



# **RULE OF LAW: PERSPECTIVES FROM ASIA**

Edited by Marc Spitzkat



Konrad  
Adenauer  
Stiftung

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# Editorial

*All intelligent thoughts have already been thought;  
what is necessary is only to try to think them again.*

Johann Wolfgang von Goethe

**O**n that promising note, the Konrad-Adenauer-Stiftung Rule of Law Programme is delighted to present ***Rule of Law: Perspectives from Asia***, a collection of articles by Asian and European scholars on different topics that is only a small reflection of the kaleidoscopic perspectives we have seen since when the programme was first instituted in Asia.

The Konrad-Adenauer-Stiftung is a German political foundation which has, for over 50 years, committed itself to the promotion of democracy, international co-operation and development.

The Rule of Law Programme Asia, launched in 2005, is one of the five regional programmes of the Konrad-Adenauer-Stiftung that is dedicated exclusively to the development of rule of law worldwide. Our cover illustration indicates the specific region that our programme is focused upon. The importance of promoting Rule of Law in this region cannot be underestimated for its sheer population size and density and the geo-cultural diversity it encompasses within it. In fact, we would like to mention an interesting map that can be found on a popular website in social media in a post titled "40 Maps That Will Help You Make Sense of the World".<sup>1</sup> One of the maps in there draws a circle around the very same countries of Asia that our programme is dedicated to and highlights that the encircled region has more people living inside the circle than outside of it. This poignant fact reinforces the need and belief that Asia, especially South Asia and South-east Asia is where promoting strong institutional mechanisms and governance shall have its furthestmost impact.

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1 Map no. 12 titled "Visualizing Global Population Density" retrieved from "40 Maps that Will Help You Make Sense of the World" created on Aug 13, 2013, last viewed at <http://twistedstifter.com/2013/08/maps-that-will-help-you-make-sense-of-the-world/> on September 5th, 2013.

As we near a decade of partnerships and collaborations on a variety of issues ranging from Judicial reform to the development of Constitutionalism in South-east Asia to Human Rights and media advocacy in the ASEAN region to Climate Change, the time has come to take a bird's eye view on the work and progress of the Rule of Law programme. Towards this end, we felt the need to compare the diverse legal systems within the region from both an Asian and European perspective. Thus this publication was conceptualized inviting legal scholars from Asia and Europe, many of whom are our partners in several key projects, to share their thoughts on any issue encompassing the 'rule of law' in Asia.

However, it is seen that defining the term 'rule of law' is not a simple basic premise that everyone agrees upon. Legal scholars across the globe agree only on one aspect; that it is an 'essentially contested concept' discusses *Prof. Mahdev Mohan* and his co-authors *Jenny Holligan and Lan Shioh Tsai*<sup>2</sup> in "**Rule of Law in ASEAN – From 'Competing Conceptions' Toward a Common Conceptual Framework.**" The article further discusses the various competing theories of what the term 'ought' to be vis-à-vis what it has become, but asserts that for it to have meaning in ASEAN, it must be independently framed, have benchmarks for assessment and be analysed in the context of its real-world implementation. In addition to the various theoretical frameworks and enumerating four central principles of Rule of Law in ASEAN, the article also discusses how the 'ASEAN framework' for Rule of Law is being applied in the ongoing trials at the Extraordinary Chambers in the Courts of Cambodia (ECCC).

How robust the mechanisms instituted by the ASEAN for the development of rule of law are, is a contentious question as illustrated by *Prof. H. Harry L. Roque Jr.* in '**Parcon vs. Republic of the Philippines: A Challenge For a Relevant ASEAN Human Rights Mechanism.**' Prof. Roque argues that when the ASEAN Inter-Governmental Commission on Human Rights (AICHR) did not act upon the first ever communication made to it in January 2010 by the heirs of the journalists killed in the Ampatuan massacre, it has violated its own Terms of Reference. The article raises some critical questions on the feasibility and implementation of protection of Human Rights within the ASEAN framework.

The World Justice Project Rule of Law index has asserted that "*the rule of law is the foundation for communities of opportunity and equity- it is the predicate*

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2 Both of whom are KAS-SMU Research fellows.

*for the eradication of poverty, violence, corruption, pandemics and other threats to civil society."*

For a concept, this would make the rule of law an onerous and tough proposition for any country, especially a 'new democracy' to achieve. Moreover, in a region as vast and culturally heterogeneous as Asia, the programme is aware that a uniform method and process to our project work in achieving this goal is both limiting and short-sighted.

Thus, how far-ranging and ideologically flexible the programme's scope of work is, ought not to surprise many of our readers.

Judicial reform, the role of the judiciary in guaranteeing the fundamental rights of citizens and the measures a government must take in order to ensure the highest degree of judicial independence, has been a key focus area of the Rule of Law programme since its inception.

*Prof. Karl-Peter Sommermann* in '**The Right to Access to the Administrative Jurisdiction**' offers a theoretical and comparative discourse on the concept of rule of law and its influence in development administrative law and jurisdiction. Taking illustrative examples of England, France and Germany the article enumerates the benefits and limitations of these courts and the likely role and impact they could play in national and sub-national governments in Asia.

Here, we also have two articles discussing two separate aspects of judicial reform in two countries which are the fastest growing economies of Asia, i.e. India and Indonesia.

In '**Judicial Review in India- Judicial Activism or Judicial Over-reach**' *Prof. M.K. Balachandran* discusses that the increased scope of the Judiciary in India in recent times in the form of 'judicial activism', while having been deemed necessary for cases of human rights abuse and wide-scale corruption in India; the Supreme Court must also tread with caution to avoid 'judicial over-reach' which undermines the doctrine of separation of powers, established by the Court as the 'basic structure' of the Indian Constitution.

Whereas, in Indonesia *Dr. iur. Sebastian Köbler* after tracing the history and organizational structures of the apex judiciary i.e. the Supreme Court and the Constitutional Court, brings to light on how despite the scope of judicial review for both courts being demarcated by defined powers and functions, has often led to conflict of jurisdiction and delay in administering justice.



Any discussion on rule of law in Asia would be incomplete without touching upon the aspects of democratic reform measures in China. Notwithstanding, the geo-political significance of the People's Republic of China in '**Democracy with the Chinese Characters? The Role of the People's Congresses in China**' Prof. *Qianfan Zhang* asks a fundamental question of the efficacy of the institutions made supreme in order to fulfill the Communist promise that 'people' shall reign in the 'People's Republic of China'. Prof. Zhang maps out the constitutional powers, the organizational structure and the legislative processes of the National and Local People's Congresses (NPC and LPC) and concludes with some recommendations on how to prevent them from remaining mere 'rubber-stamps' of the ruling Chinese Communist Party.

Finally, in keeping with the Federal Government of Germany's energy and environmental policy which in the last five years has seen a renewed focus, the Konrad-Adenauer-Stiftung and the Rule of Law Programme has launched several projects on Climate Change, Environment and Energy. Since 2011, the programme has developed a strong network of Alumni lawyers and academicians who have focused on developing stronger environmental legislations within Asia. One amongst them, Prof. *Noriko Okubo* in '**Climate Change Policy in Japan: the Role of Local Initiatives and Voluntary Approaches**' has highlighted the several voluntary and local approaches taken by Japan towards a reform in Climate Change policy. The unprecedented nuclear accident in Fukushima has caused several governments, including the German Government to re-conceptualize approaches to renewable and sustainable energy. Drawing from the Japanese model before and after the accident, leaves us readers with many questions for some serious thought which shall be the continued focus of our programme in the years to come.

Let me take this opportunity to thank the authors for their contributions and support towards this publication. Your patience and kind understanding is truly appreciated. I also thank Ms. Anna Willert, legal intern at the Rule of Law programme for translating the article by Dr. Sebastian Köbler from German to English and Mr. David Grebe, our former legal intern for his assistance in proof-reading the articles.

A special word of thanks to Ms. Chiteisri Devi, the Research Associate at our office in Singapore for editing and proof-reading the articles, creating the cover illustration and coordinating the logistics to make this publication happen.

**Marc Spitzkatz**  
**Singapore, September 2013**

# RULE OF LAW IN ASEAN - FROM 'COMPETING CONCEPTIONS' TOWARD A COMMON CONCEPTUAL FRAMEWORK

Mahdev Mohan, Jenny Holligan & Lan Shiow Tsai<sup>1</sup>

## ABSTRACT

**A** survey of the relevant literature and contemporary reception of the rule of law in ASEAN countries suggests that the definition of the rule of law should not be unduly cramped by governments nor emptied of any distinctive meaning by scholars and state-building experts seeking to foist a unitary, transplantable vision. To have meaning in ASEAN, the rule of law cannot be an abstract notion. It must be independently framed, have practical benchmarks for assessment, and be analyzed in the context of its real-world implementation. This article aims to begin to do this.

## A. INTRODUCTION

Rule of law has been “bandied about” by politicians and theorists, as though there is a shared conception of the term.<sup>2</sup> Yet no universally accepted concrete definition of the term exists. “[T]here are almost as many conceptions of rule of law as there are people defending it”<sup>3</sup>, and it is said to be an “essentially contestable concept” with both formal and substantive elements.<sup>4</sup> Nonetheless, definitional challenges should not forestall analysis and debate as “just being

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1 Mahdev Mohan is Assistant Professor of Law and Director of the Asian Peace-building & Rule of Law Programme (APRL) at Singapore Management University. Lan Shiow Tsai and Jenny Holligan are KAS-SMU research fellows. They were lead author and contributors respectively of the Human Rights Resource Centre for ASEAN’s rule of law study which was completed in April 2011.

2 Erik G. Jensen, “Justice and the Rule of Law” in *Building States to Build Peace* (Charles T. Call and Vanessa Wyeth eds, 2008, Lynne Reiner), p 122-3.

3 Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) at p 3.

4 Fallon, Jr, “The Rule of Law” as a Concept in Constitutional Discourse’, supra n 9, at 7.

aware of the basic elements of the rich definitional debate surrounding the rule of law should improve the practice of strengthening it”.<sup>5</sup>

This article will consider ASEAN’s departure from these orthodoxies with the adoption of its Charter and other recent developments. This article provides an overview of approaches to measuring the rule of law; describes the doctrine’s central principles and indicators; surveys preliminary findings from the individual member states of the Association of Southeast Asian Nations (‘ASEAN’) relating to the rule of law; and discusses challenges and lessons learned through the process. It concludes by proposing recommendations for further research, analysis, and capacity building.

### **European roots of the rule of law**

Thomas Hobbes in the *Leviathan* viewed the law as the “very embodiment of the Sovereign’s will, inseparable from questions of government.”<sup>6</sup> As for Locke, he understood the origin of law and origin of the state to be identical, since “law is both those rules to which we bind ourselves through the social contract, and those rules formulated by the sovereign in accordance with that contract”<sup>7</sup>.

Seen in this light, the rule of law is coercive - an extension of government’s hand, good or bad. But legal coercion has its limits.

Jean-Jacques Rousseau distinguished law from government, and asserted that abolishing the monarchy and replacing it with a populist parliamentary system of government is essential for good governance. Democracy has since been closely linked to the idea that “law has a certain irrevocable authority over government” and guards against unfettered governmental discretion.<sup>8</sup> English jurist Albert Venn Dicey observed that that the rule of law involves two aspects: that “no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before ordinary courts of the land” and that “every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals”<sup>9</sup>.

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5 Ibid

6 Michael J. Trebilcock and Ronald J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress*, (Edward Elgar, 2008) at p 14.

7 Ibid

8 Richard Posner, “Constitutional Law From a Pragmatic Perspective” (2005) 55 University of Toronto Law Journal 299.

9 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th Ed, 1960), at p 187.

Viewed through this lens, the rule of law can thus be viewed as a cardinal aspect of constitutional discourse made up of “multiple, complexly interwoven elements” with diverse and competing values, which any adequate theory of rule of law cannot simply subsume.<sup>10</sup> Perhaps German sociologist Max Weber put it best when he critiqued legal coercion:

“Legal coercion, where it transforms a custom into legal obligation... often adds practically nothing to its effectiveness, and, where it opposes custom, frequently fails in the attempt to influence actual conduct. The chance of legal coercion which, ...motivates even “legal” conduct only to a slight extent, is also objectively an ultimate guaranty for no more than a fraction of the actual course of consensually related conduct.... Only a limited measure of success can be attained through the threat of coercion supporting the legal order.<sup>11</sup>

Eric Jensen has interpreted Weber’s words to mean that “rules that run contrary to custom, convention and norms must be strategically targeted if there is to be a realistic expectation of enforcement (and) if new rules and institutions are developed, they should be tied to – or have the potential of being tied to – behavior over time on the context of prevailing informal constraints”.<sup>12</sup> Jensen’s erudite analysis has merit. The principle he has distilled from Weber’s words almost a century ago forms the cornerstone of how the rule of law should be analyzed and prescribed in ASEAN.

## **‘RULE OF LAW’ IN ASEAN: THROUGH ‘THICK’ & ‘THIN’**

### **The Rule of Law can be ‘Thin’**

Countries and development policy-makers keen to use positivist yard-sticks to demonstrate economic growth have traditionally advocated a ‘thin’ conception of the rule of law, which emphasizes the formal or instrumental aspects of any legal system, regardless of fundamental rights.<sup>13</sup>

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10 Richard H. Fallon, Jr, “The Rule of Law” as a Concept in Constitutional Discourse’, *Columbia Law Review* 1997; 97(1): 1-56, at 56.

11 Max Weber, “The Economy and Social Norms” and “Summary of the Most General Relations Between Law and Economy”. In his *Economy and Society: QAn outline of Interpretive Sociology*,, edited by Guenther Roth and Claus Wittich, 2 vols, (Berekeley: University of California Press, 1978), pp. 320, 324-5, 334.

12 Erik G. Jensen, “Justice and the Rule of Law” in *Building States to Build Peace* (Charles T. Call and Vanessa Wyeth eds, 2008, Lynne Reiner), p 122..

13 See JOSEPH RAZ, *The Rule of Law and its Virtue*, in *THE AUTHORITY OF LAW: Essays on Law & Morality*, 210, at 214-216 (1983).

According to Joseph Raz: “The ‘rule of law’ means literally what it says: the rule of the law”<sup>14</sup>. In other words, “people should obey the law and be ruled by it”<sup>15</sup>.

But a purely formal and instrumental conception of the rule of law can fall short in practice. As Gordon Barron persuasively argues, by forwarding “its vested interests in promoting as formal and technocratic a version of the [rule of law] as possible”,<sup>16</sup> the World Bank has hampered its own efforts to generate sustainable rule of law reform in developing countries:

“[T]he need to focus on purely economic legal institutions necessarily imposes on the Bank a very restricted view of the legal system and the [rule of law], and severely limits its ability to “build” the [rule of law]”.<sup>17</sup>

At its thinnest, the rule of law can be robbed of its central mantra – i.e. rather than having unfettered discretionary power, all branches of the governments are subject to the law and its limits.<sup>18</sup> Instead, it can end up becoming little more than a rubber-stamp for executive rule. In 1995, Singapore’s Attorney-General at the time stated that the concept of the rule of law “should not be substantially different from that understood and accepted by the government of the day”, and consistent with the “necessary conditions” allowing the government to “exist and thrive”.<sup>19</sup> Despite being enshrined in Malaysia’s magna carta, the Rukunegara, the rule of law, has not been interpreted as being “particularly concerned with the checks and balances necessary in the popular notion under a democratic system”, but has instead been “proclaimed to mean no more than that the rules and regulations made by the government must be followed”.<sup>20</sup>

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14 Ibid, at 212.

15 Ibid.

16 Gordon Barron, *The World Bank & Rule of Law Reforms* 32 (Dev. Studies Inst. Working Paper No. 05-70, 2005), available at [www.lse.ac.uk/collections/DESTIN/pdf/WP70.pdf](http://www.lse.ac.uk/collections/DESTIN/pdf/WP70.pdf).

17 Ibid, at 32.

18 Richard A. Posner, *A Constitutional Law from a Pragmatic Perspective*, 55 U. Toronto LJ, 299, at 299 (2005).

19 “Law Society Failed to Defend Legal System: AG”, *Straits Times*, 18 November 1995, 1.

20 Rais Yatim *Freedom Under Executive Power in Malaysia: A Study of Executive Supremacy*, Kuala Lumpur, Endowment Publications, 1995, at p 27.

Taken a step further, a 'thin' conception of the rule of law can devolve into rule by law, which results in all state action being beyond reproach. In Indonesia, the rule of law, or *Negara Hukum*, is constitutionally enshrined and has European roots. But prior to the democratic movement of the 1990s, usually referred to as *Reformasi*, this principle was narrowly interpreted by various administrations for the purposes of legitimizing and immunizing executive power.<sup>21</sup> Suharto's New Order government of the late 1960s, for instance, often claimed that it "ruled by law," albeit law made by and for the ruling elite alone, and mercilessly enforced.<sup>22</sup>

By accepting only that which is essential for the rule of law to function, a 'thin' conception risks ignoring the moral animus or content of the law altogether, which in Thom Ringer's words, is "much of what makes the rule of law an appealing ideal in the first place, such as equality before the law and like treatment of like cases".<sup>23</sup> After all, divorcing the law from the normative moral spirit which animates it does not necessarily guarantee that the goals of a 'thin' conception, such as efficiency, fairness or predictability of the law, will prevail. For example, although Cambodia, Laos and Vietnam embraced a 'thin' instrumentalist conception of the rule of law in the 1990s, the ruling (communist) parties in these countries were above the law, and thereby undermined its rule.

As Ronald Bruce St John opined:

"Consequently, the governments of Cambodia, Laos and Vietnam, in the two decades after 1975, faced tremendous obstacles in affecting the rule of law because its implementation involved a basic contradiction between respect for authority and tradition and the legal framework thought by many economists and other scholars to be necessary for a market economy."<sup>24</sup>

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21 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.

22 Hans Thoolen, *Indonesia and The Rule of law: twenty years of "new order" government* (1987).

23 Thom Ringer, *Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the 'Rule of Law' and its Place in Development Theory and Practice*, *Yale Human Rights and Development Law Journal*, Vol. 10, No. 1, 2007, p.196.

24 Ronald Bruce St John, *2006, Revolution, Reform and Regionalism in Southeast Asia: Cambodia, Laos and Vietnam*, Oxford: Routledge, p. 100.

## The Rule of Law can be 'Thick'

Confronted with the shortcomings of a 'thin' conception of the rule of law, other scholars have proposed a 'thick' one, which incorporates, *inter alia*, fundamental human rights norms and standards.<sup>25</sup>

Amongst ASEAN countries, Thailand and the Philippines have historically subscribed to a comparatively thicker definition of the rule of law, which includes substantive ideals such as human rights and good governance. Thailand has sought to "bring laws up-to-date with current socio-economic situation and the protection of individuals' rights in accordance with the rule of law."<sup>26</sup> The Philippines's 1987 Constitution, which provides for the protection of due process and liberty, is shaped by lessons learned from the country's experience of martial law. However, as our study reveals, formal guarantees of human rights through the rule of law are not always given effect in practice.

A 'thick' conception of the rule of law too has its drawbacks if it is allowed to overreach. At its thickest, the rule of law can end up encompassing a laundry list of aspirational qualities from egalitarian social democracy to gender equality; from a strong electoral system to social welfare.<sup>27</sup>

Such an abstract approach can lead to uncertainty as to what the rule of law precisely entails, since if it means everything, can it still really mean anything?<sup>28</sup> As Brian Tamanaha points out:

"The rule of law cannot be about everything good that people desire from government. The persistent temptation to read it this way is a testament to the symbolic power of the rule of law, but it should not be indulged".<sup>29</sup>

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25 See Michael Neumann, *The Rule of Law: Politicizing Ethics* 3 (2002). See Also Cass R. Sunstein, *Designing Democracy: What Constitutions Do* 7 (2001).

26 Abhisit Vejjajiva, *The Policy Statement of the Council of Ministers to the National Assembly*, December 29, 2008.

27 See William C. Whitford, *The Rule of Law*, 2000, *WIS. L. Rev.* 723 (2000).

28 Thomas. Carothers, *The Rule of Law Revival*, *FOREIGN AFFAIRS*, Ma-April 1988, at 95["One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's troubles"]. See also Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An analytical Framework*, 1997 *PUB.L.*467, at 487 (1997) ["the adoption of a fully substantive conception of the rule of law has the consequence of robbing the concept of any function which is independent of the theory of justice which imbues an account of law"].

29 Brian Z. Tamanaha, *"On The Rule of Law: History, Politics, Theory"* Publisher: Cambridge University Press, 2004 at 113.

Further, if the rule of law is elided with open-ended concepts such as 'a just society', a 'thick' conception of the rule of law can play into the hands of those who subjectively assert that their methods are just. Amartya Sen provides further critique of the "transcendent" approach in determining a perfect "just society". Sen counters that such concepts are "exclusively devoted to identifying the 'perfectly just'", which does not provide much guidance in "making judgments about the enhancement of justice through institutional reform or behavioral transformation."<sup>30</sup>

### **Looking Beyond 'Horizons'**

In Donnelly's reflection of the reciprocal relationship between rule of law and other concepts, he highlights that "every statement concerning rights is made within a horizon and from a point of view."<sup>31</sup> Donnelly identifies "horizons" as a "great obstacle to the advance of human rights and to the establishment in the international sphere of the rule of law."<sup>32</sup> Recognizing that the understanding of rule of law is limited to one's cultural and intellectual point of view, he argues that "the process of developing and establishing rights then should be perceived and studied in relation to the problem of horizons, the possibility of crossing horizons and the means for doing so."<sup>33</sup>

The lack of attention to the complications in differing 'horizons' is evident in instances when rule of law has been used as a sword by foreign policy-makers and donors seeking to export ethnocentric theories and policies, regardless of whether these theories and policies resonate with communities in developing countries. Since its administration by the United Nations (UN) in 1992-93, Cambodia has received billions of dollars in foreign aid to reform principal justice institutions. But funds have not always translated into lasting positive results due to the lack of empirical assessment of domestic constituencies.<sup>34</sup>

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30 Rather, Sen writes that a comparative approach offers a more practical and relevant investigation of "different way of advancing justice in a society" Amartya Sen, *Global justice in Global Perspectives on the Rule of Law*, edited by James J. Heckman, Robert L. Nelson, and Lee Cabatingan, Routledge, London and New York, 2010.

31 Donnelly, Samuel J. M. 2003. *A personalist jurisprudence, the next step: a person-centered philosophy of law for the twenty-first century*. Durham, N.C.: Carolina Academic Press.

32 Donnelly, Samuel. 2006. "Reflecting on the Rule of Law: Its Reciprocal Relation with Rights, Legitimacy, and Other Concepts and Institutions". *The Annals of the American Academy of Political and Social Science*. 603 (1): 37-53.

33 Ibid.

34 Public participation in legal reform and legal awareness projects has often been poorly conceived and ineffective. See Erik G. Jensen, "Meaningful Participation or Deliberative Deception: Realities and Dilemmas in Legitimizing Legal and Judicial Reform Projects through Consultative Processes", paper presented at World Bank Lawyers Forum, November 4-5, 1999, Washington DC.



In contrast, commune councils which provide localized conflict mediation services at the village and the commune levels have been found by Cambodians to be “easier, cheaper and more effective than at higher levels”.<sup>35</sup> As Tamanaha points out, the development community responsible for rolling out rule of law projects are often slow to realize that “if a state legal system is stuck in a dysfunctional state, viewed negatively by the populace, with reform efforts consistently persistently failing, it is sensible to explore alternatives that might satisfy legal functions”<sup>36</sup>

Conversely, the concept of horizons can also be used a shield by developing countries to derogate from human rights observance, and conveniently lend legitimacy to self-styled communitarian precepts. As Donnelly highlights, “the priority for economic rights [over civil liberties] is favored in some developing countries with strong or dictatorial central regimes”<sup>37</sup>.

Spearheaded by Indonesia, Malaysia and Singapore, the 1993 Bangkok Declaration posited that the region’s “Asian values” were incompatible with Western ones predicated on individual rights. However, as Vitit Muntarbhorn astutely explains, Asian invocations of the rule of law can be just as mystifying as Western ones:

“[A]lthough the rule of law plays a prominent place in academic thinking, the term has taken on a somewhat presumptuous air, in that when it is used people are presumed to know what it means – when in fact people do not know what it means; nor has it been explained adequately to people. The Thai term for the rule of law is “Luck Nititham”, implying a precept of law based upon a sense of justice and virtue – not an easy notion to grasp in the concrete sense. There is thus a kind of mythification of the term as a lynchpin of our society, when in reality it

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35 Kim Ninh & Roger Henke, “Commune Councils in Cambodia: A National Survey of Their Functions and Performance, with a Special Focus on Conflict Resolution”, (Asia Foundation, May 2005), available at <http://asiafoundation.org/pdf/CB-CCSurvey.pdf>

36 Tamanaha, Brian Z., *The Rule of Law and Legal Pluralism in Development* (July 2011). Washington University in St. Louis Legal Studies Research Paper No. 11-07 01; *LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE*, Caroline Sage, Michael Woolcock, Brian Z. Tamanaha, eds., Cambridge University Press, 2012; *Hague Journal on the Rule of Law*, Vol. 3, p. 1, 2011; Washington University in St. Louis Legal Studies Research Paper No. 11-07-01.

37 Donnelly, Samuel. 2006. “Reflecting on the Rule of Law: Its Reciprocal Relation with Rights, Legitimacy, and Other Concepts and Institutions”. *The Annals of the American Academy of Political and Social Science*. 603 (1): 37-53.

is steeped in popular incomprehension rather than comprehension. This mythification dilutes the impact of the notion of the rule of law, precisely because the distance between the people and the notion itself is often extreme – and that gap results in what can be described as the rule of lore”.<sup>38</sup>

Of course, we are not suggesting that international standards for the rule of law should be abandoned or that governments should not set legitimate limits upon the application of the rule of law in accordance with prevailing socio-cultural views. Our point is that freighting the rule of law with politics is unhelpful, whether those politics claim to advance Asian or Western discourses.

The “thick” conception of the rule of law would entail the protection of each individual’s share of primary social goods, as discussed by Donnelly and Sen, among others. However, There is a risk that a ‘thick’ conception of the rule of law which invests the law with the responsibility to deliver social or distributive justice places too much power in the hands of unelected judges to determine societal objectives. Scholars such as Jeremy Waldron fear that such a conception can cut against the grain of democracy and supplant the role of the legislature.<sup>39</sup>

In the final analysis, it appears to us that neither conception of the rule of law, ‘thin’ or ‘thick’, is presumptively better than the other. Both have strengths and weaknesses, and their own bounded ‘horizons’. Our survey of the relevant literature and contemporary reception of the rule of law in ASEAN countries suggests that the definition of the rule of law should not be unduly cramped by governments nor become a “proxy battleground” for disputes about broader social or political issues, and in the process empty the concept of any distinctive meaning.<sup>40</sup> To have meaning in ASEAN, the rule of law cannot be an abstract notion. It must be independently framed, have practical benchmarks for assessment, and be analyzed in the context of its real-world implementation. Our article aims to begin to do this.

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38 Vitit Muntarbhorn, “Rule of Law and Aspects of Human Rights in Thailand”, Randall Peerenboom (ed.), *Asian Discourses of Rule of Law, Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* London, New York, Routledge Curzon, 2004, p1.

39 Jeremy Waldron, *Rights and Majorities: Rousseau Revisited*, in *Liberal Rights*, 417-18.

40 *Ibid* at 114.

## **From 'Competing Conceptions' Toward A Common Conceptual Framework**

Traditionally, the rule of law has not been viewed as a unifying concept amongst ASEAN countries, but as a "protean" one.<sup>41</sup> In 2004, in a seminal treatise on Asian discourses of rule of law, scholars characterized ASEAN countries as typifying "competing conceptions" of the rule of law.<sup>42</sup>

Aside from communist Vietnam and Laos, ASEAN countries were classified by those scholars into two categories – countries that are authoritarian, soft-authoritarian or with limited democracy (Myanmar, Malaysia, Singapore and Brunei); and countries that feature constitutionalism and transitional justice (Cambodia, Philippines, Thailand and Indonesia). Both categories were compared and contrasted with mature democracies in other parts of the world, primarily in the West.<sup>43</sup>

Relying on this schema, the treatise's editor and lead author, Randall Peerenboom, concluded that while legal systems in the region are generally compliant with 'thin' conceptions of the rule of law that "provide a certain degree of universalism", "universalism breaks down, however, when it comes to competing thick conceptions".<sup>44</sup> Professor Peerenboom added that "much of the current legal and political debate has occurred without explicitly raising the banner of rule of law, though competing 'thick' conceptions of rule of law lie just beneath the surface, awaiting more systematic articulation".<sup>45</sup>

Times have changed. To borrow and recast Professor Peerenboom's words, our study reveals that ASEAN has hoisted the "banner of rule of law", and that the time is ripe for a practicable framework to be articulated so that the rule of law can be systematically assessed and enhanced in the region.

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41 Randall Peerenboom, "Varieties of Rule of Law: An Introduction and Provisional Conclusion", in Randall Peerenboom (ed.), *Asian Discourses of Rule of Law, Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* London, New York, Routledge Curzon, 2004, at 45.

42 See generally Randall Peerenboom (ed.), *Asian Discourses of Rule of Law, Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* London, New York, Routledge Curzon, 2004.

43 Ibid.

44 Ibid, at 45.

45 Ibid, at 47.

While the degree of application of the rule of law in individual ASEAN countries varies according to their specific contexts and capacities, these variations do not reflect 'competing conceptions' as much as they are different notes on the same normative register for the rule of law in ASEAN.

## **B. METHODOLOGY**

While it has great symbolic value, the rule of law is only as strong as the degree to which it is understood and allowed to take root. This article seeks to shed light on ASEAN member states' understanding, interpretation and implementation of the rule of law as a principle of good governance in relation to strengthening the respect for and protection of human rights.

This article employs two main strands of analysis in arriving at its conclusions. The first strand focuses on the extent to which ASEAN member states have succeeded in implementing the rule of law as interpreted by their various branches of government. It examines what ASEAN states say and do with respect to the rule of law, i.e. in what circumstances they invoke this concept, how they interpret it and whether they seek to give it effect in practice. We consider, for instance, if the state in question is a party to major human rights instruments, and, if so, how these treaty obligations have been received by the executive, incorporated into domestic law by the legislature, and upheld by the judiciary.

Another strand of analysis employs broadly accepted indicators that identify formal and substantive elements of the rule of law – such as whether government officials are accountable under the law, and whether legal institutions protect fundamental due process rights and allow ordinary people access to an impartial judiciary. Formal elements require laws to be general in scope, prospective in their application, clear in their formulation, and certain in their application.<sup>46</sup>

Since the law is more than a code of black-letter laws on paper, this article has sought, as far as practicable, to reflect the substantive outcomes of the law in action as well, i.e. the extent to which these indicators are fairly implemented by justice institutions, and whether or not they impose meaningful and enforceable restraints on the government through recourse to individual rights.

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46 Erik G. Jensen, "Justice and the Rule of Law", in Charles T. Call & Vanessa Wyeth, *Building States to Build Peace* (2008), at 123.

Essentially, this article aims to provide a conceptual lay of the land relating to rule of law in the context of human rights in ASEAN. It 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 member states. Rather, it is meant to serve as a preliminary sketch: a point of departure for further longitudinal empirical studies, rule of law programmes, and regional human rights bodies and other stakeholders seeking to enhance the rule of law and respect human rights in accordance with the ASEAN Charter.

Our article suggests that recent global and regional developments have helped to crystallise a growing but firm consensus about the basic elements of the rule of law. These developments include broad global acceptance for a UN definition of the rule of law linking the concept to human rights and democracy; the incorporation of the rule of law (and this linkage) in the ASEAN Charter; and the entrenchment of the rule of law and human rights as part and parcel of ASEAN's move toward becoming a rules-based and integrated community with shared values. We will consider each of these recent developments in turn.

### **C. DIFFERENT LINKS ON THE SAME CHAIN- UNDERSTANDING THE 'RULE OF LAW', 'HUMAN RIGHTS' & 'DEMOCRACY'**

#### **Rule of Law, Human Rights and Democracy: Interlinked and Mutually Reinforcing Principles**

In 2004, in an effort to promote uniformity in the usage and understanding of the rule of law, United Nations ("UN") Secretary-General Kofi Annan, as he then was, offered the following definition:

[The "rule of law"] refers to 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.<sup>47</sup>

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47 Secretary-General to the Security Council. The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies. (United Nations Security Council, 2004, S/2004/616\*), 4.

Mr. Annan’s definition has been further developed in the latest Guidance Note of the UN Secretary-General on the UN Approach to Rule of Law Assistance (“UN S-G’s Guidance Note”):

“For the United Nations system, the rule of law is 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 the 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. Justice is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Its administration involves both formal judicial and informal/customary/traditional mechanisms”.<sup>48</sup>

The UN-SG’s Guidance Note also reiterates the co-relation between democracy, rule of law and human rights,

“All human rights, the rule of law and democracy are interlinked and mutually reinforcing and they belong to the universal and indivisible core values and principles of the United Nations”.<sup>49</sup>

Affirming his predecessor’s definition, UN-SG Ban Ki-Moon recently said that respect for the rule of law “implies respect for human rights and tolerance of human differences”, underscoring the fact that the concept should be sensitively and inclusively understood, especially since human differences can “relate to things so fundamental as differences of culture and religion”<sup>50</sup>.

Mr. Annan’s definition and its subsequent reiterations (collective the “UN Definition”) are significant in several respects.

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48 UN Secretary-General (UNSG), Guidance Note of the Secretary-General: United Nations Approach to Rule of Law Assistance, 14 April 2008, at 1.

49 Ibid, at 1.

50 New York, 11 April 2011 - The Secretary-General’s remarks to General Assembly on “The Rule Of Law And Global Challenges” [As delivered] Office of the Spokesperson of the Secretary-General <<http://www.un.org/apps/sg/sgststats.asp?nid=5198>>

First, while the UN definition of the rule of law is certainly not perfect,<sup>51</sup> it thoughtfully presents the term as a collection of basic elements that inform the structure, operation, evaluation and reform of law-related institutions across the world. Moving away from a binary dichotomy of the rule of law as 'thin' or 'thick', which the schema referred to in paragraph 27 above posited, this definition interweaves both formal elements of the rule of law, such as equality, accountability, and avoidance of arbitrariness with substantive human rights norms and standards, while retaining more traditional concepts, such as supremacy of the law.

Second, the UN Definition has enjoyed broad global support and has entrenched the connection between rule of law and human rights. At the 2005 World Summit, all 192 UN member states, including ASEAN nations, unanimously pledged their commitment to "actively protecting and promoting all human rights, the rule of law and democracy", recognizing that "[these principles] are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations, and call upon all parts of the United Nations to promote human rights and fundamental freedoms in accordance with their mandates."<sup>52</sup>

Third, the UN Definition's inherent acknowledgment that the rule of law is indeed "interlinked and mutually reinforcing" vis-a-vis both human rights and democracy underscores the fact that these important principles are to be viewed together; not set apart, as a purely 'thin' conception of the rule of law would require. Not only are these principles presented as being linked and compatible, but as strengthening each other, thereby underscoring their composite importance.

Fourth, as Brian Tamanaha notes, the UN Definition's "instantiation of formal legality, individual rights, and democracy as a package" represents the very core imperative of the rule of law – the need for checks and balances. Such a packaged presentation of the rule of law presents the concept as one that can restrain unlawful executive or legislative power in favour of individual rights, as well as judicial power if democratic law-making is unduly squelched by court decisions.<sup>53</sup>

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51 Erik G. Jensen, "Justice and the Rule of Law", in Charles T. Call & Vanessa Wyeth, *Building States to Build Peace* (2008).

52 General Assembly, 05-48760 Resolution adopted by the General Assembly [without reference to a Main Committee (A/60/L.1)] 60/1. 2005 World Summit Outcome 24 October 2005, Sixtieth session, Agenda items 46 and 120.

53 Brian Tamanaha, *Brian On the Rule of Law: History, Politics, CUP / 2005* at 111.

Fifth, the UN Definition distinguishes the 'rule of law', which it refers to as a concrete "principle of governance", from the related but distinct notion of 'justice', which it terms an "ideal of accountability and fairness". It thus avoids the pitfalls of a laundry-list approach described above where the rule of law is proposed as a just cure for "all the world's troubles".<sup>54</sup>

Finally, the UN Definition presents the rule of law as a consolidated benchmark for governance, not a protean political concept that invites classifications depending on the degree to which governance styles comport with the West, as the schema mentioned in paragraph 27 above does. Indeed, the UN Definition eschews classifications which impinge on differences, such as culture and religion, as respect for these differences is a corollary of respect for human rights.

### **Rule of Law, Human Rights & Democracy: Unprecedented Inscription in the ASEAN Charter**

The UN Definition is instructive as it has found its way to into the ASEAN's new constitutional document, the ASEAN Charter, which has been ratified by the all 10 ASEAN member states. Historically, "ASEAN has never been associated with international law and treaties. ASEAN has always been regarded as a group of sovereign nations operating on the basis of ad hoc understandings and informal procedures rather than within the framework of binding agreements arrived at through formal processes".<sup>55</sup> In 2001, noting the development of a network of ASEAN treaties governing trade and investment, former ASEAN Secretary-General Rodolfo Severino predicted in 2001 that "this developing rules-based economic regime will gradually extend to other areas of ASEAN cooperation. After all, ASEAN is more than an economic association".<sup>56</sup>

We are of the view that Mr. Severino's prediction has come to pass. With the adoption of the ASEAN Charter at its 13th Summit in November 2007, ASEAN moved toward becoming a singular polity and has expressed its firm commitment to, inter alia, enhancing rule of law in terms akin to the use and definition of this expression by the UN. The ASEAN Charter has codified

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54 Thomas. Carothers, *The Rule of Law Revival*, FOREIGN AFFAIRS, Mar-April 1988, at 95.

55 Rodolfo C. Severino, "ASEAN Way and the Rule of Law", address at the International Law Conference on ASEAN Legal Systems and Regional Integration sponsored by the Asia-Europe Institute and the Faculty of Law, University of Malaya, Kuala Lumpur, 3 September 2001.

56 Ibid.



adherence to the rule of law – and its now familiar linkage to human rights and democracy – as a core ASEAN purpose and principle which all ASEAN member states have pledged to uphold.

In particular, the Preamble of the Charter states that ASEAN member states should, *inter alia*, adhere to :

“The principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms”.<sup>57</sup>

Similarly, Article 1(7) of the Charter states that the object and purpose of the ASEAN are, *inter alia*:

“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”.<sup>58</sup>

Significantly, akin to the UN Definition of the rule of law, the ASEAN charter does not invoke the concept in isolation, but uses the phrase in conjunction with “good governance”.

The ASEAN Charter and its formal commitment to the rule of law are ground-breaking developments for the 10-member regional association. Mr. Severino explains the unprecedented significance of the ASEAN Charter’s contextualization of the rule of law as follows:

“For the first time, an ASEAN document embodies norms for the domestic behaviour of states towards their peoples – democracy, human rights and fundamental freedoms, good governance, constitutional government, the rule of law, and social justice”.<sup>59</sup>

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57 2007 Charter of the Association of Southeast Asian Nations signed on 20 November 2007 in Singapore by the Heads of State/Government.

58 Ibid.

59 Rodolfo C. Severino, “The ASEAN Charter: One Year On”, *Opinion Asia*, 3 January 2010, available at <http://opinionasia.com/ASEANCharterOneyearon>.

## **Rule of Law, Human Rights & Democracy: Three Pillars of a Rules-based ASEAN Community of Shared Values & Norms**

Over the past eight years, the governments of ASEAN have worked towards the establishment of an ASEAN Community, in which political-security, economic, and cultural, cooperation form the pillars of ASEAN integration. Since the Declaration of ASEAN Concord II (Bali Concord II) in 2003, in which ASEAN Member States committed to the ASEAN Vision 2020, ASEAN governments have significantly increased their coordination of these efforts. Steps taken toward this end have included: committing to accelerate integration during the 12th ASEAN summit, and to establish an ASEAN Community by 2015; signing the ASEAN Charter at the 13th ASEAN Summit in Singapore, giving ASEAN legal personality and an internationally recognized institutional framework; and drafting the ASEAN Blueprints for integration, which map out the parameters of engagement within and between ASEAN countries and amongst ASEAN peoples in the three areas of integration.

The development of blueprints for an integrated ASEAN community by 2015 presents serious challenges but equally significant opportunities for the institutions of ASEAN member states. ASEAN members have recognized that the move towards greater integration will require an increased harmonization of institutional norms, to promote a rules-based community governed by shared values. In addition, significant capacity-building in key governmental institutions is needed, to ensure ASEAN's vision of a 'cohesive, peaceful, stable and resilient region' is able to be realized.

The Charter is no longer the only ASEAN document coupling adherence to rule of law and good governance with respect for promotion and protection of human rights. In 2009, this linkage was echoed in the Roadmap for an ASEAN Community, by which ASEAN Heads of state or government agreed to create, inter alia, an ASEAN Political-Security community ("ASEAN Roadmap") by 2015:

"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.

It shall be a means by which ASEAN Member States can pursue closer interaction and cooperation to forge shared norms and create common

mechanisms to achieve ASEAN's goals and objectives in the political and security fields".<sup>60</sup>

The ASEAN Roadmap also frames good governance & rule of law, democracy and human rights as foundational pillars for the creation of a "Rules-based Community of shared values and norms":

"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, with due regard to the rights and responsibilities of the Member States of ASEAN, so as to ultimately create a Rules-based Community of shared values and norms. In the shaping and sharing of norms, ASEAN aims to achieve a standard of common adherence to norms of good conduct among member states of the ASEAN Community; consolidating and strengthening ASEAN's solidarity, cohesiveness and harmony; and contributing to the building of a peaceful, democratic, tolerant, participatory and transparent community in Southeast Asia".<sup>61</sup>

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.<sup>62</sup> Regardless of their varying stages of development, there appears to be a growing consensus on the constitutive elements or central principles of the rule of law as a principle of good governance; and acceptance that the rule of law is compatible with strengthening democracy and promoting and protecting fundamental human rights.

An important common mechanism that has been established to achieve, according to its terms of reference, "adherence to the rule of law, good governance, the principles of democracy and constitutional government"<sup>63</sup> is

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60 2009 Cha-am Hua Hin Declaration on the Roadmap for an ASEAN Community (2009-2015) signed on 1 March 2009 in Cha-am by the Heads of State/Government.

61 Ibid, para 12.

62 Ibid, para 15.

63 2009 Terms of Reference of ASEAN Intergovernmental Commission on Human Rights adopted on 20 July 2009 in Phuket, Thailand by the Foreign Ministers, Article 2.1(d).

the ASEAN regional human rights body. Departing from parochial perceptions of human rights, Article 14 of the ASEAN Charter led to the establishment of this consultative body, which is called the ASEAN Intergovernmental Commission on Human Rights ('AICHR').

As one member of the ASEAN High Level Task Force ('HLTF') on the drafting of the ASEAN Charter observes:

"For a long time 'human rights' was considered "taboo" within ASEAN and was never the subject of detailed deliberations. As such, even to discuss it in the manner undertaken by the HLTF was a major progress for ASEAN. The final resolution of the issue among member states certainly spoke well of ASEAN's increasing recognition of the importance of human rights for the general well-being of all citizens of the region, consistent with the notion of transforming ASEAN into a "people-oriented" organisation".<sup>64</sup>

ASEAN has also developed other "people-oriented" initiatives for the protection of the rights of women and children, and the protection of the rights of migrant workers. In 2007, the ASEAN Leaders signed a Declaration on the Protection and Promotion of the Rights of Migrant Workers. At the 15th ASEAN Summit in October 2009, they adopted the Terms of Reference for an ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, ("ACWC") which was established at the 16th ASEAN Summit in April 2010, and now exists alongside the AICHR.

Viewed in the light of the UN Definition and its resonance for the key ASEAN documents mentioned above, ASEAN's remarkable rules-based normative and institutional evolution since 2007 demonstrates that the rule of law & good governance and human rights are compatible, interlinked and mutually reinforcing principles and purposes. They belong to the shared values and norms of the ASEAN community as a whole, and require all ASEAN member states to promote human rights and fundamental freedoms in accordance with their collective mandate.

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64 Tan Sri Ahmad Fuzi bin Abdul Razak, Facing Unfair Criticisms, in *The Making of the ASEAN Charter*, edited by Tommy Koh, Rosario Gonzalez-Manalo & Walter Woon, at 21-22.

## **D. STUDYING THE RULE OF LAW IN ASEAN – IDENTIFYING & UTILISING ‘CENTRAL PRINCIPLES’**

### **Four Central Principles of the Rule of Law in ASEAN**

Drawing from the broadly accepted UN Definition and using the ASEAN Charter and related developments as a spring-board for analysis, we have identified the following four central principles of the rule of law in relation to human rights in ASEAN, which are both formal and substantive<sup>65</sup>

Central principle I asks if the government, including its officials and agents, are subject to the law under the Constitution and other legislation.

