

In line with the absolute power of the Sultan, the Sultan receives immunity in his private and public capacity.[56] In addition to this, his "act, decision, grant, revocation or suspension, or refusal or omission to do so, any exercise of or refusal or omission to exercise any power, authority or discretion" are not subject to judicial review.[57]

For officials working on behalf of the Sultan, immunity is granted for actions conducted in their official capacity, although provisions can be made by written law against these officials to initiate proceedings against them.[58] In addition, their actions are also not subject to judicial review.[59]

Two legislations, the Prevention of Corruption Act, Cap 131, 1984 and the Penal Code, Cap 22, 1951[60] provide the provisions to hold public officers and employers accountable for certain actions. In 2015, the Prevention of Corruption (Amendment) Order 2015 was enacted following several "high profile" cases including "the jailing of the surveyor-general on four counts of corruption, and the indictment of a high-ranking police officer for accepting a luxury car from a convicted criminal."[61]

51 See the UN webpage on the signature and ratification status <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>, accessed 10 April 2016.

52 See <http://www.apgml.org/members-and-observers/members/details.aspx?m=2bdc69a1-2844-4db3-8024-4000d87e9f0d>, accessed 10 April 2016.

53 Brunei is not on the list of member states, <https://www.oecd.org/site/adboecdanti-corruptioninitiative/theinitiativesmember-countriesandeconomies.htm>, accessed 10 April 2016 but is listed as observer is some of the Steering Committee's meeting minutes. The last one being the 18th Steering Group Meeting in 2013, <https://www.oecd.org/site/adboecdanti-corruptioninitiative/18thsteeringgroupmeeting.htm>, accessed 10 April 2016.

54 Transparency International, *Corruption Perceptions Index 2013*, <https://www.transparency.org/cpi2013/results#myAnchor1> accessed 16 April 2016.

55 See Transparency International, *Index for 2014 and 2015*, <http://www.transparency.org/cpi2014/results> and <http://www.transparency.org/cpi2015/results >accessed 10 April 2016.

56 See Article 84B(1) of the Constitution.

57 Article 84C (2) of the Constitution.

58 Article 84B (2) of the Constitution.

59 Article 84C (2) of the Constitution.

60 Specifically Chapter IX of the Penal Code lists the offences by or relating to public servants. Please note that the new Syriah Penal Code Order 2013 does not have any similar provisions. There are only exceptions provided, for instance for a Syariah court judge who in good faith believes himself to be acting accordingly to the law when acting in his capacity as a judge, Section 7 Syariah Penal Code Order 2013.

61 Quratl-Ain Bandidal 'Fight against corruption must be a collective effort', *The Brunei Times*, 10 December 2015.

The new Order in particular focused on the integrity and honesty of public officers, a concern that had been raised by the Sultan previously,[62] and it also ensures compliance with UNCAC.[63] Changes include

- the inclusion of a new section 12A which considers it an offence if a public officer uses public funds for private purposes, gives undue preferential treatment, misuses information acquired in the course of his duties or conducts himself in such a manner as to bring his private interests into conflict with his public duties.
- a new Section 12B punishes wilful misconduct or neglect of duty which amounts to an abuse of public trust in the office holder.[64]

It is not necessary to receive a gratification or monetary benefit in order to be sentenced for one of these offences. Furthermore, a public officer can be found guilty for these offences if he is found to be involved in the abuse of powers or discretion, misuse of official functions or failure to declare any conflicts of interest.

Further amendments include the list of Public Bodies in the Schedule and the interpretation of "public body" in Section 2 to include Government Linked Companies and statutory bodies.

In addition, the Criminal Asset Recovery Order 2012 was passed. It is designed to further strengthen the efforts to fight financial crimes, including corruption. The Order broadens the authority of the Financial Intelligence Unit, for instance allowing it to suspend transactions for a limited period of time[65] and access and review information related to the government, financial institutions or non-financial businesses and professions.[66] The Order allows for certain sanctions such as restraining orders, recovery orders, confiscation orders, etc. to be carried out for conduct that occurred before the Order came into force.[67]

Special Courts and Prosecutors of Public Officers and Employees

There are no separate courts and prosecutors to handle cases against public officers and employees. The Anti-Corruption Bureau (ACB) investigates the cases, and the prosecution and hearing is conducted in the criminal court system.

62 'Working visit to the Royal Brunei Police Force Headquarters' *RTB News*, 31 March 2015.

63 Speech by the then Attorney-General Yang Berhormat Datin Seri Paduka Hajah Hayati binti POKSDSP Hj Mohd Salleh, *Opening of the Legal Year 2016*, 4 February 2016, <http://www.malaysianbar.org.my/speeches/speech_by_yang_berhormat_datin_seri_paduka_hajah_hayati_binti_poksdsp_hj_mohd_salleh_attorney_general_of_brunei_at_the_opening_of_legal_year_2016_brunei_4_feb_2016.html> accessed 10 April 2016.

64 The summary of these changes is based on the speech by the then Attorney-General Yang Berhormat Datin Seri Paduka Hajah Hayati binti POKSDSP Hj Mohd Salleh, *Opening of the Legal Year 2016*, 4 February 2016, <http://www.malaysianbar.org.my/speeches/speech_by_yang_berhormat_datin_seri_paduka_hajah_hayati_binti_poksdsp_hj_mohd_salleh_attorney_general_of_brunei_at_the_opening_of_legal_year_2016_brunei_4_feb_2016.html> accessed 10 April 2016. Please note that the Order is not yet available online at time of writing.

65 Section 33(2) Criminal Asset Recovery Order 2012.

66 Section 31(2) Criminal Asset Recovery Order 2012.

67 Section 48(3) Criminal Asset Recovery Order 2012.

B. On Central Principle 2 (Laws and procedures for arrest, detention and punishment are publicly available, lawful, and not arbitrary)

Publication of and Access to Criminal Laws and Procedures

Acts and Orders have been accessible from the website of the Attorney-General's Chambers free of charge since 2008. Printed copies may also be purchased from the Attorney-General's Chambers in Bandar Seri Begawan at nominal sums.

Cases heard in Brunei are published in the annual Judgments of the Courts of Brunei Darussalam (JCBD) published by the government. A list of cases decided in the Supreme Court since 2010 are available from the Prime Minister's Office website for the Judiciary.[68]

Accessibility, Intelligibility, Non-retroactivity, Consistency, and Predictability of Criminal Laws

Most laws are published only in English and very few, mostly pertaining to Islamic law, have been officially translated into Malay. There may thus be some difficulties in accessibility for the general population, although court-appointed interpreters mitigate this risk.[69]

Predictability of criminal law is closely linked to the idea that laws should also not be given retroactive effect. Changing the law retroactively undermines the predictability of the law as the criminal law did not exist at the time when the conduct in issue occurred. Some criminal laws, it appears, can be given retroactive effect. For example, Article 40 of the Prevention of Corruption Act, Cap 131, 1984 allows for the Act to be applied retroactive. This is however not applicable to the more general criminal laws as neither the Syariah Penal Code Order 2013 nor the Penal Code, Cap 22, 1951 provide for their sections to be applied retroactively.

Preventive Detention

While the law prohibits arbitrary arrest and detention, preventive detention is possible under two legislations.

Under the Criminal Law (Preventive Detention) Act, Cap 150, 1984, the Minister of Home Affairs can make an Order to detain a person for up to a three-year period.[70] The order has to be referred to an advisory board within 28 days of having been made. The advisory board is appointed by the Minister of Home Affairs with the approval of the Sultan.[71]

The Internal Security Act (ISA), Cap 133, 1984 also provides for detention of suspects without trial for renewable two-year periods. An advisory board appointed by the Sultan[72] reviews individual ISA detentions and recommends whether they should be renewed for an additional two years. In 2013 and 2014 there were

68 See official website, <http://www.judiciary.gov.bn/SJD%20Site%20Pages/Judgments.aspx> accessed 10 April 2016.

69 Proceeding before the Syariah courts is the Malay language though it may allow the use of any other language in the interest of justice, Section 7(2)(a) Syariah Courts Act, Cap 184, 2000.

70 Section 2 Criminal Law (Preventive Detention) Act 1984.

71 Section 10 Criminal Law (Preventive Detention) Act 1984.

72 Section 5(2) Internal Security Act, Cap 133.

no detainees under ISA.[73] In 2015, the media reported the detention of two police officers under ISA. Staff Sergeant Baha Hj Damit was issued a two-year detention order for allegedly providing protection as well as operational information to criminals within and outside the country involved in illegal activities including gambling, prostitution and illegal supply of alcohol into the Sultanate.[74] Hj Khairur Rijal Hj Abu Salim, former head of Special Investigation Unit at the Royal Brunei Police Force, was also detained under ISA for also abetting criminals. A foreign national, Koh Tieng Poh, was under a two-year restriction order under ISA for his involvement with Hj Khairur Rijal Hj Abu Salim and in activities that jeopardised the security of the country.[75]

Rights of the Accused

As stated above, the Constitution does not provide for an independent judiciary nor does it include any fundamental rights. Certain rights of an accused are however considered part of the legal system as stated by then Chief Justice Yang Amat Arif Mohammed Saied:

> I say that our criminal justice system is time honoured, has been tested over the centuries and has survived with on-going amendments to the laws to meet the demands of changing times and for dealing with more sophisticated and white-collar crimes, but what has not altered an iota are the three fundamental principles upon which the fate of an accused person is decided by our courts; those being first, the **presumption of innocence**, that is, an accused is presumed to be innocent until proven guilty, the second that the burden that is on the **prosecution of proving the accused guilty is proof beyond reasonable doubt**, and the third that all are **equal before the law** and are treated alike by the country's courts, so that the personality of the parties does not matter [emphasis added].[76]

These rights are, however, not necessarily applicable to detainees under the ISA, for instance, they are not presumed innocent and are denied right to counsel.[77]

An arrest can only be made if approved by a magistrate except in cases when the police is unable to obtain an endorsement in time to prevent the flight of a suspect. The police can detain a suspect for up to 48 hours for investigation before they are obliged to bring the individual before a magistrate. It appears practice that during those 48 hours there is no access to the detained individual.[78] In criminal proceedings,[79] the accused

73 US Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports for Brunei for 2013 and 2014*, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> accessed 10 April 2016.

74 'ISD Detains Second Cop,' *The Brunei Times*, 25 April 2015; Rabiatul Kamit, 'Ex-head of CID unit issued order of detention,' *The Brunei Times*, 5 April 2016.

75 Ibid.

76 Then Chief Justice, Yang Amat Arif Mohamed Saied, *Opening of the Legal Year*, 6 March 2003, <http://www.judiciary.gov.bn/Lists/SJD%20Speeches/SpeechesDisplayForm.aspx?ID=5&Source=http%3A%2F%2Fwww%2Ejudiciary%2Egov%2Ebn%2FSJD%2520Site%2520Pages%2FSpeeches%2Easpx&ContentTypeId=0x0100F0A666338B3ADC41B7D59C228EC23DB1> accessed 13 April 2016.

77 See US Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports for Brunei for 2013 and 2014*, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> accessed 10 April 2016.

78 In 2013 and 2014 there were no reports that the accused had been deprived of this right to a hearing. See US Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports for Brunei for 2013 and 2014*, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> accessed 10 April 2016.

79 This is not applicable to detainees under the ISA.

has the right to a defence counsel. Only in cases where an accused is charged with a death penalty offense is legal aid available. This

> provision of legal aid is subject to certain conditions and legal representation is not appointed as of right. Defendants when applying for legal aid have to undergo an examination of their financial means and if it is assessed that the defendants clearly could not afford their own counsel, legal representation would be appointed for them by the court.
>
> Based on statistics gathered for the past 10 years, 19 applications were granted for legal aid with a sum of about $318,170.00 having been paid out to legal representatives under the scheme. This supports the importance of the legal aid scheme as part of the justice system.[80]

Legal aid in general is considered one of the challenges of the legal system in Brunei. In 2016, the then re-elected president of the Law Society appealed to law firms to provide more legal services to people who could not afford legal fees.[81]

The right of appeal is explicitly mentioned in the Criminal Procedure Code, Cap 7, 1951. Section 271 allows the accused person to appeal to the High Court which therefore has appellate and original jurisdiction in certain criminal matters.[82] In cases where the High Court has original jurisdiction, a further appeal is possible to the Court of Appeal which allows the public prosecutor and the trialled person to appeal.[83]

The Relationship between Penal Code, Cap 22, 1951 and the Syariah Penal Code Order 2013

Following the enactment of the Syariah Penal Code Order 2013, there is now potential overlapping jurisdiction for certain offences to be trialled under the Penal Code and the Syariah Penal Code as the latter, unlike previous Islamic legislations, is applicable to Muslims and non-Muslim.

> Non-Muslims have expressed concern about some other aspects of the Sharia Penal Code, which appear to restrict their personal freedoms. For instance, there were concerns expressed as to whether non-Muslims would be allowed to eat at non-halal restaurants during the month of Ramadan. It remains to be seen whether the relevant authorities will adopt entirely the liberal practices of other countries that employ sharia law, such as UAE, compared with other nations, such as Saudi Arabia, that enforce sharia practices very strictly.[84]

The decision as to where the case will be filed will initially be done by the public prosecutor. The then Attorney General also tried to assure that in cases of

> [c]oncurrent jurisdiction such as murder, only the provisions of the sharia law will be applied if the stringent evidentiary conditions required by Islamic law are fulfilled; otherwise the

80 Then Chief Justice, Dato Seri Paduka Hj Kifrawi bin Dato Paduka Hj Kifli, *Opening of the Legal Year*, 4 February 2016, <http://www.judiciary.gov.bn/SJD%20Site%20Pages/Speeches.aspx> accessed 13 April 2016.

81 See, Syazwan Sadilin 'Law society pushes for legal aid' *The Brunei Times*, 11 January 2016.

82 Section 17 Supreme Court Act, Cap 5, 1984.

83 Sections 406 and 414 Criminal Procedure Code, Cap 7, 1951 and Section 19 Supreme Court Act, Cap 5, 1984.

84 Colin Ong, then President of the Arbitration Association Brunei Darussalam (AABD), 'By the Book', *The Report Brunei Darussalam 2014* (Oxford Business Group, 2014), 200.

existing penal code will continue to apply.[85]

News of application of the Syariah Penal Code Order 2013 is scarce, with reports claiming that "[s]o far there have been only two prosecutions for minor offences under the first part of the new code."[86] One prosecution involved an immigrant Indonesian worker charged with smoking during the fasting hours of Ramadan, resulting in a conviction of six months imprisonment in lieu of a fine. Another case included *khalwat*, or close proximity causing suspicion.[87]

It therefore remains to be seen how the overlap of those two jurisdictions will play out in the future as the interaction still remains to be tested in practice.

C. On Central Principle 3 (The process by which the laws are enacted and enforced is accessible, fair, efficient and equally applied)

Law Enactment

Openness and Timeliness of Release of Record of Legislative Proceedings

Attending the sessions of the Legislative Council is reserved to members, with the Sultan or the Speaker having the power to summon a person to address the Council.[88] The Council meets at least once a year with sessions having to take place within 12 months of each other.[89] Minutes of the Legislative Council are kept by the Clerk of the Council.[90] There is however no law that gives the public rights to access government information, although certain material is available.[91] The *Brunei Times* provides reports on certain topics discussed in the Legislative Council sessions.[92]

Public participation and feedback in the drafting of laws is not provided for under Brunei law, except that bills are to be published in the *Gazette* save in a case of urgency. [93] Brunei is technically still under state of emergency allowing the Sultan to issue Orders under Article 83(3) of the Constitution which are in the public interest. Those are to "be published in the *Gazette* as soon as circumstances permit."[94]

85 The then Attorney General, Datin Seri Paduka Hayati Salleh, 'Maintaining Stability', *The Report Brunei Darussalam 2014* (Oxford Business Group, 2014), 20.

86 Richard Lloyd Parry, 'Fear of Sharia stalks opulent Brunei: Homosexuals face being stoned to death after sultan's legal changes, writes Richard Lloyd Parry', *The Times*, 6 June 2015.

87 See United States Department of State, Bureau of Diplomatic Security (OSAC), *Brunei 2015 Crime and Safety Report*, <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=17082> accessed 16 April 2016

88 See Article 34 of the Constitution.

89 See Article 52 of the Constitution.

90 See Article 51 of the Constitution.

91 See US Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports for Brunei for 2014*, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> accessed 10 April 2016.

92 The reports pick up certain discussions that are deemed important <http://www.bt.com.bn/legco> accessed 16 April 2016

93 Article 41(1) of the Constitution.

94 Article 83(8) of the Constitution.

Equality before the Law

Equality before the law is one aspect of rule of law. As mentioned above, the Sultan and government authorities are granted immunity for actions carried out in their official capacities under Article 84(B) of the Constitution. Nevertheless, provisions may be made by written law for proceedings against anyone except the Sultan for wrongs committed in the course of official duties.

Equality arguably also includes gender equality meaning that everyone has access to the same rights and freedoms as everyone else. The new Syariah Penal Code Order 2013 has been criticised for its gender discrimination in two aspects, women as offenders and also women as providing evidence before the Syariah courts. Regarding the former, Emerlynne Gil of the International Commission of Jurists commented that

> [t]he code does prescribe that stoning to death applies regardless of whether the offender is male or female … studies have shown that in countries where stoning is still imposed, women face more risks of receiving this penalty […] because of the institutionalisation of gender discrimination in the laws. Women are more likely to receive the penalty of stoning to death because for instance, there is the visible evidence of pregnancy, so […] women are more easily found to have engaged in extramarital relations, or having committed adultery.[95]

The Syariah Penal Code Order 2013 distinguishes as to how certain offences can be proven. It refers to the Syariah Courts Evidence Order of 2001, which, in Section 106, prescribes the number of witnesses who must provide evidence of an offence having been committed, and authorises the substitution of a single male Muslim witness by two female Muslim witnesses.[96]

Reparation for Crimes and Human Rights Violations' Victims/ Survivors

There are different mechanisms regarding the reparation for victims of crime. In accordance with Islamic law, the Syariah Penal Code Order 2013 allows the victim of a crime or the relatives to accept compensation in lieu of punishment. It generally grants *wali-ad-dam* (heir or relatives of the victim) the opportunity to inflict *qisas* (retaliation);[97] pardon the offender;[98] or compound the *qisas* with *badal-al-sulh* (compensation).[99]

Section 382 of the Criminal Procedure Code, Cap 7, 1951 provides the courts with the power to order the payment of compensation to "any person or the representatives of any person, injured in respect of his person, character or property by the crime or offence for which the sentence is passed." Such order for payment does not preclude a right to a civil remedy for recovery of any property or damages.

95 Radio Australia, 'Concerns over Brunei's new Syariah penal code', 28 January 2014. <http://www.radioaustralia.net.au/international/radio/program/asia-pacific/concerns-over-bruneis-new-syariah-penal-code/1254946> accessed 15 April 2016.

96 Section 106(6)) Syariah Courts Evidence Order of 2001, except in certain circumstances.

97 Section 131 Syariah Penal Code Order 2013. *Qisas* (Ar.) is defined in s 118 as "retaliation or similar penalty for offences of *qatlul-'amd* or causing hurt".

98 Sections 133, 142, 149 and 173 Syariah Penal Code Order 2013.

99 Sections 134, 147 and 174 Syariah Penal Code Order 2013.

Law Enforcement

The crime rate in Brunei is low and the country unmarked by social or political violent conflict. The police force has been described as "generally professional and courteous."[100] Most crimes are non-violent crimes of opportunity, including petty theft and residential or vehicle break-ins.[101]

Yet the police has been criticised not least by the Sultan himself when in 2015, he censured the police for "corrupt practices, questioning why only 21 per cent of criminal cases were solved in 2014."[102] In order to address the issue of corruption in the law enforcement, the Prevention of Corruption (Amendment) Order 2015 was passed.

D. On Central Principle 4 (Justice is administered by competent, impartial, and independent judiciary and justice institutions)

Appointment and Other Personnel Actions in the Judiciary and among Prosecutors

Although there have been significant changes in the structure of the judicial system, with the creation of new courts and the expansion in the jurisdiction of Syariah courts, the manner of appointing prosecutors and judges remains the same. The Sultan of Brunei appoints members of the judiciary and maintains wide latitude with regard to their discipline and dismissal.

While the laws provide for the necessary qualifications of judges of the Supreme Court[103] and Intermediate Courts[104] as well as Judicial Commissioners of the Supreme Court,[105] the Sultan "may appoint any fit and proper person" to a judgeship in the Subordinate Courts.[106] The Sultan also may appoint as many judges to the Intermediate Courts as he may think fit.[107] For the Chief Syariah Judge, Syariah Appeal Court judges, or High Court judges, the requirement is seven years of experience as a Judge of a Syariah Court, or Kadi, or "being learned in *Hukum Syara*'." Syariah Court judges are appointed by the Sultan on the advice of the President of the Majlis and after consultation with the Majlis.[108]

100 Research & Information Support Center (RISC), 'Brunei 2015 Crime and Safety Report, *Overseas Security Advisory Council, United States Department of State*, 9 February 2015, <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=17082> accessed 20 April 2016.

101 Ibid.

102 Quratl-Ain Bandidal, 'HM censures police for corrupt practices', *The Brunei Times*, 1 April 2015.

103 See Section 7 Supreme Court Act, Cap. 5, 1984.

104 See Section 10 Intermediate Courts Act, Cap 162, 1999.

105 Section 11(1) Supreme Court Act Cap 5, 1984 requires Judicial Commissioners to posses the same qualifications as Supreme Court Judges. Section 11(5) provides the powers of the Commissioners as follows:

A Judicial Commissioner appointed under this section shall have power to act as a Judge and all things done by him in accordance with the terms of his appointment shall have the same validity and effect as if they had been done by a Judge and in respect thereof he shall have the same powers and enjoy the same immunities as if he had been a Judge.

106 See Section 9, Supreme Court Act, Cap 5, 1984.

107 See Section 10(2) Intermediate Courts Act, Cap 162, 1999.

108 Sections 8, 9, 10 Syariah Courts Act, Cap 184, 2000.

The Attorney General, who is at the same time the Public Prosecutor, is appointed by and holds office at the pleasure of the Sultan.[109] The Sultan "may from time to time appoint fit and proper persons to be Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor."[110] The Sultan, on the advice of the President of the Majlis and after consultation with the Majlis, also appoints the Chief Syariah Prosecutor, who must possess the qualifications required of a Syariah High Court judge. His Majesty similarly appoints "fit and suitable persons" from members of the public service to be Syariah Prosecutors.[111]

The laws regarding tenure and removal from office have also remained unchanged. Judges of the Supreme Court as well as the Chief Syariah Judge and Syariah High Court Judges serve until they are 65 years old or beyond if approved by the Sultan.[112] Judges of the Supreme Court may be removed from office for "inability to perform the functions of his office or for misbehaviour."[113] The Sultan may remove Supreme Court judges from office upon the advise of the Judicial Committee of the Privy Council. Pending the decision of the Judicial Committee of the Privy Council, the Sultan may suspend the judge.[114]

Syariah court judges can be removed from office for misconduct or inability to properly perform their duty upon the recommendation of a tribunal constituted to decide on the matter. Pending the report of the tribunal, the Sultan may, on the recommendation of the Majlis or the Chief Syariah Judge, suspend the Chief Syariah judge or the Syariah judge from performing his duties.

There are no provisions in the Constitution that guarantee the independence of the judiciary. In fact, several provisions of the laws governing the various courts allow for the influence of the Sultan over the court. For instance, the oaths of office of judges of the Supreme Court and Intermediate Court are by law prescribed by the Sultan.[115] Further, the Sultan has the authority to direct a civil or Syariah court to hold the hearing of any proceedings at a time and place of his choosing.[116]

Nonetheless, despite the absence of guidelines to ensure independence, there is no information to indicate that the executive government exerts pressure with regard to how actual controversies are to be decided. The US Department of State's *2014 Investment Climate Statement* reported that "in practice the court system operates without government interference. Post has received no complaints from companies regarding the judicial system."[117]

109 Articles 81(1) and 81(6) of the Constitution; Section 374(1) Criminal Procedure Code, Cap 7, 1984.

110 Section 374(2) Criminal Procedure Code, Cap 7, 1984.

111 Section 25 Syariah Courts Act, Cap 184, 2000.

112 See Section 8, Supreme Court Act, Cap 5, 1984.

113 See Section 8(2) Supreme Court Act, Cap 5, 1984.

114 See Section 8(3) and (4) Supreme Court Act, Cap 5, 1984.

115 See Section 10 Supreme Court Act, Cap. 5, 1984; Section 10(4) Intermediate Courts Act, Cap 162, 1999.

116 Section 27B(3) Syariah Courts Act, Cap 184, 2000; Section 15(6) Supreme Court Act, Cap 5, 1984; Section 7(5) Intermediate Courts Act, Cap 162, 1999; Section 7(5) Subordinate Courts, Cap 6, 1984.

117 US Department of State, *Department of State: 2014 Investment Climate Statement*, June 2014, <http://www.state.gov/documents/organization/226810.pdf> accessed 14 April 2016.

Training, Resources, and Compensation

There does not appear to be any regular or systematic training curriculum for the continuous development of prosecutors and judges. Training is however given on an *ad hoc* basis, presumably based on perceived needs. For instance, to improve case management, plans were developed for both the judicial officers and staff to undergo training in judicial administration, with the aim of improving management of the court systems and management of cases.[118] Judges and prosecutors are also sent abroad for training. In November 2013, four prosecuting officers from the Syariah Prosecution Division attended a one-day course on "Advocacy Skills Course" organised by the Malaysia Syariah Lawyers Association in Kuala Lumpur, Malaysia.

In September 2015, the then new Chief Syariah Judge, Pehin Orang Kaya Paduka Seri Utama Dato Paduka Seri Setia Hj Awg Salim Hj Besar, stated that he is planning to further train Syariah court judges in better handling proceedings once the Syariah Penal Code is fully implemented. The Syariah court system, he disclosed, is developing guidelines for Syariah judges on crime-related cases.

> This is because criminal cases that will be heard in the Syariah court, especially on hudud and qisas,[119] are based on the new law that has not yet been carried out especially in Asia, furthermore Brunei is the first country in the region to carry out such law.[120]

In fact, more judges may be needed when the Syariah Penal Code Order 2013 is fully implemented, he said.

Salaries of judges are determined by the Sultan and these are charged to the consolidated budget.[121] There are no Constitutional protections against reduction of salaries.

State's Budget Allocation for the Judiciary and Other Principal Justice Institutions

In March 2016, the Legislative Council passed a national budget of $5.6 billion BND for the fiscal year 2016-2017. Among the entries under the Prime Minister's Office, allotments were made for

- the Law Section for $941,415 BND (0.017 per cent of the total budget);
- Attorney General's Chambers for $10.568 million BND (0.19 per cent of the total budget); and
- the State Judiciary Department for $9.415 million BND (0.17 per cent of the total budget).[122]

The State Judiciary Department was established in May 2002 to oversee the administration and finance of

118 Then Chief Registrar of the Supreme Court Brunei, Pengiran Hajah Rostaina Pengiran Haji Duraman, 'The Framework of the Judicial Cooperation in ASEAN in Case Management The Brunei Darussalam Experience,' 11th General Assembly of the ASEAN Law Association 2012 <http://www.aseanlawassociation.org/workshop-eleventhGA.html> accessed 16 April 2016.

119 *Hudud* are offences that carry specific punishments as stipulated by Syariah. *Qisas* allows victims or the victim's heirs to inflict equal retaliation against an accused as punishment for an offense, see Sections 118 and 131 Syariah Penal Code Order 2013.

120 Waqiuddin Rajak, 'Syariah Court judges to get further training,' *The Brunei Times*, 7 September 2015.

121 Section 9 Supreme Court Act, Cap. 5, 1984 and Section 28(b) Syariah Courts Act, Cap 184, 2000.

122 Rachel Thien, 'LegCo passes $5.6b budget,' *The Brunei Times*, 22 March 2016.

The budget is available from <http://bt.com.bn/files/digital/Legco%20Budget/legco_state%20budget%202016-17.pdf> accessed 16 April 2016.

the Civil and Syariah courts of Brunei.[123]

Impartiality and Independence of Judicial Proceedings

Sources generally indicate that, while the law does not provide for an independent judiciary, there are no known instances of government interference in the judiciary. "[J]udges in the common law courts have established a reputation for independence. Practitioners report confidence in the independence of the courts, particularly the Supreme Court."[124] It has been noted however, that courts "have yet to be tested in political cases."[125]

Similarly, there are no reports of private corporations improperly influencing judicial proceedings. Generally, the government implements laws punishing corruption effectively, with the Anti-Corruption Bureau resourced to conduct investigations and to hold regular corruption prevention programs.[126] As mentioned above, in the *2013 Corruption Perception Index*, Brunei was the second ranked non-corrupt country in ASEAN only after Singapore.[127] In 2015, while corruption cases were among the prominent ones heard in the country, there was no mention of newly-instituted or on-going corruption complaints against judicial officers during that year.[128]

Provision of Competent Lawyers or Representatives by the Court to Witnesses and Victims/Survivors

There is no law school teaching civil law in Brunei, although those wanting to train in Syariah law may attend the Universiti Islam Sultan Sharif Ali.[129] Those aspiring to work in the civil courts must get a civil law degree outside the country, usually from a university in another common law country such as Australia, England, Malaysia, or Wales. This, according to the Judicial Commissioner and Chief Registrar of the Supreme Court, explains why the number of civil lawyers in Brunei is limited.[130]

123 Then Justice Datin Paduka Hayati Salleh, 'Brunei Darussalam: Independence of the Judiciary Revisited and Towards More Effective Case Management,' 8th General Assembly of the ASEAN Law Association 2003, <http://www.aseanlawassociation.org/workshop.html > accessed 16 April 2016.

124 Ann Black, 'Brunei Darussalam: Ideology and law in a Malay sultanate,' in Ann Black, Gary F. Bell (eds), *Law and Legal Institutions of Asia: Traditions, Adaptations and Innovations* (Port Melbourne: Cambridge University Press, 2011), 318.

125 Freedom House, *Freedom in the World: Brunei Report 2015*, <https://freedomhouse.org/report/freedom-world/2015/brunei> accessed 27 March 2016

126 US Department of State, Bureau of Democracy, Human Rights and Labor, *Country Report for Brunei for 2014*, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> accessed 10 April 2016. See also Quratul-Ain Bandial, 'Brunei stands firm against corruption,' *The Brunei Times*, 10 December 2014.

127 Transparency International, *Corruption Perceptions Index 2013*, <https://www.transparency.org/cpi2013/results#myAnchor1> accessed 16 April 2016.

128 Syazwan Sadikin, 'Major court cases in 2015', *The Brunei Times*, 12 December 2015.

129 A recent amendment to the Legal Profession (Alternative Qualifications) Rules 2014 recognises the law degree conferred by the Universiti Islam Sultan Sharif Ali as an alternative qualification to allow graduates to be admitted to the Brunei Bar and to practise as an advocate and solicitor in Brunei Darussalam. Attorney General's Chambers, *Report 2013-2015*, 21,

<http://www.agc.gov.bn/AGC%20Images/Publication/AGC_Report_2013_2015.pdf> accessed 17 April 2016.

130 Asian Development Bank, *Fourth ASEAN Chief Justices' Roundtable on Environment: Role of the Judiciary in Environmental Protection: The Proceedings*, (Mandaluyong City: Asian Development Bank, 2015) 70, <http://www.adb.org/publications/proceedings > accessed 14 April 2016.

The number of Syariah lawyers who have applied to practice before the Syariah courts is relatively low. As of June 2014, only 16 out of 103 qualified and registered Syariah lawyers applied to practice in the Syariah courts, a number the Chief Syariah Judge viewed as unsatisfactory to meet the demands the implementation of the Syariah Penal Code will bring. He opined that there should be around 50 practicing Syariah lawyers for cases to run smoothly.[131]

Practice in the civil courts is regulated by the Legal Profession Act, Cap 132, 1984. To be admitted as an advocate and solicitor in Brunei, one must have obtained qualification as an advocate, barrister or solicitor in another common law country including England, Northern Ireland, Singapore, Malaysia or Australia.[132] In addition to these qualification requirements, an applicant who is not a citizen of Brunei Darussalam or a permanent resident must have been practicing in the United Kingdom, Singapore, Malaysia, Australia or in any other country in the Commonwealth designated by the Attorney General for at least seven years immediately preceding his or her application. Bruneians or Bruneian permanent residents may be admitted even without having obtained qualifications as an advocate, barrister or solicitor overseas "if he has obtained such alternative qualification as may be prescribed."[133] The Chief Justice may declare that there are sufficient advocates in Brunei, after which only nationals of Brunei Darussalam may be admitted as an advocate.[134]

According to Section 27 of the Syariah Courts Act, Cap 184, 2000, the Chief Syariah Judge may admit a person who possesses sufficient knowledge about Hukum Syara' and is suitable to become a Syariah lawyer to represent parties in any proceeding before any Syariah Court. Additional qualifications are provided in Rule 10 of the Syariah Courts (Syar'ie Lawyers) Rules 2002, including that the applicant be a Muslim who has (i) obtained a bachelor's degree in Syariah from any institution recognised by Brunei, (ii) an advocate or solicitor enrolled under the Legal Profession Act who has passed the Syariah Lawyer Certificate examination, (iii) a Syariah judge, *Kadi* or Syariah prosecutor for not less than three years, or (iv) has received professional training in Islamic judicial matters or who specializes in Hukum Syara'.[135]

Safety and Security of the Judiciary, Prosecutors, Litigants, Witnesses, and Affected Public

No information detailing measures to ensure the physical safety of court participants and the judiciary were found, and neither are there reports of recent violence committed against judges, prosecutors, or accused persons by reason of a judicial or administrative proceeding. As noted in the *2011 Rule of Law Baseline Study*, Brunei is a peaceful country and it has remained so in the last five years. As mentioned above, judicial officers are provided legal protection from suit "for any act done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided that he at the time in good faith believed himself to have jurisdiction to do that act."[136]

131 Rasidah Hab, 'Only 16 lawyers have applied to practise Syariah law,' *The Brunei Times*, 27 June 2016.

132 Section 3 Legal Profession Act, Cap 132, 1984.

133 Ibid.

134 Section 12 Legal Profession Act, Cap 132, 1984.

135 'Legal Systems in ASEAN: Chapter 5. The Legal Profession,' *ASEAN Law Association*, n.d., <http://www.aseanlawassociation.org/papers/Brunei_chp5.pdf> accessed 15 April 2016.

136 Section 33(1) Supreme Court Act, Cap. 5, 1984.

Specific, Non-Discriminatory, and Unduly Restrictive Thresholds for Legal Standing

Order 15 of the Rules of the Supreme Court 2004 details the procedure surrounding causes of actions, counter-claims and parties. It allows the court, on its own or on application, to exclude a person who has been improperly or unnecessarily made a party or who has ceased to be a proper or necessary party. The courts can also order the inclusion of

> 6(2)(b)(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue […] connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.[137]

No reports that might indicate that the courts have in recent years unduly prevented persons from filing complaints or seeking remedies from the courts were found.

Publication of and Access to Judicial Hearings and Decisions

Section 6(1) of the Criminal Procedure Code, Cap 7, 1951 provides for court proceedings to be open, stating that "[t]he place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them." Nonetheless, the presiding judge or magistrate may, on grounds of public policy or expediency, order for the public or a particular person to be excluded. The grounds for such exclusion shall be recorded. The US Department of State, Bureau of Democracy, Human Rights and Labor *Brunei Human Rights Report 2014* stated that judges conducted most criminal cases in public trials.[138]

The Supreme Court Act, Cap 5, 1984 and Syariah Courts Act, Cap 184, 2000 require the High Court, Court of Appeal and Syariah courts to pronounce a decision, either orally or in writing at the conclusion of the hearing or at some time thereafter.[139] The Criminal Procedure Code, Cap 7, 1984 provides more extensive guidelines. It requires judgments in every trial in any court of original jurisdiction to be pronounced in open court, or the substance of such judgment explained in open court. This should be done "immediately" or at a subsequent time of which parties or their legal representatives have been notified. Every such judgment shall be delivered in Malay or in English, and in some language understood by the accused. It should contain the reasons for the decision. If the judgment is delivered orally, the substance of it shall be reduced to writing and filed with the record.[140]

Judgments on appealed cases are also to be ordinarily delivered in open court; in the absence of the appellant or for other just cause, the court may deliver judgment by service of a written copy or may direct that the

137 Rules of the Supreme Court Act, Cap. 5, 1984, R 1, 0.15, r.6.

138 US Department of State, Bureau of Democracy, Human Rights and Labor, See US Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports for Brunei for 2014*, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> accessed 10 April 2016.

139 Section 25 Supreme Court Act, Cap. 5, 1984; Section 7(c) Syariah Courts Act, Cap 184, 2000.

140 Section 237 Criminal Procedure Code, Cap 7, 1984.

judgment be read out in the subordinate court.[141] Some judgments are accessible via the judiciary Electronic Filing System website.[142] The website does not indicate how comprehensive and complete the database is, although judgments of the High Court and Court of Appeal from as far as 2009 were found.

Reasonable Fees and Non-arbitrary Administrative Obstacles to Judicial Institutions

As reported in the *2011 Rule of Law Baseline Study*, the Legal Profession Act, Cap 132, 1984 stipulates that associated costs must be fair and reasonable, though this is left to the court's discretion. No reports indicating that fees are arbitrary or exorbitant were found.

In the last five years, there has been a visible move to adopt measures to avoid the high cost and inconvenience of lengthy litigation. The Small Claims Tribunal (SCT) was established in 2013 to hear and determine small claims, with parties not having to engage the services of lawyers, relating to contract disputes not exceeding the amount of $10,000 BND.[143]

To enhance efficiency and improve public and legal services, the judiciary launched the Judiciary Case Management System (JCMS) on 23 March 2015.[144] It includes an e-filing system that allows court users and lawyers 24-hour access to case documents and case schedules. It also allows lawyers to file court documents online. The e-filing website allows the public to download certain documents, access cause lists of the various courts, obtain contact details of the active law firms in the country, and conduct case and judgment searches.[145] A Queue Management System will allow the public and legal practitioners to obtain hearing lists, case statuses and other court schedules via kiosks located in selected court buildings.

In 2015, then Chief Justice Dato Seri Paduka Hj Kifrawi Dato Paduka Hj Kifli said that the civil court will also look into introducing court-annexed mediation to encourage early settlement of any dispute. He added that mediation has already been adopted in certain High Court cases such as divorce and defamation, with most cases successfully settled amicably.[146]

Assistance for Persons Seeking Access to Justice

As mentioned above, legal aid is only available in criminal cases to those who cannot afford legal representation in court and are charged with capital punishment offences that will lead to death sentences.[147] Eligibility to receive free legal aid is determined by the Chief Registrar of the Supreme Court and appointed

141 Section 288(2) Criminal Procedure Code, Cap 7, 1984.

142 *Judiciary Brunei Darussalam Electronic Filing System*, <http://efiling.judiciary.gov.bn/eFiling/# > accessed 16 April 2106.

143 See the Judiciary Homepage

<http://www.judiciary.gov.bn/SJD%20Site%20Pages/Frequently%20Asked%20Question%20(Small%20Claim%20Tribunal).aspx> accessed 17 April 2016.

144 Nabilah Haris, 'Judiciary Case Management System to improve court services,' *The Brunei Times*, 3 March 2015; Azaraimy HH, 'Judiciary launches electronic case management system,' *Borneo Bulletin*, 24 March 2015.

145 *Judiciary Brunei Darussalam Electronic Filing System*, <http://efiling.judiciary.gov.bn/eFiling/# > accessed 16 April 2106.

146 'Justice system should be last resort,' *The Brunei Times*, 24 April 2015.

147 Brunei Council on Social Welfare, 'Legal Aid in Brunei Darussalam,' Presentation, <http://www.rlpd.go.th/rlpdnew/images/rlpd_1/ppt/Legal_Aid_in_Brunei_Darussalam.ppt> accessed 16 April 2016; Speech by the then Chief Justice, Dato Seri Paduka Hj Kifrawi bin Dato Paduka Hj Kifli, *Opening of Legal Year 2016*, 4 February 2016, <http://www.judiciary.gov.bn/SJD%20Site%20Pages/Speeches.aspx> accessed 13 April 2016.

lawyers are given remuneration equal to the average of regular rates charged by lawyers in non-legal aid cases.[148] In 2016, the Chief Justice said that 19 legal aid applications were granted in the past 10 years, with legal representatives having been paid around $318,170 BND from the scheme.[149] In other cases, indigent defendants may act as their own lawyer in court.[150]

There are other organisations that render legal assistance. For instance the Law Society of Brunei Darussalam conducts legal clinic on civil, criminal, and syariah matters. Law firms, on a rotational basis, render free legal advice to those earning less than $750 BND a month. Pro bono representation appears to not be available. The president of the Law Society however recognizes that giving advice is not the same as representing clients in court and said that implementing legal aid will be the biggest challenge for the society in 2016.[151] The Law Society was established in 2003 and its membership is comprised of all advocates and solicitors in private legal practice.

The Brunei Council on Social Welfare, established in 2009, launched its legal advice and advisory clinic in 2013. It runs a weekly legal clinic with the assistance of three volunteer law firms. To be eligible, clients must have an average family income of less than $400 BND per family member per month. In "deserving cases," the Council also appoints a lawyer to represent a client in legal proceedings on a subsidised or pro bono basis.[152]

No data on the level of awareness of the public of pro bono initiatives was found. However, the activities of the Law Society of Brunei Darussalam and Brunei Council on Social Welfare are reported in national newspapers. The Brunei Council on Social Welfare has indicated an increase in the number of people seeking their services. In 2013, the legal clinic provided advice on 37 cases, 42 in 2014, and 90 in 2015.[153]

Other forms of assistance may be sought from the Council of Women of Brunei Darussalam which operates a resource and referral service to provide advice and counselling on social and legal matters. The Royal Brunei Police Force also has a Women and Children's Unit and the Ministry of Culture, Youth and Sports provides welfare homes to those in need of protection, such as women who seek refuge from their abusive husbands.[154]

148 Brunei Council on Social Welfare, 'Legal Aid in Brunei Darussalam,' Presentation, <http://www.rlpd.go.th/rlpdnew/images/rlpd_1/ppt/Legal_Aid_in_Brunei_Darussalam.ppt> accessed 16 April 2016.

149 Speech by the then Chief Justice Dato Seri Paduka Hj Kifrawi bin Dato Paduka Hj Kifli, *Opening of Legal Year 2016*, 4 February 2016, < http://www.judiciary.gov.bn/SJD%20Site%20Pages/Speeches.aspx> accessed 13 April 2016.

150 US Department of State, *Brunei 2014 Human Rights Report*, 4, <http://www.state.gov/documents/organization/236638.pdf> accessed 15 April 2016.

151 Syazwan Sadikin, 'Law society pushes for legal aid,' *The Brunei Times*, 11 January 2016.

152 Quratul-Ain Bandial, 'More people seek free legal aid,' *The Brunei Times*, 18 August 2015; 'MKM Legal Advice and Advisory Clinic ,' Majlis Kesejahteraan Masyarakat, <http://www.mkmbrunei.com/#!about1/c1vcd> accessed 16 April 2016.

153 Quratul-Ain Bandial, 'More people seek free legal aid,' *The Brunei Times*, 18 August 2015; Quratul-Ain Bandial, 'Bright Spots in the Legal Field,' *The Brunei Times,* 17 April 2016.

154 See homepage of the Ministry, <http://www.japem.gov.bn/perkhidmatan/counseling.htm> accessed 17 April 2016.

Measures to Minimize Inconvenience to Litigants and Witnesses, and their Families, Protect their Privacy, and Ensure Safety from Intimidation/Retaliation

The protections afforded to witnesses and victims have stayed unchanged. Brunei does not have a law providing for a comprehensive victim or witness protection scheme. Instead, protections are found in various legislations. The Criminal Procedure Code, Cap 7, 1984, Supreme Court Act, Cap 5, 1984, Intermediate Courts Act, Cap 162, 1999, and Subordinate Courts Act, Cap 6, 1984 for instance, all allow proceedings to be held in camera in the interests of public policy, justice, public security, propriety or other sufficient reason.[155] The courts may also order that no one shall publish the name, address or photograph of a witness or any evidence or information that would to lead to the identification of such witness.[156]

There are several protections with regard to child witnesses. For instance, a child witness under 14 years is allowed to give evidence via live television link in cases involving assault, injury or sexual offences.[157] Where a video-recording has been admitted as evidence in relation to such cases, a child witness shall not to be examined-in-chief on matters already dealt with in his or her video-recording evidence.[158] In cases involving assault, injury or sexual offences, an accused is also precluded from cross-examining in person a child witness, a person who witnessed the commission of the offense, or the person against whom the offenses were allegedly committed.[159]

As indicated in the *2011 Rule of Law Baseline Study*, the Women and Girls Protection Act, Cap 120, 1984 also requires the use of in camera proceedings for girls below the age of 16 years; it also restricts publication of details of the victim.[160] Measures to protect female witnesses in cases relating to sexual offences are also stipulated. However, as was also noted in the *2011 Rule of Law Baseline Study*, the law allows the court to detain a woman or girl on whom the following had been committed:

- offences punishable under the Act; or
- under certain provisions of the Penal Code, Cap 22, 1951 for instance:
    - Section 354 (Assault or criminal force to person with intent to outrage modesty),
    - Section 375 (Rape),
    - Section 498 (Enticing or taking away or detaining with criminal intent a married woman), or
    - Sections 360 and 361 (Kidnapping).[161]

The Commissioner (Director of Welfare, Youth and Sports) may also order the detention in a place of safety of any woman or girl whose detention in a place of safety is requested by her guardian, who needs protection and whose lawful guardian is not found, who is ill-treated, or "whom the Commissioner considers to be

155 Section 15 Supreme Court Act, Cap. 5, 1984; Section 7 Intermediate Courts Act, Cap 162, 1999; Section 7 Subordinate Courts, Cap 6, 1984; Section 7 Criminal Code of Procedure, Cap 7, 1984.

156 Section 15(3) Supreme Court Act, Cap. 5, 1984; Section 7(2) Intermediate Courts Act, Cap 162, 1999; Section 7(2) Subordinate Courts, Cap 6, 1984.

157 Section 236B Criminal Procedure Code, Cap 7, 1984.

158 Section 236C Criminal Procedure Code, Cap 7, 1984.

159 Section 236E Criminal Procedure Code, Cap 7, 1984

160 Sections 8(1) and 8(4) Women and Girls Protection Act, Cap 120, 1984.

161 Section 10(1) Women and Girls Protection Act, Cap 120, 1984.

in moral danger."[162] While these provisions are intended to keep women and girls safe, they are arguably inconsistent with Article 15(4) of the Convention on the Elimination of Discrimination against Women.

The Attorney General's Chambers has a victim response unit within the Criminal Justice Division to assist victims of crimes to understand the criminal justice process, including informing them of the status of their cases.[163] The Ministry of Culture's Social Affairs Services Unit runs places of safety known as *Taman Nor Hidayah*, *Darussyafaah* and *Darussakinah* for people in various needs of protection, including victims of abuse, rape, incest and negligence.[164]

III. INTEGRATING INTO A RULES-BASED ASEAN

Progress towards Achieving a Rules-Based ASEAN Community

On Mutual Support and Assistance on the Rule of Law

Brunei, as a member of ASEAN, participates in the activities of the ASEAN Law Ministers Meeting (ALAWMM). Initiatives of the ALAWMM include the ASEAN Government Law Directory, ASEAN Legal Information Authority (ALIA), ASEAN Government Legal Officers' Programmes (AGLOP) and Exchange of Study Visits that aim to promote awareness and understanding of each other's legal system.[165]

The country was also represented at the Court Excellence and Judicial Cooperation Forum held in Singapore in 2014. The forum served to promote sharing of best practices in the area of judicial administration and delivery of justice among ASEAN judiciaries.[166]

The ASEAN Law Association, a non-governmental organization of lawyers in the ASEAN region that promotes close relations and mutual understanding amongst lawyers, has a National Chapter in Brunei. In 2016, then Chief Justice of Brunei, Dato Seri Paduka Haji Kifrawi bin Dato Paduka Haji Kifli, is among the Vice-Presidents of the organisation and, at the same time, the Chairman of ASEAN Law Association Brunei.[167]

Additionally, Brunei Darussalam's Legislative Council became a full member of the ASEAN Inter-Parliamentary Assembly (AIPA) in 2009. Before this it only had Special Observer status as the Legislative Council had been suspended until 2004. AIPA "serves as the center of communication and information"

162 Ibid, Section 15.

163 Mohammad Yusree Junaidi & Zuraini Sharbawi, 'The Protection of Victims, Particularly Women and Children, Against Domestic Violence, Sexual Offences and Human Trafficking—The Brunei Experience,' 9th General Assembly of the ASEAN Law Association 2006 <http://www.aseanlawassociation.org/workshop-ninthGA.html> accessed 15 April 2016.

164 Syazwana Souyono, 'Finding strength to return,' *The Brunei Times*, 7 July 2014.

165 *Joint Communiqué of the 9t ASEAN Law Ministers Meeting* (ALAWMM), 22 October 2015, <http://www.asean.org/2015/10/?cat=21> accessed 17 April 2016.

166 Subordinate Courts Singapore, 'Subordinate Courts Media Release: Court Excellence and Judicial Cooperation Forum: 5 March 2014 to 7 March 2014,' 5 March 2014, <https://www.statecourts.gov.sg/NewsAndEvents/Pages/Media-Release--Court-Excellence-and-Judicial-Cooperation-Forum-(5---7-March-2014).aspx> accessed 17 April 2016.

167 ASEAN Law Association 'Office Holders: Chairman, ALA Brunei Darussalam,' <http://www.aseanlawassociation.org/chairman-brunei.html> accessed 16 April 2016.

among member parliaments.[168] According to its Statutes, it aims to encourage understanding, cooperation, and close relations among its member parliaments and "promote the principles of human rights, democracy, peace, security and prosperity in ASEAN."[169] Brunei hosted the 34th General Assembly of AIPA in Bandar Seri Begawan in 2013.

On Legislative and Substantive Changes Promoting the Rule of Law

There is no information regarding legislative changes that were adopted particularly to promote rule of law at the regional level. While the country has made improvements regarding legislation on corruption, these changes seem to have been adopted primarily to support the country's drive against graft. Nonetheless, Brunei's Criminal Asset Recovery Order 2012 contributes positively to regional efforts to fight transnational crimes as it establishes, among others, the measures for the disclosure of information regarding cross-border movements of currencies and negotiable instruments involved in money-laundering and related offences, as well as provides guidelines with regard to requests for enforcement of foreign restraining, confiscation, and benefit recovery orders.

On Enactment of Laws relating to the ASEAN Community Blueprints and Similar Plans

The then Attorney General, Yang Berhormat Datin Seri Paduka Hajah Hayati binti POKSDSP Hj Mohd Salleh, reconfirmed Brunei's commitment to the Blueprint at the 9th ASEAN Law Ministers Meeting, stating that

> As stated in the APSC Blueprint, our overall goal is not only limited to the ratification of the treaty but also to discuss and consider its elevation to an ASEAN treaty. This mandate needs to be achieved fully bearing in mind the current role of ASLOM as the sectoral body guarding issues relating to mutual assistance in criminal matters.[170]

Brunei has undertaken some changes that positively affect rule of law, particularly by strengthening its legislative framework surrounding corruption through the amendment of the Prevention of Corruption Act, Cap 131, 2002 and enactment of the Criminal Asset Recovery Order 2012.

The aims of these laws overlap with those of the ASEAN Political-Security Community Blueprint,[171] the Treaty on Mutual Legal Assistance, and the ASEAN Convention Against Trafficking in Persons, Especially Women and Children.[172]

168 ASEAN Inter-Parliamentarian Assembly 'About Us: Background and History,' <http://www.aipasecretariat.org/about-us/background-history/> accessed 16 April 2016.

169 ASEAN Inter-Parliamentarian Assembly 'About Us: Statutes,' <http://www.aipasecretariat.org/about-us/statutes/> accessed 16 April 2016.

170 The then Attorney General, Yang Berhormat Datin Seri Paduka Hajah Hayati binti POKSDSP Hj Mohd Salleh, 9th ASEAN Law Ministers Meeting, 22 October 2015, <http://www.agc.gov.bn/AGC%20Site%20Pages/AGCspeechesview.aspx> accessed 5 April 2016.

171 ASEAN Political-Security Community Blueprint 2025, A.2.

172 ASEAN Convention Against Trafficking in Persons, Especially Women and Children, Articles 7 and 8.

On Integration as Encouraging Steps toward Building the Rule of Law and Stronger State Institutions

The impact of integration on the state of rule of law in the country is unclear. While Brunei has actively participated in regional initiatives, the configuration of Brunei's rule of law institutions has not changed dramatically since plans to create an ASEAN Community took shape in 2003 at the ASEAN Summit in Bali.

Brunei remains in the same state of emergency that was declared over 50 years ago; executive and legislative powers still rest with the Sultan; and the judiciary, although recognised to be free from government interference, does not have the power of judicial review.

Furthermore the impact on institution-building in Brunei appears to have been minimal, if any. Brunei has for years been a country of peace and political stability. However, political stability is largely because of the unbalanced sharing of power among the three branches of government and the absence of checks and balances. This has not changed in the years of Brunei's membership in the ASEAN.

Moving forward, among the key elements of Brunei's National Vision 2035 is an institutional development strategy. This strategy will "enhance good governance in both the public and private sectors, high quality public services, modern and pragmatic legal and regulatory frameworks and efficient government procedures that entail a minimum of bureaucratic 'red tape.'"[173] How much this strategy has been inspired by the goals of the ASEAN is not known.

Prospects and Challenges

The most substantial challenge to the rule of law in Brunei is to define and adopt a conceptualisation of rule of law that is acceptable to Brunei as well as being compatible with international standards and expectations. This will be discussed below in IV. Conclusion.

Commitments and Plans/Initiatives in relation to ASEAN-wide Commitments and Declarations on Human Rights

Brunei Darussalam participates in some regional human rights related mechanisms including the ASEAN Committee on Women (ACW), the ASEAN Confederation of Women Organization (ACWO), and the Senior Officials Meeting on Social Welfare Development.

Since the *2011 Rule of Law Baseline Study*, Brunei's progress in certain areas of human rights have been noted, in particular in the area of protection of persons against trafficking. In the 2nd cycle of the Universal Periodic Review for Brunei Darussalam—completed in 2014—the changes to Sections 294B and 377F of the Penal Code, Cap 22, 1951 to curb commercial sexual exploitation among children enacted in 2012 where mentioned as achievements.[174]

Advancements were also made in the protection of labour as a licensing system was introduced by the

173 Embassy of Brunei Darussalam to the United States of America 'Brunei Vision 2035 – Wawasan 2035', <http://www.bruneiembassy.org/brunei-vision-2035.html> accessed 16 April 2016.

174 See the 2nd cycle of the Universal Periodic Review for Brunei Darussalam completed in 2014, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BNSession19.aspx> accessed 20 March 2016 and in particular the National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, A/HRC/WG.6/19/BRN/1

Department of Labour, Ministry of Home Affairs, requiring labour recruitment agencies to provide a monetary deposit as well as company-wide and individual background checks. In January 2012, the Employment Agencies Order 2004 was fully implemented, providing for comprehensive measures to further stabilise security, welfare, safety and the protection of workers' rights by taking into account the standards of the International Labour Organization.[175]

The protection of foreign workers and human trafficking can be closely linked. Attorney General's Chambers *Report 2013-2015* singled out the case of *Esmidiade Bujang and Sanawa Sanaddin v PP* [Court of Appeal CA No. 1 & 3 of 2015] as showing the progress made in those areas.

> One of the two Bruneian men who were found guilty for arranging and assisting in the unlawful entry of Indonesian nationals into Malaysia in April 2013 at the Sungai Tujoh Immigration Post under section 7(1) of the Trafficking and Smuggling Persons Order 2004 appealed against his conviction. Esmediade Bujang's conviction was upheld.
>
> The Public Prosecutor made a cross appeal against both defendants' sentences which was allowed. Esmidiade Bujang was sentenced to 4 years imprisonment and 3 strokes of the whipping whereas Sanawa Sanaddin was sentenced to 5 years imprisonment and 4 strokes of whipping. The Court of Appeal then imposed an additional fine of $1 on both defendants as the penalty prescribed sentences of imprisonment, fine and whipping to be inflicted cumulatively.[176]

Despite the progress made, Brunei was taken to task in the 2nd cycle of the Universal Periodic Review for Brunei Darussalam on the basis that the implementation of legal protections was not sufficient. Instead

> the Committee of Experts noted that Brunei Darussalam did not have a proactive system to formally identify victims of trafficking among vulnerable groups, such as foreign workers and foreign women and children in prostitution, and that the Government had not implemented training for its officials on identifying trafficking victims. It also observed that children of migrant workers were at increased risk of becoming victims of sale and trafficking and requested the Government to take effective and time-bound measures to ensure that this group of children were protected from that worst form of child labour.[177]

Since then plans have been made to further amend the Trafficking and Smuggling of Persons Order 2004 in order to fulfil obligations under the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP) and the ASEAN Plan of Action Against Trafficking in Persons. According to then Minister of Energy at the Prime Minister's Office, Pehin Datu Singamanteri Colonel (Rtd) Dato Seri Setia (Dr) Awang Haji Mohammad Yasmin bin Haji Umar, possible amendments include the "provisions for enhanced penalties in aggravated cases of trafficking in persons, assistance for victims of trafficking in persons, immunity from prosecution for victims of trafficking and increased powers of investigations for

175 See the 2nd cycle of the Universal Periodic Review for Brunei Darussalam completed in 2014, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BNSession19.aspx> accessed 20 March 2016 and in particular the National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, A/HRC/WG.6/19/BRN/1.

176 Attorney General's Chambers, *Report 2013-2015*, 21, <http://www.agc.gov.bn/AGC%20Images/Publication/AGC_Report_2013_2015.pdf> accessed 17 April 2016.

177 See the 2nd cycle of the Universal Periodic Review for Brunei Darussalam completed in 2014, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BNSession19.aspx> accessed 20 March 2016 and in particular the Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, A/HRC/WG.6/19/BRN/2.

enforcement agencies."[178]

IV. CONCLUSION

One of the challenges is defining as to what exactly constitutes rule of law. The ASEAN Charter sets out that rule of law is a purpose of ASEAN (Article 1(7) of the ASEAN Charter), obliging ASEAN and its member states to act in accordance with the fundamental principle of adherence to the rule of law (Article 2(2)(h) of the ASEAN Charter).

The question is how this rule of law is envisioned in the national frameworks and whether the national frameworks share common ground.[179]

The then Attorney General, Yang Berhormat Datin Seri Paduka Hajah Hayati Binti POKSDSP Hj Mohd Salleh commented at the 9th ASEAN Law Ministers Meeting (ALAWMM) in 2015 on some of the challenges, stating that ASEAN's mandate changed from "exchange of legal information to one that is more substantive with efforts to find ways to harmonize our diverse legal systems."[180] The identification of

> common interest which call for legal cooperation among ASEAN member states or establishment of a regional legal framework [...] Cooperation and coordination with other ASEAN sectorial bodies as well as entities associated with ASEAN including the ASEAN Law Association is important in realizing ASEAN goals to strengthen the rule of law, Judicial systems and legal infrastructure. Such cooperation and coordination may be intensified by streamlining each other's work processes, enhancing information exchange and experience sharing and other relevant activities. [181]

It is difficult to answer what rule of law means in the context of Brunei. Rule of law can be understood in different manners, from "thin" to "thick" descriptions or combining "formal"[182] as well as "substantive"[183] elements. Randall Peerenboom aptly summarised that

> Rule of law is essentially a contested concept. It means different things to different people, and has served a variety of different political agendas [...] That is both its strength and its

178 The then Minister of Energy at the Prime Minister's Office, Pehin Datu Singamanteri Colonel (Rtd) Dato Seri Setia (Dr) Awang Haji Mohammad Yasmin bin Haji Umar at the 10th ASEAN Ministerial Meeting on Transnational Crime (10th AMMTC), 28 September -1 October 2015 as reported in 'Brunei intensifies combat against human trafficking' *Borneo Bulletin*, 2 October 2016.

179 Several countries mention similar concepts to the rule of law in their constitution. For example, the General Elucidation in the Constitution of Indonesia states that "Indonesia is a State based on law (*Rechtsstaat*) not on power (*Machtstaat*)". Rechtsstaat a continental civil law concept translated in "Indonesian as *Negara Hukum*, a term that literally means 'law state', but is often understood to imply 'rule of law'", see Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Oxford: Hart Publication, 2012). Articles 2(1), 8(1) and 4(3) of the Constitution of the Socialist Republic of Vietnam of 2013 which defines the defines Vietnam as a "socialist state ruled by law".

180 The then Attorney General, Yang Berhormat Datin Seri Paduka Hajah Hayati Binti POKSDSP Hj Mohd Salleh, 9th ASEAN Law Ministers Meeting, 22 October 2015, <http://www.agc.gov.bn/AGC%20Site%20Pages/AGCspeechesview.aspxhttp://www.judiciary.gov.bn/SJD%20Site%20Pages/Speeches.aspx> accessed 5 April 2016.

181 One of the challenges mentioned by the then Attorney General, Yang Berhormat Datin Seri Paduka Hajah Hayati Binti POKSDSP Hj Mohd Salleh, 9th ASEAN Law Ministers Meeting, 22 October 2015, <http://www.agc.gov.bn/AGC%20Site%20Pages/AGCspeechesview.aspxhttp://www.judiciary.gov.bn/SJD%20Site%20Pages/Speeches.aspx> accessed 5 April 2016.

182 Formal elements of the rule of law include concepts such as equality, accountability, and avoidance of arbitrariness.

183 Substantive understanding of rule of law includes human rights norms and standards, while retaining more traditional concepts, such as supremacy of the law.

> weakness.[184]

He concludes that despite the differences it has a "core meaning and basic elements" which include

> a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite as captured in the rhetorically powerful if overly simplistic notions of a governments of laws, supremacy of the law and equality of all before the law.[185]

Yet looking at these core elements in the context of an absolute monarchy that has been under a state of emergency is challenging. The challenge is aptly illustrated in the *Worldwide Governance Indicator* which compiled a report on Brunei based on numerous different sources and their understanding of "rule of law."[186]

It appears that the majority of international organisations prefer not to answer the question of what rule of law means for Brunei and the ones that do, present very different results. In short, the challenge is how to classify a system that possesses such an exceptional legal foundation in which the absolute monarch is the foundation or *Grundnorm,* meaning that the Sultan is above the law.

This notion appears to be accepted by many Bruneians[187] with their loyalty[188] to the Sultan in Brunei resting on the reciprocal arrangement that while "the Ruler must act justly to his subjects," "the subjects must be loyal to their Ruler."[189] It is for instance enshrined in the Bruneian-drafted Independence Declaration of 1984 which states that Brunei "shall be forever a sovereign, democratic and independent Malay Muslim Monarchy [founded upon] the teachings of Islam according to *Ahlis Sunnah Waljamaah* and based upon the principle of liberty, trust and justice."[190]

Given the absolute power of the monarch and the lack of democratic institutions, the word "democratic" seems out of place. This has been explained by some commentators that, in the Bruneian context, "democratic" means that the "people's will is expressed through the supremacy of Islam, or that their welfare and national aspirations are completely understood and cared for by the monarch."[191] Supporters of the MIB ideology argue, predictably, that alternative conceptions of democracy, including "Western" notions of representative democracy, are inappropriate for Brunei's cultural circumstances[192] and that some descriptions of Brunei are based on "deconstructivist foreign analyses" which have been perceived by local scholars as "ignorant,

184 Randall Peerenboom, ‚Varieties of Rule of Law: An Introduction and Provisional Consclusion' in Randall Peerenboom (ed), *Asian Discourses of Rule of Law* (London, Great Britain: Routledge Curzon, 2004), 1.

185 Ibid, 2.

186 See Annex 1.

187 Dominik Müller, (2015), 'Sharia Law and the Politics of ‹Faith Control› in Brunei Darussalam: Dynamics of Socio-Legal Change in a Southeast Asian Sultanate' 46(3) *International Quarterly for Asian Studies*, 319.

188 This loyalty is not only voluntary but also encapsulated in various norms. The new Syriah Penal Code Order 2013 criminalises behaviour of a person who "contempts, neglects, contravenes, opposes or insults" (sic) a *titah* or decree of the Sultan and Yang Di-Pertuan to a prison term of up to five years, Section 230. Furthermore for members of the Legislative Council it is not permissible to question the MIB according to Article 42 (1)(e) of the Constitution of 1959.

189 Roger Kershaw *Monarchy on Southeast Asia. The Faces of Tradition in Transition* (London: Routledge, 2001), 126.

190 As cited in Roger Kershaw, 'Brunei: Malay, Monarchical, Micro-state' in J. Funston (ed.), *Government and Politics in Southeast Asia* (Singapore: Institute of Southeast Asian Studies, 2001), 13.

191 Roger Kershaw, 'Brunei: Malay, Monarchical, Micro-state' in J. Funston (ed.), *Government and Politics in Southeast Asia* (Singapore: Institute of Southeast Asian Studies, 2001), 13.

192 Ibid.

orientalist and possibly malicious misrepresentations of Brunei."[193]

The question is therefore whether the ASEAN conceptualisation of rule of law, if and when it emerges, will be able to influence the further development in Brunei. As the question of what constitutes rule of law at a regional level is not yet answered, it is too early to predict as to what effect it will have on Brunei, if any at all.

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193 Abdul Latif Ibrahim as aptly summarised in Dominik Müller, (2015), 'Sharia Law and the Politics of ‹Faith Control› in Brunei Darussalam: Dynamics of Socio-Legal Change in a Southeast Asian Sultanate' 46(3) *International Quarterly for Asian Studies*, 317. The reference was made in the context of discussing the MIB.

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Judiciary Brunei Darussalam Electronic Filing System, <http://efiling.judiciary.gov.bn/eFiling/#>

Juvenile Court, <http://www.judiciary.gov.bn/SJD%20Site%20Pages/Juvenile%20Court%20(Subordinate%20Court).aspx>

Ministry of Culture, Youth and Sport, <http://www.japem.gov.bn/perkhidmatan/counseling.htm>

Ministry of Foreign Affairs, <http://www.mofat.gov.bn/Pages/Regional-And-Multilateral.aspx>

OECD, <https://www.oecd.org/site/adboecdanti-corruptioninitiative/theinitiativesmembercountriesandeconomies.htm>

UN Human Rights Treaties, <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=BRN&Lang=EN>

World Justice Project, <http://data.worldjusticeproject.org/#>,

Small Claims Tribunal,

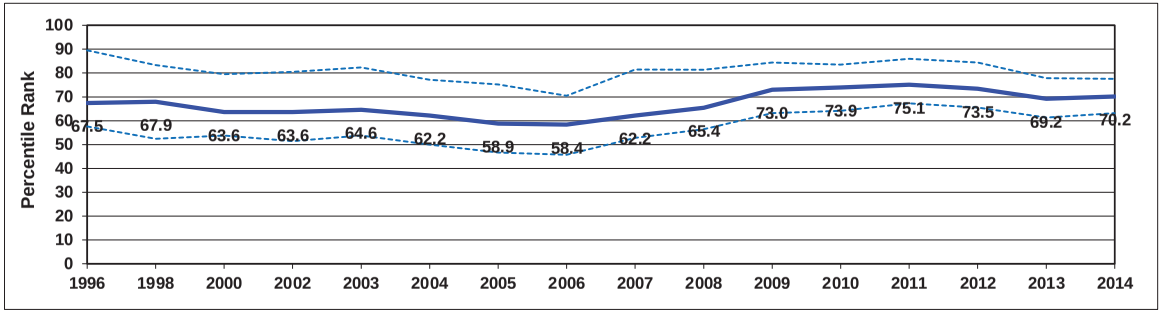
<http://www.judiciary.gov.bn/SJD%20Site%20Pages/Frequently%20Asked%20Question%20(Small%20Claim%20Tribunal).aspx>

Annex 1

Worldwide Governance Indicators

Brunei Darussalam, 1996-2014

Aggregate Indicator: Rule of Law



Individual Indicators used to construct Rule of Law

Code	Source	Website	1996	1998	2000	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
ADB	African Development Bank CPIA	http://cpia.afdb.org/	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
AFR	Afrobarometer	http://www.afrobarometer.org	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
ASD	Asian Development Bank CPIA	http://www.adb.org/	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
BPS	Business Enterprise Environment Survey	http://www.worldbank.org/eca/governance	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
BTI	Bertelsmann Transformation Index	http://www.bertelsmann-transformation-index.de/	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
CCR	Freedom House Countries at the Crossroads	http://www.freedomhouse.org	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
EIU	Economist Intelligence Unit	http://www.eiu.com	..	..	..	..	..	..	..	..	..	..	0.75	0.75	0.75	0.75	0.72	0.72
FRH	Freedom House	http://www.freedomhouse.org	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
GCS	World Economic Forum Global Competitiveness Survey	http://www.weforum.org	..	..	..	..	..	..	..	..	..	0.65	0.70	0.68	0.71	0.66	0.71	..
GII	Global Integrity	http://www.globalintegrity.org/	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
GWP	Gallup World Poll	http://www.gallupworldpoll.com	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
HER	Heritage Foundation Index of Economic Freedom	http://www.heritage.org	..	..	..	..	..	..	..	..	..	..	..	..	..	..	0.40	0.35
HUM	CIRI Human Rights Database	http://www.humanrightsdata.com	1.00	0.50	0.50	0.50	0.50	0.50	0.00	0.00	0.50	0.50	0.50	0.50	0.50	0.50	0.50	..
IFD	IFAD Rural Sector Performance Assessments	http://www.ifad.org	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
IPD	Institutional Profiles Database	http://www.cepii.fr/	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
LBO	Latinobarometro	http://www.latinobarometro.org	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
PIA	World Bank Country Policy and Institutional Assessments	http://www.worldbank.org	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
PRS	Political Risk Services International Country Risk Guide	http://www.prsgroup.com	1.00	1.00	1.00	1.00	1.00	1.00	0.83	0.83	0.83	0.83	0.83	0.83	0.83	0.83	0.83	0.83
TPR	US State Department Trafficking in People report	http://www.state.gov/g/tip/rls/tiprpt	..	..	..	0.50	..	..	..	..	..	0.67	0.33	0.33	0.67	0.67	0.67	0.67
VAB	Vanderbilt University Americas Barometer Survey	http://www.lapopsurveys.org	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
WCY	IMD World Competitiveness Yearbook	http://www.imd.ch	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
WJP	World Justice Project	http://www.worldjusticeproject.org.	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
WMO	IHS Global Insight Country Risk Rating	http://www.globalinsight.com	0.69	0.69	0.69	0.69	0.69	0.61	0.69	0.69	0.69	0.69	0.69	0.69	0.69	0.69	0.69	0.72

The Kingdom of Cambodia

CAMBODIA

TABLE 1
SNAPSHOT[1]

Formal Name	Kingdom of Cambodia
Capital City	Phnom Penh
Independence	9 November 1953
Historical Background[2]	Cambodia became a French protectorate in 1863 and a formal colony in 1884. After WWII ended in 1945, the movement for independence found its momentum. Cambodia gained full independence from France in 1953. Thereafter, it went through several relatively short regimes, from constitutional monarchy (1953-1970) to republic (1970-1975) to communism/dictatorship (1975-1979) to communism/socialism (1979-1991), before a constitutional monarchy was restored in 1993. In April 1975, communist Khmer Rouge forces captured Phnom Penh. People were evacuated from the cities and forced to live in the countryside. At least 1.5 million Cambodians died from execution, forced labour, or starvation in between 1975-1979.[3] In December 1978, Vietnamese troops toppled the regime, although Khmer Rouge forces maintained their strongholds in the north-eastern part of the country. The Vietnamese troops withdrew as a result of the 1991 Paris Peace Accords, which mandated democratic elections and a ceasefire (which was not fully respected by the Khmer Rouge). In 1993, UN-sponsored elections led to the installation of a coalition government. Factional fighting in 1997 ended the coalition government; a second round of national elections in 1998 led to the formation of another coalition government. The remaining elements of the Khmer Rouge surrendered in early 1999. Some of the surviving Khmer Rouge leaders were brought to trial for crimes against humanity by a hybrid UN-Cambodian tribunal supported by international assistance. Elections in July 2003 were relatively peaceful, but it took one year of negotiations before a coalition government was formed. In October 2004, King Norodom Sihanouk abdicated the throne and his son, Prince Norodom Sihamoni, was selected to succeed him. The national election in July 2008 was also largely peaceful although there were accusations of widespread irregularities. National elections in July 2013 were disputed, with the opposition—the Cambodian National Rescue Party (CNRP)—boycotting the National Assembly.[4] The political impasse ended nearly a year later, with the CNRP agreeing to enter parliament in exchange for commitments from the ruling party, the Cambodian People's Party (CPP), to undertake electoral and legislative reforms.
Size	181,035 sq. km

1 Unless otherwise indicated, statistics and information are from CIA, The World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html (accessed 10 May 2016).

2 *See* David P. Chandler, *A History of Cambodia*, 4th ed., USA: Westview Press, 2008; BBC, 'Cambodia profile – Timeline,' *BBC News*, http://www.bbc.com/news/world-asia-pacific-13006828 (accessed 13 May 2016).

3 David Chandler, *The Tragedy of Cambodian History: Politics, War, and Revolution Since 1945*, (Bangkok: Silkworm Books, 1999).

4 'Amid Cambodia protests, UN Rights Expert Appeals for Calm, Urges Meaningful Talks,' *UN News Centre*, http://www.un.org/apps/news/story.asp?NewsID=46838#Vu4hvdJ971U (accessed 20 March 2016).

Land Boundaries	Total Boundaries: 2,530 km Laos (555 km), Thailand (817 km), Vietnam (1,158 km)
Population	15,708,756 (July 2015 est.); Growth Rate: 1.58% (2015 est.)
Demography	0-14 years: 31.43% (male 2,489,964/female 2,447,645) 15-24 years: 19.71% (male 1,532,016/female 1,564,240) 25-54 years: 39.61% (male 3,043,676/female 3,178,825) 55-64 years: 5.2% (male 315,741/female 501,544) 65 years and over: 4.04% (male 238,840/female 396,265) (2015 est.)
Ethnic Groups	Khmer 90%, Vietnamese 5%, Chinese 1%, other 4%
Languages	Khmer (official) 96.3% (2008 est.)
Religion	Buddhist (96%), Muslim 2.5%, Bahai, Jewish, Vietnamese Cao Dai, and Christians 1.5% (2014 est.)
Adult Literacy	Definition: age 15 and over can read and write Total population: 77.2% Male: 84.5% Female: 70.5% (2015 est.)
Gross Domestic Product	$54.17 billion (2015 est.) $50.65 billion (2014 est.) $47.34 billion (2013 est.) note: data are in 2015 US dollars
Government Overview	• Executive Branch: The Head of State is King Norodom Sihamoni (since 29 October 2004), whose role is ceremonial. The Head of Government is Prime Minister Hun Sen (Prime Minister since 14 January 1985; Co-Prime Minister from 1993 to 1998). The executive power is vested in the Council of Ministers, which is named by the Prime Minister and appointed by the monarch upon approval from the National Assembly. • Legislative Branch: The Cambodian legislature is bicameral, consisting of the Senate (61 seats,[5] with members serving for a term of six-years) and the National Assembly (123 seats, with members elected by popular vote to serve a five-year term). • Judicial Branch: Courts at all levels exercise judicial power and hear all matters including administrative cases.[6] Judicial power is vested in the Supreme Court, one Appeal Court, and 23 First Instance Courts (located in each province/municipality, except in Kep and Oddar Meanchey provinces). A Military Court hears cases concerning military discipline. An internationalised/hybrid court, the Extraordinary Chambers in the Courts of Cambodia (ECCC), was established in 2004 and adjudicates certain crimes committed between 1975-1979. Judicial review is not vested with the courts, but in the Constitutional Council of Cambodia.[7]

5 Two members were appointed by the Monarch, two elected by the National Assembly, and 57 elected by commune councils.

6 Article 3-5, Law on Organisation of Courts, Royal Kram No. NS/RKM/0714/015, 16 July 2014.

7 Kong Phallack, 'Overview of Cambodian Legal and Judicial System,' in Hor Peng et al. (eds.), *Introduction to Cambodian Law*, Phnom Penh: Konrad Adenauer Stiftung, 2012, pp. 10-11, http://www.khmerlex.com/Site/images/library_file/10-Overview%20of%20the%20Cambodian%20Legal%20and%20Judicial.pdf (accessed 10 April 2016).

Human Rights Issues	Pressing human rights issues include: Freedom of expression, association, and assembly; human rights violations in connection with land disputes, including land and housing rights (land confiscation and forced eviction); lack of independence of the judiciary; judicial harassment (mostly against government dissidents); threats and attack against human rights defenders and on-going and prevailing impunity for perpetrators; arbitrary detention and torture; refugees and asylum seekers (threat of forced repatriation); issues concerning elections; right to highest attainable standard of health; and violence and sexual crimes against women and children.[8]
Membership in International Organizations	ADB: Asian Development Bank ARF: ASEAN Regional Forum ASEAN: Association of Southeast Asian Nations CICA: Conference on Interaction and Confidence-Building Measures in Asia (observer) EAS: East Asia Summit FAO: Food and Agriculture Organization G-77: Group of 77 IBRD: International Bank for Reconstruction and Development ICAO: International Civil Aviation Organization IDA: International Development Association ICRM: International Red Cross and Red Crescent IFAD: International Fund for Agriculture Development IFC: International Finance Corporation IFRCS: Intl' Federation of Red Cross & Red Crescent Society ILO: International Labour Organisation IMF: International Monetary Fund Interpol: International Police Criminal Organisation IOC: International Olympic Committee IOM: International Organization for Migration IPU: Inter-Parliamentary Union ISO: International Organization for Standardisation ITU: International Telecommunication Union ITSO: International Telecommunication Satellite Organisation MIGA: Multilateral Investment Guarantee Agency NAM: Nonaligned Movement OIF: Organization International de la Francophonie OPCW: Organization for Prohibition of Chemical Weapon PCA: Permanent Court of Arbitration UN: United Nations UNCTAD: United Nations Conference on Trade and Development UNESCO: United Nations Educational, Scientific, and Cultural Organisation UNIDO: United Nations Industrial Development Organization UNIFIL: United Nations Interim Force in Lebanon UNMIS: United Nations Mission for Sudan UNWTO: World Tourism Organization UPU: Universal Postal Union

8 See, e.g., UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Cambodia, A/HRC/26/16, 27 March 2014; UN Human Rights Council, Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Cambodia, A/HRC/WG.6/18/KHM/3, 7 November 2013; International Federation for Human Rights, Asian Forum for Human Rights and Development, Cambodian Center for Human Rights, et. al., 'Call on the UN Human Rights Council to Address the Deteriorating Human Rights Situation in Cambodia: Joint NGO Letter,' FIDH, https://www.fidh.org/en/region/asia/cambodia/call-on-the-un-human-rights-council-to-address-the-deteriorating (accessed 9 May 2016).

	WCO: World Custom Organization WFTU: World Federation of Trade Unions WHO: World Health Organization WIPO: World Intellectual Property Organization WMO: World Metrological Organization WTO: World Trade Organization
Human Rights Treaty Commitments	In line with the 1991 Paris Peace Accords on the comprehensive political settlement of the Cambodian conflict, Cambodia agreed to have a UN-appointed independent expert to monitor and report on the human rights situation in Cambodia. Ms. Rhona Smith of United Kingdom was appointed Special Rapporteur in March 2015, succeeding Professor Surya P. Subedi. Since the *2011 Rule of Law Baseline Study*, Cambodia has ratified two more treaties, namely the Convention for the Protection of all Persons from Enforced Disappearance and the Convention on the Rights of Persons with Disabilities. Thus, Cambodia currently has ratified or acceded to eight of nine core UN human rights treaties. *Core UN Human Rights Treaties:*[9] • ICERD: International Convention on Elimination of All Forms of Racial Discrimination (Ratification: 28 November 1983) • ICCPR: International Covenant on Civil and Political Rights (Accession: 26 May 1992) • ICESCR: International Covenant on Economic, Social and Cultural Rights (Accession: 26 May 1992) • CEDAW: Convention on the Elimination of all Forms of Discrimination Against Women (Accession: 15 October 1992) • CAT: Convention Against Torture, and Other Cruel, Inhumane or Degrading Treatment or Punishment (Accession: 15 October 1992) • CRC: Convention on the Rights of the Child (Accession: 15 October 1992) • CED: Convention for the Protection of all Persons from Enforced Disappearance (Accession: 27 June 2013) • CRPD: Convention on the Rights of Persons with Disabilities (Ratification: 20 December 2012) In relation to these treaties, Cambodia has ratified a number of optional protocols, including OP-CEDAW, OP-CAT, OP-CRC-AC (Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict), and OP-CRC-SC (Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography). Cambodia has also signed the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families (CMW), but has, to date, not ratified the same.

9 'Ratification Status for Cambodia,' *Office of the United Nations High Commissioner for Human Rights*, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=29&Lang=EN (accessed 13 May 2016).

	Other Relevant Human Rights Treaties:[10] Other relevant human rights treaties that Cambodia has ratified are the following: • Convention on the Prevention and Punishment of the Crime of Genocide (Accession: 14 October 1950); • Convention relating to the Status of Refugees (Accession: 15 October 1992); • Op. Protocol relating to the Status of Refugees (Accession: 15 October 1992); • Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Accession: 12 June 1957); • Convention on the Suppression and Punishment of the Crime of Apartheid (Accession: 28 July 1981); • Rome Statute of the International Criminal Court (Ratification: 11 April 2002); • United Nations Convention against Corruption (Accession: 5 September 2007).

I. INTRODUCTION

Cambodia is a constitutional monarchy that formally adopts liberal democracy and pluralism/multi-party system.[11] The Constitution specifies the political and economic systems, but does not specify the legal system.[12] Legal scholars argue that Cambodia, in practice, adopts a mixed legal system of both common law and civil law.[13] The Constitution and various laws provide for government accountability as well as separation of powers of the three branches of government. However, past and contemporary reports point to the de facto influential power of the executive.[14] Nevertheless, one member of the Supreme Council of Magistracy (SCM) has stated that "in democratic society, it is inevitable that every individual and entity at all levels collaborate and are interconnected. Therefore, there is often influence on one another. However, judges make decision without being due to order or command from ruling party or an influential person."[15]

As a result of the 1991 Paris Peace Accords, there is a monitoring mechanism for the human rights situation in Cambodia, a mandate entrusted upon the Special Representative of the Secretary General for Human Rights Situation in Cambodia (SRSG) (later changed to "Special Rapporteur"). In the last five years, besides the annual reports on the general human rights situation in Cambodia, then Special Rapporteur Surya P. Subedi also submitted thematic reports on (i) economic and other land concessions and (ii) eviction and resettlement. Cambodia has undergone two Universal Periodic Review (UPR) processes. The report of the Human Rights Council on the first UPR was issued on 8 February 2011, while the report of the UN Working Group on the second UPR was issued on 27 March 2014.

10 'Ratification of International Human Rights Treaties – Cambodia,' University of Minnesota Human Rights Library, https://www1.umn.edu/humanrts/research/ratification-cambodia1.html (accessed 10 May 2016).

11 Article 1 of the 1993 Constitution (Cambodia). Available at http://www.ccc.gov.kh/english/basic_text/Constitution%20of%20the%20Kingdom%20of%20Cambodia.pdf (accessed 6 March 2016).

12 Chapter IV and V of the 1993 Constitution.

13 Supra note 7, pp. 8 & 22.

14 *See for example*, International Bar Association's Human Rights Institute, *Justice versus Corruption: Challenges to the independence of the judiciary in Cambodia*, September 2015, http://www.ibanet.org/Article/Detail.aspx?ArticleUid=fb11e885-5f1d-4c03-9c55-86ff42157ae1; and Ms. Chak Sopheap, 'Political Judiciary vs. independent judiciary in Cambodia,' *The Phnom Penh Post*, 21 November 2014 http://www.phnompenhpost.com/political-judiciary-versus-independent-judiciary-cambodia (all links accessed 11 April 2016).

15 Mao Sopha, 'A Member of Supreme Council of Magistracy Has Not Seen Anyone Order Court' (in Khmer), *Thmey Thmey*, 24 March 2016, http://www.thmeythmey.com/?page=detail&ctype=article&id=37987&lg=kh (accessed 11 April 2016).

During the 2nd cycle of the UPR, specifically on the rule of law, the Cambodian delegation stated that the government had adopted 416 laws[16] to enhance the legal framework and strengthen the capacity, independence and impartiality of the judiciary. The authorities would continue to work hard on legal reforms and encourage the drafting of new laws, establish programmes to increase the awareness of laws, and conduct training for law enforcement officials at all levels. The delegation added that the government is determined to enact laws related to the judiciary.[17]

Ironically, civil society and the general public have criticised the government for the shroud of secrecy over the law-making process concerning judicial and legal reforms. Three new laws concerning the judiciary have been much criticised for expanding the influence of the executive on the judiciary. Additionally, the government, also without holding meaningful consultations, passed laws containing repressive clauses, including the Law on the Election of Members of the National Assembly, the Law on Associations and NGOs, and the Telecommunications Law.

The increasing discontent of the citizens in the ruling party became unequivocal in the most recent National Assembly elections. In the 2008 elections, the Cambodian People's Party won 90 of 123 seats. By the July 2013 elections, it was able to secure only 68 seats. Despite the CPP's reduced majority in the National Assembly, CNRP and their supporters still felt the election was fraught with irregularities and deeply biased in CPP's favour. Mass protests over the election results were held, resulting in violence and at least one death as government forces tried to suppress demonstrators. In protest of the election results, CNRP refused to attend sessions of the National Assembly until July 2014, when the two parties were able to agree on key reforms to be instituted.[18]

In the first cabinet meeting in September 2013, the Prime Minister unveiled a five-year "Rectangular Strategy" (3rd phase) and vowed to implement deeper reforms focusing on legal and judicial reforms, anti-corruption, good governance and forest management. The strategy intended to build Cambodian society by strengthening peace, stability and social order, promoting sustainable and equitable development, and entrenching democracy and respect for human rights and dignity. The reform was seen as a strategy to regain the confidence of the people and to avoid further loses in the 2018 national election. The Prime Minister also warned that there would be no tolerance for any minister abusing his or her power when dealing with lower-level officials and the citizenry.[19] On 4 April 2016, the Prime Minister reshuffled the cabinet—an act that some commentators saw as implementation of reform efforts, but viewed by others as insignificant.[20]

16 No timeframe was specified.

17 UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Cambodia*, A/HRC/26/16, 27 March 2014, par 14.

18 Kate Hodal, 'Cambodian election protests grip Phnom Penh,' *The Guardian*, 16 September 2013, http://www.theguardian.com/world/2013/sep/16/cambodia-election-protests-phnom-penh; 'Cambodia opposition boycott opening of parliament,' *BBC News*, 23 September 2013, http://www.bbc.com/news/world-asia-24177265; Joshua Lipes, 'Cambodia's Ruling, Opposition Parties Agree to End Year-Long Deadlock,' *Radio Free Asia*, 22 July 2015, http://www.rfa.org/english/news/cambodia/agreement-07222014154033.html (all links accessed 6 May 2016).

19 Nguon Sovan, 'Cambodian PM unveils 5-year strategy, vowing deep reforms,' *Xinhua*, 25 September 2013, http://news.xinhuanet.com/english/world/2013-09/25/c_132749682.htm (accessed 6 March 2016).

20 Luke Hunt, 'Why did Cambodia's Hun Sen Reshuffle His Cabinet,' *The Diplomat*, 24 March 2016, http://thediplomat.com/2016/03/why-did-cambodias-hun-sen-reshuffle-his-cabinet/; Khmer Times/Taing Vida, 'Cabinet Reshuffle Approved by Assembly,' *Khmer Times*, 4 April 2016, http://www.khmertimeskh.com/news/23588/cabinet-reshuffle-approved-by-assembly/ (accessed 7 April 2016).

Cambodia has been ranked consistently low in the World Justice Project's rule of law index. It was 91st out of 99 countries in 2014.[21] In 2015, Cambodia was ranked the lowest in the East Asia and Pacific region, and 99th out of 102 countries globally.[22]

Key Rule of Law Structures

The key institutions in overseeing and implementing the rule of law in the country include the courts, Supreme Council of Magistracy, Constitutional Council of Cambodia, Ministry of Justice, Commissions within the National Assembly and Senate, Cambodian Human Rights Committee, Anti-Corruption Institution, Royal Academy for Judicial Professions, Prosecution Department, Judicial Police, and the National Election Committee.

The Courts

Judicial power is vested in the Supreme Court, Appeal Court, and First Instance Courts. There is also a Military Court, which hears cases concerning military discipline. An internationalised/hybrid court, the Extraordinary Chambers in the Courts of Cambodia (ECCC), was established in 2004 and adjudicates certain crimes committed between 1975-1979. Currently, there are three active cases against six accused.[23] The subject matter jurisdiction of the ECCC includes genocide, crimes against humanity, grave breaches of the Geneva Conventions, destruction of cultural properties, crimes against internationally protected persons, and crimes penalised in the 1956 Penal Code of Cambodia.

Between 2011-2016, two new First Instance Courts were established in the newly-created provinces of Tbong Khmum (carved out of Kampong Cham province) and Pailin (carved from Battambang province). There is a long-awaited plan to create seven more regional Appeal Courts to ease complainants' expenses and reduce court backlog. Three out seven regional Appeal Courts are expected to be created by 2018.[24]

On 16 July 2014, three laws pertaining to the judiciary were promulgated: 1) Law on Organisation of Courts, 2) Law on Statute of Judges and Prosecutors, and 3) Law on Organisation and Functioning of Supreme Council of Magistracy (SCM). These laws have been much criticized on the basis that they increased the government's control over the Supreme Council of Magistracy and weakened judicial independence.

21 Stuart White and May Titthara, 'Low Ranking for Rule of Law,' *The Phnom Penh Post*, 6 March 2014, http://www.phnompenhpost.com/national/low-ranking-rule-law (accessed 6 Mar 2016).

22 World Justice Project, *Rule of Law Index 2015*, pp. 6 & 21, http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf (accessed 6 Mar 2016).

23 Extraordinary Chambers in the Courts of Cambodia, 'ECCC at a Glance,' April 2014, http://www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance%20-%20EN%20-%20April%202014_FINAL.pdf (accessed 15 April 2016).

24 Chhay Channyda, 'Provinces Tapped for Appeal Court Project,' *The Phnom Penh Post*, 29 July 2015, http://www.phnompenhpost.com/national/provinces-tapped-appeal-court-project; Shane Worrell and Chhay Channyda, 'Regional Appeal Court System to Be Installed,' *The Phnom Penh Post*, 2 May 2012, http://www.phnompenhpost.com/national/regional-appeal-court-system-be-installed; Noeu Vannarin, 'Gov't Plans to Build New Appeal Courts,' *The Cambodia Daily*, 29 October 2010, https://www.cambodiadaily.com/archives/govt-plans-to-build-new-appeal-courts-106884/ (all accessed 30 March 2016).

Supreme Council of Magistracy

The SCM is mandated to appoint and discipline judges and prosecutors throughout the country. The newly-enacted Law on the SCM increased the members of the council from eight to 11.[25] Concerns over the new law as well as the two others that accompanied it have been raised, including that the executive government, through the Minister of Justice (who sits in the SCM), is given excessive influence over the appointment and promotion of judges and prosecutors.[26]

Constitutional Council of Cambodia

Judicial review is not vested with the courts, but the power to check the constitutionality of a law or executive regulation is vested in the nine-member Constitutional Council of Cambodia (CCC).[27] The Council may review laws adopted by the legislature and executive regulations (Royal Decree, Sub-Decree, ministerial proclamation, order, circular, sub-national authorities' order or bylaw).[28] Three members of the Constitutional Council of Cambodia are appointed by the King; three members are elected by the National Assembly; and the other three members are elected by SCM. Members of the CCC are prohibited from serving other public functions as well as being president or vice-president of a political party.[29]

Ministry of Justice

Based on Article 3 of the Sub-Decree on the Organisation and Functioning of the Ministry of Justice No. 47 ANK/BK dated 11 May 2007, the Ministry of Justice is mandated to, among others, 1) participate in protecting the independence of judges, 2) organise and monitor the administrative process of courts and the prosecution offices at all levels, 3) ensure the smooth operation of the courts in all cases and levels, 4) monitor the implementation of laws and execution of judgements, 5) monitor penitentiaries and detention centres, 6) draft laws concerning the judicial sector, 7) research, educate, and disseminate laws concerning the judicial sector, and 8) maintain criminal records and issue abstracts thereof.

Commissions within the National Assembly and Senate

There are 10 commissions each within the National Assembly and Senate.[30] There is a Human Rights and Complaints Commission in the National Assembly[31] and a Human Rights and Complaints Commission

25 Article 4 of Law on SCM.

26 *See* Cambodian Centre for Human Rights, *CCHR Legal Analysis - May 2014: Three Draft Laws Relating to the Judiciary*, http://www.cchrcambodia.org/admin/media/analysis/analysis/english/2014_06_17_CCHR_Analysis_of_the_Draft_Laws_on_Judicial_Reforms_(ENG).pdf (accessed 15 April 2016).

27 Constitutional Council of Cambodia <http://www.ccc.gov.kh/index_en.php> accessed 15 April 2016.

28 See 'About Cambodian Legal System,' *Chbab*, http://www.chbab.net/chbab-net-in-english/about-the-cambodian-legal-system-en (accessed 30 March 2016).

29 Article 139 of the Constitution.

30 National Assembly's decision No. 198.RS dated 14 August 2014.

31 National Assembly's decision No. 001 RS dated 9 January 2014 on roles and responsibilities of committee on human rights, receipt of complaint, investigation, and senate-national assembly relation.

in the Senate.[32] Their duties consist of legislative initiatives, receipt of complaints, investigation, education, mainstreaming, and awareness-raising with regard to human rights.

As a result of political dealings between the two political parties after the 2013 election, Commissions on Investigation and Corruption were created within the National Assembly[33] and the Senate.[34] The Commissions are tasked with initiating laws or examining draft laws, monitoring implementation, consulting and meeting with stakeholders, researching and giving recommendations concerning anti-corruption.

Cambodian Human Rights Committee

The Cambodian Human Rights Committee, established in 1998, is under the Council of Ministers and is tasked to investigate, collect information relating to the enforcement of human rights, prepare the report to be submitted to relevant bodies of the United Nations, develop policies, and take action to enhance the implementation of human rights standards. Notably, the Cambodian Human Rights Committee encourages resolving disputes through mediation.[35] This institution does not have judicial or quasi-judicial functions. As of January 2016, no institution in Cambodia has applied for accreditation in accordance with the Principles relating to the Status of National Institutions (The Paris Principles).[36]

Anti-Corruption Institution

In 1999 and again in 2006, the Royal Government issued Sub-Decrees on the establishment of an Anti-Corruption Unit under the management of the Office of the Council of Ministers. On 17 April 2010, the Law on Anti-Corruption was promulgated, establishing the Anti-Corruption Institution (ACI) comprising of the Anti-Corruption Unit (ACU) and the National Council Against Corruption (NCAC). The ACU's core mission is to spearhead initiatives against corruption in all forms, at all levels of society. It follows a three-pronged approach: public education, prevention, and enforcement of the Law on Anti-Corruption.[37] It is empowered to receive complaints and investigate alleged incidents of corruption.[38] The ACU has the privilege to, in cooperation with concerned authorities, suspend all functions of any individual who is substantially proven to be involved in corrupt offence[39] as well as freeze assets.[40] The NCAC acts as an

32 Senate's decision no. 020/0912/BHS/SR dated 6 September 2012 on roles and responsibilities of committee on human rights, receipt of complaint and investigation.

33 National Assembly's decision No. 284/RS dated 14 November 2014 on role and responsibilities of commission on investigation and anti-corruption.

34 Senate's decision No. 116/0914/BHS/SR dated 25 September 2014 on role and responsibilities of commission on investigation and anti-corruption.

35 Article 6.1, Royal Decree No. NS/RKT/1213/1336 dated 9 December 2013 on Establishing Cambodian Human Rights Committee.

36 Accreditation of National Human Rights Institutions, *Office of the United Nations High Commissioner for Human Rights,* last updated 26 January 2016, http://www.ohchr.org/Documents/Issues/HRIndicators/NHRI.pdf, (accessed 17 April 2016).

37 'Background on Establishment of ACU, *Anti Corruption Unit*, http://www.acu.gov.kh/index.php?4a8a08f09d37b73795649038408b5f33=%E1%9E%91%E1%9F%86%E1%9E%96%E1%9F%90%E1%9E%9A%E1%9E%8A%E1%9E%BE%E1%9E%98&03c7c0ace395d80182db07ae2c30f034=2 (accessed 7 April 2016).

38 Article 25 of Law on Anti-Corruption 2010.

39 Ibid, Article 26.

40 Ibid, Article 28; See also Articles 13, 27 and 29.

oversight body, providing guidance and consultation to the ACU. The NCAC is also tasked with developing anti-corruption strategies and policies to be implemented by the ACU.[41]

The ACI has several foundations in place to make it an effective mechanism against corruption. In particular, the legal framework provides for the independence of the institution's budget and autonomy over its accounting and auditing procedures. Nevertheless, its ability to independently function is tarnished by its closeness to the Prime Minister and the ruling party. The current Chairman of the ACU was former adviser to the Prime Minister. The Prime Minister appoints the Chairperson and Vice-Chairperson of ACU through sub-decree. As illustrated in the table below, the ACI has been described by Transparency International to be "weak" in terms of capacity, governance, and role (with the exception of education).[42]

Table 2

National Integrity System: Anti-Corruption Institution (ACI) TI Cambodia 2014 Assessment

PILLARS	SCORE		SCALE
Capacity	**In Law**	**In Practice**	+ Very weak: 0-19
Resources	75	25	+ Weak: 20-39
Independence	25	0	+ Moderate: 40-59
Governance			+ Strong: 60-79
Transparency	25	25	+ Very strong:80-100
Accountability	25	25	
Integrity Mechanism	50	25	
Role			
Prevention	N/A	25	
Education	N/A	75	
Investigation	N/A	25	

Royal Academy for Judicial Professions

The Royal Academy for Judicial Professions (RAJP) is overseen by the Ministry of Justice. Previously, oversight was provided by the Council of Ministers.[43] The RAJP consists of the Royal School for Judges,

41 Ibid, Articles 5 and 10.

42 Transparency International Cambodia, *Corruption and Cambodia's Governance System: The Need for Reform*, pp. 135-146, http://www.ticambodia.org/files/2014EN-NISA-WEB.pdf (accessed 7 April 2016).

43 Aun Pheap, 'Hun Sen makes more cuts to Sok An's Portfolio,' *The Cambodia Daily*, 4 November 2013, https://www.cambodiadaily.com/archives/hun-sen-makes-more-cuts-to-sok-ans-portfolio-46512/ (accessed 31 March 2016). See also Royal Decree No. NS/RKT/1013/1058 dated 24 October 2013.

Royal School for Clerks, Royal School for Bailiffs, and Royal School for Notary.[44] Cambodian judges can be categorised as trial judges, investigating judges, and prosecutors. They receive training from the Royal School for Judges, and choose their specialization in the last four months of their training.[45]

The Lawyer Training Center is located within the compound of the RAJP, but is overseen by Bar Association of the Kingdom of Cambodia (BAKC).[46]

Prosecution Department

The Prosecution Department files criminal charges with the courts, is responsible for the implementation of decisions on criminal offenses, and ensures that arrest warrants are disseminated. Prosecutors may also request investigating judges to conduct further investigations into a case, collecting both exculpatory and inculpatory evidence.[47] In civil cases, public prosecutors may, where they deem it necessary for the public welfare, attend the proceedings of a civil action and present opinions.[48]

Judicial Police

The Judicial Police acts as an auxiliary of the judiciary's power and has the duty to identify and arrest offenders as well as collect evidence.[49] It consists of 1) judicial police officers trained by the Police Academy of Cambodia and subordinated to the General Commissariat of the National Police, 2) judicial police agents, and 3) government officials and public agents who are authorized by law to monitor some offenses within their territorial authority. The General Prosecutor attached to the Appeal Court monitors and controls judicial police officers.[50]

National Election Committee

The National Election Committee (NEC) was formed in 1997 with the official motto "Independence, Neutrality, Truthfulness, Justice, and Transparency."[51] Since 1998, every election organised by NEC has been plagued with accusations of irregularities.[52] In the national election on 28 July 2013, the Cambodian People's Party of the incumbent Prime Minister was declared the victor, securing 68 of 123 seats. The opposition contested the results and for months held demonstrations. After rounds of political negotiations,

44 Royal Academy for Judicial Professions <http://www.rajp.gov.kh/index.html> (in Khmer), accessed 31 March 2016.

45 See 'Table 4: Administration of Justice Grid' of this report for more information.

46 Bar Association of the Kingdom of Cambodia <www.bakc.org.kh> (in Khmer), accessed 31 March 2016.

47 Articles 27, 40-50, 124, and 127 of Cambodian Code of Criminal Procedure 2007.

48 Article 6 of Cambodian Code of Civil Procedure.

49 Article 56 of Cambodian Code of Criminal Procedure.

50 Articles 35, 37 and 56-60 of the Cambodian Code of Criminal Procedure.

51 The National Election Committee <http://www.necelect.org.kh/>, accessed 12 April 2016.

52 See e.g., UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Cambodia, Surya P. Subedi*, A/HRC/27/70, 15 August 2014; The Committee for Free and Fair Elections in Cambodia (COMFREL), *2013 National Assembly Elections: Final Assessment and Report*, December 2013.

an agreement between CPP and CNRP was reached in July 2014. Among the points agreed on was the incorporation of NEC into the Constitution and adoption of laws to ensure its independence.[53]

Foundation & Evolution of Rule of Law

During the Communist Party of Kampuchea's (CPK) rule from 1975 to 1979, all institutions and laws existing under Cambodia's previous regimes, including the courts, were abolished. Intellectuals, along with legal professionals, were among those targeted by the regime for elimination. The collapse of the Soviet Union in 1989 and Paris Peace Accords in 1991 allowed for democracy and rule of law in Cambodia to take hold after decades of Communist/Socialist regimes (the CPK's Democratic Kampuchea in 1975-1979; the Salvation Front's People's Republic of Kampuchea [supported by Vietnamese military force and civilian advisory effort] in 1979-1989; and the State of Cambodia, with the same one-party rule and leadership structure as under the People's Republic of Kampuchea, in 1989-1993).

Between 1993-2002, after the UN-conducted general elections, Cambodia undertook legal and judicial reforms based on its own political platform and policies with the support of development partners based on their own policies and agenda. To harmonise and align the policies of the government and development partners, the Council of Ministers adopted two important documents—the Legal and Judicial Reform Strategy in 2003 and the Plan of Action for the Implementation of the Legal and Judicial Reform Strategy in 2005. The reform strategies were developed based on four basic concepts set out in the 1993 Constitution, namely (i) Liberal Democracy, (ii) Rule of Law, (iii) Separation of Powers and (iv) Individual Rights. "Rule of Law" comprises: (a) hierarchy of laws; (b) predictability; (c) transparency; (d) accountability; (e) due process; and (f) enforcement.[54]

The current ruling government, which won national elections in 1998, 2003, 2008 and 2013, continued legal and judicial reform efforts. It adopted the "Triangle Strategy" in 1998, which focused on internal peace and stability as well as sustainable development, and later the Rectangular Strategy (1st phase in 2004, 2nd phase in 2008, and 3rd phase in 2013), which is centred on good governance with key programs on (1) fighting corruption; (2) legal and judicial reform; (3) public administration reform; and (4) reform of armed forces.[55]

Four main codes, namely, the Code of Civil Procedure, Criminal Procedure Code, Civil Code, and Criminal Code were adopted in 2006, 2007, 2007, and 2009 respectively. Another law that is closely related to good governance and rule of law is the law on Administrative Management of Capital, Provinces, City, District, and Khan of 2008, which was followed by more detailed executive acts in 2009 and 2010. These three statutes eased access to justice through justice centres at commune levels.[56]

In the context of grave crimes committed during the Democratic Kampuchea, the ECCC also serves to strengthen rule of law by holding the most responsible leaders of the Khmer Rouge accountable through fair

53 Alex Willemyns & Kuch Naren, 'Election Experts Vow Reform as "Neutral" NEC Member,' *The Cambodia Daily*, 2 April 2015 https://www.cambodiadaily.com/archives/election-expert-vows-reform-as-neutral-nec-member-81218/ (accessed 12 April 2016).

54 Supra note 7, pp. 17-22.

55 Royal Government of Cambodia, *"Rectangular Strategy" for Growth, Employment, Equity and Efficiency: Phase III*, September 2013, 13.

56 Ibid, p. 56.

and open criminal trials, sending the message that impunity must be rejected and fought against.[57]

However, despite the government's policy commitment on good governance, the government seems wary of opinions and activities that negatively affect the image or interests of the government as well as of entrepreneurs with close ties to the government.[58] The government keeps a close watch over civil society's and the general public's legal and peaceful exercise of fundamental rights, including the right to freedom of expression, freedom of assembly, and freedom of association. Restrictions are placed relative to a range of issues, including private development and land concessions causing forced eviction,[59] labour rights,[60] and deforestation and management of natural resources.[61] Restrictions, including by making actions illegal or subject to prior permission,[62] over the exercise of fundamental rights are made on the basis of public order, national security, and national interest.[63] However, if the exercise of fundamental rights does not involve specific sensitive issues or the interests of the ruling party, activities are allowed to proceed smoothly without interruption and, sometimes, with the authority's facilitation.

It is particularly interesting that Prime Minister Hun Sen, on the occasion of the UN International Day of Peace, 21 September 2015, stated, The Royal Government also has a strong commitment to crack down and prevent all activities and tricks under the auspices of democracy and human rights to serve individual political gain or handful of people."[64] In this regard, calls have been made for the government to cease its "clampdown on civil society, human rights defenders, parliamentarians and UN personnel."[65] In recent years, criminal charges, questioning, court proceedings and public statements against them have increased.

57 Ibid, pp. 58-59.

58 John Vidal, 'Cambodia Bans Film about Murdered Rainforest Activist,' *The Guardian*, 21 April 2016, http://www.theguardian.com/environment/2016/apr/21/cambodia-bans-film-about-murdered-rainforest-activist-chut-wutty (accessed 22 April 2016); The Associated Press, 'Cambodian police charge opposition critic of border policy,' *Salon*, 12 April 2016, http://www.salon.com/2016/04/12/cambodian_police_charge_opposition_critic_of_border_policy/ (accessed 1 May 2016).

59 Pav Suy, 'Land Conflict Victims Call for a Stop to Lake Filling,' *Khmer Times*, 31 March 2016, http://www.khmertimeskh.com/news/23483/land-conflict-victims-call-for-a-stop-to-lake-filling// (accessed 21 April 2016).

60 See e.g., Shane Worrell and Khouth Sophak Chakrya, 'NagaWorld Strike Ends with Force,' *The Phnom Penh Post*, 19 June 2013, http://www.phnompenhpost.com/national/nagaworld-strike-ends-force; Post Staff, 'Vicious May Day Beatings,' *The Phnom Penh Post*, 2 May 2014, http://www.phnompenhpost.com/national/vicious-may-day-beatings; and Pech Sotheary and Ananth Baliga, 'Guards Beat Demonstrators at Union Law Protest,' *The Phnom Penh Post*, 4 April 2016 http://www.phnompenhpost.com/national/guards-beat-demonstrators-union-law-protest (all accessed 22 April 2016).

61 Sen David, 'Police End Prey Lang Event,' *The Phnom Penh Post*, 20 June 2014, http://www.phnompenhpost.com/national/police-end-prey-lang-event; Prach Chev, Cambodian Activists, 'Monks Urge Lawmakers to Save Endangered Forest,' *Radio Free Asia*, 6 July 2015, http://www.rfa.org/english/news/cambodia/forest-07062015163702.html; Pech Sotheary and Daniel Pye, 'Police Put Brake on Ride,' *The Phnom Penh Post*, 18 August 2014, http://www.phnompenhpost.com/national/police-put-brakes-ride (all accessed 21 April 2016).

62 Cambodian Centre for Human Rights, *CCHR's Briefing Note – Cambodia: Freedom of Assembly on Hold*, April 2014, http://sithi.org/CCHR_Briefing_Note-Freedom_of_Assembly_on_hold_ENG.pdf; 'Cambodian Human Rights Day Events Cancelled Amid State Crackdown,' *Aljazeera America*, 7 December 2015 http://america.aljazeera.com/articles/2015/12/7/cambodian-group-cancels-human-rights-event-amid-state-crackdowns.html (all accessed 21 April 2016).

63 Pech Sotheary & Igor Kossov, 'Human Rights Day Protest Stay Positive,' *The Phnom Penh Post,* 11 December 2015, http://www.phnompenhpost.com/national/human-rights-day-protest-stays-peaceful (accessed 21 April 2016).

64 CCHR, Briefing Note, *Cambodia: Democracy under Threat*, September 2015, http://cchrcambodia.org/admin/media/analysis/analysis/english/2015_09_24_CCHR_Briefing_Note_Cambodia_Democracy_Under_Threat_ENG.pdf; Hul Reaksmey & Ten Soksreinith, 'Hun Sen Says He Will "Dismantle" Threats to Government,' *VOA Cambodia*, 21 September 2015, http://www.voacambodia.com/content/hun-sen-says-he-will-dismantle-threats-to-government/2972231.html (all accessed 21 April 2016).

65 'Cambodia: UN experts urge end to attacks against civil society, human rights defenders,' *UN News Centre*, 12 May 2016, http://www.un.org/apps/news/story.asp?NewsID=53915#.V0LiZZN94cg (accessed 23 May 2016).

The most recent example involves the arrest of four senior staff of the Cambodian Human Rights and Development Association (ADHOC) for allegedly bribing a woman into denying that she has an extra-marital affair with an opposition parliamentarian.[66]

Human Rights Treaties

Chapter III of the Constitution states that "Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights." With regard to the relation between municipal and international law, Cambodia is a dualist country that requires ratification of international laws signed by the head of the government (or his or her representative) through an adoption of law (*Royal Kram*) by the legislature to make them effective in Cambodia. Below is the status of Cambodia's ratification as regards the core human rights treaties.

Table 3

Cambodia's Ratification Status of Core UN Human Rights Treaties[67]

Instrument (Entry into force)	Signature	Ratification or Accession (a)	Reservation	Acceptance of Specific Procedure
CERD (4 Jan 1969)	12 Apr 1966	28 Nov 1983	No	N/A
CCPR (23 Mar 1976)	17 Oct 1980	26 May 1992 (a)	No	No individual complaint procedures
CESCR (23 Mar 1976)	17 Oct 1980	26 May 1992 (a)	No	No individual complaint procedures
CEDAW (3 Sep 1981)	17 Oct 1980	15 Oct 1992 (a)	No	N/A
OP-CEDAW (22 Dec 2000)	11 Nov 2001	13 Oct 2010	No	• Individual complaint procedures • Inquiry procedures
CAT (26 Jun 1987)	N/A	15 Oct 1992 (a)	No	• Inquiry procedures
OP-CAT (22 Jun 2006)	14 Sep 2005	30 Mar 2007	No	N/A
CRC and its amendment (2 Sep 1990)	N/A	15 Oct 1992 (a)	No	N/A
Amendment of CRC, Art. 43(2) (18 Nov 2002)	N/A	12 Aug 1997 (a)	No	N/A
OP-CRC-AC (12 Feb 2002)	27 Jun 2000	16 Jul 2004	No	N/A
OP-CRC-SC (18 Jan 2002)	27 Jun 2000	30 May 2002	No	N/A

66 Ibid; Ben Sokhean and Alex Willemyns, 'UN, Adhoc Staff Charged Over Sex Scandal,' *The Cambodia Daily*, 3 May 2016, https://www.cambodiadaily.com/news/un-adhoc-staff-charged-over-sex-scandal-112053/ (accessed 23 May 2016).

67 Supra note 9.

CRMW (1 Jul 2003)	27 Sep 2004	No	N/A	N/A
CRPD (3 May 2008)	1 Oct 2007	20 Dec 2012	N/A	N/A
CED (23 Dec 2010)	6 Feb 2007	27 Jun 2013 (a)	N/A	Inquiry procedure

In general, Cambodian judges rarely invoke and apply international human rights provisions directly to domestic cases before national courts, referring instead to applicable domestic laws. This is despite the fact that the Constitutional Council of Cambodia has affirmed that, in adjudicating a case, the court must not only look at national but also other international laws recognized by Cambodia.[68]

Interpretation and Use of the 'Rule of Law'

"Rule of law" has been in all three phases of the Rectangular Strategy. The cornerstone of the strategy is good governance, with a focus on fighting corruption, legal and judicial reform, public administration reform, and armed forces reform. A thorough search of "rule of law" in the speeches of the Prime Minister shows that "rule of law" is in at least 18 speeches between 2010 to March 2016.[69] While the Prime Minister does not elaborate on the meaning of "rule of law" in his speeches, the government's understanding of "rule of law" may be gleaned from the Rectangular Strategy, Phase III. According to the strategy, one achievement of the Fourth Legislature was as follows:

> Peace, political stability, security, social order and the functioning of multiparty liberal democracy have been strengthened; along with the observance of the principles of "rule of law", particularly the development of the legal framework, enhancement of effective law enforcement, and assurance of respect for freedom, dignity and human rights. In particular these achievements are reflected in: (1) the improvement of respect for exercise of political rights and freedom…; (2) the implementation of the "Safe Village/Commune" policy which contributed to substantial reduction in crime…; and (3) … reforms in key areas including the fight against corruption, and reform of the legal and judicial system, armed forces, public administration, and public financial management, which were aimed at promoting good governance so that all the operations and functions of state institutions at both national and sub-national levels would be conducted in a transparent, account-table, predictable, effective and efficient manner.[70]

Rule of law is thus understood as part of a cluster of other values and principles, including democracy, human rights, justice, good governance, social order and respect of the law.[71]

68 Constitutionality of the Article 8 of the Law on the Aggravating Circumstances of Felonies, 131/003/2007 (Constitutional Council, 27 June 2007).

69 There are at least 373 speeches of Prime Ministers Hun Sen (with unofficial English translation) between 2010 – March 2016. Available at 'Releases from 2002,' *Cambodia New Vision* <http://cnv.org.kh/speech/>, accessed 31 March 2016.

70 Supra note 55, 3.

71 'Keynote Address to Close the National Conference on the People's Prosperity through the Achievements from the Implementation of the Rectangular Strategy by the Royal Government 2004-2007,' *Cambodia New Vision*, 20 December 2012, http://cnv.org.kh/keynote-address-to-close-the-national-conference-on-the-peoples-prosperity-through-the-achievements-from-the-implementation-of-the-rectangular-strategy-by-the-royal-government-2004-2007-2/ (accessed 5 May 2016).

