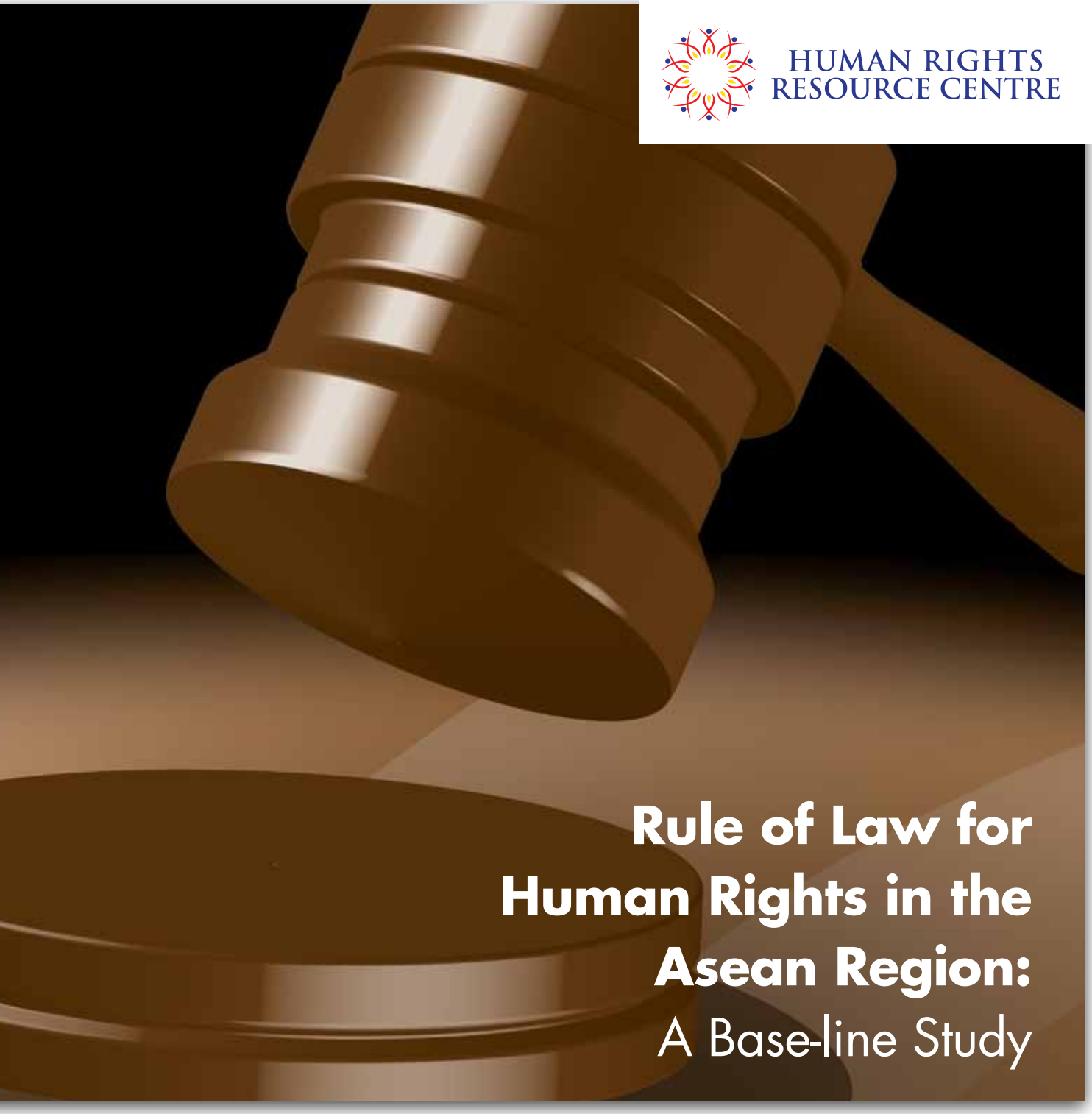

HUMAN RIGHTS RESOURCE CENTRE

Rule of Law for Human Rights in the Asean Region:
A Base-line Study

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Human Rights Resource Centre

The Human Rights Resource Centre and its foundation were officially registered by the Ministry of Law and Human Rights on 31 March 2010 (Keputusan Menteri Hukum dan Hak Asasi Manusia Republik Indonesia Nomor: AHU.1173.AH.01.04.Tahun.2010). It is a not for profit foundation under Indonesian law. The Centre has been established with the independence necessary to implement its own research, training, and educational agenda. While the HRRC is hosted at the University of Indonesia, it has an autonomous structure and independent funding to ensure its independence and regional focus. The HRRC is a genuinely regional institution that will employ in its operations the most capable and qualified individuals from across ASEAN.

The Humans Rights Resource Centre (HRRC) has been designed to support the work of ASEAN human rights bodies, by providing an independent forum for regional experts to engage in research and capacity-building, as well as training and teaching that addresses human rights issues in ASEAN. Its overarching goal is to develop regional networks of experts on human rights issues in ASEAN in order to promote a better understanding of human rights in the region.

The HRRC is headed by Marzuki Darusman as Chairman/ Executive Director and includes a core research staff with direct experience in leading regional projects in human rights training, research, and education. The HRRC's activities will be concentrated in three areas: (i) research, analysis and data collection/presentation; (ii) training and capacity-building; and (iii) support for educational programs at universities throughout the region.

The HRRC encompasses a network of Partner and Affiliated Institutions that taps into the region's rich academic research community. Current Partner Institutions include the University of Indonesia, University of the Philippines (Philippines), the University of Malaya (Malaysia), the Law School of the National University of Singapore, Singapore Management University, and Paññāsāstra University of Cambodia. The Islamic University of Indonesia, which has a strong interest in human rights education, is the HRRCA's first affiliate institution.

Through collaboration with these partner and affiliated university-based institutions across ASEAN, the HRRC's research, training, and capacity building projects will contribute to the development of human rights throughout the region.

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Foreword

I am pleased to present the Human Rights Resource Centre's (HRRC) first regional baseline study on Rule of Law for Human Rights in the ASEAN Region. Given the importance accorded to the Rule of law in the ASEAN Charter, I believe this is an important contribution towards the ASEAN Vision 2020 that envisions that "social justice and the rule of law reign."

The HRRC, a newly established non-profit organization dedicated to the furtherance of research in human rights in the ASEAN region, initiated the Rule of Law for Human Rights Baseline Study in ASEAN Member States to undertake an inventory of the implementation of rule of law in each ASEAN Member State, including how it defines and interpret the 'rule of law' and its relationship with 'good governance' and 'human rights'. This deals on how States interpret the rule of law in its national judicial, legislative, and executive branches of government.

The Study involves a range of secondary sources including surveys on the opinions of experts and the general public, information from the police, courts, attorneys and other institutions, NGO reports, and legislations. These sources led to an academic analysis on the overall implementation of the rule of law, which hopefully results in a better understanding of ASEAN practices of the Rule of Law. This Study also serves as a baseline for future studies that would produce recommendations for effective evaluation, empirical research and more effective measures for fully implementing the commitment of the ASEAN Charter.

Marzuki Darusman
Executive Director

The HRRC would like to express its gratitude to all committed researchers from ASEAN Member States for their dedication and hard work in concluding individual country reports. The HRRC would also like to thank all the institutions that have contributed to the conduct of this Study namely; the United States Agency for International Development (USAID), Canada International Development Agency (CIDA), the British Embassy, the Switzerland Embassy in Indonesia, The Asia Foundation, the MacArthur Foundation, the War Crimes Studies Center and Marccus Partners.

Jakarta, May 2011

Marzuki Darusman

Executive Director

Rule of Law for Human Rights in the Asean Region: A Base-line Study

Mahdev Mohan[i]

A. Designing The HRRC Rule of Law Study

a. Introduction & Methodology

1. 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 base-line study 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.

2. Our study is primarily based upon the country-specific findings of our team of expert researchers and research co-ordinators. Since this is an early-phase base-line study, we have relied mainly on reviewing existing secondary sources – such as administrative data, judicial decisions, legislation, regulations, official government statements, and third-party reports – and left more in-depth empirical studies for later.

3. Our study 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. Our country reports 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.

4. 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.[ii]

5. Since the law is more than a code of black-letter laws on paper, our researchers have 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.

6. Essentially, this base-line study 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 a preliminary sketch: a point of reference for further 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.

7. This study provides an overview of approaches to measuring the rule of law; describes the rule of law central principles and indicators employed; surveys preliminary findings from the individual ASEAN member states; and discusses challenges and lessons learned through the process. It concludes by proposing recommendations for further research, analysis, and capacity building.

b. Overview of Rule of Law in ASEAN

1. Before we present an analytic summary of our findings, we shall set out the orthodoxies of the rule of law as "just being aware of the basic elements of the rich definitional debate surrounding the rule of law should improve the practice of strengthening it".[iii] We will then consider ASEAN's departure from these orthodoxies with the adoption of its Charter and other recent developments.

2. 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.[iv] According to Joseph Raz:

   "The 'rule of law' means literally what it says: the rule of the law".[v]

3. 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",[vi] 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]".[vii]

4. 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.[viii] 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".[ix] 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".[x]

5. 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 N*egara 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.[xi] 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.[xii]

6. 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".[xiii] 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.

7. 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."[xiv]

8. 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.[xv]

9. 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."[xvi] 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.

10. 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.[xvii]

11. 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*?[xviii] 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".[xix]

12. 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.

13. The rule of law can then be 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.[xx] 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".[xxi]

14. Conversely, the rule of law can also be used as a *shield* by developing countries wishing to diminish or derogate from the importance of individual human rights, and conveniently lend legitimacy to self-styled communitarian precepts. 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 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 linchpin of our society, when in reality it 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*".[xxii]

15. 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.

16. Finally, there is a risk that a 'thick' conception of the rule of law which invests the law with the responsibility to delver 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. [xxiii]

17. 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. 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 crimped 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.[xxiv] To have meaning in ASEAN, the rule of law cannot be an abstract notion. It be independently framed, have practical benchmarks for assessment, and be analyzed in the context of its real-world implementation. Our study aims to begin to do this.

c. Rule of Law in ASEAN: From 'Competing Conceptions' Toward a Common Conceptual Framework

1. Traditionally, the rule of law has not been viewed as a unifying concept amongst ASEAN countries, but as a "protean" one.[xv] 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.[xvi]

2. 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.[xxvii]

3. 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". [xxviii] Professor Peerennboom 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".[xxix]

4. 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.

5. 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.

6. In other words, our study 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.

7. We will consider each of these recent developments in turn.

d. Rule of Law, Human Rights and Democracy: Interlinked and Mutually Reinforcing Principles

1. 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.[xxx]

2. 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" (emphasis inherent).[xxxi]

3. 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".[xxxii]

4. 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".[xxxiii]

5. Mr. Annan's definition and its subsequent reiterations (collective the "UN Definition") are significant in several respects.

6. First, while the UN definition of the rule of law is certainly not perfect,[xxxiv] 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.

7. 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." [xxxv]

8. 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.

9. 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.[xxxvi]

10. 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".[xxxvii]

11. 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.

e. Rule of Law, Human Rights & Democracy: Unprecedented Inscription in the ASEAN Charter

1. 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.

2. 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".[xxxviii] 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".[xxxix]

3. 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 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.

4. 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".[xl]

5. 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".[xli]

6. 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".

7. 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".[xlii]

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

1. 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".[xliii]

2. 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".[xliv]

3. 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.[xlv] 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.

4. 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"[xlvi] is 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').

5. 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". [xlvii]

6. 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.

7. 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.

B. Studying The Rule of Law in ASEAN

a. Four Central Principles of the Rule of Law in ASEAN

1. 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.[xlviii]

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

3. 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.

4. 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.

5. 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.

6. 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. Each country-specific report answers indicator questions relevant to these central principles, mindful that *de jure* laws must considered together with their *de facto* outcomes to get a more accurate snap-shot of the rule of law. For the full list of indicator questions, see Appendix A.

7. 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.

b. ASEAN Rule of Law Grid

1. We have captured the results of our base-line study in an ASEAN Rule of Law Grid, see Appendix B. To be clear, this grid is not designed to reduce data into a single summary score to "rank" country performance. In fact, the grid is merely a tabular representation of our primary findings in relation to the central principles identified above and ASEAN countries' reception of core international human rights and humanitarian law instruments. Of course, our country researchers have also undertaken a textured and detailed qualitative analysis of the data they have gathered as evinced in their annexed individual country reports. An analytic synthesis of their findings and the thematic conclusions which emerge are presented in the following sections.

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

1. 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.

2. As the ASEAN Rule of Law Grid indicates (see Appendix B), 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.

3. Even royalty are subject to the law in Malaysia. 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. 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. 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.

4. 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, Vice-President, Union Ministers, Attorney-General and Chief Justice and other judges 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.

5. 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. 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. As the ASEAN Rule of Law Grid indicates (see Appendix B), this data is unavailable in several ASEAN countries.

6. 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.

7. 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."[xlix] 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."[l]

8. 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.

9. 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. 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, and emergency powers grant the Sultan absolute and unfettered 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.

10. 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.

11. 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.

12. In Thailand, in addition to criminal penalties, government officials and agents also face civil liability for misfeasance of public authority. 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, the Minister of Internal Affairs or the Governor, 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.

13. 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. 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.

14. 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 holing the various branches of government accountable, and ways in which the capacity of judiciary systems and legal infrastructure can be built, supported and enhanced.

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

1. As the ASEAN Rule of Law Grid indicates (see Appendix B), 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.

2. There is wide variation ASEAN in regard to accession to major human rights conventions related to the rule of law.

3. 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.

4. 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 depravation 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*.

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

6. 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.

7. Similar criticisms have been made of a variety of laws in Myanmar, Laos and Cambodia. 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.

8. 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 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.

9. 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.[li]

10. 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.[lii] Unlawful arrests or arbitrary detentions are criminal offences.[liii] Yet there, been many well-documented cases of extra-judicial execution, revenge killing, enforced disappearance, torture, illegal arrest and illegal search and seizure.[liv] Initiatives by former

President Arroyo to investigate the extra-judicial killings are indicative of governmental acknowledgement of these problems.[lv] 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.

11. 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.[lvi]

12. 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.

13. 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.

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

1. 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.[lvii] Likewise, according to the Thai constitution, a law will only come into operation after being published in the Government Gazette.

2. 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 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, Laos and Vietnam also have relatively clear processes for the enactment of laws through a national assembly (or parliament). Legislative proceedings in Thailand and the Philippines 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.

3. 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.

4. In Brunei, however, legislative proceedings are not open to the public. There is also limited access to legislative proceedings in Indonesia, which makes it difficult for the general public to observe the law making process. Attempts to develop dialogue amongst Myanmar's newly formed Parliament on draft laws will need to be closely monitored to determine how much progress has been made since military rule.

5. 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.[lviii] Various ASEAN countries have adopted different mechanisms to address this issue.

6. 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 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.

7. 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 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. In the Philippines, the Public Attorney's Office provides free legal services to indigent accused persons. However, there 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.[lix]

8. 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.

9. Currently, it has proven difficult for our expert researchers 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.

10. 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 channelled 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.

11. 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.

12. 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. 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.

13. 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 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.

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

1. 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.

2. 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".[lx]

3. 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.

4. 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.[lxi]

5. 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.

6. 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.

7. It is well-settled that security of tenure and commensurate remuneration help to ensure that judicial officers administer justice without fear or favour. As the ASEAN Rule of Law Grid indicates (see Appendix B), 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.

8. 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. Similar measures aimed at strengthening the judiciary have been introduced in the Philippines, including the adoption of a new judicial code of conduct by the Supreme Court. Similarly, the "one roof" policy in Indonesia prevents the government form 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.

9. 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. 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.

10. 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.

11. Our base-line study 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.

12. 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. 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.

C. Conclusions & Recommendations

1. 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 hand protection of human rights, thereby providing the foundation for a conceptual framework.

2. 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.

3. Our study 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.

4. But enhancing the rule of law is easier said than done. It requires a whole range of measures considered in the preceding synthesis section. 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.

5. Our base-line study has turned up the following conclusions, which we hope will guide further research.

6. First, this study 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.

7. Our study 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.

8. 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.

9. 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.

10. 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.

11. In other words, we no longer need to articulate 'thick' *conceptions* of the rule of law, as the schema referred to in paragraph 27 above suggests, but we need to have qualitatively 'thick' *descriptions* of the primary challenges to and modalities of rule of law implementation. Building on this base-line study, effective strategies for rule of law implementation must be informed by further in-depth research.

12. Second, to enable further research, the compilation and documentation of relevant data is key. In several instances, our country experts were unable to acquire authoritative data because it was secret or unavailable. 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. This information should be housed in repositories or databases which enable policy-relevant research.

13. 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 sorts of issues that such a study should focus on are enumerated in the recommendations below.

14. Fourth, the very process of identifying researchers to undertake this base-line study on rule of law in ASEAN has revealed 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.

15. 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 obligations to protect 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.

16. 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 study distils will prove useful. This study provides a conceptual base-line of central principles and practices related to the rule of law, and identifies indicative benchmarks for assessing the rule of law 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 rules-based community of shared values and norms.

Appendix 1 - Indicators

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

1. Are the powers of the government are defined and limited by a constitution or other fundamental law?

2. Can the fundamental law may be amended or suspended only in accordance with the rules and procedures set forth in the fundamental law?

3. Are government officials and agents, including police and judicial officers, accountable under the law for official misconduct, including abuse of office for private gain, acts that exceed their authority, and violations of fundamental rights?

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

1. Are the criminal laws and procedures, including administrative rules that provide for preventative detention or otherwise have penal effect, published and widely accessible in a form that is up to date and available in all official languages?

2. Are these laws accessible, understandable, non-retroactive, applied in a consistent and predictable way to everyone equally, including the government authorities, and consistent with the other applicable law?

3. Do these laws authorize administrative/preventative detention without charge or trial during or outside a genuine state of emergency?

4. Do these laws protect accused persons from arbitrary or extra-legal treatment or punishment, including inhumane treatment, torture, arbitrary arrest, detention without charge or trial and extra-judicial killing by the State? Is the right to habeas corpus limited in any circumstance?

5. Do these laws provide for the presumption of innocence?

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

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

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

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

10. Do these laws prohibit the use of coerced confessions as a form of evidence and do they guarantee the accused person's right to remain silent?

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

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

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

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

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

3. Are the thresholds for legal standing before courts clearly specified, not discriminatory and not unduly restrictive?

4. Are judicial hearings and decisions public and made readily available to affected parties?

5. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law?

6. Do persons have equal and effective access to judicial institutions without being subjected to unreasonable fees or arbitrary administrative obstacles?

7. Are the laws effectively, fairly and equally enforced? Are persons seeking access to justice provided proper assistance?

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

9. Do the laws provide for and do prosecutors, judges and judicial officers take measures to minimize the inconvenience to witnesses and victims (and their representatives), protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect their interests?

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

1. Are prosecutors, judges and judicial officers appointed, re-appointed, promoted, assigned, disciplined and dismissed in a manner that fosters both independence and accountability?

2. Do prosecutors, judges and judicial officers receive adequate training, resources, and compensation commensurate with their institutional responsibilities? What percentage of the State's budget is allocated for the judiciary and other principal justice institutions, such as the courts?

3. Are judicial proceedings conducted in an impartial manner and free of improper influence by public officials or private corporations?

4. Are lawyers or representatives provided by the court to accused persons, witnesses and victims competent, adequately trained, and of sufficient number?

5. Do legal procedures and courthouses ensure adequate access, safety and security for accused persons, prosecutors, judges and judicial officers before, during and after judicial, administrative, or other proceedings? Do they ensure the same for the public and all affected parties during the proceedings?

Appendix 2 - ASEAN Rule Of Law Grid

	Brunei	Cambodia	Indonesia	Laos	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
PARTY TO CORE HUMAN RIGHTS AND HUMANITARIAN LAW INSTRUMENTS										
Convention on the Prevention and Punishment of the Crime of Genocide	X	X		X	X	X	X	X		X
Convention on the Elimination of all forms of Racial Discrimination		X	X	X			X		X	X
International Covenant on Civil and Political Rights (ICCPR)		X	X	X			X		X	X
Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)		X					X			
Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), aiming at the abolition of the death penalty							X			
International Covenant on Economic, Social and Cultural Rights (ICESCR)		X	X	X			X		X	X
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR)										
Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)	X	X	X	X	X	X	X	X	X	X
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)		X	X				X		X	
Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment		X	X				X		X	
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment		X								
Convention on the Rights of the Child	X	X	X	X	X	X	X	X	X	X
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict		X	X				X		X	X
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography		X	X				X		X	X
Rome Statute of the International Criminal Court		X			X		X			
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families		X					X			
Convention on the Rights of Persons with Disabilities		X		X	X		X		X	
Optional Protocol to the Convention on the Rights of Persons with Disabilities		X								
International Convention for the Protection of All Persons from Enforced Disappearance			X							
1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	X	X	X	X	X	X	X	X	X	X

1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	X	X	X	X	X	X	X	X	X	X
1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War	X	X	X	X	X	X	X	X	X	X
1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War	X	X	X	X	X	X	X	X	X	X
1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)	X	X		X						X
1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)	X	X		X			X			
2005 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)							X	X		
United Nations Convention against Transnational Organized Crime		X	X	X	X	X	X	X	X	X
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children		X	X	X	X	X	X		X	
Protocol against the Smuggling of Migrants by Land, Sea and Air		X	X	X		X	X		X	
1951 Convention relating to the Status of Refugees and the 1967 Protocol		X					X			
1954 Convention relating to the status of Stateless Persons							X			
1961 Convention on the Reduction of Statelessness										
UNESCO Convention against Discrimination in Education	X		X				X			X

CENTRAL Principle 1 – The government and its officials and agents are accountable under the law

Does the Constitution guarantee the separation of power?	No	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Are fundamental rights guaranteed by a constitution or other fundamental law?	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Is there internal security or emergency legislation which limits fundamental rights and authorizes detention without trial?	Yes	No	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes

CENTRAL PRINCIPLE 2 – Laws and procedure for arrest, detention and punishment are publicly available, lawful and not arbitrary										
Do laws prohibit torture or other cruel and inhumane treatment in detention?	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes
Do laws provide access to legal counsel?	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Do laws require accused persons the right to be informed of the precise charges against them in a timely manner?	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Do these laws guarantee accused persons the right to be tried without undue delay?	Yes	Yes	Yes	Yes	No	No	Yes	No	Yes	Yes
Are criminal and penal laws publicly available?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Do these laws adequately provide for the right to appeal against conviction and /or sentence to a higher court according to law?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

CENTRAL PRINCIPLE 3 – The process by which the laws are enacted and enforced is accessible, fair, efficient and equally applied										
Are legislative proceedings held with timely notice and are open to the public?	No	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Are official drafts of laws and transcripts or minutes of legislative proceedings made available to the public on a timely basis?	No	Yes	No	No	Yes	No	Yes	Yes	Yes	No
Are judicial hearings and decisions public and made readily available to affected parties?	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Are all persons equal before the law and are entitled without any discrimination to the equal protection of the law?	No	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes

CENTRAL PRINCIPLE 4 – Justice is administered by competent, impartial and independent judiciary and justice institutions										
What percentage of the State's budget is allocated for the judiciary and the operation of the courts?	Unknown	0.82%	9.15%	Unknown	Unknown	Unknown	0.87%	0.66%	4.688%	Unknown
Does the judiciary have tenure?	Yes	Yes	Yes	No	Yes	No	Yes	Yes	Yes	No
Are there legal procedures that ensure access, safety and security for all parties before, during and after judicial proceedings?	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	No	Yes
Availability of continuation of legal education?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Cases before national human rights commission or other independent commissions (if applicable)	N/A	N/A	5637	N/A	962	N/A	499	N/A	695	N/A
Complaints filed against police, judiciary or other state institutions (per year)	Unknown	N/A	6346	No	N/A	Unknown	Unknown	N/A	5206	N/A
If yes, how many resolved?	N/A	N/A	2383	N/A	N/A	Unknown	Unknown	N/A	Unknown	N/A

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i. I am grateful for the excellent assistance of the HRRC Rule of Law Research Coordinators Mr. Joel Ng, Ms. Sarah Shi and Ms. Lan Shiow Tsai.

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The State of Brunei Darussalam

Brunei Darussalam

Joel Ng

Snapshot Box

Formal Name	Negara Brunei Darussalam
Capital City	Bandar Seri Begawan
Independence	1 January 1984
Historical Background	Brunei entered into a formal agreement to become a British Protectorate in 1888, and a Resident appointed in 1906. Oil was discovered here in 1929 that would eventually become the country's chief export. In 1950, Sultan Omar Ali Saifuddin III assumed the throne after the sudden death of his predecessor Sultan Sir Ahmad Tajjudin, and immediately began reforms designed to lead Brunei toward self-government while maintaining the authority of the Sultan. At the same time, the first political party, Partai Rakyat Brunei (PRB), was founded in 1956 and largely comprised non-aristocratic Malays, dissatisfied with colonial and monarchic rule. The first Constitution was proclaimed in 1959 and established a Legislative Council, but was criticised by the PRB for granting too much power to the Sultan. In 1962, the PRB's military wing revolted, but was quickly suppressed by British troops. A state of emergency was declared which remains in effect today. Brunei formally gained independence in 1984 after negotiations with the British, with the Sultan as the head of state. An Emergency Order was immediately announced that suspended the Legislative Council, but this was lifted in 2004 after further Constitutional amendments that broadened the Sultan's powers.
Size	5,765 km2
Land Boundaries	Two unconnected parts situated on the northwest coast of the island of Borneo, with Malaysia bordering its south and 161 km of coastline on its north
Population	395,207 (July 2010 est.)
Demography	26.6% from 0-14 years, 70.1% from 15-64 years, 3.3% from 65 years and over (2010 est.)
Ethnic Groups	67 percent Malay, 11 percent Chinese, 22 percent from Belait, Bisaya, Brunei, Dusun, Kedayan, Murut, Ukits (indigenous ethnic groups)
Languages	Malay is the official language. English is widely spoken and all laws are published in English. Other languages spoken include Mandarin and Chinese dialects, Dusun, Iban, Hindi and Tamil
Religion	Islam is the state religion, but other religions are also practiced
Adult Literacy	92.7%
Gross Domestic Product	$11.96 billion, $50,300 per capita (2010 est.)
Government Overview	Malay Islamic Monarchy under State of Emergency
Human Rights Issues	Brunei's emergency is still in force, good governance is entirely dependent on a single individual without institutional frameworks to ensure durability of peace and stability, freedom of speech restrictions through the Defamation Act, Newspapers Act, Sedition Act, Internal Security Act, permissibility of corporal punishment for immigration offences, unequal rights of women in civil matters such as divorce and inheritance, non-Malay Muslims face constitutional discrimination
Membership in International Organizations	ADB, APEC, ARF, ASEAN, C, CP, EAS, G-77, IBRD, ICAO, ICRM, IDB, IFRCS, ILO, IMF, IMO, IMSO, Interpol, IOC, ISO (correspondent), ITSO, ITU, NAM, OIC, OPCW, UN, UNCTAD, UNESCO, UNIFIL, UNWTO, UPU, WCO, WHO, WIPO, WMO, WTO
Human Rights Treaties Ratified	CRC (1995) and optional protocol on sale of children (2006) – reservations on CRC articles 14, 20 & 21 CEDAW (2006) – reservations on articles 9(2) & 29(1)

Overview

Brunei is officially a Malay Islamic Monarchy (*Melayu Islam Beraja*), with absolute powers invested in the Sultan and Yang Di-Pertuan (head of state), who is also the Prime Minister, Chief of Defence Forces (Minister of Defence), and Minister of Finance. The Sultan is advised by six Councils: the Privy Council which advises on customary ranks and honours, the Religious Council which deals with Islamic matters, the Council of Ministers (executive matters), the *Adat Istiadat* Council which advises on State custom, the Legislative Council on legislative matters and the Council of Succession. All Councils are appointed by the Sultan, and while they have consultative rights, he is not required to act on their advice.

The Judiciary is instituted through individual Acts relating to the status of each Court.[i] Thus Brunei law is based on English Common Law but with a parallel Syariah law structure on Islamic matters. The objective of the Judiciary, as stated at its website, is "Upholding the Rule of Law."[ii] The judicial authorities in this system are the UK Privy Council, the Supreme Court, the Intermediate Courts, the Subordinate Courts and the Syariah Courts. The Common Law courts have authority over both civil and criminal matters, as well as personal matters of non-Muslims. Syariah law was instituted by the Syariah Courts Act (1998, 2000) and its courts have authority on Islamic family law, as well as criminal jurisdictions involving Syariah offences. These courts succeeded the indigenous traditional courts known as *Kadi* courts and gave the courts greater powers.

A grassroots tier exists for local administration, with elected *Penghulus* (head of *mukims* or wards) and *Ketua Kampungs* (head of villages). They are charged with local welfare and may be answerable to District Officers or the Village Consultative Councils. They must also be Muslim and approved by the government. Small claims and arbitral tribunals have also recently been instituted.

Bruneians are officially "subjects" of the Sultan and as such technically have only fully derogable rights accorded by the Sultan, to whom they must swear allegiance. Thus there is no list of fundamental rights in the Constitution, which is primarily a document that maps the structures of government. The Sultan has full immunity from the law, and partial immunities extend to officials and those working on behalf of the Sultan under Section 84B of the Constitution.

The Constitution was first promulgated in 1959 while under British rule. Previously, a Residential System had been in place that granted absolute power to the Resident, a British colonial officer. As part of moves towards decolonisation, the British installed Sultan Omar as successor to the Resident, and vested full powers in the Sultan under the terms of the 1959 Constitution. It also set up and held elections in 1961, and all electoral seats were won by the Partai Rakyat Brunei (Brunei People's Party, PRB). However, only 16 seats of 33 were designated for elected members and PRB was unable to form a government. As tensions rose over the Sultan's proposal to merge with Malaya, rebels of the military wing of the PRB, calling themselves the North Kalimantan National Army, staged a revolt against the government. The Sultan proclaimed a state of emergency and British troops from Singapore quelled the revolt within days. The PRB was banned, and the leaders were arrested or fled.

On attaining independence in 1984, the new Sultan of Brunei, Hassanal Bolkiah (his father Omar abdicated in 1971), immediately abolished the Legislative Council under an Emergency Order. The Legislative Council was not reinstated until 2004, when amendments to the Constitution reduced all legislative powers to advisory ones. These amendments also broadened and clarified the Sultan's powers, including granting supreme executive authority, assuming the role of Prime Minister, command of the armed forces, and absolute immunity under the law. The current 28-member Legislative Council meets annually to discuss policy and only four of the members are elected officials.

Technically, Brunei remains in the same state of emergency declared in 1962, with that declaration renewed every two years since. Thus in Bruneian legal terminology, "Orders" are legislation instituted by the Sultan under his emergency powers in Section 83(3) of the Constitution, while "Acts" are those enacted through normal processes involving the Legislative Council. The intention is that emergency Orders will be eventually promulgated as Acts over time.[iii] However, Acts are also frequently replaced by Orders, so it is difficult to recognise any trends to these institutional changes. A raft of legislation has been adopted, sometimes verbatim, from Singaporean law since independence and these include laws for which Singapore is often criticised by human rights groups, such as the Internal Security Act (Cap. 133) and the Newspapers Act (Cap. 105). The Internal Security Act was enacted at independence and revised in 2002, while the Newspapers Act was greatly revised at independence and also revised in 2002.

Brunei argues that its small size makes for special exceptions to systems in other countries, such as the lack of judicial review. On this, the Attorney-General has remarked:

> In some countries, the courts have powers to review administrative actions but such countries usually have an army of lawyers to deal with the complaints (lawyers for the courts, lawyers for the victims or complainants and lawyers for the Government or public authority). Such adversarial system of judicial review, furthermore, may not be suitable for Brunei Darussalam.[iv]

Thus two counterarguments to standard rule of law principles can be inferred: firstly, that Brunei is too small with insufficient human resources to operate expediently in such a system, and secondly that it does not resonate culturally with the country's system. Nevertheless, the government's legitimacy rests on serving the public good and public servants are regularly encouraged to uphold this principle. For a country as small as Brunei, it does not have large bureaucracies and there is relatively greater access to organs of government for its population. At the same time, few institutional arrangements exist for review or reform of existing mechanisms, and this is compounded by relatively small amount of data on judicial activities that is released to the public.

The difficulty in addressing fairly the questions posed by the study is that the unique constitutional structure of the Bruneian state requires exceptional status for the Sultan, otherwise on nearly every indicator, one must note the Sultan remains above the law. It thus raises questions as to the relative protection from the law of his closest kin and associates, as direct challenges to the Sultan or his family's actions have only ever reached trial outside of the country.[v] As a relatively rich, peaceful Sultanate, the structures in place have long cultural histories and there appears little desire to make fundamental changes, although one must bear in mind that the philosophy of Malay Islamic Monarchy cannot be discussed by any member of the Legislative Council. Thus rule of law is relatively strong as long as the institutional edifice on which it stands is unquestioned and subjects maintain absolute loyalty to the Sultan.

Administration of Justice Grid

Indicator	Figure
No. of judges in country	Magistrate Courts: 5 Magistrates Intermediate Courts: 2 Judges Supreme Courts: 3 Judges, 6 Registrars Total: 16 (information from Profiles available at judicial.gov.bn)
No. of lawyers in country	Unknown, 33 law firms listed at judiciary website
Annual bar intake? Cost/fees	Not applicable as Brunei accepts qualifications from a variety of institutions, including from outside the country.
Standard length of time for training/qualification	Qualifications can be obtained from numerous jurisdictions, on average about 4 years, though less for Syariah advocates.
Availability of post-qualification training	Yes
Average length of time from arrest to trial (criminal)	Unknown
Average length of trials (from opening to judgment)	Unknown
Accessibility of individual rulings to public	Yes, in *Judgments of the Courts of Brunei Darussalam*
Appeal structure	
Cases before the National Human Rights Commission (NHRC)	Not applicable
Complaints filed against police, judiciary or other institutions (per year)? How many resolved?	Unknown

A. The government and its officials and agents are accountable under the law.

1. The powers of the government under the constitution

There is no formal separation of powers. The 1959 Constitution was developed around an Executive and Legislative Council. The Judiciary was not defined in this Constitution and instead is instituted in the Supreme Court Act. The Constitution has been amended subsequently, with major changes in 1984 and 2004. Furthermore, the Emergency (Constitution) (Amendment and Suspension) Order 1984 suspended Parts VI and VII of the Constitution relating to the Legislative Council, and this Order was not lifted until 2004, after amendments to the Constitution that removed checks on the Sultan and granted complete immunity.

Both the 1984 and 2004 amendments broadened the powers of the Sultan. At independence, his powers were widened beyond the scope originally granted by the British, using Emergency (Constitution) (Amendment and Suspension) Order 1984 to remove the ability of the Legislative Council to perform checks on the Executive. These included, for example, Section 39 of the 1984 Constitution, which required the Sultan to make laws "with the advice and consent of the Legislative Council". The 2004 Constitution reinstated the Legislative Council, but with only advisory powers and nothing in the Constitution could be deemed to derogate from the prerogative of the Sultan (Section 84(2)).

Historically, attempts under the British in 1962 to place checks on the Executive by the Legislative Council failed after an insurgency attempted to seize power. The insurgency was quickly suppressed by British forces. However, a state of emergency was declared and this has been renewed every two years since then and is still in force today. Emergency powers in Section 83(3) of the Constitution (and Section 3(1) of the Emergency Regulations Act) grant the Sultan absolute discretion to issue Orders as long as the Sultan himself considers such Orders to be "desirable in the public interest" and thus there are no external limits to these powers according to the Constitution.

In practice, however, most orders affecting subjects relate to welfare stipulations such as the Children and Young Persons Order 2006, the Children Order 2000, the Compulsory Education Order 2007, the Employment Order 2009, Legitimacy Order 2001, or to technical matters, such as the Arbitration Order 2009, Disaster Management Order 2006, Halal Certificate and Halal Label Order 2005, International Banking Order 2000, Syariah Courts Civil Procedure Order 2005, as well as a few criminal matters, such as the Criminal Registration Order 2008 and Trafficking and Smuggling of Persons Order 2009.

The majority of Orders under emergency powers have been uncontroversial and within reason, arguably in the public interest. However, the main exception was the Emergency Order 1984 that lasted until 2004 which abolished the Legislative Council (it was reinstituted following the removal of laws requiring them to approve the Sultan's amendments, among others). The Emergency (Continuation and Validation of Emergency Provisions) Order 2004 that replaced the 1984 Order remains in force.

2. Amendment or suspension of the law

Section 85(1) of the Constitution grants the Sultan the power to amend the Constitution. While required to consult the Privy Council, their advice is nonbinding. Under the 1984 Constitution, states of emergency notwithstanding, the Legislative Council's approval was required for amendments or revocations made by the Sultan under Section 85(3). Under the 2004 Constitution, however, this was altered to only require that they review and if necessary, propose changes to any amendments sent to them, after which the Sultan is free to adopt or reject their proposals. The Legislative Council is further proscribed from discussing any matters that might reduce the rights and powers of the Sultan and his family, nor may they discuss matters relating to the national philosophy of the Malay Islamic Monarchy. The Sultan is not required to give reasons for any decisions he makes.

The judiciary are not allowed to interfere with the constitutional structure through interpretation or construction of its provisions, and judicial review is explicitly prohibited. If questions arise on the interpretation of the Constitution, an Interpretation Tribunal is appointed by the Sultan with binding powers on interpretations of the law (Sections 86(6) and 86(7)).

3. Accountability of officials under the law

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

> His Majesty the Sultan and Yang Di-Pertuan can do no wrong in either his personal or any official capacity. His Majesty the Sultan and Yang Di-Pertuan shall not be liable to any proceedings whatsoever in any court in respect of anything done or omitted to have been done by him during or after his reign in either his personal or any official capacity.

Section 84B(2) further grants officials working on behalf of the Sultan immunity for actions taken in their official capacity, although provisions can be made by written law against these officials to initiate proceedings against them.

The Penal Code and Prevention of Corruption Act outlines abuses of power for which state officials may be charged. Police are further stipulated not to be exempt from ordinary processes of the law under Section 34 of the Royal Brunei Police Force Act.

As the press is tightly controlled, the extent of official investigations into misconduct, corruption or other offences performed by officials is difficult to assess. The majority of corruption cases that make the news involve petty sums usually relating to traffic offenses. The Anti-Corruption Bureau lists 355 cases that it received in 2010, but it is unclear what the outcomes for any of these were. The last accessible outcomes it noted are cited in purely numerical terms (numbers of cases resulting in investigation, referrals, "enclosed in existing file", "KIV", and no further action) – some 215 cases from 2008 (oddly, no cases from 2009 are listed) of which roughly 30 percent resulted in investigations and a similar number resulted in no further action.[vi] It is unclear how many cases were charged in court under the Prevention of Corruption Act.[vii]

The most prominent corruption case has been that of the Sultan Hassanal Bolkiah's brother Prince Jefri, who allegedly embezzled billions of dollars from the Brunei Investment Agency into Amedeo Development, both of which he ran until the Asian financial crisis of 1997-1998. The original charges against Prince Jefri were settled in 2000 after he agreed to relinquish assets thought to be around US$5 billion. Further complications led Prince Jefri to appeal to the Privy Council in London but the Council ruled against him and in 2008 an arrest warrant was even placed on him in London. Nevertheless, he has since claimed to have reconciled with Sultan Bolkiah and the matter appears to have been settled privately, and so the manner in which he might have been held accountable is unknown.

Another prominent case involved the former Minister of Development, Dr Haj Ismail bin Haj Damit and his associate in a five-year trial from 2005 and 2010. Charged under the Prevention of Corruption Act and Penal Code, the case resulted in a conviction, a B$4.2 million (approximately US$3.2 million) fine with costs and a seven-year sentence for the Minister. Most cases reported by the Anti-Corruption Bureau, however, involve low-ranking officials and relatively small amounts of money.

B. Laws and procedure for arrest, detention and punishment are publicly available, lawful and not arbitrary; and preserve the fundamental rights to physical integrity, liberty and security of persons, and procedural fairness in law.

1. Availability of laws

Acts and Orders have been accessible from the website of the Attorney-General's Chambers free of charge since 2008. Printed copies may also be purchased from the Attorney-General's Chambers in Bandar Seri Begawan at nominal sums. However, most laws are published only in English and very few, mostly pertaining to Islamic code, have been officially translated into Malay. There may thus be some difficulties in accessibility for the general population, although court-appointed interpreters mitigate this risk.

Cases heard in Brunei are published in the annual *Judgments of the Courts of Brunei Darussalam* (JCBD) published by the government. Details on individual cases may only be obtained by request of parties to the respective decisions and are not publicly accessible. As such, a case law archive would be relatively inaccessible.

2. Accessibility and application of laws

It is an oft-stated principle that laws must be applied equally and predictably within the Sultanate. However, the Sultan and government authorities are granted immunity for actions carried out in their official capacities under Section 84(b) of the Constitution. Nevertheless, provision may be made by written law for proceedings against anyone except the Sultan for wrongs committed in the course of official duties. Indeed much of the legal procedures stipulated by the Criminal Procedure Code would be rendered meaningless if this were not so. Under Chapter IV of the Code, clear procedures for search, arrest and seizure are outlined that should in theory ensure consistent application of the law in respect of the subject's rights. Being an English Common Law system, the laws are readily accessible and, at least for advocates, understandable and applied consistently. Under the Application of Laws Act, precedents in British law are applicable provided they do not supersede Bruneian law and custom. Furthermore, case law from Malaysia, Singapore, and other English Common Law systems can be used but are nonbinding, having the weight of "persuasive authority".

Thus the difficulty in answering this question is that where laws are clearly and narrowly defined, they can be assessed for their equal application, but where broad rules with wide discretionary power are defined, their application is difficult to assess, especially when they have been rarely tested. For example, the Societies Order (2005) has been allegedly used to disband several associations, including two opposition parties, leaving only one legal opposition party in the country.[viii]

3. Preventive detention

Under normal circumstances, police may detain a suspect for up to 48 hours with a warrant. However, under the Internal Security Act, detention of persons who are deemed by the Sultan or Minister to be "acting in any manner prejudicial to the security of Brunei Darussalam" (Section 3(1)) is permitted for two years without warrant, charge or trial and is renewable.

Known applications of the Internal Security Act are not complete, but Muhamad Yasin Abdul Rahman, a leader of Partai Rakyat Brunei involved in the uprising was detained from 1962 to 1973 when he escaped to exile in Malaysia. When he returned in1997, he was immediately rearrested and detained until 1999 when he was released after swearing an oath of loyalty to the Sultan and admitting his "crimes". Several nationals were detained in 1998 for distributing pamphlets alleging misconduct of the royal family and government officials relating to the collapse of Amedeo Development, and several Christians were detained in 2000 and 2001 over alleged subversive activities, although it was denied these were religious in nature. It is thought that since the release in 2008 and 2009 of individuals accused to be part of a counterfeiting ring and three others said to have leaked government secrets, the government has no more prisoners held under the Internal Security Act.[ix]

4. Protection from arbitrary treatment or punishment

Section 40(i) of the Internal Security Act prohibits the use of "personal violence" against a detainee but this may be waived "in the case of repeated refusal to obey a lawful order, self-defence, defence of another officer, person or detained person." Sanctioned corporal punishment (caning) is permitted for numerous offences in the Penal Code as well as for immigration offences.

Detention without trial is permitted by the Internal Security Act. *Habeas corpus* is provided for in the Criminal Procedure Code (Criminal Procedure Code) Chapter XXXIV, but is overruled where the Internal Security Act applies (Section 61(b) of Internal Security Act). In practice, emergency powers may also be used to deny bail if the court deems it necessary. Detainees may not be remanded by more than 15 days under the Magistrate's orders. However, this limit is inapplicable if ordered by the High Court.

5. The presumption of innocence

The presumption of innocence is not explicitly provided for in law. Nevertheless, in practice, the accused in criminal cases is presumed innocent before trial. As stated by Chief Justice Yang Amat Arif Mohammed Saied:

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

However, detainees under the Internal Security Act do not benefit from such considerations. The determination for detention is made by the Sultan, and the reports of the advisory board (under Section 5(4)) which reviews the grounds of such detention orders are nonbinding on the Sultan's discretion (Section 6(2)).

6. Access to counsel and rights to information

Qualified advocates and solicitors have the right to appear and plead in all courts of justice in Brunei.[xi] Accused persons may choose to represent themselves as well. However, access to counsel for Internal Security Act detainees is less clear.

Legal aid is provided to defendants facing capital charges (i.e. where the death penalty applies). A Syariah legal aid body was also said to be under consideration,[xii] and a legal advice clinic was formed in 2010 serving people whose incomes were less than BND750 per month.[xiii]

Brunei law guarantees accused persons of the right to be informed of the charges against them. The police officer must read an accused person their rights and explaining the charges under Article 117 of the Criminal Procedure Code. However, no stipulations exist requiring a length of time for preparing a defence or conferring with their legal counsel. Under English Common Law, most fundamental rights are listed in the Constitution, but Brunei's Constitution does not contain any rights. Thus gaps may appear in areas such as a right to counsel, which is not explicitly stated.

With a relatively small population, Brunei's courts do not suffer from serious backlogs of cases, though the more complex the case, the longer it may take to get to trial and be concluded. The principle of timeliness is set forth by the Attorney-General: "To do Justice we should avoid unreasonable delay in investigation, prosecution and hearing of cases." Conversely, "if you dispense justice too fast to the extent of not giving enough time to either prosecutors or plaintiff or defendants to prepare their cases then you are not doing justice."[xiv] Nevertheless, delays may occur for example due to lack of forensic expertise within the country, requiring external reports or

else foregoing the process. Again the exception is that trial is not required for detainees under the Internal Security Act, though an advisory board discusses the grounds for their order with no requirement that such discussions be made public.

7. Right of Appeal

The Right of Appeal for criminal convictions is granted under Section 414 of the Criminal Procedure Code. Court hierarchy starts from the Subordinate Court to Intermediate Court to High Court and Court of Appeal, and finally the Supreme Court. Civil appeals may be made under provisions in the Subordinate Court Act, Intermediate Courts Act and Supreme Courts Act. Section 14 of the Supreme Courts Act grants that civil cases may be further referred to the UK Privy Council on recommendation by the Sultan, but the Supreme Court rulings are final for criminal appeals. A parallel appeals structure exists in the Syariah courts with Syariah Subordinate Courts, the Syariah High Court and the Syariah Court of Appeal. In the case of charges under the Internal Security Act, the detainee has no access to redress under preventive detention.

8. Protection against coercion

Brunei laws prohibit the use of coerced confessions as a form of evidence and guarantee the accused person's right to remain silent. Section 119 of the Criminal Procedure Code requires that statements of confession must be made voluntarily. Section 57(2) of the Internal Security Act also prohibits statements made under threat, inducement or promise from being admissible, and further that they must be notified that they need not answer any question before any statements are taken.

The laws also prohibit persons from being tried or punished again for an offence for which they have already been finally convicted or acquitted. Section 269 of the Criminal Procedure Code prohibits persons who have been convicted or acquitted of being tried for the same offence again. Separately, Section 63 of the Internal Security Act also prohibits multiple punishment of a person for the same offence for those offences committed under the Internal Security Act.

9. Remedy under the law

Damages between victims and perpetrators are often granted, though it is less clear whether this applies as regularly in cases where the officials of the government are the offender. While Brunei's laws do not list fundamental rights unlike most Constitutions, Brunei has explicitly stated it "recognises the importance of promoting and protecting human rights" in its submissions before the UN Human Rights Council during its Universal Periodic Review.[xv] The Attorney-General has also established a connection to a commitment to protect human rights via Islam:

> Brunei Darussalam's Constitution provides that the official religion is the Islamic religion, provided that all other religions may be practiced in harmony. Respect for human rights is one of the fundamental purposes of Islam. Our laws do guarantee basic human rights such as right to life, which is considered inviolable under Islamic Laws, the right to own property, the right to justice and fair trial and most importantly protecting the rights of women and children.[xvi]

In domestic violence matters, the Attorney-General has instructed that cases be brought to court even in the event of withdrawal by the victim, with trials taking place under the Penal Code and Women and Girls Protection Act. Assault is also a recognised ground for divorce under Syariah laws.

Subjects may appeal to the Sultan to look into cases of human rights violations, but any such outcome is typically handled in private and it is unknown whether any reparations were granted. The law does provide that those acquitted of charges may be awarded compensation if the charges were deemed frivolous or vexatious by the court.[xvii] Conversely, the courts may also order a convicted person to pay compensation to victims or costs for the prosecution.[xviii] In one case in 1990, a police officer arrested a woman on a Friday, but failed to bring her to the court until the following Monday. She subsequently sued the officer privately and the judge found that the officer had failed to follow Section 47 of the Criminal Procedure Code that stipulates that arresting officers must bring the suspect to court without unnecessary delay.[xix] As Lee notes:

> The trial judge held that there existed a right in the injured party to sue a government servant in his private capacity prior to the English Crown Proceedings Act. The same right would therefore exist in Brunei so that a private person may sue a government servant in his private capacity and that wrongs committed in the course of carrying on the government of Brunei is meant to refer only to those torts which the crown in England could not be held liable before the passing of the Crowns Proceedings Act of 1947. Damages for wrongful imprisonment were subsequently awarded against the defendant.[xx]

As such, the possibility of seeking damages was allowed and this is recognised under Section 84(b) of the Constitution which, despite granting immunity to officials working on behalf of the Sultan, also allows that provision may be made by written law for proceedings against anyone except the Sultan for wrongs committed in the course of official duties.

C. The process by which the laws are enacted and enforced is accessible, fair, efficient, and equally applied.

1. Legislative proceedings

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. The Legislative Council is said to meet only once a year and has relatively limited powers under the 2004 Constitution.