Central principle II asks if laws and procedure for arrest, detention and punishment are publicly available, lawful and not arbitrary. This central principle is concerned with a state’s application of its criminal (and other penal) laws to promote and protect fundamental human rights and freedoms such as the right to liberty, physical integrity, security of persons, and procedural fairness in law.

Central principle III asks if persons have access to justice as the process by which laws are enacted and enforced is accessible, fair, efficient, and equally applied. This Central Principle is concerned with whether laws are publicly promulgated and equally enforced, and if persons have equal and effective access to the justice process.

Central principle IV asks if justice is administered by a competent, impartial and independent judiciary and justice institutions. Whereas the Central Principle III is concerned with access to justice, this central principle is concerned with its administration by the courts and other justice institutions in a fair, independent and impartial manner.

Taken together, these four central principles of the rule of law establish the base-line for rule of law implementation in ASEAN by which the success, shortcomings and progress of each ASEAN country can be measured, and policy-relevant recommendations prescribed.

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<sup>65</sup> Inspired by the UN definition, similar principles have been affirmed and used in other indices such as the World Justice Project (WJP), which has developed a Rule of Law Index to measure the extent to which countries adhere to the rule of practice. The WJP Rule of Law Index is composed of 10 factors and 49 sub-factors, including the four central principles we have selected.

These central principles are not exhaustive, and nor are the indicator questions written in stone. Beyond this base-line study, we hope that the principles and indicators will be refined in view of the available data— eliminating or revising some and deciding which ones should receive greater weight.

### **Central Principle I – The Government and its officials are accountable under the law**

A central feature of the rule of law is that no one, including government officials, is above the law. In institutionalizing this principle that everyone is subject to the law, the separation of powers amongst the three branches of government is an important prerequisite for holding the government accountable under the law.

As the ASEAN Rule of Law Grid indicates, eight of the ten ASEAN countries' laws expressly guarantee the separation of powers doctrine and permit the courts and other judicial and quasi-judicial bodies to hold government officials and agents accountable for their conduct.

Even royalty are subject to the law in Malaysia. Article 182 of the Federal Constitution establishes a Special Court that can try rulers of the states – including the King – in their personal capacities, with the consent of the Attorney- General (Article 183)<sup>66</sup> In Brunei, save for the Sultan who has absolute sovereign immunity, the law permits judicial proceedings to be brought against state officials for misconduct in the course of official duties. The Penal Code and Prevention of Corruption Act outlines abuses of powers which state officials may be charged.

In Singapore, laws strictly punish corruption and misfeasance of public authority, and have even been applied against those in the highest echelons of the state apparatus. The Prevention of Corruption Act (PCA) empowers officers from the Corrupt Practices Investigations Bureau (CPIB) to investigate and arrest individuals involved in corruption.<sup>67</sup> With its close engagement with the international community and the UN, which helped draft its 1993 Constitution embedded with, Cambodia's legislation is modern and relatively robust in its separation of powers that provide, in theory, checks on the government. Article 51 of the Constitution clearly states the principle of separation of

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66 Laws of Malaysia, Federal Constitution, Incorporating all amendments up to P.U.(A) 164/2009.

67 Prevention of Corruption Act.

powers and the exercise of power by the people through the three branches of government.<sup>68</sup>

After decades of military rule, Myanmar appears to have transitioned to a rules-based constitutional structure. Provisions for the impeachment of high-level state officials including the President<sup>69</sup>, Vice-President<sup>70</sup>, Union Ministers<sup>71</sup>, Attorney-General<sup>72</sup> and Chief Justice<sup>73</sup> and other judges<sup>74</sup> are now in place. Similarly, in Vietnam, mechanisms to impeach ministers and senior officials at the National Assembly do exist and disagreements and challenges are raised within the Assembly.

We must, of course, distinguish between formal constitutional or legal provisions and what occurs in practice. It has been suggested that the formal system of separation of powers created by Myanmar's newly-minted constitutional and legal framework has little impact upon the way in which the government actually functions on a day-to-day basis. In a number of countries, observers have called into question instances where those allied with or linked to the government have escaped investigation or prosecution with impunity. In other countries, such as in Brunei, data on investigations into official misconduct are virtually non-existent as they are rarely reported upon in the tightly controlled press. It is thus difficult to accurately and authoritatively pin-point just how many complaints concerning corruption or related abuses of power have been received, let alone investigated. The Anti-Corruption Bureau lists 355 cases that it received in 2010, but it is unclear what the outcomes for any of these were.<sup>75</sup> This data is unavailable in several ASEAN countries.

By examining these gaps between rhetoric and reality through further sustained empirical research, we may be able to more accurately assess how effectively the doctrines of separation of powers and accountability of the government under the law actually function in ASEAN countries.

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68 Cambodia Constitution. (Sep. 24, 1993), Ch. III, Art. 31(1).

69 Section 71 of the *2008 Constitution*.

70 Ibid. Under the 2008 Constitution there are two Vice Presidents.

71 Section 233 of the *2008 Constitution*.

72 Section 238 read with Section 233 of the *2008 Constitution*.

73 Section 302 of the *2008 Constitution*.

74 Section 334 read with Section 302 of the *2008 Constitution*.

75 The Attorney-General stopped giving statistics of corruption cases in his annual speech after 2000.

In Vietnam and Laos rapid legislative reforms appear to have outpaced effective legal enforcement. After laws are passed, subsidiary decrees and ordinances need to be enacted to give these laws effect, a process which can be drawn out. Moreover, the concomitant process by which laws are applied by different institutions can lead to inconsistencies that leave “plenty of room for inaction, personal interpretation, arbitrariness, and corruption.”<sup>76</sup> In sum, determining the legal status of Party edicts, which may, in practice be indistinguishable from national laws, can prove close to impossible. Lack of clarity on what the expression ‘law’ means, leaves open the possibility that it includes Party edicts, especially since in Vietnam, “it has been difficult to conceive of the Vietnamese state as separate from the Party: hence the use of the term Party-state.”<sup>77</sup>

In a similar vein, definitional controversy surrounding phrases such as in ‘accordance with law’, ‘internal security’, and ‘public interest’ found in constitutions and other fundamental laws in ASEAN countries have placed limits on the very human rights and fundamental liberties designed to limit executive power.

Constitutions may also provide for extraordinary circumstances in which the checks and balances on executive power are relaxed. For example, the constitutions of Singapore and Malaysia both provide that most fundamental liberties may be derogated from in times of emergency, and limited in certain other circumstances. Both constitutions provide for few external checks to the executive’s powers with regard to emergency powers. In Singapore, a state of emergency can be proclaimed by the President when he is “satisfied” that the constitutional criteria are met.<sup>78</sup> There is no judicial review of such an exercise of discretion. During an emergency period, parliament may pass laws inconsistent with many parts of the constitution as long as it appears to parliament that the laws are required by reason of the emergency. Brunei remains in a technical state of emergency, the Emergency (Continuation and Validation of Emergency Provisions) Order 2004 that replaced the 1984 Order remains in force. Emergency powers grant the Sultan absolute and unfettered

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76 Matthieu Salomon and Vu Doan Ket, 2010, “Achievements and challenges in developing a law-based state in contemporary Vietnam: How to shoe a turtle?” in John Gillespie and Albert H.Y. Chen (eds.) *Legal Reforms in China and Vietnam: A comparison of Asian Communist regimes*, London & New York: Routledge, p. 141.

77 Penelope Nicholson, “Vietnamese Courts: Contemporary Interactions between Party-State and Law,” in Stephanie Balme and Mark Sidel, 2007, *Vietnam’s New Order: International Perspectives on the State and Reform in Vietnam*, New York: Palgrave Macmillan, p. 179.

78 Singapore Constitution, Article 150 (1).



discretion to issue orders as long as he considers the orders to be “desirable in the public interest” and, again, there appear to be no external limits to these powers.<sup>79</sup>

In order to limit the use of executive power, some ASEAN countries have created institutions to provide a potential check in such circumstances. In Malaysia, Indonesia, Philippines and Thailand, for example, there are ombudsman offices, national human rights institutions and commissions, and constitutional courts that serve as judicial or quasi-judicial watch-dogs against abuse of power.

In 1997, Thailand established a host of such mechanisms, namely, the Constitutional Court, the Administrative Court, the National Human Rights Commissions, Ombudsman, Supreme Court’s Criminal Division for Persons Holding Political Positions and the National Anti-corruption Commission. In Indonesia, oversight mechanisms are present to monitor the conduct of Supreme Court judges, court clerks, prosecutors, Attorney General’s office, and the National Police. In the Philippines, the office of the Ombudsman, the Civil Service Commission, heads of offices, Office of the President, legislative councils of local government units, and regular courts can take administrative disciplinary action against government officials guilty of misconduct. However, the reach of these institutions and the laws which support their operation vary in each country.

In Thailand, in addition to criminal penalties, government officials and agents also face civil liability for misfeasance of public authority, under the Act on Liability for Wrongful Act of Official B.E. 2539 (1996). Conversely, in Indonesia, investigations into the conduct of high-ranking officials by the Public Prosecutor and other oversight institutions cannot commence without permission from the President<sup>80</sup>, the Minister of Internal Affairs<sup>81</sup> or the Governor<sup>82</sup>, as the case may be. In practice, the requirement for such executive fiats – which may be withheld without legitimate reason – can insulate the abuse of executive power from judicial scrutiny.

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79 The 2004 Constitution granted the Sultan absolute immunity in both private and official capacities under Section 84B(1).

80 Article 220 and 289 of Law No. 27 of 2009 regarding House of Representatives, the Regional Representative Council and the local House of Representatives.

81 Article 340 of Law No. 27 of 2009.

82 Article 391 of Law No. 27 of 2009.

Of course, watch-dog institutions like national human rights institutions may vary in their effectiveness or in the limitations built into their statutory mandate and authority. Malaysia, for example, has a Human Rights Commission (SUHAKAM) with rather limited powers and its influence has also often been limited in practice. Although SUHAKAM publishes annual reports, their findings have been largely ignored by the government. In the Philippines, the Ombudsman has administrative authority over any public employee for acts or omissions that appear “illegal, unjust, improper or inefficient”, but exceptions are made for officials removable by impeachment, members of Congress and members of the judiciary. Despite the large volume of complaints and cases the Ombudsman handles, experts have argued the process to be ineffective and have pointed to well known cases of politically motivated extrajudicial killings and enforced disappearances as indicative of a lack of accountability with respect to government officials.

In conclusion, while most ASEAN countries formally provide for the separation of powers and accountability under the law, these provisions are not always given effect in practice. It also appears that the mere existence of oversight institutions does not ipso facto guarantee that fundamental human rights will be protected. Further empirical research is required to obtain data on the systemic obstacles to holding the various branches of government accountable, and ways in which the capacity of judiciary systems and legal infrastructure can be built, supported and enhanced.

### **Central Principle II - Laws and procedure for arrest, detention and punishment are publicly available, lawful and not arbitrary.**

In almost all ASEAN countries, the grounds and procedures for arrest, trial and detention are prescribed by law. Employing rights-based language, their criminal procedure codes expressly provide for, at least in theory, the fair and equal enforcement of due process protections. Vietnam’s Criminal Procedure Code, for example, stipulates that all detainees and accused persons have the right to attend as litigants in person or select counsel of their choice, the right to trials in open court, and the right to adduce and test the veracity and credibility of such evidence in court. Similar provisions can be found in the procedural codes of Indonesia, Thailand and the Philippines, which prohibit detention without trial and ensure the right to habeas corpus, due process and the presumption of innocence.

There is wide variation ASEAN in regard to accession to major human rights conventions related to the rule of law. Several countries such as Singapore, Malaysia, Brunei and Myanmar have not ratified or acceded to most of the

core human rights and humanitarian law instruments. Cambodia, on the other hand, is a state party to almost all of these instruments. It is the only ASEAN country to be a state party to the 1984 Convention against Torture, and the first to have ratified the Rome Statute establishing the International Criminal Court. Decisions at the Extraordinary Chambers of the Courts of Cambodia (ECCC), the UN-backed internationalized court in Phnom Penh currently tasked with trying former Khmer Rouge leaders for international crimes, have set important precedents for the legal system. After a detailed study of the ECCC's jurisprudence and initiatives, our country report suggests that the ECCC is poised to have a lasting impact on bolstering the rule of law in Cambodia, while also strengthening domestic judicial and legal capacity.

Yet, there are both practical obstacles to and lawful limits placed upon due process guarantees in Cambodia and other ASEAN countries. These have sometimes resulted in the arbitrary deprivation of liberty in two separate respects. First, some laws are substantively arbitrary as they derogate from guaranteed due process rights, such as internal security legislation in Singapore, Malaysia, Brunei which permit detention without grounds, charge or trial, as discussed above. Often a vestige of their colonial heritage, internal security and emergency laws in these countries are similar in structure. While preventative detention is reviewed every two years in all three countries, it appears that the period of detention may be renewed indefinitely by the reviewing bodies and without judicial scrutiny, thereby curtailing detainees' rights to habeas corpus.

However, on 15 September 2011, Malaysia's Prime Minister Najib Tun Razak declared in a speech that the government would abolish the Internal Security Act (ISA) and the Banishment Act 1959, as well as review other repressive laws, including the Restricted Residence Act 1933, the Printing Presses and Publications Act 1984.<sup>83</sup> At the time of writing, it is yet to be known whether the new laws replacing ISA and the Banishment Act will improve due process rights. Nevertheless, the announcement marks a positive step in the interpretation of the rule of law and prompted debate on due process rights within countries who have inherited these emergency laws in similar circumstances, such as Singapore.

Other particular features of different legislative and regulatory frameworks reveal the range of legal provisions in ASEAN countries that potentially authorize

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83 National Day Speech by Prime Minister Najib Tun Razak, 15 September 2011.

arbitrary deprivations of liberty or legal rights. For example, in Brunei, laws prohibiting “personal violence” against a detainee may be waived “in the case of repeated refusal to obey a lawful order”, under Section 40(i) of the Internal Security Act. In Indonesia, although the law generally provides for due process rights, the Criminal Procedural Law permits prolonged detention of persons under police custody, with limited access to judicial recourse. While a new draft Code of Criminal Procedure that addresses such problems has been conceived, it has not yet been enacted into law.

Problems of arbitrary implementation of the laws may also arise where laws are so vaguely framed as to facilitate their arbitrary application. The principles of certainty and predictability of the law are widely regarded as essential to the rule of law and these principles require laws to be drafted with sufficient specificity and clarity so as to enable citizens to act in accordance with legal norms. However, the Vietnam Penal Code prohibitions against “sabotaging the infrastructure of Socialism” and “taking advantage of democratic freedoms and rights to violate the interests of the State and social organisations” have been seen by critics as being manifestly arbitrary.

Similar criticisms have been made of a variety of laws in Myanmar, Laos and Cambodia. For example, in Cambodia, laws regarding defamation and disinformation have been used to target journalists, human rights activists and political leaders.<sup>84</sup> The Laws on Anti-Trafficking and Draft Law on Drug Control has been used to prosecute sex workers, rather than drug traffickers and dealers.<sup>85</sup> The introduction or continued operation of arbitrary laws appear antithetical to due process and fair trial rights, and are not conducive to the rule of law, which requires clarity and certainty in design and application of laws. Likewise, the Human Security Act in the Philippines, anti- terrorism legislation in Indonesia and the Internal Security Act in Thailand have been criticized for having no clear test as to their applicability and for violating the due process and equal protection.

Second, laws that have been drafted in a manner that is clear and certain may nonetheless be arbitrary in effect due to their application. Of course, arbitrary application of a law can occur in every legal system in the region and elsewhere isolated instances. Concern for the rule of law arises where

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84 Surya P. Subedi, Report of the Special Rapporteur on the situation of human rights in Cambodia, U.N. Doc. No. 4/ HRC.15/46, September 2010, p. 9.

85 U.N. GAOR, HRC, 6th Sess., UN Doc. A/HRC/WG.6/6/KHM/3 (2009).

there appears to be systematic application of laws in an arbitrary manner that operates to deprive individuals or groups of their constitutionally guaranteed rights. For example, the law may provide for the right to an adequate defence in a criminal prosecution, but it may generally be applied in such a way that defence counsels are unable to adequately represent their clients.

It bears repeating that while the laws in most ASEAN countries do establish formal guarantees that, if properly implemented, would provide an adequate defence, in practice there appears to be a wide range in the degree of implementation. Observers in Vietnam, Indonesia, and Cambodia, and other ASEAN member states have alleged such discrepancies between the law on paper and in action.<sup>86</sup>

Such disparities also occur in other areas that impact the rights of accused and, if systemic, can undermine the rule of law. In the Philippines, for example, the Constitution prohibits extra-legal detention and inhumane practices, and the Penal Code punishes mistreatment of prisoners.<sup>87</sup> Unlawful arrests or arbitrary detentions are criminal offences.<sup>88</sup> Yet there, been many well-documented cases of extra-judicial execution, revenge killing, enforced disappearance, torture, illegal arrest and illegal search and seizure.<sup>89</sup> Initiatives by former President Arroyo to investigate the extra-judicial killings are indicative of governmental acknowledgement of these problems.<sup>90</sup> Further empirical research is required to understand why such initiatives have been ineffective in combating or deterring these human rights violations, and to compare the lessons learned in the Philippines to those in other ASEAN member states.

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86 Nguyen Hung Quang, "Lawyers and Prosecutors under Legal Reform in Vietnam: The Problem of Equality" in Stephanie Balme and Mark Sidel, 2007, *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam*, New York: Palgrave Macmillan, p. 168.

87 Revised Penal Code, Article 235.

88 Revised Penal Code, Article 269 and Article 124.

89 According to human rights group Karapatan, during Arroyo's 9-year administration, 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. Karapatan, 2010 Year-End Report on the Human Rights Situation in the Philippines, 1 December 2010, 25.

90 Jam L. Sisante and Sophia Dedace, GMANews.TV, "Govt to form new task force on extrajudicial killings", 10 December 2010, <<http://www.gmanews.tv/story/208037/govt-to-form-new-task-force-on-extrajudicial-killings>>, (20 December 2010).

The lack of predictability in the application of law is a widespread concern in ASEAN and, as noted above, predictability and certainty are central elements of the rule of law. This issue has been a significant concern, for example, in Indonesia and the Philippines. In a study in the Philippines, only 43% of judges found decisions to be predictable, and less than a quarter of lawyers polled said court decisions were predictable.<sup>91</sup>

In conclusion, our base-line study makes clear that most ASEAN countries have adopted legislation or have Constitutions that provide a legal framework that guarantees the basic rights of citizens in regard to arrest, trial and detention. The study also reveals, however, that some ASEAN member states have enacted legislation which is either patently inconsistent with such provisions or contain significant exceptions that can be invoked to whittle away these guarantees. It also appears that even when a robust rule of law framework is in place, due process rights may be undermined through arbitrary implementation and practices, indicating that the rule of law in this context is honored more in its breach than its observance in some ASEAN member states.

Utilizing our study and base-line indicators, further comparative research is required on the promulgation of laws and regulations in the region, which can help develop strategies to strengthen legal infrastructure that preserves due process rights, guards against the preponderance of arbitrary laws, and entrenches clarity and predictability in the application of these laws.

### **Central Principle III - The process by which the laws are enacted and enforced is accessible, fair, efficient, and equally applied.**

Laws in Indonesia, Thailand, Malaysia, Brunei, Singapore, and the Philippines are widely available and easily accessible, both in print and digital form. Positively, in the Philippines, statutes only take effect 15 days after publication.<sup>92</sup> Likewise, according to the Thai constitution, a law will only come into operation after being published in the Government Gazette.

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91 Linda Luz Guerrero, Mahar Mangahas and Marlon Manuel, Social Weather Stations, "New SWS Study of the Judiciary and the Legal Profession Sees Some Improvements, But Also Recurring Problems", 25 January 2005, <<http://www.sws.org.ph/pr050125.htm>>, (04 December 2010).

92 Civil Code of the Philippines, Article 2; and Executive Order 200 (1987).

Apart from the laws themselves being readily accessible, the rule of law provides that the process by which the laws are enacted should also be clear and transparent. In Singapore<sup>93</sup> and Malaysia, Parliamentary sessions are open to the public, and the dates and times of the sessions, along with copies of bills, are published. Cambodia<sup>94</sup>, Laos<sup>95</sup> and Vietnam<sup>96</sup> also have relatively clear processes for the enactment of laws through a national assembly (or parliament). Legislative proceedings in Thailand<sup>97</sup> and the Philippines<sup>98</sup> are publicly accessible, and measures are taken to ensure that the information is made available in a convenient and easily understood manner, such as through live streaming of proceedings online; ensuring that all drafted laws are accompanied by explanatory notes; and making transcripts, minutes, decisions and resolutions readily available. Indeed, the right to information is itself enshrined in the Philippines constitution.

A significant piece of legislation in Vietnam in this regard is its Law on the Promulgation of Legal Normative Documents, usually referred to as the "Law on Laws". Amended in 2002 and 2008, the latest changes require disclosure of the drafts of all legal normative documents within 60 days to allow for public comment. Vietnam has also actively solicited views from the public on important legislation, though relatively little input has been received in response to these calls.<sup>99</sup>

In Brunei, however, legislative proceedings are not open to the public. As an absolute monarchy under a technical state of emergency, legislative matters are not subject to public review. There is also limited access to legislative proceedings in Indonesia, which makes it difficult for the general public to observe the law making process. Legislative proceedings were only open to the public after the enactments of Law No. 27 of 2009 regarding the House of Representatives, the Regional Representatives Council and the local House of Representatives. Attempts to develop dialogue amongst Myanmar's newly

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93 Association of Criminal Lawyers Criminal Procedure Code Consultations, para. 3; Public Order Act, Singapore Parliamentary Debates.

94 Cambodian Constitution. (Sep. 24, 1993), Ch. VII, Art. 83 and Ch. VIII, Art. 107.

95 The Law on National Assembly, 2006, Art 9, para 1.

96 VHLSS Governance Module 2008. in VDR 2010 – Modern Institutions, Joint Donor Report to the Vietnam Consultative Group Meeting, Hanoi, December 2009, p.88.

97 The 2007 Constitution, Section 142.

98 1987 Constitution, Article VI, Section 16(4), 20 & 26, Article III, Section 7.

99 VHLSS Governance Module 2008. in VDR 2010 – Modern Institutions, Joint Donor Report to the Vietnam Consultative Group Meeting, Hanoi, December 2009, p.88.

formed Parliament on draft laws will need to be closely monitored to determine how much progress has been made since military rule.

Within the legal system, access to the legal system benefits the general public, especially the indigent and the vulnerable. Equality before the law and access to law are also key features of the rule of law. The rule of law requires equal access to justice and a level playing field for all members of the society.<sup>100</sup> Various ASEAN countries have adopted different mechanisms to address this issue.

In Singapore, there have been various initiatives to assist ordinary litigants' access to justice. For example, there is a legal aid framework for both civil and criminal cases; and institutions such as the Community Mediation Centres and the Small Claims Tribunal<sup>101</sup> have been set up to facilitate access to dispute resolution mechanisms. In Brunei, a legal advice clinic was formed in 2010 for persons with low incomes. But, in Malaysia, it appears the legal aid system is not fully developed. While there is legal aid for criminal proceedings, for civil matters, litigants rely on the voluntary Bar Council Legal Aid Bureau which is unable to cope with the demands made of it.

Legal aid is available in Cambodia under the auspices of NGOs such as the Cambodian Defender's Project and the Legal Aid of Cambodia, and in Vietnam<sup>102</sup> through state-sponsored channels, but does not feature in Myanmar.

Legal aid is provided in Thailand and the Philippines to assist the underprivileged. To ensure equal protection by law and equal access to justice in Thailand, the Office of Public Legal Aid provides free consultations, advice and representation. Legal assistance can also be sought in Thailand by recourse to the Thai Bar or the Office of the Attorney General.<sup>103</sup> In the Philippines, the Public Attorney's Office provides free legal services to indigent accused persons. However, there

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100 See Ross Cranston, *How Law Works – The Machinery and Impact of Civil Justice* (Oxford University Press, 2006), p.36.

101 Small Claims Tribunal Act.

102 Support to the Legal Aid System in Vietnam 2005-2009. Annual Progress Report (SIDA, SDC, Oxfam, N(O)VIB, Save the Children, 2008).

103 L Information Sheet Response of the Lawyers Councils of Thailand, 2010.



are practical impediments to access. It has been estimated that a criminal case handled pro bono in the Philippines could still cost as much as three times the average annual savings of an average Filipino family. It has also been noted that the indigent and underserved in Indonesia are not properly assisted when seeking justice.<sup>104</sup>

Issues of access to justice and equality before the law may also arise in autonomous areas of the administration of justice. For example, the inclusion of Sharia laws in specific situations and locations in Singapore, Malaysia, Indonesia, Thailand and the Philippines are sui generis. Even though there is no Sharia court in Thailand, Islamic judges are provided for civil suits concerning the family and inheritance issues when both parties in the civil suit are Muslim. In the Philippines, the Code of Muslim Personal Laws may be applied to Muslims. Although Indonesia is a secular country, many districts issue "sharia inspired" local regulations that may be regarded as discriminatory against women. Further empirical research is required to better understand legal pluralism Sharia and other customary/religious laws engender and their impact on the principle of equality before the law. Among other things, such research should consider the allocation of jurisdiction between formal and customary/religious systems of justice, approaches to customary/religious practices that may contravene international human rights norms and standards, possible limits and challenges in the use of customary justice mechanisms, ramifications for the distribution of political and economic power within the justice sector, and the facilitation of dialogue and information-sharing between formal and customary justice systems.

Currently, it has proven difficult to assess equal access to justice and equality before the law with precision as many ASEAN governments do not compile or do not make available the necessary data. In some ASEAN countries, such statistics are state secrets which cannot be lawfully disclosed. Independent assessment is further hampered when judicial proceedings are held in camera, especially where it is claimed (even if not proved) that national security is at stake. As a result, in many ASEAN contexts, there is a striking paucity of authoritative data on the fairness and efficiency of legal enforcement and punitive measures for non-compliance, which considerably limits opportunities for proper secondary assessment of the rule of law.

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104 See AP, Armando Siahaan & Camelia Pasandaran, "Gayus Tambunan Case Symbolic of Indonesia's Woes," Jakarta Globe, 18 November 2010, <<http://www.thejakartaglobe.com/home/gayus-tambunan-case-symbolic-of-indonesias-woes/407147>>, accessed 31 January 2011.

As ASEAN countries lay the ground for an institutional framework to facilitate free flow of information based on each country's national laws and regulations in an effort to become an integrated rules-based community by 2015, a greater proportion of state revenue is likely to be channeled towards strengthening vital state institutions. The proper disclosure and documentation of data on crime rates, legal aid services, judicial decisions, and other criminal justice statistics and legal developments should be a necessary component of institutional reform. This will not only improve transparency, but the ability to accurately assess and propose policy-relevant recommendations for ASEAN-wide rule of law entrenchment and implementation.

In order to ensure the operation of the judicial process in a manner consistent with the rule of law and fair trial guarantees, victims, especially young victims and victims of sexual offences, require adequate legal protection and psychological assistance before, during and after trial. There is, however, a wide variation in ASEAN as to victim/witness protection and assistance practices and in general this area of practice is underdeveloped and requires attention and further research.

While Singapore does not have a formal witness protection programme, there is protection given to young witnesses and victims and volunteer support officers are assigned to such victims/witnesses to assist them. In Malaysia, however, concerns have been raised that victim/witness safety may be at risk from defendants who seek to suborn or intimidate them, regardless of police protection. In Brunei, while there is a witness protection scheme, the rules also permit detention of victims of sexual offences with punitive consequences for failure to adhere to detention orders<sup>105</sup>. The failure to reform the witness protection program has been considered a significant contributing factor towards perpetuating a culture of impunity for extra-judicial killings in the Philippines, as it has been reported that the lack of witnesses willing to testify have prevented 80% of the cases from being prosecuted. In Indonesia the new Witness Protection Agency (LPSK) has yet to implement a protective regime of broad application.<sup>106</sup>

With respect to access to and administration of justice in ASEAN, there is broad consensus on principles and differences in practice. This creates a need for comparative study to identify best practices and lessons learned that can

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105 Women and Girls Protection Act Section 10(1), 354, 360, 361, 375, 498.

106 Memorandum of Understanding No. 490/TUA/XII/2009.

be generalized in ASEAN. The study has also identified three important areas of concern: (a) under-enforcement, whereby those who violate the law are not brought to justice; (b) selective-enforcement, where certain groups, often indigenous or minority communities, are not equally treated in regard to protection or enforcement of the law; and (c) over-enforcement, where certain laws are applied in an excessively punitive and often selective manner in the name of national security and public order.

**Central Principle IV - Justice is administered by a competent, impartial and independent judiciary and justice institutions.**

Our study reveals a wide range of perceptions and attitudes in regard to judicial independence and impartiality as well as in the level of development and professionalism within judicial institutions in ASEAN countries.

Singapore consistently ranks at the top of global studies and indexes regarding the prevention of corruption, whereas most other ASEAN countries don't typically fare as well. Singapore's presiding Chief Justice is also the only Asian jurist to be honoured by the International Council of Jurists for apparently "enhancing the dignity of the judiciary in Asian countries".<sup>107</sup>

Public perceptions of and confidence in the independence and impartiality of judiciaries also vary widely. In Singapore, public polls reveal that a significant majority feel there is a fair and impartial administration of justice, while in Indonesia polls indicate that the public views the judiciary and police as among the most corrupt state institutions in the country.

Of course, in every ASEAN country there is criticism of aspects of the administration of justice. Notwithstanding Singapore's accolades, concerns have been expressed that the outcomes of contempt of court and political defamation litigation in the city-state may give the appearance of judicial bias toward the government.<sup>108</sup>

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107 "CJ Chan Sek Keong receives top jurist award", The Straits Times: B20, 26 November 2009.

108 Report of the Special Rapporteur on the independence of judges and lawyers, Dato Param Cumaraswamy, UN Doc. E/CN.4/1996/37 (Commission on Human Rights, 52nd session), para 218 ["The very high number of cases won by the Government or members of the ruling party in either contempt of court proceedings of defamation suits brought against critics of the Government, be they individuals or the media, particularly from a liberal perspective"].

In other ASEAN countries, constitutional arrangements and structures relating to the appointment process and tenure of judges may potentially impede judicial and quasi-judicial institution-building. For example, in Malaysia, the Attorney-General serves at the pleasure of the King, and as the King acts on the advice of the Prime Minister, there is a risk that the executive will have too much influence on the Attorney-General's exercise of prosecutorial discretion.

Similarly, the establishment of tribunals in the late 1980s to try then Malaysian Lord President Tun Salleh Abas and other judges critical of the government have been criticised as an indubitable example of executive interference with the judicial branch, and the former's power over the latter's appointments. In Brunei, the Sultan has absolute discretion over judicial appointees. However, there has been no evidence of interference by the executive in appointment and to date there have been no major allegations of improper influence in the court proceedings.

It is well-settled that security of tenure and commensurate remuneration help to ensure that judicial officers administer justice without fear or favour. Apart from Myanmar, Vietnam and Laos, the rest of the ASEAN countries formally provide for security of judicial tenure. Remuneration varies very widely across ASEAN, with Singaporean judges enjoying the highest salaries in the world in what appears to have been a successful strategy to reduce incentives for corruption. In other ASEAN jurisdictions, however, judges are relatively poorly compensated in comparison with private sector remuneration. The starting monthly pay of regional trial court judges in the Philippines is just under 30,000 pesos (US\$691), far less than what their counterparts are expected to earn in private practice. Low pay has therefore been cited as a chief reason for why there are currently only 2,300 local and regional court judges remaining in the Philippines, well below the number needed to fill the vacancies that have left entire provinces without functioning courts.<sup>109</sup>

The need for judicial independence is enshrined within the Thai Constitution and judicial reforms aimed at strengthening independence have been instituted. By 2000, the judiciary moved away from being administered by the Ministry of Justice, so as to minimize the likelihood of political interference with the functioning of the courts.<sup>110</sup> Similar measures aimed at strengthening the

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109 Supreme Court of the Philippines, *2009 Supreme Court Annual Report*, 57.

110 Surin Cholpattana and Patcharin Rui-on, "Current Judicial Reforms in Thailand: Lessons and Experience" in *the 10th General Assembly of the ASEAN Law Association*, p.2.

judiciary have been introduced in the Philippines, including the adoption of a new judicial code of conduct by the Supreme Court in 2004 which adopts the Bangalore Code of Judicial Conduct. Similarly, the “one roof” policy in Indonesia prevents the government from influencing the appointment, promotion, assignment, discipline and dismissal of judges. Such measures ensure the separation of powers doctrine based on checks and balances, which, as we have explained, is a structural precondition for judicial independence.<sup>111</sup>

Despite these positive measures aimed at strengthening domestic judicial capacity and enhancing the quality and capacity of judges and prosecutors, they may be undermined by contrary practices. The Philippines, for example, has stringent processes for the appointment of judges but they appear not to be fully implemented in practice and studies have reflected that the majority of judges and lawyers are dissatisfied with the judicial selection process.<sup>112</sup> To once again use the Philippines as an example, even where there are excellent institutions for legal education and judicial training, it does not necessarily lead to a satisfied or highly capable judiciary.

In conclusion, it is apparent from our country-specific reports that most if not all ASEAN countries have embarked upon programmes for judicial and legal reform and the strengthening of judicial institutions. But these programmes have at times been path-dependent and have not always yielded positive results. Our study suggests that large-scale efforts and improvements are necessary to promote common standards and best practices, and enhance capacity and competence in judicial institutions in the region, which is essential to achieve ASEAN’s goals and objectives in support of its rules-based political-security and economic integration by the year 2015.

Our article reveals problems of training, competence, and professionalism in many ASEAN judiciaries. These problems arise from a variety of factors including (but not limited to) the general quality of higher or professional legal education, the scope and quality of judicial training, levels of remuneration, barriers to entry, opaque selection processes, and other context-specific factors such as violence against judicial actors and lack of courtroom security and protection for judges.

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111 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.

112 Guerrero, et al. *Social Weather Stations*, “New SWS Study of the Judiciary and the Legal Profession”.

Strengthening judicial institutions would require enhanced institutionalization of judicial independence and capacity. If executive interests are permitted to dominate or overrule the judiciary, then the judicial branch will necessarily remain weak and ineffectual. Bolstering domestic judicial capacity and primacy will bring with it legal predictability necessary for economic development at the national and the regional levels.

One key area where such harmonization is urgently required is in relation to the role played by judicial institutions and quasi-judicial bodies (such as national human rights institutions, cadastral commissions and anti-corruption mechanisms). Given the varying stages of development of ASEAN states' legal systems and the correspondingly varied capacities of respective judicial institutions, many ASEAN governments have recognized that sustained capacity building is necessary in order to ensure ASEAN can meet its aims to 'strengthen democracy, enhance good governance and the rule of law, and promote and protect human rights' as stated in the ASEAN Political-Security Blueprint.

This is reflected in national legal and judicial reform plans such as the national rule of law programmes now underway, for example, in Vietnam, Cambodia and Laos. While such national programs are a vital component of long term judicial development in ASEAN, there is also a need to approach capacity building at the regional level through the development of cooperative programmes which strengthen the rule of law, judicial systems, and legal infrastructure as a whole. In-depth study of judicial training, capacity and competence across the region can provide a basis for developing recommendations and institutions to strengthen judicial institutions through regional initiatives.

## **E. ECCC'S LEGACY FOR THE RULE OF LAW**

### **Overview and Operation**

The problems facing the Cambodian legal system were well known when the ECCC was created and were among the reasons for its establishment<sup>113</sup>. Impunity and lack of redress has increased frustration and resentment in victims, which has led to revenge killings. By providing aggrieved parties with a legitimate mechanism for pursuing justice, can stay the hand of vengeance, which will help pave the way for reconciliation.

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113 See paragraph 14 Trial Chamber Decision on Ieng Sary's application to disqualify Judge Nil Nonn and related requests, 28 January 2011

Additionally, the creation of a hybrid court partnering international and national lawyers and judges provides a forum for exchanging legal knowledge, skills and best practices, building the capacity of the legal profession in Cambodia and strengthening the rule of law. The ECCC, the only internationalized criminal tribunal currently sitting in an ASEAN country, has a number of unique features which distinguish it from its counterparts that deal with mass atrocities in former Yugoslavia, Rwanda and Sierra Leone.

While formally part of the Cambodian court system, the ECCC has its own separate jurisdiction. It applies both international and domestic law, allows for the participation of victims as civil parties and has Chambers comprising national and international judges. The Trial Chamber is composed of five judges (3 Cambodian and 2 International) and the Supreme Court Chamber contains seven judges (4 Cambodian and 3 International). Every decision requires a "super-majority," meaning an affirmative vote of at least four out of five judges in Trial Chamber, and at least five out of seven judges in the Supreme Court Chamber. The existence of national and international staff purports to confer ownership to Cambodia in seeking its own justice, and allows Cambodian nationals to play a meaningful role in prosecuting and defending the suspects. While existing criminal procedure applies before the Court, if that procedure does not deal with a particular matter, or if there is a question regarding its consistency with international standards, guidance is sought in rules established at the international level.

The jurisdiction to try a defendant under national and international law is a significant innovation of the ECCC. The ECCC has jurisdiction over specific offences set out in the 1956 Cambodian Penal Code (murder, torture and religious persecution), as well as international crimes of genocide, crimes against humanity and grave breaches of the 1949 Geneva Conventions. The ECCC limits criminal liability to senior leaders of Khmer Rouge regime and those most responsible for the crimes committed. The ECCC thus enhances the possibility of national reconciliation by enabling lower level cadres who were not personally responsible for the commitment of atrocities to distance themselves from their association with the CPK policies. Individual accountability of those most responsible for crimes also serves as a rehabilitative mechanism for victims and survivors of atrocities.

The ECCC issued its first verdict in July 2010, finding Kaing Guek Eav (alias "Duch"), a Khmer Rouge official, guilty of crimes against humanity and war crimes for his operation of the notorious Toul Sleng detention center in Phnom Penh. The Trial Chamber's judgment is discussed in greater detail below. Case 002, the second trial for four of the most senior surviving Khmer Rouge

leaders, is scheduled to begin in mid-2011. On 15 September 2010, the Co-Investigating Judges indicted Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith for genocide, crimes against humanity, war crimes, and violations of the 1956 Cambodian Penal Code. Among the many positions they held, Nuon Chea was the Deputy Secretary of the CPK, Ieng Sary Minister for Foreign Affairs, Khieu Samphan the Chairman of the State Presidium, and Ieng Thirith the Minister for Social Affairs.

While the ECCC has had many achievements since its establishment in 2006, it has faced setbacks. The tribunal is under great pressure to ensure due process and to administer justice quickly given the advanced age of the accused. It also faces ongoing funding difficulties and has attracted several damaging accusations of corruption and unwarranted influence by the Royal Government of Cambodia.<sup>114</sup> A recent example of alleged political interference in the proceedings the ECCC was the Cambodian government's public condemnation of any further prosecutions beyond Cases 003 and 004. Nevertheless, Cases 003 and 004 are currently under judicial investigation and civil party applications were lodged in early April 2011.

### **Rule of Law and the ECCC**

Despite the criticisms and difficulties faced by the ECCC, it has made substantial progress in achieving justice for victims, a central principle for bolstering the rule of law in Cambodia (see central principle III above). The proceedings are conducted in a transparent public manner and are open to scrutiny by the press and civil society. The court complies with international fair trial principles, demonstrating the importance of the accused persons' right to a fair trial, in accordance with central principle II. It is also the first international tribunal to provide for such comprehensive participation of victims in official criminal proceedings, which contributes to the healing of trauma and brings reconciliation to the country as a whole.

As such, the ECCC is making considerable progress in raising the expectations for the administration of justice in Cambodia's legal system through promoting increased transparency and accountability in its criminal and civil proceedings. Furthermore, ensuring that fair and rights-based procedure is followed will promote a desire among Cambodians for future legal reforms, encouraging fair and just procedure in domestic courts. Capturing the decisions and interpretations of the National Penal code upheld by the ECCC will also give

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114 For example see <http://www.timesonline.co.uk/tol/news/world/asia/article5745438.ece>



national judges and lawyers a basis to litigate on rule of law issues in domestic courts. The ECCC further facilitates this process by producing jurisprudence of international standards on human rights in Khmer, which can easily be transposed into the Cambodian legal system.

In addition to helping address the lack of transparency and accountability within Cambodia's legal system, the ECCC can also be used to strengthen judicial capacity and resources in Cambodia. One of the major challenges confronting Cambodia is the lack of institutional and judicial capacity and expertise. In terms of strengthening judicial capacity, the hybrid nature of the ECCC provides an ideal environment to ensure that positive skills, practices, and knowledge from the ECCC are transferred to domestic institutions through training, workshops, internships and roundtable discussions. National lawyers, prosecutors and judges can participate in these training programmes and utilize the skills, practice and knowledge they have gained at the ECCC when they return to domestic practice.

Since the ECCC was established in 2006, its judges and lawyers have litigated on a wide range of matters, including pre-trial detention, modes of criminal liability, requests to disqualify judges and jurisdiction. The legal professionals at the ECCC are therefore exposed to a breadth of ethical and procedural issues that are determined in line either with national law, international law, or both. As such, the ECCC provides an ideal environment to strengthen judicial capacity which will then feed into the national institutions. The ECCC also runs an internship programme providing national law students with an insight into the work of the ECCC, educating the younger generation of Cambodians about human rights violations suffered by the previous generation, and exposing them to the criminal justice process which holds the perpetrators accountable in fair and transparent proceedings.

Although the decisions coming out of the ECCC are made in the context of mass crimes, such as genocide and crimes against humanity, and as such will not be directly applicable to every-day litigation in Cambodia, the recording of the judges' interpretation of the provisions of domestic legislation will add much-needed persuasive value to the ability of national legal professionals when they litigate on these provisions in the domestic courts. The ECCC also strengthens the rule of law in Cambodia by involving victims as parties to the proceedings, ensuring that they are aware of the proceedings and providing them with collective reparations. The scope of victims' rights to participate in ECCC proceedings in Cambodia is wider than in any other international criminal tribunal.

Because the ECCC functions within the existing Cambodian court structure, the general Cambodian procedural rules regarding victim participation apply. During the Duch trial it became evident that the procedural rules relating to be civil party participation would have to be amended to promote greater efficiency in trial management, especially given the substantially higher volume of victims in the second case.

The disappointment expressed by some civil parties in the Duch trial, regarding their limited role in practice, demonstrates the need for pro-active outreach by the court to better prepare victims for future proceedings and to assist them with a broader understanding of the judicial process. In addition, the Court has committed to balance the limitations in the civil party process with a more robust mandate to support victims generally through non-judicial measures to be implemented by the ECCC Victims Support Section. By giving victims a voice and including them in the criminal justice process, the ECCC will help to increase the social demand for justice within the Cambodian population.

## **ECCC Judgments and Decisions**

### *DUCH JUDGMENT*

The former director of Tuol Sleng prison, Kaing Guek Eav, alias “Duch,” was arrested by the Cambodian authorities in 1999 and kept in military detention without trial until his transfer to the ECCC in 2007. His trial at the ECCC commenced in early 2009 and closing statements were delivered in November 2009. During the trial, the court heard extensive testimony from Duch, as well as 33 witnesses and 22 civil parties at public hearings attended by approximately 28,000 visitors. On 26 July 2010, the Trial Chamber pronounced its judgment, finding Duch guilty of persecution as a crime against humanity and grave breaches of the Geneva Conventions. The Chamber imposed a sentence of 30 years of imprisonment (after a five year reduction in recognition of Duch’s unlawful detention by the Cambodian authorities).

Given that he had already been detained for 11 years at the time of his conviction, Duch will serve only another 19 years, subject to the outcome of the appeal proceedings, which were in progress at the time of writing (April 2011). Both Duch and the Co-Prosecutors have appealed the Trial Chamber’s judgment before the ECCC Supreme Court Chamber. Duch’s defence team has argued on appeal that Duch was beyond the Court’s jurisdiction, as he was not a senior leader of the Khmer Rouge, and should therefore be released. The prosecutors have argued, among other things, that the Trial Chamber erred by subsuming individual crimes (including murder and torture) under persecution as a crime against humanity and failing to sentence Duch to 40

years imprisonment as requested by the prosecution at the end of the trial. The Supreme Court Chamber's decision will likely be announced in June 2011.

The Duch judgment represents a significant milestone in Cambodian and international criminal justice. The judgment and sentence reinforce the fundamental nature of due process by recognizing the illegality of Duch's pre-trial detention and reducing his sentence accordingly. The reduction of Duch's sentence augurs well for fair trials in Cambodia; for example in cases of detention related to land evictions.

In order for the Duch trial to positively affect the rule of law in Cambodia, it is crucial to gain the support of the Cambodian people. This can be achieved through conducting meaningful outreach and equipping the victims with a better understanding of the judgment and sentence which will help victims to accept the sentence and appreciate the judgment as having contributed to the nation's reconciliation.