In Phase III, the government expresses continued commitment to the rule of law, although with the caveat that it will not allow acts that lead to political instability. Specifically, the government intends to focus on "Continued strengthening of the rule of law, democracy, culture of peace, morality in the society and respect for human rights and dignity, along with zero tolerance to provocative activities that lead to political instability and social unrest."[72]

Table 4

Administration of Justice Grid

Indicator	Figure
No. of judges in country	- Supreme Court: 23 Judges (3 female);[73] and 8 Prosecutors (1 female)[74]
No. of lawyers in country (As of February 2016)[75]	- Practicing lawyers: 816 (154 female) - Trainee lawyers: 215 (49 female) - Non-practicing lawyers due to professional incompatibility: 53 (6 female) - Non-trainee lawyer: 1 - Non-practicing lawyers: 29 (7 female) - Suspended lawyers: 4 (1 female) - Disbarred lawyers: 53 (6 female) Total: 1,171 (224 female) (from 751 lawyers, 127 of which were female, in February 2011)[76]
Annual bar intake (including costs and fees)	Around 60 new lawyers are admitted to the Bar every year.[77] Currently the fee for training at the Lawyer Training Center is USD 2,000. Annual intake of applicants at the Royal School of Judges is 55 per intake.[78] Judges are public officials, so applicants who are accepted are not required to pay any money for the training, but receive a monthly salary of approximately USD 75.

72 Supra note 55, 10.

73 'Judges,' *Supreme Court and General Prosecutor*, http://www.supremecourt.gov.kh/index.php/km/about-us/supreme-court/judges (accessed 13 May 2016).

74 'Prosecutors,' *Supreme Court and General Prosecutor*, http://www.supremecourt.gov.kh/index.php/km/about-us/prosecutor-s-general/prosecutors (accessed 13 May 2016).

75 'BAKC (2016, February 23): Statistics of Lawyers.' *Bar Association of Kingdom of Cambodia*, http://www.bakc.org.kh/km/lawyer-statistic (Khmer) (accessed 6 March 2016).

76 'BAKC (2011, February 9): Statistics of Lawyers.' *Bar Association of Kingdom of Cambodia*, http://www.bakc.org.kh/km/lawyer-statistic.html (Khmer) (accessed 22 February 2011).

77 Dorine V. van der Keur, *Raising the Cambodian Bar*, n.d., available at: http://www.advocatenvooradvocaten.nl/wp-content/uploads/Raising-the-Cambodian-Bar.pdf (accessed 4 May 2016).

78 *Royal Academy for Judicial Professions*, http://www.rajp.gov.kh/index.php/secretary-general/59 (accessed 6 March 2016).

Standard length of time for training/qualification	Completion of the training at the Royal School of Judges (RSJ) is required to qualify as a judge. The entrance exam of the RSJ includes an oral exam on general knowledge about human rights, general concepts of rule of law and justice, and law and justice.[79] The length of training is 24 months (in-class: 8 months, apprenticeship at courts: 12 months, and specialized training: 4 months). To qualify as a registered lawyer, one must complete the training at the Lawyer Training Center[80] or possess required experience.[81] The training for lawyers at the Lawyer Training Center of the Bar Association started in October 2002. The training components are in-class training: 9 months; apprenticeship: 1 year; and special training: 3 months.
Availability of post-qualification training	Currently, no continuing legal education is required of judges. Through cooperation with foreign entities, however, special trainings regarding the four major codes (Civil Code, Civil Procedure Code, Criminal Code and Criminal Procedure Code) have been conducted. There are also plans to include training on special laws such as administrative law, labour, and juvenile justice law. Continuing legal education is also not required of lawyers. However, workshops and conferences are organized by the Bar Association in conjunction with various partners.
Average length of time from arrest to trial (criminal cases)	Between 2-6 months. The Criminal Procedure Code sets maximum pre-trial detention periods, *e.g.*, 18 months for felonies; 6 months for misdemeanour, 3 years for crimes against humanity, genocide or war crimes.[82] The investigating judge at the closing of an investigation may keep the accused under pre-trial detention until the time he/she appears in court, which additional detention should not exceed 4 months.[83] More than one year for particular cases before ECCC (Case 001 and Case 002).[84]
Average length of trials (from opening to judgment)	Trials, particularly at First Instance Courts, are very hasty as they are usually concluded within one day, with the announcement of the judgment usually given on the same day as the trial.

79 *Royal Academy for Judicial Professions*, http://rajp.gov.kh/index.php?option=com_content&view=article&id=51&Itemid=58 (accessed 6 March 2016).

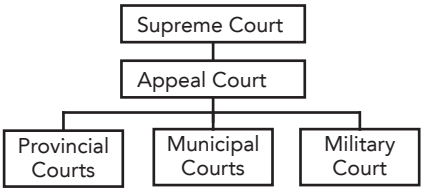
80 Article 31 of the Law on the Bar.

81 Ibid, Article 32.

82 Articles 208-214 of Criminal Procedure Code.

83 Ibid, Article 249.

84 Although provisional detention orders against the accused in Case 001 were issued in July 2007, the accused had been detained since 1999 by the Military Court. The first substantive hearing of Case 001 started in late March 2009. His sentence was reduced by five years as a remedy for his illegal detention by the Cambodian Military Court between 10 May 1999 and 30 July 2007. He also received credit for time already spent in detention under the authority of both the Cambodian Military Court and the ECCC. Defendants in Case 002 were arrested in between September-July 2010; after an initial hearing in June 2011, the first trial (Case 002/01) commenced on 21 November 2011. 'Case 001,' Extraordinary Chambers in the Courts of Cambodia, http://www.eccc.gov.kh/en/case/topic/1 (accessed 2 May 2016); 'Case 002,' Extraordinary Chambers in the Courts of Cambodia, http://www.eccc.gov.kh/en/case/topic/2 (accessed 2 May 2016).

Accessibility of individual rulings to public	In the past, it was close to impossible to get a copy of the judgment of a case, as the judgment will be delivered only to parties to the case. However, a request can now be made, which will be forwarded by the registrar to the president of the court. If a copy of the judgment is given, the actual names or information identifying persons involved will be erased. Copying fees are required. The website of the Supreme Court contains copies of judgments issued from 1994 to 2006 for civil cases, and from 1995 to 2006 for criminal cases. There are categories for labour and commercial cases, however they do not contain any judgment. Thus, it appears that there is an on-going effort to make judgments available electronically.
Appeal structure	
Cases before the National Human Rights Institution	N/A. Cambodia does not have an accredited NHRI.
Complaints filed against the police, the military, lawyers, judges/justices, prosecutors or other institutions (per year)	No sufficient data found. There is no comprehensive database for this information.
Complaints filed against other public officers and employees	No sufficient data found. There is no comprehensive database for this information.

II. COUNTRY PRACTICE IN APPLYING THE CENTRAL PRINCIPLES OF RULE OF LAW FOR HUMAN RIGHTS

A. On Central Principle 1 (Government and its officials and agents are accountable under the law)

Definition and Limitation of the Powers of Government in the Fundamental Law

There are separate chapters in the Constitution on the legislature (Chapters VII, VIII, IX), executive government (Chapter X), and the judiciary (Chapter XI). Each provides for the composition and functions of the different branches of government. Notably, the Constitution elaborates more lengthily on the powers of the legislature than it does on the other two branches of government. Further details on the organization and functioning of the legislature, executive, and judiciary are to be determined in Internal Rules of Procedure for the National Assembly and the Senate, and in laws with regard to functions of the Royal Government, the judiciary and the Congress of the National Assembly and Senate.[85] Thus, there is the Law on Organization and Functioning of Council of Ministers (1994) and the Law on Organization of the Courts (1994 and 2014).

Article 51 of the Constitution specifies that "All powers belong to the people. The people exercise these powers through the National Assembly, the Royal Government and the Judiciary." Further, it also establishes the principle of separation of powers. Some constitutional provisions on separation of powers include stipulations for the legislature's autonomous budget,[86] internal rules for organization and functioning of the legislative branch,[87] and the procedure for stripping parliamentarian immunity.[88] Nevertheless, as a country adopting a parliamentarian system, while members of the National Assembly are not allowed to serve in any constitutional organ, they may be required to serve in the executive branch.[89] Some provisions, such as those relating to declarations of war and emergency,[90] also provide for a system of checks-and-balances.

Regardless of constitutional safeguards, the executive government is said to interfere with the functions of the judiciary. For instance, the government has been vocal in opposing Cases 003 and 004 at the ECCC. Prime Minister Hun Sen has warned that trials beyond Case 002 risk plunging the country into civil war. Cases 003 and 004 have been the subject of investigation before the Co-Investigating Judges since September 2009. The judicial police had refused to arrest Meas Muth, who is charged in Case 003 for genocide, crimes against humanity, and war crimes—despite the issuance of a warrant of arrest in December 2014. The ECCC's chief of security is reported to have said that officials would conduct public opinion surveys before taking action. Meas Muth presented himself to a judge in December 2015.[91]

85 Articles 117 (New), 127, 116 of the Constitution.

86 Ibid, Articles 81 and 105.

87 Ibid, Articles 94, 95, 114, and 115.

88 Ibid, Articles 80 and 104.

89 Ibid, Article 79.

90 Ibid, Articles 22, 24, 86, 90, and 102.

91 George Wright, 'Despite Progress, KRT Crippled by Interference,' *The Cambodian Daily*, 29 December 2015, https://www.cambodiadaily.com/news/despite-progress-krt-crippled-by-interference-104071/; 'Meas Muth: Biography,' *Extraordinary Chambers in the Courts of Cambodia*, http://www.eccc.gov.kh/en/charged-person/meas-muth (all accessed 3 May 2016).

Amendment or Suspension of the Fundamental Law

Article 151 of the Constitution enumerates the people who can initiate a revision or an amendment, namely the King, the Prime Minister, and the President of the National Assembly at the suggestion of ¼ of all the Assembly members. Moreover, revisions or amendments shall be enacted by a law passed by the National Assembly with a 2/3 majority vote of all members.[92]

Revisions or amendments are prohibited during a state of emergency. Amendments affecting the system of liberal and pluralistic democracy and the regime of constitutional monarchy are prohibited.

So far no emergency decree has been enacted for the purpose of suspending certain provisions of the Constitution. The Constitution does not describe the effects of a proclamation of state of emergency. Instead, it simply says that (i) when the nation faces danger, such a proclamation can be made by the King after agreement with the Prime Minister and the Presidents of the National Assembly and Senate;[93] (ii) during a state of emergency, the National Assembly shall meet everyday, may not be dissolved, and has the right to terminate the state of emergency,[94] (iii) if circumstances do not allow the National Assembly or the Senate to convene, the state of emergency is automatically extended,[95] (iv) the Senate must meet everyday, may terminate the state of emergency, and, if circumstances make it impossible to conduct elections, may have its mandate extended once a year,[96] and (v) the Constitution may not be amended or revised during a state of emergency.[97]

In October 2014, the National Assembly voted to amend the Constitution, making the National Election Committee a mandated "independent body." The amendment requires the NEC's Steering Committee to ensure the independence of the election body. Its nine members will have a five-year mandate and cannot be politically affiliated or be leaders of other organizations or unions. A lawmaker of the ruling Cambodian People's Party noted that the session that passed the law demonstrated "a new culture" of cooperation between the CPP and CNRP.[98]

Laws Holding Public Officers and Employees Accountable

The Code of Criminal Procedure of 2007 stipulates that disciplinary sanctions are imposed on judicial police officers and prosecutors by the General Prosecutor attached to the Appeal Court.[99] Additionally, the Ministry of Interior and Ministry of Defence may impose disciplinary sanctions on police personnel, [100] while the Disciplinary Committee of the Supreme Council of Magistracy may impose sanctions on prosecutors and

92 Article 151(2) of the Constitution.

93 Ibid, Article 22 (New).

94 Ibid, Article 86.

95 Ibid, Articles 86 and 102 (New).

96 Ibid, Article 102.

97 Ibid, Article 152.

98 Heng Reaksmey, "Cambodian Constitution Amended to Strengthen 'Independent' Election Body," *Voice of America*, http://www.voanews.com/content/cambodian-constitution-amended/2469307.html (accessed 3 May 2016).

99 Articles 59 of the Code of Criminal Procedure.

100 Ibid, Articles 64, 65, 79, 80.

judges.[101] Another disciplinary action against the police officials is removal from the post pending further investigation and court action. The Criminal Code 2009 also lists as aggravating circumstance the fact of the perpetrator being a public official.

The Anti-Corruption Law and some provisions of the Criminal Code penalise bribery, abuse of power by a public officer in order to take any illegal advantage, illicit enrichment and other related crimes.[102]

Special Courts and Prosecutors of Public Officers and Employees

Article 39 of the Constitution lays down the right of Khmer citizens to denounce, make complaints or file claims against any breach of the law by state and social organs or by members of such organs committed during the course of their duties. The settlement of complaints and claims, according to this provision, shall be the competence of the courts.

Besides matters within the jurisdiction of the Military Court or the Anti Corruption Unit, investigations and proceedings against public officers and employees follow the same procedure as cases involving persons who are not employed with the government.

B. On Central Principle 2 (Laws and procedures for arrest, detention and punishment are publicly available, lawful, and not arbitrary)

Publication of and Access to Criminal Laws and Procedures

Article 93 (New) of the Constitution states that:

> Any law approved by the Senate and Assembly and signed by the King for its promulgation, shall go into effect in Phnom Penh 10 days after signing and throughout the country 20 days after its signing. However, laws that are stipulated as urgent shall take effect immediately throughout the country after the date of promulgation. All laws promulgated by the King shall be published in the Journal Official and published throughout the country in accordance with the above schedule.

The journal or official gazette is issued eight times a month and costs approximately USD 1.25 per issue. The journal is not always up-to-date, with some laws, sub-decrees, proclamations, and the like being published a month after they have been adopted. The language of the official gazette is Khmer.

Unofficial translations into English of some laws and regulations are usually done by development partners and civil society organisations, which are mostly available online. Some donor agencies also support hardcopy printing of important laws such as the Constitution, land law, and labour law. The websites of the legislature,

101 Article 23-26 of Law the on Supreme Council of Magistracy.

102 Articles 32-44 of Law on Anti-Corruption

executive government, and judiciary do not have a complete database of laws.[103] However, laws are available through the website of various ministries, non-governmental entities and individuals (bloggers).

Accessibility, Intelligibility, Non-retroactivity, Consistency, and Predictability of Criminal Laws

Citizens have some access to laws through the official gazette and websites of NGOs and development partners. Part of the difficulty with regard to intelligibility is that, while laws are in Khmer, the root words are borrowed from Indian ancient languages such as Pali or Sanskrit. As the *2011 Rule of Law Baseline Study* reported, the Council of Ministers made an effort to compile a Legal Lexicon and standardize legal terminology used in the Civil Code and Code of Civil Procedure. NGOs continue to contribute to raising legal awareness among professionals as well as lay people.

The principle of non-retroactivity and its exceptions are embodied in Articles 9 and 10 of the Criminal Code and Articles 610 and 612 of the Code of Criminal Procedure. The Criminal Code may be applied retroactively only when it provides for less severe sentences.

The Cambodian Center for Human Rights (CCHR), according to its latest trial monitoring report covering 1 January 2012 to 30 June 2012, found two cases where the Criminal Code was applied retrospectively. The Criminal Code did not come into effect until December 2010; the UNTAC Penal Code was in effect prior to the Criminal Code. In a case in Banteay Meanchey, the report indicated that "The Court imposed a lighter sentence." In a case at the Phnom Penh Court, the Court imposed a heavier sentence by retroactively applying the Criminal Code.[104]

Detention Without Charge Outside or During an Emergency

Provisions on preventive arbitrary detention are stipulated in the Criminal Procedure Code and Criminal Code, which include grounds and prescribed length of arrest, pre-trial detention, and imprisonment.

The police may detain a person suspected of a crime. They may also detain any person who may be able to provide relevant facts but refuses to provide such information, provided a prosecutor has given written authorization for such detention. Police custody may last up to 48 hours and can be extended for another 24 hours with the permission of a prosecutor. The period starts from the moment the suspect arrives at the police or military police station. A minor under 14 years old of age, however, cannot be placed under police custody.[105]

Cambodian laws also authorize provisional detention or detention pending trial. However, time limits and reasons are provided for such detention. According to Article 205 of the Criminal Procedure Code, pre-trial detention may be imposed when the detention is necessary to:

103 See websites of National Assembly <http://www.national-assembly.org.kh/eng/>, Senate <http://www.senate.gov.kh/home/index.php?lang=km> and Council of Ministers <http://www.pressocm.gov.kh/>

104 Cambodian Center for Human Rights, *Sixth Bi-annual Report: "Fair Trial Rights in Cambodia*," December 2013, 44-45, http://sithi.org/tmp/admin/article/files/CCHR_Sixth%20Bi-annual%20Reports%20on%20Fair%20Trial%20Rights_December_2013(English).pdf (accessed 10 May 2016).

105 Article 96 of the Criminal Procedure Code.

(i) Stop the offense or prevent the offense from happening again;

(ii) Prevent any interferences on witnesses/victims or prevent collusion between accused persons and accomplices;

(iii) Maintain evidence or material leads;

(iv) Ensure the accused is kept for the court;

(v) Protect the security of the accused; and

(vi) Maintain public order.

The maximum pre-trial detention period is 18 months for felonies; six months for misdemeanour, and three years for crimes against humanity, genocide or war crimes.[106] For the same grounds stated above, the investigating judge at the closing of an investigation may keep the accused under pre-trial detention until the time he/she appears in court. However, if the accused person does not appear in the court within four months, "the accused person shall be automatically allowed to stay outside custody."[107]

The Constitution and Criminal Procedure Code do not provide for detention without charge or trial during or outside a genuine state of emergency.

The CCHR found that the prevalence of pre-trial detention was high; it was used in around 70 per cent of total cases observed from January to June 2012.[108] The CCHR monitored 354 trials of 719 individuals accused of criminal offenses in Courts of First Instance in Phnom Penh, Banteay Meanchey, and Ratanakiri. CCHR's trial monitors identified 16 cases of excessive and unlawful pre-trial detention. One pre-trial detention exceeded the maximum period allowed by law by seven months and 24 days.

Rights of the Accused

Freedom from Arbitrary Arrest, Detention without Charge or Trial, Extra-legal Treatment or Punishment, and Extra-Judicial Killing

As stated above, the Criminal Procedure Code provides the grounds for police custody and provisional detention. Persons under police custody shall be either released upon the expiration of the period for police custody or handed over to the prosecutor for prosecution.[109] Persons under provisional detention are to be released when (i) there is no ground for detention, (ii) the period for provisional detention and its extension expires, and (iii) the accused posts bail.[110] The Criminal Code also penalises illegal arrest, detention or confinement as well as refusal by a civil servant to release a person unlawfully detained or failure to request for intervention from competent authorities.[111]

106 Ibid, Articles 208-214.

107 Ibid, Article 249.

108 Supra note 104, pp. 18-21.

109 Article 103 of the Criminal Procedure Code.

110 Ibid, Articles 205-215.

111 Articles 253, 589-591 of the Criminal Code.

The term "habeas corpus" is not mentioned in civil or criminal procedural laws. However, Article 133 of the Criminal Procedure Code allows an accused to, at any time during an investigation, request the investigating judge to interview him or her and/or to hear the statement of the plaintiff, of a civil party or witness. If the investigating judge does not decide upon the request within one month, the accused person can file a complaint with the investigation chamber for it to decide on the matter. Decisions of investigating judges, including relative to pre-trial detention, may all be appealed to the Appeal Court's investigation chamber.[112] Additionally, Article 307 of the Code allows an accused under detention to request the court to release him or her; this can be made verbally by the lawyer during the trial or by a written letter submitted to the court clerk. The court shall decide on the matter (after hearing the accused, the lawyer and the prosecutor) not later than 10 days after receiving a verbal or written request.

Article 38 of Constitution states that:

> Coercion, physical ill-treatment or any other mistreatment that imposes additional punishment on a detainee or prisoner shall be prohibited. Persons who commit, participate or conspire in such acts shall be punished according to the law. Confessions obtained by physical or mental force shall not be admissible as evidence of guilt.

Evidence obtained through physical or mental duress and evidence emanating from communication between the accused and his lawyer have no evidentiary value or are inadmissible.[113] The Criminal Procedure Code also safeguards the accused persons' right to remain silent at the investigation and trial stages.[114]

Article 210 of the Criminal Code punishes torture, while Article 213 provides for a heavier penalty if the crime is committed by a government official in carrying out his/her functions or during the performance of his/her functions. The law also includes torture as one of the acts that may constitute crimes against humanity and war crimes.[115] The law however does not provide a definition of torture.

Despite these provisions, reports have alleged that torture continues to occur with impunity. For example, between January 2008 to June 2014, the Cambodian League for the Promotion and Defense of Human Rights (LICADHO) reported that it received more than 500 allegations of torture or ill-treatment by Cambodian police and prison officials. Just in the first four months of 2014, LICADHO received 49 allegations of torture or ill-treatment during arrest or in police custody. Among the primary purposes of abuse was the forced extraction of confessions or money.[116]

LICADHO stated that it is not aware of any successful prosecution of law enforcement officials for torture-related crimes in recent years; the numbers of administrative complaints and investigations is also low.[117] This is attributed to the absence of an independent body that can receive complaints against law enforcement personnel. Prisoners fear that they will be subjected to further abuse if they make a complaint.

112 Articles 55, 257, 266-277 of the Criminal Procedure Code.

113 Ibid, Article 321.

114 Ibid, Articles 143 and 318.

115 Articles 188 and 193 of the Criminal Code.

116 Cambodian League for the Promotion and Defense of Human Rights (LICADHO), *Torture & Ill-Treatment: Testimony from inside Cambodia's police stations and prisons*, June 2014, 1 and 4, available at http://www.licadho-cambodia.org/collection/22/torture_ill_teatment_2014 (accessed 10 May 2016).

117 Ibid, 19.

Although Cambodia ratified the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in March 2007, until now the required independent National Preventative Mechanism (NPM) has yet to be established. Instead, an inter-ministerial committee composed of various government officials was created. "This body is neither independent nor capable of performing the functions of an effective NPM. Moreover, since its establishment in 2009, it has done very little of actual substance."[118]

Presumption of Innocence

Article 38 of the Constitution mandates that an accused be considered innocent until proven guilty by a court of law; any case of doubt shall be decided by the judge in favour of the accused.

Legal Counsel and Assistance

The Constitution states that "Every citizen shall enjoy the right to defense through judicial recourse."[119] The Criminal Procedure Code also stipulates the various stages and situations when the accused is informed of the right to legal assistance,[120] and when presence of legal counsel is a prerequisite before any action can be taken by judicial officials, including police, prosecutors, and judges.[121] However, a suspect has right to counsel only 24 hours after the police custody.[122]

In Cambodia, it is not mandatory to be legally represented when appearing before a court if accused of a misdemeanour offense (unless a juvenile).[123] Individuals facing misdemeanour charges may however still choose to retain a lawyer. From January to June 2012, CCHR's trial monitors identified four out of 244 felony trials (where legal counsel is mandatory) where the accused was not assisted by counsel. For misdemeanour cases, the accused was not represented by a lawyer in 61.5 per cent of the trials observed.[124]

Knowing the Nature and Cause of the Accusation

Accused persons have the right to be informed of the precise charge against them in the language that they understand.[125] Accused persons who are represented by a lawyer are given five days in advance to examine case files before actual interrogation by the investigating judge.[126] Moreover, an accused is entitled to be informed by the court of first instance that he has time to prepare for his defence before commencement of trial.[127] According to Article 292 of the Criminal Procedure Code, in setting the date for trial, the president of the court shall consider the time limits provided in Article 457 (Time Limits to be followed between

118 Ibid, 1.

119 Article 38 of the Constitution.

120 Articles 98, 143, 304(2) of the Criminal Procedure Code.

121 Ibid, Articles 46, 48, 97, 98, 143, 145, 149, 167, 170, 300, 301, 304, 426 and 510.

122 Ibid, Article 98.

123 Ibid, 301.

124 Supra note 104, 29.

125 Articles 48, 97, 325, and 330 of the Criminal Procedure Code.

126 Ibid, Article 145.

127 Ibid, Articles 48, 304.

Summon, Order for Direct Hearing and Citation) and Article 466 (Time Limits to be followed between Summons and Citation).[128]

Other provisions in the Criminal Procedure Code that aim to ensure that an accused is informed of the nature and cause of accusation and is able to prepare his defence are Article 319 on access to examine case file before the trial; Article 428 on access of lawyers to case files for them to copy at their own cost; and Article 149 on free communications between the accused person and legal counsel, without being listened or recorded by others.

The CCHR, in their trial monitoring report covering January to June 2012, found that judges stated the criminal charge in 97.7 per cent of cases observed; details such as the relevant law, the date of the offense, or the location of the offense were however not as frequently announced.[129] The same report found that "in the overwhelming majority of cases, a lack of time and/or facilities to prepare a defense is not an issue."[130]

Guarantees during Trial

In cases that fall under the procedure for immediate appearance, Articles 303 and 304 of the Criminal Procedure Code require judgment on the merits to be announced no later than two weeks from the date the accused appeared in court. A pre-trial detention shall be terminated at the expiration of the two-week period. A prosecutor may order the accused's immediate appearance before a court of first instance when a person is caught in flagrante delicto of an offense that carries a sentence of imprisonment for not less than one year and not more than five years.[131] In cases filed by a referral order of the investigating judge or referral judgment of the Investigation Chamber, a judgment on the merits shall be made "within a reasonable time period."[132]

According to Article 326 of the Criminal Procedure Code, the chairman of the hearing shall allow prosecutors, lawyers and parties to ask questions relative to statements of civil parties, victims, witnesses and experts. During confrontations, the chairman of the hearing is tasked to "guarantee the free exercise of the rights to defense."[133] Before the hearing, lawyers can examine the dossiers in the court clerk's office and copy documents.[134]

In case the trial was conducted without the accused person's presence, the Criminal Procedure Code allows the accused to file an opposition against a judgment declared in his or her absence.[135]

128 Fifteen days if the accused person lives in the territorial jurisdiction of the court of first instance; 20 days if the accused person lives in other places of national territory; two months if the accused person lives in a country bordering the Kingdom of Cambodia; three months if the accused person lives in other places. If the accused person is in detention, no duration of time is required.

129 Supra note 104, 22-25.

130 Ibid, 28.

131 Article 47 of the Criminal Procedure Code.

132 Ibid, Article 305.

133 Ibid, Article 318.

134 Ibid, Article 319.

135 *See* ibid, Articles 365-372, and 409-416.

Appeal

Appeals can be made to the Appeal Court and Supreme Court.[136] The statute of limitation is one to three months for appeals to the Appeal Court, and one month for appeals to the Supreme Court.[137] Final judgments which have the effect of *res judicata* may be challenged through a Motion for Review with the Supreme Court.[138] Such a motion may be filed where (i) after sentencing for murder, it appears that the victim is still alive; (ii) two accused persons are sentenced for the same crime with inconsistent sentences; (iii) any witness was sentenced for giving false testimony against the accused person; or (iv) new facts, documents, or other new evidence is discovered which leads to reasonable doubt of the guilt of a convicted person.

Currently, there is only one Appeal Court, which is located in Phnom Penh. This makes all appeal cases delayed, with the court unable to review all complaints equally thoroughly. Appellants can wait up to five years or more before their cases are heard due to backlog. Further, it has been difficult for prisoners in more remote provinces to participate in their appeal hearings. It is reported that 69 per cent of cases at the court are heard in absentia because prisoners are unable to travel to the capital when summonsed.[139] In what is viewed as a positively development, the recently passed Law on the Organization of the Courts provides for regional Appeal Courts.[140] The determination of the territorial jurisdiction of the regional Appeal Courts shall be made by a Royal Decree. The Ministry of Justice has announced that three out seven regional courts are expected to be created by 2018. Each regional Appeal Court is expected to cover three or four of Cambodia's 24 provinces.[141]

Freedom from Double Jeopardy

The Criminal Procedure Code clearly forbids trying or punishing a person for an offence for which he or she has already been finally convicted or acquitted.[142] An exception to double jeopardy is in the case of a Motion for Review, as described above. It should be noted that general amnesty or pardon is not an obstacle for trying a person for matters within the jurisdiction of the ECCC. The law establishing the ECCC states that "The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers."[143]

Remedy before a Court for Violations of Fundamental Rights

The ECCC adjudicates certain crimes committed between 1975-1979. These crimes include genocide, crimes against humanity, grave breaches of the Geneva Conventions, destruction of cultural properties, crimes

136 *See* ibid, Articles 417-442.

137 Ibid, Articles 381-383 and 373-408.

138 Ibid, Articles 443-455.

139 Chhay Channyda, 'Provinces Tapped for Appeal Court Project,' *The Phnom Penh Post*, 29 July 2015 http://www.phnompenhpost.com/national/provinces-tapped-appeal-court-project (accessed 30 March 2016).

140 UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Cambodia, Surya P. Subedi*, A/HRC/27/70, 15 August 2014, par 14-16.

141 *See* supra note 139; Noeu Vannarin, 'Gov't Plans to Build New Appeal Courts,' *The Cambodia Daily*, 29 October 2010 https://www.cambodiadaily.com/archives/govt-plans-to-build-new-appeal-courts-106884/ (accessed 30 March 2016).

142 Articles 7,12, 264, and 439 of the Criminal Procedure Code.

143 Article 40 new of Law on the Establishment of the Extraordinary Chambers.

against internationally protected persons, and crimes penalised in the 1956 Penal Code of Cambodia. Other than matters falling within the ECCC's jurisdiction, complaints relative to violations of fundamental rights may be brought before the regular courts, applying the Criminal Code or other penal laws. Cases involving military personnel may be brought before the Military Court.

C. On Central Principle 3: (The process by which the laws are enacted and enforced is accessible, fair, efficient and equally applied)

Law Enactment

Openness and Timeliness of Release of Record of Legislative Proceedings

Articles 88 and 111 of the Constitution require legislative proceedings or sessions to be held in public unless requested otherwise by (i) the President of the National Assembly or Senate, (ii) at least 1/10 of the members of the National Assembly or Senate, (iii) the King, or (iv) the Prime Minister. The sessions are conducted twice a year with a period of three months for each session, and extraordinary sessions can also be convened. The agenda and dates for extraordinary sessions at the National Assembly are to be made known to the public.[144]

A 12 September 2014 circular issued by National Assembly President Heng Samrin has been criticised by civil society for being counter to the principle of transparency and violating people's right to access information. Under the circular, commissions of the National Assembly are not allowed to invite civil society or the public to attend its meetings.[145] The circular indicates that "Every invitation to the public, civil society or other experts who are not [the] National Assembly's experts, including guests invited by lawmakers and commissions, in order to get inside the National Assembly compound shall ask for permission and get approval in advance from the president of the National Assembly."[146]

The opposition party had expressed the intention of bringing more transparency and allowing for more public consultation. CNRP lawmaker Ke Sovannaroth said that "It's very hard to do our job when they draw circles around our work because we cannot get a broad range of ideas."[147] On 17 September 2014, nine representatives from national and international organisations invited by the Commission on Education, Youth, Sports, Religious Affairs, Culture and Tourism to participate and observe a hearing on the situation of the education sector were barred from attending.[148]

144 Article 83 of the Constitution.

145 'Joint Statement on National Assembly President's Circular Not Following the Framework of Law and Principles of Effectiveness, Transparency, and Democracy' (pdf), *Open Development Cambodia*, 2 October 2014, https://cambodia.opendevelopmentmekong.net/pdf-viewer/?pdf=files_mf/1413456662Joint_statement_on_National_Assembly_president_circular_Eng.pdf (accessed 3 May 2016).

146 Kung Naren and Zsombor Peter, 'Rule Changes Give Assembly President Broad New Powers,' 19 September 2014, https://www.cambodiadaily.com/archives/rule-changes-give-assembly-president-broad-new%E2%80%88powers-68216/ (accessed 4 May 2016).

147 Ibid.

148 Supra note 145.

Timeliness of Release and Availability of Legislative Materials

Concerns regarding lack of consultation and transparency continue to be raised. According to Principle 18 of the National Assembly's Internal Regulation, all records and documents of the National Assembly must be kept in the General Secretariat and must not be circulated to the public without permission from the President of the National Assembly.

Between 2011-2016, especially after the 2013 national election, several laws were adopted and promulgated despite protests and pleas from civil society and the general public for meaningful consultation and amendment to the draft laws.[149] One critique is that draft laws are generally kept confidential and only become available to a limited public when there is a "leak." For example, the draft of the Law on Trade Union which leaked in 2010 was met with much protest as to its substance. It suddenly resurfaced in 2014. The law was adopted by the National Assembly with little stakeholder consultation on 4 April 2016,[150] and is awaiting review by the Senate. In its current form, the draft makes it difficult for workers to exercise their right to organise, right to strike and right to bargain collectively.[151]

Local and international organisations also protested the process by which the Law on Associations and NGOs (LANGO) was adopted. A statement issued by over 60 CSOs in July 2015 said that the drafting and adoption process was marred by a lack of transparency and meaningful consultations after 2011:

> Two consultations were conducted by the Ministry of Interior in 2011 with few inputs and concerns taken into consideration in the 4th version. Since then, the Royal Government of Cambodia refused to make the new draft law public and consult with CSOs. The 5th and final version of the LANGO, yet to be officially released despite the adoption by the National Assembly, added further controversial provisions. The workshop conducted by the National Assembly with CSOs on 8 July 2015, just few days before the scheduled vote meeting, was a nominal consultation in terms of time and process. Many questions and concerns from CSOs remained unanswered.[152]

The public was also kept in the dark with regard to three laws pertaining to the judiciary passed in July 2014, namely (i) Law on Organisation of Courts, (ii) Law on Statute of Judges and Prosecutors, and (iii) Law on Organisation and Functioning of Supreme Council of Magistracy. Although work on the three laws started sometime in 2005, no consultation was ever held on the drafts and the authorities did not publically share them until the day before the National Assembly started examining them.[153]

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149 *See e.g.*, Banteay Srei, Cambodian Center for Human Rights, Cambodian Human Rights Action Committee, et. al., 'Civil Society Organisation Urge His Majesty the King not to sign the LANGO,' 30 July 2015, available at http://www.adhoc-cambodia.org/wp-content/uploads/2015/07/CSOs_Open-Letter-to-King-Norodom-Sihamoni_ENG3.pdf (accessed 11 April 2016).

150 Paul Millar, 'As Trade Union Law Reaches Cambodia's Parliament, Protest Met with Violence,' *Southeast Asia Globe*, 4 April 2016, http://sea-globe.com/cambodia-trade-union-law-protest/ (accessed 21 April 2016).

151 OHCHR Cambodia, 'A Human Rights Analysis of the Draft Law on Trade Unions,' n.d., available at http://cambodia.ohchr.org/WebDOCs/DocNewsIndex/2016/032016/TUL_Analysis-Eng.pdf (accessed 22 April 2016).

152 Joint Statement of Civil Society Organizations on the adoption of the Law on Associations and Non-Governmental Organizations by the National Assembly' 16 July 2015, http://www.ccc-cambodia.org/downloads/ngolaw/endorsement/CSO%20Joint%20Statement%20on%20adoption%20of%20LANGO%20by%20NA_July%202015_English%20.pdf (accessed 6 May 2016).

153 'Lack of judiciary consultation on key Cambodian laws draws concern of UN rights expert,' *UN News Centre*, 27 May 2014, http://www.un.org/apps/news/story.asp?NewsID=47904#.Vyo7ZhV94cg; Vong Sokheng, 'New laws on judiciary due by 'end of month.' *The Phnom Penh Post*, 5 February 2014, http://www.phnompenhpost.com/national/new-laws-judiciary-due-%E2%80%98end-month%E2%80%99 (all accessed 5 May 2016).

In view of criticisms over the approval of the draft laws on the judiciary by the Council of Ministers in April 2014—without consultation and without releasing the texts of the legislation—Prime Minister Hun Sen said that draft laws need not be reviewed by anyone besides those who compose the laws before they are forwarded to the Council of Ministers and the National Assembly. "Don't demand things beyond what's within your rights. You should be ashamed of yourselves, and just enjoy the rights that are given to you as NGOs."[154]

In 2016, the Acting President of the National Assembly assured the Special Rapporteur that all drafts are uploaded to the Assembly website upon receipt from the Council of Ministers.[155]

Equality before the Law

The laws provide for equal protection, with Article 31 of the Constitution stating as follows:

> Every Khmer citizen shall be equal before the law, enjoying the same rights, freedom and fulfilling the same obligations regardless of race, colour, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status.

While the Constitution guarantees equal protection, there are issues in regards selective enforcement of laws. (See *Equal Protection of the Law and Non-Discrimination* below*)*. Recently, the Special Rapporteur called attention to recent legislative developments including the Law on the Election of Members of the National Assembly, the Law on Associations and NGOs, and the Telecommunications Law. She noted stakeholders have highlighted "a claimed politicisation in the implementation of these and other laws of the Kingdom of Cambodia."[156]

Reparation for Crimes and Human Rights Violations' Victims/Survivors

The Human Rights and Complaints Commissions of the National Assembly and Senate as well as the executive branch's Cambodian Human Rights Committee are empowered to conduct investigations into human right violations. Aside from reparations for crimes within the jurisdiction of the ECCC, there is no special law that governs reparation for crimes and human rights violations. Instead, redress may be sought with the courts when acts violating human rights are also addressed under criminal and civil laws of Cambodia.

Article 22 of the Criminal Code allows civil actions to either be brought in conjunction with a criminal action before a criminal court, or brought separately before a civil court. In case of the latter, the civil action is suspended until the final decision on the criminal action has been made.

Article 2 explains that the purpose of the civil action "is to provide compensation to victims of an offense and to allow victims to receive sufficient damages corresponding to the injuries they suffered." An injury can

154 Rachel Vandenbrink, 'Hun Sen Warns NGOs Not to Interfere With Judicial Reform Legislation,' *Radio Free Asia*, 28 April 2014, http://www.rfa.org/english/news/cambodia/laws-04282014172126.html (accessed 5 Mary 2016).

155 'End of Mission Statement: Statement by the United Nations Special Rapporteur on the situation of human rights in Cambodia: Professor Rhona Smith,' 31 March 2016, 5, available at http://cambodia.ohchr.org/WebDOCs/DocStatements/2016/SR_Mission_Statement_31_March_2016-Eng.pdf (accessed 6 May 2016).

156 Ibid.

be a property, physical or emotional damage. Compensation can be made by paying damages, by returning the property that was taken or by restoring the damaged or destroyed property to its original state. The damages must be proportionate to the injury suffered.[157]

Law Enforcement

Equal Protection of the Law and Non-Discrimination

Despite the guaranty to equality before the law in the Constitution, concerns have been raised with regard to unequal enforcement of laws regarding assembly, public demonstrations and defamation, depending on the political orientation of the demonstrators or the sector they represent.

For instance, Article 3(3) of the Law on Peaceful Demonstration exempts "gatherings for the purposes of serving religion, art, culture, national customs and tradition and educational dissemination activities for social interests" from its scope. The Special Rapporteur however noted, "That direction is not being consistently applied, with educational activities generally, and community meetings on resolution of land issues in particular, all too often being restricted." In fact, a commune police officer tried to stop the Special Rapporteur's meeting with indigenous Kui groups in Preah Vihear Province.[158]

The security forces have used excessive force in suppressing protests. For example, on 2 January 2014, military soldiers guarding the Yakjin factory indiscriminately beat workers demonstrating outside the factory. The following day, military police fired live ammunition when a demonstration on the outskirts of Phnom Penh turned violent, killing four and injuring many more.[159] The lack of action against security officers who opened fire on the crowds or otherwise committed acts of violence contrasts with the speed of criminal proceedings against individuals who are not members of security forces.[160]

Human Rights Watch said, in 2014, the police, prosecutors, and judges pursued "at least 87 trumped-up cases" against CNRP leaders and activists, members of other opposition political groups, prominent trade union figures, urban civil society organizers, and ordinary workers. For example, there are charges of incitement to violence and other crimes against six union leaders in connection with a general strike in December 2013-January 2014.[161] On 21 July 2015, 11 CNRP organizers were convicted on charges of leading or participating in an anti-government "insurrection," after the court found them responsible for crowd violence that erupted when security forces broke up a peaceful CNRP-led demonstration calling for the reopening of Phnom Penh's "Freedom Park" on 15 July 2014.[162]

157 Articles 13 and 14 of the Criminal Code.

158 Supra note 155. *See also* Siena Anstis, 'Access to Justice in Cambodia: The Experience of Grassroots Networks in Land Rights Issues,' *Legal Working Paper Series on Legal Empowerment for Sustainable Development* (Montreal: Centre for International Sustainable Development Law, 2012), 14.

159 Supra note 140, pars 14-16.

160 Ibid, par. 20.

161 'World Report 2015: Cambodia: Events of 2014.' *Human Rights Watch*, https://www.hrw.org/world-report/2015/country-chapters/cambodia (accessed 6 May 2016).

162 'Cambodia: Events of 2015,' *Human Rights Watch*, https://www.hrw.org/world-report/2016/country-chapters/cambodia (accessed 6 May 2016).

Opposition leader Sam Rainsy has been in a self-imposed exile since November 2015, after the Supreme Court issued a warrant for his arrest over a defamation and incitement complaint lodged by Foreign Minister Hor Namhong in 2008. Sam Rainsy had said that Hor Namhong ran the Boeung Trabek prison under the Khmer Rouge.[163] Sam Rainsy was found guilty in 2011, but his conviction was presumed to have been expunged as part of a royal pardon he received in July 2013, which allowed him to return to Cambodia. Three days after the issuance of his warrant of arrest, Sam Rainsy was unanimously removed from the National Assembly by the CPP on the basis of his prior conviction for defamation.[164]

In December 2015, National Assembly President Heng Samrin filed a defamation complaint against Sam Rainsy for a statement on Facebook which stated that "the regime born on 7 January 1979 used their court [system] to sentence [late] King Norodom Sihanouk to death on the accusation of being a traitor." [165] Heng Samrin was President of Cambodia from 1979 to 1992. More recently in March 2016, Sam Rainsy incurred another defamation suit after he posted on his Facebook a message that allegedly originated from Sam Soeun, a CPP cabinet member, telling CPP members to promote the Prime Minister's Facebook page and to organise "technical working groups" to create accounts to "like" Hun Sen.[166]

Other CNRP lawmakers have been arrested for posts on Facebook that showed an allegedly fabricated map showing that the government had ceded territory to Vietnam, and for posting a fake government pledge to dissolve Cambodia ′s border with Vietnam.[167]

Special Rapporteur Professor Rhona Smith issued a statement on 31 March 2016 saying that "The political situation which includes renewed threats, judicial proceedings and even physical beatings of members of the opposition, is worrying."[168]

D. On Central Principle 4: (Justice is administered by competent, impartial, and independent judiciary and justice institutions)

Appointment and Other Personnel Actions in the Judiciary and among Prosecutors

Judges and prosecutors in all courts are appointed through decrees (Kret) issued by the King upon the proposal of the Supreme Council of Magistracy. The SCM also takes disciplinary actions against delinquent judges and proposes the transfer or removal of judges to the King.[169]

163 Phak Seangly and Shaun Turton, 'Sam Rainsy faces arrest warrant,' *The Phnom Penh Post*, 14 November 2015.

164 Alex Willemyns and Mech Dara, 'Rainsy Cancels Return to Phnom Penh,' *The Cambodia Daily*, 17 November 2015, https://www.cambodiadaily.com/news/rainsy-cancels-return-to-phnom-penh-100503/ (accessed 6 May 2016).

165 Joshua Lipes, 'Cambodian Court Summons Sam Rainsy in New Defamation Case,' *Radio Free Asia*, 2 December 2015, http://www.rfa.org/english/news/cambodia/summons-12022015180642.html (accessed 6 May 2016).

166 Niem Chheng and Shaun Turton, 'Rainsy faces defamation charge for post about PM's 'likes',' *The Phnom Penh Post*, 11 March 2016, http://www.phnompenhpost.com/national/rainsy-faces-defamation-charge-post-about-pms-likes (accessed 6 May 2016).

167 Prak Chan Thul, 'Cambodian opposition MP arrested over 'fake' border map on Facebook,' Reuters, 11 April 2016, http://uk.reuters.com/article/uk-cambodia-politics-idUKKCN0X80HB (accessed 6 May 2016).

168 Supra note 155.

169 Articles 133 and 134 of the Constitution.

On 16 July 2014, three laws pertaining to the judiciary were promulgated. These laws give the Minister of Justice undue influence over the court system and the judiciary. Particularly, the Law on Organisation and Functioning of Supreme Council of Magistracy includes members of the executive government (particularly the Minister of Justice) and the National Assembly in the Council. Considering that the Council is charged with assisting the King in guaranteeing judicial independence,[170] the role of the executive in their functions has been criticised.[171] The law establishes a Disciplinary Council, which has jurisdiction over penal matters related to judges and prosecutors. The Law on the SCM provides that all complaints regarding judicial conduct must first go to the Minister. Only those complaints that the Minister have approved may be submitted to the Disciplinary Council for investigation and action. Where the Disciplinary Council finds "gaps of judges in fulfilling their profession, the harmfulness to honour, good morals and dignity," it will recommend a disciplinary sanction against the judge or prosecutor to the SCM. These range from verbal reprimands for minor violations, to removal or revocation of status as a judge for major ones.[172]

The Law on Judges and Prosecutors grants the Minister of Justice a seat on the Commission on Promotion in Grade and Rank (CPRG), the body responsible for appointing and promoting judges. Further, Article 67 allows the Minister to submit a report to the SCM if the Minister believes that a judge can no longer carry out his/her duty for reasons of mental or physical disability. The SCM will then consider the case and, if appropriate, recommend forced retirement. If this decision is taken by the SCM, the Minister must prepare the decree in question and submit it to the King. The Law on Organisation of Courts grants the Minister a great deal of power over the courts' budget as well as administrative matters relating to the courts.[173]

In regard to these laws, the International Bar Association's Human Rights Institute (IBAHRI) stated as follows:

> [T]here is a pressing need for greater transparency in the area of judicial appointments and promotions. Although the fact of the Minister sitting on the CPRG and the SCM, while undesirable, does not in itself necessarily breach international standards, there is evidently a strong perception among Cambodians that the Minister, acting on behalf of the executive, has abused his position to appoint party officials and government loyalists to key positions in the judiciary.[174]

Training, Resources, and Compensation

Beginning 2003, after the Royal School of Judges was established, all judges and prosecutors have been required to undergo training. Candidates are required to possess a degree in Bachelor of Laws, be a Cambodian citizen, and pass the oral and written admission exams. Trainees receive two years of training comprised of eight months of classroom instruction; one year practical judicial traineeship; and four

170 Ibid, Article 132.

171 *See* supra note 140, pars 34-39.

172 International Bar Association's Human Rights Institute, *Justice versus Corruption: Challenges to the independence of the judiciary in Cambodia*, September 2015, 7, http://www.ibanet.org/Article/Detail.aspx?ArticleUid=fb11e885-5f1d-4c03-9c55-86ff42157ae1 (accessed 1 May 2016), 31.

173 Ibid, 16-18.

174 Ibid, 27.

months legal specialization.[175] Further in-service training for judicial officials is provided by government entities in cooperation with various donor agencies; the degree of regularity of such trainings is however unknown. An important knowledge and capacity transfer occurs through the involvement of junior and senior Cambodian judicial professionals at the ECCC. This capacity-building process is an explicit goal of the ECCC's legacy activities.[176]

Recently, the government has issued Sub-Decree No.39.RNKr.KB dated 09 March 2016 on Remuneration for Judges and Prosecutors at all court levels. It aims to ensure the effectiveness and productivity in the justice system as well as guarantee equity and brotherliness in the salaries of the judicial officers. This Sub-Decree creates seven monthly remuneration brackets based on the rank of judges and prosecutors:

1) President and General Prosecutor of Supreme Court: 10,000,000.00 Riels (around USD2,500.00);
2) Vice President of Supreme Court, President of Supreme Court Chamber, Deputy General Prosecutor of Supreme Court, President of Appeal Court, and General Prosecutor of Appeal Court: 4,500,000.00 Riels (around USD1,125.00);
3) Judge and Prosecutor of Supreme Court, Vice President of Appeal Court, President of Appeal Court Chamber, Deputy General Prosecutor of Appeal Court: 4,000,000.00 Riels (around USD1,000.00);
4) Judge of Appeal Court, President of Court of First Instance, Prosecutor of Appeal Court, Prosecutor of Court of First Instance, and Prosecutor serving at Ministry of Justice: 3,500,000.00 Riels (around USD875.00);
5) Vice President of Court of First Instance, President of Specialized Court of Court of First Instance, and Deputy Prosecutor of Court of First Instance: 3,200,000.00 Riels (around USD800.00);
6) Judge of Court of First Instance: 3,000,000.00 Riels (around USD750.00); and
7) Training Judge and Training Deputy Prosecutor: 1,500,000.00 Riels (around USD 375.00).

State's Budget Allocation for the Judiciary and Other Principal Justice Institutions

The government approved a budget amounting to $4.3 billion for 2016. The budget allocates a total of 96,162.9 million Riels (around USD23,679,610) to the Ministry of Justice. Under this category, there is an entry for "Justice," which could refer to the operations of the Ministry of Justice itself, for 33,885.8 million Riels (around USD8,344,200). Still under the budget for Ministry of Justice, 5,346.6 million Riels (around USD1,316,570) is allocated to the Supreme Court; 6,180.2 million Riels (around USD1,521,840) to the Appeal Court; and 4,539.6 million Riel (around USD1,117,850) to the Supreme Council of Magistracy. "Departments of expertise attached to Capital and Provinces" is given 44,287.1 million Riel (around USD10,905,465), while "Public investment by foreign loan" is allotted 1,923.6 million Riels (around USD473,675).[177]

175 Human Rights Resource Centre, *Judicial Training in ASEAN: A Comparative Overview of Systems and Programs* (Singapore: Konrad-Adenauer-Stiftung, 2014), 31-34.

176 Ibid.

177 2016 Budget Law (in Khmer), 22 January 2016, available at http://www.mef.gov.kh/documents/laws_regulation/budget-law-2016.pdf (accessed 10 May 2016).

Impartiality and Independence of Judicial Proceedings

The Constitution provides for the independence of the judiciary; judicial power should not be given to the legislature or executive government. The impartiality and independence of the judiciary is guaranteed by the King with assistance from the Supreme Council of Magistracy.[178]

It has been alleged that the judiciary is unduly influenced by the executive government. Reports also indicate that corruption is widespread. The IBAHRI reports that "cases in which the authorities have an interest are consistently resolved in their favour and in other cases, the party able to offer the largest bribe to a judge or clerk will almost certainly win the case, regardless of the merits."[179] As example, the former Special Rapporteur points to the case of the seven CNRP Members of Parliament and one supporter who were arrested in relation to a protest on 15 July 2014, during which event security forces were beaten severely by protesters. "[T]he lack of material evidence needed for their arrests on very serious charges and their speedy release on the evening of the successful negotiations between the two parties on 22 July clearly reveal the extent to which the judiciary continues to be influenced by the executive."[180]

Corruption is also an issue. A group of lawyers who met with IBAHRI in 2015 were convinced that 90 per cent of cases heard by the courts involve payment of bribes in one form or another, either to judges or to judicial clerks. They revealed that less than five per cent of cases with which they have been involved in did not involve payment.[181]

Provision of Competent Lawyers or Representatives by the Court to Witnesses and Victims/Survivors

To become a lawyer, Article 31 of the Law on the Bar requires one to be of Khmer nationality, have a Bachelor of Laws degree and have never been convicted of a crime. One of the following two other conditions must also be met: (i) A certificate from the Lawyer Training Center, which requires aspirants to pass an entrance exam and follow a training of one year and an internship of one year; or (ii) Two years of legal work experience.

The Law on the Bar and the Internal Regulations of the Bar Association of the Kingdom of Cambodia oblige all lawyers to provide legal aid to the poor.[182] The Law defines "poor people" as "those people who have no property, no income, or who receive insufficient income to support their living. The determination of 'poverty' shall be accomplished by the Chief Judge of the Courts and the Chiefs of the Court Clerks following an on-site investigation."

After the Chief Judge or the Chief Clerk has established insufficiency of resources, the beneficiary of legal assistance transmits to the President of the Association a request for legal assistance. Within a period of 15 days, the President is to designate a volunteer to render legal assistance.

178 Articles 128, 130 and 132 of the Constitution.

179 Supra note 172, p. 7.

180 Supra note 140, par 28.

181 Supra note 172, 29.

182 Article 29(3) of Law on Bar.

Lawyers designated to provide legal assistance are to receive a monthly compensation from the Bar Fund, of an amount that is determined each year by the Council of the Bar Association. The Bar Fund is derived from dues paid by all members and donations from organisations or foreign governments. The monthly remuneration is independent of the number of cases handled. There is a possible disciplinary proceeding against legal aid lawyers when they do not provide diligent services.[183]

Despite these provisions, the Bar Association is nowhere close to meeting the high demand for legal assistance. In 2013, Bar Association President Bun Honn said the Association's legal aid department had 48 legal aid lawyers, with a budget of about $50,000 per year.[184] From January to October 2013, the Bar Association received requests for free legal aid in 798 cases involving 1,169 clients, 88 of whom were minors; assistance could only be provided in 95 of these cases. Bun Honn said that data gathered by BAKC in 2013 showed that legal aid is needed in 54 per cent of all criminal cases in the country. An official at the Ministry of Justice said that the cost of legal aid could not be borne by the government alone.

Aside from financial constraints, a report notes that the practice of limiting the number of lawyers in the country restricts access to lawyers and access to justice.[185] The country currently has 816 practicing lawyers to serve its population of 15,708,756 (July 2015 estimate), or one lawyer for every 19,250 persons—a ratio that is very far behind compared to other countries. The report attributes this low number to the "artificial yearly cap" on membership to the BAKC.[186] There are many Cambodians who meet the qualifications to become lawyers, however only around 60 new lawyers are admitted to the Bar per year. The entrance exam given by the Lawyer Training Center is difficult to pass. In 2013, only 59 or eight per cent of 700 applicants passed. Corruption has been reported in the admission process, with candidates allegedly "invited" to pay USD 10,000-15,000 for admission. To qualify as a member of the Bar on the basis of two year's legal work experience, it is said that the unofficial fee amounts to around USD 20,000.[187]

(See also discussion below on *Available and Fair Legal Aid to All Entitled*.)

Safety and Security of the Judiciary, Prosecutors, Litigants, Witnesses, and Affected Public

Safety and security for accused persons, prosecutors, judges, and judicial officers are well provided in the cases before the ECCC. There is a Supplementary Agreement on Safety and Security which outlines the separate areas of responsibility of the United Nations and Cambodian government to ensure that all aspects of security and safety are covered.[188]

There is, on the other hand, no comprehensive mechanism provided in special law to ensure protection of judicial officers, litigants, witnesses, and the public in the regular courts. Instead, there are provisions in the Criminal Code that punish perpetrators who cause inconvenience, intimidation or retaliation to

183 See Article 7 of Internal Regulation of Bar Association of Cambodia.

184 Lauren Crothers, 'Lack of Legal Aid in Cambodia Puts Children, Poor at Risk,' *The Cambodia Daily*, 30 November 2013.

185 Supra note 77.

186 Ibid, 3.

187 Ibid, 4.

188 'Security & Safety,' *Extraordinary Chambers in the Courts of Cambodia*, http://www.eccc.gov.kh/en/office-of-administration/security-and-safety (accessed 12 May 2016).

witnesses, victims or civil parties before and after a proceeding. Further, courts may use court screens and courtroom TV-linked testimonies for children and vulnerable victims testifying in criminal cases.[189] In practice, controversial hearings are heavily guarded by security personnel, with the police at times blocking roads and setting up barricades to keep protesters from getting anywhere near the courthouses.[190]

(See also discussion below on *Measures to Minimize Inconvenience to Litigants and Witnesses, and their Families, Protect their Privacy, and Ensure Safety from Intimidation/Retaliation*.)

Specific, Non-Discriminatory, and Unduly Restrictive Thresholds for Legal Standing

Standing before the law, especially in criminal proceedings is clearly defined. Criminal actions are initiated by prosecutors; victims of an offense can file a complaint as plaintiffs of a civil action before the investigating judge.[191] The Criminal Procedure Code allows some associations to assist victims in filing a complaint.[192] The victim's successor (in case of death) or legal representative (in case of a minor or adult under legal guardianship) can represent the victim.[193]

Article 141 of the Constitution also mentions standing before the Constitutional Council, stating that, after a law is promulgated, the King, the President of the Senate, the President of the Assembly, the Prime Minister, 1/10 of the Senate members, 1/10 of the Assembly members or the courts, may ask the Constitutional Council to examine the constitutionality of that law. Citizens have the right to appeal against the constitutionality of laws through members of parliament.

Publication of and Access to Judicial Hearings and Decisions

According to the Criminal Procedure Code, trial hearings must be conducted in public except when the court determines otherwise on grounds of public morals or public order.[194] The Code requires the chairman of the hearing to inform the parties of the date of the announcement of the judgment, unless the announcement is made at the same session in which parties held a confrontation. Announcement of the judgment must be in public, and the ruling must be read aloud by the presiding judge.[195] In practice, trials are being conducted openly and publicly.[196]

189 Prakas on the Use of Court Screen and Courtroom TV-Linked Testimony from Child/Vulnerable Victims or Witnesses, Ministry of Justice No: 62/08, 06 October 2008.

190 *See e.g.* Khy Sovuthy and Eang Mengleng,'Garment Protest Trial Defendants Deny Charges,' *The Cambodia Daily*, 7 May 2014; Abby Seiff, 'Cambodia court puts 25 activists on trial,' *UCA News*, 25 April 2014.

191 Articles 4-6 of Criminal Procedure Code.

192 These associations are Associations for Eliminating All Forms of Sexual Violence, Domestic Violence or Violence against Children, Association of Elimination All Forms of Kidnapping, Human Trafficking and Commercial Sexual Exploitation, and Association for Eliminating All Forms of Racism and Discrimination. Ibid, Articles 17-20.

193 Ibid, Articles 15, 16 and 22.

194 Ibid, Articles 316, 392, and 434.

195 Ibid, Article 317, 347 and 359.

196 Supra note 104, 16.

Additionally, the Supreme Court launched its own website in 2011 so that people would be able to access the Supreme Court's judgment database from 1996 onwards. Judgments until 2006 are now accessible online. While the database is still not up-to-date, this represents a positive development that should be pursued. Generally, only the lawyers or the parties themselves could easily obtain copies of judgments. For others, it is still difficult to obtain copies of judgments and access case files.

Reasonable Fees and Non-arbitrary Administrative Obstacles to Judicial Institutions

The victim in a criminal case is not required to pay any fee, as "court fees [are] the responsibility of the state."[197] Convicted persons, however, are required to pay all procedural taxes to the state, in an amount that is determined by a ministerial proclamation (Prakas).[198] In civil disputes, the plaintiff must pay the filing fee. If the defendant loses, the defendant shall be responsible for the court fee, paying the plaintiff a lump sum to cover the filing fee. The filling fee is calculated based on the value of the subject matter of the complaint.[199]

Bribery is however reportedly widespread. Lawyers reported that payments are made not only for decision-making in a case, but are frequently demanded by judges and clerks for "follow-up" work, *i.e.* to simply track the progress of a case. Some lawyers reported that, if they refuse to pay such fees, court staff would neither let them have any information about their clients nor give them access to their clients (where clients were held in prison cells).[200]

Assistance for Persons Seeking Access to Justice

Persons, especially members of grassroots communities, seeking to access justice through the court system have reported significant challenges. Grassroots communities have to weigh the urgency of seeking access to justice while supporting the basic needs of their families. In cases of forced evictions, families are often left without access to basic needs like food and shelter.

Free legal representation in Cambodia is limited, with the country's legal aid budget insufficient to provide adequate legal assistance to those who need it.[201] Further, the BAKC, which is expected to provide legal assistance, is viewed as too politicised and closely allied with the government.[202] NGOs are the main source of free legal aid in Cambodia, but fear of reprisals and desire for more stable and lucrative employment cause many lawyers working for NGOs to resign and move into private practice. Finally, even if persons have access to legal representation, "they are still faced with a corrupt and arbitrary institution directly under the control of the government."[203]

197 Article 553 of the Criminal Procedure Code.

198 Ibid, Article 554.

199 Article 61-66 of the Code of Civil Procedure.

200 Supra note 172, 29.

201 Ibid, 8.

202 Siena Anstis, 'Access to Justice in Cambodia: The Experience of Grassroots Networks in Land Rights Issues,' *Legal Working Paper Series on Legal Empowerment for Sustainable Development* (Montreal: Centre for International Sustainable Development Law, 2012), 14. See also supra note 172, 8.

203 Ibid, 15. See also supra note 172, 7.

Measures to Minimize Inconvenience to Litigants and Witnesses and their Families, Protect their Privacy, and Ensure Safety from Intimidation/Retaliation

So far there is no special law that provides a comprehensive mechanism to ensure protection of and minimise inconvenience to litigants, witnesses, and their families. Instead, provisions in the Criminal Code that punish perpetrators who cause inconvenience, intimidation or retaliation to witnesses, victims or civil parties before and after a proceeding may be applied. Examples of such provisions are Article 546 on Intimidation Against a Witness, Article 548 on Bribery Given to a Witness, and Article 549 on Publication Aiming at Putting Pressure on a Witness.

Committing specific crimes against victims, civil parties or witnesses may be considered an aggravating circumstance. Higher penalties are imposed on perpetrators of Murder (Article 203), Torture and Barbarous Acts (Article 212), Intentional Violence (Article 220), and Acts of Threat (Article 231-234) when the same is committed on (i) a victim or civil party to prevent him or her from denouncing the offence or demanding reparation, or because he or she has made such denouncement or demand, or (ii) a witness to prevent him or her from becoming a witness, or because he or she has given testimony. These articles impose greater penalty on crimes that target victims and witnesses, but not their family.

Protective measures at the ECCC are more elaborate. The Law on the Establishment of the ECCC states that the Court shall provide for the protection of victims and witnesses. Protective measures are regulated in Internal Rule 29 and Practice Direction on Protective Measures. Protective measures may be ordered by the Co-Investigating Judges or the Chambers to protect victims, as complainants or civil parties, and witnesses.

To protect the identity of witnesses, Internal Rule 29(4) includes the following measures:

a) Declaring their contact address to be that of their lawyers or their Victims' Association, as appropriate, or of the ECCC;

b) Using a pseudonym when referring to the protected person;

c) Authorising recording of the person's statements without his or her identity appearing in the case file;[204]

d) Where a Charged Person or Accused requests to be confronted with such a person, technical means may be used that allow remote participation or distortion of the person's voice and or physical features;

e) As an exception to the principle of public hearings, the Chambers may conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means.

The Practice Direction lists more protective measures, including (i) ordering written records or the record of specific parts of the proceedings to be placed under seal; (ii) forbidding public access to specific material from the case file or classified register which identifies the protected person; (iii) ordering measures aimed at physically protecting the protected person, in particular by providing a safe residence inside or outside Cambodia; and (iv) redacting from the record all information that could reveal the identify or location of the protected person.

204 No conviction may be pronounced against the Accused on the sole basis of statements taken under the conditions set out in sub-rule 29(4)(c). Internal Rule 29(6) of the Extraordinary Chambers in the Courts of Cambodia.

Available and Fair Legal Aid to All Entitled

As stated above, the Bar Association has a department that provides free legal assistance, however its resources are very limited. There are several NGOs that also provide such assistance; prominent among them are Legal Aid Cambodia (LAC) and Cambodian Defenders Project. Other organizations with smaller legal aid capacities include Legal Support for Children and Women, Protection of Juvenile Justice, Cambodian Women Crisis Center, International Bridges to Justice, and the Cambodian League for the Promotion and Defense of Human Rights. Despite these efforts, there is no substantial legal aid presence outside of Phnom Penh. Organizations such as LAC have been pushing BAKC to review legal aid requirements for the legal community to improve overall service coverage.[205]

In November 2013, it was reported that there were only 76 free legal aid lawyers in the country (from 119 in 2010). In several provinces, there were no legal aid lawyers at all. "Access to lawyers in police stations is extremely limited, especially in rural areas. The provision of legal aid services in the country is neither effective, nor sustainable. For many Cambodians, justice is a luxury that they cannot afford," Wan-Hea Lee of OHCHR Cambodia said.[206]

Legal aid providers in Cambodia face financial hurdles as well as constraints due to the lack of lawyers in the country, especially outside the capital. LAC, the largest legal aid NGO in Cambodia, reported in its 2014 annual report that it is difficult to retain experienced and skilled staff and lawyers for a long period because it does not have guaranteed funding to ensure that services will remain the same from year to year.[207] This insecurity results in lawyers and staff looking for alternative jobs. Additionally, although LAC has seven branch or satellite offices besides its head office in Phnom Penh,[208] it is hard to recruit lawyers to work in provinces. Lawyers prefer to stay in Phnom Penh where there are more potential clients. Further, majority of BAKC-approved lawyers are working for private law firms, which pay salaries that legal aid organizations cannot afford. Thus the number of lawyers who want to work for an NGO is very restricted.

General Public Awareness of Pro Bono Initiatives and Legal Aid or Assistance

There is no comprehensive data to show the level of awareness of the general public with regards pro bono initiatives. However, as legal aid providers are concentrated in Phnom Penh, it is likely that awareness of legal aid services is low in some provinces.

205 Michael Garcia, 'Legal Aid: Strengthening Law in Cambodia,' *Michigan Journal of International Law*, 26 September 2014, http://www.mjilonline.org/legal-aid-strengthening-law-in-cambodia/#_edn15 (accessed 5 May 2016).

206 Supra note 184.

207 Run Saray, *Annual Report (1 January 2014 to 31 December 2014): Legal Aid of Cambodia*, 38.

208 'LAC Offices,' *Legal Aid of Cambodia*, http://lac.org.kh/about-lac/lac-offices/ (accessed 5 May 2016).

III. INTEGRATING INTO A RULES-BASED ASEAN

Progress towards Achieving a Rules-Based ASEAN Community

On Mutual Support and Assistance on the Rule of Law

Cambodia is a signatory to the ASEAN Mutual Legal Assistance in Criminal Matters Treaty (AMLAT), which it ratified in 2010. It also has existing extradition agreements with Thailand, Lao PDR and Vietnam. In 2011, to implement the process for mutual legal assistance in criminal matters, as well as in civil matters, extradition, and transfer of prisoners, the Cambodian government established a Central Authority within the Ministry of Justice.[209]

In 2013, Cambodia and Vietnam agreed to provide mutual judicial assistance in civil matters—which provides for copies of judicial documents, taking and transferring of evidence, summoning of witnesses and experts, recognition and enforcement of court judgments and decisions, and exchange of legal information and documents.[210]

The country has also signed separate bilateral Memorandums of Understanding and Cooperation with Lao PDR and with Vietnam for information exchange and capacity building among legal staff, judges and prosecutors.[211] In addition, participants from Cambodia have also taken part in Court Excellence and Judicial Cooperation Forums between judiciaries of ASEAN Member States to share best practices and exchange views on common concerns and interests in anticipation of the ASEAN Community in 2015 and beyond.[212]

Aside from formal mechanisms, informal cooperation (such as "police to police" or "agency to agency" assistance) facilitates a wide measure of information sharing between law enforcement agencies of different countries.[213]

On Legislative and Substantive Changes Promoting the Rule of Law

There appears to be no new law that the government enacted specifically to promote rule of law at a regional level.

On Enactment of Laws relating to the ASEAN Community Blueprints and Similar Plans

Cambodia's National Assembly approved amendments to its customs laws in 2014 as part of its preparation for the AEC and following its signing of the ASEAN Customs Agreement in 2012. The amendments concern the synchronisation of Cambodia's customs procedures with international standards and the management of customs after the realization of the AEC in 2015. The changes include measures intended to simplify cross-border exchange and facilitate trade between ASEAN countries, such as reducing paperwork, modernizing

209 Ku Khemlin, 'Mutual Legal Assistance and Recovery of Proceeds of Corruption,' 24-26 November 2015, http://www.unafei.or.jp/english/pdf/PDF_GG9_Seminar/12_GG9_IP_Cambodia1.pdf (accessed 11 May 2016).

210 Ibid.

211 Ibid.

212 Joint Communiqué of the Ninth ASEAN Law Ministers Meeting (ALAWMM), 22 October 2015. Available at: http://www.asean.org/storage/images/2015/October/statement-and-communique/ADOPTED%20Joint%20Communique%20of%20the%20Ninth%20ASEAN%20Law%20Ministers%20Meeting%20as%20of%2020%20October%202015%20CLEAN-revised.pdf

213 Supra note 209.

procedures, and stricter clauses regarding the prevention of terrorism and smuggling.[214]

In compliance with its commitment under the ASEAN Trade in Goods Agreement, Ministry of Economy and Finance Prakas 288 dated 31 March 2011 was issued, promulgating the schedule of Cambodia for Reduction/Elimination of Import Duties under the ASEAN Trade in Goods Agreement. Under this Prakas, tariff for ASEAN goods was reduced from 2009 and import duties eliminated by 2015, with flexibility on some duties until 2018.[215]

On Integration as Encouraging Steps toward Building the Rule of Law

While Cambodia's efforts appear to mostly concentrate on the economic aspect of ASEAN integration, integration has nonetheless encouraged the government to introduce improvements in its policies, laws and procedures that contribute to the country's rule of law. As an example, the amendment of customs laws to comply with ASEAN standards is expected to strengthen control on imports, exports, crossings, and goods trafficking, helping to combat smuggling and prevent terrorism.[216]

The launch of the National Trade Repository (NTR) website in 2015, on the other hand, promotes transparency and openness in dealing with relevant government offices for import and export businesses. The website provides access to all necessary trade information, including registration for importers and exporters, list of prohibited and restricted goods, customs permits and duties, as well as ASEAN-specific trade regulations.[217]

On the Contribution of ASEAN Integration to the Building of Stronger State Institutions

Integration has impressed upon the government the necessity of building stronger state institutions. In the Rectangular Strategy, Phase III, the government indicated that regional and global integration, including participating in the AEC and meeting the obligations of the World Trade Organization, "requires better coordination and stronger human and institutional capacity as well as effective and timely internal reforms, to ensure that Cambodia will benefit from the integration."[218] The Rectangular Strategy recognises that good governance is needed to create an environment attractive to investors and conducive to economic growth. Thus, for example, one priority involves:

> Further strengthening favorable investment and business climate through improvement in regulatory framework, rationalization of incentives for investment projects, and *improvements in good governance and efficiency of public institutions*…[219]

214 'Cambodia Implements ASEAN Standards on Customs,' *ASEAN Briefing*, 29 May 2014, http://www.aseanbriefing.com/news/2014/05/29/cambodia-implements-asean-standards-customs.html (accessed 12 May 2016).

215 'Duties and Taxes,' *General Department of Customs and Excise of Cambodia*, http://www.customs.gov.kh/outline-of-law-on-customs/duties-and-taxes/ (accessed 12 May 2016).

216 Supra note 214.

217 Cambodia National Trade Repository. <http://cambodiantr.gov.kh/> accessed 13 May 2016.

218 Supra note 55, 6.

219 Ibid, 28.

Prospects and Challenges

Challenges to a Strengthened Commitment to the Rule of Law

Cambodia continues to face challenges in its efforts to strengthen the rule of law in the country. The Office of the United Nations High Commissioner for Human Rights for Cambodia has stated that, "the Ministry of Justice and the courts continued to suffer from serious lack of resources. Respect for the rule of law was also hampered by ongoing credible allegations of interference by the executive in the court system, and of widespread corruption. As a result, impunity continued and public confidence in the criminal justice system is not improving."[220]

Concerns have also been raised on access to justice, especially for the poor and other vulnerable groups. Legal aid services continue to suffer from lack of funding and legal representation for juveniles and persons charged with felonies are not always available.[221]

Commitments and Plans/Initiatives in relation to ASEAN-wide Commitments and Declarations on Human Rights

The Cambodian government states that it continues to work with its fellow ASEAN members to achieve further progress on human rights through the ASEAN Intergovernmental Commission of Human Rights and other related bodies.[222] Confirming its commitment with other ASEAN member states to a stronger regional cooperation against trafficking in persons, Cambodia signed the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP) during the 27th ASEAN Summit in November 2015, and promptly deposited the instrument of ratification with the ASEAN Secretary-General in January 2016.[223]

IV. CONCLUSION

Nexus of the Changes to the Overall State of the Rule of Law for Human Rights

The current ruling government, which has dominated elections since 1998, has been implementing key reforms that have shaped the country's rule of law regime. The Rectangular Strategy, with its focus on good governance, is particularly relevant.[224] Important laws have been adopted, not least of which are the Code of Civil Procedure (2006), Criminal Procedure Code (2007), Civil Code (2007), and Criminal Code (2009). In

220 UN Human Rights Council, *Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Cambodia*, A/HRC/WG.6/18/KHM/2, 7 November 2013, par. 29.

221 Ibid, par. 31.

222 UN Human Rights Council, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Cambodia*, A/HRC/WG.6/18/KHM/1, 21 November 2013, par. 38(f).

223 'Cambodia, Singapore Deposit Instrument for Ratification of Convention against Trafficking in Persons,' *ASEAN,* 25 January 2016, http://www.asean.org/cambodia-singapore-deposit-instrument-of-ratification-of-the-asean-convention-against-trafficking-in-persons/ (accessed 13 May 2016).

224 Supra note 55, pp 13-14.

2007, the Supreme Council of Magistracy approved the Code of Ethics for Judges. Currently there are plans to create regional Appeal Courts to reduce backlog and to make the court more accessible to appellants. Thus, it can be said that the country has been successful in laying the foundation needed to advance rule of law in the country.

Despite significant progress made, some recent laws and actual practices of the government show that the legal framework surrounding rule of law needs to be improved. The lack of measures to ensure that civil society is involved in legislation-making has resulted in laws that have been criticised for being repressive and that fail to meet the needs of society. Equal enforcement of the law remains an issue, with rights pertaining to peaceful assembly and expression of specific groups particularly being suppressed. This includes groups advocating for land and housing rights, workers' rights and management of natural resources. For these groups as well as others with meagre economic means, accessing justice is very challenging.

Finally, the lack of confidence in the judiciary on the part of the citizenry is a grave concern. The judiciary lacks independence, both in law and in practice. Laws concerning the administration and organisation of the judiciary, which for years had been awaited by former Special Rapporteurs on the human rights situation in Cambodia,[225] were finally adopted in July 2014. However, these laws, instead of securing judicial independence, have entrenched the executive government's control over the affairs of the judiciary. In practice, interference from executive officers and corruption undermines judicial integrity.

Contributing Factors

Emerging from the Khmer Rouge regime, Cambodia has had to build its rule of law infrastructure from zero. There were no laws to implement and no institution to administer them had there been any. The lack of academics and legal professionals, resulting from the policy of the CPK to target intellectuals for execution, made it particularly challenging to rebuild the country. On the liberation of Phnom Penh in January 1979, one source has estimated that there were only ten individuals with any kind of legal education in the whole of Cambodia.[226]

The dominance of the ruling party for many years has also meant that it has been able to set the direction of legal and institutional reform and act without effective checks within the country. Nonetheless, it should be recognised that there is now a robust civil society in Cambodia, which, together with pressure from foreign organisations and governments, has been able to draw greater attention on the need for meaningful reforms and capacity-building.

225 *See e.g.,* UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Cambodia: Surya P. Subedi*, A/HRC/15/46, 16 September 2010, par 66; UN Human Rights Council, *Report of the Special Representative of the Secretary-General for human rights in Cambodia, Yash Ghai*, A/HRC/4/36 30 January 2007, par. 33-34

226 Supra note 172, 13, *citing* Roderic Broadhurst, 'Cambodia: A criminal justice system in transition', in Cindy J Smith, Sheldon X Zhang and Rosemary Barberet (eds), Routledge Handbook of International Criminology (Routledge, 2011) 338.

Role of the ASEAN Declaration on Human Rights in Strengthening Rule of Law for Human Rights

The ASEAN Human Rights Declaration was adopted in Phnom Penh during Cambodia's chairmanship of the ASEAN in 2012. However, so far, it has not visibly played a key role in strengthening rule of law and human rights in the country. Cambodia has been undergoing major legal and institutional transformations since it signed the Paris Peace Accords in 1991. Until now, the state of human rights in the country is being observed by a Special Rapporteur and the country continues to receive recommendations on how its policies and practices relative to human rights may be improved. In this context of protracted on-going reforms, it is difficult to assess the influence of the ASEAN Human Rights Declaration on recent developments in the country. At any rate, some legal developments in Cambodia after the adoption of the Declaration, such as the laws pertaining to the judiciary, need to be reviewed in order to further strengthen the rule of law for human rights.

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The Republic of Indonesia

INDONESIA

TABLE 1

SNAPSHOT

Formal Name	Republic of Indonesia
Capital City	Jakarta
Independence	17 August 1945
Historical Background	The Dutch began to colonize Indonesia in the early 17th century; Japan occupied the islands from 1942 to 1945. Indonesia declared its independence on 17 August 1945 and enacted the 1945 Constitution on 18 August 1945. Soekarno was the first president of the Republic Indonesia (18 August 1945-12 March 1967), while Suharto is the second one (12 March 1967-21 May 1998). The first and second presidents were very long in power due to the weaknesses in the 1945 Constitution. After Suharto's authoritarian regime fell in 1998, the political setting changed dramatically. The first parliamentary election after Suharto was in 1999, which was then followed by constitutional amendments in 1999, 2000, 2001 and 2002. In 1999, the then East Timor Province of Indonesia, backed by the UN, held a referendum, opted for independence and thereafter obtained independence as Timor-Leste in 2002. After 1998, the presidents are the following: B.J. Habibie (21 May 1998-20 October 1999), Abdurrahman Wahid (20 October 1999-23 July 2001), Megawati Soekarnoputri (23 July 2001-20 October 2004), Susilo Bambang Yudhoyono (20 October 2004-20 October 2014), Joko Widodo (inaugurated on 20 October 2014 for 5-year fixed term of office).
Size	1,904,569 sq km[1]
Land Boundaries	Total: 2,958 km Timor-Leste 253 km, Malaysia 1,881 km, Papua New Guinea 824 km[1]
Population	255,993,674 (July 2015 est.)[1]
Demography	0-14 years: 25.82% (male 33,651,533/female 32,442,996) 15-24 years: 17.07% (male 22,238,735/female 21,454,563) 25-54 years: 42.31% (male 55,196,144/female 53,124,591) 55-64 years: 8.18% (male 9,608,548/female 11,328,421) 65 years and over: 6.62% (male 7,368,764/female 9,579,379) (2015 est.)[1]
Ethnic Groups	Javanese 40.1%, Sundanese 15.5%, Malay 3.7%, Batak 3.6%, Madurese 3%, Betawi 2.9%, Minangkabau 2.7%, Buginese 2.7%, Bantenese 2%, Banjarese 1.7%, Balinese 1.7%, Acehnese 1.4%, Dayak 1.4%, Sasak 1.3%, Chinese 1.2%, other 15% (2010 est.)[1]
Languages	Bahasa Indonesia (official, modified form of Malay), English, Dutch, local dialects (of which the most widely spoken is Javanese) Note: more than 700 languages are used in Indonesia
Religion	Muslim 87.2%, Christian 7%, Roman Catholic 2.9%, Hindu 1.7%, other 0.9% (includes Buddhist and Confucian), unspecified 0.4% (2010 est.)[1]

1 'The World Factbook,' *Central Intelligence Agency*, https://www.cia.gov/library/publications/the-world-factbook/geos/id.html (accessed 20 April 2016).

Adult Literacy	Definition: age 15 and over can read and write Total population: 93.9% Male: 96.3% Female: 91.5% (2015 est.)[1]
Gross Domestic Product	$2.839 trillion (2015 est.) $2.712 trillion (2014 est.) $2.582 trillion (2013 est.) note: data are in 2015 US dollars[1]
Government Overview	Executive Branch: President and vice president are elected for five-year terms (eligible for a second term) by direct vote of the citizenry. The Cabinet is appointed by the president. Legislative Branch: Dewan Perwakilan Rakyat (House of Representatives) and Dewan Perwakilan Daerah (Regional Representatives Council), election held at the same time as presidential election. Judicial Branch: Supreme Court or Mahkamah Agung is the final court of appeal but does not have the power of judicial review. Constitutional Court or Mahkamah Konstitusi has the power of judicial review, jurisdiction over the results of a general election, and reviews actions to dismiss a president from office.
Human Rights Issues	Holding the military and police accountable for past human rights violations; religious minorities face harassment, intimidation, and violence by Islamist militants; Islamic bylaws violate the rights of women, LGBT people, and religious minorities; torture and killings in Papua; death penalty against convicted drug traffickers.[2]

2 'Indonesia,' Human Rights Watch, https://www.hrw.org/asia/indonesia (accessed 26 February 2016).

Membership in International Organizations	Asian Development Bank, Asia-Pacific Economic Cooperation, ASEAN Regional Forum, Association of Southeast Asian Nations, Bank for International Settlements, CD, Conference on Interaction and Confidence-Building Measures in Asia (observer), Colombo Plan, D-8, East Asia Summit, Extractive Industries Transparency Initiative (compliant country), Food and Agriculture Organization, G-11, G-15, G-20, G-77, International Atomic Energy Agency, International Bank for Reconstruction and Development, International Civil Aviation Organization, International Chamber of Commerce (national committees), International Red Cross and Red Crescent, International Development Association, IDB, International Fund for Agriculture Development, International Finance Corporation, International Federation of Red Cross and Red Crescent Societies, International Hydrographic Organization, International Labour Organization, International Monetary Fund, International Maritime Organization, International Mobile Satellite Organization, Interpol, International Olympic Committee, International Organization for Migration (observer), Inter-Parliamentary Union, International Organization for Standardization, International Telecommunications Satellite Organization, International Telecommunication Union, International Trade Union Confederation (NGOs), Multilateral Investment Guarantee Agency, United Nations Mission for the Referendum in Western Sahara, United Nations Stabilization Mission in Haiti, United Nations Organization Mission in Democratic Republic of the Congo, Non-Aligned Movement, Organization for Economic Cooperation and Development (Enhanced Engagement), Organisation of Islamic Cooperation, Organization for the Prohibition of Chemical Weapons, Pacific Islands Forum (partner), United Nations, United Nations–African Union Mission in Darfur, United Nations Conference on Trade and Development, United Nations Educational, Scientific, and Cultural Organization, United Nations Industrial Development Organization, United Nations Interim Force in Lebanon, United Nations Interim Security Force for Abyei, United Nations Mission in Liberia, United Nations World Tourism Organization, Universal Postal Union, World Customs Organization, World Federation of Trade Unions (NGOs), World Health Organization, World Intellectual Property Organization, World Meteorological Organization, World Trade Organization[3]

3 Supra note 1.

Human Rights Treaty Commitments	Geneva Conventions I, II, III, IV 1949 (ratification: 30 September 1958) Hague Convention 1954 (ratification: 10 January 1967) Hague Protocol 1954 (ratification: 26 July 1967) Hague Protocol 1999 (signature only: 17 May 1999) ICERD 1965 (accession: 25 June 1999) ICCPR 1966 (accession: 23 February 2006) ICESCR 1966 (accession: 23 February 2006) CEDAW 1979 (ratification: 13 September 1984) OP-CEDAW 1999 (signature only: 28 February 2000) CAT 1984 (ratification: 28 October 1998) CRC 1990 (ratification: 5 September 1990) CRC Optional Protocol Armed Conflict 2000 (ratification: 24 September 2012) CRC Optional Protocol Sale of Children 2000 (ratification 24 September 2012) ICRMW 1990 (ratification: 31 May 2012) Disability Rights Convention (ratification: 30 November 2011) Geneva Gas Protocol 1925 (succession: 21 January 1971) Biological Weapons Convention 1972 (ratification: 19 February 1992) Chemical Weapons Convention 1993 (ratification: 12 November 1998) Ottawa Treaty 1997 (ratification: 16 February 2007) Convention for the Suppression of the Financing of Terrorism 1999 (ratification: 29 June 2006)[4]

I. INTRODUCTION

There has generally been no significant change in Indonesia since the *2011 Rule of Law Baseline Study* in terms of the Constitution and legal regime. The Constitution has several provisions aimed to regulate the power of the state and its bodies and to ensure equal status of all citizens before the law. It also provides measures with regard to legal certainty and just judicial proceedings. Nonetheless, similar issues still occur within the realm of law enactment, law enforcement, as well as equal access to legal procedures.

A number of laws and policies enacted and implemented in between 2011 and 2016 affect the rule of law in Indonesia. On a positive note, the House of Representatives and the government passed three laws that further regulate constitutional rights as well as implement international treaties, namely Law No. 16 of 2011 regarding Legal Aid, Law No. 11 of 2012 regarding the Juvenile Justice System, and Law No. 8 of 2016 on People with Disability.[5]

4 'Ratification Status for Indonesia,' *United Nations Human Rights Office of the High Commissioner*, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN (accessed 24 April 2016); 'Treaties, States Parties and Commentaries: Indonesia,' *International Committee of the Red Cross*, https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=ID (accessed 25 April 2016); and 'International Convention for the Suppression of the Financing of Terrorism,' United Nations Treaty Collection, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&lang=en (accessed 25 April 2016).

5 'ILO urges business sector to offer work opportunities to people with disabilities,' The Jakarta Post, 22 March 2016, http://www.thejakartapost.com/news/2016/03/22/ilo-urges-business-sector-offer-work-opportunities-disabled.html, accessed 21 April 2016.

On a negative note, there are laws and policies that are not in accordance with rule of law principles. In 2013, for instance, the government enacted the Societal Organization Law (Law No. 17 of 2013) which hinders freedom of organization by imposing additional registration requirements as well as increasing the government's control over societal organizations. The Law stipulates a registration mechanism for all organizations regardless of form (foundation or association or organizations without legal entity status), which in practice has been used by a number of local governments to control civil society organizations.[6]

On freedom of expression, Law No. 11 of 2008 on Electronic Information and Transactions (ITE) has been used arbitrarily to curtail alleged defamatory comments on social media. The Law may have seemed sound at the time it was enacted, but its arbitrary use is increasing along with the increased use of social media. In May 2015, Minister Rudiantara of the Ministry of Communication and Information, in supporting the revision of the law, mentioned that 74 people have been accused of defamation on social media under this Law.[7]

In addition, there are reports showing the failure of state institutions, such as the police, to protect the constitutional right to freedom of religion. Indonesia-based human rights advocacy group Setara Institute recorded 197 cases and 236 incidents of violence related to religious intolerance in 2015, most of which were perpetuated by local administrations. In 2014, the number of cases was 134, with 177 incidents of violence.[8]

Furthermore, the change of government in 2014 has brought some changes in terms of policies related to the rule of law and human rights. For example, the new government led by President Joko Widodo of the Indonesian Democratic Party Struggle resumed the imposition of the death penalty on a number of drug traffickers. The death penalty had been suspended by the previous government of President Yudhoyono of the Democrat Party. In 2015, 14 people were executed. As Amnesty International reported, the Indonesian government has vowed to use the death penalty to tackle a national "drugs emergency," while President Widodo has issued a statement that he will reject all clemency petitions of death row prisoners on drug charges.[9]

6 The Law is more often cited in the media as "Mass Organization Law," although the correct translation is 'societal organization' (from '*Organisasi Kemasyarakatan*'). For more information on the law, see: http://www.icnl.org/research/monitor/indonesia.html, accessed Feb 26, 2016. It should be noted that The Constitutional Court in 2014 through its decisions No. 82/PUU-XI/2013 and No. 3/PUU-XII/2014, annulling 10 articles and providing constitutional interpretation for two. One of the most important impacts of this decision is that registration is no longer compulsory for societal organizations. However, until 2015, there local governments erroneously use this law to control societal organizations, for example through denial of services for or even disbandment of organizations that are not registered. See for example ,'UU Ormas, Dulu dan Sekarang,' Kompas, 12 November 2015, http://print.kompas.com/baca/2015/11/12/UU-Ormas%2c-Dulu-dan-Sekarang, accessed 06 May 2016.

7 'Puluhan Orang Sudah Jadi Korban Pasal 27 UU ITE,' *Detik News,* 7 May 2015, http://news.detik.com/berita/2908891/puluhan-orang-sudah-jadi-korban-pasal-27-uu-ite (accessed Feb 24, 2016).

8 Hans Nicholas Jong, 'Local administrations main violators of religious freedom,' *The Jakarta Post,* 19 January 2016, http://www.thejakartapost.com/news/2016/01/19/local-administrations-main-violators-religious-freedom.html#sthash.C8aJEDmc.dpuf (accessed 25 April 2016).

9 Amnesty International, 'Indonesia: Report reveals endemic judicial flaws in death penalty cases,' 15 October 2015, https://www.amnesty.org/en/latest/news/2015/10/indonesia-report-reveals-endemic-judicial-flaws-in-death-penalty-cases/ (accessed 23 February 2016).

Key Rule of Law Structures

The *2011 Rule of Law Baseline Study* lists nine institutions that are relevant to the rule of law, namely: Supreme Court, Constitutional Court, Judicial Commission, Attorney General's Office, National Human Rights Commission, Human Rights Court, Witness and Victim Protection Agency, Indonesian National Police, and Anti-Corruption Commission.[10] In addition to this, the Ombudsman has raised into political prominence after its establishment in 2008. Furthermore, the role of the legal profession (advocates) should also be highlighted.

The Indonesian judiciary involves three institutions: (1) the Supreme Court and the lower courts; (2) the Constitutional Court; and (3) the Judicial Commission.

Supreme Court (*Mahkamah Agung*) is the highest court in the Indonesian judicial system. Indonesia subscribes to "one-roof system," in which both judicial and administrative matters of the courts are under the authority of the Supreme Court. There are 54 Supreme Court Justices[11] and a total of 8,097 judges at all levels under the Supreme Court.[12] Beneath the Supreme Court there are four branches of the judicature: (i) the courts of general jurisdiction, which have jurisdiction to try civil and criminal cases; (ii) the courts of religious affairs (for Islamic family law); (iii) the courts of state administration; and (iv) the courts of military affairs.

Under the Supreme Court are Districts Courts at the district/regency level and Courts of Appeal at the provincial level. Each of the four branches of the court has its own Appellate Courts. Law No. 4 of 2004 regarding basic provisions on Judicial Power, which was amended by Law No. 48 of 2009, regulates matters pertaining to the lower courts. Cases at all levels are tried by a panel of three judges, except for certain special courts that are under the Court of General Jurisdiction.[13]

In 2003, the Supreme Court published a blueprint for the Supreme Court's reform. In 2010, the Supreme Court reviewed the implementation of the blueprint and published a blueprint for judicial reform 2010-2035. The new blueprint provides the vision of bringing about "excellent court values" of independence, integrity, impartiality, transparency, and accountably.[14]

The Indonesian Supreme Court Annual Report of 2015 shows that there were 4,584,104 pending and ongoing cases registered in the Courts of the First Instance in 2015. The total number of cases registered is considerably small compared to the population of Indonesia of over 255 million in 2015 and shows the high reluctance of Indonesian citizens to use the court to settle disputes.[15] The reasons to avoid courts include: high cost, lengthy process, complex procedures, intimidating court rooms and lack of trust in the judiciary.[16]

10 Human Rights Resource Centre, *Rule of Law for Human Rights in the ASEAN Region: A Base-line Study*, 2011, 91-95.

11 Article 4 (3) of Law No. 5 of 2004 regarding the Supreme Court (amendment to Law No. 14 of 1985) provides that the maximum number of the Supreme Court justices is 60.

12 2015 Annual Report of the Supreme Court, 2016.

13 These include Juvenile Court, Commercial Court, Human Rights Court, Corruption Court, Industrial Relations Court, and Fishery Court. See: Asshiddiqie, SH., Prof. Dr. Jimly. "Pengadilan Khusus." *In Putih Hitam Pengadilan Khusus*, 3-30. 1st ed. Jakarta: The Secretariat General of The Judicial Commission of The Republic of Indonesia, 2013.

14 Takdir Rahmadi, Justice, Supreme Court of Indonesia, *Reform Programs in the Case Management: the Indonesian Judiciary Experiences*, n.d., http://www.aseanlawassociation.org/11GAdocs/workshop2-indo.pdf (accessed 21 April 2016).

15 Pokja Laporan Tahunan Mahkamah Agung RI. Laporan Tahunan 2015 Mahkamah Agung Republik Indonesia. Report. Vol. 1. Jakarta: Mahkamah Agung Republik Indonesia, 2016.65

16 Kadafi, Binziad. "Revitalizing Indonesian Civil Justice." Jakarta Post, March 29, 2016. Accessed April 26, 2016. http://www.thejakartapost.com/news/2016/03/29/revitalizing-indonesian-civil-justice.html.

Constitutional Court (*Mahkamah Konstitusi*). The Constitutional Court was set up in 2003 based on the amended Constitution (2001) and Law No. 24 of 2003, which was amended by Law No. 8 of 2011 and Law No. 4 of 2014. Its authorities and responsibilities include reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by the Constitution, overseeing the dissolution of political parties, and hearing disputes regarding the results of a general election. Also, the Constitutional Court has the authority to impeach the President and/or the Vice-President. Persons and entities whose constitutional rights are injured by the enactment of a law may file judicial review petitions with the Constitutional Court.

While laws (parliamentary act or statute) are reviewed by the Constitutional Court against the Constitution, regulations (Government Regulation, Presidential Regulation and Local Regulation) are reviewed by the Supreme Court against laws.[17] As mentioned in the *2011 Rule of Law Baseline Study*, this means that regulations cannot be reviewed against constitutional principles.

Judicial Commission. According to the Constitution, the Judicial Commission has the authority to propose candidates for appointment as justices of the Supreme Court, and possesses further authority to maintain and ensure the honour, dignity and behaviour of judges. This institution is further regulated by Law No. 22 of 2004 as amended by Law No. 18 of 2011 regarding Judicial Commission, which provides details on how the Commission proposes candidates for Supreme Court justices and the oversight mechanism of the Commission on the conduct of the Supreme Court.

Attorney General's Office. The key functions of the Attorney General's Office (AGO) are instituting prosecutions on behalf of the state and executing final binding judicial orders and decisions. AGO may also conduct investigations into certain crimes.[18] Prosecutors also have the authority to act on behalf of the state in civil and administrative matters, both in and out of court. Moreover, AGO is tasked, among others, to secure the policy on law enforcement, supervise the distribution of printed materials, supervise religious beliefs that may be harmful to the state and society, and prevent misuse of religion and/or blasphemy. Mirroring the court structure, there are prosecutor offices at the district level and provincial level (high prosecution office). According to the AGO Annual Report of 2014, in 2013, there were 9,007 prosecutors in Indonesia.[19]

National Commission of Human Rights (*Komisi Nasional Hak Asasi Manusia* or *Komnas HAM*). The National Commission of Human Rights was established during the Soeharto administration with Presidential Regulation No. 50 of 1993 and was put under the control of the president. Law No. 39 of 1999 regarding Human Rights provides the new basis for the National Human Rights Commission.

The main roles of the Commission are to educate the government and the public on human rights, establish a network of human rights defenders, and receive complaints on human rights violations. The Human Rights Law no. 39 of 1999 provides for 35 commissioners nominated by the Commission and selected by the House of Representatives for maximum of two five-year terms. It should be noted that despite this stipulation, only 13 commissioners have been appointed for the 2012-2017 term of office.

17 The "hierarchy of law and regulations" is provided in Law No. 12 of 2011 on Law Making, as follows: (1) constitution, (2) Decree of the People's Consultative Assembly, (3) Laws (parliamentary act or statute) and Government Regulation in Lieu of Law, (4) Government Regulation, (5) Presidential Regulation, (6) Provincial Regulation, and (7) Regency/ City Level Regulation.

18 Law No. 16 year 2004 on the Attorney General of Indonesia provides this power in so far it is regulated by Law. To date the following laws grant investigative power to prosecutors: Law No. 26 year 2000 on Human Rights Court, Law No. 31 year 1999 on Eradication of Corruption as amended by Law No. 20 year 2001, and Law No. 30 year 2002 on The Commission for The Eradication of Corruption (KPK")

19 There is no further annual report published by the AGO. The 2014 Annual Report (in Indonesian language) can be downloaded at https://www.kejaksaan.go.id/upldoc/laptah/l2013f.pdf (accessed Feb 27, 2016).

Human Rights Court. The Human Rights Court, which was established under Law No. 26 of 2000, is under the Court of General Jurisdiction and tries what are termed as "gross violations of human rights" that consist of genocide and crimes against humanity. One of the main features of this special court is the number of judges. Cases are examined by five judges, three of which are ad hoc judges. There are 12 ad hoc judges selected by the Supreme Court for maximum of two five-year terms. Cases that occurred before entry into force of Law No. 26 of 2000 may be tried in an ad hoc Court on Human Rights set up especially for that purpose upon the recommendation of the House of Representatives. Such ad hoc courts were established relative to crimes committed in Timor-Leste in 1999, the Tanjung Priok massacre in 1984, and the bloody violence in Abepura in 2000. The Court, however, has ceased to function for almost a decade. This is primarily due to the lack of cases filed before it. Despite the fact that to date Komnas HAM has filed 10 investigative reports on gross human rights violations,[20] they have not been followed by prosecution, either because the Attorney General's Office deemed there was insufficient initial evidence to pursue formal investigation or the refusal of the Parliament to establish the ad hoc human rights court.[21]

Witness and Victim Protection Agency (*Lembaga Perlindungan Saksi dan Korban* or LPSK). The Witness and Victim Protection Agency was established by Law No. 13 of 2006 regarding Witness and Victim Protection and started its operation in 2008. There are seven members of the Agency selected by the House of Representatives based on candidates nominated by the President. In December 2009 the Agency signed a Memorandum of Understanding with the National Commission on Human Rights to set up a joint committee to formulate technical guidance on the protection to victims of gross human rights violation.[22]

Anti-Corruption Commission (*Komisi Pemberantasan Korupsi* or KPK). The Anti-Corruption Commission was set up by Law No. 30 of 2002 regarding the Commission for Corruption Eradication and started its operation in 2003. The Commission deals with corruption prevention and investigation as well as prosecution of corruption cases involving law enforcement agencies, state apparatus, and other people who (i) have some degree of involvement with corruption committed by law enforcers or government executives, (ii) attracted disconcerting public attention, and/or (iii) involves a loss to the state of a minimum of one billion rupiahs (equal to USD114,000). The Commission has five commissioners selected by the House of Representatives based on candidates nominated by the President. As with other corruption cases, those investigated and prosecuted by KPK are filed only with the Special Court on Anti-Corruption, which was also established by the same law.[23] The Special Court has five judges, three of which are ad hoc judges. Ad Hoc Judges of the Special Court were selected by a special selection Committee under the Supreme Court.

The Indonesian National Police (*Kepolisian Republik Indonesia* or POLRI). The Indonesian National Police is governed by Law No. 2 of 2002 regarding the Indonesian National Police. The police has the authority to investigate almost all crimes on their own initiative, except for those defined in the Law on Criminal Procedure as "complaint crimes" (*delik aduan*). This refers to crimes that require a request from an "interested

20 Komnas HAM has published the executive summaries of the ten investigative reports which include among others the 1965 massacre. See: Aswidah, Roichatul, and Muhammad Nurkhoiron, eds. Jakarta: Komnas HAM, 2014. Accessed May 06, 2016. http://www.komnasham.go.id/sites/default/files/dokumen/Ringkasan Eksekutif___edit2b (1)_0.pdf.

21 For example, the House of People's Representatives (DPR) determined that the case of the shooting of student activists and civilians in Trisakti University and Semanggi area was not gross human right violations therefore requiring no establishment of Ad Hoc Human Rights Court. This became the ground for the Attorney General's Office to suspend investigation on these cases. See: Mys, 'Nebis in Idem Tak Berlaku dalam Kasus Trisakti dan Semanggi,' *Hukumonline,* 17 March 2003, http://www.hukumonline.com/berita/baca/hol7640/inebis-in-idemi-tak-berlaku-dalam-kasus-trisakti-dan-semanggi (accessed 06 May 2016).

22 Memorandum of Understanding No. 490/TUA/XII/2009.

23 It should be noted that the law initially only established one such court in Jakarta. Later, in response to a judicial review against the constitutionality of the law, it was amended by Law No. 46 year 2009 on Corruption Court, which stipulated that the court should be established in all provincial capitals in Indonesia, and the Attorney General's Office may also prosecute corruption cases before the courts.

party" to take action against the person who allegedly committed the crime before the police can investigate the matter. They include a number of family matters, crimes of defamation, and disclosure of confidential information. In the annual report press release on 29 December 2015, the National Police Chief stated that there are 429,711 police officers.[24]

Ombudsman. The Ombudsman was initially formed in 2000 as a commission with minimal powers and resources by Presidential Decree No. 44 of 2000. In 2008, the Ombudsman was re-constituted with more powers and resources by Law No. 37 of 2008 on the Ombudsman of the Republic of Indonesia. Since then, the Ombudsman has become an increasingly active watchdog institution that has now grown substantially in size, capacity and influence.

By the end of 2014, the Ombudsman had established offices in 32 of the 34 provinces in Indonesia. The Ombudsman handles public complaints free of charge, funded fully by the government. Most complaints are about government's services—including business licensing, health and education services, the police, and the National Land Agency. The most prevalent type of complaint related to "undue delay in decision-making," which is often a proxy for corruption. It received 5,173 complaints in 2013 and 3,021 complaints from January to June 2014.[25] In 2015, the Ombudsman received 6,859 complaints and processed 47.46 per cent or 3,255 complaints. In terms of prevalence, complaints about courts ranked sixth (261 cases) and the police second (806 cases).[26]

Legal Profession. The reform of the legal profession is needed in order to strengthen rule of law, as disorder in the legal profession contributes to a corrupt judiciary. The narrative goes back to the 1960s under President Suharto's authoritarian rule.

The first Indonesian Bar Association was established in 1964, but Suharto's government intervened against the organization in the early 1980s until it was replaced by IKADIN (*Ikatan Advokat Indonesia* or Indonesian Advocate League).[27] Thereafter, other bar associations were set up without proper codes of conduct and oversight so that integrity in the legal profession declined. In addition, participants had to bribe court officials to pass the bar exam. After *reformasi*, a unified and self-governed bar association that is independent from the government was established based on Law No. 18 of 2003 on Advocates' Profession. The organization is called Indonesian Bar Association (*Persatuan Advokat Indonesia* or Peradi).

Peradi started to organize annual bar examinations in February 2006. However, due to a three-year (2003-2006) transition period and limited number of bar intakes, many law graduates were disappointed. Backed by lawyers who criticized the establishment process of Peradi, another bar association called Indonesian Advocates' Congress (*Kongres Advokat Indonesia* or KAI) was set up in 2008. Further, due to heightened tension within Peradi, it split into three factions during its national congress to select a new chairperson in March 2015. The split brought challenges to the courts as to which advocates would be allowed to appear before them, although the Constitutional Court does not require bar admission for legal representation

24 Press Release for the End-of-the-year Press Conference of 2015 (Siaran Pers Kapolri Pada Acara Konferensi Pers Akhir Tahun 2010), 29 December 2015 <http://www.tribratanews.com/refleksi-akhir-tahun-kinerja-polri-2015/>, accessed Feb 27, 2016.

25 Ombudsman RI, "Mid-Year Report on Public Complaints, Semester I Year 2014."

26 Ombudsman's Statistical report 2015 http://ombudsman.go.id/index.php/laporan/laporan-statistik.html, last accessed Feb 27, 2016.

27 See Daniel S. Lev, "Between State and Society: Professional Lawyers and Reform in Indonesia," in Daniel S. Lev, *Legal Evolution and Political Authority in Indonesia, Selected Essays,* (The Hague, London, Boston: Kluwer Law International, 2000): 305-320, at 315-316; Binziad Kadafi, *et. al.*, *Advokat Indonesia Mencari Legitimasi: Studi Tentang Tanggung Jawab Profesi Hukum di Indonesia* [Indonesian Advocates in Search of Legitimacy: A Study on Legal Professional Responsibility in Indonesia] (Jakarta: PSHK, 2001).

and lawyers working in companies and state institutions are not required to be members of the bar. To resolve the issue, the Supreme Court issued the Letter of the Chief Justice No. 73/KMA/HK.01/IX/2015 (25 September 2015) to allow the Appellate Court (at the Provincial level) to administer the oath of advocates to members of any bar association who have passed all requirements provided in the 2003 Law on Advocates.

According to the Law on Advocates, to be admitted to the bar, a candidate must hold an undergraduate law degree ("*Sarjana Hukum*" degree, obtained after approximately four years of study), be at least 25 years of age, and have completed advocate professional course (*Pendidikan Kekhususan Profesi Advokat* or PKPA) provided by institutions approved by Peradi, which usually takes several weeks. Then the candidate must take the bar exam. Upon passing the exam, the advocate has to do internship for two years. In early 2016, Peradi claimed to have more than 35,000 members.[28]

Foundation & Evolution of Rule of Law

As mentioned in the *2011 Rule of Law Baseline Study*, the Indonesian legal system is inherited from the Dutch colonization period. The "rule of law" tradition in Indonesia is closer to the continental European "*rechtsstaat*" tradition. This was elucidated in the original text of the 1945 Constitution, which stated that "Indonesia is based on law (*rechtsstaat*), and not based on mere power (*machtsstaat*)." The elucidation of the Constitution was abolished in the 1999-2002 amendments and this statement was then inserted into the text of the Constitution in the third amendment (2001). The *rechtsstaat* concept is widely known as *"negara hukum."*

In the early years after Indonesian independence, *negara hukum* served as the legitimating ideology of the constitutional republic.[29] Under Soekarno's regime of Guided Democracy (1958-1967) *negara hukum* declined due to the regime's patrimonialism. Corruption in legal institutions commenced and President Soekarno started to subjugate the judiciary under the executive. During Suharto's rule, the discourse of *negara hukum* was generally dominated by the government and the idea of *negara hukum* was only discussed in the context of legitimizing Suharto's power.[30] It has been noted that Soekarno used the term to support his vision of unfinished revolution, whereas Suharto interpreted it for the purpose of "economic development, stability, security and order."[31]

The end of President Suharto's regime in May 1998, which is usually termed as "*reformasi"* (reform), opened rule of law projects from various countries and donors, especially in line with the language of good governance. In those projects, rule of law by and large is understood as having an independent and professional judiciary as well as more public participation, transparency and accountability in governance. This definition of rule of law is reflected in the society until today, with the term "rule of law" being used by different actors, including international and local non-governmental organizations.

28 Peradi Gelar Pro Bono Award Untuk Advokat Yang Jalankan Bantuan Hukum Gratis, RMOL, Jan 30, 2016 <http://www.rmol.co/read/2016/01/30/234081/Peradi-Gelar-Pro-Bono-Award-Untuk-Advokat-yang-Jalankan-Bantuan-Hukum-Gratis->, accessed Feb 27, 2016.

29 Daniel S. Lev, "Social Movements, Constitutionalism, and Human Rights," in Daniel S. Lev, *Legal Evolution and Political Authority in Indonesia, Selected Essays*, (The Hague, London, Boston: Kluwer Law International, 2000): 321-336, at 329.

30 Tim Lindsey, "Indonesia: Devaluing Asian Values, Rewriting Rule of Law," in Randall Peerenboom ed., *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian countries, France and the U.S.,* (London: Routledge, 2004): 286-323, at 295.

31 Todung Mulya Lubis, "The *Rechtsstaat* and Human Rights," in Tim Lindsey, ed., *Indonesia: Law and Society* (Sydney: The Federation Press, 1999): 171-185, at 172.

Human Rights Treaties

Indonesia has signed nine major human rights instruments and has ratified eight of these instruments.[32] Ratification must be followed by incorporating the conventions' stipulations into relevant national laws and policies. However, the main challenge in Indonesia is the lack of implementing laws and policies for these instruments.

It is important to note that decentralization in Indonesia allows subnational authorities (provinces and regencies/cities) to issue local regulations ("*Peraturan Daerah*" or Perda). The United Nations Country Team noted in its submission for the Universal Periodic Review in 2011 that there were more than 1,000 local bylaws and policies that were not in accordance with national and internationally agreed standards.[33] The problem is two-fold. First, there is a lack of effective control mechanism at the central government level to ensure that local governments adhere to the national legal framework on human rights based on the ratifications of the international treaties.[34] Second, the Supreme Court's authority to review local regulations against national law has not been used effectively by the general public at the local level because of its distance, literally and figuratively. The Supreme Court does not have the authority to review local laws against the Constitution and the Constitutional Court cannot review local regulations.

The nine major human rights instruments signed by Indonesia and their implementing laws are as follows:

The Convention on the Elimination of all Forms of Racial Discrimination (in force 4 January 1969)

Date of Ratification: 25 June 1999. The treaty was enacted as a national law by Law No. 29 of 1999 regarding the Ratification of International Convention on the Elimination of All Forms of Racial Discrimination 1965. To implement the treaty, the Indonesian government has been revoking laws and policies that discriminate against Indonesian citizens of Chinese descent, such as the requirement for these citizens to have an additional document to acknowledge their Indonesian citizenship. In the Second Cycle of the Universal Periodic Review, the Compilation prepared by the Office of the High Commissioner for Human Rights noted that Indonesia's fourth to sixth reports on CERD have been overdue since 2010.[35]

32 As discussed later in this section, the Convention for the Protection of All Persons from Enforced Disappearance has been signed by Indonesia but has not yet been ratified at the time of writing of this Report.

33 Compilation prepared by the Office of the High Commissioner for Human Rights, 12 March 2012, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/119/37/PDF/G1211937.pdf?OpenElement>, accessed Feb 25, 2016.

34 Pursuant to Law No. 23 year 2014 on Regional Government the Ministry of Interior Affairs monitors regional regulations and may annul one if it conflicts with a higher law, public interest, and morality. The current Minister of Interior Affairs in 2015 issued a statement that since November 2014 to May 2015 his Ministry has repealed 139 Regional Regulation, including the controversial Aceh *Qanun* that prohibited women from leaving home alone after 23.00 pm. However, a specific monitoring for local bylaws' compliance to the human rights standards Indonesia has subscribed to and the effectiveness of this mechanism to repeal discriminatory regional regulations is not immediately evident. See: See 'Sejak November 2014 hingga Mei 2015, Mendagri Batalkan 139 Perda', Kompas, July 22, 2016, http://nasional.kompas.com/read/2015/07/22/17054251/Sejak.November.2014.hingga.Mei.2015.Mendagri.Batalkan.139.Perda, accessed May 6, 2016;

35 Compilation prepared by the Office of the High Commissioner for Human Rights, 12 March 2012, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/119/37/PDF/G1211937.pdf?OpenElement>, accessed Feb 25, 2016.

International Covenant on Civil and Political Rights (ICCPR) (in force 23 March 1976)

Date of Ratification: 23 February 2006. The treaty was ratified as a national law by Law No. 12 of 2005 regarding the Ratification of International Covenant on Civil and Political Rights (ICCPR). There remain to be some challenges after the ratification. For example, as outlined previously, freedom of organization is facing some restrictions because of the enactment of the Societal Organization Law (Law No. 17 of 2013) that imposes additional registration requirements, as well as increased the government's powers and control over societal organizations.[36] For instance, foreign foundations are to refrain from activities which "disrupt the stability and the unity" of Indonesia or "disrupt diplomatic ties." They must also have minimum assets allocated for the establishment of the organization of USD1 million for a foreign legal entity and USD100,000 for a foreign individual. The Societal Organization Law was reviewed by the Constitutional Court in 2013 and decided in December 2014. While the Court ruled that the law is not too excessive in nature in light of Article 28J of the Constitution, some provisions in the Law considered to inflict undue risks to the principle of freedom of association were repealed. It should be noted that although the ICCPR was referred to in the petitioners' argument, the Constitutional Court based its decision only on its interpretation of the Constitution.

Freedom of expression also faces challenges, among others, because of Law No. 11 of 2008 on Electronic Information and Transactions (ITE), which has been used arbitrarily for alleged defamatory comments on social media.[37] In addition, the government's failure to protect civil rights of minority groups such as minority religions as well as the LGBT (Lesbian, Gay, Bisexual, and Transgender) community has been noted by a number of human rights advocacy groups[38] as well as the National Commission on Human Rights.[39]

International Covenant on Economic, Social and Cultural Rights (ICESCR) (in force 23 March 1976)

Date of Ratification: 23 February 2006. The treaty was ratified as a national law by Law No. 12 of 2005 regarding the Ratification of International Covenant on Economic, Social and Cultural Rights (ICESCR). While there have been improvements in terms of economic, social and cultural rights in Indonesia, the implementation of the ICESCR in Indonesia still needs major improvements, such as on the right to social security and to an adequate standard of living, right to health, labour rights, right to land, right to

36 'NGO Law Monitor: Indonesia,' *The International Center for Not-for-Profit Law*, Last updated 16 November 2015, http://www.icnl.org/research/monitor/indonesia.html, accessed Feb 26, 2016.

37 http://news.detik.com/berita/2908891/puluhan-orang-sudah-jadi-korban-pasal-27-uu-ite, accessed Feb 24, 2016.

38 See, for example, Human Rights Watch, "Indonesia: Don't Censor LGBT Speech. Parliamentary Proposal Latest Attack on Gay Rights," March 9, 2016 <https://www.hrw.org/news/2016/03/09/indonesia-dont-censor-lgbt-speech>, accessed March 9, 2016; Human Rights Watch, "Indonesia: Ahmadiyah Community Persecuted. Subang Authorities Ban Religious Minority's Activities, February 11, 2016, <https://www.hrw.org/news/2016/02/11/indonesia-ahmadiyah-community-persecuted>, accessed Feb 26, 2016; Amnesty International Report on Indonesia 2015/2016 <https://www.amnesty.org/en/countries/asia-and-the-pacific/indonesia/report-indonesia/> accessed Feb 26, 2016.

39 Information provided by the national human rights institution of the State under review accredited in full compliance with the Paris principles, March 9, 2012, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/118/12/PDF/G1211812.pdf?OpenElement>, accessed Feb 25, 2016.

housing, and right to education, especially for people living in remote areas.[40] It is hard to gauge whether the convention has been taken into account in the design of developmental policies.

Convention on the Elimination of all forms of Discrimination Against Women (in force 3 September 1981)

Date of Ratification: 13 September 1984. The treaty was ratified as national law by Law No. 7 of 1984 regarding the Ratification of Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). A number of relevant laws have been enacted since the CEDAW ratification, for example Law No. 21 of 2007 regarding the Eradication of Human Trafficking and Law No. 23 of 2004 regarding the Elimination of Domestic Violence. Nevertheless, discrimination against women is still rampant, due to cultural and religious thoughts that undermine gender equality.

Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (in force 26 June 1987)

Date of Ratification: 28 October 1998. The treaty was ratified as national law by Law No. 5 of 1998 regarding the Ratification of Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment. Although the principles have been ratified, in reality there remain to be reports regarding the use of torture by police officers to obtain statements, inhumane treatments (and killings) by the military and the police in conflict areas such as West Papua, and the use of flogging as punishment in Aceh Province under Sharia Law.

Convention on the Rights of the Child (in force 2 September 1990)

Date of Ratification: 5 September 1990. The convention was ratified by Presidential Decree No. 36 of 1990 regarding the Ratification of Convention on the Rights of the Child. Later in 2012, two laws were enacted to ratify two optional protocols of the convention, namely Law No. 9 of 2012 regarding the Ratification of Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and Law No. 10 of 2012 regarding the Ratification of Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

An important law to implement this treaty was enacted in 2012, namely Law No. 11 of 2012 on Juvenile Justice System. This Law has a strong focus on the diversion of juveniles away from the prison system. It includes a fundamental change of juvenile law enforcement orientation from punishment to restorative justice.[41]

40 For example, UN Committee on Economic, Social and Cultural Rights in its 2014 concluding observations for Indonesia noted that while some policies such as universal health coverage are commendable, the government's performance can still be further improved in a number of areas, including more effective prohibition of discrimination in providing economic, social and cultural rights, conditions of work in the informal sector, domestic worker situation in home and abroad, child marriage, human rights impact of mining and plantation operations as well as forced evictions. See: *The United Nations Committee on Economic, Social and Cultural Rights Concluding Observations on the Initial Report of Indonesia*. E/C.12/IDN/CO/1. June 19, 2014. Accessed May 7, 2016. http://www.refworld.org/publisher,CESCR,CONCOBSERVATIONS,IDN,53c788264,0.html.