Public participation and feedback in the drafting of laws is not provided for under Brunei law, and so there is no requirement for publishing draft laws for the public. Furthermore, under Emergency powers, the Sultan may issue Orders entirely at his own prerogative and these may come into force without review. Once issued, they may be found at the Attorney General's website (*www.agc.gov.bn*). Ad hoc consultative mechanisms may exist in the creation of laws, but these are not systematic whether in law or policy. As such, drafts of laws are not readily available to the public, and there is no official feedback mechanism outside the Legislative Council. In addition, under Section 67 of the Royal Brunei Police Force Act, Police Orders need not even be published in the Government Gazette.

2. Judicial hearings and rulings

Criminal hearings are open to the public under Section 6 of the Criminal Procedure Code. Cause lists for all courts are accessible from the Judiciary website.[xxi] Section 7 of the Subordinate Court Act states that courts are open and public, though it may hold court in camera in the interests of justice, public security or propriety. All decisions are also published in the *Judgments of the Courts of Brunei Darussalam* annually.

3. Equality before the law

Brunei professes equality for all before the law.[xxii] However, there is no constitutional guarantee for the maintenance of equality, as the Constitution contains no list of fundamental rights of the subjects of Brunei. In technical terms, there is also unequal application, particularly in matters of religion

and gender. Women face unequal rights under several laws, particularly in matters relating to divorce, inheritance, custody of children and transmission of citizenship,[xxiii] and these contravene Articles 9 and 16 of the Convention on the Elimination of Discrimination against Women.

One question that hangs over assessing equality before the law is where wide discretionary powers exist. This is most especially pronounced for non-specific and ambiguous crimes such as "acting in any manner prejudicial to the security of Brunei Darussalam or any part thereof or to the maintenance of public order or essential services therein", as listed in Section 3(1) of the Internal Security Act. Under such broad terms, these have included members of the banned political party Partai Rakyat Brunei accused of fomenting rebellion but without trial. It has also been used to detain dissidents and more recently, Christians allegedly engaging in subversive activities.

It should be noted that Brunei is considered a non-practicing capital punishment state, in which capital punishment is not carried out despite laws mandating it for certain offences. Those sentenced to death, of which there have been relatively few, must have the orders for their executions signed by the Sultan, and the current Sultan is not known to have ever signed such an order. Nevertheless, future application of the death penalty will depend entirely on the character of the current and future rulers of Brunei.

Homosexuality may be criminalised under Section 377 of the Penal Code for sexual acts "against the order of nature", although this is inferred rather than explicit (cf. Singapore's Section 377A of the Penal Code), and it is usually outlawed in Islamic tradition. However, it is unclear if any prosecutions under this Section have been made in Brunei.

The Children and Young Persons Order 2006 instituted a juvenile court for dealing with young persons below the age of 18. However, the UN Committee on the Rights of the Child raised concerns during Brunei's Universal Periodic Review in 2009 that the minimum age of criminal responsibility – seven years of age – was too low and a concern for fair proceedings.[xxiv] In Brunei however, age is regularly taken into consideration in court cases, including capital offences,[xxv] and prosecution of minors rarely makes it to court.[xxvi]

4. Legal access

The Legal Profession Act stipulates that associated costs must be fair and reasonable, though this is left to the court's discretion. Court fees are generally nominal or set at cost prices. Legal aid is provided to defendants facing capital charges (i.e. where the death penalty applies). A Syariah legal aid body was also said to be under consideration,[xxvii] and a legal advice clinic was formed in 2010 serving people whose incomes were less than BND750 per month.[xxviii]

5. Protection of witnesses

Section 15 of the Supreme Court Act and related legislation (e.g. Section 7 of the Subordinate Court Act) state that courts may hold court in camera in the interests of justice, public security or propriety. Section 8(1) of the Women and Girls Protection Act also requires the use of in camera proceedings for girls below the age of 16 years. Witnesses are also afforded protection with the court having powers to prevent anyone from publishing details of their identity if necessary.

Detailed measures for the protection of female witnesses in cases relating to sexual offences are stipulated by the Women and Girls Protection Act. However, these rules also permit the detention of victims with punitive consequences for their failure to adhere to detention orders. While these laws are largely written in concern with prostitution cases, Section 10(1) also state the courts may order detention of the woman or girl in cases under Sections 354 (Assault or criminal force to person with intent to outrage modesty), 375 (Rape), 498 (Enticing or taking away or detaining with criminal intent a married woman), or defined in Sections 360 and 361 (Kidnapping) of the Penal Code. Such provisions are inconsistent with Article 15(4) of the Convention on the Elimination of Discrimination against Women.

D. Justice is administered by competent, impartial and independent judiciary and justice institutions.

1. Appointment of judicial officials

The Sultan has absolute discretion over judicial appointees and there are no guidelines as to how he must act to ensure independence and accountability in the judiciary. Retired judges from Hong Kong have been the mainstay of High Court judges for much of Brunei's history. Following British practice pre-independence, the Chief Justice of Hong Kong was usually also appointed as the Chief Justice of Brunei. Brunei's previous Chief Justice, Dato' Sir Denys Roberts, however, broke tradition to retain the Brunei post despite stepping down in Hong Kong in 1988. The new Hong Kong Chief Justice, Sir Ti-liang Yang, was instead appointed President of Brunei's Court of Appeal. Sir Denys Roberts continued in his role of Chief Justice of Brunei until 2001 when he was appointed President of the Court of Appeal.

The present Chief Justice is the first Chief Justice to be Bruneian by nationality, Dato' Seri Paduka Awg Kifrawi bin Kifli, appointed in 2009. However, the Sultan has stated as early as 1984 that senior judicial positions should be taken up increasingly by Bruneians.[xxix] Most positions within the courts today are filled with Bruneians. Several Attorney-Generals have been Judges or Registrars in the High Courts prior to appointment.

For Syariah judges, the Sultan appoints judges on advice from the President of the Majlis Ugama Islam. Nevertheless, there has been no evidence of interference by the Executive in the courts process and judges have technical security of tenure[xxx] until the age of 65 after which they may remain at the discretion of the Sultan.

In 1996, the High Court ruled that the courts have powers independent of whether the prosecution decides to drop a case, and ordered a discharge amounting to an acquittal in an auto theft case.[xxxi] This ruling has not been challenged to date.

In recent years, the present Chief Justice has stated:

> Over the years this principle of judicial independence has matured and is now firmly established and highly respected in the Common Law world, which includes the jurisdiction of Brunei Darussalam.[xxxii]

2. Training of judiciary

Prosecutors, judges and judicial officers typically receive legal training in England or Malaysia. Syariah law training is available from the Department of Syariah at Sultan Omar Ali Saifuddien Institute of Islamic Studies and qualifications obtained in Malaysia may also be accepted. Judges must have several years of practice in lower courts before being appointed to higher courts.

Key appointees such as the Chief Justice and Attorney-General are paid equivalent salaries to ministers, and in general, judiciary pay is linked with salaries in the civil service, which places them among the higher earners in Bruneian society. A Human Resource Development Committee was in the planning stages in 2010 and would eventually be tasked with ensuring the professional upgrading of judicial officers and other appointees.[xxxiii] Outside the courts, the Law Society was established by the Legal Profession Order 2003, and one of its aims is to improve the standards of professional conduct and learning in the profession.

3. Judicial proceedings

The impartiality and any external influence on judicial proceedings is difficult to investigate in any situation but to date, there have been no significant allegations of improper influence in the proceedings of the court. The former Chief Justice Dato' Sir Denys Roberts has stated:

> … Brunei continues to enjoy an admirable judicial system, though there are minor faults in this. This system has suited the requirements of a society which is multi-cultural and is, I have no doubt, well respected here and abroad for its independence and integrity. These qualities have never been questioned, as has happened in some countries. Nor has there been any effort to influence the courts improperly in their decisions by any outside authority or persons.[xxxiv]

4. Legal representation

Regulations for practice are governed by the Legal Profession Act. Advocates and solicitors must have valid practicing certificates that prove a minimum level of competence, usually obtained through qualification as an advocate, barrister or solicitor in England, Northern Ireland, Singapore, Malaysia or Australia (Section 3). Bruneians or Bruneian permanent residents may be admitted if they have obtained alternative qualifications as prescribed. The Chief Justice may however declare there are sufficient advocates in Brunei after which no further applications may be admitted.

Syariah lawyers must have obtained a recognised Syariah degree, passed the Syariah lawyer's certificate examination, or have practiced Syariah law for at least three years in order to qualify when the Syariah Courts Act came into effect.

5. Security of court and judicial officials

In general, Brunei is a peaceful country with relatively few incidents of violence or threats to persons in general. Given the lack of evidence to show systematic threats against court participants and judiciary, there is no specific stipulation to ensure their safety and security. They are also legally protected from suits arising from the discharge of judicial duties under Section 23 of the Subordinate Court Act.

Endnotes

i. The Supreme Court Act (Cap 5, 2001 Ed.), Intermediate Courts Act (Cap 162, 1999 Ed.), Subordinate Courts Act (Cap 6, 2001 Ed.), and Syariah Courts Act (Cap 184, 2000 Ed.), last accessed 7 April 2011, *http://www.agc.gov.bn/*.

ii. Header, Judiciary of Brunei Darussalam webpage, last accessed 7 April 2011, *http://www.judicial.gov.bn*.

iii. The Attorney-General of Brunei Darussalam, Yang Berhormat, Dato Seri Paduka Haji Kifrawi Bin Dato Paduka Haji Kifli, in a Speech made at the Opening of the Legal Year, on 18 March 2008, last accessed 7 April 2011, *http://www.agc.gov.bn/*.

iv. The Attorney-General of Brunei Darussalam, Yang Berhormat, Dato Seri Paduka Haji Kifrawi Bin Dato Paduka Haji Kifli, in a Speech made at the Opening of the Legal Year, on 27 March 2007, last accessed 7 April 2011, *http://www.agc.gov.bn/*.

v. For example, United States District Court for the District of Hawaii, "*Jane Doe* v. *Haji Jefri Bolkiah et al.*", 74 F. Supp. 2d 969; 1998.

vi. Anti-Corruption Bureau, Prime Minister's Office, Brunei Darussalam, "Statistic Terkini", last accessed 10 February2011, *http://www.bmr.gov.bn/english/page_StatDetails.php?STAT_ID=67*.

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

viii. Roberts, Christopher, and Lee Poh Onn, "Brunei Darussalam: Cautious on Political Reform, Comfortable in ASEAN, Pushing for Economic Diversification," *Southeast Asian Affairs* Vol. 2009, p. 63.

ix. Roberts and Lee, "Brunei Darussalam", p. 65.

x. The Chief Justice of Brunei Darussalam, Justice Yang Amat Arif Mohamed Saied, in a Speech made at the Opening of the Legal Year, on 6 March 2003, last accessed 7 April 2011, *http://www.judicial.gov.bn*.

xi. Legal Profession Act (Cap 132, 2006 Ed.), section 17.

xii. *Brunei Times*, 17 May 2009.

xiii. Under US$600 per month. *Brunei Times*, 26 September 2010.

xiv. The Attorney-General of Brunei Darussalam, Yang Berhormat, Dato Seri Paduka Haji Kifrawi Bin Dato Paduka Haji Kifli, in a Speech made at the Opening of the Legal Year, on 1 March 2005, last accessed 7 April 2011, *http://www.agc.gov.bn/*.

xv. Brunei Darussalam, 2009, *National Report Submitted in Accordance with Paragraph 15(A) of the Annex to the Human Rights Council Resolution 5/1*, A/HRC/WG.6/6/BRN/1, para. 16.

xvi. The Attorney-General of Brunei Darussalam, Yang Berhormat, Dato Seri Paduka Haji Kifrawi Bin Dato Paduka Haji Kifli, in a Speech made at the Opening of the Legal Year, on 7 April 2009, last accessed 7 April 2011, *http://www.agc.gov.bn/*.

xvii. "Criminal Procedure Code" (Cap 7, 2001 Ed.), section 187, last accessed 7 April 2011, *http://www.agc.gov.bn/*.

xviii. "Criminal Procedure Code", section 382.

xix. The High Court of Brunei Darussalam, "*Kwan Kwai Choi* v *AK Zaidi Bin Pg Metali*" (Civil Suit No. 175 of 1990, Judgment delivered on 12 September 1992, by Denys Roberts CJ), [1993] 2 MLJ 207.

xx. Lee, Yew Choh. "Recent Legal Developments in Brunei Darussalam." *Singapore Journal of Legal Studies*, 1993, pp. 668-677.

xxi. Last accessed 11 Feb 2011, *www.judicial.gov.bn*.

xxii. CJ Mohamed Saied, "Speech made at the Opening of the Legal Year", 6 March 2003.

xxiii. Report of the Working Group on the Universal Periodic Review, A/HRC/WG.6/BRN/2, p. 5.

xxiv. UN Human Rights Council, 2009, *Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(B) of the Annex to Human Rights Council Resolution 5/1, Brunei Darussalam*, A/HRC/WG.6/6/BRN/2.

xxv. See for example The High Court of Brunei Darussalam, "Public Prosecutor v. *Abdul bin Turkey* and *Chong and Chong J.*" [1996] BNHC 44 (6 July 1996).

xxvi. Response by Brunei to recommendations in UN Human Rights Council, 2010, *Report of the Working Group on the Universal Periodic Review, Brunei, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, A/HRC/13/14/Add.1, Recommendation No. 15.

xxvii. *Brunei Times*, 17 May 2009.

xxviii. *Supra note xiii*

xxix. The Attorney-General of Brunei Darussalam, Yang Berhormat, Datin Paduka Hajah Hayati Binti POKSDSP Hj Mohd Salleh, in a Speech made at the Opening of the Legal Year, on 16 March 2010, last accessed 7 April 2011, *http://www.agc.gov.bn/*.

xxx. Subject to incapacity to perform the functions of his office or for misbehaviour only, "Supreme Court Act", section 8.

xxxi. The High Court of Brunei Darussalam, "*Chong Kim Bui* v. Public Prosecutor" [1996] BNHC 65 (21 September 1996)

xxxii. The Chief Justice of Brunei Darussalam, Justice Mohamed Saied, in a Speech made at the Opening of the Legal Year, on 2 March 2008, last accessed 7 April 2011, *http://www.judicial.gov.bn*.

xxxiii. AG Datin Paduka Hajah Hayati, "Speech made at the Opening of the Legal Year", 16 March 2010.

xxxiv. The Chief Justice of Brunei Darussalam, Dato Seri Paduka Sir Denys Tudor Emil Roberts, KCMG., SPMB., in a Speech made at the Opening of the Legal Year, on 13 February 2001, last accessed 7 April 2011, *http://www.judicial.gov.bn*.

The Kingdom of Cambodia

Cambodia[i]

PHUN Vidjia and
Jennifer Holligan

Snapshot Box[ii]

Country Name:	Kingdom of Cambodia
Capital city	Phnom Penh
Independence	November 9, 1953
Historical Background	Cambodian King accepted France as a protectorate government in 1863, and after the WWII ended in 1945, movement for independence got its momentum. Finally, Cambodian gained full independence from France in 1953. After the colonial period, Cambodia underwent fluctuations of relatively short regimes from Constitutional Monarchy (1953-1970) to Republic (1970-1975) to Communism/ Dictatorship (1975-1979) to Communism/Socialism (1979-1989), before a Constitutional Monarchy regime was restored in 1993. In April 1975, after a five-year struggle, Communist Khmer Rouge forces captured Phnom Penh and evacuated all cities and towns. At least 1.5 million Cambodians died from execution, forced hardships, or starvation in between 1975-1979. In December 1978, Vietnamese troop toppled the regime, but Khmer Rouge forces still maintained their strongholds in the North-Eastern part of the country. The Vietnamese troops withdrew as a result of the 1991 Paris Peace Accords, which mandated democratic elections and a ceasefire, which was not fully respected by the Khmer Rouge. UN-sponsored elections in 1993 helped restore some semblance of normalcy under a coalition government. Factional fighting in 1997 ended the first coalition government, but a second round of national elections in 1998 led to the formation of another coalition government and renewed political stability. The remaining elements of the Khmer Rouge surrendered in early 1999. Some of the surviving Khmer Rouge leaders are awaiting trial for crimes against humanity by a hybrid UN-Cambodian tribunal supported by international assistance. Elections in July 2003 were relatively peaceful, but it took one year of negotiations between contending political parties before a coalition government was formed. In October 2004, King Norodom Sihanouk abdicated the throne and his son, Prince Norodom Sihamoni, was selected to succeed him. Local elections were held in Cambodia in April 2007, with little of the pre-election violence that preceded prior elections. National elections in July 2008 were relatively peaceful. The next election will be around mid 2013.
Size	181,035 km2
Land Boundaries	Laos (541 km), Thailand and Gulf of Thailand (803 km), Vietnam (1,228 km)
Population	14,453,680 (est. 2010); Growth Rate at 1.705% (2010 est.)
Demography	0-14 years: 32.6% (male 2,388,922/female 2,336,439) 15-64 years: 63.8% (male 4,498,568/female 4,743,677) 65 years and over: 3.6% (male 197,649/female 329,038) Urban: 20% of total population (est. 2010)
Ethnic Groups	Khmer 90%, Vietnamese 5%, Chinese 1%, other 4%
Languages	Khmer (official) 95%, French, English
Religion	Buddhist 96.4%, Muslim 2.1%, other 1.3%, unspecified 0.2% (1998 census)
Education and Literacy	Age 15 can read and write: 76.3% of Total Population (2007 est.)
Welfare	Population below poverty line: 31% (2007 est.); One in five Cambodian lived under national food poverty line (2,100 calories/day); Life expectancy: 62.28yrs Social security regime provided for every citizen, the poor, disabled person, veteran, and workers and employees.
Gross Domestic Product	$29.46 billion (2010 est.)

Government Overview	• Executive Branch: Head of state is King Norodom Sihamoni (since 29 October 2004) whose role is ceremonial whereas the Head of Government is [Samdech Akkak Moha Sena Padei Techo] Prime Minister Hun Sen (since 14 January 1985) [co-prime minister from 1993 to 1997]. In other words, the executive power is vested in the Cabinet (Council of Ministers), which is named by the PM and appointed by the monarch upon approval from the National Assembly; After the election in 2008, there was an appointment of 10 Deputy Prime Ministers. • Legislative Branch: Bicameral, consists of the Senate (61 seats; 2 members appointed by the monarch, 2 elected by the National Assembly, and 57 elected by parliamentarians and commune councils; members serve five-year terms) and the National Assembly (123 seats; members elected by popular vote to serve five-year terms) • Judicial Branch: Courts at all levels exercise judicial power and hear all matters including administrative cases. In other words, courts are divided according to hierarchy (no specialised court), namely Supreme Court, Appeal Court, and First Instance Court. The first instance court consists of municipal, provincial, and military courts. There is one first-instance court in each province/municipality, except Kep, Oudor Meanchey, and Pailin. Military Courts hear cases concerning military discipline committed by members of the army or an offense that harm the property of military. Precisely, there are 21 First-Instance Courts, one Appeal Court, and one Supreme Court. However, judicial review is not vested with the courts, but the power to check constitutionality of a law or regulation is given to the Constitutional Council. The Supreme Council of the Magistracy (provided for in the constitution and formed in December 1997) is the body that oversees independence and appointments, and decides on disciplinary action against all judges and prosecutors.
Human Rights Issues	Freedom of Expression, Association, and Assembly; Human rights violations in connection with land disputes, including land and housing rights (land confiscation and forced eviction), lack of independence of the judiciary, and prevailing impunity, arbitrary detention and torture; refugees and asylum seekers (threat of forced repatriation).
Membership in International Organisations	ADB, ARF, ASEAN, CICA (observer), EAS, FAO, G-77, IBRD, ICAO, ICC, ICRM, IDA, IFAD, IFC, IFRCS, ILO, IMF, IMO, Interpol, IOC, IOM, IPU, ISO (subscriber), ITU, MIGA, NAM, OIF, OPCW, PCA, UN, UNCTAD, UNESCO, UNIDO, UNIFIL, UNMIS, UNWTO, UPU, WCO, WFTU, WHO, WIPO, WMO, WTO

Human Rights Treaties Ratified/ acceded/ succeeded (Selected)	• ICERD: International Convention on Elimination of All Forms of Racial Discrimination (7 March 1966) (Entry into Force 4 January 1969); • ICCPR: International Covenant on Civil and Political Rights (16 December 1966) (Entry into force 23 March 1976); • ICESCR: International Covenant on Economic Social and Cultural Rights (16 December 1966) (Entry into force 3 January 1976); • CEDAW: Convention on Elimination of All Forms of Discrimination Against Women (18 December 1979) (Entry into force 3 September 1981); • OP- CEDAW (6 October 1999) (Entry into force 22 December 2000); • CAT: Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) (Entry into force 26 Jun 1987); • OP-CAT: (18 December 2002) (Entry into force 22 June 2006); • CRC: Convention on the Right of the Child & Its amendment (20 November 1989) (Entry into force 2 September 1990); • OP-CRC-AC: Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (25 May 2000) (Entry into force 12 February 2002); • OP-CRC-SC: Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (25 May 2000) (Entry into force 18 January 2002); • Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) (Entry into force 12 January 1951) (Cambodia acceded 14 October 190); • Convention relating to the Status of Refugees (25 July 1951) (Entry into force 22 April 1954) (Cambodia acceded 15 October 1992; • Optional Protocol relating to the Status of Refugees (31 January 1967) (Entry into force 4 October 1967) (Cambodia acceded 15 October 1992); • Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (7 September 1956) (Entry into force 30 April 1957) (Cambodia acceded 12 Jun 1957); • Convention on the Suppression and Punishment of the Crime of Apartheid (30 November 1973) (entry into force 18 July 1976) (Cambodia acceded 28 Jul 1981); • Rome Statute of the International Criminal Court (17 July 1998) (Entry into force 1 July 2002) (Cambodia ratified 11 April 2002); United Nations Convention against Corruption (31 October 2003) (Entry into force 14 December 2005) (Cambodia acceded 5 September 2007).
Instruments Signed (Selected)	• ICRMW: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (18 December 1990) (Entry into force 1 July 2003); • OP-ICCPR (16 December 1966) (Entry into force 23 March 1976) (Cambodia signed 27 September 2004); • Convention on the Political Rights of Women (31 March 1953) (Entry into force 7 July 1954) (Cambodia signed 11 November 2001); • Convention on the Nationality of Married Women (20 February 1957) (Entry into force 11 August 1958) (Cambodia signed 11 November 2001); • CRPD: Convention on the Rights of Person with Disabilities (13 December 2006) (Entry into force 3 May 2008); • OP-CRPD (13 December 2006) (Entry into force 3 May 2008).
Not Signed (Selected)	• CPED: International Convention for Protection of all Persons from Enforced Disappearance (20 December 2006) (Entry into force 23 December 2010).

Overview

1. Key Rule of Law Structures

The Constitution of Cambodia stipulates various provisions that fit key indicators of the Rule of Law as laid down in Section D of this country report. Cambodia is a constitutional monarchy that adopts liberal democracy and pluralism.[iii] Most importantly, Chapter III of the constitution proclaims a regime that recognises and respects human rights, for instance guarantees for equality before the law and rights of the accused, prohibits illegal detention and all kinds of discrimination, and provides for protection of the freedom of speech and expression, free movement, rights to form associations, to religion and beliefs, and to property and security.[iv] In addition to national mechanism(s), Cambodia is also involved in the recognition and application of both regional (ASEAN) [v] and international mechanisms (UN Charter, UDHR, ICCPR, ICESCR, CEDAW, CRC, etc.)[vi] to ensure respect, promotion, and protection of Human Rights. Moreover, Cambodia has agreed with UN to allow an examination of its human rights situation through a report of the Special Rapporteur[vii] (formerly referred to as Special Representative of the Secretary-General for human rights in Cambodia),[viii] thematic reports, and other country report by OHCHR.[ix] Most importantly, Cambodia expressed the importance of the Universal Periodic Review,[x] and during a peer review concluded on 17 March 2010, Cambodia accepted all 91 recommendations.[xi]

Last but not least, Article 51(4) of the Constitution provides for separation of powers among the three branches of the government, legislative, executive, and judiciary. The constitution and various legal provisions hold not only citizen but also government officials accountable for any violation of the law.[xii]

2. Foundation & Evolution of Rule of Law

Cambodia's legal system suffered significant setbacks as a result of the Communist Party of Kampuchea's (CPK) policies during the 1975 to 1979 period. In constructing the state of Democratic Kampuchea (DK), the CPK abolished virtually all institutions and laws existing under Cambodia's previous regimes, including the courts. In place of the pre-existing legal system, the CPK imposed a centralised dictatorial legal system, which exercised absolute power over the country and governed every aspect of its citizens' lives. Intellectuals were among those targeted by the regime for elimination, resulting in Cambodia losing the majority of its legal professionals in this period. Since the fall of the CPK and the end of the ensuing civil wars, there has been momentum for legal development.

The collapse of Soviet Union in 1989 and Paris Agreement were two main historical factors that led to the implantation of seeds of democracy and Rule of Law in Cambodia after decades of Communist/Socialist regimes (1975-1979; 1979-1989; and 1989-1993).[xiii] The current ruling government won the national election in 1998, 2003 and 2008. One of the main aims in its policy framework, based upon the triangular strategy (in 1998, focus more on internal peace and stability as well as sustainable development) and later on the rectangular strategy (1st step in 2004 and 2nd step in 2008) involved judicial, administrative, and legal reform.[xiv] The judicial reform effort has seen the Supreme Council of Magistracy (SCM) come into operation in 2000[xv] and the creation of the Council for Judicial and Legal Reform as well as the Council for Administrative Reform.[xvi]

Yet, the country's legal institutions and judicial capacity are still in the process of transition, and various systemic weaknesses within the Cambodian judiciary dating to the DK period are still present today.17 Having to rebuild socio-political institutions in the aftermath of the Khmer Rouge regime has presented Cambodia with significant difficulties, including a lack of human, institutional and financial resources.

The UN Special Rapporteur for Human Rights in Cambodia (the SRHRC), Surya Subedi, visited Cambodia in June 2010 and issued a statement highlighting the major concerns surrounding the Cambodian Legal System: "A combination of a lack of adequate resources, organisational and institutional shortcomings, a lack of full awareness of the relevant human rights standards, and external interference, financial or otherwise, in the work of the judiciary, has resulted in an institution that does not command the confidence of people from many walks of life."[xvii]

An important development in Cambodia's attempts to address these shortcomings and institute a culture of accountability and rule of law was the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) in early 2006. The ECCC was established as a hybrid court comprised of national and international judges and lawyers charged with prosecuting senior leaders of the Khmer Rouge and the most responsible persons who are alleged to have committed genocide, war crimes, and crimes against humanity.[xix] [See section below on ECCC and the Rule of Law]

In addition, 4 main codes, namely, the Code of Civil Procedure, Code of Criminal Procedure, Civil Code, and Criminal Code were adopted in 2006, 2007, 2007 and 2009 respectively. Another new law that is closely related to good governance and the rule of law is the law on Administrative Management of Capital, Provinces, City, District, and Khan in 2008 which was followed by more detailed executive acts concerning organisation, functioning, powers as well as responsibility, disciplinary action, civil and/or criminal responsibility in 2009 and 2010. To combat corruption,[xx] a new Law on Anti-Corruption was promulgated on 11 March 2010, and Anti Corruption Unit was created to investigate and take measures in accordance with Code of Criminal Procedures provisions against allegedly corrupt government officials.[xxi] This law also requires public officials who are appointed by Royal state Decree and Sub-Decree to declare their assets and sources of revenue no later than March 2011.[xxii] Other important laws for the judiciary are in the drafting process: the Law on Organisation and Functioning of Courts and the Law on the Status of Judges and Prosecutors.[xxiii] Last but not least, there has been as increase in access to justice through alternatives to the court system such as justice centres at the local level to settle small cases effectively and efficiently.[xxiv]

3. Human Rights Treaties:

Cambodia has ratified or acceded to many important UN human rights conventions. It has demonstrated a commitment to the localisation of international law through ratification of OP-CEDAW, for example, after recommendation from UPR 2009 review, and also shown the state's willingness to apply the principles of the conventions in the near future through its signature of ICRMW, CRPD, and OP-CRPD.

With regard to the relation of municipal and international law, Cambodia is a dualist country that requires a ratification of international law signed by the head of the government (or representative) through an adoption of law (Royal Kram) by the legislative branch to make it effective in Cambodia. There are variations in opinion with regard to the hierarchy of international and national law in Cambodia.[xxv] The first one is that there is equal rank of the Constitution and international law as recognised by Article 31(1) of the Constitution,[xxvi] and the Cambodia Constitutional Council also affirmed that in adjudicating a case, the court must not only look at national but also other international laws recognised by Cambodia.[xxvii] The second variation is that international law is hierarchically lower than the constitution.[xxviii] The third, in rare circumstances, international laws can fill in the gap of a national law as stipulated in Article 60 of the Trademark Law[xxix] and Article 33(1) of the law on Establishment of ECCC.[xxx]

Instrument (Entry into force)	Signature	Ratification/ Accession (a) or Succession (d)	Reservation	Recognition of Specific Competence Treaty Bodies
ICERD (4 Jan 1969)	12 Apr 1966	28 Nov 1983	No	No individual complaint
ICCPR (23 Mar 1976)	17 Oct 1980	26 May 1992 a	No	No inter-state complaint
ICESCR (23 Mar 1976)	17 Oct 1980	26 May 1992 a	No	N/A
CEDAW (3 Sep 1981)	17 Oct 1980	15 Oct 1992 a	No	N/A
OP-CEDAW (22 Dec 2000)	11 Nov 2001	13 Oct 2010	No	Individual Complaint Inquiry Procedure
CAT (26 Jun 1987)	N/A	15 Oct 1992 a	No	No individual complaint No inter-state complaint No inquiry procedure
OP-CAT (22 Jun 2006)	14 Sep 2005	30 Ma 2007	No	Individual Complaint Inquiry Procedure
CRC and its amendment (2 Sep 1990)	N/A	15 Oct 1992 a	No	N/A
Amendment of CRC, Art. 43(2) (18 Nov 2002)	N/A	12 Aug 1997 a	No	N/A
OP-CRC-AC (12 Feb 2002)	27 Jun 2000	16 Jul 2004	No	N/A
OP-CRC-SC (18 Jan 2002)	27 Jun 2000	30 May 2002	No	N/A
ICRMW (1 Jul 2003)	27 Sep 2004	No	N/A	N/A
CRPD (3 May 2008)	1 Oct 2007	No	N/A	N/A
OP-CRPD (3 May 2008)	1 Oct 2007	No	N/A	N/A
CPED (23 Dec 2010)	No	No	N/A	N/A

4. Interpretation and Use of the 'Rule of Law'

The concept of the Rule of Law is no longer a stranger to Cambodia after the upheaval in the 1970s and 1980s, and as the Samdech Prime Minster Hun Sen stated, "[I]t is only a gradual process that Cambodia must respect fundamental and common principles in the era of globalisation and interdependency, which includes Rule of Law". Mr. Tep Darong[xxxi] was in concurrence with the PM that Rule of Law started to develop in Cambodia in 1993 and has then become more mature.[xxxii]

> "Rule of Law is a set of practices and institution that bring order to our society for the better good of all citizens", the Prime Minister stated. Moreover, the concept also involves an application that disciplines exercise of rights and obligations and the exercise of authority's power, the PM additionally stated.[xxxiii]

As indicated in one nationally representative survey in 2007, the support of the Rule of Law[xxxiv] was remarkably widespread in Cambodia, especially on the eve of Trial of Khmer Rouge leaders.[xxxv] A political culture in which respect for the rule of law is already fairly well established in Cambodia, the article claimed.[xxxvi] "Most Cambodians seem to view […] rule of law as a positive and desirable political value, irrespective of the realities of corruption and lawlessness in Cambodian society", wrote Gibson.[xxxvii] An aspect of the Rule of Law that Cambodians value is holding the leaders of the former regime accountable for human rights violations.[xxxviii]

The position of the government in relation to the Rule of Law was clearly stated:

> "By judging the criminals in fair and open trials and by punishing those most responsible, the trials will strengthen our rule of law and set an example to people who disobey the law in Cambodia and to cruel regimes worldwide."[xxxix]

In regard to the Cambodian government's understanding of the Rule of Law, the Prime Minister and Mr. Darong similarly stated in a publication that there are 3 main elements of the Rule of Law:[xl]

1. Codification of law and its clear hierarchical order[xli] in order to ensure rights and obligation.

2. The law must be known, understood, and supported by the vast majority.

3. The application of the law must be fair, effective, equitable, and predictable. In addition, there is a need of enforcement mechanisms such as police, justice department, etc.

Furthermore, the bold strategy of legal and judicial reform[xlii] is also important for the achievement of Rule of Law. According to the World Bank, Rule of Law is one of the foremost elements of building good governance for a country[xliii], and the PM asserted that all the effort put in to good governance leads to the improvement of rule of law.[xliv] The achievement was impressive but it needed further improvement and it needed to be quick, the PM acknowledged.[xlv] The PM affirmed clear political will for the actualisation of the rule of law in the conclusion of his article:

"The road is arduous but we have no other [effective mean] or course to follow [in order to achieve the well-being of the citizens]". It is difficult road, but there is no other course. Regardless of the difficulty and lack of resources (capacity and finance), there is a clear and firm political resolve.[xlvi]

While the government affirms its commitment to a robust understanding of the Rule of Law, commentators such as H.E. Keo Puth Reasmey[xlvii] and the H.E. Son Soubert[xlviii]agreed that the perception of the vast majority toward the rule of law is that there are many good laws, but the practice is another matter.[xlix] The perception of cases of judgment favouring the rich and the powerful due to rampant corruption is one of the main factors that can undermine public confidence in the rule of law.[l] One such account specified two features of the Rule of Law:[li]

1. Rule according to the wishes of the majority with the respect of the minority.

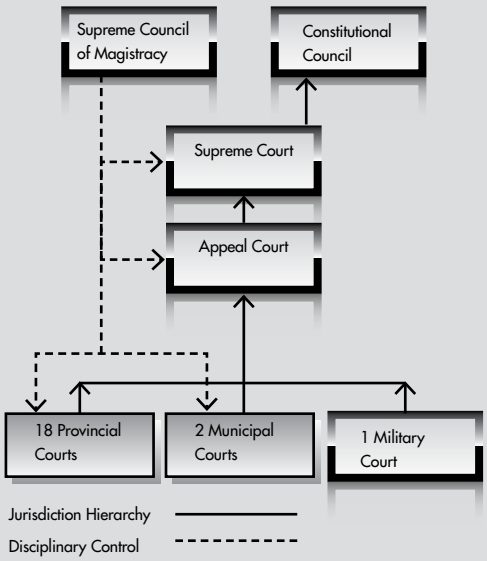
2. Existence of structures to provide services (welfare, education, and research watchdog) to educate people and to ensure civic and ethical consciousness.

On this view, international communities, citizens, and human rights and related NGOs play an important role in improving the Rule of law as it can be achieved through the education of free and critical minds, assurance of separation of power, promotion of free press, and the advancement of economic, social, and cultural rights.[lii]

Last but not least, the commitment of the government toward rule of law can be partly reflected by looking at the allocation of national budget 2011 for the Ministry of Justice (Approximately USD 9 million = 0.82% of the allocated budget).[liii]

Administration of Justice Grid

Indicator	Figure
No. of judges in country	• Supreme Court: 16 Judges (2 Female) and 7 Prosecutors (1 Female) • Appeal Court: 16 Judges (2 Female) and 9 Prosecutors • First Instance Courts: 161 Judges and 76 Prosecutors * According to the website of the Royal Academy for Judicial Profession, the total number of Judges is 396 in year 2011
No. of lawyers in country (As of February 2011)	• Practicing Lawyer: 594 (104 Female) • Trainee Lawyer: 55 (7 Female) • Non-Practicing lawyer due to the professional incompatibility: 33 (2 Female) • Suspended lawyer: 36 (8 Female) • Disbarred lawyer: 33 (6 Female) Total: 751 (Female 127)
Annual bar intake? Costs / fees?	• 30-45 Lawyers per intake (44 in 2010) Fee for training at Lawyer Training Center USD 800-1,000 (10th and 11th batch) *Note: Annual intake of trainees for Royal School of Judge is 55 judges per intake. A Judge is a public official, so once the applicants are accepted, they are not required to pay any money for the training, but receive a monthly salary of approximately USD 75
Standard length of time for training/qualification	• Qualification for Judge shall be based on completion of training at Royal School of Judge (RSJ). One of the two components for entrance exam of the RSJ is oral exam which consist of general knowledge about human rights, general concept of rule of law and justice, and law and justice. The length of training is 24 months (in-class: 8 months, apprenticeship at courts: 12 months, and specialised training for another 4 months). • Qualification for a registered lawyer shall be based on training at Lawyer Training Center or experience. The training for lawyers (4th) at Lawyer Training Center of Bar Association started in October 2002. The training components are In-class training: 9 months; Apprenticeship: 1 year; and special training: 3 months
Availability of post-qualification training	• Currently there is no required continuing legal education for judges, yet through cooperation with foreign entities special trainings regarding the four recently promulgated major codes (civil code and procedure and criminal code and procedure) have been conducted, and training (in the near future) for special laws such as administrative law, labour, and juvenile justice law will be offered as well. • Continuing legal education is not required. However, it is made possible through either periodical or sporadic workshop/conferences organised by Bar Association in conjunction with various partners such JICA, IBJ, etc.
Average length of time from arrest to trial (criminal)	• The length is between 2-6 months and does not exceed 18 months, since without any acceptable justification, prosecutor and/or judge face a possible disciplinary sanction if found, by the Supreme Council of Magistracy, in violation of procedural law. • More than one year for particular cases before ECCC (Case 001 and Case 002).

Average length of trials (from opening to judgment)	• The trial is very short as it is typically concluded within one day and the announcement of the judgment is on the same day of the trial. The average length varies according to the time limit for provisional detention. • More than a year for cases before ECCC.
Accessibility of individual rulings to public	• In the past, it was close to impossible to get a copy of the judgment for a case, as the judgment would be delivered only to parties to the case. However, a request can be made, and the request will be forwarded by the registry to the president of the court. If a copy of judgment is give, the actual names or identity information will be erased. The copying fee is also an issue of access to court cases. • The publication of judgments of the Supreme Court started in 2010 and is continuing in the year 2011. The system is still under development but the newly developed website of the Supreme Court manifests an intention to upload its decisions.
Appeals structure (Source: ADB Judicial Independence Project, Court Organisational Charts, October 2003, p. 31. Note: As of 2011 there are 21 Provincial courts)	
Cases before national human rights commission or other independent commissions (if applicable)	NA
Complaints filed against police, judiciary or other state institutions (per year)? How many resolved?	NA

A. Country's practice in applying 4 principles for rule of law for human rights

1. The government and its officials and agents are accountable under the law.

a. Are the powers of the government defined and limited by a constitution or other fundamental law?

The power of the government, namely Legislative, Executive, and Judiciary are defined and limited by the Constitution. Article 51 clearly states the principle of separation of powers and the exercise of power by the people through the three branches of government.[liv] Some examples of such principles would be autonomous budget,[lv] internal rules for organisation and functioning of the legislative branch,[lvi] stripping of parliamentarian immunity,[lvii] and declaration of war and emergency and its end.[lviii] Nevertheless, as a country adopting a parliamentary system, members of the Cambodian parliament are not allowed to serve in any constitutional organ, except in the executive branch.[lix] There are also some references to the check-and-balance principle in Chapter VII of the Constitution.[lx]

However, only Legislative branch's power[lxi] is stipulated in detail whereas further details about the organisation and functioning of Executive[lxii] and Judicial Powers[lxiii] are stated in separate law. Furthermore, provisions regarding the judiciary deal with the roles and powers of the Judicial Branch (protection of rights and freedom of the citizen and exclusive power to adjudicate), basic principles (independence and Impartiality), empowerment of only the Supreme Council of Magistracy (SCM), to appoint, dismiss, take disciplinary actions against judges and prosecutors.

Although the provisions noted above establish the independence of the judiciary, in practice there have been a number of controversies over cases of alleged interference by the executive branch in the work of other branches.[lxiv] One high-profile case where indirect interference was alleged involved the Prime Minister's disagreement toward further indictments beyond the 5 existing accused at the ECCC on the grounds of social stability.[lxv] On the other hand there were also declarations of non-interference, for example during the past year when the Prime Minister publicly announced that the government won't interfere in ongoing cases (e.g., Trial of Thais,[lxvi] case against Mr. Hun Hean, former Anti-Narcotic Drug Police in Banteay Meanchey Province,[lxvii] and case against leader of opposition party for uprooting markers along Vietnamese border and for posting a map on his party's website which the Supreme court says falsely alleges Vietnamese border encroachment[lxviii]).

b. Can the fundamental law may be amended or suspended only in accordance with the rules and procedures set forth in the fundamental law?

Revision or amendment of the Constitution can only be done in accordance with the rules and procedures set forth in the fundamental law. Chapter XV of the Constitution of the Kingdom of Cambodia prescribes rules governing effects, revisions, and amendments of the constitution. Particularly, Article 151(1) indicates who can initiate a revision or an amendment, and those people are the King, the Prime Minister, and the Chairman of the National Assembly at the suggestion of ¼ of all the assembly members. Moreover, revision or amendments shall be enacted by a Constitutional law passed by the National Assembly with a 2/3 majority vote[lxix] and promulgated by the King after consultation with the Constitutional Council.[lxx]

In addition to the strict rule of 2/3 majority vote, revisions or amendments are prohibited in cases such as during a state of emergency or amendments affecting the system of liberal, pluralistic democracy, and the regime of constitutional monarchy. No emergency decree has yet been enacted to waive or suspend provisions in the constitution. In contrast, in a state of emergency, the parliament cannot take a vacation but must meet every day continuously and can extend the mandate if such a state makes it impossible to hold election.[lxxi] Most importantly, there is a prohibition against dissolving the national assembly during a state of emergency.[lxxii]

In practice, however, there have been uncertainties over the amendment procedures, as where some commentators claimed that the constitutional law passed by national assembly in 2004 to promulgate the "Annex Constitution"[lxxiii] violated the amendment procedure as it was not reviewed by the Constitutional Council.[lxxiv] The Constitutional Council, on the other hand, declared itself

to be incompetent to review the law on the grounds that it was already adopted by the National Assembly[lxxv] and that the law on the "Annex Constitution" has an equal quality with the 1993 Constitution.[lxxvi]

c. Are government officials and agents, including police and judicial officers, accountable under the law for official misconduct, including abuse of office for private gain, acts that exceed their authority, and violations of fundamental rights?

Various provisions of the Code of Criminal Procedure of 2007 stipulate that violating the procedures (search, seizure, arrest, investigation, provision of legal aid, adjudication, etc.), renders null and void of evidence collected or the judgment render against the procedures.[lxxii] Further disciplinary sanctions are imposed on judicial police and prosecutors by the general prosecutor attached to the court of appeal,[lxxiii] and additionally there is imposition of disciplinary sanction against police, prosecutors, and judges by the Ministry of Interior and Ministry of Defense[lxxix] and Disciplinary Committee of Supreme Council of Magistracy[lxxx] respectively. Recently there has been a re-emphasis on dismissal in cases where a police official is involved in drug trafficking, possession of illegal weapons or "anarchically" firing military-issue weapons.[lxxxi] Another disciplinary action against the police official is removal from the post pending further investigation and court action.[lxxxii]

Furthermore, provisions of the Criminal Code 2009 list various aggravating circumstances, one of which is the circumstances of the perpetrator. If the perpetrator is a public official, the punishment to be imposed is higher than that of ordinary person. In addition to embezzlement and corruption, provisions apply to public officials and citizens entrusted with the Public Mandate through Elections who commit homicide, violence (assault and battery), rape, etc.[lxxxiii] As defined in Article 30 of the Code, they are punished regardless of the government entities they are working for, or their rank, remuneration, and age.[lxxxiv]

Since the establishment of the Anti-Corruption Unit, there has been a series of prosecutions against police, prosecutors, and other public servants leading to considerable public interest in the outcome of the hearing or trial.[lxxxv] The Anti-Corruption Unit made its first arrest of a Pursat Provincial Court Prosecutor on 29 November 2010. He was charged with corruption, illegal detention of people, and extortion.[lxxxvi] Following that there were many incidents of complaints lodged such as corruption charges levelled against 30 Tax agents,[lxxxvii] accusations against commune officials of marriage graft,[lxxxviii] provincial officials in Kampong Thom province accused of taking bribes from illegal logging trade,[lxxxix] and corruption charges against a former Banteay Meanchey Provincial Police Chief who was allegedly involved in a drug trafficking case.[xc]

2. Laws and procedure for arrest, detention and punishment are publicly available, lawful and not arbitrary; and preserve the fundamental rights to physical integrity, liberty and security of persons, and procedural fairness in law.

Although Cambodian laws, and especially Code of Criminal Procedure, do not devote a Chapter to enumerate the rights of accused persons are entitled to, they do specify provisions and procedures for arrest, detention, and punishment that seek to preserve fundamental rights to physical integrity, liberty, and security of person and procedural fairness.

a. Are the criminal laws and procedures, including administrative rules that provide for preventative detention or otherwise have penal effect, published and widely accessible in a form that is up to date and available in all official languages?

Provisions against arbitrary detention are stipulated in the Code of Criminal Procedures and Criminal Code which include grounds for and prescribed length of arrest, pre-trial detention, and imprisonment.[xci] In addition, legal aid provisions, in part, act against arbitrary detention.[xcii] A legislative act will become effective in the capital city and the whole country. This code and other laws are published in an official gazette which is issued 8 times a month, and cost USD 1.25 (Approx.) per issue. The language of the official gazette is Khmer, and unofficial translation of some laws and regulations into English is usually done by development partners and civil society organisation, and is available on websites or in soft copy. Some donor agencies also support hardcopy printing of important laws such as the Constitution, land law, labour law, etc.[xciii] The websites

of the legislative, executive, and judicial branches do not have a "complete database of laws",[xciv] Yet now there is a momentum to make related laws and other information public through various ministries and other public entities' websites. The law compilation and dissemination effort is also undertaken by non-governmental entities (such as Bar Association of Cambodia, OHCHR, GTZ, etc.)[xcv] and individuals (bloggers). All this effort has made previously inaccessible documents, including laws, more available in electronic/digital format.

b. Are these laws accessible, understandable, non-retroactive, applied in a consistent and predictable way to everyone equally, including the government authorities, and consistent with the other applicable law?

In principles, the answer to these questions would be yes.[xcvi] Citizens have limited access to law through the above mentioned sources (official gazette[xcvii] and websites) but there are a number of initiatives underway to increase the accessibility of the law to the Cambodian public. Part of the difficulty for ordinary citizens to understand legal terminology is that although the laws are written in Khmer the root word is borrowed from Indian ancient languages such as Pali or Sanskrit. In response, there is an effort of the Council of Minister to compile a Legal Lexicon and to standardise legal terminology used in the Civil Code and Code of Civil Procedure.[xcviii] Further there are a number of law talk shows hosted by both private and public TV stations.[xcix] Moreover, NGOs contribute to raising legal awareness among professional as well as lay people, focusing on issues other than criminal law/deprivation of liberty such as land law, labour law, family and marriage, and other development issues.[c]

The principle of non-retroactivity and its exceptions are embodied in the Criminal Code and Code of Criminal Procedure,[ci] and like the international criminal law standards, there are provisions that allow retroactive application of law such as the application of new procedures for incidents occurring before the entry into force of the codes and the application of new criminal punishments that favours defendant.[cii] The CCHR report in 2010 showed very good signs of non-retrospective application of law.[ciii]

Some evaluations have argued that there is little transparency, accountability or even predictability in the functioning of the Cambodian legal system.[civ] Although equality before the law is established in the law,[cv] there are incidents of the contrary.[cvi] For example, it has been argued that the law regarding defamation and disinformation has been used selectively and in a biased manner against journalists, human rights activists and political leaders. One controversial case involved the lifting of the parliamentary immunity of three members of parliament from opposition parties so criminal charges could be brought against them for defamation and/or disinformation.[cvii] Other sources have argued that legal provisions such as the Law on Anti-Trafficking and Draft Law on Drug Control have often been used to prosecute sex workers instead of traffickers and the drug dependent instead of drug dealers.[cviii]

c. Do these laws authorise administrative/ preventative detention without charge or trial during or outside a genuine state of emergency?

The maximum time allowed for the police custody is up to 48 hours and can be extended only for another 24 hours upon a request to the prosecutor. The period starts from the moment when the suspect arrives at the police or military police station. An exception is applied, as a minor under 14 years old of age cannot be placed in police custody.[cix] Cambodian laws also authorise extension of provisional detention or detention pending trial. However, there are time limits and reasons for such detention. Expiration of the time limit for provisional detention or failure by the investigating judge to substantiate grounds for detention will result in release of the charged person.[cx] Articles in both Constitution and Code of Criminal Procedure re-emphasise the ICCPR principle for a speedy trial[cxi] and the regulations do not provide for any allowance for detention without charge or trial during or outside a genuine state of emergency. Instead, criminal action will be extinct at the expiration of statute of limitation of offense.[cxii]

Contrarily, incidents of excessive detention have been reported, leading to over-crowding in the prison (See indicator III). For example, the CDP stated in a report that in some cases accused persons might be detained for a month more awaiting appeal by prosecutor after the time limit for pre-trial detention had expired and after being found not guilty [by the court of first instance].[cxiii]

d. Do these laws protect accused persons from arbitrary or extra-legal treatment or punishment, including inhumane treatment, torture, arbitrary arrest, detention without charge or trial and extra-judicial killing by the State? Is the right to habeas corpus limited in any circumstance?