It will also help to increase support and interest in the ECCC for the trial of the four senior leaders of the Khmer Rouge, due to commence in mid 2011. The guilty verdict is a significant first step forward at both the national and the international levels in terms of holding one of the perpetrators of the regime accountable for the crimes committed during the DK era, as well as providing a model for fair trials in Cambodia. Not only will future prosecutions at the ECCC be informed by the results of Duch but the rulings on particular provisions of the domestic law, such as the statute of limitations and sentencing provisions, can be used by national judges and lawyers in the domestic courts in Cambodia going forward.

#### *Decisions dealing with accusations of corruption*

Allegations of corruption have been directed towards national judges at the ECCC, casting doubt on the legitimacy of the proceedings. This reflects poorly on judicial practices within Cambodia and the fact that bribes and political interference play a prominent role in the domestic criminal justice process.

Positively, investigating and litigating the corruption allegations and disqualification of judges requests at the ECCC has enabled lawyers to confront the issue of corruption. In dismissing the request to disqualify Judge NEY Thol on the basis of corruption charges, the Pre-Trial Chamber responded by emphasizing that the ECCC "is a separate and independent court with no institutional connection to any other court in Cambodia"<sup>115</sup>.

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115 Paragraph 30, PTC Decision on the Co-Lawyer's urgent application for disqualification of Judge Ney Thol pending the appeal against the provisional detention order in the case of Nuon Chea, 4 February 2008.

These statements affirm the court’s impartiality and take a step forward toward ending impunity and, thereby strengthening the rule of law in Cambodia. In addressing these corruption allegations, the ECCC has also sent messages to the Supreme Council of Magistrates stressing the importance of competent and impartial Judges. Dismissing an application to disqualify Judge NIL Nonn, the Trial Chamber stated that:

“[W]here allegations of individual fitness to serve as a judge are entailed, recourse is instead to domestic mechanisms designed to uphold standards of judicial integrity within the Cambodian judiciary. The Chamber agrees that the allegations in the application must be taken seriously and emphasises the importance of a genuine commitment on the part of the Royal Government of Cambodia to develop further judicial capacity and thereby fully restore public confidence in the judiciary”<sup>116</sup>.

The Chamber also noted the ECCC’s role in strengthening the rule of law, declaring that the ECCC was “designed in part to reinforce measures intended to strengthen domestic judicial capacity in Cambodia”.

### **Legacy Projects**

The most direct link between the work of the ECCC and the future integrity and effectiveness of the domestic legal system are ‘legacy’ projects being undertaken by the court and various NGOs. Broadly speaking, ‘legacy’ refers to “a hybrid tribunal’s lasting impact on bolstering the rule of law in a particular society.... [T]he aim is for this to continue even after the work of the court is complete”.<sup>117</sup>

Legacy involves multifaceted programming that seeks to disseminate relevant rulings and decisions of the court to actors in the domestic legal system, provide training to law students and practitioners, and spreading the human rights values upon which the tribunal rests. In order for the decisions and interpretations of National and International law to improve the capacity of national institutions in Cambodia, various organizations have created tools and training programmes to ensure that the ECCC has a lasting legacy in Cambodia.

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116 TC Decision on Ieng Sary’s application to disqualify judge Nil Nonn and related requests, 28 January 2011

117 “International Justice and Human Rights: Supporting the Legacy of Cambodia’s Extraordinary Chambers,” United Nations Office of the High Commissioner of Human Rights. (Last accessed 10 April 2011).

As discussed below, this has been done through the creation of practical tools aimed at carrying on the legacy of the ECCC in national institutions (e.g. practice manuals, annotation books). In order to understand how the ECCC impacts on the rule of law in Cambodia, one must be aware of the various legacy projects planned or already underway.

#### *Archiving ECCC documents and judicial decisions*

The ECCC can only manifest its modeling potential if there are mechanisms whereby ECCC documents and judicial decisions are disseminated to the Cambodian judiciary, legal practitioners, and Cambodian citizenry. As noted above, such access is currently virtually nonexistent in Cambodia.<sup>118</sup> The ECCC serves a fundamental function of creating a judicial record of the atrocities committed for future generations of Cambodians and for the rest of the world. Several institutions are attempting to alter the status quo by creating archives of ECCC-generated jurisprudence.

#### *Capacity-building training*

Another way in which the decisions and best practices from the ECCC are preserved and passed on to legal practitioners in Cambodia is through educational initiatives. A number of organizations are currently conducting trainings, seminars and courses to ensure that the training value of the court is not lost.

Possibly the greatest proponent and organiser of legal education initiatives related to the ECCC is the United Nations' Office of the High Commissioner of Human Rights (OHCHR) Cambodia Office. From hosting judicial roundtables with lawyers from the ECCC and national sector to discuss best practices, to hosting legal study tours from national sector judges at the ECCC, facilitating legal dialogue for practitioners and a instigating a lecture series for law students, OHCHR is attempting to support and facilitate the sharing by ECCC judges and legal professionals of their knowledge, skills and experience with individuals working in, or in the process of entering, the domestic legal system.

Various offices within the ECCC itself are also participating in the educational aspects of its legacy by conducting training.

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118 "Country Report: Cambodia," ASEAN Rule of Law for Human Rights Study, Human Rights Resource Center for ASEAN. p. 10.

Recognising that the future of the domestic legal system will be served by not only investing in current Cambodian lawyers, organizations have also created educational opportunities for law students and, in some cases, for high school students. For example, DC-Cam conducted a one-week training after the publication of the Duch verdict, geared towards law students and discussing the international and domestic laws relevant to Duch's case. It plans to host another training at the commencement of trial for Case 002.

The Royal University of Law and Economics (RULE) has formed strategic partnerships at the ECCC to place students in internships and fellowships, bring ECCC lawyers to the university to guest lecture, and confer the responsibility of coaching the international law moot court team to international lawyers from the ECCC. In the same educational vein, the OHCHR is contributing to the rule of law by creating A Practitioner's Guide to the Cambodian Code of Criminal Procedure. Currently in creation, the handbook will annotate the provisions of the Cambodian Code of Criminal Procedure (CCPC) with the decisions, interpretations, orders and practices of the ECCC. It is intended to assist the Cambodian legal community to understand, apply and develop the CCPC and, in doing so, strengthen the rule of law in Cambodia.<sup>119</sup>

In summary, by setting standards for procedural fairness subject to international scrutiny and building capacity amongst Cambodian legal professionals, the ECCC has the potential to leave a profound and positive legacy on the Cambodian legal system. Various organizations, including the ECCC itself, have designed practical measures to ensure that its work has a meaningful and practical effect on Cambodian society.

## **F. CONCLUSIONS & RECOMMENDATIONS**

It bears repeating that the ASEAN Charter enshrines the importance of enhancing the rule of law, presents this concept as part and parcel of good governance, and connects it to respect for and protection of human rights, thereby providing the foundation for a conceptual framework.

Among other things, the central principles we have identified as a base-line to assess the rule of law in relation to human rights involve not only the passage of law but also enforcement and compliance. They necessitate a clear separation of power between the executive, legislative and judicial branches, together with a consistent body of law and transparent rules and regulations.

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119 See the webpage for the Office of the High Commissioner of Human Rights <http://cambodia.ohchr.org/EN/PagesFiles/RuleOfLawIndex.htm>.

Our article reveals that ASEAN member states have largely committed themselves to these central principles that embody the rule of law, and that their legal systems have incorporated structures designed to give effect to these principles.

But enhancing the rule of law is easier said than done. It requires a whole range of measures considered in this article. Some measures may be more important than others but it is only taken together that they can produce a conducive legal and judicial environment that can be characterized as instantiating the rule of law. As we have seen, some ASEAN countries have implemented most of these required measures, others still have quite a long way to go on this path.

We have turned up the following conclusions, which we hope will guide further research.

First, this article has presented a base-line and benchmarks for gathering information about the formal mechanisms and programs now in place in ASEAN countries to promote the rule of law and enhance judicial performance.

Our article reveals broad agreement in ASEAN as to the necessity of promoting the rule of law. Viewed in the light of regional and global developments, the ASEAN Charter provides a conceptual framework for understanding the rule of law, democracy and human rights as mutually reinforcing and interlinked principles which member states must strive to enhance and protect.

There is, however, considerable variation in the nature and scope of rule of law measures adopted by ASEAN governments to implement this principle in the context of respecting human rights. There is also a striking paucity of authoritative data on rule of law indicators and benchmarks, which considerably limits opportunities for proper secondary assessment of the rule of law.

It follows that the next step is further in-depth and empirical analysis that alone can produce substantive and practical lessons learned and make policy-relevant recommendations. Comparative empirical studies evaluating the effectiveness of such measures across the region may be particularly beneficial in regard to distilling key lessons learned that might assist ASEAN governments and common inter-governmental institutions in developing common goals and best practices.

In other words, we no longer need to articulate ‘thick’ conceptions of the rule of law, but we need to have qualitatively ‘thick’ descriptions of the primary challenges to and modalities of rule of law implementation. Effective strategies for rule of law implementation must be informed by further in-depth research.

Second, to enable further research, the compilation and documentation of relevant data is key.

In several instances, in-country experts were unable to acquire authoritative data because it was secret or unavailable. In-country experts are often most at risk when seeking to access information which they require for their research. ASEAN member states can benefit by thinking about the challenges they face at the regional level and learn from the ways in which individual countries have addressed common problems. In order to do so, the necessary first step is accurate collection, compilation, documentation and analysis of all the available information.

Identifying common ground and shared understanding among ASEAN countries on the rule of law is merely the first step. As Tamanaha accurately highlights, “what is significant here lies not in the similarities ... but in the essential differences,” as “multiple legal systems continue to exist alongside state law.” The reality of legal pluralism in many of the ASEAN countries indicates a crucial need to track and analyze landmark decisions within each country, be it case law or judgments issued from customary, traditional, religious or hybrid courts.

Third, in-depth research will also be required to accurately assess the way in which different ASEAN countries and institutions have implemented various rule of law reform measures, and to glean lessons learned from the relative successes and failures of those initiatives. The sort of issues that such a study should focus on are enumerated in the recommendations below. A pan-ASEAN rule of law database will significantly increase ease of intra-ASEAN comparative research by improving accessibility of information and reducing language barriers.<sup>120</sup>

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120 This is a database project which is exploring together with the Asian Peace-building & Rule of Law Programme at SMU and the Human Rights Resource Centre (for ASEAN). The database will draw from a wide range of sources, including analysis of case judgments, but also civil society reports, documents produced by the Universal Periodic Review at the Human Rights Council and other UN review processes.



Fourth, there is a lack of relevant experts in certain countries who are willing and able to conduct research. It is critical, therefore, to build capacity amongst in-country researchers, proper empirical research cannot be conducted in the region without their leadership or input.

In view of these conclusions, our recommendations for further rule of law research, reform and capacity building are as follows.

1. Conduct in-depth research projects in collaboration with ASEAN member states and AICHR to propose country-specific and ASEAN-wide policy mechanisms and legal instruments that strengthen the rule of law where gaps have been identified in ASEAN countries.
2. Promote rule of law and human rights education and awareness, including developing a university course and curriculum on ASEAN legal systems and their relationship to the principles and purposes inscribed in the ASEAN Charter, including enhancing the rule of law & good governance and respecting the promotion and protection of human rights and fundamental freedoms.
3. Develop and implement a training programme on rule of law norms, best practices, and legal frameworks for officials, civil society and academia from relevant ministries in each of the ten ASEAN countries.
4. Develop and implement judicial training programmes for judges from across the region so as to strengthen judiciary systems.
5. Propose a draft text on upholding and promoting the rule of law for inclusion into an ASEAN Declaration on Human Rights, which draws on the findings of this study and best practices internationally.
6. Encourage the development of a network of regional human rights lawyers, empiricists and scholars engaged in undertaking legal and policy-oriented studies of the rule of law and human rights in Southeast Asia, so as to create and build relevant local capacity and expertise.
7. Compile a rule of law database on human rights which serves as a repository for data from each of the ten ASEAN countries, and which tracks important case law and legislative or regulatory changes that may improve or detract from the identified central principles of the rule of law.

8. Request that ASEAN member states avail further empirical and statistical information on the rule of law central principles identified above to academics, civil society organizations and the public, especially statistics relating to judicial proceedings concerning human rights abuses, in terms of the numbers of complaints lodged, investigations successfully completed, and redress received.
9. Examine the experience and jurisprudence of existing national human rights commissions and oversight institutions to consider lessons learned and ways in which to strengthen them.
10. Propose feasibility studies in collaboration with AICHR on the establishment of national human rights commissions, academic centres or other possible institutions to promote and protect human rights in ASEAN countries which do not yet have such institutions.
11. Research implementation gaps of the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in ASEAN, as all ASEAN member states have ratified or acceded to these instruments.
12. Of the core international human rights instruments to which not all ASEAN countries have acceded, conduct studies to determine ASEAN countries' domestic reception of and adherence to the fundamental human rights they enshrine, including but not limited to:
  - a) ` businesses and their obligation to respect human rights
  - b) ` rights of minorities and indigenous people, including religious minorities
  - c) rights of refugees, asylum seekers and internally displaced persons
  - d) ` protection from torture, inhumane and degrading treatment and from arbitrary deprivation of life including extrajudicial and arbitrary executions
  - e) ` right to a fair trial including rights during pre-trial detention f) freedom of opinion and expression, including the press
  - g) right to development in all areas, including food, water, sanitation, housing, healthcare and education h) rights to property, including land and mineral rights

13. Stock-take the progress of extant human rights bodies such as AICHR and ACWC, provide research support for their thematic studies in furtherance of their respective mandates.

The diversity of legal systems and traditions in ASEAN will pose significant challenges for the kind of holistic cooperation and harmonization that ambitious integration goals will require. As ASEAN moves towards deeper integration in areas such as political-security and economic cooperation, we hope that the conceptual framework of the central structural principles embodied in the term “the rule of law” which this article distils will prove useful. This article does not presume to predict rule of law development. It provides a conceptual base-line of central principles and a practice related to the rule of law, and identifies indicative benchmarks for assessing the concept in the region. After surveying these principles and practices in the ten ASEAN countries, it has sought to illuminate paths towards achieving greater coherence across the region in conformity with the ASEAN’s commitment to the rule of law as essential to good governance, and for creating a rule-based community of shared values and norms.

# PARCON VS. REPUBLIC OF THE PHILIPPINES: A CHALLENGE FOR A RELEVANT ASEAN HUMAN RIGHTS MECHANISM

Prof. H. Harry L. Roque, Jr.

## ABSTRACT

**I**n January 2010, some of the heirs of media men killed in the so-called Ampatuan massacre filed the first ever individual complaint with the ASEAN Inter-Governmental Commission on Human Rights. The communication alleged that since all 197 individuals accused of masterminding and implementing the single most murderous attack against journalists and which claimed the lives of 58 individuals were all state organs, either as elected local officials, regular members of the Armed Forces of the Philippines, regular members of the Philippine National Police, or members of the military auxiliary force known as Civilian Voluntary Organization (CVO) or auxiliary police force known as the CAFGU's, the killings were hence perpetrated by the state itself breaching thus the victims' right to life under Art. 1 of the International Covenant on Civil and Political Rights.

Unfortunately, the first ever communication was received but un-acted upon by the AICHR. Initially, it was because the Commission allegedly had not yet promulgated its rules of procedure. But a member of the Commission, Rafendi Djamin, declared that the communication could not be acted upon because of a decision reached by the Commission that it would focus on dissemination rather than protection of human rights in the region.

This article argues that this refusal to act on this first communication is contrary to the Terms of Reference of the AICHR itself and is a breach of the ASEAN's avowed mandate to protect and promote human rights in the region. It will conclude furthermore, that the individual country members of ASEAN also have an obligation under international law to ensure that the Human Rights Body that it established should have the power to implement the duty to protect under treaties that the individual members have ratified and under customary international law.

## THE MASSACRE

On 23 November 2009, Buluan Vice Mayor Esmael "Toto" Mangudadatu (hereinafter "Vice Mayor Mangudadatu") was scheduled to file his certificate of candidacy (COC) for the May 2010 Philippine elections before the Commission on Elections office in the town of Shariff Aguak, Maguindanao, Philippines, for the position of Governor of Maguindanao. In order to cover the supposedly landmark filing of the COC, thirty two (32) journalists and media workers from all over Mindanao were invited to join the convoy to Shariff Aguak.

Between 7:30 AM and 8:00 AM on that fateful day, "Vice Mayor Mangudadatu" requested by phone Col. Medardo Geslani (hereinafter "Col. Geslani"), Commander of the 601st Infantry Brigade, for security escorts. He explained thoroughly to the official the verified information he received on a possible ambush against the convoy, the heated political atmosphere in the province of Maguindanao, and the overwhelming support the military and police have been extending to the Ampatuans. Vice Mayor Mangudadatu made these requests for security escorts several times<sup>1</sup>.

Nevertheless, according to Vice Mayor Mangudadatu, Col. Geslani of the 601st Infantry Brigade refused to provide a single military personnel to aid in the security of the convoy.<sup>2</sup> During that time, the Army officer commanded an Army unit which had immediate jurisdiction over Ampatuan town. At this point, Vice Mayor Mangudadatu realized that the officer had no plans of providing security to the Vice Mayor's representatives.<sup>3</sup>

Journalists on the convoy also called the Commanding General of the 6th Infantry Division of the Philippine Army, which had responsibility over the entire province of Maguindanao for security. Indeed, the Vice Mayor's statements are supported by the testimony of Manila Standard Today correspondent Joseph T. Jubelag, one of the journalists invited to cover the convoy.

Jubelag said that just a few hours before the convoy took off, he heard Alejandro "Bong" Reblando relay to the group of journalists and media workers

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1 Based on Vice Mayor Esmael "Toto" G. Mangudadatu's Affidavit Complaint dated 30 November 2009.

2 Based on Vice Mayor Esmael "Toto" G. Mangudadatu's Affidavit Complaint dated 30 November 2009.

3 Based on Vice Mayor Esmael "Toto" G. Mangudadatu's Affidavit Complaint dated 30 November 2009.

invited to the convoy that Maj. Gen. Cayton had just told him (Alejandro “Bong” Reblando) that the reason why Respondent Col. Geslani had to turn down the request of the Mangudadatus is that his troops had to attend a send-off ceremony that morning for the 46th Infantry Battalion, which was to be sent to Samar.<sup>4</sup>

Jubelag also heard the Philippine Daily Inquirer’s Aquiles Zonio ask Respondent Maj. Gen. Cayton about the security situation in Shariff Aguak.<sup>5</sup> Zonio told Jubelag that Maj. Gen. Cayton gave him (Aquiles Zonio) assurances that it was safe to travel through the national highway to Shariff Aguak from Buluan because there was a deployment of soldiers and CAFGUs there.<sup>6</sup> Jubelag said he was sitting only an arms-length away from both Alejandro “Bong” Reblando and Aquiles Zonio so he could hear their telephone conversations with Respondent Maj. Gen. Cayton.<sup>7</sup> He said after hearing Maj. Gen. Cayton’s assurances, he felt relieved, as everyone in the group was, considering that the assurances came from no less than the highest military commander in the area.<sup>8</sup>

Joseph T. Jubelag also assumed, on the basis of such assurances, that Respondent Maj. Gen. Cayton was in touch with his man in the area, Col. Geslani, Commanding Officer of the 601st Brigade, which had jurisdiction over the provinces of Maguindanao and Sultan Kudarat.<sup>9</sup>

Jubelag could sense the immediate relief felt by everyone upon hearing that Maj. Gen. Cayton had in fact given such assurances of a safe journey through the national highway after two hours of trying to get a firm hold on the security situation in the area.<sup>10</sup>

In order to ease the tension between the Mangudadatus and the Ampatuans, Vice Mayor Mangudadatu decided to send his wife, two sisters, aunt and two female lawyers in the belief that their womanhood will be respected. According

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4 Based on Joseph Jubelag’s Affidavit.

5 Based on Joseph Jubelag’s Affidavit.

6 Based on Joseph Jubelag’s Affidavit.

7 Based on Joseph Jubelag’s Affidavit.

8 Based on Joseph Jubelag’s Affidavit.

9 Based on Joseph Jubelag’s Affidavit.

10 Based on Joseph Jubelag’s Affidavit.

to Vice Mayor Mangudadatu, he received reports that the Ampatuans, whom he would challenge in the gubernatorial race in the May 2010 elections, had threatened to chop him into pieces once he filed his candidacy.<sup>11</sup>

So Vice Mayor Mangudadatu sent an all-woman team and journalists, reasoning that "Under our tradition, Muslim women are to be respected. They should not be harmed just like innocent children and the elders."<sup>12</sup>

According to Buluan Councilor Toy Khadafi Mangudadatu, "We really decided to send the women to file the CoCs on our behalf thinking that they will be protected and spared from violence and the men won't hurt them."<sup>13</sup> The Mangudadatu women who were in the convoy were:

- (a) Bai Genalin Mangudadatu (his wife);
- (b) Bai Eden Mangudadatu (his sister);
- (c) Bai Farina Mangudadatu (his sister);
- (d) Bai Rowena Mangudadatu (his aunt);
- (e) Atty. Cynthia Oquendo-Ayon (his lawyer); and
- (f) Atty. Connie Brizuela (his lawyer).

The convoy of Vice Mayor Mangudadatu was composed of six (6) vehicles, to wit: 4 Toyota Grandia vans (one grey, one green, and two white); and 2 two media vehicles – a Pajero owned by a DZRH broadcast journalist and a Mitsubishi L-300 van owned by UNTV<sup>14</sup>.

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11 Based on Vice Mayor Esmael "Toto" G. Mangudadatu's Affidavit Complaint dated 30 November 2009.

12 Based on <http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20091126-238432/Massacre-planned-says-Buluan-vice-mayor>.

13 Based on Joel B. Escovilla and G. S. dela Peña news article entitled "At least 21 dead in bloody poll violence," *Business World*, which can be accessed at [http://www.undp.org.ph/?link=news&news\\_id=310&fa=2](http://www.undp.org.ph/?link=news&news_id=310&fa=2)

14 As quoted in *Hiding Behind Its Limits: A Performance Report on the First Year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2009-2010*, (p. 104) by Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), published by the Asian Forum for Human Rights and Development

Two (2) other vehicles were not part of the Mangudadatu convoy but happened to be traveling on the same highway: a red Toyota Vios; and a light blue Toyota Tamaraw FX.

The Vios had five (5) passengers: Eduardo Lechonsito, a government employee who was bound for a hospital in Cotabato City after suffering a mild stroke Monday morning. He was with his wife Cecille, co-workers Mercy Palabrica and Daryll delos Reyes, and driver Wilhelm Palabrica<sup>15</sup>. The FX was driven by Anthony Ridao, employee of the National Statistics Coordination Board, and son of Cotabato City councilor Marino Ridao<sup>16</sup>.

The Mangudadatu convoy, along with the Vios and Toyota Tamaraw FX, was intercepted in Ampatuan, Maguindanao by more than a hundred (100) armed men<sup>17</sup>. Everyone in the convoy was brought to a nearby killing field in a hilly area of Sitio Masalay, Barangay Salman, Ampatuan town, Maguindanao province, the Philippines.

At about 10:30 in the morning of 23 November 2009, 1st Lt. Gempesao received a phone call from his intelligence personnel, in the person of Cpl. Emelio Ysita, informing him that they were in the vicinity of Brgy. Salman, Ampatuan town, and that they had observed several persons clad in police camouflage uniforms on board a vehicle marked with "PNP." Further, they had also observed a number of vehicles, mostly vans escorted by armed men on board a pick-up and a Sports Utility Vehicle (SUV) vehicle, going to the hilly part of the area.<sup>18</sup>

Immediately after receiving the said phone call, 1st Lt. Gempesao informed his Commanding Officer, Lt. Col. Rolando Nerona, that their intelligence personnel who were dispatched to the area had observed that several vehicles had been taken at gunpoint and had been moved to the hilly part of the area.<sup>19</sup>

At about 10:40 in the morning, Staff Sergeant Coronel received a call from 1st Lt. Gempesao for him, together with Cpl. Ysita and Sgt. Rodriguez, to

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15 Id.

16 Id. p.105

17 Id.

18 Based on 1st Lt. Rolly Stefen A. Gempesao's Sworn Statement dated 29 November 2009.

19 Based on 1st Lt. Rolly Stefen A. Gempesao's Sworn Statement dated 29 November 2009.



proceed to the Masala Detachment in Brgy. Masalay, Ampatuan, Maguindanao, to confirm if there were captured Mangudadatus supporters. But before they could proceed to the Masalay Detachment they were blocked on the highway by numerous armed men consisting of uniformed policemen and militiamen.

According to Staff Sergeant Coronel's estimate, there were about five hundred (500) armed men who blocked them, together with other armed men on high ground surrounding the checkpoint.<sup>20</sup> At this point, Staff Sergeant Coronel's group turned around and stopped about 100 meters away to observe. They observed that there was a back hoe being unloaded from a long bed truck or heavy equipment carrier parked near the road that was facing them or towards Shariff Aguak. The back hoe was running and entering the crossing to Brgy. Salman, Ampatuan, Maguindanao. After about twenty (20) minutes, Staff Sergeant Coronel's group was permitted to enter, and they proceeded to the Masalay detachment.<sup>21</sup>

On the other hand, at about 11:00 o'clock, Buka Sakilan Ali (a member of the Cafgu Active Auxiliary (CAA) based along the National Highway of Sitio Masalay, Brgy. Matagabong, Ampatuan, Maguindanao) observed that police personnel of the Regional Mobile Group of the ARMM flagged down eight (8) units of vehicles loaded with passengers along the National Highway of Sitio Masalay, Barangay Matagabong, Ampatuan, Maguindanao<sup>22</sup>.

He told investigators that the vehicles were signaled by two (2) patrol police vehicles going to the mountainous area of Barangay Salman, Ampatuan, Maguindanao more or less FIVE (5) kilometers away from the national highway of the said place wherein their detachment was located. After several minutes, he heard simultaneous gun fire believed to be within their area of responsibility.<sup>23</sup> Upon hearing the said simultaneous gun fire, Ali stated that their Commanding Officer sent a message through mobile cellular phone to the 38th Infantry Battalion Headquarters located at Brgy. Semba, Dos Shariff Kabungsuan, Maguindanao.<sup>24</sup>

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20 Based on Staff Sergeant Jimmy Coronel's Sinumpaang Salaysay dated 28 November 2009.

21 Based on Staff Sergeant Jimmy Coronel's Sinumpaang Salaysay dated 28 November 2009.

22 Based on Buka Sakilan Ali's Sworn Affidavit dated 26 November 2009.

23 Based on Buka Sakilan Ali's Sworn Affidavit dated 26 November 2009.

24 Based on Buka Sakilan Ali's Sworn Affidavit dated 26 November 2009.

On the other hand, at about 10 minutes later from 10:30 in the morning of 23 November 2009, 1st Lt. Gempesao again received another cell phone call from Cpl. Ysita again informing him that they had sighted a trailer loaded with a “back hoe” going to the same direction where the several vans were sighted.<sup>25</sup> During 1st Lt. Gempesao’s conversation with his intelligence personnel, in the person of Cpl. Ysita, 1st Lt. Gempesao’s cellphone was on loudspeaker mode, thus, his Commanding Officer together with Ex-Officer in the person of Major Navarro, and 1st Lt. Reyes, overheard their conversation. Hence their Commanding Officer, in the person of Lt. Col. Nerona, immediately called up the 601st Infantry Brigade and talked to the Brigade Commander, in the person of Col. Medardo Geslani, explaining the whole situation that had taken place in Brgy. Salman, Ampatuan.<sup>26</sup>

At least fifty-seven (57) women and men were brutally murdered by the perpetrators at the massacre scene<sup>27</sup>. Amongst the victims of the carnage were all of the 32 journalists and media workers who joined the Magundadatu convoy.

Of 32 journalists and media workers, heirs of thirteen (13) of these murdered mediemen filed the Communication with the AICHR, namely:

- (a) McDELBERT ARRIOLA (for *UNTV* in General Santos City);
- (b) JHOY DUHAY (for *Goldstar Daily* in Cagayan De Oro City);
- (c) JULITO EVARDO (for *UNTV* in General Santos City);
- (d) SANTOS “JUN” P. GATCHALIAN, JR. (for *Metro Gazette* in Davao City);
- (e) BIENVENIDO LEGARTA (for *Periodico Ini* in Koronadal City);
- (f) LINDO T. LUPOGAN (for *Metro Gazette* in Davao City);
- (g) REY MERISCO (for *Periodico Ini* in Koronadal City);
- (h) VICTOR NUÑEZ (for *UNTV* in General Santos City);

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25 Based on 1st Lt. Rolly Stefen A. Gempesao’s Sworn Statement dated 29 November 2009.

26 Based on 1st Lt. Rolly Stefen A. Gempesao’s Sworn Statement dated 29 November 2009.

27 As quoted in *Hiding Behind Its Limits: A Performance Report on the First Year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2009-2010*, (p. 107) by Solidarity for Asian People’s Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), published by the Asian Forum for Human Rights and Development

- (i) JOEL V. PARCON (for *Prontiera News* in Koronadal City);
- (j) ALEJANDRO “Bong” M. REBLANDO (for *Manila Bulletin* in General Santos City);
- (k) NAPOLEON SALAYSAY (for *Clearview Gazette* in Cotabato City); and
- (l) DANIEL BECOLLADO TIAMZON (for *UNTV* in General Santos City).
- (m) ROBERT “Bebot” MOMAY (for *Midland Review* in Tacurong City) who is still missing but is presumed dead, based on available forensic evidence.

Indeed, various members of the Ampatuan clan, which includes two governors and several mayors, have been pointed to by witnesses as masterminds and direct participants in the mass murder. They were allegedly part of a conspiracy in which the leading figures were former governor Andal Ampatuan Sr. and Mayor Andal “Unsay” Ampatuan Jr.

Paradoxically, both the Magundadatus and the Ampatuans were close allies of the then Arroyo administration and belonged to the same ruling party, the Lakas-NUCD-CMD. However, it is to the Ampatuans that President Gloria Macapagal-Arroyo is heavily indebted<sup>28</sup>.

During the 2004 Presidential elections, President Gloria Arroyo was caught on tape talking with election commissioner Virgilio Garcillano asking the latter to ensure that she wins by one million votes. The commissioner mentioned Maguindanao, ruled by the Ampatuans, as a vote-rich region that will ensure that she will win by said number of votes.

True enough, in the last senatorial elections, the Ampatuans delivered a 12-0 win for the administration ticket even if the administration consistently lost in virtually all of the other provinces<sup>29</sup>.

Because of the terrorism by the Ampatuans, there were consistent reports that voters were not actually allowed to vote in Maguindanao and that Ampatuan

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28 As quoted in *Hiding Behind Its Limits: A Performance Report on the First Year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2009-2010*, (p. 109) by Solidarity for Asian People’s Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), published by the Asian Forum for Human Rights and Development.

29 Id.

goons just filled up the ballots<sup>30</sup>. Consequently, opposition candidates incredibly received zero votes in many of Maguindanao towns. There were also consistent reports that the Arroyo administration channeled large chunks of government funds to ghost projects in Maguindanao, and a substantial part of said funds were paid back to Arroyo, her relatives, and favored allies.

The Arroyo administration armed the Ampatuans against the secessionist Moro Islamic Liberation Front (MILF) in the region, granting the clan much leeway to establish its own paramilitary units. In the end, it was the key members of the Ampatuan political clan, who were local chief executives of various LGUs in Maguindanao, who would be involved in the planning, staging, and execution of the gruesome massacre.<sup>31</sup>

Militiamen and officers and members of the Philippine National Police (PNP) under the direct control of the Ampatuans were among the perpetrators. In addition, officers and men of the Armed Forces of the Philippines (AFP) were also complicit in the carnage<sup>32</sup>.

Mrs. Gloria Macapagal-Arroyo, as President of the Republic of the Philippines, has general supervision over these officials of Philippine LGUs. She also has supervision, control and command responsibility over officers and members of the military and the PNP<sup>33</sup> who were among the perpetrators of the Ampatuan Massacre.

Based on the 197 individuals charged for the commission of the massacre, all of whom are agents of the Philippine State, their acts in connection with the 23 November 2009 Maguindanao massacre are attributable under international law to the Republic of the Philippines.

## **BACKGROUND OF THE AICHR**

Europe has been at the forefront of the human rights protection with the creation of the Council of Europe and, under it, the European Court of Human

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30 Id.

31 Id., p. 110

32 Id., p. 110

33 As provided for in Article VII, Section 18 of the 1987 Constitution

Rights in the aftermath of the Second World War<sup>34</sup>. Some decades later, there were regional initiatives for a human rights body and in Southeast Asia, this initiative “dates back to the World Conference on Human Rights in Vienna in 1993.”<sup>35</sup>

Following that World Conference, foreign ministers of ASEAN state-parties met in the 26th ASEAN Ministerial Meeting (AMM) “to publish a Joint Communiqué, which welcomed the Vienna Declaration and included, albeit ambivalently, one recommendation of action considering an arrangement of a regional human rights mechanisms.”<sup>36</sup> However, it was only more than a decade later that this actually started to pick up steam.

Before such regional human rights mechanisms could be fully implemented, there had to be an overarching understanding between the member states of ASEAN as to the promotion and protection of human rights. This was taken up in 2005, twelve years after the above recommendation, that the “ASEAN members began discussing the construction of a formal charter for ASEAN.”<sup>37</sup> Two years later, the Charter was adopted at the 13th ASEAN Summit in November 2007.<sup>38</sup>

In answer to the growing demand for a regional human rights body which was much like what Europe had, the ASEAN charter stated that one of its purpose was “to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN.”<sup>39</sup> This was seen as a concrete step towards the creation of a human rights body in the region.

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34 STAGGS-KELSALL, MICHELLE. *The New ASEAN Intergovernmental Commission on Human Rights: Toothless Tiger or Tentative First Step*, (p.5) “AsiaPacific Issues”, No. 90 (September 2009), East West Center.

35 As quoted in *Hiding Behind Its Limits: A Performance Report on the First Year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2009-2010*, (p. 1) by Solidarity for Asian People’s Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), published by the Asian Forum for Human Rights and Development

36 *Id.*, p. 2

37 ARENDHORST, JOHN. *The Dilemma of Non-Interference: Myanmar, Human Rights and the ASEAN Charter*, “Northwestern Journal of Human Rights”, Vol. 8 Issue 1 (Fall 2009), p.111

38 ASEAN SECRETARIAT, *THE RATIFICATION OF THE ASEAN CHARTER 1* (2008), <http://www.aseansec.org/AC-update.pdf>. in ARENDHORST (supra), p.111

39 ASEAN CHARTER, Article 1, § 7

To get about the creation of this body, "ASEAN created the Working Group for an ASEAN Human Rights Mechanism ("Working Group") and charged it with examining several possible forms the human rights body could take."<sup>40</sup> It proposed that this body should have the primary task of promoting and protecting human rights, "which in its view includes raising awareness, advising, sharing information, and advocating, but not to pass judgment regarding human rights in any member nation."<sup>41</sup>

What started out as a human rights body that had the investigative and prosecutorial powers of the ECHR, or even the ECJ, soon began to look the opposite. When the Terms of Reference (TOR) was drafted by the Working Group, this "essentially removed any possibility that the new human rights body would have any enforcement power."<sup>42</sup> Many of the provisions leaned more towards the promotion of human rights than its protection. What resulted was a body that limited "its role to an advisory body for the ASEAN Secretariat and member states, rather than giving the commission independent enforcement powers."<sup>43</sup>

As it was, "when ASEAN formally approved the terms of reference for the AICHR on July 20, 2009, more than two years after the ASEAN Charter mandated the creation of a human rights body, the human rights community reacted with disappointment."<sup>44</sup> Many, especially the socio-civic groups, saw it as inadequate to tackle the prevalent human rights issues in the region. One of the main criticisms against it is that it lacked "any substantial means of penalizing human rights violators."<sup>45</sup>

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40 Working Group for an ASEAN Human Rights Mechanism: About Us, <http://www.aseanhrmech.org/aboutus.html> (last visited Nov. 7, 2009). In ARENDHORST (supra), p. 111

41 ASEAN SECRETARIAT, TERMS OF REFERENCE OF ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS §§ 10-12 (2009), available at <http://www.aseansec.org/Doc-TOR-AHRB.pdf> in ARENDHORST (supra), p. 113

42 ASEAN SECRETARIAT, TERMS OF REFERENCE OF ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS § 2.5. in ARENDHORST (supra), p. 113

43 STAGGS-KELSALL, MICHELLE. *The New ASEAN Intergovernmental Commission on Human Rights: Toothless Tiger or Tentative First Step*, (p.2) "AsiaPacific Issues", No. 90 (September 2009), East West Center.

44 ARENDHORST (supra), p. 113

45 ARENDHORST (supra), p. 114

This becomes a problem, especially when many sectors and groups in the Southeast Asian region looked to the AICHR as a way to air their grievances when their own governments are unable or unwilling to take cognizance of it. This inability of the AICHR was all the more highlighted when, in the aftermath of the Ampatuan Massacre, several heirs of the victims of the massacre filed a communication, asking it to take cognizance of their case.

## **THE COMMUNICATION**

### **Grounds for the preliminary request**

Petitioners' preliminary request for the appropriate declaration is based on strong evidence of complicity on the part of agents of the Republic of the Philippines – including those who occupy top posts of the Arroyo cabinet – in the massacre. At the very least, these agents of the Philippine State, they argued, had been complicit in the massacre through failure to prevent the massacre, which they had clearly foreseen, as well as their failure to protect the Right to Life of the victims.

In his testimony last January 28, 2010 in the bail hearings before the Quezon City Regional Trial Court, Vice Mayor Esmael "Toto" Mangundadatu said that just before his wife Genalyn was killed, she managed to place a call on her mobile phone to inform him that armed men led by Andal "Unsay" Ampatuan Jr. had just waylaid their convoy. She also told him that Unsay slapped her on the face.<sup>46</sup>

In his tearful testimony, Vice Mayor Magundadatu also said that then Defense Secretary Gilbert Teodoro (the administration's Presidential candidate in the May 2010 elections) and other Presidential Palace officials knew of the violent nature of the Ampatuans but had failed to stop them from bullying their political rivals in Maguindanao<sup>47</sup>.

He told the court that weeks before the massacre, former Congressman Prospero Pichay, also of the ruling Lakas-Kampi-CMD party, told him to be careful because the Ampatuans were given to violence<sup>48</sup>.

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46 See <http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20100128-249861> Mangudadatu-blames-Palace-for-failure-to-stop-violent-Ampatuans. As of this filing, the official transcript of stenographic notes of the court proceeding was not yet available.

47 As quoted in *Hiding Behind Its Limits: A Performance Report on the First Year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2009-2010*, (pp. 111-112) by Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), published by the Asian Forum for Human Rights and Development

48 *Id.*, p. 112

In his one-and-a-half-hour testimony, Vice Mayor Mangudadatu said President Gloria Macapagal-Arroyo's chief political adviser, Gabriel Claudio, brokered two "reconciliatory meetings" on July 20 and Aug. 11, 2009 between the Mangudadatus and the Ampatuans. In those meetings, Andal Ampatuan Sr. strongly demanded that he declare that he would not contest Ampatuan Jr.'s gubernatorial run, Mangudadatu said. He said he replied to the clan patriarch that he was running for governor because of the clamor from his constituents<sup>49</sup>.

Moreover, complicity by the Philippine State in the carnage is established by the following points:

*First*, the Republic of the Philippines could have disarmed the Ampatuans. Its top officials have pronounced that they are "violent people" but continued to supply them with high-powered firearms so that the clan could maintain a private army.

*Second*, the Republic of the Philippines could have sent police and military personnel to accompany Mangudadatu's supporters to the capitol but it did not, despite intelligence reports received from personnel on the ground of the massing of armed men along the highway leading to Shariff Aguak. This security provision could have prevented the massacre. Yet the Republic of the Philippines' top Army officers in the region refused to heed requests by the Mangudadatus and their media companions, on the lame excuse that they did not have enough personnel for the purpose. Worse of all, they gave assurances that the highway leading to the capitol is safe and secure.

The avoidance by both the police and the military officials in the region of security duty on that ill-fated day is inexplicable, given that the violent tendencies of the Ampatuans are well-known to them and to the high civilian officials of the Republic of the Philippines and the abundant intelligence information passed on from the ground to the chain of command about the massing of armed men along the highway.

Likewise, this avoidance of duty by responsible officers and men of the Philippine national police and armed forces constitutes a failure to prevent impunity under international law.

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49 Id.



The preliminary relief prayed by Petitioners was thus because of their argument that the Philippine State is responsible under international law for the acts of its agents who were either complicit in the 23 November Massacre or were its direct perpetrators. It was also because of Petitioner's fear that there were well-founded fears that the Philippine State would be under very heavy pressure from the Ampatuans to whitewash the investigation or to cover up crucial evidence and witnesses. Thus, the need on the part of the Commission to issue an urgent declaration calling on the Philippine State to abide with its obligations under international law and ensure the prosecution and conviction of the perpetrators of the massacre as well as the provision of adequate reparations, including compensation and satisfaction, to the victims and their heirs.

### **Legal grounds for the preliminary request**

The Petition alleged that as a member of the ASEAN, the Republic of the Philippines pledged to support the aims and objectives of the Commission towards the protection and promotion of human rights within its territory and in the region as a whole.

Indeed, Petitioners argued that the Philippines gave its full support to the creation of the Commission, signing on 23 October 2009 the "Cha-am Hua Hin Declaration on the Inauguration of the AICHR", pledging full cooperation with this new ASEAN body and emphasizing the member-States' commitment to further develop cooperation to promote and protect human rights in the region.

They argued that the slaughter of innocents perpetrated by agents of the Philippine State in the 23 November Maguindanao massacre violated the Right to Life of the victims under Art. 6(1) of the International Covenant on Civil and Political Rights (ICCPR)<sup>50</sup>, among other human rights instruments under which the Philippine State is a party.

The Philippines, the submission argued, had the obligation under international law<sup>51</sup> to protect the fundamental rights of individuals, especially the rights to

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50 The provisions states thus: " Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

51 See RESTATEMENT OF THE LAW THIRD: 2 RESTATEMENT OF THE LAW: THE FOREIGN RELATIONS LAW OF THE UNITED STATES, sec. 701, comment, p. 152 (May 14, 1986).

life,<sup>52</sup> to dignity, and to be provided with adequate remedies for the violation of fundamental rights.<sup>53</sup>

Moreover, the submission argued that the Philippine State also violated the duty of preventing impunity, considering that its very own agents were behind the slaughter and it failed to prevent them from carrying it out.

This obligation, according to them, is rooted in human rights treaties to which the Philippines is a party. In particular, the International Covenant on Civil and Political Rights and the United Nations Charter--as interpreted by the subsequent practice of State Parties<sup>54</sup>-- impose the obligation to promote and protect human rights.<sup>55</sup>

It was also argued that the Philippines has the same obligation under customary international law, as evidenced by the widespread acceptance of numerous

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52 See ICCPR, art. 6(1)

53 See ICCPR, art 2(3), 993 U.N.T.S. 3; *McCann and Others v. United Kingdom*, Eur. Ct. of Hum. Rts. (Ser.A), No. 324 (1995), para. 161.

54 Universal Declaration of Human Rights, art. 7, UN General Assembly Resolution 217A (III), 10 December 1948; General Assembly Resolution 40/144, A/RES/40/144, 13 December 1985, ANNEX, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, Preamble; General Assembly Resolution 54/109, A/RES/54/109, 25 February 2000, article 9, nos. 3-4, articles 17, 21; General Assembly Resolution 54/164, A/RES/54/164, 24 February 2000, no. 4, Preamble, 1st par., 10th par., 15th par, 16th par.; General Assembly Resolution 50/186, A/RES/50/186, 6 March 1996, no. 3, Preamble, paras. 9, 13, ; General Assembly Resolution 52/133, A/RES/52/133, 27 February 1998, no. 4, Preamble, paras. 9, 14. See Vienna Convention, art. 31(3); Beyani supra note 92, at 24, citing B. Simma and P. Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTRALIAN YRBK INT'L L 82, 83 (1988-89).

55 Charter of the United Nations, Preamble, para. 2, articles 1 (1), 55, 56; International Covenant on Civil and Political Rights, arts. 2, 8, 9. See also Beyani, supra note 92, at 24; Criton G. Tornaritis, *The Individual as a Subject of International Law and International Criminal Responsibility*, 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 103-105, 114 (M. Cherif Bassiouni, Ved P. Nanda, eds. 1973).

international conventions<sup>56</sup> and instruments stating this hallowed principle,<sup>57</sup> such conventions being evidence of the existence of a customary norm.<sup>58</sup>

The Petition<sup>59</sup> then prayed for the following remedies:

- (a) XXXX;
- (b) verification of the facts and full public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others;
- (c) the search for bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities;
- (d) an official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely associated with the victim;
- (e) apology, including public acknowledgement of the facts and acceptance of responsibility;

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56 Charter of the United Nations, Preamble, para. 2, articles 1 (1), 55,56. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov.4, 1950, 312 U.N.T.S. 221; American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970); African Charter on Human and People's Rights, June 27, 1981, 21 L.L.M. 59 (1981). See *Beyani*, supra note 92, at 33, citing MERON, supra note 77, at 198).