41 The new law guarantees a number of important changes. These include a diversion mechanism; a family and community based reconciliation approach; specialised justice systems for child offenders, victims and witnesses; capacity development of law enforcement agencies; and restorative justice principles.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (in force 1 July 2003)

Date of Ratification: 31 May 2012. The Convention was ratified by Law No. 6 of 2012 regarding the Ratification of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Before the ratification of this convention a law concerning migrant workers was enacted in 2004, namely Law No. 39 of 2004 regarding Placement and Protection of Indonesian Workers Abroad. This Law, however, contains provisions that put Indonesian migrant workers in a weak position, with lack of clear enforcement mechanism and the lack of government protection abroad. A number of human rights advocacy groups have been pushing the government to amend the law and policy concerning migrant workers in accordance with the convention.

Convention on the Rights of Persons with Disabilities (in force 3 May 2008)

Date of Ratification: 30 November 2011. The Convention was ratified by Law No. 19 of 2011 regarding Convention on the Rights of Persons with Disabilities. Further, Law No. 8 of 2016 on People with Disability was enacted on 15 April 2016.

International Convention for the Protection of All Persons from Enforced Disappearance (entry into force 23 December 2010)

On 27 September 2010, the Indonesian government signed the Convention for the Protection of All Persons from Enforced Disappearance. However, until this report is written, it has not been ratified although the ratification bill has been tabled since 2015.

Other main relevant international instruments	Ratification, accession or succession
Convention on the Prevention and Punishment of the Crime of Genocide	Yes
Rome Statute of the International Criminal Court	No
Palermo Protocol	No
Refugees and stateless persons	No
Geneva Conventions of 12 August 1949 and Additional Protocols thereto	Conventions only
ILO fundamental conventions	Yes
UNESCO Convention against Discrimination in Education	Yes

Source: UN Universal Periodic Review 2008

Interpretation and Use of the 'Rule of Law'

Since 1998, the government has been issuing five-year National Action Plans on Human Rights (*Rencana Aksi Nasional Hak-Hak Asasi Manusia* or RANHAM). They contain detailed plans ranging from human rights trainings in the regions to ratifications of international covenants. The government also issued the National Strategy and Action Plan on Corruption Eradication for 2010-2025 (*Strategi Nasional dan Rencana Aksi Pemberantasan Korupsi 2010-2025 or Stratnas PK*).

Additionally, the government formally acknowledges the rule of law in the National Long Term Development Plan 2005-2025 and the National Medium Term Development Plans. The current Medium Term Development Plan (2015-2019), for example, identifies law and justice as intrinsically linked to the nation's political and economic development objectives. Without rule of law, investors and the private sector cannot operate with confidence. The legal development component of the MTDP focuses on "achieving greater enforcement and awareness of legal norms." The MTDP, in turn, proposes that this be achieved by focusing on three objectives: improved transparency, accountability and speed in law enforcement; improved effectiveness of corruption prevention and eradication; and respect, protection and fulfilment of human rights.

For the purpose of implementing the plan, the government, through the State Ministry of National Development Planning ("*Badan Perencanaan Pembangunan Nasional*"), specifically developed the National Strategy on Access to Justice that aims to strengthen Indonesia as a *negara hukum*.[42]

Although the government's commitment looks good on paper, there are challenges in implementation. Challenges occurred mainly in reforming legal institutions that did not have procedures and mechanisms (such as recruitment and oversight mechanisms) that promote independence and professionalism. In addition, the government also faces challenges in regard to the rights of minority, such as the minority religious groups and LGBT groups. The challenge may be caused by lack of understanding about constitutional rights and the inability of the government to stand against intolerant groups.[43]

42 See the website of the project: http://akseskeadilan.org/, accessed Feb 26, 2016.

43 There are even cases where the government and/or the legislatures issued regulations that are not in accordance with the rule of law principles. See, for example, Setara Institute's Tolerant City Index 2015 that provides ranks of cities based on (1) state rules on religion, (2) favouritism, and (3) social rules: http://setara-institute.org/en/english-tolerant-city-index-2015/, accessed May 1, 2016.

TABLE 2
ADMINISTRATION OF JUSTICE GRID

Indicator	Figure
No. of judges in country	Supreme Court, including all courts under it: 8,097[44] Supreme Court Justices: 54 Constitutional Court: 9
No. of lawyers in country	In 2014, the head of Peradi claimed to have 26,000 members.[45] (Peradi members only, not including judges and state prosecutors.) In early 2016, Peradi claimed to have more than 35,000 members.[46]
Annual bar intake (including costs and fees)	The numbers are fluctuating until now as the system was reformed in 2006. In 2015, 88.7% (4,574 of 5,154);[47] in 2010, 25% (832 of 3,325); in 2009, 57.1% (1,915 of 3,352); in 2008, 36.1% (1,323 of 3,665); and in 2007, 30.3% (1,659 of 5,473).[48] Cost: IDR1,250,000 (94.77USD) for taking the bar exam. The cost of obligatory special education for advocates prior to taking the bar exam varies depending on the course provider.
Standard length of time for training/qualification	Advocates: special education for advocates (several weeks) and 2 years internship. Judge: 106 weeks or 2 years.
Availability of post-qualification training	Required for promotion of judges and prosecutors. Required by the bar association for advocates.
Average length of time from arrest to trial (criminal cases)	111 days (maximum number of days allowed by the Law on Criminal Procedure)
Average length of trials (from opening to judgment)	290 days: 90 days at the district court, 90 days at the high court and 110 days at the Supreme Court (maximum number of days allowed by the Law on Criminal Procedure)

44 2015 Annual Report of the Supreme Court, published in 2016.

45 http://www.hukumonline.com/berita/baca/lt52f9f0d0cbc4f/advokat--profesi-idaman-anak-muda-indonesia.

46 Peradi Gelar Pro Bono Award Untuk Advokat Yang Jalankan Bantuan Hukum Gratis, RMOL, Jan 30, 2016 <http://www.rmol.co/read/2016/01/30/234081/Peradi-Gelar-Pro-Bono-Award-Untuk-Advokat-yang-Jalankan-Bantuan-Hukum-Gratis->, accessed Feb 27, 2016

47 http://www.hukumonline.com/berita/baca/lt565d724d71a16/tingkat-kelulusan-ujian-peradi-gelombang-ii-mencapai-88-7

48 PERADI bar intake number. Source: PERADI, as published in hukumonline.com <http://hukumonline.com/berita/baca/lt4d562a11cdf2f/angka-kelulusan-ujian-advokat-2010-terjun-bebas-> accessed 18 February 2011.

Accessibility of individual rulings to public	Rulings are accessible on the Supreme Court's website.[49]
Appeal structure	District court → high court → Supreme Court
Cases before the National Human Rights Institution	The National Human Rights Commission received 8,249 complaints in 2015.[50]
Complaints filed against the police, the military, lawyers, judges/ justices, prosecutors or other institutions (per year)	Prosecutors: 77 prosecutors sanctioned in January-June 2010.[51] There is a decrease since the last report: 156 prosecutors in 2010. Complaints filed with the Ombudsman in 2015: 117.[52] Constitutional Court: 1 complaint resulted in 1 justice being given notice in 2011, but he resigned. The Chief Justice of the Constitutional Court, Akil Mochtar, was arrested by the Anti-Corruption Commission in October 2013 and removed immediately by the Court. He was found guilty by the Court in June 2014 and the decision was upheld by the Supreme Court in February 2015. Supreme Court: 1,408 complaints submitted in 2015, 266 disciplinary sanctions taken by the Court. In addition, 6 justices were tried in the Judge's Honorary Council, in conjunction with the work of the Judicial Commission.[53] Police: based on the press release quoted by the media, in 2014 9,892 police officers received disciplinary sanctions.[54] There is no data in 2015. The Police does not publish reports. Reports against the police filed with the Ombudsman: 806.[55]
Complaints filed against other public officers and employees	Reports filed with the Ombudsman in 2015.[56] - Against local government: 2,853 - Against military personnel: 39

49 *Mahkamah Agung Republik Indonesia*, https://www.mahkamahagung.go.id/ (accessed 21 April 2016).

50 Source: Komnas HAM website <http://www.komnasham.go.id/laporan-pengaduan>, accessed Feb 27, 2016.

51 Data from the AGO's website https://www.kejaksaan.go.id/unit_kejaksaan.php?idu=26&idsu=24&id=4150, accessed Feb 27, 2016.

52 Ombudsman's Statistical report 2015 http://ombudsman.go.id/index.php/laporan/laporan-statistik.html, last accessed Feb 27, 2016.

53 2015 Annual Report of the Supreme Court, published in 2016.

54 Pemberian Sanksi terhadap Anggota Polri Meningkat di Tahun 2014, *Kompas.com*, Dec 30. 2014 http://nasional.kompas.com/read/2014/12/30/22293311/Pemberian.Sanksi.terhadap.Anggota.Polri.Meningkat.di.Tahun.2014, accessed Feb 26, 2016.

55 Ombudsman's Statistical report 2015 http://ombudsman.go.id/index.php/laporan/laporan-statistik.html, last accessed Feb 27, 2016.

56 Id. There are many other institutions and groups of institutions (such as "ministries) in the statistics, which cannot all be explained in this Grid. Ombudsman further classifies the numbers according to the substance of the report, such as health, environment, etc; and types of complaints, such as discrimination, conflict of interest, undue delay, etc.

II. COUNTRY PRACTICE IN APPLYING THE CENTRAL PRINCIPLES OF RULE OF LAW FOR HUMAN RIGHTS

A. On Central Principle 1 (Government and its officials and agents are accountable under the law)

Definition and Limitation of the Powers of Government in the Fundamental Law

There is no change since 2011. As indicated in the *2011 Rule of Law Baseline Study*, the Constitution provides a set of provisions regarding the power of the executive, legislative and judicial bodies. It regulates the term for the elected President and Vice President and provides an impeachment mechanism for acts of treason, corruption, bribery, other serious criminal offences, or moral turpitude as well as when the President and/or the Vice-President no longer meets the qualifications to serve as President and/or Vice President. The manner of electing or appointing members of the legislature and judiciary are also stipulated.

The Constitution establishes a system of checks and balances. For example, government policies can be questioned in the State Administration Court, while the constitutionality of laws can be challenged in the Constitutional Court. Government Regulations, Presidential Regulations and Local Regulations can be brought to the Supreme Court for review.

The Constitution also provides for the independence of the judiciary,[57] with a Judicial Commission that has the authority to "propose candidates for appointment as justices of the Supreme Court and… maintain and ensure the honour, dignity and behaviour of judges."[58]

Amendment or Suspension of the Fundamental Law

There is no change since 2011. Constitutional amendments require a proposal by at least 1/3 of the members of People's Consultative Assembly. A minimum of fifty per cent plus one members of the total member of the People's Consultative Assembly must vote in favour of the amendment in a session that is attended by at least 2/3 of the total membership of the Assembly.[59]

Laws Holding Public Officers and Employees Accountable

Some changes have been made in the legal framework since the 2011. There are various laws that aim to hold public officials and employees accountable, although written permission is required to initiate an investigation against high-ranking officials.

As mentioned in the previous study, written permission was required under Law No. 27 of 2009 with regard to investigations by law enforcers of members of the House of Representatives. This law has been replaced by Law No. 17 of 2014, which maintains the requirement for a written permission from the House Honor Tribunal, except if members of the House of Representatives are (i) caught committing a crime, (ii) suspected

57 Article 24(1), Constitution.

58 Article 24B(1), Constitution.

59 Article 37, Constitution.

of committing a crime punishable by death or imprisonment for life or a crime against humanity and the security of the state based on sufficient preliminary evidence, or (iii) suspected of committing a special crime. However, there is Constitutional Court Decision No. 76/PUU-XII/2014 that effectively changed the meaning of the provision so that the written permission from the president is required to investigate members of the House of Representatives, House of Regional Representatives, and the People's Consultative Assembly, with the same exceptions as stated above. For the local House members, permission from the Minister of Home Affairs is required.[60]

Similarly, although Law No. 32 of 2004 on Regional Government has been repealed by Law No. 23 of 2014 on Local Government, the new law still requires written approval prior to investigation against local leadership. Article 90 states that, with regard to governors and vice governors, written approval shall be sought from the President; with regard to regents, vice-regents, mayors and deputy mayors, approval should be obtained from the Minister of Interior Affairs. The investigation may be initiated if (i) written permission is not granted 30 days after the request was received (a reduction from the 60 days given in the previous law), (ii) the official is caught in the act of the crime, or (iii) the official is suspected of committing a crime that carries the capital punishment or a crime related to state security. Bases for dismissing governors, vice governors, regents, vice-regents, mayors, deputy mayors, and members of the provincial assembly, as well as the procedure to be followed are also stipulated in the law.[61] The grounds and procedure for impeaching the President and Vice-President are provided for in the Constitution.

As to the implementation of the Code of Ethics for judicial officers, internal oversight over judges under the Supreme Court is conducted by the Supreme Court Supervisory Body (*Badan Pengawasan Mahkamah Agung*) led by the Deputy Chief Justice on Supervision. This body handles reports on misconduct of judges and court clerks as well as receives complaints from the public. External oversight is conducted by the Judicial Commission. (*See* Part I. on "Key Rule of Law Structures.") There is no permanent oversight over the justices in the Constitutional Court; instead, a Council of Ethics of the Constitutional Court shall be set up when an inquiry on misconduct is to be conducted.

Special Courts and Prosecutors of Public Officers and Employees

There are no dedicated courts and prosecutors that handle cases against public officers and employees.

B. On Central Principle 2 (Laws and procedures for arrest, detention and punishment are publicly available, lawful, and not arbitrary)

Publication of and Access to Criminal Laws and Procedures

There is no change in the condition relative to publication and access of criminal laws and procedures since 2011. The Penal Code, which is a translation of the Dutch colonial government code, and Law No. 8 of 1981 on Criminal Procedure are readily available in both Bahasa Indonesia and English. Laws are published in Bahasa Indonesia, the official language, with unofficial translations into English usually made by private publishers and non-governmental organizations. The government does not translate laws and regulations into English or local languages. According to Law No. 10 of 2004 on the Law Making Process, laws that have been approved by the House of Representatives and signed by the President are to be published in the

60 Article 122, Law No. 17 of 2014.

61 Articles 78, 79, 139, and 140, Law No. 23 of 2014.

State Gazette of the Republic of Indonesia. Laws are easily accessible as they are published by commercial as well as non-profit publishers both in printed and digital forms.

Accessibility, Intelligibility, Non-retroactivity, Consistency, and Predictability of Criminal Laws

There is no significant change since 2011. As noted in the *2011 Rule of Law Baseline Study*, while laws are readily accessible, they may not be very understandable, as they tend to be in a complicated writing style. Article 28I of the Constitution, Article 1 of the Penal Code, and Articles 4 and 18(2) of Law No. 39 of 1999 on Human Rights all provide for the non-retroactivity of criminal laws.

Predictability and consistency of criminal laws remains a challenge, since judges are not obliged to follow previous decisions of similar cases. The absence of sentencing guidelines also results in big differences in sentencing similar crimes. The out-dated Penal Code, of which an amended draft has been languishing in the Ministry of Law and Human Rights since 1981, has not been revised. While the House of Representatives and the executive government started to discuss the Draft Penal Code in July 2015, due to its extensive content, there has not been any significant development at the time this report is written.

In addition, widespread corruption in judicial institutions (AGO, courts, police) greatly undermines predictability of court decisions generally, including criminal laws. There are cases in which judges had been separately caught red handed by the Corruption Eradication Commission as they took bribes to change their convictions.[62]

Detention Without Charge Outside or During an Emergency

There is no change since 2011. Law No. 8 of 1981 on the Criminal Procedure allows investigators to detain for a maximum of 20 days for investigation, which may be extended by a prosecutor for a maximum of 40 days.[63] After the 60-day period, the investigator must release the suspect. Law No. 15 of 2003 on the Eradication of Terrorism, in Section 28, allows investigators to detain any person suspected of committing a criminal act of terrorism for seven days. For the "purpose of investigation and prosecution," a person may be detained for a maximum of six months.[64] Investigations may be instituted based on intelligence reports checked by the head of a District Court. Law No. 23 of 1959 on the State of Emergency allows preventive detention for a maximum of 50 days without charge.

In the aftermath of the January 2016 terrorist attacks in Jakarta, the government is reportedly considering revising the anti-terror law, with the view to broaden the definition of terrorism and raise the allowable length of time for detention without trial for up to three months from the one-week stipulation in the present law.[65]

62 See Powerful couple jailed for bribing court judges, politician, the Jakarta Post, March 15, 2016, http://www.thejakartapost.com/news/2016/03/15/powerful-couple-jailed-bribing-court-judges-politician.html, accessed May 1, 2016; Two Indonesian Anti-Corruption Judges Caught Red-Handed Receiving Bribes, the Jakarta Globe, August 17, 2012, http://jakartaglobe.beritasatu.com/archive/two-indonesian-anti-corruption-judges-caught-red-handed-receiving-bribes/, accessed May 1, 2016.

63 Articles 20 and 24, Law No. 8 of 1981 on the Criminal Procedure.

64 Section 25, Law No. 15 of 2003 on the Eradication of Terrorism.

65 Agustinus Beo Da Costa and Kanupriya Kapoor, Exclusive: Indonesia plans tougher anti-terrorism laws after Jakarta attack, *Reuters*, 16 February 2016, http://www.reuters.com/article/us-indonesia-security-exclusive-idUSKCN0VP1LS (accessed 23 April 2016).

Rights of the Accused

Freedom from Arbitrary Arrest, Detention without Charge or Trial, Extra-legal Treatment or Punishment, and Extra-Judicial Killing

There is no change since the *2011 Rule of Law Baseline Study*. The Constitution, Law No. 39 of 1999 on Human Rights and Law No. 8 of 1981 on the Criminal Procedure provide protection from arbitrary or extra-legal treatment or punishment, including inhumane treatment, torture, arbitrary arrest, detention without charge or trial and extra-judicial killing by the state.[66] Chapter VI of the Law on Criminal Procedure provides the procedures to ensure the rights of the accused and suspects. A procedure called "*pra-peradilan*" may be availed of to exercise the right to *habeas corpus*.[67] A suspect, his family or his attorney-in-fact may thus request a district court to examine the legality or illegality of an arrest or detention.

However, issues of abuse in the pre-trial stage and in detention centers consistently occur. Despite numerous reports of abuse, including torture, "No credible investigation has ever been conducted, while the police have sought to shield themselves from accountability by making illusionary pledges to investigate themselves." [68] The most recent incident that has been highlighted by the media and human rights groups is that of Siyono, suspected leader of an offshoot of the extremist group Jemaah Islamiyah. He died after he was arrested in March 2016 by Densus 88, the police's counter-terrorist wing.[69] Autopsy revealed that he was hit by a blunt object that broke six ribs. One of the bones pierced his heart, causing his death. Another wound was also found on his head. The House of Representatives has called on the National Counterterrorism Agency to coordinate with the National Police for the establishment of standard operational procedures in preventing terrorism.[70]

Between June 2014 and May 2015, the NGO Commission on the Disappeared and Victims of Violence (KONTRAS) recorded 84 reports of torture by the police involving 274 victims, including 16 cases of torture resulting in death. Many of these incidents involved the investigative General Crimes (Reskrim) units, also known as Criminal Investigation Division (CID) units. Although CID units comprise only 10 per cent of the police force, 95 per cent of complaints of police misconduct made to Komnas HAM in 2014 involved CID units.[71]

Excessive use of force and unjustified killings by both the military and the police have also been highlighted by human rights groups and the media. For instance, on 8 December 2014, soldiers shot to death five persons

66 Articles 28(G) and 28(I), Constitution; Articles 4, 33, 34, and 66, Articles 77-83, Law No. 39 of 1999 on Human Rights; and Law No. 8 of 1981 on Criminal Procedure.

67 Articles 77-83, Law No. 8 of 1981 on Criminal Procedure.

68 Indonesia: Police chief's shocking torture admission only tip of iceberg, *Amnesty International*, 21 April 2016, http://www.amnestyusa.org/news/press-releases/indonesia-police-chief-s-shocking-torture-admission-only-tip-of-iceberg (accessed 23 April 2016).

69 'Indonesia: Independent autopsy reveals anti-terror unit tortured victim to death,' *Asian Human Rights Commission*, 14 April 2016, http://www.humanrights.asia/news/urgent-appeals/AHRC-UAU-008-2016 (accessed 23 April 2016); Tia Asmara, 'Indonesian Police: Man Who Died in Custody was a Militant Leader,' *Benar News*, 5 April 2016, http://www.benarnews.org/english/news/indonesian/Siyono-04052016175208.html (accessed 23 April 2016).

70 Nurul Fitri Ramadhani and Nani Afrida, 'House asks BNPT, police for clear procedures,' *The Jakarta Post*, 14 April 2016, http://www.thejakartapost.com/news/2016/04/14/house-asks-bnpt-police-clear-procedures.html (accessed 23 April 2016).

71 US Department of State, *Country Reports on Human Rights Practices for 2015: Indonesia*, available at: http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dlid=252765#sthash.kspuhYW1.dpuf (accessed 24 April 2016).

aged between 16-18 years and injured 22 others.[72] The shooting occurred at a protest held in Papua over the brutal attack committed by a unit of Army Battalion 753 on Yulianus Yeimo, a 15-year-old boy, which had occurred the previous night. "Police and military personnel fired live ammunition at about 800 peaceful demonstrators, including women and children," who were armed with ceremonial hunting bows and had expressed their grievance through a traditional Papuan dance that involved shouting, running in circles and mimicking birdsong.[73]

Presumption of Innocence

There is no change since the 2011 Report. Presumption of innocence is acknowledged, with Article 18(1) of Law No. 39 of 1999 on Human Rights stating as follows: "Everyone arrested, detained, or charged for a penal offence has the right to be presumed innocent until proven guilty according to law in a trial at which he has had all the guarantees necessary for his defence, according to prevailing law." Article 8 of Law No. 48 of 2009 on Judicial Authority also provides for presumption of innocence.

Legal Counsel and Assistance

Several laws touch on the right to counsel. Article 54 of the Criminal Procedure Law states that, "For purposes of defence, a suspect or an accused shall have the right to obtain legal assistance from one or more legal counsels during the period of and at every stage of examination…." Article 56(1) of the Law on Criminal Procedure further obligates the official concerned at all stages of examination in the criminal justice process to assign legal counsel to a suspect or an accused who is (i) suspected of having committed an offense punishable by the death penalty or imprisonment of 15 years or more, or (ii) destitute, liable to imprisonment of five years, and without his or her own legal counsel. Any legal counsel who is assigned under this provision of the Law shall provide his or her assistance free of charge.

Article 18(4) of the Human Rights Law recognises the right to counsel in criminal cases. Articles 56(1) and (2) and 57(2) of Law No. 48 of 2009 on the Judicial Authority stipulate that anyone facing a criminal charge against him or her is entitled to legal aid and the state should cover all legal fees for those who cannot afford them until a "permanent legal force" (*kekuatan hukum tetap*) has been reached.[74]

Anyone who cannot afford to pay legal fees may avail of legal aid in accordance with Articles 4 and 5 of Law No. 16 of 2011 on Legal Aid. This is applicable with regard to civil, criminal and administrative matters and may be in the form of assistance, representation, defence or other appropriate action. Following the issuance of this Law and its implementing regulation, the Supreme Court issued Supreme Court Regulation No. 1 of 2014 on the Guidelines to Provide Free Legal Services for the Poor. (*See* Part II.D.)

Despite these legal provisions, the right to counsel is not regularly afforded to accused persons. In a report documenting 12 cases that involved crimes punishable by death, Amnesty International found that, in all

72 'A written submission to the UN Human Rights Council by the Asian Legal Resource Centre: Indonesia: Extrajudicial and summary executions remain a serious problem despite legal guarantees to the right to life,' *Asian Legal Resource Centre,* 8 June 2015, http://alrc.asia/indonesia-extrajudicial-and-summary-executions-remain-a-serious-problem-despite-legal-guarantees-to-the-right-to-life/ (accessed 23 April 2016).

73 'Indonesia: Security Forces Kill Five in Papua: Investigate Deadly Shooting of Peaceful Protesters,' Human Rights Watch, 10 December 2014, https://www.hrw.org/news/2014/12/10/indonesia-security-forces-kill-five-papua (accessed 23 April 2016).

74 Amnesty International, *Flawed Justice: Unfair Trials and the Death Penalty in Indonesia*, 2015, 26, available at: https://www.amnesty.org/en/documents/asa21/2434/2015/en/ (accessed 23 April 2016).

12 cases documented, the defendants did not have access to legal counsel from the time of arrest and at different stages of their trial and appeals. For example, Yusman Telaumbanua, who was detained on 14 September 2012 by the police for the murder of three men, received legal assistance only when the District Court appointed a lawyer on 29 January 2013.[75]

A report of the Institute for Criminal Justice Reform (ICJR) analysing court documents of 42 death penalty cases concluded that in seven of those cases the suspects were denied legal counsel at various stages of the proceedings.[76] ICJR also classified 11 of the 42 cases as "questionable" in terms of access to counsel, "as the decision stated that there is an indication of the lack of legal aid" among the identified formal procedural issues. Other legal matters with relation to the death row inmates include faulty application of procedure in submitting legal action, which is common due to the lack of legal knowledge of the death convicts as well as the lack of legal aid.

Knowing the Nature and Cause of the Accusation

There is no change in the law since the 2011 Report. Article 21(2) of the Law on Criminal Procedure requires investigators or public prosecutors to present a person to be detained with a warrant of detention or the ruling of a judge which sets forth, among others, the reason for detention and a brief explanation of the criminal case of which he is suspected or accused of.

A bill of indictment must also include "an accurate, clear and complete explanation of the offense of which accusation is made, stating the time and place where the offense was committed." A copy of the bill of indictment shall be sent to the suspect, his attorney in-fact or his legal counsel at the same time that the letter bringing the action is submitted to the district court. Where a public prosecutor changes a bill of indictment, he shall send a copy of it to the suspect or his legal counsel.[77]

Article 51 of the same Law also states that, "in order to prepare a defence, (a) a suspect shall have the right to be clearly informed in a language he understands about what he is suspected of at the time an examination begins; (b) an accused shall have the right to be clearly informed in a language he understands about what he is accused of."

Further, the Law on Criminal Procedure provides that, to aid his defence, a suspect or an accused has the right to obtain the assistance of counsel during and at every stage of his examination, as well as the right to contact and correspond with his counsel.[78]

Guarantees during Trial

There is no change in the law since the 2011 Report. Article 50 of the Law on Criminal Procedure states that accused persons "have the right to be promptly adjudicated by the court."

With regard to the right to be present, the Law states that if an accused who is not in detention fails to be present during the examination of a case, the head judge at trial shall ascertain if the accused was legally

75 Ibid.

76 Institute for Criminal Justice Reform (ICJR), *Overview on Death Penalty in Indonesia*, 2015, 11, available at: http://icjr.or.id/data/wp-content/uploads/2015/06/Overview-on-Death-Penalty-inIndonesia.pdf (accessed 23 April 2016).

77 Articles 143 and 144, Law No. 8 of 1981 on Criminal Procedure.

78 Articles 54, 57 and 62, Law No. 8 of 1981 on Criminal Procedure.

summoned. If the accused was not properly summoned, the trial shall be postponed and the accused summoned. If in fact the accused was properly summoned but failed to be present at trial without a valid reason, the examination of the case cannot continue and the head judge at trial shall order that the accused be summoned once again. If the accused is not present without valid reason after he has been summoned for the second time, the head judge at trial shall order that he be forced to be present in the next following trial session.[79] An accused person can be tried without their presence only in fishery, money laundering and corruption cases, after certain procedures have been conducted.[80]

Further, Article 65 provides for the right of an accused to seek and call a witness and/or a person with special expertise to provide testimony that is favourable to him.

Appeal

There is no change in the law since the 2011 Report. Article 67 of the Law on Criminal Procedure and Articles 23 and 26 of Law No. 48 of 2009 on Judicial Authority provide for the right to appeal against conviction and/or sentence to a higher court.

Freedom from Double Jeopardy

There is no change since the 2011 Report. Article 18 of the Human Rights Law states that "No one shall be charged more than once for an action or omission concerning which a tribunal has previously made a legally binding decision." Article 76 of the Criminal Code also prohibits persons from being tried or punished again for an offence for which they have already been finally convicted or acquitted.

Remedy before a Court for Violations of Fundamental Rights

There is no change in the law since the 2011 Report. Law No. 26 of 2000 establishes that gross violations of human rights that consist of genocide and crimes against humanity are to be tried by the Human Rights Court under the Court of General Jurisdiction. Besides such cases, there is still no specific provision on the right to seek a timely and effective remedy before a competent court for violations of fundamental rights. Remedy for violation of rights may be sought through the regular courts when acts result to injury or contravene a law, such as the Penal Code and other special laws.

79 Article 154, Law No. 8 of 1981 on Criminal Procedure.

80 Articles 36 and 37 of Law No. 15 of 2002 regarding Money Laundering Crimes, Article 38 of Law No. 31 of 1999 on the Eradication of Corruption, and Article 79 of Law No. 31 on Fishery as amended by Law No. 45 year 2009. This does not include the right to be represented by another person during criminal proceeding for traffic crimes (Article 214 of the Law on Criminal Procedure) and, pursuant to the Circular Letter of The Supreme Court No. 9 year 1985 on Decisions to be Announced Without the Presence of the Defendant, misdemeanors as determined by Article 205 of the Law on Criminal Procedure.

C. On Central Principle 3: (The process by which the laws are enacted and enforced is accessible, fair, efficient and equally applied)

Law Enactment

Openness and Timeliness of Release of Record of Legislative Proceedings

There has been no significant difference in terms of the legal framework surrounding openness and timeliness of legislative proceedings since 2011. The same provision about legislative meetings is adopted in the Law No. 17 of 2014 that replaced Law No. 27 of 2009, which was cited in the 2011 report. Specifically, the law states that all meetings of the parliament, including those at the provincial, regency, and city levels, are open—except for certain meetings that are declared closed.[81] Further regulation on session and meeting procedures shall be provided for in a Regulation on Procedures (or Code of Conduct) for the different parliaments.

The legislative bodies, however, have not done much to ensure that legislative proceedings are held with up to date notice and open to the public. As noted in the *2011 Rule of Law Baseline Study*, it is not easy to obtain information on the parliament's schedule. Their websites are not regularly updated with timely information on parliamentary sessions and legislative materials.

Timeliness of Release and Availability of Legislative Materials

Since 2011, there has been no significant change in terms of the legal framework and actual practice with regard to providing legislative materials in a timely manner. As noted in the previous *Rule of Law Baseline Study*, official drafts of laws and transcripts and minutes of legislative proceedings are not made available to the public in timely manner. The different parliaments at the national and local levels do not have an information management system that can make these documents easily accessible.

However, a positive difference is the more effective use of social media, such as Twitter, and collaborative work on technology employed by civil society. In 2014 *wikidpr.org* was launched, which is a platform for crowdsourcing information related to the House of Representatives. "DPR" in the name of the website is short for the House's name in Bahasa Indonesia, *Dewan Perwakilan Rakyat*.

Equality before the Law

The legal framework and practice are still the same as what were described in the *2011 Rule of Law Baseline Study*. Article 27 of the Constitution states that "All citizens shall be equal before the law and the government and shall be required to respect the law and the government, with no exception." Article 28D(1) further declares that "Every person shall have the right to recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law."

However, enforcement of these guarantees has continued to fall short. In fact, a number of cases of discrimination based on belief, sexual orientation, and political views, especially on communism, may cast

81 Article 229, 294,342, 392, Law No. 17 of 2014.

the assumption that they are sanctioned by the state. For instance, in October 2015, the well-known "Ubud Writers and Readers Festival" in Bali was pressured by the police to cancel panels, exhibition, and screening that are linked to the 50th anniversary of the massacre of the alleged communists in 1965.[82] The head of the Gianyar Regency Police, Farman, stated that the police's recommendation to cancel some sessions is in accordance with the Decree of the People's Consultative Assembly No. XXV of 1966 regarding the Prohibition of Communism in Indonesia and Law No. 27 of 1999 that regulates crimes related to state security.[83]

Along the same vein, in January 2016, the Minister of Research, Technology and Higher Education issued a statement that LGBT people "corrupt" Indonesian social norms and values, and therefore he would ban all LGBT activities in Indonesian universities. Later, on 3 February 2016, the Indonesian Broadcasting Commission (KPI) issued a letter recommending that all television and radio stations ban programs promoting LGBT activities in order to "prevent children from learning indecent behaviour." Furthermore, on 24 February 2016, the *Al Fatah Pesantren Waria*, a transgender Islamic boarding house in Yogyakarta was closed down by the local authorities after a complaint was filed by Front Jihad Islam, a hard-line Islamist organization.

Reparation for Crimes and Human Rights Violations' Victims/Survivors

There is no change since the 2011 Report. There is still no law providing a comprehensive scheme on reparation for victims of crime or human rights violations. Nonetheless, there are forms of reparation in practice, based on various laws. Law No. 13 of 2006 on the Protection of Witness and Victim provides the right to medical assistance and psycho-social rehabilitation to victims of gross violation of human rights.[84] A request for compensation for cases involving gross violation of human rights and restitution for victims of crime may be submitted to the court through the Witness and Victim Protection Agency (LPSK).[85] Government Regulation No. 44 of 2008 on Compensation, Restitution, and Assistance for Witnesses and Victims determines the procedures for the pursuance of the above rights through the agency. In 2011, a Joint Decree of the Ministry of Law and Human Rights, the Attorney General Office, the Commission for Corruption Eradication, and the LPSK was issued, further regulating the procedures to protect those who report crimes and cooperating witnesses. In 2015 LPSK announced that it had afforded protection and support for 323 victims and witnesses on cases ranging from human trafficking, corruption, sexual violence, to tax evasion.[86]

The *2011 Rule of Law Baseline Study* had mentioned that the Aceh Reintegration Board (*Badan Reintegrasi-Damai Aceh* or BRA) was established by the Decree of the Aceh Governor No. 330/032/2006 dated 11 February 2006 to manage programs on reintegration of former members of the Free Aceh Movement into the society. One of the agreed ways of reintegration was to provide compensation to the victims of the conflict between the Indonesian government and Free Aceh Movement. This compensation scheme was

82 ule of Law Baseline Studyion in the present law.r law.tives and signed by the President are to be Indonesian writers' festival forced to cancel events linked to 1965 massacre, the Guardian.com, Oct 23, 2015 http://www.theguardian.com/books/2015/oct/23/indonesian-writers-festival-forced-to-cancel-events-linked-to-1965-massacre, accessed Feb 27, 2015.

83 Ubud Writers Festival Batal Bahas G30S, Ini Alasan Polisi [Ubud Writers Festival was cancelled, this is the reason according to the police], Tempo.co, October 23, 2015 https://m.tempo.co/read/news/2015/10/23/114712469/ubud-writers-festival-batal-bahas-g30s-ini-alasan-polisi accessed Feb 27, 2016.

84 Article 6, Law No.13 of 2006 on the Protection of Witness and Victim.

85 Ibid, Article 7.

86 Ferri, Oscar. 'LPSK: Saksi dan Korban Kasus Perdagangan Orang Tertinggi 2015". Liputan 6. December 30, 2015. http://news.liputan6.com/read/2400935/lpsk-saksi-dan-korban-kasus-perdagangan-orang-tertinggi-2015. Accessed 07 May 2015

managed by the BRA. The BRA was dissolved in January 2013 as the reintegration of the former combatants of the Free Aceh Movement is considered done.

Also with regard to the conflict in Aceh, a key element of the 2005 Helsinki peace agreement which ended the 29-year conflict in Aceh was the establishment of a truth commission in Aceh. The Aceh Truth and Reconciliation Commission (TRC) bylaw (Qanun No. 17/2013 tentang Komisi Kebenaran dan Rekonsiliasi) was passed by the Aceh parliament on 27 December 2013. On 21 November 2015, the Aceh provincial parliament announced the appointment of five members of the selection team for the Aceh TRC. The selection team has the mandate to propose 21 candidates as commissioners to the Aceh parliament, which will eventually select seven commissioners. The Aceh TRC is expected to operate between 2016 and 2021.[87]

Law Enforcement

Equal Protection Before the Law and Non-Discrimination

Equal protection and non-discrimination remain as challenges. There are cases showing different treatments provided to different groups. Many cases of discrimination against religious minorities, either sanctioned or condoned by the state by omission have been found in the country, as extensively discussed in the Indonesia Country Report in HRRC's recent report on freedom of religion in ASEAN.[88] Local governments, although they have no authority to implement laws based on sharia or religious consideration (unlike Aceh, which has special authority to implement sharia regulations), enforced regulations that mandate female modesty and discriminate against women. NGOs noted, for instance, that local anti-prostitution regulations in Bantul and Tanggerang have been used to detain women walking alone at night. As the US Department of State reports:

> According to the National Commission on Violence against Women, there were 365 local laws that were unconstitutional and discriminatory towards women. The Ministry of Home Affairs is responsible for "harmonizing" local regulations that are not in line with national legislation, and a 2014 law reinforces this authority, but to date the ministry has never invoked this authority to overturn discriminatory local regulations.[89]

Another example involves the treatment of members of the LGBT community. As mentioned above, they face legal challenges and prejudices not experienced by others. For example, "local regulations across the country criminalize same-sex sexual activity.… Under a local ordinance in Jakarta, security officers regard any transgender person found in the streets at night as a sex worker."[90]

87 'Indonesia: Appointment of Aceh truth commission selection team a step closer to truth and reparation for victims,' Amnesty International, 30 November 2015, https://www.amnesty.nl/nieuwsportaal/pers/indonesia-appointment-aceh-truth-commission-selection-team-step-closer-truth-and- (accessed 24 April 2016).

88 Bagir, Zainal Abidin, 'Indonesia Country Report in Human Rights Resource Centre,' *Keeping The Faith: A Study on Freedom of Thought, Conscience, and Religion in ASEAN*, 2014, 139-196.

89 US Department of State, *Country Reports on Human Rights Practices for 2015: Indonesia*, available at: http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dlid=252765#sthash.kspuhYW1.dpuf (accessed 24 April 2016).

90 Ibid.

D. On Central Principle 4: (Justice is administered by competent, impartial, and independent judiciary and justice institutions)

Appointment and Other Personnel Actions in the Judiciary and among Prosecutors

There is generally no change since the 2011 Report. Supreme Court justices are nominated by the Judicial Commission, selected by the House of Representatives, and appointed by the President. The retirement age for Supreme Court Justices is 70 years, but they can be dismissed based on disciplinary measures conducted by Honorary Council.[91] The promotion of judges in the lower courts is regulated in Government Regulation No. 41 of 2002. In line with the "one-roof" policy in regards the judiciary, the executive government does not have direct involvement in the appointment, promotion, assignment, discipline and dismissal of judges.

The Attorney General heads the Public Prosecution Service. He is appointed and removed by, and is directly accountable to, the President. Law No. 16 of 2004 on the Public Prosecution Service provides for the functions and duties of the Public Prosecution Service. Career path and promotion of prosecutors are generally regulated according to the government employee scheme, which is based on achievements and performance, while at the same time allowing for "regular promotion."

Training, Resources, and Compensation

The Judicial Training Center (*Pusat Pendidikan dan Pelatihan Mahkamah Agung* or JTC) of the Supreme Court provides a two-year integrated initial judicial training program for candidate judges.[92] This compulsory program trains candidates to perform all daily tasks at the court, *i.e.* court administration, case management, and judicial competence. The JTC also began offering "mid-career" judges with continuing judicial education. However, the training program is still a developing process, with subject matter and materials prepared on an ad hoc basis. In 2012, for instance, trainings focused on case management, the quality of decisions, and the Code of Ethics.[93] The manner of selecting participants for the continuing judicial education is not identified in available literature.

Prosecutors have four years of training in total. The two-year pre-inauguration training includes governance system, prosecutorial tasks and organizational culture. The two-year post-inauguration training includes leadership training, functional training on the work of a prosecutor, and technical training. Human rights topics are included in the curriculum, especially in relation to the human rights court.

As mentioned in the *2011 Baseline Study*, the salary of judges is considerably small compared to lawyers. There had been efforts to raise the total income of judges by granting them "judge's allowance" and "performance allowance." In 2012, in the wake of threats by judges to go on strike if their welfare was not looked into, the basic salary of district judges was raised from Rp1.976 million (around USD 150) a month to between Rp10 million and Rp11 million (around USD 760 to USD 830) a month. In addition, judges are also to receive benefits such as transport allowance, cost of living allowance and housing allowance.[94]

91 Law No. 3 year 2009 on the Second Amendment to Law No. 14 year 2015 on The Supreme Court of the Republic of Indonesia, Article 15

92 Human Rights Resource Centre, *Judicial Training in ASEAN: A Comparative Overview of Systems and Programs*, Konrad-Adenauer-Stiftung, Singapore, April 2014, 35-40.

93 Mahkamah Agung RI. *The Annual Report 2012*. (2013), 262.

94 Basic Salary of District Judges in Indonesia Raised to RM3,500,' NAM News Network, 25 July 2012, http://namnewsnetwork.org/v3/read.php?id=MjAxMjcx (accessed 24 April 2016).

State's Budget Allocation for the Judiciary and Other Principal Justice Institutions

Of the state budget for 2016, 29.8 per cent of the total budget of IDR 2,121,286.1 billion (around 160,794,113,165 USD) is allocated for the category of "politics, law, and defence," which includes the Supreme Court, Corruption Eradication Commission, Ministry of Defence, and a number of other ministries and institutions. The total budget for the Supreme Court amounts to IDR 8,964.9 billion (around 678,909,588 USD).[95]

Impartiality and Independence of Judicial Proceedings

Impartiality in judicial proceedings is a big problem in Indonesia, with the widespread so-called "case brokers" or "judicial mafia" comprising public officials or private corporations who deal with judges as well as court clerks to arrange the convictions.[96] It is such a serious problem that former President Yudhoyono set up a special task force to eradicate judicial mafia in 30 December 2009. The task force was dismissed in January 2012 after it transferred its works to relevant ministries, but the issue is still relevant today.

A case that has attracted significant attention involved the Chief Justice of the Constitutional Court, Akil Mochtar, who was arrested by the anti-corruption commission in October 2013. He was found guilty in June 2014 and the decision was upheld by the Supreme Court in February 2015. There is also a case involving a court clerk who was caught red handed by the Corruption Eradication Commission with an allegation of receiving bribes to change judges' conviction in a case. As this report is written, the investigation shows that the case may lead to a bigger case of a well-networked court staff and judges at the Supreme Court that can arrange how cases would be decided.[97]

Provision of Competent Lawyers or Representatives by the Court to Witnesses and Victims/Survivors

There is no data regarding the competence and the number of representatives provided by the court to witnesses and victims/survivors. However, the legal framework and the system exist. In 2011, the government enacted Law No. 16 of 2011 regarding Legal Aid, which regulates government-funded legal aid for the first time in Indonesia. With this Law, which has been effective since 2013, the government provides funds for accredited legal aid organizations based on the type of cases they handle. Following this Law and its implementing regulations, the Supreme Court issued Supreme Court Regulation No. 1 of 2014 on the Guidelines to Provide Free Legal Services for the Poor.

The 2014 Supreme Court regulation replaced the previous guideline that was explained in the *2011 Rule of Law Baseline Study*, namely Supreme Court Circular Letter (*Surat Edaran Mahkamah Agung* or SEMA) No. 10/Bua.6/Hs/SP/VII/2010 regarding Guidelines to Provide Legal Aid in Court. The 2011 report noted that the Circular Letter was not well-implemented. The new Supreme Court Regulation of 2014 simplifies

95 Kementerian Keuangan Republik Indonesia. *Buku II Nota Keuangan Beserta Rancangan Anggaran Pendapatan Dan Belanja Negara Tahun Anggaran 2016*. Kementerian Keuangan Republik Indonesia, 2016. Accessed April 26, 2016. 135 (The Ministry of Finance of the Republic of Indonesia, *Book II Financial Note and Draft State Budget for The Budget Year of 2016*. The Ministry of Finance of the Republic Indonesia)

96 Norimitsu Onishi, "In Indonesia, Middlemen Mold Outcome of Justice," The New York Times, Dec 19, 2009, http://www.nytimes.com/2009/12/20/world/asia/20indo.html?_r=0, accessed May 1, 2016.

97 Nurhadi money trail may lead to other bribery cases, The Jakarta Post, April 27, 2016, http://www.thejakartapost.com/news/2016/04/27/nurhadi-money-trail-may-lead-other-bribery-cases.html, accessed May 1, 2016.

the procedure for the justice seekers to be freed from any court fees. They will know immediately if they are eligible to undergo a "prodeo" procedure because the Regulation provides a system that allows the court clerks to decide on the matter directly.

Thus far, there is no record on the competence and the number of representatives provided by the court to witnesses and victims/survivors, but judging from the number of legal aid organizations accredited by the government (405 organizations nation-wide), the number of lawyers provided by the Court is still minimal compared to Indonesia's total population.

Safety and Security of the Judiciary, Prosecutors, Litigants, Witnesses, and Affected Public

There is no change in the law and in the situation since the 2011 Report. There are measures that provide for the safety and security of accused persons, prosecutors, judges and judicial officers before, during and after judicial, administrative, or other proceedings.

The Law on Criminal Procedure charges the head judge at trial with the duty to maintain rules of order and gives him or her the authority to order the removal of persons who display an attitude unbefitting the dignity of the court. The Law also prohibits the bringing of firearms, sharp weapons, explosives or devices which may endanger the security of the trial; whoever brings them shall be obligated to deposit them at a place especially provided for that purpose.[98] Further, Article 48 of Law No. 48 of 2009 regarding Judicial Authority obligates the police to safeguard the security of judges at all courts and the Constitutional Court. In addition, every court has its own rules of procedure to ensure safety and security. However, the courthouses often do not have adequate facilities, such as metal detectors, to enforce those legal procedures. As mentioned in the *2011 Rule of Law Baseline Study*, there have been cases where victims and witnesses and their families were attacked physically and verbally during trial.[99]

There is no data analysing the accessibility of courthouses, whether to disabled people or otherwise.

Specific, Non-Discriminatory, and Unduly Restrictive Thresholds for Legal Standing

There is no change since the 2011 Report. Legal standing before the courts is regulated in a number of laws. Citizens Law Suit is acknowledged based on Law No. 23 of 1997 on Environmental Management, Law No. 8 of 1999 on Consumer Protection and Law No. 41 of 1999 on Forestry. The Supreme Court issued Regulation No. 1 of 2002 on Class Action Procedure, providing details on the examination, court proceeding and decision on class actions. Legal standing for NGOs is regulated in Law No. 23 of 1997 on Environmental Management based on a landmark decision regarding an environmental case. Meanwhile, legal standing requirements for the Constitutional Court are clearly provided in the Law No. 24 of 2003 on the Constitutional Court. Specifically, individuals and entities may file judicial review petitions with the Constitutional Court if he/she is able to demonstrate that his/her constitutional rights are injured by the enactment of a law.

98 Articles 217-219, Law on Criminal Procedure.

99 As reported in the 2011 Report, a detailed list of incidents in the courtroom is available in Indonesian language at <http://www.reformasihukum.org/file/kajian/Tabel%20Data%20Tindak%20Kekerasan%20Di%20Pengadilan.pdf>, accessed 21 February 2011.

Publication of and Access to Judicial Hearings and Decisions

There is no change in the legal framework on publication and access to judicial hearings and decisions. According to Article 226 of the Law on Criminal Procedure, affected parties will obtain excerpts of the decision promptly after the judgment has been pronounced, but not the copy of the complete court decision. Affected parties may obtain decisions upon request. The same provision states that other persons may obtain a copy of the judgement with the permission of the head of the court after considering the purpose of such request."

There has been a positive development in the implementation of provisions surrounding access to court decisions. It was reported in the *2011 Rule of Law Baseline Study* that Decrees of the Chief Justice No. 144/KMA/SK/VIII/2007 regarding Access of Information at the Court and No. 1-144/KMA/SK/I/2011 regarding Guidelines in Providing Information at the Court faced challenges in their implementation. Since then, the Supreme Court has undertaken a number of measures to overcome these challenges. As of February 2015, there were 1,191,030 court decisions available for free online, compared to zero in 2007. In addition, as reported in its 2015 Annual Report, the Supreme Court has modernized the mechanism to make decisions available to affected parties, for example, by developing a system whereby the lower courts actively upload decisions to the website. In 2011, 36.98 per cent of all courts participated in the system and by 2015, 100 per cent of all courts have participated in the system so that the speed and accuracy in providing published decisions have significantly increased.[100]

Reasonable Fees and Non-arbitrary Administrative Obstacles to Judicial Institutions

There is no change since the 2011 Report. Court case fees vary depending on the type and scope of the case, but all courts are obliged to announce the fees in the court buildings based on the Decree of the Chief Justice on Judicial Transparency. The amount of the fees can be seen at the Information Desk of the court or at the website of the court. Supreme Court Circular Letter No. 10/Bua.6/ Hs/SP/VII/2010 dated 30 August 2010 allows fees to be waived for poor people, provided they submit documentation on their economic condition.

The problem lies with the unofficial fees that occur during the pre-trial process, especially during police custody and investigation by prosecutors. As the US Department of State noted, "Police commonly extracted bribes ranging from minor payoffs in traffic cases to large bribes in criminal investigations."[101]

Assistance for Persons Seeking Access to Justice

There is no change since the 2011 Report. Those seeking justice may ask for assistance from government institutions such as the police, Ombudsman, National Commission of Human Rights and National Commission on Violence against Women. (*See* Part I. on "Key Rule of Law Structures.") Persons may also avail of legal assistance based on Law No. 16 of 2011 regarding Legal Aid.

100 2015 Annual Report of the Supreme Court, 2016.

101 US Department of State, *Country Reports on Human Rights Practices for 2015: Indonesia*, available at: http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dlid=252765#sthash.kspuhYW1.dpuf (accessed 24 April 2016).

Measures to Minimize Inconvenience to Litigants and Witnesses, and their Families, Protect their Privacy, and Ensure Safety from Intimidation/Retaliation

There is no change since the 2011 Report. Article 48 of Law No. 48 of 2009 regarding Judicial Authority and Article 219 of the Law on Criminal Procedure stipulate for the safety of courtrooms. Further, Law No. 13 of 2006 on the Protection of Witness and Victim provides the following rights for victims and witnesses:

- To obtain protection on personal security
- To participate in the process of choosing and determining forms of protection and security support
- To provide testimony without pressure
- To have a translator
- To be free from deceiving questions
- To obtain information regarding the progress of the case
- To obtain information regarding the court decision
- To know in the case that the suspect is acquitted
- To obtain a new identity
- To obtain a new home
- To obtain reimbursement on transportation
- To obtain legal advice
- To obtain support for living costs until the protection period ends.

In this regard, a Witness and Victim Protection Agency was established to provide protection and assistance as stipulated in the Law. (*See* Part I. on "Key Rule of Law Structures.")

Available and Fair Legal Aid to All Entitled

As discussed above, in 2011, the government enacted Law No. 16 of 2011 regarding Legal Aid, which regulates government-funded legal aid. Effective as of 2013, the Law mandates the government to provide funds for accredited legal aid organizations based on the type of cases they handle. Following this Law and its implementing regulations, the Supreme Court issued the Supreme Court Regulation No. 1 of 2014 on the Guidelines to Provide Free Legal Services for the Poor. Under the Regulation, those entitled to receive aid are the poor, which are defined as justice seekers who are able to produce documents from their local authorities (village or *kelurahan* level) about their financial condition.

The system is generally fair. It requires the legal aid organizations providing legal aid services to file for reimbursements from the government, thereby the system is open for all justice seekers so long as they can prove their financial condition. Yet, there are weaknesses in the law, such as the reimbursement procedures and the need to address marginalized groups such as women and children, despite their financial conditions. At the time this report is written, there are 405 organizations accredited by the government.[102]

102 Decision of the Ministry of Law and Human Rights No. M.HH-01.HN.03.03 of 2016.

In addition to government-funded legal aid, there is also a requirement for advocates to provide pro-bono legal services. Law No. 18 of 2003 on Advocates Profession requires advocates (practicing lawyers) to have a minimum of 50 hours of pro-bono legal services per year.[103] However, Peradi, the Indonesian Bar Association, does not have any system to ensure the implementation of this article, especially with the conflict within the association in 2015. A proof of pro-bono hours was required to renew the bar membership until around 2011, but the Bar discontinued the system due to protests by the majority of members because of their inability to provide the proof. To fulfil its ethical obligation on this matter, Peradi set up a legal aid organization. Further, as of 2016, one of the three Bar Associations organizes an annual "Pro-Bono Award" to encourage its members to provide free legal services. It is, however, important to note that the pro-bono legal services by the advocates are not aimed specifically for the poor and there is no mechanism to ensure its use by the poor and marginalized groups.

General Public Awareness of Pro Bono Initiatives and Legal Aid or Assistance

There is no data on the level of awareness of the general public of the pro-bono initiatives/options for obtaining legal aid or assistance. The Court is obliged to inform the justice seekers about the options and refer them to the nearby accredited legal aid organizations.

III. INTEGRATING INTO A RULES-BASED ASEAN

Progress towards Achieving a Rules-Based ASEAN Community

On Mutual Support and Assistance on the Rule of Law

Although ASEAN integration and the ASEAN Economic Community (AEC) have been increasingly discussed in Indonesia lately, there have not been any measures taken in the development of strategies for strengthening the rule of law and judiciary systems and legal infrastructure in that regard. There are plans to strengthen the rule of law and judiciary systems, but they are not made for the purpose of ASEAN integration. They are mostly for purposes of meeting the needs of the country and are initiatives of the national government and its institutions.

There are policy measures taken by the Indonesian government in terms of ASEAN integration, but they are on the economic and trade areas.

On Legislative and Substantive Changes Promoting the Rule of Law

No official information regarding legislative and substantive changes in Indonesia that promote the rule of law in ASEAN (at a regional level) was found. However, it can be argued that Indonesia is one of the most democratic countries in ASEAN and, as such, has contributed significantly to ensuring that democratic principles are included in regional aspirations.

103 Article 22, Law No. 18 of 2003 on Advocates Profession.

> The proposal to transform ASEAN into a security community, which requires ASEAN to become a democratic entity, was first made by Indonesia in June 2003 at the ASEAN Senior Officials' Meeting…. By political development, Indonesia meant the imperative for ASEAN member states: (a) 'to promote people's participation, particularly through the conduct of general elections'; (b) 'to implement good governance'; (c) 'to strengthen judicial institutions and legal reforms'; and (d) 'to promote human rights and obligations through the establishment of the ASEAN Commission on Human Rights'. This proposal by Indonesia broke new ground for the working practices of ASEAN with regard to the place of democracy and democracy building in its official discourse.[104]

On Enactment of Laws relating to the ASEAN Community Blueprints and Similar Plans

Aside from presidential issuances in line with the AEC, there has not been any law enacted in regards the ASEAN Community Blueprints. The government has however showed its commitment in implementing the AEC through Presidential Instruction No. 11 of Year 2011 on the Implementation of Commitments of the Association of Southeast Asian Nations Economic Community Blueprint in 2011. Another is Presidential Decree No. 39 of 2014, which contains the Investment Negative List in Indonesia (*Daftar Negatif Investasi* or "DNI") that distinguishes between foreign ownership restrictions for non-ASEAN and ASEAN investors.[105]

On Integration as Encouraging Steps toward Building the Rule of Law

There has not been any real action taken by the government to build rule of law in the country that is encouraged particularly by the integration.

On the Contribution of ASEAN Integration to the Building of Stronger State Institutions

There is no apparent effect of the integration on building stronger state institutions.

Prospects and Challenges

Challenges to a Strengthened Commitment to the Rule of Law

There are changes in terms of Indonesia's commitment to the rule of law. However, there is no clear indication that the recent developments are linked to the ASEAN integration. The increase or decrease in the commitment to the rule of law in this paper has been framed in the domestic context. The ASEAN is yet to be seen as an important factor in Indonesia's political and social contexts, albeit more discourse has been taking place nationally about the regional association's impact in the context of trade and the economy.

104 Dr Rizal Sukma, *Democracy Building in South East Asia: The ASEAN Security Community and Options for the European Union*, International Institute for Democracy and Electoral Assistance 2009, 6, available at http://www.idea.int/resources/analysis/loader.cfm?csmodule=security/getfile&pageid=35040 (accessed 25 April 2016).

105 'Press Release: ASEAN Economic Community (AEC), from the Law and Business Point of View,' *HPRP Lawyers*, 21 May 2015, http://hprplawyers.com/asean-economic-community-aec-from-the-law-and-business-point-of-view/ (accessed 24 April 2016).

Commitments and Plans/Initiatives in relation to ASEAN-wide Commitments and Declarations on Human Rights

There has not been any specific plan on the state's conformity to ASEAN-initiated/formed commitments and declarations on human rights. Indonesia has signed the ASEAN Convention Against Trafficking in Persons, Especially Women and Children, Treaty on Mutual Legal Assistance in Criminal Matters, and ASEAN Convention on Counter Terrorism.[106] Up to date, there is no reliable data on changes made in terms of domestic legislation in this regard.

IV. CONCLUSION

With regard to rule of law and ASEAN integration in the Indonesian context, there is no apparent connection between the state's commitment to the rule of law and the ASEAN integration. While some improvements have been made relating to law enforcement and judicial institutions, none of the changes can be unequivocally claimed to be made specifically or in part for the purpose of ASEAN integration.

In general, Indonesia's commitment to the rule of law is increasing in terms of legal framework and policies. This is shown by the enactment of, for example, the Legal Aid Law and the passing of the Law on Disability. The Supreme Court continues its commitment to strengthen its institution as well as the courts under it according to the Blueprint of Court Reform 2010-2035 by, for instance, taking serious efforts to publish decisions online to increase their public access and by extension, the judiciary's transparency.

However, commitment to the rule of law cannot be measured only by making a list of laws, regulations, and institutional changes. It is important to also assess the state's actions in applying the legal framework and in protecting and promoting the rights of the citizens. In terms of taking action to protect constitutional rights of minority groups, such as the LGBT community and minority religious and political groups, there remains to be an expansive room for improvement for Indonesia's commitment.

Nexus of the Changes to the Overall State of the Rule of Law for Human Rights

There is no specific indication that the developments in ASEAN have influenced the rule of law for human rights in Indonesia. In fact, unfortunately, some recent changes in Indonesia do not promote the rule of law for human rights.

Contributing Factors

The changes in domestic politics, especially the president and the political parties in power, have been the main factors impacting the rule of law in Indonesia. There are studies on how the post-1998 legal framework as well as the political space on the rule of law have actually been used by the elites. This situation, with the exception of a number of regions with notably critical and human rights friendly local leaders, has not changed significantly since the fall of President Suharto in 1998.[107]

106 Masyarakat ASEAN [ASEAN Community], an information pamphlet published by the Indonesian Ministry of Foreign Affairs, 10th edition, December 2015, accessible on http://www.kemlu.go.id/Majalah/ASEAN%20Edisi%2010.pdf, last accessed Feb 27, 2016.

107 See, for example, Jeffrey A. Winters. "Oligarchy and Democracy in Indonesia". *Indonesia* 96 (2013): 11–33.

Role of the ASEAN Declaration on Human Rights in Strengthening Rule of Law for Human Rights

The ASEAN Declaration on Human Rights has not played a specific role in national developments pertaining to the rule of law and human rights in terms of the actions of the state. There is stronger cooperation among non-governmental actors, but there are challenges for member states of ASEAN with regard to addressing specific human rights issues. Additionally, while commitments have been made, they have yet to be acted upon and implemented in practice. There are wordings on security and mutual cooperation, for example, but there have not been any changes in terms of legislation and institutional reform that are directed towards the ASEAN integration.

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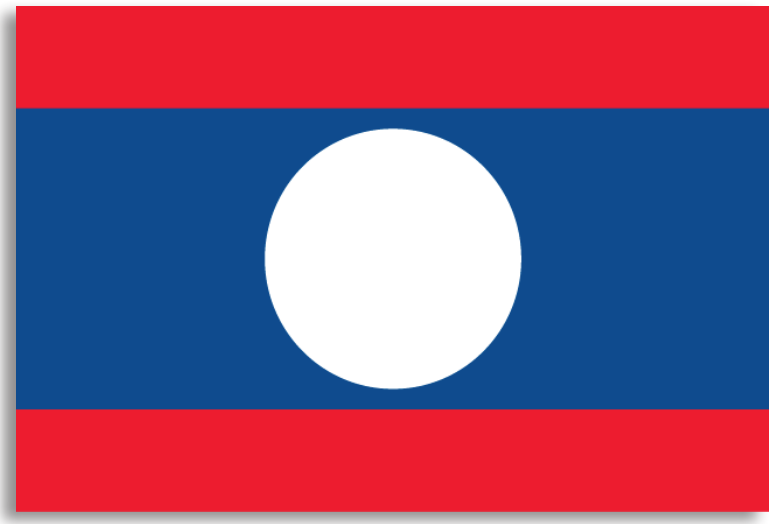
Lao People's Democratic Republic



LAO PEOPLE'S DEMOCRATIC REPUBLIC

TABLE 1

SNAPSHOT

Formal Name	Lao People's Democratic Republic
Capital City	Vientiane
Independence	2 December 1975
Historical Background	The multi-ethnic Lao people have existed and developed on this territory for thousands of years, starting from the middle of the 14th century, during the time of Chao Fa Ngoum, who founded the unified Lane Xang country. Since the 18th Century, the Lao land has been repeatedly threatened and invaded by outside powers. The Lao people enhanced the heroics and unyielding traditions of its ancestors, and continuously and persistently fought to gain independence and freedom. Since the 1930's under the leadership of the former Indochinese Communist Party until the present Lao People's Revolutionary party, the multi-ethnic Lao people have carried out difficult and arduous struggles until they managed to crush the yokes of domination and oppression of the colonial and feudal regimes and completely liberated the country—establishing the Lao People's Democratic Republic and opening a new era of independence and freedom for the Lao people.[1]
Size	Surface Area: 236,800 km^2; land: 230,800 km^2; water: 6,000 km^2
Land Boundaries	Total: 5,083 km Border countries: Burma 235 km, Cambodia 541 km, China 423 km, Thailand 1,754 km, Vietnam 2,130 km Coastline: 0 km (landlocked) Boundaries: North by China, on the East and Southeast by Vietnam, on the South by Cambodia, on the West by Thailand, and on the Northwest by Myanmar, with a total boundary length of 5,083 km (3,158 mi)
Population	6.7 Million (est. 2015) (increase of .3M from 2010); Urban population 37.6%.[2]
Demography	0-14 years: 37%; 15-64 years: 59%; 65 years up: 3% (2012); Male: 49.9%; Female 50.1% (2012)[3] Population growth: 1.6% p.a.; Life expectancy: 68.2 years

1 Preamble, Constitution of The Lao People's Democratic Republic, No. 25/NA, 6 May 2003 (Lao PDR) (hereinafter "**2003 CONSTITUTION**").

2 Bertelsmann Stiftung's Transformation Index (BTI) 2016 – Laos Country Report, (Guttersloh: Bertelsmann Stiftung), 2016, 2.

3 Lao Statistics Bureau, Statistical Yearbook 2013. <http://lsb.gov.la/en/Population%20and%20Demography1.php> accessed 28 February 2016.

Ethnic Groups	49 different ethnic groups were declared as a result of ethnic group reclassification in 2005. The majority of the population in Lao PDR is Lao which accounts for 55% of the whole population; 11% of the population are Khmou; 8% Hmong; and the rest is comprised of various groups, including the Akha, Singsil, Lue, Lamed, Tai, Katu, Triang and Harak, Oy and Brao. (2005 Population Census)
Languages	Lao (official), French, English, and various ethnic languages
Religion	Buddhist 66.8%, Other (Animist) 30.9%, Christian 1.5%, No Answer 0.7%, Muslim 0.03%, Bahai 0.02% (2005 census)[4]
Adult Literacy	Youth (15-24 years) literacy rate (%) 2008-2012: male 89.2%, female 78.7%[5]
Gross Domestic Product	US $12.00 billion (2014)[6] (from $5.7 billion in 2008)
Government Overview	Lao PDR is a single-party democratic state with the following organs of state power: The National Assembly as the legislative branch; the Government as the executive branch headed by the President; the People's Courts and the People's Prosecutor Offices as the judicial branch.
Human Rights Issues	Enforced disappearance; human trafficking; freedom of religion or belief; freedom of expression, association and peaceful assembly; and right to participate in public and political life[7]
Membership in International Organizations[8]	Asian Development Bank; Association of South-East Asian Nations; Food and Agriculture Organization; Group of 77; International Atomic Energy Agency; International Civil Aviation Organization; International Committee of the Red Cross; International Fund for Agricultural Development; International Finance Corporation; International Criminal Police Organization; International Labour Organization; International Monetary Fund; International; Telecommunications Union; Multilateral Investment Guarantee Agency; Organisation Internationale de la Francophonie; Permanent Court of Arbitration; United Nations; United Nations Conference on Trade and Development; United Nations Educational, Scientific and Cultural Organization; United Nations Industrial Development Organization; UN World Tourism Organization; World Customs Organization; World Health Organization; World Intellectual Property Organization; World Trade Organization[9]

4 Lao Statistics Bureau. The Lao PDR Population and Housing Census 2005, Table 1.5, 14.

5 Lao Statistics Bureau, Statistical Yearbook 2013. http://lsb.gov.la/en/Education1.php accessed 28 February 2016.

6 Lao PDR, World Bank. <http://data.worldbank.org/country/lao-pdr> accessed 27 February 2016.

7 *See* Lao People's Democratic Republic, 'Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21,' (A.HRC/WG.21/Lao/3) 24 October 2014, par. 14-15, 21-35,

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/191/35/PDF/G1419135.pdf?OpenElement> accessed 28 February 2016. *See also* Lao People's Democratic Republic, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21,' (A/HRC/WG.6/21/LAO/1) 5 November 2014.

8 The list of Lao PDR's membership to international organizations is not exhaustive.

8 Central Intelligence Agency. <https://www.cia.gov/library/publications/the-world-factbook/fields/2107.html> accessed 28 February 2016.

Human Rights Treaty Commitments	International Covenant on Civil and Political Rights (signature: 2000; ratification: 2009) *(reservation: article 22; declarations: arts. 1 and 19);* International Convention on the Elimination of All Forms of Racial Discrimination (accession: 1974); International Covenant on Economic, Social and Cultural Rights (signature: 2000; ratification: 2007); Convention on the Rights of Persons with Disabilities (signature: 2008; ratification: 2009); Convention on the Elimination of All Forms of Discrimination against Women (signature: 1980; ratification: 1981); Convention on the Rights of the Child (accession: 1991); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signature: 2010; ratification: 2012) (R*eservations: arts. 20 and 30, para. 1; Declarations: art. 1, para. 1 and part. 8, para. 2, 2012)*[10]

I. INTRODUCTION

The Lao People's Democratic Republic (Lao PDR) has undergone rapid economic and legal development since 2011, consistent with its intention towards regional and international integration and increased democratic governance.

Lao PDR is a single-party state established in 1975 and governed by the Lao People's Revolutionary Party (LPRP). Between 1975 and 1991, there was no constitution and very few laws were adopted by the Lao Government, with no established hierarchy of laws.[11] The promulgation of the 1991 Constitution as the country's fundamental law signified the country's move towards becoming a "rule of law state."[12] It defined the state's political regime, socio-economic system, fundamental rights and obligations of citizens, defence and foreign affairs, the system of organization of the state apparatus, and for the first time, guaranteed the people's right to self-determination.[13]

The Constitution declared Lao PDR to be a People's Democratic State where "(a)ll powers are of the people, by the people and for the interests of the multi-ethnic people," whose rights are exercised and ensured

10 UN Human Rights Council, 'Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21:Lao People's Democratic Republic' (A/HRC/WG.6/21/Lao/2) 12 November 2014, 2. *See also* United Nations Treaty Collection. <https://treaties.un.org/Pages/TreatyParticipantSearch.aspx?tab=UN> accessed 28 February 2016.

11 United Nations Development Programme Lao PDR and Ministry of Justice, 'The Law-Making Process in Lao PDR: A Baseline Study,' (Vientiane) November 2015, 1.

12 Ibid.

13 *See* Preamble, Constitution of the Lao People's Democratic Republic, 13-15 August 1991 (Lao PDR) (hereinafter "**1991 Constitution**").

through the political system, with the LPRP as "its leading nucleus."[14] The National Assembly, composed of representatives elected by the people, oversees the activities of the executive and judicial state organs,[15] with the three branches operating under the principle of "democratic centralism."[16] In 2003, the Constitution was amended to further enhance the state's commitment towards the rule of law, with new and revised articles that expounded on the socio-economic system and laid down the powers and functions of each state organization.[17]

In 2009, Lao PDR launched its Legal Sector Master Plan (LSMP) with the view to develop Lao PDR as a rule of law state by the year 2020. The LSMP sets out four central pillars for the development of the Laotian legal system:

Pillar One:	Framework of laws, decrees and regulations;
Pillar Two:	Law-related institutions that implement the legal framework;
Pillar Three:	Means for educating and training on the use of the system;
Pillar Four:	Means for ensuring that all laws and regulations are accessible to both state agencies and citizens.[18]

The LSMP, which was implemented with the assistance of the United Nations Development Programme in Lao PDR, has made much progress towards its objectives over the past five years.[19]

Between 2011 and 2015, important laws were passed by the Lao PDR Government in accordance with its five-year law-making master plan, under Pillar One of the LSMP. This includes the amendment of the Law on Civil Procedure and the Law on Criminal Procedure in 2012,[20] superseding the procedural laws that were passed in 2004. The Baseline Study on the Law-Making Process in Lao PDR at the end of 2015 considered that the Lao legal framework could be said to be "complete," when compared to laws in ASEAN countries, "with the understanding that more work still needs to be done to make the framework "law in action" as opposed to "law on books."[21]

A legislation of particular importance for rule of law is the Law on Legislation, enacted in 2012,[22] which addressed the lack of transparency and systemization of laws in the country. This Law clarifies the hierarchy of normative legal documents and provides a general format and content of laws. It also provides detailed requirements in the law-making process, including the posting of drafts, public consultations, and impact

14 Articles 2 & 3, 1991 Constitution.

15 Articles 4 & 39, 1991 Constitution.

16 Article 5, 1991 Constitution.

17 *See* 2003 Constitution.

18 UNDP Lao PDR, 'Framework Document: Support Project for Implementation of the Legal Sector Master Plan," 2013, 14. <http://www.la.undp.org/content/dam/laopdr/docs/Project%20Documents/Governance/UNDP_LA_SPLSMP_%20Prodoc.pdf> accessed 28 February 2016.

19 Ibid. *See also* United Nations Development Programme Lao PDR, SPLSMP Project in Brief, November 2015.

20 These amendments were published in the Lao PDR Official Gazette website on 5 February 2014 and 21 February 2014, respectively.

21 Supra note 11, ii.

22 Law on Legislation, No. 19/NA, 12 July 2012 (Lao PDR) (hereinafter "**Law on Legislation**"). This law is also referred to as the Law on Making Legislation and the Law on Laws.

assessment reports prior to its submission to the National Assembly for consideration. It also mandates that all laws be published before they come into force, which spurred the launch of the Lao Official Gazette website in late 2013. This marked a significant step towards greater transparency in the country's legal system.

On 8 December 2015, the seventh National Assembly passed the second amendment to the Constitution. The new Constitution was signed by the President of State on 15 December 2015 and came into force on 19 February 2016.[23] While retaining the fundamental principles and structure of government, this Constitution contained amendments that clarified the role of the different authorities and limited the tenure of the President and other government officials to two consecutive terms. It also introduced three new chapters: Local People's Assembly, State Audit and the Election Committee.[24]

Lao PDR is a party to seven (7) core international human rights conventions. Subsequent to the Human Rights Resource Centre's *Rule of Law for Human Rights in the ASEAN Region: A Baseline Study*[25] the Lao Government ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2012. In addition, it is reported to be preparing to ratify the Convention on the Protection of All Persons from Enforced Disappearance (CED), which it signed in 2008.[26] It also joined the World Trade Organization in 2013,[27] and this was viewed as another step towards developing a stronger legal system and stronger institutions to achieve integration into the global economy.[28]

With these developments, a substantial portion of the Lao PDR legislation referred to in the *2011 Rule of Law Baseline Study*[29] has been amended or superseded.

23 The amended Constitution became effective 15 days from its publication on the Lao PDR Official Gazette on 04 February 2016, in accordance with the publication requirement set forth in Art. 80 of the Law on Legislation.

24 Constitution of the Lao People's Democratic Republic, No. 63/NA, December 2015 (Lao PDR) (hereinafter"**2015 Constitution**"). *Note: Only the official Lao language document of the 2015 Constitution was available at the time of writing; an unofficial English translation of the document was used as reference for this report.*

25 *See* Human Rights Resource Centre, 'Rule of Law for Human Rights in the ASEAN Region: A Base-line Study', (Jakarta, Indonesia) 2011.

26 Lao People's Democratic Republic, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21,' (A/HRC/WG.6/21/LAO/1) 5 November 2014, par. 9.

27 World Trade Organization. <https://www.wto.org/english/thewto_e/countries_e/lao_e.htm> accessed 14 March 2016.

28 *See* Alexandra Sander, 'Laos' WTO Membership Will Help Bolster Rule of Law,' CogitASIA (26 October 2012). <http://cogitasia.com/laos%E2%80%99s-wto-membership-will-help-bolster-rule-of-law/> accessed 14 March 2016.

29 Supra note 25, 121-129.

TABLE 2
ADMINISTRATION OF JUSTICE GRID

Indicator	Figure
No. of judges in country	375 judges and 29 military judges (as at 2011)[30]
No. of lawyers in country	188 (as at December 2015)[31]
Annual bar intake (including costs and fees)	No information available
Standard length of time for training/qualification	Lawyers: A Bachelor of Laws degree; has professional training as a lawyer; has undergone law internship and experience in legal works (12 months of training with the Lao Bar Association); passed examination for lawyers; not a civil servant, soldier or police in active service[32] Judges: A law degree; trained according to the curriculum for judges; natural born Lao citizen; at least 25 years of age; has strong political commitment; has good behaviour, loyal to the nation, good deontology, honest in performance of duty, in good health[33]
Availability of post-qualification training	Short training courses are provided to judges and other staff in legal and judicial institutions[34]
Average length of time from arrest to trial (criminal cases)	No information available
Average length of trials (from opening to judgment)	No information available
Accessibility of individual rulings to public	Judgments and decisions are available to the litigants

30 'Information Sheet – Lao PDR,' Japan Federation of Bar Associations <http://www.nichibenren.or.jp/library/ja/bar_association/word/data/Laos.pdf> accessed 22 May 2016.

31 Phetphoxay Sengpaseuth, 'Bar Association elects new president and committee,' Vientiane Times, 17 December 2015. <http://www.vientianetimes.org.la/FreeContent/FreeConten_Bar.htm> accessed 18 February 2016.

32 Art. 9, Law on Lawyers, No. 10/NA, 2011 (Lao PDR).

33 Art. 46, Amended Law on People's Court, No. 09/NA, 2009 (Lao PDR) (hereinafter "**LAW ON PEOPLE'S COURT**").

34 Human Rights Resource Centre, 'Judicial Training in ASEAN: A Comparative Overview of Systems and Programs,' (Konrad-Adenauer-Stiftung: Singapore) April 2014, 11-12.

Appeal structure	People's Area Courts adjudicate cases at the first instance within their jurisdictions as provided by law; The People's Provincial Courts and People's City Courts adjudicate cases at first instance that are not within the jurisdiction of People's Area Courts and adjudicate appeals from decisions of People's Area Courts; The People's Region Courts adjudicate appeals from decisions of the provincial, city, and juvenile courts; The People's Supreme Court reviews on cassation appeals decisions of the People's Region Courts[35]
Cases before the National Human Rights Institution	Not applicable (a national human rights institution that hears cases has not been established in Lao PDR)
Complaints filed against the police, the military, lawyers, judges/justices, prosecutors or other institutions (per year)	No information available
Complaints filed against other public officers and employees	No information is available

II. COUNTRY PRACTICE IN APPLYING THE CENTRAL PRINCIPLES OF RULE OF LAW FOR HUMAN RIGHTS

A. On Central Principle 1 (Government and its officials and agents are accountable under the law)

Definition and Limitation of the Powers of Government in the Fundamental Law

The 2015 Constitution defines the powers and structure of the Lao PDR government. The second amendment retained the political regime defined under the 1991 and 2003 Constitutions but introduced amendments that further clarified the mandate of the three state powers (legislative, government/executive, and judiciary) and the roles of the country's top leaders.[36]

The new Constitution expressly declares the National Assembly (NA) as "the highest state organization."[37] Consistent with this pronouncement and with the principles of democratic centralism, the Constitution grants this legislative branch with extensive powers "to endorse the Constitution and laws, to make decisions on fundamental issues of the country, and to monitor and inspect the respect of and the compliance with

35 Arts. 20-27, Law on People's Court.

36 *See* Somsack Pongkhao, 'New Constitution Spells Out Top Leaders' Roles,' *Vientiane Times*, 07 January 2016. <http://www.vientianetimes.org.la/FreeContent/FreeConten_New_constitution.htm> accessed 28 February 2016.

37 Art. 52, 2015 Constitution. This express declaration under Art. 52 is an amendment not previously contained in the 1991 and 2003 Constitutions.

the Constitution and laws by other state organizations."[38] Of particular importance is the power of the NA to elect or remove key state officials such as the President and Vice-President of the State, the Prime Minister, the President of the Supreme People's Court, the Supreme Public Prosecutor, the President of the Government Inspection Authority, Vice-Ministers and other government members. It also has a duty to adopt the country's socio-economic plans and the state budget, as well as the power over the organizational structures of the executive branch, including ministries, provinces and cities.[39]

In addition, the amended Constitution provides the NA with new roles, including the right to adopt the appointment, transfer, or removal of the Judge's Council of the People's Supreme Court, the power over the organizational structure of the National Assembly, including the power over the National Assembly Commission and its personnel, and the right to consider matters of war or peace (based on the recommendation of the President of the State).[40] It is also given the power to dissolve the newly-created Provincial People's Assembly (PPA) if the PPA causes "material damage" to the nation and the people.

The National Assembly Standing Committee, a body elected by the National Assembly to carry out duties on its behalf during the recess of the National Assembly, also holds important functions under the 2015

38 Ibid. There is an apparent change in wording from the power to "oversee activities" of "executive organs, people's courts and the Office of the Public Prosecutor" under Art. 52 of the 2003 Constitution to the power to "monitor and inspect" compliance with the Constitution and laws by "other state organizations" under the 2015 Constitution (unofficial translation).

39 The National Assembly's rights and duties under the previous Constitution that were retained in Art. 53 are as follows:

(1) to consider and adopt the Constitution and laws;

(2) to consider and adopt socio-economic plans, the State budget, as well the power to adopt, exempt from or abrogate taxes and duties;

(3) to elect or remove key State officials:

   a. the President or Vice-President of the National Assembly Standing Committee,

   b. the President and Vice-President of the State, based on recommendation of the NA Standing Committee

   c. the Prime Minister, the President of the Supreme People's Court, the Supreme Public Prosecutor, the President of the Government Inspection Authority, based on recommendation of the President of the State;

   d. Government vice-ministers and government members, based on the recommendation of the Prime Minister;

(4) to consider and adopt the organizational structure of the Government (executive branch) on recommendation of the Prime Minister, including the establishment, dissolution incorporation and division of ministries, provinces and cities, as well as the adoption of boundaries of provinces and cities.

(5) To consider and adopt the granting of amnesties based on the recommendation of the National Assembly Standing Committee;

(6) To consider and adopt the secession from and the cancellation of accession in international conventions that Lao PDR is a party, international treaties based on the recommendation of the Prime Minister.

40 The National Assembly's new rights and duties under Art. 53 of the 2015 Constitution are:

(1) To consider and adopt the appointment, the transfer or the removal of the President and the Vice President of the National Assembly Commission and Secretariat, based on the recommendation of the National Assembly Standing Committee;

(2) To consider and adopt the appointment, the transfer or the removal of members of Judge Council of the People's Supreme Court based on the recommendation of the President of the People's Supreme Court;

(3) To consider and adopt the organizational structure of the National Assembly, the establishment, dissolution, incorporation and division of the National Assembly Commission and Secretariat;

(4) To consider to dissolve a Provincial People's Assembly in the event that such People's Assembly causes material damages to the benefits of the Nation and the People;

(5) To consider and adopt the matters of war or peace based on the recommendation of the President of the State;

(6) To cancel agreement of relevant parties that are contrary to the Convention and the laws, except for an decision in relation to a trial made by the Office of the Public Prosecutor and the People's Court; and

(7) To assign the right to the National Assembly Standing Committee to agree upon necessary and urgent works, and report to the National Assembly sessions.

Constitution. Consistent with the 2003 Constitution, it retains its duty to prepare for and summon the NA into session and to appoint, transfer or remove judges of people's courts (now conditioned on the recommendation of the President of the People's Supreme Court).

Interestingly, the amended Constitution grants the NA Standing Committee expanded rights and duties, to: (1) propose provisions of the Constitution and the laws, in addition to its right to interpret and explain the same; (2) propose draft presidential edicts to the President of the State; (3) appoint the National Election Committee; (4) agree on the accession to international conventions and international treaties based on the recommendation of the Prime Minister; and (5) receive and consider requests for justice made by citizens.[41] It is also noteworthy that Art. 53.21 of the amended Constitution expressly grants the National Assembly the latitude to assign to the National Assembly Standing Committee the right to agree upon necessary and urgent works, and report to the National Assembly sessions.

An important innovation in the 2015 Constitution is the introduction of the Local People's Assembly (LPA), the local legislative organization tasked with the approval of legislation, decision-making on local issues, and the supervision of the local state organization. The LPA is described as consisting of people's assemblies at the provincial, district and village levels (with the latter two assemblies established upon the agreement of the National Assembly, which basically leaves the provincial assemblies as the main component of the LPA).[42]

The Provincial People's Assembly (PPA) mirrors at the provincial level most of the rights and duties of the NA, including to: (1) approve legislation at the provincial level; (2) approve the socio-economic plan and provincial state budget plan; (3) supervise local state organizations as to compliance with the Constitution and laws; (4) elect or remove the provincial governor/mayor, chief of the public prosecutor and president of the local people's court; (5) power over the organizational structures of the provincial/district level state organizations, including the establishment or cancellation of, and the determination of territories of districts, municipalities, or the capital; and (6) repeal or cancel agreements or legislation under their sector or lower that contradicts the law, except decisions with regard to prosecution of the office of the public prosecutor and people's court.[43] Similarly, the Standing Committee of the Provincial People's Assembly has duties resembling that of its counterpart in the NA.[44]

The broad powers invested in the legislature by the Constitution are further supplemented by the grant of immunity from suit to members of the legislative body. Art. 64 states that "(m)embers of the National Assembly shall not be prosecuted in criminal court, or arrested or detained without the approval of the National Assembly, or the National Assembly Standing Committee. In cases involving manifest or urgent offences, relevant officers must immediately report to the National Assembly or to the National Assembly Standing Committee for consideration. Investigations shall not [be conducted in such a manner as to] prevent a prosecuted member from attending National Assembly sessions." The same immunity from

41 Art. 56, 2015 Constitution.

42 Art. 76, 2015 Constitution.

43 Art. 77, 2015 Constitution.

44 Under Art. 79 of the 2015 Constitution, the rights and duties of the Standing Committee of the PPA are follows: (1) Prepare and convene provincial people's assembly session; (2) Propose to appoint, reshuffle, and remove vice provincial governor and vice mayor; (3) Consider and approve the proposal of president of provincial people's court in province and capital in regards to appointment, re-shuffle or removal of vice president and judge of local people's court; and (4) Derive and consider any request for justice made by people in the area of their own responsibility.

criminal prosecution is granted to members of the Provincial People's Assembly.[45] It is observed that the immunity granted to legislative body pertains to all criminal prosecution, not only limited to acts committed in relation to duties as a legislator. Moreover, while prosecution should be a judicial function, the legislature retains authority and appears to hold the discretion over the prosecution of its own members, a power that may be open to misuse especially in a single-party state.

On the other hand, as part of its power of supervision, the legislative branches have the power to call on and interrogate members of the executive and judiciary. The National Assembly has the right to interrogate the Prime Minister, members of the government, the Supreme Public Prosecutor, the President of the People's Supreme Court, and the President of the Government Inspection Authority. Persons interrogated must give oral or written answers at the National Assembly session.[46] In the same vein, the Provincial People's Assembly has the same power of interrogation over officials of the government and the judiciary in the local level.[47]

The functions and powers of the President of State are also defined in the amended Constitution. The President is the Head of State and the representative of the Lao people within the country and abroad. He is also the Chairperson of the National Defence and Security Council and the Commander of the People's Armed Force.[48] While the functions of the President is substantially retained in the present Constitution, the power to appoint, transfer, or remove provincial and city governors is now held by the Prime Minister and the PPA.[49] It is also interesting to note that under the present Constitution, the NA Standing Committee has the right to propose draft presidential edicts to the President of State.

The Constitution provides that the government is the executive branch of the state, and has the role of managing and administering the state's duties. It is responsible to the National Assembly and the President of the State. It is headed and represented by the Prime Minister, who manages the work of the government and local administrations.

It must be noted that the term of office of the President and other government leaders is now limited to two consecutive terms under the new Constitution.[50] This is a positive modification that will prevent entrenchment in power and encourage new leaders in government. No similar term limit is provided for members of the legislature.

Amendment or Suspension of the Fundamental Law

Article 118 of the 2015 Constitution provides that only the National Assembly has the right to amend the Constitution. Any amendment to the Constitution requires the affirmative vote of more than two-thirds of the total number of NA members.[51]

45 Art. 84, 2015 Constitution.

46 Art. 63, 2015 Constitution.

47 Art. 83, 2015 Constitution.

48 Art. 65, 2015 Constitution.

49 Art. 67, 72 & 77, 2015 Constitution.

50 Art. 66 & 71, 2015 Constitution.

51 Art. 118 amends Art. 97 of the previous Constitution, which requires "at least two-thirds of the total number of National Assembly members" for any amendment of the Constitution.

Articles 15 and 16 of the Law on Legislation meanwhile provide that the Constitution may be made or amended only by the National Assembly, by a vote of at least two-thirds of the total number of its members. The National Assembly is empowered to enact detailed regulations on the procedure to make or amend the Constitution. A National Committee for making or amending the Constitution shall be established to collect information and conduct public consultation in a manner broader than the one carried out for making or amending laws.

Laws Holding Public Officers and Employees Accountable

Public officers are accountable for offences committed in relation to or in breach of his/her duties, under the Penal Law of 2005. The Law provides for penalties for the following offences:

1. Chapter 8 of the Penal Law punishes Breach of Civil Servants' Responsibilities, including abuse of power (Art. 153), abuse of authority (Art. 154), abandonment of duty (Art. 155), negligence in the performance of duty (Art. 156), bribery and corruption (Art. 157);
2. Article 174 specifically punishes Corruption committed by any leader, staff, civil servant, solider or police officer who breaches his duty by abusing his status, position or power, or by embezzling, swindling, receiving bribes, misappropriating state or collective property, or abusing power for the benefit of himself, or any other person, causing damage to the interest of the state or collectives or the rights and benefits of citizens;
3. Chapter 3 of the Penal Code punishes Offences against Civil Rights and Freedoms committed by any person, such as Duress (Art. 97), Unlawful Arrest and Detention (Art. 99), Taking of Hostages/ Abduction (Art. 101), Violation of an individual's freedom to engage in lawful speech, writing, gathering, meetings and other freedoms (Art. 102), and Trespass to Residence (Art. 103).

To further strengthen the State's anti-corruption efforts, the National Assembly also amended the Anti-Corruption Law in 2012, wherein the National Assembly added provisions covering foreigners living in Lao PDR, and assigning the Anti-Corruption Authority to fully investigate corruption cases and conduct interrogation.[52]

The 2015 Constitution introduced a new Chapter on State Audit and defined the rights and duties of the State Audit Organization. The State Audit Organization, mandated to carry out independent audit to verify all financial documents, has the duty to report the results of its audit on the implementation of the state budget to the National Assembly and propose measures against units violating the law on the management of the state budget, finance and assets based on the results of the audit.[53]

Special Courts and Prosecutors of Public Officers and Employees

The Constitution and existing laws such as the Law on People's Court do not provide for specialized or dedicated courts and prosecutors to handle cases against public officers and employees.

52 Phongsavanh Phommahaxay, 'Enhancing Investigative Ability in Corruption Cases,' Seventh Regional Summit on Good Governance for South East Asian Countries (Kuala Lumpur, Malaysia) 4 December 2013. <www.unafei.or.jp/english/pdf/PDF_GG7_Seminar/lao_PDR.pdf> accessed 14 March 2016.

53 Articles 104 to 107, 2015 Constitution.

However, the State Inspection Authority (also translated as Government Inspection Authority) is the state's central level counter-corruption organization tasked with the role of preventing and countering corruption in the country.[54] It conducts an inspection if acts of corruption are found or claims of corruption are made. If the inspection results in strong evidence of corruption, it then forwards its findings either to: (a) the concerned organizations for disciplinary measures in case of minor offences; or (b) to the public prosecutor to consider prosecution in court, in case of serious offences.[55] Thereafter, further investigation, filing of complaint, and prosecution is conducted in the appropriate court which has jurisdiction of the offence charged against a public officer or employee.

B. On Central Principle 2 (Laws and procedures for arrest, detention and punishment are publicly available, lawful, and not arbitrary)

Publication of and Access to Criminal Laws and Procedures

In accordance with the Law on Legislation, the Lao PDR Official Gazette was launched online in October 2013. All legislation, including criminal laws and procedures, are now available for viewing online in the Lao language through this website. This may be regarded as the most up-to-date and reliable source of Lao laws as existing legislation not posted in the Gazette website by January 2015 shall no longer be considered valid under the Law.[56] Prior to this breakthrough, Lao laws were not readily available and there were at times uncertainty on the existence of or prevailing version of laws or decrees. There have been instances when older versions of a law continued to be used as reference when an amendment has already been passed. However, the level of awareness of the Official Gazette website amongst the general population is still unknown. Moreover, individuals with Internet access in Lao PDR remain low at only 12.5 per cent of the population in 2013.[57]

Aside from publication via electronic format in the Official Gazette website, the Law also requires that printed copies of the promulgated legislation be sent to each sector and organization of the state at the national and local levels.[58] The authority in charge of the enacted law and the government organizations at the national and local levels are given the task of dissemination and education on the law through different means and methods, including dissemination in ethnic languages, to ensure the effective implementation of the law.[59] Again, there is currently no data to determine if these requirements for dissemination are being implemented, especially in the local levels.

54 Phongsavanh Phommahaxay, 'Effective Mechanisms to Prevent Corruption, Instances of Successful and Unsuccessful Implementation of Anti-Corruption Prevention Measures in the Lao PDR.' Fifth Regional Seminar on Good Governance for Southeast Asian Countries,' (Tokyo, Japan) 7-9 December 2011. www.unafei.or.jp/english/pdf/PDF_GG5_Seminar/GG5_LaoPDR2.pdf *accessed 26 February 2016.*

55 Xaysana Rajvong and Phongsavanh Phommahaxay, 'The Criminal Justice System and Corruption Case Procedure in Lao PDR,' Eighth Regional Summit on Good Governance for South East Asian Countries (Kuala Lumpur, Malaysia) 18-20 November 2014. <www.unafei.or.jp/english/pdf/PDF_GG8.../19_GG8_IP_Lao_PDR.pdf > accessed 13 March 2016.

56 Art. 80 & 83, Law on Legislation.

57 U.S. Department of State, 'Laos 2104 Human Rights Report', 2015, 10. http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> accessed 27 February 2016.

58 Art. 83, Law on Legislation.

59 Ibid.

Accessibility, Intelligibility, Non-retroactivity, Consistency, and Predictability of Criminal Laws

Art. 6 of the 2015 Constitution, replicating Art. 6 of the 2003 Constitution, mandates all state organizations and government officials to disseminate and create awareness of all policies, regulations and laws among the people, and together with the people, organize their implementation in order to guarantee the legitimate rights and interests of the people.[60]

The Law on Legislation, as discussed above, has introduced provisions that promote accessibility and consistency in all legislation. Aside from identifying the hierarchy of normative legal documents, it mandates the application in the event of contradiction in laws, and provides for the simultaneous amendment of several laws in a single document when necessary.

Prior to this Law, Presidential Ordinance No 02/President, dated 3 October 2003, on the drafting and adoption of legislation was in effect. This Ordinance set the basic procedures for drafting, proposing and adopting laws as well as the hierarchy of laws.[61] However, it was observed in the past that the application of a law "was a complex difficulty for those who actually implement the laws, because many laws are generally defined and require the implementing decrees for detail(ed) elaboration on one hand, and on the other hand the law is effective from the date of promulgation."[62] Likewise, it was noted in 2009 that laws were not widely applied, with people still placing more emphasis on customary law than implementing laws; the active implementation of laws by various sectors was not strict and effective; the society's legal awareness was not improving; and violations of laws by the agencies, officials and civil servants themselves, as well as businesses in all sectors were widespread.[63]

While steady progress has been made towards accessibility, awareness and consistency in the law at present, constraints continue to exist. The Lao government, in its submission to the Human Rights Council for the 21st session of the Universal Periodic Review, acknowledged that the "(d)isseminaton of laws and legal instruments, human rights conventions including the information on the UPR has not been widely covered throughout the country due to state budget constraints, limited national capacity and limited resources provided by the international community. Thus, awareness and understanding of some officials and the general public about laws and regulations as well as the human rights obligations and commitments of the Lao PDR remain limited and are not sufficiently in depth."[64]

As to retroactivity of penal laws, Article 5 of the Penal Law states that any law stipulating heavier punishment than that provided in an earlier law shall not have retroactive effect while a new law calling for lighter penalties or eliminating any offence in former laws shall have retroactive effect. Meanwhile, Article 81 of the Law on Making Legislation specifically provides that penal laws shall have no retroactive effect. In other cases, laws are retroactive only when expressly provided in the legislation, and will be applied only if reasonable and will respect the legitimate interests of concerned persons.

60 Article 6, 2015 Constitution.

61 Lao PDR Ministry of Justice, Office of the Supreme People's Prosecutor, People's Supreme Court and Ministry of Security, 'Master Plan on Development of the Rule of law in the Lao P.D.R. Toward the Year 2020,' (Lao PDR), August 2009 (hereinafter "**Legal Sector Master Plan 2009**").

62 Ibid, 125.

63 Ibid, 128.

64 Supra note 26, par. 65.

Detention Without Charge Outside an Emergency

Article 42 of the 2015 Constitution provides thus:

> The right of Lao citizens in their lives, bodies, honour and houses are inviolable.
>
> Lao citizens cannot be arrested, detained, or searched without the order of the Public Prosecutor or the people's courts, except if otherwise provided by the laws.

Art. 12 of the Law on Criminal Procedure, meanwhile provides thus:

> It is not authorized to detain a person without an order of the head of investigation-interrogation organization or of the chief of office of prosecutor.
>
> It is not authorized to arrest, imprison or search the building where the crime is occurred without an order of the chief of office of prosecutor or of the court, except for the arrest, search of building in case of offence committed in confrontation or in case of urgency only.
>
> In the case when the detention, arrest, imprisonment are carried out in contradiction with the laws or the imprisonment is beyond the period provided in the laws or is not in compliance with the decision of the court, the chief of office of prosecutor must issue an order to release immediately.
>
> xxx

The first sentence of Art. 12 prohibiting the detention of a person without an order from the head of investigation-interrogation organization or of the chief of office of prosecutor is a new insertion in the 2012 Law on Criminal Procedure. The second sentence of Art. 12 prohibits arrest, imprisonment or search of a building where the crime has occurred without an order of the chief of the Office of the Prosecutor or of the court, except if the crime is in the act of commission or in the case of "urgency." However, reviewing this article in context with the other articles under this Law raises concern that certain provisions may be violative of the right against arbitrary or unlawful detention.

First, the term "offences in urgent case" is defined in Article 140 as either: "(1) an individual suspected to have committed an offence who has bad history or uncertain residence; or (2) individual suspected to have committed an offence who is fleeing." This is the same definition used in the previous Law. These definitions of "urgency," however, do not pertain to a genuine state of emergency that justifies warrantless arrests and appears to violate the right of presumption of innocence of a person, as it authorizes detention based mainly on previous acts, residence, or the act of flight.

Second, it appears that the instances and length of preventive detention as ordered by the head of the investigation-interrogation organization or the chief of office of prosecutor could be for prolonged periods even if there is no formal charge of an offence before a court of law. Under Art. 135, in relation to Art. 136, the issuance of warrants, detention, arrest, remand, or house arrest can be used as a preventive measure "in order to timely prevent the offence or when there is the basis leading to the belief that the accused person will create difficulties to the investigation-interrogation."

Under Art. 138, a suspect may be detained for forty-four (44) hours to allow the conduct of an investigation-interrogation, with the detention reported to the chief of the office of the prosecutor within twenty-four (24) hours from the time of detention. Within forty-eight (48) hours, the investigator or the public prosecutor must issue its finding based on the evidence gathered and request the chief of the office of prosecutor for either: (a) the order of release of the detainee if there is no evidence to support the opening of an investigation; (b) the order to open an investigation-interrogation, when reliable evidence is found to support the case; or (c) an order of remand (or temporary imprisonment before the final imprisonment of the court), to proceed with the investigation-interrogation.

This third option presents a cause for concern as it appears to authorize the continued detention of a detainee even while investigation is on-going. Art. 111 of the Law effectively allows a person under investigation-interrogation to be legally incarcerated for months and even up to one year,[65] an inordinately prolonged period of detention without any formal charge in court.

Rights of the Accused

Freedom from Arbitrary or Extra-legal Treatment or Punishment, and Extra-Judicial Killing

Article 42 of the 2015 Constitution provides thus:

> The right of Lao citizens in their lives, bodies, honour and houses are inviolable.
>
> Lao citizens cannot be arrested, detained, or searched without the order of the Public Prosecutor or the people's courts, except if otherwise provided by the laws.

While Art. 42 mostly adopted similar wording found in the 2003 Constitution, it is important to note that the "right to life" is now guaranteed in the first sentence of the current article, which is a welcome development in the new Constitution, and is in accord with Article 6 of the ICCPR.

The right against arbitrary arrest, detention and search is also guaranteed in Art. 42. The inclusion of the phrase "except if otherwise provided by the laws" provides an interesting point of discussion as it subjects these fundamental rights to interpretation provided by the law. As examined in the immediately preceding section, the Law on Criminal Procedure of 2012, which implements these Constitutional rights, contains articles that seemingly restrict the fundamental guarantee.

In addition, the writ of habeas corpus or any similar petition does not appear to be an available remedy under Lao laws. However, a petition or "claim" may be made to a judicial body such as a prosecutor or court to request for the authorities to decide on a matter that the petitioner believes infringes and affects the interests of the state, community or rights and legitimate interests of the petitioner.[66] Likewise, under Articles 56 and 79 of the 2015 Constitution, the National Assembly Standing Committee and the Provincial

65 Art. 111 presents the time limit for temporary remand in conducting investigation-interrogation as: (a) two months, which may be extended up to an aggregate of six months, for minor offences; and (b) three months, which may be extended up to an aggregate of one year, for major offences. If there is still insufficient evidence after the period of temporary remand, an order of release must be sought for the accused person.

66 Supra note 18, 11.

People's Assembly is empowered to receive petitions or "requests for justice from citizens."[67] The Standing Committee, in light of the NA's power of supervision over the judiciary, may request the prosecutor or the people's court to review or reconsider a court decision or instruct the government to address the grievance.[68] There is thus a possibility of using these avenues as a remedy for urgent cases of arbitrary or illegal detention.

Nevertheless, the Law on Criminal Procedure also provides assurance that persons who violate these fundamental rights will be subject to prosecution. Art. 7 thereof declares that "(i)n criminal procedure, citizens shall receive protection for their life, health, honour and dignity or property. All acts of the organizations and person conducting criminal proceedings, such as beating, torture, coercion and threat which cause damages to the citizens shall be subjected to punishment in accordance with the laws." Moreover, Article 12 of the Law on Criminal Procedure improved on the 2004 Law by including an express prohibition on the use of force, threats, beatings or torture against the accused or defendant. Any individual who detains, arrests, imprisons, conducts an illegal search shall be subjected to case proceedings and shall be criminally liable and pay compensation for damages.

Presumption of Innocence

Art. 15 of the Law on Criminal Procedure accords to a suspect, accused or defendant the presumption of innocence until conviction by a final decision of the court. Further, Art. 14, par. 3, assures that a suspect, accused person, or defendant will not be forced to present evidence to prove their innocence. However, in the U.S. Department of State 2014 Human Rights Report on Lao PDR, it noted that "judges at times decided guilt or innocence in advance, basing their decisions on police or prosecutorial investigation reports. Most trials, including criminal trials, were little more than pro forma examinations of the accused and reviews of the evidence. Juries are not used."[69]

Legal Counsel and Assistance

Art. 96 of the 2015 Constitution provides that "(a)ccused offenders have the right to defend themselves, or by their parents, or lawyers."

Article 14, par. 1 of the Law on Criminal Procedure introduced the right to defence of accused persons or defendants, either "by themselves, lawyers or other protectors who shall provide them with legal assistance." In addition, Articles 65 (2) and 66 (2) provide accused persons and defendants, respectively, the right to receive an explanation on their rights and obligations in the defence of the case. Art. 71 of the Law on Criminal Procedure and Article 19 of the Law on Lawyers both expounded on the defence lawyer's rights and duties in a criminal case, and in the process indirectly provided and clarified the rights of an accused to counsel. This includes, among others, the right to be informed of the allegations and to participate in listening to his client's statements; the right to review the case dossiers, make copies or record the contents of documents; to present evidence and witnesses; and to give comments and ask questions to other participants during case investigation or court hearing.[70]

67 Art. 56 & 79, 2015 Constitution.

68 Supra note 18, 11.

69 Supra note 57, 5.

70 Art. 19, Law on Lawyers (2012).

However, the right to counsel and defence appears to be limited in practice and under the law. There are only 188 members of the Lao Bar Association in 2015[71] in a population of 6.5 million persons. It was noted that, "(a)uthorities provided defence attorneys at government expense only in cases involving children, cases likely to result in life imprisonment or the death penalty, and cases considered particularly complicated, such as ones involving foreigners."[72] There was also a report in 2012 of a human rights defender who was allegedly denied legal aid and requests to meet with his family and lawyers.[73]

Knowing the Nature and Cause of the Accusation

Under Article 64.1 of the Law on Criminal Procedure, suspects have the right to be informed of the suspicion towards them. Similarly, Article 65.1 provides that accused persons are accorded the right to be informed of the accusations against them and to respond to such accusations, while Article 66.1 accords defendants the right to be informed of the order of prosecution and to respond to accusations.

Art. 138, in an improvement on the previous version of the article on detention, introduces the requirement that the investigator-interrogator or the public prosecutor read out the order of detention and inform the detainee of his/her rights and obligations and then notify the detainee's family, office, office, organization or enterprise of the place of detention within twenty-four hours.

Article 193, meanwhile, introduces the requirement for the order to prosecute to be read to the accused person before conducting the trial of the case.

The 2015 Constitution does not directly guarantee an accused the right to counsel, but instead gives lawyers the right to provide assistance to an accused, with the last sentence of Art. 96 stating that "(l)awyers have the right to provide assistance to complainants and accused offenders." Articles 65.7 and 66.3 of the Law on Criminal Procedure, on the other hand, grants accused persons and defendants the right to take or meet a lawyer or other protector for the purpose of the defence of the case. There is no legal right to adequate time and facilities to prepare a defence.[74]

Guarantees during Trial

The right to speedy trial is not granted as a right of accused persons or defendants under Lao law.

Article 175 requires the participation of the defendant in the trial of his case according to the summons of the court. If an accused fails to appear in his trial without sufficient reason, the court may issue a warrant of arrest to bring the person to court.[75]

Article 14, par. 3 provides that the "suspect, accused person and defendant shall have the right to respond to the claim, to debate, to present evidence in order to defend themselves." During trial, a lawyer or other protector may place questions to witnesses or other participants when granted the authorization to do so

71 Supra note 31.

72 Supra note 57, 5-6.

73 Supra note 10, par. 21.

74 Supra note 57, 5-6.

75 Art 137, Law on Criminal Procedure.

by the presiding judge.[76] However, the judges lead the trial, questioning witnesses on issues to complete and clarify the case,[77] as well as verifying evidence presented in court for correctness, inconsistencies and relevance to the case.[78]

It has been reported that "(t)here is no legal right of the accused to examine government-held evidence, but a defendant may request to view such evidence if the arresting authority has completed its investigation report. In more serious cases (such as drug cases with a life-imprisonment penalty), the arresting authority generally does not allow the accused to examine government-held evidence."[79] Further, "defendants have the right to refuse to testify, although authorities sometimes imposed harsher penalties on defendants who did not cooperate."[80]

Appeal

Art. 66.11 of the Law on Criminal Procedure includes the right of the defendant to "submit the application for appeal or for cassation against the decision of the court." This is mirrored and expanded in Art. 212 of the Law, which states that, "the defendant, the lawyer or other protector of the defendant shall have the right to apply for appeal against the decision of the court." This right must be exercised within twenty (20) days from the date of pronouncement or from the date of being informed of the decision of the court.[81]

Freedom from Double Jeopardy

Article 7.9 of the Law on Criminal Procedure provides that a case will be discontinued in the event that there is already an order to dismiss the case or there is a final decision of the court regarding the same case.

Remedy before a Court for Violations of Fundamental Rights

Article 12 mandates that "any individual who detains, arrests, imprisons, conducts the search of building or of person in contravention of the laws shall be subjected to case proceedings and shall be criminally liable and pay compensation for damages which are occurred." The right to file a complaint is guaranteed by Article 25, stating that "(i)ndividuals or organizations shall have the right to file the complaint against the investigation-interrogation organization, the office of prosecutor, the court or the concerned persons who perform the duties in contravention to the laws. The claim shall be submitted to the organization of the next higher level or to the organization where such persons work. The organization which has received such complaint must examine and consider such document in a timely manner, and must notify the result of the examination in writing to the individual or organization which had submitted the complaint within thirty days from the date of receipt of the complaint. The relevant organizations or individuals who have violated the laws must restore the dignity of, and compensate for the damage to the injured party. Such relevant individuals may be subjected to disciplinary measures or to legal proceedings, depending on the severity of the offence."

76 Art. 194, Law on Criminal Procedure.

77 Art. 197, Law on Criminal Procedure.

78 Art. 199, Law on Criminal Procedure.

79 Supra note 57, 5-6.

80 Ibid.

81 Art. 214, Law on Criminal Procedure.

C. On Central Principle 3: (The process by which the laws are enacted and enforced is accessible, fair, efficient and equally applied)

Law Enactment

Openness and Timeliness of Release of Record of Legislative Proceedings

The Law on Legislation details the principles, regulations and procedures for legislation with the objective of ensuring effective, transparent and uniform legislation process and laws that are complete, easy to understand, implementable, and reflect the realities in Lao PDR but at the same time enable regional and international integration.

Possibilities for public participation exist under the Law in the local, regional and central levels. This takes place before the drafts are submitted to the National Assembly, with the line ministry of the organization taking the lead-role in drafting the law and having the responsibility of organizing public consultations. However, participation in such consultations tends to be by invitation only.

In the recently released Baseline Study on the Law-Making Process in Lao PDR issued by the United Nations Development Programme and the Ministry of Justice, it was noted that there were still no meetings or workshops of the drafting committee that were opened to the public at large. There has also not been any public consultation by the NA Standing Committee as required under Art. 53 of the Law.[82] This notwithstanding, it was reported that public participation and consultation is increasing. Since 2008, the National Assembly has operated a telephone "hotline," allowing the public to call and ask questions about NA actions during periods when it is in session, and also has televised certain National Assembly sessions. A variety of other mechanisms are now available, such as the process for complaints and petitions, and holding public hearings on policy as it tries to obtain broader public participation in legislative activities. These mechanisms have not yet included opening up the law making process itself by means of organizing public hearings or consultations for a discussion of specific draft legislation (as opposed to hearings on general policy) or putting draft laws on its website.[83]

Timeliness of Release and Availability of Legislative Materials

Under the Law on Legislation, drafts of proposed legislation must be made available to the public by website, print media or other means to ensure easy access to the public for at least 60 days for comments (Art. 8, par. 2). Individuals, legal entities and organizations in both the public and private sector may provide their comments on the draft legislation by sending their comments to the authority in charge of the proposed legislation according to defined times and procedures (Art. 8, par. 1). However, the UNDP Baseline Study noted that the requirement of posting drafts of normative legal documents on diverse websites is not being implemented in any significant degree at present.[84]

82 Supra note 11, 6.

83 Ibid, 13, 15.

84 Ibid, 11.

Art. 37 of the Law on Legislation also requires that the law drafting committee take minutes during law-making meetings, particularly on policies, principles, terminologies, timeframe and other important matters. Similarly, the Law on the National Assembly requires that minutes of each National Assembly session be taken and certified by the Chief of the Secretariat and the Chairman of the National Assembly session.[85]

Equality before the Law

The Lao PDR Constitution guarantees that Lao citizens are all equal under the law irrespective of their gender, social status, education, beliefs and ethnic group. Rights of non-citizens, on the other hand, are protected under the laws of Lao PDR.

The state's promotion of equality and non-discrimination is reflected in the Penal Law, which penalizes with both imprisonment and fine accused persons who are found guilty of: (a) keeping another person from, or preventing, or restricting a person from participating in any activity or who discriminates against another person based on ethnicity (Art. 176); and (b) discrimination against women, or keeping any woman separate from or preventing or restricting the participation of any woman in, any political, economic, socio-cultural or family activity based on gender (Art. 177).

Law Enforcement

Effective, Fair and Equal Enforcement of Laws

Despite the progress towards establishing rule of law in recent years, the weak implementation and enforcement of law remains to be a challenge for the country.[86] As stated above, the Lao government itself admits that due to limited budget and human capacity, there has been limited dissemination of laws, resulting in limited awareness and understanding of some officials and the general public about laws and regulations.[87] The limited knowledge of the laws consequently limits their effective, fair and equal enforcement.

D. On Central Principle 4: (Justice is administered by competent, impartial, and independent judiciary and justice institutions)

Appointment and Other Personnel Actions in the Judiciary and among Prosecutors

Under the 2015 Constitution, appointment and removal in the judiciary is made as follows:

(1) The National Assembly elects or removes the Supreme Public Prosecutor and the President of the People's Supreme Court, based on the recommendation of the President of the State;[88]

85 Art. 15, Law on the National Assembly, No.04/NA, 2010, (Lao PDR).

86 United Nations in Lao PDR, "Country Analysis Report: Lao PDR," (Vientiane) 13 November 2015, 17.

87 Supra note 26, par. 65.

88 Art. 53, 2015 Constitution.

(2) The President of the State appoints, transfers or removes the Vice-President of the People's Supreme Court and the Deputy Supreme Public Prosecutor, based on the recommendations of the heads of these organizations;[89]

(3) The National Assembly Standing Committee appoints, transfers or removes presidents, vice-presidents and judges of the People's Supreme Court and the People's Courts, based on the recommendation of the President of the Supreme Court;[90]

(4) The Supreme Public Prosecutor appoints, transfers, or removes public prosecutors and deputy public prosecutors.[91]

It is interesting to note that Art. 48 of the Amended Law on People's Court specifically mandates that judges can only be arrested or investigated on the approval of the NA Standing Committee, except in case of a "flagrant offense and urgency of the matter." Such arrest must be reported to the Standing Committee immediately and approval for further investigative measures must be obtained. Moreover, the arrest of any judge in the people's courts must be reported to the President of the People's Supreme Court, while an arrest of any judge in the military court must be reported to the President of the People's Supreme Court and the Minister of National Defence.[92]

The system of appointment of the judiciary requiring legislative and executive agreement is placed to ensure check-and-balance between the state powers in theory. Also, the power of the NA Standing Committee to approve or stop the arrest or investigation of judges is intended as a safeguard for judges in the performance of their duties. However, this system may also compromise the independence of the judiciary and may be a possible shield from investigation or prosecution of erring members of the judiciary. It is reported that while institutionally differentiated from the legislative and executive branches under the Constitution, the judiciary is still not independent of the ruling party as most judges and senior officials from the Ministry of Justice are party members.[93]

Training, Resources, and Compensation

The Law on People's Courts enumerates that one of the rights and duties of judges and other court officers is to receive training and to upgrade their knowledge for their work.[94] To this end, the Judicial Research and Training Institute under the People's Supreme Court holds trainings for judges and other court personnel. The Institute's main structured training is for judge's assistants, which is held for six weeks and follows a training curriculum under two main components: (1) Ethics and Code of Conduct; and (2) Judicial Technique and Skills. It is reported that in the year 2013, around 20 judges were appointed and 67 qualified to become judge assistants following these trainings. Special training seminars are also held by the Institute for judges, with curriculum dependent on the topic and the organizer of the seminar.[95]

89 Art. 67.5, 93 & 102, 2015 Constitution.

90 Art. 93 & 56.4, 2015 Constitution.

91 Art. 102, 2015 Constitution.

92 Art. 48, Law on People's Court.

93 Supra note 2, 9.

94 Articles 40, 42, 43, 44, Law on People's Courts.

95 *See* Supra note 34, 44-47.

In a similar vein, the Legal and Judicial Training Institute of the Ministry of Justice provides short-term training courses on specific themes for different categories of staff in legal and judicial institutions.[96] More recently, the government established the National Institute of Justice, which is designed for systemic human resource development in the justice sector and for promoting the role of professionals such as lawyers and prosecutors.[97]

There is no authoritative data on the compensation provided to prosecutors and members of the judiciary. In HRRC's *2011 Rule of Law Baseline Study*, it was mentioned that salaries of judges are the same as that of other government officials, with salary ranges below the country's average per capita income.[98] Prior assessments made in a study funded by the World Bank indicated that in general, civil service pay in Lao PDR was low and compressed although there remains a high level of interest in civil service jobs. The average regular monthly compensation in the civil service appears lower across all positions than compensation for similar jobs in the private sector or state-owned enterprises. However, civil servants may receive other benefits such as per diem, shorter work weeks, and other non-monetary compensation such as free housing or land allotments.[99]

State's Budget Allocation for the Judiciary and Other Principal Justice Institutions

Authoritative information on the budget allocated for the judiciary and other principal justice institutions is not readily available. According to Art. 60 of the Law on the People's Court, budget at all levels of the people's courts is formulated by the People's Supreme Court, and a request for approval of the same is submitted to the National Assembly. The budget of the military courts, on the other hand, is allocated through the Ministry of Defence.