Cambodia has ratified CAT, but has yet to establish the required independent national preventative mechanism.[cxiv] In principle, Article 38(4) of Cambodian Constitution provides protection of accused persons from physical ill treatment or any other mistreatment that imposes additional punishment on a detainee or prisoner. The perpetrator of such an act, regardless of being a public official, shall be punished according the current Criminal Code.[cxv] Moreover, evidence extracted from illegal mean such as physical or mental force shall be nullified.[cxvi] Furthermore, the Constitution instructs that any prosecution, arrest, or detention of any person may not be done except in accordance with the law.[cxvii] Persons under police custody shall be either released by the Prosecutor upon expiration of the period of police custody or handed over to the prosecutor for any further prosecution.[cxviii] A detainee may be released when there is no ground for detention, at the expiration of period of provisional detention and its extension, and upon request by charged person.[cxix] Like any other rights stated in Articles 31-50 of the Constitution, the right to habeas corpus is limited in accordance with the law, but it is not clear whether a state of emergency can be a limitation since no emergency law or decree has been issued since the adoption of the Constitution in 1993 (even during more than one year of political deadlock from July 2003 – June 2004[cxx]).

While the laws prohibit the use of torture by the police to secure confessions from criminal suspects, some NGOs have reported that torture is widely practiced, and the CDP noted other instances of physical or mental tortures that are not perceived as torture.[cxxi]

e. Do these laws provide for the presumption of innocence?

The law presumes an accused innocent until proven guilty by the court of law and also provides that any doubt shall be decided by the judge in favour of the accused.[cxxii] One of the examples that the law presumes accused persons innocent is the principle of provisional detention whereby only in exceptional case and in accordance with certain conditions where the charged person may be provisionally detained.[cxxiii] However, courts ordered provisional detention in 176 out of 199 cases, reported by CCHR.[cxxiv] The CCHR also reported judge's statements about accused could be perceived as indicating a presumption of guilt before the verdict was announced.[cxxv]

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

The first source of legal assistance is the Cambodian Constitution, which states that "Every citizen shall enjoy the right to defense through judicial recourse".[cxxvi] The second source is the Code of Criminal Procedure which stipulates various stage and situations where the accused is informed of the right to legal assistance and where the presence of legal counsel is a prerequisite before any action taken by judicial officials (polices, prosecutors, and judges). Judicial officials are required[cxxvii] to inform the defendants of the right to counsel.[cxxviii] However, a suspect has right to counsel only 24 hours after being taken into police custody.[cxxix] While the law provides for the right to counsel, the CDP noted that no accused has access to legal counsel immediately after arrest, and that no private room is provided for a lawyer to meet the client.[cxxx] The CCHR tabled 64 out of 199 trials where there was no legal representation, including 5 out of 105 felony trials where legal representation is compulsory, that were not attended by any lawyers.[cxxxi]

The third source of the right to legal assistance is the Law on the Bar Association[cxxxii] and its Internal Regulations.[cxxxiii] Under these provisions all lawyers are obliged to provide legal aid.[cxxxiv] In addition, the poor[cxxxv] are entitled to free legal aid[cxxxvi] through funding, partially mobilised by a compulsory lawyers' membership fee.[cxxxvii] Defense lawyers are paid by the fund of the Bar Association of Cambodia according to specified procedures and at a rate determined on a year basis by the Bar Association

Council. Most importantly, there is a possible disciplinary proceeding against legal aid lawyers when they do not provide diligent services.[cxxxviii]

A study in 2006 recognised those currently providing legal aid services in Cambodia consist entirely of lawyers working at NGOs, with the exception of services by BACK and pro bono initiatives by private lawyers.[cxxxix] In late 2006, a survey showed that Cambodians have limited knowledge of legal aid services and where to obtain them. They obtain referral legal aid services through local authorities. On the one hand, clients had financial difficulties to travel to and from legal aid's office to communicate physically with the lawyer. Furthermore, limited knowledge of the law hampers timely and effective legal aid intervention. On the other hand, legal aid service providers also face certain challenges in term of human resources, budget and financing for salaries and investigation expenses, as well as other trivial but important issues, such as IT-related equipment and texts of currently enforced laws.[cxl] Due to the financial crisis, some branches of these NGOs have been closed or have had to move the offices as they cannot afford the rental fee.[cxli] Relocation made it difficult for indigent clients to access legal aid services. Underfunding is one obstacle to effective legal aid, because it forces lawyers to generate more income to support their lives and families rather than focusing on the public defender job. The competence and professionalism of lawyers has also been questioned as contributing to ineffective legal aid in Cambodia.

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

Accused persons have the right to be informed of the precise charge against them in the language that they understand.[cxlii] Accused persons that are represented by lawyer are given 5 days in advance to examine case files before actual interrogation by investigating judge.[cxliii] Moreover the accused is entitled to have a period of time to prepare for his defense.[cxliv] Article 457 and 466 of Criminal Procedure stipulate a particularly adequate time that accused need to prepare for the case, which depends on the whereabouts of the accused.[cxlv] Other provisions regarding adequate time to prepare for defense are Article 304 (Procedure of immediate appearance before the court), Article 319 (Access to examine case file before the trail)[cxlvi]; Article 322 (Placing witness outside the court room before testifying; Article 428 (Presentation of case file for examination which provides for free access to case file by lawyer); and Article 429 – Extension of time limit for writing brief).

In practice, virtually all of the accused persons were informed of the charges against them, as noted by CCHR.[cxlvii] Some commentators have questioned whether all accused persons have enough time to prepare for defense as they or their lawyers received short notice for hearing (especially in substantive hearing of the merits).[cxlviii] Last but not least, the guarantee for free communication between accused persons and legal counsel (without being listened to or recorded by others) is stipulated in Article 149 (Right of defense – during pre-trial detention).

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

Although without using the exact wording of "trial without undue delay", the Code of Criminal Procedure empowers the Investigating Chamber to ensure that there is no undue delay in the implementation of any proceedings.[cxliv] To emphasise a prohibition of undue delay, various provisions of the procedure use words "…without delay", "… unnecessarily delay", or "…immediately". In an immediate proceeding, the criminal code instructs an announcement of judgment within 2 weeks of the accused person's appearance in court.[cl] In case the prosecutor orders an investigation instead of immediately proceeding, there is no time specification, but "within reasonable time", set for the announcement of judgment.[cli]

Pre-trial/provisional detention provisions also guarantee principle of trial without undue delay. The duration and number of extensions of detention are specified according to types of crime and the age of the charged person.[clii] Article 294 of the Code of Criminal Procedure also provides for an additional four months of detention in anticipation of a trial following the closing of an

investigation. 8 of 199 incidents monitored by CCHR were in violation of the procedure. Significantly, the majority of the cases enumerated by the CCHR as exceeding pre-trial detention, the term of detention surpassed the eventual length of sentence from less than a week to a year or even 2 years.[cliii]

With regard to right of accused persons to examine witnesses and evidence against them, the Code of Criminal Procedure states that the Prosecutor summons the witnesses. However, the defense may also present to the hearing any witnesses who were not summoned by the Prosecutor and may request that the court hear them in the capacity of witnesses.[cliv] In cases where the trial is conducted without the accused persons' presence, the Code allows opposition to a default judgment issued as result of trial in absentia.[clv]

In practice, a court monitoring effort illustrated that almost all accused persons were given the opportunity to present evidence and examine evidence against them. The monitoring reports also noted, however, that witnesses were present in the courtroom even before testifying.[clvi]

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

Appeals can be lodged, within the prescribed time, at the Court of Appeal[clvii] and Supreme Court[clviii] according to statutory procedures.[clix] In a form of challenge to final judgment of court, which has the res judicata effect, the Code of Criminal Procedure also allows a Motion for Review to be lodged at Supreme Court in a plenary hearing.[clx] The new Code of Criminal Procedure does not only provide a possibility to challenge the judgment of the trial judge but also decisions of investigating judges, i.e. provisional detention.[clxi]

There may, however, raises practical obstacles to the exercise of the right of appeal. In February 2010, LICADHO issued a briefing paper about obstacles for appeal which include, inter alia, prison's means of transportation for long-distance travel to the only Appeal Court in Cambodia, lack of expenses for travel such as petroleum, lack of staff, lodging and other expenses for staff, etc.[clxii] As a result, 540 inmates with appeal pending in seven provincial prisons were at risk of not being able to attend the appeal, appeal in absentia.[clxiii] These obstacles could also lead to ineffective defense and/or adequate time for preparation of the case as the accused might be transferred to the Court of Appeal on the day of the hearing,[clxiv] the paper continued.[clxv]

j. Do these laws prohibit the use of coerced confessions as a form of evidence and do they guarantee the accused person's right to remain silent?

The Cambodian Constitution prohibits the use of coerced confessions as a form of evidence.[clxvi] Additionally, provisions of the Rules of Evidence are included in the new Code of Criminal Procedure (2007). It presumes all evidence as admissible and the trial judges as the person who considers the value of the evidence following his intimate conviction.[clxvii] However, certain types of evidences have no evidentiary value or are inadmissible. This includes evidence obtained through physical or mental duress and evidence emanating from communication between the accused and his lawyer.[clxviii] The Code of Criminal Procedure also safeguards the accused persons' right to remain silent at the investigation and trial stage.[clxix] Challenges remain in fully implementing these recent provisions. For example, a court monitoring effort by CCHR in 2010 suggested signs of extraction of confession through either coercion (threat) or torture (application of force).[clxx] NGOs have also alleged that torture is an institutionalised practice during police custody due to lack of proper training for police, lack facilities for investigation, and impunity.[clxxi]

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

The Code of Criminal Procedure clearly forbids trying or punishing a person for an offence for which they have already been finally convicted or acquitted (Res Judicata).[clxxii] An exception to double jeopardy is in the case of motion for review.[clxxiii] However general amnesty or pardon is not an obstacle for trying a person, especially in the case of most serious crime (crime against humanity, war crime, and genocide).[clxxiv]

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

In general, the rights and freedom of Cambodian citizens are protected by the judiciary.[clxxv] The Cambodian Constitution and Criminal Code provide for a right to seek a remedy from a competent court (court at all level) for a complaint against public official.[clxxvi] Furthermore, any violation of fundamental rights by a private person shall be settled and remedied according to the Code of Criminal Procedure.[clxxvii] Imprisonment (maximum life imprisonment) and/or fine by the state are two types of remedies enforced by the state for any violation of fundamental rights by private or public persons.[clxxviii] Compensation for injury sustained by the victim of rights violations seeks to proportionally restore damaged or destroyed property to its original state.[clxxix]

In practice, incidents of ineffective remedies have been reported whereby perpetrators of human rights violations enjoyed impunity.[clxxx] Victims or their families were under threat not to resort to judicial recourse and persuaded/forced to accept monetary compensation.[clxxxi] It has also been reported that state authorities often seek compensation for victims of rape or sexual assault as an alternative to criminal prosecution, and that victims' access to court for civil remedies was hampered by fees imposed by court. Nevertheless, in such cases there are available alternatives to court proceedings, for instance the Arbitration Council[clxxxii] and Cadastral Commission.[clxxxiii]

3. The process by which the laws are enacted and enforced is accessible, fair, efficient, and equally applied.

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

Legislative proceedings or session must be in held public unless requested otherwise.[clxxxiv] The sessions are conducted twice a year with a period of 3 months for each session, and extraordinary sessions can also be convened. The agenda for the session is proposed by the Secretariat of the two houses and made known to the public.[clxxxv] In the past several years and up to now, there is a state-televised live session or debate of legislation at both houses, National Assembly and Senate. There is little information about the written record of legislative sessions as to whether they are recorded or the record is made available to the public.

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

In the past several years, draft laws are treated with confidentiality. They are only circulated among government entities and NGOs involved in the consultation process. Only in recent years have some draft laws been circulated and reached the academic sphere (including students).[clxxxvi] Praise for consultative participatory dialogue between the civil societies and the government has been reported in the case of enactment of Law on Peaceful Demonstration.[clxxxvii] However, in the case of the Anti-Corruption Law and NGOs Law, there was not much consultation and little information was made known to the public, especially civil society groups.[clxxxviii] Later on, the government changed the stance to involve and take NGOs' recommendation into consideration.[clxxxix] Concerns were also raised about the lack of consultation and parliamentary debate in the case of the Law on Peaceful Demonstrations in October 2009, the Law on Expropriation in February 2010, and the Anti-Corruption Law in March 2010.[cxc]

c. Are the thresholds for legal standing before courts clearly specified, not discriminatory and not unduly restrictive?

Standing before the law, especially in criminal proceedings is clearly defined.[cxci] In fact, the new Criminal Code (2009) allows some associations to assist victims in filling a complaint.[cxcii] In addition, the victim can be represented by the victim's successor (in case of death) or legal representative (in case of minor or adult under legal guardianship) and can file a civil complaint attached to the criminal action initiated by prosecutor.[cxciii] The Constitution also clearly mentions standing before the Constitutional Council. An ordinary citizen can request constitutional review of laws and other executive's regulation that affect their constitutional rights through representatives and through the Supreme Court.[cxciv] Any individual, legal representatives, groups, organisations, or association have standing before the committee of Human Right Protection and Reception of Complaint.[cxcv]

d. Are judicial hearings and decisions public and made readily available to affected parties?

Trial hearings must be conducted in public except in case where public morals, public order, national security, or the privacy of relevant parties is at stake.[cxcvi] Nevertheless, the announcement of the judgment must be in public,[cxcvii] and the ruling part must be read aloud by the presiding judge in a public hearing session.[cxcviii] A recent court monitoring of 199 trials[cxcix] by CCHR indicated that the public was not obstructed from attending the trial, but notice of hearing on the public notice board occurred only in 5 trials.[cc] In recent years, however, there have been efforts by courts, especially the Phnom Penh Municipal Court and Supreme Court, to make the information about trial schedules public via the notice board and court website.[cci] Last but not least, an announcement of judgment is also required to inform the parties.[ccii] Please see information regarding the publication of decisions at Section B: Justice Grid of this report.

e. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law?

The laws provide for equal protection,[cciii] but in practice it has been widely alleged that application of the laws favoured wealthy or powerful individuals.[cciv] These cases particularly involve land disputes arising from economic land concession and other development projects[ccv] leading to alleged forcible land eviction[ccvi]and land grabbing.[ccvii] The OHCHR has raised other equal protection issues such as those involving Khmer Krom Buddhist monks, government's dissidents,[ccviii] equal payment and promotion for female employees,[ccix] slow issuance of certificate of land title for indigenous group despite evidence of valid possession;[ccx] etc.

f. Do persons have equal and effective access to judicial institutions without being subjected to unreasonable fees or arbitrary administrative obstacles?

The victim in a criminal case is not required to pay any fee, but it is the responsibility of the state.[ccxi] However, in civil disputes, the filing fee must be paid by the plaintiff and if the defendant loses, the defendant shall be responsible for the court fee (paying the plaintiff a lump sum to cover the filing fee). Aside from fees associating with the preceding, by filling fee is calculated based on the value of the subject matter of the complaint. The minimum filing fee is USD 25 (approx.), and the maximum is USD 70 (approx.).[ccxii] Concerns have been raised about the extraction of an "extra fee" by judicial officials, especially clerks, in order to support their low salaries.[ccxiii] One report also cited the example of victims of human trafficking who were unable to bring civil suit against the perpetrator due to fees imposed by courts.[ccxiv] The OHCHR has also reported lack of access to judicial institution due to fees imposed by courts in cases of rape and sexual assault against women.[ccxv]

g. Are the laws effectively, fairly and equally enforced? Are persons seeking access to justice provided proper assistance?

The issue of equality before law is discussed in Indicator II.2. Concerns have also been raised about unequal enforcement of laws regarding assembly, public demonstrations, disinformation, and defamation, depending on the political orientation of the demonstrators.[ccxvi]

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

The Human Rights and Complaints Reception Committees of the National Assembly and Senate of Cambodia as well as the executive branch's Cambodian Human Rights Committee are empowered to conduct investigations into human right violations, but they are enabled to effectively and promptly provide reparation to victims of human rights violation (i.e. victim of land eviction) or hold perpetrators accountable. These bodies have been claimed to be largely ineffective.[ccxvii] Victims of human rights violation have often either asked for help from NGOs or important figures in the country such as members of Parliament, the Prime Minister, or the Human Rights Special Rapporteur.[ccxviii]

i. Do the laws provide for and do prosecutors, judges and judicial officers take measures to minimise the inconvenience to witnesses and victims (and their representatives), protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect their interests?

So far there is no mechanism other than Criminal Code which punishes perpetrators who cause inconvenience to witnesses, victims or civil parties, or that deals with safety concerns such as intimidation or retaliation toward victims, witnesses, and their families before and after there is a proceeding against the perpetrators. The punishment for the perpetrators who commit crimes against these persons involves aggravating circumstances depending on target.[ccxix]

4. Justice is administered by competent, impartial and independent judiciary and justice institutions.

Obstacles to judicial independence include the possibility of politically motivated removal of judges as well as low wages for judges. Judges can be impartial only when they are able to make decisions on the basis of the evidence presented at trial, not based on based on outside threats, bribes, personal bias, financial interest, etc.[ccxx] A need to reform of judiciary is acknowledged by the government[ccxxi] and it has developed policy initiatives towards legal and judicial reform to ensure competency of judicial officials and the impartiality and independence of judiciary and justice institutions.[ccxxii]

a. Are prosecutors, judges and judicial officers appointed, re-appointed, promoted, assigned, disciplined and dismissed in a manner that fosters both independence and accountability?

Judge shall not be dismissed, but disciplinary action may be taken by the Supreme Council of Magistracy a body which also proposes to the King the appointment, transfer and removal of all judges and prosecutors in the country.[ccxxiii] A report in October 2003 showed that before 1993, judges and prosecutors were appointed by the Communist Party and had little legal education[ccxxiv]. While the qualifications and training for judges have dramatically improved it has been alleged that political factors influence the selection and appointment of judges.[ccxxv] Judges have no effective means of control over court clerks, who are appointed by the Ministry of Justice.[ccxxvi]

b. Do prosecutors, judges and judicial officers receive adequate training, resources, and compensation commensurate with their institutional responsibilities? What percentage of the State's budget is allocated for the judiciary and other principal justice institutions, such as the courts?

Training for Judicial officials is provided by government entities in cooperation with various donor agencies.[ccxxvii] Prosecutors, judges, and judicial officers received a salary equal to that of government official. One source wrote that salary of the judge is in between USD 400 – 1,200 per month[ccxxviii] or 8,400 – 48,000 per annum, which present much gap between judicial officials' salary at ordinary court and those of at ECCC.[ccxxix] According to a report by ADB, the national budget (in 2000) devoted to judiciary is only 0.30%,[ccxxx] and National Budget allocation for ministry of justice (in 2011) is approximately 0.82%,[ccxxxi] which doesn't represent much difference from that of in 2000. ADB stated that such low remuneration didn't allow, especially judges, to maintain a minimally respectable standard of living roughly commensurate to their level of responsibilities and status.[ccxxxii]

c. Are judicial proceedings conducted in an impartial manner and free of improper influence by public officials or private corporations?

Under the Constitution the judicial power shall be an independent power to protect the rights and freedoms of citizens[ccxxxiii] and it should not be given to legislative or executive branch.[ccxxxiv] The impartiality and independence of judiciary is guaranteed by the King with assistance from the Supreme Council of Magistracy.[ccxxxv] One may interpret the involvement of the Ministry of Justice in SCM as a possible interference[ccxxxvi] with the independence of the judges, because the Minister of Justice is empowered by the law on SCM to draft a sub-decree on the appointment,

promotion, transfer, suspension, and dismissal of judges and prosecutors.[ccxxxvii] There is a proposal to have the Ministry of Justice perform the role of secretariat of the SCM, which includes assistance to Disciplinary Council of SCM in investigating the alleged misconduct of the judge or prosecutor.[ccxxxviii] In what seems to be an overlapping function, in September 2009, an assistance team to the Disciplinary Council of the SCM was created for the "effectiveness of disciplinary action" against misconduct by judges and prosecutors.[ccxxxix] Furthermore, the Minister of Justice is also authorised to issue a proclamation regarding the election of 3 judges as full members of SCM and another 3 judges as reserve members.[ccxl] Most importantly, SCM doesn't have autonomous budget approved by the legislature but its budget is a part of Ministry of Justice's budget.[ccxli]

Since the Law on Judge and Prosecutor is being drafted, the SCM issued a Code of Ethics for Judges and Prosecutors in 2007. The Code of Ethics is consistent with international standards of judicial independence and impartiality. The Council is headed by King, but he does not attend the meetings of the Council, but delegated the chairmanship to the President of the Senate. Such delegation is seen by civil society groups as violation of judicial independence and separation of power.[ccxlii] In a recent report and analysis of impartiality and independence of judiciary, Prof. Surya P. Subedi[ccxliii] offered 8 points, for consideration, regarding the current public confidence and problems associated with Cambodian judiciary.[ccxliv]

In 2003, the ADB analysed two sources of pressure on the independence and impartiality of judges, which was based on appointment and disciplinary actions, budget and remuneration, court facilities and infrastructure, etc. [ccxlv] In 2009, FIDH, LICADHO, CHRAC, and other NGOs jointly made a submission for the UPR of Cambodia (Joint Submission, JS3) that was highly critical of the judiciary in regard to independence and impartiality.[ccxlvi]

d. Are lawyers or representatives provided by the court to accused persons, witnesses and victims competent, adequately trained, and of sufficient number?

One may become a lawyer after completion of a 24 months training program at the Lawyer Training Center or fulfilment of the requirement of experience (2 years of legal experience with the bachelor of law degree) or receiving a doctoral degree in law.[ccxlvii] The competency of legal aid lawyers is a subject that requires empirical assessment.[ccxlviii] In regard to numbers, for a population of approximately 14 million, Cambodia has a total of less than 600 practicing lawyers. Nevertheless, it represents an increase in numbers, however slow.[ccxlix] An evaluation by the Rule of Law Program indicated that there were simply too few lawyers in the country to defend in criminal prosecutions.[ccl]

e. Do legal procedures and courthouses ensure adequate access, safety and security for accused persons, prosecutors, judges and judicial officers before, during and after judicial, administrative, or other proceedings? Do they ensure the same for the public and all affected parties during the proceedings?

Safety and security for accused person, prosecutors, judges, and judicial officers are well provided in the cases before the ECCC, but it is less true in ordinary cases. A joint NGO submission for UPR Cambodia 2009 pointed to threats against human right defenders/activist[ccli] and activists for other causes.[cclii] The statistic of threat increased from one year to another for example 37 cases in 2006, 46 in 2007 and 52 in 2008. It also equally important to note that in the past a Judge was shot dead in a high profile case.[ccliii]

B. ECCC's LEGACY FOR THE RULE OF LAW

1. 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.[cliv] 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. 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 internationalised 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 centre 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.[clv]. A recent example of alleged political interference in the proceedings the ECCC was the Cambodian government's public condemnation of any

further prosecutions beyond Case 002. Nevertheless, Cases 003 and 004 are currently under judicial investigation and civil party applications were lodged in early April 2011.

2. 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 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 utilise 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.

3. ECCC Judgments and Decisions

Duch Judgment

The former director of Tuol Sleng Security Centre (S21), 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 that Duch did not fall within the personal jurisdiction of the ECCC, 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 during 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 request 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".[cclvi]

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".[cclvii]

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".

4. 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".[cclviii]

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 organisations have created tools and training programmes to ensure that the ECCC has a lasting legacy in Cambodia. 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.

a. Archiving ECCC documents and judicial decisions

The ECCC can only manifest its modelling 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.[cclix] 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.

The Virtual Tribunal ("VT"), is an online digital archive, research portal, interactive educational site, and public outreach tool for international criminal tribunals and human rights courts. The immediate aim of VT is to assist the legacy preservation of the ECCC by turning its vast records into a powerful educational tool for both domestic and international audiences. VT will also enhance the rule of law in Cambodia by providing public access to important judicial decisions that will have persuasive value in proceedings addressing related judicial matters. VT aims to recreate the live courtroom environment, with enhancements such as immediate access to relevant court records and exhibits, links to related civil society advocacy materials, and supplementary interview footage of trial participants sharing their own personal reflections on historically significant criminal proceedings. This multi-faceted design enables users, ranging from victims to scholars, to easily use the resources wherever they may be.

Also aiming to archive the products of the ECCC is the Documentation Center of Cambodia ("DC-Cam"), long revered for its invaluable archiving of primary source materials relating to the Khmer Rouge, including documents and photographs. DC-Cam is currently establishing a permanent centre. the Sleuk Rith Institute, which will serve as a permanent documentation centre and include a research and training institute, library, museum, and press archive.[cclx] Though its focus will not be exclusively on the ECCC's jurisprudence, the process and outcome of the trials will factor heavily in the Institute's substantive focus.

Both Virtual Tribunal and the Sleuk Rith Institute seek to be more than static archives where the onus is on users to find value in the materials stored within. The mission of each involves substantial educational programming to ensure that the ECCC's documents and decisions are comprehensible and relevant for users.

b. 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 organisations 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.

Recognising that the future of the domestic legal system will be served by not only investing in current Cambodian lawyers, organisations 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 English Language Based Bachelor of Law Program at 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.

c. Creation of educational materials

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.[cclxi]

5. Conclusion

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 organisations, including the ECCC itself, have designed practical measures to ensure that its work has a meaningful and practical effect on Cambodian society as a whole. These include practical annotated versions of the National Penal Code incorporating ECCC interpretations of its provisions, judicial capacity trainings, National ECCC Internships and archiving programmes. The existence of the ECCC and the initiatives created to ensure its legacy act as a building block in developing a fairer and more effective legal process in Cambodia.

Endnotes

i. PHUN Vidjia, Director of PUC Legal Clinic and Law Lecturer, Paññāsāstra University of Cambodia (PUC).Jennifer Holligan from Royal University of Law & Economics Cambodia and Singapore Management University.

ii. Most Statistics and Information are extracted from CIA, The World Factbook, *https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html* (last visited Mar. 12, 2011).

iii. Cambodia CONST. (Sep. 24, 1993), Ch. I, Art. 1.

iv. A comprehensive set of Civil and Political Rights and Social, Economics, and Cultural Rights are stated in Cambodia CONST (Sep. 24, 1993), Ch. III, Art. 31-50 and Ch. V-VI.

v. ASEAN, ASEAN Intergovernmental Commission on Human Rights (AICHR), *http://www.aseansec.org/22769.htm* (last visited Mar. 12, 2011).

vi. Cambodia CONST. (Sep. 24, 1993), Ch. III, Art. 31(1).

vii. The power of Special Representative of the Secretary General for human rights in Cambodia was weakened by a change of mandate to a Special Rapporteur mandate as claimed by a Joint submission on Freedom of Expression for UPR Cambodia 2009 (JS2 coordinated by Alliance for Freedom of Expression in Cambodia), at p. 3, ¶13.

viii. Cambodian lodged a formal complaint against the Special Representative. Critics said the government was not happy with blatant assessment of the human rights situation in Cambodia. In few months before his mandate ended (2008), the Special Representative forced to resign in September 2008. See UNHCR, Cambodia: Concern over UN Human Rights Role, Oct. 30, 2008, *http://www.unhcr.org/refworld/country,,,,KHM,,490ad4d4c,0.html* (last visited Mar. 12, 2011).

ix. See OHCHR – Cambodia Country Office, Reports, *http://cambodia.ohchr.org/EN/PagesFiles/ReportIndex.htm* (last visited Mar. 12, 2011). The government extended the mandate of OHCHR-Cambodia country in January 2010 for two more years, but subsequently threatened to close the OHCHR-Cambodia Country Office at the end of this extension. See Human Rights Watch, Cambodia: Closure of UN Office Threatens Rights Efforts, Oct. 29, 2010, *http://www.hrw.org/en/news/2010/10/29/cambodia-closure-un-office-threatens-rights-efforts* (last visited Mar. 12, 2011).

x. U.N. GAOR, HRC, 13th Sess., Agenda Item 6, at 3, ¶5, U.N. Doc. A/HRC/13/4 (2010), available at *http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/KH/JS3_KHM_UPR_S06_2009_JointSubmission3.pdf* (last visited Mar. 12, 2011).

xi. Universal Periodic Review, Response to Recommendation: Cambodia, available at *http://www.upr-info.org/IMG/pdf/Recommendations_to_Cambodia_2009.pdf* (last visited Mar. 12, 2011).

xii. Cambodia CONST. (Sep. 24, 1993), Ch. III, Article 39; Ch. VII, Art. 80(2-3); Ch. VIII, Art. 104(2-3); and Ch. XI, Art. 133 and134(4) and provisions of Criminal Code 2009, Criminal Procedure 2007, Anti-Corruption Law 2010, and a set of Administrative Laws (adopted between 2008-2009).

xiii. See Snapshot box, "historical background".

xiv. CHRAC, however, stated that progress on the reform is slow and insubstantial. See U.N. GAOR, HRC, 6th Sess., at 5, ¶ 24, UN Doc. A/HRC/WG.6/6/KHM/3 (2009), available at *http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/KH/A_HRC_WG6_6_KHM_2_E.pdf* (last visited Mar. 12, 2011).

xv. Five years after the adoption of 1993 Constitution, the Council was created in 1998 (see Law on Organizing and Functioning of SCM) and came into operation in 2000.

xvi. Triangular Strategy, available in general at *http://www.cdc-crdb.gov.kh/cdc/socio_conomic/introduction.htm* (last visited Mar. 12, 2011); Rectangular Strategy Phase I, available at *http://www.cdc-crdb.gov.kh/cdc/7cg_meeting/position_paper_eng2004/7cg_default.htm* or *http://www.ilo.org/wcmsp5/groups/public/–asia/–ro-bangkok/documents/genericdocument/wcms_100515.pdf* (last visited Mar. 12, 2011); and Rectangular Strategy Phase II, available at *http://www.aideffectiveness.org/media/k2/attachments/Rectangular_Strategy___Phase_II_1.pdf* (last visited Mar. 12, 2011).

xvii. See e.g. The Cambodian Government in Report to the Human Rights Committee in 1993 (ICCPR/C/81/Add.12, 23 September 1998), E9/6.8, ERN (Fr) 00333208, para. 212; Report of United Nations Secretary-General for Human Rights, Mr. Michael Kirby (Australia) to the Commission on Human Rights, Cambodia Human Rights in 1994, E/CN.4/1994/73, E9/6.6, ERN (Fr) 00333197, 00333198, paras 137, 155

xviii. See *http://www.un.org.kh/index.php?option=com_content&view=article&id=330:united-nations-special-rapporteur-on-the-situation-of-human-rights-in-cambodia-statement&catid=44:un-speeches-and-statements&Itemid=77*

xix. "ECCC Agreement," at http://www.eccc.gov.kh/en/tags/topic/80 (last accessed 11 April 2011).

xx. It is claimed that Anti-Corruption Unit possibly cannot perform its function independently and without any bias when there is no exclusion of party-affiliation as one of criteria for president and vice-president candidacy. Moreover, the president and vice-president are not elected, but nominated by the Prime Minister and approved by the King. Also, it is placed under supervision of a body National Council for Anti-Corruption, whose membership criteria does not exclude affiliation with any political party and given a role to report to the Prime Minister, and whose annual budget is a part of Council of Minister's annual budget approved by the legislature. See Law on Anti-Corruption (March 2003), Art. 6(3), 10(2), and 16.

xxi. Id. at Art. 21.

xxii. Id. at Art. 17-19. See also Chun Sakada, Official Begin Asset Declaration to Counter Corruption, VOA News, Jan. 14, 2011, *http://www.voanews.com/khmer-english/news/Officials-Begin-Asset-Declaration-to-Counter-Corruption-113602619.html* (last visited Mar. 12, 2011) and DAP-News, Cambodia's Anti-Corruption Unit Urges Officials to Claim Assets, Jul. 14, 2010, *http://www.dap-news.com/en/news/923-story-cambodias-anti-corruption-unit-urges-officials-to-claim-assets.html* (last visited Mar. 12, 2011).

xxiii. U.N. GAOR, HRC, 6th Sess., Supra note xiv, at 2, ¶4.

xxiv. Chun Sakada, Cambodia Hope to Expand Alternative Justice Centers, VOA News, Dec. 15, 2010, *http://www.voanews.com/khmer-english/news/Cambodia-Hopes-to-Expand-Alternative-Justice-Centers-111921724.html* (last visited Mar. 12, 2011). For larger picture of ADR project in Cambodia, please see UNDP, Access to Justice: Project ID # 00048421, last updated Oct. 2010, *http://www.un.org.kh/undp/what-we-do/projects/access-to-justice-project?app_id=17* (last visited Mar. 12, 2011).

xxv. Tep Darong, Cambodia and the Rule of Law, in Konrad Adenauer Stiftung, 5 Democratic Development: Occasional Paper 21, 23-24 (Jan. 2009).

xxvi. Cambodia CONST. (Sep. 24, 1993), Ch. III, Art. 31(1) "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women's and children's rights".

xxvii. Constitutionality of the Article 8 of the Law on the Aggravating Circumstances of Felonies, No. 131/003/2007, Constitutional Council, Jun. 27, 2007, available at *http://www.ccc.gov.kh/english/dec/2007/dec_003.html* (last visited Mar. 12, 2011).

xxviii. See Cambodia CONST. (Sep. 24, 1993), Ch. II, Art. 26; Ch. IV, Art. 55; Ch. VII, Art. 90(5); and Ch. XV, Art. 150.

xxix. Trademark Law (Jan. 8, 2002), available at GoCambodia.com, Trademark Law, *http://www.gocambodia.com/laws/copyright.asp* (last visited Mar. 12, 2011).

xxx. Law on Establishment of ECCC (Oct. 27, 2004), available at Extraordinary Chambers in the Courts of Cambodia (ECCC), Law on Establishment of ECCC, *http://www.eccc.gov.kh/english/law.list.aspx* (last visited Mar. 12, 2011).

xxxi. President of the Royal Academy for Judicial Profession.

xxxii. Tep Darong, Supra note xxv, at 21.

xxxiii. Hun Sen, Rule of Law in Cambodia, in Konrad Adenauer Stiftung, 5 Democratic Development: Occasional Paper 9, 9 (Jan. 2009).

xxxiv. James L. Gibson et al., Cambodia's Support of the Rule of Law on the Eve of the Khmer Rouge Trials, 4 IJTJ 377, 388 (2010), available at *http://ijtj.oxfordjournals.org/content/4/3/377.full.pdf+html* (last visited Mar. 12, 2011).

xxxv. Id, pp. 385-396.

xxxvi. Id, p. 395.

xxxvii. Id, p. 389.

xxxviii. Id, p. 390.

xxxix. Id, p. 378.

xl. The 3 main elements are elaborated more in Hun Sen, Supra note xxxiii, at 10-11.

xli. Tep Darong, Supra note xxv, at 25-26.

xlii. The strategy was approved by the government on 29 April 2005. Judicial and legal reform effort of the government, including legal aid, are assisted by foreign donors such USAID, ABA, EWMI (an implementing agency), UNDP (Access to Justice), ADB, (Access to Justice), JICA and French Agency (Legislative drafting and general judicial reform), AUSAID (criminal justice reform); World Bank (legal and judicial reform); etc. See in general Council for Administrative Reform, *http://www.car.gov.kh/document/gap/gapII/legal_judicial_reform_en.asp*; and *http://www.car.gov.kh/document/gap/gapI/areas_actions_en.asp*; LICADHO, Briefing Paper: Legal and Judicial Reform in Cambodia, available at *http://www.licadho-cambodia.org/reports/files/79LICADHOLegalJudicialReformPaper06.pdf*; and Cambodia Criminal Justice Assistance Project at*http://www.ccjap.org.kh/* (last visited Mar. 12, 2011).

xliii. According to the paper, there are 6 elements of Rule of Law, 1) Voice and Accountability, 2) Political Stability and Absence of Violence, 3) Government Effectiveness, 4) Regulatory Quality, 5) Rule of Law, and 6) Control of Corruption.

xliv. Hun Sen, Supra note xxxiii, at 10-12.

xlv. Id, p. 12.

xlvi. Id, pp. 10-11.

xlvii. Then a President of FUNCINPEC Party.

xlviii. Then a member of the Constitutional Council.

xlix. Keo Puth Reasmey, The Rule of Law in Cambodia in the 21st Century, in Konrad Adenauer Stiftung, 5 Democratic Development: Occasional Paper 13, 13-14 (Jan. 2009) and Son Soubert, The Rule of Law in Cambodia in the 21st Century, in Konrad Adenauer Stiftung, 5 Democratic Development: Occasional Paper 15, 15 (Jan. 2009).

l. Cambodia ranked 154 out of 178 in 2010 and 158 out of 180 in 2009 by Transparency International. See Transparency International, Corruption Perceptions Index, *http://www.transparency.org/policy_research/surveys_indices/cpi* (last visited Mar. 12, 2011).

li. Son Soubert, The Rule of Law in Cambodia in the 21st Century, in Konrad Adenauer Stiftung, 5 Democratic Development: Occasional Paper 15, 15-16 (Jan. 2009).

lii. Id, pp. 16-19.

liii. Education, defense, health, social affairs, and agriculture are prioritized. See Vong Sokheng, National Budget Approved, The Phnom Penh Post, Nov. 29, 2010, p. 3 and Cambodia Review, Cambodian National Budget for 2011 Approved by NA, Cambodian Economy Reviews, Nov.29, 2010, *http://khmerian.com/cambodia%E2%80%99s-national-budget-for-2011-approved-by-na/* (last visited Mar. 12, 2011).

liv. Cambodia CONST. (Sep. 24, 1993), Ch. VII, Art. 90 & Ch. VIII, Art. 99.

lv. Cambodia CONST. (Sep. 24, 1993), Ch. VII, Art. 81 & Ch. VIII, Art. 105.

lvi. Cambodia CONST. (Sep. 24, 1993), Ch. VIII, Art. 94, 95, 114, & 115.

lvii. Cambodia CONST. (Sep. 24, 1993), Ch. VII, Art. 80 & Ch. VIII, Art. 104.

lviii. Cambodia CONST. (Sep. 24, 1993), Ch. II, Art. 22 & 24; Ch. VII, Art. 86 & 90; and Ch. VIII, Art. 102.

lix. Cambodia CONST. (Sep. 24, 1993), Ch. VII, Art. 79.

lx. Few examples would be 1) dissolution of the National Assembly by king with the request of the Prime Minister and approval by Chairman of National Assembly in case that executive branch is dissolved twice through vote of no-confidence within a period of twelve months (Article 78). Yet, dissolution of National Assembly during state of emergency is prohibited (Article 86); 2) Approval of National Budget and the like, Treaties or International Convention, Law on Declaration of War; and 3) Motion by the legislative branch against the member of Council of Minister, explanatory reply by member of Council of Minister to legislative branch (in oral or in writing), and question and answer session (invitation by legislative branch to member of Council of Minister).

lxi. Cambodia CONST. (Sep. 24, 1993), Ch. VII & Ch. VIII, Art. 76-115.

lxii. Cambodia CONST. (Sep. 24, 1993), Ch. X, Art. 118-127 and Law on Organization and Functioning of Council of Minister (1994).

lxiii. Cambodia CONST. (Sep. 24, 1993), Ch. XI, Art. 128-135; Law on Organization of the Court (1994); and Law on Law on the Organization and Activities of the Adjudicative Courts of the State of Cambodia (SOC Law 1993).

lxiv. Interference of judiciary by executive branch was once reported in ADB report in which in December 2000 hundreds of people were re-arrested when the Prime Minister issued an order for the arrest of all suspects and prisoners previously released

on bail or acquitted by the courts. This act suggests that the government itself does not have confidence in the judicial system. See ADB, Judicial Independent Project, Judicial Independence Overview and Country Level Summaries, Oct. 2003, p. 51.

lxv. Sok Khemara, Donors, UN Weak against Tribunal Interference: Court Monitor, VOA News, Dec. 9, 2010, *http://www.voanews.com/khmer-english/news/Donors-UN-Weak-Against-Tribunal-Interference-Court-Monitor–111597604.html* (last visited Mar. 12, 2011).

lxvi. Apsara, 2 Thais Accused of Spying a Cambodian Military Unit are being Questioned by Investigating Judge, Koh Santepheap Daily, Jan. 12, 2011, *http://www.kohsantepheapdaily.com.kh/article/20110111-19484.html* (Khmer) (last visited Mar. 12, 2011); Apsara, Thai Newly Appointed Border Officer Visited Cambodia while Court Questioning 2 Thais, Koh Santepheap Daily, Jan. 12, 2011, *http://www.kohsantepheapdaily.com.kh/article/2011z0111-201356.html* (Khmer) (last visited Mar. 12, 2011); and Apsara, Samdech Decho: No One or Any Foreigner Interfere Court's Action [Arrest of Thais], Koh Santepheap Daily, Jan. 11, 2011, *http://www.kohsantepheapdaily.com.kh/article/20110110-19409.html* (Khmer) (last visited Mar. 12, 2011.).

lxvii. Please see Apsara, [Transfer of Banteay Meanchey Police Officers to Anti-Corruption Unit for Legal Action], Koh Santepheap Daily, Jan. 11, 2011, *http://www.kohsantepheapdaily.com.kh/article/20110111-041756.html* (Khmer) (last visited Mar. 12, 2011) and Apsara, [Civil Society Supports the Arrest of Corrupt Officials by Anti-Corruption Unit], Koh Santepheap Daily, Jan. 14, 2011, *http://www.kohsantepheapdaily.com.kh/article/20110113-194954.html* (Khmer) (last visited Mar. 12, 2011). An unspecified source claimed that Mr. Hun Hean is a cousin of Prime Minister Hun Sen, a claim that the PM denied.

lxviii. Sok Khemara, Parliamentary Group Seeks Solution to Sam Rainsy Cases, VOA News, Oct. 14, 2010, *http://www.voanews.com/khmer-english/news/Parliamentary-Group-Seeks-Solution-to-Sam-Rainsy-Cases-104943589.html* (last revised Mar. 12, 2011).

lxix. Cambodia CONST. (Sep. 24, 1993), Ch. XV, Art. 151(2).

lxx. Cambodia CONST. (Sep. 24, 1993), Ch. XII, Art. 141.

lxxi. Cambodia CONST. (Sep. 24, 1993), Ch. XII, Art. 141.

lxxii. Cambodia CONST. (Sep. 24, 1993), Ch. VII, Art. 86.

lxxiii. The translation version of the decision regarding this matter is "Additional Constitution". See Cambodia Constitutional Council, Case No. 082/005/2004, available at *http://www.ccc.gov.kh/english/dec/2004/dec_002.html*, (last visited Mar. 12, 2011).

lxxiv. Son Soubert, Supra note li, at 15.

lxxv. According to Articles 136(1), 140(1), and 141(1), the Constitutional Council has the power to review constitutionality of a law before and after its promulgation by the head of state.

lxxvi. See a Decision of the Constitutional Council, Supra note lxxiii. One of the objectives of the Additional Constitution is to guarantee regular functioning of the National Institutions, an objective that stemmed from a political deadlock in 2003 when the winning party cannot secure a two-third majority either through the vote or coalition. Please see the background information here BBC News, Time Line: Cambodia, last updated Feb. 7, 2011, *http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/1244006.stm* and Xinhua, Chronology of Forming Cambodia's New Government Since Election in 2003, n.d., available at *http://english.peopledaily.com.cn/200407/16/print20040716_149826.html* (last visited Mar. 12, 2011).

lxxvii. Code of Criminal Procedure (CCP 2007), Art. 44, 69, 109, 117, and 252.

lxxviii. CCP (2007), Art. 59.

lxxix. CCP (2007), Art. 64, 65, 79, and 80.

lxxx. Law on Supreme Council of Magistracy, Art. 12 and Art. 7-16.

lxxxi. Sen David & Phak Seangly, Military Commander Issues Gun Warning, available, Phnom Penh Post, Jan. 12, 2011,available at *http://www.phnompenhpost.com/index.php/2011011246020/National-news/military-commander-issues-gun-warning.html*, (last visited Mar. 12, 2011).

lxxxii. Sen David & Phak Seangly, Police Chief Removed Pending Graft Probe, Phnom Penh Post, Jan. 9, 2011, available at *http://www.phnompenhpost.com/index.php/2011010945959/National-news/police-chief-removed-pending-graft-probe.html* (last visited Mar. 12, 2011).

lxxxiii. See Cambodian Criminal Code (CC 2010), Art. 30 for the definition of these titles. See CC (2010), Art. 204, for example, for the punishment for any public official who commit homicide.

lxxxiv. See also section B: Key Rule of Law Structure for more articles concerning the accountability of public officials before the laws. There is, however, no available database of government officials being held accountable by judiciary (court at any level) for violation of a law.

lxxxv. Corruption related crimes are mentioned in Law on Anti-Corruption (2010), Art. 32-44.

lxxxvi. Sen David & Phak Seangly, Anti Corruption Unit Nabs First Suspects, Phnom Penh Post, Nov. 29, 2010, available at *http://www.phnompenhpost.com/index.php/2010112945041/National-news/anticorruption-unit-nabs-first-suspects.html* (last visited Mar. 12, 2011) and Mom Kunthear, ACU Charges Pursat Prosecutor, Phnom Penh Post, Nov. 30, 2011, available at *http://khmernz.blogspot.com/2010/12/acu-charges-pursat-prosecutor.html* (last visited Mar. 12, 2011). The possible punishment is 20 years imprisonment, please see, Officials face 20 Years: ACU, Phnom Penh Post, Dec. 2, 2010, p. 6.

lxxxvii. Chun Sakada, 30 Tax Agents to Face Corruption Charges, VOA News, Dec. 1, 2010, *http://www.voanews.com/khmer-english/news/30-Tax-Agents-To-Face-Corruption-Charges-111114219.html* (last visited Mar. 12, 2011).

lxxxviii. Chun Sakada, Anti-Corruption Group Accuses Official of Marriage Graft, VOA News, Dec. 9, 2010, *http://www.voanews.com/khmer-english/news/Anti-Corruption-Group-Accuses-Officials-of-Marriage-Graft-111593629.html* (last visited Mar. 12, 2011).

lxxxix. Vong Sokheng, Provincial Official in Graft Warning, Phnom Penh Post, Jan. 2, 2011, available at http://www.cam111.com/photonews/2011/01/03/69419.html (last visited Mar. 12, 2011).

xc. Chun Sakada, Corruption Charges Leveled at Detained Police, Official, VOA News, Jan. 17, 2011, *http://www.voanews.com/khmer-english/news/Corruption-Charges-Leveled-at-Detained-Police-Officials-113873149.html* (last visited Mar. 12, 2011).

xci. CCP (2007), Article 86-88, Police Custody (Article 96-102), Handing over of Person in Police Custody (Article 103-104), Arrest Warrant (Article 195-202), Provisional Detention (Article 203-218), Detention Order (Article 219-222) Article 116, 306, 308, 353, Provisional Detention and Punishment Depriving of liberty (Article 502-511), Parole (Article 512-522), and Imprisonment in Lieu of Payment (Article 523-533) of Criminal Procedure 2007 and CC (2010), Article 24, 31-41, 43-71.

xcii. See further answer in Indicator II.6.

xciii. It seems that the focus is on socio-economic rights rather than law that deprive liberty of individuals.

xciv. See websites (available in Khmer, English, and/or French) of National Assembly at *http://www.national-assembly.org.kh/eng/* and Senate at *http://www.senate.gov.kh/home/index.php?lang=km* and Council of Minster *http://www.pressocm.gov.kh/* (last visited Mar. 12, 2011).

xcv. Web links to ministries and other public entities and relevant laws are available Senate at *www.senate.gov.kh*; Bar Association of the Kingdom of Cambodia at *www.bakc.org* (Khmer), Office of High Commissioner for Human Rights at *http://cambodia.ohchr.org/KLC_pages/klc_english.htm*, a German technical assistant agency, GTZ (not available online but soft copy circulated among academia and practitioners), or PUC Law Faculty at *http://www.puc.edu.kh/faclaw/index.php?option=com_content&view=article&id=10&Itemid=14*.

xcvi. Legislative acts will become effective 10 days in the Capital after date of promulgation and 20 days in the whole country after date of promulgation (Article 93(1) of Cambodian Constitution). However, virtually all laws in Cambodia enter into force immediately its promulgation (See Article 93(2) of Cambodian Constitution).

xcvii. Cambodia CONST. (Sep. 24, 1993), Ch. VII, Art. 93(3).

xcviii. The author is informed that more lexicons concerning criminal law and criminal procedure are being compiled.

xcix. Significantly, there is series of law talk shows about criminal procedures recorded on a national TV, TVK, where three leading experts from Ministry of Justice are in panelled Some shows are creative because they raise legal awareness through a role play/performance by comedians before an explanation by a lawyer/legal practitioner or academia. Other shows are just a plain explanation by experts. The others may be a bit more interactive by responding to legal questions posted by audience (in a letter not a call-in show).

c. See in general, Konrad Adenauer Stiftung, 5 Democratic Development: Occasional Paper, (Jan. 2009).

ci. CC (2010), Art. 9 & 10 and CCP (2007), Art. 610 & 612.

cii. or circumstances where retroactive application of law is allowed, please see Royal University of Law and Economics, Introduction to Cambodian Law, 2007, pp. 82-84.

ciii. CCHR, Fair Trial Rights in Cambodia: First Bi-Annual Report, Jul. 2010, p. 21.

civ. Richard Blue, Evaluation of the Program on Rights and Justice (PRAJ), p. 10.