57 Universal Declaration of Human Rights, article 7, UN General Assembly Resolution 217A (III), 10 December 1948. General Assembly Resolution 40/144, A/RES/40/144, 13 December 1985, ANNEX, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, Preamble; General Assembly Resolution 54/109, A/RES/54/109, 25 February 2000, article 9, nos. 3-4, articles 17, 21; General Assembly Resolution 54/164, A/RES/54/164, 24 February 2000, no. 4, Preamble, 1st par., 10th par., 15th par, 16th par.; General Assembly Resolution 50/186, A/RES/50/186, 6 March 1996, no. 3, Preamble, paras. 9, 13, ; General Assembly Resolution 52/133, A/RES/52/133, 27 February 1998, no. 4, Preamble, paras. 9, 14.

58 Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. YRBK. OF INT'L. L. 1, 53 (1974-75) [hereafter Akehurst], See also R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, BRIT. YRBK. OF INT'L. L. 275, 298 (1965-66); and Akehurst at 43, citing Fisheries Jurisdiction Case, 1974 ICJ Reports 3, 26, and Lauritzen v. Government of Chile (1956) 23 INT'L. L.R. 703, 729-31.

59 As quoted in *Hiding Behind Its Limits: A Performance Report on the First Year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2009-2010*, (pp. 115-116) by Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TFAHR), published by the Asian Forum for Human Rights and Development

- (f) judicial or administrative sanctions against persons responsible for violation of memory;
- (g) commemoration and tributes to the victims;
- (h) inclusion of an accurate account of the violations that have occurred in international human rights and humanitarian law training and in educational materials at all levels;
- (i) preventing the recurrence of violations.<sup>60</sup>

### **The AICHR Response**

Since the filing of the Petition by registered mail and email, the AICHR did and said nothing about the Petition. On the occasion of the first meeting of the AICHR in Jakarta, Indonesia, and while Parcon and other human rights victims were gathered outside the premises of the ASEAN, the Indonesian Commissioner Rafendi, met with Parcon et. al. and said that “the AICHR is unable to accept the individual complaint because it has opted to meanwhile concentrate on dissemination of human rights in the region”. Nothing has been done to the submission since.

### **AICHR AND THE DUTY TO PROTECT AND PROMOTE HUMAN RIGHTS**

Clearly, the AICHR has for the time being opted not to accept individual communications from human rights victims in the region. This has resulted in stinging criticisms that the body is playing mere lip service to its own mandate to protect and promote human rights in the region. While this criticism appears to be valid, this paper seeks to go beyond criticism and argue that the AICHR, under the ASEAN Charter, and its own Terms of Reference, is equipped to do beyond its dissemination mandate; and two, it has in fact the international responsibility to accept and act on these individual communications.

The ASEAN Charter provides in clear and unequivocal terms that amongst the purposes of the Association is to “to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of

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60 See Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery, Judgement, The Hague, The Netherlands, 4 December 2001, para. 1032, citing E/CN.4/2000/62, Mr. M. Cherif Bassiouni, *Final Report of the Special Rapporteur on the Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, at para. 25. (Hereinafter, Bassiouni’s *Final Report*)

the Member States of ASEAN<sup>61</sup>. The Terms of Reference, in turn of the AICHR provides that amongst the functions of the body is “to uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN member states are parties<sup>62</sup>. Article 4 of the TOR also provides that part of the mandate of the body is to “develop strategies to promote and protect human rights<sup>63</sup>. In line with this, it is further empowered to “engage in dialogue and consultation with ASEAN bodies and entities associated with ASEAN<sup>64</sup> and to “consult with other national, regional and international institutions and entities concerned with human rights<sup>65</sup>. It also has the mandate to “obtain information from member states on human rights promotion and protection and to develop common approaches and positions on human rights matters<sup>66</sup>.

According to the UN High Commissioner for Human Rights Regional Office for Southeast Asia, “Integral aspects of the minimum monitoring requirements of regional human rights mechanisms include that the body be mandated to observe and report on the general human rights situation in the region, to request information from State Parties, to carry out on-site visits in order to investigate specific human rights concerns, issue reports and recommendations, and develop an early warning system to help prevent gross violations of human rights including crimes against humanity, war crimes and genocide. As a corollary to investigative powers, regional human rights mechanisms should be empowered to receive communications from any person, group of persons, NGO or Member State alleging human rights violations against another Member State. They should also obtain any information necessary in the course of an investigation and require States to report on the steps they have taken to implement findings and recommendations.”<sup>67</sup>

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61 ASEAN CHARTER, Article 1, § 7

62 CHR Terms Of Reference (TOR), Article 1, § 6

63 TOR Article 4, § 1

64 TOR Article 4, § 8

65 TOR Article 4, § 9

66 TOR Article 4, § 10

67 Office for the High Commissioner for Human Rights Regional Office for Southeast Asia, ‘Principles for Regional Human Rights Mechanisms (Non-Paper)’, 2009, available at <http://bangkok.ohchr.org/programme/asean/principles-regional-human-rights-mechanisms.aspx>

Comparing the minimum standards of the High Commissioner with the TOR of the AICHR, it would seem that the latter has all the powers required by way of a minimum, that is, to accept individual communications and to confer with state parties on these communications. It has the power to “protect and promote”. It has the power to engage in dialogue with both ASEAN nationals, as they are after all “entities” within ASEAN, and with member states. At the minimum, they are empowered to obtain information from members states relative to matters stated in these individual communications.

In fact, the charter obligation to protect and promote human rights and the AICHR’s TOR would indicate that the body has the jurisdiction to grant both the provisional and ultimate remedies sought by petitioners Parcon et al. They are after all remedies which are declaratory in nature, that is, that when state agents kill innocent civilians and the state does not grant the victims an adequate remedy under domestic law and the right to reparations, that the state breaches its obligation to protect and promote the right to life.

It would seem thus that the decision not to accept the recent communication is a decision not founded on the limitations of the AICHR itself, either on the basis of its TOR or the ASEAN Charter, but a political decision made by the Commissioners themselves.

This notwithstanding, it is true that it would have been better if the TOR itself stated that the AICHR shall have the power to receive and act on individual communications. It would help further if the AICHR further promulgate its rules of procedures so that the Commission would know exactly what to do with these communications, even the ground and manner of rejecting them, if need be. In fact, the Parcon communication was filed precisely to give the Commission an opportunity to define exactly what it will do with individual communications. Should they decide to reject them, at least they would have to promulgate rules to enable the body to reject them.

The over-all strategy, and this was why many other victims from all over Southeast Asia followed suit after Parcon, is to keep on filing communications until the Commission runs out of reasons to reject them. This was the advice to the legal team that filed Parcon. Apparently, the Inter-American Court Commission on Human Rights also started on a similar track. It started with a mandate purely to disseminate. But with individual communications being filed regularly and persistently, the body eventually had to provide rules on how to deal with individual communications.

There are further challengers to the AICHR other than its refusal to accept individual communications. For instance, there is the absolute lack of transparency in its proceedings. To date, and after almost two years of existence, it has rightfully been observed that it has only issued 3 press releases on its functioning. Its meetings, including the drafting of its rules of procedure which has not been finalized, and are held behind closed doors. There has also not been transparency in the selection of the Commissioners themselves, save for Thailand and Indonesia where consultations were held in selecting their commissioners. And other than institutionalized and infrequent links with the Working Group on the ASEAN Regional Human Rights Mechanism, it has had almost no contact with other civil society groups in the region. There is furthermore, a funding problem given the very little amount of resources pledged by the member states for the Commission.

All these problems though pale in comparison to the Commission's failure to give victims like Parcon et al. any remedy, even just a recognition that their human rights were breached. Although dissemination is a legitimate undertaking, the best way to achieve this is to show how these rights where they exist have corresponding remedies when they are breached.

# The Right to Access to the Administrative Jurisdiction

*Karl-Peter Sommermann*

## INTRODUCTION

The right to access to the administrative jurisdiction is closely interrelated with the right to effective judicial protection by administrative courts. Both rights are conceptually overlapping: The former puts more emphasis on the requirements for a hearing by a judge and on the removal of possible barriers, whereas the latter focuses on the instruments of judicial protection and the corresponding powers of the courts. In the last two decades, it has become a key concept in discussions about judicial control, especially in European countries and those with related legal cultures.

Both aspects will be combined in the following analysis of the conceptual background, modes, shortcomings and new forms of access to the administrative jurisdiction. Therefore, this essay will cover the right to access to an effective judicial protection in a broad sense. *Administrative jurisdiction* will be understood as a branch of the judiciary specialised in public law disputes, generally composed of so-called administrative courts.

## THE CONCEPT OF THE RULE OF LAW AND THE RISE OF ADMINISTRATIVE JURISDICTION

The establishment of administrative courts cannot be conceived without the development of an administrative law that aims specifically at directing and limiting administrative action according to the principle of the rule of law. Although the origins of the rule of law can be traced far back into history<sup>1</sup> its

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· This essay is based on a lecture given on the occasion of the 10th anniversary of the Thai Administrative Jurisdiction on 9 March 2011 in Bangkok.

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1 Cf. *Karl-Peter Sommermann*, The Rule of Law and Public Administration in a Global Setting, in: The International Institute of Administrative Sciences (Ed.), *Governance and Public Administration in the 21st Century: New Trends and New Techniques*, Brussels 2002, pp. 67 et seqq.



main conceptualisation started in Europe in the 19th century. The contemporary understanding of the rule follows and further develops this tradition.

### **1. The European Origins in the 19th Century**

The term "rule of law", in its international linguistic usage, does not only stand for the specific concept of English constitutional law, but equally is a translation of related concepts of other countries, in particular of the Continental European notions of Rechtsstaat and Etat de droit. It goes without saying that the expression "rule of law" thus comprises concepts of different origins, meanings and connotations. However, starting from shared ideas underlying the different concepts, the international discourse on the rule of law has produced a considerable convergence or even merger of conceptual approaches that justify a transnational use of the term "rule of law".

#### **a) England**

In his "Introduction to the Study of the Law of the Constitution", first published in 1885, *Albert Venn Dicey* (1835-1922) attached the rule of law to the sovereignty of parliament which in England had been achieved in the 17th century. He defined the core of the rule of law as "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power"<sup>2</sup>. Effective judicial protection seemed to him to be a crucial and characteristic element in the English tradition of the rule of law: "The whole history of the writ of habeas corpus illustrates the predominant attention paid under the English constitution to 'remedies', that is, to modes of procedure by which to secure respect for a legal right, and by which to turn a merely nominal into an effective or real right."<sup>3</sup>

For Dicey, it was inconceivable that judicial protection was to be given by courts other than those belonging to the ordinary jurisdiction. Rejecting the concept of French droit administratif as "absolutely foreign to English law" because of the exemption of public officials from common law principles<sup>4</sup>, he considered the French administrative jurisdiction as incompatible with the rule of law. Consequently he did not even consider the creation of specific administrative courts as part of the judiciary. The elaboration of

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2 *Albert Venn Dicey*, Introduction to the Study of the Law of the Constitution, 8th ed., London 1915, p. 120.

3 Ibidem, p. 134.

4 Ibidem, pp. 254 et seq.

administrative law as a specific branch of law<sup>5</sup> in the United Kingdom and the consequent reorganisation of the court system is only a quite recent development, one which accelerated in the 1980s. The Tribunals, Courts and Enforcement Act 2007<sup>6</sup> was an important step towards the integration of the so-called administrative tribunals into the judiciary, separating these quasi-judicial organs from the executive, to which they traditionally belonged.

b) France

In France the idea of a rule of law based State was in nuce (in a nutshell) expressed in Article 16 of the Declaration on the Rights of Man and Citizen of 1789, stating that the safeguarding of rights and the separation of powers must be constituent elements of a Constitution. In the Napoleonic era, through the Constitution of the year VIII of the revolutionary calendar (1799), a Council of State was established. In addition to the drafting of proposals for statutes and statutory orders it had competence for the settlement of administrative law conflicts. In 1872 this organ was vested with the competence to decide cases on its own (the so-called transition from *justice retenue* to *justice déléguée*)<sup>7</sup>. It also inspired the creation of similar organs in other countries including Thailand (1874).

The Council of State has remained the key institution in the French administrative jurisdiction which was transformed into a three-tier system in the second half of the 20th century. Although there is no doubt about the independence and judicial character of the Council of State and the other organs of the administrative jurisdiction when dealing with the *contentieux-administratif*, they are still deemed to be – conceptually speaking – separate from the judicial power (*pouvoir judiciaire*)<sup>8</sup>.

c) Germany

The objective of safeguarding individual rights and freedoms is also inherent in the concept of the Rechtsstaat, which was coined in the first half of the 19th century in Germany and has since been adopted by other

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5 Cf. A. W. Bradley/K. D. Ewing, *Constitutional and Administrative Law*, 14th ed., Harlow et al. 2007, pp. 657-673.

6 2007 c. 15.

7 Cf. Olivier Gohin, *Contentieux administratif*, 4th ed., Paris 2005, pp. 25 et seqq.; Bernard Pacteau, *Manuel de contentieux administratif*, Paris 2006, pp. 34 et seqq.

8 Cf. Jean Waline, *Droit administratif*, 23rd ed., Paris 2010, p. 535.

countries. Originally, it even contained elements of obliging the State to foster the free development of the citizens through positive action, thus, anticipating the modern concept of a social State based on the rule of law. In this sense *Robert von Mohl* (1799-1875) defined the main objective of a *Rechtsstaat* as "to organize [sic] the living together of the people in such a manner that each member of it will be supported and fostered, to the highest degree possible, in its free and comprehensive exercise and use of its strengths"<sup>9</sup>. The subsequent doctrine of the *Rechtsstaat* gradually elaborated organisational principles intended to guarantee the effectiveness of individual rights and the prevention of arbitrary state action. The main principles, alongside with the separation of powers, are those of legality, equal treatment, judicial control by independent courts, legal certainty, accountability of those who act on the basis of public powers, and the principle of proportionality<sup>10</sup>.

The *Rechtsstaat* like the rule of law relies upon procedural rationality and justice. Despite their original differences the translation of the principle of the *Rechtsstaat* (*État de droit*, *Stato di diritto*, *Estado de Derecho*) as rule of law nowadays, seems to be well justified given their increasing conceptual proximity. It indicates at the same time that the two concepts are in the process of merging within the international discourse and international legal instruments.

In the 19th century judicial control and protection soon moved to the centre of the debate about the *Rechtsstaat*.<sup>11</sup> While some jurists like *Otto Baehr* trusted more in an expanded control by ordinary courts, other authors like *Rudolf Gneist*<sup>12</sup> pleaded for the creation of independent administrative courts. The impact of the spirit of liberal thinking and of the doctrine of the *Rechtsstaat* was later seen in the reform projects of several German territories. The first German State to introduce an independent administrative

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9 *Robert von Mohl*, *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*, 2nd. ed., vol 1, Tübingen 1844, § 2 (p. 8).

10 Cf. *Karl-Peter Sommermann*, *Staatsziele und Staatszielbestimmungen*, Tübingen 1997, pp. 48 et seqq.

11 In this sense *Otto Baehr* emphasized in his monograph „*Der Rechtsstaat: eine publicistische Skizze*“, published in 1864 (reprint Aalen 1961), p. 12: "Law and Statutes can

12 *Rudolf Gneist*, *Der Rechtsstaat und die Verwaltungsgerichte in Deutschland*, 2nd. ed., Berlin 1879, pp. 233 et seq. (the first edition was published in 1872); *Rudolf Gneist*, *Bericht auf dem zwölften deutschen Juristentag*, in: *Verhandlungen des zwölften deutschen Juristentages*, 1875, vol. 3, pp. 221-241.

court was Baden in the year 1863, soon followed by Prussia (1872/1875), Hesse (1874/75), Württemberg (1876) and Bavaria (1878). It goes without saying that these courts were not yet vested with complete jurisdiction for all administrative law disputes and that the right of access to effective judicial protection was not yet guaranteed at the constitutional level. However, the conviction that public administration had to be controlled by specially qualified independent courts was alive. Furthermore, the case-law of the administrative courts soon contributed to the elaboration of general principles and to a greater coherence of the administrative law which had been scattered over numerous laws and statutory orders.

## **2. The Recognition of a Constitutional Right to Judicial Protection and its Impact on the Reform of Judicial Control**

An important step forward towards a strong concept of a rule of law based State was the introduction of guarantees concerning judicial control into the Constitutions of numerous countries. Often, these guarantees were interpreted by constitutional courts in a dynamic way, thus instigating legislative reforms to improve the effectiveness of judicial control.

### **a) The 'constitutionalisation' of the right to judicial protection**

The most dynamic development of judicial protection in administrative matters took place after the Second World War, usually after the collapse of totalitarian or dictatorial regimes. Driven by the legacy of the harshest violations of personal rights committed under totalitarian regimes and dictatorships, a strong judicial protection of the individual was considered as a key element in the restoration of the Rechtsstaat or rule of law. The right to judicial protection against unlawful behaviour of public authorities was enshrined as a fundamental right in the new Constitutions first in Italy and Germany (1940s), later in Greece, Portugal and Spain (1970s) and finally in Middle and Eastern European countries (1990s)<sup>13</sup>. Where the Constitution did not explicitly refer to effective protection the Constitutional Courts generally derived the principle of effectiveness by way of a teleological interpretation of the constitutional

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13 See *Karl-Peter Sommermann*, Das Recht auf effektiven Rechtsschutz als Kristallisationspunkt eines gemeineuropäischen Rechtsstaatsverständnisses, in: F. Kirchhof/H.-J. Papier/H. Schaeffer (Hrsg.), *Rechtsstaat und Grundrechte – Festschrift fuer Detlef Merten*, Heidelberg 2007, pp.442, 450 et. seqq.

provisions<sup>14</sup>. In France the Conseil Constitutionnel deduced the right to an effective judicial remedy in the mid-1990s by using the above mentioned Article 16 of the Declaration on the Rights of Man and Citizen of 1789<sup>15</sup>.

The right to effective judicial protection has become a central concept in other regions of the world as well. A lively discussion is ongoing in Latin America where the right is derived from constitutional guarantees of specific instruments of judicial protection and is interpreted also in the light of international human rights treaties<sup>16</sup>. In Southeast Asia, for instance, the Constitution of the Republic of the Philippines of 1987 lays down the right of free access to the courts, however, without explicitly mentioning protection vis-à-vis public administration<sup>17</sup>. A more elaborated provision on the right to access to judicial process and other procedural guarantees are enshrined in the Constitution of the Kingdom of Thailand of 2007<sup>18</sup>. Although section 40 does not explicitly mention public law disputes it can be interpreted in combination with Article 223 as including the right of access to the Administrative Court and to an administrative court procedure which complies with the standards established in section 40.

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14 See for Germany, among others, the judgements of the *Bundesverfassungsgericht* (Federal Constitutional Court) of 19.6.1973, BVerfGE 35, 263, 274, and 19.10.1977, BVerfGE 46, 166, 178; for Italy the judgement 204/2004 of 6.7.2004 of the *Corte Costituzionale* (G.U. v. 14.7.2004).

15 Decisions No. 96-373 DC of 9.4.1996; No. 99-416 DC of 23.7.1999; No. 2000-437 DC of 19.12.2000; No. 2006-540 DC of 27.7.2006.

16 Cf. for Argentina Pedro Aberastury, *La justicia administrativa*, Buenos Aires 2006, pp. 37 et seqq.; Juan Carlos Cassagne, *Perspectivas de la justicia contencioso administrativa en Argentina en el siglo XXI*, in: M. J. Montoro Chiner (coord.), *La justicia administrativa. Libro Homenaje al Prof. Dr. D. Rafael Entrena Cuesta*, Barcelona 2003, pp. 117, 125 et seqq.; for Brasil Ricardo Perlingeiro Mendes da Silva, *Execução contra a fazenda pública, São Paulo 1999*, pp. 202 et seqq.; *Germana de Oliveira Moraes, Controle Jurisdicional da Administração Pública*. 2nd ed., São Paulo 2004, pp. 239 et seqq.; *Celso Antônio Bandeira de Mello, Curso de direito administrativo*, 12th ed., São Paulo 2000, pp. 47-48, 90-91; for Venezuela Allan R. Brewer-Carias, *Contencioso administrativo (=Instituciones Políticas y Constitucionales, Bd. 7)*, Caracas/San Cristóbal 1997, pp. 11 et seqq.; *Jesús María Casal Hernández, Los derechos humanos y su protección*, Caracas 2006, pp. 104 et seqq.; weitere Nachweise bei Eduardo Roza Acuña, *Le garanzie costituzionali nel diritto pubblico dell'America latina*, Torino 2006, pp. 280 et seqq.

17 See article 3, section 11; English translation of the Constitution of 1987 in: *Clauspeter Hill/Joerg Menzel* (eds.), *Constitutionalism in Southeast Asia*, vol. 1, Singapore 2008, pp. 205 et seqq.

18 English translation of the Constitution of 2007 in: *Clauspeter Hill/Joerg Menzel* (eds.), *Constitutionalism in Southeast Asia*, vol. 1, Singapore 2008, pp. 295 et. seqq. and in an edition by Office of the Council of State's Welfare Fund (ed.), *Constitution of the Kingdom of Thailand B.E. 2550* (2007).

## **b) The implementation of the right to judicial protection by ordinary legislation**

The constitutional recognition of a right to effective judicial protection and its concretisation by constitutional courts has led to substantial reforms of procedural law in all countries concerned and often also to organisational restructuring. In Germany, the Administrative Courts Code of 1960<sup>19</sup> set out a system of complete and effective protection of the individuals by a three-tier administrative jurisdiction with regard to all conceivable infringements of personal rights, including a differentiated system of interim relief. The Code of 1960, a federal Statute, gave a common legal basis for the whole of the Federal Republic of Germany. The Federal Constitutional Court as well as the administrative courts of the *Laender* and the Federal Administrative Court, established in 1952 as the supreme court of the administrative jurisdiction, had, from the very outset, strived for a high degree of realisation of the rights of the individual.

A later important reform era in Europe was the period from the early-1990s to the beginning of the new century<sup>20</sup>. In many countries new codes or laws were passed<sup>21</sup>, aimed at closing loopholes in the protection of individuals but also at speeding up the procedures and improving the systematisation of the procedural law<sup>22</sup>. Among the loopholes one could find, in several countries, a

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19 English translation with the modifications until 1998 in: H. Siedentopf/C. Hauschild/K.-P. Sommermann, *Implementation of Administrative Law and Judicial Control by Administrative Courts*, Speyer 1998, pp. 151 et seqq.; excerpts of the Code in an English translation also in *Mahendra P. Singh*, *German Administrative Law in Common Law Perspective*, 2nd ed., Berlin et al. 2001, pp. 315 et seqq.

20 Cf. *Karl-Peter Sommermann*, *Konvergenzen im Verwaltungsverfahrens- und Verwaltungsprozessrecht europäischer Staaten*, in: *Die Oeffentliche Verwaltung* (DOEV) 2002, pp. 133, 141 et seqq.

21 See e.g. for France *Loi no 95-125 du 8 février 1995 relative à l'organisation des juridictions et à la procédure civile, pénale et administrative* (Journal Officiel Nr. 34 of 9.2.1995) and *Loi no 2000-597 relative au référé devant les juridictions administratives* (Journal Officiel Nr. 151 vom 1.7.2000); for Finland the *Administrative Judicial Procedure Act of 1996* (586/1996 with further amendments); for Spain *Ley 29/1998 reguladora de la Jurisdicción Contencioso-Administrativa* (Boletín Oficial del Estado No. 311 of 14.7.1998); for Greece *Law 2717/1999 on the Code of contentious administrative procedure*; for Italy *Legge no. 205 of 21.7.2000 „Nuove disposizioni sulla giustizia amministrativa“* (G.U. No. 17 of 16.7.2000) and, recently, the adoption of a „Codice del processo amministrativa“ by *Decreto legislativo no. 104 of 2.7.2010* (G.U. of 7.7.2010); for Portugal *Lei no. 13/2002* (*Estatuto dos Tribunais Administrativos e Fiscais*) and *Lei no. 15/2002* (*Código de Processo nos Tribunais Administrativos*), both modified by *Lei no. 4-A/2003 of 19.2.2003*, *Diário da República – I Série-A no. 42 of 19.2.2003* (new version of both laws on pp. 1152-8 et seqq.).

22 Cf. *Sommermann*, *Das Recht auf effektiven Rechtsschutz* (note 13), pp. 452, 456.

lack of adequate procedures for cases of administrative inactivity and a lack of effective instruments of interim relief. However, judicial protection has generally improved significantly in part also due to the influence of international and supranational standards.

The organisation of judicial control of administrative matters still varies greatly<sup>23</sup>. Even systems which continue to stick to a monistic approach, i.e. which do not divide the judiciary into private and criminal law courts on the one hand and administrative law courts on the other hand, are generally characterised by a strong specialisation not only of the respective organs and judges within the courts but also of the procedural rules. Pure and uniform monistic systems are rarely seen<sup>24</sup>. Effective protection of the individual requires procedural rules and principles that differ in essential points from the judicial resolution of conflicts between private persons. Therefore, legislators should endeavour to reduce as much as possible the number of the still existing exceptions in which public law disputes are dealt with under the rules of civil procedure.

## **GUARANTEES IN INTERNATIONAL LAW**

The development of international standards of access to the courts and judicial protection has been a concern of numerous arenas: From informal associations of judges and non-governmental organisations to organs of international organisations dedicated to human rights matters.

### **Universal Standards**

The right to an effective remedy by the competent national tribunals was proclaimed in the Universal Declaration of Human Rights of 1948<sup>25</sup>, albeit limited to cases of violation of "fundamental rights granted ... by the constitution or by law". However, Article 10 of the Declaration seems to open up the possibility of a guarantee to rights and obligations in general. Since the Declaration does not constitute binding law although its core principles nowadays may reflect standards of international customary law, a clarification of the scope of the guarantee has not taken place<sup>26</sup>. Thus more attention is given to the

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23 Cf. Council of Europe Publishing, *Judicial Organisation in Europe*, Strasbourg 2000.

24 Cf. also *Observatoire des Mutations Institutionnelles et Juridiques* (ed.), *La justice administrative en Europe / Administrative Justice in Europe*, Paris 2007, pp. 20 et seqq.

25 *United Nations Yearbook 1948-49*, p. 535.

26 Cf. *Christian Tomuschat*, *Voelkerrechtliche Grundlagen der Verwaltungsgerichtsbarkeit*, in B. Bender et al. (ed.), *Rechtsstaat zwischen Sozialgestaltung und Rechtsschutz—Festschrift fuer Konrad Redeker zum 70. Geburtstag*, Muenchen 1993, pp. 273, 274 et seqq.

binding provisions of the International Covenant on Civil and Political Rights of 1966<sup>27</sup> to which Thailand acceded in the year 1996. Article 2 par. 3 of the Covenant stipulates an effective remedy in case of violation of the rights or freedoms enshrined in it and adds the obligation "to develop the possibilities of judicial remedy" for those States that do not possess adequate courts. In the Covenant it is Article 14 which, similar to Article 10 of the Declaration, might be interpreted as not only adding specific procedural standards in given lawsuits but also as opening the way for a guarantee of effective remedy for the "determination ... of rights and obligations" in general.

Irrespective of the need to further concretise the guarantees laid down in the International Covenant on Civil and Political Rights there is a broad consensus among all States which adhere to the principle of the rule of law that effective judicial protection in public law disputes is an indispensable prerequisite for the safe and free development of the citizens<sup>28</sup>. Informal international platforms contributed substantially to this consensus. For example the works and deliberations on rule of law standards conducted by the International Commission of Jurists since the 1950s<sup>29</sup>. Under the auspices of this commission, 105 jurists from 16 countries of the Southeast Asian and Pacific Region met in Bangkok in February 1965 to discuss the conditions for the practical realisation of a state governed by the rule of law. In its final declaration the conference emphasised that "the elimination of corruption at political and administrative levels" and the availability of "proper means of redress ... where administrative wrongs are committed" are indispensable<sup>30</sup>. Prior to this declaration, at the Congress of Rio in 1962, where jurists including judges and lawyers from both the private and public sector from 75 countries participated, the Second Committee had insisted "that there should be available to the person aggrieved a right of access to ... a hierarchy of administrative courts of independent jurisdiction" or "where these do not exist, to an administrative tribunal subject to the overriding authority of the ordinary courts"<sup>31</sup>.

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27 United Nations Treaty Series vol. 999, p. 171.

28 For Thailand, see section 3 of its Constitution of 2007.

29 The early works are documented in: International Commission of Jurists, *The Rule of Law and Human Rights Principles*, Geneva 1966.

30 See Appendix F of the publication mentioned in note 29.

31 See Chapter 3 of the publication mentioned in note 29.



## Regional Standards

Compared to the universal legal instruments the guarantees of the European and American systems of human rights protections go further. In the case of the European Convention on Human Rights<sup>32</sup> this is because of the very dynamic interpretation of its Articles 6 and 13 by the European Court of Human Rights. In the case of the American Convention of Human Rights<sup>33</sup> this is because of the broad scope of protection intrinsic in its Article 25. In the European Union when drafting the European Charter of Fundamental Rights which later became part of the primary law of the Union it was very clear from the beginning that a right to effective remedy before a tribunal should be included<sup>34</sup>. In its judgement “Unión de Pequeños Agricultores” of 25 July 2002 the European Court of Justice stated clearly<sup>35</sup>:

“The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights.

Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms...”

The right to effective judicial protection is thus clearly placed at the centre of a rule of law based European regime.

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32 European Treaty Series no. 5.

33 OAS Official Records OEA/Ser. K/XVI.I, Doc. 65, Rev. 1, Corr. 2.

34 See article 47 of the Charter of 2000. From the preceding case-law of the European Court of Human Rights cf., e.g., *Waite and Kennedy v. Germany* (Application no. 26083/94), judgement of 18 February 1999, no. 67, reaffirmed in *Prince Hans-Adam II of Liechtenstein v. Germany* (Application no. 42527/98), judgement of 12 July 2001, no. 45: “It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial ...”.

35 Case C-50/00 P, judgement of 25 July 2002, para. 38-39.

## **MAIN ELEMENTS OF THE RIGHT OF ACCESS TO THE ADMINISTRATIVE JURISDICTION AND TO EFFECTIVE JUDICIAL PROTECTION**

In order to identify internationally consensual key elements of the right of access to the administrative jurisdiction and to effective judicial protection it is indispensable to consider the international human rights treaties and the jurisprudence issued by their supervisory bodies. Furthermore, the deliberations of judges and lawyers from different legal cultures shed light on diverging and converging viewpoints. Recommendations of international organs like the Committee of Ministers of the European Council may help to reveal new emerging international standards of judicial control<sup>36</sup>. However, only the analysis of national legislation and judicial practice can convey a clear picture of the existing standards and aspirations at national level. To this end, cooperation between experts of different countries can foster the attainment of sustainable results.

The following summarized overview, which concentrates on six essential aspects of judicial protection, takes into account the results of a research group consisting of jurists from five European and five Latin American countries. The research group, coordinated by the author together with a Brazilian colleague<sup>37</sup>, has elaborated a Model Code of Administrative Justice. Although the results of the group may not be representative they can be taken as recommendations that are the fruits of long discussions about the rationality of different options.

### **Independent Courts**

The first point is the independence of the administrative jurisdiction. Without independent courts and judges, confidence in effective judicial protection cannot grow. The independence of the judiciary comprises of both institutional

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36 Cf. *Heinrich Siedentopf*, The control of Public Administrations by the courts, in: H. Siedentopf/C. Hauschild/K.-P. Sommermann, *Implementation of Administrative Law and Judicial Control by Administrative Courts*, Speyer 1998, pp. 43 et seqq.

37 *Ricardo Perlingeiro Mendes da Silva*, Federal University Fluminense.

and personal independence<sup>38</sup>. Institutional independence requires a solid financial basis for the functioning of the courts and a certain degree of self-administration by the judiciary. Personal independence refers particularly to, freedom from any orders regarding judicial functions whether these come from outside or from inside the court. Furthermore, the judges must have a decent income and a safe status which is best guaranteed by appointment for life notwithstanding for mandatory ages for retirement.

Closely related to the right to an independent judge is the guarantee of a judge predetermined by law. The law has to specify the jurisdiction of the courts and the court rules have to distribute the tasks between the judicial units and among the judges according to objective criteria, not just defining them when the case comes before the court. This right which is enshrined e.g. in Article 101 par. 1 of the German Basic Law (Constitution) has not yet been fully recognised by international human rights treaties. Rather, guarantees herein are limited to a right to be heard "by a competent, independent and impartial tribunal established by law", i.e. Article 14 par. 1 of the International Covenant on Civil and Political Rights<sup>39</sup>.

In addition to these guarantees of independence, provisions about the selection, the disciplinary regime and safeguards for the impartiality of the judges are added in the draft of the Model Code.

### **Opening Clause**

The second aspect after the existence of an independent court is the determination of its jurisdiction. In some countries legislators use the technique of enumeration ("enumeration principle") indicating specifically the types of administrative action, the kinds of disputes or the subject-areas for which the court is competent to exercise judicial control. The advantage of this

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38 Cf. article 6 par.1 of the European Convention on Human Rights and the analysis of the jurisprudence of the European Court of Human Rights by *David Harris, Michael O'Boyle et al.*, *Law of the European Convention on Human Rights*, 2nd ed., Oxford 2009, pp. 284 et seqq., and *Christioph Grabenwarter*, *Europäische Menschenrechtskonvention*, 4th ed., München/Wien 2009, pp. 346 et seqq.; see furthermore the differentiated Recommendation CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities, adopted on 17 November 2010; see also the United Nations Basic Principles on the Independence of the Judiciary, endorsed by the United Nations General Assembly Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

39 Cf. also article 6 par. 1 of the European Convention on Human Rights.

technique which is used inter alia in Thai and Portuguese law<sup>40</sup> is the concrete circumscription of the objects or claims which fall within the competence of the courts providing more or less clear guidelines to the judges. However, there is a risk that the enumeration is incomplete and thus access to the court limited which might even contravene constitutional guarantees to the extent that the loopholes cannot be closed by an extensive interpretation of the law in conformity with the Constitution.

Therefore, other countries such as Germany and Spain have introduced a general clause<sup>41</sup>. In Germany administrative courts are open to all public law disputes except for disputes between constitutional organs and disputes expressly conferred by law to another jurisdiction. Generally, the respective statutes indicate indirectly viz. by procedural regulations that the general clause covers very different claims<sup>42</sup>.

In the draft Model Code a solution nearer to the general clause approach is chosen. The task of the administrative jurisdiction to control the lawfulness of administrative behaviour and to protect subjective rights and legitimate interests is combined with the admissibility of claims necessary to achieve these tasks. The claim or demand to annul, to condemn to do or to omit something, and to declare a legal situation is mentioned explicitly, leaving room for other kinds of claims as far as the realization of effective judicial protection so requires.

### **Right to File an Action (Standing)**

Within the framework of the substantial competence of the courts access to the court is generally only admitted if the plaintiff invokes an individual right or a justifiable interest. In comparative law so-called objective systems are often contrasted with so-called subjective systems. The former aims at safeguarding the integrity of the objective legal order and therefore opens the initiative of

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40 See section 9 of the Thai Act on Establishment of Administrative Courts and Administrative Court Procedure of 1999 (B.E. 2542) and the exhaustive enumeration in article 2 of the Portuguese Código de Processo nos Tribunais Administrativos (above, note 21).

41 See section 40 par. 1 of the German Administrative Courts Code of 1960 (last modification of the Code by law of 21.8.2010; English translation with the modifications until 1998 in: H. Siedentopf/C. Hauschild/K.-P. Sommermann, *Implementation of Administrative Law and Judicial Control by Administrative Courts*, Speyer 1998, pp. 151 et seqq.) and articles 25 and 26 of the Spanish Law on Administrative Jurisdiction (above note 21).

42 See articles 42 and 42 of the German Administrative Courts Code and the indications contained in articles 25 and 26 of the Spanish Law on Administrative Jurisdiction (note 21).

judicial control not only to persons who are invoking the violation or possible violation of their individual rights but also to other interested persons. The latter, the "subjective system", aims primarily to protect subjective rights and therefore uses the possible violation of such a right as a filter for the admissibility of an action.

In reality the difference between both systems is not as deep as one might assume. The "objective systems", on the one hand, have always provided the opportunity to defend one's personal rights and have, meanwhile, mostly overcome the lack of adequate instruments for the effective protection of individual rights in urgent cases. In France, traditionally a defender of the objective approach, the reforms of 1995 and 2000 were clearly directed towards improving the protection of the individual. The "subjective systems", on the other hand, do also serve, at least secondarily, to maintain objective legality and often have quite an open understanding of subjective rights. Thus, in Germany<sup>43</sup> subjective rights are traditionally defined as "individual interests protected by law"<sup>44</sup>. Under the influence of the jurisprudence of the European Court of Justice they are now interpreted even more generously than before<sup>45</sup>. Furthermore, important exceptions to the subjective-rights requirement have been introduced during the last several years especially in the field of environmental protection where qualified associations dedicated to this policy area are vested with the right to file an action<sup>46</sup>. Even earlier they had already been given rights of participation in certain planning procedures, rights which have been under the protection of the administrative courts. To sum up, a convergence of judicial control also with regard to the personal requirements for access to the court can be observed.

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43 Thailand can also be counted among the countries following the subjective approach, cf. Section 42 of the Thai Act on Establishment of Administrative Courts and Administrative Court Procedure of 1999 (B.E. 2542).

44 Cf. already the classical definition by *Ottmar Buehler*, *Die subjektiven Rechte und ihr Schutz in der deutschen Verwaltungsrechtsprechung*, Berlin et al. 1914, esp. 42 et seqq. (concluding on p. 224).

45 Cf. *Jan Ziekow*, *Europa und der deutsche Verwaltungsprozess – Schlaglichter auf eine unendliche Geschichte*, in: *Neue Zeitschrift fuer Verwaltungsrecht* 2010, pp. 793 et seqq.

46 See the German Statute on Judicial Remedies in Environmental Affairs (Gesetz ueber ergaenzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG) of 7.12.2006 (Federal Law Gazette – BGBl. – 2006 I, p. 2816 with the last modification by the Statute of 11.8.2010 (BGBl. 2010 I, p. 1163). This Statute transposes a Directive of the European Union, which in turn is a concretisation of an international Treaty, the so-called Aarhus-Convention of 25.6.1998 (2161 United Nations Treaty Series 450).

In the draft Model Code it is decided in favour of the “Spanish” solution, viz. an integration of both aspects. Since the administrative jurisdiction is to control for the lawfulness of administrative behaviour as well as to protect subjective rights and legitimate interests admissibility can be based on positions from either category – subjective rights or legitimate interests. The opening for legitimate interests does not lead to the admissibility of so called popular actions because the interest has to be justified. It must be substantial and can be of material or moral character and therefore also qualified associations can initiate a judicial control. However, in the end this depends on the further concretisation by law or jurisprudence.

### **Adequacy of the Procedures and Powers of the Court to the Different Claims**

If the right of access to the court is not to remain merely a formal guarantee, the plaintiffs must be entitled to formulate actions for different situations in which there is a possible violation of their rights. The annulment of administrative decisions or norms can cover only a part of the protection scheme. The modern Administrative State is to a large extent a coordinating, performing, distributing, service-delivering and enabling State that interferes in many respects and in many forms with the rights and interests of the citizens. Effective judicial protection has to develop in step with the transformation of the tasks of public administration. Effective remedies against administrative inactivity are needed too, as is the prevention of not yet realised unlawful acts and protection against risks through an in-depth control of permit and planning procedures.

As far as the decisions of the courts are concerned they must meet the different needs of judicial protection. Taking into account the different kinds of claims or actions, the draft Model Code provides for the necessary powers of the court including the annulment of acts, the pronouncement of the obligation of the administration to issue an administrative act or a by-law, to perform any other activity, to abstain from an activity or to declare the existence or non-existence of a legal situation. While in former times the powers of the courts were strongly restricted in view of a possible infringement upon the principle of separation of powers, nowadays a more flexible understanding within a more open interpretation of checks and balances is to be seen.

In the context of the adequacy of the procedures for different situations of conflict it should also be mentioned that in many countries instruments of alternative dispute settlement are successfully used. Especially the intra-judicial mediation which is held upon the demand of the concerned parties before a judge-mediator who must be different from the judge competent for

the case<sup>47</sup> seems to be a useful additional instrument, provided that the parties can still return to the ordinary court procedure at any time. In no case should alternative dispute settlement exclude the access to a court.

### **Prior Administrative Objection Procedure**

Some countries provide for a compulsory prior contesting of the administrative behaviour before the administration itself<sup>48</sup>. Formalised preliminary objection procedures offer the possibility of corrective self-control by the administration, may reduce the workload of the courts (if a substantial number of conflicts can be resolved positively) and provide an additional instrument of control to the citizen. In particular, this allows for a deeper examination of discretionary aspects since the control of the courts is generally restricted to safeguarding the limits of the discretion, the purpose of the enabling law, and the conformity with constitutional or general principles like the principle of proportionality. Therefore, the requirement of a prior objection procedure has for a long time been deemed an important element of the protection system in Germany. However, during the last few years it has been abolished as a general rule in several Länder in order to rationalise procedures<sup>49</sup>. The debate is ongoing and the tendency seems to be for a differentiated use of the objection procedure according to the subject-area concerned.

But there are also other disadvantages. If the administration is not strictly bound by time limits for its decision about an objection the requirement of a prior objection procedure may lead to a delay in judicial protection and if there are not available interim safeguard measures it could even be tantamount to a denial of judicial protection. That is why the draft Model Code follows the principle of an optional prior objection procedure and provides for time limits and other guarantees in cases where the law stipulates a compulsory preliminary proceeding.

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47 Cf. *Max-Juergen Seibert*, *Mediation in der Verwaltungsgerichtsbarkeit*, in: *Neue Zeitschrift fuer Verwaltungsrecht* 2008, pp. 365 et seqq.

48 See, e.g., sections 68 et seq. of the German Administrative Courts Code and the comparative study of *Gernot Sydow/Stephan Neidhardt*, *Verwaltungsinterner Rechtsschutz*, Baden-Baden 2007.

49 See *Henning Biermann*, *Das Widerspruchsverfahren unter Reformdruck – Foermliche verwaltungsinterne Kontrolle als nutzloses und kostenintensives Auslaufmodell?*, in: *Die Oeffentliche Verwaltung* 2008, pp. 395 et seqq.; *Thomas Holzner*, *Die Abschaffung des Widerspruchsverfahrens*, in: *Die Oeffentliche Verwaltung* 2008, pp. 217 et seqq.; *Christine Steinbeiß-Winkelmann*, *Abschaffung des Widerspruchsverfahrens – ein Fortschritt?*, in: *Neue Zeitschrift fuer Verwaltungsrecht* 2009, pp. 686 et seqq.

## Interim Relief

Without measures of interim relief, judicial protection often remains a toothless instrument. For a long time the lack of adequate interim relief, either because of deficient legislation, or for reasons of poor application of the existing instruments by the judges was one of the main weaknesses of judicial protection in many countries. The due development of effective interim relief was prevented in some cases by the dogma of the prohibition against anticipating the main procedure<sup>50</sup> and in other cases by the presumption of the lawfulness of administrative behaviour<sup>51</sup>. Nonetheless, currently there is a broad consensus that effective interim relief is an essential and indispensable part of judicial protection. Legislation and judicial practice have thus changed accordingly.

The measures of interim relief have to meet the needs of protection in the specific case. In cases of administrative decisions that impose a burden, an order of temporary suspension will be a suitable measure. In other cases, judicial orders or mandatory injunctions may need to be imposed on an administrative authority to force them to act or to refrain from an action. It is understood that the decision of the court about the issuance of an interim measure presupposes an evaluation of the interests of the person who is seeking relief and the concrete public interests at stake. In balancing these interests the probability of a successful main procedure (*fumus boni iuris*) and the urgency of the protection because of the risk of suffering irreparable harm (*periculum in mora*) have to be considered<sup>52</sup>.

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50 Cf. for France *Bernard Pacteau*, *Manuel de contentieux administrative*, Paris 2006, p. 253, for Germany Friedhelm Hufen, *Verwaltungsprozessrecht*, 7th ed., Muenchen 2008, p. 519, for Spain *Juan Francisco Mestre Delgado*, Art. 132, in: *Redacción de Revista Española de Derecho Administrativo* (ed.), *Comentarios a la Ley de la Jurisdicción contencioso-administrativa de 1998*, Madrid 1999, pp. 878, 882.