Impartiality and Independence of Judicial Proceedings

The 2012 Law on Civil Procedure[100] and the 2012 Law on Criminal Procedure[101] articulate the requirement for judicial tribunals to be impartial and independent in mediating, trying and deciding cases. According to reports, however, impunity and corruption continued to be problems in the judiciary, with some judges reportedly accepting bribes.[102] While the judiciary is institutionally differentiated, it is reportedly not independent of the ruling party. Most judges and senior officials from the Ministry of Justice are party members.[103] The judiciary has been depicted as subservient to the dictates of the party leadership, in particular in the prosecution of dissidents.[104]

96 Ibid, 45 - 47.

97 Supra note 86, 18.

98 Supra note 25, 128.

99 *See* Naazneen H. Barma and Jana Orac, 'Tailoring Civil Service Pay Analysis and Advice to Context: Challenges, Approaches and the Case of lao PDR,' Policy Research Working Paper for the World Bank, January 2014, 4, 27.

100 Articles 12, 13, 195, Law on Civil Procedure (2012) (Lao PDR).

101 Articles 10 & 19, Law on Criminal Procedure (2012) (Lao PDR).

102 Supra note 57, 5.

103 Supra note 2, 9.

104 Supra note 7, par. 20.

Provision of Lawyers or Representatives by the Court to Witnesses and Victims/ Survivors

There appears to be no requirement under the law to provide lawyers for witnesses or victims. Free legal assistance in Lao PDR is provided by the Lao Bar Association, especially in criminal matters or in administrative disputes. With the help of partners such as the Asia Foundation and UNDP, the LBA has seen continued institutional strengthening and professional capacity development over the past years, raising the profile of LBA and lawyers in general.[105] Currently, seven legal aid clinics have been established in Lao PDR, which are located in Vientiane, Oudomxay, Champasack, Xayabouly and Xiengkhouang. Despite this, there is still a dearth of lawyers in the country (with only 188 members in 2015[106]), with some provinces not having a single lawyer.[107] Also, due to several reasons, including the general perception that attorneys cannot affect court decisions, most defendants chose not to have attorneys or trained representatives.[108]

Safety and Security of the Judiciary, Prosecutors, Litigants, Witnesses, and Affected Public

A judge may use necessary protection measures under Art. 70 of the Law on Criminal Procedure to protect and ensure the safety of witnesses and their close relatives. A security officer is also provided under the law to maintain order and execute the order of the president of the judicial tribunal during court sessions. Moreover, under Articles 21, 23 and 25 of the Law on People's Court, the People's Supreme Court, People's Regional Courts, and Provincial, City and Juvenile Courts have the duty to set out necessary measures on the issue of organization, improvement and administration of courts. Thus, it is submitted that it is entirely within the power and function of the courts to issue administrative orders to ensure adequate access and safety measures in proceedings of courts within their respective jurisdictions.

Specific, Non-Discriminatory, and Unduly Restrictive Thresholds for Legal Standing

Art. 71 of the Law on Civil Procedure provides the requirements for litigants before a civil court. In general, litigants in the case must be persons 18 years old and above and are not insane. Minors or insane persons are required to have the parents or guardians act on their behalf in the case proceedings. Organizations may become litigants in the case if such organizations are registered as legal persons in accordance with the laws of the Lao PDR or the laws of the relevant countries.

Art. 13 of the Law on Criminal Procedure guarantees equality of all citizens before the laws and courts without discrimination on the basis of gender, race, ethnicity, socio-economic status, language, education level, occupation, belief, and place of residence. Further, the investigation-interrogation organization, the office of prosecutor and the court is mandated to "create the conditions to enable the citizens, especially the suspect, accused person, defendant, injured party, civil plaintiff, civil liable person to exercise their rights in accordance with the laws in order to ensure that criminal proceedings are conformed with the facts and are objective."

105 Supra note 18, 14.

106 Supra note 31.

107 Supra note 86, 18.

108 Supra note 57, 6.

Publication of and Access to Judicial Hearings and Decisions

Art. 96 of the 2015 Constitution requires that cases be conducted in open court proceedings, except where otherwise provided by the laws. In the same vein, Articles 10 and 21 of the Law on Criminal Procedure espouses the open trial of a case as a basic principle, and Art. 15 of the Law on Civil Procedure mandates that trials be conducted openly. In both civil and criminal cases, certain exceptions are acknowledged that necessitate closed hearings, such as cases concerning state secrets, sensitive family matters, human trafficking, or juvenile cases (children under 16). In all cases, the court's decision is required to be read out openly.

Reasonable Fees and Non-arbitrary Administrative Obstacles to Judicial Institutions

Article 10 of the Law on Civil Procedure assures "equality of Lao citizens, foreigners, aliens, persons having no nationality before the laws and the court without discrimination on the basis of gender, races, ethnicity, socio-economic status, languages, education levels, occupation, beliefs, place of residence and others. The people's courts provide facilities to Lao citizens, foreigners, aliens, persons having no nationality, particularly the litigants in the case, to exercise equal rights in defending the case by presenting and providing the information and evidence to the court fully and inclusively in order to ensure that the decision on the case is correct and conformed with the facts and laws." Article 10 of the Law on Criminal Procedure similarly guarantees equality of all citizens before the law and the courts without discrimination.

Assistance for Persons Seeking Access to Justice

Persons seeking access to justice through formal mechanisms can be given assistance through the free legal aid services offered by the Lao Bar Association.

In the Access to Justice survey in 2011, 14.8 per cent of the respondents (20 per cent in Vientiane and 11 per cent in Oudomxay) were aware of legal aid services. Of these, 16.2 per cent said they were available in their area but only 1.5 per cent of those surveyed used the services. Fifteen per cent of respondents said that a mobile legal clinic came to their community and 14.7 per cent availed of their services. Those who had used them mentioned grievances such as domestic conflicts, land disputes, accidents, trespass of animals, or theft of livestock as issues they referred to legal aid.[109]

General Public Awareness of Pro Bono Initiatives and Legal Aid or Assistance

Awareness of legal aid is certainly on the increase since 2011. According to the LBA, it has provided free legal assistance in more than 1,700 cases over the past three years, with 96 parties receiving free legal aid. In total, it is estimated that 3,000 individuals and legal entities have received assistance from the association's lawyers. The LBA President, Mr. Khamsay Soulinthone expressed that LBA was ready to respond to problems of the poor in ensuring court cases were dealt with fairly, although lawyers still continue to struggle with the implementation of professional rights of defence lawyers in their pursuit of justice for clients.[110]

109 United Nations Development Programme, 'People's Perspective on Access to Justice Survey in Four Provinces of Lao PDR,' (Vientiane) November 2011, 101.

110 Supra note 31.

III. INTEGRATING INTO A RULES-BASED ASEAN

Progress towards Achieving a Rules-Based ASEAN Community

On Mutual Support and Assistance on the Rule of Law

Lao PDR became a signatory of the ASEAN Mutual Legal Assistance Treaty in Criminal Matters (AMLAT) in 2004, which provides for mutual legal assistance in investigations, prosecutions and proceedings in criminal matters, subject to the domestic laws of each signatory.[111] It is reported that a draft law on mutual legal assistance will be submitted to the National Assembly for its consideration.[112]

Lao PDR and Vietnam maintain close cooperation and assistance, with continuing programs and technical exchanges in building the state apparatus, legal systems and personnel training.[113,114] In November 2010, the two countries entered into an agreement for Cooperation in Preventing and Combating Trafficking in Person and Protection of Victims of Trafficking. The two nations have boosted their judicial cooperation in the past years, and have agreed to prioritize training of judicial personnel. In a ceremony marking 30 years of judicial cooperation between the two countries in September 2012, five cooperation agreements between the judicial sectors of the two countries were signed.[115]

On Legislative and Substantive Changes Promoting the Rule of Law

The country promulgated its Extradition Law on 1 August 2012, which provides the principles, rules and remedies for extradition and also names the Office of the People's Supreme Prosecutor as the central authority for extradition. This enforces the extradition treaties it has signed with two other ASEAN countries, Thailand and Vietnam.[116]

On Enactment of Laws relating to the ASEAN Community Blueprints and Similar Plans

Lao PDR is committed to realizing the ASEAN Economic Community. To implement its tariff commitments, the Prime Minister issued the Decree on the Issuance of the Tariff Nomenclature based on the ASEAN

111 Art. 1, 2004 Treaty on Mutual Legal Assistance in Criminal Matters, ASEAN <http://cil.nus.edu.sg/2004/2004-treaty-on-mutual-legal-assistance-in-criminal-matters-signed-on-29-november-2004-in-kuala-lumpur-malaysia/> accessed 29 February 2016.

112 Phongsavanh Phommahaxay, 'Mutual Legal Assistance and Extradition,' Sixth Regional Seminar on Good Governance for Southeast Asian Countries,' (Tokyo, Japan) UNFEI Seminar, (Tokyo, Japan) 2012. <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjLiPXJmqbLAhUHipQKHcxpDaoQFggdMAA&url=http%3A%2F%2Fwww.unafei.or.jp%2Fenglish%2Fpdf%2FPDF_GG6_Seminar%2F05-3_Lao.pdf&usg=AFQjCNEAsAIcY01Pkd33e1SLfgqSP6RurA > accessed 29 February 2016.

113 Vovworld, 'Vietnam and Laos mark 30 years of judicial cooperation,' *Talk Vietnam,* 8 September 2012 <http://talkvietnam.com/2012/09/vietnam-and-laos-mark-30-years-of-judicial-cooperation/#.UwoxEYWrBdo> accessed 29 February 2016.

114 However, there is no available data on the actual programs for judicial cooperation implemented between the two nations.

115 'Vietnam and Laos boost judicial cooperation,' *Vietnam Breaking News*, 2012. <http://www.vietnambreakingnews.com/2012/03/vietnam-laos-boost-judicial-cooperation/#.UwoxaoWrBdq> accessed 29 February 2016.

116 Supra note 112.

Harmonized Tariff Nomenclature 2012 (AHTN 2012) on 10 January 2013,[117] and the country has applied the preferential tariff rates under the ASEAN Trade in Goods Agreement to goods imported from ASEAN countries from January 2015.[118] Likewise, as part of the Lao PDR's ASEAN commitment to create a trade repository, the Lao Trade Portal, an online platform to boost transparency on trade-related regulations, has been established.[119]

On Integration as Encouraging Steps toward Building the Rule of Law

One of the objectives of the government of Lao PDR in the development of laws by the year 2020 under its Legal Sector Master Plan is to encourage the function and effectiveness of laws for regional and international integration.[120] To achieve this objective, it envisioned the development and improvement of a complete legal framework on civil and economic laws between 2015 and 2020, which must include laws on regional and international integration, implementation of international treaties, and contracts where Lao PDR is a party. Particular attention is enjoined on, among others, the development of a legal framework that harmonizes with ASEAN framework agreements by incorporating these international treaties into a domestic legal framework.[121]

Prospects and Challenges

Challenges to a Strengthened Commitment to the Rule of Law

Despite the developments achieved in the past five years, Lao PDR still faces a lot of challenges in its push to build a rule of law state. Greater participation in legal reform activities is still needed from various stakeholders such as the Ministry of Public Security, and a broader cross-section of civil society, the private sector, and the public. Other constraints include the difficulty to access justice due to limited knowledge in the justice system, limited availability of legal aid and legal professionals, poverty, physical barriers, and lack of judgment enforcement. There is also a need to harmonize the informal with the formal justice system.[122]

Commitments and Plans/Initiatives in relation to ASEAN-wide Commitments and Declarations on Human Rights

In its National Report to the Human Rights Council for the 21st session of the Universal Periodic Review, the Lao PDR government declared that over the past years, the country has contributed to the development of human rights in ASEAN in terms of institutional building and standard setting. It enumerated its activities

117 Decree on the Issuance of the Tariff Nomenclature based on the ASEAN Harmonized Tariffs Nomenclature 2012 (AHTN 2012), No. 08/PM, 10 January 2013 (Lao PDR). <http://www.laotradeportal.gov.la/index.php?r=site/display&id=378#.Vu2Ri-Z1aHQ> accessed 15 March 2016.

118 See Lao Trade Portal. <http://www.laotradeportal.gov.la/index.php?r=tradeInfo/index accessed 15 March 2016.

119 Ibid; *see also* Buavanh Vilavong, 'Business Support Crucial for Laos to Join the ACE and Lock In Growth,' *East Asia Forum*, 3 January 2015. <http://www.eastasiaforum.org/2015/01/03/business-support-is-crucial-for-laos-to-join-the-aec-and-lock-in-growth/> accessed 15 March 2016.

120 Supra note 61, 157, 189, 192.

121 Ibid, 160.

122 Supra note 18, 15-18.

within ASEAN thus: "The Lao PDR actively participates in the work of the ASEAN Intergovernmental Commission on Human Rights (AICHR), the ASEAN Commission on the Promotion and Protection of Rights of Women and Children (ACWC), the ASEAN Committee on Women (ACW), and the ASEAN Committee on Migrant Workers (ACMW). The Lao PDR has contributed to the drafting of the ASEAN Human Rights Declaration, the ASEAN Declaration on the Elimination of Violence Against Women, the ASEAN Declaration on the Elimination of Violence Against Children, among other regional human rights instruments. At the moment, the Lao PDR participates in the drafting process for an ASEAN Instrument on Migrant Workers and an ASEAN Convention on Anti-Human Trafficking. Under the AICHR framework, the Lao PDR is leading in the conduct of Thematic Studies on the Right to Peace, the Right to Education and the Right to Health."[123]

IV. CONCLUSION

Lao PDR is a country in the process of transition. The Lao government is actively taking steps to improve its legal system and achieve its objective to build a Rule of Law State by 2020, with its commitment towards ASEAN integration as one of its motivations in achieving this objective, as is reflected in its Legal Sector Master Plan. Accordingly, key reforms have been instituted in the past four years in an effort to strengthen rule of law.

Foremost of these reforms is the recent amendment of the Constitution. The 2015 Constitution introduced a two consecutive term limit for the President of the State and government officials. Decentralization of state power and more inclusive governance is also envisioned with the introduction of the Local People's Assembly. New chapters for the State Audit Organization and the National Election Commission effectively bestows these organizations the status of constitutional bodies, indicating the state's aspiration for good governance and democratization. Moreover, the "right to life" is incorporated in the Constitution for the first time, in consonance with the ASEAN Declaration on Human Rights and the ICCPR. Rights and responsibilities of the different state organizations are also clarified and defined in the amended Constitution, although the primacy of the National Assembly over executive and judicial branches remained.

The written legal framework has been improved with the introduction of new laws or amendment of existing laws, which includes laws promoting fundamental rights, socioeconomic reforms, and accountability. The Lao legal framework could be said to be complete by the end of 2015, when compared to laws in other ASEAN countries.[124] Furthermore, the adoption of the Law on Legislation clarified the law-making process, emphasizing the requirements of transparency, public participation and consultation, impact assessment, and systemization in the legislative process.

The capacity of the legal sector is gradually being improved with the help of international institutions such as the UNDP. Notwithstanding the scarcity in legal professionals, the number of legal aid clinics established around the country has increased, and an increasing number of persons are now aware and use their services. More recently, a National Institute of Justice has reportedly been established for the systemic human resource development in the justice sector.

123 Supra note 26, par. 14.

124 Supra note 11, ii.

While gains have been achieved, a lot of challenges still exist that hamper the full realization of the country's ambition to be a rule of law state. There is a critical need for stronger government institutions, improved human capacity, and public understanding of legal rights throughout the country. As can be reflected in the various reports referenced in this update, while laws and rules are in place, its enforcement is another matter as lack of knowledge of and disregard of the law are still prevalent in practice.

Undoubtedly, more work still needs to be done to fully enforce the laws enacted and make the legal framework a "law in action" as opposed to having only "law on the books."[125] Despite the challenges and constraints, Lao PDR continues to exert genuine efforts towards reforms to achieve its ambition of building a Rule of Law State by 2020. For indeed, rule of law provides the platform that will help Lao PDR achieve its goals of integrating into the 2015 AEC and achieving long-term sustainable development.[126]

125 Ibid, ii.

126 Supra note 28. *See also* Thomas Schmitz, 'The ASEAN Economic Community and Rule of Law,' BDHK Workshop on Regionalisation, 15 December 2014. <http://home.lu.lv/~tschmit1/> accessed 27 February 2016.

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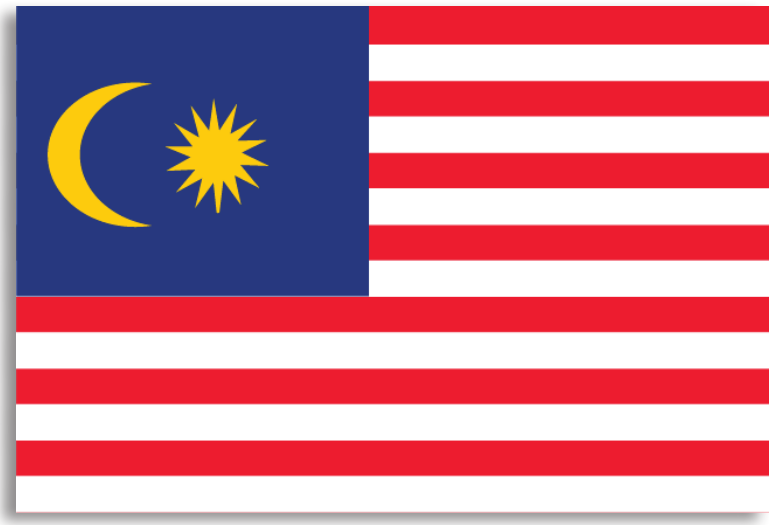
Malaysia



MALAYSIA

TABLE 1

SNAPSHOT BOX

Formal Name	Malaysia[2]
Capital City	Kuala Lumpur
Independence	31 August 1957
Historical Background	From the 19th century, the Malay Peninsula consisted of nine sultanates (Perlis, Kedah, Perak, Selangor, Negeri Sembilan, Pahang, Johor, Terengganu, and Kelantan) and two British Straits Settlements (Penang and Melaka). Apart from Penang and Melaka, which were under direct British rule, the other nine states either had British Residences or Advisors to their Sultans. Theoretically, the states were sovereign, but in reality, the British Residences and Advisors had tremendous influence on all matters of governance, except religion and Malay customs. An attempt in 1946 by the British to unify the different states under one British-led system, the Malayan Union, was short lived. Eventually, after mass civil disobedience and negotiations between the political leaders of Malaya and the British, independence was obtained in 1957. In 1963, the British-controlled states of Singapore, Sabah and Sarawak were freed of British rule and merged with Malaya to create Malaysia. In 1965, Singapore was expelled from Malaysia.[3]
Size	328,550 sq km[4]
Land Boundaries	Malaysia consists of two parts, the Peninsular and Sabah and Sarawak on the island of Borneo. The Peninsular borders Thailand in the North and is connected to Singapore by a bridge and a causeway in the South. Sabah and Sarawak both have land borders with Brunei and Indonesia.[5]
Population	31.0 million[6] (increase of 3.5 million since 2011)
Demography	70% of the population live in urban areas;[7] 12% work in the agricultural sector[8] (since 2011, the population living in urban areas increased by 10%)
Ethnic Groups	Malay, Chinese, Indian, indigenous communities

1 The Malaysian Centre for Constitutionalism and Human Rights would like to thank Seh Lih Long and K. Shanmuga for their contribution to the research.

2 Article 1(1) of the Federal Constitution.

3 Azmi Sharom, 'Rule of Law for Human Rights in the ASEAN Region: A Baseline Study' (2011), Human Rights Resource Centre, 135.

4 The World Bank. 'World Development Indicators' (22 Dec 2015). <http://data.worldbank.org/indicator/AG.LND.TOTL.K2> accessed 15 Feb 2016.

5 Azmi Sharom, 'Rule of Law for Human Rights in the ASEAN Region: A Baseline Study' (2011), Human Rights Resource Centre, 135.

6 Department of Statistics, Malaysia. 'Social Statistics Bulletin' (Dec 2015). < https://newss.statistics.gov.my/newss-portalx/ep/epProductFreeDownloadSearch.seam> accessed 15 Feb 2016.

7 <http://data.worldbank.org/indicator/SP.URB.TOTL.IN.ZS>accessed 29 Feb 2016/

8 <http://data.worldbank.org/indicator/SL.AGR.EMPL.ZS> accessed 29 Feb 2016.

Languages	Malay, Chinese (Mandarin and dialects), Tamil, Malayalam, and indigenous languages. English is widely spoken.
Religion	Islam, Buddhism, Christianity, Hinduism, Taoism, and indigenous religions
Adult Literacy	94.1%[9] (increase of 2.1% since 2011)
Gross Domestic Product	US$338.1 billion[10] (increase of US$146.5 billion since 2011)
Government Overview	There has been no change in the government structure since 2011. Malaysia practices a Federal system where there is a central government and 13 state governments. The state governments each have their own State Legislative Assemblies and Cabinet headed by a Chief Minister. The law making powers of the Federal Parliament and the State Legislative Assemblies are spelled out in Schedule 9 of the Federal Constitution. The ruling coalition, *Barisan Nasional*, won the last general election in 2013. The Federal Constitution has not been amended between the years 2011- 2015.
Human Rights Issues	No change since 2011—the main human rights issues in Malaysia include, among others, freedom of expression and peaceful assembly, death in custody, detention without trial, and freedom of religion.[11]
Membership in International Organizations	United Nations (UN), World Trade Organisation (WTO), World Health Organisation (WHO), Asia Cooperation Dialogue (ACD), Asian Development Bank (ADB), Association of Southeast Asian Nations (ASEAN), Asia-Pacific Economic Cooperation (APEC), Asian African Legal Consultative Organization (AALCO), Organisation of the Islamic Conference (OIC), Commonwealth of Nations, Non-Aligned Movement (NAM), and The Group of Fifteen (G-15)[12]
Human Rights Treaty Commitments	Since 2011, Malaysia acceded to two new treaties: the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (12 April 2012) and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (12 April 2012).[13] Other core human rights treaties that Malaysia is a party to are: Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (5 July 1995, accession); Convention on the Rights of the Child (CRC) (17 February 1995, accession); and the Convention on the Rights of Persons with Disabilities (CRPD) (8 April 2008, signed; 19 July 2010, ratified).[14]

9 <http://data.worldbank.org/indicator/SL.AGR.EMPL.ZS> accessed 29 Feb 2016.

10 UNESCO, 'Malaysia National Education For All Review Report - End of Decade Review' (May 2015), <http://unesdoc.unesco.org/images/0022/002297/229719E.pdf> accessed 16 Feb 2016.

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13 Office of the Prime Minister, Putrajaya Malaysia, 'International Organisations', <http://www.pmo.gov.my/home.php?menu=page&page=1666> accessed 16 Feb 2016.

14 Office of the High Commissioner for Human Rights. 'Ratification Status for Malaysia'. <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=105&Lang=EN> accessed 16 Feb 2016.

I. INTRODUCTION

Key Rule of Law Structures

There has been no change, since 2011, in the key rule of law structures—Part II of the Federal Constitution guarantees the liberty of the person, equality, freedom of movement, freedom of speech, assembly and association, freedom of religion, rights with respect to education, and rights to property; prohibits slavery, banishment, and forced labour; and protects against retrospective criminal laws and repeated trials.

The Constitution is the supreme law of the Federation and clearly sets out the role of the Head of State, the Head of the Government, the legislature, and the relations between them.[15]

The system of Parliamentary democracy has not changed either—the legislature is elected for at least five years, and Parliament is defined as consisting of the *Yang di-Pertuan Agong* (King), *Dewan Negara* (Senate), and *Dewan Rakyat* (House of Representatives).

Foundation & Evolution of Rule of Law

In 1970, the *Rukunegara* (National Principles) was pronounced as the national ideology and philosophy,[16] and one of the tenets of the *Rukunegara* is the principle of the rule of law. It was envisaged that the five principles in the *Rukunegara* would be the foundational principles that would govern Malaysian society. The former Lord President Tun Salleh Abas went further to state that the "*Rukunegara* does not impose more obligations, nor does it confer more rights than what is already contained in the Constitution… the *Rukunegara* is a passport towards achievement not merely co-existence of the various races by the intermingling of the various races in this country harmoniously without danger of having to repeat an incident like May the 13th."[17]

The five principles of the *Rukunegara* are: (1) Belief in God; (2) Loyalty to King and Country; (3) The Supremacy of the Constitution; (4) The Rule of Law; and (5) Courtesy and Morality.

While the rule of law was intended to be the foundation of Malaysia, over the years, the respect for the rule of law has been inconsistent. As will be seen below, the extent to which the rule of law remains a principle that is being respected by the executive, legislative, or the judiciary, remains unclear. Professor Shad Faruqi's précis is perhaps the most apt, "there is rule of law, but an imperfect one."[18]

15 Andrew Harding, *The Constitution of Malaysia – A Contextual Analysis* (Oxford: Hart Publishing Ltd, 2012), 54.

16 Speech by Tan Sri Abdul Gani Patail, Attorney General of Malaysia, 'Current Challenges in Preserving Social Order and National Harmony – A Critical Note', ILKAP National Law Conference 2014, <http://www.ilkap.gov.my/nlc2014/counter/files/Keynote%20Address-Current%20Challenges%20in%20Preserving%20Social%20Order%20and%20National%20Harmony%20by%20A%20Critical%20Note%20by%20YBhg%20Tan%20Sri%20Abdul%20Gani%20Patail.pdf> accessed 25 Feb 2016.

17 Tan Sri Dato' Haji Mohamed Salleh bin Abas, 'Selected Articles and Speeches on Constitution, Law and Judiciary' (Kuala Lumpur: Malaysian Law Publishers, 1984), 231 in K. Shanmuga, "The Rule of Law in the Rukun Negara" (2006) [*Unpublished*].

18 Shad Saleem Faruqi, *Document of Destiny – The Constitution of the Federation of Malaysia* (Kuala Lumpur: Star Publications (Malaysia) Berhad), 44.

Human Rights Treaties

In 2012, Malaysia acceded to two new international human rights treaties—the Optional Protocol to the CRC on the involvement of children in armed conflict, and the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography.[19]

Apart from the aforementioned new treaties, Malaysia is a party to three other main international human rights conventions, as follows:

TABLE 2

CORE HUMAN RIGHTS CONVENTIONS TO WHICH MALAYSIA IS A PARTY

International Document	Reservation
CEDAW	Articles 9(2), and 16(1) (a), (c), (f) and (g).
CRC	Articles 2, 7, 14, 28(1)(a) and 37.
CRPD	Articles 15 and 18.

Malaysia adopts a dualist approach to international law and requires an act of Parliament before international human rights treaties are directly applicable in Malaysia. There is no provision in any domestic legislation that expressly incorporates any of the aforementioned international human rights treaties into domestic law. However, the Child Act 2001 incorporates some parts of the CRC, and some provisions of the CRPD are similarly reflected in the Persons with Disabilities Act 2008.

As there is no legislation that specifically incorporates CEDAW, CRC, and CRPD into domestic law, the acceptance of these international treaties as a tool of interpretation has been inconsistent—the Malaysian courts have oscillated between a strict interpretation of the dualist system and a more nuanced use of these treaties as a legitimate source to interpret domestic law.

In two landmark cases of *Noorfadilla binti Ahmad Saikin v. Chayed bin Basirun and 5 others*,[20] and *Indira Gandhi d/o Mutho v. Perak Registrar of Converts, Perak Islamic Religious Department, State Government of Perak, Ministry of Education, Government of Malaysia, & Patmanathan s/o Krishnan*,[21] the High Court, for the first time, held that even though CEDAW has not been incorporated into domestic law, the court is compelled to interpret the principle of gender equality in article 8(2) of the Federal Constitution in light of Malaysia's international obligations under CEDAW. Further, in the *Indira Gandhi* case, the High Court held that ratification of CEDAW, public statements by government ministers, and the Bangalore principles meant that Malaysia is bound to give legal effect to the rights in CEDAW.

However, the Court of Appeal in *Air Asia Berhad v. Rafizah Shima Binti Mohamed Aris*[22] and *Pathmanathan Krishnan v. Indira Gandhi Mutho & Other Appeals*[23] has reverted to a more conservative approach with regard to the application of international norms and conventions, stating that international treaties do not form part of Malaysian law unless those provisions have been incorporated into domestic law.

19 Office of the High Commissioner for Human Rights, 'Ratification Status for Malaysia'. <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=105&Lang=EN> accessed 16 Feb 2016.

20 [2012] 1 MLJ 832.

21 [2013] 7 CLJ 82 (HC).

22 Rayuan Sivil No/ B-02-2751-11/2012.

23 [2016] 1 CLJ 911.

Interpretation and Use of the 'Rule of Law'

There seems to be a gap between the official commitment to the rule of law and how they (the authorities) seek to give it effect. The judiciary and the executive appear to refer to the rule of law in a positive manner—the Chief Justice, has on many occasions affirmed that the function and the duty of the judiciary are to enforce the rule of law;[24] similarly, the Prime Minister has affirmed that the rule of law would always be upheld.[25] Additionally, in these expressions of support for the rule of law in Malaysia, the judiciary seems to be in unanimity with Dicey's concept of the rule of law and even went on to state that "the repeals of the infamous preventive laws certainly mark the return of the rule of law to the court." [26]

However, the situation of rule of law in Malaysia is a paradoxical blend of official adherence and violations of the principle of the rule of law. The Chief Justice's speech in the Opening of the Legal Year 2016 exemplifies this perplexing relationship—on one hand, the Chief Justice reaffirmed the judiciary's commitment to the rule of law, and in the same vein, the Chief Justice castigated the bar, stating that unwarranted criticism by members of the bar against the judiciary threatens the foundation of the rule of law.[27]

Furthermore, a number of legislative developments in 2015 are incompatible with the rule of law. The Prevention of Terrorism Act 2015 (POTA 2015), the amendments to the Sedition Act 1948, and the Prevention of Crime Act 1959 (PCA 1959) contain provisions that allow for detention without trial and ouster clauses (removing the judicial check on wide discretionary powers of the government), and the National Security Bill 2015 contains wide executive powers, with no checks and balances.

It is unclear whether these violations of the rule of law are due to the authorities' different understanding of what rule of law entails or a deliberate disregard of the rule of law.

24 Speech by YAA Tun Arifin Bin Zakaria, Chief Justice of Malaysia 'Syarahan Perdana Integriti 2012 "Rule Of Law And Judicial System"(2012), <http://www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/CJ%20-%20Integrity%20Speech%20(NEW).pdf> accessed 25 Feb 2016; see also speech by YAA Tun Arifin Bin Zakaria, Chief Justice of Malaysia, 'Towards an Effective Administration of the Justice System and the Judges' Expectation of Lawyers' [2015] 1 CLJ I; Speech by YAA Tun Arifin Bin Zakaria, Chief Justice of Malaysia at the Opening of the Legal Year 2015 (Putrajaya, 10 Jan 2015) <http://www.malaysianbar.org.my/speeches/speech_by_yaa_tun_arifin_bin_zakaria_chief_justice_of_malaysia_at_the_opening_of_the_legal_year_2015_putrajaya_10_jan_2015.html> accessed 23 Feb 2016; Speech by Justice Tan Sri Richard Malanjum, Opening of the Legal Year 2014 [2014] 1LNS(A) ix.

25 'Najib says rule of law would always be upheld, will not condone wrongdoings', *The Malay Mail Online* 14 Mar 2015, <http://www.themalaymailonline.com/malaysia/article/najib-says-rule-of-law-would-always-be-upheld-will-not-condone-wrongdoings#sthash.oCHAKLIa.dpuf> accessed 25 Feb 2016; Meena Lakshana, 'Najib: Rule of law must reign over South China Sea', *fz.com*, 2 Jun 2014, <http://www.fz.com/content/najib-rule-law-must-reign-over-south-china-sea#ixzz41A6V1iJc> accessed 25 Feb 2016; Aiezat Fadzell, 'Najib: Strengthen interfaith understanding, tolerance and respect for national harmony', *The Sun Daily*, 24 Feb 2016, <http://www.thesundaily.my/news/1709351> accessed 25 Feb 2016.

26 Speech by YAA Tun Arifin Bin Zakaria, Chief Justice of Malaysia 'Syarahan Perdana Integriti 2012 "Rule Of Law And Judicial System" (2012), <http://www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/CJ%20-%20Integrity%20Speech%20(NEW).pdf> accessed 25 Feb 2016; see also speech by YAA Tun Arifin Bin Zakaria, Chief Justice of Malaysia, 'Towards an Effective Administration of the Justice System and the Judges' Expectation of Lawyers' [2015] 1 CLJ i.

27 Speech by YAA Tun Arifin Bin Zakaria, Chief Justice of Malaysia at the Opening of the Legal Year 2015 (Putrajaya, 10 Jan 2015) <http://www.malaysianbar.org.my/speeches/speech_by_yaa_tun_arifin_bin_zakaria_chief_justice_of_malaysia_at_the_opening_of_the_legal_year_2015_putrajaya_10_jan_2015.html> accessed 23 Feb 2016; see also Speech by Justice Tan Sri Richard Malanjum, Opening of the Legal Year 2014 [2014] 1LNS (A) ix.

TABLE 3
ADMINISTRATION OF JUSTICE GRID

Indicator	Figure
No. of judges in country[28]	Federal Court: 10 Court of Appeal: 23 High Court: 57 Judicial Commissioners: 40 Sessions Court: No known official current statistics available. Magistrates: No known official current statistics available.
No. of lawyers in country	16,113[29]
Annual bar intake (including costs and fees)	MYR1,080 (approx. US$298)[30]
Standard length of time for training/ qualification	Lawyers: 4 years Prosecutors: 4 years Judges: 10 years[31]
Availability of post-qualification training	No known mandatory requirement for prosecutors and judges after entry into the profession. As for lawyers, the Bar Council recently passed a resolution making it mandatory for lawyers with less than five years experience, to obtain a minimum of 16 Continuing Professional Development (CPD) points per 24-month CPD cycle.[32]
Average length of time from arrest to trial (criminal cases)	No known official data or statistics available.
Average length of trials (from opening to judgment)	No known official data or statistics available.
Accessibility of individual rulings to public	Court decisions are made available to the litigants and the public.

28 <kehakiman.gov.my> accessed 16 Feb 2016.

29 The Malaysian Bar, 'Statistics' <http://www.malaysianbar.org.my/legal_directory_statistics.html> accessed 16 Feb 2016.

30 '2015 Bar Council Subscription', Circular No 096/2015 (12 May 2015), *The Malaysian Bar*, < http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_details&gid=5014> accessed 16 Feb 2016.

31 Article 123 of the Federal Constitution states that, 'A person is qualified for appointment under as a superior Court Judge if he is a citizen; and for the ten years preceding his appointment he has been an advocate of those courts or any of them or a member of the judicial and legal service of the Federation or of the legal service of a State, or sometimes one and sometimes another.

32 'Resolutions Adopted at the 70th Annual General Meeting of the Malaysian Bar Held at Renaissance Kuala Lumpur Hotel (Saturday, 19 Mar 2016)', <http://www.malaysianbar.org.my/malaysian_bar_s_resolutions/resolutions_adopted_at_the_70th_annual_general_meeting_of_the_malaysian_bar_held_at_renaissance_kuala_lumpur_hotel_saturday_19_mar_2019.html> accessed 11 April 2016. However, this resolution is being challenged by a group of young lawyers – Ida Lim, 'Young lawyers pushing for Bar EGM to reverse 'unfair' mandatory training, fine', *the MalayMail Online*, <http://www.themalaymailonline.com/malaysia/article/young-lawyers-pushing-for-bar-egm-to-reverse-unfair-mandatory-training-fine#sthash.GrPZTNoh.dpuf> accessed 11 April 2016.

Appeal structure	No change—appeal remains at two levels following the hierarchical structure below: Federal Court Court of Appeal High Court Sessions Court Magistrates Court
Cases before the National Human Rights Institution[33]	Number of complaints: 2010: 1,005 2011: 1,232 2012: 911 2013: 624 2014: 717 General types of complaints received since 2011 include, among others, police inaction in investigating reports lodged; excessive use of force or acts of brutality and abuse of power by the police; violations of right to liberty and security of persons; unlawful detention under preventive detention laws; violations of rights of indigenous peoples; violations of religious freedom; violations of right to work and mistreatment of migrant workers; violations of freedom of expression and right to peaceful assembly. No official information found with regard to the speed of the disposition of the complaints.
Complaints filed against the police, the military, lawyers, judges/justices, prosecutors or other institutions (per year)	Complaints filed against the police:[34] 2012: 721 2013: 604 2014: 388 2015: 346 Complaints filed against the Ministry of Defence:[35] 2012: 517 (80% resolved* within 15 days) 2013: 543 (74.9% resolved within 10 days)

33 Information combined from SUHAKAM Annual Reports 2010 – 2014. <http://www.suhakam.org.my/pusat-media/sumber/laporan-tahunan/> accessed 16 Feb 2016.

34 Public Complaints Bureau, Prime Ministers Department, <http://www.pcb.gov.my/en/complaint/statistics-by-year> accessed 16 Feb 2016.

35 Information obtained from Ministry of Defence Annual Reports 2011-2013. <http://www.mod.gov.my/penerbitan.html> accessed 16 Feb 2016.

	Complaints filed against lawyers: *Received by Bar Council Secretariat's Complaints and Intervention Department*[36] 2012: 611 2013: 567 2014: 782 *Received by the Advocates and Solicitors Disciplinary Board*[37] 2012: 977 2013: 903 2014: 849 Complaints filed against judges: No known official data or statistics available Complaints filed against prosecutors: No known official data or statistics available
Complaints filed against other public officers and employees	*Received by the Public Complaints Bureau (which investigates complaints made by the public towards any administrative action that is considered unjust, not in accordance with the existing laws and regulations, an abuse of power, a maladministration, and other similar acts by government agencies)*[38] 2012: 7,681 (92.9% resolved* within the same year) 2013: 6,183 (96.6% resolved within the same year; 54.4% resolved within 15 days) 2014: 7,199 (99.1% resolved within the same year; 61.9% resolved within 15 days) 2015: 6,408 (94.1% resolved within the same year; 71.4% resolved within 15 days) * "Resolved" refers to providing feedback on the status of complaints, *i.e.*, whether the complaints have been completed or require further investigation.

36 2012/13 Annual Report of the Malaysian Bar, 85; 2013/14 Annual Report of the Malaysian Bar, 84; 2014/15 Annual Report of the Malaysian Bar, 136.

37 2012/13 Annual Report of the Malaysian Bar, 100; 2013/14 Annual Report of the Malaysian Bar, 97; 2014/15 Annual Report of the Malaysian Bar, 155.

38 Public Complaints Bureau, Prime Ministers Department. <http://www.pcb.gov.my/en/complaint/statistics-by-year> accessed 16 Feb 2016.

I. COUNTRY PRACTICE IN APPLYING THE CENTRAL PRINCIPLES OF RULE OF LAW FOR HUMAN RIGHTS

A. On Central Principle 1 (Government and its officials and agents are accountable under the law)

Definition and Limitation of the Powers of Government in the Fundamental Law

There has been no change in the law with regard to the accountability of the government and its officials. Article 4 of the Federal Constitution states that the Constitution is the "supreme law of the Federation." No one is above the law, including members of the Royal family as article 182 of the Federal Constitution provides for a Special Court to try all offenses and all civil cases against (and by) the King or the Ruler of any State.

Having said that, article 149 of the Federal Constitution remains problematic as it allows Parliament to make legislation to counter any action that causes fear of violence, excites disaffection against the King or any government, promotes ill-will and hostility between the different races, procures the unlawful alteration of anything established by law, prejudices the maintenance or the functioning of any supply or services, or prejudices public order or national security. There has been no change in article 149, and as stated in *Rule of Law for Human Rights in the ASEAN Region: A Baseline Study* (hereinafter, *2011 Rule of Law Baseline Study*), the wide variety of circumstances allowed by article 149 to abrogate fundamental liberties remains a concern. Since 2011, this concern has manifested in the enactment of the Prevention of Terrorism Act 2015 (POTA 2015) and the Security Offences (Special Measures) Act 2012 (SOSMA). A large part of the POTA 2015 violates rule of law principles (discussed in greater detail below), and the SOSMA was used at the end of 2015 against two persons for lodging reports against 1Malaysia Development Berhad (1MDB). They were charged with attempted sabotage of the Malaysian economy and the country's financial and banking system.[39]

Also, as stated in the *2011 Rule of Law Baseline Study*, the selective enforcement of existing laws continues to be problematic in Malaysia. Many have criticized the unfair and unequal application of the Sedition Act 1948, with only human rights activists and dissenters bearing the brunt of these laws, while others who have uttered inflammatory religious or racial statements have not been investigated or castigated by the authorities.[40]

39 V. Anbalagan, 'Khairuddin, Matthias out on bail, court rules Sosma not applicable', *The Malaysian Insider*, 18 Nov 2015, <http://www.themalaysianoutsider.com/malaysia/article/khairuddin-matthias-freed-on-bail-court-rules-charge-not-security-offence#sthash.qrccBkYF.dpuf> accessed 11 Mar 2016.

40 COMANGO, 'Stakeholder Report on Malaysia for the 17th Session in the 2nd Cycle of the HRC's Universal Periodic Review in 2013"; see also United Nations Human Rights Council, 17th Session, Working Group on the Universal Periodic Review, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21 – Malaysia (A/HRC/WG.6/17/MYS/3), 25 July 2013, para. 44; see also speech by Steven Thiru, President, Malaysian Bar at the Opening of the Legal Year 2016, Kuala Lumpur (8 Jan 2016), <http://www.malaysianbar.org.my> accessed 21 Feb 2016.

Amendment or Suspension of the Fundamental Law

There has been no change in the law with regard to amending or suspending the Constitution and/or laws on fundamental liberties. The procedures set out under the Federal Constitution are as follows:

Amendment to the Federal Constitution

Amendments to the Constitution can be made following the four procedures set out in the Federal Constitution:[41]

1. Simple majority. The following amendments to the Federal Constitution can be done by way of simple majority in both Houses of Parliament:
   - Amendments to Part III of the Second Schedule regarding supplementary provisions relating to citizenship and any consequential amendment thereof;
   - Forms of oaths and affirmations (Sixth Schedule of the Federal Constitution);
   - Election of Senators (Seventh Schedule of the Federal Constitution);
   - Incidental and consequential amendments to Parliament's legislative powers, other than powers relating to States under articles and 74 and 76 of the Federal Constitution;
   - Matters relating to the admission of new States, other than in relation to Sabah and Sarawak.

2. Two-thirds majority. According to article 159(3) of the Federal Constitution, unless otherwise stated, the Constitution can only be amended[42] if it is passed by two-thirds of the total number of members of both Houses of Parliament during the second and third readings of the amendment.

3. Assent of the Conference of Rulers.[43] Amendments made to the following provisions of the Constitution require two-thirds majority *and* (emphasis added) the consent of the Conference of Rulers:
   - Provisions prohibiting the questioning of any matter, right, status, position, privilege, sovereignty, or prerogative established or protected by the provisions of citizenship, national language, special position of Malays and natives of Sabah and Sarawak, or the sovereignty, prerogatives, powers and jurisdiction of the Rulers [article 10(4) of the Federal Constitution];
   - Matters regarding the Conference of Rulers (article 38 of the Federal Constitution);
   - The exemption of the privileges of the Parliament and Legislative Assemblies under the Sedition Act 1948 and article 10(4) of the Federal Constitution [articles 63(4) and 72(4) of the Federal Constitution]; and
   - Precedence and rights of succession of Rulers (articles 70 and 71 of the Federal Constitution).

4. Assent of Governors. Amendments to the special rights of Sabah and Sarawak require two-thirds majority in both Houses of Parliament, assent of the King *and* (emphasis added) the consent of the Governors of Sabah and Sarawak.

41 Shad Saleem Faruqi, *Document of Destiny – The Constitution of the Federation of Malaysia* (Kuala Lumpur: Star Publications (Malaysia) Berhad), 552-560.

42 This includes addition and repeal of the Constitution – article 149(6) of the Federal Constitution.

43 Article 159(5) of the Federal Constitution.

Suspension of fundamental liberties

The Federal Constitution permits the suspension or violation of some or all fundamental liberties (in Part II of the Federal Constitution) in two instances:

1. To counter subversive activities. The Parliament is given the power to enact laws to deal with subversive activities or any action prejudicial to public order or security.[44] In this instance, article 149 of the Federal Constitution permits the Parliament to enact such laws that violate or suspend the right to personal liberty (article 5), freedom of movement (article 9), freedom of speech, assembly and association (article 10), and rights to property (article 13); and
2. Emergency. In a situation where the King is satisfied that a grave emergency exists whereby the security, economic life, or public order of the country, or any part thereof is threatened, article 150 of the Federal Constitution allows the King to issue a Proclamation of Emergency. Once a Proclamation of Emergency is declared, all provisions of the Constitution and all fundamental liberties, save for six areas—freedom of religion (article 11), citizenship, language, Islamic law, custom of the Malays, or any native law or customs in Sabah and Sarawak—can be suspended.

It should be noted that laws promulgated under articles 149 and 150 of the Federal Constitution must not violate safeguards for preventive detainees enshrined in article 151 of the Federal Constitution. Article 151 provides that a person detained under any preventive detention law should be conferred the right to be informed (as soon as possible) of the grounds of detention and the facts on which the detention order is based, the right to make representations to an independent Advisory Board, and the right not to be detained, unless the Advisory Board has considered any representations made by the detainee and made recommendations to the King within three months of receiving the representation. Having said that, the lack of provisions safeguarding the right to fair trial in POTA 2015, SOSMA 2012, and PCA 1959 is concerning (see below).

Laws Holding Public Officers and Employees Accountable

The Enforcement Agency Integrity Commission (EAIC) was established in April 2011 to enhance integrity among enforcement officers and law enforcement agencies.[45] The functions of the EAIC are to:[46]

- Receive complaints of misconduct from the public against enforcement officers or law enforcement agencies in general and investigate and hold a hearing on the complaints received;

44 Article 149(1) of the Federal Constitution states these includes any action that has been taken or threatened by any substantial body of persons that (a) causes a substantial number of citizens to fear, organized violence against persons or property; or (b) excites disaffection against the *Yang di-Pertuan Agong* or any Government in the Federation; or(c) promotes feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or (d) to procures the alteration, otherwise than by lawful means, of anything by law established; or (e) is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or (f) is prejudicial to public order in, or the security of, the Federation or any part thereof.

45 The EAIC supervises 21 agencies - the National Anti-Drugs Agency, Malaysian Maritime Enforcement Agency, Ikatan Relawan Rakyat Malaysia (RELA), Department of Environment, Immigration Department of Malaysia, Royal Customs Department of Malaysia, Department of Occupational Safety & Health, National Registration Department, Civil Aviation Department, Road Transport Department, Industrial Relations Department, Fisheries Department, Department of Wildlife and National Parks, Labour Department, Ministry of Health (Enforcement Division), Ministry of Tourism Malaysia (Enforcement Unit of Licensing Division), Ministry of Domestic Trade, Co-operatives and Consumerism (Enforcement Division), Ministry of Housing and Local Government (Enforcement Division), Commercial Vehicles Licensing Board, Registrar of Businesses, and the Royal Malaysia Police.

46 Section 4(1) of the Enforcement Agency Integrity Commission Act 2009.

- Formulate and put in place mechanisms for the detection, investigation and prevention of misconduct by an enforcement officer;
- Provide for the auditing and monitoring of particular aspects of the operations and procedures of an enforcement agency;
- Promote awareness of, enhancement of, and education in relation to, integrity within an enforcement agency and to reduce misconduct amongst enforcement officers;
- Assist the government in formulating legislation, or to recommend administrative measures to the government or an enforcement agency, in the promotion of integrity and the abolishment of misconduct amongst enforcement officers;
- Study and verify any infringement of enforcement procedures and make any necessary recommendations relating thereto; and
- Make site visits to the premises of an enforcement agency, including visiting police stations and lockups in accordance with the procedures under any written law, and make any necessary recommendations relating thereto.

Since its establishment in 2011, the EAIC received a total of 1,461 complaints lodged against various enforcement agencies.[47] The type of misconduct that the EAIC is empowered to investigate includes act or inaction by an enforcement officer that is contrary to a written law; is unreasonable, unjust, oppressive or improperly discriminatory; committed on improper motives, irrelevant grounds or irrelevant consideration; based on a mistake of law or fact; where grounds should have been given but were not given; failure of an enforcement officer to follow rules and procedures laid down by law or by the appropriate authority; or the commission of any criminal offence by an enforcement officer.[48] Recently, the EAIC found that the death of Dharmendran a/l Narayanasamy on 21 May 2013 resulted from the use of physical force by the police and as such, they (the said police officers) were responsible for his death.[49]

Private gain

General laws, such as the Malaysian Anti-Corruption Act 2009 (MACC Act 2009), which are applicable to all, criminalize corruption. Specific to public officers, section 23 of the MACC Act 2009 makes it an offense for an officer of a public body to use his office or position for any gratification for himself, his relatives[50] or associates.[51] In addition to the offenses under the MACC Act 2009, section 409 of the Penal Code specifically criminalizes the act of criminal breach of trust committed by any public servant or an agent who is entrusted with property in his capacity as a public servant; and section 165 of the Penal Code makes it a criminal offense to accept any valuable thing, without consideration, from a person concerned in any proceeding or business transacted by a public servant.

47 <http://www.eaic.gov.my/en/pusat-sumber/statistik/complaints> accessed 12 May 2016.

48 Section 24(1) of the Enforcement Agency Integrity Commission Act 2009.

49 Mayuri Mei Lin, 'EAIC: Police officers beat Dharmendran to death during violent interrogation', *The Malay Mail Online*, 28 April 2016, <http://www.themalaymailonline.com/malaysia/article/eaic-police-officers-beat-dharmendran-to-death-during-violent-interrogation> accessed 12 May 2016.

50 "Relative" is defined as "(a) a lineal ascendant or descendant of a spouse of the person; and (b) the uncle, aunt, cousin, son-in-law or daughter-in-law of the person.

51 "Associate" is defined as "(a) a nominee or an employee of such person; (b) a person who manages the affairs of such person; (c) an organization or a corporation controlled by such person or his nominee in the manner set out in the MACC Act; and (d) a trust created by such person or a trust in which such person has contributed not less than 20% of the value of the assets of such trust.

Other general offenses under the MACC Act 2009 include, among others, giving and accepting gratification,[52] giving or accepting gratification by agent,[53] corruptly procuring withdrawal of a tender,[54] and offering gratification to an officer of public body.[55] The penalty for these offenses is a term of imprisonment not exceeding 20 years and a fine not less than five times the sum or value of the gratification, which is the subject matter of the offense, if the same can be valued, or MYR10,000.00, whichever is higher.[56]

It must be stated that the public appears to be unconvinced with the efficacy and credibility of the Malaysian Anti-Corruption Commission (MACC) and the 2009 Act. This is especially so after the deaths of the Democratic Action Party (DAP) political aide Teoh Beng Hock, when he was questioned by the MACC in July 2009, and immigration officer Ahmad Sarbaini Mohamad in July 2011, and the lack in the prosecution of high profile cases.

Acts that exceed a public officer's authority

As regards laws that hold public officers and employees accountable for acts that exceed their authority, the Penal Code enumerates a number of offenses, among others, disobeying a direction of the law, with the intent to cause injury to any person (section 166), incorrectly preparing or translating with the intent to cause injury (section 167), unlawfully engaging in a trade (section 168), and unlawfully buying or bidding for property (section 169 of the Penal Code).

Special Courts and Prosecutors of Public Officers and Employees

There are no known official information about dedicated courts and prosecutors that handle cases against public officers and employees.

52 Section 16 of the MACC Act 2009 states, "A person commits an offence if he by himself, or through or with any other person (a) corruptly solicits or receives or agrees to receive for himself or for any other person, or (b) corruptly gives, promises or offers to any person for the benefit of that person or another person, any gratification as an inducement to, or reward for, any person or any officer of a public body doing or forbearing to do anything in respect of any matter or transaction.

53 Section 17 of the MACC Act 2009 states, "An agent commits an offence if he corruptly accepts or obtains, or agrees to accept or attempts to obtain, for himself or any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act, or for showing or forbearing to show favour or disfavour to any person, in relation to his principal's affairs or business. A person who gives gratification to an agent also commits an offence under this provision."

54 Section 20 of the MACC Act 2009 states, "A person commits an offence if he, with the intent of obtaining any contract for the supply of product or services from any public body, offers any gratification to any person who has made a tender for the same contract as an inducement or reward for him to withdraw the tender. It is also an offence for a person to solicit for or receive any gratification for withdrawing his tender".

55 Section 21 of the MACC Act 2009 states, "A person commits an offence if he offers to an officer of a public body any gratification as an inducement or reward for that officer to (a) vote or abstain from voting at any meeting in favour of or against any question submitted for approval by the public body; or (b) perform or abstain from performing or to assist in procuring, expediting, delaying, hindering or preventing the performance of any official act; or (c) assist in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or (d) show or forbear from showing any favour or disfavour in his capacity as an officer of a public body. An officer of a public body who solicits or accepts gratification on the grounds stated above also commits an offence under the MACC Act".

56 Section 24 of the MACC Act 2009.

B. On Central Principle 2 (Laws and procedures for arrest, detention and punishment are publicly available, lawful, and not arbitrary)

Publication of and Access to Criminal Laws and Procedures

There has been no change since 2011—all criminal laws and procedures in Malaysia are published, generally accessible, and available in both Malay and English. The laws published are generally up to date.

Accessibility, Intelligibility, Non-reactivity, Consistency, and Predictability of Criminal Laws

Criminal laws and procedures in Malaysia are available, free, and accessible either online (through the website of the Attorney General's Chambers and some Ministries), or in universities, or public libraries. These laws can also be purchased online through private companies such as Current Law Journal, Malayan Law Journal, Lexis Nexis, or hardcopy from bookstores.

There are no known official data or statistics to measure the level of understanding of these laws. As stated in the *2011 Rule of Law Baseline Study*, the Bar Council has produced and distributes the "Red Book – Know Your Rights"[57] and the "Rakyat Guides,"[58] which contain information on constitutional rights and criminal law and procedures in simple language.

The guarantee against retrospectivity of laws has remained the same since 2011. It continues to be embodied in article 7(1) of the Federal Constitution, which states that "no person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed."

Detention Without Charge Outside an Emergency

The most notable change since 2011 is the repeal of the Internal Security Act 1960 (ISA) (a preventive detention law) in 2012. However, the positive development brought about by the repeal of the ISA was short-lived as the executive promulgated a number of laws that allow detention without trial outside a genuine state of emergency.

Prevention of Terrorism Act 2015

The first such law is the POTA 2015. Intended to tackle terrorist activities, concerns have been raised that the 2015 Act lacks fair trial safeguards:

1. Right of access to a court or tribunal. The POTA 2015 does not contain provisions that allow for a trial before a court. Instead, the determination of whether there are reasonable grounds for believing that a person, who is the subject of the inquiry, is engaged in the commission or support

57 <http://www.malaysianbar.org.my/index.php?option=com_docman&task=cat_view&gid=333&Itemid=120> accessed 18 Feb 2016.

58 <http://www.malaysianbar.org.my/index.php?option=com_docman&task=cat_view&gid=465&Itemid=332> accessed 18 Feb 2016.

of terrorist acts, falls within the purview of an inquiry officer and the Prevention of Terrorism Board (POTB). Section 10 of the POTA empowers an inquiry officer to procure and receive all evidence in whatever form, summon and examine witnesses, and require the production of any document relevant to the inquiry.[59] The inquiry officer submits his report to the POTB, and upon receipt and review of the inquiry officer's report, the POTB can either release the person,[60] detain the person for a period not exceeding two years,[61] or subject the accused person to a restriction order;[62]

2. Right to a lawyer. The right of the person who is the subject of the inquiry or any witness to access a lawyer is not guaranteed, except when his/her own evidence is being taken and recorded by the inquiry officer;[63]
3. Prohibition on the use of evidence obtained through unlawful means/treatment. The inquiry officer may procure evidence by any means; there is no provision for the POTB to inquire into the inquiry officer's report or to request for further investigations;
4. Right to a public hearing. There is no requirement for the POTB hearings to be held in public or to allow the person, who is subject of the inquiry, to be present at the POTB hearing;
5. Right to full review. Judicial review of any order by the POTB is not allowed, except in regard to questions of procedural compliance;[64] and
6. Lack of definitions. The words "engaged," "commission," "support," and "involving" have not been defined in the POTA 2015, and the lack of definitions could be abused by the authorities.[65]

The Malaysian Bar has commented that the POTA is unnecessary as there are ample substantive and procedural counter-terrorism laws in Malaysia.[66]

Amendments to the Prevention of Crime Act 1959

Since 2011, a number of amendments were made to the PCA 1959; similar provisions (as those in the POTA), which supplant court process, were also inserted into the PCA 1959:

1. Right to a public hearing. There is no requirement for the Prevention of Crime Board (PCB) to hold their hearings in public and the PCB does not have the power to inquire into or re-examine the findings of the inquiry officer.[67]
2. Right to a lawyer. Section 9(5) does not allow a person access to legal representation;

59 Section 10 of the POTA 2015.

60 Section 12(2)(b) of the POTA 2015.

61 Section 13(1) and (2) of the POTA 2015.

62 Section 13(3) of the POTA 2015.

63 Section 10(6) of the POTA 2015.

64 Section 19 of the POTA 2015.

65 'Malaysian Bar calls anti-terror bill 'shameless revival of ISA', *The Malaysian Insider*, 5 Apr 2015, <http://www.themalaysianinsider.com/malaysia/article/malaysian-bar-calls-anti-terror-bill-shameless-revival-of-isa#sthash.7233r4v7.dpuf> accessed 18 Feb 2016.

66 Speech by Steven Thiru, President, Malaysian Bar at the Opening of the Legal Year 2016, Kuala Lumpur (8 Jan 2016), <http://www.malaysianbar.org.my> accessed 21 Feb 2016.

67 'Joint Press Release: Amendments to the Prevention of Crime Act 1959 are Repugnant to the Rule of Law - No to Preventive Detention Without Trial', *The Malaysian Bar*, 27 Sep 2013, <http://www.malaysianbar.org.my/press_statements/joint_press_statement_amendments_to_the_prevention_of_crime_act_1959_are_repugnant_to_the_rule_of_law_no_to_preventive_detention_without_trial.html> accessed 18 Feb 2016.

3. Prohibition on the use of evidence obtained through unlawful means/treatment. The inquiry officer, who is tasked to carry out the investigations and is appointed by the minister,[68] is not bound by evidentiary rules and has sole discretion on the conduct of the inquiries;
4. Right to reasoned judgment. The amendments to the PCA established a PCB that is empowered to issue a detention order against a person who has committed two or more serious offences, regardless of whether he has been convicted, and merely on the sufficiency of evidence;[69]
5. Right to full review. Judicial review is only allowed on procedural matters;[70]
6. Indefinite detention. The new section 19A of the PCA 1959 allows the PCB to "direct that any registered person be detained under a detention order for a period not exceeding two years, and may renew any such detention order for a further period not exceeding two years at a time if it is satisfied that such detention is necessary in the interest of public order, public security or prevention of crime." This largely means that a person may be detained indefinitely, without the possibility of appeal or judicial review.

Rights of the Accused

Freedom from Arbitrary or Extra-legal Treatment or Punishment, and Extra-Judicial Killing

Indefinite detention, Detention without charge or trial

The POTA 2015 and the PCA 1959 allow the authorities to detain a person without trial, with the latter allowing for indefinite detention without trial (see discussion above on "Detention Without Charge Outside an Emergency").

Treatment in custody

With regard to treatment in custody, there has been no improvement in the law or practice. Similar to the situation in 2011, Malaysia has yet to accede to/ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Penal Code does not define "torture" or "inhumane treatment." There has been no change in the law with regard to confessions or statements made to the police, in that section 24 of the Evidence Act 1950 states that a confession made by an accused person is irrelevant if it has been caused by an inducement, threat or promise.

However, with the new laws (POTA 2015 and amendments to the PCA 1959), some have argued that the provisions allow an inquiry officer to procure or receive all evidence in any form without regard to any law relating to evidence or criminal procedure, and this wide power could be abused to inflict torture or inhumane treatment on any person.[71] The protection afforded by section 24 of the Evidence Act 1950 could be lost.

68 The Prevention of Crime Act 1959 does not expressly state which Minister. As such, looking at the Interpretation Acts 1948 and 1967, any reference to "the Minister" is a reference to the Minister for the time being responsible for the matter in connection with which the reference is made.

69 Section 7C of the PCA 1959.

70 Section 15A of the PCA 1959.

71 Joint Press Release | Detention Without Trial is Oppressive and Unjust, and Violates the Rule of Law, Malaysian Bar, 10 Apr 2015, <http://www.malaysianbar.org.my/press_statements/joint_press_release_by_the_three_bars_of_malaysia_%7C_detention_without_trial_is_oppressive_and_unjust_and_violates_the_rule_of_law.html> accessed 10 May 2016.

Right to habeas corpus

The right to *habeas corpus,* guaranteed in article 5(2) of the Federal Constitution, has since been considerably watered down with the coming into force of the POTA 2015 and PCA 1959. New provisions were inserted in both these laws[72] to exclude judicial protective proceedings, such as applications for *mandamus*, prohibition, *certiorari*, declaration, injunction, and writ of *habeas corpus*.

Deaths in custody

Civil society organizations and SUHAKAM have continued to report deaths in custody and police brutality. In its 2014 Annual Report, SUHAKAM observed that since 2010, the number of deaths in custody increased from nine to 20 deaths in 2013.[73] In 2012, SUHAKAM reported 34 complaints regarding the excessive use of force by the police, and in 2013 and 2014, SUHAKAM re-classified its complaints and recorded a total of 30 complaints of cruel/inhuman/degrading treatment or punishment. The SUHAKAM reports do not contain details of such complaints.

Extra-judicial killings

There are no known official data or statistics available.

Presumption of Innocence

There has been no change in the law since 2011—the principle of "innocent until proven guilty" continues to be guaranteed in the Criminal Procedure Code (CPC), with the prosecution proving a *prima facie* case before a trial can continue. As per the *2011 Rule of Law Baseline Study*, a number of drug laws and the Sedition Act 1948[74] provide for the reversal of the burden of proof and are exceptions to the presumption of innocence.

One new provision on this issue is the amendment (in 2012) to the Evidence Act 1950. Under section 114A of the Act, a person is presumed to have published/re-published a publication if it originates from a network service that he/she is registered with and subscribed to, or from a computer which he/she has custody or control. In addition, any person whose name, photograph or pseudonym appears on any content is presumed to have posted or re-posted it via the internet.

72 Section 19 of POTA 2015 and section 15A of PCA 1959.

73 SUHAKAM Annual Report 2014, 38 <https://docs.google.com/file/d/0B6FQ7SONa3PRUG1nc25yRGV3TlU/preview> accessed 18 Feb 2016.

74 Section 37 of the Dangerous Drugs Act 1952 which presumes a person to be in possession of drugs if he is found to have custody of drugs and also presumes a person to be trafficking drugs if he is found to have possession of drugs, unless proven to the contrary; section 6 (2) of the Sedition Act 1948 states that 'No person shall be convicted of any offence…if the person proves that the publication…was printed, published, sold, offered for sale, distributed, reproduced or imported without his authority, consent and knowledge and without any want of due care or caution on his part, or that he did not know and had no reason to believe that the publication had a seditious tendency.'

Legal Counsel and Assistance

There has been no change in the law since 2011. Article 5(3)-(4) of the Federal Constitution and section 28A of the CPC guarantee the right to access to a legal counsel. As previously cited in the *2011 Rule of Law Baseline Study*, case laws have interpreted this right to mean that it cannot be exercised immediately after arrest where it would impede police investigations,[75] and this right should only be given to the accused with "all convenient speed."[76] This right is available even to persons who have been detained under laws promulgated under article 149 of the Federal Constitution. [77] However, as stated above, the POTA 2015 and the PCA 1959 contain provisions that erode the right to legal counsel for persons detained under these laws.

In practice, there have been some complaints of accused persons/detainees being denied access to a lawyer. SUHAKAM, in its 2013 Annual Report, stated that it received complaints of denial of access to lawyers by arrested persons (the SUHAKAM report did not contain a specific number of complaints received).[78] Similar concerns were raised during the Universal Periodic Review Second Cycle for Malaysia, where civil society organizations urged the authorities to guarantee arrested persons the right to access to counsel at all stages of the criminal proceedings and to ensure that lawyers are able to consult their clients freely at all times.[79]

Knowing the Nature and Cause of the Accusation

There has been no change in the law—article 5(3) of the Federal Constitution embodies this right. The case of *Mohamad Ezam bin Mohd. Noor v. Ketua Polis Negara & Ors,*[80] where the police was only required to inform the arrested person that he has reason to believe there are grounds to justify the detention, and that there is no requirement for the police to go into sufficient particulars and material evidence, still holds water.

However, in SUHAKAM's Annual Reports in 2013 and 2014, the commission noted that there have been complaints of failure by the police to inform accused persons of the grounds of arrest.[81] The reports, unfortunately, did not state how many such complaints were received.

Guarantees during Trial

Save for the provisions in the POTA 2015 and the PCA 1959 (enumerated above), which are tantamount to a circumvention of an accused's right to be tried before a court, there has been no change with regard to the right of an accused person to be tried in their presence, to defend themselves in person, and examine, or have counsel examine, the witnesses and evidence against them.[82]

75 *Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198.

76 *Public Prosecutor v Mah Chuen Lim & Ors* [1975] 1 MLJ 95.

77 *Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309.

78 SUHAKAM Annual Report 2013, 44.

79 United Nations Human Rights Council, 17th Session, Working Group on the Universal Periodic Review, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21 – Malaysia (A/HRC/WG.6/17/MYS/3), 25 July 2013, para. 46.

80 [2002] 4 MLJ 449.

81 SUHAKAM Annual Report 2014, 46 <https://docs.google.com/file/d/0B6FQ7SONa3PRUG1nc25yRGV3TlU/preview> accessed 23 Feb 2016.

82 Chapters XVIIA to XXVA of the Criminal Procedure Code (CPC).

As regards the right to be tried without undue delay, there has been no change in the law. This right was entrenched in 1992 when the High Court, in the case of *PP v. Choo Chuan Wang*,[83] held that the right to a fair hearing within a reasonable time by an impartial court established by law is part of the right to life and personal liberty guaranteed in article 5(1) of the Federal Constitution. The Court went on to state that, "criminal work should be disposed of with the least possible delay in order to avoid hardship to the accused who may be in custody or who in any case has the right to have the criminal accusation against him determined as soon as possible."

SUHAKAM's 2013 Annual Report remarked that there were instances when the Police delayed the process of recording statements from accused persons.[84]

Appeal

There has been no change in the law since 2011—the Courts of Judicature Act 1964 and Chapter XXX of the CPC lay down the right to appeal and the procedure and rules governing appeals.[85] The procedures in these laws adequately afford the guarantee of the right to appeal.

Freedom from Double Jeopardy

There has been no change in the law since 2011—article 7(2) of the Federal Constitution provides protection against repeated trials.[86]

Remedy before a Court for Violations of Fundamental Rights

No law guarantees the right to seek a timely and effective remedy before a competent court for violations of fundamental rights. For any violation of fundamental rights in Malaysia, a person alleging a human rights violation may bring a claim against the alleged perpetrator (through a writ or originating summons), or file a judicial review application, depending on the case. The available remedies are damages, declaration, *certiorari*, *mandamus* or other relief.

However, in some of the cases, particular those that involve a dispute between the jurisdiction of the Syariah and Civil Courts, applicants have been left without an effective remedy. In the cases of *Shamala Sathiyaseelan v. Dr. Jeyaganesh C. Mogarajah & Anor*[87] and *Subashini a/p Rajasingam v. Saravanan a/l Thangathoray*,[88] the Civil Court (Federal Court) refused to hear the application of a Hindu mother in a custody battle where her estranged husband had converted to Islam and unilaterally converted their children to Islam. The applicant in the case was left without an effective remedy as the Civil Court did not have jurisdiction to hear the case,

83 [1992] 3 CLJ (Rep) 329,333.

84 SUHAKAM Annual Report 2013, 44 <https://drive.google.com/file/d/0B6FQ7SONa3PRNDNNWmo5cGVQakU/edit> accessed 23 Feb 2016.

85 Sections 26-29 of the Courts of Judicature Act, Chapter XXX of the CPC.

86 Article 7(2) of the Federal Constitution states, "A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted."

87 [2004] 2 CLJ 416.

88 [2007] 2 MLJ 705.

and the applicant did not have legal standing before the Syariah Court.[89]

Also, concerns have been expressed with regard to the right of indigenous women to seek effective remedy from the Native Courts. Due to social and cultural constraints, indigenous women have limited access to justice, and are disadvantaged by native customary law. In particular, for sexual offenses, both parties (regardless of whether the woman was raped) are liable to pay a fine.[90]

C. On Central Principle 3: (The process by which the laws are enacted and enforced is accessible, fair, efficient and equally applied)

Law Enactment

Openness and Timeliness of Release of Record of Legislative Proceedings

There has been no remarkable change in this area since 2011—proceedings in both Houses of Parliament are open to the public. Members of Parliament are given notice of the dates of proceedings, and dates of proceedings are publicized on the Parliament website.[91] However, members of the public who would like to visit Parliament must submit an application at least five working days prior to the date of visit, and an official application letter must accompany the application.[92]

Timeliness of Release and Availability of Legislative Materials

There has been no improvement in the law or procedure since 2011—draft laws and minutes of legislative proceedings are not made available to the public on a timely basis. The Hansard is only available in Malay and not easily accessible from the Parliament's website.

Draft laws to be debated in Parliament are not made public by Parliament before the debate. Access to draft laws is through members of Parliament. Additionally, there has been some criticism with regard to the hurried manner in which bills are passed through Parliament. A number of members of Parliament and the Malaysian Bar criticized the sudden tabling of the new National Security Council Bill in December 2015.[93] Also, in April 2015, similar concerns were raised with regard to the Prevention of Terrorism Bill 2015, and

89 *Washing the Tigers - Addressing Discrimination And Inequality In Malaysia,* ERT Country Report Series:2 (London: November 2012), 57.

90 *Washing the Tigers - Addressing Discrimination And Inequality In Malaysia,* ERT Country Report Series:2 (London: November 2012), 95.

91 <http://www.parlimen.gov.my/takwim-dewan-rakyat.html?uweb=dr&> accessed 19 Feb 2016.

92 <https://www.parlimen.gov.my/permohonan-lawatan.html> accessed 19 Feb 2016.

93 Andrew Khoo, 'NSC Bill misguided, will not solve problems but create more', *The Malaysian Bar*, 20 Dec 2015, <http://www.malaysianbar.org.my/members_opinions_and_comments/nsc_bill_misguided_will_not_solve_problems_but_create_more.html> accessed 19 Feb 2016; Blake Chen, 'Opposition MPs furious NSC Bill being rushed', *The Malaysian Insider*, 3 Dec 2015, <http://www.freemalaysiatoday.com/category/nation/2015/12/03/opposition-mps-furious-nsc-bill-being-rushed/> accessed 19 Feb 2016; 'Suhakam: NSC bill will have 'serious effects' on civil liberties', *Malaysiakini,* 9 Dec 2015 < https://www.malaysiakini.com/news/322740> accessed 19 Feb 2016.

amendments to the SOSMA and the Sedition Act 1948.[94] The lack of transparency in the legislative process and the inadequate time for proper debate are concerning and could pave the way for abuse of these laws.[95]

Law Enforcement

The unequal and unfair enforcement of the law continues to be a problem in Malaysia. Previously cited problems (in the *2011 Rule of Law Baseline Study*) on the lack of procedural fairness, such as the arbitrary application of the Societies Act 1966 and the Official Secrets Act 1972, remain, with no significant improvement. Perhaps, the only improvement since 2011 is the elimination of the yearly requirement to renew the printing presses' permit for publications.[96] This requirement was often unequally enforced by the authorities to control the media, particularly media organizations that criticize the government.

In addition to the above, there appears to be an unequal and unfair application of the Sedition Act 1948, targeting only critics of the government and Islam. For example, civil society organizations have expressed concerns that the Attorney General refused to take action against Ibrahim Ali, President of PERKASA, when he called on all Muslims to seize and burn copies of the Bible that contain the word "Allah,"[97] while those who criticized court cases or drew cartoons that disparaged the government were arrested and investigated under the Sedition Act 1948 or the Communications and Multimedia Act 1998. The Malaysian Bar remarked that the Sedition Act 1948 appears to be a "dressed-up legislative weapon to target critics of the government and dissidents in society."[98]

In November 2015, for the first time, the SOSMA was used against political dissenters when Khairuddin Abu Hassan and Matthias Chang were arrested and detained under the SOSMA for lodging reports about possible corrupt practices of law enforcement agencies in five foreign countries.[99] It will be recalled that the SOSMA was enacted to tackle security offenses for purposes of maintaining public order and security.[100]

Civil society organizations have called on the government to establish an "Independent Police Complaints and Misconduct Commission" as they felt that there have been selective police investigations, and investigations into abuse by law enforcement officers were rare.[101]

94 'Bill passed early this morning is highlight of Parliament weekly report', *MySinChew.com*, 1 Apr 2015, <http://www.mysinchew.com/node/107882?tid=4#sthash.dX8e3Tj7.dpuf> accessed 19 Feb 2016.

95 Speech by Steven Thiru, President, Malaysian Bar at the Opening of the Legal Year 2016, Kuala Lumpur (8 Jan 2016), <http://www.malaysianbar.org.my> accessed 21 Feb 2016.

96 Printing Presses and Publications (Amendment) Act 2012.

97 COMANGO, 'Stakeholder Report on Malaysia for the 17th Session in the 2nd Cycle of the HRC's Universal Periodic Review in 2013"; see also United Nations Human Rights Council, 17th Session, Working Group on the Universal Periodic Review, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21 – Malaysia (A/HRC/WG.6/17/MYS/3), 25 July 2013, para. 44.

98 Speech by Steven Thiru, President, Malaysian Bar at the Opening of the Legal Year 2016, Kuala Lumpur (8 Jan 2016), <http://www.malaysianbar.org.my> accessed 21 Feb 2016.

99 Farik Zolkepli, 'Matthias Chang detained under Sosma', *The Star Online*, 8 Oct 2016, <http://www.thestar.com.my/news/nation/2015/10/08/matthias-chang-detained-under-sosma/> accessed 19 Feb 2016.

100 Preamble to the Security Offences (Special Measures) Act 2012.

101 United Nations Human Rights Council, 17th Session, Working Group on the Universal Periodic Review, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21 – Malaysia (A/HRC/WG.6/17/MYS/3), 25 July 2013, para. 44.

Equal Protection of the Law and Non-Discrimination

There has been no change in the law since 2011—article 8(1) of the Federal Constitution contains the guarantee that "all persons are equal before the law and entitled to the equal protection of the law."

Reparation for Crimes and Human Rights Violations' Victims/Survivors

There is no law that explicitly guarantees reparation for human right violations. General criminal and civil laws are applicable and does not make a distinction between crimes or civil wrongs and human rights violations.

Most victims gain access to relevant information on violations and reparation mechanisms through their legal counsel or through awareness activities conducted by SUHAKAM and civil society organizations in Malaysia. However, there are no known data or statistics to gauge the level of effectiveness of these awareness activities.

D. On Central Principle 4: (Justice is administered by competent, impartial, and independent judiciary and justice institutions)

Appointment and Other Personnel Actions in the Judiciary and among Prosecutors

Judiciary – Superior Courts

Unfortunately, there has been no visible improvement in the situation of the appointment, reappointment, promotion, discipline, and dismissal of judges and judicial officers since 2011. The 1988 judicial crisis (which resulted in the sacking and replacement of Supreme Court judges) continues to mar the independence of the judiciary in Malaysia.

Appointment

The former United Nations Special Rapporteur on the Independence of Judges and Lawyers has urged the Judicial Appointments Commission (JAC),[102] which has been in operation since 2009, to be more transparent and accountable in the elevation of judges. One particular recommendation to enhance the transparency and accountability of the JAC is to consult the Bar Council with regard to judicial appointments.[103] This (consultation with the Bar Council) was the practice previously (*i.e.* prior to the establishment of the JAC) where the Chief Justice would seek the Bar Council's feedback when appointments and promotions were made.[104] Greater transparency in the judicial appointments process could alleviate concerns and

102 Members of the JAC include the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judge of the High Court of Malaya, Chief Judge of the High Court of Sabah and Sarawak, and five other judges, <http://www.jac.gov.my/index.php?option=com_content&view=article&id=65&Itemid=136&lang=en> accessed 21 Feb 2016.

103 V. Anbalagan, 'Lawyers question criteria for promoting judges', *The Malaysian Insider*, 30 Sep 2013, <http://www.themalaysianinsider.com/malaysia/article/lawyers-question-criteria-for-promoting-judges#sthash.UoFa6rw8.dpuf> accessed 21 Feb 2016.

104 V. Anbalagan, 'Lawyers question criteria for promoting judges', *The Malaysian Insider*, 30 Sep 2013, <http://www.themalaysianinsider.com/malaysia/article/lawyers-question-criteria-for-promoting-judges#sthash.UoFa6rw8.dpuf> accessed 21 Feb 2016.

perceptions that judges are not promoted or appointed based on merit or seniority. Additionally, civil society organizations felt that the composition of the JAC could compromise the appointment process, and in turn, the independence of the judiciary.[105]

Dismissal/suspension

There has been no change since 2011 with regard to the law on the dismissal or suspension of superior Court judges—article 125 of the Federal Constitution states that the Prime Minister or the Chief Justice, after consulting the Prime Minister, may represent to the King that a judge ought to be removed on the ground of any breach of any provision in the Code of Ethics 2009, or inability from infirmity of body or mind, or any other cause which affects his ability to properly discharge the functions of his or her office. In this instance, the King shall appoint a tribunal[106] and refer the representation to the tribunal. The tribunal may recommend the removal or suspension of the judge from office.

If the Chief Justice is of the opinion that the breach does not warrant the judge being referred to a tribunal, section 14 of the Judges' Code of Ethics 2009[107] states that the Chief Justice may refer the complaint to the Judges' Ethics Committee. The Judges' Ethics Committee is then obliged to inform the judge in writing of the facts of the alleged breach of the Judges' Code of Ethics and give the judge the opportunity to make a written representation within 30 days. After considering the written representation, the Judges' Ethics Committee may dismiss the complaint if it feels it has no merit, or if there is merit in the complaint, invite the judge to appear before the Judges' Ethics Committee. The judge is allowed legal representation during his appearance before the said Committee. After due consideration of the representation made by the judge, if the breach is not proven, the Judges' Ethics Committee shall dismiss the complaint. If the breach is proven, the Judges' Ethics Committee may record an admonition to the judge or suspend the judge for a period not exceeding one year.

Training, Resources, and Compensation

The Judicial Academy was established in December 2011 and is charged with the function of providing coherent training for Superior Court judges.[108] It began providing six training sessions in 2012 on topics such as injunctions, admissibility of evidence in a civil trial, how to deal with cases under section 39B of the Dangerous Drugs Act 1952 and judicial review and appellate interventions. Since then, the Judicial Academy has continued to provide an average of seven training sessions per year for judges.

105 United Nations Human Rights Council, 17th Session, Working Group on the Universal Periodic Review, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21 – Malaysia (A/HRC/WG.6/17/MYS/3), 25 July 2013, para. 43.

106 Article 125(4) of the Federal Constitution states that, 'The tribunal appointed under Clause (3) shall consist of not less than five persons who hold or have held office as judge of the Federal Court, the Court of Appeal or a High Court, or, if it appears to the *Yang di-Pertuan Agong* expedient to make such appointment, persons who hold or have held equivalent office in any other part of the Commonwealth, and shall be presided over by the member first in the following order, namely, the Chief Justice of the Federal Court, the President and the Chief Judges according to their precedence among themselves, and other members according to the order of their appointment to an office qualifying them for membership (the older coming before the younger of two members with appointments of the same date)'.

107 P.U. (B) 201.

108 <http://www.jac.gov.my/?option=com_content&view=article&id=226&Itemid=188&lang=en> accessed 10 May 2016.

Judiciary – Lower Courts

Appointment

A Sessions Court judge must be a member of the Judicial and Legal Service[109] before he or she can be appointed. His or her appointment is by the King, upon the recommendation of the Chief Judge. As regards the appointment of a magistrate, the State Authority may, on the recommendation of the Chief Judge in each case, appoint any fit and proper person to be a First Class Magistrate in and for the State, provided that he or she is a member of the Judicial and Legal Service.[110]

Other Personnel Actions

As members of the Judicial and Legal Service, the appointment, confirmation, promotion, transfer, and exercise of disciplinary control over Sessions Court judges and magistrates fall within the purview of the Judicial and Legal Service Commission.[111]

The Judicial Legal Service Commission comprises of the Chairman of the Public Services Commission, the Attorney General, and other members (who are or have been, or are qualified to be, a judge of the Federal Court, Court of Appeal, or the High Court), appointed by the King, after consultation with the Chief Justice and the Secretary of the Public Services Commission.[112]

Public Prosecutor/Attorney General

Appointment

As regards the appointment of the Attorney General, there has been no change in the law since 2011—article 145 of the Federal Constitution provides that the King, on the advice of the Prime Minister, appoints a person who is qualified to be a judge of the Federal Court, to be the Attorney General. Article 145(5) goes further to state that, "subject to Clause (6), the Attorney General shall hold office during the pleasure of the *Yang di-Pertuan Agong* (King) and may at any time resign his office…" Article 145(6) states that, "The person holding the office of Attorney General immediately prior to the coming into operation of this Article shall continue to hold the office on terms and conditions not less favourable than those applicable to him immediately before such coming into operation and shall not be removed from office except on the like grounds and in the like manner as a judge of the Federal Court."

Dismissal

There are no known legal provisions setting out the procedure for the removal of the Attorney General. For the first time, the issue of the dismissal of the Attorney General was brought out in the open when, in 2015,

109 To be a member of the Judicial and Legal Service, a person must register with the Public Service Commission of Malaysia (PSC) using the Registration Form (SPA8i), fulfilled the scheme of service and shortlisting requirements set by the Commission will be called for an interview either by the Attorney General's Chambers of Malaysia or the Chief Registrar Office, Federal Court of Malaysia. Successful applicants will then be offered post of Legal Officer (Grade L41) on a contractual or permanent basis depending on the decision of the Commission, <http://www.spkp.gov.my/portal/eng/pelantikan.php> accessed 8 Mar 2016.

110 Sections 78 and 78A of the Subordinate Courts Act 1948.

111 Article 144 of the Federal Constitution.

112 Article 138(2) of the Federal Constitution.

Tan Sri Gani Patail (the then Attorney General) was suddenly dismissed. Tan Sri Gani Patail maintained that he was not aware of his dismissal.[113] This incident raised a number of questions: whether his dismissal was in accordance with the principle of fairness, and whether a tribunal similar to the one required to remove a judge should have been convened. The Bar Council observed that the dismissal was unconstitutional as it violated article 135(2) of the Federal Constitution, which affords a person who has been dismissed from the judicial or legal service, the right to be heard.[114]

Others have argued that the Prime Minister could terminate the Attorney General without convening a tribunal.[115] This hypothesis is based on the 1963 amendments to article 145 of the Federal Constitution (which included an amendment to article 145(5) and the introduction of article 145(6)[116] of the Federal Constitution). The previous article 145(5) provided that the Attorney General "shall not be removed from office except on the like grounds and in the like manner as a judge of the Federal Court"; this provision was deleted and replaced with the current version where the Attorney General holds office "during the pleasure of the Yang di-Pertuan Agong." According to the Explanatory Statement to the article 145 amendments and the first Malayan Attorney General Abdul Kadir bin Yusof, the rationale for the amendments were twofold: firstly to give greater latitude to the appointment of the Attorney General, *i.e.*, the Attorney General could be a person from the public service or a political appointee; and secondly, given that the Attorney General could be politicians, the security of tenure akin to a judge was not necessary.[117]

Deputy Public Prosecutors

Appointment

Section 376 of the CPC governs the appointment of Deputy Public Prosecutors (DPPs). The said section provides that the Attorney General may appoint "fit and proper persons to be DPPs who shall be under the general control and direction" of the Attorney General. DPPs are considered legal officers within the Judicial and Legal Service.

Members of the public service, including lower court judges and DPPs

The termination, promotion, and disciplinary control of lower court judges and DPPs are lodged with the government under the Public Officers (Appointment, Promotion and Termination of Service) Regulations

113 Yiswaree Palansamy, 'Gani says in the dark over sudden termination', *The Malay Mail Online,* 28 Jul 2015, <http://www.themalaymailonline.com/malaysia/article/gani-says-in-the-dark-over-sudden-termination> accessed 21 Feb 2016.

114 Jennifer Gomez, 'Bar president maintains Gani's removal unlawful', *The Malaysian Insider*, 31 Jul 2015, <http://www.themalaysianinsider.com/malaysia/article/bar-president-maintains-ganis-removal-unlawful#sthash.2ULDHDSI.dpuf> accessed 21 Feb 2016.

115 K. Shanmuga, 'Constitutionality of the Attorney General's Removal', *LoyarBurok,* 28 Jul 2015, <http://www.loyarburok.com/2015/07/28/constitutionality-attorney-generals-removal/> accessed 8 Mar 2016.

116 Article 145(6) of the Federal Constitution states, "The person holding the office of Attorney General immediately prior to the coming into operation of this Article shall continue to hold the office on terms and conditions not less favourable than those applicable to him immediately before such coming into operation and shall not be removed from office except on the like grounds and in the like manner as a judge of the Federal Court."

117 Abdul Kadir bin Yusof, 'The Office of Attorney-General' [1977] 2 MLJ ms xvi in K. Shanmuga, 'Constitutionality of the Attorney General's Removal', *LoyarBurok,* 28 Jul 2015, <http://www.loyarburok.com/2015/07/28/constitutionality-attorney-generals-removal/> accessed 8 Mar 2016.

2012[118] and Public Officers (Conduct and Discipline) Regulations 1993,[119] as they are considered members of the public service.

Promotion

The 2012 Regulations stipulate that promotion is based on merit, and in considering the merit for promotion, the Promotion Board shall take into consideration the efficiency and performance of the work of the officer; the qualifications, knowledge, skills, and experience of the officer; personal characteristics, including his suitability for the promotional post, integrity, potential, and leadership of the officer; the extramural activities and contributions of the officer to the country and society; and other aspects which the Promotion Board thinks relevant.[120]

Termination or reduction in rank

A public officer may be terminated if he or she fails the security vetting,[121] and for an unconfirmed officer, he or she may be terminated if the officer has concealed any information regarding his health in the medical examination form; made a false declaration in the statutory declaration; or amended or falsified any document relating to his appointment.[122] Before any officer is terminated, he or she must be given the opportunity to show cause, within a period of not less than 14 days from the date of receipt of notice to show cause, why he or she should not be terminated.[123]

If any public officer contravenes the Public Officers (Conduct and Discipline) Regulations 1993,[124] he or she may be dismissed, or his or her rank reduced. If the disciplinary offense complained of warrants dismissal or reduction in rank, the appropriate Disciplinary Authority will hear the matter. [125] If there is a *prima facie* case against the said officer, then the charge (with the facts and the grounds on which it is proposed to dismiss the officer or reduce his rank) will be sent to the said officer and the officer will be given 21 days to submit a written representation.[126] After considering the written representation, the Disciplinary Authority may dismiss or reduce the rank of the officer, impose a lesser sentence (if the complaint does not warrant a dismissal/reduction in rank), or establish an Investigation Committee to obtain further clarification.[127]

118 P.U.(A) 1/2012.

119 P.U.(A) 395.

120 Section 39 of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012.

121 Section 49 of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012.

122 Section 48 of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012.

123 Section 52 of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012.

124 Prohibited conduct: 1) An officer shall at all times give his loyalty to the Yang di-Pertuan Agong, the country and the Government. (2) An officer shall not-(a) subordinate his public duty to his private interests; (b) conduct himself in such a manner as is likely to bring his private interests into conflict with his public duty; (c) conduct himself in any manner likely to cause a reasonable suspicion that- (i) he has allowed his private interests to come into conflict with his public duty so as to impair his usefulness as a public officer; or (ii) he has used his public position for his personal advantage; (d) conduct himself in such a manner as to bring the public service into disrepute or bring discredit to the public service (e) lack efficiency or industry; (f) be dishonest or untrustworthy; (g) be irresponsible; (h) bring or attempt to bring any form of outside influence or pressure to support or advance any claim relating to or against the public service, whether the claim is his own claim or that of any other officer; (i) be insubordinate or conduct himself in any manner which can be reasonably construed as being insubordinate; and (j) be negligent in performing his duties. Sexual harassment is also a prohibited conduct (section 4A).

125 Section 37 of the Public Officers (Conduct and Discipline) Regulations 1993.

126 Section 37 of the Public Officers (Conduct and Discipline) Regulations 1993.

127 Section 37 of the Public Officers (Conduct and Discipline) Regulations 1993.

However, this procedure is not applicable if there is a criminal charge proven against the said officer; the Disciplinary Authority is of the opinion that the procedure is not necessary; it is in the interest of national security that the procedure be dispensed with; or if an order of detention, preventive detention, supervision, restricted residence, banishment, deportation, or protection of women and girls, has been made against the said officer.[128]

Disciplinary action

If any public officer contravenes the Public Officers (Conduct and Discipline) Regulations 1993,[129] he or she may be subject to disciplinary action/punishment. If the conduct warrants a lesser punishment than a dismissal or reduction in rank, the Disciplinary Authority is then obliged to inform the officer of the facts of the alleged disciplinary offence and the officer will be given 21 days to make a written representation. After considering the written representation, the Disciplinary Authority can either seek further clarification, find the officer guilty, or acquit the said officer.[130] If an officer is found guilty of a disciplinary offence, the punishments that can be meted out by the Disciplinary Authority include, warning, fine, forfeiture of emoluments, deferment of salary movement, or reduction of salary.[131]

Training, Resources, and Compensation

There has been no significant change in the training, resources and compensation of prosecutors, judges and judicial officers in Malaysia. These components are generally adequate. The Malaysian Bar continues to provide training and workshops to lawyers through its Continuing Professional Development (CPD) program. CPD points, which were mandatory but removed in 2013,[132] have been recently revived after the Bar Council passed a resolution requiring lawyers with less than five years experience to obtain a minimum of 16 CPD points per 24-month CPD cycle. As for judicial officers and prosecutors, the Judicial and Legal Training Institute (ILKAP) conducts judicial and legal training programs, colloquiums, seminars and workshops, with a view to enhancing the knowledge, competency, and professionalism of judicial and legal officers.[133]

As stated, the main problem with regard to prosecutors, judges and judicial officers is the lack of impartiality and independence.

128 Section 34 of the Public Officers (Conduct and Discipline) Regulations 1993.

129 Prohibited conduct: 1) An officer shall at all times give his loyalty to the Yang di-Pertuan Agong, the country and the Government. (2) An officer shall not-(a) subordinate his public duty to his private interests; (b) conduct himself in such a manner as is likely to bring his private interests into conflict with his public duty; (c) conduct himself in any manner likely to cause a reasonable suspicion that- (i) he has allowed his private interests to come into conflict with his public duty so as to impair his usefulness as a public officer; or (ii) he has used his public position for his personal advantage; (d) conduct himself in such a manner as to bring the public service into disrepute or bring discredit to the public service (e) lack efficiency or industry; (f) be dishonest or untrustworthy; (g) be irresponsible; (h) bring or attempt to bring any form of outside influence or pressure to support or advance any claim relating to or against the public service, whether the claim is his own claim or that of any other officer; (i) be insubordinate or conduct himself in any manner which can be reasonably construed as being insubordinate; and (j) be negligent in performing his duties. Sexual harassment is also a prohibited conduct (section 4A).

130 Section 36 of the Public Officers (Conduct and Discipline) Regulations 1993.

131 Section 38 of the Public Officers (Conduct and Discipline) Regulations 1993.

132 Update on Continuing Professional Development ("CPD") Scheme, Circular No 054/2013, (5 Mar 2013), <http://www.malaysianbar.org.my/notices_for_members/update_on_continuing_professional_development_cpd_scheme.html> accessed 20 Feb 2016; see also <http://www.malaysianbar.org.my/cpd/?page_id=1864> accessed 20 Feb 2016.

133 <http://www.ilkap.gov.my/prime_bi.php> accessed 20 Feb 2016.

State's Budget Allocation for the Judiciary and Other Principal Justice Institutions

The budget allocated to the judiciary and other principal justice institutions for the year 2016 is as follows:[134]

Table 4

Budget of the Judiciary and Other Related Institutions

Department/Agency	Budget allocation[135]	Percentage to the total government budget[136]
Attorney General's Chambers	MYR185 million	0.069%
Superior Courts (High Court, Court of Appeal and Federal Court)	MYR90 million	0.034%
Syariah Judiciary Department	MYR47 million	0.017%
Syariah Court (Wilayah Persekutuan)	MYR17 million	0.006%
Judicial and Legal Training Institute (ILKAP)	MYR11million	0.004%
Department of Legal Affairs	MYR125 million[137]	0.046%
Office of the Chief Registrar, Federal Court	MYR403 million	0.151%

Impartiality and Independence of Judicial Proceedings

Concerns over the independence of judicial proceedings have not abated since 2011, in particular in cases concerning leaders of the opposition party. In February 2015, when the Federal Court upheld the Court of Appeal's ruling that Anwar Ibrahim (opposition leader) was guilty of sodomy, the court was criticized for its lack of independence and for pandering to government's interference. The judgment in this case seems to entrench the public's perception that the judiciary is not independent and that judicial fairness and the rule of law are principles that are not respected by the courts.[138] This is the second time that Anwar Ibrahim faced charges of sodomy; in his first sodomy trial (late 1990s), the judiciary was equally criticized for its lack of independence in the handling of the said trial.[139]

134 Federal Government Budget Info 2016, Ministry of Finance <http://www.treasury.gov.my/index.php?option=com_content&view=category&id=447&Itemid=2473&lang=en> accessed 19 Feb 2016.

135 Approximate number.

136 Total budget for 2016 is MYR267,224 million.

137 Of which MYR27 million is allocated to the Legal Aid Department.

138 'Malaysia's judicial independence again in spotlight over Anwar's jailing', *The Malay Mail Online*, 21 Feb 2015, <http://www.themalaymailonline.com/malaysia/article/malaysias-judicial-independence-again-in-spotlight-over-anwars-jailing#sthash.Gm0DM3XI.dpuf> accessed 21 Feb 2016.

139 *Washing the Tigers - Addressing Discrimination And Inequality In Malaysia,* ERT Country Report Series:2 (London: November 2012), 17; see also Press Statement by Amnesty International, 'Solidarity Statement For Prisoner Of Conscience Anwar Ibrahim', 10 Aug 2015, ASA 28/2259/2015.

In some cases, there have been assertions of influence by senior members of the judiciary on lower ranked judges.[140]

Provision of Lawyers or Representatives by the Court to Witnesses and Victims/Survivors

Generally, the competence of lawyers is not a problem in Malaysia. The qualifications of an advocate and solicitor in Malaysia are set out in the Legal Profession Act 1976 and strictly regulated by the Legal Profession Qualifying Board, the Malaysian Bar, the Sabah Law Association, and the Advocates Association of Sarawak, the last two respectively in Sabah and Sarawak.

Safety and Security of the Judiciary, Prosecutors, Litigants, Witnesses, and Affected Public

Safety and security of accused persons, prosecutors, judges, judicial officers, members of the public, and affected parties are generally not a problem in Malaysia. Save for one case, the murder of a Public Prosecutor in September 2015, which was allegedly linked to a case that he was prosecuting (the trial of which was on-going),[141] there has been no other significant reports of threats to the safety and security of these categories of persons.

In this regard, there are no known mechanisms that specifically deal with the safety of judges and/or prosecutors. However, one positive development since 2011 is the Witness Protection Act 2009, which sets up the Witness Protection Program, and any witness may apply to be included in the said Programme. According to the MACC, the Witness Protection Program has instilled confidence in the public to lodge reports of corruption as the said Program (together with the Whistleblower Protection Act 2010) affords necessary protection.[142]

Specific, Non-Discriminatory, and Unduly Restrictive Thresholds for Legal Standing

The law regarding *locus standi* has seen some progress recently. The case of *Government of Malaysia v. Lim Kit Siang & Another Case,*[143] where the Supreme Court ruled that a taxpayer had no *locus standi* to question the policy of the government, has been somewhat corrected in the recent case of *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor.*[144] In the *Malaysian Trade Union Congress* case, the Federal Court held that the test of substantive *locus standi*, as laid out in the *Lim Kit Siang* case, was not applicable when determining whether a person may apply for judicial review. The Federal Court preferred the Indian judicial approach on standing, which has "veered towards liberalisation of the *locus standi* as the courts realise that taking a restrictive view on this question will have many grievances

140 'Was judge Hishamudin overlooked for promotion due to Ayer Molek case, asks DAP', *The Malaysian Insider,* 28 Feb 2015, <http://www.themalaysianinsider.com/malaysia/article/was-judge-hishamudin-overlooked-for-promotion-due-to-ayer-molek-case-asks-d> accessed 20 Feb 2016.

141 Austin Camoens, 'Body is that of Kevin Morais, confirm police', *The Star Online*, 16 Sep 2015, <http://www.thestar.com.my/news/nation/2015/09/16/kevin-morais-confirmed-body/> accessed 20 Feb 2016.

142 'MACC: Implementation of protection act proves fruitful', *The Malaysian Times*, 13 Mar 2014, <http://www.themalaysiantimes.com.my/macc-implementation-of-protection-act-proves-fruitful/> accessed 8 Mar 2016.

143 [1988] 1 CLJ 219.

144 [2014] 1 CLJ 525; see also *Kerajaan Negeri Selangor & Ors v Pendaftar Pertubuhan Malaysia & Another Appeal* [2014] 6 CLJ 471.

unremedied." The Federal Court held that to establish *locus standi*, the applicant has to at least show that he has a real and genuine interest in the subject matter, and that it is not necessary for the applicant to establish infringement of a private right or the suffering of special damage, affirming the "adversely affected" test in *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor.*[145]

Publication of and Access to Judicial Hearings and Decisions

There is no change in the law since 2011—section 15(1) of the Courts of Judicature Act 1964 provides that all courts in Malaysia are open and public, to which the public generally may have access, with the necessary exception of "*in camera*" if it is in the interest of justice, public safety, public security, or propriety. Equally, Court decisions are made available to affected parties.

The only change is with regard to the hearings of the POTB and PCB where there is no requirement for the respective boards' hearings to be public (see above).

Reasonable Fees and Non-arbitrary Administrative Obstacles to Judicial Institutions

There is no change in the law since 2011—court fees and administrative procedures are not obstacles to effective access to judicial institutions.

Assistance for Persons Seeking Access to Justice

There is no assistance provided to persons seeking justice apart from legal aid (see discussion below on "Available and Fair Legal Aid to All Entitled").

Measures to Minimize Inconvenience to Litigants and Witnesses, and their Families, Protect their Privacy, and Ensure Safety from Intimidation/Retaliation

There has been no change in the law and procedures regarding measures to minimize inconvenience to litigants, witnesses and their families since 2011. This is generally not a problem in Malaysia.

Available and Fair Legal Aid to All Entitled

Legal aid is available in Malaysia through four avenues:

1. Legal Aid Department. The Government, through the Legal Aid Act 1971, established the Legal Aid Department to provide legal advice and legal assistance to the lower income group, in relation to legal issues or matters, who cannot afford to pay private lawyers to represent them in courts.[146] Services include legal aid in the areas of Syariah family matters; civil family matters; civil cases [workmen's

145 [2006] 2 CLJ 532.

146 Legal Aid Department, Prime Minister's Department. <http://www.jbg.gov.my/index.php?option=com_content&view=article&id=62&Itemid=214&lang=en> accessed 16 Feb 2016.

compensation, *padi* cultivators, small estate (distribution)]; road accident; moneylenders; hire-purchase; tenancy matters; probate and letters of administration, adoption, and consumer claims; criminal cases (to plead guilty to the charge and to make a plea of mitigation); offenses under the Child Act 2001; minor offences (does not include accused persons who intend to claim trial); legal advice in all legal matters; and mediation for Syariah and civil cases.[147]

To be eligible for legal aid, a person's financial resources should be below MYR30,000 per annum, or between MYR25,000.00 and MYR30,000.00, per annum. If a person's financial resources are between MYR25,000.00 and RM30,000.00, a one-time monetary contribution of MYR300.00 is required. A person entitled to legal aid shall not be liable for any legal, administrative, or processing fee, except for a sum of RM2.00 for registration, a sum of RM300.00 as contribution (if applicable), and a nominal sum for disbursement (if the need arises). He or she shall not be liable for court fee, fees payable for service of process, and fees due to the sheriff in connection with the execution process. He or she shall be entitled to be supplied free of charge of a copy of the judge's notes of evidence in any proceedings. He or she shall not be liable for costs to any other party in any proceedings. He or she shall be entitled to costs of the proceedings as the court would have made in his/her favour had he/she not been an aided person.[148]

The system seems to be fair, with no significant complaints with regard to the receipt of legal aid, save for the fact that only citizens of Malaysia are eligible to apply for legal aid from the Legal Aid Department, to the exclusion of the migrant population in Malaysia.[149]

2. Bar Council Legal Aid. The Bar Council provides legal aid pursuant to section 42(h) of the Legal Profession Act 1976, which states that "the purpose of the Malaysian Bar shall be to make provision for or assist in the promotion of a scheme whereby persons may be represented by advocates and solicitors." A person is qualified for legal aid if his/her monthly income (after deduction of monthly expenses) is less than MYR650 (for a single person) and MYR900 (for a married person). In addition, a person should not own property worth more than MYR45,000 (for a house), MYR20,000 (for a car), and MYR4,500 (for a motorcycle), and have not more than MYR5,000 in savings. Those qualified for legal aid are required to pay an administrative fee of MYR20.00.[150]

   A person entitled to legal aid, including those charged with criminal offenses who intend to claim trial, enjoys free representation in court and free legal advice.[151] However, applicants are required to pay the expenses incurred by the lawyer.

   The system seems to be fair, with no significant complaints with regard to the receipt of legal aid.

147 Second and Third Schedules of the Legal Aid Act 1971.

148 Legal Aid Department, Prime Minister's Department. <http://www.jbg.gov.my/index.php?option=com_content&view=article&id=62&Itemid=214&lang=en> accessed 16 Feb 2016.

149 Ravi Nekoo, 'Legal Aid in Malaysia: The Need for Greater Government Commitment,' *The Malaysian Bar*, 23 Nov 2009, <http://www.malaysianbar.org.my/members_opinions_and_comments/legal_aid_in_malaysia_the_need_for_greater_government_commitment.html> accessed 16 Feb 2016.

150 Kuala Lumpur Legal Aid Centre. < http://www.kllac.com/LegalAidHelp.html> accessed 16 Feb 2016; see also Bar Council Legal Aid Scheme. < http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=2911> accessed 16 Feb 2016.

151 Ravi Nekoo, 'Legal Aid in Malaysia: The Need for Greater Government Commitment,' *The Malaysian Bar*, 23 Nov 2009, <http://www.malaysianbar.org.my/members_opinions_and_comments/legal_aid_in_malaysia_the_need_for_greater_government_commitment.html> accessed 16 Feb 2016.

3. National Legal Aid Foundation. The National Legal Aid Foundation (NLAF) was incorporated on 25 January 2011 as a result of a decision made at a cabinet meeting on 3 March 2010.[152] The NLAF provides free legal aid and advice on criminal matters, including Syariah criminal matters, to all Malaysian citizens at the stage of arrest, remand, charge, bail application, mitigation, hearing, and appeal. Offenses that carry the death penalty will not be covered by the NLAF as the court provides assigned counsel to persons so charged (see below).[153]

   In order to qualify for free legal representation and advice in criminal matters, a person must be a Malaysian citizen, with an income that does not exceed MYR36,000.00, per annum. No fee will be charged for a person whose income is less than MYR25,000.00, per annum. Persons whose annual income exceeds MYR25,000 but does not exceed MYR36,000 will be charged rates that will be determined by the NLAF's Board of Directors.[154]

4. Court Assigned Counsel. For persons accused of capital offenses, the judiciary, under the purview of the Chief Registrar of Malaysia, assigns a counsel to them. Counsels receive fees paid by the court based on the practice direction of the Chief Justice of Malaysia. The budget for this scheme is derived from the federal government.[155]

152 National Legal Aid Foundation. <http://www.ybgk.org.my/index.php?option=com_content&view=article&id=46&lang=en> accessed 16 Feb 2016.

153 National Legal Aid Foundation. <http://www.ybgk.org.my/index.php?option=com_content&view=article&id=46&lang=en> accessed 16 Feb 2016.

154 National Legal Aid Foundation. <http://www.ybgk.org.my/index.php?option=com_content&view=article&id=46&lang=en> accessed 16 Feb 2016.

155 Bar Council Legal Aid Scheme. <http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=2911> accessed 16 Feb 2016; see also YAA Tun Arifin Zakaria, *Fostering An Efficient And Competent Legal Profession To Support The Court Development Of Pro Bono Civil And Criminal Programs: Malaysian Perspective*: Conference Of Chief Justices Of Asia And The Pacific 2013, 27-30 October 2013.

Summary of legal aid services available in Malaysia:

Name	Relevant legislation/ Governing body	Services provided	Eligibility	Fees levied
Legal Aid Department	Legal Aid Act 1971/ Legal Aid Department	Free legal advice in all legal matters; mediation for Syariah and civil cases; Legal assistance in the areas of Syariah family matters; civil family matters; civil cases [workmen's compensation, *padi* cultivators, small estate (distribution)]; road accident; moneylenders; hire-purchase; tenancy matters; probate and letters of administration, adoption, and consumer claims; criminal cases (to plead guilty to the charge and to make a plea of mitigation); offenses under the Child Act 2001; minor offences (does not include accused persons who intend to claim trial).	- Annual income <MYR30,000 or between MYR25,000 - MYR30,000.	- MYR2.00 (registration fee); - MYR300 if annual income is between MYR25,000 – MYR30,000); - Nominal sum for disbursement.
Bar Council Legal Aid	Legal Profession Act 1976/ Bar Council	Free representation in court and free legal advice, including representation for those charged with criminal offenses who intend to claim trial.	- Monthly net income <MYR650 (single person) and MYR900 (married person); - Should not own property >MYR45,000 (house), MYR20,000 (car), and MYR4,500 (motorcycle); and - <MYR5,000 in savings.	- MYR20.00 (administrative fee); - Must pay expenses incurred by the lawyer.

National Legal Aid Foundation	National Legal Aid Foundation	Free legal advice on criminal matters, including Syariah criminal matters, at the stage of arrest, remand, charge, bail application, mitigation, hearing, and appeal, save for, offenses that carry the death penalty.	- Must be a Malaysian citizen; and - Annual income ≤MYR36,000.	- RM0.00 if annual income is less than RM25,000; - Persons whose annual income is between MYR25,000 - MYR36,000, fee at a rate determined by the NLAF's Board of Directors.
Court assigned Counsel	Chief Registrar of Malaysia/ Court	Free legal advice and representation only for capital offenses.	- No information.	- RM0.00. - Counsels receive fees paid by the court.

General Public Awareness of Pro Bono Initiatives and Legal Aid or Assistance

There are no known data and statistics that would be instructive in regards awareness of the general public of pro bono initiatives and legal assistance.

In 2014, the Bar Council's legal aid program, which has 16 centers, handled 17,189 case files, and the NLAF handled 156,129 case files (through its 15 centers). As for awareness raising activities, the Bar Council and the NLAF carry out such activities to inform the public about legal aid services that they offer. Also, according to the Legal Aid Department, in the year 2013, it carried out 1,575 awareness programs in malls, carnivals, prisons, juvenile detention centres, the Islamic religious department, courts, and district offices.[156]

III. INTEGRATING INTO A RULES-BASED ASEAN

Progress towards Achieving a Rules-Based ASEAN Community

On Mutual Support and Assistance on the Rule of Law

Malaysia is a party to the 2004 Treaty on Mutual Legal Assistance in Criminal Matters (which includes rendering to one another the widest possible measure of mutual legal assistance in criminal matters, namely investigations, prosecutions and resulting proceedings). Malaysia takes part in the ASEAN Trade Repository (ATR) that documents trade and customs laws and procedures; the ATR is intended to facilitate the standardisation of customs regulations and practices in the ASEAN region.[157]

156 Annual Report 2013, Legal Affairs Department, Prime Minister's Office, 79 <http://www.jbg.gov.my/index.php?option=com_docman&view=docman&Itemid=237&lang=en> accessed 19 Feb 2016.

157 CIMB ASEAN Research Institute, 'AEC Blueprint 2025 Analysis - Liberalisation of the Trade in Goods', Vol. 1 Paper 2 (28 January 2016) <http://www.cariasean.org/AEC_Blueprint_2025_Analysis/AEC_Volume1_Paper2.pdf> accessed 23 Feb 2016.

Also, Malaysia hosted and took part in a few activities under the ASEAN University Network, namely, the 15th AUN and 4th ASEAN+3 Educational Forum & Young Speakers' Contest (in January 2015), and AEC Forum "Fostering University Industry Partnership for the AEC" (in May 2015). Five universities in Malaysia (Universiti Kebangsaan Malaysia, Universiti Putra Malaysia, Universiti Malaya, Universiti Sains Malaysia, and Universiti Utara Malaysia) are part of the ASEAN University Network.

The judiciary participated in the Fourth ASEAN Chief Justices' Roundtable on Environment (Hanoi, Vietnam, 12-14 December 2014) and hosted the 36th ASEAN Law Association Governing Council and the 2nd ASEAN Chief Justices' Meeting in Kuala Lumpur in 2014, where it was agreed that an ASEAN Judicial Portal would be established with the broad objective of making and creating international presence for the ASEAN judiciaries. The Chief Justices also agreed to establish a working group on judicial education and training amongst ASEAN judiciaries on cross-border topics of common legal interest and create a standard and formatted mechanism as well as share best practices to facilitate the service of civil processes within ASEAN member states.[158]

In addition, within the private sector, CIMB (a Malaysian bank) established a CIMB ASEAN Research Institute (CARI) in 2011 as a regional public service in support of ASEAN's programme of economic integration, the ASEAN Economic Community (AEC).

On Legislative and Substantive Changes Promoting the Rule of Law

There is no known official information on whether there have been any legislative and substantive changes in Malaysia that promote the rule of law in ASEAN. Information on this matter is inadequate.

On Enactment of Laws relating to the ASEAN Community Blueprints and Similar Plans

Two laws were enacted to comply with the ASEAN community blueprint—the first is the enactment of the Competition Act 2010, which provides for the law and the regulatory body to protect the competitive process. The 2010 Act was also put in place to fulfil the goals of the ASEAN Economic Community Blueprint, which required that competition policy and law be put in place by 2015.

The second development is the amendment of the Legal Profession Act 1976. In June 2014, the Legal Profession (Amendment) Act 2013 came into force together with the Legal Profession (Licensing of International Partnerships and Qualified Foreign Law Firms and Registration of Foreign Lawyers) Rules 2014. These laws were enacted to promote the free flow of services and to substantially remove all restrictions on trade in legal services by 2015. This basically allowed foreign law firms and foreign lawyers to practice in Peninsular Malaysia, subject to certain requirements set out in the law.[159]

On Integration as Encouraging Steps toward Building the Rule of Law

There are no apparent links between ASEAN integration and the building of rule of law in Malaysia.

158 The Malaysian Judiciary Yearbook 2014, <http://www.kehakiman.gov.my/sites/default/files/document3/KomunikasikorporatHubAntbgsa/YEAR%20BOOK%202015.pdf> accessed 23 Feb 2016.

159 Andrew Khoo, 'Liberalisation of Legal Services' (6 Jun 2014), *The Malaysian Bar Online* <http://www.malaysianbar.org.my/trade_in_legal_services_formerly_known_as_gats/liberalisation_of_legal_services.html> accessed 23 Feb 2016.

On the Contribution of ASEAN Integration to the Building of Stronger State Institutions

There are no apparent links between ASEAN integration and the strengthening of state institutions in Malaysia.

Prospects and Challenges

Challenges to a Strengthened Commitment to the Rule of Law

The lack of respect for the principle of separation of powers

Perhaps, the foremost challenge to the rule of law in Malaysia is the erosion of the principle of separation of powers. Separation of powers between the executive, legislative and judicial branches of a state is important as it serves the ends of the rule of law, as it checks unrestricted exercise of power by any of the branches of the state.[160]

In Malaysia, the interference and obstruction in the investigations into allegations of financial impropriety in the 1MDB case have projected the image of concentration of power in one branch of the government. The undue state intrusion, which came in the form of the removal of key officers leading/involved in the investigation; delaying the inquiry by the Public Accounts Committee (PAC) of the *Dewan Rakyat*; the raid of the offices and homes of MACC personnel; the abrupt transfer of senior officers of the MACC to the Prime Minister's Department (although subsequently rescinded); and the arrest and detention of officers of MACC, Attorney General's Chambers (AGC), and the Central Bank's officers, have contributed to the perception that the rule of law is an illusory concept in Malaysia.[161]

The Malaysian Bar, in its Extraordinary General Meeting on 12 September 2015, recommended that the government establish a Royal Commission of Inquiry to look into all of the aforementioned incidents to ensure that the rule of law and administration of justice are upheld. The Malaysian Bar felt that the interference into the investigation of these prosecutorial agencies, particularly that these investigations are allegedly connected to a person acting in an official capacity, is an affront to the prosecutorial agencies' independence and impartiality.

A conservative interpretation of fundamental liberties

One of the challenges in the endeavour to strengthen the rule of law in Malaysia is the resistance to engage with international human rights norms, which has resulted in a rather conservative interpretation of fundamental liberties in Part II of the Federal Constitution. The use of international human rights law as a tool for interpretation can greatly strengthen the rule of law at the domestic level as the state is required to comply with higher norms, and international human rights treaties can act as a check to institutional backsliding.[162] Many have opined that domestic courts which fail to act as vessels for international norms

160 Denise Meyerson, 'The Rule of Law and the Separation of Powers', (2004) Vol 4 *Macquarie Law Journal,* 1.

161 Speech by Steven Thiru, President, Malaysian Bar at the Opening of the Legal Year 2016, Kuala Lumpur (8 Jan 2016), <http://www.malaysianbar.org.my> accessed 21 Feb 2016.

162 'The Internationalisation of Rule of Law – Changing Contexts and New Challenges', HiiL Innovating Justice, the Amsterdam Centre for International Law and the social Science Research Centre Berlin (2008), <http://www.hiil.org/project/internationalisation-of-rule-of-law> accessed 26 Feb 2016.

and decisions are compromising international law.[163]

The problem in Malaysia is the resistance to international human rights treaties, including treaties which Malaysia has acceded/ratified. In cases where the court is invited to look at Malaysia's international obligations in the CEDAW and the CRC, or its adherence to the principles of the UDHR as a member of the United Nations, it (the court) has often disengaged, stating that Malaysia adopts the dualist system, and thus, any treaty requires an act of Parliament.

International human rights law is never meant to be adopted *in toto* or without varying interpretations; rather, human rights norms almost always come with differential interpretations that would allow domestic courts to balance domestic conditions and international human rights law.[164] As such, the petition here is not a complete and total acceptance that international law takes precedence over domestic law, rather that domestic courts, at the very least and in good faith, engage in a contestation of international human rights law that would develop critical reasoning of fundamental liberties in Malaysia.