cv. Cambodia CONST. (Sep. 24, 1993), Art. 31(1) and CCP (2007), Art. 3.
cvi. See further at Indicator III and IV.
cvii. 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.
cviii. U.N. GAOR, HRC, 6th Sess., Supra note xiv, at 2.
cix. CCP (2007), Art. 96. The police have to either hand-over the suspect to prosecutor or release at the expiration of period of police custody (Article 103 of Code of Criminal Procedure).
cx. See CCP (2007), Art. 205-206 for reasons of provisional detention and Art. 208-214 for duration and extension of provisional detention.
cxi. See Criterion II.8 of this report.
cxii. See CCP (2007), Art. 7 and 10 for principle and duration of statue of limitation and Art. 11 for calculation of statute of limitation.
cxiii. U.N. GAOR, HRC, 6th Sess., Supra note xiv, at 6.
cxiv. Cambodian government is still working on the mechanism. See Id, p. 2.
cxv. See Cambodia CONST. (Sep. 24, 1993), Ch. III, Art. 39 and various articles in Criminal Code (Book 2 onward).
cxvi. Cambodia CONST. (Sep. 24, 1993), Ch. III, Art. 38(5).
cxvii. Cambodia CONST. (Sep. 24, 1993), Ch. III, Art. 38(3). It should be noted that Code of Criminal Procedure (2007) allows an imposition of imprisonment in lieu of payment requested by civil party (CCP, Art. 533).
cxviii. CCP (2007), Art. 103.
cxix. CCP (2007), Art. 205-215.
cxx. John Marston, Cambodia in 2004: Deadlock, Political Infighting, and New Reign, Center for Studies of Asia and Africa, Apr. 2005, *http://ceaa.colmex.mx/profesores/paginamarston/imagenespaginamarston/Ap05.htm* (last visited Mar. 12, 2011).
cxxi. U.N. GAOR, HRC, 6th Sess., Supra note xiv, at 3.
cxxii. Cambodia CONST. (Sep. 24, 1993), Ch. III, Art. 38(6&7).
cxxiii. CCP (2007), Art. 203 (Principle) and Art. 205 (Reasons).
cxxiv. CCHR, Supra note ciii, at 11.
cxxv. Id, pp. 15-16.
cxxvi. Cambodia CONST. (Sep. 24, 1993), Ch. III, Art. 38(9).
cxxvii. CCP (2007), Art. 98, 143, 304(2).
cxxviii. See CCP (2007) for main articles concerning access to legal counsel at Article 46(2) (Citation), Article 48(2) (Procedure of immediate appearance), Article 97(1)(5) (Record of police custody) Article 98 (Assistance of lawyer during police custody), Article 143(3&4) (Right to counsel and right to legal aid), Article 145 (Presence of counsel during interrogation or investigation by investigating judge - suspect has the right to be informed about counsel and legal aid), Article 149 (Right of defense during pre-trail detention), Article 167&170 (Performing and concluding expert's task in the presence of lawyer), Article 300 (Right to counsel during hearing), Article 301 (Right to compulsory legal aid, in case of felony and juvenile defendant), and Article 304 (Right to counsel informed by prosecutor), Article 426 (Appointment of Lawyer), and Article 510 (Communication between detainee and his lawyer).
cxxix. CCP (2007), Art. 98.
cxxx. U.N. GAOR, HRC, 6th Sess., Supra note xiv, at 6.
cxxxi. CCHR, Supra note ciii, at 15.
cxxxii. See BAKC, Legal Profession in Cambodia, 2005, pp. 101-139.
cxxxiii. Internal Regulation of BAKC. See Telstra, Big Pond, available at *http://www.bigpond.com.kh/council_of_jurists/Judicial/jud008g.htm* (last visited Mar. 12, 2011).
cxxxiv. Law on Bar, Art. 29(3).
cxxxv. The poor are those who have no property, no income, or who receive insufficient income to support their living. Poverty is determined by the Chief Judge of the Courts and the Chiefs of the Court Clerks following an on-site investigation. See further Internal Regulation of the Bar of the Kingdom of Cambodia, Article 6 & 7.

cxxxvi. Law on Bar, Art. 30.
cxxxvii. Law on Bar, Art. 29.
cxxxviii. Internal Regulation of BAKC, Art. 7.
cxxxix. Council for Legal and Judicial Reform, Legal Aid in Cambodia, Practices, Perceptions, and Needs, December 2006, pp. 1 & 13-18, available at *http://www.ewmi-praj.org/download/legalaid/Legal%20Aid%20in%20Cambodia%20study%20report.pdf* (last visited Mar. 12, 2011). Examples of some legal aid NGOs, please see these links Cambodia Defenders Project at *http://www.cdpcambodia.org*; Legal Aid of Cambodia at *http://www.lac.org.kh*; and Legal Support for Children and Women at *www.lscw.org*.
cxl. Id, pp. 1-2.
cxli. See for example Thet Sambath, Legal Aid Group Shuts Two Provincial Offices due to Lack of Funding, Phnom Penh Post, Jun. 9, 2009, available at *http://khmernz.blogspot.com/2009/06/legal-aid-group-shuts-two-provincial.html* (last visited Mar. 12, 2011).
cxlii. CCP (2007), Art. 97, 325, and 330. See also CCP (2007), Art. 48 (Procedure of immediate appearance).
cxliii. CCP (2007), Art. 145 (Presence of lawyer during interrogation).
cxliv. CCP (2007), Art. 48(7).
cxlv. 15 days if the accused person lives in the territorial jurisdiction of the court of first instance; 20 days if the accused person lives in other places of national territory; 2 months if the accused person lives in a country bordering the Kingdom of Cambodia; 3 months if the accused person lives in other places. If the accused person is in detention, no duration of time is required.
cxlvi. This also implies sufficient facilities to prepare for the case.
cxlvii. CCHR, Supra note ciii, at 12-13.
cxlviii. In 60 of 199 trials, defense lawyer raised issue of adequate time and facilities. See CCHR, Supra note ciii, at 14. See also another obstacle of having adequate time to prepare for the case in indicator II.9.
cxlix. CCP (2007), Art. 283(2).
cl. CCP (2007), Art. 303 & 304.
cli. CCP (2007), Art. 305.
clii. See CCP (2007), Art. 208-214.
cliii. CCHR, Supra note ciii, at 11-12.
cliv. CCP (2007), Art. 298 & 324.
clv. See CCP (2007), Art. 365-372& 409-416.
clvi. CCHR, Supra note ciii, at 18-19.
clvii. 1-3 months statute of limitation for appeal to Court of Appeal (Article 381-383 of Code Criminal Procedure).
clviii. 1 month statute of limitation for appeal to Supreme Court (Article 420 -Time Period for Request for Cassation of Code of Criminal Procedure).
clix. See CCP (2007), Art. 373-408 for authority and procedures of Court of Appeal and admissibility and effect of appeal and Art. 417-442 for request for cassation to Supreme Court.
clx. See CCP (2007), Art. 443-455 for Motion for Review of Proceeding.
clxi. CCP (2007), Art. 55 for Special Composition of Investigation Chamber of Court of Appeal, Art. 257 for Registry of Appeals and Requests of Code of Criminal Procedure, and Art. 266-277 for Appeal against various orders of Investigating Judge.
clxii. LICADHO, In Absentia: The Right of Appeal & Cambodia's Inmate Transportation Crisis, Feb. 2010, pp. 1-5.
clxiii. Id, p. 1.
clxiv. According to Article 389 of Code of Criminal Procedure detainee pending appeal "shall be transferred without delay by the order of the Prosecutor to the nearest prison or detention centre to the seat of the Court of Appeal." This transfer should take place after the court notifies the General Prosecutor of the appeal hearing date (Article 388 of Code of Criminal Procedure)
clxv. LICADHO, Supra note clxii, at 4.
clxvi. Cambodia CONST. (Sep. 24, 1993), Ch. III, Art. 38(5).
clxvii. CCP (2007), Art. 321(1).
clxviii. CCP (2007), Art. 321.
clxix. CCP (2007), Art. 143 (Notification of Placement under Judicial Investigation).

clxx. CCHR, Supra note ciii, at 20-21. See also Indicator II.4.

clxxi. See these links Asian Human Rights Commission at *http://www.humanrights.asia/news/ahrc-news/AHRC-STM-130-2010*; International Center on Human Rights and Drug Policy at *http://www.humanrightsanddrugs.org/?p=861*; LICADHO Project Against Torture at *http://www.licadho-cambodia.org/programs/project.php*; LICADHO Press Release at *http://www.licadho-cambodia.org/pressrelease.php?perm=89*; and Asian Legal Resource Center at *http://www.alrc.net/doc/mainfile.php/unar_cat_cam_2003/322/* (last visited Mar. 12, 2011).

clxxii. CCP (2007), Art. 7 (Extinction of Criminal Action), Art. 12 (Res Judicata), Art. 264, and Art. 439.

clxxiii. See Indicator II.9.

clxxiv. Law on Extraordinary Chambers in the Courts of Cambodia, Art. 40. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers. It would be interesting to see what the decision of ECCC will be in future hearing. There is an argument that a constitutionally valid pardon given to Ieng Sary and Khieu Samphan was only to shield the two accused from death sentence and confiscation order issued by a genocide tribunal in 1979, said a deputy co-prosecutor. See AFP, Former Khmer Rouge Minister Claims Royal Amnesty, Jul. 3, 2008, available at *http://ecccreparations.blogspot.com/2008_07_01_archive.html* (last visited Mar. 12, 2011).

clxxv. Cambodia CONST. (Sep. 24, 1993), Art. 128(2).

clxxvi. See Indicator I.3: Accountability of public official before the laws.

clxxvii. CCP (2007), Art. 2 (Criminal and Civil Actions).

clxxviii. CC (2010), Art. 1, 2, and 8 and CCP (2007), Art. 2.

clxxix. CCP (2007), Art. 14.

clxxx. See Also Indicator I.3 for accountability of government officials before the law.

clxxxi. ADHOC & Forum-Asia, Joint Submission on Key Human Rights Problems in Cambodia for UPR Cambodia 2009, p. 5 and Alliance for Freedom of Expression in Cambodia, Joint Submission on Freedom of Expression for UPR Cambodia 2009, p. 7.

clxxxii. Arbitration Council is one leading example of an alternative to court that can be legitimate, accessible, predictable, equitable and transparent .

clxxxiii. The effectiveness of these dispute resolution bodies are mentioned in CCHR, Business and Human Rights in Cambodia: Constructing the Three Pillars, November 2010, p. 6.

clxxxiv. The request can be made by the Chairman (of national assembly or senate) or of at least 1/10 of its members, the King or the Prime Minister. Ch. VII, Art. 88 and Ch. VIII, Art. 111.

clxxxv. Cambodian CONST. (Sep. 24, 1993), Ch. VII, Art. 83 and Ch. VIII, Art. 107.

clxxxvi. Please see indicator I.1 of this report for more information

clxxxvii. EWMI, Cambodia Enact Peaceful Demonstration Law through Consultative Process, n.d., *http://www.ewmi-praj.org/news.asp?nID=13* (last visited Mar. 12, 2011).

clxxxviii. See in general Cooperation Committee for Cambodia (CCC) at *http://www.ccc-cambodia.org/ccc-project/ngo-law/135-anti-corruption.html* (last visited Mar. 12, 2011).

clxxxix. See CCC, Latest Updated News on Association and Non-Governmental Organizations, Jan. 5, 2011, *http://www.ccc-cambodia.org/ccc-project/ngo-law/73-ngo-law.html* (last Visited Mar. 12, 2011). See also CCC, Articles about NGO Law on Newspaper, n.d., *http://www.ccc-cambodia.org/press-clips.html* (last visited Mar. 12, 2011).

cxc. Surya P. Subedi, cvii, p. 5.

cxci. Criminal action and complaint may be initiated by prosecutor and victim (Article 4 -6 of Code of Criminal Procedure).

cxcii. These associations are Associations for Eliminating All Forms of Sexual Violence, Domestic Violence or Violence against Children, Association of Elimination All Forms of Kidnapping, Human Trafficking and Commercial Sexual Exploitation, and Association for Eliminating All Forms of Racism and Discrimination. See CCP (2007), Art. 17-20.

cxciii. CCP (2007), Art. 15, 16 and 22.

cxciv. Please see this link for the chart and summary explanation Constitutional Council of Cambodia at *http://www.ccc.gov.kh/english/index.php* (last visited Mar. 12, 2011).

cxcv. Please see Senate at *www.senate.gov.kh* and National Assembly at *www.national-assembly.org.kh*.

cxcvi. CCP (2007), Art. 316, 392, and 434.

cxcvii. CCP (2007), Art. 317.
cxcviii. CCP (2007), Art. 359.
cxcix. Two courts: in the Capital City, Phnom Penh and a neighbouring provincial court, Kandal.
cc. CCHR, Supra note ciii, at 11.
cci. See example of hearing schedule of Supreme Court (in Khmer) at *http://www.supremecourt.gov.kh/index.php/en/2010-11-30-02-20-01*. Only Schedule of hearing in January and February 2011 is posted. The website is in progress and decision is not yet fully updated. Only judgment of civil case in 1994-1995 is available.
ccii. CCP (2007), Art. 347.
cciii. See Indicator II.2 for relevant legal provisions.
cciv. ADHOC & Forum-Asia, Joint Submission on Key Human Rights Problems in Cambodia for UPR Cambodia 2009, p. 1.
ccv. ADHOC & Forum-ASIA, Supra note cciv, at 1-2; Center on Housing Rights and Eviction et al., Joint Submission on Right to Adequate Housing in Cambodia for UPR Cambodia 2009, pp. 5-6.
ccvi. A Special Rapporteur wrote in September 2010 in his report that there were government efforts in strengthening of the legal framework to manage the issue of urban evictions and Relocations. See Surya P. Subedi, Supra note cvii, at 4-5.
ccvii. See this news for general information about World Bank's Project on land titling and development at Chun Sakada, Inspection Faults World Bank Program in Lake Eviction, VOA News, Mar. 9, 2011, *http://www.voanews.com/khmer-english/news/Inspection-Faults-World-Bank-Program-in-Lake-Evictions-117646673.html* (last visited Mar. 12, 2011).
ccviii. U.N. GAOR, HRC, 6th Sess., Supra note xiv, at 7.
ccix. Id, p. 8.
ccx. Id, p 10.
ccxi. CCP (2007), Art. 553 & 554.
ccxii. If the case goes on the Court of Appeal, the fee shall be increased by 1.5 times, and 2 times if goes on to the Supreme Court (Article 61-66 of the Code of Civil Procedure).
ccxiii. See ADB, Judicial Independent Project, Supra note lxiv, at 51.
ccxiv. ADHOC & Forum-ASIA, Supra note cciv, at 4 and Center on Housing Rights and Eviction et al., Joint Submission on Right to Adequate Housing in Cambodia for UPR Cambodia 2009, p.5.
ccxv. U.N. GAOR, HRC, 6th Sess., Supra note xiv, at 4.
ccxvi. Alliance for Freedom of Expression in Cambodia, Joint Submission on Freedom of Expression for UPR Cambodia 2009, pp. 8-9. The requirement for the responsibility of the organizer was not incorporated in the final law. See EWMI, Supra note clxxxvii.
ccxvii. Alliance for Freedom of Expression in Cambodia, Supra note ccxvi, at 3.
ccxviii. Surya P. Subedi, Supra note cvii, at 3-4.
ccxix. See some articles in the Criminal Code for the punishment at Article 203 (Murder), Article 212 (Torture and Barbarous Acts), 220 (Intentional Violence), Article 231-234 (Acts of Threat). These articles cite crime that target victim and witness but not their family.
ccxx. CSD, Fair Trial Handbook, 2008, p. 22.
ccxxi. Jörg Menzel, The Rule of Law: A View of Cambodia from A German Perspective, in Konrad Adenauer Stiftung, 5 Democratic Development: Occasional Paper 71, 78 (Jan. 2009).
ccxxii. Please refer to Section B: Overview, Foundation and Evolution of Rule of Law.
ccxxiii. Cambodia CONST. (Sep. 24, 1993), Ch. I, Art. 21, Ch. XI, Art. 133 & 134.
ccxxiv. The little legal knowledge was caused by the killing of educated people, including legal practitioners and judicial officials during Pol Pot regime.
ccxxv. ADB, Judicial Independent Project, Supra note lxiv, at 15.
ccxxvi. ADB, Judicial Independent Project, Supra note lxiv, at 50.
ccxxvii. Please see Section C: Justice Grid and Indicator II.6
ccxxviii. A huge increase in comparison to salary received by judge and prosecutor as reported in 2003 (USD 20 – 40 per month).
ccxxix. Stan Starygin, Judicial Officer Salaries at the ECCC for 2010-11, May 19, 2010, at *http://ecccreparations.blogspot.com/2010/05/judicial-officer-salaries-at-eccc-for.html* (last visited Mar. 12, 2011).

ccxxx. ADB, Judicial Independent Project, Supra note lxiv, at 19.
ccxxxi. See Section C: Justice Grid of this report.
ccxxxii. ADB, Judicial Independent Project, Supra note lxiv, at 18.
ccxxxiii. Cambodia CONST. (Sep. 24, 1993), Ch. XI, Art. 128.
ccxxxiv. Cambodia CONST. (Sep. 24, 1993), Ch. XI, Art. 130.
ccxxxv. Cambodia CONST. (Sep. 24, 1993), Ch. XI, Art. 132.
ccxxxvi. Others may consider it as a principle of check and balance.
ccxxxvii. See Law on Supreme Council of Magistracy (SCM), Art. 11(3). Minister of Justice and the King, however, do not involve in the disciplinary proceeding against judges or prosecutor (Article 12.2 of Law on SCM).
ccxxxviii. See Lao Monghay, Institutions for the Rule of Law and Human Rights in Cambodia, Asian Legal Resources, posted Mar. 21, 2006, available at *http://www.article2.org/mainfile.php/0501/223/* (last visited Mar. 12, 2011).
ccxxxix. The team consists of 11 members, 5 of whom are judges at Supreme Court, other 5 are prosecutors at Supreme Court and the other one member is a representative from Ministry of Justice (Article 4 of the Sub-Decree). See this link for the sub-decree that create this special body *http://www.supremecourt.gov.kh/index.php/kh/judicial-standard-document/150-decree-160-dated-on-sep-232009* (last visited Mar. 12, 2011).
ccxl. Law on SCM, Art. 6.
ccxli. Law on SCM, Art. 18 & 19.
ccxlii. ADB, Judicial Independent Project, Supra note lxiv, at 48.
ccxliii. Surya P. Subedi, Supra note cvii, at 11-14.
ccxliv. ADB, Judicial Independent Project, Supra note lxiv, at 13-14.
ccxlv. Id, p. 41.
ccxlvi. U.N. GAOR, HRC, 6th Sess., Supra note xiv, at 6. Unfortunately, similar allegations also made against the ECCC (See Alliance for Freedom of Expression in Cambodia, Supra note ccxvi, at 4.
ccxlvii. See further information at Section C: Justice Grid of this report.
ccxlviii. Description of challenges face by legal lawyer in Section II.6 and Legal Aid report by EWMI in 2006 may be helpful.
ccxlix. See Section C: Justice Grid of this report
ccl. Richard Blue, Supra note civ, at 10.
ccli. U.N. GAOR, HRC, 6th Sess., Supra note xiv, at 8.
cclii. ADHOC & Forum-ASIA, Supra note clxxxiv, at 4 and Center on Housing Rights and Eviction et al., Joint Submission on Right to Adequate Housing in Cambodia for UPR Cambodia 2009, pp. 6-7. Also see a specific case reported in joint media statement at Joint Organizations, Civil Society Condemns Conviction of Human Rights Defenders Involved in Kampong Chhnang Land Dispute, Jan. 27, 2011, available at *http://www.licadho-cambodia.org/pressrelease.php?perm=237*. (last visited Mar. 12, 2011).
ccliii. See this link Saing Soenthrith, Gunmen Kill Municipal Court Judge, Cambodia Daily, Apr. 24, 2003, available at *http://cambodia.ahrchk.net/mainfile.php/news200304/599/* (last visited Mar. 12, 2011). See also Indicator II.9 for threat resulted in actual death despite request to police or authorities for protection.
ccliv. See paragraph 14 Trial Chamber Decision on Ieng Sary's application to disqualify Judge Nil Nonn and related requests, 28 January 2011.
cclv. For example see *http://www.timesonline.co.uk/tol/news/world/asia/article5745438.ece*
cclvi. 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.
cclvii. TC Decision on Ieng Sary's application to disqualify judge Nil Nonn and related requests, 28 January 2011.
cclviii. "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).
cclix. "Country Report: Cambodia," ASEAN Rule of Law for Human Rights Study, Human Rights Resource Centre. (April, 2011).
cclx. "Archiving," Documentation Center of Cambodia, www.dccam.org. (Last accessed 10 April 2011).
cclxi. See the webpage for the Office of the High Commissioner of Human Rights *http://cambodia.ohchr.org/EN/PagesFiles/RuleOfLawIndex.htm*.

The Republic of Indonesia

Indonesia

Bivitri Susanti

Snapshot Box

Formal Name	Republic of Indonesia
Capital City	Jakarta
Independence	17 August 1945
Historical Background	The Dutch began to colonise Indonesia in the early 17th century; Japan occupied the islands from 1942 to 1945. Indonesia declared its independence on August 17, 1945 and enacted the 1945 Constitution on August 18, 1945. Soekarno was the first president of the Republic Indonesia (August 18, 1945- March 12, 1967), while Suharto is the second one (March 12, 1967-May 21, 1998). The first and second presidents were very long in power very long due to the weaknesses in the 1945 Constitution. After Suharto's authoritarian regime fell in 1998, the political setting changed dramatically. The first parliamentary election after Suharto was in 1999, which was then followed by constitutional amendments in 1999, 2000, 2001 and 2002. In 1999, the then East Timor Province of Indonesia backed by the UN held a referendum and opted for independence and further obtained independence as Timor-Leste in 2002. After 1998, the presidents are the following: B.J. Habibie (May 21, 1998- - October 20, 1999), Abdurrahman Wahid (October 20, 1999 - July 23, 2001), Megawati Soekarnoputri (July 23, 2001- - October 20, 2004), Susilo Bambang Yudhoyono (October 20, 2004, until 2014 as he was re-elected for another five-year term in 2009).
Size	1.910.931 km2
Land Boundaries	Timor-Leste 228 km, Malaysia 1,782 km, Papua New Guinea 820 km
Population	237.556.363 (2010 census)
Demography	0-14 years: 28.1% (male 34,337,341/female 33,162,207) 15-64 years: 66% (male 79,549,569/female 78,918,321) 65 years and over: 6% (male 6,335,208/female 7,968,876) (2010 est.)
Ethnic Groups	Javanese 40.6%, Sundanese 15%, Madurese 3.3%, Minangkabau 2.7%, Betawi 2.4%, Bugis 2.4%, Banten 2%, Banjar 1.7%, other or unspecified 29.9% (2000 census)
Languages	Bahasa Indonesia (official), English, local languages
Religion	Muslim 86.1%, Protestant 5.7%, Roman Catholic 3%, Hindu 1.8%, other or unspecified 3.4% (2000 census)
Adult Literacy	definition: age 15 and over can read and write total population: 90.4% Male: 94% Female: 86.8% (2004 est.)
Welfare	More than 32 million Indonesians currently live below the poverty line and approximately half of all households remain clustered around the national poverty line set at 200,262 rupiah per month (US$ 22 as of March 2010). (World Bank, 2010)
Gross Domestic Product	510.50 billion (current US$, World Bank, 2008)

Government Overview	Executive Branch: President. Cabinet appointed by the president. President and vice president elected for five-year terms (eligible for a second term) by direct vote of the citizenry; election last held on 8 July 2009 (next to be held in 2014) Legislative Branch: *Dewan Perwakilan Rakyat* (House of Representatives) and *Dewan Perwakilan Daerah* (Regional Representatives Council), election held at the same time as presidential election. Judicial Branch: Supreme Court or *Mahkamah Agung* is the final court of appeal but does not have the power of judicial review; Constitutional Court *or Mahkamah Konstitusi* has the power of judicial review, jurisdiction over the results of a general election, and reviews actions to dismiss a president from office. Unitary state, with 33 provinces and 476 regencies/cities. Regional autonomy is on regency/city level, except for Aceh and Papua.
Human Rights Issues	Holding the military and police accountable for past human rights violations, torture in prisons, gross human rights violations in Papua.
Membership in International Organisations and Human Rights Treaties ratified	International Organisations: ADB, APEC, APT, ARF, ASEAN, BIS, CICA (observer), CP, D-8, EAS, FAO, G-15, G-20, G-77, IAEA, IBRD, ICAO, ICC, ICRM, IDA, IDB, IFAD, IFC, IFRCS, IHO, ILO, IMF, IMO, IMSO, Interpol, IOC, IOM (observer), IPU, ISO, ITSO, ITU, ITUC, MIGA, MONUC, NAM, OIC, OPCW, PIF (partner), UN, UNAMID, UNCTAD, UNESCO, UNIDO, UNIFIL, UNMIL, UNMIS, UNWTO, UPU, WCO, WFTU, WHO, WIPO, WMO, WTO. Human Rights Treaties: ICERD, ICESCR, ICCPR, CEDAW, CAT, CRC, Convention on the Prevention and Punishment of the Crime of Genocide, Geneva Conventions of 12 August 1949 and Additional Protocols thereto (Conventions only), ILO fundamental conventions, UNESCO Convention against Discrimination in Education.
Human Rights Treaties Ratified	CRC (1995) and optional protocol on sale of children (2006) – reservations on CRC articles 14, 20 & 21 CEDAW (2006) – reservations on articles 9(2) & 29(1)

Overview

The Indonesian legal system is based on the civil law system inherited from the Dutch colonial period, which heavily relies on codes and statutes while court decisions are generally considered as references instead of as a source of laws as in the common law system. It is somewhat complex because it is the convergence of two distinct systems, namely: Dutch laws inherited from the colonisation and Indonesia's modern law influenced by different systems through development assistances and aid conditionalities. In addition, Islamic family law is applicable as a formal law for Muslim citizens and customary law (*hukum adat*) is acknowledged. Islamic law is also applied in Aceh as a part of its special autonomy status since 2001 and strengthened in 2006.[i] There are still applicable laws from the Dutch colonial period applicable, such as the Penal Code and the Commercial Code.

The prevailing constitution of Indonesia is the amended 1945 Constitution. The 1945 Constitution was enacted a day after the proclamation of independence on August 17, 1945. Due to post-independence diplomacy with the former colonial government, there were also Constitutions in 1949 and 1950. However, the 1945 Constitution was re-enacted in 1959 and has been in effect since. The 1945 Constitution was amended after the fall of Suharto's authoritarian regime (1966-1998), in October 1999, August 2000, November 2001, and August 2002. It was amended by a political decision by the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or MPR), which has the authority to amend the constitution, to call the changes 'amendment,' although in reality it is almost a new constitution. Major changes in the political and legal systems were made. To mention a few of them: a popular election for president replaced the presidential election by the People's Consultative Assembly; constitutional adjudication was introduced; parliamentary seat allocation for the military was abolished; and a set of human rights provisions were inserted.

Indonesia applies a presidential system of government with the president as the head of state and the government. The legislative power is held by the House of Representatives (*Dewan Perwakilan Rakyat* or DPR), with a Regional Representatives Council (*Dewan Perwakilan Daerah* or DPD) as a second chamber of the parliament that has limited authority regarding regional autonomy. The Council may propose and provide input only to bills related to regional autonomy, the relationship of central and local governments, formation, expansion and merger of regions, management of natural resources and other economic resources, and which are related to the financial balance between the centre and the regions as well oversee the implementation of the aforementioned laws and laws regarding the State Budget, taxation, education or religion. The law making process requires joint approval from the House of Representatives and the President.

Indonesia is a unitary state with 33 provinces and 476 regencies (*kabupaten)*/cities (*kota*). Regional autonomy is on regency/city level, except for Aceh and Papua under the special autonomy law. It is stipulated by the law on regional government that all implementation of public services are under the authority of the local governments, except for the following matters: foreign policies; defense; security; judicial; national monetary and fiscal; and religious affairs. Regency/city and province have local parliaments (*Dewan Perwakilan Rakyat Daerah* or DPRD) and local governments. The local parliament and the local government are directed by the Ministry of Home Affairs.

A. Institutions Related To Rule Of Law For Human Rights

The post-Suharto political momentum of 1998, which is often called *Reformasi*, brought about new institutions in the legal system. While the Constitutional Court and the Judicial Commission are set up in the Constitutional amendments, the Anti-Corruption Commission (2002), the 'empowered' National Commission of Human Rights (established in 1993, then given a new legal basis for stronger position in 1999), Witness and Victim Protection Agency (2008) were established in Laws enacted after *reformasi*.

This report highlights nine institutions that are most relevant to the Rule of Law for Human Rights issues, namely: Supreme Court, Constitutional Court, Judicial Commission, Attorney General's Office, National Human Rights Commission, Human Rights Court, Witness and Victim Protection Agency, The Indonesian National Police and Anti-Corruption Commission. In addition, the condition of the legal profession (advocates) will be discussed briefly to provide more background for this report.

1. Supreme Court.

The Indonesian Supreme Court (*Mahkamah Agung*) is the highest court in the Indonesian judicial system. Beneath the Supreme Court there are four branches of the judicature: (i) the court of general jurisdiction, which have jurisdiction to try civil and criminal cases; (ii) the courts of religious affairs (for Islamic family law); (iii) the courts of state administration; and (iv) the courts of military affairs.

Under the Supreme Court, there are Districts Courts at the district/regency level and Courts of Appeal at the provincial level. Each of the four branches has its own Appellate Court. Law No 4 of 2004 regarding Basic Provisions on Judicial Power provides basic provisions pertaining to the lower courts. Cases at all levels are tried by a tribunal of three judges, except for certain special courts, which are under the Court of General Jurisdiction. (see Appendix on the Supreme Court Structure).

The Supreme Court is the court of final appeal or cassation (*kasasi*). The Court has discretion to determine whether it will re-examine the case or only examine the decision

of the respective Courts of Appeal (decisions made by general, special, administrative and military Courts of Appeal may be appealed to the Supreme Court). The Indonesian Supreme Court does not review findings of fact made in lower courts, but instead only hears appeals on questions of law. It is also empowered by statute to review the conformity of government regulation, presidential regulation and local regulation. There are 51 Supreme Court Justices[ii] and a total of 7,390 judges at all levels under the Supreme Court.[iii]

In 1999, the Government agreed to apply the so-called "one-roof system," in which both judicial and administrative matters of the Court are put under the authority of the Supreme Court. Previously, the administrative and financial aspects of the Court were managed by the Ministry of Justice. This old structure was pointed out to be one of the reasons for the lack of independent judiciary. Judges and court clerks had the status of government employees, with its salary scheme, disciplinary mechanism as well as recruitment and promotion schemes.

Another response to the demand for an independent judiciary is to establish special courts that have special, usually expedited, procedural law and, in some courts, especially appointed and/or ad-hoc judges. In 1998, the government and the Supreme Court agreed to establish a special court for commercial cases, which was followed by the establishment of other special courts, namely the tax court (2000), the human rights court (2000), the anti-corruption court (2002), the industrial relations court (2004) and Fisheries Court (2004).

In 2003, the Supreme Court published the Blue Print for the Supreme Court reform and a set of blue prints for court reform. In 2010, the Supreme Court reviewed the implementation of the Blue Print and published the Blue Print for Court Reform 2010-2035.

Despite the abovementioned institutional reform, the Indonesian Supreme Court Annual Report of 2010 shows that there are 3,546,854 cases registered in the Court of the First Instance in 2009 and 3,015,511 cases are misdemeanours or traffic violations. The total number of cases registered is considerably small compared to the population of Indonesia of over 237 million in 2010 and shows the high reluctance of Indonesian citizens to use the court to settle disputes. The reasons to avoid courts include: high cost, lengthy process, complex procedures, intimidating court rooms and lack of trust in the judiciary.

2. Constitutional Court.

The Constitutional Court (*Mahkamah Konstitusi*) was a product of *reformasi*. Its authorities and responsibilities include reviewing the constitutionality of laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by the Constitution, overseeing the dissolution of political parties, and hearing disputes regarding the results of a general election. Also, the Constitutional Court has the authority to impeach the President and/or the Vice-President.

Indonesian individuals, community groups espousing customary law, public or a private legal entities, and state institutions may file judicial review petitions to the Constitutional Court, but only on the condition that he/she is able to confirm that his/her constitutional rights are injured by the enactment of a law. The Constitutional Court is composed of nine judges. Three of the nine judges are selected by the Government, three by the House of Representatives and three by the Supreme Court. The nine judges hear and make decisions only when all nine, or a full bench, is present.

It is important to note that while Laws (parliamentary act or statute) are reviewed by the Constitutional Court against the Constitution, regulations under Law in the hierarchy of Law and Regulations (Government Regulation, Presidential Regulation and Local Regulation)[iv] are reviewed by the Supreme Court against Laws. As a result, regulations under Law cannot be reviewed against constitutional principles.

3. Judicial Commission.

Side by side with the Supreme Court and the Constitutional Court is the Judicial Commission. According to the amended Constitution, the Commission has the authority to propose candidates for appointment as justices of the Supreme Court, and possesses further authority to maintain and ensure the honour, dignity and behaviour of judges. These constitutional provisions are regulated further in Law No. 22 of 2004 regarding the Judicial Commission,

which provides details on how the Commission proposes candidates of Supreme Court justices and the oversight mechanism of the Commission on the conduct of the Supreme Court justices as well as the Constitutional Court justices. However, the provisions on the Commission's oversight mechanism have been ruled unconstitutional by the Constitutional Court on 16 August 16 2006 on the basis that the details are not clearly regulated so that they create uncertainty.[v] Thus, until the Law is changed, the Judicial Commission's authority is only to propose candidates for appointment as justices of the Supreme Court to the House of Representatives.

There are seven commissioners at the Judicial Commission. The commissioner candidates are nominated by the president and selected by the House of Representatives. The Commissioners hold office for five years and can be re-elected for a second term.

4. Attorney General's Office.

The key functions of the Attorney General's Office (AGO) are instituting prosecutions on behalf of the State and executing final binding judicial orders and decisions. The AGO may also conduct investigations into certain crimes and conduct further investigations to supplement a brief of evidence before submitting it to a court. Prosecutors also have the authority to act on behalf of the state or government in civil and administrative matters, both in and out of court. Apart from its prosecution and court decision execution tasks, the AGO is tasked, among other things, to secure policy on law enforcement, supervision of the distribution of printed materials, supervision on religious beliefs that may be harmful to the state and society; prevention of misuse of religion and/or blasphemy.

The AGO structure is unique as it has an intelligence unit, although its main tasks is to conduct prosecution services. Law No. 16 of 2004 is a post-*reformasi* law on the AGO, but it keeps old tasks and structure, which have many characteristics of a military unit. The intelligence tasks and structure are the results of having attorney generals from the military since 1964 to 1990. The Attorney General is appointed by the president and a member of the cabinet.

Mirroring the court structure, there are prosecution offices at the district level and provincial level (high prosecution office). As of 8 May 2009, there are 7.698 prosecutors in Indonesia.[vi]

Although slower than at the Supreme Court, *reformasi* also touched the AGO. It launched "Prosecution Service Reform Agenda" in 2005 and its bureaucratic reform process in 2008.

5. National Commission of Human Rights (*Komisi Nasional Hak Asasi Manusia* or *Komnas HAM*).

The National Commission of Human Rights was established during the Suharto administration due to the pressure from international community. It was established by Presidential Regulation No. 50 of 1993 and was put under the control of the president. As the authoritarian government of Soeharto fell, the Law No. 39 of 1999 regarding Human Rights provided a new basis for the National Human Rights Commission.

The tasks of the Commission are: to conduct research, monitoring, public education, and mediation on human rights cases. The Commission provides consultation, negotiation, mediation, reconciliation, and can to recommend that the parties to go to the Court. The Commission also provides the government and the House of Representatives with recommendations to settle violations of human rights. The main roles of the Commission are to educate the government and the public on human rights, establish a network of human rights defenders, and receive complaints on human rights violations. The Human Rights Law of 1999 provides that there are 35 commissioners nominated by the Commission and selected by the House of Representatives for a maximum of two five-year terms. However, in the 2007 selection process, the House of Representatives agreed to the input of NGOs to have a smaller number of commissioners for a more effective commission. There are now eleven commissioners on duty until 2012.

The Commission has Representative Offices in three provinces: Aceh; Maluku; and Central Sulawesi. These offices have the general responsibility to assist in program delivery under the direction of the relevant Sub-Commissions. In addition, the Commission has

Representatives (Regional Commissioners) and supporting staff in three other provinces: Papua; West Kalimantan; and West Sumatra. These representatives were appointed by the Commission after being selected by a panel comprised of representatives of the region in question. Representatives have significantly more authority to implement programs directly at the local level than representative offices, but still cannot take certain important decisions.

6. Human Rights Court.

Also related to this report is the special court on Human Rights, which was established in 2000 in Law No. 26 of 2000. The Human Rights Court, which is under the Courts of General Jurisdiction, tries gross violations of human rights that consist of genocide and crimes against humanity. One of the main features of this special court is the number of judges. Cases are examined by five judges, three of which are ad-hoc judges. There are twelve ad-hoc judges selected by the Supreme Court for a maximum of two five-year terms. Cases that occurred before 2006 may be tried in ad-hoc Court on Human Rights set up especially for the cases, after a decision made by the House of Representatives. An Ad-hoc Human Rights Court was set up for the 1999 Timor-Leste Case from February 2001 to April 2003. However, in 2006 the UN Secretary-General noted that the judicial process was not effective in delivering justice for the victims of serious violations of human rights and the people of Timor-Leste. The UN Commission of Experts to review the prosecutions found that they were inadequate, owing to a lack of commitment on the part of the prosecution, as well as to the lack of expertise, experience and training in the subject matter.[vii]

7. Witness and Victim Protection Agency (*Lembaga Perlindungan saksi dan Korban* or LPSK).

The Witness and Victim Protection Agency was established by Law No. 13 of 2006 regarding Witness and Victim Protection and started its operation in 2008. There are seven members of the Agency selected by the House of Representatives based on the candidates nominated by the President. In December 2009 the Agency signed a Memorandum of Understanding with the National Commission on Human Rights to set up a joint committee to formulate technical guidance on the protection of victims of gross human rights violations.[viii]

8. Anti-Corruption Commission (*Komisi Pemberantasan Korupsi* or KPK).

The Anti-Corruption Commission was set up by Law No. 30 of 2002 regarding the Commission for Corruption Eradication and started its operation in 2003. The Commission deals with corruption prevention and investigation as well as prosecution of corruption cases that involve law enforcement agencies; state apparatus; and other people who have some degree of involvement with the crime of corruption by the state apparatus or law enforcement apparatus; gain significant public attention from the public, and/or are related to state losses of the minimum of one billion rupiah (equal to USD114,000.00). The Commission has five commissioners selected by the House of Representatives based on the candidates nominated by the President. Cases from KPK are filed only to the Special Court on Anti-Corruption, which was also set up in the same law. The Special Court has five judges, three of whom are ad-hoc judges. Ad-Hoc Judges of the Special Court were selected by a special selection Committee under the Supreme Court.

9. The Indonesian National Police (*Kepolisian Republik Indonesia* or POLRI).

The Indonesian National Police is governed by Law No.2 of 2002 regarding the Indonesian National Police. POLRI's statutory authority includes raising community legal awareness and assisting in the resolution of disputes between citizens which pose a threat to public order, but its key task is conducting investigations under the Criminal Code and other criminal laws. The police have authority to investigate almost all crimes on their own initiative. However, the Criminal Procedural Code prohibits the police from conducting investigations on crimes that require request by an 'interested party' to take action against the person who allegedly committed the crime. These crimes are referred to as 'complaint crimes' (*delik aduan*) and include a number of family law matters, crimes of defamation, and disclosure of confidential information.

The National Police Chief is selected by the president with confirmation from the House of Representatives and is directly responsible to the President. The structure of POLRI mirrors the governmental administrative structure. POLRI is represented at the provincial level by a provincial police

force (*Kepolisian Daerah* or POLDA) with a Provincial Police Chief. Each provincial police force has the authority to structure their sub-provincial representation in accordance with local needs. Usually police stations are located at the district or municipal levels (*Kepolisian Resort* or POLRES) and at the sub-district level (*Kepolisian Sektor* or POLSEK). In densely populated areas, a police post (*Pos Polisi* or POSPOL) may be established at the village level, but this is not common. There is also a paramilitary mobile brigade (*Brigade Mobil* or BRIMOB) for deployment to the regions to handle 'high intensity security disturbances'. In the annual report press release on 29 December 2010, the National Police Chief stated that there are 390,452 police officers.[ix]

10. Legal Profession.

Indonesian advocates needed reform as much as other professions in the Indonesian legal system. The first Indonesian Bar Association was established in 1964, but the Suharto government intervened against the organisation in the early 1980's until it was dismissed and replaced by IKADIN (*Ikatan Advokat Indonesia* or Indonesian Advocate League).[x] Thereafter, other bar associations were set up without proper codes of conduct or implementation so that the integrity of the legal profession was declining. In addition, the bar exam was conducted by the Court and the participants had to bribe court officials to pass the exam. After *reformasi*, a unified and self-governed bar association that is independent from the government was established based on Law No. 18 of 2003 on the Advocates' Profession. The organisation is called the Indonesian Bar Association (*Persatuan Advokat Indonesi* or PERADI).

PERADI started to organise an annual bar exam in February 2006. However, due to three years (2003-2006) transition period and a limited number of bar intake, many law graduates are disappointed. Backed by some senior lawyers who criticised the establishment process of PERADI, another bar association called Indonesian Advocates' Congress (*Kongres Advokat Indonesia* or KAI) was set up in 2008. Until now KAI is not recognised by the Supreme Court to appear in the Court. The Constitutional Court, on the other hand, does not require bar admission for legal representation. Lawyers working in companies and state institutions are not required to be members of the bar. PERADI claims to have 21,043 members.[xi]

To be admitted to the bar, a candidate must hold an undergraduate law degree ("*Sarjana Hukum*" degree, obtained after 4 years of study), be at least 25 years of age, and to have taken a special education for advocates' profession (*Pendidikan Kekhususan Profesi Advokat* or PKPA) provided by institutions approved by PERADI, which usually takes several weeks. Then she/he must take the bar exam. If she/he passes the exam she/he has to do an internship for 2 years.

B. Foundation, Evolution and the Use of Rule of Law

The term rule of law is often translated in Indonesian language as '*negara hukum,*' which literally means 'law-state'. Although it is not a literal translation of the rule of law, the term *negara hukum* is used as it is in the Indonesian constitution as a translation of *rechtsstaat*, which is often understood as the continental European concept of the rule of law. This term was formally written for the first time in the elucidation of the (original) 1945 Constitution that stated that "Indonesia is based on law (*rechtsstaat*), and not based on mere power (*machtsstaat*)." The elucidation of the constitution is abolished in the 1999-2002 amendments and this statement was then inserted into the text of the constitution in the third amendment (2001).

The initial understanding of *negara hukum* as coined in the 1945 Constitution actually came from the Dutch '*rechtsstaat,*' since the influential framers of the 1945 Constitution obtained Dutch education.

The first appearance of the term *negara hukum* in the 1945 Constitution was then followed by different conceptions about *negara hukum* according to who interprets it. In the early years after the Indonesian independence, *negara hukum* served as the legitimating ideology of the constitutional republic.[xii] Then, under Soekarno's regime of Guided Democracy (1958-1967) *negara hukum* was declining due to the regime's patrimonialism. Corruption in legal institutions commenced and President Soekarno started to subjugate the judiciary under the executive.

The pendulum swung when Suharto was in power. *Negara hukum* was initially used to counter bad practices during Guided Democracy, but in practice the executive's intervention in to legal institutions,

was also high. The discourse of *negara hukum* was generally dominated by the government and the idea of *negara hukum* was only seen as a legitimizing idea for Suharto's power.[xiii] Todung Mulya Lubis, a well known Indonesian human rights lawyer, notes that Soekarno used the term to support his vision of unfinished revolution, whereas Suharto interpreted it for the purpose of "economic development, stability, security and order."[xiv] In 1993 Suharto propounded declared the Bangkok Declaration together with Prime Ministers Lee Kuan Yew of Singapore and Mahathir Mohammad of Malaysia, which announced the "Asian values". The Asian values were claimed to be incompatible with Western values so that the West should not rely on its construction of human rights to intervene in affairs of Asian states. The implication is that Suharto did not regard human rights as being a constituent part of *negara hukum*.[xv]

The rule of law, however, is a general term used by different actors, including international organisations and local non-government organisations (NGOs). After 1998, the *reformasi* opened rule of law projects from various countries and donors, especially in line with the language of good governance. Various terms are used, ranging from the justice sector reform to access to justice, to name projects that are aimed at strengthening rule of law in Indonesia. In those projects, rule of law by and large is understood as independent and professional judiciary as well as more participation, transparency and accountability in governance.

In 1999, the government revoked laws and regulations that hindered freedom of expression such as Law No. 11 of 1963 on subversive activities. Freedom of press was acknowledged by abolishing regulations on the government's control over the media. A poll of 1,000 respondents in Jakarta, Surabaya, and Bandung in 2009 for the World Justice Project's 2010 Rule of Law Index shows that 63% of the respondents agree that the media are free to express opinions against government policies and actions.

Since 1998, the government issues a five-year National Action Plan on Human Rights (*Rencana Aksi Nasional Hak-Hak Asasi Manusia* or RANHAM). It contains detailed plans ranging from human rights trainings in the regions to ratifications of international covenants. In 2004, the Government also issued the National Action Plan on Corruption Eradication for 2004-2009, which was then followed by the National Strategy and Action Plan on Corruption Eradication for 2010-2025 (*Strategi Nasional dan Rencana Aksi Pemberantasan Korupsi 2010-2025 or Stratnas PK*).

The government also formally acknowledges the rule of law in the National Long Term Development Plan 2005-2025 and the National Medium Term Development Plans of 2005-2010 and 2010-2014. The medium term plan documents the elected president's commitment during his term of office. The vision of the National Medium Term Development Plans of 2010-2014 is a wealthy, democratic and just Indonesia, with law and as one of the nine priority areas of development.[xvi] "Just" (justice) in the aforementioned vision, according to the Plan, means strengthening law enforcement and corruption eradication as well as gap reduction. Further, the document shows the understanding of rule of law as "law enforcement" and coupled with "public order." For the purpose of informing the plan, the Government, conducted by the National development Plan Agency, specifically developed the National Access to Justice Strategy that aims at strengthening Indonesia as a *negara hukum* in 2007-2009.[xvii]

Although the government's commitment looks good on paper, as this report will further elaborate, there are challenges in the implementation. Challenges occurred mainly in reforming legal institutions that did not have procedures and mechanisms, such as recruitment and oversight mechanisms, which promote independence and professionalism. In addition, there have been cases where quick response from the government was needed but the government failed to respond or responded slowly. For example, in the case of violence against the Ahmadiyah sect of Islam in Cikeusik in February 2011, the Police failed to prevent violence against Ahmadiyah members it although they knew about the attack and were actually present at the location.[xviii]

The budget allocated in the State Budget for the justice sector is relatively small. In 2009 and 2010, only 0.11% of the total state budget was allocated for organisations related to law (Supreme Court, Attorney general's Office, Ministry of Law and Human Rights, the Police and Anti-

Corruption Commission). In the 2011 State Budget the allocation is 1.10% (44,189.5 billion rupiah) of the total budget of 432,779.3 billion rupiah.

C. Human Rights Provisions in the Constitution and Laws

The second amendment to the Constitution in 2000 introduced Chapter XA on Human Rights. Many of the new provisions mirror the rights contained in the international human rights covenants. These rights include civil and political rights (article 28A), equal treatment before the law (article 28D), economic, social and cultural rights (article 28C), the right to a healthy environment (article 28H section 1) and the right to receive medical care (article 28H section 1) and social security (article 28H section 3). The state is obligated to protect, advance and fulfil these rights (article 28I section 4).

The insertion of human rights concerns in the Constitution continued through the fourth (and the last) amendment to the Constitution in 2002. The fourth amendment resulted in even more stringent requirements on the state to fulfil economic, social and cultural rights.

Following the amendments, two new laws concerning human rights were enacted, namely Law No. 39 of 1999 regarding Human Rights and Law No. 26 of 2000 regarding the Human Rights Court. Law No 39 of 1999 further regulates the provisions in the Constitution. Law No 39 also establishes the National Commission of Human Rights and the Human Rights Court. The Human Rights Court, under the jurisdiction of the court of criminal cases, hears cases that pertain to the gross violation of human rights.