51 This concept is a guiding principle particularly in France (*présomption de légalité des décisions administratives*), see *René Chapus*, *Droit administratif général*, vol. 1, 10th ed., Paris 1996, p. 1071.

52 These two criteria underlie most judicial systems when the question of the granting of interim relief has to be answered. They were equally adopted by the jurisprudence of the European Court of Justice, cf. *Sergio Ariel Apter*, *Interim Measures in EC Law: Towards a Complete and Autonomous System of Provisional Judicial Protection before National Courts?*, *Electronic Journal of Comparative Law* vol 7.2 (June 2003), sub 4.3.2.



## **FACTUAL PREREQUISITES FOR EFFECTIVE ACCESS TO THE ADMINISTRATIVE JURISDICTION**

The extent to which the right of access to the court is effective in real life of a society is not only a matter of legislation. There are practical, political and cultural factors which determine the development of a judicial-protection-friendly State. Some brief observations will be made here.

### **Availability of Judicial Protection**

The first point relates to the costs of litigation. The availability of judicial protection for all citizens is only provided for, if court fees are not too high and if they can be reduced, or the plaintiff even be exempted from them if he or she does not have sufficient financial means. Thai law, for example, considers this situation in section 45.

A further financial hurdle to the availability of judicial protection can lie in the obligation to be represented by a lawyer. Therefore, in some countries the admissibility of an action is not dependent on representation by a lawyer, at least in the first instance<sup>53</sup>. This presupposes, however, an active role of the judge in helping the plaintiff to make the suitable petitions and in investigating *ex officio* according to the inquisitorial principle<sup>54</sup>. If assistance by a lawyer is needed the law must provide for the possibility that the State can assume the costs<sup>55</sup>.

Another practical aspect of the availability of judicial protection can be the physical distance of the courts from the person who needs help. If the courts are far away and travelling is difficult, time consuming and costly, the citizens will often forgo judicial protection.

### **Information and Encouragement to the Citizens**

The second point refers to the knowledge of the citizens about their right to access to the court and to have effective judicial protection. Only if they are well informed they will use their right to file an action. Legislators should therefore stipulate the obligation of all administrative authorities, to add clear

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53 See section 45 of the Thai Act on Establishment of Administrative Courts and Administrative Court Procedure of 1999 (B.E. 2542); section 67 par. 1 of the German Administrative Courts Code (above note 41).

54 See section 55 par. 3 of the Thai Act on Establishment of Administrative Courts and Administrative Court Procedure of 1999 (B.E. 2542); section 86 of the German Administrative Courts Code.

55 See articles 23 and 24 of the Spanish Law on Administrative Jurisdiction (above note 21).

and precise information on the remedy to which the plaintiff is entitled to and on the court which can be asked for judicial protection to all decisions that impose a burden or reject a demand<sup>56</sup>.

Furthermore, there must be public information about the functioning of the courts and the rights of the citizens. When the Thai administrative jurisdiction started to work it conducted an extensive information campaign through which the task of the new courts was explained in a clear and understandable manner. A model-like measure was also introduced to provide citizens with on-location legal advice for their specific case and, if necessary, to help them to formulate their action.

### **Developing a Culture of Judicial Protection**

Finally, the reality of judicial protection depends largely upon the administrative and legal culture of the respective State. If protection by the courts is not respected or not well-regarded by public authorities and/or if the citizens do not have confidence in the courts then the judicial system will remain weak. Therefore, the introduction of administrative courts often has to be accompanied by a transformation of the legal and administrative culture.

In this process the education and training of judges plays a key role. Judges must be well-aware of their task to objectively control the lawfulness of administrative behaviour and to protect the rights of the individuals. Where the public administration has better means to defend its position than the citizen, often due to an asymmetry of information or expertise, it is their mission to re-establish "equality of arms" through their own inquiries or with the help of independent experts.

Furthermore, the process of transformation must be accompanied by corresponding legal education and training of public servants. They have to learn that the right to judicial remedy is a natural right of the citizens, that judicial control is a normal process, and that public servants do not lose face if an administrative decision is quashed by a court. With the transformation of the administrative culture, citizens will increasingly gain trust in protection by the courts.

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<sup>56</sup> See, for instance, Article 89 para. 3 of the Spanish Law on the Legal Regime of Public Administrations and Common Administrative Procedure of 26 November 1992 (Ley 30/1992 de régimen jurídico de las Administraciones públicas y del procedimiento administrativo común, Boletín Oficial del Estado No. 285 of 27.11.1992) and section 58 of the German Administrative Courts Code.

## **CONCLUSION**

The right of access to a court in administrative law disputes and the interrelated right to effective judicial protection are key elements of a State based on the rule of law. Minimum standards for these rights are defined in international treaties. During the last two decades national legislation has made significant progress in strengthening the protection of the rights of their citizens and many judicial systems have been improving their capacity to cope with the increasing demands for differentiated judicial protection in the society of modern welfare and administrative States. Once created the institutional and procedural prerequisites for a well-performing administrative jurisdiction, the effectiveness of judicial protection depends in the final resort on the development of a corresponding administrative and judicial culture.

# Judicial Review in India – Judicial Activism or Judicial Over-reach?

*Prof. M.K. Balachandran\**

## A. INTRODUCTION

**T**he recent spurt in the judicial intervention of executive functions – some call it court’s encroachment into the executive domain and some others, judiciary’s growing foot-prints on government – has once again revived the debate on the scope and extent of judicial review under the Indian Constitution. The Supreme Court’s taking over the monitoring of some of the high profile cases of corruption such as the *2G Spectrum Scam*<sup>1</sup> and the *Common Wealth Games Scam*, the quashing of the appointment of P.J. Thomas as the Central Vigilance Commissioner<sup>2</sup> and the setting up of the Special Investigation Team (SIT) for the black money trail<sup>3</sup>, are some such instances. The tension between the executive and the judiciary has been rising and there continues to be an on-going debate – has the judicial review in India transcended itself into judicial over-reach? If so, is it justified? What is the scope and extent of judicial review envisaged under the Indian Constitution? There are conflicting views on this.

The latest controversy between the judiciary and the government over the Supreme Court’s order on 4th July, 2011<sup>4</sup>, directing the setting up of a Special Investigation Team (SIT) to probe the black money case, citing slackness in the investigation by the government, has ended up in the government moving the Supreme Court to recall the order as it amounted to judicial over-reach into the executive domain and as such was against the doctrine of Separation of Powers. *"The order is without jurisdiction in as much as it impinges upon*

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1 *Centre for Public Interest Litigation v. Union of India*, Civil Appeal No. 5323 of 2011, dt. 12/7/2011.

2 *Centre for PIL v. Union of India*, AIR 2011 SC 1267.

3 *Ram Jethmalani v. Union of India*, JT 2011 (7) SC 104 dt 04/07/2011.

4 *Ibid.*

*and goes contrary to the established doctrine of Separation of Powers. Besides, the interim order is faulty as the economic policies of government are beyond judicial review,*<sup>5</sup> said the petition.

The stand taken by the government has the support from an unexpected quarter, i.e. from another bench of Supreme Court comprising of Justice A.K. Mathur and Markandey Katju. *"We are repeatedly coming across cases where judges are unjustifiably trying to perform executive or legislative functions... In the name of judicial activism, judges cannot cross their limits and try to take over functions which belong to another organ of the state,"* the court observed and cautioned: *"If the judiciary does not exercise restraint and overstretches its limits, there is bound to be reactions from politicians and others. The politicians will then step in and curtail the powers or even the independence of the judiciary."*<sup>6</sup>

The then Chief Justice of India Hon'ble Mr. Justice S.K. Kapadia, was speaking on the same line, when he cautioned the judiciary against exceeding their judicial functions. *"We do not have competence to make policy choices and run the administration. Judicial activism which is not grounded on textual commitment to the Constitution or the statute, unlike activism in cases of human rights and life and personal liberty, raises questions of accountability of the judiciary, whose members are not chosen by any democratic process, and whose members are not answerable to the electorate or to the legislature or to the executive... Under the doctrine of separation of powers, each of the above organs must stay within the powers allocated by the Constitution,"*<sup>7</sup> the judge observed.

Dr. Manmohan Singh, the Prime Minister of India has also been very critical of the recent judicial interventions in executive decisions. Addressing the Common Wealth Law Conference at Hyderabad the Prime Minister said: *"While the power of judicial review must be used to enforce accountability, it must never be used to erode the legitimate role assigned to the other branches of the government"*. On another occasion he reiterated that the Supreme Court should not go into the realm of policy formulation and observed that *"judicial activism did not warrant an over-reach"*.

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5 *Times of India* dt. 15/7/2011.

6 *Divisional Manager, Aravali Golf Club v. Chander Hass*, (2008) 1 SCC 683.

7 *Setalvad Memorial Lecture*, delivered by the Chief Justice of India, S.H. Kapadia on April, 16, 2011.

A few days after the Supreme Court issued the orders for the setting up of a Special Investigation Team to probe the black money case, another bench of the Supreme Court<sup>8</sup> observed that the judiciary stepped in to give directions “only because of executive inaction in not implementing properly the laws enacted by the legislatures”. The court pointed out that “the highest court will be failing in its constitutional duty if it does not accept genuine PILs (Public Interest Litigations). Those who are decrying Public Interest Litigation do not seem to realize that courts are not made only for the rich and the well to do, for the landlord and for the gentry, for the business magnet and the industrial tycoon but they exist also for the poor and the downtrodden, the havenots and the handicaps and the half hungry millions of our countrymen”.<sup>9</sup>

The court said : “The most unfortunate part is that when the judiciary issues directions for ensuring the right to equality, life and liberty of those who suffer from the handicaps of poverty, illiteracy and ignorance, a theoretical debate is started by raising the bogey by judicial activism and judicial over-reach. The rule of law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interest for protecting and upholding the status quo under the guise of enforcement of their civil and political rights. The poor too have civil and political rights and the rule of law is meant for them also”.<sup>10</sup> The Court criticized the lawyers, journalists and men in public life for accusing it of judicial over-reach for entertaining public Interest litigation filed by genuine social groups, NGOs and social workers espousing the cause of the poor and the downtrodden.

Supporting the above view, Mr. Fali Nariman an eminent jurist observed that “judicial over-reach is the direct consequence of legislative and executive under-reach”. Disagreeing with the observations of the Prime Minister about judicial over-reach, he said: “I suggest that the ‘judicial overreach’ that the Prime Minister spoke about is the direct result of legislative and executive neglect or under-reach. That entails poor performance, not so much in the making of laws, but in their implementation. If judges need to introspect (and I submit that they frequently do), politicians also need to ask themselves whether they have fulfilled the aspirations of the people who put them in the driver’s seat of governance. If judges are to get off the backs of parliamentarians, politicians

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8 G.S. Singhvi and A.K. Ganguly JJ., in *Delhi Jal Board v. National Campaign for Dignity and Rights of Sewerage and Allied Works*. Decided on 12th July 2011.

9 Ibid.

10 Ibid.

*and bureaucrats, then those who claim the right to govern must come up with a much better record of performance. It is only when they do so, will the people of this great country once again deliver majority governments, both in the Centre and in the states. And, what appears to be undue interference with legislative or executive functions will hopefully cease, simply as a result of legitimate legislative and executive action becoming effective". And that seems to be the crux of the matter: what appears to be undue interference with legislative or executive functions will hopefully cease, simply as a result of legitimate legislative and executive action becoming effective.*

## **B. JUDICIAL REVIEW, JUDICIAL ACTIVISM AND JUDICIAL OVER-REACH**

Both sides have tried to put forward convincing arguments in support of their respective view points. Against the backdrop of this controversy, it is pertinent to examine the following issues pertaining to judicial review under the Indian Constitution and its expanding jurisdiction as is made out by the judiciary from time to time:

- What is the role of the judiciary in reviewing administrative actions as envisaged under the Constitution?
- What is the scope of judicial review? Is judicial activism a necessary concomitant phenomenon of judicial review?
- Has the judiciary over-stepped its jurisdiction into judicial over-reach under the guise of judicial activism? If so what is the justification?

These and some of the related issues will be discussed in this paper.

In India, unlike in UK and USA, judicial review of legislative and administrative actions is ingrained in the provisions of the Constitution.<sup>11</sup> Article 13 prohibits the State from making any law that takes away or abridges any of the fundamental rights and declares that any law made in contravention of the mandate shall, to the extent of such contravention, be void. Article 32 guarantees the right to move the Supreme Court for the enforcement of fundamental rights guaranteed under the Constitution and empowers it to issue directions, orders or writs for the enforcement of those rights. Similar powers are conferred on the High Courts under Article 226 for issuing such orders not only for the enforcement of fundamental rights but also for any other purpose i.e. for the enforcement

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11 Articles 13, 32, 226, 141 & Article 142.

of legal rights. Further, the Constitution says that the law declared by the Supreme Court shall be binding on all courts and provides for the enforcement of decrees and orders. Thus, the judiciary in India is conferred with the power of judicial review of legislative and executive actions, to protect and preserve individual rights as well as to uphold the Constitution.

### **C. PROCEDURE ESTABLISHED BY LAW TO DUE PROCESS**

In the initial years of the coming into force of the Constitution, the judiciary exercised considerable restraint in interpreting the provisions of the Constitution. This is evident in *A.K. Gopalan's*<sup>12</sup> case, the first important decision of the Supreme Court on judicial review. Article 21 of the Constitution guarantees that no person shall be deprived of his life or personal liberty except according to procedure established by law. Gopalan was detained under the Preventive Detention Act, 1950. He argued that the procedure followed in detaining him was not reasonable. Rejecting the contention, the Court held that a person could be deprived of his liberty by any procedure established by law and the Court would not go into the reasonableness or otherwise of the procedure. The court while asserting that the power of judicial review was inherent in the Constitution, restrained its scope by a narrow interpretation of the constitutional provision and refused to give a wider meaning to the words procedure established by law. This was clearly a literal interpretation of the Article. This decision was overruled in 1978 in *Maneka Gandhi's* case<sup>13</sup>, where the Court held that a law to be valid should be just fair and reasonable and not arbitrary, fanciful or oppressive. In other words, the substantive law as well as the procedure laid down under the law must be reasonable. The court through its activist interpretative process has indirectly introduced the concept of *due process* clause in Article 21, exhibiting a clear example of judicial activism. Thus after more than 25 years, the judiciary gave a new meaning to the Article through an active judicial interpretation.

### **D. CONSTITUTIONAL AMENDMENT AND LAW**

This judicial self restraint to preserve the status quo of the Constitution is reflected in some of the subsequent cases also. In *Shankari Prasad*<sup>14</sup> and *Sajjan Singh*<sup>15</sup> cases, the question for determination by the court was whether

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12 *A.K. Gopalan v State of Madras* ; AIR 1950 SC 27.

13 *Maneka Gandhi v. Union of India*; AIR 1978 SC 597.

14 *Shankari Prasad v. Union of India*; AIR 1951 SC 458.

15 *Sajjan Singh v. State of Rajasthan*; AIR 1965 SC 845.



the Indian Parliament could abridge or take away the fundamental rights through an amendment to the Constitution. The Supreme Court took the stand that amendment was not law as defined under Article 13(3) and as such the Parliament was safe in amending any part of the Constitution, including the fundamental rights by following the prescribed procedure. Through these judgments, the Court appears to have been supporting the Parliament to make necessary changes in the Constitution to implement some of its policies.

However, this view was short lived. The dissenting judge in *Sajjan Singh's* case observed that the fundamental rights should not be left to the discretion of the Parliament, thus, showing a semblance of judicial activism. This minority view became the majority decision in *Golaknath's*<sup>16</sup> case where the court held that *amendment* was *law* as defined under Article 13(3) and as such the Parliament could not take away the fundamental rights guaranteed under the Constitution through an amendment. The court asserted that fundamental rights are inalienable and not amendable so as to deprive any person any of those rights. The petitioner had challenged the validity of the First, Fourth and Seventeenth Amendments to the Constitution. The court also invoked the doctrine of *prospective overruling* (another example of judicial activism) to save the existing constitutional amendments (First, Fourth and Seventeenth) while declaring that the Parliament should not pass in future any amendment that would take away or abridge any of the fundamental rights. Thus, the court played an activist role to protect and preserve the fundamental rights under the Constitution.

However, the Parliament was not willing to accept the Golaknath verdict lying down. It reacted by enacting the 24th Amendment Act to restore the status quo by inserting Clause (4) in Article 13 and Clause 1 in Article 368 as a result of which an amendment of the Constitution passed in accordance with Article 368 would not be law within the meaning of Article 13 and the validity of the Amendment would not be open to challenge on the ground that it takes away or abridges a fundamental right.

## **E. DOCTRINE OF BASIC STRUCTURE**

The 24th Amendment was challenged before the Supreme Court in *Keshavananda Bharti's*<sup>17</sup> case where the Supreme Court overruled *Golaknath* but with a rider that under Article 368, Parliament was not empowered to

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16 *L.C. Golaknath v. State of Punjab*; AIR 1967 SC 1643.

17 *Keshavananda Bharti v. State of Kerala*, AIR 1973 SC 1461.

amend the basic structure or framework of the Constitution. It held that the amending power was not unlimited and did not include the power to destroy or abrogate the basic structure or the framework of the Constitution. It may be pertinent to point out here that although the judges enumerated certain essentials of the basic structure of the Constitution, they made it very clear that they were only illustrative and not exhaustive. What are basic structures would be determined on the basis of the facts of each case. Thus, the judiciary reserved to itself the power to look into the validity of the amendments on the touchstone of the basic structure of the Constitution.

The Parliament again reacted by passing the 42nd Amendment Act, 1976 which added two new clauses (4) & (5) to Article 368. Clause (4) provided that no amendment to the Constitution would be called in question in any court on any ground and Clause (5) provided that there would be no limitations whatsoever on the constituent power of the Parliament to amend the Constitution.

The Supreme Court struck down these clauses in *Minerva Mills*<sup>18</sup> case on the ground that the amendment purported to destroy the basic structure of the Constitution. "*Limited amending power is a basic structure of the Constitution. Since these clauses removed all limitations on the amending power and thereby conferred an unlimited amending power, it was destructive of the basic feature of the Constitution*".<sup>19</sup> The judicial activism reached its peak through the interpretatory process to preserve and protect the Constitution against the majority rule of the Parliament.

A few other cases in which the judiciary successfully thwarted the legislative onslaught on the court's power of judicial review may be cited at this juncture. In *Indira Gandhi v. Raj Narain*<sup>20</sup> (popularly known as the Prime Minister's Election Case), the High Court of Allahabad had set aside the elections of the then Prime Minister, Mrs. Indira Gandhi, to the Parliament on the ground that she was involved in corrupt practice as defined in the Representation of the Peoples Act, 1951 (the Election Law). While the appeal was pending before

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18 *Manerva Mills v. Union of India*, AIR 1980 SC 1789.

19 Ibid.

20 AIR 1975 SC 2299.

the Supreme Court, the Parliament hurriedly<sup>21</sup> amended the Constitution by passing the 39th Amendment inserting clauses (4) & (5) to Article 329-A with the object of excluding the elections of the Prime Minister and the speaker from the ambit of judicial review. The Supreme Court struck down the Amendment as violative of the principle of free and fair elections which was an essential postulate of democracy which in turn was a part of the basic structure of the Constitution. The court declared clauses (4) and (5) of the Article as unconstitutional and ruled that democracy, judicial review and rule of law were some of the basic structures of the Constitution.

Similarly, in *L. Chandra Kumar v. Union of India*<sup>22</sup>, the Supreme Court struck down the provisions of Article 323-A and 323-B to the extent that they excluded the jurisdiction of the High Courts and the Supreme Court under Articles 226, 227 and 32 of the Constitution. The court asserted that "*judicial review is an inseparable part of the Constitution in the sense that it is a basic feature and it cannot be excluded even by a Constitutional amendment*"<sup>23</sup>.

The doctrine of basic structure is an example of judicial innovation through judicial activism. As D.D. Basu has observed, "*the reason for which this novel doctrine was introduced seventeen years after the adoption of the constitution was to judicially stem the spate of amendments which was taking away, by bits, the vitals of our Constitution*"<sup>24</sup>

The activist interpretation of the words *procedure established by law to include due process*, paved the way for a wider interpretation of the provisions for the Constitution dealing with fundamental rights. The Supreme Court in a series of cases has spelt out some new fundamental rights which are not specifically mentioned in the Constitution but are implicit in the various Articles, through activist interpretation. The court gave a wider meaning to *life and liberty* in Article 21 by holding that *right to life* is not mere animal existence but is

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21 The 39th Constitution Amendment Bill was introduced in Lok Sabha (the lower house of Parliament) on 7th August 1975, was passed in that House on the same day. It was passed by the Rajya Sabha (the Upper House) on 8th August, was ratified by half of the state legislatures on 9th August and obtained the President's assent on 10th August 1975. The appeal filed by Indira Gandhi was to come up before the Supreme Court on 11th August, 1975. H.M. Seervai, *Constitutional Law of India*, p.1519.

22 AIR 1997 SC 1125.

23 Ibid.

24 D.D. Basu, *Shorter Constitution of India*, p.223.

right to live with human dignity,<sup>25</sup> free from exploitation,<sup>26</sup> right to have a clean environment,<sup>27</sup> right to shelter,<sup>28</sup> right to clean drinking water,<sup>29</sup> right to education<sup>30</sup> and other related rights. The *right to personal liberty* has also been liberally interpreted so as to include right to privacy,<sup>31</sup> right to travel abroad,<sup>32</sup> rights of prisoners such as right to legal aid,<sup>33</sup> right to speedy trial,<sup>34</sup> right against inhuman treatment,<sup>35</sup> right against delayed execution<sup>36</sup> and a number of other rights.

The *right to equality* (Art. 14), the *right to freedom* (Art. 19) and the right against exploitation (Art. 23) have also been interpreted liberally. The concept of equality in Article 14 has been interpreted to mean absence of arbitrariness as “*equality is antithesis to arbitrariness.*”<sup>37</sup> *Equality and arbitrariness are sworn enemies; one belong to the rule of law in a republic while the other to the whim and caprice of an absolute monarch*”, the court observed. In *PUDR v. Union of India*,<sup>38</sup> interpreting Article 23 dealing with the right against exploitation, the court observed that a person who provides labour or service to another for remuneration which is less than the minimum wage would amount to forced labour and as such is violative of the Article.

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25 *Francis Coralie v. Union Territory of Delhi*, AIR 1981 SC 746.

26 *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.

27 *M.C. Mehta v. Union of India*, AIR 2004 SC 4016.

28 *Shankar v. Union of India* (1994) 6SCC 349.

29 *Narmata Bachao Andolan v. Union of India* (2000) 10SCC 669.

30 *Unnikrishan v. State of Andhra Pradesh* (1993) 1SCC 645 subsequently right to education was inserted in the Constitution as a fundamental right through Article 21A by the 86th Constitutional Amendment in 2002.

31 *R Rajagopal v. State of Tamil Nadu*, (1994) 6SCC 632.

32 *Satwant Singh v. Asst. Passport Officer*, AIR 1967 SC1836;  
*Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

33 *M.H. Hoskot v. State of Maharashtra*, AIR 1978 SC 1548.

34 *Hussainara Khatoon v. Home Secretary, State of Bihar*, AIR 1979 SC 1360.

35 *Kishor Singh v. State of Rajasthan*, AIR 1981 SC 625.

36 *T.V. Vatheeswaran v. State of Tamil Nadu*, AIR 1981 SC 643.

37 *Royappa v. State of Tamil Nadu*, AIR 1974 SC 555.

38 AIR 1982 SC 1943.

Again the court widened its ambit of activism by expanding its writ jurisdiction by awarding palliative compensation and exemplary costs in cases involving violation of the fundamental right to life and personal liberty, in *Rudul Shah v. State of Bihar*,<sup>39</sup> *Sebastian M Hongray v. Union of India*,<sup>40</sup> *Bhim Singh v. State of J&K*,<sup>41</sup> *People's Union of Democratic Rights v. Police Commissioner, Delhi*<sup>42</sup> and *Saheli v. Commissioner of Police*<sup>43</sup>. Rudul Shah was granted compensation for his illegal detention in jail for 14 years after he was acquitted, Sebastian's widow was granted exemplary costs against the Army who had detained her husband and could not produce him before the court and Bhim Singh who was a member of the legislative assembly was awarded compensation for his wrongful arrest and detention due to which he was prevented from casting his vote in a session of the legislature. The *PUDR's* case and *Saheli's* case relate to custodial deaths in which compensation was awarded under the writ jurisdiction.

## **F. PUBLIC INTEREST LITIGATION — A PRODUCT OF JUDICIAL ACTIVISM**

Public Interest Litigation (PIL) is a product of judicial activism in the sense that it was initiated by the judiciary. Through PIL the court has issued orders, directions and directives in a large number of cases. Initially PIL was resorted to give relief to persons who for various reasons such as poverty or disability were not able to approach the courts for redressing their grievances. The courts had become inaccessible to the weaker sections of the society due to social and political backwardness, illiteracy and ignorance. As per the *World Justice Projects Rule of Law Index* (a new tool designed to measure countries' adherence to the Rule of Law), India has been found to rank 27th among the 35 countries in providing civil access to justice. "Clearly, the efforts taken in India are lagging behind", observed Justice Sathasivam in his address on *Enhancing Quality of Adjudication*, at the National Judicial Academy at Bangalore.<sup>44</sup>

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39 AIR 1983 SC 1086.

40 AIR 1984 SC 1026.

41 AIR 1986 SC 494.

42 (1989) 4SCC 730.

43 AIR 1990 SC 513.

44 Address by Justice Sathasivam, Judge of the Supreme Court of India, at the *South Zone Regional Judicial Conference* organized by the National Judicial Academy at Bangalore on 29.04.2011, AIR 2011 Jourl. 118 pp 120-121.

PIL is, thus, another initiative taken by the judiciary to impart justice to disadvantaged sections of the society. Under PIL courts started entertaining petitions from public spirited citizens acting bonafide for the enforcement of fundamental rights and legal rights on behalf of persons who were disabled to approach courts due to a variety of reasons as mentioned earlier so as to make fundamental rights meaningful for the masses. "Where a legal wrong or legal injury is caused to person or to a determinate class of persons by reason of violation of any constitutional or legal right and such person or determinate class of persons is by reason of poverty, helplessness of disability or socially or economically disadvantaged position unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction or order or writ in the High Court under Article 226 or in case of breach of any fundamental right to this Court under Article 32."<sup>45</sup>

During 1980s violation of rule of law and environmental degradation were the main concern of PIL. According to Justice Bhagwati, "PIL is a strategic arm of the legal aid movement intended to bring justice within the reach of the poor masses who constitute the low visibility area of humanity." In the matter of environmental degradation the intervention was mainly because of the failure of the concerned authority to perform their statutory duties resulting in violation<sup>46</sup> of citizens' rights. A large number of cases were decided by the court pertaining to environmental protection through PIL.<sup>47</sup>

PIL gradually expanded its ambit to cases of arbitrary exercise of powers, corruption in public life and even cases of non-governance or mis-governance with a view to uphold the rule of law through judicial creativity and innovation. Through PIL the courts have exposed many scams and corruption cases such as *Hawala Scam*, *Fodder Scam*, *Illegal allotment of Government Houses and Petrol Pumps Scam*.<sup>48</sup> In the latter two cases the Supreme Court directed three senior ministers to pay a huge amount by way of compensation to the government as punishment for misusing their discretionary powers as ministers.

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45 Justice Bhagwati in *S.P. Gupta v. President of India*, AIR 1982 SC 149

46 *PUDR v. India*, AIR 1982 SCC 1473 at page 1476

47 *Rural Litigation and Entitlement Kendra v. State of UP*, 1985 2 SCC 431; *M.C. Mehta v. Union of India* (1986) 2 SCC 176 (Shriram Food and Fertilizer case); *M.C. Mehta v. Union of India*, (1987) 4 SCC 463; *M.C. Mehta v. Union of India*, (1996) 4 SCC 750; *Council for Enviro-Legal Action v. Union of India*, (1996) 5 SCC 281.

48 *Common cause, a Registered Society v. Union of India*, AIR 1997 SC 1886; *Shiv Sagar Tiwari v. Union of India*, AIR 1997 SC 83.

Yet another important case is *Vineet Narian v. India*,<sup>49</sup> where the Supreme Court monitored the investigation of the corruption case since the CBI (Central Bureau of Investigation) failed to investigate it properly and promptly. The court issued orders to CBI to conduct and complete the investigation into the alleged acts of corruption and to submit the report to the court. Subsequently, the court issued directions as to how the CBI should be reorganized so as to ensure its independence as an investigating agency.<sup>50</sup>

The cases involving corruption at high places such as the 2G Spectrum Scam case, the *P.J. Thomas case* and the *Black Money case* were also filed under PIL. In 2G Spectrum case, the court took over the monitoring of the investigation as they did in the case of *Vineet Narian v. India*.<sup>51</sup> In Thomas case, the Chief Justice of India Mr. Justice SK Kapadia, who is generally not a supporter of PIL, entertained the writ petition filed by the Centre for Public Interest Litigation and observed that the petition “*gave rise to a substantial question of law and of public importance as to the legality of the appointment of Shri. P.J. Thomas as the Central Information Commissioner,*” and held: “*The Government is not accountable to the courts in respect of policy decisions. However, they are accountable for the legality of such decisions. While deciding the case we must keep in mind the difference between legality and merit and also between judicial review and merit review.*”<sup>52</sup> Similarly in the Black money case also the petition was filed by some public spirited persons who have held responsible positions in the society. The court in this case issued orders setting up a Special Investigation Team citing in support its earlier decisions in *Vineet Narian v. Union of India*,<sup>53</sup> *NHRC v. State of Gujarat*<sup>54</sup> *Sanjiv Kumar v. State of Haryana*<sup>55</sup> and *Centre for PIL v. Union of India*.<sup>56</sup>

In spite of its beneficial effects, there have been criticisms against the use of PIL such as that it would result in a flood of litigation, interfere with the executive

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49 (1996) 2SCC 199.

50 *Vineet Narian v. India*, (1998) 1SCC 226.

51 (1996) 2SCC 199.

52 AIR 2011 SC 1267 p1269.

53 1996) 2SCC 199.

54 2004 (8) SCC 610.

55 2005(5) SC 491.

56 2011(5) SCC 560.

and legislative functions and thereby violate the doctrine of separation of powers and that there would be difficulty in the implementation of the orders of the court. In a number of cases the courts have issued writs, orders or directions on the basis of PIL which have benefited a large number of people who otherwise would not have been able to get justice for the wrongs suffered by them.<sup>57</sup> There have also been cases of misuse of PIL by vested interests.<sup>58</sup> Being aware of the possibility of such misuse, the court cautioned: "*PIL is a weapon which has to be used with great care and circumspection and judiciary has to be very careful to see that behind the beautiful veil of public interest, an ugly private matter, vested interests or publicity seeking, is not lurking.*"<sup>59</sup>

Yet another area where the judicial activism through PIL played a creative role in the decriminalization of politics is depicted in *Union of India v. Association of Democratic Reforms*.<sup>60</sup> The court had directed the Election Commission to issue a notification making it compulsory for those contesting the elections to make available certain information from the candidate while filing the nomination paper for election as such information was essential for a free and fair election which was part of the basic structure of the Constitution. The Election Commission issued a notification as directed by the Supreme Court. Many politicians objected to this, arguing that it was a clear case of judicial intervention in the exclusive domain of the Parliament.

The court had held that in a democratic society every citizen has a right to know the antecedents of a candidate contesting the election.<sup>61</sup> Democracy cannot survive without free and fair elections, without free and fairly informed voters.<sup>62</sup> In other words, while exercising his right to vote, the voter should have information about the person for whom he is casting his vote so that he is not misled by the widespread criminalization of politics. In pursuance of this decision, the Parliament amended the Representation of the Peoples Act, 1951 (Election

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57 *Bhandhua Mukti Morcha v. Union of India*, AIR 1984 SC 803, *M.C. Mehta v. Union of India*, AIR 1987 SC 1087 ; *Sheela Barse v. Secretary, Children Aid Society*, (1987) 3 SCC 50; *Bihar Legal Support Society v. Chief Justice of India*, (1986) SCC 767 are some such cases.

58 *Guruvayoor Devaswom Managing Committee v. C.K. Rajan*, AIR 2004 SC 561.

59 *B.Singh v. Union of India*, AIR 2004 SC 1923.

60 AIR 2002 SC 2112.

61 "...it is difficult to understand why the right of a citizen/voter – a little man – to know about the antecedents of his candidate cannot be a fundamental right under Article 19(1)(a). *Union of India v. Association of Democratic Reforms*, AIR 2002 SC 2112.

62 *Ibid.*



Law), but not to the extent of what the court had directed the government to provide. Moreover, it clearly prohibited the demand for further information from any candidate irrespective of any court decision. In a fresh petition the court invalidated the law in so far as it did not comply with the decision of the court, reiterating that "*the voter has a fundamental right to know under Article 19 (1) (a).*"<sup>63</sup> Justice Shah observed that "*the judgment was arrived at cleansing the democracy of unwarranted elements and give the country a competent legislature.*"

The judicial intervention in electoral reforms appears to be having its desired effect. It is heartening to note that in 2011<sup>64</sup> the Government has proposed an amendment to the Election law to debar the criminals from contesting elections. The amendment, if carried through, would disqualify a candidate with serious criminal charges such as terrorism, murder, sexual assault, kidnapping and other serious offences from offering his candidature for election. Thus, the proposed amendment is expected to ensure the integrity of our elected representatives and deter criminal elements from participating in elections.

## **G. JUDICIAL LEGISLATION**

The Supreme Court through the instrumentality of PIL has also issued guidelines to fill the gaps in the legislation or to provide for matters not covered by any law. The court pointed out that these directions were issued "*in exercise of the power granted under Article 32 of the Constitution for the enforcement of the fundamental rights*"<sup>65</sup> In *Vishaka v. State of Rajasthan*,<sup>66</sup> the Supreme Court laid down the guidelines for protecting the working women from sexual harassment at the work place, since there was no legislation in place. The court observed that "*the primary responsibility for ensuring such safety and dignity through suitable legislation and the creation of a mechanism for its enforcement is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women*

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63 *PUCL v. Union of India* (2003) 4SCC 399; *Union of India v. Association of Democratic Reform* (2002) 5SCC 294.

64 *The Times of India*, dated August 4, 2011. It is pointed out that 274 out of 547 MPs (Member of Parliament) in the Lok Sabha are facing criminal trials for serious offences. Fali. S. Nariman's statement before the Supreme Court while arguing for striking down Section 8 (4) of the Representation of the People Act which permits special treatment for MPs and MLAs (Member of Legislative Assembly) convicted of heinous crimes. Reported in *Times of India* dated January 11, 2013.

65 *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011 at p.3015.

66 *Ibid.*

workers under Articles 14, 19 and 21 are brought before us for redress under Article 32 an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.”<sup>67</sup> The court emphasised that these directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field (emphasis added) and pointed out that the directions issued will be treated as the law declared by the court under Article 141<sup>68</sup> of the Constitution. Even after 15 years after the decision in Vishaka no law has been enacted by the Parliament to deal with the issue. However, it is heartening to note that a Bill on Sexual Harassment at workplace viz. the Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Bill, 2012, has been passed by the Lok Sabha (Lower House of Parliament) on 3rd September 2012. It may take some more time for the law to come into force.

Similarly, in *Laxmi Kant Pandey v. India*,<sup>69</sup> the court issued directions regarding the procedure to be followed and the precautions to be taken in cases of adoption of Indian children by foreigners. Again in *D.K. Basu v. State of West Bengal*<sup>70</sup> the court issued detailed directions in matters of arrest and detention in police custody to be followed by the concerned authority. It may be reiterated that these directions and directives are issued in those cases where there is an absence of enacted law to fill the gap, a clear example of judicial activism.

## **H. JUDICIAL RESTRAINT**

It may however be mentioned here in support of the judiciary that it has been exercising considerable restraint in reviewing the discretionary powers vested with the administrators as well as the policy decisions of the government. There are many instances where the court maintained absolute restraint. For instance, in the exercise of discretionary powers by the executive, the judiciary consistently maintained that they would not look into the merits of the case (i.e. the decision taken by the authority) but will only look into the legality of the action. In other words, they will not substitute their own view for the decision of the administrator. However, such restraints did not prevent them from laying down guidelines for the exercise by the executive of the powers – administrative rule making, administrative adjudication and discretionary

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67 Ibid pp. 3012-13.

68 Art. 141; the law declared by the Supreme Court shall be binding on all courts within the territory of India.

69 AIR 1984 SC 469.

70 AIR 1997 SC 610.

powers – vested with them. The courts have also evolved many innovative principles in the field of administrative law such as speaking orders (reasoned decisions), legitimate expectation, promissory estoppel and the principle of personal liability. However, the courts generally maintained that they would not go into the merits of the decision taken by the administrators but will only review the decision-making process.

Similarly, the Supreme Court has consistently taken the view that there can be no judicial review of the policy decisions of the government. In a number of cases in which the policy decisions of the government were challenged, the courts consistently held that they would not strike down a policy decision taken by the Government merely because they feel that another decision would have been fairer or wiser or more scientific or logical. In *State of M.P v. Nandlal Jaiswal*,<sup>71</sup> it was held that the policy decisions can be interfered with by the court only if such decisions are shown to be patently arbitrary, discriminatory or mala-fide. On matters affecting policy and requiring technical expertise the court would leave the matter for the decision of those who have qualified to address the issues. Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary, irrational or abuse of power, the court will not interfere with such matters.<sup>72</sup> Referring specifically to economic policies, the court observed that the wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. “*For testing the correctness of a policy, the appropriate forum is Parliament and not the Courts*”<sup>73</sup> The Court has been consistently exercising restraint in such cases.<sup>74</sup>

## **I. JUDICIAL OVER-REACH**

The cases listed above and many other cases decided by the Supreme Court through activist interpretation of the provisions of the Constitution amply illustrate that judicial activism has come to stay in India. Judicial activism was visible in one form or the other during 1960s and is not something that has happened recently. The opposition appears to be not so much against judicial activism but against the so called judicial over-reach. The legislature as well as the executive seems to have accepted judicial activism when the

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71 (1986) 4SCC 566.

72 *Federation of Railway Officers Association v. Union of India*; (2003) 4 SCC 289.

73 *Ram Singh Vijay Pal Singh v. State of U.P.* (2006) 6SCC 44.

74 *Villianur Iyarkkai Padukappu Mayam v. Union of India* (2009) 7SCC 561.

Supreme Court tried to uphold the Constitution and protect and preserve the fundamental rights as explained earlier in this paper. Of course, there were objections, criticisms and opposition to the court's activist approach during the initial years when the courts applied the doctrine of basic structure, prospective over-ruling or when they awarded compensation for illegal detention under the writ jurisdiction or when they laid down guidelines for dealing with cases of sexual harassment at the work place, foreign adoptions and detention cases, through PIL to fill up the gaps of inaction by the Parliament. These judicial guidelines were issued to fill up the vacuum created by legislative inaction and executive lethargy.

The doctrine of separation of powers enunciated by Montesquieu is based on the assumption that each of the three wings of the government – the legislature, the executive and the judiciary – performs its functions to achieve the maximum welfare of the people and ensures maximum extent of accountability for each branch of the government.<sup>75</sup> When the executive or the legislature does not perform the function assigned to them, can the judiciary remain an idle spectator and let the people suffer in silence? As the upholder of the Constitution and the protector of the fundamental rights the judiciary has a duty to step in as otherwise it will be failing in its constitutional obligations. *Vishaka, Laxmi Kant Pandey* and *DK Basu* are instances to bring home this point. In these cases the court issued guidelines to protect the fundamental rights of the citizens as mandated by the Constitution till the legislature enacted the law. As observed by Mr. Soli J. Sorabjee,<sup>76</sup> *"quest for justice, especially social justice and relief of human suffering is the paramount motivation for judicial activism...the fundamental rights of our people will remain ornamental show pieces and become teasing illusions unless they are translated by an activist judge into living realities and become meaningful at least to some downtrodden and exploited segments of Indian humanity."*

It is worth mentioning here, the observations of Justice Krishna Iyer that *"the judge must consciously seek to mould the law so as to serve the needs of the time. He must not be mere mechanic, a mere working mason, laying brick on*

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75 *Sathasivam J in Bhim Singh v. Union of India* (2010) 5SCC 538.

76 "Judicial Activism – Boon or Bane?", Nani Palkhivala Memorial Law Lecture delivered by Soli. J. Sorabjee, Former Attorney General for India on 11.1.2008 in Bombay.

*brick without thought to the overall design. He must be an architect – thinking of the structure as a whole building for society a system of law which is strong, durable and just. It is on his work that civilized society itself depends”<sup>77</sup>*

The Judiciary has been exercising judicial review in a number of cases resulting in judicial activism. The expansive interpretation of the right to life and personal liberty, the indirect introduction of the due process in the procedure established by law, its successful defence against the onslaughts of the legislature on its judicial review powers are examples of judicial activism. The judicial pronouncements in public interest litigations in bringing relief and benefits to the poor is again an attribute of judicial activism. Judicial activism when is exercised within the confines of judicial review and constitutional limits do not amount to judicial overreach.

There may be a few cases where the judiciary may have overstepped its jurisdiction as for example when it issued guidelines for vote of confidence proceedings in some state assemblies (States of Uttar Pradesh and Jharkhand); but they are insignificant in number compared to the innumerable cases in which judiciary has exercised judicial activism benefiting the majority of the people in the country. These cases do not justify the government’s allegation that there is an increasing tendency on the part of the judiciary to encroach upon the constitutionally demarcated domains of the legislature and the executive.

## **J. CONCLUSION**

Judicial activism should not be confused with judicial over-reach. Judicial activism as renowned scholar Prof. S.P. Sathe says is ingrained in judicial review which is authorized by the Constitution. The Constitution is a living document which is to be interpreted not mechanically but in tune with the changing social and economic conditions in the society, as otherwise, the Constitution will become stagnant.

When the court issues directions to the Government to take necessary steps to bring back the black money and the government does not perform its

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<sup>77</sup> *Rajendra Prasad v. State of U.P.*, AIR 1979 SC 916 at p.924.

investigative functions promptly,<sup>78</sup> it does not amount to judicial over-reach. It may be judicial activism to safeguard public interest, but it cannot be termed as judicial over-reach.

When the government submits before the Supreme Court that there is no account or audit for millions of rupees distributed by the centre to the state and issues directions to take action, it may be judicial activism, it does not amount to judicial over-reach.<sup>79</sup>

When the government denies permission to the CBI) to prosecute the top level officers of the government even after the CBI completes investigation and is ready with the charges and the judiciary issues directions, it may be judicial activism but definitely not judicial over-reach.<sup>80</sup>

When the government pleads its inability to contain corruption of high magnitude involving ministers, politicians and top bureaucrats under the pretext of *coalition compulsions* and the judiciary takes up the responsibility of monitoring the investigation, it does not amount to judicial over-reach.<sup>81</sup>

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78 The chronology of events in the black money trail indicating the government's attitude and inaction leading to the supreme court's order establishing a Special Investigating Team, has been brought out in detail by Mr. Anil Divan, Senior Advocate and the President of the Bar Council of India in an article entitled "the Trail of Illicit Funds" in the Hindu dated 4th August 2011.

79 The Supreme Court recently has ordered a CBI probe into allegation of corruption in the NREGA (National Rural Employment Guarantee Act) Scheme in the State of Orissa. It is reported that the Government admitted in the Supreme Court that they had released Rs. 1.08 lakh crore to states under the scheme since February 2006; but no auditing of the expenditure was done at any level. The court observed that the affidavits filed by the Centre and the States vaguely denied the allegations without providing specific explanations. "This clearly shows default on the part of the Union of India as well as the states in discharging their statutory obligation of achieving the public purpose that is sought to be achieved under the provisions of the NREGA." *The Week*.

80 It has been reported that the CBI (Centre Bureau of Investigation) has been probing 859 cases across the country in which investigation has been completed against 209 government officers and sanction to prosecute them is awaited. As per the information collected through RTI (Right to Information Act) between January 2009 and December 2009, the agency has probed corruption charges against 23 top government officers mostly of the Joint Secretary rank but was denied sanction to prosecute them. *India Today* dated March 21, 2011.

81 The 2-G Spectrum Scam Case and the Common Wealth Games Scam Case.

When the government fails to make legislation dealing with issues affecting the fundamentals rights of the people such as sexual harassment, foreign adoption and illegal detention, if the judiciary issues guidelines to fill the gap, it does not amount to judicial over-reach.

The above instances indicate that unless the executive and the legislature perform their functions and discharge their responsibilities promptly and effectively for the benefit of the citizens, the judiciary will continue to exercise its judicial review power to fill up the vacuum created by executive indifference and legislative apathy. In all these cases the judiciary has been performing its judicial functions as envisaged under the Constitution.