The need to engage with international human rights law is imperative as maintaining the status quo (of a strict implementation of the dualist approach to international human rights norms) would mean that many aggrieved Malaysians would not be adequately provided with an avenue for redress of human rights violations, and this would not reflect positively on the rule of law dynamics.

Corruption

The struggle to uphold rule of law in Malaysia is made more difficult by the high level of corruption in government, particularly in enforcement agencies. In June 2015, the Special Branch (Intelligence Agency of the police) released a report that revealed that Malaysia is dealing with deeply entrenched institutionalized corruption, and that "80 per cent of the nation's security personnel and law enforcement officers at Malaysian borders are corrupt."[165] The report, which was based on a 10-year surveillance and the intelligence gathering of the Immigration Department, the Malaysian Maritime Enforcement Agency, the Anti-Smuggling Unit, and the police's General Operations Force, found that many of the personnel of these enforcement agencies were on the payroll of drugs and weapons dealers, and human smuggling syndicates.[166]

It is disconcerting that Malaysia fell from the 50th position (in 2014) to the 54th position in Transparency International's 2015 Corruption Perception Index.[167] As corruption is linked to the rule of law, it is therefore unsurprising that Malaysia dropped from 35th to 39th place in the World Justice Project's (WJP) World Rule of Law Index.[168]

163 'The Internationalisation of Rule of Law – Changing Contexts and New Challenges', HiiL Innovating Justice, the Amsterdam Centre for International Law and the social Science Research Centre Berlin (2008), <http://www.hiil.org/project/internationalisation-of-rule-of-law> accessed 26 Feb 2016.

164 'The Internationalisation of Rule of Law – Changing Contexts and New Challenges', HiiL Innovating Justice, the Amsterdam Centre for International Law and the social Science Research Centre Berlin (2008), <http://www.hiil.org/project/internationalisation-of-rule-of-law> accessed 26 Feb 2016.

165 Farrah Naz Karim, 'EXCLUSIVE: 80pc of enforcers manning borders on the take,' *News Straits Times*, 3 Jun 2015, <http://www.nst.com.my/news/2015/09/exclusive-80pc-enforcers-manning-borders-take> accessed 27 Feb 2016.

166 Farrah Naz Karim, 'EXCLUSIVE: 80pc of enforcers manning borders on the take,' *News Straits Times*, 3 Jun 2015, <http://www.nst.com.my/news/2015/09/exclusive-80pc-enforcers-manning-borders-take> accessed 27 Feb 2016.

167 Corruptions Perception Index 2015, <http://www.transparency.org/cpi2015> accessed 27 Feb 2016.

168 'Rule of Law Index 2015', World Justice Project <http://worldjusticeproject.org/rule-law-around-world> accessed 27 Feb 2016.

The causal link between the high level of corruption, particularly among enforcement agencies at Malaysian borders, and gross violations of human rights manifested quite clearly in May 2015 when 139 mass graves were found near the town of Wang Kelian, Perlis.[169] In August 2015, the police further found 24 human skeletons in mass graves along the Thai border in the same state.[170] All the bodies were believed to be victims of human trafficking. It is also believed that approximately 300 migrants were held in 28 illegal camps where the mass graves were found. This area is situated at the Thai-Malaysian border and is understood to be the transfer point for smugglers transporting people to Southeast Asia by boat from Myanmar and Bangladesh.[171]

Commitments and Plans/Initiatives in relation to ASEAN-wide Commitments and Declarations on Human Rights

Malaysia is a signatory to the ASEAN Convention Against Trafficking in Persons, Especially Women and Children[172] and the ASEAN Convention on Counter Terrorism. The ASEAN Convention Against Trafficking in Persons was signed by Malaysia months ago (as of the writing of this report), and it may be too soon to appreciate changes, if any. Malaysia enacted its own Anti-Trafficking in Persons Act in 2007, and it remains to be seen if the 2007 Act will be amended after the signing of the ASEAN Convention on the same subject matter.

Other initiatives by the government with regard to ASEAN-initiated commitments and declarations are not so pronounced. A look at the websites of the different ministries and the judiciary with regard to past initiatives reveals little information—for example, after the announcement that the ASEAN Judicial Portal, regional judicial training and education, and sharing of best practices within the ASEAN region will be established, not much information is now publicly available on these initiatives or other rule of law/human rights-related initiatives.

IV. CONCLUSION

Nexus of the Changes to the Overall State of the Rule of Law for Human Rights

The changes over the past few years have eroded the rule of law for human rights. Existing problems cited in 2011, such as the lack of independence of the judiciary, the lack of a transparent procedure for the appointment of judges and judicial officers, deaths in custody, police brutality, and the unavailability of draft laws to the public in a timely manner, have not seen any significant improvements. While these areas have not regressed, there have been no significant advances either. In addition, the problem of the unequal enforcement of the law continues to afflict the system of the administration of justice. The use of the Sedition Act 1948 to quell dissenters has increased in the past few years, and new laws, enacted in the name of national security and terrorism, appear to be used as a sword against dissidents instead of a shield against terrorist activities.

169 Hilary Whiteman, 'Malaysia finds another mass grave near Thai border,' *CNN*, 24 Aug 2015, <http://edition.cnn.com/2015/08/24/asia/malaysia-mass-grave/> accessed 27 Feb 2016.

170 'Two dozen skeletons found in Malaysian mass grave,' *Al-Jazeera*, 23 Aug 2015, <http://www.aljazeera.com/news/2015/08/dozen-skeletons-malaysian-mass-grave-migrants-smuggling-150823052916560.html> accessed 27 Feb 2016.

171 'Two dozen skeletons found in Malaysian mass grave,' *Al-Jazeera*, 23 Aug 2015, <http://www.aljazeera.com/news/2015/08/dozen-skeletons-malaysian-mass-grave-migrants-smuggling-150823052916560.html> accessed 27 Feb 2016.

172 Malaysia has yet to ratify the ASEAN Convention Against Trafficking in Persons, Especially Women and Children.

Apart from the lack of improvement in the aforementioned problematic areas, the rule of law has taken a back seat in a number of legislation that was recently passed by the Parliament. Fundamental rights, such as the right to a legal counsel, right to fair trial and the right to *habeas corpus*, have all been expressly excluded in the POTA 2015 and the amendments to the PCA 1959. Judicial oversight of executive actions and powers has been significantly reduced in both these laws—instead of the courts dispensing judgment on the guilt or innocence of persons detained under the POTA 2015 or the PCA 1959, this has been replaced with a board, with no requirement for the board to hold its hearings in public. Except for the chairman of the board who is required to be a legally qualified person with at least 15 years of experience, the qualifications of other members of the board are not expressly stated. The laws are also silent with regard to the appointment process of the board, save for that the King appoints members of the board. In addition, the powers of the board are limited—it does not have the power to inquire into or re-examine the findings of the inquiry officer. The PCA 1959 goes further to allow the board to detain a person indefinitely.

Another area, which has regressed considerably, is the failure to preserve the separation of powers. The actions of the executive branch of government in removing the deputy prime minister, the attorney general, and officers leading/involved in the investigation of the 1MDB allegations; delaying the inquiry by the Public Accounts Committee (PAC) of the *Dewan Rakyat*; the banning of any media site that reports on the issue; and the arrest and detention of the officers of the MACC, AGC, and the central bank have given rise to the perception of executive overreach.

The lack of improvement in the *status quo*, a significant regression in the area of fair trial rights, freedom of expression, and separation of powers, and the increase in corruption amongst law enforcement agencies, which has led to the perpetuation of a culture of impunity, are signs of deterioration of the rule of law in Malaysia.

Contributing Factors

A deepening political crisis

In the past year, allegations of corruption against the Prime Minister and the scandal surrounding the 1MDB issue have deepened the political crisis within the United Malays National Organisation (UMNO).[173] The 1MDB allegations caused some within UMNO, the opposition and also the public, to question the Prime Minister on his alleged involvement. Many have posited that this crisis surrounding UMNO has meant that the ruling government would go to great lengths to maintain its political dominance, even at the expense of the rule of law. One of the most visible repercussions was the *Sodomy II* charge against Anwar Ibrahim.[174] The case is perceived by many to be politically motivated, and the Court's decision in finding him guilty raised serious concerns about the independence of the judiciary and the erosion of the rule of law, all in the name of politics.

Not only is the opposition a target, but the need to entrench position and power has led to the sacking of the Deputy Prime Minister and the Attorney General, who were critical of the 1MDB scandal. Media has also been a target of the backlash—the Ministry of Home Affairs and the Malaysian Communications

173 'Malaysia's Eventual Fall from Grace', *Stratfor Global Intelligence,* 23 Oct 2015, <https://www.stratfor.com/analysis/malaysias-eventual-fall-grace> accessed 25 Feb 2016.

174 Vikram Nehru and Yun Tang, 'Malaysia Beset with Challenges as it Takes ASEAN Helm', *Nikkei Asian Review* (13 Mar 2015), <http://asia.nikkei.com/Politics-Economy/Policy-Politics/Malaysia-beset-with-challenges-as-it-takes-ASEAN-helm> accessed 25 Feb 2016.

and Multimedia Commission banned publications, namely, *The Edge*, *Sarawak Report*, and recently, *The Malaysian Insider,* as well as a number of media websites for publishing articles on the 1MDB financial crisis.

The dismissals, other undue interference into government agencies and officers investigating the 1MDB, and the shutting down of media websites have contributed to the erosion of the rule of law in the country and raised questions about regulatory transparency.[175]

The race divide

Another factor that has contributed to the regression of the state of the rule of law is the politicization of the racial polarity within Malaysians. Immediately after the announcement of the results of the 13th general election, the Prime Minister attributed the smaller majority win by *Barisan Nasional* to a "Chinese tsunami."[176] While this was certainly not the first time that race was used to "divide and conquer," this certainly fuelled a perhaps misplaced fear of the Malay majority of the dominance of the Chinese and the weakening of the Malays in Malaysia.

The three major races in Malaysia have always enjoyed a rather delicate harmony or tolerance, and racially divisive statements by leaders of the country have sent a message that the Malay race is under threat. Further, because article 160 of the Federal Constitution essentially equates a Malay to be a person who professes the religion of Islam, any perceived threat against the Malay race is seen as a threat against Islam. As a result, many problems, including court cases, have been framed in ethnic or religious terms.

This fear that Malay and/or Islam is/are under threat has manifested itself in a negative way at the expense of the rule of law—for example, in retaliation to Bersih 4.0,[177] UMNO organized and funded the red shirt demonstrations, and the Ministry of Home Affairs, in violation of freedom of expression, banned any yellow clothing with the word 'Bersih 4'. This is also evident in the Court of Appeal judgment in the case of *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur*[178]—the Court of Appeal upheld the ban on using the word "Allah" in the Malay version of the *Herald* as the court was of the opinion that the purpose of "peace and harmony" in article 3(1) of the Federal Constitution is to protect the sanctity of Islam and to insulate it against any threat faced by, or any possible and probable threat to, the religion of Islam.

Role of the ASEAN Declaration on Human Rights in Strengthening Rule of Law for Human Rights

There are no apparent links between the ASEAN Declaration on Human Rights and the changes in laws and policies in Malaysia.

175 'Malaysia's Eventual Fall from Grace', *Stratfor Global Intelligence,* 23 Oct 2015, <https://www.stratfor.com/analysis/malaysias-eventual-fall-grace> accessed 26 Feb 2016.

176 Ram Anand, 'Najib blames polls results on 'Chinese tsunami", *Malaysiakini.com* (6 May 2013), <https://www.malaysiakini.com/news/229231> accessed 7 April 2016.

177 Bersih 4 was a call for all Malaysians to gather peacefully at Merdeka Square, Kuala Lumpur from 29-30 August 2015, to demand institutional reforms in five areas: - clean elections; clean Government; right to dissent; strengthening Parliamentary democracy' and saving Malaysia's economy – Bersih Press Statement, 'Pesta Demokrasi 34 Jam Bersih4' (11 August 2015), <http://www.bersih.org/pesta-demokrasi-34-jam-bersih4/> accessed 7 April 2016.

178 [2013] 8 CLJ 890, 926.

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CIMB ASEAN Research Institute, 'AEC Blueprint 2025 Analysis - Liberalisation of the Trade in Goods', Vol. 1 Paper 2 (28 January 2016) <http://www.cariasean.org/ AEC_Blueprint_2025_Analysis/AEC_Volume1_Paper2.pdf> accessed 23 February 2016.

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The Republic of The Union of Myanmar

MYANMAR

TABLE 1
SNAPSHOT

Formal Name	Republic of the Union of Myanmar[1]
Capital City	Nay Pyi Taw
Independence	4 January 1948
Historical Background	Parts of Myanmar became a British colony after the 1824-26 first Anglo-Burmese war and the second Anglo-Burmese war of 1852. The whole country was annexed into the British Indian Empire on 1 January 1886. The country was under military and one-party rule from 1962 to 1988 under General Ne Win. There was a massive uprising against the one-party government in 1988 and the military regime (then called the State Law and Order Restoration Council, later changed to State Peace and Development Council) took over power after crushing the uprising. In the elections held in 1990, the main opposition party, the National League for Democracy (NLD), won a landslide victory. However, the military council refused to hand over power and continued to govern the country. In 2008, the Constitution was adopted by referendum and elections were held on 7 November 2010 in which the Union Solidarity and Development Party supported by the military council won over 75 per cent of the seats in both houses of the legislature. U Thein Sein, former military General and Prime Minister, was appointed as President in 2011. NLD won in the by-election in 2012 and took seats in parliament. The second general elections were held on 8 November 2015 and NLD won a landslide victory, securing 79 per cent of elected seats (59 per cent of all seats, including military representatives).[2] The NLD took over from the previous administration on 30 March 2016.
Size	676,578 sq km[3]
Land Boundaries	Total: 6,522km Border countries: Bangladesh 271 km, China 2,129 km, India 1,468 km, Laos 238 km, Thailand 2,416km[4]
Population	51.5million[5] (2014 census)

1 The name of the country was changed from "Burma" to "Myanmar" in 1989 by the State Law and Order Restoration Council ("SLORC"). This report will interchangeably use both Burma and Myanmar, since publications prior to 1989 used "Burma," and some governments and authors still prefer to use "Burma" to this day.

2 International Crisis Group, 'The Myanmar Elections: Results and Implications,' *Crisis Group Asia Briefing*, No. 147, 9 December 2015.

3 Central Intelligence Agency, 'The World Factbook,' https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html (accessed 11 March 2016)

4 Ibid.

5 Department of Population Ministry of Immigration and Population, *The 2014 Myanmar Population and Housing Census: Highlights of the Main Results*, May 2015, 2. http://countryoffice.unfpa.org/myanmar/census/ (accessed 11 March 2016).

Demography	0-14 years: 26.07% (male 7,485,419/female 7,194,500) 15-64 years: 68.57% (male 19,190,212/female 19,429,009) 65 years and over: 5.36% (male 1,313,711/female 1707,355)[6]
Ethnic Groups	Burman 68%, Shan 9%, Karen 7%, Rakhine 4%, Chinese 3%, Indian 2%, Mon 2%, other 5%[7]
Languages	Burmese (official); minority ethnic groups have their own languages
Religion	Buddhist 89%, Christian 4% (Baptist 3%, Roman Catholic 1%), Muslim 4%, Animist 1%, other 2%[8]
Adult Literacy	Education Expenditure: 0.8% of GDP (2011)[9] Literacy rate (age 15 and over, can read and write): Total population: 93.1% Male: 95.2% Female: 91.2%[10] (2015 estimates)
Gross Domestic Product	US$65.78 billion[11] (2015 est)
Government Overview	Myanmar has a parliamentary government with a President indirectly elected by simple majority vote by the legislature's Presidential Electoral College from among three vice presidential nominees (one each from the House of Nationalities, the House of Representatives, and military members of the legislature). The President is both chief of state and head of government. Executive Branch: On 10 March 2016, NLD nominated U Henry Van Thio as Vice President for Amyotha Hluttaw (House of Nationalities) and U Htin Kyaw as Vice President for Pyithu Hluttaw (House of Representatives). Representatives of the Defence Service nominated U Myint Swe as Vice President on 11 March 2016.[12] On 15 March 2016, Myanmar's parliament elected Htin Kyaw as the country's next president, and he was sworn in with the members of his government on 30 March 2016.[13]

6 Supra note 3.

7 Ibid.

8 Ibid.

9 Ibid.

10 Ibid.

11 Ibid.

12 'The Right Hand Man: Presidential Electoral College elects three vice-presidents,' T*he Global New light of Myanmar*, Vol. II, No. 326, 12 March 2016, 1.

13 Simon Lewis, 'Who Is Htin Kyaw, Burma's New President?' *Time*, 15 March 2016, http://time.com/4258655/htin-kyaw-burma-myanmar-president-aung-san-suu-kyi/ (accessed 24 March 2016).

Government Overview	Legislative Branch: The legislature is bicameral and consists of the Amyotha Hluttaw or the House of Nationalities (with 224 seats, 168 directly elected and 56 appointed by the military) and Pyithu Hluttaw or the House of Representatives (with 440 seats, 330 directly elected and 110 appointed by the military). Judicial Branch: The President appoints and the Pyidaungsu Hluttaw (the joint houses of the legislature) approves the Chief Justice and six other Judges of the Supreme Court. There are also courts in the states, regions, self-administered zones, district courts and other courts. The Constitutional Tribunal and the Courts of Martial are established separately from the Supreme Court and vested with separate powers.
Human Rights Issues	Myanmar is subject to the Special Procedures of the Human Rights Council, with a Special Rapporteur tasked to examine the situation of human rights in the country. Identified human rights issues include arbitrary detention, freedom of expression, freedom of assembly, freedom of movement, access to justice, racial discrimination, discrimination against women, child labour, human trafficking, and land rights.
Membership in International Organizations	Asian Development Bank (ADB), Association of Southeast Asian Nations (ASEAN), Association of Southeast Asian Nations Regional Forum (ARF), Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC), Colombo Plan (CP), East Asia Summit (EAS), Extractive Industries Transparency Initiative (EITI) (candidate country), Food and Agriculture Organization (FAO), Group of 77 (G77), International Atomic Energy Agency (IAEA), International Bank for Reconstruction and Development (IBRD), International Civil Aviation Organization (ICAO), International Criminal Police Organization (Interpol), International Development Association (IDA), International Federation of Red Cross and Red Crescent Societies (IFRCS), International Finance Corporation (IFC), International Fund for Agricultural Development (IFAD), International Hydrographic Organization (IHO), International Labour Organization (ILO), International Maritime Organization (IMO), International Monetary Fund (IMF), International Olympic Committee (IOC), International Organization for Standardization (ISO) (correspondent), International Red Cross and Red Crescent Movement (ICRM), International Telecommunication Union (ITU), Nonaligned Movement (NAM), Organization for the Prohibition of Chemical Weapons (OPCW) (signatory), South Asian Association for Regional Cooperation (SAARC) (observer), United Nations (UN), United Nations Conference on Trade and Development (UNCTAD), United Nations Educational, Scientific, and Cultural Organization (UNESCO), United Nations Industrial Development Organization (UNIDO), Universal Postal Union (UPU), World Customs Organization (WCO), World Health Organization (WHO), World Intellectual Property Organization (WIPO), World Meteorological Organization (WMO), World Trade Organization (WTO)[14]

14 Supra note 3.

Human Rights Treaty Commitments	Convention on the Elimination of All Forms of Discrimination against Women (accession: 22 July 1997) International Covenant on Economic, Social and Cultural Rights (signature: 16 July 2015) Convention on the Rights of the Child (accession: 15 July 1991) Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (signature: 28 September 2015) Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography (accession: 16 January 2012) Convention on the Rights of Persons with Disabilities (accession: 7 December 2012) Worst Forms of Child Labour Convention (No.182) (ratification: 18 December 2013) United Nations Convention against Transnational Organized Crime (accession: 30 March 2004) Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (accession: 30 March 2004) Protocol against Smuggling of Migrants by Land, Sea and Air (accession: 30 March 2004) Convention on Freedom of Association and Protection of the Right to Organize (ratification: 4 March 1955) Convention on Forced and Compulsory Labour (ratification: 4 March 1955) Convention on the Prevention and Punishment of the Crime of Genocide (ratification: 14 March 1956) 4 Geneva Conventions of 1949 (accession: 25 August 1992) Treaty on Mutual Legal Assistance in Criminal Matters (ratification: 22 January 2009) ASEAN Convention on Counter Terrorism (ratification: 21 February 2012) ASEAN Convention against Trafficking in Persons (signature: 21 November 2015)

I. INTRODUCTION

Many unprecedented changes have taken place in Myanmar since 2011. After the Constitution was adopted in 2008, a new government was sworn in on the 31st of March 2011, ending the 50-year rule of an authoritarian government. The legislative power has been separated from the executive, although 25 per cent of parliament seats are occupied by representatives of the Defence Services.

Former President Thein Sein's constructive engagement with Aung San Suu Kyi, opposition leader of National League for Democracy (NLD), led her party to contest 44 of the 45 available seats in the by-elections held in April 2012. NLD won 43 seats—almost all of the vacant seats in both House of Nationalities (alternatively referred to as Upper House) and House of Representatives (alternatively referred to as Lower House). Aung San Suu Kyi won a seat and became a member of the House of Representatives; she was eventually appointed to chair the Rule of Law and Tranquillity Committee of the House of Representatives in 2012. President Thein Sein also set a historic milestone and began peace negotiations with ethnic armed groups in August 2011, after more than six decades of internal armed conflict.[15] His initiative resulted in the conclusion of 14 new bilateral ceasefire agreements from September 2011 to August 2013, followed by the signing of a Nationwide Ceasefire Agreement with eight ethnic armed groups on 15 October 2015.[16]

President Thein Sein's government showed its willingness and readiness to engage with the international community in pursuit of democracy and federalism for the political and socioeconomic development of Myanmar. These tremendous positive changes were recognized by the international community, which resulted in the lifting of sanctions imposed by ILO in June 2013 and the reinstatement by the EU of trade preferences to Myanmar. In addition, President Thein Sein's government repeatedly vowed to undertake four waves of reform in Myanmar. The legislative chambers also actively drafted bills, with the First Hluttaw enacting 229 laws during its five-year term, which ended on 29 January 2016.[17] During this time, the parliament is seen to have matured in that it increasingly held members of the government accountable, and power rivalry between the executive department and legislators became stronger than ever despite the fact that majority of lawmakers were from the same ruling party. In 2012, for example, the Minister for Agriculture and Irrigation was forced to apologize in parliament for being quoted in the press as calling the members of parliament uneducated and ill-informed after they significantly cut the annual budget.

In November 2015, NLD won a landslide victory in the general elections and secured 59 per cent of the parliamentary seats in both legislative chambers, giving the NLD the majority that would allow it to control law-making and choose the next president.[18] Among the first tasks of the new parliament was to approve a bill creating the position of "State Counsellor." The role was designed for Daw Aung San Suu Kyi, who is prohibited from running for presidency by the Constitution because her children are foreign citizens, and grants her powers that commentators note are akin to those of a prime minister. The position allows her to coordinate the activities of Parliament and the executive branch. The law makes the State Counsellor accountable to the Parliament, with a term that coincides with that of the president "who has taken office for the term of the current second parliament." During debates in each house of parliament,

15 International Crisis Group, 'Myanmar's Peace Process: A Nationwide Ceasefire Remains Elusive,' *Crisis Group Asia Briefing*, No. 146, 16 September 2015.

16 'Peace Deal Signed: President extends olive branch to those who haven't signed,' *The Global New Light of Myanmar*, Vol. II, No. 178, 16 October 2015, 1.

17 'Pyidaungsu Hluttaw concludes successfully,' *The Global New Light of Myanmar*, Vol. II, No. 284, 30 January 2016, 1.

18 International Crisis Group, 'The Myanmar Elections: Results and Implications,' *Crisis Group Asia Briefing*, No. 147, 9 December 2015.

military representatives opposed the bill, claiming it violated the separation of powers as outlined in the Constitution. The bill was signed into law by President U Htin Kyaw on 6 April 2016.[19] Aung San Suu Kyi also holds the positions of Minister of the President's Office and Minister of Foreign Affairs.

Human Rights Treaties

Myanmar acceded to the Convention on the Rights of Persons with Disabilities on 7 December 2012 and signed the International Covenant on Economic, Social and Cultural Rights on 16 July 2015. In 2015, during the Universal Periodic Review process, Myanmar revealed that it is considering signing the Convention against Torture, and necessary preparatory measures have been undertaken with relevant stakeholders and organizations.[20] Myanmar is subject to country-specific Special Procedures, which requires Myanmar to fulfil the Special Rapporteur's recommendations as contained in the reports to the Human Rights Council and UN General Assembly.

Foundation & Evolution of Rule of Law

For many decades, Myanmar was ruled by a military government. Previous governments considered rule of law as rule and order through obedience by everyone in the country without protesting or criticizing the government and military. In the past, the emphasis had been on rule *by* law and the legal system was "mostly used as an instrument of social control."[21] This has led to a widespread lack of understanding of rule of law and lack of trust in the state legal system. However, as Myanmar transforms itself into a democratic country, the government and the parliament are trying to define the rule of law by reviewing functions of the judicial, administrative and legislative organs. In this light, the Rule of Law and Tranquillity Committee of the lower house prepared a paper on "Rebuilding Rule of Law in Myanmar" in 2012. A Rule of Law Coordinating Committee comprised of representatives from all three branches of government was also formed in 2013.[22] The Coordinating Committee has been working closely with the United Nations Development Programme (UNDP) to plan a justice reform strategy and to establish Rule of Law Centres in Myanmar.[23] At the time of writing, four Rule of Law Centres have been opened in Mandalay, Shan, Kachin and Yangon. While various international NGOs and civil society organizations together with donors are assisting to improve rule of law in Myanmar, there are still several shortcomings as discussed below.

19 'State Counsellor Approved,' *The Global New Light of Myanmar*, Vol. II, No. 352, 7 April 2016, 1; 'State Counsellor Bill passed by Lower House,' *The Global New Light of Myanmar,* Vol. II, No. 351, 3; and Wai Moe and Richard C. Paddock, 'Aung San Suu Kyi Moves Closer to Leading Myanmar,' *The New York Times*, 5 April 2016, http://www.nytimes.com/2016/04/06/world/asia/myanmar-aung-san-suu-kyi-state-counselor.html?_r=0 (accessed 12 April 2016).

20 Human Rights Council, Working Group on the UPR, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Myanmar*,' A/HRC/WG.6/23/MMR/1 (5 August 2015), www.ohchr.org/EN/HRBodies/UPR/Pages/MMSession23.aspx (accessed 25 February 2016).

21 UNDP Myanmar, "Bridges to Justice: Rule of Law Centres for Myanmar," March 2014, www.mm.undp.org/content/myanmar/en/home/library/democratic_governance/bridges-to-justice.html (accessed 25 February 2016).

22 Ibid.

23 Ibid.

TABLE 2
ADMINISTRATION OF JUSTICE GRID

Indicator	Figure
No. of judges in country	All categories: 1,200[24]
No. of lawyers in country	High Grade Pleaders: 40,000 licensed; 15,000 in active practice. Law graduates can become a High Grade Pleader after one year in chamber. No course or examination is needed. Advocates: 9,000 licensed; 2,000 in active practice. Advocates are the highest classification for private sector lawyers. High Grade Pleaders become eligible to become Advocates after spending three years in practice and showing that they have provided representation in at least seven cases. No formal exam or course is needed.[25] Advocates are authorised to practice in all courts including the Supreme Court while High Grade Pleaders can appear only in District and Township Courts.[26]
Annual bar intake (including costs and fees)	Upon approval of the application to practice as an advocate, stamp duty of 30,000 kyat (US$25) is payable to the Supreme Court and membership fee of 2,500 kyat (US$2) is payable to the Bar Council chaired by the Union Attorney General.
Standard length of time for training/qualification	Law school programs are for five years. Law graduates become High Grade Pleaders only after one year in chamber. To become judges and prosecutors, law graduates can take the examinations organized by the Office of the Supreme Court of the Union for township judges and by the Union Attorney General's Office for prosecutors/law officers at township level. Once they pass the written exam and interview, they will join the Attorney General's Office and the Office of the Supreme Court of the Union, and will undergo recruitment training by the Union Civil Service Board as well as basic trainings for judges and law officers by the respective recruiting authorities.
Availability of post-qualification training	Prosecutors and judges are provided with a short term one-month training to introduce them to their job after entry into each office. Lawyers have to find their own supervisors or mentors to learn how to practise their profession. There is no formal post qualification training.
Average length of time from arrest to trial (criminal cases)	Two to three months from arrest to trial depending on the attendance of witness, caseload of the court, and availability of the judge.[27]

24 Ibid.

25 Ibid.

26 Nang Yin Kham, 'An Introduction to the Law and Judicial System of Myanmar,' *Myanmar Law Working Paper Series*, Working Paper No. 001, Singapore: National University of Singapore, Centre for Asian Legal Studies.

27 Interview with practicing lawyer.

Average length of trials (from opening to judgment)	For criminal cases: From three months to a year, depending on the complexity of the case. For civil cases: One year to three years. Some cases may take longer.[28]
Accessibility of individual rulings to public	The township, district and divisional court judges read out the judgement in the court and copy of judgment will be made available to anyone, including media, upon application with fees.[29] Only selected Supreme Court decisions are compiled in the Myanmar Law Reports, which are published yearly.
Appeal structure	Judgements of township courts can be appealed to the region/state court, then to the Supreme Court of Union.
Cases before the National Human Rights Institution	The Myanmar National Human Rights Commission stated on 10 December 2015 that it has received over 1,200 complaints since 1 January 2015, and it has reviewed and taken actions on these complaints.[30]
Complaints filed against the police, the military, lawyers, judges/justices, prosecutors or other institutions (per year)	The Myanmar National Human Rights Commission stated in its 2014 report that it received 288 complaints against police, lawyers, judges, prosecutors and other institutions in 2014.[31]
Complaints filed against other public officers and employees	The Anti-Corruption Commission received 533 complaints from 10 March 2014 to 21 August 2014. The complaints involved government maladministration (238 cases), land issues (170), legal and judicial issues (95) and general issues (30).[32]

28 Interview with practicing lawyer.

29 The Supreme Court of the Union, *Handbook for Media Access to the Courts*, 8 October 2015. http://www.unionsupremecourt.gov.mm/sites/default/files/supreme/media_handbook_8-10-15_eng_0.pdf (accessed 24 March 2016).

30 Myanmar National Human Rights Commission, 'Statement by Myanmar National Human Rights Commission on the occasion of the International Human Rights Day which falls on 10 December 2015 Statement No (16/2015),' 10 December 2015. http://www.mnhrc.org.mm/en/statement-by-myanmar-national-human-rights-commission-on-the-occasion-of-the-international-human-rights-day-which-falls-on-10-december-2015-statement-no-162015/ (accessed 24 March 2016).

31 Myanmar National Human Right Commission, *Annual Report 2014*, April 2015.

32 Nyein Nyein, 'MPs Voice Doubts Over Burma's Anti-Corruption Commission,' *The Irrawaddy*, 21 September 2014, http://www.irrawaddy.com/burma/mps-voice-doubts-burmas-anti-corruption-commission.html (accessed 25 March 2016).

II. COUNTRY PRACTICE IN APPLYING THE CENTRAL PRINCIPLES OF RULE OF LAW FOR HUMAN RIGHTS

A. On Central Principle 1 (Government and its officials and agents are accountable under the law)

Definition and Limitation of the Powers of Government in the Fundamental Law

There are no significant changes in terms of the powers of government as defined in the 2008 Constitution and related laws. The powers of government are defined and limited by the 2008 Constitution. In additional, the Union Government Law of 21 October 2010 and the Union Judiciary Law of 2010 elaborate on the functions and composition of the executive government and of the judicial bodies. No changes and or amendments have been made to these laws since promulgation. Article 11(a) of the Constitution establishes the basic principle that "legislative power, executive power and judicial power are separated, to the extent possible, and exert reciprocal control, check and balance among themselves." These laws describe the powers, functions, qualifications, appointment, disqualifications or termination from duties of executive, legislative and judicial officials at the union, state and regional levels (e.g., Ministers at the union, state and regional levels; Attorney General of the Union; and Chief Justices of the Union, Region or State High Court).

Amendment or Suspension of the Fundamental Law

The Constitution and Union Government Law can be amended and suspended only in accordance with the rules and procedures prescribed therein by the Pyidaungsu Hluttaw or the joint houses of the legislature. Since the completion of the *2011 Rule of Law Baseline Study*, the 2008 Constitution became fully operational on 31 January 2011 when a new two-chamber legislature convened for the first time in over two decades.[33]

The current and previous Special Rapporteurs have consistently recommended the amendment of the Constitution for it to be in line with international standards. Several Constitutional provisions give broad powers and responsibilities to the military and, as the current Special Rapporteur noted, ensure that "the military can never be held to account for past and present human rights violations."[34] Provisions contained in the chapter on fundamental rights contain vague and subjective limitations and are often qualified by the phrase "in accordance with law" or similar language, giving the potential to negate part or all of the right in question. Article 382 states that "the rights given in this Chapter shall be restricted or revoked through enactment to law" in order for the Defence Forces personnel or members of the armed forces "to carry out peace and security." This, the current Special Rapporteur said, appears to allow non-derogable rights to be restricted or revoked in a state of emergency and possibly in other circumstances.[35]

In this regard, one study has pointed out that no other constitution in the world has an amendment procedure that requires the approval of more than 75 per cent of the members of both parliamentary chambers or allows for the military to have practical veto power over constitutional amendments, considering that 25 per cent of the members of each house of the Pyidaungsu Hluttaw in Myanmar are appointed by the Commander-

33 Article 441 of the 2008 Constitution states as follows: 'A nation-wide referendum held for adoption of this Constitution where more than half of the eligible voters voted, of which majority of these voters adopted this Constitution, shall come into operation throughout the Union from the day the first session of the Pyidaungsu Hluttaw is convened.'

34 UN General Assembly, *Situation of human rights in Myanmar*, A/69/398, 23 September 2014, par 65.

35 Ibid, pars 63-67.

In-Chief of the Defence Services.[36]

Efforts were made to amend certain provisions of the Constitution, including the qualification of the President. They were however mostly unsuccessful as the necessary number of votes could not be secured. Only an amendment to Article 59 (d)—replacing the word "military" with "defence" among the required areas of knowledge for presidential candidates—was adopted. A referendum on the amendment is required before it can enter into force.[37] Additionally, an amendment to the Constitution's Schedule Two (Region or State Legislative list) and Schedule Five (Taxes to be Collected by Region or States) was adopted on 22 July 2015.[38] This amendment decentralized some powers of the government, devolving from the union to regions and states more powers with respect to legislation and taxation.

Laws Holding Public Officers and Employees Accountable

The reform process initiated by President Thein Sein since March 2011 focused on four waves of reform for democracy and development. The third wave addressed public administration and good governance reform with the aim of moving towards a clean, transparent, and people-centred public administration. After five years, the administrative reform measures are still many steps from accomplishing these goals.

According to the Constitution, the President, Vice Presidents, Union/Region/State Ministers, Attorney General of the Union, Advocate General of the Region or State, Auditor General of the Union/Region/State, Chief Justice and Judges of the Supreme Court or of the High Court of the Region/State, Chairperson and members of the Constitutional Tribunal, Chairperson and members of the Union Election Commission may be impeached for the following reasons: (i) high treason; (ii) breach of the provisions of the Constitution; (iii) misconduct; (iv) disqualification of qualifications prescribed in the Constitution; (v) inefficient discharge of duties assigned by law.

In the past five years, several complaints were made against Union Ministers in the media, although no one was impeached by the government or parliament. Several Ministers were reshuffled and allowed to resign. On one occasion, members of the two legislative chambers voted to impeach the nine justices of the Constitutional Tribunal after the Tribunal rendered a decision denying parliamentary committees the status of national-level organizations.[39] Without this status the committees could not overrule the government or, for example, summon government ministers for questioning. This made the parliamentarians concerned that the members of the Tribunal were not working in a democratic manner and were eroding the system of checks and balances. The judges immediately resigned from office the same day the vote for impeachment was made.[40] Former Religious Affairs Minister Hsan Hsint, however, was sentenced in October 2014 to three years in prison on charges of criminal breach of trust by a public servant through misuse of public funds and

36 Ibid, *citing* Bingham Centre for the Rule of Law, "Constitutional reform in Myanmar: priorities and prospects for amendment," January 2014.

37 UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, A/HRC/31/71, 18 March 2016.

38 Law Amending the Union of Myanmar Constitution Law, Pyidaungsu Hluttaw Law No. 45/2015, 22 July 2015 (Myanmar).

39 Wendy Zeldin, 'Global Legal Monitor: Burma: Resignation of Constitutional Court Justices,' *Library of Congress*, 12 September 2012, http://www.loc.gov/law/foreign-news/article/burma-resignation-of-constitutional-court-justices/ (accessed 25 March 2016).

40 Ibid.

an additional 10 years for sedition.[41]

There have been many changes with regard to the legislative framework on accountability of public officers. Laws on anti-corruption, on the establishment of the Myanmar National Human Rights Commission, on civil service personnel and on the procedure for writs application were enacted. However, as discussed in the following paragraphs, these endeavours have been insufficient in protecting against violations of fundamental rights. Additionally, in what is viewed as a step backward, Myanmar's previous Parliament voted on 28 January 2016 to pass the Former Presidents Security Law, which grants former presidents immunity from prosecutions for actions committed during their time in office.[42]

Anti-Corruption Law

The Anti-Corruption Law, promulgated on 7 August 2013, aims to eradicate bribery, develop clean and good governance, promote accountability, and develop the economy through prevalence of law, order and transparency in the administrative sectors.[43] It penalises bribery, which is defined as the "promising, offering or discussing or giving to an authorized official, directly or indirectly, of an undue advantage, for the official himself or another person or entity, in order that the official acts or refrains from acting in the exercise of his official duties, in order to obtain or retain business or other undue advantage." It also provides for the confiscation of monies and properties through illicit enrichment as well as penalises related offenses, including concealment, alteration, amendment or transfer by bank personnel of documents relating to the monies and properties that are the subject of enquiry.

The law covers a wide range of people who can be held liable for bribery, with punishment the most severe for "Political Post Holder,"[44] followed by "any other Authorized Person,"[45] then "any person."[46] It provides penalties of imprisonment as well as a fine. Notably, the law provides for extraterritorial application, stating that it "shall relate to any person committing any offence which requires action to be taken in the country, or any citizen or any person residing in Myanmar permanently, committing any offence under this law in Myanmar or abroad."[47]

41 Ye Naing, 'Disgraced Former Religion Minister's Appeal Rejected,' *The Irrawaddy*, 10 December 2014, http://www.irrawaddy.com/burma/disgraced-former-religion-ministers-appeal-rejected.html (accessed 25 March 2016).

42 See e.g. Amnesty International, 'Myanmar: Scrap or Amend New Law that Could Grant Immunity to Former Presidents,' 28 January 2016; and 'Groups slam bill giving immunity to Myanmar's former leaders,' *Asia Times*, 23 December 2015.

43 Anti-Corruption Law, Law No. 23, 7 August 2013, amended on 23 July 2014 (Myanmar), Section 4. Unofficial translation available at http://pwplegal.com/documents/documents/f3142-Anti-Corruption-Law-(PWP-Unofficial-English-Translation).pdf

44 Section 3(g) states: "Political Post Holder" means a person who is declared by the commission as a political post holder by relevant notifications issued from time to time with the consent of Pyidaungsu Hluttaw.

45 Section 3(i) states: "Authorized Person" means a person who is an authorized public service man by virtue of designation or a person who has the right to administer or manage, a Foreign Public Official, a Political Post Holder, a High Ranking Official or a person who has the right to manage in a public organization or a representative.

46 Anti-Corruption Law, Sections 55, 56 and 57.

47 Ibid, Section 2.

President's Office Guidelines on Accepting Gifts

In a very recent development, the new government issued in April 2016 guidelines prohibiting civil servants from accepting gifts from any person or organization that would "benefit from their [civil servants' positions of] responsibility."[48] The "President's Office Guidelines on Accepting Gifts" however provided for exceptions and allows civil servants to accept any gift not worth more than 25,000 kyats (US$21)—an amount more than 10 times lower than the threshold allowed by the previous government. Former President Thein Sein had told government officials in 2014 that they could accept gifts worth up to 300,000 kyats (US$249) without it being considered corruption. The new guidelines also specify that the total value of gifts received annually should not exceed 100,000 kyat (US$83). Additionally, civil servants are allowed to accept gifts valued at less than 100,000 kyat on religious holidays such as the Buddhist celebration Thadingyut or Christmas, when gift-giving is common. Officials can also accept gifts worth up to 400,000 kyat (US$332) as well as travel, scholarships, and medical expenses from foreign governments. The guidelines require public servants to report to their departmental heads any gifts they accept or decline.

While efforts to fight corruption are welcome considering Myanmar's very low ranking in Transparency International's 2014 Corruption Perceptions Index (where it was ranked 156th out of 175 nations surveyed), some worried that the exceptions listed could offer loopholes that would undermine the anti-graft drive. "Instead, it should only say any civil servant must not accept or take anything. Any violation can be bribery," a member of the Myanmar Lawyers' Network said.[49]

Myanmar National Human Rights Commission Law

Another development is the establishment and reconstitution of the Myanmar National Human Rights Commission. President Thein Sein first established it as a 15-person Commission through a Union Government's Notification in September 2011. In order for it to operate on a statutory basis and in compliance with the Paris Principles,[50] the Myanmar National Human Rights Commission Law was enacted in March 2014.[51] The law provides for a Commission comprised of 7 to 15 members selected by the President and Speakers of both houses of the parliament from 30 nominees submitted by the selection board.[52] The Commission was thus reconstituted with 11 members.

Among others, the powers and duties of the Commission include promoting awareness of human rights and combatting discrimination through information and education; monitoring and promoting compliance with international and domestic human rights laws; investigating complaints and allegations in respect of human rights violations; and inspecting the scene of human rights violations and, after notification, prisons, jails, detention centres and public or private places of confinement.[53]

48 Kyaw Phyo Tha, 'NLD Issues "Guidelines" on Gifts for Civil Servants,' *The Irrawaddy*, 4 April 2016.

49 Ibid.

50 'Memorandum on the promotion and protection of human rights in Myanmar,' *Permanent Mission of the Republic of the Union of Myanmar to the United Nations, New York*, 19 October 2015, http://mmnewyork.org/index.php/country-information/human-rights (accessed 25 March 2016).

51 National Human Rights Commission Law, Law No. 21/2014, 28 March 2014 (Myanmar).

52 The Selection Board consists of the Chief Justice, Minister of Home Affairs, Minister of Social Welfare, Union Attorney General, a representative from the Bar Council, two Pyidaungsu Hluttaw representatives, a Myanmar Women's Affairs Federation representative, and two representatives from registered NGOs. Bill O'Toole and Lun Min Maing, 'Rights body shake-up in line with law, insists government,' *Myanmar Times*, 3 October 2014.

53 National Human Rights Commission Law, Section 22.

In performing its duties, the Commission will take the initiative to investigate widespread and systematic violation of human rights.[54] Anyone could lodge a complaint in respect of any human rights violation against himself, or herself or for other persons or group of people.[55] The Commission has the power to summon a person for questioning or to provide necessary documents (except those relating to the security and defence of state and documents marked with security status by government departments).[56] The Commission however, does not have the authority to investigate pending or on-going cases before the courts and cases for which final judgment have been rendered.[57] The Commission shall send its findings and recommendations to relevant departments, agencies and related organizations for them to take further action. The relevant entity, in accordance with Section 38 of the Law, is required to inform the Commission of the action taken within 30 days.

Civil Service Law

The Civil Service Law enacted in March 2013 regulates the code of conduct of civil service personnel.[58] The law leaves it open for each government ministry to interpret whether the action of a civil servant in question constitutes misconduct or failure to comply with the law. There has as yet been no report on the effectiveness of the law.

Law on the Application for Writs

The 2008 Constitution introduced the writs of habeas corpus, mandamus, prohibition, quo warranto, and certiorari. The Constitution and 2010 Union Judiciary Law however failed to explain how and when to apply for these remedies.[59] The Law on the Application for Writs was thus promulgated in June 2014 to regulate how the court handles these cases. The Constitution vested the power to issue writs in the Supreme Court and it is the only judicial forum with the authority to consider writ applications brought from the whole country.[60] The right to bring writs applications is qualified by section 296(b), which provides that the writs do not apply in the event of a declaration of emergency.

The Law on the Application for Writs requires applications for certiorari and quo warranto to be brought within a two-year time limit; the other remedies are not subject to this restriction.[61] The Law also clarifies the procedure for hearing applications. It establishes an "Applications Review Board" within the Supreme Court, which consists of three judges including the Chief Justice or, if the Chief Justice was not available, a person appointed by him may fill his place.

As these constitutional remedies are a new area of law, "support needs to be provided to a wide range of legal actors in order to take hold of the opportunity this provides."[62]

54 Ibid, Section 28.

55 Ibid, Section 30.

56 Ibid, Section 34 and 36.

57 Ibid, Section 37.

58 Pyidaungsu Hluttaw Law No. 5/2013, 8 March 2013 (Myanmar).

59 Law on the Application for Writs, Law No. 24/2014, 5 June 2014 (Myanmar).

60 Constitution, Article 296.

61 Law on the Application for Writs, Section 16.

62 Melissa Crouch, *Access to Justice and Administrative Law in Myanmar*, October 2014.

Special Courts and Prosecutors of Public Officers and Employees

There are no dedicated courts and prosecutors to handle cases against public officers and employees.

The legality of actions of the courts or government agencies may however be challenged before the Supreme Court through the writs of habeas corpus, mandamus, prohibition, quo warranto, and certiorari.[63] The Chief Justice of the Union stated on 8 August 2013 that 432 writs were filed with the Supreme Court from 31 March 2011 to 30 June 2013; of these, 286 writs were rejected and 84 writs remained to be heard.[64] Over 500 applications have reportedly been lodged since 2011. It is however difficult to estimate how many of these applications were successful as the annual Myanmar Law Reports only publish a small number of cases per year. A 2014 publication noted that of several hundred writ cases lodged since 2011, only six writ cases were reported in the 2011 Myanmar Law Reports and all of them were unsuccessful.[65] No writs applications were reported in the 2012 Myanmar Law Report. One successful application that was published in the media involved an economic professor from Yangon Eastern University who had been unfairly dismissed.[66] In general, it has been noted that the Supreme Court is reluctant to take action against decisions made by government departments and ministries, focusing mainly instead on supervising decisions of lower courts.[67] All six cases reported in the Myanmar Law Reports concerned applications for writs of certiorari and/or prohibition against judgments of lower courts. (*See* Part II.B. on Appeal.)

Complaints involving human rights violations may be brought before the Myanmar National Human Rights Commission. However, since the members of the Commission are retired government officials with good relations with executive officers, their independence might be questioned. The Commission's ability to investigate effectively has also been hampered by the lack of or delay in the feedback or response of the government ministries concerned.[68] So far, the Commission has issued several press statements that, for example, call the government to release political prisoners, draw attention to humanitarian situations in Rakhine and Kachin, report on visits to labour camps and detention centers, and express apprehension for student demonstrators.[69]

The Commission's 2014 Annual Report details the activities of its different divisions. It states that, aside from 432 cases carried over from 2013, a total of 1,855 cases were received in 2014 and for which 138 meetings to hear the complaints were held. Of the 2014 cases, 916 did not fully meet the criteria for complaints, 543 were forwarded to the appropriate government agency for their action and response, and 162 had replies issued to complainants informing them of the result of the inquiries conducted by the appropriate government agency. The rest, 299 complaints, were yet to be investigated. The report showed that most of the cases, 944 out of 1,839, involved land issues. One hundred sixty-six cases concerned the judiciary, 147 involved "pension + government staff," and 96 were administrative cases. Four were "cases within the prison" and two concerned the military. While the Commission has said that it received more than 1,200 letters of complaint

63 Law on the Application for Writs, Sections 2(d), (g), (f), and (e).

64 'Chief Justice of the Union stresses important role of courts in ensuring rule of law,' *New Light of Myanmar*, Vol. XXI, No. 115, 9 August 2013, 8.

65 Supra note 62, at 7.

66 Melissa Crouch, 'Writs but no Weapons? A Stocktake on Administrative Justice in Myanmar,' *Int'l J. Const. L. Blog*, Nov. 13, 2014, http://www.iconnectblog.com/2014/11/writs-but-no-weapons-a-stocktake-on-administrative-justice-in-myanmar/ (accessed 25 February 2016).

67 Ibid.

68 Myanmar National Human Rights Commission, *2014 Annual Report*, page 18 and Annex C.

69 'Statements,' *Myanmar National Human Rights Commission*, www.mnhrc.org.mm/en/statements-2/ (accessed 30 March 2016)..

from 1 January 2015 to early December 2015, no detailed information on the nature of these complaints is currently readily available.[70]

The Anti-Corruption Law provides for the establishment of an anti-corruption commission, tasked with, among others, implementing the Law, receiving letters of complaints, and forming and supervising preliminary scrutinising and investigating teams.[71] The Commission can direct money and property to be confiscated as evidence relating to the bribery. It also has the authority to issue a list of personnel who shall be required to annually declare family-owned money, properties, assets and liabilities. Sections 21 and 43(a) state that enquiries can be made upon a complaint sent by the President, speaker of either Lower and Upper House, or the victim. Nothing is said with regard to the authority of the Commission to institute investigations on its own initiative.

The Commission was formed on 25 February 2014. In its first six months alone, from 10 March 2014 until 21 August 2014, it received 533 complaints: 170 concerned land disputes, 95 involved the judiciary, 238 related to governance, and 30 to general matters.[72] The Commission had investigated only three complaints by 23 September 2014.[73] More recently, in November 2015, Chairman U Mya Win informed Parliament that the Commission has filed lawsuits against nine people, punished 125 others under the civil service code, and transferred 31 others for infractions.[74] The Commission has recovered K20.685 million (US$15,945) in compensation payments. Three more cases are under investigation.

Although the Anti-Corruption Law and the Commission are important in countering corruption within the government, some have pointed out possible challenges to the Commission's independence. For example, Pyithu Hluttaw (Lower House) MP U Ye Tun said, "[T]he Commission may have difficulty in taking actions against bribery and corruption because of the old members of former government. Since the Commission members are appointed by the President and the two Houses, they may have influence on them."[75] Additionally, in order to fully implement the law, by-laws and regulations will have to be approved by the Parliament. Such by-laws and regulations were submitted late by the commission and were still pending approval as of December 2015.[76]

The 2013 Civil Service Personnel Law contains provisions concerning departmental action, inquiry and trial for civil servants who fail to observe and comply with the code of conduct and discipline.[77] However, information on the extent of its effectiveness is not available.

70 Myanmar National Human Rights Commission, 'Statement by Myanmar National Human Rights Commission on the occasion of the International Human Rights Day which falls on 10 December 2015 Statement No (16/2015),' 10 December 2015, http://www.mnhrc.org.mm/en/statement-by-myanmar-national-human-rights-commission-on-the-occasion-of-the-international-human-rights-day-which-falls-on-10-december-2015-statement-no-162015/, (accessed 25 February 2016).

71 Anti-Corruption Law, Law No. 23/2013 (Myanmar), Section 16.

72 Human Rights Now, *Status of Human Rights & Sanctions in Myanmar: September 2014 Report*, September 2014, 4. http://hrn.or.jp/eng/wp-content/uploads/2014/10/museptember2014report.pdf (accessed 12 April 2016).

73 Ibid.

74 Htoo Thant, 'Government anti-corruption body founders,' *Myanmar Times*, 25 November 2015, http://www.mmtimes.com/index.php/national-news/17808-government-anti-corruption-body-founders.html (accessed 30 March 2016).

75 Zin Linn, 'Is Burma's anti-corruption commission helpful?' *Asian Tribune*, http://www.asiantribune.com/node/72427 (accessed 30 March 2016). See also Win Naung Toe, Nay Myo Tun and Ba Aung, 'Myanmar Parliament Appoints Commission to Battle Graft,' *Radio Free Asia*, http://www.rfa.org/english/news/myanmar/commission-02252014181203.html (accessed 30 March 2016).

76 'Anti-Graft Effort Not Meeting Expectations: USDP Lawmaker,' *Frontier Myanmar*, 3 December 2015, http://frontiermyanmar.net/en/news/anti-graft-effort-not-meeting-expectations-usdp-mp (accessed 30 March 2016).

77 Pyidaungsu Hluttaw Law No. 5/2013, 8 March 2013 (Myanmar).

B. On Central Principle 2 (Laws and procedures for arrest, detention and punishment are publicly available, lawful, and not arbitrary)

Publication of and Access to Criminal Laws and Procedures

Myanmar's Penal Code and Code of Criminal Procedure were first published in the late 1800s and have remained the same since the *2011 Rule of Law Baseline Study*, except for an amendment in January 2016 adjusting the amount of fines and terms of imprisonment in some articles of the Penal Code.[78]

With regard to publication of laws, Article 107 of the Constitution states, "The laws signed by the President or the laws deemed to have been signed by him shall be promulgated by publication in the official gazette. The Law shall come into operation on the day of such promulgation unless the contrary intention is expressed." The Gazette is published weekly in Burmese and contains the text of new legislation, as well as executive orders and instructions, details of the establishment and composition of committees, and other relevant matters.[79] The Gazette is available on the Ministry of Information's website, which also publishes copies of some draft laws. Draft laws and enacted laws have also been published in newspapers, usually in Burmese and sometimes in the English.

Accessibility, Intelligibility, Non-reactivity, Consistency, and Predictability of Criminal Laws

As indicated in the *2011 Rule of Law Baseline Study*, the Penal Code and Code of Criminal Procedure are publicly available as they are included in statute books and in the 12-volume Burma Code. National laws and regulations are also available online in different places, however "no comprehensive or central resource of legislation currently exists for researchers or practitioners."[80] There have been no changes in the procedure to be followed by law enforcement officials, prosecutors, and judicial officers in enforcing criminal laws. Enforcement of the laws continued to be questioned by various quarters, including the UN Special Rapporteur on human rights situation in Myanmar and the media. The US Department of State said that "Security forces continued to exert a pervasive influence on the lives of inhabitants through the fear of arbitrary arrest and detention and through threats to individual livelihoods."[81]

The Union Judiciary Law provides that "no penal law shall have retrospective effect."[82] Section 5 also states that "Any person who committed an offence shall be convicted only under the relevant existing law at the time of its commission. Moreover, he shall not be sentenced with a penalty more than that which is applicable under the said law."

With regard to consistency of criminal laws, the Penal Code has not been recently amended. However, since 2011, Myanmar has issued special laws that penalise certain acts, such as the Counter-Terrorism Law,

78 Law Amending the Penal Code, Pyidaungsu Hluttaw Law No. 6/2016, 7 January 2016 (Myanmar).

79 Melissa Crouch and Nick Cheesman, 'A Short Research Guide to Myanmar's Legal System," in Melissa Crouch and Tim Lindsey (eds), *Law, Society and Transition in Myanmar*, Oxford and Portland: Hart Publishing, 2014, p 22.

80 Ibid, 21.

81 'Country Reports on Human Rights Practices for 2014: Burma,' *US Department of State*, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dlid=236428#wrapper (accessed 2 April 2016).

82 Union Judiciary Law, Law No. 20/2010, 28 October 2010 (Myanmar), Section 4.

Pyidaungsu Hluttaw Law No. 23/2014; Money Laundering Eradication Law, Pyidaungsu Hluttaw Law No. 11/2014; and Anti-Corruption Law, Pyidaungsu Hluttaw Law No. 23/2013. No information indicating that these new laws are inconsistent with other laws was found. In general, information on how stringently all new legislations are reviewed for consistency with the existing legal framework and Myanmar's institutional capacity is not readily available. As was noted, "It is presumably the job of Parliament and the UAGO to keep a grip on this process to ensure that emerging law of Myanmar is at least consistent and coherent…. Although the legislative process has become more open, it seems that still more openness is needed."[83]

Another issue on consistency and accessibility is that more than 400 laws precede independence and have not been republished. Many of these laws are out-dated but have not been amended or repealed. Not all newer laws are available online and there is no central database for all published laws. "Many of the country's laws are, therefore, neither known nor accessible to many judges and lawyers."[84] Under these circumstances, rendering decisions that are consistent with other laws would be difficult.

Detention Without Charge Outside or During an Emergency

There have been no changes with regard to laws authorizing administrative or preventive suspension. As a general rule, Article 376 of the Constitution states that "no person… shall be held in custody for more than 24 hours without the remand of a competent magistrate." However, the same provision provides the following exceptions: "except matters on precautionary measures taken for the security of the Union or prevalence of law and order, peace and tranquillity in accord with the law in the interest of the public, or the matters permitted according to an existing law."

Further, as mentioned in the *2011 Rule of Law Baseline Study*, the Law to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts authorises detention for up to five years. This law allows "[t]he Cabinet… to pass an order, as may be necessary, restricting any fundamental right of any person suspected of having committed or believed to be about to commit, any act which endangers the sovereignty and security of the state or public peace and tranquillity."[85]

Chapter VIII (on Citizen, Fundamental Rights and Duties of the Citizens) of the Constitution contains provisions that allow fundamental rights to be restricted. Particularly, applications to issue writs of habeas corpus, mandamus, prohibition, quo warranto, and certiorari shall be suspended in the areas where the state of emergency is declared.[86] Thus, when a state of emergency was declared in Rakhine state in 2012 in relation to inter-communal violence between the Buddhist and Muslim communities, writs of habeas corpus could not be applied for. Article 381 allows citizens to be "denied redress by due process of law for grievances entitled under law: (a) in time of foreign invasion; (b) in time of insurrection; (c) in time of emergency." Article 382 also states, "In order to carry out their duties fully and to maintain the discipline by the Defence Forces personnel or members of the armed forces responsible to carry out peace and security, the rights given in this Chapter shall be restricted or revoked through enactment to law."

83 Andrew Harding, 'Law and Development in its Burmese Moment: Legal Reform in an Emerging Democracy,' in in Melissa Crouch and Tim Lindsey (eds), *Law, Society and Transition in Myanmar*, Oxford and Portland: Hart Publishing, 2014, p 394.

84 James Coe, 'Broken Justice,' *Frontier Myanmar*, 27 January 2016, http://frontiermyanmar.net/en/broken-justice (accessed 7 April 2016).

85 State Protection Law, Pyithu Hluttaw Law No. 3, 1975, Article 7. http://www.burmalibrary.org/docs6/State_Protection_Law+amendment.pdf (accessed 1 April 2016).

86 Constitution, Article 296 (b).

Suspension of fundamental rights during a state of emergency is reiterated in Chapter XI on Provisions of State of Emergency. For instance, Article 414 states that the President, in declaring a state of emergency "may, if necessary, restrict or suspend as required, one or more fundamental rights of the citizens residing in the areas where the state of emergency is in operation." When a state of emergency arises from causes that may disintegrate the Union or disintegrate national solidarity or that may cause the loss of sovereignty, the President shall declare the transferring of legislative, executive and judicial powers of the Union to the Commander-in-Chief of the Defence Services.[87] The Commander-in-Chief, according to Article 420, "may, during the duration of the declaration of a state of emergency, restrict or suspend as required, one or more fundamental rights of the citizens in the required area."

Rights of the Accused

Freedom from Arbitrary Arrest, Detention without Charge or Trial, Extra-legal Treatment or Punishment, and Extra-Judicial Killing

As mentioned above, a Law on the Application for Writs has been issued to clarify the procedure to avail remedies of habeas corpus, mandamus, prohibition, quo warranto, and certiorari. Besides this, there have not been notable changes in the law.

The legal framework protecting the rights of the accused needs to be improved, with the Special Rapporteur saying that "Parliament should amend the Constitution to ensure that human rights are appropriately accorded to all persons in Myanmar, provide for the prohibition of torture, inhuman or degrading treatment or punishment and the presumption of innocence until proven guilty, and ensure that the military is subject to civilian rule and to the rule of law."

Article 353 of the Constitution provides that "Nothing shall, except in accord with existing laws, be detrimental to the life and personal freedom of any person." There is no specific prohibition in the Constitution against arbitrary arrest, although Section 61 of the Criminal Procedure Code requires permission of a court for detention of more than 24 hours. In this regard, Section 167 allows a magistrate to authorise detention for 30 days when a person is accused of an offence punishable with imprisonment of at least seven years or 15 days if a person is accused of an offence punishable with imprisonment of less than seven years.

There has been controversy in recent years over arrests of those accused of violating the Law of Peaceful Assembly and Peaceful Procession, which was promulgated on 2 December 2011 and amended on 24 June 2014. The law requires prior permission from local police before peaceful procession and assembly is conducted.[88] A 15 October 2014 report stated that, "So far in 2014, Amnesty International has received reports that at least 60 individuals have been charged under Article 18 of the Peaceful Assembly Law.… These individuals include political activists; land rights and environmental activists; human rights defenders; farmers; and other peaceful protesters."[89] This Law was also used in March 2015 to arrest eight students who protested the education law.[90]

87 Ibid, Articles 417, 418, and 419.

88 Article 19, 'Myanmar: Amended Right to Peaceful Assembly and Peaceful Procession Law,' August 2014, https://www.article19.org/data/files/medialibrary/37666/14-08-01-LA-myanmar-assembly.pdf (accessed 1 April 2016).

89 Amnesty International, 'Myanmar: Stop Using Repressive Law Against Peaceful Protesters,' 15 October 2014.

90 Nobel Zaw, 'Students, Activists Allege Violence in Rangoon Protest Crackdown,' *The Irrawaddy*, 6 March 2016.

Despite improvements, arbitrary detentions of political prisoners under various laws continued to occur during President Thein Sein's administration. On 22 January 2016, the administration released 101 prisoners, including 52 political prisoners. This brings the total of political prisoners released by President Thein Sein's administration since 2011 to 1,235; however, 409 political prisoners were still on trial and 84 remained behind bars.[91] The government formed a political prisoner review committee in May 2013 as part of democratic transition. Four hundred twenty political prisoners were released in 2014 with the assistance of the committee.[92] In this regard, the Special Rapporteur encouraged the government to continue working with the political prisoner review committee in order to release all remaining political prisoners and, to this end, to closely cooperate with civil society to develop a definition of "political prisoner."[93]

In 2014, "nearly 40 people jailed under various laws have been labelled political prisoners, including activists charged under Article 18 of the Peaceful Assembly Law, journalists, and farmers protesting against land confiscations."[94] On 22 January 2016, as the government released 52 political prisoners, Kachin activist Patrick Khum Jaa Lee was sentenced to six months imprisonment for sharing a photo on Facebook depicting a man stepping on a photo of the military chief. Chaw Sandi Tun was also sentenced to six months in late December 2015 for a post on Facebook in which she pointed out that opposition leader Aung San Suu Kyi was wearing clothes of a colour similar to those of the army, saying "If you love her [Aung San Suu Kyi] so much, put a piece of her longyi [sarong] on your head."[95]

On a positive note, since assuming the reigns of government, the new administration has released 199 political prisoners by 10 April 2016.[96] More prisoners are expected to be released, with Aung San Suu Kyi having stated that the release of political prisoners, activists and students is an urgent priority for the government.[97]

Torture is penalised in Section 330 of the Penal Code. Further, under Section 24 of the Evidence Act, "A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise." Section 343 of the Code of Criminal Procedure also prohibits the use of influence, promise or threat on an accused to induce him to disclose or withhold information, except when the disclosure is given as a condition for pardon.

Commentators have raised concerns on the use of torture by the police, with the Asian Legal Resource Centre stating in September 2014 that "The practice of torture is systemic. Officials at all levels of the police hierarchy, courts, administration, and hospitals are aware of its occurrence; are involved actively; and are either tacitly complicit or condone it."[98] Torture is reportedly committed with impunity because police

91 Hnin Yadana Zaw and Timothy McLaughlin, 'Myanmar Falls Short of Releasing all Political Prisoners,' *Reuters*, 26 January 2016.

92 Nan Lwin Hnin Pwint, 'Political Prisoners Committee Criticizes Govt Inaction,' *The Irrawaddy*, 16 December 2014.

93 UN General Assembly, *Situation of human rights in Myanmar*, A/69/398, 23 September 2014, par 71.

94 Supra note 92.

95 Amnesty International, 'Myanmar: Immediately Release Two People Detained for Mocking Army on Facebook,' 15 October 2015, https://www.amnesty.org/en/press-releases/2015/10/myanmar-immediately-release-two-people-detained-for-mocking-army-on-facebook/ (accessed 1 April 2016).

96 'More political prisoners to be released in Myanmar,' The Nation, 10 April 2016, http://www.nationmultimedia.com/breaking-news/More-political-prisoners-to-be-released-in-Myanmar-30283667.html (accessed 12 April 2016).

97 San Yamin Aung, 'Suu Kyi Outlines Strategies To Free Political Prisoners,' *The Irrawaddy*, 7 April 2016.

98 'Burma/Myanmar: Features of the practice of torture by law enforcement agencies: A written submission to the UN Human Rights Council by the Asian Legal Resource Centre,' *Asian Human Rights Commission*, 4 September 2014, http://www.humanrights.asia/news/alrc-news/human-rights-council/hrc27/ALRC-CWS-27-09-2014 (accessed 2 April 2016).

commanders shield their men from criminal liability:

> "Even if victims succeed in filing a direct complaint, the police commanders routinely request judges to remove the names of the policemen in the criminal complaint…. Not only do court judges obey police instructions, but the newly established Myanmar National Human Rights Commission (MNHRC), also thinks that once the accused policemen are imposed with administrative sanctions, no further actions are required."[99]

This reasoning has been questioned by human rights organisations who argue that disciplinary sanctions cannot erase criminal actions.

Finally, Myanmar is currently considering a draft law on the treatment of prisoners. The draft has been criticized for, among others, allowing solitary confinement for over 14 days if directed by the Director General of the Prison Department and for failing to provide proper safeguards against abuse as provided by the revised Minimum Rules on the Treatment of Prisoners.[100]

Presumption of Innocence

The Constitution does not explicitly provide for the presumption of innocence. The Handbook for Media Access to the Courts issued by the Supreme Court does however state that "It is the principle of the judiciary that any persons prosecuted for the criminal offences shall be deemed to be innocent until they are clearly found guilty by the evidence." However, considering that concerns have been raised over access to justice, interference in judicial decision-making by the Executive or senior judicial authorities, and high level of corruption in the judiciary,[101] there is grave concern that the presumption of innocence may not be regularly observed—especially for politically motivated charges.

Legal Counsel and Assistance

There have been no substantial changes in the policy pertaining to access to counsel. Section 375 of the Constitution states that "An accused shall have the right of defence in accord with the law." Section 19 prescribes the judicial principles, among which is "to guarantee in all cases the right of defence and the right of appeal under law." Section 40 of Myanmar's Prisons Act requires that provision be made for the visitation, "at proper times and under proper restrictions," of accused persons in prisons by various people, including "qualified legal advisers."

Lawyers' access to clients has vastly improved since military rule. Nevertheless, a report of the International Commission of Jurists said that some difficulties remain owing to inability of lawyers to consult with detained clients confidentially in police custody or prison due to a lack of adequate facilities or the presence of an official within hearing during lawyer-client meetings.[102] Several lawyers also indicated that they needed

99 Danilo Reyes, 'Torture by Law Enforces: Are Burma's Police the New Military?' *Article 2*, 27 August 2015, http://alrc.asia/article2/2015/08/torture-by-law-enforcers-are-burmas-police-the-new-military/ (accessed 2 April 2016).

100 Erin Neff, 'How Burma's Draft Law on Prisons Falls Short on Solitary Confinement,' *Open Society Foundations*, 10 September 2015, https://www.opensocietyfoundations.org/voices/how-burma-s-draft-law-prisons-falls-short-solitary-confinement (accessed 8 April 2016).

101 Supra note 34, at par 67.

102 International Commission of Jurists, *Right to Counsel: The Independence of Lawyers in Myanmar*, 2013, 35-36.

to pay bribes to gain initial access to clients detained in prison or at police stations. At times, prison officials denied lawyers access on their first visit to a detained client, until such time as the client has signed a "power of attorney letter" provided by the prison official and paid an additional "fee." The report also noted that, unfortunately, some people refrain from engaging a lawyer because they believe that a lawyer will have negative consequences on the outcome of the case in the courts.

Students who were arrested for protesting the new education law in March 2015 were reportedly not allowed access to their lawyers or to family members until they appeared in court for their first hearings.[103]

Knowing the Nature and Cause of the Accusation

The law pertaining to the right of the accused to be informed of precise charges and to prepare his or her defence has not been changed. The Constitution generally states that "An accused shall have the right of defence in accord with the law."

The US Department of State reported that defendants do not enjoy the right to be informed promptly and in detail of the charges, the right to consult an attorney or to have one provided at government expense. It also noted that, although there is no right to adequate time and facilities to prepare a defence, defence attorneys in criminal cases generally had 15 days to prepare for trial.[104]

Guarantees during Trial

The law relative to the right of the accused to speedy trial, to defend himself or herself in person, and examine witnesses has not been amended. The Code of Criminal Procedure provides for the right of an accused before a criminal court to be defended by a pleader (Section 340), to offer evidence in his own behalf (Sections 298, 290, 342), and to examine witnesses against him (Section 252).[105]

Several sources indicate that accused persons are not regularly accorded the right to be tried without undue delay.[106] For example, the slow pace of justice was apparent relative to the case of students who were arrested in March 2015 for protesting the National Education Law. Only four out of around 40 listed plaintiff witnesses, three police officers, and one administrative officer had been examined in the span of one year. Thus, it was remarked that "not speedy trial but tortuous trial is being facilitated."[107]

Appeal

No changes have been made relative to the right to appeal. The Constitution includes "guarantee in all cases the right of defence and the right of appeal under law" as a prescribed judicial principle. The Code of

103 'Burma/Myanmar: Students to boycott failed judicial system,' *Asian Human Rights Commission*, 15 March 2016, http://www.humanrights.asia/news/ahrc-news/AHRC-STM-033-2016 (accessed 3 April 2016).

104 'Country Reports on Human Rights Practices for 2014: Burma,' *US Department of State*, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dlid=236428#wrapper (accessed 2 April 2016).

105 Code of Criminal Procedure, pleader (Section 340), to offer evidence in his own behalf (Sections 298, 290, 342), and to examine witnesses against him (Section 252

106 See e.g., UN General Assembly, Situation of human rights in Myanmar, A/70/412, 6 October 2015, par 24.

107 Supra note 103.

Criminal Procedure provides for the manner appeal is to be made as well as the circumstances under which appeal cannot be made (such as when the sentence passed by a Court of Session consists of not more than three months imprisonment, or of fine not exceeding two hundred rupees, or of whipping). Section 374 also provides that "When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not executed unless it is confirmed by the High Court."

It should be noted that writs of prohibition and/or certiorari may be applied for to question the jurisdiction of lower courts; in fact all six writ applications reported in the 2011 Myanmar Law Reports were applications for writs of certiorari and/or prohibition against lower court judgments.[108] In four of these cases, the Supreme Court explained that the writs are only available to bar or overturn the judgment of an inferior court that does not have the jurisdiction to pass such judgment. If applicants want the merits of the case to be reviewed, an appeal should be filed instead. In defining its powers to issue writs, the Court stated in *Shin Nyana (aka) Shin Mo Pya v Republic of the Union of Myanmar* that:

> "The purpose of conferring the power to issue a writ is to supervise the inferior courts (1) when they adjudicate a case that is not within its jurisdiction, (2) when they exercise power beyond its given jurisdiction, (3) when they do not exercise their jurisdiction appropriately."[109]

Freedom from Double Jeopardy

There have been no changes in the law regarding double jeopardy. Section 374 of the Constitution states, "Any person convicted or acquitted by a competent court for an offence shall not be retried unless a superior court annuls the judgment and orders the retrial." A similar provision can be found in Section 6 of Union Judiciary Law.

However, the Special Rapporteur expressed concern over the practice of bringing multiple charges against individuals, who are often already in detention, in different townships for the same offence. For example, Phyoe Phyoe Aung, a student protestor against whom multiple charges were filed for her involvement in the demonstration against the National Education Law in Letpadan in March 2015, was brought before different township courts to face several trials.[110]

Remedy before a Court for Violations of Fundamental Rights

Article 377 of the Constitution states that, in order to obtain a right given by Chapter VIII on Citizen, Fundamental Rights and Duties of the Citizens, application shall be made to the Supreme Court. It thereafter, in Article 378, grants the Supreme Court the power to issue writs of habeas corpus, mandamus, prohibition, quo warranto, and certiorari. Persons may avail of these remedies to challenge the legality of decisions of the lower courts and of government agencies, and correct government actions that infringe on their fundamental rights. A crucial change introduced by the 2014 Law on the Application for Writs is that decisions are made by a board consisting of three judges instead of a single judge.

108 Melissa Crouch, 'The Common Law and Constitutional Writs: Prospects for Accountability in Myanmar,' in Melissa Crouch and Tim Lindsey (eds), *Law, Society and Transition in Myanmar*, Oxford and Portland: Hart Publishing, 2014, 147-151.

109 Ibid, 149, *citing* (2011) MLR (Criminal Case) 126.

110 UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, A/HRC/31/71, 18 March 2016.

In the past, applications for writs were unsuccessful not because of lack of evidence or legal basis, but because the Supreme Court was unwilling to intervene when government departments and ministries abuse or act beyond their powers. In 2013, one lawyer said most writs filed with the Supreme Court were rejected almost immediately, some within two hours, and in some cases lawyers were deregistered within hours of filing them.[111] More data is needed to fairly assess the success rate of writ applications made under the new law.

Another development is the establishment (in 2011) and reconstitution (in 2014) of the Myanmar National Human Rights Commission. Among other powers and duties, the Commission is authorised to investigate complaints and allegations in respect of human rights violations.[112] (*See* II.A.)

C. On Central Principle 3: (The process by which the laws are enacted and enforced is accessible, fair, efficient and equally applied)

Law Enactment

Openness and Timeliness of Release of Record of Legislative Proceedings

Legislative proceedings are not open to public. It was noted that the lack of transparency and systematic public consultation on draft laws have resulted in laws that do not meet the needs of the people and that fall below international standards.[113]

On a positive note, draft laws have been announced in the daily government newspaper since 2012. Civil society has also been demanding for a more consultative drafting process. For example, after the National Education Law was promulgated in September 2014,[114] students demanded that the law be amended to, among others, decentralize decision making powers from the government to educational institutions, allow the formation of student unions, and increase the state budget for education. The government eventually proposed to discuss the outstanding issues and talks among representatives from the executive government, parliament, students and civil society organizations were organized in 2015. After several rounds of discussion, the joint houses of parliament approved the final version of the amended National Education Law.[115] While some amendments reflected the demands of the students, the term "union" was rejected by the parliament. The amended law will allow students to apply for their university and program of choice, and universities are empowered to decide whom to admit without necessarily considering the results of final high school exams—which are widely criticized for their rigidity and promotion of rote learning.[116]

111 Soe Than Lynn, 'MP's tackle judicial reform with writs,' *Myanmar Times,* 1 September 2013.

112 National Human Rights Commission Law, Section 22.

113 Supra note 37, at par 11.

114 Law No. 38/2015, 25 June 2015 (Myanmar).

115 Htoo Thant and Mratt Kyaw Thu, 'Student unions left out of education law,' *Myanmar Times*, 19 June 2015, http://www.mmtimes.com/index.php/national-news/15106-student-unions-left-out-of-education-law.html (accessed 25 Feb 2016)

116 Ibid

The enactments of both the News Media Law[117] and the Printing and Publishing Enterprise Law[118] in 2014 were also met with criticisms. The News Media Law was criticized because all types of media remain under unrestricted control of the government through the Media Council."[119] The Printing and Publishing Enterprise Law requires all media enterprises to register with the government or risk fines, suggesting that power of censorship still lies with the country's authorities. There have been consultations with media representatives, but so far it is not clear to what extent their concerns will be taken into account.

The draft child law currently being reviewed by the Office of the Attorney General was developed with the engagement of civil society.[120]

Timeliness of Release and Availability of Legislative Materials

The Ministry of Information's website has published copies of some draft laws. Draft laws have also been published in newspapers, usually in Burmese and sometimes in the English.[121] Official drafts of laws and transcripts of minutes of legislative proceedings are however not regularly made available to the public on a timely basis. For example, during the drafting of the education law, students criticized the bill for lacking transparency as it moved through parliament, with information about it in state-run newspapers not matching what was passed by the lower house.[122]

Equality before the Law

Several provisions of the 2008 Constitution provide for equality of persons before the law and these provisions have not been amended since 2011. For example, it declares "enhancing the eternal principles of Justice, Liberty and Equality in the Union" as one of the country's basic principles. Article 21 states that, "Every citizen shall enjoy the right of equality, the right of liberty and the right of justice, as prescribed in this Constitution," while Article 347 provides that "The Union shall guarantee any person to enjoy equal rights before the law and shall equally provide legal protection." Despite these guarantees, the Special Rapporteur has recommended the reform of some legislation for failing to treat people equally. Examples of such are as follows:[123]

(1) Buddhist Women's Special Marriage Law (2015), which, for instance, accords Buddhist women married to men of other faiths protections against some forms of domestic violence but does not extend these protections to all women. Also, in cases of separation, dissolution of marriage or divorce, non-Buddhist fathers are denied custody of children in all circumstances. It also requires Buddhist women above 18 and under age 20 to seek parental consent to enter into marriage with non-Buddhist men; this requirement is not imposed on Buddhist men.

117 Law No. 12/2014, 14 March 2014 (Myanmar).

118 Law No. 13/2014, 14 March 2014 (Myanmar).

119 Article 19, 'Legal analysis on News Media Law,' www.article19.org/data/files/medialibrary/37623/News-Media-Law-Myanmar (accessed 25 February 2016).

120 Supra note 37, at par 14.

121 Melissa Crouch and Nick Cheesman, 'A Short Research Guide to Myanmar's Legal System," in Melissa Crouch and Tim Lindsey (eds), *Law, Society and Transition in Myanmar*, Oxford and Portland: Hart Publishing, 2014, p 22.

122 Khin Khin Ei, 'Myanmar's University Students Protest Proposed Education Law,' *Radio Free Asia*, 2 September 2014, http://www.rfa.org/english/news/myanmar/protest-09022014192146.html (accessed 3 April 2016).

123 Supra note 37, at 'Annex I: Legislation in need of reform in Myanmar.'

This Law was part of a package of four "Race and Religion Protection Laws,"[124] championed by the Committee for the Protection of Race and Religion known as Ma Ba Tha and signed by President Thein Sein between May and August 2015.[125] During its drafting, the international community issued several warnings that the proposed laws could violate Myanmar's treaty commitments, in particular the Convention on the Elimination of Discrimination against Women and the Convention of the Rights of the Child."[126] The four laws were criticized as they are perceived to target Muslims, because they restrict interfaith marriage, polygamy, religious conversion and address population growth.[127]

(2) Citizenship Law (1982), which gives full citizenship only to those ethnic groups which settled in Myanmar prior to 1823 AD, and allows the revocation of associate citizenship or naturalized citizenship on vague grounds of "disaffection or disloyalty" to the state or offences "involving moral turpitude."

(3) Penal Code (1861), which imposes penalties of up to 10 years' imprisonment for sexual intercourse "against the order of nature," including consensual same sex conduct.

Reparation for Crimes and Human Rights Violations' Victims/Survivors

Article 377 of the Constitution states that, in order to obtain a right given by Chapter VIII on Citizen, Fundamental Rights and Duties of the Citizens, application shall be made to the Supreme Court. The Constitution also grants the Supreme Court with the power to issue writs of habeas corpus, mandamus, prohibition, quo warranto, and certiorari. (*See* II.A.)

The Special Rapporteur has emphasized that truth-seeking, accountability and reparations processes for current and historic conflict-related violations are critical for building a sustainable and inclusive peace. She has thus recommended that the government consider broad and public consultations on possible frameworks and forms for such processes.[128]

Law Enforcement

Effective, Fair and Equal Enforcement of Laws

Issues regarding fair, equal and effective enforcement of laws have been noted. For instance, Myanmar enacted two land laws, the Vacant, Fallow and Virgin Land Law[129] and the Farm Land Law[130] in 2012. Despite these laws, grievances and conflicts over land remain widespread. "The farmers want an end to arrests of

124 Population Control and Health Law, Law No. 28/2015, 19 May 2015; The Religious Conversion Law, Law No. 48/2015, 26 August 2015; The Interfaith Marriage Law, Law No.50/2015, 26 August 2015; and Monogamy Law, Law No.54/2015, 31 August 2015 (Myanmar).

125 Hnin Yadana Zaw, 'Myanmar's president signs off on law seen as targeting Muslims,' *Reuters,* 31 August 2015, www.reuters.com/articles/us-myanmar-politics (accessed 25 February 2016).

126 UN General Assembly, *Situation of human rights in Myanmar*, A/69/398, 23 September 2014.

127 Feliz Solomon, 'Burma parliament approves contentious race and religious bills,' *The Irrawaddy*, 20 August 2015, www.irrawaddy.com/election/news/burma (accessed 25 Feb 2016).

128 Supra note 37, par 60.

129 Law No.10/2012, 30 March 2012 (Myanmar).

130 Law No.11/2012, 30 March 2012 (Myanmar).

farmers protesting forceful expropriation of or eviction from their land, as well as fair compensation for any land takings."[131] It is reportedly difficult to resolve land disputes in court, "because farmers are treated like criminals when businessmen or developers sue them. They feel that they are being discriminated against."[132] Farmers who protest for the land rights are arrested under peaceful assembly and procession law.

Another example involves the situation in northern Rakhine State. The Special Rapporteur has drawn attention "to the highly discriminatory policies and practices against the Rohingya and other Muslim communities in Rakhine." Movement of the Rohingya population is restricted within and between townships, and people must obtain specific authorization to travel outside Rakhine State. She also reported that local orders in northern Rakhine State require Rohingya to obtain permission to marry, and attempt to limit couples to two children; any child born beyond that limit risks not being included in the family household list and remaining unregistered. She also received reports of cases of preventable deaths due to lack of access to emergency medical treatment.[133]

D. On Central Principle 4: (Justice is administered by competent, impartial, and independent judiciary and justice institutions)

Appointment and Other Personnel Actions in the Judiciary and among Prosecutors

No changes have been made relative to the appointment and discipline of prosecutors, judges, and judicial officers. While the Constitution provides for a judiciary that is independent, separate and of equal status with the executive and legislative branches of government,[134] these provisions are undermined by the control currently exercised by the executive over the judiciary.

The Chief Justice is nominated by the President, and members of the Supreme Court are selected by the President in consultation with the Chief Justice. They are appointed with the approval of Parliament, who cannot refuse to approve the appointment unless it can clearly be proven that the person does not meet the required qualifications.[135] The President also nominates the Chief Justices of the High Courts of the Regions and States, in coordination with the Chief Justice of the Union and the pertinent Region or State Chief Minister. The Chief Minister of the Region or State concerned, in coordination with the Chief Justice of the Union, nominates other judges of the High Courts. The Chief Justices and Judges of the High Courts are appointed with the approval of the Region or State Parliament, who cannot refuse to approve the appointment unless it can clearly be proven that the nominee does not meet the required qualifications.[136] The President

131 'Burmese Farmers Organizing to Reduce Conflict Over Land,' *USAID Land Tenure and Property Rights Portal*, 23 September 2013, http://www.usaidlandtenure.net/commentary/2013/09/burmese-farmers-organizing-to-reduce-conflict-over-land (accessed 25 Feb2016)

132 RFA, 'Myanmar Farmers call for amendment to land law,' 20 March 2013, www.rfa.org/english/news/myanmar /farmers-08202013180804.html (accessed 21 February 2016).

133 Supra note 37, at pars 36-44.

134 Constitution, Article 11 (a).

135 Constitution, Article 299; Union Judiciary Law, Sections 26-27.

136 Constitution, Article 308(b); Judiciary Law, Sections 44-45.

and the Parliament jointly appoint the members of the Constitutional Tribunal.[137] Notably, with regard to professional qualification and experience, the President can nominate a person "who is, in the opinion of the President, an eminent jurist."[138]

The Special Rapporteur has said that measures are needed to guarantee the independence of the judiciary, including reforming the judicial appointment process by creating a judicial appointments committee; increasing the salaries and pensions for judges to make them commensurate with the status and responsibility of their office; creating a specialized, independent body to investigate allegations of judicial corruption; and improving continuing education and training for the judiciary.

It should be noted that, in 2012, a publication said that it "heard no evidence to suggest that the current president and Supreme Court are actually misusing their extensive powers of appointment, but the possibility of future abuse should be forestalled by the more robust safeguards."[139]

According to the Constitution, the Chief Justice and Judges of the Supreme Court or of the High Court of the Region/ State, as well as the Chairperson and members of the Constitutional Tribunal, may be impeached for the following reasons: (i) high treason; (ii) breach of the provisions of the Constitution; (iii) misconduct; (iv) disqualification of qualifications prescribed in the Constitution; (v) inefficient discharge of duties assigned by law

Prosecutors, judges holding offices in lower courts and judicial officers are regarded as civil service personnel and are recruited, appointed, promoted, assigned, disciplined and dismissed like other civil service personnel. The recruitment of judges of lower courts and prosecutors is respectively tasked to the Supreme Court and the Attorney General's Office.

The Supreme Court of the Union, in collaboration with international partners and donors, developed the Judiciary Strategic Plan (2015-17), which was launched on 17 December 2014. The plan has five strategic areas, as follows: Protect Public Access to Justice; Promote Public Awareness; Enhance Judicial Independence and Accountability; Maintain Commitment to Ensuring Equality, Fairness and Integrity of the Judiciary; and Strengthen Efficiency and Timeliness of Case Processing. No data measuring effectiveness of programmes related to "Enhance Judicial Independence and Accountability" was found at the time of writing of the report.

Training, Resources, and Compensation

Prosecutors, judges and judicial officers are civil service personnel and are trained like other civil servants, with specific professional training provided by Attorney General's Office and the Supreme Court. As they are civil servants, they are also required to attend the civil service training provided by the Union Civil Service Board. The Central Institute of Civil Service is the training institute in the Union Civil Service Board, and it provides a basic training course for entry level-judges. Training for judges of higher ranks are conducted through the Judicial Training Institute, which is a body within the Supreme Court.[140] The Union Civil Service Board has been working closely with UNDP and has included trainings on rule of law,

137 Constitution, Article 321.

138 Constitution, Articles 301 and 310.

139 International Bar Association's Human Rights Institute (IBAHRI), *The Rule of Law in Myanmar: Challenges and Prospects*, December 2012, 60.

140 Human Rights Resource Centre, *Judicial Training in ASEAN: A Comparative Overview of Systems and Programs*, Singapore: Konrad-Adenauer-Stiftung, April 2014, 53-54.

access to justice, and public administration in their training programmes. However, these are short-term programmes that are meant only for selected officials.[141]

International organizations and international NGOs have been actively engaged with the judicial sector as well as the Attorney General's Office to assist them in developing the quality of the legal profession. However, the judiciary is still lagging behind in the reform process. A report issued in late 2013 stated that many judges, particularly at the lower rungs of the judiciary, are unfamiliar with law and court procedures. Courtroom procedures are said to be inconsistent with international fair trial standards.[142] The problem goes as far back as the quality of law school programmes, with law department curricula weak in teaching jurisprudential analysis or reasoning.[143] For 2016, among the aims of the Judiciary Strategic Plan (2015-17) is to upgrade the curriculum of on-job training courses for judges.

Various sources agree that the judges receive low salaries. A township judge reportedly is paid around K250,000 (about US$200) a month. "Bribery is considered an almost acceptable way to bolster one's pay. Failing to pay a bribe, which is often negotiated between a court's clerks and the lawyers, will result in either continued adjournments or a conviction."[144]

State's Budget Allocation for the Judiciary and Other Principal Justice Institutions

According to the recent Union Budget Law for 2016, promulgated on 25 January 2016, the budget expenditure for the Judiciary or Supreme Court of the Union is 23,374.059 million kyats, which is 0.1925% of the total expenditure.[145] The Union Constitutional Tribunal is allotted 816.921 million kyats, around 0.0067% of the total expenditure.

Impartiality and Independence of Judicial Proceedings

Article 19 of the Constitution prescribes the following basic judicial principles: (a) to administer justice independently according to the law; (b) to dispense justice in open court unless otherwise prohibited by the law; and (c) to guarantee in all cases the right of defence and the right of appeal under the law. However, the executive branch of government is allowed wide influence over the judiciary. Further, corruption is reportedly rampant and people lack trust in the legal system. The International Commission on Jurists (ICJ) reported that "The lawyers with whom the ICJ spoke about this issue noted that while the degree of corruption varies (being at its worst at the lower rungs of the system), it is never absent from the equation:

141 *Country Programme Action Plan (2013-2015) Between the Government of the Republic of the Union of Myanmar and the United Nations Development Programme*, April 2013. http://www.mm.undp.org/content/dam/myanmar/docs/Documents/UNDP_MM_CPAP_%20JULY%202013.pdf (accessed 10 April 2016).

142 International Commission of Jurists, *Right to Counsel: The Independence*(accessed 10 April 2016).tion, anmarengthen urther reforms and the judiciary is udcial *of Lawyers in Myanmar*, 2013, 40.

143 Dominic J. Nardi and Lwin Moe, 'Understanding the Myanmar Supreme Court's Docket: An Analysis of Case Topics from 2007 to 2011,' in *Law, Society and Transition in Myanmar*, Oxford and Portland: Hart Publishing, 2014, 99.

144 James Coe, 'Broken Justice,' Frontier Myanmar, 27 January 2016, http://frontiermyanmar.net/en/broken-justice (accessed 7 April 2016).

145 Union Budget Law for 2016, Law No. 21/2016, 25 January 2016, Schedules 2 and 4.

it is so deeply embedded into the legal system that it is essentially taken for granted."[146]

On a positive note, the government has begun taking some action against judges accused of corruption. On 21 October 2014, the Sagaing Region Court sentenced Homemalin township judge Tin Sein to 10 years in prison after the Anti-Corruption Commission found him guilty of extorting bribes from convicts.[147]

Provision of Competent Lawyers or Representatives by the Court to Witnesses and Victims/Survivors

In 2014, UNDP said, "There is a severe shortage of legally trained professionals in Myanmar.... For new legal professionals, their foundational legal education has been limited. A visit to any law faculty in Myanmar will show only the most rudimentary conditions—no modern text books in any basic legal subject and almost no library acquisitions after 1962. There are almost no computers or internet access—all making legal research or self-teaching next to impossible. Some students obtain their degrees by correspondence…. Law professors, some of whom have foreign doctorates, struggle to keep their knowledge up do date…. In Myanmar, there is only very limited continuing education within the justice sector institutions—mostly connected with recruitment and promotion. There is no formal continuing education for private lawyers."[148] For this reason, there is a lack of genuinely qualified lawyers, prosecutors and judges

Some lawyers interviewed by the ICJ acknowledged that the public still does not hold the legal profession in high regard and lawyers continue to be generally viewed as brokers—dealmakers between client and judge. Junior lawyers are "generally seen as poorly educated and inexperienced, and unethical in their pursuit of fees." However, on a positive note, some observed a "new, merit-based reliance" on lawyers. Among the reasons for this are the high-profile cases of farmers against government, military and big corporate interests; the efforts of lawyers' networks to provide free legal assistance; and an increasing awareness that a good lawyer can advance one's cause.[149] Another positive development is the inauguration of a unified Independent Lawyers' Association of Myanmar on 20 January 2016. The association aims to become the first national, independent, professional organisation of lawyers in the country.[150]

Safety and Security of the Judiciary, Prosecutors, Litigants, Witnesses, and Affected Public

Little information is available with regard to accessibility, safety and security of court facilities. There are however news articles that indicate that security is heightened when the courts hear controversial cases. For example, court officials of the Thayawady District Court required everyone who attended the hearing held for students who protested the education law to sign a form promising to follow court regulations. Only

146 International Commission of Jurists, *Country Profile prepared by the ICJ Centre for the Independence of Judges and Lawyers*, June 2014, 11. See also UNDP Myanmar, *Bridges to Justice: Rule of Law Centres for Myanmar*, March 2014.

147 Supra note 81.

148 UNDP Myanmar, *Bridges to Justice: Rule of Law Centres for Myanmar*, March 2014, 6.

149 Supra note 102, at 15.

150 'IBA President and Aung San Suu Kyi open inaugural meeting of Myanmar's first national independent lawyers' association,' *International Bar Association*, 20 January 2016, http://www.ibanet.org/Article/Detail.aspx?ArticleUid=67923557-0f67-403c-ad67-ff04adc4ac52 (accessed 10 April 2016).

two family members per defendant were allowed to enter the court and two reporters per media outlet.[151] Security was also tightened for "fear of reprisal" when a court sentenced 15 men to death for stabbing and killing a man, an attack that caused public outrage and led to 23 arrests.[152]

Specific, Non-Discriminatory, and Unduly Restrictive Thresholds for Legal Standing

No reports or jurisprudence demonstrating how the courts determine legal standing were found; thus, no fair assessment could be made on this matter. The study did not find reports indicating that complaints were dismissed on the basis of the failure of parties to show sufficient connection to or harm from a law or action. It appears that barriers to instituting actions revolve more on reluctance to make official complaints because of fear of retaliation, associated cost or inconvenience of filing complaints, distrust or dissatisfaction in the justice system, or other reasons.[153]

Publication of and Access to Judicial Hearings and Decisions

One of the judicial principles prescribed in Article 19 of the Constitution is "to dispense justice in open court unless otherwise prohibited by law." According to the Supreme Court's Handbook for Media Access to the Courts, issued in October 2015, criminal proceedings are to be conducted in open court and the public may hear proceedings, depending on the space available in the courtroom. However, public access is not allowed with regard to criminal cases that are related to state secrets, as provided in the Burma Official Secrets Act. Similarly, according to the Child Law, no person other than the child's parents or guardian, staff of the court, law officer and police officer shall be present at the trial of a juvenile case. Moreover, "public access is prohibited in the trial of the cases on which the presiding judge assumes those cases to be the special proceedings."[154] The US Department of State reported that in 2014 ordinary criminal cases were open to the public. Unlike in previous years, there were no reports that families of political activists were not admitted to trials.[155]

The Handbook also states that any person, including the media, are entitled to receive copies of judgments, orders, decrees of criminal cases and civil cases with the permission of the court. Only parties of cases are entitled to review the case files and request copies of documents included in the proceedings. Those wishing to procure copies are required to submit an application and pay for copying fees. This could be considered as a positive development since copies of judgments were previously not easily available to media. No information is yet available as to the ease and swiftness of the application process.

151 'Police tighten security for students' court hearing in Thayawady,' *Eleven*, n.d., http://www.elevenmyanmar.com/local/police-tighten-security-students%E2%80%99-court-hearing-thayawady (accessed 7 April 2016).

152 Aung Hla Thun, 'Myanmar court sentences 15 to death for 2011 gang murder,' *Reuters*, 9 March 2015.

153 See e.g. Supra note 37, at par 53; Ei Cherry Aung, 'Rape victims struggle to find justice in Myanmar,' *Myanmar Now*, 17 February 2016, http://www.myanmar-now.org/news/i/?id=aa0320cc-cb14-4750-ad79-25d085739969 (accessed 7 April 2016); and The Carter Center, 'Carter Center Statement on the Post-Election Environment and Complaints Resolution Process in Myanmar,' 28 February 2016, 5.

154 The Supreme Court of the Union, *Handbook for Media Access to the Courts*, 8 October 2015, 18.

155 Supra note 81.

Reasonable Fees and Non-arbitrary Administrative Obstacles to Judicial Institutions

Proceedings, from filing of complaints with the police until they reach the court, are subject to unreasonable or arbitrary fees and obstacles. Police officers reportedly do not receive adequate budget to conduct investigations, resulting in officers seeking investigation funds from complainants. While the Myanmar Police Force has recognized this problem and announced that it would fund all investigation expenses starting from 2014, this was still not being implemented by the start of 2015.[156] Although there is no cost for filing criminal complaints, filing fees for some cases of other nature are high. For instance, election candidates who want to submit complaints to the Union Election Commission will need to pay 500,000 kyats ($390) as submission fee, an amount that is viewed as much higher than the international norm.[157] Besides this, corruption in the judiciary is endemic and the judicial process in general was seen as expensive.[158] Corruption is not limited to the judiciary; in 2014 President Thein Sein said "Chronic bribery and corruption are still happening in the civil service."[159]

Assistance for Persons Seeking Access to Justice

The government does not fund a national program to provide free legal aid. Nonetheless, avenues through which complaints could be submitted have been opened. In 2012, the President's Office announced that it was setting up a "People's Voice" section on its website where people could send complaints, suggestions or appeals. The office would then advise the President of the feedback sent to "People's Voice" and also forward them to the relevant ministries. In the first four days of "People's Voice," 50 anonymous letters were received.[160] No information as to the actions taken in regards the letters or whether the mailbox is still being maintained was found. The Parliament's Fundamental Rights of the Citizen, Democracy and Human Rights Committee (FRCDHRC) has also been receiving complaints that it records and compiles; some complaints are sent to relevant ministries. From 2011 to 2015, it received 3,808 complaint letters. Of these, 3,273 were referred to the executive government, 108 to the Supreme Court, and 120 to relevant ministries; 307 received no action. The government responded to 478 letters and the Supreme Court to 60.[161]

There have been many changes since 2011 as Myanmar opened up its democratic space and numerous international organisations, civil society organizations and lawyers organizations are providing assistance to persons seeking access to justice. No data comprehensively mapping accessibility to such assistance was found. The International Bar Association's Human Rights Institute (IBAHRI) reported that many people interviewed in 2012 suggested that access to justice remained poor. Civil activists typically identified institutions such as churches, industrial tribunals and local government offices as the places they would go if rights were being infringed. "None thought the Myanmar National Human Rights Commission offered satisfactory protection, while courts were almost universally discounted. Judges were considered corrupt

156 'Corruption and police reform in Myanmar,' *The Interpreter*, 18 February 2015, http://www.lowyinterpreter.org/post/2015/02/18/corruption-police-reform-Myanmar.aspx (accessed 7 April 2016).

157 The Carter Center, 'Carter Center Statement on the Post-Election Environment and Complaints Resolution Process in Myanmar,' 28 February 2016, 5.

158 Supra note 139, at 29 and 58.

159 Kyaw Kha, 'Thein Sein Admits Corruption, Bribery Are "Chronic" in Burma, *The Irrawaddy*, 22 August 2014.

160 May Sandy, 'President encourages complaints, suggestions,' *Myanmar Times*, 17 September 2012, http://www.mmtimes.com/index.php/national-news/nay-pyi-taw/1494-president-encourages-complaints-suggestions.html (accessed 9 April 2016).

161 "Lower House MP urges committee to investigate human rights in prisons,' *Eleven*, n.d., http://www.elevenmyanmar.com/local/lower-house-mp-urges-committee-investigate-human-rights-prisons (accessed 9 April 2016).

and too close to the executive, and the judicial process in general was seen as expensive and daunting."[162]

Well aware of the need to improve public trust and confidence in the courts, one Strategic Action Area of the Supreme Court's Judiciary Strategic Plan (2015-2017) is to promote public awareness. In line with this, it intends to carry out national information programs and outreach programs. "The courts will take a proactive role in communicating the achievements in improving access to justice and improvements in timeliness and efficiency that will result from the initiatives taken in this three-year strategic plan."[163]

Further, the Judiciary Strategic Plan aims to improve ease of access to court services by creating public self-help information counters in courts, and designing and implementing pilot modern public intake centres. These initiatives were initiated in 2015 and are now in their second year of implementation. Pilot courts have been identified as follows: Taungoo District Court, Hlaingthayar Township Court and Hpaan Township Court. No information on the impact of the activities so far is currently available.

Measures to Minimize Inconvenience to Litigants and Witnesses, and their Families, Protect their Privacy, and Ensure Safety from Intimidation/Retaliation

There is no special law enacted specifically to protect victims, however, some laws contain provisions intended to protect witnesses and victims. For example, the Code of Criminal Procedure allows judges to adjudicate cases in any private room or take any other suitable protection for the best interest of witnesses and victims. Aside from these measures, the 1993 Child Law prohibits including information revealing the identity of a child who is participating as a witness in any case on radio, television, written publications, as well as making use of the photograph of the child. The 2005 Anti-Trafficking Law also prohibits publication of news at any stage of investigation, prosecution, and adjudication without the permission of the Body for the Suppression of Trafficking in Persons. It also prohibits perusal or copying of documents contained in the proceedings by any person not involved in the case.

Some improvements have been introduced in the last five years, with the National Human Rights Commission Law of 2014 providing witness protection and non-retaliatory measures against victims. However, it is still not known to what extent these provisions are fully complied with and how effective they have been. Additionally, the Supreme Court's Judiciary Strategic Plan (2015-2017) intends to modernize pilot court facilities to provide adequate and safe access and improve public trust. To do this, the Supreme Court, with the assistance of USAID, will assess pilot court space, facilities, needs and priorities based on international court facilities standards and develop and test renovation designs for each pilot court.[164] Additionally, to reduce inconvenience to witnesses and parties to cases, the Judiciary Strategic Plan aims to develop pilot court case management program procedures and best practices to improve timeliness of case processing.

162 Supra note 139, at 29.

163 The Supreme Court of the Union, *Advancing Justice Together: Judiciary Strategic Plan (2015-2017).* http://www.unionsupremecourt.gov.mm/sites/default/files/supreme/advancing_justice_together_english.pdf (accessed 7 April 2016), 5.

164 Ibid, 14.

Available and Fair Legal Aid to All Entitled

Article 375 of the Constitution states that "An accused shall have the right of defence in accord with the law." A report however notes that "There is no government-funded legal aid programme and no public defender programme, except for defendants who are accused of capital crimes. For smaller disputes, such as traffic accidents, there is a strong incentive to settle quickly without involving the formal justice sector."[165]

Legal aid is provided by civil society and lawyers' organizations. As there are many organizations providing legal aid, the government enacted the Legal Aid Law in January 2016. The Chief Justice of the Supreme Court will be responsible for the establishment of a union level legal aid organization, and Chief Judges of regions/states, districts and townships will be responsible for setting up the legal aid organization in their jurisdiction. These organizations will recruit legal aid providers/lawyers for defendants who are unable to afford the services of a lawyer.[166] As the law was enacted only early this year, it is difficult to know how much this law will benefit legal aid providers and recipients.

Legal aid providers will be required to register with the local legal aid supervisory team established under the new law. Moreover, the union level legal aid provision board will determine the offences that are eligible to receive legal aid. The board will also determine the criteria for indigents who are entitled to receive assistance. Legal aid providers could face charges should they fail to conform to the prescribed procedure.[167]

General Public Awareness of Pro Bono Initiatives and Legal Aid or Assistance

As free legal aid is being provided by several civil society and lawyers' organisations operating throughout Myanmar and they began rendering services only in 2011, it is difficult to assess how widely they have been able to reach the public. The Legal Aid Law and the Independent Lawyers' Association of Myanmar have the potential of ushering in a more systematic access to information regarding free legal assistance.

III. INTEGRATING INTO A RULES-BASED ASEAN

Progress towards Achieving a Rules-Based ASEAN Community

On Mutual Support and Assistance on the Rule of Law

As a member of ASEAN, Myanmar participates in the initiatives of the ASEAN Law Ministers Meeting (ALAWMM), such as the ASEAN Government Law Directory, ASEAN Legal Information Authority (ALIA), ASEAN Government Legal Officers' Programmes (AGLOP) and Exchange of Study Visits which are designed to help promote awareness and understanding of each other's legal system.[168]

165 Dominic J. Nardi and Lwin Moe, 'Understanding the Myanmar Supreme Court's Docket: An Analysis of Case Topics from 2007 to 2011,' in *Law, Society and Transition in Myanmar*, Oxford and Portland: Hart Publishing, 2014, 99.

166 Legal Aid Law, Law No.10/2016 (Myanmar), Section 6,

167 Ibid, Section 39.

168 Joint Communique of the Ninth ASEAN Law Ministers Meeting (ALAWMM), 22 October 2015.

Myanmar has also joined the ASEAN Law Association. In August 2013, a judge from the Supreme Court of Myanmar attended an ASEAN Law Association governing council meeting with other representatives from supreme courts of ASEAN countries.[169] The judiciaries of ASEAN have also been participating in the Court Excellence and Judicial Cooperation Forums. Inaugurated in Singapore in 2014 at a forum hosted by the Subordinate Courts of Singapore, it aims to foster judicial cooperation and provide a venue for ASEAN judiciaries to share experiences in judicial administration and the delivery of justice.[170] A forum on "International Framework for Court Excellence" will be conducted in Yangon on 17 to 20 May 2016 by the Singapore Judicial College in conjunction with the Singapore Ministry of Foreign Affair's Initiative for ASEAN Integration.[171]

The country's parliament also participates in initiatives of the ASEAN Inter-Parliamentary Assembly, which aims to encourage understanding, cooperation, and close relations among member parliaments. Aside from this, U Shwe Maung, a member of the Pyithu Hluttaw from 2011 to 2016, is a Board Member of the ASEAN Parliamentarians for Human Rights (APHR), which seeks to promote democracy and human rights in all ASEAN states by utilizing the abilities of parliamentarians and other influential persons to advocate for the protection of human rights throughout ASEAN. Among other activities, the APHR sent a fact-finding mission to Myanmar in 2015 comprised of parliamentarians from Cambodia, Indonesia, and Malaysia who met with a variety of stakeholders, including government officials and political parties, in order to learn about key political and human rights issues facing the country. The objective was to learn how ASEAN and members of parliament from around the region can support Myanmar in its political development.[172]

On Legislative and Substantive Changes Promoting the Rule of Law

There have been numerous legislative and institutional changes in Myanmar since 2011. However, these developments are designed primarily to address the needs of the country as Myanmar pursues its rebirth as a democratic state and establishes ties with the international community after having been isolated for over five decades. There is no known official information on whether there have been legislative and substantive changes in Myanmar that were adopted specifically and primarily to promote the rule of law in ASEAN at a regional level.

On Enactment of Laws relating to the ASEAN Community Blueprints and Similar Plans

During its Universal Periodic Review process, Myanmar revealed that measures have been taken to implement the ASEAN Economic Community (AEC) Blueprint.[173] President Thein Sein's second wave of reform focused on socio-economic development and alleviating poverty by half by 2015; these reforms took

169 'Meeting of ASEAN Law Association's Governing Council,' *ASEAN Law Association*, 22 August 2013, http://www.news.gov.sg/public/sgpc/en/media_releases/agencies/supcourt/press_release/P-20130823-1/AttachmentPar/0/file/Media%20Release%20-%20ASEAN%20Law%20Association%20Governing%20Council.pdf.

170 Subordinate Courts Singapore, 'Subordinate Courts Media Release: Court Excellence and Judicial Cooperation Forum: 5 March 2014 to 7 March 2014,' 5 March 2014.

171 'International Training Programmes 2016,' *Supreme Court Singapore*, http://www.supremecourt.gov.sg/sjc/judicial-education/international/2016 (accessed 10 April 2016).

172 ASEAN Parliamentarians for Human Rights, 'End of Mission Statement by APHR Delegation to Myanmar,' 14 September 2015, http://aseanmp.org/wp-content/uploads/2015/09/APHR-Myanmar-Post-Mission-Statement_FINAL.pdf (accessed 11 April 2016)

173 UN Human Rights Council, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, A/HRC/WG.6/23/MMR/1, 5 August 2015, par 4.

shape in the context of the regional move towards establishing the ASEAN Economic Community by 2015. The country adopted a managed float for its currency and unified its multiple exchange rates in April 2012, it passed the Myanmar Special Economic Zone Law in 2014, and the government approved the Mining Regulations Law in December 2015.[174] Parliament is also reviewing a draft Myanmar Investment Law, which would combine the 2012 Foreign Investment Law and the 2013 Myanmar Citizens Investment Law, as well as a revision of the Myanmar Companies Act.[175] While these efforts aim to make the country more attractive to foreign investors in general, they do align with the aims of ASEAN to generate economic activity and encourage freer flow of investments. In line with implementing the AEC Blueprint, the country is also working with the Asian Development Bank to establish trade facilitation indicators and review customs regulatory framework and operations.[176]

Myanmar also enacted the Mutual Assistance in Criminal Matters Law in 2004 and the Anti-Trafficking in Persons Law in 2005. These legislations are meant to comply with the requirements of international treaties as well as regional ones.

On Integration as Encouraging Steps toward Building the Rule of Law

Myanmar is going through several transitions that are impacting the rule of law landscape in the country. While it is hard to precisely assess to what degree positive changes have been influenced by ASEAN Integration, commentators agree that integration serves to encourage rule of law in Myanmar. "Effective participation in ASEAN processes, especially in AEC, requires policy reforms, consistency in policy and in its application…. The main imperative is to 'level the playing field' for domestic firms, in order to ensure their competitiveness."[177] To this end, Dr. Myint, chief economic presidential advisor and chief of Myanmar Development Resource Institute, said in 2011 that measures would have to include (a) fair access to the country's natural resources, (b) fairness in granting business-related licenses and permits, (c) equal treatment in the application of rules and procedures, (d) eliminating arbitrary and ever-changing rules and regulations, (e) reducing corruption, (f) ending payment of arbitrary dues, and (g) transparency and accountability in applying rules and procedures.[178]

On the Contribution of ASEAN Integration to the Building of Stronger State Institutions

Since the country shifted from authoritarian rule, Myanmar's institutions have seen numerous improvements and it continues to engage with the international community to strengthen rule of law institutions. In this bustle of activity, it is hard to pinpoint to what extent progress has been influenced by ASEAN integration. Examples of ASEAN integration's influence are nonetheless apparent. For example, in the Judiciary Strategic Plan (2015-2017), among the actions to be undertaken are (i) Develop ASEAN Judiciaries Portal, (ii)

174 Myanmar Special Economic Zone Law, Pyidaungsu Hluttaw Law No. 1/2014; Dave Forest, 'New Mining Laws Here Make For A Promising 2016,' *Oil Price*, 4 January 2016, http://oilprice.com/Finance/investing-and-trading-reports/New-Mining-Laws-Here-Make-For-A-Promising-2016.html (accessed 9 April 2016).

175 Htin Lynn Aung, 'New investment laws in limbo,' *Myanmar Times*, http://www.mmtimes.com/index.php/business/16244-new-investment-laws-in-limbo.html (accessed 10 April 2016).

176 Shunichi Hinata, 'Technical Assistance Completion Report, *Asian Development Bank*, http://www.adb.org/sites/default/files/project-document/159952/46269-001-tcr.pdf (accessed 10 April 2016).

177 Moe Thuzar, 'Myanmar in the ASEAN Economic Community: Preparing for the Future,' in Sanchita Basu Das (ed), *ASEAN Economic Community Scorecard: Performances and Perception*, Singapore: Institute of Southeast Asian Studies, 2013, 208.

178 Ibid.

Conduct joint training with ASEAN judiciaries, and (iii) Develop capacity to facilitate the service of civil process within ASEAN.

At a broader level, ASEAN's support and friendship has helped Myanmar's standing and relations with the international community, including with ASEAN's dialogue partners. In this regard, Myanmar's 2014 chairmanship of the ASEAN—its first since becoming a member—bears emphasizing. For a long time, Myanmar was regarded as a weaker member of ASEAN due to its domestic politics, economic weaknesses and Western sanctions. Myanmar was supposed to chair the ASEAN in 2006 but was forced to forfeit its turn due to pressure from both ASEAN members and ASEAN's dialogue partners. In 2011, Myanmar expressed the desire to chair the ASEAN in 2014, and requested a swap with Lao PDR, who was supposed to host that year. In view of the series of political and economic reform efforts Thein Sein's government had carried out since it was inaugurated in March 2011, ASEAN decided to endorse Myanmar for ASEAN's 2014 chairmanship.

Myanmar's 2014 chairmanship is of great symbolic significance. It helped Myanmar gain political legitimacy, showed that Myanmar is an equal member in the ASEAN, and offered it the opportunity to be viewed as a responsible member of the international community. "The recognition and applause from… its fellow Southeast Asian neighbours and the rest of the world for successfully carrying out the chairmanship role has greatly boosted the national pride of the Myanmar people as well as the legitimacy of the Myanmar government and its reform agenda."[179]

Prospects and Challenges

Challenges to a Strengthened Commitment to the Rule of Law

Myanmar is still implementing several political, economic, and administrative reforms; it is in the process of reviewing, strengthening and improving its institutions. Where Indonesia, Malaysia, Thailand, Philippines and eventually Vietnam have actively engaged with the Human Rights Council as members, Myanmar is still subject to country-specific Special Procedures. The World Justice Project (WJP) 2015 rule of law index in 2015 ranked Myanmar 92nd among 102 states and lowest among fellow ASEAN Member States, demonstrating the disparity within the region.[180]

Despite the changes in the country, Myanmar is still struggling to fulfil the recommendations contained in various UN human rights resolutions issued in line with the country-specific Special Procedures. In complying with these expectations and obligations, Myanmar will also meet the rule of law commitments set for ASEAN countries. In this regard, the Special Rapporteur's findings and recommendations with regard to rule of law are instructive. She has highlighted the need for: (i) a comprehensive review of legislation and legal provisions that limit fundamental freedoms and contravene international standards, (ii) a process of legislative reform with clear timelines for consultations and the drafting and review of amendments to existing legislation or new draft bills, (iii) continued judicial reform and capacity-building and training of judges and lawyers to address corruption and strengthen the independence and effectiveness of the judiciary, and (iv) a process of consultation with all stakeholders on the review and amendment of the Constitution, to bring it into line with international standards.

179 Yun Sun, *Myanmar's ASEAN Chairmanship*, Stimson Center, September 2014, 10. See also John J. Brandon, 'ASEAN Chairmanship Offers Opportunity for Myanmar,' The Asia Foundation, 8 January 2014, http://asiafoundation.org/in-asia/2014/01/08/asean-chairmanship-offers-opportunity-for-myanmar/ (accessed 11 April 2016).

180 'Rule of Law in ASEAN: Not Appealing,' *ASEAN Briefing*, 17 June 2015, www.aseanbriefing.com/news/2015/06/17/rule-of-law-in-asean-not-appealing (accessed 24 February 2016).

Commitments and Plans/Initiatives in relation to ASEAN-wide Commitments and Declarations on Human Rights

As mentioned above, Myanmar has passed the Mutual Assistance in Criminal Matters Law in 2004 and the Anti-Trafficking in Persons Law in 2005. These legislations are meant to comply with the requirements of international treaties as well as regional ones. Myanmar's Judiciary Strategic Plan also refers to planned collaboration with other ASEAN judiciaries in order to build capacity. Myanmar is undertaking numerous initiatives to develop socially, economically and politically. While the initiatives are primarily geared to address the needs of the country, some aspirations of Myanmar overlap with that of the ASEAN. So far, Myanmar has not ratified the ASEAN Convention Against Trafficking in Persons, Especially Women and Children.