D. International Human Rights Treaties

Core universal human rights treaties	Date of ratification, accession or succession	Declarations/ reservations	Recognition of specific competences of treaty bodies
International Convention on the Elimination of all forms of Racial Discrimination (ICERD)	25 June 1999	Art. 22	Individual complaints (art. 14): No
International Covenant on Economic, Social and Cultural Rights (ICESCR)	23 Feb. 2006	Art. 1	
International Covenant on Civil and Political Rights (ICCPR)	23 Feb. 2006	Art. 1	Inter-State complaints (art. 41): No
Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)	29 July 1980	Art. 29 (1)	
Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	23 Oct. 1985	Arts. 30 (1) and 20 (1), (2) and (3)	Inter-State complaints (art. 21): No Individual complaints (art. 22): No Inquiry procedure (art. 20): Yes
Convention on the Rights of the Child (CRC)	26 Jan. 1990	Arts. 1, 14, 16, 17, 21, 22 and 29	

Core treaties to which Indonesia is not a party: ICCPR-OP1 and OP2, OP-CEDAW (signature only, 2000), OP-CAT, OP-CRC-AC (signature only, 2001), OP-CRC-SC (signature only, 2001), ICRMW (signature only, 2004), CPD (signature only, 2007), OP-CPD (signature only, 2007), CED, CED (signature only, 2010).

v. Source: UN Universal Periodic Review 2008

Other main relevant international instruments	Ratification, accession or succession
Convention on the Prevention and Punishment of the Crime of Genocide	Yes
Rome Statute of the International Criminal Court	No
Palermo Protocol	No
Refugees and stateless persons	No
Geneva Conventions of 12 August 1949 and Additional Protocols thereto	Conventions only
ILO fundamental conventions	Yes
UNESCO Convention against Discrimination in Education	Yes

vi. Source: UN Universal Periodic Review 2008

G. Administration Of Justice Grid

Indicator	Figure
No. of judges in country	Supreme Court, including all courts under it: 7,390[xix] (Supreme Court Justices: 51) Constitutional Court: 9
No. of lawyers in country	21,043 (PERADI members only, not including members of KAI, judges and state prosecutors)[xx]
Annual bar intake? Costs / fees	The numbers are fluctuating until now as the system was reformed in 2006. In 2010 it was 25% (832 of 3,325), in 2009 was 57.1% (1,915 of 3,352), in 2008 was 36.1% (1,323 of 3,665) and in 2007 was 30.3% (1,659 of 5,473).[xxi] Cost: Rp.750,000.00 or 85.47 USD for taking the bar exam. The cost for obligatory special education for advocates prior to taking the bar exam varies depending on the course provider.
Standard length of time for training/qualification	Advocates: took special education for advocates (several weeks) and 2 years internship. Judge: 106 weeks or 2 years.
Availability of post-qualification training	Required for promotion for judges and prosecutors. Required by the bar association for advocates. Institution providing.
Average length of time from arrest to trial (criminal)	111 days (maximum number of days allowed by the Criminal Procedural Law)
Average length of trials (from opening to judgment)	290 days. 90 days at the district court, 90 days at the high court and 110 days at the Supreme Court (maximum number of days allowed by the Criminal Procedural Law)
Accessibility of individual rulings to public	On paper it should be accessible on the website, but most of the time rulings are provided on request.
Appeals structure	District court à high court à Supreme Court (see appendix)
Cases before national human rights commission or other independent commissions (if applicable)	The National Human Rights Commission received 5,637 complaints in 2010.[xxii]
Complaints filed against police, judiciary or other state institutions (per year)? How many resolved?	Prosecutors: 156 prosecutors sanctioned in January-June 2010, 181 prosecutors sanctioned in 2009 and 179 in 2008. No data on number of complaints filed.[xxiii] Constitutional Court: 1 complaint, resulted in 1 justice given notice in 2011, but he resigned. This is the only case since its establishment in 2003. Supreme Court: in 2009, 11 cases on judges' misconduct from Judicial Commission (including 3 same cases from the Supreme Court), 3 got sanctions.[xxiv] Police: in 2010 there were 5,437 complaints on discipline and 1,889 have been resolved; 682 complaints on crime and 119 have been resolved; 215 complaints on ethics and all have been resolved. There were 294 officers dishonourably dismissed in 2010.[xxv]

H. Country's Practice In Applying Central Principles For Rule Of Law For Human Rights

1. The Government And Its Officials And Agents Are Accountable Under The Law

a. Are the powers of the government defined and limited by a constitution or other fundamental law?

The constitution provides a set of provisions regarding the powers of the executive, legislative and judicial bodies.

The Executive power is provided in article 4 to 16 in Chapter III of the constitution. The term of office of the popularly elected president is five year and she/he can be re-elected once. The president and/or vice president can be impeached through a process in the People's Consultative Assembly involving the Constitutional Court if the President and/or the Vice-President has violated the law through an act of treason, corruption, bribery, or other serious criminal offences, or through moral turpitude, and/or that the President and/or the Vice-President no longer meets the qualifications to serve as President and/or Vice-President.

The Constitution provides clearly for the independence of the judiciary.[xxvi] The Judicial Commission is provided for in the Constitution to ensure the independence of the judiciary. It is said in the Constitution that the Commission has the authority to maintain and ensure the honour, dignity and behaviour of judges.

Government policies can be challenged in the State Administration Court, while the constitutionality of Laws, including Government Regulation in Lieu of Law, can be challenged in the Constitutional Court. Government Regulation, Presidential Regulation and Local Regulation can be brought to the Supreme Court for judicial review.

b. Can the fundamental law may be amended or suspended only in accordance with the rules and procedures set forth in the fundamental law?

Provisions to amend constitution are set forth in Chapter XVI of the constitution. Constitutional amendments require a proposal of at least 1/3 of the People's Consultative Assembly's members, 2/3 of the total member present in the session and a minimum of fifty per cent plus one member of the total member of the People's Consultative Assembly.

c. Are government officials and agents, including police and judicial officers, accountable under the law for official misconduct, including abuse of office for private gain, acts that exceed their authority, and violations of fundamental rights?

The Indonesian Constitution sets the basis for the equal status before the law. Article 27 section 1 provides: "all citizens have equal status before the law and in government and shall abide by the law and the government without any exception." Therefore, all laws are applicable for government officials.

However, written permission is required to initiate an investigation against high ranking officials. For the members of the House of Representatives and the Regional Representatives Council, permission from the president is required;[xxvii] for the members of the House of Representatives at provincial level, permission from the Minister of Internal Affairs is required;[xxviii] and for the members of the House of Representatives at regency level, permission from the Governor is required.[xxix] If the president has not granted such permission in 30 days, then the investigation can be initiated. In addition, the written permission is not required in the case that the person is caught in the act of the crime, or if the maximum punishment of the crime conducted is capital punishment or life in prison, or if the crime is a special crime (corruption, crimes related to economic activities and crimes related to drugs).

A similar set of provisions is applicable for governors, mayors and heads of regency (*bupati)*. Written permission from the president is needed, but the investigation may be initiated if the permission is not granted after 60 days, in the case that the person is caught in the act of the crime, or if the maximum punishment of the crime conducted is capital punishment or crime related to state security.[xxx]

The written permission requirement may be seen as a mere administrative matter, but these provisions are seen as one of the main problems in combating corruption in Indonesia.

The implementation of the code of conduct of the judges under the Supreme Court at all levels is done internally and externally. The internal oversight is conducted by the Supreme Court Supervisory Body (*Badan Pengawasan Mahkamah Agung*) led by Deputy Chief Justice on Supervision. The Supreme Court Supervisory Body handles reports on misconduct of judges as well as court clerks. It receives complaints from the public directly, through district and high court as well as through the website. According to the Decree of the Chief Justice No. 144/KMA/SK/VII/2007 regarding Transparency on Court Information, all information regarding the complaint procedure by the Supervisory Body must be published.

The external oversight is conducted by the Judicial Commission. Although the articles providing on detailed provisions on the oversight function of the Judicial Commission were ruled unconstitutional by the Constitutional Court,[xxxi] Law No. 3 of 2009 on the Supreme Court provides that both internal and external oversight on the conduct of judges are based on a code of conduct agreed jointly by the Supreme Court and the Judicial Commission and that there shall be a Honorary Council consisting of three Supreme Court Justices and four commissioners of the Judicial Commission. Judges reported to the Judicial Commission or to the Supreme Court Supervisory Body appear before the Honorary Council to defend themselves. According to the 2009 Annual Report of the Supreme Court, there were eleven reports on judges misconduct in 2009 submitted by the Judicial Commission and two found by the Supervisory Body; and three of them were sanctioned by the Honorary Council.[xxxii]

Disciplinary procedure for court clerks is regulated in the Supreme Court Decree No. 145 of 2007, while the case handling mechanism is regulated in the Supreme Court Decree No. 076 of 2009. In 2009, the Supervisory Body received 4,442 complaints and processed 3,193.[xxxiii] In 2009, the Supervisory Body gave sanctions to 180 court clerks, 44 in 2007, 51 in 2006, 45 in 2005 and 18 in 2004.[xxxiv]

As for the nine constitutional court justices, there is no permanent oversight mechanism after the Constitutional Court decision nullifying the Judicial Commission's oversight procedures.[xxxv] The Honorary Council of the Constitutional Court shall be set up when there is inquiry on misconduct. It is regulated in the Constitutional Court Regulation No. 02/PMK/2003, while the Code of Ethics and Conduct is provided in the Constitutional Court Regulation No. 07/PMK/2005. The Honorary Council consists of three Constitutional Court justices and in the case that the inquiry may result in dismissal of a justice the Honorary Council consists of two Constitutional Court justices, a former Supreme Court justice, a senior practicing lawyer and a law professor. There was one investigation conducted by the Honorary Council in early 2011. In 11 February 2011, the Honorary Council announced its decision that Justice Arsyad Sanusi is found guilty of not safeguarding ethics and proper conduct by letting his daughter meet with a party involved in a dispute on local election result at his house. The sanction was a notice to the justice, but Justice Arsyad Sanusi submitted his resignation to the Constitutional Court immediately after the announcement.

Prosecutors are overseen internally by the supervision unit of the AGO led by the Deputy Attorney General on Supervision. The internal oversight resulted in 156 prosecutors sanctioned in January-June 2010, 181 prosecutors sanctioned in 2009 and 179 in 2008.[xxxvi]

The AGO has an external oversight body, namely the Prosecutorial Commission (*Komisi Kejaksaan*), but this commission does not have authority to follow up complaints. It can only receive and process complaints and then submit recommendations to the Attorney General. The Prosecutorial Commission is a special unit set up in Law No. 16 of 2004 regarding the Attorney General's Office and Government Regulation No. 18 of 2005 regarding the Prosecutorial Commission. It has seven members, who are selected by the president based on the nomination from the Attorney General. The members serve a four year term and can be re-elected a second time.

The National Police has an internal oversight mechanism. There is a formal external commission that receives public complaints but it does not have the authority to give sanctions. The National Police Commission (*Komisi Kepolisian Nasional* or Kompolnas) was set up by Law No. 2 of 2002 on the Indonesian National Police and has six members. The National Police Commission is directly under the president and tasked with providing

assistance to the president in determining policies on Indonesian National Police and providing advice to the president in the selection and dismissal of the National Police Chief. The Commission receives complaints from the public on the police performance and submits the report to the president.

Oversight concerning administrative conduct, discipline, ethics and crime are conducted by the Division on Profession and Security (*Divisi Profesi dan Pengamanan* or Divpropam) and Division on Supervision and Law (*Divisi Pembinaan dan Hukum* or Divbinkum), while oversight on the investigative function of the police is conducted by the Investigator's Overseer (*Pengawas Penyidik*). In the annual report press released on 29 December 2010, the National Police Chief stated that in 2010 there were 5,437 cases on discipline and 1,889 have been resolved; 682 cases on crime and 119 have been resolved; 215 cases on ethics and all have been resolved. There were 294 officers dishonourably discharged in 2010.[xxxvii]

2. Laws And Procedure For Arrest, Detention And Punishment Are Publicly Available, Lawful And Not Arbitrary; And Preserve The Fundamental Rights To Physical Integrity, Liberty And Security Of Persons, And Procedural Fairness In Law

a. Are the criminal laws and procedures, including administrative rules that provide for preventative detention or otherwise have penal effect, published and widely accessible in a form that is up to date and available in all official languages?

The government publishes all laws and regulations, including the Indonesian Penal Code, which is actually a translation of the old Dutch colonial government code, and Law No. 8 of 1981 on the Criminal Procedures in Bahasa Indonesia, the official language. The government does not translate laws and regulations into English nor local languages. Unofficial translations are made by private publishers and non-governmental organisations. While Law No. 10 of 2004 on the Law Making Process provides that Laws and regulations are published by the Ministry of Law and Human Rights, the Ministry does not have specific means to distribute them widely. There is no formal publication that is widely distributed by the Ministry for this purpose, but those laws are widely accessible as they are published by commercial as well as non-profit publishers both in printed and digital forms.

A number of Non-Governmental Organisations (NGOs) publish criminal laws and procedures on specific topics to communities. For example, NGOs working on women issues distribute printed publications highlighting laws regarding domestic violence.

b. Are these laws accessible, understandable, non-retroactive, applied in a consistent and predictable way to everyone equally, including the government authorities, and consistent with the other applicable law?

As mentioned above, these laws are generally accessible, but the language may not be easy to understand by all people. All laws are in Indonesian language, but they tend to be in a complicated writing style, which may not be easily understood, and there is little effort to disseminate the laws in ways more understandable.

The Penal Code acknowledges the non-retroactivity principle in article 1. The non-retroactive principle is also stated clearly in article 28I section (1) of the Constitution and Law No. 39 of 1999 on Human Rights. Further, the Constitutional Court upheld that the implementation of the Law on Terrorism to the Bali Bombing case, which happened before the law was enacted, is unconstitutional.[xxxviii]

Predictability and consistency, however, are issues that warrant further discussion. The judges are not obliged to follow previous decisions of similar cases. Decisions that are important for reference are chosen by a team of judges and printed in the Supreme Court special publication "*Yurisprudensi Mahkamah Agung.*" In addition, there are no sentencing guidelines, which results in big differences in sentencing similar crimes.

It is important to note that the Penal Code is actually a translation of a Penal Code from the Dutch Colonial Government. Although it has basic legal principles relevant to the current situation, such as non-retroactivity, the types of crimes, the colonisation context and sentences drawn in the Code are outdated. It had, for example, articles

concerning hatred against the (colonial) government, which are declared unconstitutional and nullified by the Constitutional Court in 2007.[xxxix] In terms of imprisonment and fines, the Penal Code is also highly problematic because it was issued in 1918. The Indonesian government had changed the amount of fines in the Code in 1960, but had not made any update since then. Petty theft, for example, is defined in the Code as theft in the value of IDR 250 (equivalent to USD 0.03). Thus, provisions on petty theft are practically ineffective. As a result, in November 2009, an old woman who stole 3 cacao of IDR 2,000 (USD 0.23) in value because of her economic situation was tried in the lengthy ordinary procedure and sentenced with 1 month and 15 days probation. Another example is article 362 of the Penal Code on theft that provides a maximum sentence of five years in prison or a fine of IDR 900 (USD 0.10) – an amount that today may simply be ignored. There are a number of 'new' crimes regulated in new laws, such as corruption, domestic violence, money laundering and crimes related to information technology. Sentences in the various criminal laws were established without a clear formula and are not consistent with the Penal Code sentencing policy.

There is a draft law to replace the Penal Code that consists of all crimes regulated in different laws as well as sentencing guidelines. Yet, the comprehensive 741-article draft penal code has been sitting in the Ministry of Law and Human Rights since 1981 and has not been put on the table. The main reasons for the delay include the anticipated length of discussion in the House of Representatives and the fact that there are articles that attract much public attention, such as the ones related to pornography and marital rape - two sensitive issues in the Moslem majority country.

The issue of equality in punishment in also needs further elaboration as in practice there are different treatments in correctional institutions for former government officials as well as those who are able to bribe and ordinary prisoners. A recent phenomenon that gained special attention from the Judicial Mafia Task Force (*Satuan Tugas Pemberantasan Mafia Hukum* or Satgas Mafia Hukum)[xl] is the Ayin case and the Gayus Tambunan Case.

In 2008, Ayin or Artalyta Suryani was found to be a major case broker at the Attorney General's Office and sentenced to five years in prison. In January 2010, the Task Force visited her prison room unannounced upon receiving a report on the privileges she enjoyed in prison. They found that she was put in a special room that is larger and with air conditioner, flat screen television, smart phone and a karaoke set.[xli] In 28 January 2011, Artalyta was granted parole because she had served two-thirds of her four-and-a-half-year sentence and because of good behaviour.

Gayus Tambunan is a former tax official who was recently (19 January 2011) sentenced to seven years in prison for bribing a judge and law enforcement officials, which led to his acquittal in March 2010 on money laundering and corruption charges, and for misusing his authority in accepting tax complaints. During the trial, Tambunan confessed to having helped powerful firms evade taxes, paying prosecutors and police officials, and relieving his stress by leaving his jail cell to watch an international tennis tournament in Bali. He also admitted to having flown to Singapore, Kuala Lumpur and Macau using a forged passport while supposedly in detention.[xlii]

On equal application of laws related to punishment that preserve the fundamental rights to physical integrity, liberty and security of persons, it is important to note the report on the Aceh local regulations that allows corporal punishment. The report of the United Nation's Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2008 highlights the issue of penalties provided for by Sharia law, such as public flogging, in the 2005 Aceh Criminal Code under the special autonomy status. The consumption of alcohol, closed proximity between unwed couples, and gambling are crimes penalised by flogging. The report notes:

"Corporal punishment constitutes degrading and inhuman treatment in violation of article 7 ICCPR and article 16 CAT and should therefore be abolished. These morality offences under Sharia law are normally tried in public hearings, at which the audience can shout at the defendant, which renders the presumption of innocence meaningless. Moreover, punishments are carried out in public and are often televised."[xliii]

c. Do these laws authorise administrative/preventative detention without charge or trial during or outside a genuine state of emergency?

Law No. 8 of 1981 on the Criminal Procedures does not authorise administrative/preventative detention without charge. However, Law No. 15 of 2003 on the Eradication of Terrorism Act provides a longer detention for investigation purposes. While the Criminal Procedural Law allows a maximum of 20 days with a maximum of 20 days extension detention for investigation, the Anti-Terrorism Law allows a maximum of 60 days preventive detention, which may be based on intelligence reports checked by the head of District Court.

The state of emergency is regulated in Law No. 23 of 1959 on the State of Emergency.[xliv] This Law allows preventive detention for a maximum of 50 days without charge.

d. Do these laws protect accused persons from arbitrary or extra-legal treatment or punishment, including inhumane treatment, torture, arbitrary arrest, detention without charge or trial and extra-judicial killing by the State? Is the right to habeas corpus limited in any circumstance?

The Criminal Procedural Law protects accused persons from arbitrary or extra-legal treatment or punishment, including inhumane treatment, torture, arbitrary arrest, detention without charge or trial and extra-judicial killing by the State. The Law provides a chapter on the procedures to ensure the rights of the accused and suspects.[xlv] The Law also provides a procedure called *"pra-peradilan"* to exercise the right to *habeas corpus*.[xlvi]

Yet, the report of the UN Special Rapporteur on Torture in 2008 addresses important issues regarding torture at the pre-trial stage.[xlvii] It states concern about the prolonged period of police custody allowed under the Criminal Procedural Law during which many detainees have no or very restricted access to courts. It is said:

"The types of abuse reported to the Special Rapporteur and corroborated by forensic medical analysis include beatings with fists, rattan or wooden sticks, chains, cables, iron bars and hammers, kicking with heavy boots, electrocution and shots into the legs. Some detainees alleged that heavy implements (chairs, desks, and car jacks) had been placed on their legs for a prolonged period of time. The injuries sustained in a vast number of cases remain without any treatment, putting the health of the detainee further at risk."[xlviii]

The Rapporteur also highlights the high risk of minors and children of corporal punishment and ill-treatment when they are in detention. He further notes:

"At the juvenile detention centres in Pondok Bambu prison (Jakarta), and in Yogyakarta prison, many of the minors alleged that they had been beaten either by policemen or by co-detainees during police custody, often with the knowledge of the officers. At Kutoarjo juvenile prison, detainees consistently reported regular beatings, often in public, to intimidate the other juveniles. The prison authorities openly admitted the regular use of corporal punishment for disciplinary purposes."[xlix]

With regard to habeas corpus, the UN Special Rapporteur on Torture reports that this procedure is rarely used in practice.[l]

e. Do these laws provide for the presumption of innocence?

The presumption of innocence is generally acknowledged and stated in article 18 section (1) Law No. 39 of 1999 on Human Rights and article 8 of Law No. 14 of 1970 on Judicial Power.

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

The right to counsel is stated in Law No. 14 of 1970 on Judicial Power as well as the Criminal Procedural Law. In the Criminal Procedural Law, there is a chapter for legal aid, which consists of procedures to implement the rights to legal counsel.[li] Article 54 of the Criminal Procedural

Law recognises the right to counsel for those who are charged with criminal offences. Article 56 section (1) of the Criminal Procedural Law regulates that the officials are obliged to provide free legal counsel for suspects of crimes punishable by 15 years or more or by capital punishment and for suspects who cannot afford legal counsel and of crimes punishable by five years or more. However, the construction of these two provisions creates a notion that the right to counsel is only applicable for suspects of crimes punishable by 15 years or more or by capital punishment and for suspects who cannot afford legal counsel and of crimes punishable by five years or more. Added to the construction is article 21 section (4) of the Criminal Procedural Law saying that one of the reasons for pre-trial detention is crimes punishable by five years or more. As a result, many of the police officers have the understanding that the right to counsel is only applicable for suspects of crimes punishable by five years or more.[liii]

Further, article 18 section (4) of the Human Rights Law recognises the right to counsel in the criminal cases. The Law qualifies the right to counsel as a derogable right that can be limited within a public emergency situation. Article 14 Section (3) d of the ICCPR Ratification in Law No.12 of 2005 recognises the right to counsel in criminal case if the interests of justice require it. In 2004 the Constitutional Court held that the right to counsel is a constitutional right, although the 1945 Constitution itself does not mention explicitly right to counsel.[liii] The Constitutional Court held that the right to counsel can be derived from the rule of law principle that is part of the Constitution.

Detailed provisions for the Court to provide representation for accused persons who cannot afford to pay are regulated in the Supreme Court Circular Letter (*Surat Edaran Mahkamah Agung* or SEMA) No. 10/Bua.6/Hs/SP/VII/2010 dated 30 August 2010. There are two ways to assist the accused person in this matter, namely: using the Legal Aid Post (*Pos Bantuan Hukum* or Posbakum) provided in every court and assigning an advocate requested by the accused person on the court's fund.

In practice the laws and regulations are not well-implemented. An observation conducted by LeIP (Indonesian Institute for Independent Judiciary), a Jakarta-based NGO, in Central Jakarta, South Jakarta and West Jakarta District Courts in 20 September - 14 October 2010 and 5 - 16 December 2010 revealed important facts.[liv] Of 1,490 cases analysed during the time of research, in 1,171 cases there were no legal counsel. In only 318 cases did the defendants have advocates and in one case it was not known if an advocate was present. Of all cases without legal counsel, an offer of court-provided legal assistance only occurred 37 times. The research did not enquire as to whether or not they were informed about the right to counsel, but from the small number of offers to get court-provided legal assistance, the research concludes, the number of the suspects informed with such rights would be smaller.[lv]

The research also found that 90% of the suspects were detained and 90% of them did not have legal representation, although 70% were suspects for crimes punishable by 5-15 years, over 15 years and death penalty. The head of the Central Jakarta District Court, in the interview for the LeIP's research, admits that the condition is resulted from the complicated procedure to request court-provided legal counsel.[lvi]

The UN Special Rapporteur on Torture also mentions his concern about the condition of legal representation during his mission to Indonesia in 2007. He notes that only very few detainees appear to have access to a defense lawyer.[lvii]

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

Article 59 and 60 of the Criminal Procedural Law guarantees accused persons the right to be informed of the precise charges against them to prepare their defence and communicate with their legal counsel. On this aspect, the UN Special Rapporteur on Torture notes that only few detainees had legal assistance and he received numerous complaints regarding bias of legal aid counsels.[lviii]

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

Article 50 of the Criminal Procedural Law states that accused persons have the right to be tried without undue delay. Further, article 65 of the Criminal Procedural Law states the rights of the accused persons to provide witnesses or experts in the court to defend them. The accused person can be tried without their presence only in money laundering and corruption cases, after certain procedures have been conducted.[lix]

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

Article 67 of the Criminal Procedural Laws and articles 19, 20 and 21 of Law No. 14 of 1970 on Judicial Power provide for the right to appeal against conviction and/or sentence to a higher court.

j. Do these laws prohibit the use of coerced confessions as a form of evidence and do they guarantee the accused person's right to remain silent?

There is no provision on coerced confessions as a form of evidence in the Criminal Procedural Law or in any other laws related to court procedure. A research published in early 2011 by Jakarta Legal Aid Institute involving interviews with over 1,000 suspects and prison inmates as well as responses from 400 police officers, prosecutors, judges, wardens and rights activists reports that police for the most part are the perpetrators of torture, often to obtain confessions. In addition, prosecutors and judges are complacent in either encouraging or condoning the use of force in interrogations.[lx]

The UN Special Rapporteur on Torture in his 2008 report said that detainees are more vulnerable to abuse while in police custody than in prison. There are cases where police officers had shot detainees in their legs from close range, or electrocuted them. In some instance, the torture was used to obtain confession. He remarks:

"The overwhelming majority of the detainees interviewed indicated that the ill-treatment was used primarily to extract confessions or, in the cases of drug-related crimes, to receive information on drug suppliers. In a number of cases detainees were offered to be spared in return for the payment of a substantial amount of money. Those interlocutors who had been already tried reported in unison that their coerced confessions had been used during the court proceedings and that objections they had raised were not considered by the judge, prosecutor or even their own legal aid clerk. Furthermore, they were not aware of any complaint mechanisms to which they could address their grievances expecting any kind of outcome."[lxi]

There is no guarantee on the right of the accused person to remain silent either in laws or in other procedural regulations.

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

Article 76 of the Criminal Code prohibits persons from being tried or punished again for an offence for which they have already been finally convicted or acquitted.

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

There is no specific provision on the right to seek a timely and effective remedy before a competent court for violations of fundamental rights.

3. The Process By Which The Laws Are Enacted And Enforced Is Accessible, Fair, Efficient, And Equally Applied

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

Until recently, legislative proceedings were closed to the public. It was only after the enactment of Law No. 27 of 2009 regarding the House of Representatives, the Regional Representatives Council and the local House of

Representatives the principle that all parliamentary sessions are open to the public is recognised. The provision says that all meetings are in principle open except the ones decided otherwise.[lxii]

In practice, however, it is not easy to obtain information on the parliament's schedule. Their websites are not user friendly or updated for providing timely information on parliamentary sessions and legislative the materials.

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

The official drafts of laws and transcripts and minutes of legislative proceedings are not made available to the public on a timely basis. The House of Representatives, the Regional Representatives Council and the local House of Representatives do not have an information management system that can provide these documents. Some members of the House and supporting staff unofficially provide draft laws to their constituents and organisations. NGOs provide those documents online without charge, for example: www.parlemen.net. The Secretariat General (the supporting unit) of the House of Representatives and the Regional Representatives Council provide websites to publish their works (www.dpr.go.id and www.dpd.go.id), but the information management system needs further improvement as the information most of the time is not updated.

This situation makes it difficult for the general public to be involved and watch the law-making process. The media and NGOs play an important role to observe and report on and watch the processes.

c. Are the thresholds for legal standing before courts clearly specified, not discriminatory and not unduly restrictive?

Legal standing before courts is regulated in some specific laws. Citizens Law Suit is acknowledged based on Law No. 23 of 1997 on Environmental Management, Law No. 8 of 1999 on Consumer Protection and Law No. 41 of 1999 on Forestry. Further, the Supreme Court issued Regulation No. 1 of 2002 on Class Action Procedure, providing details on the examination, court proceeding and decision on class action. Legal standing for NGOs is regulated in Law No. 23 of 1997 on Environmental Management based on a landmark decision regarding environmental case (*WALHI vs. five government bodies and PT. Inti Indorayon Utama*, 1988).

For the Constitutional Court, the legal standing requirements are clearly provided in the Law No. 24 of 2003 on the Constitutional Court. Indonesian individuals, community groups espousing customary law, public or a private legal entities, and state institutions may file judicial review petitions to the Constitutional Court, but only on the condition that he/she is able to confirm that his/her constitutional rights are injured by the enactment of a law.

d. Are judicial hearings and decisions made readily available to affected parties?

Judicial hearings and decisions are not made readily available to affected parties. Based on article 226 of the Criminal Procedural Law, the affected parties will immediately obtain the excerpts of the decision, but not the copy of the complete court decision. Affected parties may obtain decisions upon request. This is also regulated internally by the Supreme Court Circular Letter No. 4 of 2009 regarding the Delivery of the Copy of the Decision.

An important development in this context is the court transparency project at the Supreme Court. There are the Decrees of the Chief Justice No. 144/KMA/SK/VIII/2007 regarding Access of Information at the Court and No. 1-144/KMA/SK/I/2011 regarding Guidelines in Providing Information at the Court. Parts of the project are a special website at the Supreme Court website dedicated to publish decisions (putusan.mahkamahagung.go.id) and information desks at court buildings that provide, among other things, information on the trial processes. Although the facilities are available, not all decisions are readily published on the web. This is because before 2007, decisions were not archived systematically.[lxiii] It was, therefore, challenging to set up an information management system, especially with courts at all levels nationwide. The system is now in place, but the promptness of web publication is still a challenge. Moreover, many regions do not have adequate internet access so that requests for the copy of decision are often done manually and there are reports.

Copies of the decisions are often received late. For example, the case of the judicial review of Tangerang's local regulation on prohibiting prostitution. On April 2006 the Supreme Court rejected the judicial review request on the basis that its formulation procedure had been found to sufficiently meet the legal and political requirements, and therefore no review of the substantive content of the this local regulation was considered necessary. The decision was announced to the public in a press conference by the Supreme Court's speaker. However, until the date of National Commission on Violence against Women's report for Indonesia's periodic report to the CEDAW Committee 19 July 2007,[lxiv] the Supreme Court had not provided any documentation fully articulating its decision to the individuals or organisations who initiated the request for judicial review.[lxv]

e. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law?

Equality before the law and discrimination is still a big issue in Indonesia, especially in terms of gender and belief.

Although Indonesia is constitutionally a secular country, many districts issued '*sharia*-inspired' local regulations that are discriminatory against women. The National Commission on Violence Against Women report for Indonesia's periodic report to the CEDAW Committee 19 July 2007 points out that in 2006, the National Commission identified 25 regulations issued by 16 local governments (in the form of regulations, decrees, official circulars and directives) at provincial, district and village levels which constitute discrimination, particularly against women. They require Muslim women to wear head cover (*jilbab*); encourage sexual segregation in pools; criminalise women who are in close proximity with males who are not their guardians; criminalise women who create the *impression* of being prostitutes and those who are in a public area at night time.[lxvi] Further in a press release commemorating the First Indonesian Women's Congress in 1928, the Women's Commission noted that by the end of 2010 there are 189 policies that are discriminatory against women.[lxvii]

Local regulations (*Peraturan Daerah*) can be submitted for judicial review to the Supreme Court. Other forms of policies cannot be brought for judicial review, but certain policies may be brought to the Administrative Court. Court processes on women issues, however, have always been challenging. Another way to review those policies is to make use of the authority of the Ministry of Home Affairs over the local governments. The Ministry may revoke policies that are not in line with national laws and policies.

In the United Nations Universal Periodic Review compiled document dated 31 March 2008, it was noted that in 2007, CEDAW was concerned that not all 21 laws identified as discriminatory have been revised and that some amendments still discriminate against women. CEDAW also expressed their concern about the new draft law on gender equality**,** discriminatory provisions in the Marriage Act 1974, family and spousal consent requirements in the areas of women's employment and health.[lxviii]

On discrimination based on belief, the recent cases include the discrimination against the Ahmadiyah sect of Islam and the attack on a group of Christians in Bekasi in August 2010. Ahmadiyah followers, their mosques and orphanage in various regions were attacked and burned by a group of Islamic hardliners. The most recent incident was an attack on a group of Ahmadi in Cikeusik in February 2011 where 3 Ahmadi were killed brutally (the attack was actually video-taped and published on the internet). These incidents are the result of discriminatory policies of the government against Ahmadiyah. This discrimination is also mentioned in the United Nations Universal Periodic Review compiled document dated 31 March 2008.[lxix]

In 2008, the government issued a Joint Decree of the Minister of Religious Affairs, the Attorney General and the Minister of Home Affairs No.3.2008, KEP-033/A/JA/6/2008, 199 of 2008 (the numbers are for each ministry respectively) on Warning and Instruction to Followers, Members and/or Leaders of the Indonesia Ahmadiyah Community and the General Public (*Peringatan dan Perintah Kepada Penganut, Anggota, dan/atau Anggota Pengurus Jemaat Ahmadiyah Indonesia (JAI) dan Warga Masyarakat*).[lxx] This Decree has been used as a basis for Islamic hardliner groups to attack Ahmadiyah

followers. In some instances, the discrimination was even conducted by law enforcement officers. In December 2010, an orphanage in Tasikmalaya (West Java) was locked up, with the children and staff still inside, by the sub-district police chief and prosecutor, arguing that the hard-line Islamic Defenders Front (FPI) would otherwise have come to close it down.[71] After the bloody Bekasi attack, three Indonesian provinces issued decrees that prohibit the Ahmadiyah from publicly manifesting their faith.[lxxii]

On 8 August 2010, a group of people chased about 20 members of Batak Christian Protestant Church (*Huria Kristen Batak Protestan* or HKBP) in Pondok Timur Indah, Bekasi (West java) and beat them with sticks. An elder was stabbed and a priest was beaten with a stick when she came to his aid. This attack is a continuation of debate over the local government policy on the permission to build of a church in an area that has more Moslem inhabitants. This is not the only incident on the basis of permission to build a religious building.[lxxiii] This permission, which is issued by the local government, is based on the Joint Decree of the Minister of Religious Affairs and Minister of Home Affairs No. 8 of 2006 and No. 9 of 2006 regarding the Implementation of the Government Apparatus in Ensuring Order and Smooth Religious Ceremonies (*Pelaksanaan Tugas Aparatur Pemerintahan dalam Menjamin Ketertiban dan Kelancaran Pelaksanaan Pengembangan dan Ibadat Agama oleh Pemeluk-Pemeluknya*). The government still refuses to revoke this Decree as it is believed to have facilitated religious harmony.

f. Do persons have equal and effective access to judicial institutions without being subjected to unreasonable fees or arbitrary administrative obstacles?

Court case fees vary depending on the type and scope of case, but all courts are obliged to announce the fees in the court buildings based on the Decree of the Chief Justice on Judicial Transparency. The guideline for determining the court fee is Supreme Court Regulation No. 2 of 2009 regarding Fee for Case Processing and Management at the Supreme Court and courts under it. Down payment fees at district courts vary depending on the court's location and a number of witnesses and other parties summoned in the case, while fee for cassation (Supreme Court) and appeals (High Court) are fixed. For example, cassation on a civil case costs IDR 500,000 (USD 57.05), cassation on a civil case regarding commercial disputes (from commercial court) costs IDR 10,000,000 (USD 1140.90), and a judicial review case costs IDR 1,000,000 (USD 114.09).

The amount of the fees can be seen at the Information Desk of the court or at the website of the court.[74] Based on the Supreme Court Circular Letter No. 10/Bua.6/Hs/SP/VII/2010 dated 30 August 2010, the fees may be waived for poor people provided that they provide documentation on their economic condition.

The problem is the unofficial fees that occurred during the pre-trial process, especially during police custody and investigation by prosecutors. This is one of the main barriers in access to justice. It is noted by the UN Special Rapporteur on Torture that there are instances where police officers request money for some 'services,' such as to receive visitors. There were even complaints that some prisoners had to give money in order not to be beaten up by the officials.[lxxv]

g. Are the laws effectively, fairly and equally enforced? Are persons seeking access to justice provided proper assistance?

Laws are not always effectively, fairly and equally enforced. There are cases showing how people who have access to power and resources gain privileges while poor people seeking justice are not properly assisted. The cases narrated for questions number 2.2 above (the Ayin Case and Gayus Tambunan Case) exemplify how fair and equal principles are not applied.

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

To date, there is no law providing a comprehensive scheme for reparation to victims of crime or human rights violations, but there are forms of reparation in practice. Law No.13 of 2006 on the Protection of Witness and

Victim provides the right to medical assistance and psycho-social rehabilitation to the victim of gross violation of human rights (article 6). The request for compensation on gross violation of human rights cases and restitution for victims of crime may be submitted to Court through the Witness and Victim Protection Agency (article 7). This provision is yet to be further regulated in a Government Regulation.

There is also a scheme of compensation given to victims of decades of conflict between the Indonesian government and Free Aceh Movement managed by the Aceh Reintegration Board (*Badan Reintegrasi-Damai Aceh* or BRA). BRA was established by the Decree of the Aceh Governor No. 330/032/2006 dated 11 February 2006. It was set up to manage programs on reintegration of former members of the Free Aceh Movement to the society; and one of the agreed ways of reintegration is to provide compensation to the victims.

There was a clear scheme for reparation for the victims of past gross violation of human rights in Law No. 27 of 2004 regarding a Commission for Truth and Reconciliation (TRC), but in December 2006 the Constitutional Court annulled the law.[lxxvi] A new TRC Law is being discussed by the government as this report is being written. The Law on Aceh Government also provides a TRC for Aceh past gross human rights violations, but it is arguably structured under the national TRC. Thus, the Aceh TRC is awaiting the making of the new law of TRC.

i. Do the laws provide for and do prosecutors, judges and judicial officers take measures to minimise the inconvenience to witnesses and victims (and their representatives), protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect their interests?

Articles 217, 218 and 219 of the Criminal Procedural Law regulate provisions regarding the security of the Court proceedings. The official responsible for the security of the court session is the chair of the tribunal of judges. Further, article 219 of the Criminal Procedural Law provides that the Court security officials have the right to check anyone attending the session. Article 48 of Law No. 48 of 2009 regarding Judicial Power obligates the police to safeguard the security of judges at all courts and the Constitutional Court.

These provisions provide adequate legal framework to protect victims and witnesses and their families. However, there were cases where victims and witnesses and their families were attacked physically and verbally during trial. An example is violence at the Temanggung District Court (Central Java), on 8 February 2011. It was triggered by the dissatisfaction with the five year verdict of Antonius Richard Bawengan, who was convicted of blasphemy. Before the Temanggung event, another riot also took place at the South Jakarta District Court, during the hearing of the Blowfish Cafe case. According to a recent study from National Law Reformation Consortium (*Konsorsium Reformasi Hukum Nasional* or KRHN), contempt of court from 2005 until this day has occurred both inside and outside the courtroom. KRHN noted that, from September 2005 to 8 February 2011, there have been at least 30 instances of contempt of court.[lxxvii]

In this context, it is important to note the role of the Witness and Victim Protection Agency. Law No.13 of 2006 on the Protection of Witness and Victim provides the following rights for victims and witnesses:

- to obtain protection on personal security
- to participate in the process of choosing and determining forms of protection and security support
- to provide testimony without pressure
- to have a translator
- to be free from deceiving questions
- to obtain information regarding the progress of the case
- to obtain information regarding the court decision
- to know in the case that the suspect is acquitted
- to obtain a new identity
- to obtain a new home
- to obtain reimbursement on transportation
- to obtain legal advice
- to obtain support for living costs until the protection period ends

4. Justice Is Administered By Competent, Impartial And Independent Judiciary And Justice Institutions

a. Are prosecutors, judges and judicial officers appointed, re-appointed, promoted, assigned, disciplined and dismissed in a manner that fosters both independence and accountability?

Supreme Court justices are nominated by the Judicial Commission and selected by the House of Representatives. There is a retirement age for Supreme Court Justices, but they can be dismissed based on disciplinary measures conducted by Honorary Council. As for judges at courts under the Supreme Court, their promotion is regulated in Government Regulation No. 41 of 2002. There are three ways of promotion, namely regular promotion, promotion based on merit and promotion based on education. Regular promotion is based on performance and loyalty to the state (article 1 of Government Regulation No. 41 of 2002). The promotion will be expedited if a judge shows excellent performance or obtain higher education. The Supreme Court is now conducting series of activities to have a Competency Based HR Management (CBHRM) as planned in its Reform Blue Print re-launched in 2010.

Since the "one-roof" policy, as explained in the beginning of this report, the government does not have direct involvement in the appointment, promotion, assignment, discipline and dismissal of judges. As for the appointment of Supreme Court Justices, the role of the politicians is balanced by nomination by the Judicial Commission that is based on close scrutiny on the candidates' background.

The judges' recruitment, appointment and promotion as well as disciplinary measures must always be checked to ensure accountability. The system may look sound on paper but there are allegations of misconduct that are not dealt with by the Supreme Court. For that matter, the Supreme Court's effort to publish annual report and to have court transparency must be maintained and promoted.

The Attorney General is appointed by the president and a member of the cabinet. Career path and promotion of prosecutors are generally regulated according the government employee scheme. It is based on achievements and performance, together with the so-called "regular promotion," which does not necessarily promote performance. Reform on the human resources management system, which includes appointment and promotion, is underway in the AGO's bureaucratic reform plan launched in 2008.

The National Police Chief is selected by the president with confirmation from the House of Representatives and is directly responsible to the President. The Police have its own internal regulations on recruitment, promotion and assignment with fixed schedule of assignments.

However, the processes of promotion, assignment, discipline and dismissal in both the National Police and AGO are not transparent and, thus, hinders accountability. There have been cases where disciplinary measures taken by the Attorney General and the National Police were questioned. For example, in the "Ayin Case" in which a taped telephone conversation between Ayin a.k.a. Artalyta Suryani and Prosecutor Urip Tri Gunawan in March 2008 revealed the names of 3 high ranking officials at the AGO who also involved in the corruption scandal to release a big corruptor. The Attorney General only gave one letter of dissatisfaction of performance and two written notices.

Another example is the case of the unusual bank account activities of 23 high ranking officials at the National Police in 2010 that was investigated by journalists. Due to public pressure, the National Police conducted internal investigation on the accounts. In July 2010, the National Police Chief announced that 17 accounts were found normal and 6 manifested unusual activities, but he refused the reveal the names of the accounts' owners. Indonesia Corruption Watch (ICW), a Jakarta-based NGO, filed a complaint to the Information Commission under the Freedom of Information Act (Law No. 14 of 2008). ICW requested the National Police Chief to reveal all information regarding the investigation as it is regarded as public information in the Freedom of Information Act. On 8 February 2011 the Information Commission announced its decision in favour of ICW so that the National Police is obliged to reveal the information.

In the discussion of the competency, impartiality and the independence of justice institutions, it is important to note the existence of the Public Order Agency (*Satuan Polisi Pamong Praja* or SATPOL PP), a unit under local

governments tasked with enforcing local regulation. SATPOL PP is formally not a justice institution. SATPOL PP personnel do not have authority under the Penal Code, the Criminal Procedural Law or any other laws on crimes. However, SATPOL PP is often tasked by local governments to directly face a community or a group of people who are considered to have violated local regulations. For example, forced eviction and raids on prostitutes, street hawkers, buskers and other informal works that deemed disturbing public order are usually conducted by SATPOL PP.

The legal basis for SATPOL PP is article 148 of Law No. 32 of 2004 regarding Regional Autonomy. It is said that SATPOL PP is set up to assist the head of local government in enforcing local regulations and in administering public order. This is regulated further in Government Regulation No. 6 of 2010 on SATPOL PP. SATPOL PP members are government employees under the local government, which are administered by the Ministry of Home Affairs. All local governments have SATPOL PP.

SATPOL PP plays a role similar to the role of the police but without proper recruitment, education, training and oversight. Therefore, many incidents occurred when SATPOL PP exercises its authority. There was, for instance, in an incident on 14 April 2010, there was a clash between a SATPOL unit that was tasked to clear a local historic site and some organisations that refused the clearance in Tanjung Priok, North Jakarta. It was a bloody clash, and 2 SATPOL PP members were killed.[lxxviii]

In Aceh, *Wilayatul Hisbah*, a version of SATPOL PP for implementing "*Qanun*" (local regulation of Aceh) on sharia was set up in 2003. Similar issues occurred with regard to *Wilayatul Hisbah*, as they are not well-recruited, trained and overseen.[lxxix] On 8 January 2010, a 20-year old female student was taken into custody for allegedly engaging in an immoral act with her boyfriend, violating the 2003 Qanun on Public Indecency. In custody, she was raped by three members of *Wilayatul Hisbah*. The case is now in the trial process in Banda Aceh District Court.[lxxx]

Although SATPOL PP and *Wilayatul Hisbah* are not related to institutions discussed in this report, their existence is closely related to the issue of the administration of justice. In the context of the rule of law for human rights, the existence of non-judicial institutions exercising judicial or quasi judicial or law enforcement functions raises concerns.

b. Do prosecutors, judges and judicial officers receive adequate training, resources, and compensation commensurate with their institutional responsibilities? What percentage of the State's budget is allocated for the judiciary and other principal justice institutions, such as the courts?

Training for candidate judges concerning court procedures is managed by the Centre for Education and Training on Court Technicality at the Research and Development Body and Education and Legal and Judicial Training (Pusat Pendidikan dan Pelatihan Teknis Peradilan Badan Penelitian dan Pengembangan Pendidikan dan Pelatihan Hukum dan Peradilan or BalitbangDiklatkumdil). The training is regulated by The Decree of the Chief Justice No. 169/KMA/SK/X/2010 regarding the Adoption and Implementation of the Integrated Education and Training Program for Candidate Judges. In addition, there is recommendation for a structured continuing legal education for judges in the program.

In the standard curriculum of the newly adopted integrated education and training for candidate judges, there is a subject of general principles of good governance, which include discussions specifically on rule of law. In addition, there are sessions on human rights in relation with the criminal procedural law, human rights court and state administrative court (12 times 45-minute sessions for each topic).

Education and training for prosecutors are regulated in the Decree of the Attorney General No. Kep-004/A/J.A/01/2002. The training is four years in total, which consists of 2 years pre-inauguration training and 2 years post-inauguration training. The pre-inauguration training includes governance system, prosecutorial tasks and organisational culture. The post-inauguration training includes leadership training, functional (on the work of a prosecutor) training, and technical training. Human rights topics are included in the curriculum, especially in relation to the human rights courts.

Education and training for the police is conducted at the Police Academy (*Akademi Kepolisian* or AKPOL). The duration of education is 10 semesters or 3 years and 4 months.[lxxxi] Human rights is included in the curriculum of the Police Academy.

The salary of judges is considerably small compared to the average income of lawyers, but special measures to raise the total income of judges have actually been made by the Ministry of Finance by adding allowances, namely "judge's allowance"[lxxxii] and "performance allowance."[lxxxiii] The total monthly payment received by a Supreme Court justice is approximately IDR 32,633,000 (USD 3,728.22) with the 'original' salary only IDR 4,833,000 (USD 552.16), while a judge at the lowest level of court would roughly receive IDR 12,294,000 (USD 1,404.55) per month with the 'original' salary of IDR 4,294,000 (USD 490.58).

Prosecutors and the police, on the other hand, still receive salaries equivalent to ordinary government employees,[lxxxiv] which is augmented with functional allowance to increase the take home salary.

The small salary received by these judicial officials has been pointed out as one of the main reasons for corruption in the respective institutions.[lxxxv]

In the media, responding to allegations that the Constitutional Court receive an unusual honoraria for every court session, the Constitutional Court Chief Justice Mahfud MD states that the total payment per month received by a Constitutional Court judge is approximately IDR 40,000,000 (USD 4,575.08), with the 'original' salary of over IDR 5,000,000 (USD 571.89).

The number of the personnel and the amount of the salary are the main factors in determining the organisation's budget. As seen in the table below, the highest budget allocation for law enforcement agency is for the National Police.

Budget for Law Enforcement Agencies in State Budget 2005-2010

(in billion rupiah)

Organisation	2005*	2006*	2007*	2008*	2009*	2010**	2011***
Supreme Court	1,229,8	1,948,2	2,663,6	4,001,2	3,950,5	5,219,9	6,055,3
AGO	777,7	1,401,1	1,590,8	1,622,0	1,602,1	2,940,0	2,844,8
Constitutional Court	110,7	204,6	149,7	158,1	162,6	189,3	287,7
National Police	11,638,2	16,449,9	19,922,4	21,100,0	25,633,3	27,795,0	29,781,8
Anti-Corruption Commission	-	221,7	163,8	204,3	228,6	458,8	575,7
Judicial Commission	-	34,9	79,1	79,6	89,2	58,5	79,7
Total	13,756,4	20,260,4	24,569,4	27,165,2	31,666,3	36,661,5	39,625,0
Total State Budget	120,823,0	189,361,2	225,014,2	259,701,9	306,999,5	366,134,5	432,779,3

ix. *Source: Ministry of Finance, Principle Data on the State Budget 2005-2011*

Note:

x. ** Government Report*

xi. *** Revised State Budget of 2010 (the 2010 Government report is yet to be submitted)*

xii. **** Current State Budget*

a. Are judicial proceedings conducted in an impartial manner and free of improper influence by public officials or private corporations?

Judicial proceedings are generally conducted in an impartial manner. The issue of improper influence has been a matter of public concern, particularly in recent cases involving so-called "case brokers" or "judicial mafia" by public officials or private corporations. Cases like those mentioned above had been seen as responsible for the low public confidence in the judicial process noted by many national and international studies and reports. There have not been any occasions noted otherwise.

b. Are lawyers or representatives provided by the court to accused persons, witnesses and victims competent, adequately trained, and of sufficient number?

There is no data as to whether or not lawyers or representatives provided by the court to accused persons, witnesses and victims are competent, adequately trained, and of sufficient number. However, an observation conducted by LeIP in Central Jakarta, South Jakarta and West Jakarta District Courts in 20 September - 14 October 2010 and 5-16 December 2010 revealed that the court-provided advocates were often absent in the trials and not well-prepared.[lxxxvi]

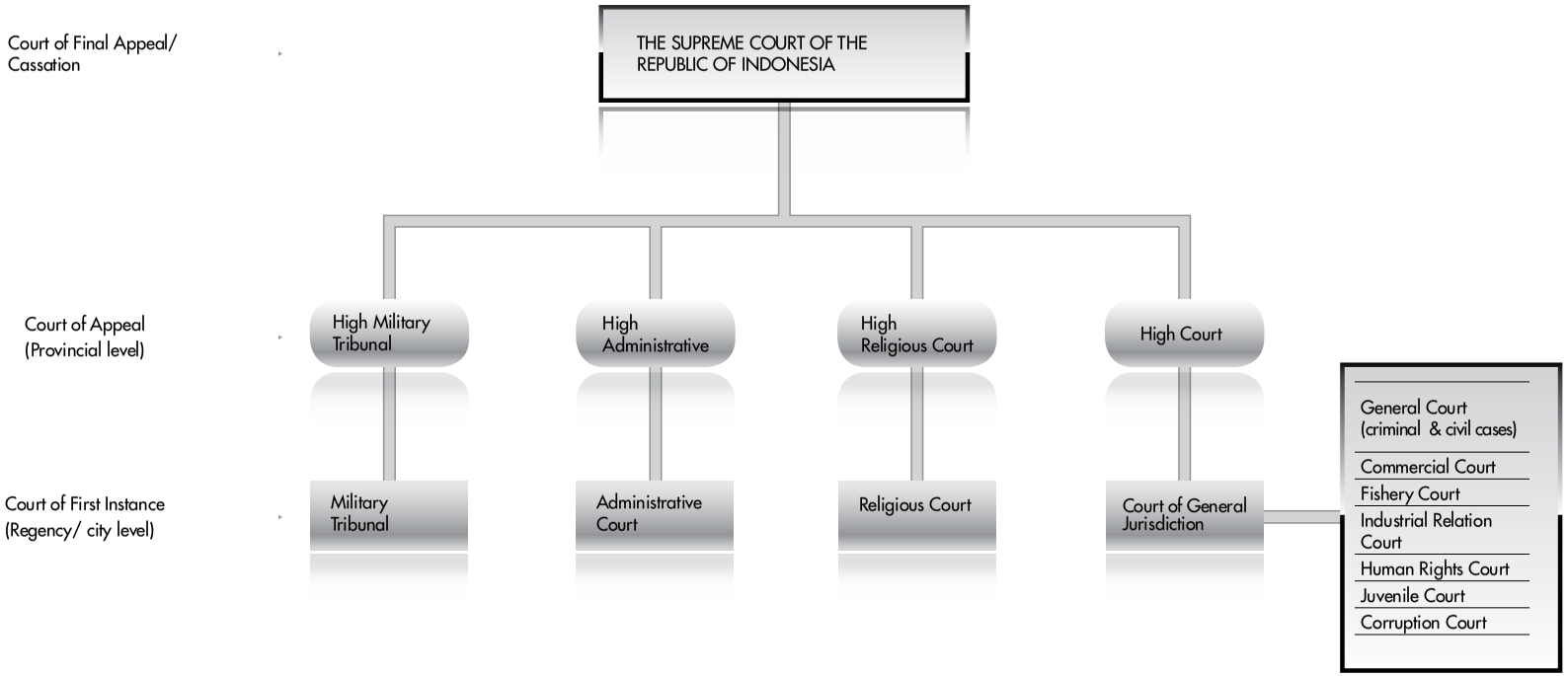
c. Do legal procedures and courthouses ensure adequate access, safety and security for accused persons, prosecutors, judges and judicial officers before, during and after judicial, administrative, or other proceedings? Do they ensure the same for the public and all affected parties during the proceedings?