One would tend to agree with Mr. Fali Nariman that judicial over-reach is the consequence of administrative under-reach. Judges are not running the government, they are only remedying the acts of non-governance or mis-governance. Soli Sorabjee has pointed out that "indignant critics forget that it is the executive failure to perform its duty and the notorious tardiness of legislatures that impels judicial activism and provides its motivation and legitimacy. When gross violations of human rights are brought to its notice, the judiciary cannot procrastinate; it must respond. If the legislature and the executive perform their functions properly, promptly and effectively there would not be any need or justification for the judiciary to interfere in the executive or legislative functions of the government. It is expected that all the three wings of the government would perform the functions assigned to them for the welfare of the people as envisaged by Montesquieu in his Doctrine of Separation of Powers.

In conclusion, it may be worth citing the observation made by Mr. Justice Swatanter Kumar, Hon'ble Judge of the Supreme Court that : " Where ever and whenever the State fails to perform its duties, the court shall step in to ensure that the rule of law prevails for the abuse of process of law. Such abuse may result from inaction or even arbitrary action of protecting the true offenders or failure by different authorities in discharging statutory or legal obligations in consonance with the procedural and penal statutes."<sup>82</sup>

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82 *Samaj Parivartan Samudaya v. State of Karnataka*, (2012) 7SCC 407.

# Democracy with the Chinese Characters? The Roles of the People's Congresses in China

*Qianfan Zhang\**

## **INTRODUCTION: SUPREMACY ON A RUBBER STAMP?**

**P**erhaps the most unique and consistent feature of China's constitutions since 1949 is highlighted in its institutional design of the National and local People's Congresses (NPC and LPC, respectively). These institutions are made supreme in order to fulfill the Communist promise that the "people" should reign and that China is to be the "People's Republic", as the very title of the state emphatically suggests. Such a design was contemplated in the 1949 Common Program, and fleshed out and maintained in all the latter constitutions. As Article 2 of the current Constitution, enacted in 1982, provides,

*All power in the People's Republic of China belongs to the people. The National People's Congress and the local people's congresses at various levels are the organs through which the people exercise state power. The people administer state affairs and manage economic, cultural and social affairs through various channels and in various ways in accordance with the law.*

A primary channel through which the people administer state affairs is the regular elections carried out at various levels. Basically, the people elect the People's Congresses at various levels, which in turn elect and oversee other branches of the governments at the same levels. Article 3 of the 1982 Constitution provides that

*The National People's Congress and the local people's congresses at various levels are constituted through democratic elections. They are responsible to the people and subject to their supervision. All administrative, judicial and procuratorial organs of the state are created by the people's congresses to which they are responsible and by which they are supervised.*

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The constitutional power structure is simple enough. Had the practice of the governments followed the rules laid down in the Constitution, China would have been the world's largest democracy quite akin to the Westminster model. Unfortunately, the practice followed, once again, the "latent" rules (*qian guize*) rather than the constitutional text. Although the People's Congresses are given supreme status in the Constitution, they have long been dubbed 'rubber stamps' since their ordinary roles are largely reduced to endorsing official acts decided by the ruling CCP, the holder of real supreme power in China, whose 'leadership' is explicitly recognized in the preface to the 1982 Constitution. In essence the power structure of the party, the moving force behind the daily flow of things in the real world, completely subverts the power structure defined in the Constitution; anything expressed there will be interpreted as consistent as possible with the dictates of the party, and be ignored to the extent that such interpretation is impossible.

For example it is commonly known that the Chairman of the Standing Committee of NPC (NPCSC), the highest position among all deputies, is a second position in the country, next to the Secretary General of the CCP, commonly regarded as the supreme figure in China despite the fact that the government position he usually holds, the President of the State, is but a symbolic figure without substantive constitutional power. In fact, although the NPCSC Chairman is officially higher than the Premier (the third in rank), who is supposed to be elected and overseen by the NPC, the Premier is much more powerful in substantive terms — and popular among the people. The deputies, usually appointed by the party rather than genuinely elected by the people, are supposed to exercise their constitutional powers over the government officials, but in reality they are made docile to the government by the party discipline, and this is no surprise since well over the majority of the deputies are party cadres, whose ranks are lower than those holding key posts in the governments. No wonder that the People Congresses and the deputies disappear almost completely from the national scene. No one even expects them to step out and express their voices in such important occasions as the Sun Zhigang event, and they are duly absent.

This is not to say, however, that the institution is completely useless. The 'two meetings' (两会, *lianghui*) held in March every year, the annual sessions for the NPC and the National Political Consultative Committee, are still national moments attracting much media exposure, by which policy expectations are expressed by many young people. Despite the overall weak position of the People's Congresses and the limited contour within which they may exercise their powers without running into conflict with the party's prerogatives,

there were genuine efforts of institutional building from the very beginning of the reform period, intended to make it a fully functioning legislature. From the first NPCSC Chairman, Peng Zhen, who personally suffered from lawless persecutions during the Cultural Revolution, the status of the People's Congresses gradually improved; even the former Premier Li Peng, a hard line conservative who made himself infamous worldwide by announcing the marshal order during the June Fourth Incident, made positive contributions to strengthen the People's Congresses when he became the NPCSC Chairman in 1993. It can be said that the People's Congresses are still 'rubber stamps', but they seem to be getting increasingly 'harder'.

Although most deputies are inert, there are a few active deputies who fought hard to win elections and dutifully exercise their functions once elected; Yao Lifa from Qianjiang city (Hubei province) and Xu Zhiyong from Haidian district (Beijing) were but two examples.<sup>1</sup> It is true that the institutional progress slowed down, even reversed, during the recent term under Wu Bangguo's leadership of the NPCSC, when independent candidates are targeted for retributions and deputies' independent activities are discouraged by the latest revision of the Law on Deputies, but such retrogression may well be attributed to idiosyncratic leadership rather than systemic, irreversible trend. At least one cannot exclude altogether the possibility that, with a new NPCSC Chairman who is more conscious of institutional building and more friendly to deputies' individual initiatives, the People's Congresses will regain vigor and play at least some role in the nation's political life.

This article deals with China's legislatures, i.e. national and local People's Congresses, officially regarded as the cornerstone of the current constitution and the primary symbol for China's democracy. I will begin with a brief discussion on the nature and evolution of the People's Congresses in China, and then introduce organizational structures, constitutional powers, and legislative procedures of the NPC as the supreme legislator, the NPCSC as the regular national legislator, and the LPC as the local legislators in turn. The article will end with a discussion of the defects in the current legislative system, e.g. the lack of representation and professionalism of the congressional deputies, and propose possible reform measures to make democracy work better for China.

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1 See Zhu Ling, *I Object: A Legend of Congressional Deputy's Political Participation* (Haikou, Hainan Press, 2006).

## THE NATIONAL PEOPLE'S CONGRESS

Although the People's Congresses as a whole exercise the constituent power of China, Article 57 of the Constitution explicitly provides that the NPC is the 'highest organ of state power', a status implied in the unitary constitutional structure, where the highest power is singularly lodged in the central (national) government and its laws and regulations enjoy unlimited supremacy. The national deputies are supposed to be elected, however, by deputies of the provincial People's Congresses (Constitution Art. 59), who are in turn elected by deputies at the city or county levels, all for a five year term (Constitution Art. 60). The elections are held every five years, and all deputies may run for consecutive terms.

### 1. Basic Structure

Like all the People's Congresses, the NPC convenes once every year. Although the Constitution does not fix the dates and time of legislative sessions, the Rules of Procedure for the NPC provides that the NPC shall convene in the first quarter every year (Art. 2). Since it has now become an established convention that the 'two meetings' take place in early March every year, that means that an ordinary session lasts no more than three weeks. In practice the NPC meets for about ten days a year. Although the NPC can hold interim sessions 'at any time the Standing Committee deems it necessary or when more than one-fifth of the deputies ... so propose' (Constitution Art. 61), such has never actually taken place.<sup>2</sup>

The NPC is a large body, with over 3000 deputies. The allocation of the number of deputies is determined by the NPCSC 'in accordance with existing conditions' (Constitution Art. 25), including the electoral population of provinces, municipalities, and autonomous regions, but the allocation fell far short of meeting the 'one person, one vote' criteria until March 2010, when the NPC repealed the 'quarter vote clause' in Article 16 of the Election Law on the NPC and LPC (hereinafter 'Election Law'),<sup>3</sup> which dictated that 'the number of people represented by each rural deputy is four times the number of people represented by each urban deputy', effectively depreciating the value of rural vote to a quarter of that of an urban vote. Even so, military deputies have

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2 Although there was strong appeal for the NPC to hold an interim session before June 4, 1989, the interim procedure was never initiated. See e.g. Zhang Liang, *June Fourth: The True Story* (Hong Kong, Mingjing Press, 2001) 686-687.

3 Decision of the National People's Congress on Amending the Election Law of National People's Congress and Local People's Congresses at Various Levels.

remained a glaring exception to the principle of equal representation, taking up as many as 300 seats, roughly ten percent of the NPC, while the size of the army is slightly over 0.2% of the entire population. In addition, the allocation scheme favors participation of women and national minorities to meet both the constitutional mandate that 'all the minority ethnic groups are entitled to appropriate representation' (Constitution Art. 59) and the legal requirements, according to which they should be guaranteed 'appropriate numbers' in the NPC and LPC (Election Law Art. 6); the Election Law devotes an entire chapter to the minority deputies, where complicated schemes are designed to guarantee minority presence in the LPC (Arts. 18 – 21).

The NPC is divided into several special committees. Besides the Standing Committee, a subset of the NPC with independent lawmaking powers, there are nine special standing committees, namely the Nationalities Committee, Law Committee, Finance and Economic Committee, Education, Science, Culture and Public Health Committee, Foreign Affairs Committee, Overseas Chinese Committee (Constitution Art. 70), plus the later established Judicial Committee of Internal Affairs, Environmental and Resource Protection Committee, and the Agricultural and Rural Committee. Each committee is composed of deputies more or less specialized in its particular area, and is responsible for drafting legislations in that area. When the NPC is not in session, all special committees are subject to the leadership of the NPCSC. In fact, each committee is usually headed by a vice Chairman of the NPCSC, and most NPCSC members are also special committee members and constitute the majority in the special committees. Like the NPCSC, each special committee convenes monthly or bimonthly, while its directors usually convene once every two weeks. Unlike the NPCSC, however, the special committees lack independent lawmaking power.

## **2. Constitutional Powers**

The multiple powers of the NPC are defined in Article 62 of the Constitution, and can be categorized into the following four types. First, the legislative powers, including the power to amend and to 'supervise the enforcement of' the Constitution (Constitution Art. 62 Clauses 1 & 2), and the power to enact and amend 'basic laws governing criminal offences, civil affairs, the state organs and other matters' (Cl. 3). At present, the basic laws governing the state organizations include various organic laws relating to the NPC, the State Council, the LPC and the local governments, the courts and the procuratorates, as well as the Election Law on the NPC and LPC, the Law on Regional National Autonomy, and the Basic Laws for the two Special Administrative Districts (SAR), Hong Kong and Macao. Constitutional amendments can be proposed

only by the NPCSC or more than one-fifth of the NPC deputies, and are adopted by a vote of more than two-thirds of all the NPC deputies (Constitution Art. 63).

Second, the appointment and removal powers, including the power to elect the President and Vice President of the state (Constitution Art. 62 Cl. 4), and to choose the Premier 'upon nomination by the President' (Cl. 5). The NPC further chooses, 'upon nomination by the Premier', the Vice Premiers, State Councilors, Ministers, the Auditor-General and the Secretary-General of the State Council (Cl. 5), elect the Chairman of the Central Military Commission (CMC) and choose, 'upon nomination by the Chairman', all other members of the CMC (Cl. 6). As a unique 'Chinese character', the NPC not only elects the leading personnel in the government, but also elects the key positions in the judicial branch (Cl. 7 & 8), i.e. the President of the Supreme People's Court (SPC) and the Procurator-General of the Supreme People's Procuratorate (SPP). The NPC, upon majority voting, has the power to remove any of the (Constitution Art. 63). One tenth of the NPC deputies may move to remove any of the above persons by presenting a reasoned bill to the Presidium, which is elected by every new elected NPC to conduct its sessions (Constitution Art. 61). The Presidium will distribute the bill among the provincial delegations before it is voted by the whole Congress, or the latter may decide to organize a special investigation committee and pass vote on the bill based on the investigation report provided by that committee.

Third, the supervisory powers, i.e., the power to inquire into the works of other branches of the central government. Article 14 of the Organic Law of the NPC provides that, during a NPC session, a provincial delegation or a group of thirty or more deputies may make a written proposal for addressing inquiries to the State Council and its ministries or commissions, the SPC, and the SPP; the proposal shall clearly state the person, the subject, and the content to be inquired, and, 'according to a decision of the Presidium', be replied by the State organ inquired. If half or more of the deputies who made the inquiries are not satisfied with the reply, they may demand another reply from the organ in question if the Presidium so decides. The NPCSC, the State Council, the SPC, and the SPP separately submit annual work report (工作报告, *gongzuo baogao*) to the general session of the NPC each year for its review (Constitution Art., though the legal effect of failing to approve the report is unclear.

Fourth, the decision-making powers for major issues, including the power to examine and approve the plan for national economic and social development as well as the report on its implementation, to examine and approve the state budget and the report on its implementation, to approve

the establishment of provinces, autonomous regions, and municipalities, and the special administrative regions, and to decide on questions of war and peace (Constitution Art. 62 Cls 9-14). For example, the construction of the controversial Three Gorges Dam was discussed and approved by the NPC in 1992, and a record number of the one-third deputies objected or abstained by voting.<sup>4</sup> Had the NPC been conducting its business in this manner, it would have long rid itself of the 'rubber stamp' title. Unfortunately, its action on the Three Gorges Project has been a lonely exception rather than the rule, and it remains silent on most of the major issues with national impact. The scale of the 'South-to-North Water Diversion' (南水北调, nanshui beidiao) project is many times greater than the Three Gorges Project, yet it was given the green light without even raising an issue in the NPC session.

As commonly is the case in China, the enumeration in Article 62 of the Constitution merely exemplifies the types of the powers that the NPC usually exercises rather than confines it to the enumerated powers; otherwise, the 1982 Constitution would have been a federalist constitution rather than a unitary one characterized by unlimited legislative power of the national government. This is attested by the catch-all clause of Article 62, providing that the NPC may 'exercise such other functions and powers as the highest organ of state power should exercise' (Cl. 15). In principle, the NPC as the supreme state power may legislate in any substantive area it deems necessary.

### **3. Legislative Procedure**

Legislation is a lengthy process at the NPC, given its extraordinary size, the paucity of sessions, and the procedural complexity. The enormous amount of the bills received every year are divided into three categories – the urgent bills that require immediate action, which means that they shall be deliberated and possibly enacted in the current legislative term; the important bills that are necessary to be enacted for public interest, but may require further investigations about the interests and problems involved and the means that best resolve these problems, and thus will be placed on the legislative agenda for the next legislative term; and other bills that require further study on their desirability and feasibility. Chapter 2 of the Law on Legislations describes the legislative procedure of the NPC in some detail.

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4 Resolution Regarding the Construction of the Three-Gorges Project on the Yangtze River, passed at the Fifth Conference of the Seventh National People's Congress, 3 April 1992. It was pointed out that the main proponent of the project, Li Peng, happened to be the NPCSC Chairman at the time, and used the NPC approval process to boost its popularity and to share responsibility for possible failures in future.

First, many state actors are authorized to initiate the legislative process by proposing bills to the NPC. These include the State Council, the CMC, the SPC, the SPP, and all special committees of the NPC, and their bills will be placed on the agenda of the current legislative session if the Presidium so decides (Art. 12). Although an individual deputy cannot propose a bill in his own capacity, a provincial delegation or 'a group of not less than 30 delegates' may jointly propose a bill to the NPC, and it is up to the Presidium to decide whether to place such bill on the current agenda or to refer such bill to the special committee for further deliberation (Art. 13), during which most proposed bills die out. It is to be pointed out that only the delegates within the delegation of the same province (or a municipality or national autonomous region) may jointly propose a bill since, as a matter of policy, deputies are prohibited from engaging in cross-delegation activities.

Second, once a bill is put on the agenda of the current NPC session the plenary session shall hear the statements of the bill sponsor, and forward the bill to the provincial delegations for further deliberation (Art. 15), based on which the NPC Legislative Committee will conduct a general deliberation on the bill and submit to the Presidium a deliberation report containing different opinions and an amended draft law (Art. 18). If necessary, the Executive Chairman of the Presidium may convene a meeting of delegation leaders to hear the deliberation opinions of all delegations on key issues of the bill (Art. 19), on the basis which the draft law shall be further amended by the Legislative Committee and be submitted to the Presidium for adoption by the plenary NPC session (Art. 22).

Finally, a law passed by the majority voting of the NPC shall be signed by the President of the state and promulgated by presidential order (Art. 23). This last requirement is purely of procedural significance as the President has no discretion in deciding whether he should sign the law once it is enacted by the NPC majority.

## **THE NPC STANDING COMMITTEE**

If the NPC is made somewhat unique by its constitutional status, its size, the paucity of its sessions, and its role in China's national life, the Standing Committee of the NPC is all the more unique because it may well be the only parliamentary committee in the world that possesses independent lawmaking power. Article 58 of the 1982 Constitution makes it clear that the NPC 'and its Standing Committee exercise the legislative power of the state'. In other words, a bill that acquires the majority voting of the NPCSC members becomes an effective law, as if it were passed by the plenary session of the NPC. This is extraordinary given the fact that the NPCSC is a much smaller body than

the full Congress, with only over 140 members, fewer than five percent of the NPC deputies.

The NPCSC is made small precisely to solve the problem that the NPC is too large, a problem that implicates issues of legislative efficacy, democratic representativeness and local autonomy. A parliament of over 3000 deputies is unmanageable and inoperative in any country, but it may well be required in China, a country with a population of 1.4 billion, in order to gain sufficient representation of its electorates. Nowadays each NPC deputies representatives roughly 500 thousand population, on the same order of magnitude as each U.S. Congressman represents the American voters. Democracy for a large population requires a large representative institute, whose very size defeats legislative efficiency and active participation on part of individual deputies; in a sense the 'rubber stamp' status of the NPC is predestined by its constitutional design. The simple tradeoff between representativeness and efficiency may produce a workable solution for a moderate size democracy,<sup>5</sup> but may not for such a large country as China. The NPCSC is small and efficient, but such a design defeats the democratic purpose that a deliberative body is established to serve. With each member roughly representing a population of 10 million, almost the entire population of a medium size state, and particularly with the heavy membership skew toward Beijing and other large cities, the NPCSC falls far short of providing adequate representation for the massive Chinese people.

Of course, that does not mean that China's democracy is no way out. If the national legislature is destined to be massive and slow to move, maybe it should not busy itself with ordinary businesses that are better left to the local governments, which are less perplexed by the representation-efficiency conundrum. So far, however, China has followed unitary centralism rather than decentralized federalism. The conundrum thus stays, and legislative efficiency is gained by sacrificing democratic representation, as the NPCSC clearly demonstrates.

### **1. A Second Chamber?**

Hence the NPCSC is a 'second chamber' in China, enjoying independent legislative authority. This term is not to be entertained, of course, in the same sense as one in bicameralism, which usually requires a bill to acquire majority voting in both chambers in order to be an effective law. The Chinese system

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5 James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundation of Constitutional Democracy* (Ann Arbor, University of Michigan Press, 1962) 135-140.



of allowing either chamber to enact laws on its own is surely peculiar, and the relationship between the two chambers must be carefully defined to avoid legislative conflicts and confusions.

The NPC-NPCSC relation is an intricate one. On surface the Standing Committee is elected by and subordinate to the full Congress (Constitution Art. 65). One NPCSC responsibility is to submit its annual work report to the NPC during its full session (Art. 69), even though the formal effect of the review remains unclear and the NPC has never failed to approve its report. Among the NPC powers, one is to 'alter or annul inappropriate decisions of the Standing Committee' (Art. 62, Cl. 11), indicating that the NPC is the higher of the two legislatures. Finally, while the NPC has the power 'to enact and amend basic laws' (Art. 62, Cl. 3), the NPCSC is authorized only 'to enact and amend laws, with the exception of those which should be enacted by' the NPC and, when the NPC is not in session, 'to partially supplement and amend' those basic laws enacted by the NPC, 'provided that the basic principles of these laws are not contravened' (Art. 67, Cls 2 & 3). It is commonly understood that these provisions set the legislative boundary between the two chambers, with the NPC solely responsible for enacting basic laws, even though it is somewhat ambiguous whether it is *limited* to enacting these laws.

In practice, however, there are plenty of reasons to believe that the NPCSC is much more powerful and effective of the two chambers. Although the NPCSC is limited to enact ordinary (non-basic) laws, it has to power to 'supplement and amend' these laws during the period when the NPC is not in session, which means most time of a year. The supplements or amendments may not contravene the 'basic principles of these laws', but such a general clause is so vague as to render it useless for limiting the Standing Committee power of amending basic laws, not to mention that the NPCSC itself is in charge of interpreting all laws, including basic laws. In reality, the NPCSC has often amended the basic laws made by the NPC, particularly the Criminal Law. For example, following the terrorist attack on September 11, 2001, it inserted provisions in the Criminal Law to crackdown on those who organize, lead, fund, or participate in terrorist activities. Other amendments can be more disputable. The General Principle section of the Criminal Law provides, for example, that 'any act is not to be convicted or given punishment without explicit stipulations of law deems it a crime' (Art. 3). According to the Standing Committee's supplements to Articles 121 and 291 of the Criminal Law, however, the SCC and SPP added crimes for 'funding terrorist activities', 'falsely putting in dangerous substances', and 'fabricating and intentionally propagating

false terrorist information'.<sup>6</sup> It is at least debatable whether the addition of these crimes violated the one of 'basic principles' as stipulated in Article 3 of the Criminal.

More problematically, it occasionally revises laws regulating the NPC, its constitutional superior. In October 2010, for example, it amended the Law on Deputies to the NPC by inserting a provision that requires the deputies to stay with their own occupations and to 'participate in uniformly organized activities for the performance of their duties when they are not in session', which was widely understood to target at those active local deputies who set up individual studios in order to promote communication with their electorates.<sup>7</sup> Despite strong academic protest and the charge of illegality of amending laws that regulates the NPC itself, a superior legislature to which the NPCSC is held accountable, it nevertheless passed the amendment when the NPC is not in session.

Even more fundamentally, although the NPCSC is supposedly elected by and responsible to the NPC, the reality is very much the reverse. To begin with, it is true that the NPCSC is to be elected by the newly formed NPC, but the election of the incoming NPC itself is 'conducted' by the outgoing Standing Committee (Constitution Art. 59). Both the number of the NPC deputies and the procedure of election are 'prescribed by law' (Art. 59), but there is surely no NPC 'law' that fixes the number of the NPC deputies; what the NPC normally does is to pass a decision that defines the maximum number of deputies in the next election and generally authorizes the Standing Committee to allocate the number of deputies.<sup>8</sup> The NPCSC then enacts a master plan that actually allocates the number of deputies for all provinces, municipalities, autonomous districts, the SAR and the Taiwan region, as well as detailed numbers of minority

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6 Supplementary Provisions Regarding the Enforcement of Criminal Charges Determined in the Criminal Law of the PRC (2002) Legal Interpretation 7, 26 March 2002; see (2002) 3 *The Supreme People's Court Gazette* 80-81.

7 'The Deputies Law Revised for the First Time, Prohibiting Individual Studios', *South Weekend News*, 25 August 2010.

8 See, e.g., the Decision with respect to the Issues of Number of Deputies to the Eleventh Congress of the National People's Congress and Their Election, Fifth Session of the Tenth Congress of the National People's Congress, which set the maximum number of deputies to be 3000.

deputies.<sup>9</sup> Indeed, it is the positive duty of the Standing Committee to 'ensure the completion of election of deputies' to the succeeding NPC two months prior to the expiration of the term of the current NPC (Art. 60). Although neither the NPC election nor the NPCSC election in itself worth serious examination, such provisions do illustrate the controlling role of the Standing Committee in the NPC formation. Only when the new NPC is elected and actually meets in March does it elect its own Presidium to conduct its session, by which it gains nominal autonomy (Art. 61). But even then, the NPC is not entirely on its own since the NPCSC still controls its operation. While the regular NPC session is 'convened by its Standing Committee', the extraordinary session 'may be convened at any time the standing Committee deems it necessary' (Art. 61), though such session has never been deemed 'necessary' so far. Finally, when the NPC is not in session, the NPCSC is also in charge of directing all special committees, which play important roles in drafting legislations.

Overall, the NPC, a giant of nearly 3000 members who meets only ten days a year, appears more like an extraordinary legislature fit only for unusual occasions, while its Standing Committee, much smaller, more effective, and meeting much more frequently, is the regular legislature responsible for enacting most of the ordinary laws. Its legislative proficiency can also be glanced from Article 41 of the Constitution, which prohibits any Standing Committee member to 'hold office in an administrative, judicial or procuratorial organ of the state', while an ordinary NPC deputy is not prohibited from taking any of the above offices.

## **2. Constitutional Functions**

As China's regular lawmaker, the NPCSC not only shares legislative power with the NPC, but also exercise other powers ordinarily not available to the NPC. One primary function is 'to interpret the Constitution and supervise its enforcement' (Constitution Art. 67 Cl. 1), even though it has never formally made use of this power; the Sun Zhigang case would have provided the perfect occasion to exercise such a power, but the Standing Committee chose to let remain silent as usual. It has made rather frequent use, however, of its power to interpret ordinary laws (Cl. 4), particularly the Criminal Law. On April 28, 2002, for example, the NPCSC passed an interpretation to Article 294 of the

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<sup>9</sup> See, e.g., the Plan for Allocation of Number of Deputies to the Eleventh Congress of the National People's Congress, and the Plan for Allocation of Number of National Minority Deputies to the Eleventh Congress of the National People's Congress, Twenty-seventh Session of the Tenth Congress of the Standing Committee of the National People's Congress, held on 27 April 2010, *NPCSC Bulletin* 2010 (No. 4).

Criminal Law, which involves a term 'organizations of triad nature'.<sup>10</sup> In 2000, the SPC defined such organizations as ones that are tightly organized for acquiring economic interest by violent means and under the illicit protection of government staffs. The propriety of requiring the last element, commonly dubbed 'black umbrella' (黑保护伞, hei baohusan) was debated since a number of prosecutions against 'organizations of triad nature' were rejected for insufficiency of evidence that they involved any 'black umbrella'.<sup>11</sup> The SPP charged that the judicial interpretation was too strict to allow crime control at an earlier stage, and proposed the NPCSC to interpret this provision. The legislative interpretation of the Standing Committee removed 'black umbrella' as the constitutive element of the crime, and listed it merely as one form of criminal organization. Unlike supplement or amendment of laws, a legislative interpretation is essentially a new gloss on an old law, and thus in principle can be applied retroactively, though principles of fairness and legal predictability counsel against such applications.

The second important function of the NPCSC is to supervise the work of the State Council, the CMC, the SPC, and the SPP (Constitution Art. 67 Cl. 6). Like the NPC, the NPCSC may also submit written questions addressed to the State Council and its ministries or commissions, if a group of ten or more members do so during a session (Organic Law of the NPC, Art. 33). In addition, the NPCSC has the power 'to annul those administrative regulations, decisions or orders of the State Council that contravene the Constitution or a law' and to annul local regulations or decisions made by the provincial LPC that contravene these superior laws or an administrative regulation (Constitution Art. 67 Cls. 7-8).

Finally, the NPCSC may exercise parts of powers reserved for the NPC when it is not in session, one being the major decision-making powers. When the NPC is not in session, the Standing Committee may review and approve 'partial adjustments to the plan for national economic and social development or to the state budget that prove necessary in the course of their implementation' (Art. 67 Cl. 5); it may even proclaim 'a state of war in the event of an armed attack on the country or in fulfillment of international treaty obligations concerning common defense against aggression' (Cl. 18). In fact, exclusively reserved to the NPCSC are the powers to ratify or abrogate treaties and important

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10 See (2002) 3 *The Supreme People's Court Gazette* 76.

11 Zhang Jie, 'The Legal Problem Provoked by the "Black Protective Umbrella"', *South Weekend News*, 9 May 2002.

agreements concluded with foreign states (Cl. 14), to decide on general or partial mobilization (Cl. 19), and to declare state of emergency for the whole country or a province (Cl. 20). Likewise, the Standing Committee may also appoint or remove chief officials of the state when the NPC is not in session, except President of the state, the Premiers and Vice Premiers, the State Councilors, the CMC Chairman, and the Presidents of the SPC and SPP (Cls. 9-12).

Like the NPC, the Standing Committee is not limited to powers enumerated in Article 67 of the Constitution, but may 'exercise such other functions and powers as the National People's Congress may assign to it' (Cl. 21).

### **3. Structure and Legislative Procedure**

The legislative procedure of the Standing Committee is somewhat simpler than that of the NPC, though still rather strictly defined by the Law on Legislation. Ten or more NPCSC members may jointly propose a bill to the Standing Committee, and the caucus of chairpersons shall decide whether to put the bill on the agenda of the current session or to refer it to the relevant special committees for deliberation and comment (Art. 25). It is specifically required that, in general, a bill put on the agenda shall be deliberated three times at the NPCSC sessions before being put to vote (Art. 27). The first deliberation is for the Standing Committee to hear the statements of the bill sponsor and refers the bill to seminars for preliminary deliberation. The Legislative Committee of the NPC is obliged to formulate a report concerning the amendment or the result of deliberation, which include a statement of the major differences in views, and to amend the draft law (Art. 31). During the second deliberation, the Standing Committee hears the report of the Legislative Committee concerning the amendment and major issues of the draft law, and refers the bill to seminars for further deliberation. During the third deliberation, the Standing Committee hears the report of the Legislative Committee about the result of the deliberation over the draft law and refers the amended draft law to the seminars for deliberation. The revised version of a draft law shall be amended by the Legislative Committee based on comments made by the Standing Committee in order to formulate a version endorsed by the Caucus of chairpersons to be voted upon in the NPCSC plenary session (Art. 40). A bill may be brought to a vote after two deliberations, and a bill that partially amends a law may be brought to vote after only one deliberation, if a general consensus has been reached (Art. 28).

The daily work of the Standing Committee is assisted by several subcommittees besides the General Office, including the Legislative Affairs Committee (LAC),

Budget Work Committee, Deputies Qualification Review Committee, and the Hong Kong and Macao Basic Law Committees. As the 'working office' of the NPCSC, the LAC is composed of over 140 professional staffs divided into several areas of law. Although most of the staffs are neither Standing Committee members nor NPC deputies, they are in charge of daily lawmaking and review activities. For example, it is the LAC that filters the citizen complaints made to the NPCSC against the constitutionality or legality of the national or provincial regulations.

## **THE LOCAL PEOPLE'S CONGRESSES**

Below the national legislatures, the NPC and its Standing Committee, are the local legislatures in the provinces (including the municipalities and autonomous regions), cities, counties, municipal districts, towns and townships. Article 96 of the Constitution provides that the LPC at various levels are 'local organs of state power', and only LPC at and above the county level establish standing committees. Their roles and functions vis-à-vis local governments at the same levels are largely parallel to those of the NPC and NPCSC vis-à-vis the national government, except that they are obliged to 'ensure the observance and implementation of the Constitution and the law and the administrative regulations in their respective administrative areas' (Constitution Art. 99). Yet the LPC at various levels do have their own roles to play that deserve separate treatment.

### **1. The LPC Structure and Functions**

The LPC deputies are elected either directly or indirectly by the local constituencies. While deputies to the LPC at the county level or below are their constituencies, deputies to the LPC above the county level are elected by the LPC the next lower level (Constitution Art. 97). This leads to a cascade election scheme: the NPC deputies are elected by deputies to their respective provincial LPC, who are elected by deputies to the LPC of cities divided into districts within their respective provinces, who are in turn elected by deputies to the LPC of districts and counties within those city jurisdictions, who are directly elected by the local constituencies. Like the NPC, each LPC is elected for a term of five years (Art. 98), and is subject to supervision of its electors (Art. 102). Like the NPC, LPC at various levels shall meet in session at least once a year, and special session may be convened at any time upon the proposal of one-fifth of the deputies (Organic Law on the LPC and LPG, hereinafter 'Local Organic Law', Art. 11).

A LPC above the county level may establish special committees, such as legislative (political and law) committees, finance and economic committees,

and education, science, culture and public health committees (Local Organic Law Art. 30). The candidates for the director, deputy directors and members of each special committee shall be nominated by the presidium from the deputies and be subject to the LPC approval. When the LPC is not in session, the special committees shall work under the direction of its standing committees, which may appoint or dismiss the deputy directors and members of a special committee. The special committees shall discuss, examine and draft relevant bills and resolutions, make investigations and put forward proposals on matters within the scope of functions and powers of the respective LPC and their standing committees. (Art. 30)

Overall, LPC exercise the following powers, with the peculiarity that the scope of powers is slightly different for the LPC at different levels (compare Articles 8 and 9 of the Local Organic Law). First, the electoral and removal powers. LPC at their respective levels elect and have the power to recall governors and deputy governors, mayors and deputy mayors, or heads and deputy heads of counties, districts, townships and towns (Constitution Art. 101). LPC at and above the county level also elect and have the power to recall court presidents and chief procurators of at the corresponding level, while the election or recall of chief procurators shall be reported to the LPC Standing Committees at the next higher level for approval (Art. 101). When LPC at or above the county level is in session, its presidium, its standing committee, or a joint group of at least one tenth of its deputies may submit a proposal to remove from office members of its standing committee or members of the government, the court president or the chief procurator at the corresponding level; when LPC at township or town level is in session, the presidium or a group of at least one-fifth of the deputies may submit a proposal to remove from office its chairman or vice-chairmen, the head or deputy heads of the township or town. The presidium shall refer the proposal to the congress for deliberation, and persons proposed to be removed from office shall have the right to defend themselves at a meeting of the presidium or at the plenary meeting of a session, or to submit their written defense. (Local Organic Law, Art. 26)

Second, policymaking powers. LPC adopt and issue resolutions and examine and decide on plans for local economic, cultural, and public service development within the limits of their authority prescribed by law; LPC at and above the county level shall examine and approve the plans for economic and social development and the budgets of their respective administrative areas, as well as the reports on their implementation (Constitution Art. 99). When a LPC is in sessions, its presidium, standing committee and special committees and the government at the corresponding level may submit bills and proposals within

the scope of its functions and powers; the presidium shall decide to refer such bills and proposals to a LPC session for deliberation, or to simultaneously refer them to relevant special committees for deliberation and reports before submitting them to the session for a vote. Ten or more deputies to a LPC at or above the county level, or five or more deputies to LPC at township or town level, may jointly submit a bill or proposal to the LPC at the corresponding level, within the scope of its functions and powers; the presidium shall decide whether to place it on the agenda or to first refer it to a relevant special committee for deliberation and a recommendation. (Local Organic Law Art. 18)

Third, the supervisory and corrective powers. LPC shall hear and examine the work reports of the standing committees, the governments, the courts, and procuratorates at the corresponding levels (Local Organic Law Art. 8 Cls. 8-9). They also have the power to alter or annul inappropriate resolutions of the standing committees and the governments at the corresponding levels (Cl. 10). When a LPC is in session, a group of at least ten deputies may submit a written proposal for addressing questions to the government or any of its departments, the court or the procuratorate at the corresponding level. The presidium shall decide whether to refer the proposal to the organ addressed for an oral reply at the meeting of the presidium, or at the plenary meeting of a session, or at the meeting of a relevant special committee, or for a written reply (Art. 28).

It turns out that some LPC are more active than their national counterpart in exercising their powers. In February 2001, for example, the majority of the LPC of Shenyang (capitol of Liaoning province) declined to approve the work report of the Shenyang Middle Level Court due to its rampant corruption and derelictions, and the LPC unusually reconvened in August to hear and review the court report for the second time.<sup>12</sup> In January 2003, deputies to the Guangdong provincial LPC examined, for the first time since 1949, the government budget proposal that listed by each item the expenses of 102 provincial departments in 600 pages; not surprisingly they found many unexplained problems in such a detailed budget.<sup>13</sup>

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12 Cheng Peng, 'Applause Rang when the Work Report Failed to be Approved', <http://news.sina.com.cn/c/2001-08-09/324307.html>, 9 August 2001.

13 Zhang Li, 'How to Spend the 22 Billion Yuan Government Expenditure', *South Weekend News*, 23 January 2003.



## **2. Structure and Functions of LPCSC**

Standing committees are established only within those LPC at or above the county level. The relationship between a standing committee and its local Congress is similar to that at the national level. A LPC at or above the county level elects and has the power to recall members of its standing committee, which is responsible and reports its work to the LPC at the corresponding level (Constitution Art. 103). Like its counterpart at the national level, however, LPCSC is also empowered 'to direct or conduct the election of deputies to' and 'convene sessions' of its LPC (Local Organic Law Art. 44 Cls. 2-3). In practice, since LPC are much smaller than the NPC, they tend to play more roles than its national counterpart vis-à-vis their standing committees; at least, they are institutionally capable of doing so if they choose to.

Similar to the NPCSC, the LPCSC meetings are convened by its chairman and held at least once every other month (Local Organic Law Art. 45). They shall discuss and decide on major issues in all fields within its jurisdiction, supervise the work of the government, court and procuratorate at the same level, annul inappropriate decisions and orders of the government at the same level and inappropriate resolutions of the LPC at the next lower level, appoint or remove local officials within the limits of its authority prescribed by law, primarily the Local Organic Law (Art. 44), and when its LPC is not in session, recall individual deputies to the people's congress at the next higher level or elect them to fill vacancies (Constitution Art. 104).

Article 41 of the Local Organic Law also defines the size of the LPCSC. While an average size of a provincial LPC is about 50 members (maximum 85), that of the LPC for a city divided into districts is about 30 (maximum 51), and that of a county LPC is around 20 (maximum 35). Besides the council of chairmen of the LPCSC and local government, five or more members of the LPCSC above county level and three or more members for the LPCSC at county level may jointly submit a bill or proposal to its standing committee within its scope of functions and powers (Local Organic Law Art. 46). When the standing committee is in session, the same number of members may also submit written proposals for addressing questions to the government, court or procuratorate at the same level (Art. 47). And the council of chairmen or a group of at least one-fifth of the standing committee members may submit a proposal for organizing an investigation committee on specific questions, which shall be submitted to the plenary meeting for decision (Art. 52).

### **HOW TO MAKE DEMOCRACY WORK**

The institutional design of the People's Congresses is, to be sure, far from being perfect, but it can work to some extent if the constitutional rules were

given minimal respect and enforcement. Besides the institutional arrangements outlined above, the 1982 Constitution also provides quite a few rights for individual deputies, ones typically provided for in a democratic constitution. Deputies may not be held legally liable for their speeches or votes at its meetings (Constitution Art. 75, Organic Law of the NPC Art. 29). No deputy to the NPC or LPC at or above the county level may be arrested, placed on criminal trial, or subjected to any other restrictions of personal freedom without the consent of its Presidium or, when the Congress is not in session, without the consent of its Standing Committee (Constitution Art. 74, Organic Law of the NPC Art. 30). If a deputy to the LPC of a township or town is arrested, placed on criminal trial, or subjected to any other restrictions of personal freedom, the executing organ is required to immediately report the matter to its LPC. The effects of these provisions are rendered nugatory, however, by the political control of deputy activities, the institutional impediments to the deputy capacities and, most importantly, ubiquitous meddling of the electoral processes.

### **1. From Supremacy to Rubber Stamp**

With the constitutional mandate to exercise the supreme state powers for the people, deputies to the People's Congresses are given many legislative and supervisory functions. The freedom of their activities is severely limited, however, by the leadership of their own institutions, and one can feel such limitations from Article 19 of the Organic Law of the NPC, which provides that the standing committee shall 'organize deputies' to the LPC at or above the county level to carry out activities when it is not in session. Deputies to the LPC at or above the county level may, 'in line with the unified arrangements made by the standing committee', carry out inspections on the work of the State organs and relevant units at the same or lower levels; and the standing committee shall, upon requests by deputies, 'make arrangements for deputies' to the people's congresses at the same or higher levels to conduct on-site inspections in their respective localities, who may put forward proposals, criticisms or opinions to the units inspected, 'but shall not deal with the problems directly' (Art. 21). With most off-session activities prearranged by their standing committees, deputies to the people's congresses at all levels are reduced to mere symbolic roles, and 'inspections' have become occasions for sham display of local achievements, even opportunities for tourism and banquets.

To be sure, there are active deputies who refuse to limit themselves to the official arrangements and exercise the constitutional functions on their own. Yao Lifa, a deputy to the LPC of Qianjiang city (Hubei province), was a good

example.<sup>14</sup> Since he was elected in the late 1990s, he quickly activated the local political atmosphere. In 1998, he discovered through his own investigation that the local teachers were denied subsidies for more than 100 million Yuan, and organized 4000 teachers to petition the city government for remedy. Next year, he was informed by his constituency that the city education commission intercepted donations for relieving the Yangtze River flood, which were forwarded to the adequate place only after the event was exposed. In 2000, he organized several city deputies to inspect the taxi sector, during which the city government was found to have exacted over 2 million Yuan of the illicit user fees. In a session in the same year, he drafted a proposal against the proposed consolidation of three cities, which would have created positions for cadres retired from the provincial departments at the expense of wasting huge amount of financial and agricultural resource. The proposal was co-signed by over half of the city deputies and sent directly to the State Council, effectively putting an end to the proposed consolidation.

Yao did what was precisely a competent deputy should have done for his people, but the LPC leaders quickly saw him as a 'controversial figure' because he liked to act on his own initiatives rather than limiting himself to the officially organized activities. They reminded him of the deputy duty, which in their minds was 'to help the government to resolve difficulties and reduce worries, not to add troubles to it'. And he suffered extreme hardship without following their advices. In December 2002, when the locality was in the process of villagers committee election, he was physically assaulted for taking a document explaining relevant policy from the city bureau of civil affairs without its consent. He edited and printed a brochure named 'villagers should decide who should be elected village officials', essentially a popular explanation for the Organic Law of Villagers Committee, and distributed it among the local peasants, all at his own expenses. Surprisingly, the city press and publication bureau denounced it as an 'illegal publication', punished him with a fine of 8000 Yuan, and ordered him to recall all copies of the brochure and hand them over for destruction.

Eventually Yao was denied opportunity for reelection. No sooner he left than the LPC of Qianjiang city lost its vitality and fell back to the 'rubber stamp' status.

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14 Huang Guangming, 'The Reality of a Plebeian Deputy', *South Weekend News*, 16 January 2003.

With the recent emphasis of 'organized activities' explicitly spelled out in the revision of the Law on Deputies to the NPC, the already small number of active deputies of Yao's type will further decrease, and the already dysfunctional people's congresses will be further deactivated.

## **2. Toward a Professional Legislature?**

The inactivity of deputies is attributed not only to political control of the ruling party, but also to institutional impediments that deprive them time and energy in exercising their constitutional powers. In essence the people's congress is by all standards an anachronistic institution reminiscent of the House of Lords in the medieval England, except without the honor and status of that House derived from its nobility. Most deputies and members of the standing committees, except very few leaders, undertake their legislative obligations in part-time capacity, and are thus necessarily preoccupied by their primary occupations, from which their salaries are derived. The Organic Law of the NPC does require that 'the unit to which the deputy belongs must ensure him the needed time' in order to participate in the arranged activities (Art. 31) and that the performance of the deputy functions should be 'regarded as normal attendance' for his wage and benefit purposes (Art. 32); 'Funds for deputy activities shall be included in the financial budget of the governments at the corresponding levels' (Art. 33), and 'the state shall, as necessary, provide them with round-trip travelling expenses and requisite material facilities or subsidies' (Local Organic Law Art. 36). But such requirements are obviously insufficient to make the deputies' ends meet and to counterbalance the disincentive for active performance of deputies' constitutional duties.

Take Yao Lifa, again, as an example, who had to halt his regular occupation at the city education commission in order to actively engage in the congressional duties and open a small gas store in order to support his own livelihood.<sup>15</sup> Every year he spent several thousand Yuan on travelling, phone conversation, material productions, and guest receptions, all out of his own expense. He once applied to be a professional deputy with the state salary, but his application was firmly rejected. Although there are active personalities of his type in China, the part-time and non-professional nature of deputies make such a position

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15 Chen Chuyue, 'The Legislative Path of the Legislator Yao', <http://www.xici.net/b26696/d8497520.htm>.

extremely irrational to take, except for those whose true purpose is to make use of the political connections it may bring them for their own benefits. To make deputies perform their due obligations as prescribed by the Constitution, the nature of the deputies' positions must undergo a fundamental change.