IV. CONCLUSION

Nexus of the Changes to the Overall State of the Rule of Law for Human Rights

In the last five years, there have been many unprecedented changes in Myanmar which promote the regime of the rule of law for human rights. Myanmar has improved its human rights situation in the country to such a degree that in November 2015, during the 70th Session of the General Assembly, representatives of Thailand, India and the Philippines said country-specific resolutions regarding Myanmar were no longer needed, while the delegate of Japan expressed the hope that the government would address remaining challenges so that a resolution would not be necessary in 2016.[181]

President Thein Sein has paved the way for further reforms and the judiciary has adopted a comprehensive strategic plan to strengthen the judicial institution. Although Myanmar's legislative process is not perfect, it has to be recognized that there have been many improvements and significant changes in the last five years. International Crisis Group noted that law-making in the country is constrained by the representatives' lack of experience and institutional weaknesses. Lawmakers have little knowledge of democratic practice, and there is very little institutional support. Without offices or staff, with no policy and research help, and with committees lacking internal experts to report on and analyse the issues, efficient and effective law-making is impossible. Under such circumstances, and with a crowded legislative agenda, it is impressive how much has been achieved. However, as the transition proceeds, far greater investments are needed if this critical branch of government is to meet public expectations.[182]

181 'As Third Committee Unanimously Approves Draft Text on Human Rights in Myanmar, Delegates Express Hope for Smooth Post-Election Transition to New Government,' *United Nations: Meetings Coverage and Press Releases*, 18 November 2015, http://www.un.org/press/en/2015/gashc4156.doc.htm (accessed 11 April 2016).

182 'Not a Rubber Stamp: Myanmar's legislature in a time of transition,' *International Crisis Group*, Asia Briefing No 142, 13 December 2013, http://www.crisisgroup.org/en/regions/asia/south-east-asia/myanmar/b142-not-a-rubber-stamp-myanmar-s-legislature-in-a-time-of-transition.aspx (accessed 25February 2016).

Contributing Factors

The previous government's engagement with opposition party NLD and the international community, the release of many political prisoners and opening up of the country contributed to improving the rule of law and human rights situation in Myanmar. However, much needs to be done as the military regime's long rule and Myanmar's isolation from the international community has resulted in a diminished understanding and sense of obligation among the people with regard to their contribution to building a rule-based society.

Role of the ASEAN Declaration on Human Rights in Strengthening Rule of Law for Human Rights

Myanmar has been undertaking massive legislative and institutional changes that impact the rule of law and human rights in Myanmar. How much of these changes are influenced by the ASEAN Human Rights Declaration is very hard to ascertain, specially considering that ASEAN works on the basis of non-interference in domestic affairs and consensus-based decision-making. Further socialization and dissemination of the ASEAN Human Rights Declaration and other international human rights instruments is needed to generate a change of mind-set in officials and citizens of the country. Nonetheless, as Myanmar strives to meet its own agenda to create a more stable and democratic government as well as create an environment that encourages foreign investments, the country also aligns itself more with the goals of the region.

Thein Sein's government considered ASEAN as friends, good neighbours and business partners; its friendship and support has helped to reduce the strained relationship Myanmar has had with the West. Indeed when ASEAN welcomed Myanmar into the Association as a member in 1997, it was a cause of concern for the U.S, Japan and the European Union, due to Myanmar's discouraging human rights record. ASEAN however maintained that inclusion in the organization would open up opportunities for communication with Myanmar's military leaders.[183] Before the move towards democratic governance, ASEAN was among very few venues where Myanmar's leaders could engage with and learn from other states. The past administration's engagement with the initiatives of ASEAN as well as those being undertaken by ASEAN's dialogue partners to support the goals of ASEAN, have undoubtedly contributed to improving rule of law in the country.

Although many concerns remain with respect to arbitrary detention, equal enforcement of law, judicial independence, access to justice, and administrative capacity, Myanmar is on a very important pathway to democracy, justice and rule of law. As the democratically-elected new government takes over from Thein Sein's administration, there is an expectation that all outstanding issues will be tackled, although it will take time before issues are finally resolved. As the new government has few experience in public administration, the executive, legislative and judiciary departments will continue to need external assistance from international partners to meet targets and remain on the right track.

183 Institute for Agriculture and Trade Policy (ed), 'Laos, Myanmar Officially Join ASEAN, Cambodia on Hold,' *Bridges*, Vol 1, No 26 (Geneva: International Centre for Trade and Sustainable Development, 1997); and Aung Zaw, 'ASEAN-Burma relations,' in *Challenges to Democratization in Burma: Perspectives on Multilateral and Bilateral Response* (Stockholm: International Institute for Democracy and Electoral Assistance, 2001).

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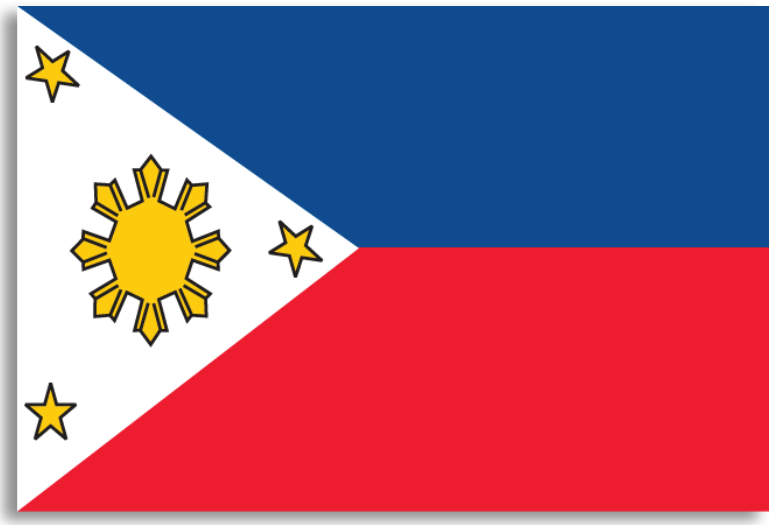
The Republic of The Philippines



PHILIPPINES

TABLE 1
SNAPSHOT

Formal Name	Republic of the Philippines
Capital City	Manila
Independence[1]	12 June 1898 (Independence from Spain) 4 July 1946 (Independence from the United States)
Historical Background[2]	The Philippines became a Spanish colony during the 16th century until it was ceded to the United States in 1898 following the Spanish-American War. In 1935, the Philippines became a self-governing commonwealth. Manuel Quezon was elected president and was tasked with preparing the country for independence after a 10-year transition. In 1942, the islands fell under Japanese occupation during World War II, and US forces and Filipinos fought together in 1944-45 to regain control. On 4 July 1946, the Republic of the Philippines attained its independence. A 20-year rule by Ferdinand Marcos ended in 1986, when a "people power" movement in Manila (EDSA 1) forced him into exile and installed Corazon Aquino as president. Her presidency was hampered by several coup attempts that prevented a return to full political stability and economic development. Fidel Ramos was elected president in 1992. His administration was marked by increased stability and by progress on economic reforms. Joseph Estrada was elected president in 1998. He was succeeded by his vice-president, Gloria Macapagal-Arroyo in January 2001, after Estrada's stormy impeachment trial on corruption charges broke down and another "people power" movement (EDSA 2) demanded his resignation. Macapagal-Arroyo was elected to a six-year term as president in May 2004. Her presidency was marred by several corruption allegations but the Philippine economy was one of the few to avoid contraction following the 2008 global financial crisis, expanding each year during her administration. Benigno Aquino III was elected to a six-year term as president in May 2010. During his term, there was an increase in government transparency and accountability of public officers with several Senators being indicted[3] as well as an impeachment of a Chief Justice.[4] However, allegations of corruption still persisted particularly regarding the "pork barrel" system of Congress.[5] In May 2016, the people elected Rodrigo Duterte as the Republic's next president.[6]

1 Central Intelligence Agency *The World Factbook*,<https://www.cia.gov/library/publications/resources/the-world-factbook/geos/rp.html>, accessed February 21, 2016 ['CIA World Factbook']

2 Ibid

3 Gil Cabacungan and TJ Burgonio, "Enrile Estrada Revilla Indicted" Inquirer.net June 7, 2014 <http://newsinfo.inquirer.net/609215/enrile-estrada-revilla-indicted> accessed May 18, 2016

4 Maila Ager, "Senate votes 20-3 to convict Corona" Inquirer.net May 29, 2012 <http://newsinfo.inquirer.net/202929/senate-convicts-corona> accessed February 18, 2016

5 Xianne Arcangel, "4th Impeachment Complaint against PNoy submitted" GMA News Online August 11, 2014 <http://www.gmanetwork.comnews/story/374260/newsnation/4th-impeachment-complaint-against-pnoy-submitted> accessed February 18, 2016

6 Charlie Campbell "Unofficial Vote Count shows Rodrigo Duterte has won Presidential Elections in the Philippines Time.com May 9, 2016 <http://time.com/4322806/rodrigo-duterte-philippines-presidential-election-wins/> accessed May 18, 2016

Size[7]	Total: 300,000 sq. km Land: 298,170 sq. km. Water: 1,830 sq. km.
Land Boundaries[8]	No land boundaries Archipelago of 7,107 islands situated between the Philippine Sea and Pacific Ocean in the east, the South China Sea (West Philippine Sea) in the west, the Luzon Strait in the north and the Celebes Sea in the south.
Population[9]	100,981,437 (increase of 12.417 million since 2011) Projected population by 2020: 111.78 million[10]
Demography[11]	0-14 years: 34.02% (male 17,531,370/female 16,828,067) 15-24 years: 19.18% (male 9,891,032/female 9,484,089) 25-54 years: 36.72% (male 18,810,887/female 18,273641) 55-64 tears: 5.8% (male 2,673,756/female 3,183,809) 65 years and over: 4.28% (male 1,802,632/female 2,519,093) (2015 est.)
Ethnic Groups[12]	Tagalog 24.4% Cebuano 9.9% Ilocano 8.7% Bisaya/Binisaya 11.4% Hiligaynon/Ilonggo 8.4% Bikol 6.8% Waray 4.0% Other 26.4% (2010 census)
Languages[13]	Filipino, English (Official) Tagalog, Cebuano, Ilocano, Hiligaynon/Ilonggo, Bicol, Waray, Pampango, Pangasinan (major regional languages)

7 CIA World Factbook

8 Ibid.

9 Philippine Statistics Authority, *2015 Census of Population*, <https://www.psa.gov.ph/content/highlights-philippine-population-2015-census-population> accessed May 18, 2016

10 Philippine Statistics Authority, *Philippine in Figures 2014*, <http://www.census.gov.ph/sites/default/files/2014%20PIF.pdf> accessed February 21,2016 ['Philippine in Figures']

11 CIA World Factbook

12 Philippine in Figures

13 CIA World Factbook

Religion[14]	Roman Catholic 80.6% Muslim 5.6% Evangelical 2.7% Iglesia ni Kristo 2.4% Non-Roman Catholic and Protestant (National Council of Churches in the Philippines) 1.2% Aglipayan 1.0% Seventh Day Adventist 0.7% Bible Baptist Church 0.5 % United Church of Christ in the Philippines 0.5% Jehovah's Witness 0.4 % None 0.1% Others/not reported 4.3% (2010 census)
Adult Literacy[15]	96.3% (2015 est)
Gross Domestic Product[16]	$742.2 billion (2015 est.) (an increase of $417.9 billion from 2011)
Government Overview[17]	There has been no change in the main branches of the national government and the Constitution since 1987 Executive Branch: President, Vice President and other executives such as heads of local government units Legislative Branch: Senate and House of Representatives Judicial Branch: Supreme Court and inferior courts
Human Rights Issues[18]	Internal displacement (due to fighting between government troops and insurgents or rebel groups) Human trafficking Extralegal killings Enforced disappearances Illegal arrests Arbitrary detention Torture Human rights abuses by militia, paramilitaries and private armies. (This enumeration is not exhaustive.)

14 Philippine in Figures

15 CIA World Factbook

16 Ibid.

17 Ibid.

18 US Department of State Bureau of Democracy, Human Rights and Labor, *Country Report on Human Rights Practices 2014* <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> accessed February 18, 2016

Membership in International Organizations[19]	Asian Development Bank (ADB), Asia Pacific Economic Cooperation (APEC), ASEAN Regional Forum (ARF), Association of South East Asian Nations (ASEAN), Bank for International Settlements (BIS), Conference on Disarmament (CD), Conference on Interaction and Confidence Building in Asia (CICA) (as observer State), The Colombo Plan for Cooperative Economic and Social Development in Asia and the Pacific (CP), East Asia Summit (EAS), Food and Agriculture Organisation (FAO), Intergovernmental Group of 24 (G-24), Group of 77 (G-77), International Atomic Energy Agency (IAEA), International Bank for Reconstruction and Development (IBRD), International Civil Aviation Organisation (ICAO), International Chamber of Commerce (ICC) (national committees), International Criminal Court (ICCt), International Red Cross and Red Crescent Movement (ICRM), International Development Association (IDA), International Fund for Agricultural Development (IFAD), International Finance Corporation (IFC), International Federation of Red Cross and Red Crescent Societies (IFRCS), International Hydrographic Organisation (IHO), International Labor Organisation (ILO), International Monetary Fund (IMF), International Maritime Organisation (IMO), International Mobile Satellite Organisation (IMSO), International Criminal Police Organisation (Interpol), International Olympic Committee (IOC), International Organisation for Migration (IOM), Inter-Parliamentary Union (IPU), International Organisation for Standardization (ISO), International Telecommunications Satellite Organisation (ITSO), International Telecommunication Union (ITU), International Trade Union Confederation (ITUC) (NGOs), Multilateral Investment Guaranty Agency (MIGA), United Nations Stabilization Mission in Haiti (MINUSTAH), Non-Aligned Movement (NAM), Organisation of American States (OAS) (as observer), Organisation for the Prohibition of Chemical Weapons (OPCW), Permanent Court of Arbitration (PCA), Pacific Islands Forum (PIF) (partner), United Nations (UN), United Nations Conference on Trade and Development (UNCTAD), United Nations Educational, Scientific and Cultural Organisation (UNESCO), United Nations High Commissioner for Refugees (UNHCR), United Nations Industrial Development Organisation (UNIDO), United Nations Mission in Liberia (UNMIL), United Nations Military Observer Group in India and Pakistan (UNMOGIP), United Nations Operations in Cote d'Ivoire (UNOCI), World Tourism Organisation (UNWTO), Universal Postal Union (UPU), World Customs Organisation (WCO), World Federation of Trade Unions (WFTU) (NGOs), World Health Organisation (WHO), World Intellectual Property Organisation (WIPO), World Meteorological Organisation (WMO), World Trade Organisation (WTO)
Human Rights Treaty Commitments[20]	The Philippines is party to eight core human rights treaties, namely: Convention on the Elimination of all forms of Racial Discrimination (CERD) (Signed on 7 March 1966, ratified on 15 September 1967) International Covenant on Civil and Political Rights (ICCPR) (Signed on 19 December 1966, ratified on 23 October 1986)

19 CIA World Factbook

20 Philippine- United Nations Human Rights Office of High Commissioner <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=137&Lang=EN> accessed February 18, 2016

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I. INTRODUCTION

Key Rule of Law Structures

The Philippines is a democratic and republican State wherein governmental functions are divided into the executive, legislative, and judicial departments.[21] A system of checks and balances is set forth in the Philippine Constitution in which one department is under the oversight of another. This system is essentially unchanged since 1987.

Executive function is vested in the President who is elected to a single six-year term. He or she is both the chief of State and the head of government, and is tasked with the implementation of the country's laws.[22] Under the executive are quasi-judicial agencies, such as the Professional Regulation Commission, Housing and Land Use Regulatory Board, National Labor Relations Commission, and the Department of Agrarian Reform Adjudication Board, which are authorised to resolve cases within their respective jurisdictions. Decisions of the respective agencies may be reviewed by the heads of agencies and further appealed to the Court of Appeals.

The legislative function is vested in a bicameral Congress composed of a 24-member Senate and a House of Representatives whose membership depends upon proportional representation. In number, 286 were members of the House during the recent 16th Congress.[23] Additionally, the legislature can serve as an impeachment court, which checks the actions of the executive and the judiciary.

The judicial function is vested in a Supreme Court, which is composed of one Chief Justice and 14 Associate Justices who are appointed by the President after being recommended by the Judicial and Bar Council. Each justice serves until he or she reaches the age of 70 or is incapacitated to discharge his or her functions. The Supreme Court sits *en banc* or in divisions of five.[24] The Supreme Court is the highest court. It exercises appellate jurisdiction, as well as administrative supervision over the other subordinate courts, namely, the Court of Appeals, the Sandiganbayan, the Court of Tax Appeals, Regional Trial Courts, Metropolitan Trial Courts, Municipal Trial Courts in Cities, Municipal Trial Courts, Municipal Circuit Trial Courts, and the Shari'a Courts.

The Philippines also has specific institutions mandated with human rights promotion and protection. The Constitution created an independent Commission on Human Rights. The independent Office of the Ombudsman is tasked to protect citizens from governmental corruption and abuse.

Foundation & Evolution of Rule of Law

The Philippine legal system is an amalgam of civil law, common law, Shari'a law, and customary law which can be traced back to when the Philippines was a colony of Spain and the civil law tradition of Spain was the one enforced in the country. Common law was introduced into the country with the entry of the Americans in 1898. Shari'a law is utilized in the Southern provinces and customary law is used by certain indigenous

21 Article II Section 1 1987 Constitution (Philippines)

22 Article VII Section 1, 4, 16, 17 1987 Constitution (Philippines)

23 House of Representatives Performance Report, 16th Congress First Regular Session <http://www.congress.gov.ph/download/16th/perfreport.16th.congress.firstregsession.pdf> accessed February 18, 2016

24 Art VIII Section 5,6, 11 1987 Constitution (Philippines)

peoples.[25] The highest source of law is the Constitution with statutes, treaties and judicial decisions also forming the law of the land.

The foundation of the Philippine legal system is based upon the principle of precedent or *stare decisis* and judicial review. The principle of *stare decisis* enjoins adherence by lower courts to doctrinal rules established by the Supreme Court in its final decisions. It is based on the principle that once a question of law has been examined and decided, it should be deemed settled and closed to further argument, subject only to judicial review once appealed before the Supreme Court. However, precedent is not set in stone and may be abandoned for strong and compelling reasons such as "workability, reliance, intervening developments in the law and changes in fact. In addition, courts put in the balance the following determinants: closeness of the voting, age of the prior decision and its merits."[26] Judicial review further extends to cases filed before the judiciary which covers acts of the executive and the legislature, subject only to the limitations against political questions or matters deemed political in nature. This includes review of laws and administrative issuance to ensure that such issuances are not inconsistent with the Constitution.[27]

Human Rights Treaties

The Philippines has signed and ratified or acceded to eight of the nine core human rights treaties. It has not ratified the International Convention for the Protection of All Persons from Enforced Disappearance but has enacted legislation that criminalizes the same, namely, Republic Act No. 10353 or An Act Defining and Penalizing Enforced or Involuntary Disappearance.

The Philippines has also ratified the Optional Protocol to the Convention on Torture, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, the Optional Protocol to the International Covenant on Civil and Political Rights, the Optional Protocol to the Convention on the Elimination of all forms of Discrimination Against Women and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.[28]

Interpretation and Use of the 'Rule of Law'

The Philippines defines Rule of Law as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."[29]

25 Pacifico Agabin, *Mestizo The Story of the Philippine Legal System* (Quezon City: The UP Law Center, 2011)

26 Benjamin Ting v. Carmen Velez-Ting, G.R. No. 166562, March 31, 2009

27 Vicente Mendoza, *Judicial Review of Constitutional Questions* (Quezon City: Rex Printing Company, 2004)

28 Supra note 20

29 Department of Justice, *Philippine Development Forum* <https://www.doj.gov.ph/philippine-development-forum.html> accessed May 18, 2016

It further states that a rule of law framework should include the following:

- Constitution or its equivalent, as the highest law of the land;
- A clear and consistent legal framework, and implementation thereof;
- Strong institutions of justice, governance, security and human rights that are well structured, financed, trained and equipped;
- Transitional justice processes and mechanisms; and
- A public and civil society that contributes to strengthening the rule of law and holding public officials and institutions accountable.[30]

It has been noted that there is a strong tradition of support for the Rule of Law in the Philippines but the quality of Rule of Law in the Philippines remains poor.[31] The 2015 World Justice Project gives a score of 0.46, with 1 being the highest, for the parameter Civil Justice and a score of 0.38 for the parameter Criminal Justice. A closer scrutiny of the sub-parameters reveals that the primary hindrance remains with the delay in the access to effective adjudication.[32]

TABLE 2

ADMINISTRATION OF JUSTICE GRID

Indicator	Figure
No. of judges in country[33]	2,022 Justices and Judges
No. of lawyers in country[34]	More than 64,000
Annual bar intake (including costs and fees)	2014: 5,984 examinees 1,126 passers 18.82%[35] 2013: 5,292 examinees 1,174 passers 22.18%[36] 2012: 5,343 examinees 949 passers 17.76% 2016 Membership Fees Annual fee of PhP 1,000 (USD 21) Lifetime fee of PhP 12,500 (USD 266) (Conversion rate of 47.6 Philippine Peso to 1 U.S. Dollar) (No change since 2011)

30 Ibid.

31 Asian Development Bank, *Background Note on the Justice Sector of the Philippines (Mandaluyong City: Asian Development Bank, 2009)* <http://www.adb.org/sites/default/files/publication/27525/background-note-justice-sector-phils.pdf> accessed May 18, 2016

32 World Justice Project Rule of Law Index 2015 <http://data.worldjusticeproject.org/#/groups/PHL,> accessed February 21, 2016

33 Supreme Court of the Philippines, *The 2013 Judiciary Annual Report Vol. 1* <http://sc.judiciary.gov.ph/pio/annualreports/2013%20ANNUAL%20REPORT%20I.pdf> accessed May 18, 2016

34 Ibid.

35 "SC announces result of 2014 Bar exams; San Beda Graduate Tops the Bar, 1,126 (18.82%) Pass" Court News Flash March 26, 2015 <http://sc.judiciary.gov.ph/pio/news/2015/03/03-26-15.php> accessed February 18, 2016

36 "1,174 (22.18%) Pass 2013Bar Examinations; UP Grad is topnotcher" Court News Flash March 18, 2014 <http://sc.judiciary.gov.ph/pio/news/2014/03/03-18-14.php> accessed February 18, 2016

Standard length of time for training/qualification[37]	Lawyers are required to complete a four-year bachelor of arts or science degree, followed by another four years of law school training.
Availability of post-qualification training	Lawyers are required to undergo Mandatory Continuing Legal Education every three years by virtue of Bar Matter No. 850. Prospective judges, justices, judges, court personnel, and aspirants to the judicial posts are required to take courses in the Philippine Judicial Academy (PHILJA) by virtue of Republic Act No. 8557.
Average length of time from arrest to trial (criminal cases)	Date of filing of information/Date accused appeared before the court to date of arraignment: Maximum of 30 days. For accused under preventive detention, case should be raffled and records transmitted to the judge within three days from filing of the information or complaint. The accused shall be arraigned within 10 days from date of the raffle. Trial should start within 30 days from arraignment.[38] (unchanged since 2011) However, there is no prescribed time limit for the conduct of preliminary investigations and it has been noted that some preliminary investigation cases have taken over a year before a case is filed in court.[39]
Average length of trials (from opening to judgment)	Trial should not exceed 180 days.[40] Resolution of cases: Supreme Court – within 24 months of filing the last pleading Lower Collegiate Courts – within 12 months All other courts – within three months.[41] No data was available for lower courts but it was noted that criminal and civil cases which were appealed to the Supreme Court were found to have remained in the court system for an average of five years before decision. The Supreme Court requires an average of 1.43 years to decide a case; the Court of Appeals, 1.32 years; the Sandiganbayan, 6.6 years.[42]

37 Rule 138, Sections 5 and 6 Rules of Court (1997) (Philippines)

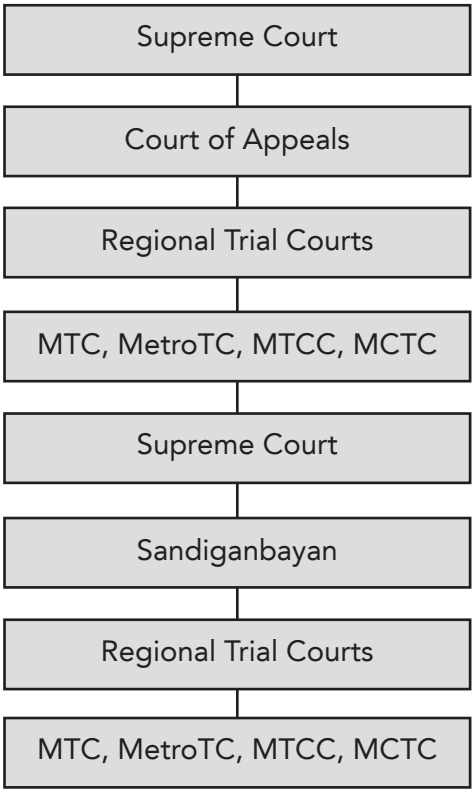
38 Rule 116, Section 1(e) Rules of Court (1997) (Philippines) and Speedy Trial Act of 1998 Rep. Act No. 8493 (1998) (Philippines)

39 Supra note 31

40 Rule 119, Section 3 Rules of Court, (1997) (Philippines) and Section 10 Speedy Trial Act of 1998 Rep. Act No. 8493 (1998) (Philippines)

41 Article VIII, Section 15 (1) and (2) 1987 Constitution (Philippines)

42 Supra note 31

Accessibility of individual rulings to public	The Rules of Court require court proceedings and records to be made public, except when the court forbids publicity in the interest of morality or decency.[43] Supreme Court decisions and resolutions are published and are public records, which are available online through the Supreme Court website. Decisions of the trial and appellate court are not published, but are public records and can be obtained from the clerk of court, except as otherwise provided by law, such as in certain family law cases.[44] Transcripts of proceedings are public records and copies are available for a fee, except as otherwise provided by law, such as in certain family law cases.[45]
Appeal structure[46]	

43 Rule 55 Section 1 Rules of Court, (1997) (Philippines)

44 Sec 12, Family Courts Act of 1997, Rep. Act No. 8369 (Philippines)

45 Ibid.

46 The following diagrams are based upon Rule 40-45, 47, 65, 122, Rules of Court (1997) (Philippines) and Presidential Decree 1606, as amended by Rep. Act. No. 8249

Cases before the National Human Rights Institution covering 2011-2014[47]	Number of Complaints Received: 6,433 Cases Resolved: 1,078 For Filing and Monitoring: 430 For Closure/Termination: 619 Legal Assistance: 5,024
Complaints filed against the police, the military, lawyers, judges/justices, prosecutors or other institutions (per year)[48] (covering 2011-2014)	Police: 1,265 Military: 182 Judges/members of the bar: 1,947[49] Prosecutors: 2 Other Institution: 651
Complaints filed against other public officers and employees (covering 2011-2014)[50]	President: 1 Vice President: 1 Chief Justice: 1 Senators: 4 Congressmen (Representatives): 7 Local Government Officials: 2,697

II. COUNTRY PRACTICE IN APPLYING THE CENTRAL PRINCIPLES OF RULE OF LAW FOR HUMAN RIGHTS

A. On Central Principle 1 (Government and its officials and agents are accountable under the law)

Definition and Limitation of the Powers of Government in the Fundamental Law

There have been no changes in the Philippine Constitution since its adoption in 1987. The Constitution outlines the composition, powers, and functions of the three main departments, namely the executive, legislative and the judiciary. The mandate, powers, and functions at the local level are set forth in the Local Government Code.

The Philippines follows the doctrine of separation of powers, and a system of checks and balances is set forth in the Constitution.[51] The president signs legislative enactments prior to becoming law, and he or she is given veto powers by the Constitution. However, Congress can override his or her exercise of the veto power by a vote of 2/3 of the members of each house of Congress. Furthermore, he is given certain powers, such as the power to negotiate treaties and to declare martial law, but the said latter act needs the concurrence of the legislature. The Supreme Court has the power to review acts of the President or Congress, and to declare them unconstitutional.[52]

The Constitution sets forth substantive limitations on the powers of government upon its citizens in the Bill of Rights.[53]

51 Myrna S. Feliciano, *Philippine Legal System* (Quezon City: The UP Law Center, 2015)

52 Article VI Section 27 (1) Article VII Section 21 Article VII Section 1, 1987 Constitution (Philippines)

53 Article III Section 1-22, 1987 Constitution (Philippines)

There has been an improvement in the Philippine ranking under the World Justice Project (WJP) Rule of Law Index 2015 from 2010. In the category on Constraints on Government Powers, it has improved from 0.57 in 2010 to 0.61 in 2015 on a scale of zero to one, with one signifying strict adherence to the rule of law. In 2010, the Philippines was ranked sixth out of seven countries in the East Asia and Pacific Region and in 2015 the rank improved to eighth out of the 15 countries in the same Region, with improvement in global ranking from 17th out of 35 countries surveyed in 2010 to 39th out of 102 countries in the study. In 2010, it was ranked third out of 12 countries of lower middle-income rank and in 2015 was ranked sixth out of 25 lower middle-income countries.[54] [55]

Amendment or Suspension of the Fundamental Law

There has been no change in the manner prescribed by the Constitution for proposing amendments and revisions since the adoption of the Constitution.

The Constitution provides the following modes of proposing amendments or revisions:

1. By the Congress acting as a constituent assembly;
2. By a constitutional convention; and
3. By the people through initiative.

The Congress, by three-fourths (3/4) vote of all members, may propose amendments or revisions or call for a constitutional convention by two thirds (2/3) vote of all members of Congress. By majority vote of all members, Congress may also submit to the electorate the question of calling a convention.[56]

Constitutional amendments, but not revisions, may be directly proposed by the people through an initiative. This requires a petition of at least twelve percent (12%) of the total registered voters, of which every legislative district must be represented by at least three percent (3%) of the registered voters therein. This is allowed only once every five years. Congress is to provide for the implementation of the exercise of this right. Any amendment or revision of the Constitution becomes valid when ratified by a majority vote cast in a plebiscite.[57]

In 2006, the Supreme Court clarified that people's initiative was limited only to amendments and not for revisions of the Constitution. Further, according to the Supreme Court, in order to use people's initiative as a means of amendment, the signature sheets should contain the full text of the proposed amendment prior to asking the people to sign the petition.[58]

As of this writing, no amendments or revisions has been made to the 1987 Constitution. However, numerous attempts have been made to do so since 1997.

54 World Justice Project Rule of Law Index 2010 <http://worldjusticeproject.org/sites/default/files/WJP_Rule_of_Law_Index_2010_Report.pdf> accessed February 21, 2016

55 Supra note 32

56 Article XVII Section 1 and 3, 1987 Constitution (Philippines)

57 Article XVII Section 2 and 4 1987 Constitution (Philippines)

58 Lambino and Aumentado v. COMELEC, G.R. No. 174153; Binay, et al. v. COMELEC, G.R. No. 174299 October 25, 2006

The latest was made in 2014 when the House of Representatives' Constitutional Amendments Committee passed a resolution filed by Speaker Feliciano Belmonte to amend the economic provisions of the Constitution, specifically those that pertain to restrictions regarding land ownership and to allow foreigners to engage in business, such as public utilities, mass media, educational institutions and advertising.[59] The Committee on Constitutional Amendments started public hearings in 2014.[60]

The resolution was able to pass through the Committee; however, the House of Representatives failed to approve the third and final reading of the resolution in 2015.[61]

Laws Holding Public Officers and Employees Accountable

The accountability of public officers is enshrined in the Constitution, which requires public officers to be accountable to the people.[62]

Public officers are divided into two in the Philippine jurisdiction. The first are impeachable officers, which include the President, Vice-President, members of Supreme Court, members of Constitutional Commissions, and the Ombudsman. The grounds for impeachment are culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, and betrayal of public trust.[63] The second class is non-impeachable officers, which fall under the jurisdiction of the Ombudsman, the Civil Service Commission, heads of offices, Office of the President, and the regular courts.[64]

The House of Representatives has the exclusive power to initiate impeachment, and by a vote of at least one-third (1/3) of all members, decide if an impeachment complaint should be forwarded to the Senate for trial. A two-thirds (2/3) vote of all members of Senate is necessary to convict an official.[65] Additionally, each House of Congress may punish members for disorderly behaviour, and suspend or expel a member.[66] The Supreme Court has the power to discipline or dismiss judges of lower courts.[67]

The power of impeachment has been exercised multiple times in recent years. In 2011, the House of Representatives found sufficient cause to impeach then Ombudsman Merceditas Gutierrez for culpable violation of the Constitution and betrayal of public trust for failure to act on major graft and rights cases involving former President Gloria Macapagal-Arroyo and some of her officials.[68] However, the former

59 Imee Charlee C. Delavin, "Charter change OK'd by House panel" Business World Online March 3, 2014 <http://www.bwonlibe.com/content.php?section=TopStory&title=Charter-change-OK'd-by-House-panel&id=84231> accessed February 18, 2014

60 Jess Diaz, "House begins Cha-Cha hearings", Philstar Global February 18, 2014 <http://www.philstar.com/headlines/2014/02/18/1291652/house-begins-cha-cha-hearings> accessed February 19, 2016

61 Paolo Romero, et al., "House fails to vote on Cha-cha resolution" Philstar Global June 11, 2015 <http://www.philstar.com/headlines/2015/06/11/1464562/house-fails-vote-cha-cha-resolution> accessed February 18, 2016

62 Article XI Section 1, 1987 Constitution (Philippines)

63 Article XI Section 2, 1987 Constitution (Philippines)

64 Section 21 The Ombudsman Act of 1989 Republic Act 6770 (1989) (Philippines), Section 37, Civil Service Decree of the Philippines Presidential Decree No. 807 (1975) (Philippines), , Book IV, Chapter VI, Section 30, Administrative Code of 1987, Executive Order No. 292 (1987) (Philippines), Section 60 and 61, The Local Government Code Republic Act 7160 (1991) (Philippines)

65 Article XI Section 3, 1987 Constitution (Philippines)

66 Article VI Section 16 (3), 1987 Constitution (Philippines)

67 Article VIII Section 6,1987 Constitution (Philippines)

68 Paolo Romero, "House finds cause to impeach Merci". The PhilStar Global March 9, 2011 <http://www.philstar.com/headlines/664057house-finds-cause-impeach-merci> accessed February 18, 2016

Ombudsman saw it fit to resign prior to the start of the Senate impeachment trial.[69] In the same year, the House of Representatives impeached then Chief Justice Renato Corona, resulting in his removal from office after being convicted with a vote of 20-3 (for-against impeachment) for failure to state in his Statement of Assets, Liabilities and Net Worth (SALN) certain high valued properties that were owned by him or his family.[70] In 2014, impeachment complaints against President Benigno Aquino were instituted for culpable violation of the Constitution and betrayal of public trust by allowing lawmakers to have lump sum funds, despite a Supreme Court ruling abolishing the so-called "pork barrel system."[71] The said complaints were defeated before they could pass the House's Committee on Justice.[72]

Special Courts and Prosecutors of Public Officers and Employees

The Office of the Ombudsman investigates any public employee or agency for acts or omissions that appear "illegal, unjust, improper, or inefficient." The Ombudsman Act of 1989 authorises the Ombudsman not only to investigate but also to prosecute. It mandates the Ombudsman to enforce administrative, civil and criminal liability.[73]

The Ombudsman's power to investigate is not exclusive. The Department of Justice may also conduct preliminary investigations against public officers.[74]

The Ombudsman has administrative disciplinary authority over all public officials, except those removable by impeachment, members of Congress, or members of the judiciary.[75] However, administrative disciplinary authority is not exclusive to the Ombudsman but is shared with other agencies, such as the Civil Service Commission, heads of offices, Office of the President, legislative councils of local government units, and regular courts. The body which first takes cognizance of the case acquires jurisdiction to the exclusion of other tribunals.[76]

The Sandiganbayan is a special anti-graft Court which has jurisdiction over criminal and civil cases involving graft and corrupt practices and such other offenses committed by public officers and employees, including those in government-owned or controlled corporations.[77]

69 Kimberly Jane Tan, "Ombudsman Merci Resigns, 10 days before Senate Trial" GMA News Online April 29, 2011 <http://www.gmanetwork.com/news/story/219073/news/nation/ombudsman-merci-resigns-10-days-before-senate-trial> accessed February 18, 2016

70 Supra note 4

71 Supra note 5

72 Uel Balena, "Three impeachment complaints against PNoy found insufficient in substance" Ang Malaya Net September 2, 2014 <http://www.angmalaya.net/2014/09/02/3903-three-impeachment-complaints-against-pnoy-found-insufficient-in-substance1> accessed February 18, 2016

73 Section 15, The Ombudsman Act of 1989, Republic Act No. 6770 (1989) (Philippines)

74 Honasan v. The Panel of Investigating Prosecutors, G.R. No. 159747, April 13, 2004

75 Section 21, The Ombudsman Act of 1989, Republic Act No. 6770 (1989) (Philippines)

76 Section 37, Civil Service Decree of the Philippines Presidential Decree No. 807 (1975) (Philippines), Book IV, Chapter VI, Section 30, Administrative Code of 1987, Executive Order No. 292 (1987) (Philippines), Section 60 and 61, The Local Government Code Republic Act 7160 (1991) (Philippines)

77 Section 4, An Act Further Defining the Jurisdiction of the Sandiganbayan, Amending for the Purpose Presidential Decree No. 1606,as amended, providing Funds therefor and for other purposes, Republic Act No. 8249 (1997) (Philippines)

It has specific jurisdiction over the following officials:

(1) Officials of the executive branch occupying the positions of regional director and higher, otherwise classified as Grade "27" and higher, of the Compensation and Position Classification Act of 1989 (Republic Act No. 6758), specifically including:

> (a) Provincial governors, vice-governors, members of the sangguniang panlalawigan and provincial treasurers, assessors, engineers and other provincial department heads;
>
> (b) City mayors, vice-mayors, members of the sangguniang panlungsod, city treasurers, assessors engineers and other city department heads;
>
> (c) Officials of the diplomatic service occupying the position of consul and higher;
>
> (d) Philippine army and air force colonels, naval captains, and all officers of higher rank;
>
> (e) Officers of the Philippine National Police while occupying the position of provincial director and those holding the rank of senior superintendent or higher;
>
> (f) City and provincial prosecutors and their assistants, and officials and prosecutors in the Office of the Ombudsman and special prosecutor;
>
> (g) Presidents, directors or trustees, or managers of government-owned or -controlled corporations, state universities or educational institutions or foundations;

(2) Members of Congress and officials thereof classified as Grade "27" and up under the Compensation and Position Classification Act of 1989;

(3) Members of the judiciary without prejudice to the provisions of the Constitution;

(4) Chairmen and members of Constitutional Commissions, without prejudice to the provisions of the Constitution; and

(5) All other national and local officials classified as Grade "27" and higher under the Compensation and Position Classification Act of 1989.[78]

However, in cases where none of the accused is occupying a position in the above enumeration, jurisdiction thereof shall be vested in the courts of law with the Sandiganbayan having appellate jurisdiction.[79]

78 Ibid.

79 Ibid.

B. On Central Principle 2 (Laws and procedures for arrest, detention and punishment are publicly available, lawful, and not arbitrary)

Publication of and Access to Criminal Laws and Procedures

No substantial change has occurred since 2011.

Statutes are required to be published prior to their effectivity, which begins 15 days after said publication, unless a different date of effectivity is determined by the legislature. Publication should be made in the Official Gazette or in a newspaper of general circulation in the Philippines.[80] Otherwise, the maxim that ignorance of the law excuses no one from compliance therewith[81] would have no basis with which to stand upon.[82]

Administrative rules enforcing or implementing laws also require publication, and a copy must be filed with the University of the Philippines' Office of the National Administrative Register (ONAR), which serves as a depository of all rules. ONAR shall be open for public inspection.[83] ONAR publishes the "ONAR Bulletin" which enumerates all the administrative rules that are submitted to its office with the corresponding agency and date of submission alongside the entries. However, the publication is delayed for a period of two months after submission of the pertinent offices of their rules.[84] In an effort to increase its reach, the office has also taken to social media to announce the availability of the bulletin, as well as a link to its contents.[85]

The 16th Congress has passed 111 republic acts, and all have been published in English, which is one of the official languages of the Philippines.[86] The said statutes were compliant with the publication requirement, but upon follow up on the implementation of the said laws, it was found that a recurring stumbling block was the delay in the release of funds by the Department of Budget and Management.[87]

Accessibility, Intelligibility, Non-reactivity, Consistency, and Predictability of Criminal Laws

No substantial change since 2011.

80 Article 2, Civil Code of the Philippines, (1949) (Philippines) and Executive Order 200 (1987) (Philippines)

81 Article 3, Civil Code of the Philippines, (1949) (Philippines)

82 La Bugal-B'Laan Tribal Association, Inc. et al. v. Ramos, et al., G.R. No. 127882, January 27, 2004

83 Book VII, Chapter 2, Section 3, Administrative Code of 1987, (1987) (Philippines)

84 Office of the National Administrative Register, ONAR Bulletin, 04 January 2016 to 08 January 2016 Vol. 6 No.1 <http://law.upd.edu.ph/wp-content/uploads/2016/03/BULLETIN-6-1-2016.pdf> accessed February 28, 2016

85 Facebook page of Office of National Administrative Register <https://www.facebook.com/Office-of-the-National-Administrative-Register-251633494893882/timeline> accessed February 28, 2016

86 Congress of the Philippines House of Representatives download Center <http://www.congress.gov.ph/download/?d=ra> accessed February 28, 2016

87 Senate of the Philippines, "Updates on the Implementation of Laws. Fifteenth Congress as of July 28, 2014" <https://www.senate.gov.ph/publications/Updates%20on%20the%20Implemention%20of%20Laws%20(as%20of%20July%2028,%202014).pdf> accessed February 28, 2016

Copies of laws are available as publications of the Official Gazette. They are also available online at the websites of the Senate[88] and the House of Representatives,[89] as well as in private servers, such as Lawphil and Chan Robles.[90] However, the 2015 World Justice Project gave the Philippines only a score of 0.49 out of a possible 1.0 for publicized laws and government data, which is lower than the 2014 score of 0.59. This indicates a decrease in the accessibility of laws from the previous years.

In terms of understandability, laws must be stated with reasonable precision as to what acts are prohibited. This is a requirement known as the void-for-vagueness doctrine which states that, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates due process of law."[91] The passage of retroactive legislation or *ex post facto* laws is prohibited by the Constitution.[92] However, certain penal laws may be applied retroactively whenever it favours felons who are not habitual offenders.[93]

Judicial decisions form part of the legal system and the Philippines follows the system of precedent wherein a conclusion in one case should be applied to those that follow if the facts are substantially the same, unless the ruling is modified for being an erroneous application of law or for other strong and compelling reason.[94]

However, it has been observed that the court has a tendency to be inconsistent in their rulings. A clear case of judicial inconsistency is noted in the computation of interest from the finality of judgement. In the case of Philippine Rabbit Lines, Inc. v. Hon. Leonardo Cruz and Pedro Manabat,[95] the court held that legal interest to be applied after the decision has become final should be 6% based on Article 2209 of the Civil Code and not the legal interest of 12% as set by the Monetary Board. In 1994, in the case of Eastern Shipping Lines v. Court of Appeals,[96] the Supreme Court held that the applicable legal interest should be 12% after finality of judgement based upon its ruling in Nakpil and Sons vs. Court of Appeals,[97] which was decided in 1986. In 2013, in the case of Dario Nacar v. Gallery Frames,[98] the Supreme Court reversed its ruling and stated that the applicable interest after the ruling has attained finality is again 6% and this is based upon the interest rate set by the Monetary Board in BSP-MB Circular no. 799.

Detention Without Charge Outside an Emergency

No substantial change is noted since 2011.

88 Senate of the Philippines <https://www.senate.gov.ph/>

89 Congress of the Philippines <http://www.congress.gov.ph/>

90 The Lawphil Project <http://www.lawphil.net/> and Chan Robles Virtual Law Library <http://lawlibrary.chanrobles.com/>

91 People of the Philippines v. Siton and Sagarano, G.R. No. 169364, September 18, 2009

92 1987 Constitution Article III Section 22

93 Revised Penal Code Article 22

94 Supra 51

95 G.R. No. 71017, July 28, 1986

96 G.R. No. 97412, July 12, 1994

97 G.R. No. L-47851, October 3, 1986.

98 G.R. No. 189871, August 13, 2013

The right to liberty is constitutionally protected and preventive detention without a warrant of arrest is allowed only under very specific conditions, such as:

1. When the person to be arrested has committed, is actually committing, or is attempting to commit an offence;
2. When an offence has just been committed and there is probable cause to believe based on personal knowledge of facts or circumstances that the person to be arrested has committed it; and
3. When the person to be arrested is a prisoner who has escaped.[99]

However, persons validly arrested without warrants are to be delivered to judicial authorities within 12 hours for offences punishable by light penalties; 18 hours for offences punishable by correctional penalties; and 36 hours for offences punishable by afflictive or capital penalties.[100] Unlawful arrests or arbitrary detentions are criminal offences under the Revised Penal Code.[101]

In case of invasion or rebellion and when public safety requires it, the President may suspend the privilege of the writ of *habeas corpus* or place the Philippines or any part thereof under martial law for a maximum of 60 days. During this period where the privilege of the writ is suspended, a person arrested or detained shall be judicially charged within three days, otherwise he shall be released. The suspension applies only to persons charged for rebellion or offences inherent in or directly connected with invasion.[102]

During martial law, the privilege of the writ is not automatically suspended. Neither is the right to bail impaired. Congress may revoke such proclamation or suspension. This revocation shall not be set aside by the President. The Supreme Court may review the sufficiency of the factual basis of the proclamation, suspension, or its extension.[103]

In case of terrorism, the Human Security Act extends the period of detention to three days, with provision to extend beyond the three days in cases of actual and imminent attack, with the requirement that the detainee be presented to a municipal, city, provincial or regional officer of the Commission on Human Rights (CHR) or a judge of the municipal, regional trial court, Sandiganbayan or a Justice of the Court of Appeals nearest the place of arrest, either at his office or at his residence to get approval for the prolonged detention.[104]

The above provision is criticised for being violative of the due process clause of the Constitution by giving law enforcement the power to incarcerate a suspect, with the only safeguard that written notice to an official be made within a period of five days.[105]

99 Rule 113 Section 5 Rules of Court (1997) (Philippines)

100 Article 125, Revised Penal Code (1932) (Philippines)

101 Article 124 and 269, Revised Penal Code (1932) (Philippines)

102 Article VII Section 18 and Article III Sections 13 and 15 1987 Constitution (Philippines)

103 Article VII Sections 18, 1987 Constitution (Philippines)

104 Sections 18 and 19, Human Security Act of 2007 Republic Act 9372 (2007) (Philippines)

105 Chester Cablaza, *Deconstructing Human Security in the Philippines,* Paper submitted to International Federation of Social Science Organisations, 2011 <https://www.academia.edu/2137055/Deconstructing_Human_Security_in_the_Philippines> accessed February 28, 2016)

Rights of the Accused

Freedom from Arbitrary or Extra-legal Treatment or Punishment, and Extra-Judicial Killing

The Constitution prohibits secret detention places, solitary, incommunicado, or other similar forms of detention. Excessive fines and cruel, degrading or inhuman punishment are not to be imposed.[106] The Revised Penal Code and the Anti-Torture Act of 2009 punish the maltreatment of prisoners.[107]

Furthermore, the passage of the Anti-Enforced or Involuntary Disappearance Act of 2012 or Republic Act 10353 serves to further strengthen the protection of citizens against improper State intrusion and action. The writ of *habeas corpus* is constitutionally protected, and is limited only in times of invasion or rebellion and when public safety requires it. Furthermore, the limitations only apply to persons charged for rebellion or offences inherent in or directly connected with invasion.[108]

However, despite these constitutional and legal protections, impunity for extrajudicial killings, torture, unlawful disappearances, warrantless arrests, and detentions is still considered a major problem. According to human rights group *Karapatan*, during President Aquino's six-year term, there were 294 victims of extrajudicial execution; 318 victims of frustrated killing; 28 victims of enforced disappearance; 172 victims of torture; 3,237 victims of illegal arrest; and 551 victims of illegal search and seizure.[109] Although these numbers are marked improvements from the term of the previous President where there were 1,206 victims of extrajudicial execution; 379 victims of frustrated killing; 206 victims of enforced disappearance; 1,099 victims of torture; 2,059 victims of illegal arrest; and 53,893 victims of illegal search and seizure, the fact still remains that the practice is still prevalent.[110]

In monitoring the human rights situation in 2014, CHR documented 6,433 new complaints of different types of human rights violations involving 10,295 alleged victims and 7,096 respondents. The total number of extrajudicial killings, enforced disappearance and torture documented by the CHR decreased to 131 incidents and 166 victims from 138 incidents in 2013. However, in terms of victims, the number increased from 166 to 187.[111]

It has been observed in a study conducted by Amnesty International that torture is still rife in the Philippines and practised largely by police forces. It was identified that the most at risk segment of society included children, repeat offenders, and criminal suspects whose acts have personally affected the officers or their families. Also found to be at risk were police auxiliaries, known as "assets," who have fallen out of favour from their handlers.[112]

106 Article III Section 12(2), 1987 Constitution (Philippines)

107 Article 235, Revised Penal Code (1932) (Philippines) and Section 6(i) Philippine Act on Crimes Against International Humanitarian Law, Genocide and other Crimes Against Humanity, Republic Act No. 9851 (2009)(Philippines)

108 Article VII Section 18 and Article III Sections 13 and 15, 1987 Constitution (Philippines)

109 Karapatan Monitor 2015 Issue no.2 <http://www.karapatan.org/files/K%20Monitor%202015%20Issue%202_WEB_0.pdf> accessed February 28, 2016

110 Karapatan 2010 Year-End Report on the Human Rights Situation in the Philippines, 1 December 2010

111 Supra note 47

112 Amnesty International, *Above the Law; Police Torture in the Philippines* <https://www.amnesty.org/en/documents/asa35/007/2014/en/> accessed February 28, 2016

In 28 January 2014, about 10 officers of the Philippine National Police were sacked following revelations that they played a so-called "wheel of torture" game at a secret detention facility to extract information from criminal suspects and also to have fun.[113]

A further observation is that although the Philippines is a party to OPCAT, it failed to comply with the commitment to set up a National Preventive Mechanism within one year after its ratification.[114]

A National Monitoring Mechanism has been established and is supposed to develop an effective monitoring mechanism to ensure that justice is served to the victims of extrajudicial killings, enforced disappearance and torture and to strengthen institutional mandates, capabilities and engagements in effectively resolving cases of extrajudicial killings, enforced disappearance and torture. However, it has been overshadowed by the creation of the Inter-Agency Committee on Extra Judicial Killings (ELKs), Enforced Disappearances (EDs), Torture and other Grave Violation of the Right to Life, Liberty and Security of Persons under the Department of Justice. The National Monitoring Mechanism has become a mere mechanism and forum for discussion of human rights issues instead of a comprehensive monitoring mechanism of determining government compliance with international human rights treaties in the government's functions, systems and processes with the end in view of harmonizing them with the standards and principles of human rights and recommending appropriate measures and actions.[115]

Presumption of Innocence

No Substantial change since 2011.

The presumption of innocence is a constitutionally protected right.[116] Thus, the prosecution must prove guilt beyond reasonable doubt and conviction must rest on the "strength of the prosecution's evidence," not on the weakness of the defence.[117]

Legal Counsel and Assistance

No substantial change in 2011.

The right to counsel, as well as the right to be informed of the right to counsel, is a constitutionally protected right.[118] Statutory protection of the right to counsel is further clarified under Republic Act No. 7438. It states

113 Cynthia Balana, "Wheel of torture: 10 cops relieved" Inquirer.net <http://www.newinfo.inquirer.net/570457/filipino-cops-accused-of-using-wheel-of-torture> accessed 22 February 2016

114 Association for the Prevention of Torture, *Philippines OPCAT Status* <http://www.apt.ch/en/opcat_pages/opcat-situation-58/?pdf=info_country> accessed May 18, 2016

115 Department of Justice, *Inter-Agency Committee on Extra-Legal Killings and Enforced Disappearance Meet to Adopt Guidelines for Investigation and Prosecution April 19, 2013* <http://www.doj.gov.ph/news.html?title=Inter-Agency+Committee+on+Extra-Legal+Killings+and+Enforced+Disappearance+Meet+to+Adopt+Guidelines+for+Investigation+and+Prosecution&newsid=178> accessed May18, 2016

116 Art III Section 14 (2), 1987 Constitution (Philippines) and Rule 115 Section 1(a),Rules of Court, (1997) (Philippines)

117 Rule 133 Section 2, Rules of Court (1997) (Philippines) and People of the Philippines v. Zafra Maraorao, G.R. No. 174369, 20 June 2012

118 Article III, Section 14(2) 1987 Constitution (Philippines)

that a person arrested, detained or under custodial investigation shall at all times be assisted by counsel.[119]

The court has the duty to inform the accused of his right to counsel before he is arraigned in criminal prosecutions,[120] and if without counsel, has to assign a counsel *de officio*, unless the accused is allowed to defend himself.[121] The court, in appointing a counsel *de officio*, shall choose from members of the bar in good standing who can competently defend the accused.[122]

Furthermore, free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty.[123]

Indigent persons may seek free legal representation, assistance, and counselling from the Public Attorney's Office.[124] The Department of Justice Action Center, a function of the National Prosecution Service and the Public Attorney's Office, provides lawyers and paralegals rendering free legal assistance and other services by the Department of Justice (DOJ).[125]

Knowing the Nature and Cause of the Accusation

No substantial change from 2011.

The Constitution states that an accused has the right to be informed of the nature and cause of the accusation.[126] Furthermore, the Rules of Court provide that an information or complaint charging an accused should contain the acts or omissions complained of, and that it must be written in a language sufficient to enable a person of common understanding to know what offence is being charged and the qualifying and aggravating circumstances present.[127]

The Rules of Court allow motions to quash information that fail to state the acts constituting the offence, which shall be granted if the prosecution fails to correct the defect. A complaint or information may also be quashed when it charges more than one offence, unless the law prescribes a single punishment for various offences.[128] However, no study on compliance has recently been conducted to confirm whether the rule is strictly followed.

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119 Section 2, An Act Defining Certain Rights of Person Arrested, Detained or Under Custodial Investigation as well as the Duties of the Arresting, Detaining and Investigating Officers, and Providing Penalties for Violations thereof, Republic Act No. 7438 (1992) (Philippines)

120 Rule 115, Section 1(c), Rules of Court (1997) (Philippines)

121 Rule 116, Section 6, Rules of Court (1997) (Philippines)

122 Rule 116, Section 7, Rules of Court (1997) (Philippines)

123 Article III Section 11 1987 Constitution (Philippines)

124 Section 3, An Act Reorganizing and Strengthening the Public Attorney's Office (PAO) Amending for the Purpose Pertinent Provisions of Executive Order 292, Otherwise Known as the "Administrative Code of 1987", as amended, Granting Special Allowance to PAO Officials and Lawyers and Providing Funds Therefor, Republic Act No. 9406 (2007) (Philippines)

125 Department of Justice, *2013 Annual Report* <https://www.doj.gov.ph/files/Annual_Reports/2013_DOJ_Annual_Report.pdf> accessed February 28, 2016

126 Article III Section 14 (2), 1987 Constitution (Philippines)

127 Rule 119, Section 6, Rules of Court (1997) (Philippines)

128 Rule 117, Section 3(f), Rules of Court (1997) (Philippines)

When the accused has no private counsel, the court appoints a counsel *de officio*, and counsel should be given reasonable time to consult with the accused as to his plea before arraignment is conducted.[129] After arraignment, the Rules of Court and the Speedy Trial Act require that the accused be given at least 15 days to prepare for trial.[130]

Guarantees during Trial

The right to a speedy trial is protected by both the Constitution and the Speedy Trial Act.[131]

The Speedy Trial Act requires arraignment within 30 days from the filing of information or from the date an accused appeared before the court where the charge is pending, whichever date last occurs.[132] If an accused is under preventive detention, the Rules of Court require his case to be raffled and records transmitted to the judge within three days from the filing of the information or complaint; the accused shall be arraigned within 10 days from the date of the raffle.[133]

Trial shall start within 30 days from arraignment, with the accused having at least 15 days to prepare for trial; otherwise, the information shall be dismissed on motion of the accused.[134] However, the Speedy Trial Act and the Rules of Court enumerate numerous delays that are to be excluded from the computation of the time limit within which trial should commence.[135] Cases must be set for "continuous trial on a weekly or other short-term trial calendar" and trial period should not exceed 180 days.[136] Cases submitted to the Supreme Court must be resolved within 24 months from the filing of the last pleading, within 12 months for those before lower collegiate courts, and within three months for all other lower courts.[137]

In order to further streamline the process, the Supreme Court formulated the Judicial Affidavit Rule, which took effect on 1 January 2013 and requires that the testimony on direct examination of witnesses be reduced to judicial affidavits without need of further questions, thus in effect saving the time needed to do direct examination of the witness. However, this rule is not mandatory for an accused in a criminal case, who may decide not to avail of the Rule.[138]

In 2013, the judiciary continued to develop court automation systems such as the E-Court project, which is a subcomponent of the Enterprise Information Systems Plan. It is an automation program of the courts where case information is recorded in a computer database to give ease of access to the judges and court employees to manage their time and activities with respect to the cases that they handle. It also lets the public see the

129 Rule 116, Section 8 , Rules of Court (1997) (Philippines)

130 Rule 119, Section 1 Rules of Court (1997) (Philippines) and Section 7, Speedy Trial Act of 1998, Republic Act 8493 (1998) (Philippines)

131 Article III Section 14 (2) and 16,1987 Constitution (Philippines) and Speedy Trial Act of 1998, Republic Act 8493 (1998) (Philippines)

132 Section 7, Speedy Trial Act of 1998, Republic Act 8493 (1998) (Philippines)

133 Rule 116, Section 1 (e), Rules of Court, (1997) (Philippines)

134 Section 7 and Section 13, Speedy Trial Act of 1998, Republic Act 8493 (1998) (Philippines)

135 Section 10, Speedy Trial Act of 1998 Republic Act 8493 (1998) (Philippines) and Rule 19, Section 3, Rules of Court (1997) (Philippines)

136 Section 6, Speedy Trial Act of 1998 Republic Act 8493 (1998) (Philippines)

137 Article VIII, Section 15 (1) and (2) 1987 Constitution (Philippines)

138 The Judicial Affidavit Rule Administrative Matter No. 12-8-8-SC (2012) (Philippines)

progress of cases handled by a particular court.[139] On 18 March 2014, in an effort to further streamline the process, the Supreme Court came out with the Guidelines for the Decongesting of Holding Jails by Enforcing the Rights of the Accused Persons to Bail and Speedy Trial. The guidelines reiterate the time limit of the Speedy Trial Act of 1998, but it took it a step further by stating that non-compliance would lead to dismissal of the case.[140] It also introduced innovations such as the use of modern technology like short messaging system (SMS or texting), telephone calls, and email to notify parties of scheduled hearings.[141]

Moreover, an accused has the constitutional right to be heard by himself and counsel, to meet witnesses face to face, and to have compulsory process to secure attendance of witnesses and production of evidence.[142]

Appeal

No substantial change since 2011.

The Supreme Court has held that the right to appeal is not a natural right, but a statutory privilege; thus, is not part of due process. The party who wishes to appeal must comply with the requirements of the law or rules; otherwise, the right is lost.[143]

Thus, a party filing an appeal must comply with the general reglementary period for filing an appeal from promulgation of judgment or notice of final order, and the appeal must be made to the higher court or body and in compliance with the manner specified by the law or rules.[144] Any party to a case may appeal from a judgment or final order so long as the accused is not placed in double jeopardy.[145]

Freedom from Double Jeopardy

No substantial change since 2011.

The protection is enshrined in the Bill of Rights of the Constitution, which states that a person may not be put twice in jeopardy of punishment for the same offence. Judgments of acquittal are final, not reviewable, and immediately executory. Furthermore, the Rules of Court state that previous conviction, acquittal, or termination of a case without the consent of the accused is a ground to quash the complaint or information[146]

Remedy before a Court for Violations of Fundamental Rights

A positive change is noted since 2011.

The Constitution created a CHR. Its mandate includes investigation of human rights violations involving civil and political rights. It also provides measures for protection of human rights and legal aid services, exercise of

139 Supra note 33

140 Section 9, Administrative Matter No. 12-11-2-SC

141 Section 11, Administrative Matter No. 12-11-2-SC

142 Article III, Section 14 (2), 1987 Constitution (Philippines)

143 Spouses Bergonia and Castillo v. Court of Appeals and Amado Bravo, Jr., G.R. No. 189151, January 25, 2012

144 Rule 122, Section 6, Rules of Court, (1997) (Philippines)

145 Rule 122, Section 1 and Rule 115, Section 1 (i), Rules of Court, (1997) (Philippines)

146 Article III Section 21, 1987 Constitution,(Philippines) and Rule 117 Section 3(i) and 7, Rules of Court (1997) (Philippines)

visitorial powers over jails, prisons, or detention facilities, and monitoring of government's compliance with international treaty obligations on human rights.[147] On 1 July 2013, a bill was proposed by Representative Rene Relampagos that would expand the powers of the Commission beyond its current mandate.[148] It would increase the jurisdiction of the Commission beyond civil and political rights, and include social, economic and cultural rights. Furthermore, the powers of the Commission would be expanded by giving it residual prosecutorial powers.[149] As of this writing, the said bill is still pending with the Committee on Human Rights.

The Commission was also made one of the lead agencies in the implementation of Republic Act No. 10353 or the Anti-Enforced or Involuntary Disappearance Act of 2012, and now has a mandate to receive bi-monthly reports on all persons detained and confined by the Philippine National Police, Bureau of Corrections, Bureau of Jail Management and Penology, and other concerned agencies, as well as the right to conduct visitation or inspection of all places of confinement.[150]

Republic Act No. 10368 or the Human Rights Victims Reparation and Recognition Act of 2013 created a new, independent, and quasi-judicial body to be known as the Human Rights Victims' Claims Board (HRVCB). It is attached to the Commission and is empowered to receive, evaluate, process, and investigate applications for claims, issue subpoenas, conduct independent administrative proceedings, resolve disputes over claims, and promulgate related rules. See below as regards progress on this matter.[151]

C. On Central Principle 3: (The process by which the laws are enacted and enforced is accessible, fair, efficient and equally applied)

Law Enactment

Openness and Timeliness of Release of Record of Legislative Proceedings

No substantial change since 2011.

The Constitution requires printed copies of bills to be distributed to members of Congress at least three days before its passage and for each to pass three readings on separate days, unless certified by the President as urgent.[152] Each bill is referred to the appropriate committee during the first reading, and if necessary, the committee schedules public hearings, issues public notices, and invites resource persons. Both the House of Representatives and the Senate of the Philippines post notices of committee meetings on their websites. These are made available to the public in advance of the dates of hearing in each of their websites.[153]

147 Article XIII, Section 18, 1987 Constitution (Philippines)

148 History of Bills <http://www.congress.gov.ph/legis/search/hist_show.php?save=1&journal=&switch=0&bill_no=HB00238&congress=16> accessed February 25, 2016

149 Rene Relampagos, *House of Representatives Explanatory Note to House Bill No. 238* "An Act Strengthening the Commission on Human Rights and Other Purposes" <http://www.congress.gov.ph/download/basic_16/HB00238.pdf> accessed February 25, 2016

150 Section 8, 10, 11 and 13 the Anti-Enforced or Involuntary Disappearance Act of 2012 Republic Act 10363 (2012) (Philippines). Section 9, 11, 12 and 13, Implementing Rules and Regulations of RA 10353

151 Section 10, Human Rights Victims Reparation and Recognition Act of 2013, Republic Act 10368 (2013) (Philippines)

152 Article VI, Section 26, 1987 Constitution (Philippines)

153 Supra notes 88 and 89

Generally, the deliberations, including budget deliberations, are open to the public, subject only to availability of seats as well as the conduct of observers in the gallery. However, when the matters under discussion involve national defence, security of the State or the dignity of the House or any of its Members, the House may hold executive sessions.[154]

Timeliness of Release and Availability of Legislative Materials

No substantial change since 2011.

Both houses of Congress are required to keep a journal of their proceedings and to publish said journal, except parts affecting national security. Each House should also keep a record of its proceedings.[155]

The website of the House of Representatives contains information on rules of proceedings, concerns discussed on session days, schedule of committee meetings, and voting and attendance records of House Members. There are information on bills referred to committees, including who the principal author is, its status, history, and full text. Upon inquiry with the Office of the Secretariat of the House of Representatives and the Senate of the Philippines, the Secretariat Staff stated that, the information as posted in the official websites of Congress is delayed by approximately 30 days from the time the session was completed, however, it is possible get a copy earlier than the official posting on the website by making an official request with the appropriate Committee Secretariat which was in charge of the proceedings.

Equal Protection of the Law and Non-Discrimination

No substantial change since 2011.

It is constitutionally protected that no one shall be denied equal protection of the laws.[156] Albeit, the Supreme Court has said that the equal protection clause requires equality among equals as determined according to a valid classification, which has these requisites:

1. Classification rests on substantial distinctions;
2. It is germane to the purposes of the law;
3. It is not limited to existing conditions only; and
4. It applies equally to all members of the same class.[157]

Reparation for Crimes and Human Rights Violations' Victims/Survivors

A positive development is noted since 2011.

In February 25, 2013, Republic Act No. 10368 or the Human Rights Victims Reparation and Recognition Act of 2013 was passed into law. This law recognizes the heroism and sacrifices of all Filipinos who were victims of summary execution, torture, enforced or involuntary disappearance and other gross human rights

154 House of Representatives, House Rules, Section 82 <http://www.congress.gov.ph/legisinfo/rules/index.php?rule=11> accessed Feb. 28, 2016

155 Article VI, Section 16(4), 1987 Constitution, (Philippines)

156 Article III, Section 1, 1987 Constitution, (Philippines)

157 Quinto and Tolentino Jr. v. COMELEC, G.R. No. 189698, February 22, 2010

violations committed during the regime of former President Ferdinand E. Marcos.[158]

As mentioned, it created the HRVCB, attached to the Commission on Human Rights, whose principal source of funds is the P10-Billion transferred to the government of the Republic of the Philippines by virtue of the 10 December 1997 Order of the Swiss Federal Supreme Court, plus accrued interests, which form part of the funds.[159] Non-monetary reparation may also be provided by the Department of Health, the Department of Social Welfare and Development, the Department of Education, the Commission on Higher Education, the Technical Education and Skills Development Authority, and others.[160] The Board has now received more than 80,000 claims and is processing the claims for distribution. It has been given a two-year extension to complete its mandate.[161]

Additionally, there is a Board of Claims under the DOJ for victims of unjust imprisonment, detention, or violent crimes. Compensation for unjust imprisonment or detention should not exceed P1,000 per month. In all other cases, the maximum amount is only P10,000.[162] The Board of Claims undertakes its mandate under the Victims Compensation Program. From January to December 2013, a total of 2,328 applications were received and 2,241 were acted upon, with 87 still pending at the end of the period. A total of 1,815 victims were granted monetary compensation. For the years 2014-2016, the Board is projecting an approximate five percent (5%) increase in the number of applications from the previous years.[163]

Furthermore, anyone who is liable for a crime is also civilly liable.[164] Said civil liability includes restitution, reparation of damage caused, and indemnification for consequential damages.[165]

Law Enforcement

There has been a slight improvement since 2011.

It has been noted by both the Commission on Human Rights[166] and human rights groups (*e.g.*, *Karapatan*) that there was a decrease in the incidence of human rights abuses, such as extrajudicial killings, enforced disappearances, and torture.[167] Furthermore, WJP has noted a small change from 2014 in regulatory enforcement from 0.46 to 0.5, which increased the Philippine ranking from 60 out of 99 countries globally

158 Section 2, Human Rights Victims Reparation and Recognition Act of 2013Republic Act 10368 (2013) (Philippines)

159 Sections 7 and 8 Human Rights Victims Reparation and Recognition Act of 2013Republic Act 10368 (2013) (Philippines)

160 Section 5 Human Rights Victims Reparation and Recognition Act of 2013Republic Act 10368 (2013) (Philippines)

161 Human Rights Victims Claims Board "President Approves R.A. 10766 gives HRVCB 2 year Extension" <http://www.hrvclaims-board.gov.ph/index.php/claim-process/announcements/102-president-approves-r-a-no-10766-gives-hrvcb-2-year-extension> accessed May 18, 2016

162 Section 4, An Act Creating a Board of Claims under the Department of Justice for Victims of Unjust Imprisonment or Detention and Victims of Violent Crimes and for other Purposes, Republic Act No. 7309 (1992) (Philippines)

163 Supra note 125

164 Article 100, Revised Penal Code (1932) (Philippines)

165 Article 104 Revised Penal Code (1932) (Philippines)

166 Supra note 47

167 Supra note 112

in 2014[168] to 52 out of 102 countries in 2015.[169]

However, since 2011, a number of high profile cases involving high government officials have surfaced and have been prosecuted. These include the arrest and detention of former President Gloria Macapagal-Arroyo on 18 November 2011 following the issuance of an arrest warrant against her by a Pasay City Court for electoral sabotage,[170] and the impeachment and subsequent conviction of a sitting Chief Justice of the Supreme Court.[171] On 7 November 2013, Janet Lim-Napoles faced the Senate regarding a P10-Billion Priority Development Assistance Fund (otherwise known as "pork barrel") scam, which resulted in the filing of plunder complaints against three sitting senators of the Republic, namely, Senate Minority Leader Juan Ponce Enrile, Senator Jose "Jinggoy" Estrada, and Senator Ramon Revilla Jr., as well as former and incumbent congressmen and other government officials.[172] On 12 August 2014, a composite team of the National Bureau of Investigation (NBI) and the Armed Forces Naval Intelligence Group arrested retired major general Jovito Palparan, Jr., one of the accused in the 2006 kidnapping and illegal detention case filed by families of University of the Philippines students Karen Empeno and Sherlyn Cadapan. Authorities arraigned Palparan on 18 August 2014, and detained him at the Bulacan Provincial Jail, then transferred him to the AFP Custodial Center in Fort Bonifacio in September 2014. Palparan is the highest-ranking former military official to be arrested and tried for involvement in a disappearance case, and was in hiding since 2011.[173] On 18 August 2014, Vice President Jejomar Binay and his son, Mayor of Makati Erwin "Junjun" Binay, faced charges of plunder for the alleged overpricing in the construction of several buildings in Makati City.[174] The investigation is continuing at the time of this writing.

D. On Central Principle 4: (Justice is administered by competent, impartial, and independent judiciary and justice institutions)

Appointment and Other Personnel Actions in the Judiciary and among Prosecutors

There has been no substantial change since 2011.

168 World Justice Project Rule of Law Index 2014 <http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf> accessed February 21, 2016

169 Supra note 32

170 Matikas Santos, "Warrant of Arrest served on Arroyo" Inquirer.net November 18, 2011<http://www.newsinfo.inquirer.net/96489/warrant-of-arrest-served-on-arroyo> accessed 28 February 2016

171 Supra note 4

172 Maila Ager, "Napoles faces Senate" Inquirer.net November 7, 2013 <http://www.newsinfo.inquirer.net/522049/napoles-faces-senate> accessed 28 February 2016

173 Leonard Postrado, "Palparan Arrested" Manila Bulletin August 12, 2014 <http://www.mb.com.ph/palparan-arrested/> accessed 28 February 2016

174 InterAksyon.com, "Binay accusers in Makati building case file new petition; Nancy says she won't use proxies" InterAksyon August 18, 2014 <http://www.interaksyon.com/article/93527/binay-accusers-in-makati-building-case-file-new-petition-nancy-says-she-wont-use proxies> accessed March 2, 2016

Judiciary – Superior and Lower Courts

Appointment

The qualifications of a Supreme Court Justice are provided for in the Constitution, which states that a justice must be at least 40 years old and a judge of a lower court or engaged in law practice in the Philippines for at least 15 years.[175] The nominee is recommended by the Judicial and Bar Council (JBC), which is composed of the Chief Justice, the Secretary of Justice, a representative of Congress, a representative of the Integrated Bar, a professor of law, a retired member of the Supreme Court, and a representative of the private sector.[176]

Whenever there is a vacancy in the judiciary, the President appoints from a list of at least three nominees submitted by the JBC within 90 days from occurrence. These appointments need no confirmation.[177] This lack of confirmation is widely criticised as a source of patronage politics and mars the independent image of the judiciary.

The Rules of the JBC require publication of the list of applicants or recommendees once in a newspaper of general circulation in the Philippines, and once in a newspaper circulating in the province or city where the vacancy is located. Copies of the list are posted in three places where the vacancy is located and furnished to the Integrated Bar of the Philippines (IBP), and whenever practicable, to major non-governmental organisations. A corresponding notice is posted on the website of the JBC.[178]

Dismissal/suspension

Members of the Supreme Court and lower courts hold office until they reach 70 years old or become incapacitated to discharge their duties. The Supreme Court has the power to discipline judges of lower courts, while members of the Supreme Court are removable only by impeachment.[179] In 2011, Chief Justice Renato Corona was impeached and subsequently convicted.[180]

Other Personnel Actions

With regard to the discipline of judges or justices, a complaint may be initiated *motu propio* by the Supreme Court or upon a verified complaint with supporting affidavits of persons with personal knowledge, as well as with other pieces of documentary evidence. These complaints are referred to the Office of the Court Administrator and the offences cover the whole range of conduct starting from serious misconduct for direct bribery to light misconduct for undue delay in submission of monthly reports. If the offences are proven, sanctions range from dismissal for serious offences to admonition with warning for light offences.[181]

175 Article VIII Section 7, 1987 Constitution (Philippines)

176 Article VIII Section 8, 1987 Constitution (Philippines)

177 Article VII Section 9, 1987 Constitution (Philippines)

178 Rule I Section 9, Rules of the Judicial and Bar Council JBC-009 (Philippines)

179 Articles VIII Section 2 and Article XI Section 2, 1987 Constitution (Philippines)

180 Supra note 4

181 Sections 1, 3, 8 to 11, Administrative Matter No. 01-8-10-SC (Philippines)

Public Prosecutors

Appointment

All prosecutors shall be selected from amongst qualified and professionally trained members of the legal profession who are of proven integrity and competence. They shall be appointed by the President of the Philippines upon recommendation of the Secretary of Justice However, it has been found that new prosecutors are recruited largely from fresh law school graduates and that many opt to leave for private practice or to apply for vacant judge positions.[182]

They shall be subject to the same qualification for appointment, rank, category, prerogatives, salary grade, salaries, allowances, emoluments, and other privileges, and shall be subject to the same inhibitions and disqualifications, as well as enjoy the same retirement and other benefits, as those of members of the bench in the following scheme:[183]

TABLE 3

RANK OF PROSECUTORS AND EQUIVALENCE

Rank	Equivalence
Prosecutor V	Associate Justice of the Court of Appeals
Prosecutor IV	Judge of the Regional Trial Court
Prosecutor III	Judge of the Metropolitan Trial Court
Prosecutor II	Judge of the Municipal Trial Court in cities
Prosecutor I	Judge of the Metropolitan Trial Court in municipalities

Dismissal/suspension

Prosecutors shall serve until they reach the age of sixty five (65) years old. They are members of the Civil Service, thus are subject to Civil Service Rules and Regulations, including the Code of Conduct and Ethical Standards for Public Officials and Employees.[184] Furthermore, prosecutors with salary grade of 27 or higher are subject to the jurisdiction of the Office of the Ombudsman.[185] Violations of the above rules would warrant administrative sanctions including suspension or dismissal.

Other Personnel Actions

The National Prosecutorial Service is tasked to investigate administrative complaints against prosecutors through their respective Regional or City Prosecutors.[186] Additionally, prosecutors are members of the Philippine Bar and thus are subject to administrative supervision of the Supreme Court of the Philippines.

182 Supra note 31

183 Section 16, Prosecution Service Act of 2010, Republic Act No. 10071 (2010) (Philippines)

184 Republic Act 6713 (1989) (Philippines)

185 Supra note 77

186 Section 5 Prosecution Service Act of 2010, Republic Act No. 10071 (2010) (Philippines)

Complaints against prosecutors are referred either to the Office of the Court Administrator or the National Prosecutorial Service and if the offences are proven, sanctions range from dismissal or disbarment for serious offences to admonition with warning for light offences.[187]

Training, Resources, and Compensation

No substantial change in 2011.

The primary concern of the National Prosecution Service (NPS) continues to be a severe manpower deficiency. In 2013, the National Prosecution Service had 1,858 prosecution officers out of 2,416 existing plantilla positions, which translate to a vacancy rate of 23%. Since 2010, the vacancy rate of the NPS has averaged 23%. Due to this deficiency, each prosecution officer conducted an average of 201 preliminary investigations. This translates to an increase of 12% in the average caseload since 2010. Around 725,000 criminal cases were prosecuted in the trial courts, with each prosecutor handling around 390 court cases in 2013.[188]

Continuing legal education is required of all members of the IBP by virtue of Bar Matter No. 850.[189] The DOJ taps, amongst others, the UP Law Center Institute on Administration of Justice to provide for the mandatory continuing legal education of members of the National Prosecutorial Service.

PHILJA is the "training school for justices, judges, court personnel, lawyers and aspirants to judicial posts." No appointee may commence his functions without completing its prescribed courses.[190] The JBC, which recommends appointments and promotions, is directed by law to consider the participation of prospective judges in the programs of PHILJA. Pursuant to its mandate, the PHILJA in 2013 held a total of 130 training activities broken down as follows: 42 under its regular programs, 72 under its special focus programs, 11 conventions-seminars for associations of judges and court personnel (academic component), and five special lectures.[191]

In 2013, the PHILJA marked a milestone when it launched its Global Distance Learning Center (GDLC) in Tagaytay. The facility's videoconferencing and other information communication technology equipment make possible greater access to educational resources, as well as global exchanges of judicial and legal information and best practices. It was formally launched on 13 June 2013 with the proceedings viewed simultaneously at the Session Hall of the Supreme Court of the Philippines.[192] PHILJA also held special

187 Code of Professional Responsibility (1988) (Philippines)

188 Supra note 125

189 Adopting the Revised Rules on the Continuing Legal Education for Members of the Integrated Bar of the Philippines, as amended 02 October 2001 Bar Matter No. 850 (2001) (Philippines)

190 An Act Establishing the Philippine Judicial Academy, Defining its Powers and Functions, Appropriating Funds Therefor and or other Purposes, Republic Act No. 8557 (1998) (Philippines)

191 Supra note 33, p. 37-40

192 Ibid.

lectures for specialized topics.[193]

State's Budget Allocation for the Judiciary and Other Principal Justice Institutions

There has been no substantial change since 2011.

The judiciary received 0.74% of the budget in 2012, 0.66% of the budget in 2013, 0.72% in 2014, 0.69% in 2015, and 0.86% in 2016.[194] This trend was also observed in the earlier study, wherein it was noted that year on year, the judiciary received less than 1% of the annual budget. Around 72.0% of the annual national budget of the judiciary goes to salaries and allowances, 21.0% for maintenance and other operating expenses, and 7% for capital outlay. However, this amount is augmented by the Judiciary Development Fund, which is collected as court fees, and allows 80% of the fund to be used as cost of living allowance and the remaining 20% for purchase of office equipment.[195]

Meanwhile, the DOJ received over 0.15% of the budget in 2012, 0.13% in 2013, 0.15% in 2014, 0.14% in 2015, and 0.15% in 2016.[196] Thus, the trend observed in the earlier study continues to the present.

Impartiality and Independence of Judicial Proceedings

There are both positive and negative trends in relation to this parameter.

This parameter is primarily measured by corruption indices and public opinion surveys. In 2014, Transparency International's Corruption Perceptions Index ranked the Philippines 85th out of 175 countries surveyed, which was an improvement from placing 94th in 2013. It scored 38 on a scale of 1 to 100 in the Corruption

193 Examples of such topics include:

1. The roll-out lecture of the third Academic Excellence Lecture Series by Dr. Antonio G. M. La Viña, 2008 Metrobank Foundation Professorial Chair Holder in International Law, on "Environmental Law and the Future: What's Next?", in partnership with De la Salle University;
2. The Launching of the PHILJA Training Center GDLC and Founding Chancellor Emeritus Justice Ameurfina A. Melencio Herrera Award for the Most Outstanding Professorial Lecturer, featuring the Lecture "Revisiting Legal and Judicial Ethics: Challenges and Perspectives", by retired Court of Appeals Justice Hilarion L. Aquino;
3. The Ninth and Tenth Metrobank Foundation Professorial Chair Lectures, respectively delivered by Atty. Francis Ed. Lim, Professorial Chair Holder in Commercial Law for 2012 ("Towards a More Forward-Looking Insolvency System") and University of the Philippines College of Law Professor Atty. Merlin M. Magallona, 2013 Professorial Chair Holder in International Law ("Internalization of Philippine Territory: The Question of Boundaries"); and
4. Chief Justice Artemio V. Panganiban Professorial Chair on Liberty and Prosperity Lecture Series' lecture on "Supreme Court Decisions on the Economic Provisions of the Constitution" by PHILJA Chancellor Adolfo S. Azcuna as the first Holder of the Chief Justice Artemio V. Panganiban Professorial Chair on Liberty and Prosperity.

194 General Appropriations Act 2012, Republic Act No. 10155 (2012) (Philippines); General Appropriations Act, 2013 Republic Act No. 10352 (2013) (Philippines); General Appropriations Act 2014, Republic Act No. 10633 (2014) (Philippines); General Appropriations Act 2015, Republic Act No. 10651 (2015) (Philippines); General Appropriations Act 2016, Republic Act No. 10717 (2016) (Philippines)

195 Section 1, Establishing a Judiciary Development Fund and for other Purposes, Presidential Decree No. 1949 (1984) (Philippines)

196 Ibid.

Perceptions Index (CPI).[197] The Philippines jumped nine places in the recently published WJP 2015 index, making it one of the most improved countries in terms of global rankings. It ranked 51st out of 102 countries in the index, a significant jump from last year when the country ranked 60th out of 99 countries. This makes the Philippines the most improved amongst ASEAN member nations. Results showed that the country ranked high in terms of absence of corruption (47th).[198]

This parameter was measured by the Ombudsman via a survey of families who actually transacted with the institutions, and it noted that there was a decrease in the incidence of solicitation of bribe money from 2010 (which showed 9.9% of respondents giving "grease" money or bribes) to 2.3% in 2013. However, the study also showed an increase in families giving bribe money when asked by the government official. The greatest increase was recorded when accessing justice.[199]

Provision of Lawyers or Representatives by the Court to Witnesses and Victims/ Survivors

There is a negative trend in relation to this parameter.

The Public Attorney's Office (PAO) defends indigent accused persons. It extends free legal services to indigent persons or to their immediate families in civil, administrative, labour and criminal cases. In the previous study, the PAO manpower of 1,407 lawyers served 4,154,587 clients. PAO lawyer-client average ratio for clients was 1:2,953; PAO lawyer-client average ratio for cases handled was 1:420 in 2009.[200]

As of December 2013, PAO had a staff of 1,525 lawyers who served 7,126,656 clients with a total caseload of 746,141 cases nationwide. This was higher by 6% than in 2012 with PAO lawyer-client ratio reaching 1:4,748 and PAO lawyer-client average ratio for cases handled as 1:497.[201] In 2009, its 1,407 lawyers handled criminal and civil cases before 2,182 courts nationwide.[202] As of December 2013, the 1,525 lawyers of PAO handled criminal and civil cases before 2,214 courts nationwide.[203]

Thus, the concerns identified in the previous study remain largely unchanged. Some of these were identified as heavy workload of its lawyers and the non-fulfilment of the legal requirement that an organized sala should have one public attorney.[204] Despite this "overwhelming caseload," PAO was able to secure 154,086 acquittals, dismissals, and other favourable outcomes for clients in criminal cases. At the prosecutory level, PAO was able to terminate 21,943 out of 61,583 handled cases, as well as 27,391 out of 46,919 civil cases,

197 Nestor Corrales, PH Improves rank in Global Corruption Index" Inquirer.net December 3, 2014 <http://globalnation.inquirer.net/115053/ph-improves-rank-in-global-corruption-index> accessed February 28, 2016

198 Amy Remo, *PH is most improved in rule of law index* Inquirer.net June 6, 2015 <http://business.inquirer.net/193172/ph-is-most-improved-in-rule-of-law-index> accessed February 27, 2016

199 Office of the Ombudsman, *2013 National Household Survey on Experience with Corruption in the Philippines.* October 2014<http://www.ombudsman.gov.ph/docs/caravan/2013OMBCorruptionSurveyReport.pdf> accessed February 28, 2016

200 Department of Justice, *2009 Annual Report* <https://www.doj.gov.ph/files/2009Annual.pdf> accessed February 21, 2016

201 Supra note 125

202 Supra note 200

203 Supra note 125

204 An Act Reorganizing and Strengthening the Public Attorney's Office (PAO) Amending for the Purpose Pertinent Provisions of Executive Order 292, Otherwise Known as the "Administrative Code of 1987", as amended, Granting Special Allowance to PAO Officials and Lawyers and Providing Funds Therefor, Republic Act No. 9406, (2007) (Philippines)

6,381 out of 11,891 administrative cases, and 43,054 out of 81,054 labour cases.[205]

Safety and Security of the Judiciary, Prosecutors, Litigants, Witnesses, and Affected Public

Some 38 lawyers have been killed since the start of the term of President Aquino in 2010. About 24 judges and 116 lawyers have also been killed since 1999, with the latest judge being Judge Erwin Alba of Baler Regional Trial Court.[206] The Supreme Court and the NBI created Task Force Judiciary Protection to provide protection from threats and investigate killings or attempted killings in 2008. Today, the task force continues to conduct personal security training for judges.[207] The training covers threats assessment, prevention, firearms orientation, marksmanship, and technical proficiency.

Specific, Non-Discriminatory, and Unduly Restrictive Thresholds for Legal Standing

No substantial change since 2011.

In private suits, standing is covered by the "real parties in interest" rule in the Rules of Court. The real party in interest is "the party who stands to be benefited or injured by the judgment in the suit or the party entitled to the avails of the suit."[208]

As regards "public suits" assailing an illegal official action, taxpayers, voters, concerned citizens, and legislators may be accorded standing to sue when the following are met:

1. The case involves constitutional issues;
2. For taxpayers, there must be a claim of illegal disbursement of public funds or that the tax measure is unconstitutional;
3. For voters, there must be a showing of obvious interest in the validity of the election law in question;
4. For concerned citizens, there must be a showing that the issues raised are of transcendental importance which must be settled clearly; and
5. For legislators, there must be a claim that the official action complained of infringes upon their prerogatives as legislators.[209]

Despite the largely all-inclusive enumeration of people given standing to initiate suits of both private and public nature, it has been noted that the great deterrent for people to access formal judicial avenues is not

205 Supra note 125

206 Rosette Adel, *Australian law Prof: Philippines a very dangerous place for lawyers.* PhilStar Global September 8, 2015 <http://www.philstar.com/headlines/2015/09/08/1497377/australian-law-prof-philippines-very-dangerous-place-lawyers> accessed February 27, 2016

207 Philippine Judicial Academy Schedule of Training <http://philja.judiciary.gov.ph/2015_09.html>

208 Rule 3 Section 2, Rules of Court (1997) (Philippines)

209 David, et al. v. Macapagal-Arroyo, et al., G.R. Nos. 171396, 171409, 171485, 171483, 171400, 171489 & 171424, May 3, 2006

legal standing to sue, but rather the cost of the suit.[210]

Publication of and Access to Judicial Hearings and Decisions

No substantial change since 2011.

As mentioned, court proceedings and records are a matter of public record, except when the court forbids publicity in the interest of morality or decency.[211] Decisions of the trial and appellate courts are not published, but are public records and anyone can obtain copies of decisions from the clerk of court while copies of the Transcript of Stenographic Notes (TSN) are available upon payment of a fee, except for selected family law cases where confidentiality is required by law.[212] Supreme Court decisions are published and are public records. Decisions and resolutions of the Supreme Court are available online on the website of the Supreme Court[213] and through private online sources (*supra*).

Reasonable Fees and Non-arbitrary Administrative Obstacles to Judicial Institutions

A positive change has been noted since 2011.

Although the Constitution states that no one is to be denied free access to courts and quasi-judicial bodies and adequate legal assistance by reason of poverty, court fees remain high for a family living in minimum wage conditions.[214] This is in spite of the exemption of indigents from paying docket and other fees, including transcripts of stenographic notes.[215]

To increase access to justice, the judiciary continues to implement the Enhanced Justice on Wheels (EJOW) project. The EJOW uses especially designed buses that are deployed as mobile courts to different areas of the country. Aside from case docket and jail decongestion, the program now includes additional components, such as mobile court-annexed mediation; free medical, dental, and legal aid to inmates; information dissemination campaign for barangay officials; dialogue amongst Supreme Court officials and stakeholders in the Philippine judicial system; and a team-building seminar for court employees.[216] In 2013, EJOW contributed to the release of 7,830 inmates; gave medical and dental services to 17,796 inmates; gave legal aid to 4,706 inmates; successfully mediated 13,478 cases; and lectured to 25,717 participants.[217] On 18 June 2013, the court also started "Judgement Day" wherein simultaneous hearings and decision-making were done in five jail facilities with the highest inmate population, namely, the Manila City Jail, Quezon City Jail, Angeles City Jail, Cebu City Jail, and Davao City Jail. During the activity, a total of 553 criminal cases were heard, 245 cases were dismissed or disposed of, and 215 inmates were released. Three other

210 American Bar Association, *Access to Justice Philippines, Mindanao, 2012* (Washington: ABA 2012) <http://www.americanbar.org/content/dam/aba/directories/roli/philippines/philippines_access_to_justice_assessment_2012.authcheckdam.pdf> accessed February 28, 2016

211 Rule 135, Section 2 Rules of Court (1997) (Philippines)

212 Supra note 44

213 Supreme Court of the Philippines <http://www.sc.judiciary.gov.ph>

214 Article III, Section 11, 1987 Constitution (Philippines)

215 Rule 3 Section 21 and Rule 141 Section 19 Rules of Court, (1997) (Philippines)

216 Supra note 33

217 Ibid.

"Judgement Days" were held in other areas during 2013 resulting to a total of 444 criminal cases heard, 376 cases dismissed/disposed of, and 322 inmates released.[218]

The Court also continued its program on Small Claims Courts wherein purely money claims of P100,000 and below are decided. Attorneys are not allowed, and forms are provided. Decisions are rendered on the first day of hearing and are final and unappealable, except by a special civil action of certiorari to the Supreme Court.[219]

A further program instituted in 2013 is Case Docket Decongestion: *Hustisyeah*!, which is the local version of Asia Foundation's Judicial Strengthening to Improve Court Effectiveness project that seeks to improve court efficiency and predictability of adjudication of courts by reducing docket congestion and case delay; strengthening contractual enforcement; strengthening enforcement of intellectual property rights; and supporting integrity and confidence-building measures for the justice system. From a caseload of 34,014 in 31 December 2011, the program was able to decrease caseloads to 25,258 by May 2014 in the 33 courts enrolled in the program in Quezon City.[220]

Assistance for Persons Seeking Access to Justice

Measures that allow for adequate legal representation and assistance for citizens are constitutionally mandated and such measures on legal representation and assistance should not be denied to any person by reason of poverty.[221] Thus, the State is mandated to provide competent and independent counsel to the indigent accused.

However, a study of the American Bar Association on access to justice in Mindanao noted that in the formal justice system, the cost of hiring a private lawyer—estimates range from P10,000 (USD 232.56) to P50,000 (USD 1,162.79) (at a conversion rate of 43 PhP to 1 USD)—is out of reach to most citizens who earn on average P1,403 (USD 32.63) per month.[222]

The IBP obligates lawyers to render service to indigent parties through its Legal Aid Program, which is implemented nationally by its chapters. However, the IBP has not been able to disseminate information about its legal aid programs to citizens who are qualified to avail of them. Majority of citizens are unaware of the legal aid programs provided by the IBP and continue to believe that lawyers cater only to those with money, tend to concentrate their practice in city centres, and rarely serve in the hinterlands, if at all.[223]

The State provides representation to poor clients through PAO, which has significantly provided legal services throughout the country. PAO's mission reflects the need to serve marginalised groups in seeking justice and accessing courts. Citizens are largely familiar with the services of the PAO, and barangay and government leaders refer their constituencies to the PAO when they are in need of legal advice or representation. However, with the average case load per public attorney numbering in the hundreds per year, the quality of

218 Ibid.

219 The Rule of Procedure for Small Claims Cases Administrative Matter 08-8-7-SC, October 27, 2009

220 Supra note 33

221 Article II, Section 10 and Article III Section 11, 1987 Constitution (Philippines)

222 Supra note 210

223 Ibid.; Ador Vicente Mayol, "Free legal aid: A challenge for IBP" Cebu Daily News May 14, 2015 <http://cebudailynews.inquirer.net/56675/free-legal-aid-a-challenge-for-ibp> (February 28, 2016)

service is likely to suffer.[224]

Legal aid is also offered in some law schools.[225] Law students are allowed to undergo a law student practice under the supervision of a lawyer upon having the Legal Aid Clinic accredited by the Supreme Court.[226] Efforts by law schools to improve access to legal representation have not, however, yet achieved that purpose.

Alternative Law Group member-organisations also handle public interest cases. More significant, though, is their work in developing community-based paralegals who can readily assist communities with their legal issues and concerns. While the group's programs on the formation of community-based paralegals are laudable, they are limited in scope. Paralegals might be perceived to have limited knowledge of the law and procedures, but are capacitated to engage in the legal system. At the level of the community, paralegals are the most accessible resource in terms of providing information on law and mediating conflicts.[227]

Measures to Minimise Inconvenience to Litigants, Witnesses, and their Families, Protect their Privacy, and Ensure Safety from Intimidation/Retaliation

The Witness Protection, Security and Benefit Program is administered by the DOJ. In 2013, the program admitted 580 covered witnesses. In the same year, a conviction rate of 87.23% was noted, wherein out of the 47 cases decided, 41 won.[228] The program provides witnesses and their families with secure housing facility; financial assistance or assistance in obtaining a means of livelihood; protection from demotion from work on account of his/her testimony in court; travel and subsistence allowance; free medical treatment, hospitalization and medicines; and, in some instances, relocation and a change of identity. In return, witnesses are bound, amongst other requirements, to testify and provide information to all appropriate law enforcement officials, take measures to avoid detection, and comply with legal obligations and civil judgments against him or her.[229]

However, a continuing review is being made of the financial assistance extended, and this is made in view of the current economic climate with the aim of reducing the financial dependence of the witnesses on the government.[230] Furthermore, while the law provides for extensive protection, the process of enrolling someone into the witness protection program does not meet the urgent requirements of many witnesses, including victims and their families, as the process involves several bureaucratic layers in the DOJ. For high profile cases, it is not uncommon for witnesses to seek sanctuary with religious groups and other non-governmental organisations, but this option is not feasible for a large number of complainants.[231]

In cases where a victim or his or her family decides to file a complaint first with the CHR, they will have to wait for an endorsement from the CHR to the DOJ for provisional admission into the DOJ's witness protection program. Interviews with torture victims and their families have shown that this process could take months,

224 Supra note 125

225 Rule 138-A, Rules of Court (1997) (Philippines)

226 Bar Matter No. 730, June 13, 1997

227 Supra note 210

228 Supra note 125

229 Sections 5 and 8, Republic Act No. 6981

230 Supra note 125

231 Supra note 115

and sometimes more than a year, although CHR officials told Amnesty International they now have an agreement with the DOJ to expedite the process. Already fearing reprisal and having no immediate access to State-provided protection, many witnesses are reluctant to step forward and talk to investigators.[232] From previous interviews with people enrolled in the DOJ witness protection program, Amnesty International researchers have found that some of them have practically put their lives on hold, remaining within witness protection for more than five years, as the case in which they are testifying moves slowly.[233]

Available and Fair Legal Aid to All Entitled

Generally, legal aid is available for all entitled. This is thru the efforts of the Public Attorney's Office although in the urban centres, the Integrated Bar of the Philippines also makes legal aid available to indigent persons.[234] Some law schools such as the University of the Philippines College of Law and the Ateneo College of Law have accredited legal aid clinics with students in the 4th year of law school attending to indigent individuals under the supervision of a qualified lawyer.[235] Alternative law groups such as the Free Legal Assistance Group (FLAG) also provide free legal aid.[236] (See discussion above on Assistance for Persons Seeking Access to Justice.)

General Public Awareness of Pro Bono Initiatives and Legal Aid or Assistance

In general, public awareness on how to access legal information, be it pro bono initiatives such as that of the IBP and those of selected law schools or that being given by NGOs or alternative law groups are limited. However, the public is well informed of government provided legal aid thru the Public Attorney's Office and this is disseminated even at the community level, such as the barangay, by community leaders.[237]

III. INTEGRATING INTO A RULES-BASED ASEAN

Progress towards Achieving a Rules-Based ASEAN Community

On Mutual Support and Assistance on the Rule of Law

The Philippines is party to the Treaty on Mutual Legal Assistance in Criminal Matters among States in the ASEAN,[238] but does not have a stand-alone Mutual Legal Assistance Law, which provides legal basis for assistance. The treaty covers mutual assistance to be rendered among member countries, which may include:

232 Ibid.

233 Ibid.

234 Supra note 210

235 Supra notes 225 and 226

236 Free Legal Assistance Group <http://flagfaqs.blogspot.com/> accessed May 18, 2016

237 Supra note 210

238 2004 Treaty on Mutual Legal Assistance in Criminal Matters <https://cil.nus.edu.sg/rp/pdf/2004%20Treaty%20on%20Mutual%20Legal%20Assistance%20in%20Criminal%20Matters-pdf.pdf> accessed May 18, 2016

a. taking of evidence or obtaining voluntary statements from persons;
b. making arrangements for persons to give evidence or to assist in criminal matters;
c. effecting service of judicial documents;
d. executing searches and seizures;
e. examining objects and sites;
f. providing original or certified copies of relevant documents, records and items of evidence;
g. identifying or tracing property derived from the commission of an offence and instrumentalities of crime;
h. the restraining of dealings in property or the freezing of property derived from the commission of an offence that may be recovered, forfeited or confiscated;
i. the recovery, forfeiture or confiscation of property derived from the commission of an offence;
j. locating and identifying witnesses and suspects; and
k. the provision of such other assistance as may be agreed and which is consistent with the objects of this Treaty and the laws of the Requested Party.[239]

This treaty has been used multiple times by the Philippines in order to protect the interest of its citizens as well as to go after suspects and collect evidence with assistance from member States.[240]

The Philippines also has 13 extradition treaties, but only two with ASEAN member States, namely Indonesia and Thailand.[241] Majority of the said treaties use the non-list dual criminality approach as a means of determining whether an individual can be extradited. In the said system, the conduct that is the basis for extradition must be an offense in both the signatory states. Exception to this approach are the treaties with Indonesia and Thailand that use the list dual criminality approach wherein extraditable offenses are listed and outside the listing, no extradition can be granted. However, the Philippines has never denied a request for legal assistance, especially on the grounds of dual criminality.[242]

Three Philippine universities are also members of the ASEAN University Network, namely, Ateneo de Manila University, De La Salle University, and University of the Philippines Diliman.[243]

On Legislative and Substantive Changes Promoting the Rule of Law

There have been legislative enactments that promote the rule of law.

239 Ibid. Article I

240 Mark Meruenas, *The many times the Mutual Legal Assistance Treaty aided PHL*. GMA News Online April 30, 2015 <http://www.gmanetwork.com/news/story/479246/news/specialreports/the-many-times-the-mutual-legal-assistance-treaty-aided-phl> accessed February 28, 2016

241 United Nations Office on Drug and Crime *Country Review Report of the Philippines 2012*, <http://www.ombudsman.gov.ph/docs/uncac/Philippines%20Country%20Report.pdf> accessed Feb 28, 2016

242 Ibid.

243 Website of ASEAN University Network <http://www.aunsec.org/aunmemberuniversities.php>

The Philippines enacted statutes that enhanced the rule of law in the Philippines, namely, Republic Act No. 10353 or An Act Defining and Penalizing Enforced or Involuntary Disappearance; Republic Act No. 10368 or an Act Providing for Reparation and Recognition of Victims of Human Rights Violations during the Marcos Regime, Documentation of said Violations, Appropriating Funds Therefor and For Other Purposes; Republic Act No. 10389 or An Act Institutionalizing Recognizance as a Mode of Granting the Release of an Indigent Person in Custody as an Accused in a Criminal Case and For Other Purposes; and Republic Act No. 10575 or an Act Strengthening the Bureau of Corrections and Providing Funds Therefor. Further, policies were enacted by the judiciary to further enhance both access to justice and the rule of law. These policies include the simplification of procedures in small claims cases, or those with amounts not exceeding P100,000;[244] the enhanced Justice on Wheels Program; the zero-backlog project; and the introduction of modern case management systems.[245] Another development is the greater focus on the use of Alternative Dispute Resolution.[246] The Alternative Dispute Resolution Act of 2004[247] allows for the use of different forms of dispute resolution mechanism such as arbitration, mediation, early neutral evaluation and mini trial.[248]

On Enactment of Laws relating to the ASEAN Community Blueprints and Similar Plans

There have been enactments that tend to support the ASEAN Economic Community Blueprint. These include modernization of the governing laws on the different professions, such as in the fields of chemistry,[249] geology,[250] interior design,[251] psychology,[252] among others, which makes the professions compliant with the blueprint's intention to allow reciprocity between professions.

Another recently passed legislation which has positive implications is the Philippine Competition Act,[253] which promotes free and fair trade and prevents monopolies, in line with the ASEAN Economic Community blueprint's goal of a single market with free flow of goods and services.

On Integration as Encouraging Steps toward Building the Rule of Law

There is no available data that suggests that integration has led to the building of rule of law in the country. However, it has been noted that interaction between different counterpart ministers in regional assemblies have had a positive effect in the approach that is being utilised by the departments, especially in matters such as transnational crime, trafficking in persons, and illicit drugs.[254]

244 Administrative Matter 08-8-7-SC

245 Supra note 33

246 Supra note 210

247 Republic Act No. 9285 (2004) (Philippines)

248 Section 3(d) (n) (q) (u), Alternative Dispute Resolution Act of 2004, Republic Act No. 9285 (2004) (Philippines)

249 Chemistry Profession Act, Republic Act No. 10657 (2015) (Philippines)

250 Geology Profession Act of 2012, Republic Act No. 10166 (2012) (Philippines)

251 Philippine Interior Design Act of 2012, Republic Act No. 10350 (2012) (Philippines)

252 Philippine Psychology Act of 2009, Republic Act No. 10029 (2009) (Philippines)

253 Philippine Competition Act, Republic Act No. 10667 (2015) (Philippines)

254 ASEAN Inter-Parliamentary Assembly *ASEAN Senior Officials of Drug Matters Cooperation on Drugs and Narcotics Overview*<http://www.aipasecretariat.org/asod-reports/asean-senior-officials-on-drug-matters-asod/> accessed February 28 2016

On the Contribution of ASEAN Integration to the Building of Stronger State Institutions

There is no available data that suggests that integration has led to the building of stronger State institutions in the country. However, it has been noted by monitoring bodies such as the World Justice Project and Transparency International that Philippine institutions have become more transparent and has had a decrease in corruption, which has been endemic in the Philippines for quite some time.[255] This has resulted in the improvement in the rankings of the Philippines from 139th in 2009 to 85th in 2015 in Transparency International's Corruption Perceptions Index.[256] Furthermore, a corollary indicator of the increasing integrity of State institutions has also been mirrored in the increase of its ratings by international financial organisations, such as Moody's, Fitch, and Standard and Poor, which rate the ability of the country to service its debts. Increasingly positive outlook indicates stability of State institutions to warrant international investors to invest in the Philippines.[257]

Prospects and Challenges

Challenges to a Strengthened Commitment to the Rule of Law

One of the challenges that is foreseen is the effect of the change of leadership in government as a result of the May 2016 elections. While the present leadership is committed to strengthening the rule of law in the Philippines, other prospective leaders have espoused a more chaotic approach to law with limitations on the importance of individual human rights.[258] With the election of President-elect Rodrigo Duterte, there is a possibility that individual human rights may take on a secondary importance especially with his statements regarding the reinstatement of the death penalty and "shoot-to-kill" orders against suspects.[259]

Another challenge that is foreseen is continuing the gains made in government transparency and accountability. In the past several years, the country has been noted to have made great strides in the area of anti-corruption campaign. It is such that international bodies such as Transparency International have rated the country increasingly higher over the preceding six years. Sustaining such momentum should be made a priority so that rule of law can be institutionalized in State institutions.

Increasing access to justice is another challenge that should be taken up. Streamlining and simplification of judicial and administrative procedures should be continued and the confusing matrix of jurisdiction should be simplified. An example of the confusing bureaucracy is the multiple agencies existing that are tasked to monitor institutions such as the police forces. These include the National Police Commission, the People's Law Enforcement Board, the Internal Affairs Service, the Ombudsman, the Civil Service Commission and the PNP Command itself. Each agency theoretically handles a specific aspect of administration but in reality a significant overlap of their jurisdiction exists. This results to confusion in the citizenry that leads to lack of

255 U. S. Department of State, *2014 Investment Climate Statement* <http://www.state.gov/documents/organization/227069.pdf> accessed May 18, 2016

256 Supra note 48

257 Official Gazette, *Philippine Credit Ratings* <http://www.gov.ph/report/credit-ratings/> accessed February 28, 2016

258 Philip Alston, "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions" (A/HRC/11/2/Add.8) 29 April 2009 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.2.Add.8.pdf> accessed February 18, 2016

259 Joseph Tristan Roxas, "FLAG hits Duterte for Proposed Restoration of Death Penalty, Imposition of Shoot-to-Kill orders" GMA News May 22, 2016 <http://www.gmanetwork.com/news/story/567240/news/nation/flag-hits-duterte-for-proposed-restoration-of-death-penalty-imposition-of-shoot-to-kill-orders> accessed May 23, 2016

accountability just because persons do not know with which agency to lodge complaints.[260] Access to judicial institutions should also be simplified and programs such as the Small Claims Courts should be expanded to facilitate easier access to justice.

Commitments and Plans/Initiatives in relation to ASEAN-wide Commitments and Declarations on Human Rights

Plans that have taken the forefront in implementation, which are ASEAN-driven, lie primarily in the education sector. Universities have begun synchronizing their calendars in preparation for the effects of ASEAN integration, and the education sector has implemented radical changes in curriculum, such as the K-12 program wherein the length of time that a student stays in secondary school is increased by two years and a senior high school level is created that intends to prepare the student along the particular path that he or she would want to proceed.[261]

Another on-going effort is the possibility of having reciprocity between professionals in ASEAN. Efforts have been made in the legislature to modernize the governing laws on each profession to make the practice in tune with neighbours in ASEAN in line with the ASEAN Economic Community Blueprint.[262]

The Philippines also has commitments in regional instruments, such as the ASEAN Charter, the ASEAN Declaration against Trafficking in Persons Particularly Women and Children and the ASEAN Declaration on Human Rights.

IV. CONCLUSION

Nexus of the Changes to the Overall State of the Rule of Law for Human Rights

As a whole, ASEAN integration has had a minimal impact on rule of law for human rights. The primary mover for human rights matters in the Philippines has been State compliance with treaty obligations that came with the ratification of or accession to eight of the nine principal human rights treaties. Findings of Special Rapporteurs as well as treaty compliance monitoring teams on government inaction on specific State obligations have pushed the government to action in some matters.[263] However, there are some matters which the government has decided to ignore.[264]

260 Supra note 115

261 Mark Canlas, *Why are Universities moving their class opening from June?* Philstar Global March 26, 2014 <http://www.philstar.com/campus/back-to-school/2014/05/26/1327486/why-are-universities-moving-their-class-opening-june> accessed February 28, 2016

262 Supra notes 253, 254, 255, 256

263 Opening Statement of Secretary Leila de Lima to 106th Session, Human Rights Council, October 15-16, 2012. <http://www2.ohchr.org/english/bodies/hrc/docs/statements/StatementPhilippes106.pdf> accessed February 28, 2016

264 Carmen Pedrosa, "Lawyer: UN rules GMA Detention Violates International Law" Philstar Global October 8, 2015 <http://www.philstar.com:8080/headlines/2015/10/08/1508366/lawyer-un-rules-gma-detention-violates-international-law> accessed May 22, 2016

Several positive indicators have been noted in the rights of individuals, specifically with the express recognition of the claims of victims of human rights violations in the past Marcos regime, as well as with the efforts of the judiciary to increase access to justice by means of non-traditional modalities, such as small claims courts and the Justice on Wheels program.

Another positive note is the prosecution of high government officials such as Presidents, Senators, Congressmen, Generals, and Justices of the Supreme Court for crimes that have adversely affected the Filipino people. This has an effect of culling the culture of impunity that has been prevalent in Philippine society since the time of the Spanish colonisation.[265] In the past, high government officials were able to walk away from the commission of felonies but, increasingly, high government officials are being made accountable for their actions. Although the treatment of such prisoners is still far from the average detainee, the fact that several have been incarcerated shows the increasing application of the rule of law in the Philippines.

Contributing Factors

Increasing Awareness of the Filipino People

The Filipino people are becoming increasingly aware of the situation that surrounds the country. With the widespread availability of the Internet and social media, the people are better informed then before as to the actions taken by their government, as well as being reminded of the past conduct of their leaders. Gone are the days when the citizenry could be fooled by lack of available information; now the people actively participate in debate in a myriad of topics such as their choice of leaders in the past elections. In the recently concluded elections, this discourse took on a whole new level, prompting even politicians to come out with a statement that each person should learn to respect another's opinion.[266]

Calls for Transparency and Accountability

In relation to increasing awareness, the citizens also call for transparency and accountability from its government and officials. The age-old practice of promising and forgetting the said promises no longer applies in the current political milieu of the country. Currently, officials are taken to task for failure to achieve goals or in doing acts that are violative of the law, such that even the Philippine poll body, the Commission on Elections, took to using a shame campaign against officials violating election law.[267]

Role of the ASEAN Declaration on Human Rights in Strengthening Rule of Law for Human Rights

While there appears to be no direct causal connection between the ASEAN Declaration on Human Rights to changes in Philippine laws and judicial institutions, the Declaration serves as an indicator of the continuing commitment of the Republic to human rights.

265 Supra note 25

266 Politiko Luzon, "Don't Ruin Friendships over the Elections, Councilor Koko Gonzales Says" May 6, 2016 <http://www.luzon.politics.com.ph/2016/05/07/dont-ruin-friendships-over-the-elections-councilor-koko-gonzales-says/> accessed May 18, 2016

267 Crisostomo, Sy and Villanueva, "Shame Campaign Launched vs Epal bets" Philstar Global February 3, 2016 <http://www.philstar.com/headlines/2016/02/03/1549199/shame-campaign-launched-vs-epal-bets> accessed May 18, 2016

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The Republic of Singapore

SINGAPORE

TABLE 1

SNAPSHOT[1]

Formal Name	Republic of Singapore
Capital City	Singapore
Independence	1965
Historical Background	Discovered by Sir Stamford Raffles in 1819; became a British Crown Colony in 1867; attained internal self-governance in 1959; merged with Malaya to form the Federation of Malaysia in 1963; and left the Federation of Malaysia and achieved independence in 1965.
Size	719.1 km^2
Land Boundaries	None
Population	5,535,000
Demography	Below 20 years: 845,300; 20-64 years: 2,597,700; 65 years and over: 459,700
Ethnic Groups	Chinese – 74%; Malays – 13.3%; Indians – 9.1%; Others – 3.3%
Languages	English (official language), Mandarin, Malay, Tamil and other dialects
Religion	Buddhism – 33.2%; Taoism – 10.9%; Christianity – 18.3%; Islam – 14.7%; Hinduism – 5.1%; Other religions – 0.7%; No Religion – 17.0%
Adult Literacy	96.7%
Gross Domestic Product	101,989.0 (S$m) (Q4 of 2015)
Government Overview	The People's Action Party (PAP) has ruled Singapore since 1965

1 All data are taken from Department of Statistics Singapore, 'Latest Data,' <http://www.singstat.gov.sg/statistics/latest-data> accessed 14 March 2016.

Human Rights Issues	The top human rights issues are: 1. Restrictions on freedom of expression, peaceful assembly and association: examples include the Media Development Authority's banning of the film "To Singapore, With Love" which features interviews with political exiles on the basis that it undermines national security; the Public Order Act 2009 which requires a police permit for cause-related assemblies; and the use of criminal and civil defamation lawsuits against government critics. 2. Continued use of preventive detention laws, i.e. the Internal Security Act and the Criminal Law (Temporary Provisions) Act. 3. Use of the death penalty and caning. 4. Sexual orientation and gender identity: the Court of Appeal's ruling that the ban on gay sex is constitutional; and censorship by the National Library Board of children's books with alleged LGBT themes. 5. Rights of migrant workers and labour exploitation. (Source: Human Rights Watch World Report 2015: Singapore[2])
Membership in International Organizations	Asia-Middle East Dialogue (AMED) Asia-Pacific Economic Cooperation (APEC) The Group of Twenty (G20) Association of Southeast Asian Nations (ASEAN) Asia-Europe Meeting (ASEM) Forum for East Asia-Latin America Cooperation (FEALAC) Group of 77 and Non-Aligned Movement (G77 and NAM) The Commonwealth United Nations (UN) United Nations Security Council (UNSC) World Trade Organisation (WTO) (Source: Ministry of Foreign Affairs.[3])

2 Human Rights Watch, 'World Report 2015: Singapore.' <https://www.hrw.org/world-report/2015/country-chapters/singapore> accessed 29 February 2016.

3 Ministry of Foreign Affairs, 'International Organisation & Initiatives.' <http://www.mfa.gov.sg/content/mfa/international_organisation_initiatives/un.html> accessed 29 February 2016.

Human Rights Treaty Commitments	1. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) – acceded to on 5 October 1999 (signature date not available). 2. Convention on the Rights of the Child (CRC) – acceded to on 5 October 1999 (signature date not available). 3. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict – signed on 7 September 2000; acceded to on 11 December 2008. 4. Convention on the Rights of Persons with Disabilities (CRPD) – signed on 30 November 2012; ratified on 18 July 2013. 5. United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children – acceded to on 28 September 2015 (signature date not available). 6. International Convention on the Elimination of All Forms of Racial Discrimination (CERD) – signed on 19 October 2015. 7. ASEAN Convention Against Trafficking in Persons, Especially Women and Children – ratified on 25 January 2016. 8. ASEAN Convention on Terrorism – ratified 31 October 2007.

I. INTRODUCTION

Singapore's commitment to the rule of law has been variously lauded and decried. In the World Justice Project's 2015 Rule of Law Index, which provides and ranks data on how the rule of law is experienced in a particular country,[4] Singapore was ranked 9th globally and 2nd in the East Asia & Pacific Region (which includes all ten ASEAN states), just behind New Zealand.

Singapore's relatively high ranking seems to substantiate the Singapore government's commitment to the rule of law. In short, the rule of law is a "fundamental principle,"[5] the "foundation on which [Singapore] was built, and provides the framework for its proper functioning."[6] The rule of law requires that no power be exercised unchecked, and so the courts' exercise of judicial review is the "cornerstone"[7] of the rule of law: "The Judiciary has the duty to check all unlawful legislative or executive acts, but it also has the responsibility not to interfere with or obstruct the policies of an elected government."[8] Above all else, the rule of law mandates that "[no] person should be above the law. That should apply in equal measure to the Government and officials as much as it does to everyone else."[9]

4 See generally World Justice Project, 'Rule of Law Index 2015'. <http://data.worldjusticeproject.org/#> accessed 15 March 2016.

5 'Singapore's Response to the International Bar Association's Report on Singapore,' annexed to a letter (reference no LAW/06/021/026) dated 14 November 2008 from Mark Jayaratnam, Deputy Director, Legal Policy Division, Ministry of Law, to the Chairman of the Human Rights Institute Council of the International Bar Association, <http://www.webcitation.org/6B1FmYJMJ> accessed 29 February 2016.