Legal procedures provide adequate safety and security for accused persons, prosecutors, judges and judicial officers before, during and after judicial, administrative, or other proceedings. This is apparent from a set of provisions regarding contempt of court in the Criminal Procedural Law (articles 217-219) as well as Article 48 of Law No. 48 of 2009 regarding Judicial Power that obligates the police to safeguard the security of judges at all courts and the Constitutional Court. In addition, every court has its own rules of procedure that is usually very detailed in order to ensure safety and security. However, the courthouses often do not have adequate facilities to enforce those legal procedures. There are not many court houses equipped with metal detectors, for example, although there have been instances where visitors brought weapons and caused incidents in the court.[lxxxvii] In addition, the security personnel of the courthouses are not well-trained to handle disorder in the court room.

On 24 March 2010, two advocates on the judicial review of blasphemy law were beaten in the Constitutional Court building by Islamic hardliner group FPI. On 22 September 2008, a court session at the Central Jakarta District Court on the "Monas incident" involving an attack of some Islamic hardliner groups to the Alliance for Freedom of Religion rally for Ahmadiyah ended in disorder after a group of people chased and beat the victim.

There is no data on access to courthouses, but general observation shows that the issue of accessibility to courthouses is rarely discussed. It is taken for granted that all parties in the case and other interested parties should make efforts to reach the courthouse. The issue of court accessibility for disabled people is also never discussed.

Appendix 1. Indonesian Supreme Court Structure



Endnotes

i. The special autonomy was a solution offered by the central government to long term conflict in Aceh. It was provided in Law No. 18 of 2001 regarding Special Autonomy for Aceh. The Law was then replaced by Law No. 11 of 2006 regarding Aceh Government, which was part of the Memorandum of Understanding between the Indonesian government and the Free Aceh Movement signed in Helsinki in 2005.

ii. Article 4 section (3) of Law No. 5 of 2004 regarding the Supreme Court (second revision to Law No. 14 of 1985) provides that the maximum number of the Supreme Court justices is 60.

iii. 2009 Annual Report of the Supreme Court, published in 2010, at 176.

iv. The "hierarchy of law and regulations" is provided in Law No. 10 of 2004 on Law Making, as follows: (1) constitution, (2) Laws (parliamentary act or statute) and Government Regulation in Lieu of Law, (3) Government Regulation, (4) Presidential Regulation and (5) Local Regulation.

v. Constitutional Court Decision No. 005/PUU-IV/2006.

vi. Data from the Attorney General's Office's Website *http://www.kejaksaan.go.id/unit_kejaksaan.php?idu=21&idsu=1&id=2* accessed 18 February 2011.

vii. United Nations Human Rights Council, Working Group on the Universal Periodic Review, First session, Geneva, 7-18 April 2008, Compilation Prepared By The Office Of The High Commissioner For Human Rights, In Accordance With Paragraph 15(B) Of The Annex To Human Rights Council Resolution 5/1: Indonesia, 31 March 2008 (A/HRC/WG.6/1/IDN/2), para. 24. See also Institute For Policy Research and Advocacy (ELSAM), "Final Report: The Failure of Leipzig Repeated in Jakarta, Monitoring Report on Ad Hoc Human Rights Court Against Gross Human Rights Violations in East Timor, Jakarta, Indonesia," <*http://socrates.berkeley.edu/~warcrime/ET-ELSAM-Reports/ELSAM-Final-Report.pdf*>, accessed 10 January 2011.

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

ix. Press Release for the End-of-the-year Press Conference of 2010 (Siaran Pers Kapolri Pada Acara Konferensi Pers Akhir Tahun 2010), 29 December 2010 <*http://www.polri.go.id/berita/4559*>, accessed 20 January 2011.

x. See Daniel S. Lev, "Between State and Society: Professional Lawyers and Reform in Indonesia," in Daniel S. Lev, Legal Evolution and Political Authority in Indonesia, Selected Essays, (The Hague, London, Boston: Kluwer Law International, 2000): 305-320, at 315-316; Binziad Kadafi, et. al., Advokat Indonesia Mencari Legitimasi: Studi Tentang Tanggung Jawab Profesi Hukum di Indonesia [Indonesian Advocates in Search of Legitimacy: A Study on Legal Professional Responsibility in Indonesia] (Jakarta: PSHK, 2001).

xi. As of 30 March 2010. Data from the Legal Aid Center of the Indonesian Bar Association (Pusat Bantuan Hukum Perhimpunan Advokat Indonesia or PBH PERADI).

xii. Daniel S. Lev, "Social Movements, Constitutionalism, and Human Rights," in Daniel S. Lev, Legal Evolution and Political Authority in Indonesia, Selected Essays, (The Hague, London, Boston: Kluwer Law International, 2000): 321-336, at 329.

xiii. 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.

xiv. Todung Mulya Lubis, "The Rechtsstaat and Human Rights," in Tim Lindsey, ed., Indonesia: Law and Society (Sydney: The Federation Press, 1999): 171-185, at 172.

xv. Lindsey, supra note xiii, at 295.

xvi. The other priority areas are (1) development of social, cultural and religious life; (2) economy; (3) knowledge and technology; (4) structure and infrastructure of development; (5) politics; (6) defense and security; (7) area and urban planning; and (8) natural resources and environment. See Presidential Regulation No. 5 of 2010 regarding National Medium Term Development Plan 2010-2014.

xvii. See Ulma Haryanto, "Bappenas Program to Increase Poor's Access to Legal Assistance Next Year," Jakarta Globe, 19 October 2009 <*http://www.thejakartaglobe.com/indonesia/bappenas-program-to-increase-poors-access-to-legal-assistance-next-year/336269*>, accessed 28 February 2011.

xviii. See : 27 US Congressmen urge RI to annul bans on Ahmadiyah sect," The Jakarta Post, 17 March 2011 *http://www.thejakartapost.com/news/2011/03/17/27-us-congressmen-urge-ri-annul-bans-ahmadiyah-sect.html*, accessed 17 March 2011. See also the letter on <*http://www.congress.org/congressorg/bio/userletter/?letter_id=6599238076*>, accessed 17 March 2011.

xix. 2009 Annual Report of the Supreme Court, published in 2010, at 176.

xx. As of 30 March 2010. Data from the Legal Aid Center of the Indonesian Bar Association (Pusat Bantuan Hukum Perhimpunan Advokat Indonesia or PBH PERADI).

xxi. PERADI bar intake number. Source: PERADI, as published in hukumonline.com <*http://hukumonline.com/berita/baca/lt4d562a11cdf2f/angka-kelulusan-ujian-advokat-2010-terjun-bebas*> accessed 18 February 2011.

xxii. Source: Komnas HAM website <*http://www.komnasham.go.id/data-pengaduan*>, accessed 18 February 2011. According to the Commission's printed Annual Reports, 1,351 complaints were received in 2006 and 1,430 in 2005. Data between 2006 and 2010 are not available.

xxiii. Data from the AGO's website <*http://www.kejaksaan.go.id/unit_kejaksaan.php?idu=26*>, accessed 28 February 2011.

xxiv. 2009 Annual Report of the Supreme Court, at 176.

xxv. Press Release for the End-of-the-year Press Conference of 2010 (Siaran Pers Kapolri Pada Acara Konferensi Pers Akhir Tahun 2010), 29 December 2010 < *http://www.polri.go.id/berita/4559*>, accessed 20 january 2011.

xxvi. Article 24 section (1) Constitution.

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

xxviii. Article 340 of Law No. 27 of 2009.

xxix. Article 391 of Law No. 27 of 2009.

xxx. Article 36 of Law No. 32 of 2004 on Regional Government.

xxxi. Constitutional Court Decision No. 005/PUU-IV/2006.

xxxii. 2009 Annual Report of the Supreme Court, at 87. One judge was dismissed and two were sentenced with suspension and relocation.

xxxiii. Id., at 96.

xxxiv. Id., at 100.

xxxv. Constitutional Court Decision No. 005/PUU-IV/2006.

xxxvi. Data from the AGO's website <*http://www.kejaksaan.go.id/unit_kejaksaan.php?idu=26*>, accessed 28 February 2011.

xxxvii. Press Release for the End-of-the-year Press Conference of 2010 (Siaran Pers Kapolri Pada Acara Konferensi Pers Akhir Tahun 2010), 29 December 2010 < *http://www.polri.go.id/berita/4559*>, accessed 20 january 2011.

xxxviii. Constitutional Court Decision No. 013/PUU-I/2003.

xxxix. Constitutional Court Decision No. 6/PUU-V/2007. The articles are article 154 and 155.

xl. This task force is a special unit under the office of the vice president that was established in January 2010. It was President Susilo Bambang Yudhoyono's response to the many corruption cases by court and court related officials that were revealed recently.

xli. See "Jailhouse rocks for some inmates in Indonesia," The Strait Times, 12 January 2010, accessed via Asia News Net <*http://www.asianewsnet.net/home/news.php?sec=1&id=9519*> on January 31 2011.

xlii. 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.

xliii. United Nations Human Rights Council, Seventh session, Agenda item 3, Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Addendum, Mission to Indonesia, 10 March 2008 (A/HRC/7/3/Add.7).

xliv. The Law was revised two times, the last one was by Law No. 52 of 1960. This Law was originally a Government Regulation in Lieu of Law issued by Soekarno to safeguard his power. The state of emergency was declared by Soekarno in 1957 and ended in 1963. An attempt to revise this law was made in 1999 but failed due to massive protests from the civil society. This Law was used to declare state of emergency in East Timor in 1999 and in Aceh in 2003-2004.

xlv. Chapter VI of the Law No. 8 of 1981, articles 50-68.

xlvi. Article 77-83 of Law No. 8 of 1981.

xlvii. A/HRC/7/3/Add.7.

xlviii. Id., para 21. The UN Committee Against Torture in 2008 issued a series of "principals, subjects, concerns and recommendations" to Indonesia on human rights abuse issues in the country based on this report. The committee asked Indonesia to respond by May 2009, but the government failed to meet this deadline.

xlix. Id., para. 42.

l. Id., at 21.

li. Chapter VI of the Law No. 8 of 1981, articles 69-74.

lii. LeIP, "Monitoring Legal Aid in Indonesia: The Rights of Suspect/Defendant to Access Legal Counsel," Final report in Monitoring Legal Aid in Indonesia conducted in cooperation between Indonesian Institute for Independent Judiciary, Arab Council for Judicial and Legal Studies, and American Bar Association, 2011.

liii. Constitutional Case Decision No. 006/PUU-II/2004

liv. LeIP, supra note xlii.

lv. Id.

lvi. Article 11 of the SEMA No. 10 of 2010 regulates that the request has to be accompanied by the certificate of incapability of self-finance from the head of sub-regency or village head, certificate of social allowance and a statement of incapability of self-finance.

lvii. A/HRC/7/3/Add.7, p. 20.

lviii. Id.

lix. Article 36 and 37 of Law No. 15 of 2002 regarding Money Laundering Crimes and article 38 of Law No. 31 of 1999 on the Eradication of Corruption.

lx. "Indonesian Police Accused of Systematic Torture of Prisoners," *http://www.voanews.com/english/news/Legal-Aid-Group-Accuses-Indonesian-Police-of-Systematic-Torture-of-Prisoners-112796219.html*, accesses 8 January 2011.

lxi. A/HRC/7/3/Add.7, para. 22.

lxii. Articles 200, 269, 319 and 370 of Law No. 27 of 2009.

lxiii. On the decisions archival and the effectiveness of court decisions in Indonesia, see Sebastiaan Pompe, The Indonesian Supreme Court: A Study of Institutional Collapse, (Ithaca: Cornell University Press, 2005), esp. Chapter VII.

lxiv. The National Commission on Violence against Women (Komnas Perempuan) was established in 1998 as a national mechanism for the protection and promotion of women's human rights. It was set up by Presidential Decree No. 181 of 1998, which was renewed in by Presidential Decree No. 65 of 2005. This national mechanism is recognised in the Combined Fourth and Fifth Periodic Reports of the Indonesian Government to the CEDAW Committee.

lxv. Indonesian National Commission on Violence Against Women, "Crucial Issues Related to the Implementation of the CEDAW Convention in Indonesia," an independent report prepared by the National Commission on Violence Against Women presented on the occasion of Indonesia's Combined Fourth and Fifth Periodic Reports to the CEDAW Committee, Jakarta, 19 July 2007, para. 7.

lxvi. Id., para. 9.

lxvii. Press release in Indonesian language: ""Meneguhkan Perjuangan Kita: Pelaksanaan Mandat Konstitusi Untuk Penghapusan Diskriminasi Terhadap Perempuan," Siaran Pers Komnas Perempuan, Jakarta, 21 Desember 2010 <*http://www.komnasperempuan.or.id/2010/12/meneguhkan-perjuangan-kitapelaksanaan-mandat-konstitusi-untuk-penghapusan-diskriminasi-terhadap-perempuan/*>, accessed 20 February 2011.

lxviii. A/HRC/WG.6/1/IDN/2, para. 11.

lxix. Id., para. 28.

lxx. See International Crisis Group, Indonesia: Implications of the Ahmadiyah Decree, Asia Briefing Nr. 78, Jakarta/ Brussels, 7 July 2008 <*http://www.crisisgroup.org/en/regions/asia/south-east-asia/indonesia/B078-indonesia-implications-of-the-ahmadiyah-decree.aspx*>, accessed 28 February 2011.

lxxi. Elisabeth Oktofani, "Rights Groups Demand Ahmadiyah Orphanage Be Unlocked," The Jakarta Globe, December 28, 2010 <*http://www.thejakartaglobe.com/home/rights-groups-demand-ahmadiyah-orphanage-be-unlocked/413883*>, accessed 28 February 2011.

lxxii. U.S. Commission on International Religious Freedom (USCIRF), "Indonesia: USCIRF Urges Protection of the Ahmadiyah," Press Release, 7 March 2011 <*http://www.uscirf.gov/news-room/press-releases/3559-3072011-indonesia-uscirf-urges-protection-of-the-ahmadiyah-.html*>, accessed 10 March 2011.

lxxiii. See International Crisis Group, Indonesia: "Christianisation" and Intolerance, Asia Briefing Nr. 114, Jakarta/Brussels, 24 November 2010 <*http://www.crisisgroup.org/~/media/Files/asia/south-east-asia/indonesia/B114%20Indonesia%20-%20Christianisation%20and%20Intolerance.ashx*>, accessed 28 February 2011.

lxxiv. For example: Bandung (West Java) District Court at *http://pn-bandung.go.id/page/biaya-perkara-perdata*, Central Jakarta District Court at *http://pn-jakartapusat.go.id/index.php/layanan/biaya* and Pontianak (West Kalimantan) District Court at *http://pn-pontianak.go.id/index.php?option=com_content&task=view&id=125&Itemid=89*

lxxv. A/HRC/7/3/Add.7.

lxxvi. Constitutional Court Decision No. 006/PUU-IV/2006.

lxxvii. Detailed list of contempt of court (in Indonesian language) can be seen at http://www.reformasihukum.org/file/kajian/Tabel%20Data%20Tindak%20Kekerasan%20Di%20Pengadilan.pdf , accessed 21 February 2011.

lxxviii. Nivell Rayda, Arientha Primanita & Dimas Siregar, "Anarchy at Tanjung Priok Leaves a Trail of Destruction," The Jakarta Globe, 15 April 2010 <*http://www.thejakartaglobe.com/city/anarchy-at-tanjung-priok-leaves-a-trail-of-destruction/369567*>, accessed 28 February 2011.

lxxix. "Discontent Simmers with Aceh's 'Silly' Take on Shariah," Tha Jakarta Globe, 12 April 2009 <*http://www.thejakartaglobe.com/justAdded/discontent-simmers-with-acehs-silly-take-on-shariah-/272620*>, accessed 28 February 2011.

lxxx. Nurdin Hasan, "Prosecutors Seek Maximum Sentence In Alleged Aceh Religious Police Rape," Jakarta Globe, June 23, 2010 <*http://www.thejakartaglobe.com/home/prosecutors-seek-maximum-sentence-in-alleged-aceh-religious-police-rape/382072*>, accessed 28 February 2011.

lxxxi. *http://www.akpol.ac.id/baru/index.php?option=com_content&view=article&id=88&Itemid=192*

lxxxii. Regulated in Presidential Decree No. 89 of 2001 regarding Judge's Allowance.

lxxxiii. Regulated in Presidential Regulation No. 19 of 2008 regarding Special Performance Allowance for Judges and Government Employees at the Supreme Court and all courts under it. This "performance allowance" was indeed a solution from the then Minister of Finance Sri Mulyani on the request to increase the salary of judges without spoiling the salary structure of government employees. This solution also kept financial stability (because increasing the salary means there will be an increase in the pension fund) as the payment of the allowance is made in stages based on performance. At the same time, the Supreme Court was encouraged to show better performance. In the first year, it was only paid 70% with the promise that the performance allowance will be paid in full when the performance reaches certain target.

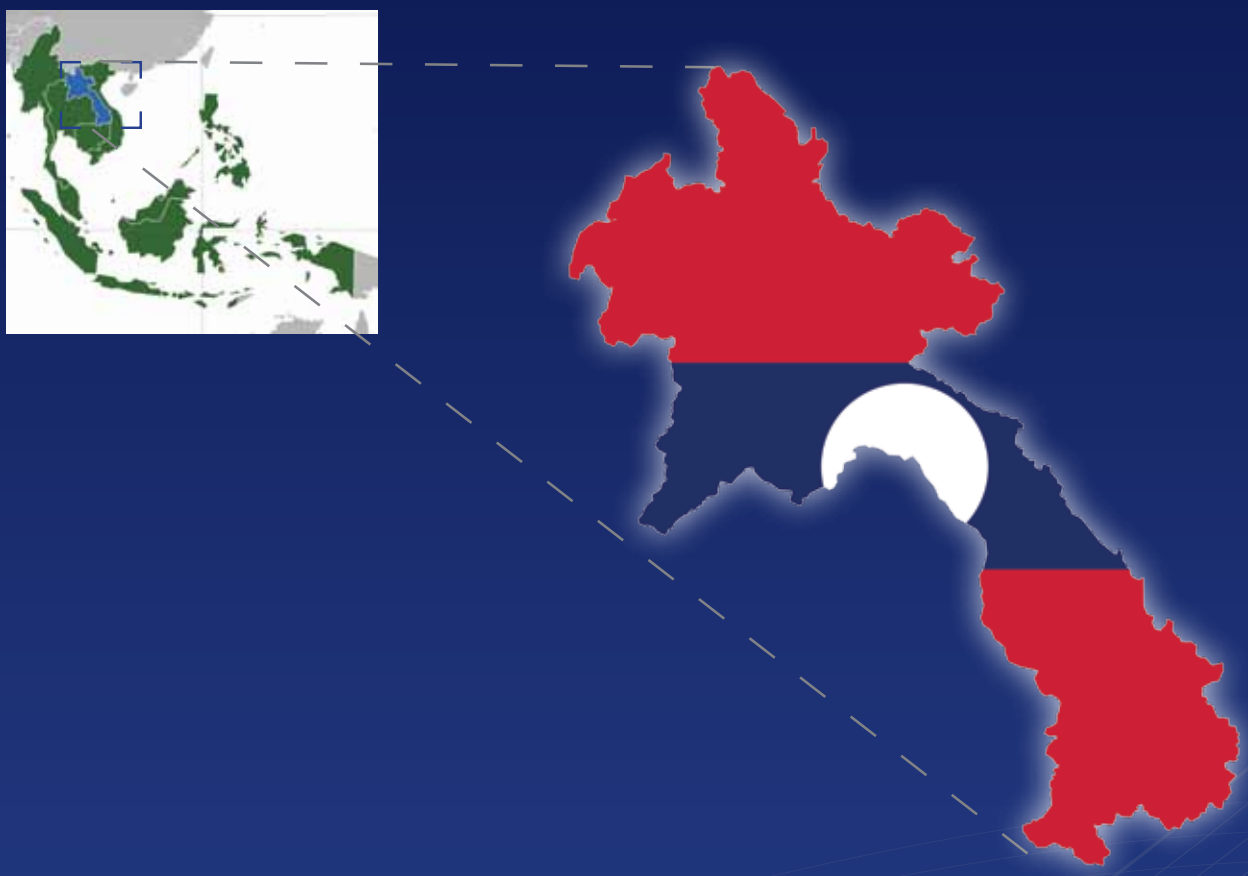
lxxxiv. Regulated in Government Regulation No. 25 of 2010 regarding Salary Regulation for Government Employees.

lxxxv. The World Bank, "Combating Corruption in Indonesia, Enhancing Accountability for Development," World Bank East Asia Poverty Reduction and Economic Management Unit, October 20, 2003.

lxxxvi. LeIP, supra note xlii.

lxxxvii. See answer for question no. 3.9. There have been recent cases of violence in courthouses. A detailed list of such incidents is available in Indonesian language at <http://www.reformasihukum.org/file/kajian/Tabel%20Data%20Tindak%20Kekerasan%20Di%20Pengadilan.pdf>, accessed 21 February 2011.

Lao People's Democratic Republic



Lao P.D.R*

Snapshot[i]

Formal Name	The Lao People's Democratic Republic (Lao P.D.R)
Capital City	Vientiane
Independence	on 2nd December 1975
Historical Background	the multi-ethnic Lao People have existed and developed on this beloved land for thousands of years. Starting from the middle of the 14th century, during the time of Chao Fa Ngoum, who founded the unified Lane Xang country. Since the 18th Century, the Lao Land has been repeatedly threatened and invaded by outside powers. The Lao People enhanced the heroics and unyielding its traditions of ancestors and continuously and persistently fought to gain independence and freedom. Since the 1930's under the leadership of the former Indochinese Communist Party and the present Lao People's Revolutionary party and multi-ethnic Lao People have carried out difficulties and arduous struggles full of great sacrifices until the managed to crush the yokes of domination and oppression of the colonial and feudal regimes and completely liberates country and establishes the Lao People's Democratic Republic and opening the new era-the era of Independence and freedom for the Lao People.
Size	Area: total: 236,800 km², land: 230,800 km², water: 6,000 km²
Land Boundaries	total: 5,083 km, border countries: *Burma* 235 km, *Cambodia* 541 km, *China* 423 km, Thailand 1,754 km, Vietnam 2,130 km. Coastline: 0 km (*landlocked*). Boundaries: N by China, on the E and SE by Vietnam, on the S by Cambodia, on the W by Thailand, and on the NW by Myanmar, with a total boundary length of 5,083 km (3,158 mi).
Population3	6,368,162 (July 2010 est.) million in early 2010. Most people live in valleys of the Mekong River and its tributaries. Vientiane prefecture had about 740,010 residents in 2008. The country's population density was 27/sq. km
Demography:	(July 2010 est.): 0-14 years: 40.8%; 15-64 years: 56.2%; 65 years and over: 3.1%. Median age: total: 20.7 years; male: 20.4 years ; female: 21 years (2010 est.).Population growth rate: 1.712% (2010 est.); Birth rate: 26.57 births/1,000 population (2010 est.);Death rate: 8.28 deaths/1,000 population (July 2010 est.).
Ethnic Groups	49 different ethnic groups were declared as a result of ethnic group reclassification in 2005. The majority of the Laos population is Lao which accounts for 55% of the whole population. 11% are Khmou, 8 % Hmong, Akha, Singsil, Lue, Lamed, Tai, Katu, Triang and Harak, Oy and Brao (Laos population census 2005, National Statistics Centre).
Languages	Lao (official), French, English, and various ethnic languages
Religion	Buddhist 67%, Christian 1.5%, other and unspecified 31.5% (2005 census)
Adult Literacy Rate	73% of the Laos population over 15 can read and write female: 63% (2005 Census). (2009)
Welfare	Laos has social welfare and social insurance system
Gross Domestic Product	$5.7 billion. Per capita income (2008 est.): $790.3 [statistics from UN data available at: http://data.un.org/CountryProfile.aspx?crName=Lao%20People's%20Democratic%20Republic]
Government Overview	The administrative system of the Lao PDR consist of the organs of state powers, namely the National Assembly as the legislative branch , the government as the executive branch , the people's courts and the people's prosecutor offices as the judicial branch. The Courts are divided into First Instance, Appellate Instance and Court of Cassation. This division also applies to the Prosecutor's Office. The government is the executive branch of the State. The government administers the implementation of the State's duties in all fields such as political, economic, cultural, social, national defense and security, and foreign affairs. The National Assembly is the representative of the rights, powers and interests of the multi-ethnic people. The National Assembly is also the legislative branch that has the right to make decisions on fundamental issues The judicial branch of the State is the People's Courts which consist of: The People's Supreme Court; the appellate courts; the people's provincial courts and city courts; the people's district courts; and the military courts. In the event that it is deemed necessary, the National Assembly Standing Committee may decide to establish a special court. The People's Supreme Court is the highest judicial organ of the State.

Human Rights Issues	human trafficking-women and children for trades, children prostitute and Family violence.
Membership in International Organisations	Laos is a member of many international organisations: ACCT, ASEAN, AFTA, ESCAP, FAO, G-77, World Bank, ICAO, IDA and others
Human Rights Treaties Ratified5	Laos is a signatory to six Human Right treaties ratified namely: CERD, ICESCR,ICCPR,CEDAW,CRC, OP-CRC-SC, CRPD

Overview

Lao PDR is ruled by the Lao People's Revolutionary Party (LPRP). It has around 65,000 members and is the country's only political party. It is governed by a central committee, and headed by the nine-member Politburo, which formulates policy making for virtually every aspect of public life. The Party Congress serves as the highest authority, which serves as a gathering of party cadres that meets to ratify decisions made by the leaders.

The LPRP assumed power from the former Royal Lao regime in 1975 and established the Lao People's Democratic Republic (Lao PDR). Upon coming to power, the Lao government did not promulgate new laws, and the only piece of legislation in the State was the Prime Minister's 053-decree on arrest and punishment in 1976. The government adopted the first constitution in 1991. Under the 1991 Constitution, the president was the head of the state and worked on the behalf of the people[1] and under the leadership of a single party — the Lao People's Revolutionary Party (LPRP). Although the 1991 Constitution contained only a limited notion of the rule of law,[ii] Chapter III of the Constitution provided for the protection of certain fundamental rights.[iii]

To further enhance the State's commitment towards the rule of law, the Constitution was amended in 2003. The 2003 Constitution affirms that Lao PDR is a people's democratic state where all powers belong to the people and are exercised by the people and for the interest of the multi-ethnic people of Laos. It provides that the rights of the people are exercised and ensured through the functioning of the political system with the LPRP as its leading nucleus.[iv] Pursuant to Chapter IV (Articles 34 – 51) of the 2003 Constitution, the fundamental rights and duties of the Lao citizens, including civil, political, economic, social, and cultural rights, are protected.[v]

The 2003 Constitution recognises the rule of law and provides for the separation of powers by clearly defining the role of executive, legislative and judicial branches. These branches of the State are respectively defined in Article 52, Chapter V (the national assembly), Article 69, Chapter VII (the Government), and Article 79, Chapter IX (the Judicial Organs) of the Constitution.[vi]

Although the 2003 Constitution declares the State's commitment to rule of law and the separation of powers, translating these principles into institutional reality presents a challenge in a single-party state. Under the Constitutional arrangements, the LPRP practically rules all of branches of the State. The members of the government are all members of the Party, making the National Assembly what some observers have called a simple "room of recording" under the supervision of the Party.[vii] The Party has full power in directing all the sectors of the life of the country: mainly the "Lao Front for National Construction", the "Lao Women Union", the "Lao Youth Revolutionary", the "Federation of the Lao Trade Unions".[viii] The Party controls all level of government from the central State to the smallest village.[ix]

A. Country's practice in applying central principles for the rule of Law for Human rights.

1. The government and its officials and agents are accountable under the law

The ruling Lao People's Revolutionary Party (LPRP) has been in power for the past 30 years,[x] and the Constitution is its source of authority. Articles 3 and 5 of the 2003 Constitution affirm that the Party is a "leading nucleus" and "all other state organisations" function by a process of "democratic centralism." In practical terms, the "leading role" reserved to the LPRP under the Constitution is interpreted to authorise it to override the judiciary and other government institutions if necessary.[xi] Thus, while there is a formal separation of powers in the Lao constitution between the National Assembly (legislature), the executive, and the judiciary, all branches of the State are functionally subordinate to the LPRP.[xii] As a result, the separation of powers and concomitant checks and balances provided for in the Constitution appear to exist in tension with the provisions of the Constitution that centralise political authority under one roof.[xiii]

Although no Constitutional provision explicitly states that the government is under the law, Article 85 provides that decisions reached by the people's courts, when final, must be respected by the LPRP and State organisations. The tension in constitutional provisions noted above may present practical problems in implementing the accountability of the government under the law to the extent that the functional separation of powers between the executive and the judiciary may be blurred.[xiv] Most judges and officials of the ministry of justice are LPRP members. [xv] The Office of the Public Prosecutor (OPP) is also an arm of the Party.[xvi]

Article 64 of the 2003 Constitution provides for the immunity of members of the National Assembly (NA), who cannot be prosecuted in court or detained without the approval of the NA, or the National Assembly Standing Committee (NASC) during the recess of the NA. This immunity extends to cases involving manifest or urgent offences, as Article 64 goes on to provide that in such cases, the organisation which has detained the member of the NA must immediately report to the NA or to the NASC during a recess of the National Assembly for consideration and decision on further action concerning the member, and investigations shall not be conducted in such a manner as to prevent a prosecuted member from attending NA sessions. The NA thus retains authority to determine when its members shall be held subject to the law rather than assigning this task to one of the other branches of government, following the separation of powers principle.

While some NGOs have argued that this arrangement in practice undermines public confidence in accountability under the law, it has also been suggested that governmental efforts in legal reform, particularly in the areas of economic affairs and land ownership, have helped to raise confidence in judicial institutions.[xvii] Improvements to the legislative process are currently being supported by a UN joint programme with the NA. As the UN Country team in Laos has observed, "the programme seeks to enhance the effectiveness and efficiency of the National Assembly to further strengthen its legislative, oversight and representational capacities through initiatives involving parliamentarians, the parliamentary committees, committee support staff, and the office of the National Assembly".[xviii]

> Can the fundamental law be amended or suspended only in accordance with the rules and procedures set forth in the fundamental law?

The 2003 Constitution authorises the National Assembly to adopt and amend the existing laws, including the Constitution itself.[xix] Article 97 of the 2003 Constitution provides that only the NA has the right to amend the Constitution, and any amendment to the Constitution requires the affirmative votes of at least two-thirds of the total number of the NA members. The practical effect of this provision must be seen in relation to the provisions of the Constitution that establish a one-party state. In addition to the broad powers inherent in the legislature to amend the Constitution, there is also no constitutional court or similar institution to review the constitutionality of laws or decisions made by the government.[xx] The Standing Committee of the NA decides whether or not a law is constitutional or an interpretation is valid.[xxi] This again indicates the tension between the constitutional provisions for the separation of powers and the structural arrangements that tend towards a unitary state apparatus.

Are government officials and agents, including police and judicial officers, accountable under the law for official misconduct, including abuse office for private gain acts that exceed their authority and violation of fundamental human rights?

Abuses of power and authority are punishable under the Penal Code, and heavy fines are imposed for violations. Offenders may be punished and imprisoned for three to five years and fined from 2 million kip to 7 million kip (US$240 to US$840).[xxii] The Penal Code provides for punishments for civil servants who abuse their power or authority, but does not appear to cover other Party members.

2. Law and procedure for arrest, detention and punishment are publicly available, lawful and not arbitrary; and preserve the fundamental rights to physical integrity, liberty and security of persons and procedural fairness in Law.

A variety or provisions, rather than one comprehensive document, relate to the rights of persons to be secure from arbitrary arrest, detention, or punishment. In the 2003 amendments to the Constitution, Article 29 was inserted, and this has been hailed as a positive development, as it provides guarantees against arbitrary arrest and represents the ongoing evolution towards the rule of law.[xxiii]

Article 29 provides that "[t]he right of Lao citizens in their bodies and houses are inviolable. Lao citizens cannot be arrested or searched without warrant or approval of the authorised organisations, except in the cases as prescribed by law."

Article 5 of the Criminal Procedure Law implements the Constitutional guarantees of Article 29. It prohibits any arrest, detention or building search without an order from a public prosecutor or from a people's court, except in the case of an on-the-spot arrest or in the case of urgency. It goes on to provide that where an arrest or detention has been effected in a manner contrary to law, or constitutes a deprivation of liberty beyond the period provided for in the laws or in a court decision, the public prosecutor shall issue an order to release that person immediately. Further, any individual who arrest, detains or conducts any search of buildings or persons in contravention of the laws shall be subject to criminal proceedings and shall be criminally liable.[xxiv] However, the procedural safeguards for making arrests can in practice be revoked for "urgent" cases.[xxv]

Even so, the law clearly provides for statutory limits for detention, both for detention without being charged, and for detention after formal charges have been brought. Article 61 of the Criminal Procedure Law provides that a suspect may be detained for up to forty-eight hours to allow for further investigations to be conducted. The law provides for a safeguard by requiring the investigating officers to notify the Office of the Public Prosecutor (OPP) of the arrest and detention within twenty-four hours from the time of the detention. Where there is no reliable information to issue an order to open an investigation, the suspect will be released.

If reliable information is found and it is deemed necessary to remand the suspect, the head of the investigation organisation shall issue an order to open an investigation and request an order of remand from the public prosecutor. Upon receiving such a request, the OPP will have up to twenty-four hours to decide whether to release or to charge and remand the detainee.

If the charged person is to be remanded, the safeguards in Article 65 of the Criminal Procedure Law will take effect. "Remand" is defined in that section as a "temporary" detention for the purpose of pre-trial investigation. The maximum period of remand is one year for "major" offences and three months for "minor" offences.[xxvi] Concerns remain with regard to these detention periods pending trial.[xxvii] While there have been reports that the statutory maximum periods were not adhered to in practice, further empirical study is necessary before conclusions can be drawn. It bears mentioning that the OPP has reportedly made efforts to ensure that all prisoners were brought to trial within the one-year limit.[xxviii]

In response to reports of ill-treatment of persons in detention, about treatment and conditions of pre-trial detention, the Laos government has stated that acts of torture and mistreatment are considered criminal offences and that the Criminal Procedure Law does not allow the inhumane treatment of detainees in any circumstances.[xxix] The Government has further stated that

measures had been taken to improve prison conditions, and that training had been conducted for prison officers and related personnel on the United Nations minimum standards for the treatment of prisoners.[xxx]

The fundamental rights declared in the Constitution do not include criminal procedural rights. Article 8 of the Criminal Procedure Law provides for the presumption of innocence, and is supported by Article 7 which provides that an accused person shall not be forced to bring evidence to prove his innocence. Some commentators have observed that these protections are often not reflected in actual trial practice. Empirical study through trial monitoring and maintaining case databases would be necessary to provide accurate data for generalisations about the conduct of trials.[xxxi]

With regard to legal representation for accused persons who cannot afford counsel, the Lao Bar Association has established legal aid programs in Vientiane, Champasak and Oudomsay.[xxxii, xxxiii] It has been reported, however, that most defendants do not choose to have attorneys or trained representatives.[xxxiv] Again, in the absence of government statistics, empirical study would be required to determine the percentage of trials in which this is the case.

Articles 51 and 59 of the Criminal Procedure Law, which respectively provide for searches and other coercive measures, are framed in broad terms, giving rise to concerns about the potential for abuse of these provisions.[xxxv]

3. The process by which the laws are enacted and enforced is accessible, fair, efficient and equally applied.

Are legislative proceedings held with time notice and are open to the public?

The National Assembly ("NA") convenes its ordinary session twice a year in an open session.[xxxvi] Attendees include members of the NA, the members of the government; the President of the People's Supreme Court; the Supreme Public Prosecutor; representatives of Party and State organisations, the Lao Front for National Construction, mass organisations, and social organisations; and representatives from different social strata. Participants who are not members of the NA may be authorised to provide opinions and comments to the session but shall have no voting rights.

Are official drafts of Laws and transcripts or minutes of legislative proceeding made available to the public on a timely basis?

Although the Law on the National Assembly provides for consultation, there have been reports that this does not occur in practice; that draft laws and transcripts of minutes of legislative proceeding are not published and only the Ministry of Justice routinely publishes its decrees and some of the other ministries it deems important.[xxxvii] Empirical studies have to be carried out to determine whether public consultation is routinely embarked on, or whether it occurs for only selected draft laws.

Are the threshold for legal standing before the court clearly specified, not discrimination and not unduly restrictive?

The Criminal Procedure Law defines principles, regulations, and measures on criminal procedure aiming to deal with criminal cases correctly and with justice, to eliminate and prevent offences, to protect the legitimate rights and interests of citizens, to ensure social security and public order, and to create conditions for the multi-ethnic people to participate in the protection and development of the nation.[xxxviii]

Are judicial hearings and decisions public and ready available to the effect party?

Laotian law provides that all trials in the courtroom shall be conducted openly, except for cases that concern secrets of the State or society, the offences of individuals who are from fifteen years old but under eighteen years old, or some offences that concern the spousal relationship or customs and traditions that shall be conducted in a closed-door hearing. In all cases, the court's decision must be read out openly.[xxxix]

Are all persons equal before the Law and entitled without discriminatory equal protection to the law?

The Lao PDR is pursuing a policy of building a Rule of Law State and of ensuring a fair trial. The related bodies have taken appropriate measures to ensure the right to equality of the citizens before the law and the court in accordance with the Constitution and laws. The right to a fair trial is ensured in the justice system according to the relevant laws, especially the Law on Criminal Procedure and Law on Civil Procedure. The Lao Bar Association is being strengthened to provide legal aid to ensure a fair trial.[xl] Some minority ethnic groups, however, have questioned whether equality before the law is consistently applied.[xli]

> Are the laws effectively, fairly and equally enforced, are persons seeking access to justice provided proper assistance?

The accused person in a criminal case and the parties in a civil case have the right of action to litigate their matters personally or to have a lawyer or a legal representative to protect their rights and benefits in proceedings.[xlii] In theory, it is the duty of the government to provide legal counsel to the accused. However, as stated earlier, there have been reports that most defendants do not choose to have attorneys or trained representatives.[xliii] It is unclear why this is so, and empirical studies need to be done to determine the cause of this, and of the percentage of cases in which this is the case. As stated earlier, there have been developments in the legal aid framework.

An accused person may defend himself or have a lawyer to provide him legal assistance.[xliv] Article 28 goes on to provide *inter alia* that the accused has a right to be informed of the charge made against him and to ask to see documents pertaining to his case.

The Law on the People's Court provides for other cases where legal representation must be provided. Advocates must represent the accused or defendant if they are a child under 18 years of age, a deaf or mute person, an insane or mentally ill person, someone who does not know the Lao language, or someone who will receive the death penalty. If such an accused person or defendant has no protector, the people's court is required by law to appoint a lawyer.[xlv] Arrest shall, in every case, be notified to the person's family, [and to the] office, organisation, or enterprise to which the concerned individual is attached within twenty-four hours, and [they shall also be notified of] his place of detention if it will not hinder the case proceedings.[xlvi]

As the UN Country team in Laos has observed, "the Lao legal system is the practice of appealing against court decisions to the National Assembly, public prosecutors and even local authorities, long after the appeal period has ended. Overall, the rate of judgment enforcement remains very low in spite of a recent Law on Judgment enforcement".[xlvii]

> Do the Laws provide for adequate, effective and prompt reparation to victim of the crime or human rights violation for harms suffered? Do these victims have access to relevant information concerning violations and reparation mechanism?

When the police obtain information of victims of crimes, and especially of victims of human trafficking, they are required by law to cooperate with the authority concerned to assist victims and send them to places of safety as defined in Article 28, paragraph 3, 4 and Articles 21-26 of the Law on the Development and Protection of Women and the Law on Criminal Procedure.[xlviii]

Special statutory provisions apply to victims who allege abuse by state agents. They have "the right to bring a petition or claim regarding the performance of duties by the investigation organisations, the Office of the Public Prosecutor, the people's courts, or any person in such organisations who has contravened the laws".[xlix] Article 18 of the Criminal Procedure Law goes on to provide that the perpetrators shall thus "restore the dignity of, and shall compensate for the benefits lost by, the injured party. Any civil servant or individual who violates the laws shall be subject to disciplinary measures or legal proceedings depending on the severity of the offence".

Under the Law on the Development and Protection of Women,[l] women who are abused are entitled to the right to ask for help from people nearby, the right to protection and care for their personal safety, right for shelter and reparation.[li] Although Article 25(6) of the law provides that victims of trafficking may not be prosecuted under the offence of "prostitution" or "illegal migration," there are

allegedly no mechanisms in place to fully implement the law's protections. This arises in part due to lack of capacity in distinguishing trafficking and migration cases with the result that victims of trafficking may not be informed of their rights or resources available to them and may instead wind up in detention.[lii]

> Do the laws provide for and do the prosecutors, judges and judicial officers take measures to minimise the inconvenience to witnesses and victims (and their representative), protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation as that their family and witness before, during and after judicial, administrative, or other proceeding that affect their interest?

Under Article 32 of the Criminal Procedure Law, a witness has the right to "[r]eceive protection under the laws and regulations from any threat to life, health, or property because of giving testimony".[liii] Yet, there does not appear to be an institutionalised victim or witness protection mechanism. Article 44 of the Law on the Protection of the Rights and Interests of Children ("PRIC") specifically provides that children who are victims and witnesses have the rights *inter alia* to have their privacy protected; to be "protected from coercion, threat, and all types of danger, including their family members"; and to have their dignity and human value respected. In light of the special vulnerability of children, Article 45 of the PRIC provides that interviews of children who are victims and/or witnesses should be conducted by "specially trained investigators and public prosecutors in collaboration with social workers" to ensure that "sensitive and friendly methods" are used towards the children.

4. Justice is administered by competent, impartial, and independence judiciary and justice institutions.

> Are prosecutors, judges and judicial officers appointed, re-appointed, promoted, assigned, disciplined and dismissed in a manner that fosters both independence and accountability?

The President of the People's Supreme Court is appointed or removed by the National Assembly based on the recommendation of the President of the State.[liv] The vice-presidents of the People's Supreme Court are appointed or removed by the President of the State, based on the recommendation of the President of the People's Supreme Court.[lv] However, Judges can only be arrested or investigated upon the approval of the Standing Committee of the National Assembly.[lvi]

To combat corruption, the United Nations General Assembly adopted the United Nations Convention against Corruption (UNCAC) in 2003. The UNCAC obliges State Parties to implement an extensive range of anti-corruption measures that focus on the legal framework and the core anti-corruption institutions and practices. The Lao PDR was among the first countries to sign the convention; it then ratified the UNCAC in 2009.[lvii]

A number of Constitutional amendments passed in 2003 modified and enhanced the judiciary. New tier of courts, the Appellate Courts, was established. Judges are now appointed, transferred and dismissed by the National Assembly Standing Committee on the recommendation of the President of the Supreme Court (formerly a government responsibility). Similarly, the administration of local courts (formerly the responsibility of the Ministry of Justice) now resides with the Supreme Court. Both the Supreme Court and Supreme People's Prosecutor report to the National Assembly.[lviii]

At present, there are 386 judges in Lao PDR, of which 14 are Supreme Courts judges, 34 are regional court judges, 134 are the provincial and Municipal Courts judges and 138 are Subordinated courts' judges (area courts).[lix] There is no known data on the number of judges in the Appellate Courts. Village mediation units have been strengthened by the development and issuance of regulations concerning their organisation and operation. These units (currently operating in approximately 90 percent of all Lao villages) provide the option of settling disputes at a village level. This is particularly important, as in many instances such units are the first and only recourse to settlement of disputes for the general population.[lx]

A person who becomes a judge of the people's court of the Lao PDR must: be a Lao citizen of 25 years of age, have obtained law degree or legal professional skills, have strong political commitment, have good behaviour, be patriotic, safeguard the national interests possess good ethics and be in good health.[lxi] Article 55 of Law on the People's Court does not give specific criteria for those who become judges at each court level. After all levels of the local courts started to work under the supervisions of the People's Supreme Court in 2003, the People's Supreme Court has played an important role in considering the qualifications and criteria of a specific person proposed to be a judge. After considering the abilities and conditions of such candidates, the president of the court sends a list of the candidates to the People's Supreme Court for consideration. Then, if the candidates meet the criteria to become a judge, the People's Supreme Court will propose the list of candidates to the National Assembly Standing Committee to consider and appoint them as judges.[lxii]

The Supreme Public Prosecutor is appointed and removed by the National Assembly on the proposal of the President of the State.[lxiii] Each deputy supreme public prosecutor is appointed and removed by the President of the State, based on the proposal of the Supreme Public Prosecutor.[lxiv]

> Do prosecutors, judges and judicial officers receive adequate training, resources and compensation commensurate with their institution responsibility? What percentage of the state budget allocated for their judiciary and principles justice institution, such courts?

The budgets of the People's Supreme Court and the appellate courts are formulated by the People's Supreme Court and proposed to the government, which in turn submits them to the National Assembly for consideration. The budgets of the people's provincial, city, district, and municipal courts are formulated by each people's provincial, city, district or municipal court and proposed to their respective local administrations for consideration. The budgets of the high military court and regional military courts are formulated by such courts and proposed to the Ministry of National Defense, which in turn submits them to the government after coordination with the People's Supreme Court.[lxv] The salary of the judges is the same as that of other government officials,' which is pegged to their qualifications. The salary ranges from $70-120 per month, which is below the country's average per capita income.[lxvi]

Authoritative information regarding the budget, frequency and scope of judicial training is not readily available.

> Are judicial proceedings conducted in impartial manner and free of improper influence by public official or private cooperation?

The People's Court Law articulates the principle of judicial independence, providing that in considering and deciding a case, judges shall be independent and comply with the laws only.[lxvii] As noted above, however, the Constitution establishes a governmental structure whereby the separation of powers exists alongside provisions which blur or undermine that separation. The continued weak separation of powers between Party and governmental institutions creates a legal basis for potential infringement of judicial independence.

Lao PDR has many laws prohibiting the act of bribery, such as the "Law on Anti Corruption" which was promulgated in 2005. However, they have not always been effectively applied. A report of the Lao PDR anti-corruption committee, a consultative body, found that in 2006-2008 the state treasury lost 120,769 billion kip (Lao currency or $19.1 million) due to widespread corruption.[lxviii] The part of this amount involving corruption in the judiciary was not specified.

> Are lawyers, representatives provided by courts to the accused persons, witness and victim competent, adequately trained and sufficient number?

There are about 125 lawyers in the Lao PDR, of which 27 were trainee lawyers.[lxix] As the average lawyer's income per month is $50-100, most Lao lawyers have to rely on the contributions of NGOs to supplement their income.[lxx] After graduating with a law degree, lawyers undergo training for 3-6 months. Most Lao lawyers are relatively young and inexperienced.[lxxi] Therefore, expertise about laws, legal concepts and judicial processes is very limited and legal drafting skills remain weak.[lxxii] A new initiative to strengthen the Lao Bar Association (LBA) and thereby the legal profession came into action in 2004.[lxxiii]

Due to the way in which the Lao judiciary has developed, many judicial actors have a limited legal background.[lxxiv] Continuing legal education is provided by various legal and judicial institutions such as the Ministry of Justice, the Office of the Public Prosecutor and the Supreme Court.