In 2003, the regime headed by Hu Jintao and Wen Jiabao briefly experimented limited 'professionalization' (专职化, *zhuanzhi hua*) of the NPCSC. Twenty Standing Committee members quit their primary occupation and became full-time members in charge of legislation. Yet this reform was not followed, and the scope of a professional NPC or its Standing Committee has so far failed to be expanded. In summer of 2010, Luojiang county of Sichuan province openly experimented local professional deputies, who established personal studios for receiving constituent complaints, but such apparently benign local experiments were speedily brought to halt by the conservative NPCSC, which revised the Law on Deputies to the NPC as a restrictive response to the individual initiatives of active local deputies.<sup>16</sup> Apparently the professionalization of people's congresses, vital for democracy to work in China, still has long road to travel.

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16 'The First Studio of Full-time Congressional Deputy Was Halted', *The First Finance Daily*, 31 August 2010.

# The Relationship between the Constitutional Court and the Supreme Court in Indonesia

*Dr. iur. Sebastian Köbler<sup>1</sup>*

## A. INTRODUCTION

**T**he Indonesian legal system is often described as an 'unguided chaos'.<sup>2</sup> It is characterised by Indonesia's cultural diversity and different legal sources and traditions. Therefore, the indigenous law (*hukum adat*) still applies today in the island country that is inhabited by 240 million people of all five world religions.<sup>3</sup> Because of the Dutch colonial rule, the Indonesian legal system is furthermore influenced by a continental European style. In addition, religious law, '*hukum islam*', applies to members of the respective religious community and therefore conflicts arise with the general statutory law.

This cornucopia of different sources has led to a legal system of conflicting rules and norms and thus, it is difficult to appraise it from a bird's eye-view. Within the process of resolving these conflicts of law, the Indonesian Constitutional Court and the Supreme Court play important roles. Being crucial elements of the Indonesian legal system it is their task to develop practical solutions and correct flaws caused by legislations by consistent writing of judgements. However, the competence of the courts and the acceptance among the population differ significantly.<sup>4</sup> There are also overlaps regarding to jurisdiction that cause conflicts. These issues will be subject of the last part of this paper.<sup>5</sup>

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1 The author worked as a legal clerk at the German Embassy in Jakarta/Indonesia in summer of 2011.

2 *Bowen, Islam, Law and Equality in Indonesia*, Cambridge 2003, p. 4.

3 <http://botschaft-indonesien.de/de/indonesien/bevoelkerung.htm> (not available anymore).

4 While the Constitutional Court has a high reputation, the majority of the population is critical about the Supreme Court; Compare *Stockmann, The New Indonesian Constitutional Court*, Jakarta 2007, p. 99.

5 See E.

## B. CONSTITUTIONAL ROOTS AND DEVELOPMENT

The Supreme Court and the Constitutional Court are codified in the Indonesian Constitution (*Konstitusi*). However, this was not always the case.<sup>6</sup> Rather, the current constitution had to develop on a hard road after Indonesia's independence in 1945. The original Constitution of August 18th, 1945 stipulated a Supreme Court but no separate Constitutional Court. Only four years later, on December 27th, 1949, a new constitution got ratified under the pressure of the former Dutch colonial administration. This constitution, known as the Constitution of 1950, contained the option of judicial review of ordinary law by the Supreme Court.<sup>7</sup> But within only seven months this constitution also had to be changed again after the Indonesian Legislature had recognized that the Constitution of 1950 did not satisfy the specific Indonesian requirements. That is why on August 27th, 1950 a new temporary constitution was adopted which returned to the previous reviewing function of the Supreme Court.<sup>8</sup> This temporary constitution was supposed to be legitimated democratically by adopting an amendment. Due to a lack of a qualified majority which was necessary for a constitutional amendment the former president Sukarno had to replace this version by the old Constitution of 1945 by presidential decree. Decades later, after the riots of 1998 and the disempowerment of the governing Suharto Clan, a new amendment was adopted in 1999, which was followed by three more amendments. All amendments implemented elementary principles of democracy, e.g. free and equitable elections and separation of powers.<sup>9</sup>

## C. CONSTITUTIONAL COURT

### 1. History

The Indonesian Constitutional Court (*Mahkama Konstitusi*) was founded in summer of 2003 and is codified as a constitutional institution since the Third Amendment of the Constitution. Article 24C of the Constitution of Indonesia<sup>10</sup> specifies the tasks and competences of the court.<sup>11</sup> However, the origins of

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6 The Supreme Court already existed during the colonial era, see D.I.

7 See D.I.

8 *Mahfud*, The Role of the Constitutional Court in the Development of Democracy in Indonesia, article to the World Conference on Constitutional Justice, Capetown 2009, p. 2 ff.

9 See more for the development of the Constitution: *Jimly Asshiddiqie*, The Constitutional Law of Indonesia, Selangor (Malaysia) 2009, p. 56 ff.

10 In the following named Constitution.

11 *Harjona*, The Indonesian Constitutional Court, article to the Third Regional Seminar of Asian Constitutional Court Judges 2005, p. 1.

the court can be traced back to the original Constitution of 1945 as the editors discussed the legal review of legislative acts.<sup>12</sup> After a short period of judicial review of legal acts by the Supreme Court during the time of the Constitution of 1950,<sup>13</sup> there were several attempts to establish a constitutional control. In contrast, concrete solutions were not found before the riots in 1998 and the disempowering of the Suharto regime. This post Suharto political momentum is often called *Reformasi*. However, a constitutional court was not established. According to Decree Number III/MPR/2000 the People`s Consultative Assembly (*Majelis Permusyawaratan Rakyat, MPR*) which consists of members of the two legislative branches (*Dewan Perwakilan Rakyat, DPR*, House of Representatives, and *Dewan Perwakilan Daerah, DPD*, Regional Representatives Council) was addressed to these reviewing issues. Because the judgements of the MPR originally did not have legal quality according to the aforementioned decree the constitutional protection has been uncompleted so far. Therefore, the foundation of the Constitutional Court has been enacted in 2002.<sup>14</sup> Finally, in August 2003, the Constitutional Court was founded.

## 2. Organisation and Structure

The Constitutional Court is a body of the Constitution and has a special position in the Indonesian jurisdiction, as it is neither a court of appeal nor judicial review.<sup>15</sup> The Constitution also does not statute a constitutional control of judicial acts.<sup>16</sup> Therefore, there should not be any interference between the Constitutional Court and other courts in Indonesia theoretically.<sup>17</sup>

According to Article 24C Section 3 of the Constitution the Constitutional Court consists of nine judges of whom three are propounded by the Parliament, three by the President and three by the Supreme Court. However, the appointment of the judges is made by the President who is bound to the former nominations of the Parliament and the Supreme Court.

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12 *Stockmann*, The New Indonesian Constitutional Court, Jakarta 2007, p. 7.

13 See above B. and footnote 8.

14 In the time between the date of enacting in August 2002 and the foundation in August 2003 the Supreme Court took over the reviewing tasks again.

15 *Harjona*, The Indonesian Constitutional Court and its important roles, in KAS (Konrad Adenauer Stiftung): Constitutional Review and Separation, 2009, pp. 71/72.

16 In contrast to German law, every judicial act can also be subject to the constitutional complaint to the German constitutional court.

17 More see E.III.



The Constitutional Court only consists of one Senate and is basically staffed with all nine judges. Only in exceptional cases a judgement is made by seven judges.

According to Article 22 Law 24/2003<sup>18</sup> the term of office of a judge at Constitutional Court is limited to five years and can only be extended for one term of office. The conditions for the appointment are according to Article 15 Section 2 Law 8/2011 the Indonesian citizenship, a university degree in law, at least ten years practical law experience, no conviction for indictable offences which have at least a threat of punishment of five years, no bankruptcy and a minimum age of forty-seven.

In addition, the profession of a judge at the Constitutional Court is incompatible with the job as an advocate, business man, as a member of the parliament or a political party or other public offices or services.<sup>19</sup>

### **3. Competence of Control of the Constitutional Court**

The competence of control is limited to five scopes which are enumerated in Article 24C Section 1 and 2 of the Constitution as well as in Law 24/2003 respectively Law 8/2011:

#### **a. Control of primary legislation/ judicial review**

According to chapter 8 of Law 24/2003 the constitutional control of primary legislation is assigned to the Constitutional Court by judicial review proceedings whereas the competence is limited to formal acts by the parliament. As the Supreme Court is responsible for all secondary legislation those acts are explicitly not subject to review of the Constitutional Court.<sup>20</sup>

Originally by law 24/2003 all constitutional infringements caused by parliament acts were subject to review of the Constitutional Court. As a result of the reform in 2011 the basic principle "ultra petita" has been established by Article 57 Section 2a Law 8/2011.<sup>21</sup> This means that now, the competence of control

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18 As references relate explicitly to Law 24/2003 no changes by Law 8/2011 have been made.

19 *Harjona*, The Indonesian Constitutional Court and its important roles, in KAS (Konrad Adenauer Stiftung): Constitutional Review and Separation, 2009, pp. 71/72.

20 See below D.III.

21 Law 8/2011, compare *Rachmann/Haryanto*, Jakarta Globe of June 22nd, 2011, "Constitutional Court Powers Rolled Back With Revision".

is limited on only those constitutional infringements the claimant refers to. Infringements must be specified by naming specific parts of the legislative act and specific articles of the Constitution.

It remains to be seen whether the amendment of the constitutional procedural law will withstand judicial review by itself as constitutional reviews have been already announced<sup>22</sup> and the outcome of the proceedings is erratic.

In this context a previously similar situation in the past is quite interesting in which the Constitutional Court countered the Legislature once again. Then, Article 50 of Law 24/2003 also initially limited the constitutional competence of control. By this, it was provided that only "legal acts can be subject to judicial review which were passed after the amendment of the constitution of 1945". Amendment of the constitution in the meaning of Article 50 of Law 24/2003 should be only the amendment of 1999 pursuant to the interpretation of the Legislature of this time. So the competence of the Constitutional Court was significantly limited to legal acts after the amendment in 1999. This meant de facto that all legal acts of the period of the Suharto regime and even earlier ones were excluded of judicial review included all judicial acts except the law about human rights courts.<sup>23</sup> The Constitutional Court countered this soon as it simply ignored Article 50 by letting the article remain out of the purview of judicial review. Shortly afterwards it got the chance to review Law 24/2003 at all and declared this law as unconstitutional.<sup>24</sup> Current pending proceedings will show whether the Constitutional Court repeats this controversial jurisdiction concerning Law 8/2011 again.<sup>25</sup>

In practice, the judicial review of legal acts has become most important besides to the scrutiny of elections. From the foundation in 2003 until 2008 the Constitutional Court managed 211 proceedings in total, of which 156 have been

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22 Compare *Rachmann/Haryanto*, Jakarta Globe of June 22nd, 2011, "Constitutional Court Powers Rolled Back With Revision".

23 This law is the basic for the trials in East Timor.

24 Compare *Stockmann*, The New Indonesian Constitutional Court, Jakarta 2007, p. 38 ff.

25 Based on former statements of well reputed members of the Indonesian judicial system it can be assumed that the Constitutional Court will not favor the limitation and will declare the limitation as unconstitutional again. E.g. in 2009 the constitutional judge *Harjona* said that it is a major task of the Constitutional Court to review a legal act completely and independent of the concrete complain (The Indonesian Constitutional Court and its important roles, in KAS (Konrad Adenauer Stiftung): Constitutional Review and Separation, 2009, pp. 71 ff.) Compare also the former President of the Constitutional Court *Jimly Asshidiqie*, in Jakarta Globe of June 15th, 2011, "Constitutional Court's Power To Be Limited".

judicial reviews.<sup>26</sup> In 2010 104 of 366 proceedings in total were at least judicial reviews. Therefore, judicial reviews have been the second most proceedings after the scrutiny of elections whereas those were especially common in 2010 because of the high number of regional elections in this period.<sup>27</sup>

### **b. Proceedings between Governmental Bodies/ Dispute of Authorities**

The Proceedings between Governmental Bodies are quite similar to the German *Organstreitverfahren* according to Article 93 Section 1 Number 1 Basic Law of the Federal Republic of Germany, §§ 13 Number 5, 63 ff. Constitutional Court Act. They serve as a security to the doctrine of separation of powers and the basic principle of *checks and balances*.<sup>28</sup>

### **c. Closure of Political Parties**

According to Article 24C Section 1 of the Constitution the Constitutional Court has a monopoly for the closure of political parties. It may control whether a party is constitutional or not, exhaustively and exclusively.<sup>29</sup> Substantial reasons like the national unity, the democratic system or the existence of the state are necessary to ban the party. The proceeding itself can only be initiated by the government which has not happened so far.<sup>30</sup>

### **d. Scrutiny of Elections**

As mentioned above the scrutiny of national elections is according to Article 24C Section 1 of the Constitution also a major task of the Constitutional Court. By Law 22/2007 the competence of control has been extended on regional head general elections whereby proceedings have been increased significantly<sup>31</sup>. Whereas in 2007 only 32 admissible proceedings were instituted,

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26 Mahfud, The Role of the Constitutional Court in the Development of Democracy in Indonesia, article to the World Conference on Constitutional Justice, Cape Town 2009, p. 11.

27 *Constitutional Court*, Annual Report 2010, pp. 17, 18.

28 Compare Article 61 ff. Law 24/2003 for more specified requirements of the proceeding.

29 Jimly Asshiddiqie, The Constitutional Law of Indonesia, Selangor (Malaysia) 2009, p. 482 ff.; Mahfud, The Role of the Constitutional Court in the Development of Democracy in Indonesia, article to the World Conference on Constitutional Justice, Cape Town 2009, pp. 481, 482.

30 Mahfud, The Role of the Constitutional Court in the Development of Democracy in Indonesia, article to the World Conference on Constitutional Justice, Cape Town 2009, pp. 32, 33.

31 About 94 % of the Indonesian elections in 2010 were subject of a constitutional complaint, Constitutional Court, Annual Report 2010, p. 18.

in 2010 already 230 proceedings were newly pending<sup>32</sup>. Due to its own case-law the Constitutional Court's competence of control is limited to the results of the election. If the procedure of the election is the subject of complaint the Supreme Court shall be responsible.<sup>33</sup> In 2004, also the parliamentary elections were subject to scrutiny proceedings. Twenty-three of the twenty-four parties of the parliament complained the election, whereas some were also successful. The result was a considerable redistribution of seats.<sup>34</sup>

### **e. Participation in Impeachment Proceedings**

In addition, the Constitutional Court is also a participant in impeachment proceedings of the President and the Vice-President according to Article 7A of the Constitution. In a first step the DPD has to complain to the Constitutional Court a constitutional infringement of the President or the Vice-President and also has to prove the infringement. A double qualified majority of 2/3 of the members of the DPD is necessary for the complaint: on a quorum of 2/3 of all elected members a majority of 2/3 of all present votes is required. Only when the Constitutional Court confirms the infringement, the DPD is allowed to call on the MPR in a second step which then can impeach the President or the Vice-President.<sup>35</sup> So far, no such proceeding has been instituted.<sup>36</sup>

## **4. Legal effect of the constitutional final judgement**

A judgement of the Constitutional Court is binding *inter omnes* and there is no possibility of reviewing which means there is an immediate legal effect for all Indonesian Courts and judgements.<sup>37</sup> According to Article 57 Section 1 and 2 of the Constitution, Article 58 Law 24/2003, the final judgement of a judicial

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32 *Constitutional Court*, Annual Report 2010, pp. 17, 18.

33 So said by the judge of the Supreme Court Paulus on September 7th, 2011; compare also *Mahfud*, The Role of the Constitutional Court in the Development of Democracy in Indonesia, article to the World Conference on Constitutional Justice, Capetown 2009, p. 27.

34 *Mahfud*, The Role of the Constitutional Court in the Development of Democracy in Indonesia, article to the World Conference on Constitutional Justice, Capetown 2009, pp. 28 ff.

35 *Jimly Asshiddiqie*, The Constitutional Law of Indonesia, Selangor (Malaysia) 2009, p. 482 ff; *Mahfud*, The Role of the Constitutional Court in the Development of Democracy in Indonesia, article to the World Conference on Constitutional Justice, Capetown 2009, pp. 10, 11.

36 *Mahfud*, The Role of the Constitutional Court in the Development of Democracy in Indonesia, article to the World Conference on Constitutional Justice, Capetown 2009, p. 33.

37 Compare Article 24C Section 1 of the Constitution: "The Constitutional Court shall possess the authority to try a case at final and binding and shall have the final power of decision in reviewing laws against the Constitution...".

review by Constitutional Court will cause the nullity of the legal act in question from the date of ruling on.

Formerly the Constitutional Court often avoided declaring the nullity of unclear or partial legal acts. It rather referred to its right of judicial development of law and replaced those acts by final acts created by its own or interpreted the acts in question widely in the light of the Constitution. By now, with the reform of the Constitution by Law 8/2011 the Legislature struggled against this practise. The Constitutional Court meanwhile has to delegate these cases to the parliament so that the legal act can be reformed.<sup>38</sup> Therefore, the Constitutional Court is no longer able to replace the Constitution violating acts by itself. It has to declare them null and void and delegate the case to parliament to fulfil the created legal gap which occurs by nullifying the act.

## 5. Supervising

Although the Judicial Commission<sup>39</sup> is according to Article 24B Section 1 of the Constitution and Law 4/2004 responsible for supervising the judiciary in terms of maintaining the honour and dignity of the courts in general, this does not cover the control of the Constitutional Court. This was stated by the Constitutional Court itself while referring to Legislation's official jurisdiction of Law 4/2004.<sup>40</sup> Furthermore, in the eyes of the Constitutional Court this is also mandatory for the judicial independence of the Constitutional Court. If the Judicial Commission was responsible for supervising the Constitutional Court the Court would not be able to judge independently in cases when the Judicial Commission is a party of the case.<sup>41</sup> Therefore, infringements at the inauguration of the constitutional judges shall be judged exclusively by an ad hoc Honour Council which consists of members of the Parliament, the Government, the Judicial Commission and the Supreme Court.<sup>42</sup>

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38 This reform is the preliminary highlight of the legislative attempt to limit the competences of the Constitutional Court.

39 The Judicial Commission is one of the constitutional bodies according to Article 24B of the Constitution and shall secure the honorable and dignified behavior of judges. The Judicial Commission also suggests candidates for the Supreme Court. The Members of the Judicial Commission are appointed by the President, Article 24B Section 2 of the Constitution.

40 Decision Number 005/PUU-IV/2006 of the Constitutional Court.

41 Decision Number 005/PUU-IV/2006 of the Constitutional Court.

42 Compare Law 8/2011. Formerly, the composition of the Honor Council was stated by the Constitutional Court itself, Article 23 Section 4 Law 24/2003.

## D. SUPREME COURT

### 1. History

The Supreme Court (*Makahma Agung*) has already been an established part of the Indonesian law system during the colonial administration under the Netherlands. By the end of the colonial administration it, de facto, lost its independence due to massive political and administrative influence.<sup>43</sup> This was caused due to the lack of trust of the new political class in the judiciary. Their traditional closeness to the former Dutch colonial masters made the Indonesian judiciary suspicious. That is why the government at the outset, started to restructure the judicial system in order to establish the judiciary as a loyal political part of the state.<sup>44</sup>

In the course of these efforts the hierarchies within the judiciary were tightened and a new understanding of the Supreme Court as a unilateral, covering all branches of law, highest supervisory was created. Therefore, the Supreme Court was given more and more extensive instruments to control the lower courts. It even went so far that judgements of the lower courts could be reviewed of the Supreme Court at any time and even without any complaints of the parties at its own discretion.<sup>45</sup> This right of arbitrary reviewing decisions obviously did not match with the general principle of legal force.

One more outcome of these centralising tendencies was the increasing of the power of the President of the Supreme Court. He became more and more powerful comparing to the other sitting judges. Thus, filling the position of the President with a suitable candidate ensured regime-loyal political judgements easily.<sup>46</sup>

By the end of the Suharto-regime in 1998 the European roots of the Supreme Court got revitalised. The following constitutional reforms<sup>47</sup> were mainly focused on strictly separation of powers, to secure a political independence

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43 *Pompe*, The Indonesian Supreme Court: Fifty Years of Judicial Development, Leiden 1996, p. 23.

44 *Pompe*, The Indonesian Supreme Court: Fifty Years of Judicial Development, Leiden 1996, p. 24 ff.

45 Ibid

46 *Pompe*, The Indonesian Supreme Court: Fifty Years of Judicial Development, Leiden 1996, p. 202, 203

47 See above: B.

of the judiciary, at least in theory. Today the western style framework of the constitution and the procedure law is the basis of the independence of the Supreme Court as the highest court of appeal.

## 2. Organisation and Structure

The Supreme Court is the highest court in Indonesia as per Article 24A Section 1 of the Constitution. According to Article 24A Section 2 of the Constitution, its jurisdiction includes criminal, civil, religious, military and administrative cases. It is not responsible for bankruptcy cases because this is part of the special Commercial Court. There are also special courts for finance, labour and fisheries issues.<sup>48</sup>

In total, the Supreme Court employs fifty-one judges in eight court divisions each which consist of a maximum of nine judges.<sup>49</sup> The appointment of the judges is not limited to one term. Additionally, since 2008 the age of retirement for Supreme Court judges is seventy years. This is why some critical voices talk about an oligarchy body when it comes to the Supreme Court.<sup>50</sup>

## 3. Function and Tasks

Comparing to the German *Bundesgerichtshof* the Supreme Court is not just an appellate court although Article 24A Section 1 of the Constitution provides that its function shall be judicial review.<sup>51</sup> Due to the lack of quality of the jurisdiction of the lower courts and the fragmentary and contradictory legislation, the Supreme Court extended its competence to a further instance. E.g. in the event of new facts the Court appeared as a further court of appeal on its own discretion<sup>52</sup> Concerning interpreting law, in the last 3 years the Supreme Court veered away from the western-continental legal methodology and focused instead continuously more on justice, equity and good conscience.<sup>53</sup>

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48 EKONID (AHK), *Private Law in Indonesia* (available in German), Jakarta 2010, p. 2.

49 *Legal and Judicial Research Center/Supreme Court*, *Judicial System of Indonesia*, Jakarta 2003, p. 8; *Supreme Court*, *Judicial System of the Supreme Court of the Republic of Indonesia*, Jakarta 2008, p. 55, 56.

50 *Tatak Prapti Ujijati*, *The Indonesian Update Volume III*, No. 6 2008, p. 8.

51 However, the catalogue of competences is not exclusive due to the opening clause in the end. *Lewenton*, *StAZ* 2010, 38/44; EKONID (AHK), *Private Law in Indonesia* (available in German), Jakarta 2010, p. 2.

52 *Lewenton*, *StAZ* 2010, 38/44; EKONID (AHK), *Private Law in Indonesia* (available in German), Jakarta 2010, p. 2.

53 Corruption could be a reason for this development.

However, this development cannot be compared to the Anglo-Saxon case law. The legal certainty and the predictability of legal decisions in the Anglo-Saxon law system are based on the continuous publishing of decisions. In contrary to this there is no editing or publishing of decision of the Indonesian Supreme Court on a regular basis. The judgements of the Supreme Court are generally not available for the public.<sup>54</sup> Some reform-oriented parts of the politics and the jurisdiction started to see this as a problem and attempt to improve the availability of the judgements.<sup>55</sup>

Additional to its function as the highest judicial authority, the Supreme Court is also responsible for controlling secondary legislation regarding the validity, Article 24A Section 1 of the Constitution. The competence of control is limited to check whether the secondary legislation is compatible with the enabling provisions. If the Supreme Court declares a secondary legal act as inapplicable, it is void and *inter omnes* non-binding.<sup>56</sup> In particular the following secondary legislation can be subject to control:<sup>57</sup>

- Government Ordinances replacing acts (*Perpu*)
- Pre-constitutional Government Ordinances which have explicitly been adopted
- Presidential Decrees (*Penetapan Presiden/ Penpes*)
- Presidential Ordinances based on Article 4 of the Constitution of 1945 (*Peraturan Presiden*)
- Ministerial Ordinances
- Regional or local legislation

Moreover, the Supreme Court also acts administratively. It has a duty to organize and structure the whole Indonesian judiciary.<sup>58</sup> Insofar, the Secretary of the Supreme Court acts de facto as a member of the ministry of

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54 *Pompe*, The Indonesian Supreme Court: A Study of Institutional Collapse, New York 2005, p. 435.

55 Supreme Court, Executive Summary of the 2010 Annual Report, p. 2 ff., 10 ff, 57 ff, 68 ff.

56 *Jimly Asshiddiqie*, The Constitutional Law of Indonesia, Selangor (Malaysia) 2009, p. 459.

57 Compare for more information about the hierarchy of legal acts: *Jimly Asshiddiqie*, The Constitutional Law of Indonesia, Selangor (Malaysia) 2009, p. 178 ff.

58 Indeed, the Constitutional Court is not subject to this competence.



justice, even though he is not directly responsible to the Minister of Justice, but rather to the Chief of Justice which is the President of the Supreme Court.<sup>59</sup>

The Supreme Court supervises 30 High Courts and 250 District Courts.<sup>60</sup> The Supreme Court itself is supervised only by the Judicial Commission which is more a 'moral' control. The Commission is only able to discover infringements concerning judicial behaviour or irregular office execution but it does not have the power for direct sanctions.<sup>61</sup> The Judicial Commission can only inform the administrative and prosecuting authorities and give some recommendations.<sup>62</sup>

#### 4. Problems with Corruption

Unfortunately, in practice the Supreme Court has often been involved in corruption as it made a number of questionable decisions.<sup>63</sup> Descriptively the way of a dubious judgement is written down by one of the involved judges in his minority vote: "*This verdict is a humiliation of the law... . The defendant's action could be categorized as a "corrupt practice"*".<sup>64</sup> In general, the Supreme Court is subject to significant allegations concerning transparency, competence, honesty and integrity.<sup>65</sup> That is why it is not very surprising that several NGOs

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59 *Jimly Asshiddiqie*, *The Constitutional Law of Indonesia*, Selangor (Malaysia) 2009, p. 436.

60 EKONID (AHK), *Private Law in Indonesia* (available in German), Jakarta 2010, p. 2; *Legal and Judicial Research Center/Supreme Court*, *Judicial System of Indonesia*, Jakarta 2003, p. 11.

61 Constitutional Court Decision No. 005/PUU-IV/2006; *Jimly Asshiddiqie*, *The Constitutional Law of Indonesia*, Selangor (Malaysia) 2009, pp. 464, 465; *Supreme Court*, *Judicial System of the Supreme Court of the Republic of Indonesia*, Jakarta 2008, pp. 12, 13.

62 *Jimly Asshiddiqie*, *The Constitutional Law of Indonesia*, Selangor (Malaysia) 2009, p. 464.

63 Compare *Schweisshelm*, „Halftime“ of the Government of Susilo Bambang Yudhoyono: The progress is considerable, the problems as well (available in German), FES (Friedrich Ebert Stiftung) 2007, p. 3; *Esders*, *Corruptive judiciary, impunity of Akbar Tandjung*, GOLKAR – Chair of the party and President of the Parliament, FES Asien Pazifik, Jakarta 2004, p. 1 ff.; *Weck*, *Corruption and Collusion*, KAS, *Indonesia Country Report 2010*, p. 1 ff.

64 In fact this is from the criminal proceeding against the former Chair of the Party Golkar (one of the biggest parties in Indonesia) Akbar Tandjung. He was alleged that he embezzled subsidies amounting 5 Million US Dollar during the crisis years in 1997/1998 to finance his party. In spite of seamless evidence the Supreme Court set aside the judgments under appeal of the two lower courts by specious justification. According to the Supreme Court the personal enrichment was missing, which in fact is irrelevant for the accusation of embezzlement.

65 *Tatak Prapti Ujijati*, *The Indonesian Update Volume III*, No. 6/2008, pp. 8/9, self-critical also *Supreme Court*, *Judicial System of the Supreme Court of the Republic of Indonesia*, Jakarta 2008, p. 57.

and Indonesian intellectuals emphasize the role of the Supreme Court as key institution when it comes to the fight against comprehensive corruption.<sup>66</sup>

## **E. INTERRELATION BETWEEN THE CONSTITUTIONAL COURT AND SUPREME COURT**

### **1. Basic Structure of the Relationship**

In general, the Indonesian legal system is based on the assumption that the Constitutional Court and the Supreme Court are on the same level of power. This is mainly shown by the fact that both courts are, besides the Judicial Commission, the only judicial institutions the Constitution mentions and distinguishes explicitly. According to the Constitution, the constitutional bodies operate independently of each other due to the different functions and tasks they have. However, the constitutional Legislature ignored that in practice there are interrelations between the Constitutional Court and the Supreme Court which can cause problems.

### **2. Impacts of constitutional judicial reviews on proceedings of the Supreme Court**

The relationship between both courts is especially complicated when it comes to constitutional judicial reviews of primary legislation. A declaration of unconstitutionality of a legal act by the Constitutional Court can break the back of a judgement of the Supreme Court if the legal act in question is the substantive law of a proceeding of the Supreme Court. Therefore, two questions arise in this regard:

- What impact does a declaration of unconstitutionality of a legal act have on a pending proceeding of the Supreme Court?
- What impact does a declaration of unconstitutionality of a legal act have on judgements of the Supreme Court when the legal act is the substantive law of the judgement?

#### **a. Impacts on pending proceedings**

The Indonesian Legislature meanwhile has recognized this problem and decided in cases of constitutional judicial reviews of primary legislation to break the general independence of the Constitutional Court and the Supreme Court. According to Article 53 Law 24/2003 the Constitutional Court has to inform the

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66 Compare *Tatak Prapti Ujijyati*, The Indonesian Update Volume III, No. 6/2008, pp. 8/10.

Supreme Court about a complaint of judicial review within seven days after the incoming of the complaint. The purpose of this procedure is stipulated in Article 55 Law 24/2003 whereupon the Supreme Court has to suspend all proceedings, in which the legal act of the constitutional judicial review is substantive, until the judgement of the Constitutional Court is announced. By this, the Legislature tries to secure the constitutionality of the jurisdiction in the end.<sup>67</sup>

### **b. Impacts on judgements of the Supreme Court**

In reverse of Article 55 Law 24/2003 – the Supreme Court has to suspend pending proceedings<sup>68</sup> the declaration of unconstitutionality of a legal act does not have any impact on former judgements of the Supreme Court. So, the legal force of decisions of the Supreme Court is ensured at any time. In aspects of legal protection this cannot be criticised because a party of a proceeding of the Supreme Court always has the possibility to complain a constitutional judicial review so that the legal act can be declared unconstitutional before the Supreme Court proceeding ends. Due to the aforementioned obligation of the Supreme Court to interrupt pending cases there is no danger of creating accomplished facts by a judgement of the Supreme Court before the Constitution Court decides about the constitutional questions.<sup>69</sup>

### **3. Judicial Control by constitutional complaint (of judgements)?**

In contrast to the German constitutional court law, there is no constitutional complaint of judgements in the Indonesian constitutional court law. Indeed, during the reform of the court law the Constitutional Court by itself considered to implement a possibility for individuals to complain judgments as unconstitutional before the Constitution Court. In the end, this proposal could not carry through so that only the aforementioned basic catalogue of proceedings had been left at the end of the reforms.<sup>70</sup> Therefore, an individual has not the possibility to let judicial judgements be controlled by the Constitutional Court yet. There is no constitutional control of the jurisdiction in Indonesia.

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67 To the lack of constitutional control of jurisdiction see E.III.

68 See above E.II.1.

69 Although according to the courts internal requirements (Chief of Justice's Directive No. 138/KMA/SK/IX/2009) the period of a proceeding should not exceed one year, the usual period of a proceeding is more than one year, *Supreme Court*, Executive Summary of the 2010 Annual Report, pp. 34, 35.

70 See above C.III.

#### **4. Conflict of Jurisdiction in Scrutiny of Elections**

The relationship between both courts is especially complicated when it comes to scrutiny of elections although in theory there is a straight line between them: Whereas the Constitutional Court only reviews the final result of an election, the Supreme Court is responsible to control the procedure of the election.

In practice, this distinction is mostly difficult and leads to competence conflicts and interferences. Therefore, there is a danger of contradictory judgements. In fact: How should the result of an election be controlled without checking the way and the methods of the election? Even the counting of the votes as final step for the result is a procedural issue. That is why the Constitutional Court admitted a number of proceedings of scrutiny of elections even though it also emphasizes itself that its competence of control is restricted.<sup>71</sup>

#### **5. Conflict of Jurisdiction in a Dispute of Authorities**

Today there is a new area of conflict between the apex courts in Indonesia. Basically, it is about the demarcation of competences and tasks between the three most important institutions of the Indonesian judiciary: The Constitutional Court, the Supreme Court and the Judicial Commission. Actually, in the foreground it is more a dispute between the Supreme Court and the Judicial Commission about the competence of control over the administration of the judges of the lower judicial authorities.

The Judicial Commission<sup>72</sup> derives its competencies directly from the third Amendment of the Constitution, Article 24B Number 1 of the Constitution and Law 4/2004. According to these regulations the Judicial Commission is responsible for the control of the administration of the judges of the lower judicial authorities under the aspects of honour, dignity and prestige.<sup>73</sup> According to the Supreme Court the competence of the Judicial Commission does not include technical questions upon the way of the proceedings, this is meant to be its own competence. Therefore, the key issue of the dispute is the demarcation between the procedural management and the personal exercise

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71 In 2010 the Constitutional Court admitted 230 proceedings to scrutiny elections, *Constitutional Court*, Annual Report 2010, pp. 17, 18.

72 The Judicial Commission started its work in 2005, compare *Butt*, The Constitutional Court's Decision in the Dispute between the Supreme Court and the Judicial Commission: Banishing Judicial Accountability, Sydney Law School, Legal Studies Research Paper No. 9/31 (2009), p. 11.

73 Compare *Maruarar*, Legal Basis for Appointment /Removal of Constitutional Court Judges in Indonesia, in: KAS, Constitutional Courts and Politics, Singapore, 2005, p. 157/165 ff.

of duty. The Supreme Court claims the control of any procedural behaviour exclusively whereas the Judicial Commission sees its competence cumulative to the one of the Supreme Court.

The current dispute originates from the refusal of the Supreme Court to follow the recommendation of the Judicial Commission to suspend some of its own members of the proceedings because of some infringements against the code of ethics.<sup>74</sup> Actually, the relationship between the Judicial Commission and the Supreme Court is already damaged since 2006 when the Judicial Commission burdened members of the Supreme Court publicly for the first time and requested the President to replace the whole Supreme Court, in the end without avail.<sup>75</sup> As a result, several members of the Supreme Court applied to the Constitutional Court for a review of the Judicial Commission Act<sup>76</sup>. According to them the competence of the Judicial Commission does not cover the control of the Supreme Court at all.

The Constitutional Court did only partially affirm the argumentation of the plaintiffs.<sup>77</sup> On the one hand the competence of the Judicial Commission shall also cover the control of the Supreme Court, but on the other hand the Commission shall not be responsible to review the judgements of the Supreme Court. With the decision the Constitutional Court aims to secure the independence of the complete jurisdiction.<sup>78</sup>

Now again the Constitutional Court has to deal with this dispute.<sup>79</sup> This time the proceeding will probably be initiated by the Judicial Commission which aims to settle the interferences with the Supreme Court finally by a dispute of authorities.

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74 Compare *Antaranews*, Law professor deplores Supreme Court's stand on Judicial Commission's recommendation, of September 10, 2011 (<http://www.antaranews.com/en/news/75554/law-professor-deplores-supremecourts-stand-on-judicial-commissions-recommendation>).

75 Compare Butt, *The Constitutional Court's Decision in the Dispute between the Supreme Court and the Judicial Commission: Banishing Judicial Accountability*, Sydney Law School, Legal Studies Research Paper No. 9/31 (2009), pp. 12/13.

76 Law 22/2004.

77 Constitutional Court Decision No. 005/PUU-IV/2006.

78 Compare Butt, *The Constitutional Court's Decision in the Dispute between the Supreme Court and the Judicial Commission: Banishing Judicial Accountability*, Sydney Law School, Legal Studies Research Paper No. 9/31 (2009), pp. 18/19.

79 So said by the judge of the Supreme Court Paulus on September 7th, 2011.

In terms of constitutional process law it comes firstly to the question if the Supreme Court can be a party in a dispute of authorities' process. Basically, this is not possible. Although Article 65 of Law 24/2003 has been repealed - this regulation denied the possibility of being a party explicitly<sup>80</sup> - the Constitutional Court cannot decide about the competence of control of the Supreme Court. Otherwise the independence of the Supreme Court would not exist anymore and the constitutionally separation of power between the Constitutional Court and the Supreme Court and the separation between constitutional and ordinary jurisdiction would be broken up.<sup>81</sup> A reciprocal control of both higher courts in Indonesia is not within the Constitution.

Nevertheless, even under Article 65 Law 24/ 2003 the Constitutional Court accepted the capacity to sue or be sued concerning the Supreme Court at least in cases in which judicial administrative questions were substantive, .<sup>82</sup> This exception is based on internal rules of the Supreme Court and the Constitutional Court<sup>83</sup> which were stated by mutual agreement in year 2004 due to a dispute<sup>84</sup> about the competence of control about the calculation of court fees.<sup>85</sup>

The background of this exception is the purpose of Article 65 Law 24/2003. The negated possibility for the Supreme Court to be a party in these proceedings shall prevent a substantive control of the judgements of the Supreme Court by the Constitutional Court.<sup>86</sup> But in purely administrative cases this is not necessary.<sup>87</sup> So there is no reason to deny the capacity to sue or be sued concerning the Supreme Court in these cases.

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80 Article 65 Law 24/2003, "The Supreme Court cannot be one of the parties in dispute of authorities between state institutions whose authorities are mandated by the 1945 Constitution of the Republic of Indonesia to the Constitutional Court."

81 Compare *Jimly Asshiddiqie* in: *AntaraneWS*, Law professor deplores Supreme Court's stand on Judicial Commission's recommendation, of September 10th, 2011 (<http://www.antaraneWS.com/en/news/75554/law-professor-deplores-supremecourts-stand-on-judicial-commissions-recommendation>).

82 *Jimly Asshiddiqie* in a personal interview in September 2011.

83 Compare Article 86 Law 24/2003 concerning the Constitutional Court.

84 In this case the parties were the Supreme Court and the Judicial Commission as well.

85 Compare *Jimly Asshiddiqie* in: *AntaraneWS*, Law professor deplores Supreme Court's stand on Judicial Commission's recommendation, of September 10th, 2011 (<http://www.antaraneWS.com/en/news/75554/law-professor-deplores-supremecourts-stand-on-judicial-commissions-recommendation>).

86 *Jimly Asshiddiqie* in a personal interview in September 2011.

87 *Jimly Asshiddiqie* in a personal interview in September 2011.

In fact, the core of the current dispute between the Supreme Court and the Judicial Commission is just a question of responsibility within the judicial administration. The controversial point is: who is responsible for the control of the exercise of duty of judges? The former President of the Constitutional Court, Jimly Asshiddiqie, votes for the right of the Supreme Court to be party in this dispute. From his point of view the question of responsibility is a classical administrative question.<sup>88</sup> That's why the Supreme Court should be an exceptional party in the dispute of authorities in cases like this.<sup>89</sup>

## F. SUMMARY

Under the Indonesian Constitution the Supreme Court and the Constitutional Court shall exist next to each other without any conflict. While the competence of the Supreme Court is limited to control the ordinary law, the Constitutional Court is responsible for constitutional issues exclusively. Furthermore, the Constitution does not provide the opportunity to review any judgements. That is why the Constitutional Court cannot exercise as an appeal stage which would be foreign to the constitutional system.

In addition, the Indonesian jurisdiction distinguishes strictly between the competence of constitutional and ordinary judicial review. The Constitutional Court reviews only primary legislation (parliament acts), whereas the Supreme Court reviews secondary legislation in the aspect of accordance with the enabling provision. In all these cases the decisions take effect *inter omnes*.

In contrast, the scrutiny of elections can result problematic interferences between both courts. Those are caused by the aspect that the constitution distinguishes between the control of the result of an election and the procedure of an election. This criterion is too formal and therefore not usable to define the interferences in a proper way as a mistake of the result of an election is always based on mistakes of the procedure of an election. Anyway, there has not been any greater conflict between the courts so far. Both courts always accepted the competence decisions of the other court based on and justified by the above mentioned criterions.

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88 Compare *Jimly Asshiddiqie* in: *Antaranews*, Law professor deplors Supreme Court's stand on Judicial Commission's recommendation, of September 10th, 2011 (<http://www.antaranews.com/en/news/75554/law-professor-deplors-supremecourts-stand-on-judicial-commissions-recommendation>).

89 *Jimly Asshiddiqi* in a personal interview in September 2011.

It will be seen soon in the proceedings between the Supreme Court and the Judicial Commission concerning the control of the judicial exercise of duty of the ordinary courts, in which way the Constitutional Court has the competence to control and define the position of the Supreme Court in relation to other constitutional bodies. It is also to be expected, that within these proceedings the question about the capacity to sue or be sued of the Supreme Court before the Constitutional Court will be answered finally.





# Climate Change Policy in Japan: the Role of Local Initiatives and Voluntary Approaches

Prof. Dr. Noriko Okubo\*

## INTRODUCTION

The main characteristics of the Japanese environmental policy in comparison with European countries consist of strong local initiatives and effective voluntary approaches<sup>1</sup> in cooperation with private and governmental actors. That is the so called Japanese model of public policy implementation (Japanese Model). This paper aims to explore the characteristics of the Japanese Model focusing on policies on climate change.

An evaluation of such model is deemed necessary, due to international and domestic challenges Japan has been recently facing, especially on the establishment of a low carbon society. On the international scenario, the world has been witnessing how difficult it has been to settle a new, fair and effective international framework binding major emerging economies like China to slow down their greenhouse gas (GHG) emissions. The most expressive achievement in the last decade took place in Doha over the 18th Conference of the Parties to the United Nations Framework Convention on Climate Change (COP 18). In such occasion, the terms of Kyoto Protocol have been extended until 2020. In accordance with the Kyoto Protocol, Japan had committed to reduce its GHG emission in 6%, considering 1990 levels, until 2012. However, the country withdrew its participation in the second period of the treaty since countries like China, India and Brazil were not to be obliged on any reduction target<sup>2</sup>.

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1 See also R. Watanabe, *Climate Policy Changes in Germany and Japan - A Path to Paradigmatic Policy* (2011); H. Imura / M. Schreurs, *Environmental policy in Japan* (2005); M. Schreurs, *Environmental Politics in Japan, Germany, and the United States* (2003), pp.241-261.

2 See FCCC/KP/CMP/2012/L.9.

Notwithstanding the international setback, domestically Japan has been trying to settle its trek towards a low carbon society. Back in 2004, the Japanese Government had already disclosed measures on how to reconcile environment and economy aiming at building a sustainable society. The strategy for the achievement of such objective was based on three pillars: a low carbon economy, a sound material-cycle and harmony with nature<sup>3</sup>.

Also in 2007, the Japanese Government reinforced the idea of bringing about a sustainable society by the disclosure of the document titled "Becoming a Leading Environmental Nation Strategy in the 21st Century - Japan's Strategy for a Sustainable Society"<sup>4</sup>. The document included proposals for an international framework which were submitted at the G8 Toyako Summit in 2008.

Finally, in 2009, the Cabinet, under the administration of the Democratic Party (DPJ), submitted to the *Diet* the bill "Basic Act on Global Warming Countermeasures"<sup>5</sup> bringing specific mid- and long-term goals to reduce GHG emissions. Although it has not been approved by the *Diet*, the Japanese Government had set a mid-term reduction goal of 25%, having the 1990 levels as baseline, by 2020.

Japan meant to set such goal as an international standard by a legally binding international treaty. However, this was based on the premise that all major economies should commit to achieve the same ambitious target. The COP 18 proved this is still a distant reality. The Japanese Government maintained the 25% target as a domestic reference. However, ever since the Tohoku Earthquake struck the Fukushima nuclear power plant in 2011, the achievement of such goal has been put under threat.

Aiming at avoiding similar catastrophes, except for two reactors, all nuclear power plants had their operation ceased for further inspections. That represents a severe constraint since nuclear sources correspond to 30% of all the electricity generated in Japan. The switchover to fossil fuels was necessary to compensate the lack of the nuclear energy. That not only resulted in additional fuel costs,

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3 Ministry of the Environment, Vision for a Virtuous Circle for Environment and Economy in Japan ~Toward a Healthy, Rich and Beautiful Environmentally-Advanced Country~ (2004). <[http://www.env.go.jp/en/policy/economy/vvceej.pdf#search=Vision for a Virtuous Circle](http://www.env.go.jp/en/policy/economy/vvceej.pdf#search=Vision%20for%20a%20Virtuous%20Circle)> (last accessed 3 February 2013).

4 <<http://www.env.go.jp/en/focus/attach/070606-b.pdf>> (last accessed 3 February 2013).

5 <[http://www.env.go.jp/en/earth/cc/bagwc/overview\\_bill.pdf](http://www.env.go.jp/en/earth/cc/bagwc/overview_bill.pdf)> (last accessed 3 February 2013).

but also increased GHG emissions. Also, the reconstruction of Tohoku area will seriously boost GHG if carried out in an accelerated pace and if low-carbon measures are not taken into account.