6 K Shanmugam, 'The Rule of Law in Singapore,' (2012) *Singapore Journal of Legal Studies* 357.

7 Chan Sek Keong, 'The Courts and the 'Rule of Law' in Singapore,' (2012) *Singapore Journal of Legal Studies* 209, 223.

8 Ibid, 231.

9 K Shanmugam, 'Speech by Minister for Law K. Shanmugam at the New York State Bar Association (NYSBA) Rule of Law Plenary Session' 27 October 2009, <http://www.webcitation.org/5l3ykltXH> accessed 15 March 2016.

Critics nevertheless question and criticize the government's commitment to the rule of law. Prominent local socio-political blogger, Alex Au, lamented the "narrow conception of the rule of law" adopted in Singapore, a concept so "debased" that the "institutions that are charged with delivering justice fail us."[10] In his speech at the International Bar Association's Rule of Law Symposium in Tokyo in October 2014, opposition politician Dr. Chee Soon Juan of the Singapore Democratic Party pointed out the "double standards" in the rule of law in Singapore and asserted that the law is used "to undermine justice and thwart democratic freedoms."[11] Both Au and Chee referred to, inter alia, various controversial laws (such as the Internal Security Act, which provides for preventive detention without trial) and the government's use of defamation lawsuits against opposition politicians and dissenters to make their argument.[12]

Evidently, there is an ideological clash between the conception of the rule of law to which the government is committed, and the conception that these critics prefer. The contention that Singapore is not governed by the rule of law in a meaningful sense is premised upon substantive conceptions of the rule of law, such as Ronald Dworkin's "rights conception," which is "the ideal of rule by an accurate public conception of individual rights," requiring that "the rules in the book capture and enforce moral rights."[13] This is a conception that Chee clearly prefers; in a separate letter to the Chief Justice, the Law Minister and the Attorney-General, he described Singapore's rule of law as "a system where laws—unjust laws, laws that run contrary to our Constitution, and laws that contravene the Universal Declaration of Human Rights—are used to suppress the rule of law in Singapore."[14] For him, the rule of law encompasses such rights as "the right [of] citizens to conduct peaceful protests."[15]

Such a thick conception of the rule of law is not one to which the Singapore government adheres. Indeed, the Singapore government and judiciary espouse a commitment to a *thin* conception of the rule of law, with the judiciary demonstrating a positivistic understanding of "law" in its decisions. Singapore's conception of the rule of law is thus more in line with Joseph Raz's formulation: the rule of law is an "inherent virtue of the law," and law's virtue is "the virtue of efficiency."[16] This means that the rule of law "fulfills essentially a subservient role": "Conformity to it makes the law a good instrument for achieving certain goals, but conformity to the rule of law is not itself an ultimate goal."[17] Likewise, in Singapore, the rule of law is not only an ideal in itself to be exalted, but a means to an end—that is, the "[production] of order and justice in the relationships between man and man and between man and the State."[18] If the goal of the law is to secure order and justice in a society, then the rule of law "must be approached and applied in a way which

10 Alex Au, "'Rule of law" in Singapore is so thin, it holds no more meaning' 19 September 2013. <https://yawningbread.wordpress.com/2013/09/19/rule-of-law-in-singapore-is-so-thin-it-holds-no-more-meaning/> accessed 23 February 2016.

11 Chee Soon Juan, 'Double Standard of Rule of Law in Singapore' *Singapore Democratic* Party, 19 November 2014. <http://yoursdp.org/news/double_standards_of_rule_of_law_in_singapore/2014-11-19-5909> accessed 23 February 2016.

12 In Chee's own words: "I have the dubious honour of having been sued repeatedly by three prime ministers of Singapore, both former and present, and ordered by the courts to pay more than a million dollars in damages which I could not afford to do, and hence my bankruptcy." (Ibid.)

13 Ronald Dworkin, 'Political Judges and the Rule of Law' (1978) 64 *Proceedings of the British Academy* 259 at 262.

14 Chee Soon Juan, 'Chee responds to CJ, AG and Law Minister' 6 January 2009, <http://www.webcitation.org/66VD0xg5J> accessed 23 February 2016 (originally posted on Singapore Democratic Party's website).

15 Ibid.

16 Joseph Raz, 'Rule of Law and its Virtue,' in *The Authority of Law: Essays on Law and Morality* (OUP 1972) 210, 226.

17 Ibid, 299.

18 Lee Kuan Yew, Speech at the University of Singapore Law Society Annual Dinner, 18 January 1962. <http://www.nas.gov.sg/archivesonline/data/pdfdoc/lky19620118.pdf> accessed 23 February 2016.

recognizes practical realities, to achieve good governance and to promote general welfare."[19]

The rule of law in Singapore, then, enforces accountability of state officials, observes procedural fairness, places checks and balances on state power, and is enforced by an independent judiciary. In this regard, Singapore has had a consistently good record in adhering to the thin, Razian conception of the rule of law, which has played a significant role in Singapore's development and economic success. Considering Singapore's preference for pragmatic approaches that produce results, it is perhaps unsurprising that the government and the judiciary's thin conception of the rule of law has not changed significantly since 2011. Although there have been significant changes such as a change in the mandatory death penalty regime and Singapore's ratification of the Convention on the Rights of Persons with Disabilities, these changes are hardly seismic shifts in Singapore's overall thin approach to the rule of law. ASEAN integration, too, has played a supporting role in Singapore's development and practice of the rule of law. All in all, as the report will demonstrate, Singapore does not adhere to grand rights-based rule of law theories, but focuses on practical realities and solutions that improve access to justice on the ground.

TABLE 2:

ADMINISTRATION OF JUSTICE GRID

Indicator	Figure
No. of judges in country	74 State Courts judges (as listed in Singapore government directory); 12 International Judges;[20] 19 Supreme Court judges (including Senior Judges, 2 Judges of Appeal and 1 Chief Justice).[21]
No. of lawyers in country	4,834 practitioners in 2015.[22]
Annual bar intake (including costs and fees)	662 admitted as advocates and solicitors in 2015.[23]
Standard length of time for training/qualification	All lawyers, prosecutors and judges follow the same qualification route. 1. Preparatory Course leading to Part B of the Singapore Bar Examinations: commences in July and ends in early December[24] 2. Practice Training period: 6 months[25]

19 Ibid, 357.

20 Singapore International Commercial Court, 'Judges'. <http://www.sicc.gov.sg/Judges.aspx?id=30#14> accessed 18 March 2016.

21 Supreme Court Singapore, 'Justices'. <http://www.supremecourt.gov.sg/about-us/the-supreme-court-bench/justices> accessed 18 March 2016.

22 Law Society of Singapore, 'General Statistics'. <http://www.lawsociety.org.sg/AboutUs/GeneralStatistics.aspx> accessed 14 March 2016.

23 Law Society of Singapore, Annual Report 2015. <http://www.lawsociety.org.sg/Portals/0/AboutUs/AnnualReport/2015/The%20Law%20Society%20of%20Singapore%20Annual%20Report%202015.pdf> accessed 15 March 2016.

24 Singapore Institute of Legal Education, 'Preparatory Course leading to Part B of the Singapore Bar Examinations'. <http://www.sile.edu.sg/admission-requirements/preparatory-course-leading-to-part-b-of-the-singapore-bar-examinations> accessed 18 March 2016.

25 Singapore Institute of Legal Education, 'Practice Training Period'. <http://www.sile.edu.sg/admission-requirements/practice-training-period> accessed 18 March 2016.

Availability of post-qualification training	Yes – Continuing Professional Development is mandatory for lawyers. See report for other examples of training programs.
Average length of time from arrest to trial (criminal cases)	Information not available.
Average length of trials (from opening to judgment)	6 weeks from the date of the final Criminal Case Disclosure Conference or Pre-trial conference before trial (whichever is later)[26]
Accessibility of individual rulings to public	Full court decisions and judgments are available on Singapore Law Watch and singaporelaw.sg.
Appeal structure	The State Courts are the first instance courts and comprise the District Courts and Magistrate Courts, both of which oversee criminal and civil matters, as well as the specialized Family, Juvenile and Coroner's Courts, and the Small Claims Tribunal. Appeals may be brought to the High Court. From the High Court, parties may appeal to the apex court, the Court of Appeal, unless the claims are prohibited from appeal under the law. The High Court and Court of Appeal form the Supreme Court.[27]
Cases before the National Human Rights Institution	There is no National Human Rights Institution in Singapore.
Complaints filed against the police, the military, lawyers, judges/justices, prosecutors or other institutions (per year)	Complaints against lawyers 1 September 2014 to 31 August 2015: 66 complaints received[28] 1 September 2013 to 31 August 2014: 71 complaints received[29] 1 September 2012 to 31 August 2013: 82 complaints received[30] 1 September 2011 to 31 August 2012: 84 complaints received[31] Other information not available.
Complaints filed against other public officers and employees	Information not available.

26 Supreme Court of Singapore, Annual Report 2014-2015. <http://www.supremecourt.gov.sg/data/AnnualReport/AnnualRpt2014/#48> accessed 15 March 2016.

27 Supreme Court of Singapore, 'Singapore Judicial System'. <http://www.supremecourt.gov.sg/about-us/the-supreme-court/singapore-judicial-system> accessed 15 March 2016.

28 Supra note 23.

29 Law Society of Singapore, Annual Report 2014. <http://www.lawsociety.org.sg/Portals/0/AboutUs/AnnualReport/2014/The%20Law%20Society%20of%20Singapore%20Annual%20Report%202014.pdf> accessed 15 March 2016.

30 Law Society of Singapore, Annual Report 2013. <http://www.lawsociety.org.sg/Portals/0/AboutUs/AnnualReport/2013/singlepage.html> accessed 15 March 2016.

31 Law Society of Singapore, Annual Report 2012. <http://www.lawsociety.org.sg/Portals/0/AboutUs/AnnualReport/2012/flash/index.html#/44> accessed 15 March 2016.

II. COUNTRY PRACTICE IN APPLYING THE CENTRAL PRINCIPLES OF RULE OF LAW FOR HUMAN RIGHTS

A. On Central Principle 1 (Government and its officials and agents are accountable under the law)

Definition and Limitation of the Powers of Government in the Fundamental Law

The Supremacy of the Constitution

The Constitution of Singapore is the "supreme law" of the country, as proclaimed in Article 4. Any law that is "inconsistent" with the Constitution is therefore void to the extent of its inconsistency. In principle, Singapore operates under a system of constitutional supremacy. In the absence of express ouster clauses, the courts can exercise judicial review of legislations and executive and administrative actions. As the Court of Appeal stated in *Public Prosecutor v Taw Cheng Kong*:[32] "Questions on the constitutionality of our laws and whether they have been enacted ultra vires the powers of the legislature are matters of grave concern for our nation as a whole. The courts, in upholding the rule of law in Singapore, will no doubt readily invalidate laws that derogate from the Constitution which is the supreme law of our land."[33]

The Constitution establishes and delimits the powers of the three branches of government (i.e. the Executive, the Legislature and the Judiciary), and this structure has remained mostly unchanged since 2011.[34]

(i) Fundamental Liberties

Part IV of the Constitution sets out a list of fundamental liberties, namely: liberty of the person (Article 9); prohibition against slavery and forced labour (Article 10); protection against retrospective criminal laws and repeated trials (Article 11); equal protection (Article 12); prohibition of banishment and freedom of movement (Article 13); freedom of speech, assembly and association (Article 14); freedom of religion (Article 15); and rights in respect of education (Article 16). These Articles have not been amended since 2011.

(ii) Recent Constitutional Amendments

In 2014, the Constitution was amended to introduce, inter alia, the appointment of International Judges and Senior Judges; a gratuity plan for judicial and statutory appointment holders; and the office of Deputy Attorney-General. The office of the International Judge was introduced alongside the establishment of the Singapore International Commercial Court (SICC). The SICC is a division of the High Court and it serves to further Singapore's "vision [of becoming] the leading dispute resolution hub in the region."[35] It is "an international court with specialist jurists hearing international commercial disputes."[36] Pursuant to Article

32 [1998] 2 SLR(R) 489.

33 *Taw Cheng Kong* at [89].

34 See generally Cheah Wui Ling, 'Singapore' in *Rule of Law for Human Rights in the ASEAN Region: A Baseline Study*, 220-221.

35 Speech in Parliament by the Minister for Law, Second reading of the amendment bill. 4 November 2014.

36 Ibid.

95(5) of the Constitution, International Judges are appointed by the President either to hear a specific case only, or to be appointed for a specified period. International Judges may only hear cases in the SICC; as such, this particular amendment has little effect on the application of domestic law.

The office of Senior Judge was created to allow the Supreme Court to tap into the expertise of retired judges. As is the case with the International Judge, the Senior Judge hears either a specific case only, or is appointed by the President for a specified period. They are empowered to hear cases in the High Court, including the SICC, or the Court of Appeal. The purpose of this amendment is also to "ease the hearing load of the Supreme Court"[37] which may have a positive impact of the rule of law generally if it results in an increase in the timeliness with which cases are heard.

The office of the Deputy Attorney-General (DAG) was created to assist the Attorney-General (AG) in the discharge of his duties: the DAG will discharge such duties as the AG may assign. The rationale behind the introduction of this post was to ease the AG's increasing workload, which includes a "fourfold increase in requests for attendance in international negotiations and dispute resolution, and a threefold increase in mutual legal assistance requests."[38] The DAG's duties may include overseeing the day-to-day administration of criminal justice. As such, the creation of the post of the DAG may have a positive impact on the rule of law if it leads to a more efficient administration of justice.

Finally, a Constitutional Commission was recently appointed, on 27 January 2016, by Prime Minister Lee Hsien Loong to review the office of the Elected Presidency. The Commission will review and make recommendations relating to: 1) the qualifying process for Presidential candidates and whether the eligibility criteria for the candidates should be updated; 2) the framework governing the exercise of the President's custodial powers; and 3) ensuring that minorities have the chance to be periodically elected to Presidential office.[39]

Amendment or Suspension of the Fundamental Law

Derogation from Fundamental Liberties

Fundamental liberties are not absolute, and the Constitution contains provisions that allow some of these rights to be derogated from in times of subversion and emergency. These Articles have not been amended since 2011. In short, Part XII of the Constitution contains the provisions on "special powers against subversion and emergency powers"[40] that the Executive and Parliament can exercise. Article 149(1) retrospectively authorizes legislations against subversion that contravene most of the fundamental liberties under Part IV (except Article 10 and Article 15) and even when such legislation would be "outside the legislative power of Parliament."[41] Article 149(1) defines subversion as action or threat of action by "any substantial body of persons, whether inside or outside Singapore:

37 Factsheet on Constitution of the Republic of Singapore (Amendment) Bill 2014 [URL].

38 Supra note 35. IV 73.

39 Prime Minister's Office, 'Constitutional Commission to Review Specific Aspects of the Elected Presidency,' 10 February 2016. <http://www.pmo.gov.sg/mediacentre/constitutional-commission-review-specific-aspects-elected-presidency> accessed 29 February 2016.

40 Constitution of the Republic of Singapore ("Singapore Constitution"), Part XII.

41 Article 149(1).

"(a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property;

(b) to excite disaffection against the President or the Government;

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence;

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the security of Singapore."

Pursuant to Article 149(3), the validity of any decision or act taken pursuant to the subversion legislation is only reviewable in the context of the legislation itself; further, judicial review of any such decision or act is expressly precluded.

Article 150 sets out the procedure for the President to issue a Proclamation of Emergency when he is "satisfied that a grave emergency exists whereby the security or economic life of Singapore is threatened."[42] Article 151 puts in place minimum protective standards to be observed when individuals are preventively detained under Articles 149 and 150.

Amending the Constitution

The amendment process has not changed since 2011. Article 5(1) of the Constitution requires a constitutional amendment bill to be supported by a two-thirds majority of the total number of elected Members of Parliament. Given the ruling party's overwhelming majority of 83 of 89 seats in Parliament, a two-thirds majority is not difficult to achieve.

Laws Holding Public Officers and Employees Accountable

Holding Public Officials Accountable

Singapore's commitment to the rule of law meaningfully encompasses the principle of accountability. Nowhere is this more evident than in the Prevention of Corruption Act (PCA), Singapore's principal anti-corruption legislation. While it applies to private citizens and public officials alike, it holds public officials to a higher standard. Section 8 of the PCA reverses the burden of proof in cases involving public officers: where it has been proved that a public officer has paid or received gratification from someone who has dealings with the government or any public body, the gratification will be presumed to have been given or received corruptly as an inducement or reward. The accused then bears the burden of proving that the gratification was not corruptly given or received. The punishment for corruption is a fine not exceeding SGD$100,000 or a jail term not exceeding five years, or both;[43] in cases involving corruption pursuant to a contract or proposal for a contract with the government or any public body, the maximum penalty is a fine not exceeding SGD$100,000 or a jail term not exceeding seven years, or both.[44] The PCA has not been significantly amended since 2011. In addition, there are no dedicated courts and prosecutors that handle cases against public officials; prosecutions of public officials are conducted in the usual judicial process.

42 Article 150(1).

43 Section 5, PCA.

44 Section 7, PCA.

The Singapore government takes corruption very seriously. Since 2011, there has been one high profile PCA prosecution of a public official. In 2013, the former Singapore Civil Defence Force (SCDF) chief Peter Lim Sin Pang was found guilty of obtaining sexual favours from a private sector employee in exchange for furthering the business interests of her employer. Lim initiated a sexual relationship with the employee, and subsequently contravened procurement rules by tipping her off about the SCDF's need for a product that the employer produced. Lim was eventually sentenced to six months' imprisonment. In her judgment, the District Judge noted that an "uncompromising stance" must be taken against all corruption offenders, and that a deterrent imprisonment sentence was warranted in this case to reflect the "severity of corruption committed."[45]

In addition to the Peter Lim case, there have also been a few other prosecutions of high-ranking public officials who abused their position of power for private gains. In February 2014, the Assistant Director of the Corrupt Practices Investigation Bureau (CPIB), Edwin Yeo, was sentenced to 10 years' imprisonment for misappropriating S$1.76 million from the CPIB to finance his gambling habit.[46] Also in February 2014, the protocol chief of the Ministry of Foreign Affairs (MFA), Lim Cheng Hoe, was sentenced to 15 months' imprisonment for pilfering SGD$88,997 of taxpayers' money by claiming to have purchased some pineapple tarts that were in fact never bought.[47] These prosecutions demonstrate the government's commitment to upholding the rule of law by holding public officials accountable for their transgressions.

Judicial Review of Administrative Actions

As mentioned previously, Article 4 of the Constitution proclaims the Constitution to be the supreme law of Singapore; as such, the courts are empowered to review the legality of administrative actions and violations of fundamental rights. Singapore's practice of judicial review has its roots in English administrative law and generally falls under three heads: illegality, irrationality and procedural impropriety. Illegality relates to whether the public authority was actually empowered to make the decision that it made, and/or whether the authority exercised its discretion properly. The concept of irrationality stems from the seminal English case of *Associated Provincial Picture Houses v Wednesbury Corporation*,[48] and an irrational decision by a public authority is one that is "so absurd that no sensible person could ever dream that it lay within the powers of the authority."[49] Finally, a public official commits a procedural impropriety if he does not comply with legislative procedures, or fails to follow the rules or natural justice, or acts in a procedurally unfair manner towards a person who will be affected by the decision. An administrative action that is found to be illegal, irrational or procedurally improper will be quashed by the courts.

Judicial review is a crucially important manner in which the rule of law is upheld in Singapore. In a highly significant decision regarding the legality of the preventive detention of Tan Seet Eng, an alleged football match-fixer, under the Criminal Law (Temporary Provisions) Act (CLTPA), the Court of Appeal (CA) spelled out the following general principles:

45 'Ex-SCDF chief Peter Lim starts serving six-month jail term,' *Yahoo Newsroom*, 31 May 2013. <https://sg.news.yahoo.com/ex-scdf-chief-peter-lim-found-guilty-in-sex-for-contracts-case-074038943.html> accessed 18 March 2016.

46 'Former CPIB assistant director jailed 10 years,' *Today Online*, 21 February 2014. <http://www.todayonline.com/singapore/former-cpib-assistant-director-jailed-10-years-0> accessed 23 February 2016.

47 'Ex-MFA protocol chief Lim Cheng Hoe sentenced to 15 months' jail for cheating,' *The Straits Times*, 20 February 2014 <http://www.straitstimes.com/singapore/ex-mfa-protocol-chief-lim-cheng-hoe-sentenced-to-15-months-jail-for-cheating>

48 [1948] 1 KB 223.

49 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, pg. 229.

> "The rule of law is the bedrock on which our society was founded and on which it has thrived. The term, the rule of law, is not one that admits of a fixed or precise definition. However, one of its core ideas is the notion that *the power of the State is vested in the various arms of government and that such power is subject to legal limits*. But it would be meaningless to speak of power being limited were there no recourse to determine whether, how, and in what circumstances those limits had been exceeded. Under our system of government, which is based on the Westminster model, that task falls upon the Judiciary. Judges are entrusted with the task of ensuring that any exercise of state power is done within legal limits."[50]

In *Tan Seet Eng*, Tan was arrested on 16 September 2013 for his alleged involvement in global football match-fixing activities. On 2 October 2013, the Minister for Home Affairs issued a detention order for Tan to be detained pursuant to section 30 of the CLTPA, which allows for the preventive detention of those suspected of criminal activities such as loan-sharking and other organized crimes. Section 30 authorizes the Minister to make an order for the preventive detention of any person with respect to whom he is satisfied that the person "has been associated with activities of a criminal nature," and that "the person [should] be detained in the interests of public safety, peace and good order."[51]

Tan sought an Order for Review of his detention which was dismissed by the High Court. When the case reached the CA, however, the CA held that Tan's detention was illegal. The CA powerfully asserted, "Unfettered discretion is contrary to the rule of law. All power has legal limits and it is within the province of the courts to determine whether those limits have been exceeded."[52] Where discretion is vested in the Executive by the Legislature, it is for the courts to decide the boundaries of that power, and whether the Executive has exceeded the ambit of that jurisdiction or power. As Article 93 of the Constitution vests judicial power in the courts, it is therefore up to the courts to determine the lawfulness of government actions.[53]

With respect to Tan's detention, the CA found that "there is nothing to indicate that [Tan] *did* engage in any activities of so serious a nature…that brought his actions *within* the contemplated…remit of the CLTPA"[54] and that Tan's "slew of corrupt [and reprehensible] practices" did not "rise to the level of gravity that they would have to in order to come within the scope of the Minister's power to act."[55] The CA also found that there was nothing to suggest whether, or how, Tan's activities "could be thought to have a bearing on the public society, peace and good order *within* Singapore."[56] Accordingly, the CA held that Tan's detention was unlawful and that the Minister had acted beyond the scope of his powers.

The significance of this case lies in the CA's categorical assertion of the proper delimitation of power between the Executive, the Legislature and the Judiciary. This is especially crucial in a one party-dominant state such as Singapore, where Parliament is overwhelmingly dominated by a single party. By upholding its constitutionally-conferred power to review the lawfulness of government action, the CA in this case has demonstrated a principled adherence to the rule of law, which includes the principle that all actions taken

50 *Tan Seet Eng v Attorney-General* [2015] SGCA 59 at [1] (emphasis added).

51 Section 30(a), Criminal Law (Temporary Provisions) Act.

52 *Tan Seet Eng* at [98].

53 Ibid.

54 Ibid at [139].

55 Ibid.

56 Ibid at [146].

by the government and public authorities have to be lawful.[57]

B. On Central Principle 2 (Laws and procedures for arrest, detention and punishment are publicly available, lawful, and not arbitrary)

Publication of and Access to Criminal Laws and Procedures

All laws passed by Parliament, including subsidiary legislations, are available for free on the Attorney-General Chamber's (AGC) website, Singapore Statutes Online.[58] Anyone can access this website. The AGC's plan to launch a new portal that includes subsidiary legislations as mentioned in the *2011 Baseline Study* has since been implemented. These statutes and subsidiary legislations are only available in English.

Accessibility, Intelligibility, Non-reactivity, Consistency, and Predictability of Criminal Laws

All legislation – civil and criminal – are available on the AGC's website. There has been a recent move to use plain English in Singapore's statutes, such as using "must" instead of "shall" to highlight obligations.[59] The purpose of the reform is to increase the intelligibility of the laws so that they are easier for Singaporeans to understand. This is an important reform to increase accessibility of the laws, and it was initiated in response to statistics showing that more and more Singaporeans are accessing the AGC's Singapore Statutes website: in 2013, the website was accessed about 3 million times, which was three times more than the figure for 2012.[60] Singapore Statutes is thus an important database, and one way to improve access to justice is to use plain English in the law; the AGC's efforts are thus laudable.

Further, as part of the general aim to improve understanding of the legal process, the AGC has published on its website some articles to "offer general information on the legal process," including glossaries of commonly used terms in criminal proceedings in English and one of the non-English official languages (i.e. English and Chinese; English and Malay; and English and Tamil).[61]

57 It should be noted, however, that despite being released after the CA released its judgment, Tan was re-arrested a week later: see, for example, 'Alleged match-fixing mastermind Dan Tan re-arrested in Singapore,' *The Guardian*, 2 December 2015. <http://www.theguardian.com/football/2015/dec/02/alleged-match-fixing-mastermind-dan-tan-rearrested> accessed 22 February 2016. On 5 December 2015, the MHA issued a press release on Tan's detention, stating in general terms that the new Detention Order "expressly sets out" Tan's "criminal activities over many years, their impact on public safety…and the fact that he has intimidated witnesses to the extent that they continue to be unwilling to testify against him for fear of reprisal." See 'MHA Statement on Detention of Dan Tan Seet Eng,' Ministry of Home Affairs, 5 December 2015. <https://www.mha.gov.sg/Newsroom/press-releases/Pages/MHA-Statement-on-Detention-of-Dan-Tan-Seet-Eng.aspx> accessed 23 February 2016.

58 'Singapore Statutes Online,' accessed 22 February 2016. http://statutes.gov.sg.

59 Walter Sim, 'Attorney-General's Chambers to simplify language used in Singapore's laws' *The Straits Times*, 29 July 2014. <http://www.straitstimes.com/singapore/attorney-generals-chambers-to-simplify-language-used-in-singapores-laws> accessed 15 March 2016.

60 Ibid.

61 Attorney-General's Chambers, 'Understanding Legal Processes' <https://www.agc.gov.sg/Understanding_Legal_Processes.aspx> accessed 15 March 2016.

Article 11(1) of the Constitution provides protection against retrospective criminal laws.

Detention Without Charge Outside an Emergency

Such preventive detention can be made pursuant to the Internal Security Act (ISA), and the CLTPA, briefly discussed above. These measures have all been constitutionally-authorized: the ISA is sanctioned by Article 149, and the CLTPA by Article 9(6)(a). There have been no changes to the ISA since 2011, and the CLTPA was renewed once again for another five years in 2015.

(i) The ISA

Since 2011, the government has continued to use the ISA to detain individuals suspected of being involved in terrorism-related activities. In 2011, when Malaysia repealed its own ISA, the Ministry of Home Affairs (MHA) addressed Singapore's continued use of the ISA by stating, "The Singapore Government has used the ISA sparingly. The ISA has only been used against individuals who have acted in a manner prejudicial to the security of Singapore or to the maintenance of public order or essential services therein. No person has ever been detained only for their political beliefs."[62]

The MHA continues to issue the occasional press release of detentions and releases under the ISA. For instance, 27 male Bangladeshi workers were arrested and detained under the ISA for suspected jihadism,[63] and two self-radicalized Singaporeans were similarly detained before they could travel to Syria to join the Islamic State.[64] An update on ISA cases released on 9 January 2014 stated that one person was detained, two imposed with restriction orders, one released, and two restriction orders were allowed to lapse.[65] There is thus *some* degree of transparency in the ISA detentions, albeit more specific statistics remain hard to come by. However, the ISA remains a hallmark of the repressive side of Singapore's legal system. Interestingly, the Law Minister, K Shanmugam, appears to have accepted that the ISA is an exception to the rule of law. In his paper on the rule of law in Singapore, he discusses the ISA as an exception to due process, which he named as an important aspect of the rule of law. Such exceptions "call for explanation and justification"[66] because "exceptions to the Rule of Law must be closely scrutinised and strictly justified."[67]

62 Press Release, MHA, para 3. <https://www.mha.gov.sg/Newsroom/press-releases/Pages/Ministry-of-Home-Affairs-Press-Statement-on-ISA-16-September-2011.aspx> accessed 22 February 2016.

63 'Arrests of 27 Radicalised Bangladeshi Nationals under the Internal Security Act,' Ministry of Home Affairs, 20 January 2016. <https://www.mha.gov.sg/Newsroom/press-releases/Pages/Arrests-of-27-Radicalised-Bangladeshi-Nationals-under-the-Internal-Security-Act-.aspx> accessed 23 February 2016.

64 'Detention of Two Self-Radicalised Singaporeans under the Internal Security Act,' Ministry of Home Affairs, 30 September 2015. <https://www.mha.gov.sg/Newsroom/press-releases/Pages/Detention-of-Two-Self-Radicalised-Singaporeans-under-the-Internal-Security-Act.aspx> accessed 23 February 2016.

65 'Update on Terrorism-related Cases Under the Internal Security Act,' Ministry of Home Affairs, 9 January 2014. <https://www.mha.gov.sg/Newsroom/press-releases/Pages/Update-on-Terrorismrelated-Cases-Under-the-Internal-Security-Act-.aspx> accessed 23 February 2016.

66 K Shanmugam, supra note 6, page 363.

67 Ibid, 365.

(ii) The CLTPA

The provisions of the CLTPA have not been changed since 2011. It continues to be used by the MHA (such as its detention of Tan Seet Eng), which also issues press releases on CLTPA detentions.

Rights of the Accused

Freedom from Arbitrary or Extra-legal Treatment or Punishment, and Extra-Judicial Killing

Extra-Judicial Killing, Torture, and Inhumane Treatment

There are no instances of extra-judicial killings by the State. However, Singapore continues to mete out caning and the death penalty as forms of punishment.

In 2015, the constitutionality of caning was unsuccessfully challenged in the courts in the case of *Yong Vui Kong v Public Prosecutor*.[68] The appellant argued that caning violated Article 9(1) of the Constitution. Although Singapore law does not prohibit torture, the appellant's case was that the prohibition of torture was nevertheless imported into domestic law in two ways: through the *jus cogens* norm of the prohibition of torture, and through the prohibition of torture at the level of the common law. As such, caning violated Article 9(1) which requires life or personal liberty to be deprived of only "in accordance with law."

The CA held, however, that caning does not violate Article 9(1) because caning as a form of punishment is properly executed "in accordance with law." The lack of an express prohibition on torture in Singapore law means that the *jus cogens* status of the prohibition of torture cannot override a domestic statute that mandates caning as a form of punishment: "The fact that peremptory norms admit of no derogation in the international sphere where relations between states are concerned, says nothing about what the position should be in the domestic sphere."[69] As such, even if caning did amount to torture, the courts are nevertheless "bound to implement laws that have been validly passed by Parliament unless these are inconsistent with the Constitution."[70] The CA's reasoning here reveals the thin conception of the rule of law briefly discussed in the introduction: a law is valid and thus binding on the courts if it has been validly passed by Parliament, even if the *content* of the law may be suspect. A more substantive account of the law and the rule of law would hold that a morally suspect law, such as one that authorizes torture, should be interpreted by the courts in a manner that cures the law of its moral defect.

In any event, the CA decided in this case that caning did not amount to torture. That still leaves open the issue of whether it amounts to inhumane treatment, but since this issue was not litigated, the CA did not comment on it, though international human rights organizations have characterized caning as inhumane treatment.[71]

68 [2015] 2 SLR 1129 ("*Yong Vui Kong*").

69 Ibid, para. 35.

70 Ibid, para. 38.

71 See e.g. Human Rights Watch 2014 report on Singapore that refers to caning as "an inherently cruel punishment." <https://www.hrw.org/world-report/2014/country-chapters/singapore?page=2>.

With respect to the death penalty, there has been significant changes in the death penalty regime since 2011. Whereas the death penalty was imposed as a mandatory sentence once an accused is found guilty of drug trafficking under the Misuse of Drugs Act (MDA), a 2012 amendment to the MDA replaced the mandatory death sentence with a discretionary one. In other words, the courts no longer have to impose the death penalty on convicted drug traffickers. The courts' sentencing discretion, however, is not an automatic one; it arises only when two conditions have been met. The accused first has to prove that, on a balance of probabilities, he acted merely as a drug courier,[72] and subsequently, the Public Prosecutor has to certify that he rendered substantive assistance to police investigations.[73] If the accused proves that he acted merely as a drug courier on a balance of probabilities and also proves that he suffered from abnormality of mind when he committed the offence, such that his mental responsibility was diminished, then the courts must not impose the death penalty and must impose life imprisonment instead.[74]

The courts' scope for discretion is thus quite narrow. Further, the Public Prosecutor has a wide discretion to determine whether or not an accused person has rendered substantive assistance. Not only does section 33B(4) of the MDA provide that the determination of the Public Prosecutor in this regard is not open to judicial review "unless it is proved to the court that the determination was done in bad faith or with malice,"[75] the CA has also held that the grant of such a certificate was not justiciable by the courts.[76]

Right to habeas corpus

The right to habeas corpus (now known as the order for review of detention) is enshrined in Article 9(2) of the Constitution, which provides that where a complaint of an unlawful detention is made, "the Court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the Court and release him." Although this right is not limited in any circumstance, the courts' review of the lawfulness of detention is restricted only to the procedural requirements of the detention.

Presumption of Innocence

In his paper on the rule of law in Singapore, Law Minister K Shanmugam stated that the presumption of innocence forms part of the rule of law.[77] Although the presumption of innocence is not constitutionally protected, the standard of proof in criminal cases is that of beyond a reasonable doubt. Hence, the presumption of innocence generally applies except when the statute reverses the burden of proof. For instance, the MDA provides that upon establishing that the accused possesses a certain amount of drugs, it is then for the accused to show, on a balance of probabilities, that he was not engaged in drug trafficking.[78] Another example is the reversed burden of proof for government and public officials in the PCA as discussed above. There has been no change to these provisions since 2011.

72 MDA, section 33B(2)(a).

73 MDA, section 33B(2)(b).

74 MDA, section 33B(3).

75 MDA, section 33B(4); emphasis added.

76 *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] SGCA 53 at para. 66.

77 Supra note 6.

78 MDA, section 17.

Legal Counsel and Assistance

Right to Counsel, and the Right to be Informed of the Right to Counsel

Article 9(3) of the Constitution provides that "[where] a person is arrested, he shall…be allowed to consult and be defended by a legal practitioner of his choice." Similarly, section 236 of the Criminal Procedure Code provides that "[every] accused person before any court may of right be defended by an advocate."

Article 9(3) is silent on when the right arises. As stated in the *2011 Baseline Study*, the courts have held that the right does not arise immediately, and that a reasonable time can elapse before the accused is given access to counsel. What has been deemed reasonable by the courts has ranged from two weeks[79] to 19 days.[80] More recently, the CA in *James Raj v Public Prosecutor*[81] reiterated that the right to counsel does not arise immediately but only within a reasonable time.[82] What constitutes a "reasonable time" is not an axiomatic matter, but is rather "inherently a question of fact" that "calls for a factual inquiry of all the relevant considerations."[83]

As stated in the previous report, the Singapore courts have held that the right to counsel does not come with a corresponding right to be informed of the right to counsel. Despite the Law Society's proposal that a standard form be given to accused persons to fill in which sets out the necessary information relating to the right to counsel, this proposal has not been accepted. There are no known studies on the effectiveness of the right to counsel.

Legal Aid

This issue will be dealt with below.

Knowing the Nature and Cause of the Accusation

Article 9(3) of the Constitution stipulates that upon arrest, a person "shall be informed as soon as may be of the grounds of his arrest." In order to conduct a proper defence, the accused person also needs to have access to information about the Prosecution's case against him. As noted in the previous report, the Criminal Procedure Code (CPC) went through a significant amendment process in 2010 which sought to improve the rights of accused persons in the criminal process. One such amendment introduced the Criminal Case Disclosure Conference (CCDC) regime, set out in section 160 of the CPC. The Prosecution and the accused will be directed by the courts to attend a CCDC, during which they are to settle the following matters: (a) the filing of the Case for the Prosecution and the Case for the Defence; (b) any issues of fact or law which are to be tried by the trial judge; (c) the list of witnesses to be called by the parties to the trial; (d) the statements, documents or exhibits which are intended by parties to be admitted at the trial; and (e) the trial date.[84] The CCDC is applicable to all cases tried before the High Court, the majority of offences tried in the District Court and cases tried in the Magistrates' Courts.

79 *Jasbir Singh v Public Prosecutor* [1994] 1 SLR(R) 782.

80 *Leong Siew Chor v Public Prosecutor* [2006] SGCA 38.

81 [2014] SGCA 33.

82 Ibid [36].

83 Ibid [39].

84 Criminal Procedure Code, section 160(1).

The purpose of the CCDC is to "introduce greater transparency and consistency to the pre-trial process" by "obliging the Prosecution and Defence to exchange relevant information about their respective cases before trial."[85] Prior to the enactment of the CCDC regime, there was no formal discovery obligation imposed on the Prosecution save for criminal trials conducted in the High Court. The lack of a comprehensive discovery framework (or a discovery framework at all) invariably led to an imbalance of information between the Prosecution and the Defence, and a common problem faced by defence counsel was the Prosecution's refusal to furnish the Defence with the accused person's own statement recorded during police investigations of the alleged crime.[86]

The CCDC is therefore a highly significant improvement to the criminal justice system in Singapore; not only is the Prosecution now required by section 162(e) of the CPC to furnish the Defence with statements made by the accused, there is now a formal framework setting out the discovery obligations of *both* parties. In *Public Prosecutor v Li Weiming*,[87] the CA observed that the "[timely] disclosure of information facilitates the efficient dispensation of criminal justice as both the Prosecution and accused are in a position to evaluate the merits of their respective cases….*This creates a balanced and fair procedure that provides a system for arriving at the truth*…and precludes resort to ambush tactics….From the perspective of the accused, an early disclosure of the Prosecution's case enables him to make preparations for his defence [and] ensures that relevant facts are not concealed from the trial judge."[88] The CCDC is therefore a laudable improvement to the criminal justice system in Singapore which demonstrates Singapore's commitment to fairness in criminal justice and, accordingly, the rule of law.

Guarantees during Trial

The *2011 Baseline Study* sets out the CPC procedure according to which criminal trials are to be conducted, which is contained in section 230 of the CPC. There have been no changes to the procedure since 2011. Specifically, the CPC provides that the charge must be read and explained to the accused and his plea taken at the commencement of the trial;[89] that the accused may cross-examine witnesses of the Prosecution;[90] and that the court, if it is of the view that there is some evidence which satisfies each and every element of the charge, must call on the accused to give his defence and inform him of the effect of his refusal to give evidence in his own defence.[91] Additionally, an accused may apply to the court to issue process for compelling the attendance of any witness for the purpose of examination or cross-examination or to produce any exhibit in court.[92]

85 Singapore Parliamentary Debates, Official Report (18 May 2010) vol 87 at cols 413-414, Minister for Law, K Shanmugam.

86 Amarjeet Singh, 'Equality of Arms — The Need for Prosecutorial Discovery,' Singapore Law Gazette (September 2005). <http://www.lawgazette.com.sg/2005-9/Sep05-feature3.htm> accessed 24 February 2016.

87 [2014] SGCA 7.

88 Ibid [26] (emphasis added).

89 Criminal Procedure Code, section 230(a).

90 Ibid, section 230(e).

91 Ibid, section 230(j) and (m).

92 Ibid, section 230(q).

Appeal

Although the right to appeal is not constitutionally protected, other statutory provisions provide for the right to appeal against conviction and/or sentence. The relevant provisions set out in the *2011 Baseline Study* have not been amended since 2011. Briefly, section 374 of the CPC states that an appeal "may lie on a question of fact or a question of law or on a question of mixed fact and law." Sections 23 and 26 of the Supreme Court of Judicature Act[93] recognize the High Court's powers of revision for criminal proceedings. In such cases, the High Court, on its own motion or on the application of a Subordinate Court, the Public Prosecutor or the accused, "[calls] for and [examines] the record of any criminal proceeding before any Subordinate Court to satisfy itself as to the correctness, legality or propriety of any judgment, sentence or order recorded or passed and as to the regularity of those proceedings."[94]

Freedom from Double Jeopardy

Article 11(2) of the Constitution provides that no person who has been acquitted or convicted of an offence may be tried again for the same offence except where the conviction has been quashed and a retrial ordered by a superior court. The rule against double jeopardy is also set out in section 244 of the CPC. However, the explanation to section 244 states that the dismissal of a complaint or the discharge of the accused is not an acquittal for the purposes of the section. There has been no significant update to the law since 2011.

Remedy before a Court for Violations of Fundamental Rights

Generally, judicial review is available to address alleged violations of fundamental rights. In the criminal context, constitutional challenges have been brought against the Attorney-General's use of his prosecutorial discretion under Article 35(8) of the Constitution in which the applicants alleged that the Attorney-General's exercise of prosecutorial discretion violated their Article 12 right to equal protection. Article 35(8) provides that the Attorney-General, as the Public Prosecutor, "shall have the power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence." The scope of the Article 35(8) prosecutorial discretion was recently comprehensively mapped out by the CA and it merits closer attention.

In *Ramalingam Ravinthran v Attorney-General*,[95] the applicant and another individual, Sundar, were arrested for attempting to sell 5,560.1g of cannabis and 2,078.3g of cannabis mixture. Sundar was charged under the MDA with trafficking a smaller amount of drugs, a charge that did not attract the death penalty. The applicant, on the other hand, was charged with trafficking the *actual* amount of drugs, a charge that attracted the death penalty and for which he was convicted. He subsequently filed a criminal motion for an order that the capital charges against him be amended to a non-capital one on the basis that the Attorney-General's exercise of prosecutorial discretion violated the applicant's Article 12(1) right to equal protection.[96]

The CA dismissed the motion and held that Article 12(1) was not violated. The scope of the prosecutorial discretion is a wide one, and there is a presumption that the Attorney-General's exercise of the discretion is constitutional; further, the doctrine of separation of powers requires that the courts not interfere with the

93 Supreme Court of Judicature Act, Cap. 322.

94 Criminal Procedure Code, section 400(1).

95 [2012] 2 SLR 49 ("*Ramalingam*").

96 Article 12(1) states: "All persons are equal before the law and entitled to the equal protection of the law."

Attorney-General's exercise of prosecutorial discretion unless it has been exercised unlawfully.[97] However, there is an "inherent limitation" on his discretion, which is that "it may not be exercised arbitrarily, and may only be used for the purpose for which it was granted and not for any extraneous purpose."[98] In addition, the CA also stated strongly that "an exercise of an executive decision-making power, even one with a constitutional status, cannot be allowed to override a fundamental liberty enshrined in the Constitution."[99] Accordingly, the prosecutorial discretion is also constitutionally limited and subject to, inter alia, Article 12.

The CA went on to analyse the interplay between the prosecutorial discretion and Article 12. Article 12 concerns equality before the law and equal protection of the law, and so requires that like should be compared with like. Similarly, the Attorney-General is "obliged to compare like with like in deciding whether or not to differentiate between the charges against different offenders involved in the same criminal transaction."[100] In deciding what charges to bring against the offenders, the Attorney-General "must not unlawfully discriminate against one offender as compared to another" and "may take into account a myriad of factors, including whether there is sufficient evidence against a particular offender, whether the offender is willing to co-operate…"[101] On the facts of the case, the CA concluded that the applicant had not produced evidence to prove a *prima facie* case of an Article 12 violation, and even if it could be said that the applicant and Sundar were equally culpable, this, in itself, is not sufficient to rebut the presumption of constitutionality inherent in the Attorney-General's exercise of discretion.[102] The CA concluded by remarking that the Attorney-General has no obligation to disclose the reasons for his prosecutorial decisions.[103]

The above analysis demonstrates that the courts give a wide leeway to the Attorney-General in his prosecutorial decisions. The difficulty with the CA's decision, however, lies in the relatively high hurdle that an accused person must overcome in order to prove a *prima facie* violation of Article 12. In particular, the CA's position that equal culpability between co-offenders is insufficient to prove such a prima facie case is rather troubling. As a Singaporean academic has pointed out, "if both co-offenders were equally culpable, the differential charging decision of the Prosecution would, all other things being equal, raise a prima facie case of unconstitutionality that demands an explanation from the Prosecution. Otherwise, the odds would be heavily stacked against the accused person seeking to challenge a prosecutorial discretion."[104] Such difficulties should be cautioned against especially in instances where the life of the accused person is at stake. Further, the Attorney-General should be required to provide reasons for his prosecutorial decisions under some circumstances.[105]

97 *Ramalingam* [44].

98 Ibid [51].

99 Ibid [41].

100 Ibid [61].

101 Ibid [52].

102 Ibid [73].

103 Ibid [74].

104 Gary Chan Kok Yew, 'Prosecutorial Discretion and the Legal Limits in Singapore' (2013) Singapore Academy of Law Journal 15 at pg. 37.

105 For an in-depth discussion of this issue, see ibid.

C. On Central Principle 3: (The process by which the laws are enacted and enforced is accessible, fair, efficient and equally applied)

Law Enactment

Openness and Timeliness of Release of Record of Legislative Proceedings

As mentioned in the *2011 Baseline Study*, the dates and times of upcoming parliamentary sessions are announced by the Singapore Parliament on its website. Such information is up to date. Parliamentary sessions are open to all members of the public, including foreigners. Bills introduced in parliament and Special Select Committee Reports are also made available on the website.

Timeliness of Release and Availability of Legislative Materials

All Parliamentary Reports from 1955 to the present day are made publicly available on the Singapore Parliament's website.[106] These reports provide transcripts of debates in full. Reports are made available seven to ten working days after the adjournment of a sitting. Minutes of parliamentary debates are not available.

Equality before the Law

Article 12 of the Constitution provides that "[all] persons are equal before the law and entitled to the equal protection of the law." The potency of Article 12's protection was recently tested in the CA in *Lim Meng Suang and Another v Attorney-General and Another Appeal and Another Matter* [107] when a gay couple and a gay man mounted two separate constitutional challenges to section 377A of the Penal Code,[108] a colonial-era law that exclusively criminalises sex between men. There is no equivalent provision for sex between women.

In holding that section 377A does not violate Article 12, the CA's judgment reveals a positivist approach to law and an adherence to a thin conception of the rule of law. The CA first analysed section 377A in light of the doctrinal test used by the courts to adjudicate Article 12 cases, the "reasonable classification test." This test consists of two limbs: (a) whether the classification prescribed by statute is based on an intelligible differentia; and (b) whether the differentia bears a rational relation to the purpose of the statute.[109] The CA then held that section 377A satisfies the reasonable classification test: The classification prescribed by section 377A of "men who have sex with other men" is based on a logical and coherent distinguishing characteristic "inasmuch as there was little difficulty in determining who fell within and without the provision."[110] There is therefore a "complete coincidence" in the relation between the differentia and the purpose of section 377A, which is to criminalize sexual conduct between men.[111]

106 Parliament of Singapore, 'Official Reports – Parliamentary Debates (Hansard).' <http://www.parliament.gov.sg/publications-singapore-official-reports> accessed 24 February 2016.

107 [2015] 1 SLR 26.

108 377A reads: "Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years."

109 Ibid [60].

110 Ibid [110]-[111].

111 Ibid [153].

The reasonable classification analysis is essentially the entirety of the CA's reasoning in deciding that section 377A does not violate Article 12. However, the test is not without some deficiencies. Limb (a) requires only intelligibility, which sets a rather low standard for a test that is used to determine a statute's constitutionality. Furthermore, there seems to be a lack of clear guidelines for ascertaining the purpose of the statute, and so the test has been criticized for being open to manipulation: the test can be sustained or rejected depending on how broadly or narrowly the courts frame the statutory purpose.[112] It is thus arguable that the reasonable classification test is not stringent enough to determine whether a statute violates the right to equality.

Additionally, although the High Court in the decision below took the view that the courts can examine the legitimacy of the purpose of a statute,[113] the CA rejected this view and stated that such questions are beyond the courts' jurisdiction because "there are *no legal standards* [to ascertain] whether the object of that statute is illegitimate."[114] Thus, a law is constitutional so long as there is a rational connection between limb (a) and limb (b), even if it has a questionable purpose.[115] This suggests a formalistic conception of law and an adherence to a thin rule of law.

Reparation for Crimes and Human Rights Violations' Victims/Survivors

As discussed in the *2011 Baseline Study*, the new CPC makes it compulsory for the courts to consider making an order for victim compensation in criminal proceedings after an accused has been convicted. The purpose of this change is to "make the criminal justice process more meaningful to victims of crime."[116] This idea is similarly reflected in the courts' attitude towards the victim compensation regime. In *Public Prosecutor v AOB*,[117] the High Court opined, "Compensation orders are particularly suitable and appropriate for victims who may have no financial means or have other difficulties in commencing civil proceedings for damages against the offender. Although a custodial sentence or a heavy fine may be appropriate as punishment for the offender, such punishments are cold comfort to a victim who has experienced pain and suffering as a result of the offenders actions and who, as a result, has to bear the burden of medical bills, lost wages and other expenses."[118] Hence, the power to make compensation orders should be exercised in "appropriate cases," which "include those where the offender has caused the victim physical injury in respect of which the victim would be entitled to claim damages in a civil action."[119]

The victim compensation regime has proved rather successful. In 2012, the courts made 43 compensation orders; and in 2013, the courts made 46 compensation orders. More than 70 per cent of these orders were made in relation to cases involving hurt, mischief and theft. The remaining cases involved other offences,

112 Yap Po Jen, Constitutional Dialogue in Common Law Asia (OUP 2015) 172.

113 *Lim Meng Suang and another v Attorney-General* [2013] 3 SLR 118 [114].

114 Ibid [85].

115 Although the CA attempted to introduce, at [67] and [86], a substantive element to limb (a) by adding that a differentia capable of being apprehended by intellect can nevertheless be unintelligible if it is extremely illogical and/or incoherent, this qualification does very little work. It requires a differentia of such illogicality and incoherence that it is implausible that a law would be passed on this basis in Singapore.

116 Written Answer by Minister for Law, K Shanmugam, to Parliamentary Question on the Criminal Procedure Code 2010, 14 February 2012. <https://www.mlaw.gov.sg/news/parliamentary-speeches-and-responses/written-answer-by-minister-for-law-k-shanmugam-to-parliamentary-question-on-the-criminal.html> accessed 25 February 2016.

117 [2011] 2 SLR 793.

118 Ibid [23]

119 Ibid.

including cheating. In 70 per cent of all instances where compensation orders were made, the compensation amounts were less than S$2,000. In 20 per cent of these cases, the compensation amounts were between S$2,000 and S$10,000. The remaining 10 per cent were above S$10,000 with the highest being S$63,716.[120]

Law Enforcement

Effective, Fair and Equal Enforcement of Laws

Singapore's legal system enjoys a good reputation for being efficient and fair. Criminal laws are, for the most part, strictly, fairly and equally enforced. However, when deciding to retain section 377A during the 2007 Parliamentary debates on amendments to the Penal Code, the government has said that it will not actively enforce section 377A, and that the decision to retain it was a pragmatic one to maintain harmony in Singapore and not further divide society over a polarizing issue.[121] However, this may be problematic for the rule of law. The most obvious implication is that the non-enforcement of a specific criminal law while other criminal laws are enforced points to an unequal application of the law, which is inconsistent with the rule of law. It is suggested that a law which the government does not wish to enforce should not remain on the books in order to maintain consistency and uphold the rule of law.

From an institutional perspective, Singapore constantly employs new measures to improve the effective, fair and equal enforcement of the laws. The *2011 Baseline Study* mentioned that there has been a move in the Singapore judiciary from a "court-centric culture" to a "service-centric one." In this spirit, the State Courts launched the new Community Justice and Tribunals Division (CJTD) on 24 April 2015.[122] The CJTD is unique in that it will deal with cases with both civil and criminal components, which was not the norm before the CJTD was launched. The CJTD is made up of the Small Claims Tribunals and the Community Disputes Resolution Tribunals. The purpose of the CJTD is to encourage parties to resolve their differences in an amicable manner, with adjudication being the last resort if attempts at conciliatory resolutions fail.

D. On Central Principle 4: (Justice is administered by competent, impartial, and independent judiciary and justice institutions)

Appointment and Other Personnel Actions in the Judiciary and among Prosecutors

The process of appointing and promoting judges and judicial officers was comprehensively set out in the previous report, and this process has remained largely unchanged since 2011. As mentioned above, a recent constitutional amendment introduced the new posts of International Judge and Senior Judge. The appointment process for these judges is the same as the other judges, i.e. the President makes the appointment

120 Written Answer by Minister for Law, K Shanmugam, to Parliamentary Question on the Criminal Procedure Code 2010, 14 April 2012. <https://www.mlaw.gov.sg/news/parliamentary-speeches-and-responses/written-answer-by-minister-on-victim-compensation-orders.html> accessed 25 February 2016.

121 Singapore Parliamentary Debates 23 October 2007, vol 83, col 2405-2407.

122 See generally 'Media Release – Launch of the Community Justice and Tribunals Division,' State Courts of Singapore, 24 April 2015. <https://www.statecourts.gov.sg/NewsAndEvents/Documents/Media%20Release%20for%20launch%20of%20CJTD.pdf> All information on the new Division is taken from the press release.

on the advice of the Prime Minister, who would have conferred with the Chief Justice before rendering his advice.

The procedure for dismissing and disciplining judges has remained unchanged since 2011. The procedure for dismissing and disciplining judges is set out in the Constitution. Article 98(3) states that where the Prime Minister or the Chief Justice in consultation with the Prime Minister, informs the President that a Supreme Court judge should no longer hold office on the basis of inappropriate conduct or incapacity, the President must appoint a Tribunal and refer the matter to it. The President can remove the Judge on the Tribunal's advice. Article 98(4) states that the Tribunal is to be composed of at least five members who are current or former Supreme Court judges.

Standards of conduct for judicial officers are set out in the State Courts Act. Section 67(1) states that if a State Court officer is charged with extortion or misconduct, the Presiding Judge of the State Courts can nominate a District Judge to inquire into the matter in a summary manner. A judicial officer found guilty of corruptly accepting any fee or reward will be liable for damages[123] and will be dismissed.[124]

Training, Resources, and Compensation

There are numerous training schemes for judges and judicial officers. In 2015, the Supreme Court established the Singapore Judicial College (SJC) dedicated to the training of judges and judicial officers.[125] The SJC consists of a local wing that oversees the needs of the Singapore Judiciary such as continuing education and developmental programs; an international wing that builds on Singapore's well-reputed legal system to offer Singapore as a forum for judicial training; and the empirical judicial research laboratory which serves as a test bed for innovation in judicial studies and practices with the aim of allowing new or existing practices in the courts to be tested and validated. Local training programs include workshops organized around the themes of bench skills, legal development, judicial ethics and social awareness. As part of its international training program, the SJC conducts workshops on court excellence in other ASEAN countries in conjunction with the Ministry of Foreign Affair's Initiative for ASEAN Integration.

The Attorney-General's Chambers (AGC) has also set up training schemes for its officers. In 2014, the AGC Academy was set up "[to] help make AGC an institution that is continually learning and improving."[126] The Academy is "in charge of the training, education, quality control and auditing skills of the entire AGC," and a Prosecution School was formed to "provide a more systematic development of our prosecutors."[127] The Academy also develops other skills and areas of law, such as advocacy; advisory, transactions and civil litigation; international law; legislation drafting, policy and law making process; prosecution; knowledge management; and critical thinking, performance management and soft skills.[128]

123 Section 67(3), State Courts Act (Cap 321).

124 Ibid, section 67(4).

125 See generally Supreme Court of Singapore, 'Singapore Judicial College.' <http://www.supremecourt.gov.sg/sjc/home> accessed 15 March 2016. All information on the SJC is taken from the website.

126 Attorney-General's Chambers, 'Attorney-General's Chambers' Key Initiatives in 2014,' para. 15. <https://www.agc.gov.sg/DATA/0/Docs/NewsFiles/OLY%202015_AGC%20KEY%20INITIATIVES%202014_FINAL_For%20AGC%20website_5%20Jan%202015.pdf> accessed 25 February 2016.

127 Ibid.

128 Attorney-General's Chambers, 'Capabilities Development.' <https://www.agc.gov.sg/Who_We_Are/Significant_Work_Highlights_2014/Capabilities_Development.aspx> accessed 26 February 2016.

State's Budget Allocation for the Judiciary and Other Principal Justice Institutions

In 2014, 1.05 per cent of Singapore's budget was allocated for the Ministry of Law (which falls under Government Administration). In 2015, the figure was 0.73 per cent.[129] The Judicature, which is grouped with seven other government bodies as Organs of State under the budget for Government Administration,[130] received an allocation of 0.35 per cent in 2014 and 0.38 per cent in 2015.[131]

Impartiality and Independence of Judicial Proceedings

The State Courts continued to conduct public perception surveys and the results of the surveys were published in its Annual Report 2014.[132] The surveys were conducted by an independent marketing research firm, Nexus Link Pte Ltd, and a total of 1,006 Singaporeans and permanent residents aged 17 and above were surveyed from December 2013 to January 2014. The survey showed that 97 per cent of the respondents were of the opinion that the State Courts administered justice fairly and effectively. Ninety-nine per cent of the respondents were of the view that the State Courts had integrity, independence and impartiality. If these survey results are generally indicative of public perception of the administration of justice in Singapore, then it would suggest that Singaporeans generally have a positive view of the rule of law in Singapore.

As noted in the *2011 Baseline Study*, however, there have been some criticisms of the judiciary's independence and impartiality. In its 2013 Human Rights Report on Singapore, the US State Department noted, "(i)ndependent observers viewed the judiciary as generally impartial and independent, except in a small number of cases involving direct challenges to the government or the ruling party."[133] In a 2014 report on judicial independence published by the International Bar Association's Human Rights Institute, the writer observed that "[it] may be a coincidence that the best paid judges in the world, those in Singapore who receive US$1m a year, rarely rule against the government and never against its ministers when they sue their critics for defamation."[134] It should be noted, however, that defamation is a constitutionally-accepted limitation to free speech as provided in Article 14(2)(a) of the Constitution, and that the courts have generally applied the established law on defamation in the relevant cases. Further, in *Review Publishing Co Ltd v Lee Hsien Loong*,[135] the CA stated that balance between freedom of speech and the protection of reputation is appropriately struck in the Constitution because the courts have consistently held that defamation laws are not inconsistent with free speech.[136] Regardless of the outcome of the defamation suits, the courts have adhered to the rule of law by applying the appropriate laws in an impartial manner.

129 Singapore Budget, 'Analysis of Revenue and Expenditure – Financial Year 2015.' <http://www.singaporebudget.gov.sg/data/budget_2015/download/FY2015_Analysis_of_Revenue_and_Expenditure.pdf> accessed 26 February 2016.

130 Singapore Budget, 'Total Expenditure for FY2015 by Sector and Ministry' [graph], note 3. <http://www.singaporebudget.gov.sg/data/budget_2015/download/05%20Government%20Expenditure%202015.pdf> accessed 19 March 2016.

131 Singapore Budget, 'Head E – Judicature.' <http://www.singaporebudget.gov.sg/data/budget_2015/download/15%20Judicature%202015.pdf> accessed 19 March 2016.

132 State Courts Annual Report 2014. <https://www.statecourts.gov.sg/Resources/Documents/AnnualReport2014.pdf>.

133 'Country Reports on Human Rights Practices for 2014 – Singapore,' US Department of State Bureau of Democracy, Human Rights and Labor. <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dlid=236474> accessed 26 February 2016.

134 'Judicial Independence: Some Recent Problems,' Geoffrey Robertson QC, International Bar Association's Human Rights Institute, June 2014, 16. <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=15acea39-aeee-46ef-ab76-1cd18d7571cc> accessed 26 February 2016.

135 [2010] 1 SLR 52.

136 Ibid [273].

It is suggested that the appearance of judicial bias towards the government is due to the courts' non-adoption of the public figure doctrine. An example of an expression of this doctrine can be found in the European Court of Human Rights case of *Lingens v Austria*[137] in which the court held that "[the] limits of acceptable criticism are…wider as regards a politician as such than as regards a private individual."[138] This doctrine has not been accepted in Singapore where politicians are conceived of as "public men" who are "*equally entitled* to have their reputations protected as those of any other persons" because public men, "in the discharge of their official duties, are laying themselves open to public scrutiny both in respect of their deeds and their words."[139] Hence, allegations of judicial bias fail to distinguish between a judicial adherence to the established case law and what can arguably be termed a culturally different conception of political leaders. Criticisms of the Singapore judiciary's defamation decisions should bear this difference in mind, and should rather be directed at whether the "public men" doctrine and the high award of damages to the winning plaintiff have an unjustifiable chilling effect on free speech, instead of suggesting bias on the part of the courts.

As stated in the previous report, Singapore's state officials take judicial independence very seriously; as such, the Attorney-General's Chambers does not hesitate to take action against individuals for contempt of court.[140] For instance, in 2015, a prominent Singaporean socio-political blogger, Alex Au, was convicted for contempt of court and fined S$8,000 for an article that he published on his blog titled "377 wheels come off Supreme Court's best laid plans" in which he implied the partiality of the Chief Justice, Sundaresh Menon, in relation to his hearing of the two section 377A constitutional challenges. Essentially, Au alleged that the Supreme Court had scheduled the hearings of the two appeals (before they were consolidated) so that CJ Menon could hear one of the appeals, ostensibly because he had a vested interest in the outcome of the case. In upholding his conviction, the CA reaffirmed the law on scandalizing contempt in Singapore. A statement is liable for scandalizing contempt if: (a) the statement in question poses a real risk of undermining public confidence in the administration of justice; (b) the accused had intended to publish the statement in question; and (c) the accused had not done so pursuant to fair criticism.[141] In its judgment, the CA asserted that issues of judicial independence and impartiality were "foundational"[142] ones: "…without judicial independence and impartiality, the concept of a judiciary in general and the office of a judge in particular become nothing more than empty shells, shorn of any meaning whatsoever."[143]

Due to the important role that the judiciary plays in the upholding of the rule of law, Singapore state officials take seriously attempts to undermine public confidence in the administration of justice. The seriousness of the issue was further underscored by a press release issued by the AGC after Au was charged with contempt in which the AGC reiterated that the law of contempt exists to protect public confidence in the administration of justice; and because judges are unable to respond to allegations of bias, the administration of justice needs to be protected from such allegations by the law of contempt.[144] Undoubtedly, the judiciary is the foundational pillar of the rule of law, and in this respect, Singapore's stance on contempt laws is sensible. Nevertheless, the tension between the offence of scandalizing contempt and freedom of expression should always be borne in

137 [1986] 8 EHHR 407.

138 Ibid [42].

139 *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 1 SLR(R) 791 [62] (emphasis added).

140 See section 7 of the Supreme Court of Adjudicature Act (Cap 322).

141 *Au Wai Pang v Attorney-General* [2015] SGCA 61 at [18].

142 Ibid [33].

143 Ibid [37].

144 Attorney-General's Chambers, 'The Law of Contempt and Posts by Alex Au on the Blog "Yawning Bread"', 17 July 2012. <https://www.agc.gov.sg/DATA/0/Docs/NewsFiles/AGCPressRelease17Jul2012.pdf> accessed 29 February 2016.

mind when deciding whether or not to prosecute an individual for scandalizing contempt, and so only the most egregious cases should be prosecuted. This would also ensure that the judiciary is not shielded from legitimate criticisms, which would in turn ensure that the judiciary remains faithful to the rule of law.

Provision of Lawyers or Representatives by the Court to Witnesses and Victims/ Survivors

Lawyers in Singapore are generally adequately trained. Qualification and admission as an advocate and solicitor to the Singapore bar is governed by section 12 of the Legal Profession Act, and the criteria for admission (good character, passing of the requisite bar examinations, and completion of the requisite legal training period) are strictly observed.

Safety and Security of the Judiciary, Prosecutors, Litigants, Witnesses, and Affected Public

As stated in the *2011 Baseline Study*, security issues are taken seriously in the State Courts and Supreme Court of Singapore: all those entering the court are subject to scans of their persons and their belongings to ensure that no prohibited materials are bought into the building. Police officers are stationed in the building to ensure safety and non-violence.[145] This has not changed significantly since 2011.

Specific, Non-Discriminatory, and Unduly Restrictive Thresholds for Legal Standing

The general principle to determine legal standing for seeking judicial remedies for constitutional rights violations and/or breaches of public duty is that "individuals must have sufficient stakes."[146] The various thresholds for legal standing were summarized by the CA in *Kenneth Jeyaretnam*.[147] An applicant can only have legal standing when there has been a breach of a public duty.[148] There are three main categories of standing: first, when the public duty generates a correlative private (constitutional) right; second, when the public duty generates a public right; and third, when the breach of the duty does not generate a breach of any rights, but the breach is "of a sufficient gravity such that it would be in the public interest for the courts to hear the case."[149]

When the Public Duty Generates a Correlative Private (Constitutional) Right

The first category was considered and established by the CA in *Tan Eng Hong v Attorney-General*.[150] The appellant Tan brought a constitutional challenge to section 377A of the Penal Code after he was arrested and charged under the law for engaging in oral sex with another man in a public toilet. Tan's charge was

145 Singapore 2011 Report, pg. 246.

146 *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 [63] ('*Kenneth Jeyaretnam*').

147 [2014] 1 SLR 345.

148 Ibid [64].

149 Ibid.

150 [2012] 4 SLR 476.

subsequently amended by the Public Prosecutor to that of committing an obscene act in a public place under section 294(a), and on that basis, the Attorney-General successfully applied to have Tan's application struck out. Tan appealed the striking out of his application, and one of the issues before the CA was whether Tan had *locus standi* to bring the constitutional challenge.

The CA answered the question in the affirmative and clarified the position on legal standing in seeking remedies for constitutional violations. The test for *locus stand* consists of three elements: (a) whether the applicant has a real interest in bringing the action; (b) whether there exists a real controversy between the parties concerned; and (c) whether there is a violation of a personal right. The existence of a "real interest" is established as soon as the applicant demonstrates a "a *violation* of *his* constitutional rights."[151] A violation of a constitutional right is therefore the "crux"[152] of the standing requirement. The CA then went on to consider what constitutes a violation of a constitutional right and held that prosecution under an allegedly unconstitutional law should *not* be a necessary requirement for standing.[153]

Turning to the question of whether the very existence of an allegedly unconstitutional law suffices to show a violation of constitutional rights, the CA chose to leave this question open and declined to lay down a general rule to this effect, stating that "[each] case must turn on its own facts."[154] An instance where an applicant will be granted standing to seek remedies for a constitutional violation is when he is able to show that he faces "a real and credible threat of prosecution under an allegedly unconstitutional law."[155] With respect to Tan's case, the CA held that Tan had standing to bring the constitutional challenge: "It is uncontroverted that s 377A is a law which specifically targets sexually-active male homosexuals…Tan professes to be a member of the targeted group…Therefore, since we have found that s 377A arguably violates the Art 12(1) rights of its target group, as a member of that group, Tan's rights have arguably been violated by the mere existence of s 377A…We also accept that there is a real and credible threat of prosecution under s 377A."[156]

The threshold for standing, then, seeks to strike a balance between granting greater access to justice and preventing an increase in unmeritorious cases, which may delay access to justice for other claimants.[157] The threshold laid down by the CA has struck a fair balance between the two concerns.

When the Public Duty Generates a Correlative Public Right

A public right is distinct from a private (constitutional) right. This was considered in *Vellama d/o Marie Muthu v Attoney-General.*[158] The applicant was a resident of a single member constituency (SMC) that was vacated after the elected Member of Parliament was expelled from his political party. The applicant sought judicial review for a mandatory order that the Prime Minister advised the President to issue a writ of election for the SMC within three months from the date of vacancy or a reasonable period that the court deemed fit. The applicant also sought a declaration on the proper construction of Article 49 of the Constitution, which deals with the filling of such vacancies.

151 Ibid [82], emphasis in original.

152 Ibid [84].

153 Ibid [89].

154 Ibid [110].

155 Ibid [114].

156 Ibid [126].

157 Ibid [109].

158 [2013] 4 SLR 1.

The CA considered a public right to be "*shared in common* with other citizens"[159] as opposed to a private constitutional right, which accrues to the applicant *personally*. In respect of a public right, the applicant has standing only if he can show "special damage" that establishes "a nexus between the applicant and the desired remedy," such that his claim can be distinguished from other potential litigants in the same class.[160] The applicant has to show that "his personal interests are directly and practically affected over and above the general class of persons who hold that right, but need not go so far as to show that he is the only person affected."[161] In this case, the CA held that the applicant did not have the requisite standing because the applicant was unable to point to any damage she had suffered and so did not establish special damage.

Much like the test for standing established in *Tan Eng Hong*, the CA's concern here is with striking a balance between vindicating the applicant's rights and safeguarding good administration. The "special interest" requirement is necessary to prevent the courts from being "inundated by a multiplicity of actions, some raised by mere busybodies…to the detriment of good public administration."[162] The special damage requirement appears to have struck the right balance between the two competing concerns.

When the Breach of Public Duty is Sufficiently Grave

The CA in *Kenneth Jeyaretnam* considered cases when an applicant can bring proceedings against a breach of public duty even when the public duty generates no correlative rights. Extending the "special damage" requirement in *Vellama*, the CA opined that "'special damage' might also possibly encompass those rare and exceptional situations where a public body has breached its public duties in such an egregious manner that the courts are satisfied that it would be in the public interest to hear it."[163] Hence, this third category of legal standing goes beyond mere illegality, and is satisfied only in "extremely exceptional instances of very grave and serious breaches of legality."[164] The high threshold for this category is necessary to prevent "a surge of public interest litigation."[165] This is in line with the judiciary's "ethos of judicial review focused on vindicating personal rights…through adjudication rather than determining public policy through exposition."[166] As such, the courts are concerned with the *legality* of the acts or omissions of public bodies, not the *merits* of these acts or omissions.[167]

Publication of and Access to Judicial Hearings and Decisions

As stated in the previous report, judicial hearings are to be open and generally accessible by the public. There has been no changes to this practice since 2011: hearing lists continue to be made available on the courts' official websites, and the Singapore Academy of Law makes certain High Court and Court of Appeal judgments freely available on its website, SingaporeLaw.sg. These are cases from 2000 onwards and there are also some cases from 1970.

159 Ibid [33].

160 Ibid.

161 Ibid [43].

162 Ibid [33].

163 *Vellama* [62].

164 Ibid.

165 Ibid.

166 *Vellama* [34].

167 *Kenneth Jeyraretnam* [59]-[60].

Reasonable Fees and Non-arbitrary Administrative Obstacles to Judicial Institutions

Hearing fees for matters heard by the Court of Appeal and before a High Court Judge are set out in Order 90A of the Rules of Court. The information is also available in simplified version on the Supreme Court's website.[168] Similarly, the State Courts have also made information regarding hearing and court fees available on its website.[169] There appears to have been no significant fee increases since 2011.

Assistance for Persons Seeking Access to Justice

Access to justice may be undermined if aggrieved parties choose not to seek legal redress due to the high cost of litigation. As such, in 2014, the Community Justice Centre (more details below), in collaboration with the State Courts, the Law Society and other justice stakeholders, set up the Primary Justice Project (PJP), which aims to provide "paid, basic legal services at a fixed fee and is geared towards helping parties to resolve their disputes, and at much lower costs, through the use of alternative dispute resolution services at the pre-filing stage."[170] PJP services are available for divorce matters and small value civil claims of less than S$60,000 and which fall outside of the Small Claims Tribunals' jurisdiction.[171] Such initiatives are geared towards reducing the financial cost of access to courts for the ordinary man on the street and, if successful, will strengthen the rule of law in Singapore.

Access to justice may also be hindered if a litigant or accused person is unable to afford legal representation. As discussed below, legal aid is available in Singapore. Apart from that, the courts' websites also publish basic information for litigants who wish to represent themselves in court.[172] In 2012, the Community Justice Centre (CJC) was established to ensure that litigants in person "have access to justice through community partnership." The CJC was set up in response to statistics showing that the number of litigants in person had risen over the years. The CJC aims to "help to simplify court processes so that [litigants in person] will not be disadvantaged in not being able to effectively participate in court proceedings."[173]

Other sources of assistance include the Law Society of Singapore's community legal clinics where volunteer lawyers provide free legal advice to Singaporeans who need legal advice on personal matters,[174] and a free legal forum where members of the public can post their legal questions which will then be answered by volunteer lawyers.[175]

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168 Supreme Court of Singapore, 'Court Fees and Hearing Fees'. <http://www.supremecourt.gov.sg/rules/court-processes/civil-proceedings/commencement-of-an-action/court-fees-and-hearing-fees> accessed 15 March 2016.

169 For Criminal matters, see: https://www.statecourts.gov.sg/CriminalCase/Pages/CourtFees.aspx; For civil matters, see: https://www.statecourts.gov.sg/CDRT/Pages/CDRT-Fees.aspx.

170 State Courts Annual Report 2014, p 3.

171 Primary Justice Project, 'Basic Legal Services At A Fixed Fee.' <http://cjc.org.sg/images/brochures/PJP_PrimaryJusticProject.pdf> accessed 26 February 2016.

172 The Supreme Court: http://www.supremecourt.gov.sg/services/self-help-services/self-help-guides/self-representation-basics; The State Courts for civil matters: https://www.statecourts.gov.sg/CivilCase/Pages/ConductingaCivilTrialinPerson.aspx; The State Courts for Criminal Matters: https://www.statecourts.gov.sg/CriminalCase/Pages/HowToConductACriminalCaseYourself.aspx

173 Today, 'Justice centre to aid the self-represented' 21 June 2012, accessed 25 February 2016, http://tanfoundation.com.sg/wp-content/uploads/2014/09/TODAY-21.6.12-Justice-centre-to-aid-the-self-represented.pdf.

174 http://probono.lawsociety.org.sg/Help-for-Public/personal-legal-issue/CommunityLegalClinic/

175 http://legalhelp.com.sg/about-us/

Measures to Minimize Inconvenience to Litigants and Witnesses, and their Families, Protect their Privacy, and Ensure Safety from Intimidation/Retaliation

Apart from the measures explained in the *2011 Baseline Study*, Singapore has put new measures in place to help witnesses. In 2014, the State Courts, together with the Singapore Children's Society, set up the Witness Support Programme (WSP) to support vulnerable witnesses who have to give evidence against accused persons in criminal proceedings.[176] Vulnerable witnesses are children below 18 years old; adults who have a mental capacity below 18 years old; adults who were victims or eye-witnesses of potentially traumatizing violence-related or sexual offences; or elderly victims above 65 years old. The WSP is managed by the State Courts, and is free of charge. It is run by volunteers who are recruited by the State Courts and Children's Society and given training. Witnesses will be given emotional support and familiarization with court procedures before the witness is due to give evidence in court.

Available and Fair Legal Aid to All Entitled

There are three forms of legal aid available in Singapore: legal aid for civil cases administered by the Legal Aid Bureau (LAB), a department of the Ministry of Law; the Legal Assistance Scheme for Capital Offences (LASCO) provided by the State through the Supreme Court; and the Criminal Legal Aid Scheme (CLAS) provided by the Law Society of Singapore. Information relating to the various legal aid options in Singapore is publicly available on the organizations' respective websites. LAB and the Law Society also produce brochures that set out all the necessary information on how to apply for legal aid.[177]

LAB

Legal aid is available to Singapore citizens and permanent residents who are in Singapore, and citizens or residents of contracting states who are involved in applications under the Hague Convention on the Civil Aspects of International Child Abduction.[178] LAB handles a wide range of civil matters including divorce, adoption, and custody of children, estate matters and claim for compensation in injury or medical negligence cases.[179] LAB provides oral advice on questions of Singapore law, representations in civil proceedings, and legal assistance in the drafting of legal documents including deeds of separation and deeds of severance of cohabitation.[180]

However, legal aid is not free: most receivers of legal aid are required to pay a contribution towards the costs of work done which usually does not exceed S$1,000. In addition to the contribution amount, receivers also have to pay for the preparation of various essential documents such as medical reports and expert opinions,

176 'Witness Support Programme,' State Courts Singapore, accessed 26 February 2016, https://www.statecourts.gov.sg/CriminalCase/Documents/Community%20Court_Witness%20Support%20Programme_2015_03.pdf. All information relating to the Programme is extracted from this brochure.

177 See e.g. the 'Brochures and Forms' page of the LAB: https://www.mlaw.gov.sg/content/lab/en/about-us/Brochures.html accessed 25 February 2016.

178 Ministry of Law, 'Do I qualify for legal aid?' <https://www.mlaw.gov.sg/content/lab/en/eligibility/do-i-qualify-for-legal-aid.html> accessed 15 March 2016.

179 Ministry of Law, 'What types of cases are handled by LAB?' <https://www.mlaw.gov.sg/content/lab/en/what-we-do/what-types-of-cases-are-handled-by-lab.html> accessed 15 March 2016.

180 Ministry of Law, 'What services does LAB provide?' <https://www.mlaw.gov.sg/content/lab/en/what-we-do/what-services-does-lab-provide.html> accessed 15 March 2016.

and fees incurred in the service of court documents to the opposing party.[181]

To qualify for legal aid, applicants must pass the means test and the merits test.

The Means Test[182]

The mean test determines the applicant's financial eligibility for legal aid by assessing the applicant's disposal income and disposable capital. Namely, the applicant's disposal income cannot exceed S$10,000 a year, and his disposal capital similarly cannot exceed S$10,000 a year. The applicant will be required to swear a Statutory Declaration before a Commissioner for Oaths as to his means if he passes the preliminary assessment during the registration of his case.

If an applicant does not satisfy the means test and is facing financial hardship, he can inform the Director of Legal Aid about the hardship that he is facing. The Director has discretion under the Legal Aid and Advice Act to grant further deductions in exceptional circumstances.

The Merits Test[183]

The merits test simply means that the applicant must show a good reason to bring or defend his case under the law. This is to prevent awarding legal aid to frivolous or vexatious claims.

There are between 9,000 and 10,000 cases registered with the LAB from 2011 to 2014. At least 50 per cent of these cases are matrimonial disputes, and half of the applicants have been educated only to secondary school level.[184] As can be seen, the LAB provides an essential service to the ordinary person to whom access to justice may be hindered without such apparatus to help them navigate the legal process.

LASCO[185]

Once a person is charged with a capital offence, he is assigned free legal counsel under the LASCO. There is no means test to pass or eligibility criteria to satisfy. Legal representation is provided at trial and on appeal, and there are usually two counsel assigned (one lead counsel and one assisting counsel).

181 Ministry of Law, 'Is legal aid free?' <https://www.mlaw.gov.sg/content/lab/en/what-we-do/is-legal-aid-free.html> accessed 15 March 2016.

182 Ministry of Law, 'What is the means test?' <https://www.mlaw.gov.sg/content/lab/en/eligibility/what-is-the-means-test.html> accessed 15 March 2016.

183 Ministry of Law, 'What is the merits test?' <https://www.mlaw.gov.sg/content/lab/en/eligibility/what-is-the-merits-test.html> accessed 15 March 2016.

184 'Statistics,' Legal Aid Bureau, accessed 26 February 2016, https://www.mlaw.gov.sg/content/lab/en/about-us/statistics.html.

185 Supreme Court of Singapore, 'Legal assistance for capital offences' http://www.supremecourt.gov.sg/services/self-help-services/legal-assistance-for-capital-offences accessed 15 March 2016.

CLAS[186]

The CLAS was set up by the Law Society of Singapore in 1985 with the purpose of "[providing] criminal legal assistance to the poor and needy in non-capital charges." CLAS is available to "[anyone] who is in Singapore and has been charged in Court for an offence" under, for example, the Penal Code. Applicants are required to pass a means test and a merits test, which are the same as that administered by the LAB.

CLAS is provided by volunteer lawyers who take on these cases on a *pro bono* basis. Receivers of CLAS are generally not charged the lawyer's professional fees, but he may be required to pay out of pocket expenses and a co-payment amount, depending on the results of the means test.

General Public Awareness of Pro Bono Initiatives and Legal Aid or Assistance

Information relating to the various legal aid options in Singapore is publicly available on the organizations' respective websites. LAB and the Law Society also produce brochures that set out all the necessary information on how to apply for legal aid.[187]

In addition, the Law Society runs a handful of initiatives and projects to raise public awareness of the law, such as its biennial Law Awareness Project[188] and its Know the Law booklet.[189]

III. INTEGRATING INTO A RULES-BASED ASEAN

Progress towards Achieving a Rules-Based ASEAN Community

In general, the Singapore government tends to accede to or ratify treaties which obligations are already in line with Singapore's domestic laws, and embed treaty obligations into existing legislations.[190] For instance, after enacting the Prevention of Human Trafficking Act on 1 March 2015, Singapore went on to accede to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children on 28 September 2015, and then ratified the ASEAN Convention against Trafficking in Persons, Especially Women and Children on 25 January 2016.[191] As such, Singapore's regional or international treaty commitments do not influence its domestic legislation as much as its domestic legislations forms the basis on which Singapore chooses which treaties to ratify.

186 Criminal Legal Aid Scheme brochure, <http://probono.lawsociety.org.sg/Documents/CLAS_brochure_eng.pdf> accessed 15 March 2016.

187 See e.g. the 'Brochures and Forms' page of the LAB: https://www.mlaw.gov.sg/content/lab/en/about-us/Brochures.html accessed 25 February 2016.

188 Law Society of Singapore, 'Law Awareness'. http://probono.lawsociety.org.sg/Pages/Law-Help.aspx accessed 15 march 2016.

189 Law Society of Singapore, Know the Law'. http://probono.lawsociety.org.sg/Pages/know-the-law-booklet.aspx accessed 15 March 2016.

190 See e.g. Thio Li-ann, 'Singapore Human Rights Practice and Legal Policy: Of Pragmatism and Principle, Rights, Rhetoric and Realism,' (2009) 21 *Singapore Academy of Law Journal*, 346.

191 'Singapore Ratifies the ASEAN Convention against Trafficking in Persons, Especially Women and Children,' Ministry of Home Affairs, 26 January 2016. <https://www.mha.gov.sg/Newsroom/press-releases/Pages/Singapore-Ratifies-the-ASEAN-Convention-against-Trafficking-in-Persons,-Especially-Women-and-Children.aspx> accessed 27 February 2016.

The implication of the above is that ASEAN integration has had relatively little impact on the strengthening of the rule of law and state institutions in Singapore. The fact that Singapore does not rely on regional and international treaty obligations to implement domestic laws attests to the healthy state of the rule of law in Singapore and the strength of its state institutions. In other words, Singapore has been the leader amongst ASEAN states in terms of compliance with the rule of law, and the objectives of ASEAN integration merely reflect what Singapore already practices, for the most part.

Owing to its strength in the region, Singapore has launched initiatives and programs for mutual support and assistance to develop the rule of law and judiciary systems and legal infrastructure in ASEAN. In November 2000, Singapore launched the "Initiative for ASEAN Integration"[192] (IAI) at the 4th ASEAN Informal Summit held in Singapore. The IAI conducts training for government officials from Cambodia, Myanmar, Lao PDR and Vietnam and has set up training centers in those countries. Training programs include English Language, Trade, Information Technology and Tourism. In 2011, Singapore pledged a further contribution of S$50 million from 2012 to 2015 to the IAI. Further, the SJC conducts training programs in these four countries as part of the IAI. The course that the SJC will conduct in 2016 is called the "International Framework for Court Excellence."[193] Similar workshops were also conducted in 2015.[194]

In terms of preventing and combating transnational crime, Singapore signed and ratified the Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries in 2005. In financial year 2012, the AGC had 131 mutual legal assistance requests and extradition hearings; and in financial year 2013, the figure was 139.[195] The nature of these cases and the countries involved are not stated.

Singapore also actively works with other ASEAN states to combat the trafficking of persons in the region through platforms such as the ASEAN Ministerial Meeting on Transnational Crime, the ASEAN Senior Officials Meeting on Transnational Crime and its Working Group on Trafficking in Persons.[196]

Prospects and Challenges

This report has shown that Singapore has a robust and effective comment to a thin conception of the rule of law. Laws are enacted according to established procedures; public officials are held accountable for breaches of the law; the government does not carry out arbitrary killings or detentions that are not authorized by the law; laws are clearly promulgated and predictable enough to effectively guide citizens' behaviour; and the judiciary applies and enforces these laws in a manner that is generally impartial and fair. It is suggested that this conception of the rule of law can be expanded to include some notions of fundamental rights. For instance, a more substantive rule of law would preclude the use of the death penalty and caning, and the continued operation of the ISA and CLTPA. Such a conception would recognize that fundamental rights

192 'Initiative for ASEAN Integration,' Singapore Cooperation Programme. <http://www.scp.gov.sg/content/scp/iai_programmes/about.html> accessed 26 February 2016.

193 Supreme Court of Singapore, 'International Training Programmes 2016'. <http://www.supremecourt.gov.sg/sjc/judicial-education/international/2016> accessed 15 March 2016.

194 Supreme Court of Singapore, 'International Training Programmes 2015'. <http://www.supremecourt.gov.sg/sjc/judicial-education/international/2015> accessed 15 March 2016.

195 Attorney-General's Chambers, 'Annual Report 2013/2014' https://www.agc.gov.sg/DATA/0/docs/AnnualRep/2014/AGC_Annual_Report_2013-2014.pdf accessed 15 March 2015.

196 'Second Reading of the Prevention of Human Trafficking Bill – Speech by Mr Masagos Zulkifli, Senior Minister of State for Home Affairs and Foreign Affairs' Ministry of Home Affairs, 4 November 2014.

(such as the right to life and liberty, and the prohibition of cruel and inhumane punishment) are an integral part of the rule of law, which would be offended by these practices.

Commitments and Plans/Initiatives in relation to ASEAN-wide Commitments and Declarations on Human Rights

As mentioned above, Singapore generally ratifies treaties only when its domestic legislations already reflect the terms of those treaties. As the Minister for Law stated, Singapore's focus is on the "*full and effective implementation* of treaty obligations."[197] Singapore's ratification of the ASEAN Convention Against Trafficking in Persons thus demonstrates its full commitment to tackling the problem of human trafficking in Singapore and the ASEAN region, especially in light of the extra-territorial effect of the Prevention of Human Trafficking Act.[198]

197 Written Answer by Minister for Law, K Shanmugam, to Parliamentary Question on Human Rights Treaties and Conventions, https://www.mlaw.gov.sg/content/minlaw/en/news/parliamentary-speeches-and-responses/written-answer-by-minister-on-human-rights-treaties-conventions.html (emphasis in original).

198 Section 3(1) of the Act provides that the exploitation of an individual, whether in Singapore or elsewhere, constitutes an offence under the Act. Section 3(4) states that for the purposes of the trafficking offences that are caught under the Act, "it does not matter whether the act of trafficking in persons…is done partly in and partly outside Singapore provided that the act, if done wholly in Singapore, would constitute an offence [under the Act]."

IV. CONCLUSION

Nexus of the Changes to the Overall State of the Rule of Law for Human Rights

There have been both steps forward and backward for the rule of law in Singapore since 2011. The most significant change over the last five years is the modification of the death penalty regime. It is laudable that the courts now have some discretion when sentencing convicted drug traffickers, even if this discretion is too limited and narrow. The CA's decision in *Tan Seet Eng* is also highly significant and laudable: it demonstrates the judiciary's commitment to the rule of law and serves as a powerful rebuttal to its critics that accuse it of being deferential to Parliament.

At an operational level, the various changes to the criminal and civil justice process are to be commended. The improvements to the CPC, especially the new CCDC regime, address and correct the inequality of arms between the Prosecution and the Defence that plagued Singapore's criminal justice system before the changes were introduced by obliging the Prosecution to provide vital documents and information to the Defence. This puts the Defence on a more even keel with the Prosecution which, in turn, strengthens the rule of law by improving the criminal justice process and making it fairer. The initiatives launched by the State Courts to help ordinary Singaporeans attain justice in the courts are also to be commended. One of the most obvious and sometimes insurmountable barrier to justice is the cost of litigation; and so initiatives like the Community Justice Centre help to alleviate the financial burden of litigation for ordinary Singaporeans and improve their access to justice.

The Singapore government has also continued to be committed to the rule of law and good governance by holding accountable public officials who have abused their public position. The prosecutions of Peter Lim, Edwin Yeo and Lim Cheng Hoe demonstrate a key rule of law principle, which is that of accountability. This is undoubtedly a positive factor for the rule of law in Singapore.

Singapore's rule of law standards can be improved by embracing a more substantive conception of it. This is not to say that Singapore has to emulate the practices of liberal democratic countries, but only to say that a more substantive conception of the rule of law that encompasses fundamental rights would strike a more calibrated balance between protecting the individual and safeguarding the public interest. Such a conception would recognize, for instance, that the reasonable classification test includes a test for whether the purpose of the impugned statute is legitimate so that the courts can ensure that statutes based on arbitrary discriminations do not pass constitutional muster. A more substantive conception of the rule of law would also be slow to use the criminal law to punish critics of the government and the judiciary.

Role of the ASEAN Declaration on Human Rights in Strengthening Rule of Law for Human Rights

With regard to ASEAN integration, it is perhaps fair to say that ASEAN integration plays more of a supporting role in the development of the rule of law in Singapore. This is due to the fact that Singapore already has state and judicial institutions that are transparent, non-corrupt and which adhere to the law. The ASEAN Human Rights Declaration has had little impact on human rights in Singapore, principally because the aspirations and standards set out in the Declaration are already more or less in line with Singapore's practices and interpretation of human rights. In particular, paragraph 8 of the ASEAN Human Rights Declaration states that human rights and fundamental freedoms must be exercised with "due regard to the human rights and

fundamental freedoms of others" and that these rights are subject to "limitations as are determined by law...to meet the just requirements of national security, public order…public morality…" Such language can also be found in Article 14(2) of the Singapore Constitution which allows Parliament to restrict the right to freedom of speech, assembly and association—restrictions that it considers necessary in the interest of the security of Singapore, public order or morality. Hence, the ASEAN Human Rights Declaration broadly reflects the practice in Singapore, and so the Declaration has had little impact in Singapore.

In conclusion, ASEAN integration is a positive development in the region for promoting the rule of law in the different ASEAN countries. As a rule of law leader in ASEAN, Singapore has an important role to play in helping its ASEAN neighbours strengthen the rule of law and state institutions in their countries; as such, Singapore should continue to contribute to the IAI and launch other programs for mutual support and assistance. At the same time, Singapore should seek to maintain its strong commitment to the thin rule of law and seek to adopt a more substantive conception of the rule of law, one that equally protects the rights of all Singaporeans.

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The Kingdom of Thailand

THAILAND

TABLE 1

SNAPSHOT

Formal Name	The Kingdom of Thailand
Capital City	Bangkok
Independence	1238 (traditional founding date; never colonised)
Historical Background	The Kingdom of Thailand (formerly named as the Kingdom of Siam until 1939) was formed in the mid-14th century. Thailand was governed under an absolute monarchy until the bloodless revolution in 1932, which led to a constitutional monarchy, and the drafting and promulgation of the country's first Constitution. Since 1932, Thailand has had twenty charters or constitutions (as at 2015), many adopted following military coups, which reflects high degrees of political instability. The most recent coup d'état launched by the Royal Thai Armed Forces, led by General Prayut Chan-o-cha, Commander of the Royal Thai Army (RTA), was on 22 May 2014. The military established a junta called the National Council for Peace and Order (NCPO) to govern the nation, and General Prayut Chan-o-cha became Prime Minister of the country.
Size[1]	513,120 sq. km.; land: 510,890 sq. km.; and water 2,230 sq. km.
Land Boundaries[2]	Thailand is located at the centre of peninsular Southeast Asia. Myanmar is to the west, Laos to the north and east, Cambodia to the southeast, and Malaysia to the south. The south coast of Thailand faces the Gulf of Thailand.
Population[3]	65,124,716; male: 31,999,008; female: 33,125,708
Demography[4]	0-15 yrs. = 17.8%; 15-59 yrs. = 65.7%; 60 yrs. and over = 16.5%; 65 yrs. and over = 11% (2016 est.)
Ethnic Groups[5]	Thai 95.9%, Burmese 2%, other 1.3%, unspecified 0.9% (2010 est.)
Languages[6]	Thai, English (secondary language of the elite), ethnic and regional dialects
Religion[7]	Buddhist (official) 93.6%, Muslim 4.9%, Christian 1.2%, other 0.2%, none 0.1% (2010 est.)

1 Central Intelligence Agency (CIA), CIA World Factbook <https://www.cia.gov/library/publications/the-world-factbook/fields/2107.html> accessed 6 Feb 2016. ['CIA World Factbook']

2 Ibid.

3 National Statistical Office, Ministry of Information and Communication Technology, 'Population from Registration Record by Sex and Area, Whole Kingdom: 2005 – 2014,' < web.nso.go.th> accessed 4 Feb 2016.

4 Institute for Population and Social Research, Mahidol University, 'Population of Thailand 2016,' *Mahidol Population Gazette* 25(2016) <http://www.ipsr.mahidol.ac.th/ipsr/Contents/Documents/Gazette/Population_Gazette2016-EN.pdf> accessed 20 Feb 2016,

5 CIA World Factbook.

6 Ibid.

7 Ibid.

Adult Literacy[8]	96.7%; male: 96.6%; female: 96.7% (2015 est.)
Gross Domestic Product[9]	2.8% (2015)
Government Overview	The Royal Thai Government, ruled by a succession of military leaders, was installed after 2014 coups. The 2007 Constitution was annulled by the 2014 coup-makers who run the country as a military dictatorship. The government of Thailand is composed of three branches: the executive, the legislative, and the judiciary. • Executive branch: Council of Ministers (Cabinet), consisting of the Prime Minister appointed by the King in accordance with the resolution of the National Legislative Assembly, and not more than 35 others Ministers who are appointed by the King upon the advice of the Prime Minister. They have duties to carry out the administration of state affairs and to put into effect reforms in different fields and to promote unity and harmony amongst the people of the nation.[10] • Legislative branch: The National Legislative Assembly, consisting of not more than 220 members appointed by the King, upon the advice of the NCPO, acts as the House of Representatives, the Senate, and the National Assembly.[11] • Judicial branch: Thailand has four categories of courts: a three-level court system collectively known as the Courts of Justice (*i.e.*, Courts of First Instance; Court of Appeal; and Dika (Supreme) Court, including specialized Courts of Justice, such as the Central Bankruptcy Court, the Labor Court, the Juvenile and Family Court, Environmental Court and the Central Intellectual Property and International Trade Court); Constitutional Court; Administrative Court; and Military Court.
Human Rights Issues	• The military coup in 2014 did not only go against the principle of democracy recognised under the ASEAN Charter but the rule of law in Thailand has also been questioned because the elected Prime Minister, the Cabinet as well as the Constitution have been discarded. These issues have continued after the coup. Importantly, under the current government, the NCPO has broad authority to limit or suppress fundamental human rights and is granted immunity for its actions,[12] as reflected in the provisions of the junta-promulgated Interim Constitution.[13] - Freedom of expression and association: after the coup, the junta ordered print media not to publicize commentaries critical of the military. TV and radio programs were instructed not to invite guests who might comment negatively on the situation in Thailand.[14]

8 Ibid.

9 Office of the National Economic and Social Development Board, 'Gross Domestic Product: Q4/2015,' <http://www.nesdb.go.th/Default.aspx?tabid=95> accessed 20 Feb 2016.

10 The Interim Constitution of the Kingdom of Thailand of 2014 ['2014 Interim Constitution'], Section 6, 7 and 19.

11 Ibid., Sections 6 and 7.

12 International Crisis Group, "A Coup Ordained? Thailand's Prospects for Stability," Asia Report, No. 263 (3 Dec 2014) <http://www.crisisgroup.org/~/media/Files/asia/south-east-asia/thailand/263-a-coup-ordained-thailand-s-prospects-for-stability.pdf> accessed 10 Feb 2016.

13 2014 Interim Constitution, Section 48.

14 Ibid.

	- Arbitrary detention: since the coup, the junta has detained more than 300 politicians, activists, journalists, and people that it accused of supporting the deposed government, disrespecting the monarchy, or those involved in anti-coup protests and activities.[15] More recently on 29 March 2016, the Constitution Drafting Committee revealed a draft of the new Constitution, which provides the process for electing members of the House of Representative and the process for electing and selecting the members of the Senate. The draft also allows the possibility of a parliament-selected Prime Minister, if approved by a joint session of the lower house and the appointed Senate. The draft will be put to a national referendum in August 2016.[16] • Enforced disappearances: Thailand has already signed the International Convention on the Protection of All Persons from Enforced Disappearance (CED), but has not yet ratified it. The problem of enforced disappearances is one of the most serious human rights violations faced by the country, frequently happening to activists.[17] These include the disappearance of prominent human rights lawyer Somchai Neelapaijit and prominent ethnic Karen activist Por Cha Lee Rakchongcharoen, known as "Billy," who has forcibly disappeared after officials at Kaengkrachan National Park arrested him on 17 April 2014 in Petchaburi province.[18] • Trafficking in persons: Thailand is now faced with the problem of human trafficking because it is a source, destination, and transit country for men, women, and children subjected to forced labour and sex trafficking. There are an estimated three to four million migrant workers in Thailand, most from Thailand's neighbouring countries—Myanmar, Laos, and Cambodia. In addition to Thai victims of trafficking, some of these migrant workers are also believed to be forced, coerced, or defrauded into labour or sex trafficking.[19] Importantly, the US Trafficking in Persons (TIP) Report has downgraded Thailand from the Tier 2 Watch List to Tier 3 since 2014 because the government of Thailand does not fully comply with the minimum standards for the elimination of trafficking.[20]

15 Ibid.

16 Ron Corben, 'Thai Political Parties Oppose Draft Constitution,' Voice of America, 11 April 2016, http://www.voanews.com/content/thai-political-parties-oppose-draft-constitution/3279334.html; Tan Hui Yee, 'Thailand's new draft Constitution unveiled,' *The Strait Times*, 30 March 2016, <http://www.straitstimes.com/asia/thailands-new-draft-constitution-unveiled>; 'Thailand unveils new constitution draft to public,' *DW*, 29 March 2016, <http://www.dw.com/en/thailand-unveils-new-constitution-draft-to-public/a-19147871> all links accessed 8 May 2016.

17 Justice for Peace Foundation, "Enforce Disappearances in Thailand," (2012) <http://justiceforpeace.org/wp-content/uploads/2012/06/Enforced_Disappearances_in_Thailand_03.pdf> accessed 10 March 2016.

18 Human Rights Watch, "Thailand: Prominent Activist Feared 'Disappeared' Urgently Produce Information on Por Cha Lee Rakchongcharoen," (20 April 2014) <https://www.hrw.org/news/2014/04/20/thailand-prominent-activist-feared-disappeared> accessed 15 February 2016.

19 US Department of State, 2015 Trafficking in Persons Report. <http://www.state.gov/j/tip/rls/tiprpt/countries/2015/243547.htm> accessed 1 Feb 2016.

20 US Department of State, 2014 Trafficking in Persons Report. <http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226832.htm> accessed 28 April 2016.

Membership in International Organisations[21]	ASEAN Community (AC); Asian Development Bank (ADB); Asian Institute of Technology (AIT); Asian-Pacific Postal Union (APPU); Asia-Pacific Telecommunity (APT); Asian Reinsurance Corporation (ARC); International Criminal Police Organisation (INTERPOL); International Committee of the Red Cross (ICRC); International Federation of Red Cross and Red Crescent Societies (IFRC); International Organisation for Migration (IOM); International Union for Conservation of Nature and Natural Resources (IUCN); Network of Aquaculture Centres in Asia-Pacific (NACA); Southeast Asian Fisheries Development Center (SEAFDEC); Southeast Asian Ministers of Education Secretariat (SEAMES); World Trade Organisation (WTO); United Nations (UN); UN Organisations, namely, International Monetary Fund (IMF), Secretariat of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), International Bank for Reconstruction and Development (IBRD), International Civil Aviation Organisation (ICAO), International Finance Corporation (IFC), International Labour Organisation (ILO), International Telecommunication Union (ITU), United Nations Development Programme (UNDP), United Nations Environment Programme (UNEP); United Nations Educational, Scientific and Cultural Organisation (UNESCO), United Nations Population Fund (UNFPA), United Nations High Commissioner for Refugees (UNHCR), United Nations Children's Fund (UNICEF), United Nations Industrial Development Organisation (UNIDO), United Nations Office on Drugs and Crime (UNODC), United Nations Office for Project Services (UNOPS), United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), Universal Postal Union (UPU), World Food Programme (WFP), and World Health Organisation (WHO).
Human Rights Treaty Commitments	Thailand is a party to seven core human rights treaties, namely: 1. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): acceded on 9 August 1985; 2. Convention on the Rights of the Child (CRC): acceded on 27 March 1992; 3. International Covenant on Civil and Political Rights (ICCPR): acceded on 29 October 1996; 4. International Covenant on Economic, Social and Cultural Rights (ICESCR): acceded on 5 September 1999; 5. Convention on the Elimination of all forms of Racial Discrimination (CERD): acceded on 28 January 2003; 6. Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT): acceded on 2 October 2007; and 7. Convention on the Rights of Persons with Disabilities (CRPD): ratified on 29 July 2008. In addition, on 9 January 2012, Thailand signed the CED and is now in the process of considering ratification.

21 Ministry of Foreign Affairs of the Kingdom of Thailand, *Diplomatic Corps*. <http://www.mfa.go.th/main/en/information/2557> accessed 7 March 2016.

I. INTRODUCTION

The Kingdom of Thailand (formerly called the Kingdom of Siam until 1939) is located in the South East Asian Region and is a member of the ASEAN Community (AC), which was launched officially at the end of 2015. Beginning in the mid-14th century, Thailand was governed by an absolute monarchy, until the bloodless revolution during the reign of King Rama VII in 1932. After the revolution, the absolute monarchy was replaced by a constitutional monarchy under the first Constitution of the country on 26 June 1932 (Temporary Charter for the Administration of Siam Act of 1932). After that, the Temporary Charter was replaced by the Constitution of the Siam Kingdom of 1932, which was the first permanent Constitution of the country (10 December 1932), and King Rama VII became the first king under the constitutional monarchy.

As Head of State, the power of the King is limited by the Constitution, and the King is portrayed as a symbolic Head of State. Interestingly, during the 83 years of constitutional monarchy in Thailand, several constitutions were promulgated, amended, as well as revoked; many were adopted following military coups. Since 1932, Thailand has had 20 constitutions and charters.[22] A number of governments and military coups, forming the democratic regime (the latest military coup took place on 22 July 2014), reflect a high degree of political instability in the country. After each successful coup, military regimes abrogated existing constitutions and promulgated new ones. The current 2014 Interim Constitution was promulgated after the 2014 coup, and now, the new Constitution of the country is undergoing a drafting process.

Among the 20 constitutions of the country, the 16th Constitution of the Kingdom of Thailand (1997) is considered to be the best constitution that Thailand ever had. It was known as the *"People's Constitution,"* which introduced measures to hold the government accountable, protect civil liberties, and reform Thai criminal justice. Furthermore, it offered Thailand a great chance to incorporate judicial review into administrative procedure, in particular, establishing the Administrative Court and other measures to prevent the monopoly of the executive arm. The independent organisations set up by the 1997 Constitution are still continuously working up to the present, even though the 1997 Constitution was revoked after the 2006 military coup.[23]

After the 2006 coup, the 2007 Constitution was drafted and came into force on 24 August 2007. The country continued to face political instability, in particular, after the general election in 2011, when Yingluck Shinawatra and the Pheu Thai Party obtained a landslide victory and formed the government with Yingluck as Prime Minister. Anti-government protesters, led by former Democrat Party secretary general Suthep Thaugsuban, formed the People's Democratic Reform Committee for the purpose of demanding the establishment of an unelected "people's council" to supervise a "political reform," while pro-government groups, including the Red Shirts, held mass rallies in response. Violence occasionally occurred, resulting in a number of deaths and injuries during such period. Next, on 7 May 2014, the Constitutional Court unanimously removed Prime Minister Yingluck and nine other senior ministers from office over the controversial transfer of a top security officer in 2011. The remaining ministers selected Deputy Prime Minister and Minister of Commerce Niwatthamrong Boonsongpaisan to replace Yingluck as caretaker Prime Minister as protests continued.

On 22 May 2014, the Royal Thai Armed Forces, led by General Prayut Chan-o-cha, Commander of the Royal Thai Army, launched a coup d'état (the 12th since the country's first coup in 1932) against the caretaker

22 Charters have traditionally been temporary instruments, promulgated following military coups.

23 Human Right Resource Centre, *Rule of Law for Human Rights in the Asean Region: A Base-line Study* ['Rule of Law for Human Rights Study'] (Jakarta: Human Rights Resource Centre, 2011), p.256.

government. The military dissolved the government and the Senate and established a junta called the National Council for Peace and Order (NCPO) to govern the nation. The NCPO vested the executive and legislative powers in its leader and ordered the judicial branch to operate under its directives. In addition, it partially repealed the 2007 Constitution and promulgated the 2014 Interim Constitution, declared martial law and curfew nationwide, banned political gatherings, arrested and detained politicians and anti-coup activists, imposed internet censorship, and took control of the media. Martial law was finally revoked in Thailand on 20 March 2015; however, instead of returning Thailand to civilian rule as it had promised, the Thai junta replaced martial law with its new protocol, Section 44 of the Interim Constitution, which has significantly broadened its authority while still retaining the power to crush political dissent with arrests and detentions.

Section 44 provides that, "In the case where the Head of the National Council for Peace and Order deems necessary for the purpose of reforms in various fields, for the enhancement of unity and harmony among people in the country, or for the prevention, restraint, or suppression of any act which undermines public order or national security, the Throne, the national economy, or State affairs, irrespective of whether such act occurred inside or outside the Kingdom, the Head of the National Council for Peace and Order, with the approval of the National Council for Peace and Order, shall have power to order, restrain, or perform any act, whether such act has legislative, executive, or judicial force; the orders and the acts, including the performance in compliance with such orders, shall be deemed lawful and constitutional under this Constitution, and shall be final. When those have been carried out, a report shall be made to the President of the National Assembly and the Prime Minister for acknowledgement without delay." In this regard, all orders so issued are considered lawful and final, and all public discussions about the Interim Constitution are prohibited. Furthermore, the Constitution also grants amnesty for all past and future military actions concerning the coup.

Key Rule of Law Structures

The 2014 Interim Constitution recognises Thailand as a democratic state, with the King as Head of State, and the sovereign power belonging to Thai people.[24] The rule of law provisions under the 2007 were revoked, however, the Interim Constitution provides for the recognition of human dignity, rights, liberties, and equality previously enjoyed by the Thai people under conventions issued by the democratic regime of government with the King as Head of State. In addition, the Interim Constitution states that all of Thailand's existing international obligations shall be protected. The Interim Constitution was drafted to pave the way for the establishment of a national legislature to exercise the legislative power, a provisional cabinet to take charge of public administration, and an independent judiciary. In addition, it sets up the National Reform Council to execute extensive national reforms and approve a draft new Constitution drafted by the Constitution Drafting Commission.

In Thailand, the rule of law is a basic principle applied to govern the country since the uncodified Constitution up to the present. The rule of law has been continuously recognised in provisions since the 1932 Constitution. Even though rule of law provisions under the 2007 Constitution were removed in the 2014 Interim Constitution, all human dignity, rights, and liberties previously enjoyed by the Thai people,

24 2014 Interim Constitution, Sections 2 and 3.

as well as international obligations of the country, are still protected by the 2014 Interim Constitution.[25] In addition, it provides that the Constitution Drafting Commission shall prepare the draft Constitution to cover many matters, including an efficient mechanism for the reinforcement of principles of the rule of law, and the cultivation of morality, ethics, and good governance in every sector and every level.[26] Resulting from this, in the current Draft Constitution of the Kingdom of Thailand of 2016, the rule of law is recognised as a general principle by which the performance of duties of the National Assembly, the Council of Ministers, the courts, constitutional organisations, and state agencies shall comply with.[27]

Foundation & Evolution of Rule of Law

In 2011-2015, the government-appointed Independence National Rule of Law Commission (NRLC) underwent a process of formation. The NRLC, chaired by Professor Dr. Ukit Mongkolnavin, aims to promote the sustainable development of the rule of law in Thailand. Due to the work of the NRLC, the rule of law situation in Thailand was studied and researched. The solutions to disseminating information on the rule of law to all sectors of society to enhance people's knowledge and understanding on the subject, as well as their awareness of its significance, respect for, and compliance with it, were analysed. One remarkable piece of work of the NRLC is the booklet on *"The Rule of Law: Meaning, Essence and Sanctions of the Rule of Law."* This booklet is the result of the collaboration of a group of law academics from leading universities and practitioners in the justice process, including judges, public prosecutors, police officers, solicitors, and barristers, who jointly undertook an extensive study, analysis and debate, and have achieved a successful result.[28] A series of studies and materials of the NRLC was submitted to the government for its consideration.

The NRLC's works define the meaning rule of law as a basic legal principle, which any legislation, justice process, or act shall not contravene, be in conflict with, or be contrary to.[29] The essence and sanctions of the rule of law are divided into two categories of strict and general meanings of the rule of law.

The strict or narrow meaning of the rule of law consists of the following:

1. The principle of independence and impartiality of the judges shall be adhered to;
2. Law must be applicable to all;
3. Law must be promulgated to the public;
4. State officials shall exercise their powers only to the extent as authorised by law;
5. An alleged offender or defendant in a criminal case shall have the right of defence;
6. Criminal law shall not have a negative retroactive effect on the offender;
7. Double jeopardy is prohibited;
8. A person enjoys the right against self-incrimination; and
9. The law cannot exempt from liability any act which has not been committed.

25 Id., Section 4.

26 Id., Section 35.

27 The Draft Constitution of the Kingdom of Thailand of 2016 ['2016 Draft Constitution'], Section 3.

28 The Independence National Rule of Law Commission, *The Rule of Law: Meaning, Essence and Sanctions of the Rule of Law* (Bangkok: Charernratprinting, 2015).

29 Id., p.1.

Any legislation, justice process or act which contravenes, is in conflict with, or is contrary to this strict meaning of the rule of law shall be invalid.[30]

The general or broad meaning of the rule of law means good characteristics of any legislation, justice process, or act, which could be considered as the ideology of law and justice process. The essence of the general or broad meaning of the rule of law means:

1. Good law must be clear;
2. Good law must not conflict with itself;
3. Good law must be based on reasonableness;
4. Good law must lead to fairness;
5. Good law must protect human rights, human dignity, and fundamental rights;
6. Good law must be a living instrument that could respond to the changes in society, economy, politics, culture and technology;
7. Good law must be enacted by the competent authority in accordance with procedures prescribed by the law;
8. Good law shall not have a negative retroactive effect on a person's rights, duties or liberties;
9. Good law must have an appropriate penalty proportional to the gravity of the offence;
10. Good law must be effectively enforced; public awareness and the respect for the law and the rule of law must be promoted;
11. The legislative process must be open, transparent, and accountable;
12. Good justice process must provide an opportunity to appeal;
13. Good justice process must provide an easy access, without undue delay, at reasonable costs;
14. Good justice process must provide an easy access to alternative dispute resolution;
15. Lawyers, state officials, and persons involved in the justice process must be independent and impartial in the performance of their duties; and
16. Lawyers, state officials, and persons involved in the justice process must maintain integrity, morality, kindness, and peacefulness.

Any legislation, justice process or act which does not possess those good characteristics and the essence pursuant to the general meaning of the rule of law are still enforceable so long as they are not in conflict with the strict meaning of the rule of law.

Human Rights Treaties

Thailand is a party to seven of nine major human rights treaties, with some reservations, namely: Article 30(1) of the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Article 22 of the Convention on the Rights of the Child (CRC); and Articles 7, 10, 16, and 29(1) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Thailand is in the process of incorporating treaty obligations into domestic laws. In addition, on 9 January 2012, Thailand

30 Ibid.

signed the International Convention on the Protection of All Persons from Enforced Disappearance (CED), which is one of the core human rights treaties, and is now in the process of ratifying the same.

Interpretation & Use of the 'Rule of Law'

Since 2011, the political turmoil and military coup led the rule of law to become one of the most contentious issues in society. Within the junta governing, the circumstances to invoke or to give effect to the rule of law are limited. In 2014, the 2007 Constitution, which explicitly recognised the rule of law, was annulled and circumstances to invoke the rule of law have been controlled and limited by the junta. However, Section 35(6) of the Interim Constitution stipulates that the Constitution Drafting Commission shall prepare an efficient mechanism for the reinforcement of principles of the rule of law and the cultivation of morality, ethics, and good governance in every sector and every level. During the drafting process, the proposal of the NRLC concerning the definition, essence, and sanctions of the rule of law were submitted to the Constitution Drafting Commission.

TABLE 2

ADMINISTRATION OF JUSTICE GRID

Indicator	Figure
No. of judges in country	4,480 (Nov 2015)[31] (increase of 184 since 2011)
No. of lawyers in country	65,647 (Feb 2016)[32] (increase of 10,327 since 2011)
Annual bar intake (including costs and fees)	US$ 100 (approx.)[33] (no change since 2011)
Standard length of time for training/qualification	1 year[34]
Availability of post-qualification training	Training is available to lawyers, provided by the Lawyers Council of Thailand; to prosecutors, by the Training and Development Office of the Attorney-General; and to judges, provided by the Judicial Training Institute[35]
Average length of time from arrest to trial (criminal cases)	Less than 1 month (in 2014, 80% of criminal cases were terminated).[36]

31 Office of Court of Justice (23 November 2015).

32 Lawyers Council of Thailand under the Royal Patronage (10 February 2016)

33 The Thai Bar under the Royal Patronage < www.thethaibar.or.th>

34 Ibid.

35 Human Rights Resource Centre, Judicial Training in ASEAN: A Comparative Overview of Systems and Programs (Singapore: Konrad-Adenauer-Stiftung, 2014) [Judicial Training in ASEAN]; Lawyers Council of Thailand under the Royal Patronage <http://www.lawyerscouncil.or.th/>; Training and Development Office of the Attorney-General <http://www.dt.ago.go.th/dt/>; and Judicial Training Institute < http://www.jti.coj.go.th/>

36 Courts of Justice, *Annual Judicial Statistics*, Thailand 2014 http://www.oppb.coj.go.th/doc/data/oppb/Annual_Tha_2014.pdf accessed 10 March 2016.

Average length of trials (from opening to judgment)	In general, 2-3 months to 2-3 years, depending on the nature and complexity of the case
Accessibility of individual rulings to public	Full judgments are accessible to litigants, and in summarised form, to the public (no change since 2011); also accessible online via <http://www.deka.2007.supremecourt.or.th>
Appeal structure	Court of First Instance, Court of Appeal, and Dika (Supreme) Court
Cases before the National Human Rights Institution	689 cases (gross per year) (2014) Most concern violations of rights in criminal proceedings, community rights, and political rights.[37]
Complaints filed against the police, the military, lawyers, judges/ justices, prosecutors or other institutions (per year)	*Before the Department of Discipline of the Royal Thai Police* 956 cases (2013)[38] *Before the Lawyer Professional Ethics Commission* 336 cases (2014)[39]
Complaints filed against other public officers and employees	*Before the National Anti-Corruption Commission* 2,876 cases (2013)[40]

37 National Human Rights Commission of Thailand, 2014 *Human Rights Evaluation Report and Annual Report of the National Human Rights Commission of Thailand*. (June 2015) <http://www.nhrc.or.th/webdoc/annual-report-2014.pdf> accessed 12 Feb 2015.