In 2009 the Government finalised the country's first legal sector plan 'Master Plan on Development of the Rule of Law in the Lao PDR toward the year 2020' (LSMP).The Ministry of Justice provides legal training through the Legal and Judicial Training Institute (LJTI). However, in practice the LJTI only organises relatively few training per year (in average 2-3 trainings per year). There have been discussions within the Government to use the LJTI as the focal point for coordinated training among the various legal and judicial training institutions. However, this has not yet been implemented.[lxxv]

Endnotes

* This report is prepared by the HRRC research team in consultation with in-country expertise

i. Art 52 of the 1991 Constitution.

ii. See e.g. Art 6 of the 1991 Constitution.

iii. The report on law implementation presented by the president of the people's supreme court to the national Assembly on 25th August 2009, p. 12.

iv. Constitution of Laos , amended 2003, art, 3, Available at http://www.na.gov.la/index.php?option=com_content&task=view&id=27&Itemid=51

v. Human rights council, working group on the Universal periodic review, eight session ,Geneva 3-4 May 2010, p. 4.

vi. The Constitution Amended 2003.

vii. 30th Anniversary of the End of the Vietnam War, Human Rights in Cambodia, Laos, Vietnam: Report prepared by Forum Asia Democracy for the Hearing on Cambodia, Laos & Vietnam European Parliament Subcommittee on Human Rights Brussels, 12 September 2005.

viii. Bertelsmann Transformation Index 2010, Laos Country Report, p 2, available at: http://www.bertelsmann-transformation-index.de/fileadmin/pdf/Gutachten_BTI2010/ASO/Laos.pdf

ix. *Id.*

x. *Supra* note vii.

xi. Internal Displacement Monitoring Centre, Lao PDR, Arbitrariness and the Weak Rule of Law Remain the Norm in Laos, May 2004, available at: http://www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/8ADFD0959D668251C12576F8004B707F?OpenDocument

xii. *Supra* note viii, p. 9.

xiii. *Id.*

xiv. *Supra* note vii.

xv. *Supra* note viii, p. 9.

xvi. *Supra* note vii.

xvii. *Id.*

xviii. Contribution by the United Nations Country Team in Laos PDR for the Universal Periodic Review, Eighth Session, 2010, p. 4.

xix. Art 53(1) and (2) of the 2003 Constitution.

xx. *Id,* p. 9.

xxi. Art 56(2) of the 2003-Constitution.

xxii. Arts 142 and 143 of the Penal Law, available at: *http://www.mfa.gov.sg/vientiane/Laws/Penal%20Law.pdf*

xxiii. *Id.*

xxiv. The Law on criminal procedure, 2004, art 5, available at *http://www.na.gov.la/docs/eng/laws/pub_adm/Criminal%20Procedure%20&%20Decree%20(2004)%20Eng.pdf*

xxv. IDMC, Arbitrariness and the Weak Rule of Law Remain the Norm in Laos.

xxvi. Article 65 of the Law on Criminal Procedure.

xxvii. *Supra* note xviii.

xxviii. 2010 Human Rights Report: Laos, Bureau of Democracy, Human Rights and Labour, p. 4.

xxix. Draft Report of the Working Group on the Universal Periodic Review Lao PDR 2010, p. 4.

xxx. *Id.*

xxxi. *Id.*

xxxii. The website of the legal aid program is found at *http://www.laobar.org/legal.php*

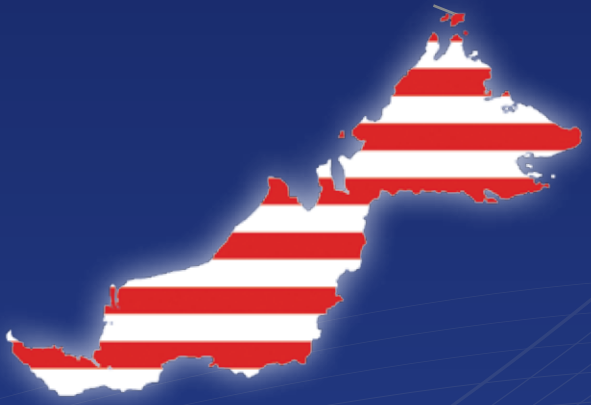
xxxiii. *Supra* note xxviii, p. 5.

xxxiv. *Id.*

xxxv. Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1, Lao People's Democratic Republic, May 2010, p. 4.

xxxvi. The Law on National Assembly, 2006, Art 9, para 1.
xxxvii. Shadow Report on Human Trafficking in Lao PDR: The U.S Approach v. International Law," Anne Gallagher, January 2007, Asian and Pacific Migration Journal 16.1.
xxxviii. The Law on Criminal Procedure Amended 2004, Art. 1.
xxxix. *Id*, Art. 13.
xl. Human right council working group on the universal periodic revive eight session, Geneva, 3-14 May, 2010, p. 10.
xli. The leader of an un-identified ethnic group attended the seminar on the national ethnic group: Human right perspective held by the ministry of MOFA, Justice and Lao Front for Nation construction dated 28/2/-1 /3/22011 at the National culture Hall.
xlii. The Law on People' Court, Art. 10.
xliii. *Id*.
xliv. The Law on Criminal Procedure, Art 7, 28.
xlv. *Id*.
xlvi. The Law on Criminal Procedure, Amended 2004, Art. 63.
xlvii. *Supra* note xviii.
xlviii. the Law on the Development and Protection of Women, Art. 20.
xlix. The Law on Criminal Procedure, Amended 2004, Art. 18.
l. *Supra* note xxxvii.
li. *Id*.
lii. *Id*, noting that verification of cases is extremely difficult as case records are kept at each court and not aggregated or stored centrally.
liii. The Law on Criminal Procedure, Amended 2004, Art. 32, para 3.
liv. The Law on People's Court, Art. 20.
lv. *Id*, para 2.
lvi. *Id*, Art. 54.
lvii. UNODC available at: http://www.unodc.org/laopdr/en/Overview/Rule-of-law/Anti-corruption.html
lviii. UN Common Country Assessment CCA Lao PDR 2006, p. 8.
lix. The Summary of the People's Supreme Court 2009-2010, p. 5.
lx. *Supra* note xviii.
lxi. The People's Court Law, Art. 3.
lxii. Interview with the ex-judge of the People Supreme Court of the Lao PDR, 7th August, 2010.
lxiii. The Law on Public Prosecutor, Art. 25.
lxiv. *Id*, Art. 27.
lxv. The Law on People's Court, Art. 62.
lxvi. The Summary of the People's Supreme Court 2009-2010.
lxvii. The People's Court Law, Art. 11.
lxviii. The report on anti corruption movement in Lao PDR 2006-2008 and future guideline plan 2009-2010 conducted by the committee on Anti corruption of Lao PDR dated on 05 January 2009.
lxix. The summary of the Lao Bar Association on function implementation dated 20 August 2010, p. 2.
lxx. *Id*.
lxxi. An interview with Mr Nuanthong Xayvongsa, a lawyer of the Lao PDR on 16th April 2010.
lxxii. UNODC, Lao PDR, available at: http://www.unodc.org/laopdr/en/Overview/Rule-of-law/Criminal-Justice.html
lxxiii. *Supra* note xviii, p. 9.
lxxiv. *Id*.
lxxv. Strengthening Legal Education at the Faculty of Law and Political Science, National University of Laos, 2006.

Malaysia



Malaysia

Dr Azmi Sharom[i]

Snapshot Box

Formal Name	Malaysia [Article 1(1) Federal Constitution]
Capital City	Kuala Lumpur
Independence	31 August 1957
Historical background	From the 19th century, the Malay Peninsula consisted of nine sultanates (Perlis, Kedah, Perak, Selangor, Negeri Sembilan, Pahang, Johor, Terengganu, and Kelantan) and two British Straits Settlements (Penang and Melaka). Apart from Penang and Melaka which were under direct British rule the other nine states either had British Residences or Advisors to their Sultans. Theoretically the states were sovereign but in reality the British Residences and Advisors had tremendous influence in all matters of governance except religion and Malay customs. An attempt in 1946 by the British to unify the different states under one British led system, the Malayan Union, was short lived. Eventually after mass civil disobedience and negotiations between the political leaders of Malaya and the British, independence was obtained in 1957. In 1963, the British controlled states of Singapore, Sabah and Sarawak were freed of British rule and merged with Malaya to create Malaysia. In 1965, Singapore was expelled from Malaysia.
Size	329847 sq km[ii]
Land Boundaries	Malaysia consists of two parts, the Peninsular and Sabah and Sarawak on the island of Borneo. The Peninsular borders Thailand in the North and is connected to Singapore by a bridge and a causeway in the South. Sabah and Sarawak both have land borders with Brunei and Indonesia.
Population	27.5 million[iii]
Demography	60% of citizens live in urban centres. Approximately 10% work in the agricultural sector; the rest of the workforce is distributed fairly evenly between the service and the industrial sectors[iv]
Ethnic Groups	Malay, Chinese, Indian, indigenous communities
Languages	Malay, Chinese (Mandarin and dialects), Tamil, Malayalam, indigenous languages, English is widely spoken
Religion	Islam, Buddhism, Christianity, Taoism, Hinduism, indigenous religions
Education and literacy	Primary and Secondary school is provided with a minimal fee with primary schooling being compulsory. There are 20 public universities, 27 polytechnics and 59 Community Colleges with subsidised fees. There are 465 private higher education institutions which include universities, university colleges and colleges.[v] The adult literacy rate is 92%.[vi]
Welfare	Malaysia is not a welfare state although government health services are provided. Average life expectancy is 74 years and poverty is at 15.5%[vii]
Gross Domestic Product (GDP)	US$ 191.6 billion[viii]

Government Overview	Malaysia practices a Federal system where there is a central government and thirteen state governments. The state governments each have their own State Legislative Assemblies and Cabinet headed by a Chief Minister. The law making powers of the Federal Parliament and the State Legislative Assemblies are spelt out in Schedule 9 of the Federal Constitution. Below is a description of the Federal government. • Executive Branch: The executive consists of the Prime Minister and his cabinet of ministers. The Prime Minister is selected by the King amongst all the elected parliamentarians and his choice is made based on the person whom he thinks will have the confidence of the house. In the past this has meant the leader of the party with the majority of MPs. The country practices a Constitutional Monarchy where the royal households play a symbolic role in governance as part of the executive branch of government. Every five years a Yang di-Pertuan Agong (King) is selected by the Council of Rulers (the nine Sultans and the Governors of the other four states). • Legislative Branch: Malaysia has a Westminster-type legislature. The Parliament consists of a lower house of elected members (the Dewan Rakyat) and an upper house of appointed members (the Dewan Negara). The King has the final, albeit merely symbolic, power of assent on any bill which has gone through the process of being passed by both houses. • Judicial Branch: The judiciary is broadly divided into two, the subordinate courts and the superior courts. The subordinate courts are (in order of ascending hierarchy) the Penghulu (Village Head) Courts, The Juvenile Courts, the Magistrates Court and the Sessions Court. The superior courts are the High Courts, the Court of Appeal and the Federal Court (which is the highest and final appeal court of the land). The Court of Appeal and the Federal Court were recent additions made by the Constitution Amendment Act 1994.[ix] Previously, above the High Court, there was only the Supreme Court with no intervening appeal court. In theory this amendment has left the highest court in the land to deal only with matters of great importance. Article 128 and 130 of the Constitution states the jurisdiction of the Federal Court as being to determine appeals from lower courts on points of law; Constitutional matters, particularly disputes of jurisdiction between State and Federal powers; and as an advisory body to the King upon request. Another point of detail should be made here and that is the fact that there are two High Courts in Malaysia. According to Article 121 of the Federal Constitution, there are two High Courts of co-ordinate jurisdiction and status. One is the High Court of Malaya and the other is the High Court of Sabah and Sarawak. This distinction has no serious legal implications as both High Courts are of the same status. It simply means that cases coming from Sabah and Sarawak have to climb the court hierarchy through their own High Courts. This is due to historical reasons and the Borneo states' desire for a certain degree of autonomy.
Currently there are two competing political coalitions. The ruling coalition is known as the Barisan Nasional (National Front) (BN) and its main component parties are the United Malay National Organisation (UMNO), Malaysian Chinese Association (MCA), Malaysian Indian Congress (MIC), Malaysian Peoples' Movement Party (Gerakan), United Traditional Bumiputera Party (PBB), Sarawak United People's Party (SUPP) and United Pasokmomogun Kadazandusun Murut Organisation (UPKO). The opposition coalition is known as the Pakatan Rakyat (People's Coalition)(PR) and consists of the People's Justice Party (Keadilan), Democratic Action Party (DAP) and Pan Malaysian Islamic Party (PAS).	
Human Rights Issues	Speech, assembly, association, religion, death in custody
Membership in International Organisations and Human Rights Treaties ratified	UN member since 1957, party to Convention on the Rights of the Child 1989, Convention on the Rights of Persons with Disabilities 2007 and Convention on the Elimination of all forms of Discrimination Against Women 1979

Overview

1. Key Rule of Law Structures

Malaysia has a system of government and law that under the Federal Constitution provides a formal structure for upholding and development of the rule of law. Part II of the Constitution is entitled Fundamental liberties and it guarantees the following:

- Liberty of the person
- Slavery and forced labour prohibited
- Protection against retrospective criminal laws and repeated trials
- Equality under the law
- Prohibition of banishment and freedom of movement
- Freedom of speech, assembly and association
- Freedom of religion
- Rights in respect of education
- Rights to property

In a formal sense the Constitution provides a basic framework for protection of basic civic and political rights. Apart from civil liberties, it also includes several provisions associated with fundamental features of the rule of law. Malaysia also has a Criminal Procedure Code (CCP) which along with the Constitution creates a legal structure through which the rights of the accused can be protected. As will be seen, however, other aspects of the Malaysian legislative scheme for the administration of justice appear to undercut some of the rule of law guarantees established in the Constitution and CCP.

The Constitution also clearly defines the role of the executive, the legislature and the judiciary, thus providing for the separation of powers necessary for the exercise of judicial independence. The legislature is elected at least once every five years and elections are held to elect both the Federal House of Representatives and the various state legislatures. The party with the majority of the house will then select the executive. Generally the elections have been fair with no overt interference with the process.[x]

2. Foundation and Evolution of Rule of Law

Recognition of the central importance of the rule of law for Malaysia may be found in foundational principles that define the contours of good governance. The idea of the rule of law forms an element of the *Rukunegara*, or National Principles, which were instituted by Royal Proclamation in 1970 as a set of principles to guide the governance of the nation and to promote unity in the light of race riots that occurred in the preceding year. The *Rukunegara* states:

WHEREAS OUR COUNTRY, MALAYSIA nurtures the ambitions of:

Achieving a more perfect unity amongst the whole of her society;

Preserving a democratic way of life;

Creating a just society where the prosperity of the country can be enjoyed together in a fair and equitable manner;

Guaranteeing a liberal approach towards her rich and varied cultural traditions; and

Building a progressive society that will make use of science and modern technology.

NOW, THEREFORE WE, the people of Malaysia, pledge to concentrate the whole of our energy and efforts to achieve these ambitions based on the following principles:

BELIEF IN GOD

LOYALTY TO KING AND COUNTRY

THE SUPREMACY OF THE CONSTITUTION

THE RULE OF LAW

COURTESY AND MORALITY

The rule of law and the principle of constitutional government thus constitute 2 of 5 basic principles of good governance expressed in an official document. All of the documents referenced above, however, provide virtually no guidance as to what understanding of the concept of the rule of law should prevail in Malaysia. For example, to a large extent the Constitution falls short in determining exactly what the rule of law means in the country. The original draft[xi] of the Constitution had Article 3 which is noted "The Rule of Law". It read:

3 (1) This Constitution shall be the supreme law of the Federation, and any provision of the Constitution of any State or of any law which is repugnant to any provision of this Constitution shall, to the extent of the repugnancy, be void.

(2) Where any public authority within the Federation or within any state performs any executive act which is inconsistent with any provision of this Constitution or of any law, such act shall be void.

This is followed by Draft Article 4 which is noted "Enforcement of the Rule of Law" and it read:

4 (1) Without prejudice to any other remedy provided by law –

a. Where any person alleges that any provision of any written law is void, he may apply to the Supreme Court for an order so declaring and, if the Supreme Court is satisfied that the provision is void, the Supreme Court may issue an order so declaring and in the case of a provision of a written law which is not severable from other provisions of such written law, issue an order declaring that such other provisions are void.

b. Where any person affected by any act or decision of a public authority alleges that it is void because –

i. The provision of the law under which the public authority acted or purported to act was void, or

ii. The act or decision itself was void, or

iii. Where the public authority was exercising a judicial or quasi-judicial function that the public authority was acting without jurisdiction or in excess thereof or that the procedure by which the act or decision was done or taken was contrary to the principles of natural justice, he may apply to the Supreme Court and, if the Court is satisfied that the allegation is correct, the Court may issue such order as it may consider appropriate in the circumstances of the case

This emphatic statement that the country will respect the rule of law as well as a clear explanation as to how it is to be enforced was not accepted[xii] in the final draft of the Constitution. What was adopted instead is Article 4 which simply states that the Constitution is the supreme law of the land and any laws made in contravention of it, to the extent of the contravention is void.

Thus the concept of the rule of law as stated in the Rukunegara exists in a philosophical vacuum, lacking any constitutional guidance on how it is to be understood or enforced. The lack of conceptual substance fails to clarify how the rule of law as the guarantee of the rights of citizens in the administration of justice relates to political interests of the state that may be seen as coming into conflict with the constitutional rights of individuals. This vacuum has led to a somewhat simplistic understanding of the rule of law that identifies it with such interests rather than distinguishing and balancing them. As Sim KY states:

> "The perception of the majority of Malaysians with regards to the Rule of Law is probably one which identifies law with order. Simply put, the Rule of Law is the establishment and maintenance of public order, security, peace and stability. The alternative is anarchy strife and war."[xiii]

Rais Yatim (currently a Minister in the government) states:

> "The Rule of Law in the Rukunnegara did not necessarily mean the same as the rule of law conceived by Dicey or the various International Commission of Jurists congresses. It was not particularly concerned with the checks and balances necessary in the popular notion under a modern and democratic system. It was proclaimed to mean no more than that the rules and regulations made by the government must be followed".[xiv]

It could be concluded that the understanding of the concept of the rule of law in Malaysia by the public and the government is more akin to "rule by law" as opposed to "rule of law". This can be observed in the country's actual application, or non-application, of the principles of the rule of law in its governance. Whereas the ASEAN Charter understands the principle of the rule of law to be connected to the basic requirements of good governance and human rights, the Malaysian constitutional framework fails to make such a connection clear, thus allowing for interpretations of the rule of law that strip of substantive content. Indeed, if the statement of Rais Yatim quoted above accurately reflects the prevalent view by Malaysian governmental and judicial officials, the rule of law may be recognised only as a formal concept without the critical association with ""checks and balances necessary …. under a modern democratic system." One must therefore look to implementation and practices associated with key rule of law issues to gain a better picture of the actual understanding and state of the rule of law as an active principle in the administration of justice in Malaysian institutions.

3. Human Rights Treaties and Commission

Malaysia has a Human Rights Commission (known as SUHAKAM and one of four National Human Rights Institutions in ASEAN) and is party to three human rights international treaties. The three treaties are: the Convention on the Rights of the Child 1989, the Convention on the Rights of Persons with Disabilities 2007 and the Convention on the Elimination of all forms of Discrimination against Women 1979. Malaysia has thus not a party to the International Covenant on Civil and Political Rights or the Convention against Torture, both of which provide for important elements of the rule of law.

With regard to the first two treaties, the following laws were passed in order to aid the country's compliance with their international obligations: the Child Act 2001[xv] and the Person's With Disabilities Act 2008.[xvi] With regard to CEDAW an amendment was made to the Federal Constitution in 2001[xvii] adding the word "gender" to Article 8 (2) and providing for a basic framework of equality under the law. Article 8 (2) now reads:

> Except as expressly authorised by this constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

The establishment of the Human Rights Commission, SUHAKAM, was an important step but has limited impact upon the implementation of the rule of law as its powers are limited. According to section 4 of the Human Rights Commission of Malaysia Act 1999 (HRCMA)[xviii] the function and powers of the Commission are:

- To promote human rights awareness and education
- To advise and assist the government in formulating laws and administrative procedures
- To make recommendations to the government regarding human rights treaty compliance
- To inquire into complaints regarding human rights infringements

In order to achieve these objectives SUHAKAM has the power to

- Conduct workshops and seminars
- Give advice to the government and relevant authorities
- Conduct studies to verify human rights infringements
- Visit detention centres and make recommendations
- Issue public statements on human rights

While SUHAKAM has conducted such activities and made recommendations to the government it is not clear that its actions have had a significant impact upon concerns about the rule of law and the protection of citizens from actions that, according to the Commission appear to infringe basic rights associated with the rule of law. For example, although SUHAKAM publishes an annual report and there have been numerous calls for these reports to be discussed in parliament, at the time of writing, there has been no such discussion, let alone implementation of their recommendations. It has thus been suggested that the government chooses to largely ignore the work

of SUHAKAM as it relates to rule of law protections and closer empirical study is required to accurately assess the effectiveness of the Commission and the nature of its relations with key governmental institutions responsible for maintaining Constitutional guarantees of rights and the rule of law.

Administration of Justice Grid

Indicator	Figure
No. of judges in country	Federal Court: 7 Court of Appeal: 22 High Court: 37 Sessions Court: 143 Magistrates: 196
No. of lawyers in country	13000
Annual bar intake? Costs / fees	Fees: approximately US$300
Standard length of time for training/qualification	5
Availability of post-qualification training	Not required until 2012
Average length of time from arrest to trial (criminal)	NA
Average length of trials (from opening to judgment)	NA
Accessibility of individual rulings to public	Accessible
Appeals structure	Federal Court Court of Appeal High Court Sessions Court Magistrates Court
Cases before national human rights commission or other independent commissions (if applicable)	2000: 150 2001: 300 2002: 200 2003: 250 2004: 600 2005: 1350 2006: 1200 2007: 1150 2008: 1150 2009: 962 - In 2009 SUHAKAM found that 535 of complaints fell outside its jurisdiction - From the 427 remaining SUHAKAM has completed investigating 180 cases, the rest are still under investigation or pending response
Complaints filed against police, judiciary or other state institutions (per year)? How many resolved?	NA

A. Country's practice in applying four principles for rule of law for human rights

1. The Government and its officials and agents are accountable under the law

In principle no one in the country is above the law. Even royalty is subject to the law for Article 182 of the Federal Constitution establishes a Special Court which can try the King or the rulers of the states in their personal capacities with the consent of the Attorney General (Article 183). The issue here is not of there being laws which give government or government agents' immunity from the law, the issue is of how existing laws are enforced. (see discussion below on impartiality in enforcement).

2. Laws and procedure for arrest detention and punishment are publicly available, lawful and not arbitrary; and preserve the fundamental rights to physical integrity, liberty and security of persons and fairness in law

a. Are the criminal laws and procedures, including administrative rules that provide for preventive detention or otherwise have penal effect, published and widely accessible in a form that is up to date and available in all official languages?

All laws in Malaysia are publicly available (in English and Malay) and enacted following clearly defined legislative procedures. The usual procedure for arrests and the protection of the accused can be found in the Federal Constitution and the Criminal Procedure Code (CPC).[xix]

b. Are these laws accessible, understandable, non-retroactive, applied in a consistent and predictable way to everyone equally, including the government authorities, and consistent with the other applicable law.

The accessibility of laws is generally good with copies available in libraries and book shops. Whether they are understandable is a matter of perspective as all statutes are not written in a manner which the lay man can easily grasp. There are efforts however by bodies such as the Bar Council to produce easily understood publications regarding citizens' rights.

Retrospective criminal laws, a fundamental principle of legality at the core of the rule of law, are not allowed according to the Constitution:

Article 7(1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

c. Do these authorise administrative/preventive detention without charge or trial during or outside a genuine state of emergency?

The Internal Security Act 1960 (ISA)[xx] allows for detention without trial. The period of detention is potentially indefinite. Although initially designed to deal with the communist insurrection, the broad circumstances which authorizing such detentions is so wide that it can be used in many other circumstances. Critics of the ISA have repeatedly argued that it is used against critics of the government. The Act provides for two types of detention. Section 73 gives power to the police to detain a person without trial for up to sixty days.[xxi] Section 8 gives the Minister of Home Affairs the discretion to make a detention order of up to two years.[xxii] This detention can be renewed by the minister ad infinitum. In addition to raising rule of law issues because of the authorisation to incarcerate citizens indefinitely without trial, further serious concerns arise because the ISA provides that the Minister's decision cannot be challenged in Court.[xxiii]

d. Do these laws protect accused persons from arbitrary or extra-legal treatment or punishment, including inhumane treatment, torture, arbitrary arrest, detention without charge or trial and extra judicial killing by the State? Is the right to habeas corpus limited in any circumstances?

The ISA (see above) allows for arbitrary detention without trial. With regard to treatment while in custody, NGOs have raised concerns that the number of deaths in custody is very high. Malaysia, as noted above, is not a party to the Convention against Torture.

Habeas Corpus is guaranteed in the Federal Constitution:

> Article 5(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him

This right is however limited by the broad discretionary powers given to the government in laws such as the ISA, particularly section 8B(1) (see note 23).

Torture is not specifically prohibited under the Penal Code. However, confession or statement made under duress is inadmissible (see note 34). SUHAKAM does not make any specific mention of torture, however they have received many complaints about police brutality (8 in 2006, 20 in 2007 and 19 in 2008).[xxiv] Their recommendations have been for video recordings to be made of interrogations and for the police to refrain from causing harms to those in detention. However, these recommendations, even if implemented, have not had a significant effect on police practice as complaints are still made and attempts by SUHAKAM to create a Memorandum of Understanding between themselves and the police force to expedite investigations were rejected by the police.[xxv]

e. Do these laws provide for the presumption of innocence?

Malaysia follows the common law principle of innocence until proven guilty. The CPC reflects this with the prosecution needing to prove a *prima facie* case before a trial can continue.

There are a number of laws in Malaysia, such as the Misuse of Drugs Act, that provide for rebuttable presumptions of guilt. There are concerns that the reversal of the burden of proof do not sit well with the presumption of innocence.

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

Art 5(3) and (4) of the Federal Constitution read respectively;

> Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.
>
> Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrates authority

This is further confirmed in section 28 (A) of the CPC. The right to communicate is not merely to one's lawyer but also to a friend or relative in order to inform them of one's whereabouts. It ought to be noted however that complaints have been received of family members not being informed of the detention of the accused.[xxvi] This right can be withheld by an officer of at least the rank of Deputy Superintendant of Police (DSP) in writing, if it is believed that such communication can lead to the alerting of accomplices, the destruction or concealment of evidence and the endangering of third parties.

According to section 28 of the CPC a person must be brought before a magistrate within 24 hours and the magistrate can then authorise further detention for up to 14 days depending on the offence committed.

Further, not every violation of the right leads to a complaint being brought before the courts. Even so, there may be other mechanisms for accountability. For example, SUKAHAM launched a Public Inquiry into an incident where some lawyers at a legal aid centre were arrested,

and found that this arrest and detention constituted a denial of legal representation and contravention of Article 5(3) of the Constitution and s 28A of the CPC.[xxvii]

SUKAHAM recognised that the provision of the right could be temporarily denied pursuant to s28A(8) of the CPC, but urged the police to use the exemption only in exceptional and genuine cases.[xxviii]

There is a system of legal aid in criminal cases for accused persons with no ability to afford a lawyer.

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

Article 5(3) of the Constitution (see above) provides for the right of an arrested person to be informed of the grounds of his arrest. However, the interpretation of "grounds" has been fairly narrow, and it needs merely consist of general information and not the evidential details more relevant to allegations of fact.[xxix]

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

Under the preventive detention laws, the detainee is given the opportunity to make representations against the order to the Advisory Board as provided in Article 151 of the Constitution. However, SUKAHAM stated that the best avenue to uphold justice and the rule of law remained the judicial system and thus persons under detention should be allowed to seek a fair public trial.[xxx]

i. Do these laws prohibit the use of coerced confessions as a form of evidence and do they guarantee the accused person's right to remain silent?

There are no specific laws regarding the proper treatment of detainees, however any statements made by a suspect is inadmissible by itself. In this way, confessions, whether obtained by force or otherwise are insufficient without a proper investigation. This does not however mean that the use of force does not occur; for example for the purpose of extracting information. Many cases have gone to court where evidence was held to be inadmissible due to the involuntary nature of their obtainment.[xxxi]

There is no specific right to silence although under the CPC a person may refuse to answer if the answer might incriminate him. That refusal, however, may be held against him. During a trial the accused has the right to silence unless the prosecutor has proven a *prima facie* case in which case he is obliged to offer evidence to counter the charge, failing which the prosecution's case would be deemed proven "beyond reasonable doubt".

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

According to the Federal Constitution

> Article 7(2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he has acquitted or convicted

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

A person may appeal to the courts for violations of his Constitutional rights if such a breach was conducted by a government agency. The lack of governmental statistics on, for example, complaints against police or judicial officials, make it difficult to assess the extent to which such violations are alleged to occur.

l. Additional points to be considered

The indicator questions have focussed on criminal justice matters, it should however be noted that there are other laws in Malaysia that have been criticised as not meeting the standards of "procedural fairness" and prohibiting arbitrariness in the administration of justice as required to fulfil the rule of law criteria. For example:

1. The Societies Act 1966 (SocA)[xxxii]
   Article 10(1)(c) of the Constitution provides that subject to clauses (2), (3) and (4), all citizens have the right to form associations. However, this Act makes it difficult for groups to organise themselves into lawful organisations. Registration of a society is compulsory[xxxiii] but the registration process is highly discretionary and experience has shown that depending on the group applying it could be very slow or very quick. Furthermore the Minister has broad powers in deciding if a society is to be declared unlawful.[xxxiv] This situation has given rise to allegations of arbitrary and politically motivated application of the law that, if accurate, would conflict with the equal and impartial application of the laws required by the rule of law.
2. The Printing Presses and Publication Act 1984 (PPPA)[xxxv]
   This Act requires a license for any publication[xxxvi] and at the core of the law the government can withdraw or refuse to renew, their licence to print on any ground whatsoever.[xxxvii] Furthermore conditions can be imposed on the licences before they are granted. Even if a license is given, they would normally be with conditions, for example an opposition party newspaper is only available for sale to its party members. The way in which this law has been implemented has given rise to allegations of unequal, discriminatory, and arbitrary application.
3. Official Secrets Act 1972 (OSA)[xxxviii]
   The OSA gives very wide powers to the Federal Minister, the state Chief Minister or any person appointed by them,[xxxix] to declare any document of a "public body" as an official secret. Apart from the wide statutory definition of "public body", the minister can also appoint any person, tribunal, body, institution or authority to be in the "public service", thus making documents produced by them potentially official secrets. The use of this power cannot be questioned in court. The mere possession of an official secret is an offence and *mens rea* is not a relevant factor. This Act and the broad unquestionable discretionary powers it provides the government inhibits the transparency necessary for achieving good governance and the rule of law. The ability of the government to deny access to statistics, records, and documents necessary to assess the performance of institutions involved in the administration of justice and responsible for the implementation of the rule of law presents an obstacle to accurate assessment.

3. The process by which the laws are enacted and enforced is accessible, fair, efficient, and equally applied

a. Are the thresholds for legal standing before courts clearly specified, not discriminatory and not unduly restrictive?

Locus standi in Malaysia is a problematic area. Judicial interpretation as to who has *locus standi* is unfortunately narrow. In the case of *Government of Malaysia v Lim Kit Siang, United Engineers (M) Berhad v Lim Kit Siang* [1988][xl] Mr Lim had applied for an injunction restraining the company UEM from signing a contract with the government of Malaysia for the construction of a highway linking the north and the south of the country. His application was based on the grounds that the tender awarded by the government to UEM was invalid. On the ground of standing, Mr Lim argued that as a taxpayer, a road user and the leader of the opposition was enough to give him *locus standi*. Unfortunately, the Supreme Court held by a majority of three to two, that Mr Lim did not have standing because his rights as a private citizen were not affected over and above that of an ordinary road user.

In *Abdul Razak Ahmad v Kerajaan Negeri Johor* [1995][xli] a plaintiff attempting to challenge the legality of the planning permission given by the State Government of Johor to build a "floating city" was not allowed on the grounds that he had no legal interest in the project, he was not an adjoining neighbour nor had he suffered any special damage. The judge also said "[t]o give locus standi to a rate payer like the plaintiff would open the floodgate [sic] and this would in turn stifle development in the country".[xlii] The plaintiff was then described as "a troubleshooter [sic], a maverick of a sort out to stir trouble".[xliii] Mr Abdul Razak stands in good company for in the Lim Kit Siang case, Salleh Abas Lord President, as he then was, asked "…[i]s he (Mr Lim) motivated by public-spirited-ness or an expectation of political gain and popularity".[xliv] It seems a common theme that anyone bringing a public interest case in Malaysia is deemed to be up to no good.

On the other hand, there are some cases which have adopted a broader view of standing. For example, in *Lim Cho Hock*[xlv] *v Government of the State of Perak*, the court commended the litigant for bringing the case "with commendable zest and perhaps even out of a keen sense of indignation" and held that he had standing as a ratepayer to bring an application for a declaration. In *Mohamed Bin Ismail v Tan Sri Haji Othman Saat & Ors*,[xlvi] the court gave a wider interpretation to "sufficient interest" in Order 53 of the Rules of Court and held that the applicant had standing as an aggrieved person.

The issue of standing, whether it is to be interpreted broadly or narrowly, depends on the discretion of the judge. According to Gopal Sri Ram in the Bakun Dam case, this would mean taking into consideration the situation of the country, including its culture, economic situation and its political climate. If this is the case then it would appear that the climate in Malaysia is not favourable at all to public interest litigation cases (including human rights cases) for without a liberal view of standing it is incredibly difficult to bring such cases to court. Or, in the words of Tan Sri Abdoolcader SCJ (one of the dissenting judges in the Lim Kit Siang case);

> "To deny *locus standi* in the instant proceedings would in my view be a retrograde step in the present stage of development of administrative law and a retreat into antiquity. The merits of the complaint are an entirely different matter, and we are not concerned with the personalities in the picture or whether it is a highway project or a construction of a causeway to the moon that is involved. The principle that transcends every other consideration must *ex necessitate* be that of not closing the door to the ventilation of a genuine public grievance, and more particularly, so where the disbursement of public funds is in issue, subject always of course to a judicial discretion to preclude the phantom busybody or ghostly inter-meddler."[xlvii]

The issue of standing thus raises issues concerning access to justice and equal, fair, and impartial treatment under the law. Detailed analysis of the exercise of discretion in an adequate sample of representative cases would be required to provide an accurate general assessment.

b. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law?

According to the Federal Constitution:

> Art 8(1) All persons are equal before the law and entitled to the equal protection of the law.

This provision is true of criminal laws, however the constitution does provide for unequal treatment in civil matters, namely with regard to preferential treatment of Malays and natives of Sabah and Sarawak.

c. Are the laws effectively, fairly and equally enforced? Are persons seeking access to justice provided proper assistance?

Regarding the equality of enforcement, this is dealt with below. Access is problematic in the sense that the legal aid system in the country is not fully developed. Although there is legal aid provided for those accused of a crime (if they pass the means test), for civil matters there is a dependence on the voluntary Bar Council Legal Aid Bureau which is unable to cope with the demands made of it.

The right of an accused person to consult a lawyer of his or her choice under Art 5(3) of the Constitution is not unfettered in practice. While the right accrues at the point of arrest, it has been held that this right may not be exercised immediately after arrest where it would impede police investigations.[xlviii] Further, in *Public Prosecutor v Mah Chuen Lim & ors*,[xlix] it was held the right was only to be given to an accused person "with all convenient speed".[l] The court declined to define "convenient speed", but held that it would depend on the circumstances of each particular case. There is thus a risk that protracted periods may constitute "convenient speed".

More recently, however, a broader view of the right to counsel has been upheld in a seminal case which has been described by one scholar as a "bright light in a darkened tunnel".[li] In *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & ors*,[lii] Siti Norma Yaakob FCJ held that allowing access to legal counsel only after the expiry of detention constituted a clear violation of Art 5(3); and further, that the Internal Security Act (ISA) was subject to the

rights enshrined therein. In order to ensure that the right to counsel is not rendered "illusory or ineffective", the learned judge further held that the police must act "promptly and professionally" and prioritize their investigations relating to the conduct of ISA detainees.

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

In the event of human rights violations in Malaysia, any action taken would have to be based on the Constitution. The constitutional framework has significant shortcomings in providing remedies for such violations, as discussed below (under the heading "Impartiality of Legal Institutions").

e. Do the laws provide for and do prosecutors, judges and judicial officers take measures to minimise the inconvenience to witnesses and victims (and their representatives), protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect their interest?

Generally this is not a problem in Malaysia, however there have been recent developments that suggest the police may be involved in action to intimidate those who testify against them.

f. Additional points to be considered

There are several factors that raise concerns as implementation of the rule of law in Malaysia.

1. The Constitution
   As noted above the Constitution lacks clear provisions on the rule of law and the relation of fundamental rights associated with the rule of law to other interests and principles established in the Constitution.

For example, by virtue of Article 149 of the constitution, Parliament may make legislation against subversion, organised violence, and acts and crimes prejudicial to public order even if they are contrary to the fundamental liberties guaranteed in Part II. Article 149 provides a broad spectrum of activities that could be considered as subversive, violent and contrary to public order and they include;

- To cause fear of violence
- To excite disaffection to the King or the government
- To promote ill will amongst races
- To procure the unlawful alteration of anything established by law
- To act in a way that is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public
- To act in a way that is prejudicial to public order or the security of the Federation

The broad manner in which these grounds are articulated and the lack of express provisions concerning the fundamental legal rights and their status vis-à-vis legislative acts promulgated under Article 149 suggests that the Parliament could be understood to have the authority to enact legislation abrogating or denying fundamental rights and the rule of law under a wide variety of circumstances. The protection of constitutional rights and the operation of the rule of law could thus been seen as placed within the realm of party politics.

Another Constitutional provision that can impact the operation of the rule of law is the emergency powers provision. According to Article 150 the Executive can declare an emergency, during which period any ordinances can be made that may be in contradiction with the Constitution. While most states have provisions that allow for the imposition of martial law or other extraordinary measures concerns have been raised in Malaysia about the potentially arbitrary use of emergency powers arising from the fact that emergencies in Malaysia require a declaration for them to stop being in force. Such emergencies never expire and do not require renewal. . As such, several emergencies declared in Malaysia continue in operation indefinitely even if the threat they were meant to combat have long ceased to be.[liii]

Rule of law concerns arise from this situation because the emergency power provisions are broad and open ended and they give a great deal of power to the legislature. By their very nature emergency powers may impede the operation of the rule of law. Critics have argued that if the emergency that gave rise to such provisions has passed then there can be no justification for using such provisions to deny rule of law guarantees to citizens. The issue thus arises as to what extent the judiciary provides a balance of powers that effectively limits the arbitrary exercise of legislative action to restrict the implementation of the rule of law and the fundamental rights associated with it. Critics have also argued that the judiciary has declined to play such a role, pointing to the case of *Stephen Kalong Ningkan* v *Government of Malaysia* [1968][liv] where Barakbah (Lord President) representing the majority held:

> "In an act of the nature of a Proclamation of Emergency, issued in accordance with the Constitution, in my opinion it is incumbent on the Court to assume that the Government is acting in the best interest of the State and to permit no evidence to be adduced otherwise. In short, the circumstances which bring about a Proclamation of Emergency are non justiciable…In my opinion the Yang di-Pertuan Agong (King) is the sole judge and once His Majesty is satisfied that a state of emergency exists it is not for the Court to inquire as to whether or not he should have been satisfied".

2. Impartiality of legal institutions

   One persistent concern with regard to the Malaysian system of justice and the rule of law is the impartiality of its legal systems. The perception exists among some commentators that the justice system is not impartial and the use of law differs depending on the perpetrator.

One such concern arises from questions as to the loss of independence on the part of the Attorney General. This is related to the broad discretion the AG enjoys in deciding whether to prosecute a case or not. This discretion can be found in Art 145(3) of the Federal Constitution which reads: "The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence…" This discretionary power has generally been unquestioned by the courts. In the case of *Johnson Tan Han Seng* v *Public Prosecutor* [1977][lv] it was argued that this discretionary power was in contradiction with the principles of equality enshrined in Art 8 of the Constitution. It was held that this discretion is absolute and the provision was clear thus Art 8 must be read in line with Art 145(3).

As noted above, the Constitution provides for equal protection and equal treatment under the law. Critics have advanced examples that they allege indicate areas where there are systematic inequalities in application. For example, in regard to the Malaysian Anti Corruption Commission (MACC) formed by the Malaysian Anti-Corruption Commission Act 2009[lvi] concerns have been raised as their neutrality in regard to investigations being done on the governments of opposition held states as opposed to investigative action on complaints against the ruling government or members of the ruling government.[lvii]

One example referred to by such critics is the death of Teoh Beng Hock. Teoh Beng Hock was a political aide to a state legislative assembly person. His employer was part of the Selangor state government which was in the hands of the opposition coalition Pakatan Rakyat (PR) (The People's Coalition). On 15 July as part of a MACC operation specifically aimed at the PR state government, Teoh was taken in to the MACC offices not as a suspect but merely for questioning. Despite not being a suspect he was held in custody overnight and on 16 July his body was found outside the MACC building. He had apparently fallen out of the building and died as a result. An inquest was held and a verdict delivered on 5 January 2010. Although the judge was convinced that the cause of death was not suicide neither was he willing to state that the cause of death was homicide, despite findings by a pathologist appointed by the Selangor state government that there were pre fall injuries and that the injuries sustained in the fall was not consistent with someone who was conscious at the time of the fall. An open verdict was announced. This case raises potential issues of the rule of law extending beyond the issue of equal application of the laws.

Similar claims of unequal enforcement and application of the law have been levied against the police in regard to unequal treatment of demonstrators, depending on their political affiliations and

4. Justice is administered by competent, impartial and independent judiciary and judicial institutions

a. Are prosecutors, judges and judicial officers appointed, re-appointed, promoted, assigned, disciplined and dismissed in a manner that fosters both independence and accountability?

An independent and impartial judiciary is universally held to be a fundamental requirement of the rule of law, good governance, and respect for human rights. The independence of the Malaysian judiciary has been called into question by many expert commentators on the basis of a series of cases that occurred in 1988 resulting in the sacking and replacement of judges on the Supreme Court. These cases have been widely criticised as politicised, based on inadequate evidence, application of an erroneous legal standard and an inappropriate burden of proof. These cases have been seen by critics as entrenching the power of the Executive over the Judiciary,

The enactment of the Judicial Appointments Commission Act 2009[lviii] which provides that the Prime Minister must now act upon the advice of a committee in the selection of judges has addressed some of the issues about judicial independence but critics maintain that serious concerns remain, particularly in cases that involve members of the political opposition or of the ruling party.

b. Do prosecutors, judges and judicial officers receive adequate training, resources, and compensation commensurate with their institutional responsibilities? What percentage of the state's budget is allocated for the judiciary and other principal justice institutions, such as the courts?

It is submitted that in terms of legal knowledge and capacity, there is a sufficient training. All judicial and Attorney General Chamber's personnel have to obtain a law degree. Continuing education is also practiced both in the judiciary and the Attorney General's Chambers. Remuneration is high comparative to the civil service wage scheme. However, it is submitted that the independence of the judiciary and the Attorney General are of more pressing concern.

c. Are judicial proceedings conducted in an impartial manner and free of improper influence by public officials or private corporations?

Since the 1988 judicial crisis the independence of the judiciary has come under serious criticism. In his chapter "The 1988 Judiciary Crisis and its Aftermath",[lix] Visu Sinnadurai, listed several developments that cast doubt over the independence of the judiciary in the years following the sacking of the Lord President. There were incidents where judges were shown to have close relations with litigants. The judge that took over from the sacked Lord President, Hamid Omar was the subject of a report by the International Bar Association:

> "…Lord President Tun Hamid recently acknowledged that on 24 march 1994 he had a private meeting with the chief executive of a company engaged in litigation pending before the Supreme Court, following which, on 24 April, he presided over an interlocutory appeal, ruling in favour of the company. Tun Hamid has stated that he did not discuss the case at his meeting with the chief executive… It is ironic – or perhaps poetic justice – that the judge who upheld wholly specious allegations of misconduct against his predecessor should now have admitted to much more questionable behaviour…it is plain that the acknowledged conduct of the Lord President can only reinforce distrust in the impartiality of the Malaysian judiciary."[lx]

In 1994 Hamid Omar's predecessor Eusoff Chin was caught on camera on a holiday with a lawyer, V.K. Lingam, who had a case before him.[lvi] Later allegations arose that the holiday was paid for by the lawyer. This question of the independence of the judiciary created widespread public criticism with the release of what has come to be known as the Lingam Tapes. These tapes show V.K Lingam on video brokering the promotion of a judge. Federal ministers were implicated in the tapes. A Royal Commission was establish to verify the genuineness of the recording as well as to judge whether any wrong doing had occurred. They held that the tape was indeed authentic and that a serious wrong has been committed. At the time of writing there has been no action taken by the Attorney General's Chambers.[lxii]

Other incidents include lawyers selecting judges to hear their trial which led a judge to declare; "…the conduct of the judge and the lawyer in this case give the impression to right-thinking people that litigants can choose the Judge before whom they wish to appear for their case to be adjudicated upon…";[lxiii] and a judge, Justice Muhammad Kamil Awang, declaring in court in June 2001 that he was instructed to decide in a particular way for case involving election irregularities.

In short, concerns over judicial independence and impartiality have been a principal feature of criticism of the operation of the rule of law from a variety of sources. These concerns continue to day, particularly in regard to cases involving the political figures.

Endnotes

i. Associate Professor, University of Malaya, Kuala Lumpur.
ii. Source BBC *http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/1304569.stm* (accessed 25 March 2011).
iii. Source BBC *http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/1304569.stm* (accessed 25 March 2011).
iv. Source World Bank *http://data.worldbank.org/country/malaysia* (accessed 25 March 2011).
v. Source Ministry of Higher Education *http://www.portal.mohe.gov.my/portal/page/portal/ExtPortal/* (accessed 25 March 2011).
vi. Source World Bank *http://data.worldbank.org/country/malaysia* (accessed 25 March 2011).
vii. Source World Bank *http://data.worldbank.org/country/malaysia* (accessed 25 March 2011).
viii. Source World Bank *http://data.worldbank.org/country/malaysia* (accessed 25 March 2011).
ix. Laws of Malaysia Act A885.
x. In general Malaysia has experienced free elections. There have been 12 general elections since independence. However the problems with regard to elections are numerous. One major complaint is the lack of access to the media by opposition parties. Due to laws such as the Printing Presses and Publications Act and other laws that control the electronic media, the mainstream media is not generally open to any party apart from the ruling party. Add to this the fact that the mainstream newspapers are owned or controlled by the ruling political parties (The Malaysian Chinese Association (MCA) party owns The Star, a major English language daily. The United Malays National Organisation (UMNO) party through its nominee business group Media Prima has interest in the New Straits Times which has under its banner four national English and Malay language dailies. Media Prima also has interest in four terrestrial television channels), the imbalance is quite severe. The issue of fraud is also often raised, in particular with regard to the non transparent use of postal votes during an election.
xi. Report of the Federation of Malaya Constitutional Commission, Government Printers, Kuala Lumpur, 1957, pp 123 – 124.
xii. For a full exploration of why this provision was not accepted, see Khoo BT, "Rule of Law in the Merdeka Constituion" 27 Journal of Malaysian and Comparative Law (2000), pp 59 – 101.
xiii. "The Rule of Law" paper presented at Conference on Reflections on the Malaysian Constitution: 30 Years After Merdeka (15-16 Aug 1987: Kuala Lumpur).
xiv. Freedom Under Executive Power in Malaysia: A Study of Executive Supremacy, Kuala Lumpur, Endowment Publications, 1995, p. 27
xv. Laws of Malaysia Act 611.
xvi. Laws of Malaysia Act 685.
xvii. Amending Act A1130.
xviii. Laws of Malaysia, Act 597.
xix. Laws of Malaysia Act 593.
xx. Laws of Malaysia, Act 82.
xxi. ISA S73(1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of when he has reason to believe – a) that there are grounds which would justify his detention under section 8 and b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or of the maintenance of essential services therein or to the economic life thereof. ISA S73(3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under section 8.
xxii. ISA S8 If the minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any

manner prejudicial to the security of Malaysia… or to the maintenance of essential services therein or the economic life thereof, he may make an order directing that that person be detained for any period not exceeding two years.

xxiii. ISA S8B(1) There shall be no judicial review in any court and no court shall have or exercise any jurisdiction in respect of any act done or decision made by the Yang di-Pertuan Agong or the minister in the exercise of their discretionary power in accordance with this Act save in regard to any question on compliance with any procedural requirement.

xxiv. SUHAKAM Annual Report 2006, 2007 and 2008.

xxv. SUHAKAM Annual Report 2009, p. 30.

xxvi. SUHAKAM 2008 Annual Report, p. 31.

xxvii. SUKAHAM 2010 Annual Report, p. 39.

xxviii. SUKAHAM 2010 Annual Report, p. 40.

xxix. Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara & ors [2002] 4 MLJ 449.

xxx. SUKAHAM 2010 Annual Report, p. 42.

xxxi. See Majid KM Criminal Procedure in Malaysia (3rd edition), University of Malaya Press, Kuala Lumpur, 1999, pp. 128 – 139.

xxxii. Laws of Malaysia, Act 335.

xxxiii. SocA S6(1) Every local society …shall, in the manner prescribed make application to the Registrar for registration under this Act. SocA S6(2) Until a local society is registered under this Act, no person shall, without a written permission of the registrar, organize or take part in any activity of or on behalf of the society.

xxxiv. SocA S5(1) It shall be lawful for the minister in his absolute discretion by order to declare unlawful any society or branch or class or description of any societies which in his opinion, is or is being used for purposes prejudicial to or incompatible with the interest of the security of Malaysia or any part thereof, public order or morality.

xxxv. Laws of Malaysia, Act 301. PPPA S5(1) No person shall print, import, publish , sell, circulate or distribute, any newspaper printed in Malaysia or Singapore unless there has been granted by the Minister in respect of such newspaper a permit.

xxxvi. PPPA S6(1)(a) The Minister may in his absolute discretion grant – to any person a permit to print and publish a newspaper in Malaysia.

xxxvii. PPPA S6 (2) The Minister may at any time revoke or suspend a permit for any period he considers desirable.

xxxviii. Laws of Malaysia, Act 88.

xxxix. OSA S16A A certificate by a Minister or a public officer charged with any responsibility in respect of any Ministry, department or any public service or the Menteri Besar or the Chief Minister of a State or by the principal officer in charge of the administrative affairs of a State certifying to an official document, information or material that it is an official secret shall be conclusive evidence that the document, information or material is an official secret and shall not be questioned in any court on any ground whatsoever.

xl. 2 MLJ 12.

xli. 2 AMR 1174.

xlii. Emphasis added. A wonderful exposé of the judge's value system.

xliii. [1995] 2 AMR, p. 1186.

xliv. See note xliii, p. 25.

xlv. Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh [1980] 2 MLJ 148.

xlvi. [1982] 2 MLJ 133.

xlvii. See note xliii, p. 25.

xlviii. Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198.The onus of proving that the right to counsel would be an impediment to investigations rest with the police: Hashim Bin Saud v Yahaya Bin Hashim & anor [1977] 2 MLJ 116.

xlix. [1975] 1 MLJ 95

l. Pursuant to s 30 of the Interpretation and General Clauses Ordinance 1948.

li. Chan, Gary K Y (2007) "The Right of Access to Justice: Judicial Discourse in Singapore and Malaysia," Asian Journal of Comparative Law: Vol. 2: Iss. 1, Article 2.

lii. [2002] 4 MLJ 449

liii. See Das CV, "Emergency Powers and the Rule of Law" [1984] 1 CLJ 61.

liv. 1 MLJ 119, p. 122.

lv. 2 MLJ 66.

lvi. Laws of Malaysia, Act 694.

lvii. Loh D, "The Problem with the MACC", The Nut Graph, *http://www.thenutgraph.com/problem-with-macc/* accessed 19 January 2011.

lviii. Laws of Malaysia, Act 695.

lix. In Constitutional Landmarks in Malaysia: The First Fifty Years 1957 – 2007, eds. Harding A and Lee H.P, Lexis nexis, 207, at pp 187 – 194.

lx. Quoted in Wu M.A, "The Malaysian Judiciary: Erosion of Confidence", (1999) 12 Australian Journal of Asian law 124.

lxi. Aliran Monthly, Volume 25, 2005, Issue 1.

lxii. See Special Report: The Lingam Tape, Malaysiakini, *http://www.malaysiakini.com/news/72772* accessed 19 January 2011.

lxiii. Ayer Molek Rubber Co Bhd & Ors v Insas Bhd & Megapolitan Nominees Sdn Bhd [1995] 2 MLJ 734 CA, per NH Chan JCA, p. 743.