To ease the dependence on fossil fuels, the Japanese Government has been considering a series of countermeasures. As an example, the Energy and Environment Council drafted and released “the Innovative Strategy on Energy and the Environment” on 14 September 2012<sup>6</sup>. One of the pillars of this strategy is the “Realization of a society non-dependent on nuclear power as soon as possible” by promoting renewable energy. According to this document, the energy generated out of renewable sources is expected to triplicate from 110 billion kWh in 2010 to 300 billion kWh by 2030<sup>7</sup>.

Also, the Cabinet set forth the “Future Policies for Energy and the Environment” on 19 September 2012<sup>8</sup>. It states that the Government of Japan will implement policies on energy and the environment, taking into account, “the Innovative Strategy on Energy and the Environment”.

It is worth emphasizing that all mentioned countermeasures on GHG have been considered during the DPJ administration. Now, since the Liberal Party (LDP) won the general elections of 2012, there is much more uncertainty about political decisions on policy on climate change. The new government has already suggested a change of energy policy and the target for 2020.

Despite the uncertainties of both international and domestic scenarios, it is no doubt that Japan should at least comply with the target of Kyoto Protocol and at the same time reduce the dependence on nuclear energy as soon as possible. The achievement of such goal comprises a new challenge for Japanese society. In this case, will the Japanese Model, traditionally based on voluntary approaches, be sufficient to deliver the challenge?

Will more innovative and comprehensive measures be necessary?

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6 <[http://www.npu.go.jp/en/policy/policy06/pdf/20121004/121004\\_en2.pdf](http://www.npu.go.jp/en/policy/policy06/pdf/20121004/121004_en2.pdf)> (last accessed 3 February 2013).

7 Ibid., [6], p.13.

8 <[http://www.npu.go.jp/en/policy/policy06/pdf/20121004/121004\\_en1.pdf](http://www.npu.go.jp/en/policy/policy06/pdf/20121004/121004_en1.pdf)> (last accessed 3 February 2013).

## LEGAL FRAMEWORKS FOR CLIMATE CHANGE MEASURES ON NATIONAL LEVEL

The 1992 Rio Earth Summit stimulated a renewed progress in Japanese environmental policy. The new Basic Environmental Law (BEL)<sup>9</sup> was established in November 1993. The first Basic Environmental Plan was formulated in December 1994 and was revised in 2000, 2006 and 2012<sup>10</sup>.

It is remarkable to note that before the Fukushima Accident, the Energy Law, including nuclear power, was not under the Environmental Law umbrella. According to the BEL before the revision in 2012, the measures to prevent air, water or soil radioactive contamination should have been implemented under the Atomic Energy Basic Law. It is worth emphasizing that all nuclear energy related legislation namely, the "Atomic Energy Basic Law", the "Energy Policy Basic Law" and the "Nuclear Reactor Regulation Law", has been basically enforced by the Ministry of Economy, Trade and Industry. In other words, *the Ministry of the Environment was not authorized to deal with nuclear power related issues.*

Under this framework, there are laws concerning climate change such as the Act on the Promotion of Global Warming Countermeasures, and several acts related to energy saving and the promotion of renewable energy, which are outlined below.

### 1. Act on Promotion of Global Warming Countermeasures

The Act on the Promotion of Global Warming Countermeasures was established in 1998<sup>11</sup>, which was the world's first specialized law concerning climate change. The purpose of this law was to promote global warming countermeasures by formulating a plan to attain targets under the Kyoto Protocol and taking measures to promote the control of greenhouse gas emissions due to social, economic, and other activities, thereby contributing to the health and cultural life of the Japanese people, both now and in the future, as well as contributing to the well-being of all humankind (Art.1). It included the following content:

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9 <<http://www.env.go.jp/en/laws/policy/basic/index.html>> (last accessed 3 February 2013).

10 <[http://www.env.go.jp/policy/kihon\\_keikaku/plan/plan\\_4/attach/pamph\\_en-1.pdf](http://www.env.go.jp/policy/kihon_keikaku/plan/plan_4/attach/pamph_en-1.pdf)> (last accessed 3 February 2013).

11 COP3 in Kyoto in 1997 stimulated renewed progress in Japanese policy on climate change at that time. See R. Watanabe, *ibid*, pp.43-52, with regard to the negotiation process of this law.

- Responsibilities of the national government, local governments, business operators, and the general public
- Kyoto Protocol Target Achievement Plan
- Global Warming Prevention Headquarters
- National Government Action Plan
- Action Plans of Local Governments
- Appointment of Climate Change Action Officers to Promote Activities to Mitigate Global Warming
- Local Centers to Promote and Enhance Global Warming Prevention Activities
- Establishment of Local Partnership Council
- Reporting of Carbon Dioxide Equivalent Greenhouse Gas Emissions
- Quota Account Inventory

a) Kyoto Protocol Target Achievement Plan

The Kyoto Protocol Target Achievement Plan is the most important plan concerning climate change policy, which has been decided by the national government (Art.8). It shall mainly prescribe the following matters.

- (i) Basic orientation regarding the promotion of countermeasures against global warming.
- (ii) Basic matters regarding the control of greenhouse gases, which should be taken by the national government, local governments, businesses, and citizens.
- (iii) Targets regarding greenhouse gas emissions and sinks for each class and category of greenhouse gases.
- (iv) Targets regarding the implementation of measures.
- (v) Matters regarding programs by the national government and local governments.
- (vi) Basic matters regarding the National Government Action Plan and action plans by local governments.
- (vii) Basic matters regarding plans that should be formulated and announced concerning measures to control greenhouse gases related to businesses with considerably high total greenhouse gas emissions.

The current plan was revised in 2008<sup>12</sup> and the situation regarding implementation has been checked and evaluated every year.

b) National Government Action Plan and Local Action Plans

The national government shall formulate the National Government Action Plan, which prescribes measures to reduce greenhouse gas emissions and to maintain and improve the absorption of greenhouse gases with regard to its own administration and undertakings through efforts such as energy saving in governmental offices (Art.20-2).

Prefectural and municipal governments shall also formulate plans for measures to reduce greenhouse gas emissions and to maintain and improve the absorption of greenhouse gases with regard to their own administration and undertakings (Art.20-3). In addition, it is important for prefectural governments and specific municipal governments<sup>13</sup> to formulate four measures to reduce greenhouse gas emissions in their areas of responsibility:

- Measures to promote the use of renewable energy,
- Measures to promote activities by enterprises and residents to reduce GHG emissions,
- Measures to improve the local environment, such as contribute to and promote the use of public transportation and conservation of urban green space, and
- Measures to form a sound material-cycle society.

Local governments shall take into account the links between city/land use planning and action plans to reduce greenhouse gas emissions and listen to the opinions of residents and other stakeholders. Once each year, the respective prefectural and municipal governments shall announce what the situation is with the implementation of measures based on the action plans of local governments, including what the situation is with total greenhouse gas emissions.

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12 <<http://www.env.go.jp/en/earth/cc/kptap.pdf>> (last accessed 3 February 2013).

13 The Ministry of the Environment compiled "The Manual of the Action Plan for Greenhouse Gas Emission Reduction in Local Government Operations - Abridged Version (1st Edition)" to help the non-designated municipalities (the municipalities with less than 200,000 people) develop their own action plans in 2010.

c) Measures based on partnerships

A characteristic of this law is that it has various provisions to promote advocacy and partnership.

First, according to Article 20-4, local governments can organize a Consultation Council to promote the formulation and implementation of local action plans. The members of this council are officials of their own local government, other relevant administrative agencies, centers for action on climate change, officers for action on climate change, business operators, members of the general public, and people with relevant knowledge and experience.

Second, prefectural governors may delegate people to serve as officers for action on climate change who are enthusiastic and knowledgeable about promoting activities to regionally disseminate knowledge regarding what the current situation is with global warming and related countermeasures and about promoting countermeasures against global warming (Art.23). The three main tasks of these officers for action on climate change are:

- (i) Deepening understanding by the general public on what the current situation is with global warming and the importance of implementing countermeasures against global warming.
- (ii) Investigating measures to control greenhouse gases with regard to daily activities and providing guidance and advice based on such investigations to members of the general public in response to their requests.
- (iii) Supporting members of the general public who conduct activities to promote countermeasures against global warming by providing relevant information and other types of cooperation.

Third, according to Articles 24 and 25, prefectural governors may designate public corporations or NGOs as local centers to promote activities to prevent global warming and the Minister of the Environment may designate a Japan Center for Climate Change Action (JCCCA).

Fourth, another interesting method of promoting partnerships is to organize Regional Councils on countermeasures against global warming based on Article 26. Organizers and members of the council are local governments, local centers, officers for action on climate change, enterprises, experts, NGOs, and citizens. It is the task of the council to



discuss measures to take to limit greenhouse gas emissions in daily life. Council members should respect the results of the discussion. There are currently more than 520 Councils all over Japan.

As these examples demonstrate, legal provisions of national law concerning local policies on climate change are mainly based on a voluntary approach.

d) Reporting of CO2 equivalent greenhouse gas emissions

Parties specified by a Cabinet Order as producing considerably high greenhouse gas emissions in conjunction with their business activities ("specified emitters") shall report every fiscal year (FY) on matters concerning CO2 equivalent GHG emissions produced during a period specified by a Competent Ministerial Order (Art.20-2). The Minister of the Environment and the Minister of Economy, Trade and Industry shall prepare records of the matters he is notified about in computer files (Art. 21-5) and announce that information. If an announcement has been made, then any person may request the matters in the record files to be disclosed on or after the date of that announcement. Such a reporting system enabled to determine the exact amount of GHG discharged by each factory and was expected to secure more transparency of voluntary approaches by factories.

## 2. Law concerning energy saving

The most important law concerning energy saving is the Act on the Rational Use of Energy. This act was originally established in 1979 in response to the world oil crisis and has been revised several times. There are four pillars of this law; energy conservation measures for machinery and equipment, measures for factories and business establishments, measures for transportation, and measures for residences and buildings.

a) Energy conservation measures for machinery and equipment

Energy conservation measures for machinery and equipment in Japan are well known as "top runner methods"<sup>14</sup> (Art.78-81, 95). The concept underlying these methods is that fuel economy standards for vehicles and energy conservation standards for electrical and other appliances shall be set exactly the same as or higher than the best

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14 See Ministry of Economy, Trade and Industry / Agency for Natural Resources and Energy, Top runner Program: Developing the World's best Energy-Efficient Appliances (2010).

standard value for each product item currently available on the market. Manufacturers are under an obligation to comply with the standards. When Ministry of Economy, Trade and Industry (METI) finds it necessary to improve performance significantly, it shall advise or announce these improvements to the public. Non-compliant manufacturers may also have orders and penalties (under one million yen) imposed on them.

- b) Energy conservation measures for factories and business establishments  
The Minister of Economy, Trade and Industry shall establish and publicize standards of assessing business operators using energy in factories and business establishments with regard to targets for the rational use of energy and measures to be systematically taken to achieve such targets (Art.5). Large-scale factories and offices with annual energy use of 1,500 kl or more are required to conform to plan-based and voluntary energy controls. These factories and business establishments shall appoint energy managers and submit periodical reports on the use of energy (Art. 7, 13, 15). In addition, they shall prepare and submit mid- and long-term plans for measures to achieve energy conservation targets (Art.14). Establishments that have an extremely poor level of rationalization of energy use are instructed to prepare and submit a rationalization plan, implement the plan, and take other relevant steps after on-the-spot inspections have been conducted (Art.16, 95).

- c) Measures for transportation  
The Minister of Economy, Trade and Industry and the Minister of Land, Infrastructure, Transport and Tourism shall establish and publicize standards to assess freight and passengers carriers with regard to targets for the rational use of energy in transportation and measures to be systematically taken to achieve such targets (Art. 52, 59, 66).

Specified large carriers shall submit plans (Art. 62) or mid- and long-term plans (Art. 55) and periodical reports on energy use (Art. 56, 63). When the Minister finds the rational use of energy to be significantly deficient in terms of the criteria, it shall advise and announce this to the public or order operators to conform and penalize them (Art. 57, 64, 95).

- d) Measures for residences and buildings  
The Minister of Economy, Trade and Industry and the Minister of Land, Infrastructure Transport and Tourism shall announce guidelines for the design and construction of residences (Art. 73). The clients of these,

who will construct or extensively modify designated buildings, and their owners shall submit notifications of energy-saving measures and be instructed to follow these. Where a person who has received instructions has failed to take the measures as instructed without justifiable grounds, the administrative agency may, after hearing the opinions of people with relevant knowledge and experience concerning buildings, order to take these measures (Art. 75).

The Minister of Land, Infrastructure, Transport and Tourism may with respect to a new specified residence constructed by a constructor whose volume of construction exceeds the number recommend him to improve the performance of new residence, by setting targets for improvement (Art. 76-6). Where a residential constructor has failed to take the measures as recommended without justifiable grounds, the Minister may order to take the measures.

These measures formulated by this law are a sort of combination of voluntary approaches and regulative approaches. However the standards or guidelines have been basically respected by people concerned without order or recommendation.

### **3. Laws concerning promotion of renewable energy**

There are several laws concerning the promotion of renewable energy such as the Act on Special Measures Concerning New Energy Use by Electric Utilities, the Law on the Promotion of the Use of Non-fossil Energy Sources and Effective Use of Fossil Energy Materials, and the Basic Law on the Promotion of Biomass Utilization.

The Act on Special Measures Concerning New Energy Use by Electric Utilities in 2002, known as the Renewables Portfolio Standard Act (RPS Act) has played an important role in promoting renewable energy through the establishment of minimum amounts of electricity generated by new energy sources (new-energy-sourced electricity) that should be used by electric utilities. "New energy" in this act means solar photovoltaic (PV), wind power, hydraulic power, geothermal and biomass, heat produced with biomass and other renewable resources. The Minister of Economy, Trade and Industry shall set a target every four years for the use of electricity from this new energy that obligates the operators of electric utilities ("Use target for new-energy-sourced electricity") for an eight-year period (Art. 3). The operators of electric utilities shall notify the Minister every year of the standard amount of electricity they use from the new energy, which they plan to use for a one-year period and

other matters, and use the standard or a greater amount of renewable-energy-sourced electricity in each FY (Art. 5). However, the percentage of renewable energy in the sources of power was just 3.2% in 2010 (preliminary figures). This is much less than that used by other countries such as Germany (10.4%), France (8.4%), China (11.9%), and the USA (5.8%)<sup>15</sup>.

Consequently, an "Act on Purchase of Renewable Energy Sourced Electricity by Electric Utilities"<sup>16</sup> was established in 2011. This act obliges electric utilities to purchase electricity generated from renewable energy sources based on a fixed-period contract at a fixed price. Electric utilities are obliged to allow grid connections and execute contracts as required for the purchases. This feed-in-tariff (FIT) scheme has started on July 1, 2012<sup>17</sup>.

The FIT rate and contract period shall be determined corresponding to the type, form of installation, and scale of renewable energy sources. The Minister of Economy, Trade and Industry shall notify electric utilities of the rate and period on the basis of opinions from a newly established independent committee. The Minister has approved each electricity utility to request its customers to pay additional charges (surcharges for renewable energy) on electricity prices proportional to their electricity usage to cover the costs required for the purchases.

## **LEGAL FRAMEWORKS FOR CLIMATE CHANGE MEASURES ON LOCAL LEVEL**

### **1. Importance of local initiatives in Japanese environmental policy**

General administration in Japan is exercised by the national government and local governments. This does not mean a federated system, but Japan's Post war Constitution has provided for a positive relationship between central and local governments under the rubric of localized self-government. Article 92 says, "Regulations concerning organization and operations of local public entities shall be fixed by law in accordance with the principle of local autonomy". Article 94 states, "Local public entities shall have the right to ... enact their own regulations within law". Japan is presently divided

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15 Source: International Energy Agency, *Energy Balances of OECD Countries, Energy Balances of Non-OECD Countries*. See also Agency for Natural Resources and Energy, Ministry of Economy, Trade and Industry, *Energy in Japan 2010* at <<http://www.enecho.meti.go.jp/topics/energy-in-japan/english2010.pdf>> (last accessed 3 February 2013).

16 <[http://www.meti.go.jp/english/policy/energy\\_environment/renewable/pdf/summary201109.pdf](http://www.meti.go.jp/english/policy/energy_environment/renewable/pdf/summary201109.pdf)> (last accessed 3 February 2013).

17 See <[http://www.enecho.meti.go.jp/info/event/121203event/1-1\\_METI\\_Murakami.pdf](http://www.enecho.meti.go.jp/info/event/121203event/1-1_METI_Murakami.pdf)> (last accessed 3 February 2013).

into 47 prefectural governments, which are themselves divided into 1,727 municipal governments. Big cities such as Osaka and Kyoto also belong to the prefectures of Osaka or Kyoto. However, they have stronger authority than other municipal governments.

Local initiatives have had a long history in the field of Japanese environmental policy. After World War II, especially during the period from 1955–1970, the Japanese economy entered a period of vast growth. This led to serious pollution and caused extremely tragic events that damaged human health and life such as the outbreak of Minamata disease. It was not central government that took initiatives and measures against pollution at that time, but local administrations.

The public elected environmentally minded, reformist politicians to official local positions in the 1960s and 1970s in areas where most people were pro-environment. First, politicians implemented strong administrative leadership based on pollution-control agreements. For example, the city of Yokohama arrived at a gentlemen's agreement with Electric Power Development Company in 1964. The power company under this agreement accepted controls on pollution emitted by a new thermal power plant it planned to build. This action by the city was the outgrowth of a large citizens' movement that began in the 1960s to control sulfur-dioxide and demonstrated the possibility of controlling pollution emitted by big corporations. This agreement influenced other local governments as well. By 1974, 1,332 local governments in 40 of Japan's 47 prefectures had concluded some sort of agreement with corporations to control pollution. These agreements suffered from problems and limitations from legal points of view; for instance, what is the legal nature of these agreements? If they are gentlemen's agreements, how could corporations be forced to conform when they were non-compliant? They actually did achieve results in most cases. Voluntary approaches in combination with agreements or "administrative guidance", i.e., "gyousei shidou", has been effective in most cases despite there being no power for enforcement. This is one of the most well-known traditional characteristics of Japanese administration.

There has, however, been another approach. For example, Tokyo established a Pollution Control Ordinance in July 1969 that represented a decree that was tougher than national laws. The central government claimed it was unconstitutional, but ultimately knuckled under in the face of public opinion that was steadfastly anti-pollution. Other local governments gradually proceeded with their own measures that were equally effective such as controlling the total pollutant load over wide areas that were introduced into national laws several

years later. Therefore, current wide-spread opinion is that local governments can set down tougher standards, e.g., emission standards, than national standards when the national standards are regarded as minimum standards for the whole region and local ordinances do not counteract the objectives of other national laws. National environmental regulations are usually interpreted as minimum standards. As a result, almost all local governments have their own range of environmental ordinances and they still play an important role in environmental protection.

## **2. Local climate change policy based on own ordinances**

Several local governments, especially big cities such as Osaka, Kyoto, and Kobe, have set up the same mid-term goal as the national target, i.e., a 25% reduction in greenhouse gases, and originally established local ordinances concerning countermeasures against global warming also continue to play an important role.

Local ordinances that are concerned with global warming can basically be classified into five types.

- Type 1: Ordinances concerned with protection of the global environment (e.g., Ibaragi Prefecture),
- Type 2: Ordinances concerned with protecting the living environment (e.g., Tokyo metropolitan area),
- Type 3: Ordinances concerned with countermeasures against local global warming (e.g., Kyoto, Osaka, and Nagano Prefectures),
- Type 4: Ordinances concerned with establishing a low carbon society (e.g., Shiga Prefecture), and
- Type 5: Ordinances concerned with natural energy (e.g., Konan City).

Types 2 and 3 are currently popular, and type 3 ordinances have especially been increasing to emphasize and to clarify the stance of local governments on high level targets to reduce greenhouse gas emissions. Kyoto as the city where the Kyoto Protocol was signed put into effect a local ordinance concerning global warming countermeasures in April 2005, becoming the first city in Japan to enact type 3 ordinances. The immediate goal for this ordinance was to reduce the amount of greenhouse gases in the city of Kyoto by 10% by 2010 from 1990 emission levels. This exceeded the obligation for the 6% reduction set for Japan as a whole by the Kyoto Protocol. This ordinance was revised in 2010. The city of Kyoto has presently set a mid-term goal to reduce greenhouse gas emissions by 25% by 2020 from the 1990 level and by 40% by 2030.

Remarkable climate change policies at the local level are explained in what follows:

1. Promotion of efforts by private enterprises to achieve CO<sub>2</sub> reductions
  - a) Systems by business establishments to report programs/plans to formulate their own measures to reduce greenhouse gases  
Systems by business establishments to report programs/plans are a most popular measure introduced by local ordinances for private enterprises to take the initiative in actively reducing emissions. According to these systems, large business establishments emitting greenhouse gases are required to submit plans to reduce greenhouse gases and many local governments have also obligated them to announce these plans to the public. However, these systems have not given enough incentives to the business sector in most cities.

Therefore, the Tokyo Metropolitan Environment Security Ordinance, for example, has strengthened its reporting system by expressing that these plans shall be evaluated, rated on a five-point graded scale, and announced by the authority (Art.6-8-4). The authority of the metropolitan government can give them advice and guidance based on the results of reviews and publicize the results obtained from evaluations. Almost all business establishments under this upgraded system have partially succeeded in reducing their own greenhouse gas emissions by, for example, positively introducing highly-efficient equipment. Business establishments that have gained AA ratings account for a quarter of the total<sup>18</sup>.

- b) Cap & Trade system targeting large business establishments emitting CO<sub>2</sub>  
Even though Tokyo has adopted a strengthened report and evaluation system, there is much room for about three-quarters of business establishments to reduce gases that have gained A and A+ ratings, because they have so far attained a relatively lower rate of these reduced gases. The targets for reductions by these business establishments during the planned period remained at 3–4% on

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18 Tokyo Metropolitan Government, Tokyo Climate Change Strategy - A Basic Policy for the 10-Year Project for a Carbon-Minus Tokyo - (2007), pp.7-8. See <[http://www.kankyo.metro.tokyo.jp/en/attachement/tokyo\\_strategy\\_full.pdf#search=Tokyo Climate Change Strategy](http://www.kankyo.metro.tokyo.jp/en/attachement/tokyo_strategy_full.pdf#search=Tokyo%20Climate%20Change%20Strategy)> (last accessed 3 February 2013).

average<sup>19</sup>. That was why Tokyo introduced its own emission trading system in 2010, which was the world's first urban Cap-and-Trade program (Art.5-11-5-25). No emission trading system that is legally binding has been introduced at the national level in Japan. Consequently, it was also the first local initiative established by the biggest municipal government in Japan. Tokyo set a cap at the city level for large commercial and industrial buildings by focusing on end users of energy. The owners of these buildings were required to meet their targets to reduce emissions through on-site measures for energy efficiency or an emission trading scheme. This program allowed owners the flexibility of choosing methods they thought would be the most effective.

This city's Emissions Trading System (Tokyo-ETS) covers large CO<sub>2</sub>-emitting facilities that consume energy of more than 1,500 kiloliters per year, i.e., it applies to about 1,300 facilities, about 1,000 office buildings, and 300 factories. Transactions between large business establishments will be promoted under this system, but large business establishments are also expected to purchase reductions achieved by smaller business establishments that often have more potentials for reducing CO<sub>2</sub>, but fewer financial resources to carry out environmental investigations. In so doing, smaller business establishments will be able to promote and support the adoption of measures to conserve energy<sup>20</sup>.

## 2. CO<sub>2</sub> Reductions by Households

Emissions from households including private cars and general waste represent about 20% of entire CO<sub>2</sub> emissions. Household appliances that use enormous amounts of power are air conditioners, refrigerators, lighting, and television. Measures for households to reduce power consumption have mainly been based on voluntary approaches in combination with published methods.

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<sup>19</sup> Ibid. p.7.

<sup>20</sup> Tokyo Metropolitan Government, Tokyo Climate Change Strategy - Progress Report and Future Vision (2010) pp. 10-12 at <[http://www.kankyo.metro.tokyo.jp/en/attachement/tokyo\\_climate\\_change\\_strategy\\_progress\\_report\\_03312010.pdf#search='Tokyo Climate Change Strategy progress report'](http://www.kankyo.metro.tokyo.jp/en/attachement/tokyo_climate_change_strategy_progress_report_03312010.pdf#search='Tokyo%20Climate%20Change%20Strategy%20progress%20report')> (last accessed 3 February 2013) and On the Path to a Low Carbon City - Tokyo Climate Change Strategy - (2011), pp.5-7.



a) Introduction of system to check energy efficiency by individual households  
Local governments have promoted campaigns for each household to check the amount of energy they consume in domestic use in cooperation with JCCCA as a first step. JCCCA gives advice and makes proposals on how individual households can conserve energy. Some local governments are awarding subsidies to individual households who introduce any environmentally friendly facilities such as solar panels on the roofs of residential houses.

b) System of Labeling Energy Efficiency of Home Appliances

A system of labeling the energy efficiency of home appliances was first initiated by the city of Kyoto and this has spread to local governments across the country. Companies that sell electronics appliances such as air-conditioning equipment under this system must attach labels to them indicating the energy consumed by the equipment, and they must be able to provide an explanation of its energy efficiency. This became a national program in October 2006 and is being implemented throughout the country.

c) Bio-diesel fuel project

The “Nanohana Project” has been promoted in cooperation with citizens and NGOs in several areas. Nanohana means a canola flower in Japanese and the seeds of the plant are used to make cooking oil. If the used oil is simply poured down the drain, this imposes increased burdens on sewage processing plants. Therefore, citizen’s groups have begun projects to produce bio-diesel fuel from used canola oil. This activity has been supported by local governments and has spread nationally.

There are currently approximately 1,200 bases for collecting used cooking oil in the in the city of Kyoto and they have constructed a bio-diesel fuel plant. Many Kyoto residents have been participating in the collection efforts. The collected oil is refined at the fuel conversion plant, and the resulting fuel is used to power 220 garbage collection vehicles and 95 of the city’s buses. Many estimates have been made that the use of this fuel will reduce the annual emissions of CO<sub>2</sub> by approximately 4,000 tons.

### **3. Local Rules for Reductions in CO<sub>2</sub> in Urban Development**

One of the salient characteristics of urban activities in big cities such as Tokyo and Osaka is the progress in active urban development primarily in central areas. New office buildings, apartment houses, and other structures will be built there over the next several decades. The environmental efficiency of

these structures will determine the magnitude of environmental load in big cities for long periods. The framework of Japan's present legal system for city planning does not contain provisions for energy or reductions in CO2 emissions. Therefore, it is necessary for local governments to formulate their own local rules to reduce greenhouse gases.

a) Certificate Program for Energy Efficiency

A certificate program for energy efficiency has been introduced by several local governments in the category of large condominiums. Building owners under this program are required to present a certificate of energy efficiency in accordance with the condominium indication of environmental efficiency when conducting transactions and leasing condominiums. This is one of the systems of labeling energy efficiency and it is a simple approach that effectively appeals to end users. This process is expected to lead to improved environmental efficiency by condominiums.

b) Systems for developers to report programs/plans

Many big cities have introduced systems for developers to report programs/plans. Developers under these systems are required to submit plans to reduce greenhouse gases and authorities may give them advice. The aim of these programs is to create a real estate market in which greener buildings are valued more highly than those that are less green.

In addition, Tokyo has recently strengthened this system and adopted a new Green Building Program<sup>21</sup>. Developers under this system are required to conserve more energy than that with the existing level of requirements to increase the energy conserved by new buildings based on guidelines. Before an applicant applies for a building permit, he/she is required to submit a building environmental plan. This plan, along with rated results for efficiency, is published on a website. Environmental efficiency is assessed by focusing on twelve items in four categories (energy, resources, natural environment, and the heat-island effect) and a three-point rating system is applied.

#### **4. Energy law and its lack of transparency and public participation**

Energy legal system plays an important role in the field of policy on climate change. However Japanese Energy Law lacks provision on public

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21 Tokyo Metropolitan Government (2011), *ibid.* pp.7-8.

participation. That brings a clear contrast with the Act on Promotion of Global Warming Countermeasures under the competence of the Ministry of the Environment. This lack of transparency in the Japanese energy policy is one of the barriers to promote renewable energy.

(1) Scenario before Fukushima accident

a) Lack of guarantee of public participation at policy making level

The Atomic Energy Basic Law was enacted on December 19, 1955. The Law states that the use of nuclear energy should aim at securing energy resources for the future, promoting science and industries, and thereby contributing to the improvement of both welfare of human society and the living standard of the people.

It also specifies that the utilization of nuclear energy shall be promoted under the following principles:

- (a) limit to peaceful purposes,
- (b) assure its safety, under democratic administration,
- (c) transparency of the results, and
- (d) promotion of international cooperation.

In order to achieve the democratic administration, the Article 4 establishes the Atomic Energy Commission and the Nuclear Safety Commission. The mission of the Atomic Energy Commission is to 'plan, deliberate and decide' on basic policies or strategies for the promotion of nuclear energy. In 1955 the "Law of Establishment of the Atomic Energy Commission" was enacted to regulate its competence and organization. Since its establishment, the Commission has been playing the central role for the basic atomic policy.

Although regarded as important to a democratic administration of nuclear issues, the Commission lacks transparency and limit public participation in its process. A concrete example of this situation was formulation of the Framework for Nuclear Energy Policy (2005), which is regarded by the government as a fundamental guideline for research, development and utilization of nuclear science and engineering. Since the Atomic Energy Basic Law does not set forth any procedural provision concerning public participation, the Framework was drafted behind closed doors. What is worse is that there is not a single legal provision about this Framework. The Commission has set it up only based on its comprehensive competence to plan, deliberate and decide basic

nuclear policies. The Commission requested for public opinion to draft Framework for Nuclear Energy Policy. However, it is not sure how deeply the submitted opinions have been taken account.

Another factor limiting the public participation is the procedure of appointment of its members. The Atomic Energy Commission is composed of five commissioners appointed by the Prime Minister with the Diet's consent, for a three years term. However, there is no provision about the requirement or qualification of the members. It is true that some members come from the civil society, such as a representative of consumer association etc. but most of the appointees are specialists who have close relationship with nuclear industry. Such an unbalanced composition disrupts the democratic role of the Commission in the nuclear administration.

b) Lack of guarantee of public participation at the decision making level  
According to the "Nuclear Reactor Regulation Law", before Fukushima Accident, the installation of a nuclear reactor for electric power generation purposes should be preceded by an authorization of the Minister of Ministry of Economy, Trade and Industry. In the authorization procedure, the Minister must consult the Atomic Energy Commission and the Nuclear Safety Commission.

The Nuclear Safety Commission was responsible for the development of the intellectual infrastructure for ensuring nuclear safety and disaster countermeasures. It was composed of five commissioners appointed by the Prime Minister with the Diet's consent for a three years term. All members were specialists of the nuclear power and there was no representative from the social scientist or the civil society.

As usual, there is no legal provision assuring the participation of the public on nuclear power plants installation decision making process. In this sense, those against the installation of nuclear power plants have no other alternative than to organize protests or file lawsuits.

However, the street protests in Japan did not attract the sympathy of the public, especially in the field of nuclear energy. Furthermore, lawsuits have also been proving ineffective. There have been more than 15 nuclear power plant cases brought to the courts and all of them have been rejected. Also, judicial control over technical issues of nuclear reactors has been limited.

c) Energy Policy Basic Law

The purpose of the “Energy Policy Basic Law” is to promote not only measures on energy supply and demand, but also to contribute to the environmental preservation and the sustainable development (Art. 1). In this sense, the government shall formulate a basic plan on energy supply and demand in order to promote measures on energy supply and demand on a long-term, comprehensive and systematic basis (Art.12). Although there is no provision concerning public participation in this process, the government has actually requested for the Public Opinion on its draft decided in 2010.

The only provision on the public involvement on energy issues refers to the efforts the government should make to disseminate information for

- (a) for allowing citizens to increase their interest in energy, and
- (b) for raising public awareness on energy efficiency.

(2) Changes after the Fukushima Accident

a) Restructuring legal framework on nuclear energy

The Fukushima Accident led to a revision of the legal framework on atomic energy in 2012. As a concrete result, the Nuclear Safety Commission was abolished and a new independent regulatory commission was established, the Nuclear Regulation Agency. In Contrast the Atomic Energy Commission still exist like before.

This new body, Nuclear Regulation Agency, is under the Ministry of the Environment authority and its 5 Commissioners are appointed by the Prime Minister with the Diet’s consent for a three years term. Since the Minister of Economy, Trade and Industry was sacked from the nuclear administration, this new Agency is now the competent body to authorize the installation of nuclear reactor. In this context, the Basic Environmental Law was also revised. Now, any case of environmental pollution caused by nuclear power plants is also under control of Ministry of the Environment.

This wave of legal revision was not enough to change the provisions on public participation, which are still lacking in the “Atomic Energy Basic Law” and the “Nuclear Reactor Regulation Law”. However the process of decision making on energy policy is actually changing.

## b) Anti-Nuclear Movements

After the Fukushima Accident, a wave of anti-nuclear movements has emerged in three ways: Public demonstrations, referenda and litigation.

As for public demonstrations, protests spread all over the country, and, sometimes, they happen in regular basis. That is case of the rallies held every Friday before the premier's residence in Tokyo. Even a coalition of anti-nuclear groups has been formed. Organizers regard this situation as a fundamental change, since it is not usual for Japanese people to take action on political issues.

It is worth emphasizing the massive demonstrations over June and July, 2012, against the government decision to restart two nuclear reactors at the Oi Plant in Kansai, western Japan. Many of the protests gathered more than 20,000 people in Tokyo. Activists managed to collect more than 8 million signatures for denuclearization through an online petition by the end of October, 2012. The wide range of participants, such as young people and housewives, and the continuation of the regular demonstrations led to the meeting between citizens' groups and the then Prime Minister Yoshihiko Noda on August 14, 2012.

In addition to the rallies, some groups have been campaigning for a national referendum about the future of nuclear power. However, in Japan there is no law concerning general national plebiscite or referendum. Also, under the Constitution, the *Diet* is the sole law-making organ of the State. Therefore, as a non-binding instrument, such referendum aims at pressuring the *Diet* and the Government to reflect the will of the Japanese citizens in energy related public policies.

In some cities, such as Tokyo and Osaka, some initiatives have tried to demand a local level referendum based on the "Local Autonomy Law". According to the Paragraph 1 of Article 74, one fiftieth or more of electors are empowered to jointly present a petition to the chief of the local level executive demanding enactment, amendment or abolition of a bylaw.

Many local referenda based on such referendum bylaws have been held concerning important issues such as nuclear power plant

construction, relocation of American military bases and sluice-gate dams. In the past, three local referendums have been held concerning the construction of nuclear power plants. The first one was held in city of Maki Town (now part of Niigata City) in 1996. About 60% of voters were against the construction of a nuclear power plant. The Mayor of this town respected this result and didn't sell the public land to the electric company. As a result, the company has given up the plan.

However demand for enactment of bylaw has not always been successful. In some important cases, the local assemblies have not adopted the bill of a referendum bylaw. In these cases referenda have been blocked by the assemblies. After the Fukushima Accident, no one bill based on referenda has passed.

Finally, some environmental groups and citizens' initiatives are trying to prevent nuclear power plants to resume operation via litigation. As an example, in 2012, more than 250 residents of Fukui, the Kansai and Gifu filed a lawsuit in Osaka District Court against Kansai Electric, seeking an injunction to stop the operation of units 3 and 4 of Kansai Electric's nuclear power plant in Oi Town.

c) New Energy Policy

The Energy and Environment Council, was established in June, 2011, to formulate the Innovative Strategy for Energy and the Environment. Such document was released on September 14, 2012, and its composition had a great share of public participation.

Since the beginning, the government has emphasized that this new energy strategy is not a "strategy formulated only by a small number of people" and it should be a "strategy built upon national discussions held throughout Japan" where the Government and its people should consider to individual point of views, anxieties as well as hopes with open minds, and deep understanding of each other's various opinions.

Concretely, the Government made estimations based in three scenarios considering the reduction of the dependence on nuclear energy and fossil fuels, as well as the reduction of CO2 emissions<sup>22</sup>.

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22 <[http://www.npu.go.jp/policy/policy09/pdf/20120720/20120720\\_en.pdf](http://www.npu.go.jp/policy/policy09/pdf/20120720/20120720_en.pdf)>.

The scenarios are (1) 0% nuclear dependence rate, (2) 15% nuclear dependence rate, and (3) 20-25% nuclear dependence rate by 2030. Based on such scenarios, the Council called for the national discussions held throughout Japan.

The following three methods of public consultation have been adopted;

- (a) Public hearing sessions
- (b) Solicitation of public comment; and
- (c) Deliberative Polling.

The results are as following: public hearings were held at 11 places national wide. Written comments summed 89,000 submissions. And more than 80% of submitted opinions supported the 0% scenario.

That was the first deliberative polling in Japan that was commissioned by the Government to get input on a subject of national importance before a decision. Citizens are often uninformed about key public issues. Conventional polls represent the public's surface impressions of sound bites and headlines. According to the Center for Deliberative Democracy of Stanford University<sup>23</sup>, the Deliberative Poll is an attempt to use television and public opinion research in a new and constructive way. The polling process reveals the conclusions the public would reach, if people had the opportunity to become more informed and more engaged in important issues.

This Deliberative Polling was conducted by the Center for Deliberative Poll at Keio University. It was commissioned by the national government and conducted with the active advice of the Center for Deliberative Democracy at Stanford University. The 285 participants in the weekend of deliberation were drawn from a larger random sample of registered voters throughout the country totaling 6,849. They gathered in the room at Keio University in Tokyo and spent most of two days deliberating about the key policy choices. They were demonstrably more informed and changed their views in certain key respects. After deliberation more than 50% of the participants have supported also the 0% scenario.

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23 See <<http://cdd.stanford.edu>> (last accessed 3 February 2013).



After the public consultations process finished, the Government held a meeting to compile and assess and its results. Based on that assessment, the Council drafted and released the Innovative Strategy for Energy and the Environment on 14. September 2012<sup>24</sup>. One of the pillars of this strategy is the "Realization of a society non-dependent on nuclear power as soon as possible." The Cabinet set forth the Future Policies for Energy and the Environment on 19. September 2012<sup>25</sup>. It states that the Government of Japan will implement policies on energy and the environment, taking into account of "the Innovative Strategy on Energy and the Environment", while having discussions in a responsible manner with related local governments, the international community and others, and obtaining understanding of the Japanese public, by constantly reviewing and reexamining policies with flexibility.

## 5. Perspectives

The Japanese Model is also reflected on the climate change policy. It means that the achievement of its GHG reduction goals depends on voluntary approaches not only in the industrial segment, but also in the household one.

In fact, there is a multitude of measures that might encourage companies and individuals towards a low-carbon based business models or life styles. An adequate campaign advocating and educating people on issues like saving electricity, use of public transportation and bicycles and waste reduction is likely to bring concrete results in the long run.

Voluntary approaches based on guidelines set forth by national and local governments, typical of Japanese administration, do not always mean weakness or inefficiency. In most cases, these have resulted in actual GHG cuts.

In addition, since a low-carbon economy implies more efficient use of natural resources triggering an operational cost cut, several industrial sector have already formulated their own voluntary emissions cutting action plans in coordination with the Japan Business Federation (Keidanren).

It seems that such initiatives have worked before the Tohoku Earthquake. The Japanese general emissions have declined by 4.1% in 2009 (1990 emissions as baseline). The industrial sector alone largely reduced its emissions in 2008

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24 Ibid., [6].

25 Ibid., [8].

and 2009, a down by 7.3% compared to 2007. Until 2009, this sector had already cut 20% of its emissions (1990 emissions as baseline).<sup>26</sup>

One of the merits of voluntary approaches is to provide the business sector with wide discretion and flexibility for imaginative and original measures. In this context, it can be said that the Partnership Principle (*Kooperationsprinzip* in German) is effective. However if the transparency lacks, these approaches will achieve less effectiveness because the average citizen will not be able to know how eco-friendly each company indeed is. Therefore, the combination of voluntary approaches and informative measures (e.g. eco-labeling) is important.

Furthermore, transparency is also a principle to be observed. The business sector in Japan normally negotiates about voluntary targets only with the government in closed rooms in order to avoid regulatory measures. This makes it difficult to evaluate the fairness of such targets. Therefore, the process of consultation between the business sector and the government should be improved to make it more transparent, especially by strengthening the access to information and public participation.

In addition, there is now a grave uncertainty about the energy policy caused by unprecedented disasters. The ratio of energy generated by nuclear power has been suddenly cut and the ratio of fossil fuels energy has increased as a consequence of the Tohoku Earthquake. Despite of the grid fuel switchover, the overall power generation has decreased. To avoid electricity shortages, a 15% saving target has been uniformly set to any electricity consumer (large/small users and households) by the central government. Such goal has been achieved and no blackouts happened in Japan in 2012.

However, according preliminary figures Japan's total GHG in 2011 increased by 3.6% (1990 emissions as baseline). The key driver for the rise in the emissions was the increased fossil fuel consumption in response to the expansion of thermal power generation<sup>27</sup>.

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26 Japan's National Greenhouse Gas Emissions for Fiscal Year 2009, < [http://www.env.go.jp/en/headline/file\\_view.php?serial=412&hou\\_id=1580](http://www.env.go.jp/en/headline/file_view.php?serial=412&hou_id=1580)> (last accessed 3 February 2013).

27 Japan's National Greenhouse Gas Emissions for Fiscal Year 2012 (Preliminary Figures), < [http://www.env.go.jp/en/headline/file\\_view.php?serial=482&hou\\_id=1895](http://www.env.go.jp/en/headline/file_view.php?serial=482&hou_id=1895)> (last accessed 3 February 2013).

Therefore it is also necessary to consider the introduction of various additional measures, including regulatory procedures, to secure energy supply along with the promotion of the use of renewable energy and energy conservation. It is especially important to make additional efforts to introduce decentralized and diverse renewable energy sources (e.g., solar power roof, small hydroelectric power generation) throughout Japan.

The Government introduced the FIT system as a first step and a new environmental tax as measures against global warming, in force since 2012. These measures were originally based on the German and European models. The best mix of the Japanese and EU models is worth further consideration.

Local governments have historically played a great role in advancing environmental policies throughout Japan. The general tendency toward deregulation however has made this difficult, especially for small local governments. Big cities such as Tokyo and Kyoto have introduced stronger measures, but other smaller local governments would not be expected to introduce such policies without any support or pressure from outside. Therefore, close cooperation between local governments and the central government are also important to promote local initiatives.

Finally, voluntary approaches by individuals and public participation in the decision-making process on the energy policy should be further encouraged. The aforementioned process of public consultation after the Fukushima Accident shows a new stage of public participation in the field of energy policy in Japan. However, there are still uncertainties about its future developments. While the reorganization of the administrative structure concerning nuclear energy was legally regulated, no legal provisions for public participation in the field of energy law has been admitted yet.

Methods of public consultation adopted after the Fukushima Accident, such as deliberative polling, were certainly important for an effective public participation. However, it does not necessarily mean that the right to participate in policy-making or decision-making processes, from now on, is guaranteed to the public. That is because the Government still has a wide discretion on how to manage and arrange the public participation process. Also, it has been difficult to judicially control the procedural failure, such as those involving insufficient public participation.

The unprecedented Fukushima Accident has raised public awareness on energy issues. The new big wave of citizens' anti-nuclear movements forced

the government to take actions to promote public participation. Since such participation is not an obligation prescribed in the Japanese Law, the Government may cease at anytime to grant people the opportunity to intervene in nuclear affairs. Thus, now it has become important to amend the legal framework to make the public participation be guaranteed by law. It might take time, but it is an inevitable and an indispensable process to construct a sustainable society.

As we near a decade of partnerships and collaborations on a number of issues ranging from Judicial reform to the development of Constitutionalism in South-east Asia and from Human Rights in ASEAN to Climate Change, the time has come to take a bird's eye view on the work and progress of the Rule of Law programme.

Towards this end, we felt the need to compare the diverse legal systems within the region from both an Asian and European perspective. Thus *Rule of Law: Perspectives from Asia* was conceptualized inviting legal scholars from Asia and Europe, many of whom are our partners in key projects, to share their thoughts on any issue encompassing the 'rule of law' in Asia.

*Rule of Law: Perspectives from Asia* is a compilation of seven articles that showcases the wide-range of topics and issues that the Rule of Law programme, Asia seeks to address through various projects and provides a glimpse of the scope and limitations of the programme. The authors from six different countries offer an insight into some of the most current and debated issues within the broad subject matter of 'rule of law' in Asia.

The articles blend both theoretical frameworks and the practical on-ground experiences in the respective countries of the topics the authors have chosen to discuss, deliberate and offer recommendations for action in the future.

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