38 Department of Discipline, The Royal Thai Police. *Statistic of Cases* <http://www.discipline.police.go.th> accessed 12 Feb 2016.

39 Lawyers Council of Thailand (10 February 2016)

40 National Anti-Corruption Commission, *Annual Report 2013*. <https://www.nacc.go.th/images/article/freetemp/article_20150227161247.pdf> accessed 18 Feb 2016.

II. COUNTRY PRACTICE IN APPLYING THE CENTRAL PRINCIPLES OF RULE OF LAW FOR HUMAN RIGHTS

A. On Central Principle 1 (Government and its officials and agents are accountable under the law)

Definition and Limitation of the Powers of Government in the Fundamental Law

The separation of powers has been enshrined in all Thai constitutions since the 1932 Constitution. Under the 2014 Interim Constitution, the legislative branch, called the National Legislative Assembly, consisting of not more than 220 members appointed by the King upon the advice of the NCPO, acts as the House of Representatives, the Senate, and the National Assembly. The executive branch consists of the King as the Head of State; the Prime Minister, who is appointed by the King as the head of government; and not more than 35 other ministers, appointed upon the advice of the Prime Minister, constituting the Council of Ministers, which has the duty to carry out the administration of state affairs, put into effect a reform of different fields, and promote unity and harmony among the people of the nation.

The judicial branch is vested with the power to try and adjudicate cases in the courts in the name of the King. Thailand has four categories of courts: Courts of Justice, Constitutional Court, Administrative Court, and Military Court. The Courts of Justice has a three-level court structure, comprising of Courts of First Instance, the Court of Appeal, and the Supreme Court, and also includes other specialised courts, such as the Central Bankruptcy Court, the Labour Court, the Environmental Court, the Central Intellectual Property, and International Trade Court. The Constitutional Court is an independent court established under the 1997 Constitution with jurisdiction over the constitutionality of parliamentary acts, royal decrees, draft legislations, as well as the appointment and removal of public officials, and issues regarding political parties. The Administrative Court has jurisdiction over disputes arising from administrative acts of state officials, and the Military Court was established to deal with military personnel and persons arrested during periods of martial law.

Human rights groups in the region have however noted that the National Council for Peace and Order (NCPO) Order 13/2016 confers sweeping powers to "Prevention and Suppression Officers" from the Royal Thai Armed Forces and their actions under this Order are not subject to judicial review. This results in a removal of power from the judiciary and erodes the system of checks and balances.[41]

The 2014 Interim Constitution reaffirms that the sovereign power belongs to the Thai people, and the King shall exercise such power through three separate organs. This is according to the provision of Chapter II, The King, of the 2007 Constitution, which is still in force as part of the 2014 Interim Constitution under Announcement of the NCPO No. 11/2557, dated 22nd May, B.E. 2557 (2014).

The National Anti-Corruption Commission (NACC), an inspection mechanism, continues to inspect the assets and liabilities of persons holding political positions. The government is subject to scrutiny by the Constitutional Court. In addition, the Administrative Court has been set up to use judicial powers to investigate and to decide disputes arising from administrative acts by state officials, whether that matter concerns a state organ and a private individual, or is one between state organs themselves.

41 'Thailand: Human rights groups condemn NCPO Order 13/2016 and urge for it to be revoked immediately,' *Forum Asia*, 5 April 2015, <https://www.forum-asia.org/?p=20537> accessed 7 May 2016.

Amendment or Suspension of the Fundamental Law

The 2007 Constitution of the Kingdom of Thailand stipulates rules and procedures on amending the Constitution.[42] However, after the coup in 2014, the 2007 Constitution was partly cancelled by the junta, including the rules and procedures on amending the Constitution as stipulated in the 2007 Constitution, violating the rule of law and democratic principles recognised by the ASEAN Charter, as well as basic political rights. The mechanism of drafting the new Constitution of the country is established by the 2014 Interim Constitution.[43] Sections 32 to 39 provide for a Constitution Drafting Commission appointed by the president of the National Reform Council. The Commission shall prepare the draft Constitution to cover the following matters:

1. The recognition of the unity and indivisibility of the Kingdom;
2. The adoption of a democratic regime of government with the King as Head of State;
3. An efficient mechanism for preventing, scrutinising, and eliminating dishonest acts and malfeasance in both the public sector and private sector, including a supervision and control mechanism, which ensures that state powers are executed in the common interests of the nation and the public;
4. An efficient mechanism for prevention and scrutiny to absolutely exclude from holding a political position a person who has been convicted of committing a dishonest act or a malfeasance, by judgment or lawful order, or has committed an act which causes an election not to proceed in an honest or fair manner;
5. An efficient mechanism for ensuring that state officials, especially those holding political positions, and political parties, are able to perform duties or carry out activities independently, without being illegally manipulated or directed by any person or group of persons;
6. An efficient mechanism for the reinforcement of principles of the rule of law and the cultivation of morality, ethics, and good governance in every sector and every level;
7. An efficient mechanism for restructuring and stimulating the system of economy and society for the purpose of attaining sustainable fairness and preventing the administration of state affairs that is aimed at creating demagoguery that may cause detriment to the economic system of the country and the public in the long term;
8. An efficient mechanism for ensuring that the expenditure of the state is worthwhile and able to respond to the common interests of the public, while being in accordance with the financial and fiscal status of the country, and an efficient mechanism for scrutiny and disclosure of expenditure of the state;
9. An efficient mechanism to prevent the impairment of essential principles which are to be enshrined by the Constitution; and
10. A mechanism to drive the completion of a reform of substantial matters.

Presently, Thailand is under the process of drafting the new Constitution. Sections 252 to 253 of the draft Constitution stipulate rules and procedures on amending the Constitution. Any motion for amendment must be proposed by the Council of Ministers, members of the House of Representatives or/and senators, or persons having the right to vote in numbers which are stated in the Constitution. The motion must be

42 The Constitution of the Kingdom of Thailand of 2007 [2007 Constitution'], Section 291.

43 2014 Interim Constitution, Sections 32-39.

proposed in the form of a draft constitutional amendment, and the National Assembly will consider and vote on it in three readings. After the resolution has been passed, the draft will be presented to the King for his signature, and it shall come into force after being published in the Government Gazette. The enactment of ordinary legislation is done by the National Legislative Assembly according to Sections 14 to 15 of the current Constitution. The King enacts an Act by and with the advice and consent of the National Legislative Assembly.

Laws Holding Public Officers and Employees Accountable

The mechanisms established by the 1997 Constitution, namely: the Constitutional Court, Administrative Court, National Human Rights Commission, Ombudsman, Supreme Court's Criminal Division for Persons Holding Political Positions, and NACC, are still in force. Accountability for private gain, acts that exceed their authorities, and the violation of fundamental rights are subject to those mechanisms.

Apart from abovementioned mechanisms, official misconduct, abuse of power, and excess of jurisdiction are also dealt with by the various disciplinary boards established under internal codes for each organ, such as the civil service commission, the judicial officer commission, and the police commission. For instance, 956 cases (2013) of police misconduct have been investigated by the Department of Discipline of the Royal Thai Police.[44]

Special Courts and Prosecutors of Public Officers and Employees

In Thailand, the Supreme Court's Criminal Division for Persons Holding Political Positions is the court that handles criminal cases against persons who hold political positions. Apart from that, the Administrative Court has competence to try and adjudicate administrative cases, which refer to disputes between a private individual and an administrative agency or a state official, or to a dispute between an administrative agency and state officials themselves.[45] The nature of such cases necessarily involves the exercise of administrative power, neglect of official duties, unreasonable delay in the performance of duties, an administrative tort, or other liabilities incurred by an administrative agency or state official in relation to an administrative case falling within the jurisdiction of the Administrative Court. Before the Administrative Court, administrative judges and prosecutors for administrative cases are assigned to specific cases.

B. On Central Principle 2 (Laws and procedures for arrest, detention and punishment are publicly available, lawful, and not arbitrary)

Publication of and Access to Criminal Laws and Procedures

There are no remarkable changes in policy or practice; the criminal laws and procedures, including administrative rules, such as the Ministerial Regulations on Rules and Procedure relating to detention, imprisonment, and provisional release, are published in Thai language. This makes it quite easy for the public to read and understand them. Beyond publication in the Government Gazette, they are also published on

44 The Royal Thai Police, *Statistic of Cases*.

45 Administrative Court <http://www.admincourt.go.th/>

the official website of government organs. Hence, Thai laws are widely and easily accessible for everyone, not only in hardcopies but also in electronic versions at the websites of the Government Gazette <http://www.ratchakitja.soc.go.th> or the Office of the Council of State <http://www.krisdika.go.th>.

Accessibility, Intelligibility, Non-reactivity, Consistency, and Predictability of Criminal Laws

Laws and procedures on arrest, detention, and punishment are printed and published in the Government Gazette, and published online via the official website of government organs. Hence, these laws and procedures are accessible to everyone. If an arrested person does not understand the Thai language, criminal procedure law requires that the inquiry officials provide a translator for the arrestee.[46]

Under the Interim Constitution, a law will come into force after being published in the Government Gazette.[47] Laws do not generally have retroactive effect. Even though the provision of the 2007 Constitution concerning non-retroactivity has been annulled, the Thai Penal Code guarantees non-retroactivity with regard to criminal offences.[48]

Detention Without Charge Outside an Emergency

According to law, any arrest or detention must be made by the order or warrant of the court, or upon other causes provided by law.[49] The court will issue the warrant of arrest, detention, and imprisonment only when evidence reasonably shows that the accused has committed an offence, and there is cause to believe that he will escape or interfere with the evidence.[50]

The 2005 Emergency Decree provides broad powers to the Prime Minister, permitting the delegation of sweeping emergency power to law enforcement officials, and reducing accountability to the parliament and the courts.[51] In addition, it allows competent officials to arrest and detain a person for an initial period of seven days, with possible extensions for up to 30 days.[52] The ordinary procedure on detention under the Criminal Procedure Code only applies at the end of this period of detention.[53]

However, after the coup, the junta replaced martial law with its new protocol, Section 44 of the Interim Constitution, which has significantly broadened its authority while still retaining the power to crush political dissent with arrests and detentions. All orders so issued are considered lawful and final, and all public discussions about the Interim Constitution are prohibited.

46 Criminal Procedure Code, Article 13.

47 2014 Interim Constitution, Section 15.

48 Penal Code, Section 2(1)-(2).

49 Criminal Procedure Code, Section 58; and the Regulations of the President of the Supreme Court on Rule and Procedure Relating to the Issuing of the Order or a Warrant B.E.2548.

50 *Ibid.,* Sections 66 and 71.

51 The 2005 Emergency Decree on Public Administration in Emergency Situation, B.E. 2548 ['2005 Emergency Decree']

52 Ibid., Section 12, para 1.

53 Ibid.

Rights of the Accused

Freedom from Arbitrary or Extra-legal Treatment or Punishment, and Extra-Judicial Killing

There are no remarkable changes in the law. Thailand is a party to the CAT and is now in the process of its implementation. Currently, the only provision relating to this is in the Criminal Procedure Code, which stipulates that inquiry officials are not allowed to make, or be made to do, any act of deception, threat, promise, torture, or coercion over the accused to make any particular statement in connection with the charge.[54]

Extra-judicial killing in Thailand is prohibited; it may be undertaken by officials only for self-defence, or to prevent suspects from escaping.[55]

Thai Criminal Procedure Law recognises the right to habeas corpus in the case of any person detained in a criminal case, or in any other unlawful case. According to the law, the detainee himself, the public prosecutor, the inquiry official, the head of the jail or the jail officer, or spouse or relatives of the detainee, are entitled to file a petition to determine the release of the person with the court empowered to try the criminal case. The court shall proceed without delay, and if the jail officer is unable to satisfy the court that the custody is lawful, then the Court shall order to release the detainee without delay.[56]

Presumption of Innocence

There is no data found indicating remarkable changes in law; the presumption of innocence is still recognised by laws. A person who has been charged in court with the commission of an offence is called an accused, and a person who has not yet been charged in court is called an alleged person.[57] Although there is no provision in the Criminal Procedure Code that explicitly affirms the presumption of innocence, it however recognises that where any reasonable doubt exists as to whether or not the accused has committed the offence, the benefit of the doubt shall be given to him; therefore, the presumption of innocence is also guaranteed by such provision.[58]

Legal Counsel and Assistance

There is no data found indicating remarkable changes in law; rights of the accused are still recognised by laws, including the right to counsel, or having the presence of trusted persons during interrogation. The accused is also entitled to meet and talk with the person who will be his or her lawyer, and has the right to let his or her lawyer or trusted person be present during interrogation.[59] In addition, the accused person is entitled to be informed of these rights at the time of arrest.[60]

54 Criminal Procedure Code, Section 135.

55 Penal Code, Section 78.

56 Criminal Procedure Code, Section 90.

57 Criminal Procedure Code, Sections 2(2) and (3).

58 Id., Sections 227, para 2.

59 Criminal Procedure Code, Sections 7/1 (1) and (2).

60 Id., Section 7/1, para 2.

Moreover, under the Criminal Procedure Code, in offences punishable by death penalty, or where the accused is less than 18 years old, the inquiry official or court must ask the accused if he or she has a lawyer. If he or she does not have one, then the state shall appoint one.[61] The appointed lawyers are entitled to receive a gratuity and be paid for their expenses by the court, pursuant to the rules designed by the Administrative Committee of Court of Justice.[62]

Knowing the Nature and Cause of the Accusation

There is no data found indicating remarkable changes in law; the right to be informed is still guaranteed by laws. According to the Criminal Procedure Code, the arrestee has the right to be informed of the precise charges against him,[63] and in case an accused person is summoned or brought or appears voluntarily before the inquiry official, the official shall notify him of the charges.[64] The right to communicate with their legal counsel is confirmed by the provision of the Criminal Procedure Code, which states that the arrestee or accused person is entitled to be informed of the right to meet and talk with his or her lawyer, and is entitled to communicate with his or her lawyer.[65] Additionally, the accused is entitled to have the presence of the lawyer or trusted person during interrogation,[66] and to appoint the lawyer to deal with preparing his or her defence at any stage of the proceedings.

Guarantees during Trial

There are no significant changes found in law; the right to be tried without delay, or the right to a speedy trial, is guaranteed by the Criminal Procedure Code. From the time of the entry of a charge, an accused is entitled to be tried speedily, continuously, and fairly. It restates that the accused is entitled to be examined rapidly, consecutively, and impartially.[67] Additionally, the trial and taking of evidence shall be conducted in open court and in the presence of the accused.[68] The trial and taking of evidence in the absence of the accused shall be done as an exception where the accused and lawyer have the court's permission not to attend the trial and the taking of evidence. In addition, the court may issue an order that the trial be conducted within closed doors, in the interest of public order and morality, or in order to prevent secrets concerning the security of the state from being disclosed to the public. Nevertheless, the judgment and order of such trial shall be read in open court.

Appeal

No data indicating remarkable changes in policy or practice was found; the right to appeal is still recognised by the law. The Courts of Justice, which has jurisdiction over all cases, comprise the following: Courts of First Instance; the Court of Appeal, and the Supreme Court of Justice (Dika Court). The Criminal Procedure

61 Criminal Procedure Code, Sections 134/1 and 173.

62 The Administrative Committee of Court of Justice's Rules on the Gratuity and Expense Payment for the Lawyer Appointed by the Court for the Accused or Defendant According to Article 173 of the Criminal Procedure Code B.E. 2548, and (No. 2) of B.E. 2550.

63 Criminal Procedure Code, Section 84.

64 Id., Section 134.

65 Criminal Procedure Code, Sections 7/1 and 8(3).

66 Id., Section 134/4 (2).

67 Criminal Procedure Code, Sections 8(1) and 134 para 3.

68 Id., Section 172.

Code recognises the right to appeal against the judgment or order, on questions of fact or questions of law, to a higher court, except where such appeal is prohibited under the law.[69] When judgment has been rendered by the Court of First Instance, the parties have the right to appeal to the Court of Appeal, and then all the way to the Supreme Court of Justice. [70]

Freedom from Double Jeopardy

No data indicating remarkable changes in policy or practice was found; the principle of *Ne Bis in Idem*, that no one shall be twice tried for the same offence, is recognised under the Penal Code and the Criminal Procedure Code. The Penal Code forbids punishment for the same act, including offences committed outside the country where the final judgment of the foreign court acquits or convicts the accused, in which case such judgment is final, and he or she may not be prosecuted again in Thailand.[71] In addition, Article 39 of the Criminal Procedure Code prohibits the prosecution of a case for the same cause of action twice and the re-trial or re-punishment of an offence, where a person has already been convicted or acquitted.

Remedy before a Court for Violations of Fundamental Rights

Even though the provision regarding the right of victims and witnesses to seek remedy, as stipulated in the 2007 Constitution, was annulled, victims of crimes who suffer damage to their rights may receive reasonable restitution. Under the provision of the Criminal Procedure Code, the victim is entitled to claim compensation for any act causing death, bodily harm, mental harm, loss of bodily freedom, reputation or property damage arising from the accused person's commission of the offence.[72] In addition, apart from claiming directly from the offenders, crime victims may be entitled to compensation from the state for monetary relief from the apprehension and conviction of the offender, pursuant to the Damages for the Injured Person and Compensation and Expense for the Accused in Criminal Case Act, B.E. 2544.

Despite there being no remarkable change in policy, since the 2014 coup, there has been no explicit practice on remedy before the court for fundamental rights violations, in particular, for persons whose fundamental rights have been violated by the coup as well as the junta government.

69 Id., Sections 192 bis, 218 and 219

70 Id., Section 193 and 216.

71 Penal Code, Sections 10 and 11.

72 Criminal Procedure Code, Section 44/1.

C. On Central Principle 3: (The process by which the laws are enacted and enforced is accessible, fair, efficient and equally applied)

Law Enactment

Openness and Timeliness of Release of Record of Legislative Proceedings

Legislation may be introduced through three channels: the National Legislative Assembly; the Council of Ministers; and the National Reform Council, as stated in the Constitution. Upon approval of a bill by the National Legislative Assembly, the Prime Minister shall present it to the King for His Royal Signature within 20 days from the date of the receipt of the bill from the National Legislative Assembly. The law comes into force upon its publication in the Government Gazette.

The legislative proceedings are made publicly and conveniently accessible. Every person has access to legislative proceedings by following and watching them online through the website of the Thai National Legislative Assembly at <http://www.senate.go.th/w3c/senate/main.php>.

Timeliness of Release and Availability of Legislative Materials

Draft acts, recordings, and transcripts are promptly uploaded on the website <http://www.senate.go.th/w3c/senate/lawdraft.php> for universal access. Apart from watching a real-time webcast of the National Legislative Assembly at <http://www.senate.go.th>, everyone who is unable to watch it in real time is able to access day-by-day legislative proceedings by getting the transcripts or minutes of the proceedings via such websites.

As stated above, legislative proceedings are publicly accessible in a convenient manner. Hence, everyone is able to get official draft laws and records of the legislative proceedings from the website of the Thai National Legislative Assembly at <http://www.senate.go.th/w3c/senate/main.php>, or of the Office of the Council of State at <http://www.krisdika.go.th>.

Law Enforcement

Equal Protection of the Law and Non-Discrimination

In Thailand, there is no Sharia Court, but the Statute of the Court of Justice (the Law of Court Organisation) provides that in civil suits, such as in family and succession cases, Islamic judges called *"Dato Yuttidham,"* also known as *"Kadi,"* will preside. The Act on the Application of Islamic Law in the Territorial Jurisdictions of Pattani, Narathiwat, Yala and Satun Provinces, B.E. 2489, was promulgated in 1946 and applies to civil suits concerning families and inheritance among Thai Muslims.

The poor is entitled to assistance for equal access to the courts, provided by the Legal Aid Unit of the Lawyers Council of Thailand. It provides free consultation and advice on legal issues, free representation to eligible persons, and legal dissemination activities. Further, it also runs a legal aid hotline from Mondays to Fridays and legal aid services via its web board. Moreover, the poor may also ask for any assistance from the Thai Bar or the Office of Attorney General.

Equality before the law is still protected by the law. Although the 2007 Constitution was revoked, Section 4 of the 2014 Interim Constitution recognises and protects human dignity, rights, liberties, and equality previously enjoyed by the Thai people under conventions issued by a democratic regime of government with the King as Head of State and existing international obligations. However, in practice, after the coup, equal protection of the law and non-discrimination has been challenged by the junta in banning political gatherings and arresting and detaining politicians and anti-coup activists.

Reparation for Crimes and Human Rights Violations' Victims/Survivors

Although the provision of the 2007 Constitution regarding the right of victims and witnesses to seek remedy was annulled, under the Criminal Procedure Code victims are entitled to claim reparation both from the offenders directly pursuant to the Criminal Procedure Code, and from the state according to the Compensation for Victims of Crime Act, B.E. 2544. An injured person is entitled to submit the request for compensation via the Office of Monetary Assistance to Injured Person and Accused Person in Criminal Case, the Rights and Liberties Protection Department, Ministry of Justice, or at the Office of Justice in every province within one year from the date the offence was committed and known to the injured person.[73] There is no available data highlighting practice in regards reparations for human rights abuses after the 2014 coup.

D. On Central Principle 4: (Justice is administered by competent, impartial, and independent judiciary and justice institutions)

Appointment and Other Personnel Actions in the Judiciary and among Prosecutors

No data indicating remarkable changes in policy in regards personnel actions was found. Administratively, judges and prosecutors are in practice independent from the influence of the military government. The appointment and removal from office of a judge or a prosecutor is done by the King. To be appointed as a judge or a prosecutor, a candidate must pass a highly competitive examination and chosen to be trainee before the royal appointment.

The judiciary was completely separated from the Ministry of Justice. The President of the Supreme Court acts as the head of the judiciary. The courts have an independent central administrative body, the Office of Judiciary, which has powers and duties to support judicial proceedings in all aspects of administrative work, judicial affairs, and judicial technical affairs, including cooperation with other government agencies.[74] Section 26 of the Interim Constitution affirms the independence of judges. Additionally, there are some laws to ensure judicial independence, such as the Law on Court Organisation, B.E. 2543, in which Section 32 provides that the President of the Supreme Court, the President of the Court of Appeal, presidents of regional courts of appeal, chief judges of courts of first instance, chief judges or chief justices of divisions in each court, shall be responsible for the assignment of cases to quorums of judges in their respective courts or divisions, in accordance with the rules and procedures prescribed by the judicial regulations of the Courts of Justice and the Judicial Officials' Regulations Regarding Cases Management. However, as noted above, the

73 The Act on Damages for the Injured Person and Compensation and Expense for the Accused in Criminal Case B.E. 2544 (2001), Section 22.

74 Rule of Law for Human Rights Study, p.272

power of judicial review has been significantly clipped by the NCPO.[75]

The appointment and removal from office of a judge are done by the King. In the case of the Court of Justice, the Judicial Commission oversees the appointment, promotion and discipline of judges. The appointment and removal from office of a judge of a Court of Justice must be approved by the Judicial Commission of the Courts of Justice before they are presented to the King. The promotion, increase of salaries, and punishment of judges of the Courts of Justice must be approved by the Judicial Commission of the Courts of Justice.

Hence, administratively, the judiciary and its functions are virtually independent from both the legislative and executive arms of government. Judges are governed by the Regulation of the Judicial Service Act, B.E. 2543, and may be dismissed from service only for proven misconduct, incapacity, or infirmity.

Training, Resources, and Compensation

With regard to the training of the judiciary, the Judicial Training Institute is an institute responsible for the training of judicial personnel.[76] The institute runs various kinds of legal and related knowledge trainings and seminars for all levels of judicial personnel, namely: career judges (including judge-trainees), lay judges (associate judges), senior judges, and Kadis (Datoh Justice).[77] Meanwhile, the Training and Development Office of the Attorney-General runs the training on legal and related knowledge programs for public prosecutors, as well as public prosecutor-trainees for annual recruitment.[78] According to a study on the potential development of judges, inadequate training is seen in both the structures and contents of the trainings, in particular the content on human rights, ASEAN integration, and ASEAN legal instruments.[79]

State's Budget Allocation for the Judiciary and Other Principal Justice Institutions

From 2011 to 2016, Thailand allocated budgets for the Ministry of Justice at around 0.05-0.15% of the total state budget. The amount of THB 2,364.1 million (0.1% of the state's budget) was allocated for the Ministry in 2011; THB 2,821.88 million (0.1% of the state's budget) in 2012; THB 2,862.16 million (0.14% of the state's budget) in 2013; THB 1,973.17 million (0.09% of the state's budget) in 2014; THB 1,512.54 million (0.07% of the state's budget) in 2015; and THB 1,256.97 million (0.05% of the state's budget) in 2016.[80] Drawing from the mentioned statistics, the respective amounts allocated to the Ministry of Justice of Thailand are quite small compared to the overall amount of the budget each year, and the budget allocated decreased gradually in the last five years.

With regard to judicial agencies, THB 3,362.11 million (0.15% of the state's budget) was allotted in 2015, and THB 4,697.24 million (0.20%) in 2016.

75 'Thailand: Human rights groups condemn NCPO Order 13/2016 and urge for it to be revoked immediately,' *Forum Asia*, 5 April 2015, <https://www.forum-asia.org/?p=20537> accessed 7 May 2016.

76 Judicial Training Institute, <http://www.jti.coj.go.th/> accessed 1 February 2016.

77 *T*he Act on Judicial Administration of the Courts of Justice, B.E. 2543

78 Training and Development Institute Office of the Attorney-General, <http://www.dt.ago.co.th> accessed 1 February 2016.

79 Judicial Training in ASEAN, pp. 19-20; Legal Research Institute Foundation. "Potential Development of Judges: A Comparative Study and Practices of Civil Law and Common Law Countries" (Bangkok: Courts of Justice, 2007).

80 Bureau of the Budget, *Thailand's Budget in Brief Fiscal* <http://www.bb.go.th/> accessed 10 Feb 2016.

Impartiality and Independence of Judicial Proceedings

The independence of the judiciary is guaranteed continuously by the Constitution of the country, including by Section 26 of the current Interim Constitution. The current Interim Constitution does not include a provision concerning the impartial manner of judicial proceedings and freedom from improper influence. In practice, after the coup, there are some cases which were influenced by the junta government, particularly those against politicians and anti-coup activists.

The draft of the new Constitution explicitly provides that judges are not allowed to be political officials or hold political positions.[81] These measures seek to prevent partiality and improper influence by public officials or any private cooperation.

Provision of Lawyers or Representatives by the Court to Witnesses and Victims/Survivors

No data indicating remarkable changes in policy or practice on competence and adequate training for lawyers was found. Lawyers, under the Criminal Procedure Code, have to be qualified lawyers who hold Bachelor of Laws (LL.B.) degrees from university and should have passed a training course provided by the Lawyers Council of Thailand. Regarding their sufficiency in number, as at 10 February 2016, there were 65,647 lawyers registered as members of the Lawyers Council of Thailand, which reflects a sufficient number of lawyers in the country.

Safety and Security of the Judiciary, Prosecutors, Litigants, Witnesses, and Affected Public

No data indicating remarkable changes in policy or practice was found. There is no specialised sector responsible for the security and protection of prosecutors, judges, judicial officers, as well as courthouses. However, Ministerial Regulation on National Security, B.E. 2552 states that all governmental organisations shall have their own security mechanisms[82] so the respective offices of judicial officials and the Office of the Attorney General have to provide security for their personnel and the institutions themselves. In the other words, they are empowered to hire security companies to protect themselves.

Normally, the security system at the courthouse will be set up by a private company to provide overall protection to persons in the courthouse. The members of the public, journalists, and affected parties enjoy the protection as such. There have been some exceptions, for example, victims and witnesses are entitled to enjoy special protection under the Act on the Protection of Witness in Criminal Cases Act, B.E. 2546, the Compensation for Victims of Crime Act, B.E. 2544, and other regulations, such as the Judicial Officials Regulation on the Treatment of the Witness, B.E. 2548 or the Judicial Officials Regulation on the Protection of and Allowance for the Witnesses in Criminal Cases, B.E. 2548.

81 2016 Draft Constitution, Section 198.

82 Ministerial Regulation on National Security B.E. 2551, Section 8.

Specific, Non-Discriminatory, and Unduly Restrictive Thresholds for Legal Standing

No data indicating remarkable changes in policy or practice was found; the threshold for standing before the courts of justice is prescribed by the Criminal Procedure Code and the Civil Procedure Code. Under the Criminal Procedure Code, cases can be brought by the Public Prosecutor and/or the injured person.[83] The threshold for criminal cases relates to the injury sustained as a result of any offence under the Penal Code, and such injury must have resulted from the act of the accused (causation). A criminal case may be withdrawn at any time before it is decided, but if the Public Prosecutor withdraws the prosecution of a compoundable offence, he must obtain the written consent of the injured person. However, the withdrawal of cases concerning both compoundable and non-compoundable offences by the public prosecutor does not preclude the injured person from reinstituting the suit. In the same way, the withdrawal of cases relating to a non-compoundable offence by the injured person does not preclude reinstitution of the case by the public prosecutor.[84]

In civil cases, under the Civil Procedure Code, the thresholds for legal standing before the civil court are: disputation involving his or her rights or duties under the civil law or willingness to exercise his or her right through a court. If the case meets these requirements, the plaintiff may submit his or her case to a civil court having jurisdiction and competence over the case.[85]

Publication of and Access to Judicial Hearings and Decisions

No data indicating remarkable changes in policy or practice was found; the judgment or order shall be read in open court, and then made available to parties to the case. Non-interested third parties do not have access to the full judgment of the court of justice, but only to the summary of the judgments of the Supreme Court through the official website of the Supreme Court at <http://www.deka2007.supremecourt.or.th/deka/web/search.jsp>. Moreover, judgments of the Administrative Court and the Constitutional Court are published publicly. Everyone can access the decisions and judgments of these courts through the official website of the Constitutional Court <http://www.constitutionalcourt.or.th> or the official website of the Administrative Court <http://www.admincourt.go.th>.

Reasonable Fees and Non-arbitrary Administrative Obstacles to Judicial Institutions

No data indicating remarkable changes in policy or practice was found; the jurisdiction of the courts is divided into four sections according to the court concerned: Civil Courts, Criminal Courts, Municipal Courts, and Provincial Courts. The municipal courts hear smaller matters, where the civil claim does not exceed THB 300,000 (approx. US$ 10,000), or when the imposable prison sentence does not exceed three years or a fine not exceeding THB 60,000 (approx. USD 2,000). Another difference between municipal courts and general courts is quorum. A general court requires two judges, whereas a single judge presides in a municipal court.

83 Criminal Procedure Code, Section 28.

84 Id., Sections 35 and 36.

85 Civil Procedure Code, Section 55.

Court fees are not an impediment to judicial access in criminal cases as there is no court fee in criminal cases. In civil cases, fees are two per cent of the disputed sum. In addition, there are some other administrative obstacles, such as justice services, which are very complicated and require legal knowledge. These obstacles increase inaccessibility to the courts for the poor; however, they may have access through the Legal Aid Unit in Thailand, particularly through the Lawyers Council of Thailand.

Assistance for Persons Seeking Access to Justice

No data indicating remarkable changes in policy or practice was found. Under the Constitution, all Thai persons are equal before the law, and everyone is entitled to equal protection by the law. All Thais have equal access to justice. The poor are entitled to assistance for equal access to the courts. This is provided by the Legal Aid Unit of the Lawyers Council of Thailand, the Thai Bar, or the Office of the Attorney General.

Measures to Minimize Inconvenience to Litigants and Witnesses, and their Families, Protect their Privacy, and Ensure Safety from Intimidation/Retaliation

No data indicating remarkable changes in policy or practice was found; the Act on the Protection of Witness in Criminal Cases Act, BE 2546 provides for the general and special protection of witnesses in criminal cases, and for the consideration of witnesses for compensation and allowances. In addition, the Office of Witness Protection was established in 2003 to deal with the protection of witnesses. Further, the Judicial Officials Regulation on the Treatment of the Witness, B.E. 2548 provides that witnesses should be treated politely and in a non-discriminatory fashion, bearing in mind local customs and traditions. The Criminal Procedure Code was amended to include a new procedure for the interrogation of children who are victims of violence, particular domestic violence, by allowing them to have prosecutors, psychologists, and social workers present during interrogation. Teleconference testimonies may be provided during the hearing to reduce confrontation with the defendants.[86] In addition, the Compensation for Victims of Crime Act, BE 2544 of 2001 also provides measures that consider compensation for the victims or injured persons in criminal cases.

Available and Fair Legal Aid to All Entitled

There are several legal aid organisations and programs in Thailand, and everyone can receive such aid. Some legal aid bureaus are supported and funded by the national government, while others are supported with funds from private enterprises. Much of the state-sponsored legal aid is provided by the Office of the Attorney General. With its role as the principal agency responsible for criminal prosecution and the provision of legal advice to the government and state agencies, the Office of the Attorney General is also tasked with the duty to protect civil rights and provide legal aid/assistance to the needy.[87] Legal aid is also offered in certain circumstances by the Lawyers Council, the Rights and Liberties Protection Department of the Ministry of Justice, the Legal Aid Office of the Thai Bar, and various law schools.

86 Criminal Procedure Code, Section 133 bis.

87 Latham & Watkins LLP, *A Survey of Pro Bono Practices and Opportunities in 71 Jurisdictions* (August 2012): 321-322. <http://www.probonoinst.org/wpps/wp-content/uploads/a-survey-of-pro-bono-practices-and-opportunities-in-71-jurisdiction-2012.pdf> accessed 10 Feb 2016.

General Public Awareness of Pro Bono Initiatives and Legal Aid or Assistance

The pro bono culture in Thailand is still at the beginning stage of development. Overall, the level of pro bono activity in Thailand is quite low, especially compared to the size and scope of the legal profession in Thailand. Support for pro bono work in the private sector is particularly lacking, and only a small minority of lawyers at private law firms volunteers their time for law-related pro bono projects. Nonetheless, there are limited pockets of pro bono opportunities in Thailand, mainly offered by non-profit organisations.

III. INTEGRATING INTO A RULES-BASED ASEAN

Progress towards Achieving a Rules-Based ASEAN Community

On Mutual Support and Assistance on the Rule of Law

To strengthen the rule of law pursuant to the blueprint of the ASEAN Political and Security Community (APSC), the Thailand Institute of Justice (TIJ) proposed to establish an ASEAN Conference on Crime Prevention and Criminal Justice (ACPCJ), which was accepted by Member States at the 16th ASEAN Senior Law Officials Meeting (ASLOM) held in Bali, Indonesia. The ACPCJ aims to promote and examine regional legal cooperation on the prevention of transnational organised crime and the strengthening of criminal justice institutions to facilitate greater ASEAN cooperation in support of ASEAN integration.[88] Importantly, Thailand has already ratified the Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries, which will be used as an instrument for cooperation on mutual assistance in criminal matters in the ASEAN region. In addition, Thailand has already arranged bilateral extradition treaties with many countries, such as the United Kingdom, Belgium, United States, China, Bangladesh, and some ASEAN countries, *i.e.*, Cambodia, Laos, Indonesia, Malaysia, and the Philippines.

On Legislative and Substantive Changes Promoting the Rule of Law

Thailand is in the process of drafting a new Constitution, wherein rule of law is one of the fundamental principles, The draft of the new Constitution contains provisions concerning the rule of law, which is applied throughout the legislative, executive, and judiciary branches of government.[89] Civil society and politicians from all sides are reported to have expressed that they do not want a Constitution that will prolong military rule or distort democratic will. The draft currently provides the process for electing members of the House of Representative and the process for electing and selecting the members of the Senate. The draft also allows the possibility of a parliament-selected Prime Minister, if approved by a joint session of the lower house and the appointed Senate.[90]

88 Thailand Institute of Justice (TIJ), 'TIJ joined the 16th ASLOM and the 9th ALAWMM,' <http://www.tijthailand.org/main/en/content/335.html> accessed 10 Feb 2016.

89 2016 Draft Constitution, Sections 3 and 26.

90 Ron Corben, 'Thai Political Parties Oppose Draft Constitution,' *Voice of America*, 11 April 2016, <http://www.voanews.com/content/thai-political-parties-oppose-draft-constitution/3279334.html>; Tan Hui Yee, 'Thailand's new draft Constitution unveiled,' *The Strait Times*, 30 March 2016, <http://www.straitstimes.com/asia/thailands-new-draft-constitution-unveiled>; 'Thailand unveils new constitution draft to public,' *DW*, 29 March 2016, <http://www.dw.com/en/thailand-unveils-new-constitution-draft-to-public/a-19147871> all links accessed 8 May 2016.

On Enactment of Laws relating to the ASEAN Community Blueprints and Similar Plans

To comply with the ASEAN Blueprints, the Preparedness Centre for the ASEAN Community (PCAC) has been set up, and Prime Minister Prayut Chan-o-cha chairs the Centre. The country has not yet amended the law or enacted a new law to implement the ASEAN blueprints, but the country has a plan to amend the law, as well as enact new laws, to promote compliance with the blueprints, such as at least seven pieces of legislation related to copyright, engineering, immigration, trademarks, extradition, foreign business, and foreign workers.

On Integration as Encouraging Steps toward Building the Rule of Law

After the coup in 2014, Thailand has been under a junta regime. The issue of the rule of law is widely criticised in public. ASEAN integration covers the rule of law in each ASEAN country, including Thailand. The rule of law in Thailand is promoted and encouraged under the drafting process of the new Constitution of the country and in the rule of law provisions provided in the current draft of the new Constitution, which recognise the rule of law in the legislative, executive, and judicial branches of government.[91] However, some provisions of the draft Constitution are deemed problematic, including by the different political parties of the country. For example, the Democratic Party's leader, Abhisit Vejjajiva, expressed concern that the draft would deprive people of their right to participate in the political process.[92]

On the Contribution of ASEAN Integration to the Building of Stronger State Institutions

The Thailand Institute of Justice (TIJ) was established by the Royal Thai Government in 2011, aiming to promote excellence in research and capacity building in justice and against crimes. Building on Thailand's engagement in the UN Commission on Crime Prevention and Criminal Justice and the UN Crime Congresses, TIJ serves as a bridge that transports global ideas to local practise, including in enhancing domestic justice reform and the rules-based community within the ASEAN region. The primary objectives of the TIJ are to promote the implementation of the United Nation Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) as well as other relevant UN standards and norms, especially those related to women and children. TIJ also gears its work towards important cross-cutting issues on the UN agenda, such as the rule of law, development, human rights, peace, and security.

Prospects and Challenges

Challenges to a Strengthened Commitment to the Rule of Law

Strengthening the rule of law is challenged by the political instability in the country, particularly, under the junta government, in which the rule of law is eroded by the coup and the NCPO has broad authority to limit or suppress fundamental human rights and is granted immunity for its actions. Media is controlled by the military and human rights violations have been commented on and argued negatively in many forums in all levels: domestically, regionally, and globally.

91 2016 Draft of Constitution, Sections 3 and 26.

92 Ron Corben, 'Thai Political Parties Oppose Draft Constitution,' *Voice of America*, 11 April 2016, <http://www.voanews.com/content/thai-political-parties-oppose-draft-constitution/3279334.html> accessed 8 May 2016.

Commitments and Plans/Initiatives in relation to ASEAN-wide Commitments and Declarations on Human Rights

Thailand has commitments concerning the rule of law for human rights in regional instruments, such as the ASEAN Charter, the ASEAN Declaration against Trafficking in Persons Particularly Women and Children and the ASEAN Declaration on Human Rights, which have been signed by Thailand. In addition, the country has ratified the Treaty on Mutual Legal Assistance in Criminal Matters among Like-Minded ASEAN Member Countries, and signed but not yet ratified the binding ASEAN Convention Against Trafficking in Persons, Especially Women and Children, which aims to prevent and combat trafficking in persons, to ensure the just and effective punishment of traffickers, to protect and assist victims, and foster cooperation among the parties. Apart from that, the country initiated the Regional Plan of Action to Combat Trafficking in Persons in the ASEAN Senior Officials Meeting on Transnational Crime (SOMTC) in 2012 to support the UN Global Plan of Action to Combat Trafficking in Persons and initiated the ASEAN Convention on Trafficking in Persons during the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) in 2013.[93]

IV. CONCLUSION

Nexus of the Changes to the Overall State of the Rule of Law for Human Rights

Due to the country's situation, the rule of law provisions recognised by the Constitution were revoked. Thus, the role of the rule of law for human rights, as an issue, has been questioned after the 2014 coup. The junta government, which was set up after the coup, has been questioned in particular for the way it has come to power and its exercise of power. The rule of law, which is fully recognised by the 2007 Constitution, has been eroded by the coup and continues to be eroded by the exercise of power by the junta. Hence, overall, the rule of law for human rights in the country has been degraded in the view of the international community.

Contributing Factors

The main factor that eroded the rule of law in the country has been the political conflict and the 2014 military coup. The military regime plays a great role in eroding the regime of the rule of law for human rights in the country. In particular, after the coup, the revocation of the 2007 Constitution, including the rule of law provisions, led to the country under the junta regime to be questioned for violations of human rights, particularly those committed by the NCPO and soldiers.

Role of the ASEAN Declaration on Human Rights in Strengthening Rule of Law for Human Rights

The principles on democracy, the rule of law, and human rights stipulated in the ASEAN Charter as well as the ASEAN Declaration on Human Rights reflect the regional development of the rule of law and human rights, which creates a good reputation not only for the region as a whole, but for each ASEAN country,

93 Ministry of Foreign Affairs, <http://www.mfa.go.th/main/th/issues/9894-%E0%B8%81%E0%B8%B2%E0%B8%A3%E0%B8%84%E0%B9%89%E0%B8%B2%E0%B8%A1%E0%B8%99%E0%B8%B8%E0%B8%A9%E0%B8%A2%E0%B9%8C.html> accessed 10 March 2016.

including Thailand. Thailand is a signatory of the ASEAN Declaration on Human Rights, in which a minimum standard of human rights guarantees is recognised by the international community. However, there are events that erode the rule of law, such as the coup in 2014 and its aftermath, and other alleged human rights violations by the junta—in particular, violations of the political rights of the people in the country and the violations of human rights by officials, especially those under the control of the NCPO.

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The Thai Bar under the Royal Patronage <www.thethaibar.or.th>

Training and Development Office of the Attorney-General <http://www.dt.ago.go.th/dt/>

The Socialist Republic of Vietnam

VIETNAM

TABLE 1

SNAPSHOT BOX

Formal Name	The Socialist Republic of Vietnam
Capital City	Hanoi
Independence	1945 (from France)
Historical Background	In its early history, Vietnam underwent a thousand years of Chinese domination. In the 10th century, it gained independence from it. Feudalism flourished with the expansion of its territory to the south. However, in the late 19th century, it became a colony of France. Vietnam declared independence from France in 1945. In 1946, Vietnam held the first National Assembly election, which adopted its first Constitution. However, the situation was precarious as the French tried to regain power by force, causing Vietnam War I (1946-1954). After the defeat of France in 1954, the country was divided into the north and the south. The south was named the Republic of Vietnam; while the north, the Democratic Republic of Vietnam. The intervention of the United States led to Vietnam War II, which ended in 1975 after the victory of the north. The country was unified and followed the soviet political and economic structures. In 1986, Vietnam implemented a number of economic reforms (known as "Doi Moi"), which developed a market-oriented economy, and provided for the country's integration with the world. Vietnam established diplomatic relations with 178 nations,[1] and economic, trade and investment relations with more than 224 nations and territories. It also became a member of the United Nations (UN), the Association of South East Asian Nations, Asia-Europe Meeting, Asia-Pacific Economic Cooperation (APEC), World Trade Organisation (WTO), International Francophone Organisation, and other international organisations. Since 2000, Vietnam has been one of the countries with the fastest economic growth in the world.
Size	332,698 sq. kms[2]
Land Boundaries	Vietnam is located on the eastern Indochina Peninsula. The combined length of the country's land boundaries is 4,639 kms,[3] and its coastline is 3,444 kms long (excludes islands).[4] Vietnam has a land border with China in the north, and Cambodia and Laos in the west.
Population	90,520,000, of which: Male: 44,620,000 Female: 45,900,000[5]

1 Consulate General of Vietnam in Houston, Foreign Policy of Vietnam <http://vietnamconsulateinhouston.org/vi/learn-about-vietnam/foreign-policy> accessed 26 February 2016

2 World Bank, 'World Development Indicators' (22 Dec 2015) <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG/countries/VN?display=graph > accessed 26 February 2016.

3 CIA, World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/print/country/countrypdf_vm.pdf> accessed 26 Feb 2016.

4 Ibid.

5 General Statistics Office, Population and Household (Báo cáo dân số và nhà ở), Hanoi, 2015; see also CIA, CIA World Factbook, 2014

Demography	0-15 yrs. = 23.5%; 15-64 yrs. = 69.1%; 60 yrs. and over = 10.2%; 65 yrs. and over = 7.1% (2015 est.)[6]
Ethnic Groups	Kinh (Viet) 85.7%, Tay 1.9%, Thai 1.8%, Muong 1.5%, Khmer 1.5%, Mong 1.2%, Nung 1.1%, others 5.3%[7]
Languages	Vietnamese, ethnic and regional dialects[8]
Religion	Buddhist 9.3%, Catholic 6.7% Muslim 0.1%, Protestant 0.5%, Hoa Hao 1.5%, Cao Dai 1.1%, none 0.1% (2014 est.)[9]
Adult Literacy	95.4 %: male: 96.4 %, female: 93.7% (2014 est.)[10]
Gross Domestic Product	6.6% (2015)[11]
Government Overview	There has been no change since 2011, except in the organisation of the People's Court. Vietnam is a single-party socialist state officially espousing communism. Its current Constitution, the 2013 Constitution, asserts the central role of the Communist Party of Vietnam (CPV) amongst all organs of government, politics, and society.[12] All senior government positions are held by members of the CPV.[13] The government of Vietnam operates under the principle of parliamentary supremacy. The National Assembly, the highest organ of state power, is superior to both the executive and judicial branches, and is vested with constitutional and legislative powers. The National Assembly, a 498-member unicameral body elected to a five-year term, meets twice a year.[14] The authority of the National Assembly includes, amongst others, the power (i) to pass the Constitution and the laws; (ii) to organize, grant authority, and dictate the activities of the state, the Presidency, the Supreme and Local People's Court, the People's Procuracy, and local administrations; (iii) appoint and dismiss the heads of executive and judicial state organs; and (iv) to pass the national economic, social, and monetary plans and policies, and the state budget.

6 Ibid.

7 Ibid.

8 CIA, World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/print/country/countrypdf_vm.pdf > accessed 26 Feb 2016

9 Ibid.

10 Ibid.

11 World Bank, 'World Development Indicators' (22 Dec 2015) <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG/countries/VN?display=graph > accessed 26 February 2016.

12 Switzerland Global Enterprise, 'Attachment Vietnam and Vietnamese ICT Sectors', p.4, <http://www.s-ge.com/fr/filefield-private/files/208725/field_event_public_files/96380> accessed 26 February 2016.

13 Global Investment Centre, 'Vietnam Electoral, Political Parties Laws and Regulations Handbook', International Business Publication, USA, 2015, p. 43-44.

14 Ibid.

	The President, appointed by the National Assembly, is the head of the state, and represents Vietnam in domestic and foreign affairs. The President has the authority to: (i) enact legislation; (ii) act as chief of the armed forces; (iii) propose to the National Assembly the appointment or dismissal of the Prime Minister and other key members of the government; (v) approve national amnesty; and (vi) sign international treaties, amongst others. The executive branch of Vietnam's government, consisting of various ministries, is headed by the Prime Minister, who is elected by the National Assembly. The executive branch promulgates decrees, and clarifies rules and regulations. Local governments administer laws, and control, adopt, and develop policies for their respective localities. The Vietnamese judicial system is comprised of several levels of courts, tribunals, and a Supreme People's Procuracy. The highest court in the country is the Supreme People's Court. Underneath the Supreme People's Court are three levels of courts: (i) the superior courts, which are appellate courts based in Hanoi, Danang, and Ho Chi Minh City, each responsible for the northern, central, and southern regions of the country; (ii) the provincial-level people's courts; and (iii) the district-level people's courts, which are at the lowest level. Provincial and municipal courts are both trial courts and appellate courts, while district courts are trial courts only. There are military tribunals established in accordance with divisions of the Vietnam People's Army, the highest one being the Central Military Tribunal, which is subordinate to the Supreme People's Court.
Human Rights Issues	Under the active process of integration, human rights have improved gradually in Vietnam. However, there are still many issues. The main human rights issues in Vietnam include, amongst others, freedom of expression and association, arbitrary detention, human trafficking, and freedom of religion.
Membership in International Organisations	Vietnam was admitted to the UN in September 1977 and gained membership in some of its specialised and related agencies, such as the Food and Agriculture Organization (FAO), the World Bank, the International Civil Aviation Organization (ICAO), the International Monetary Fund (IMF), the UN Development Program (UNDP), the UN Educational, Scientific, and Cultural Organization (UNESCO), the World Health Organization (WHO), and the World Intellectual Property Organization (WIPO). Vietnam is also a member of the Asian Development Bank (ADB), the Colombo Plan, the Economic and Social Commission for Asia and the Pacific (ESCAP), Intelsat, the Mekong Development Project Committee, the Nonaligned Movement, APEC, ASEAN, and WTO.[15]

15 Supra note 13, p.12, 91; see also CIA, World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/print/country/countrypdf_vm.pdf> accessed 26 Feb 2016.

Human Rights Treaty Commitments	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Signed: 7 November 2013. Ratified: 5 February 2015. International Covenant on Civil and Political Rights (ICCPR). Acceded: 24 September 1982. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Signed: 29 July 1980. Ratified: 17 February 1982. International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Acceded: 9 June 1982. International Covenant on Economic, Social and Cultural Rights (ICESCR). Acceded: 24 September 1982. Convention on the Rights of the Child (CRC). Signed: 26 January 1990. Ratified: 28 February 1990. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC-OP-AC). Signed: 8 September 2000. Ratified: 20 December 2001. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (CRC-OP-SC). Signed: 8 September 2000. Ratified: 20 December 2001. Convention on the Rights of Persons with Disabilities (CRPD). Signed: 22 October 2007. Ratified: 5 February 2015.

I. INTRODUCTION

Vietnam has undergone a fast pace of economic and legal development since its implementation of the Doi Moi (Renovation) reformation policy, which emphasizes promotion of multicomponent commodity economy, active integration and increased democratic governance.

The government of Vietnam operates under the principle of parliamentary supremacy. The National Assembly is the highest organ of state power, superior to both the executive and judicial branches, and is vested with constitutional and legislative powers.

Vietnam, along with China, Cuba, and Laos, is one of the world's four remaining single-party socialist states officially espousing communism. The Communist Party of Vietnam (CPV) is defined under the Constitution as the "leading force of the state and the society,"[16] and thus, assumes a central role in all organs of government, politics, and society. Members of CPV hold all senior government positions.[17] Therefore, the election of the National Congress of the CPV is important to the development of the country.

16 Article 4, Constitution 2013

17 Global Investment Centre, 'Vietnam Electoral, Political Parties Laws and Regulations Handbook', International Business Publication, USA, 2015, p. 43-44.

The significance of the development of rule of law in Vietnam was recognised in the Constitution of 1992 for the first time. The concept was further cemented in the recently adopted Constitution of 2013. Accordingly, Article 2 of the 2013 Constitution states that "[the] Socialist Republic of Vietnam is a socialist rule of law State of the People, by the People and for the People. […] The State powers are unified and delegated to state bodies, which shall coordinate with and control one another in the exercise of the legislative, executive and judiciary powers." However, up to now, there has been neither a legal procedure nor a state institution for directly enforcing constitutional norms.

Key Rule of Law Structures

Vietnam adopted a new Constitution in 2013, which aims at further strengthening the status of Vietnam as a democratic state that respects the principle of the supremacy of the law.[18] In particular, Article 8 of the Constitution provides that, "the [government] shall be organised and operates in compliance with the Constitution and the law, manages society by the Constitution and the law and practices the principle of democratic centralism." All government bodies and agencies, economic and social organisations, and army and police forces must strictly abide by the Constitution and the law. Individual citizens are equal before the law,[19] and have the duty to respect the Constitution and the law.[20] All actions violating the legitimate rights and interests of the state and state agencies, as well as interests of individuals and private associations, shall be handled in compliance with the law.

With respect to the economic regime, Vietnam recognises and pursues the development of a "market economy under the socialist orientation"[21] with "multi-forms of ownership and multi-sectors of economic structure."[22] Participants in different economic sectors in the national economy are deemed equal, and cooperate and compete in accordance with the law. In addition, the government undertakes to provide favourable conditions for entrepreneurs, enterprises, individuals, and other organisations to invest, produce, and do business, and to contribute to the stable development of economic sectors and nation building. Legal possessions of individuals, organisations of investments, productions, and businesses are protected by the law, and are not subjected to nationalisation.[23]

Recent international economic integration endeavours (*e.g.*, the establishment of the ASEAN Community, the execution of the Trans-Pacific Partnership Treaty, the European Union-Vietnam Free Trade Agreement) have influenced significantly the development of the system of the rule of law in Vietnam. The National Assembly adopted/amended a number of laws from 2014 to 2015 to prepare for the abovementioned integration endeavours, including the Laws concerning the Organisation of People's Court (2014)[24] and the

18 Mai Hong Quy, 'New significant features of the draft amendments to the Constitution 1992 and some commentaries' (*Những điểm mới cơ bản của Dự thảo sửa đổi Hiến pháp 1992 và một số kiến nghị),* Journal of Legal Sciences, Issues 1 (74), 2013, pp.4-16

19 Article 16, Constitution 2013.

20 Article 14, Constitution 2013.

21 Article 51, Constitution 2013.

22 Ibid.

23 Ibid.

24 Law No. 62/2014/QH13 on organisation of the People's Court, dated 24 November, 2014

People's Procuracy (2014),[25] the Law on Referendum (2015),[26] the Law on Marriage and Family (2014),[27] the Law on Real Estate Business (2014),[28] the Law on Investment (2014)[29] and the Law on Enterprises (2014),[30] amongst others. The new Civil Code[31] and Criminal Code,[32] leading laws in Vietnam that govern all civil and penal relations in society, were also adopted and shall take into effect (and replace the existing codes) on 1 January 2017. This legal development is expected to improve the quality of the law in the country.

The Law on the Organisation of the People's Courts aims to promote judicial reform in Vietnam. It establishes a new hierarchy of courts, with the previous Supreme Court restructured into two levels: the current Supreme Court and three High Courts. In addition, Vietnam's Supreme Court has also recognised judicial precedent and started working on the issuance of the first casebook in 2016. This development is expected to improve the efficiency and quality of the courts in Vietnam.

On the political aspect, the most recent remarkable events are the 12th National Congress of the CPV, which was held successfully in January 2016,[33] and the national election. The new leaders of the CPV promised to continue legal reform. Thus, it is assumed that there will be significant changes in many fields of law, state administration and policies, and politics.

Foundation & Evolution of Rule of Law

The discussion on development of "rule of law" in Vietnam took place for the first time during the 2nd Plenum of the CPV National Congress VII (1991).[34] The notable result of the theoretical studies of the 1990s was the creation of the concept of a "socialist Rule of Law state." The rule of law state has been understood and recognised as a democratic state that not only embodies the law, but also abides by the law.[35] The Constitution of 1992 declared that Vietnam is "building the socialist rule of law state of the people, by the people and for the people."[36] The construction of the socialist rule of law became the central task of the government with a range of strategies, including the entire organisation and operation of the state apparatus. It also became the basis and orientation for the reform process in the state apparatus under the condition of the development of the market economy with a socialist orientation. The concept of the "rule of law state" was stipulated in the 2001 amendments to the Constitution of 1992 and in the new Constitution of 2013.

25 Law No.63/2014/QH13 on organisation of People's Procuracies, dated 24 November 2014

26 Law No 96/2015/QH13 on Referendum, dated 27 November 2014

27 Law No 52/2014/QH13 on Marriage and Family, dated 19 June 2014.

28 Law No 66/2014/QH13, Real Estate Business, 25 November 2014

29 Law No 67/2014/QH13 on Enterprises, dated 26 November 2014

30 Law No 68/2014/QH13 on Enterprises, dated 26 November 2014

31 Civil Code No 91/2015/QH13, dated 27 November 2015

32 Criminal Code 100/2015/QH13, dated 27 November 2015

33 Tuoi Tre News' Journalist. 'Communist Party of Vietnam concludes congress, says will stick to Marxism-Leninism in reforms.' Tuoi Tre News (28 Jan 2016). <http://tuoitrenews.vn/politics/32981/communist-party-of-vietnam-concludes-congress-says-will-stick-to-marxismleninism-in-reforms> accessed 29th Feb 2016

34 Doan Trong Truyen, On Reform of the State Apparatus, Su that Publishing House, 1997, pp 10-12.

35 Truong Trong Nghia, 'Rule of Law in Vietnam: Theory and Practice' in Jerome A. Cohen (ed.), *The Rule of Law: Perspectives from the Pacific Rim,* Mansfield Center for Pacific Affairs, 2000, p.130

36 Article 2 Constitution 1992

The concept of "rule of law" in Vietnam is derived from its relation to the state's ruling political ideology.[37] Whilst sharing the same basic terminology, in particular embodying the notion of "rule," it carries some connotations that differ from the Western notion of the "rule of law" as a principle.[38] Accordingly, "rule of law" in Vietnam is said to embody the following key principles, namely, (i) supremacy of the Constitution and the law, (ii) equality of all people before the law, (iii) respect of human rights, as well as community values, (iv) significance of the social order, and (v) democratic centralisation of state powers.[39] It is of course particularly the latter two principles that distinguish the Vietnamese conception of the rule of law from core notions of the rule of law embodied in most constitutional democracies.

Pursuant to the rule of law as a concept in the Vietnamese legal order, the state shall create a legal framework to protect the socialist democracy, and the freedom, rights, and obligations of citizens. It is also recognised that all peoples are equal before the law, are allowed to do anything that the law does not ban, and shall not be forced to do what the law does not oblige.[40] Restrictions on constitutional freedoms and rights are allowed only to prevent the violation of the interests of other people or that of the state, and must be stipulated by law or sub-law regulations.[41]

Human Rights Treaties

Vietnam is a party to following human rights treaties:

1. CERD (in force on 4 January 1969): Vietnam ratified the Convention on 9 June 1982, and in domestic legislation, Article 5 of the Constitution of 2013 states that: "All the ethnicities are equal and unite with, respect and assist one another for mutual development; all acts of discrimination against and division of the ethnicities are prohibited."
2. ICCPR (in force on 23 March 1976) and ICESCR (in force on 23 March 1976) were both acceded to on 24 September 1982, and Article 14 of the Constitution provides that: "1. In the Socialist Republic of Vietnam, human rights and citizens' rights in the political, civil, economic, cultural and social fields shall be recognized, respected, protected and guaranteed in accordance with the Constitution and law. 2. Human rights and citizens' rights may not be limited unless prescribed by a law solely in case of necessity for reasons of national defence, national security, social order and safety, social morality and community well-being."
3. CEDAW (in force on 3 September 1981) was ratified on 17 February 1982, and in Article 26 of the Constitution of 2013, it is declared that: "1. Male and female citizens have equal rights in all fields. The State has a policy to guarantee equal gender rights and opportunities. 2. The State, the society, and the family create conditions for women's comprehensive developments and promotion of their

37 Tran Ngoc Duong, Developing and Strengthening the Socialist Rule of Law State (Xây dựng và hoàn thiện nhà nước pháp quyền xã hội chủ nghĩa), Nhan Dan News Paper, 2015. *The socialist rule of law in Vietnam is built on the basis of Marxism - Leninism and Ho Chi Minh, the Party's Political Platform and practices of Vietnam's revolution, in line with practical building and defense of the country, domestic and foreign affairs in the new period.*

38 Vu Cong Giao and Joel Ng, Vietnam Chapter in David Cohen et al (ed), *Rule of Law for Human Rights in the Asean Region: A Baseline Study*, KAS, p. 285, < http://www.kas.de/wf/doc/kas_7178-1442-2-30.pdf?120718133007 > accessed 16 Feb 2016.

39 Ibid. see also the UN Human Rights Council, 2009, *Report of the Working Group on the Universal Periodic Review: Vietnam*, A/HRC/12/11, para. 9

40 Truong Trong Nghia, 'Rule of Law in Vietnam: Theory and Practice' in Jerome A. Cohen (ed.), *The Rule of Law: Perspectives from the Pacific Rim,* Mansfield Center for Pacific Affairs, 2000, p.132-133

41 Ibid, p. 132

role in the society. 3. Sex discrimination is strictly prohibited."

4. CAT (in force on 26 June 1987) was ratified on 5 February 2015 and, after its ratification, the Prime Minister has adopted Decision No. 364/QĐ-TTg as regards its implementation, which provides for its direct application.
5. CRC (in force on 2 September 1990) was ratified on 28 February 1990, and Article 37 of the Constitution provides that: "Children shall be protected, cared for and educated by the State, family and society; children may participate in child-related issues. Harassing, persecuting, maltreating, abandoning or abusing children, exploiting child labour or other acts that violate children's rights are prohibited."
6. Convention on the Rights of Persons with Disabilities (CRPD) (in force on 3 May 2008) was signed on 22 October 2007 and ratified on 5 February 2015. Article 59(2) of the Constitution provides that the state shall, among others, exercise a policy of assisting disabled people, while Article 61(3) stipulates that the state shall provide favourable conditions for the disabled and the poor to access cultural and vocational learning.
7. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC-OP-AC). Signed: 8 September 2000. Ratified: 20 December 2001.
8. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (CRC-OP-SC). Signed: 8 September 2000. Ratified: 20 December 2001.

Interpretation & Use of the 'Rule of Law'

The Constitution of 2013 reaffirmed the significance of the rule of law as basis of the democratic state of Vietnam and further elaborated on the content of its five fundamental principles.[42] Hence, different from the previous Constitutions, the Constitution of 2013 emphasises that the "State [must] acknowledge, respect and guarantee human rights and citizen rights."[43] Thus, in the provisions relating to human rights and citizen rights, the Constitution of 2013 specifically uses the wording "everyone/every citizen has rights to […]," indicating that those rights are natural and essential to human beings and citizens, and are recognised and protected by the Constitution. The Constitution also establishes that the state has the responsibility to respect, protect, and fulfil the rights of citizens, not that the state merely "grants" or "graces" these rights to peoples and citizens (as in the previous Constitutions). Specifically, human rights and citizens' rights shall only be restricted when prescribed by law in imperative circumstances for reasons of national defence, national security, social order and security, social morality, and community well-being.[44] This broad enumeration of circumstances of course creates considerable room for the state to restrict, limit, or infringe fundamental rights of citizens.

42 Mai Hong Quy, 'New significant features of the draft amendments to the Constitution 1992 and some commentaries' (*Những điểm mới cơ bản của Dự thảo sửa đổi Hiến pháp 1992 và một số kiến nghị),* Journal of Legal Sciences, Issues 1 (74), 2013, pp.4-16

43 Article 3, Constitution 2013

44 Article 14, Constitution 2013.

The recognition of this principle in the Constitution is significant as it means that no one, including the state agencies, can arbitrarily truncate or limit human rights and citizen rights stipulated in the Constitution.[45] In addition, the regulations on the inalienable natural rights and the freedoms of human beings and citizens (*i.e.*, the right to live,[46] freedom from torture,[47] the right to be equal before the law,[48] and the right not to be arrested in the absence of a decision by the People's Court)[49] shall have direct legal effect; and holders of these rights are entitled to refer to these provisions of the Constitution to protect their rights when they are being violated.

The Constitution of 2013 also recognises some "new" human rights and freedoms, compared to the previous Constitution of 1992, such that: "A [Vietnamese] citizen shall not be expelled or extradited to other nations" (Article 17); "[…] No one shall be illegally deprived of his or her life" (Article 19); "Everyone is entitled to the inviolability of personal privacy, personal secrecy and familial secrecy and has the right to protect his or her honour and prestige […]" (Article 21); "Citizens have the right to social security" (Article 34); "Everyone has the right to enjoy and access to cultural values, participation in cultural life, to use cultural institutions" (Article 41); "Any citizen has the right to determine his or her nationality, use his or her mother language and select his or her language of exchange" (Article 42); and "Everyone has the right to live in a healthy environment and the obligation to protect the environment" (Article 43). This represents a new step in the expansion and development of human rights, reflecting the outcome of the renovation process and international integration of Vietnam. It should be noted that the content of the regulations on human rights, basic rights, and duties of citizens in the Constitution of 2013 are drafted in the light of international treaties on human rights to which Vietnam is a party.[50]

Another important development in the Constitution of 2013 is the clear confirmation that the function of the People's Court is to "perform judicial power" (Article 102). This reflects the implementation of the principle of division of state powers amongst state agencies. The previous Constitutions did not specify which agency implemented judicial power. In addition, the Constitution of 2013 asserts certain constitutional principles on legal proceedings, such as the principle of independence of judges[51] and some other guarantees during trials or legal proceedings.[52] The recognition of the importance of judicial proceedings is of high significance, as it would ensure equality amongst the participants in such proceedings, thereby enhancing transparency and publicity and improving the quality of the of the judicial process.

45 Phan Nhat Thanh, 'Human rights, fundamental rights and obligations of citizens – hallmarks of the Constitution of the Socialist Republic of Vietnam 2013' (Quyền con người, quyền và nghĩa vụ cơ bản của công dân – dấu ấn trong Hiến pháp nước Cộng hòa XHCN Việt Nam năm 2013), Journal of Legal Sciences, Special Isssue 1, 2014, pp 17-24.

46 Article 19, Constitution 2013.

47 Article 20, Constitution 2013.

48 Article 16, Constitution 2013.

49 Article 20.2, Constitution 2013.

50 Phan Nhat Thanh, 'Human rights, fundamental rights and obligations of citizens – hallmarks of the Constitution of the Socialist Republic of Vietnam 2013' (Quyền con người, quyền và nghĩa vụ cơ bản của công dân – dấu ấn trong Hiến pháp nước Cộng hòa XHCN Việt Nam năm 2013), Journal of Legal Sciences, Special Isssue 1, 2014, pp 17-24.

51 Article 103, Constitution 2013.

52 Article 103, Constitution 2013.

TABLE 2
ADMINISTRATION OF JUSTICE GRID

Indicator	Figure
No. of judges in country	4,957 judges (as at June 2013)[53]
No. of lawyers in country	11,285 individual lawyers and 3,408 law firms (as at September 2014)[54]
Annual bar intake (including costs and fees)	800-1,000 new lawyers per year[55] (fee: 200,000 VND or U$9 monthly)[56]
Standard length of time for training/qualification	A Bachelor of Laws degree and completion of a specific training course are compulsory for all judicial careers. Lawyers: 12 months of judicial training, 12 months of pupillage[57] Prosecutors: 9 months of training, at least 4 years of legal work[58] Judges: 12 months of training, at least 4 years of work experience at the court[59]
Availability of post-qualification training	Short courses of training every year are available for judges and prosecutors. No compulsory courses for lawyers, but lawyers are required to participate in the professional conferences and seminars organised by the local bar association or the Vietnamese Bar Federation (VBF).

53 Vietnam Supreme People's Court, Report on the works performed by the people's court (Báo cáo công tác tòa án nhân dân), 2014.

54 Ministry of Justice, *Strategies of development of legal profession until the year 2020 Conference*, Proceedings, Ho Chi Minh City, 14-15 April 2015, p16-17

55 Decision 2320/QD-BTP of the Minister of Justice, dated 13/08/2012 on the Implementation of strategy of development of lawyer profession until the year 2020; see also Vietnam Bar Federation, *Report on development of lawyers period 2010-2015*, Hanoi, 2015.

56 Resolution 05/NQ-HDLSTQ of the National Lawyer Council on the pupilage fee, membership fee, the cases of waiver of membership fee, dated 14/12/2015.

57 Article 12, Law 20/2012/QH13 on amendment, supplement to the Lawyer Law 2006, dated 20/11/2012 (Lawyer Law); see also see also Introduction to the Course on Professional Training for Lawyers of Judicial Academy 2015, <http://hocvientuphap.edu.vn/thongtindaotaols.aspx> accessed on 08 March 2016

58 Article 75, Law 63/2014/QH13 on organisation of the People's Procuracies; see also Introduction to the Course on Professional Training for Procurators by Vietnam Judicial Academy 2015, <http://hocvientuphap.edu.vn/Daotaotaksv.aspx> accessed on 08 March 2016

59 Articles 67 and 68, Law 62/2014/QH-13 on organisation of the People's Court; see also Introduction to the Course on Professional Training for Judges by Vietnam Judicial Academy 2015, <http://hocvientuphap.edu.vn/Dao-tao-tham-phan.aspx> accessed on 08 March 2016

Average length of time from arrest to trial (criminal cases)	3 months[60]
Average length of trials (from opening to judgment)	Criminal cases: 3 days[61] Administrative cases: 1 day[62] Civil cases: 1 day[63]
Accessibility of individual rulings to public	Judgments and decisions are available to the litigants. However, they are not accessible to the public since they are confidential and protected by law.
Appeal structure	Vietnam recognises the settlement of cases at two instances (Lower Court -> Appellate Court). Since 2014, the organisation of People's Courts system comprises of: (a) Supreme Court; (b) high courts; (c) provincial courts; (d) district courts; and (e) military courts. The Supreme Court has the jurisdiction to review the judgments and decisions of the lower courts. The People's High Courts have appellate jurisdiction over first-instance judgments or decisions of Provincial People's Courts within their territorial jurisdictions. The Provincial People's Courts have appellate jurisdiction over first-instance judgments or decisions of District People's Courts within their territorial jurisdiction. District People's Courts are courts of first instance only.[64]
Cases before the National Human Rights Institution	Not applicable (a National Human Rights Institution has not been established in Vietnam)
Complaints filed against the police, the military, lawyers, judges/justices, prosecutors or other institutions (per year)	4,252 cases per year (from 2012-2013) for administrative litigants; 50% are subject of appeal.[65] No further information is available for this category of complaints.
Complaints filed against other public officers and employees	No information is available for this category of complaints.

60 Supra note 37; see also Article 172, Criminal Procedural Code 2015 and Article 121, Criminal Procedural Code 2003

61 Supra note 53

62 Supra note 53

63 Supra note 53

64 Law No. 62/2014/QH13 on organisation of the People's Court, dated 24 November, 2014

65 Vietnam Supreme People's Court, Report on the works performed by the people's court (Báo cáo công tác tòa án nhân dân), 2014.

II. COUNTRY PRACTICE IN APPLYING THE CENTRAL PRINCIPLES OF RULE OF LAW FOR HUMAN RIGHTS

A. On Central Principle 1 (Government and its officials and agents are accountable under the law)

Definition and Limitation of the Powers of Government in the Fundamental Law

Vietnam has several tiers of laws and policies, even beyond those spelled out in the Constitution. Within the national legal system, the Constitution is superior to all legislations. Any law or regulation that is "inconsistent" with the Constitution shall be considered void to the extent of its inconsistency. In practice, however, there is no procedure by which laws can be scrutinized vis-à-vis the Constitution; there is no constitutional court with the authority to declare laws unconstitutional. Instead, the Constitution grants the National Assembly control over ensuring conformity with the Constitution and the duty to abrogate all formal written documents issued by all branches of government that are inconsistent with the Constitution, statutes, and resolutions taken by the National Assembly.[66]

The Constitution acknowledges different state powers, but unites them at the hands of the legislative branch (*e.g.*, the National Assembly), the highest state authority, which has the power to make laws, and delegates the executive power to the executive and the judicial power to the courts.

There are separate chapters in the Constitution on the National Assembly (Chapter V), the State President (Chapter VI), the Government (Chapter VII), and the People's Court and People's Procuracy (Chapter VIII). Each chapter describes the powers and functions of these offices as well as the manner by which persons in these institutions are to be selected. For instance, Article 96 of the Constitution of 2013 lists the tasks and powers of the executive government. Article 95 provides for its composition and stipulates that the Prime Minister is accountable to the National Assembly.

Amendment or Suspension of the Fundamental Law

Recently in 2013, the National Assembly adopted a new Constitution, which replaced the Constitution of 1992. The drafts of the Constitution were officially opened for public and official comment. The procedure for adoption of the Constitution was carried out in light of Article 147 of the Constitution of 1992.

As the supreme law of the land, the Constitution can only be amended or suspended in accordance with the rules and procedures set forth in the fundamental law. The previous Constitution stipulated that only the National Assembly could amend the Constitution. The new Constitution included more actors who could be involved in the process of amending or suspending the Constitution. Specifically, it allows the President, the Standing Committee of the National Assembly, or at least one-third of the total number of the National Assembly's representatives to propose the drafting of a Constitution or its amendment

Pursuant to Article 120 of the Constitution of 2013, the amendment, supplementation, or any change to the Constitution must comply with following procedural steps:

66 Article 70(2) and 70(10), Constitution 2013.

1. The President or the Standing Committee of the National Assembly, or at least two-thirds of the total number of the representatives of the National Assembly, proposes the drafting of a Constitution or its amendment. Such proposal shall be approved by two-thirds of the total number of National Assembly representatives.
2. The National Assembly shall create the Committee of Constitutional Drafting. The Committee of Constitutional Drafting drafts the text, organises the collection of the people's opinion, and submits to the National Assembly the draft text.
3. The Constitution shall be enacted with the approval of at least two-thirds of the total number of National Assembly representatives. The referendum on the Constitution shall be decided by the National Assembly.
4. The time limit for the promulgation and effective date of the Constitution shall be decided by the National Assembly.

In November 2015, the National Assembly approved the Law on Referendum; it will become effective beginning 1 July 2016. Under the Law on Referendum, the National Assembly may organise a nationwide referendum to seek the opinion of the people in regards amending the Constitution. A referendum is valid when at least three quarters of the total number of voters nationwide take part. For a referendum on constitution-related issues, the content of the Constitution is passed if it receives the support of at least two-thirds of the valid votes of the referendum. Notably, Article 11 stipulates that the result of a referendum is final and decisive. This means that the result of a referendum will take effect directly, without having to undergo any examination by any agency.[67]

Laws Holding Public Officers and Employees Accountable

The Vietnamese government has acknowledged the negative impact of corruption on both Vietnam's future prosperity and the CPV's own legitimacy. Corruption is considered as an alarming issue in society and the government has developed a comprehensive anti-corruption legal framework.

Public officers and government employees, including the police, professional army personnel, and managerial officials in state enterprises, may be subject to the Anti-Corruption Law 2005[68] if they commit corrupt acts, which covers (i) embezzling property, (ii) taking a bribe, (iii) abusing a position or power to appropriate property, (iv) taking advantage of a position and/or power during the performance of a task or official duties for self-seeking purpose, (v) abusing powers during the performance of a task or official duties for self-seeking purposes, (vi) taking advantage of a position or power to influence another person for self-seeking purposes, (vii) committing forgeries in the performance of work for self-seeking purposes, (viii) giving a bribe or bribe brokerage conducted by a person with a position and/or power to resolve affairs of a body, organisation, entity or a locality for self-seeking purposes, (ix) taking advantage of a position and/or power to illegally use state property for self-seeking purposes, (x) conducting harassment for self-seeking purposes, (xi) failing to perform tasks or official duties for self-seeking purposes, (xii) taking advantage of a position or power to cover up a law offender for self-seeking purpose; hindering or intervening illegally in the examination, inspection, auditing, investigation, prosecution, hearing or judgment execution for

67 'Vietnam legislature adopts law on referendum, among others,' *Tuoi Tre News*, 26 November 2015, <http://tuoitrenews.vn/society/31875/vietnams-legislature-adopts-law-on-referendum-among-others> accessed 11 May 2016.

68 Law 55/2005/QH12 on Anti-Corruption (as amended in by the law 01/2007/QH12 and the Law No. 27/2012/QH13)

self-seeking purposes.[69] The Anti-Corruption Law imposes criminal liability; the weight of the punishment depends on the seriousness of the action. The maximum penalty applicable to public officials and employees is capital punishment.

There have been 1,854 corruption-related cases settled in the Vietnamese people's courts with 3,987 people prosecuted in last five years.[70] Despite these endeavours, corruption remains inefficiently addressed in Vietnam. Findings from the 2014 *Vietnam Provincial Governance and Public Administration Performance Index* (PAPI) showed that citizens across the country still witness the prevalence of nepotism for state employment, bribery in the public sector and a lack of willingness to stop corruption from both the local government and citizens themselves.[71] The loss of confidence in the system and lack of effective whistle-blowers' protection have prevented individuals and organisations from reporting corruption incidents.

As regards laws that hold public officers and employees accountable for acts that exceed their authority, the Criminal Code enumerates a number of offences, amongst others, disobeying a direction of the law with the intent to cause injury to any person, incorrectly preparing or translating with the intent to cause injury, abusing positions and/or powers to humiliate others, violation of land management regulations, and forgery in the course of employment. However, there is no specific law against public officers who violate fundamental rights and freedoms.

Special Courts and Prosecutors of Public Officers and Employees

The right of citizens to complain and denounce government officers is a fundamental constitutional right.[72] This process has formed a dual complaint settlement mechanism: settlement of complaints under administrative procedures and settlement of complaints under legal proceedings in court (judicial procedures). Any individual or organisation disagreeing with the complaint settlement decisions of government agencies, government officers, and employees may initiate administrative actions in court.

The hearings on administrative cases in Vietnam are conducted by the general courts. However, within the High Courts and the Provincial Courts are divisional courts specified for administrative matters. The divisional administrative courts only have the competence to pass judgment on these matters. The laws do not provide for dedicated prosecutors to handle cases against public officers and employees. In practice, dedicated prosecutors exist depending on the policy of the province.

69 Article 3, Anticorruption Law 2005

70 Vietnam Supreme People's Court, Report on the works performed by the people's court (Báo cáo công tác tòa án nhân dân), 2014.

71 Centre for Community Support and Development Studies, Centre for Research and Training of the Viet Nam Fatherland Front, and United Nations Development Programme, *The Viet Nam Governance and Public Administration Performance Index (PAPI) 2014: Measuring Citizens' Experiences*, 2015, xvii.

72 Article 30, Constitution 2013

B. On Central Principle 2 (Laws and procedures for arrest, detention and punishment are publicly available, lawful, and not arbitrary)

Publication of and Access to Criminal Laws and Procedures

In 2015, Vietnam presented two new codes on criminal law and criminal procedure, which would be effective in 2016. The rules for preventive detention, regulated in Resolution No. 162/2004/NDD-CP (amended by Resolution No. 19/2009/NDD-CP), have not been changed for a long time. They are all published and made widely accessible in a form that is up to date and available in the official language (Vietnamese). They are available online in the official website of the National Assembly and the Ministry of Justice. All legal documents are also published in the Official Gazette (Cong Bao).

Accessibility, Intelligibility, Non-reactivity, Consistency, and Predictability of Criminal Laws

All the laws in Vietnam, including the Criminal Code, Criminal Procedural Code, and their sub-law regulations, are published in the Official Gazette (Cong Bao) and freely accessible online on the website of the Ministry of Justice, government offices, and some ministries and departments. Hard copies of the laws can be found in universities, public libraries, and bookstores.

With regard to consistency and predictability of criminal laws, the National Assembly is tasked by Article 70 of the Constitution to exercise "control over conformity to the Constitution, the law and the resolutions of the National Assembly," as well as to abrogate all formal written documents issued by the State President, the Standing Committee of the National Assembly, the Government, the Prime Minister, the Supreme People's Court, and the Supreme People's Procuracy that are inconsistent with the Constitution, statutes, and resolutions taken by the National Assembly. However, challenges remain in this regard. As was noted in the 2nd Universal Periodic Review, "There is still a lack of uniformity in the legal system, together with overlapping legislation. The Government is aware of the difficulties and challenges and will continue to improve the legal system on the basis of the 2013 Constitution."[73]

The guarantee against the retrospectivity of laws has remained the same since 2011. Article 7(1) of the Criminal Code 2015 states that, "[t]he provision [of the Criminal law] applying to a criminal act shall be the provision currently in force at the time such criminal act is committed."

Detention Without Charge Outside an Emergency

Article 20(2) of the Constitution states that no one shall be arrested in the absence of a decision or sanction by the People's Court or the People's Procuracy, except when caught in the act of committing an offence. It then states that the taking of persons into custody shall be provided by law. Administrative detention without charge or trial can be carried out under the rules of temporary custody according to the administrative

73 UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Viet Nam*, A/HRC/26/6, 2 April 2014, par 18.

procedures of Decree 112/2013/ND-CP.[74] Accordingly, the temporary custody of people on the basis of administrative procedures shall be applied when:

1. It is necessary to immediately prevent or stop acts that disturb public order;
2. It is necessary to immediately prevent or stop acts injuring other individual(s);
3. It is necessary to immediately prevent or stop domestic violence.

The duration of temporary custody according to administrative procedures must not exceed 12 hours. In case of necessity, such duration may be extended, but must not exceed 24 hours from the time the violators are held. For violations of border regulations or administrative violations in remote mountainous areas or islands, the temporary custody duration may also be extended, but must not exceed 48 hours from the time the violators are held.

With regard to laws during emergencies, under Article 110.4 of the Criminal Procedural Code, persons may be arrested in urgent cases. Accordingly, the proper procuracy must be immediately notified in writing of the urgent arrest, enclosed with documents related to it, for the procuracy's consideration and approval. Procuracies must closely examine the grounds for the urgent arrest. In case of necessity, the procuracies must meet and question the arrestees in person, before considering and deciding to approve or not to approve the arrests. Within 12 hours after receiving the request for approval and documents related to the urgent arrest, the procuracies must issue a decision approving or disapproving such arrest. If the procuracies decide not to approve the arrest, the issuer of the arrest warrant must immediately release the arrestee.

There are some reports concerning arbitrary arrest and detention, including of minority groups and human rights activists, for activities that constituted their practice of freedom of religion, expression, association and/or peaceful assembly.[75]

In Vietnam, around seven in every 10 suspects become detainees, and sometimes the rate could be nine in 10—which is very high. More than 200,000 people were detained pending criminal investigations between 2012 and 2014.[76] During the drafting process of the new Criminal Procedural Code, members of the National Assembly's Standing Committee had observed that the presumption of innocence is not respected during investigations. According to Le Thu Ba, deputy head of the National Steering Committee on Legal Reform, in many cases, the investigation agencies failed to prove the allegation against suspects but they fabricated some accusations or sought to legalize the detention period instead of freeing detainees.[77]

74 Decree No. 112/2013/ND-CP on the Regulation on sanction of expulsion, temporary custody of people according to administrative procedures, and the management of foreign violators of Vietnamese law pending the completion of expulsion procedures.

75 UN Human Rights Council, *Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Vietnam*, A/HRC/WG.6/18/VNM/2, 7 November 2013, pars 34-37. See also 'Corporate report Vietnam - in-year update December 2015,' *Foreign and Commonwealth Office*, 21 April 2016, <https://www.gov.uk/government/publications/vietnam-in-year-update-december-2015/vietnam-in-year-update-december-2015> accessed 15 May 2016; 'Viet Nam 2015/2016,' Amnesty International, <https://www.amnesty.org/en/countries/asia-and-the-pacific/viet-nam/report-viet-nam/> accessed 11 May 2016; Human Rights Watch, 'Vietnam: Events of 2015,' <https://www.hrw.org/world-report/2016/country-chapters/vietnam> accessed 11 May 2016.

76 Cam Nguyen, 'Doubts linger as Vietnam reports causes of 226 deaths in custody,' Thanh Nien News, 22 March 2015, <http://www.thanhniennews.com/politics/doubts-linger-as-vietnam-reports-causes-of-226-deaths-in-custody-40112.html> accessed 11 May 2016; see also Bao Tran, 'Increased allegations of torture and ill-treatment' ("Nhiều tố cáo bức cung, nhục hình"), Nguoi Lao Dong Online, <http://nld.com.vn/thoi-su-trong-nuoc/nhieu-to-cao-buc-cung-nhuc-hinh-20150319234644997.htm>, accessed 14 May 2016.

77 Vu Quoc Ngu, 'Vietnam Urged to Prioritize Presumption of Innocence,' *Defend the Defenders*, 14 August 2015, <http://www.vietnamhumanrightsdefenders.net/2015/08/14/vietnam-urged-to-prioritize-presumption-of-innocence/> accessed 11 May 2015.

People dependent on drugs, including children, are held in government detention centres where they perform "labour therapy." In 2015, the government reduced the overall number of detainees, but confirmed plans to leave some 15,000 detainees in the centres by 2020.[78]

Rights of the Accused

Freedom from Arbitrary or Extra-legal Treatment or Punishment, and Extra-Judicial Killing

Article 20(1) of the Constitution states that every person is protected against torture, harassment, coercion, violations of his or her life and health, and offences against honour and dignity. The Law on Compensation Liability of the State, Criminal Code, and Criminal Procedural Code elaborate on the protection of accused persons from arbitrary or extra-legal treatment or punishment, including inhumane treatment, torture, arbitrary arrest, detention without charge or trial, and extra-judicial killing by the state. The right to habeas corpus is not limited in any circumstance.

Despite the constitutional and statutory protections, there are still many allegations of torture and ill-treatment. The Ministry of Police reported that 226 detainees died around the country between October 2011 and September 2014.[79] The claim that the detainees died mostly from illness or suicide has been met with incredulity, including from members of the National Assembly who urged the government to provide further details on the causes.[80]

In 2015, the National Assembly approved the reduction in the number of capital offences from 22 to 15 and exempted offenders under 18, over 75, or pregnant/nursing women from capital punishment.[81] The World Coalition Against the Death Penalty reports there were five executions in 2011, no recorded executions in 2012, seven executions in 2013 and three in 2015.[82]

Presumption of Innocence

The principle of presumption of innocence was introduced in the Criminal Procedural Code of 1988 (Article 10). Hence, the Constitution of 2013 has recorded it as one of the basic principles to be observed in legal proceedings. According to Article 31.1 of the Constitution, a defendant shall be regarded as innocent until the crime is proved in accordance with legal procedure and the sentence of the court has acquired full legal effect. The Criminal Procedural Code 2015 further elaborates that when there is not enough evidence or the evidence is not sufficient to accuse a person, or sentence him or her in accordance with the procedures set, the official conducting the legal proceeding shall conclude that the accused is innocent.[83]

78 Human Rights Watch, 'Vietnam: Events of 2015,' <https://www.hrw.org/world-report/2016/country-chapters/vietnam> accessed 11 May 2016.

79 Supra note 76.

80 Ibid.

81 'Corporate report Vietnam - in-year update December 2015,' *Foreign and Commonwealth Office*, 21 April 2016, <https://www.gov.uk/government/publications/vietnam-in-year-update-december-2015/vietnam-in-year-update-december-2015> accessed 15 May 2016.

82 World Coalition Against the Death Penalty, *Death Penalty and Drug Crimes: Detailed Factsheet: 13th World Day Against Death Penalty*, 2015, p 4.

83 Article 13, Criminal Procedural Code

Legal Counsel and Assistance

There has been no change in the law since 2011. The Constitution of 2013 provides that any person who has been arrested, held in custody, prosecuted, investigated, charged or brought to trial in violation of the law, has the right to defend himself/herself or to seek the assistance of lawyers or other people.[84]

Article 16 of the Criminal Procedural Code also reconfirmed that the accused has the right to defend himself/herself and to request for a legal counsel or other persons to defend him or her. Accordingly, within 24 hours from receipt of such a request from the detainee or accused, the competent authority is obliged to forward such application to defence counsels, representatives, or relatives of the detainee or accused. In cases where the detainee or accused does not identify particular defence counsels, competent authorities must forward the application to their representative or their relatives so that they could find a defence counsel for them.[85] If accused persons do not invite defence counsels to the proceedings, the competent authority conducting the proceedings must appoint defence counsels for them in the following cases: (a) They are accused of criminal offences where the maximum prescribed penalty is 20 years imprisonment, life imprisonment or death; (b) The accused has physical disadvantages that render them unable to defend themselves; and (c) The accused has mental defects or is under 18 years old.[86] The competent authority may require the following organisations to appoint a defence counsel, namely, the lawyers' or bar association, government centres for legal aid, and the Committee of the Vietnam Fatherland Front and its member organisations.[87]

Knowing the Nature and Cause of the Accusation

There has been no change in the law—Article 16 of the Criminal Procedural Code embodies this right. Accordingly, the accused shall be informed of the offences that they have been accused of committing. Competent authorities must explain to the accused their rights and obligations during the proceedings in a timely manner so that they can act in their own defence or ask their legal counsels or other persons to defend them.

Guarantees during Trial

There has been no change in the law since 2011. This right has been entrenched in the Constitution of 2013. A defendant/accused person must be tried in a timely manner in a public process, with respect for the principle of equality before the law.[88]

The Criminal Procedural Code also states that the accused shall be tried without undue delay, tried in their presence, defend themselves in person, and examine, or have their counsel examine, the witnesses and the evidence against them. However, in practice, competent authorities often do not carry out the trial within the required time frame due to lack of resources, such as shortage of investigators, prosecutors and clogged

84 Article 31, Constitution 2013

85 Article 75.3, Criminal Procedural Code

86 Article 76, Criminal Procedural Code

87 Ibid.

88 Article 31, Constitution 2013.

docket.[89] They usually would apply various technical measures to justify their delay, such as requiring the involved parties to provide verification and proofs.

Appeal

No remarkable changes in policy or practice have taken place since 2011. The right to appeal is guaranteed in Article 103(6) of the Constitution and is regulated by the Criminal Procedural Code.

Freedom from Double Jeopardy

There has been no substantial change since 2011. The protection is enshrined in the Constitution of 2013, which states that no one shall be tried twice for the same offence.[90] Judgments of acquittal are final, not reviewable, and immediately executory.

Remedy before a Court for Violations of Fundamental Rights

There have been no substantial changes since 2011. There are no laws that explicitly guarantee the right to seek a timely and effective remedy before a competent court for violations of fundamental rights. A person alleging a human rights violation may bring a claim against the alleged perpetrator, through complaint, denunciation or court petition, depending on the nature of the case. The available remedies are compensation for damages and declaration in the form of a reprimand or public apology.

C. On Central Principle 3: (The process by which the laws are enacted and enforced is accessible, fair, efficient and equally applied)

Law Enactment

Openness and Timeliness of Release of Record of Legislative Proceedings

Every year, the National Assembly announces its plan on the number and kinds of legislative documents that it intends to draft and adopt through a resolution. However, the proceedings are not considered efficient since cooperation between the government (with regard to drafting) and the National Assembly (on evaluation and adoption) is lacking.[91] Furthermore, the large number of legislative documents annually has overloaded the capacity of the legislative department.

89 Luong Thi Minh Quynh, Study of inquisitorial procedure model and recommendations for improvising criminal procedure models of Vietnam (Tìm hiểu mô hình tố tụng thẩm vấn và những kiến nghị hoàn thiện mô hình tố tụng hình sự Việt Nam), Journal of Legal Science, Issue 6, 2010; see also Luong Thi My Quynh (2011), "Recommendations for improving the Criminal Procedure Code of Vietnam regarding the right to defense counsel ("Những kiến nghị hoàn thiện pháp luật Tố tụng hình sự Việt Nam về bảo đảm quyền có người bào chữa"), Journal of Legal Sciences, Issue 23, 2011; Cao Vu Minh, 'The statute of limitations and duration of administrative sanctions in the Law on Handling of Administrative Violations 2012', (Thời hiệu và thời hạn xử phạt vi phạm hành chính trong Luật Xử lý vi phạm hành chính năm 2012), Journal of States and Law, Issue 11 (319), 2014.

90 Ibid.

91 Nguyen Sy Dung & Hoang Minh Hieu, 'Vietnam legislative process: From drafting and consult to deciding, translating, expertise the policy', (2008) 131 *Legislative Studies* 1.

Nowadays, the legislative proceedings are open to the public in order to gather every idea and opinion of the people. Any draft legislative document are accessible freely on the website of the government.[92]

Timeliness of Release and Availability of Legislative Materials

There has been no remarkable change since 2011. Vietnam applied to the WTO in 1995 and its accession package was approved in 2006. Since the accession to the WTO (which required Vietnam to be transparent in regards its policies), the official draft of laws and transcripts, or minutes of legislative proceedings, have been made available to the public in a timely manner, usually on the website of the government agencies that are in charge of drafting relevant laws and regulations. In addition, final drafts of important laws are available on the website of the Ministry of Justice and the responsible government office.

Equal Protection of the Law and Non-Discrimination

There are no substantial changes since 2011. In Vietnam, the principle that all persons are equal before the law and are entitled, without discrimination, to the equal protection of the law, was incorporated in the Constitution of 1992. Article 16 of the Constitution of 2013 has restated this principle as follows: "1. All people are equal before law. 2. No one is subject to discriminatory treatment in political, civil, economic, cultural or social life."

Law Enforcement

In Vietnam, the quality of law is improving year by year as the government considers the development of the legal system as the core of the development of the rule of law state.[93] The Constitution and other laws are encouraged to be followed efficiently for the equal enforcement of the law. However, laws in Vietnam are not enforced directly; they need to be guided by government documents or regulations. This procedure is sometimes hampered by challenges in making law enforcement effective, fair, and equal. The shortage of competent and skilled bureaucrats also adds to the problems. The issue of fairness and efficiency remains the core problem in Vietnam legal system for many years.

With regard to law enforcement, commentators have expressed concerns over the restriction of rights, including speech, opinion, press, and association, of rights activists and dissident bloggers. It has been reported that police sometimes use excessive force in responding to protests over evictions, land confiscation, and other social issues. The government also restricts religious activities that are deemed contrary to the "national interest," "public order," or "national great unity."[94] In January 2015, UN Special Rapporteur on Freedom of Religion or Belief Heiner Bielefeldt stated that legal provisions concerning freedom of religion and belief lack clarity. This in turn leads to "broad leeway to regulate, limit, restrict or forbid the exercise of freedom of religion or belief in the interest of 'national unity and public order.'"[95]

92 The website for public legislative drafts of Vietnam, <http://duthaoonline.quochoi.vn/Pages/default.aspx> accessed 3 Mar 2016.

93 See e.g., World Trade Organization, *Trade Policy Review: Vietnam*, WT/TPR/S/287, 13 August 2013; UNCTAD, *Investment Policy Review: Vietnam*, 2008, available at <http://unctad.org/en/Docs/iteipc200710_en.pdf> accessed 11 May 2016.

94 Supra note 78.

95 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt: Addendum: Mission to Viet Nam (21 to 31 July 2014)*, A/HRC/28/66/Add.2, 30 January 2015.

Reparation for Crimes and Human Rights Violations' Victims/Survivors

In Vietnam, there is no specific law or department that provides adequate, effective, and prompt reparation to victims/survivors of crimes and human rights violations for harm or violation suffered, and the reparation mechanism differs from case to case. However, there are prescribed solutions in certain laws. For example, there is a legal mechanism for protecting the victims of domestic violence or human trafficking.

d. On Central Principle 4: (Justice is administered by competent, impartial, and independent judiciary and justice institutions)

Appointment and Other Personnel Actions in the Judiciary and among Prosecutors

No data indicating remarkable changes in policy or practice was found; the process as such still has not been changed or amended. Overall, there has been no visible improvement on the situation of the appointment, reappointment, promotion, discipline, and dismissal of judges and judicial officers since 2011.

All the judges of the People's Supreme Court are appointed by the State President and all the judges of other courts are appointed by the Chief Justice of their higher court.[96] The judges in Vietnam are appointed to a court and not to a particular jurisdiction for a period of five years. The judge may be dismissed after the term if he/she cannot pass the assessment of the Chief Justice of the relevant court. To be appointed as judge, an individual must meet a number of criteria—some of which are quite vague, such as good morals and professional adjudicative capacity. In addition, older personnel are favoured with regard to judicial appointments. Party influence also implicitly affects the assessment of the "adjudicative capacity" criterion. Judges tasked with selecting appointees usually chose from a known pool of party members who are working in the court and possess an "opinion letter" from the Party cell.[97]

Regarding judicial promotion, there are two kinds of promotion in Vietnam. First, in accordance with civil servant regulations, judges can expect salary increases to reflect their level of experience. Secondly, it is possible for judges to move between courts and obtain the benefits of higher remuneration and status by becoming a member of a more senior court.

The recent change in the organisational structure of the People's Court in 2015 aims at improving the efficiency of the court, but it has yet to show results.

Training, Resources, and Compensation

Traditionally, judicial training is carried out by the Judicial Academy. The Judicial Academy runs various kinds of both legal and related knowledge trainings and seminars for lawyers, prosecutors, public notaries, and all levels of the judicial personnel (including judges and court secretaries).[98] Since 2015, in addition to

96 UN Human Rights Council, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Viet Nam*, A/HRC/WG.6/18/VNM/1, 8 November 2013, par 42.

97 Penelope (Pip) Nicholson and Nguyen Hung Quang, The Vietnamese Judiciary: The Politics of Appointment and Promotion, *Pacific Rim Law* and *Policy Journal*, Vol 14 (1) (2005): 1-34.

98 Judicial Academy, <http://www.hocvientuphap.edu.vn/> accessed in 3 March 2016.

the Judicial Academy, judicial training is also provided by two other institutions: Vietnam Court Academy,[99] which provides training for judges and court personnel, and Hanoi Prosecutor College, which provides training for public prosecutors.[100]

The salary of judges is regarded as very low. Judges are considered to be "civil servants" who enjoy the same status and same salary as any other person working in the civil society. The salary system for civil servants is the same irrespective of sector. A 2012 publication placed the salary for civil servants at the lowest level at around USD45 a month; this can rise to ten times higher as the person's career progresses.[101]

State's Budget Allocation for the Judiciary and Other Principal Justice Institutions

The budget for the judicial system comes from two sources, namely (i) central judicial budget, proposed by the government and approved annually by the National Assembly, and (ii) local budget, allocated by the provincial government. According to this system, the National Assembly will approve the central judicial budget to the People's Supreme Court and the latter will then allocate the budget for the local courts and judicial agencies. The local courts may, in addition, receive an additional budget from the local government (taken from the local government's budget).

It should be noted that although the central judicial budget for the operation of the judiciary is approved by the National Assembly, courts and other justice institutions can only get the monies from the State Treasury at the locality, which is a government agency, upon satisfying the requirements set by the government.

The current regime of budget allocation raises a doubt on the independence of the judiciary from the executive in Vietnam. It is argued that the court can only be independent if it is able manage and supervise the usage of judiciary budget by itself without any interference by government. Moreover, the operation of local courts should not be controlled by local government nor the superior court (e.g. Supreme Peoples Court).

Impartiality and Independence of Judicial Proceedings

There is no remarkable change since 2011. The Constitution requires that judicial proceedings be conducted in an impartial manner, free from improper influence by public officials or private corporations. Judges and people's juries are expected to be independent and obey the law. However, a lack of independence on the part of the judges has been observed.[102] In practice, impartiality and fairness are sometimes questioned due to corruption. In addition, the fact that judges should be members of the CPV might affect their impartiality when the case is related to issues sensitive to the interests of the CPV or its leadership.

99 Vietnam Court Academy, <http://hvta.toaan.gov.vn/> accessed in 3 March 2016.

100 Hanoi Prosecutor College, <http://tks.edu.vn> accessed in 3 March 2016.

101 Andrea Andersson, *Judicial Independence and the Vietnamese Courts*, 2012, p 19, <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=2760334&fileOId=3129618> accessed 11 May 2016.

102 Supra note 75, par 46.

Provision of Lawyers or Representatives by the Court to Witnesses and Victims/ Survivors

Generally, lawyers in Vietnam are competent, with the qualifications of lawyers set out in Lawyer Law 2012, and strictly regulated by the Legal Profession Qualifying Board of the VBF and the provincial bar associations.

Safety and Security of the Judiciary, Prosecutors, Litigants, Witnesses, and Affected Public

In Vietnam, legal procedures and courthouses ensure adequate access, safety, and security for accused persons, prosecutors, judges, and judicial officers before, during, and after judicial, administrative, or other proceedings. The judicial police are in charge and accountable for this mission. They also ensure the same for the public and all affected parties during the proceedings.

Specific, Non-Discriminatory, and Unduly Restrictive Thresholds for Legal Standing

The Constitution, in Article 30, recognises the right of every person to lodge complaints and denunciations with the competent state bodies, organisations, and individuals against the illegal acts of state organs, organisations, and individuals. It was however reported that the government prohibits class-action lawsuits against government ministries, thus rendering ineffective joint complaints from land rights petitioners.[103]

Publication of and Access to Judicial Hearings and Decisions

Article 31(2) of the Constitution requires defendants to be tried in public. Trials may be heard *in camera* in accordance with the law, however, the verdict should still be pronounced in public. Article 103(3) of the Constitution stipulates the exceptions, which are special cases necessary for the protection of (i) state secrets, customs and habits of the nation, (ii) adolescents, and (iii) private secrets according to the legitimate requirement of the persons concerned.

Generally, in practice, court proceedings in Vietnam are public; however, court decisions are not publicly available. Only parties to the trial can obtain copies of the decision from the clerk of the People's Court. Only Supreme Court decisions are published and are made public record. In recent years, the Supreme Court has started developing a casebook system, which shall help improve public access to court decisions.[104]

Reasonable Fees and Non-arbitrary Administrative Obstacles to Judicial Institutions

There are no substantial changes since 2011. Persons have equal and effective access to judicial institutions without being subjected to unreasonable fees or arbitrary administrative obstacles.

103 'Country Reports on Human Rights Practices for 2015: Vietnam,' *US Department of State*, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2015&dlid=252813#wrapper> accessed 11 May 2016.

104 Decision No 74/QD-TANDTC of the Supreme People's Court on approval of the project "developing the case book system of the People's Court, dated 31/10/2012.

Assistance for Persons Seeking Access to Justice

Persons seeking access to justice are provided proper assistance and could receive free legal advice from Vietnam's lawyers associations that are available at every local commune. (See discussion below on "Available and Fair Legal Aid to All Entitled.")

Measures to Minimize Inconvenience to Litigants and Witnesses, and their Families, Protect their Privacy, and Ensure Safety from Intimidation/Retaliation

There is no significant change in the law and procedures since 2011. There is no special law or comprehensive mechanism designed to protect witnesses or whistle-blowers. Instead, matters concerning witnesses are found in various laws, such as the Criminal Procedural Code and the Law on Preventing and Combating Drugs. The laws provide for, and prosecutors, judges and judicial officers take, measures to minimize the inconvenience to witnesses and victims/survivors (and their representatives), protect them against unlawful interference with their privacy as appropriate, and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during, and after judicial, administrative, or other proceedings that affect their interests.

Available and Fair Legal Aid to All Entitled

A legal aid system intended to help poor citizens, war veterans and their families, national minorities, and others access an increasingly complex legal system began developing in Vietnam in 1997, when the Prime Minister issued a regulation for their establishment across the country.[105] Since then, legal aid services have been mainly provided by legal aid centres managed by provincial departments of justice (provincial units of the Ministry of Justice) with annual budgets provided by the state. At present, there are 64 provincial legal aid agencies; five offices specialising on women affairs, 127 district branches, and 928 commune-level legal aid clubs.[106]

The work scope of the legal aid clubs includes, amongst others, providing consultancy in the area of civil, economic, and criminal law; providing legal representation in a host of cases; and, in some cases, helping in the protection of rights vis-à-vis other private parties or the state.[107] In addition, legal aid aims to "propagate" and explain the law, undertake mass legal education, and spread legal literacy to poor and disadvantaged groups of peoples. Legal aid is available in Vietnam for anybody who is seeking a solution to his or her legal troubles, from public to private disputes. To a certain extent, the state-run legal aid system has proved to be helpful in facilitating disadvantaged group's access to justice.[108] However, some commentators maintain that there has been an increasing need for legal aid, thus, causing the legal aid system to be overloaded.

105 Decision. 734/1997/QĐ-TTg of the Prime Minister on establishment of legal aid center to assist poor and poor citizens and disadvantaged groups, dated 06/09/1997.

106 Supra note 37.

107 Supra note 105

108 Supra note 37.

General Public Awareness of Pro Bono Initiatives and Legal Aid or Assistance

The general public is aware of pro bono initiatives/options for obtaining legal aid or assistance since it is very popular in the whole country. Aside from legal aid centres operating under the departments of justice of provinces/central, some major legal educational institutions, such as Ho Chi Minh City University of Law (HCMUL) and Hanoi Law University, have developed clinics of legal education, which also aim to provide legal aid or assistance on a pro bono basis. The law lecturers and students of HCMUL, in particular, have been providing regular legal aid and assistance to prisoners and the accused since 2013.

III. INTEGRATING INTO A RULES-BASED ASEAN

Progress towards Achieving a Rules-Based ASEAN Community

On Mutual Support and Assistance on the Rule of Law

The ASEAN Political-Security Community Blueprint is guided by the ASEAN Charter, and provides a roadmap to establish and promote political development in adherence to the principles of democracy, the rule of law and good governance, and respect for and promotion and protection of human rights and fundamental freedoms in the ASEAN Community. It shall be a means by which ASEAN states pursue closer interaction and cooperation to forge shared norms, and to create common mechanisms to achieve ASEAN's goals and objectives in the political and security fields.[109]

Extradition, Mutual Legal Assistance (MLA), and the recovery of proceeds in Vietnam are principally governed by the Law on Mutual Legal Assistance of Viet Nam (passed by the National Assembly in 2007; entered into force in July 2008).[110] This law provides for principles, competencies, and procedures for executing legal assistance in civil and criminal matters, extradition, and transfer of sentenced persons between Vietnam and foreign countries,[111] and the responsibilities of state agencies of Vietnam in mutual legal assistance. The incoming requests for MLA from a state that does not have a treaty with Vietnam shall be conducted based on reciprocity only.

Vietnam is active in signing the MLA treaties with partners in the region. It has signed and ratified the Treaty on Mutual Legal Assistance in Criminal Matters among ASEAN States in 2004 to create favourable legal grounds for MLA in the area of investigations or proceedings in respect of criminal matters. Vietnam entered into bilateral MLA treaties with European Union members who are former socialist countries, like Czech Republic, Poland, Slovakia, and Bulgaria;[112] and has recently also signed bilateral MLA treaties in

109 ASEAN, ASEAN Political-Security Community Blueprint, <http://www.asean.org/wp-content/uploads/images/archive/5187-18.pdf> accessed 28 February 2016.

110 The Law No 08/2007/QH12 on Mutual Legal Assistance (LMLA)

111 Article 17, LMLA

112 'Notifications under Article 26(1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I)', *EUR-Lex,* <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52010XC1217(01)> accessed 10 March 2016.

respect of criminal matters with the UK (2009)[113] and Australia (2014).[114] Vietnam also signed bilateral extradition treaties with India (2011) and Korea (2003).

Vietnam has signed the United Nations Convention against Transnational Organized Crime (UNCTOC), but has not yet ratified it.[115] The UNCTOC is also relevant to MLAs in the area of anti-corruption investigations and proceedings. [116]

According to statistics, from 2012 to 2014, Vietnam received an average of 75 MLA requests and three extradition requests from other countries, mostly from European Community member countries. Vietnam also sent 54 MLA requests and two extradition requests to foreign countries.[117] The MLA requests sought mainly are for serving of documents, providing of evidence, and criminal prosecution.

On Legislative and Substantive Changes Promoting the Rule of Law

Vietnam has adopted the new Constitution in 2013, which restated the government's goal of developing a rule of law state of the people, by the people, and for the people.[118] Accordingly, the Vietnamese government shall be organized and operate in accordance with the Constitution and the law, manage society by the Constitution and law, and implement the principle of democratic centralism. The Constitution also recognizes and incorporates many important principles of the UN Charter and the ASEAN Charter, including, amongst others, respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice. These can be considered as important legislative changes as Vietnam has committed to actively participate in building the post-2015 ASEAN Community Vision and identifying priorities for ASEAN cooperation in the next 10 years.[119]

On Enactment of Laws relating to the ASEAN Community Blueprints and Similar Plan

Vietnam is pursuing active economic integration policy. The Vietnamese government aims to comply with all international treaties to which Vietnam is a party. To that end, Vietnam has reviewed, enacted, and amended domestic laws to promote compliance with the ASEAN Community blueprints.

Accordingly, in 2014, the Ministry of Justice has reviewed and assessed 506 legal normative documents, including 83 laws and four resolutions ratified by the National Assembly; eight ordinances and 162 decrees of the Government; 16 joint circulars and 199 circulars/decisions of ministries and agencies; and 41 ASEAN international treaties (focusing mainly on trade and economy) to ensure that the national legal system meets

113 UK-Vietnam Treaty on Mutual Legal Assistance in Criminal Matters (2009) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238430/7879.pdf> accessed 08/ March 2016.

114 Australia – Vietnam Treaty on Mutual Legal Assistance in Criminal Matters (2015) <https://www.legislation.gov.au/Details/F2015L01804/Html/Text> accessed 08 March 2016.

115 Asian Development Bank and Organisation for Economic Co-operation and Development, *ADB/OECD Anti-Corruption Initiative for Asia and the Pacific: Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and Pacific*, <http://www.oecd.org/site/adboecdanti-corruptioninitiative/37900503.pdf> accessed 10 March 2016.

116 OECD, Assistance, Extradition And Recovery Of Proceeds Of Corruption In Asia and the Pacific, <http://www.oecd.org/site/adboecdanti-corruptioninitiative/37900503.pdf > accessed 10 March 2016

117 Ministry of Police, Report on the MLA activities (báo cáo hoạt động hợp tác trương trợ tư pháp) 2014, pp 20-21

118 Article 2, Constitution 2013

119 Bao Ha, ASEAN Community – the main pillar of the South East Asia (Cộng đồng ASEAN – trụ cột của Đông Nam Á), Bien Phong Newspaper online <http://www.bienphong.com.vn/congdong-asean-tru-cot-cua-dong-nam-a> accessed 12 January 2016.

the requirements for Vietnam's participation in the ASEAN Community.

In 2014, the National Assembly adopted new Laws on the Organisation of the People's Court[120] and People's Procuracy,[121] Law on Referendum,[122] Law on Real Estate Business,[123] Law on Investment,[124] and Law on Enterprises.[125] In 2015, the National Assembly passed the new Civil Code[126] and Criminal Code,[127] the leading legislations governing all civil and penal relations in the society, which will take effective and replace the current one on 1 January 2017. These efforts align with the ASEAN Economic Community Blueprint, which requires revision of legal normative documents by its members to support the development of the AEC. Vietnam, thus, has made efforts to improve its legal system in various fields such as trade, investment, banking-finance, judicial support, and prevention of crime, money laundering and corruption.

On Integration as Encouraging Steps toward Building the Rule of Law

Integration into the ASEAN Community and participation in international trade agreements such as the Trans-Pacific Partnership Treaty and the European Union-Vietnam Free Trade Agreement have encouraged the country to incorporate the concept of the "rule of law" into the new Constitution of the country. The National Assembly also adopted/amended various laws from 2014 to 2015 to prepare for integration endeavours, including those concerning the organisation of the courts, procuracy, referendum, real estate business, investment, and enterprises. These developments are expected to improve the quality of the legal framework and policy implementation in the country. (See discussion above on "Key Rule of Law Structures.")

On the Contribution of ASEAN Integration to the Building of Stronger State Institutions

Over the last three decades of integration, specifically since the adoption of the Doi Moi policy in 1988,Vietnam has made great steps in market economy institutionalisation by creating an open and equal environment for competition as well as implementing reforms in the organisational and operational structures of the state apparatus. The Ministry of Justice plays increasingly significant roles in improving institutions and policies, involving not only macro-activities, such as assisting the government and the National Assembly in formulating national legal strategies, development, and enforcement of legislation to meet the requirements of socio-economic development, but also micro-activities, such as drafting specific legal normative documents. The justice department is a core force in the process, and the judiciary is an important part of this network of institutions.

The development of the "one-door system" for receiving and answering requests and complaints of the public by the government and the implementation of e-government (in major cities like Ho Chi Minh City and Hanoi) have started to bring positive results in state management in the business sector and in creating

120 Law No. 62/2014/QH13 on organisation of the People's Court, dated 24 November, 2014

121 Law No.63/2014/QH13 on organisation of People's Procuracies, dated 24 November 2014

122 Law No 96/2015/QH13 on Referendum, dated 27 November 2014

123 Law No 66/2014/QH13, Real Estate Business, 25 November 2014

124 Law No 67/2014/QH13 on Enterprises, dated 26 November 2014

125 Law No 68/2014/QH13 on Enterprises, dated 26 November 2014

126 Civil Code No 91/2015/QH13, dated 27 November 2015

127 Criminal Code 100/2015/QH13, dated 27 November 2015

more transparent and equal environments for economic and social activities. The live transmission to the public of the debates during the working sessions of the National Assembly helps improve the efficiency and capacity of the legislative body. These developments had initially taken place due to the requirements of international integration, but they subsequently helped change the way of thinking on developing legislation to timely respond to on-going problems.

Prospects and Challenges

Challenges to a Strengthened Commitment to the Rule of Law

Strengthening the rule of law is challenged by the political ideology and old approaches in state management by the leaders. The single party system can help maintain stability, but also creates certain challenges in developing the rule of law and the democratic regime in Vietnam. The media is still controlled by the government. Protection of human rights has improved over the years, but human rights violations are still commented on and argued negatively in many forums in all levels: domestically, regionally, and globally.

Commitments and Plans/Initiatives in relation to ASEAN-wide Commitments and Declarations on Human Rights

Vietnam signed, but has not yet ratified the binding ASEAN Convention Against Trafficking in Persons, Especially Women and Children, which aims to prevent and combat trafficking in persons, ensure the just and effective punishment of traffickers, protect and assist victims, and promote cooperation amongst the parties. No information on other plans was found.

IV. CONCLUSION

Nexus of the Changes to the Overall State of the Rule of Law for Human Rights

Legal reforms in Vietnam have established the legal foundation for human rights. However, much is still expected to be done to implement the provisions and principles set in the Constitution of 2013 to ensure the rule of law for human rights.

The problem of the lack of independence of the judiciary, the lack of a transparent procedure for the appointment of judges and judicial officers, police brutality, corruption, and the lack of efficient judgment enforcement remain the main challenges for Vietnam. Other constraints include difficulty to access justice due to limited resources at the judicial and executive bodies, and bad infrastructure. These affect the exercise of fundamental human rights, such as the right to legal counsel and/or to seek external legal assistance, and the right to have the proceedings conducted in a timely manner. Judicial mistakes and inaccuracies during the proceedings will significantly reduce the effectiveness of the laws.

The significant regression in the area of fair trial rights, freedom of expression and separation of powers, and the increase of corruption amongst law enforcement agencies, which has led to the continuation of a culture of impunity, indicates problems in the rule of law in Vietnam.

Role of the ASEAN Declaration on Human Rights in Strengthening Rule of Law for Human Rights

The ASEAN Declaration on Human Rights creates an important foundation for regional developments on the rule of law and human rights. Being a signatory to the Declaration, Vietnam also respects its commitment under it. The country has adopted a number of laws and regulations from 2014 to 2015 in light of the declaration, which would positively influence and improve the state of human rights in Vietnam.

In conclusion, ASEAN integration is a positive development in the region for promoting the rule of law amongst ASEAN countries. The commitments under the ASEAN framework have an important role in promoting and facilitating the implementation of the rule of law and state institutions in ASEAN member countries. Vietnam should continue to contribute to the development of ASEAN programs for mutual support and assistance in the development of the rule of law in the region.

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