The Republic of The Union of Myanmar

Myanmar

Snapshot Box

Formal Name	Republic of the Union of Myanmar
Capital City	Nay Pyi Taw
Independence	4 January 1948
Historical background	Parts of Burma (as it was then called) became a British colony after the 1824-1826 first Anglo-Burmese war and the second Anglo Burmese war of 1852. The whole country was annexed into the British Indian Empire on 1 January 1886. It achieved self-governance in 1937 and gained full independence on 4 January 1948. The country was under military and one-Party rule from 1962 to 1988 under General Ne Win. There was a massive uprising against the then one-party Government from the period of March to September 1988 and the State Law and Order Restoration Council (later name was changed to State Peace and Development Council) took over power after crushing the uprising. In the elections held in 1990, the main opposition party the National League for Democracy (NLD) won a landslide victory. However, the military council refused to hand over power and continues to govern the country. In *2008 Constitution* was adopted by 'referendum' and' elections' were held on 7 November 2010 in which the Union Solidarity and Development Party supported by the military council won over 75 percent of the seats in both Houses of the Legislature. (See below Overview)
Size	676,578 sq km
Land Boundaries	Total: 5,876 km; Border countries: Bangladesh 193 km, China 2,185 km, India 1,463 km, Laos 235 km, Thailand 1,800 km
Population	Around 54 million
Demography	0-14 years: 25.3% (male 6,193,263/female 5,990,658) 15-64 years: 69.3% (male 16,510,648/female 16,828,462) 65 years and over: 5.4% (male 1,121,412/female 1,493,298) (2010 est.)
Ethnic Groups	Burman 68%, Shan 9%, Karen 7%, Rakhine 4%, Chinese 3%, Indian 2%, Mon 2%, other 5%
Languages	Burmese (official) minority ethnic groups have their own languages
Religion	Buddhist 89%, Christian 4% (Baptist 3%, Roman Catholic 1%), Muslim 4%, animist 1%, other 2%
Education and literacy	Educational Expenditure: 1.2% of GDP (2001) Literacy definition: age 15 and over can read and write: total population: 89.9%; male: 93.9%; female: 86.4% (2006 estimates)
Gross Domestic Product (GDP)	US$60.07 billion (2010 est.)

Government Overview	Executive Branch: • Chief of state: President Thein Sein; Vice Presidents: Sai Mouk Kham & Tin Aung Myint Oo (all of whom took office in 30 March 2011, following their election on 3 February 2011). • Head of government: Prime Minister Thein Sein (since 24 October 2007 formally relinquished that role when he takes over as President, on 30 March 2011). Under the *2008 Constitution*, the President is both the Head of State and Head of Government and there is no post of Prime Minister. • Cabinet: Cabinet is appointed by the president and confirmed by the *Pyidaungsu Hluttaw*, the joint Two Houses of the Legislature. • Elections: The *2008 Constitution* stipulates elections every five years. After the November 2010 elections, U Thein Sein was elected president by the *Pyidaungsu Hluttaw* (Two Houses of the Legislature in Joint Sitting) in February 2011 from among three vice presidents; the Upper house, the Lower house, and military members of the Legislature each nominate one vice president (the president serves a five-year term and can be re-elected once). • Legislative Branch: The legislature is bicameral, and consists of *Amyotha Hluttaw* ('the House of Nationalities') (224 seats, 168 directly elected and 56 appointed by the military; members serve five-year terms) and *Pyithu Hluttaw* ('the House of Representatives')(440 seats, 330 directly elected and 110 appointed by the military; members serve five-year terms). Elections were last held on 7 November 2010 in which the Union Solidarity and Development Party supported by the junta won over 75 percent of the seats. • Judicial Branch: The President appoints and the *Pyidaungsu Hluttaw* (joint Houses of Legislature) approves the Chief Justice and six other Judges of the Supreme Court. There are also courts in the States, Regions, Self-Administered Zones, District Courts and other Courts. The jurisdiction of the Supreme Court does not cover and does not affect the powers of the separate Constitutional Tribunal and the Courts-Martial. • Human Rights Issues: Draconian laws and practices are being used to prosecute political activists; immunity and impunity for the military even for major human rights violations; externally and internally displaced persons; arbitrary arrests, detention as well as arbitrary and excessive sentences; torture and mistreatment of some prisoners; severe lack of basic freedoms of speech and assembly lack of possibility of redress even for major human rights violations.
Membership in International Organisations and Human Rights Treaties ratified	• Convention on the Elimination of All Forms of Discrimination against Women (Accession 22 July 1997) • United Nations Convention against Transnational Organised Crime (Ratification 30 March 2004) • Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (Accession 30 March 2004) • Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime (Accession 30 March 2004) • Convention on the Rights of the Child (Accession 15 July 1991) • Freedom of Association and Protection of the Right to Organise Convention (Ratification 4 March 1955) • Convention concerning Forced or Compulsory Labour (Ratification 4 March 1955) • Convention on the Prevention and Punishment of the Crime of Genocide (Ratification 14 March 1956) • Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Accession 25 August 1992) • Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Accession 25 August 1992) • Geneva Convention relative to the Treatment of Prisoners of War (Accession 25 August 1992) • Geneva Convention relative to the Protection of Civilians in Times of War (Accession 25 August 1992) • International Convention for the Suppression of Terrorist Bombing (Accession 12 November 2001) • International Convention for the Suppression of the Financing of Terrorism (Signed 12 November2001) • International Convention for the Suppression of Unlawful Seizure of Aircraft (Ratification 22 May 1996) • Convention on the Privileges and Immunities of the United Nations (Accession 25 January 1955)

Overview

The Union of Burma gained independence from Great Britain on 4 January 1948. Several months before independence the Constituent Assembly met and adopted a Constitution for the Union of Burma on 24 September 1947 ('*the 1947 Constitution*'). It came into force at the time of independence. The Constitution stipulated a bi-cameral Parliamentary system where the Prime Minister is the Head of government and the President as the Head of State. In general constitutional parlance the system of governance under the *1947 Constitution* can be described as Parliamentary in that it is the Prime Minister rather than the President who exercises executive power and the leader of the majority party which holds the plurality of seats in the Lower House becomes the Prime Minster. In this regard multiparty elections under the *1947 Constitution* were held in the years 1951-52, 1956 and 1960 in which the Anti Fascist People's Freedom League (AFPFL) formed the government. Hence under the *1947 Constitution* it is a 'Parliamentary system' and not a 'Presidential system'.

The *1947 Constitution* also provided for an independent judiciary. There were two apex courts namely the Supreme Court and High Court of Burma and they have operated with independence and integrity striking down at times the excessive action of the executive arm of the government.[i]

On 2 March 1962, a group of Army officers led by the then Chief of Staff the late General Ne Win took power in a military coup from the democratically-elected government of the late Prime Minister U Nu. The President, the Chief Justice, the Prime Minster and Cabinet ministers together with many other important leaders were arrested. A 17 member Revolutionary Council was formed with General Ne Win as Chairman. Later, a Revolutionary government was also formed with General Ne Win as Prime Minster. General Ne Win also took the Portfolios of Defence, Home Affairs, Finance and National Planning.

On 30 March 1962 the Supreme Court and High Courts of Burma established under the *1947 Constitution* were abolished by a decree of the Revolutionary Council. The Revolutionary Council did not formally abolish or suspend the *1947 Constitution* but with the formal abolition of the Parliament and the abolition of the two apex courts, most of the legal and political institutions established by the *1947 Constitution* effectively came to an end.

From March 1962 to March1974 Burma did not have a Constitution and the Revolutionary Council ruled by decrees ('Orders', 'laws')[ii] which were announced on radio and newspapers and most of which contain the statement 'This order shall come into force immediately'. On 25 September 1971, a 97-member State Constitution Drafting Commission was formed with then Brigadier San Yu, a member of the Revolutionary Council as its Chairman.[iii] The drafting of what was to become the *1974 Constitution* took over two years and the Constitution was put through a referendum between 15 to 31 December 1973. It was announced that 90.19% of those who voted in the national referendum voted in favour of adopting the Constitution. On 3 January 1974 the Revolutionary Council declared the 'New State Constitution' adopted.[iv]

The *1974 Constitution* is radically different from its predecessor. Its preamble states that due to 'defects in the old [1947] Constitution and the ill effects of capitalistic parliamentary democracy [t]he cause of Socialism came under near eclipse'.[v] Article 11 of the *1974 Constitution* states that 'The State shall adopt a single-party system'. The Burma Socialist Programme Party is the sole political party and it shall lead the State'. The *1974 Constitution* merely 'constitutionalises' the *de facto* situation. On 23 March 1964 the Revolutionary Council promulgated the *Law Protecting National Unity* [vi] in which all political parties except the Burma Socialist Programme Party were abolished and the assets of the political parties were seized.

There is no separation of powers under the *1974 Constitution*. It can best be described as 'socialist Constitution' in that (for example) under the *1974 Constitution* the judges in the top judicial body with its 'socialist sounding' name 'Council of People's Justices' were members of the unicameral one Party Legislature (*Pyithu Hluttaw*)[vii] and reports to it.[viii]

The *1974 Constitution* effectively came to an end with the military takeover by the State Law and Restoration Council on 18 September 1988. A week earlier, in response to the sustained and nation-wide demonstrations against the Burma Socialist Programme Party government, the

unicameral one-party *Pyithu Hluttaw* in 'overcoming the Constitution' (the term used in its resolution) decided to hold multiparty elections on 11 September 1988 in 'no less than thirty days and no more than 90 days.[ix] On the day of its takeover, the new military junta the State Law and Order Restoration Council announced the abolition of all organs of State power that were formed under the *1974 Constitution*.[x] Like its predecessor the Revolutionary Council 26 years earlier the State Law and Order Restoration Council (SLORC) did not formally either abolish, annul or suspend the *1974 Constitution* though it can be stated that the *1974 Constitution* like its 1947 predecessor came to an end some time after September 1988. On the day of its takeover the SLORC also announced the abolition of the *1964 Law Protecting National Unity* which had abolished all other political parties except the Burma Socialist Programme Party.

The SLORC announced that multi-party elections would be held soon after the restoration of political stability. On 27 May 1990 'multi-party democracy general elections' were held. Ninety three political parties participated in the elections out of which the main opposition party the National League for Democracy (NLD) won nearly 60% of the votes cast and 81% of the seats in the National Assembly. This Assembly was never convened. SLORC Chief, Senior General Saw Maung announced that there was no Constitution and that until a 'firm Constitution' was in place, the SLORC would retain power. This was notwithstanding his earlier announcement in a speech on Armed Forces day 1989 that after the 'elections the *Tatmadaw* will hand over the power to the party that wins the election and would return to the barracks'.[xi]

On 23 June 1992, there was a meeting with political parties to facilitate the drafting of a new Constitution and it was announced that a 'National Convention' would draft the principles to govern the new Constitution. The first session of the National Convention was held on 9 January 1993 and it adjourned the same day. Even before the Convention, the SLORC laid down 'six basic principles' to be included in the new Constitution. Among the six principles are that 'the *Tatmadaw* (Armed Forces] to be able to participate in the national political leadership role of the future State'.[xii]

The drafting of the Constitution took 15 years and 4 months, starting from the first session of the mainly SLROC-picked 'National Convention'[xiii] up to the time the *2008 Constitution* was declared 'adopted' by the State Peace and Development Council on 29 May 2008.[xiv] The *2008 Constitution* was, like the *1974 Constitution*, adopted through a 'national referendum' with 92.48% of the voters' approving the new Constitution'.[xv] Just as there were strong criticisms of the 'national referendum' leading to the 'adoption' of the *1974 Constitution*[xvi] there were numerous criticisms of the 'referendum' that 'adopted' the *2008 Constitution*. The *2008 Constitution* can be considered praetorian in that the military looms large and dominant and is unique in modern constitutional history.[xvii]

On 7 November 2010, 'multiparty elections' were once again held. The word 'elections' is used advisedly. Before the elections, five restrictive, draconian laws were 'promulgated' by the ruling State Peace and Development Council.[xviii] The unsurprising result was that the government's Union Solidarity and Development Party 'won' more than 75% of the seats in the both the *Amyotha Hluttaw* and the *Pyithu Hluttaw.*[xix] The first session of the military-dominated legislature was called on 31 January 2011. In the third week of March 2011, the President, two Vice-Presidents, the Chairperson[xx] of the Constitutional Tribunal and its members, the Chief Justice, the Attorney-General, the Auditor-General, Chairman[xxi] and members of the Union Election Commission were recommend by the 'elected President' for 'approval' by the *Pyidaungsu Hluttaw.* All of them as well as members of the 'Union government' were sworn in and took office on 30 March 2011.

Due to the fact that the *2008 Constitution* has only recently come into force, reference will be made to the *2008 Constitution* as well as the pre-*2008 Constitutions*[xxii] state structure,[xxiii] laws,[xxiv] policies and practices.

A. Espousal of the Rule of Law Concept by Burmese (Myanmar) authorities

The most recent statement on what the ruling regime regards as the *rule of law* can be seen in a report what then-Prime Minister General Thein Sein[xxv] said in September 2009 in the Government-run *New Light of Myanmar*:

> Prime Minister General Thein Sein said administrative bodies at various levels need to constantly know about the State policies and objectives. It is necessary to strive for the emergence of a peaceful, modern and developed nation by upholding Our Three Main National Causes as it is a national policy forever so long as the State exists. To do so, the rule of law is important. At a time when the State is in its important state, constant measures are to be taken to ensure the rule of law in order to thwart any disturbances. In this regard, high civil administrative capability is the main factor and that will contribute much towards community peace and stability. So, to ensure high administrative capability and the rule of law, the strength of ward and village peace and development councils is needed, said the Prime Minister.[xxvi]

And again:

> Prime Minister General Thein Sein said that [the] legislative, executive and judicial pillars are of paramount importance for a nation, and nation-building endeavours have to be carried out through the practice of the three main pillars. Out of the three branches, the judicial pillar is indispensable like the legislative and executive pillars, and the law is a rule or discipline of a nation. It is incumbent upon the administrative body to supervise the rule or discipline for each citizen to abide by, he noted. Therefore, the law staff and judicial staff play a pivotal role in the process of building a nation. In adopting, assessing and translating laws, bylaws, procedures and orders, law officers are required to do so in accordance with the basic principles upholding Our Three Main National Causes non-disintegration of the Union, non-disintegration of national solidarity and perpetuation of sovereignty.[xxvii]

There is no mention at all–nor does there exist in practice for the past several decades – of the State being 'accountable to law and the need for independent adjudication as well as adherence to international human rights and norms'.[28]

1. The Government and its Officials and Agents are Accountable under the Law

From 1988 to 30 March 2011, Burma is formally ruled by a group of military officers and by a military Council, named the State Peace and Development Council. When the current session of the Legislature ends its meeting at the end of March 2011[xxix] the *2008 Constitution* can be considered as fully operational. In the pre-*2008 Constitution* period, the Government and its officials and agents were not accountable under the law. The State Law and Order Restoration Council (SLORC) and the State Peace and Development Council (SPDC) came to power through a military takeover after brutally crushing a people's uprising. Even though SLORC announced that existing laws are to be continued to be in force until they are formally repealed[xxx] it was stated by General Saw Maung, then Chairman of the SLORC that it rules by martial law, which 'no law at all'.[xxxi] The SLORC and later its successor, the SPDC's power to make, repeal, amend or for that matter by pass laws is unrestricted. It is not limited by any Constitution, Statutes, administrative conventions or laws. Moreover, even after the *2008 Constitution* becomes fully operational, it has been explicitly stated in the Constitution itself that

> All policy guidelines, laws, rules, regulations, notifications and declarations of the State Law and Order Restoration Council and State Peace and Development Council or actions, rights and responsibilities of the State Law and Order Restoration Council shall devolve on the Republic of the Union of Myanmar.[xxxii]

The actions of both SLORC and SPDC are accorded immunity under the Constitution, thus making them 'unaccountable' in law. The second sentence of Section 445 of the Constitution specifically states:

> No proceeding shall be instituted against the said [State Law and Order Restoration and State Peace and Development] Councils in respect of any act done in the execution of their respective duties.[xxxiii]

Given its track record, it is highly unlikely that the 'new judiciary' constituted under the *2008 Constitution* will accept any 'challenge' regarding the validity, scope or application of this 'immunity' clause. Apart from Section 445, there are other provisions in the *2008 Constitution* which making the military 'unaccountable' – at least not in the ordinary sense of 'accountability'. For example under Chapter 1 'Basic Principles of the Union' , Section 20 (b) states 'The Defence Services has the right to independently administer and adjudicate all affairs of the armed forces'. Section 319 states that '… the Courts martial shall be constituted in accord with the Constitution and the other law [sic] and shall adjudicate Defence Services personnel'. The fact that all matters concerning Defence Services does not fall within the purview of the civilian courts – including the Supreme Court[xxxiv] and the Constitutional Tribunal[xxxv]- strongly suggests that Defence Forces personnel and their 'activities' will not be subject to the ordinary process of the law. In any case, even if they were subject to the jurisdiction of the civilian courts, these courts are extremely unlikely to consider let alone adjudicate any challenge to military's 'unaccountability'.

The *2008 Constitution* contains elements of 'accountability' in the loose sense of the word. There are provisions concerning impeachment of the President,[xxxvi] Vice-Presidents,[xxxvii] Union Ministers,[xxxviii] Attorney-General,[xxxix] Chief Justice and Judges of the Supreme Court,[xl] Chairperson of Constitutional tribunal and members of the Constitutional tribunal.[xli] Theoretically these provisions can be considered as an improvement over the pre-*2008 Constitution* situation where all members of the 'Legislature' the ruling military Councils and the ruling government and the Ministers in the government[xlii] are not 'accountable' in law and in fact even in theory.[xliii]

Even so, there are no impeachment provisions for the Commander-in-Chief of the Armed Forces. This 'lacunae' makes both the Commander-in-Chief and the Armed Forces 'unimpeachable' even in theory and denude the significance of the constitutional provisions' regarding 'accountability'. Moreover since the 'President-elect',[xliv] two Vice-Presidents elect, etc were former members of the Union Solidarity and Development Party which 'won' over 75% of the 'seats' in the two Legislatures, the possibility of impeaching the top members of the government exists only in theory rather than in practice. Furthermore, Sections 418 to 420 of the *2008 Constitution* contains provisions concerning the formal takeover of power in cases of emergency by the Commander in Chief of the Armed Forces. These provisions entrench the position of the military and immunise them from any suit and gives a virtual carte blanche to the Armed Forces.

The *2008 Constitution* also significantly entrenches, constitutionalises and perpetuates very restrictive methods or modes of governance and military rule. The 'fundamental law' perpetuates military rule and any attempt to change it must 'accord with the rule and procedure set forth in the fundamental law'. This amendment procedure does not accord with any prevailing understanding of the Rule of Law. For example Section 6 (f) of the *2008 Constitution* states that the 'Union's consistent objectives' includes 'enabling the Defence Services to be able to participate in the National political leadership role of the State'.[xlv] Section20 (b) further states that '[t]he Defence Services has the right to independently administer and adjudicate all affairs of the armed forces' and Sections 420 to Sections 432 of the *2008 Constitution* which stipulates the takeover of power by the Commander in Chief of the Defence Services can only be changed only 'with prior approval of more than 75% of all representatives of the *Pyidaungsu Hluttaw*, after which in a nation-wide referendum only with the votes of more than half of those who are eligible to vote'.[xlvi]

Provisions such as those 'enabling the Defence Services to participate in the National political leadership role of the State'[xlvii]are very difficult to amend, while the formal 'transferring of the legislative, executive and judicial powers of the Union to the Commander-in-Chief of the Defence Services to enable him to carry out measures to speedily restore its original situation in the Union'[xlviii] can take place quite easily through the issuing of emergency decrees. While the issuance of 'emergency decrees' would be in accordance with the provisions of the Constitution and would not formally amount to 'waiving of certain provisions of the Constitution', it is evident that these provisions are problematic and do not adhere to the rule of law concept.

Neither the 1962 military coup that ended parliamentary democracy in Burma nor the 1988 military takeover was authorised, stated or was inferable from the then existing Constitutions. Even though both the 1962 and 1988 military takeovers were extra-constitutional, they effectively abolished the pre-existing Charters. To 'rectify' this for future military takeovers a priori, the *2008 Constitution* formally authorises a 'Constitutional military takeover'.[xlix]The Constitution formally authorises not only the issuance of an Emergency 'Ordinance' by the President – who would in any case be a military person or possess a military 'vision' – but also the transfer of executive, legislative and judicial powers to the Commander-in-Chief of the Defence Services. There is thus prior constitutional approval of a military takeover albeit in times of 'emergency' and 'hedged' with qualifications. These praetorian provisions are indeed 'unique' among ASEAN Constitutions if not in the world. They do not conform to issues of accountability at least as far as certain top military officials and actions of the military as a whole are concerned. The officials and its agents are not accountable under the law; instead the law at least implicitly authorises and 'empowers' non-accountability.

2. Laws and procedure for arrest, detention and punishment are publicly available, lawful and not arbitrary; and preserve the fundamental rights to physical integrity, liberty and security of persons, and procedural fairness in law

Laws and procedures for arrest, detention and punishment are found in the Penal Code and Criminal Procedure Code. Some of these laws are very similar if not identical to those other former British colonies in ASEAN like Malaysia and Singapore. British colonial legislation[l] and criminal 'laws' and decrees passed by various military councils – including the Revolutionary Council[li], State Law and Order Restoration Council (SLORC)[lii], State Peace and Development Council (SPDC)[lii] and the Burma Socialist Programme Party government formed under the *1974 Constitution* – are used to justify any unlawful arrests or instances of deprivation of liberties.[liv]

Laws Affecting Deprivation of Liberty being 'lawful' and not 'arbitrary'

The 1975 Law Protecting the State from Hostile Subversive Elements[lv] authorises 'arbitrary' detention, if necessary incommunicado, for up to 5 years.[lvi] This Law has been used indiscriminately and arbitrarily mainly against opponents of the government including Daw Aung San Suu Kyi. Moreover this law has been used to extend the detention of opponents of the government and to extend the detention of those whose sentences had already been completed. The first 'stint' of detention of Burmese opposition student leader Min Ko Naing from March 1989 to November 2004 should have expired in 1999 but the detention was extended under Article 10(a) of the this legislation.[lvii]

The Public Availability of the Laws

The Penal Code and The Criminal Procedure Code are publicly available in the sense that they are published in Statute books and in the 12-volume Burma Code.[lviii] Colonial era and pre-independence laws such as 1908 Unlawful Association Act, the1947 Public Order (Preservation Act) are published in English and 'available' in the Burma Code. The 1975 Law Protecting the State from Hostile, Subversive Elements (in Burmese language) was published in a booklet at the time of its promulgation and may be available in certain government bookshops and old book shops.

The decrees (laws) made by the SLORC and SPDC are published in the government-controlled newspapers the day after they are announced. At the end of the first session of , the Legislature (*Pyidaungsu Hluttaw*) on 30 March 2011 it did not enact new laws, but when it does so it will be published and gazetted and '[t]he law shall come into operation on the day of such promulgation unless the contrary intention is expressed '.[lix]

However there are reports that at least one recent law promulgated by the SPDC was not made public. The online Irrawaddy magazine reported that on 17 January 2011 (just before the *Pyidaungsu Hluttaw* was called into session on 31 January2011) a law was passed and 'confidentially distributed among government officials on February 11 [2011] 'which gives the military Chief [Commander in Chief] absolute power and discretion in the use of unlimited 'special funds' that are not included in the country's defense budget'.[lx] The article also states one of the law's provisions include: '*The Tatmadaw* [armed

forces] commander-in-chief has the authority to use Special Funding in the local currency or foreign currency while providing for the non-disintegration of the Union; the non-disintegration of national solidarity; and the perpetuation of national sovereignty'. The Irrawaddy also reported that the law's stipulation that 'for the spending of the Special Funding [sic] no person or organisation can question, propose or audit'.[lxi] If this law was passed 'confidentially' and without publication then -unlike the other laws which though draconian had at least been published – this law would fall short of basic international standards of laws. There is no web site for any of the laws passed by the ruling military Councils.

The Laws (and Practices) Concerning Arrest, Detention and Punishment preserve the Rights, to Physical Integrity, Liberty and Security of Persons and Procedural Fairness in Laws

Laws authorising detention without the detained person being informed of the specific charges (except the vague statement that his or her actions affect or potentially affect 'national security') have already been mentioned. The Special Rapporteur on the *Situation of Human Rights in Myanmar* states:

> … many trials were conducted behind closed doors, within prison compounds, without legal representation, without the presence or knowledge of prisoners' family members, without proof of evidence or with defective evidence, and pursuant to arbitrary decisions of the judges[lxii]

There are also detailed NGO reports[lxiii] which meticulously document detailed case names, names of Courts, protagonists including name of judges and officials which indicate that regardless of what the laws state, the prevailing practices concerning 'arrest, detention and punishment' in many cases do not 'preserve the rights to physical integrity, liberty and security of persons and procedural fairness' in laws.[lxiv]

There are 'in the laws' procedural guarantees regarding fair trials. These include Article 2 of the *2000 Judiciary Law,*[lxv] procedural defence against arbitrary detention[lxvi], procedural defence against torture[lxvii] but the actual practices including judicial decisions not only does not conform to these laws and procedures but also violates the essence of these provisions. For example, in *Union of Myanmar v. U Ye Naung and One*[lxviii]the full bench of the Supreme Court (Chief Justice U Aung Toe presiding) ruled that a confession obtained from military intelligence personnel without any judicial oversight was admissible in the absence of evidence from the defendant that it was not obtained through any of the means prohibited under section 24 of the *Evidence Act*. The court reversed the burden of proof by calling on the accused to present evidence that military intelligence had forced them to confess in a process that went on entirely without judicial oversight'.[lxix]

A few political activists have been sentenced to inordinately long prison sentences. For example the Khun Htun Oo, Chairman of the Shan National League for Democracy, was sentenced to 93 years imprisonment[lxx] and activist Min Ko Naing to 65 years imprisonment.[lxxi] These are only two instances of many. In response to the statements that there are about '2200 political prisoners in Myanmar'[lxxii] in the January 2011 United Nations Human Rights Council working group on the Universal Periodic Review's tenth session, Myanmar's representative replied that'" political prisoners" and "prisoners of conscience" are in prison because they had breached the prevailing laws and not because of their political belief.'[lxxii]

Arbitrary Detentions

A 2007 United Nations report noted that the military had dispersed demonstrations, peacefully initiated by Buddhist monks, firing indiscriminately into the crowds, killing and injuring a significant number of persons.[lxxiv] The authorities involved in these violations have not been held to account. Given the political, legal and judicial realities on the ground they continue to 'enjoy' immunity. In events and court cases which occurred before the Saffron Revolution also there were many instances of arbitrary detentions cited with the names of court cases and arbitrary decisions given by the courts. The details of the cases need not be mentioned here since they are mentioned in United Nations documents.[lxxv]

The Use of Torture

In its presentation to the United Nations Human Rights Council in relation to the Universal Periodic Review in January 2011 the Myanmar delegation stated that 'torture is a grave crime and the Constitution prohibits torture or cruel, inhuman or degrading punishment'.[lxxvi] Yet, the United Nations General Assembly has in the years 2008, 2009 and 2010 expressed its concerns among others at the 'continuing practice' of arbitrary detentions as well torture and cruel, inhuman and degrading treatment and have also called upon the government to allow a full and independent investigation into all reports of human rights violations and to bring to justice those responsible'.[lxxvii]

Timely and Effective Remedies before a Competent Court for Violations of Fundamental Human Rights

The judiciary is not independent of the executive arm, especially in political cases. The government has vehemently denied many violations of fundamental rights[lxxviii] notwithstanding numerous documents adduced to the contrary, including by the United Nations General Assembly,[lxxix] Presidential statements of the United Nations Security Council,[lxxx] various reports of United Nations Rapporteurs[lxxxi] There are no 'competent courts' where 'remedies' can be sought for violations of fundamental human rights. The Asian Legal Resource Centre gives examples of cases where redress was sought for violations of rights and where instead of receiving remedies the redress-seekers themselves were penalised or prosecuted.[lxxxi]

The Five Writs under the 2008 Constitution: No 'Great Expectations'

From the time of the SLORC takeover up till the adoption and coming into force of the *2008 Constitution*, there is no effective remedy for fundamental violation of human rights or more specifically for detentions which are arbitrary, and which do not preserve the physical integrity and security of the person.

Section 296 of the *2008 Constitution* states:

The Supreme Court of the Union:

(a) has the power to issue the following writs:

  (i) Writ of Habeas Corpus
  (ii) Writ of Mandamus
  (iii) Writ of Prohibition
  (iv) Writ of Quo Warranto
  (v) Writ of Certiorari

(b) The applications to issues writs shall be suspended in the areas where the state of emergency is declared.

The Supreme Court's power to issue writs is mentioned in Article 25 of the now long defunct *1947 Constitution*. With the 1962 military takeover, the 'right to move the Supreme Court for the enforcement of any rights conferred by this Chapter [Chapter II of the *1947 Constitution* entitled 'Fundamental Rights'] is hereby guaranteed'[lxxxiii] fell into desuetude. In early March 1962 when the Chief Justice of the Union[lxxxiv] was himself detained and when at least one other former Supreme Court justice[lxxxv] was also in detention without charge or trial and these detentions were made without any reference to any law. The Supreme and High Court of Burma were abolished by a decree of the Revolutionary Council. Hence from 1962 onwards there has been no case before any court where a detainee was released by the courts.

The *2008 Constitution* 'comes into operation on the first day the *Pyidaungsu Hluttaw* is convened'[lxxxvi] and a 7-member Supreme Court was formed and judges were sworn in on 30 March 2011. Will political detainees – which according to one source totals 2076 persons[lxxxvii] – be able to invoke any of the above writs in the new Supreme Court?

Since the former Supreme Court (from the period September 1988 to March 2011) has been constituted by a decree of SLORC and by the *2000 Judiciary Law*[lxxxviii] and *not* under the *2008 Constitution*, it is arguable that it will have neither jurisdiction nor power to issue writs. Under the *2008 Constitution*, the 'Supreme Court', whose members, including Chief Justice U Aung Toe, were appointed by the military Councils. Five judges out of the

then six member Supreme Court were 'permitted to retire' on the same day by the SPDC. Secondly, attempts by the opposition National League for Democracy to 'challenge' before some of the laws issued by the SPDC regarding the de-registration of the National League for Democracy were rejected out of hand.[lxxxix]The non-independence of the judiciary has for more than a few decades now a very marked feature of the unchanged military rule. Any significant break with this and re-assertion of judicial independence in the mode and function of the late Burmese Supreme Court of the 1940s and1950s is not foreseeable in the future.

3. The Process by which the Laws are Enacted and Enforced is Accessible, Fair, Efficient, and Equally Applied.

By the end of March2011, when the first session of the *Pyidaungsu Hluttaw* ended it did not make any new laws under the *2008 Constitution*.[xc]Since no actual laws were enacted under the *2008 Constitution* as yet this section deals primarily with the pre-*2008 Constitution* mechanisms and practices of enacting laws.

There were no controls in relation to the two military Councils enacting laws. Laws issued by the SLORC and SPDC were signed by the Chairmen of the Councils and announced in newspapers. Later, they would be published in booklets and are generally available in some government book shops or in a few private bookshops. Quite a few laws issued by the military Councils have come under heavy criticism[xci] and cannot be said to be 'fair' or 'equally applied'. Many of the laws enacted by the two military Councils are substantively and substantially unfair.[xcii] Since most of the laws are announced (sometimes in gist) on radio and television and published the next day in all government controlled newspapers[xciii] it can be said to be 'accessible'.[xciv]

The fact that these laws are not 'equally' applied can also be seen in the concrete examples given by various organisations such as those of the Special Rapporteur on the Situation of Human Rights in Myanmar.[xcv] The Asian Legal Resource Centre's submission to the UN Human Rights Council Universal Periodic Review discusses the unequal, indeed arbitrary application of the law under various headings such as the police force in Myanmar not functioning 'as a discrete professional civilian force but as a paramilitary and intelligence agency under the command of the armed forces' and that 'the routine arbitrary arrest and detention; common use of torture and other forms of cruel and inhuman treatment, and frequent deaths in custody; coerced signing of documents that have no basis in law; baseless and duplicated charges; and fabricated cases'.[xcvi]

The Legislature is controlled by the government's party (Union Solidarity Development Party) with over 75% of the members of Legislature from that party.[xcvii] In addition in both Houses of the Legislature, the *Pyithu Hluttaw*[xcviii] and *Amyotha Hluttaw*[xcix] there are 25% of military representations directly appointed by the Commander-in-Chief of the Defence Forces.

There are strict and cumbersome rules not only for submission of bills but even to asking of questions in the Legislature.[c] In mid-March 2011 the 'opposition' party, the National Democratic Force (NDF)[ci]'floated' the idea of proposing a Bill to give a general amnesty to political prisoners.[cii] This 'idea' or proposal did not proceed beyond the 'proposal' in the meeting of the two Houses of Legislature which ended on 30 March 2011. Furthermore, none of the few opposition members in the Legislature has talked even informally of 'modifying' some provision of laws including those issued by the military Councils. In the very unlikely event that such an idea is mooted, it is very difficult to even reach the 'proposal' stage.[ciii] Hence in the foreseeable future laws are unlikely to be enacted and enforced in an accessible and fair manner.

From September 1988 to the first session of the *Pyidaungsu Hluttaw* formed under the *2008 Constitution* there were no legislative proceedings. To the extent that the calling into session of the two Houses of the Legislature can be called 'legislative proceedings' it can be said to meet the criteria for 'timely notice'. Since in the *pre-2008 Constitution* period there were no legislative proceedings the issue of whether there were timely notice and are 'open to the public' is answered in the negative. The proceedings of both Houses of the Legislature are also not open to the public. The *2008 Constitution* states that 'The proceedings and the records of the *Pyidaungsu Hluttaw* shall be published. However, the proceedings and the records prohibited by any law or the resolution of the *Pyidaungsu Hluttaw* shall not be published'[civ]

4. Justice is Administered by Competent, Impartial and Independent Judiciary and Justice Institutions

In many cases, especially those involving political dissidents who 'breach the prevailing laws'[cv] the judiciary is, at all levels, neither impartial nor independent.[cvi] As for competence, comparing the law reports of the apex Burmese Courts[cvii] of the first year of independence in 1948 and the fiftieth year of independence in 1998, it has been noted that there has been a deterioration in terms of the academic and professional qualifications of the judges, the format of law reporting and quality of the judgments of the two apex Courts that operate after independence fifty years apart.[cviii]

> *Are prosecutors, judges and judicial officers appointed, re-appointed, promoted, assigned, disciplined and dismissed in a manner that fosters both independence and accountability?*

From September 1988 to January 2011 the Supreme Court Judges were appointed by the military Councils and also are 'permitted to retire' based on the whims of the military Councils. The SPDC also appoints lower Court judges after 'coordinating' with the Supreme Court. Given that the executive has explicitly directed that judges follow State policy, and the manner in which judges are appointed and dismissed, there is no independence and impartiality in the judicial branch.

> Are judicial proceedings conducted in an impartial manner and free of improper influence by public officials or private corporations?

In the earlier sections and main subsections this issue has already been addressed. There is no independence of the judiciary and the executive authorities and the military have influenced the outcome of the decisions.

The Theoretical 'Guarantee' of Defence and Targeting of Defence Lawyers

The right of defence but not necessarily by legal counsel is provided in the *2000 Judiciary Law*. Section 2(f) 'guarantee[s]in all cases the right of defence and the right of appeal under the law'. Section 375 of the *2008 Constitution* also states that '[a]n accused shall have the right of defence in accord with the law'. These provisions' 'guarantee' or 'promise' of the right of defence becomes denuded of all meaning when one studies realities on the ground. The Asian Legal Resource Centre documents several cases in which defence lawyers were targeted through wrongful and arbitrary use among others of the *1880 Legal Practitioners Act*, the *1926 Contempt of Courts Act*.[cix] These defence lawyers were targeted because they were involved in defending 'persons accused in political cases'.[cx]

Public Access to Judicial Proceedings

As this report is being written a contemporaneous news item citing a decision by the Myanmar Supreme Court[cxi] stated that:

Burma's Supreme Court has ruled that it is not the responsibility of judges to decide who can attend court hearings held inside prisons, a move described by legal experts as 'astounding'. The ruling came as a result of an appeal filed by Phyo Wei Aung, who is facing murder charges over the series of grenade attacks in Rangoon during the *Thingyan* festival last year. He had appealed to judges to allow his family to attend the trial, but was denied by Insein prison authorities. Judges and legal experts were then unable to overturn the decision. The Hong Kong-based Asia Human Rights Commission (AHRC) said that the trial further highlights serious problems with the justice system in Burma.

Whereas a judge in a courtroom outside a prison in Burma may not conduct a trial fairly, at least she has nominal authority over the premises: by contrast, her counterpart inside a prison does not even have this.

He is in an Alice in Wonderland scenario, perched in a courtroom over which he has no control, deciding on a case in which a decision has already been made: a non-judge occupying a non-courtroom in a non-trial.

It added in a statement that the decision showed 'just how far logic has departed' from Burma's judicial system and 'underscores the extent to which the judiciary in Burma has abdicated its authority in favour of the security services'.

> That sentiment was echoed by David Mathieson, Burma analyst at Human Rights Watch, who told *DVB* that 'this is another example that the courts in Burma serve the military junta, not the people or justice.'[cxii]

Brief Survey of 2008 Constitution Provisions Concerning the Judiciary: More of the Same or Marginal Improvement?

As stated earlier, there are provisions concerning the Judiciary in the *2008 Constitution*.[cxiii] Only certain Sections in the Constitution mainly concerning the Supreme Court and the Constitutional Tribunal will be briefly commented on in addressing the competency, impartiality and independence of the judiciary and justice institutions.

Under the *2008 Constitution*, the President must 'submit the nomination of the person suitable to be appointed as Chief Justice of the Union to the *Pyidaungsu Hluttaw* and seek its approval'.[cxiv] But the following 'caveat' follows immediately:

> The *Pyidaungsu Hluttaw* shall have no right to refuse the person nominated by the President for the appointment of Chief Justice of the Union and Judges of the Supreme Court of the Union unless it can clearly be proved that the persons do not meet the qualifications for the post prescribed in Section 301.[cxv]

The 'requirement' to seek the approval of the *Pyidaungsu Hluttaw* is a mere formality as are all appointments at Union level by the President including the Ministers in the Government,[cxvi] the Attorney-General,[cxvii] Auditor-General,[cxviii] and Chairperson and members of the Constitutional Tribunal.[cxix]The *2008 Constitution* further enables both the President and representatives of the *Amyotha Hluttaw* and the *Pyithu Hluttaw* to impeach the Chief Justice and Supreme Court Judges,[cxx] in effect making Presidential 'control' of the Supreme Court Judges even firmer.

Under the *2000 Judiciary Law* there is no explicit or implicit security of tenure for the Chief Justice or Supreme Court Judges. Supreme Court judges are 'permitted to retire' and five (out of six) Supreme Court judges were 'retired' on a single day in 1998.[cxxi] Additionally, at least for the Chief Justice (under the pre-*2008 Constitution* arrangements) who was appointed on 27 September 1988[cxxii] there is no compulsory retirement age. Hence Chief Justice U Aung Toe, who is 85 years old, remains Chief Justice for more than 22½ years. Only in March 30, 2011 he was required to relinquish the role with the appointment of the new Chief Justice Tun Tun Oo.

In contrast, the *2008 Constitution* requires that a judge be impeached and either on the initiative of the President or of the members of either the *Pyithu Hluttaw* or the *Amyotha Hluttaw* and only after a successful impeachment can they be removed from office.[cxxiii] Moreover, in comparison with the pre-2008 Constitution period there appears to be security of tenure until the compulsory retirement age of seventy.[cxxiv] Section 303 of the *2008 Constitution* states that:

The Chief Justice of the Union and Judges of the Supreme Court of the Union shall hold office up to the age of 70 years unless one of the following occurs

(a) resignation on his own volition
(b) being impeached in accord [sic] with the provisions under the Constitution and removed from office;
(c) being found to be unable to continue to serve due to permanent disability caused either by physical or mental defect according to the findings of the medical board formed by law
(d) death

This is in contrast to the 'Term [sic] of the Constitutional Tribunal' which 'is the same as that of the *Pyidaungsu Hluttaw* being five years'.[cxxv] with the proviso that 'the ongoing [sic] Constitutional Tribunal of the Union, on expiry of its term, shall continue its functions till the President forms a new Tribunal under the Constitution'.[cxxvi]

The process of impeachment and removal of the Chief Justice and Supreme Court may seem cumbersome but it should be noted that in the *Pyidaungsu Hluttaw* 25% of its members are military appointees and more than 75% of both *Hluttaws* are members of the Union Solidarity and Development Party. It is therefore quite likely that once the President initiates an impeachment against the Chief Justice or Supreme Court judges could be removed from office. And according to the *2008 Constitution* there is no ground for redress in the Constitutional Tribunal.

The Constitutional tribunal has no jurisdiction in interpreting the immunity clause dealing with actions of members of the Defence Forces.[cxxvii] Moreover Section 322 of the *2008 Constitution* lists the 'functions and duties of the Constitutional Tribunal' in seven different sub-sections[cxxviii] and even though it is mentioned in Article 322 (a) that the Constitutional Tribunal's jurisdiction include interpreting the provisions under the Constitution the scope and application of certain Constitutional provisions may be beyond the pale of the Constitutional Tribunal. This is so not merely because of the provisions concerning courts martial. It is also because: (a) the military has 'the right to independently administer and adjudicate all affairs of the armed forces;[cxxix] (b) Courts Martial is a separate court from all the other Courts including the Supreme Court and the Constitutional Tribunal;[cxxx] and (c) '[i]n the adjudication of military justice … the decision of the Defence Services Chief is final and conclusive.[cxxxi]

Only 'the President, the Speaker of the *Pyidaungsu Hluttaw*, the Speaker of the *Pyithu Hluttaw*, the Speaker of the *Amyotha Hluttaw*, the Chief Justice of the Union, the Chairperson of the Union Election Commission, 'have the right to submit matters directly to obtain the interpretation, resolution and opinion of the Constitutional Tribunal of the Union'.[cxxxii] These office bearers are unlikely to 'initiate' any issue pertaining to the 'immunity' provisions contained in Section 445 of the *2008 Constitution*. Section 326 of the *2008 Constitution* states that 'the Chief Ministers of the Region or the State, the Speaker of Region or State *Hluttaw*, the Chairperson of the Self-Administered Division Leading Body or the Self-Administered Zone Leading Body, representatives numbering at least 10% of all the representatives of the *Pyithu Hluttaw* or the *Amyotha Hluttaw*' also have the right to submit matters to obtain the interpretation, resolution and opinion of the Constitutional Tribunal' but only *'in accord with the prescribed procedures*'.[cxxxiii]

Hence the Constitutional Tribunal's existence need not bring any great hopes or expectations that independent, impartial judicial institutions would arise nor the principles of the rule of law to (in the words of the *2008 Constitution*) 'come into operation'.

Endnotes

i. See for e.g. *Ma Ahmar v. The Commissioner of Police and One*, 1949 Burma Law Reports (BLR), Supreme Court (SC) 39 where the Supreme Court held that the mere distribution of leaflets of the Burma Communist Party about the 'murderer Thakin Nu [then Prime Minister] Fascist government' was no justification for detention under the *1947 Public Order Preservation Act*. The power of judicial review has been exercised which includes a landmark Supreme Court ruling which held that the President's action was ultra vires of an Act under which the President purported to act. See *Ah Kham v. U Shwe Phone*, 1952 BLR (SC) 222.

ii. 'Decrees' issued by the Revolutionary Council which were announced on radio and published in news papers. The English version of the decrees would use the term 'laws' and the English language newspapers (only two, both of which owned and operated by the government) will often state that 'The Revolutionary Council promulgates new laws'.

iii. See *The Working People's Daily* (Rangoon) 26 September 1971.

iv. See *The Guardian* (Rangoon) 4 January 1974. The headline 'New State Constitution Adopted' is written in a red (colour) banner headline. The *1974 Constitution* was adopted on 3 January 1974 but it fully came into force on 2 March 1974 when the Revolutionary Council led by its Chairman U Ne Win handed over power to the one-party *Pyithu Hluttaw* and U Ne Win became the first President of the Socialist Republic of the Union of Burma.

v. Third paragraph of the *1974 Constitution*. The English translation of the *1974 Constitution* can be found in AP Blaustein and GH Flanz, *Constitutions of the World* (Oceana Publication, New York, 1990). It is also accessible on line at *www.blc-burma.org/pdf/Constitution/1974%20Constitution.pdf* (accessed 3 February 2011).

vi. See *The Guardian* (Rangoon), 24 March 1964 regarding the Law Protecting National Unity. On 18 September 1988 the State Law and Order Restoration Council which has taken over power abolished by decree (law) the 1964 law made by the Revolutionary Council.

vii. The Burmese word *Pyithu Hluttaw* is used for the (lower House) of the Legislature under the 1947 (Westminster-based) Constitution as well as under the current *2008 Constitution* even though under the 1947 Constitution the word 'Parliament' is used in Burmese transliteration fairly often during the 1948 to 1962 period. *Pyithu Hluttaw* is always used in place of 'Parliament' either in English or in Burmese transliteration to refer to the unicameral Legislature during the period of the 1974 ('Socialist' one-party) Constitution. Under the *2008 Constitution*, the 'Lower' house is called *Pyithu Hluttaw* while the Upper House is called *Amyotha Hluttaw*. Joint-sittings of the two House of Legislature is called *Pyidaungsu Hluttaw* ('Union Legislature').

viii. Article 34 and Article 104 of the 1974 Constitution, Article 104 in part states: 'The Council of People's Justices shall be responsible to the *Pyithu Hluttaw* and shall report to the *Pyithu Hluttaw* on the state of administration of justice.'

ix. News items of the *Pyithu Hluttaw* resolution can be read in *The Working People's Daily* (Rangoon, Burma), 12 September 1988,

x. State Law and Order Restoration Council Order No. 2 as reported in *The Working People's Daily*, 19 September 1988.

xi. See the Burmese language newspaper *Loke Thar Pyi Thu Nazin*, 28 March 1989 where General Saw Maung's entire speech was reproduced.

xii. For a contemporaneous report of the 'objectives' laid down by the then State Law and Order Restoration Council see Joint Committee on Foreign Affairs, Defence and Trade Submission on Myanmar by the Department of Foreign Affairs and Trade (1995).

xiii. The news item of the first session of the National Convention being convened to be 'postponed' the next day can be seen in the 10 January 1993 issue of *The New Light of Myanmar*, 10 January 1993 issue.

xiv. The English translation of the Preamble of the *2008 Constitution* states that 'The Constitution of the Republic of the Union of Myanmar' was adopted on the 'Twenty-Ninth Day of May 2008 A.D.)

xv. For a contemporaneous report see People's Daily (Beijing), 'Myanmar formally announces ratification of new constitution draft' 31 May 2008, also accessed at *http://english.people.com.cn* (accessed 27 February 2011).

xvi. See Myint Zan, 'Law and Legal Culture, Constitutions and Constitutionalism in Burma' in Alice ES Tay (ed) *East Asia- Human Rights, Nation-Building, Trade*, pp. 236-29. For one among many others analyses of the 'referendum' that led to the adoption of the *2008 Constitution* see, Donald M Seekins, 'Myanmar in 2008, Hardship Compounded' (2009) 49 (1) *Asian Survey* 166, pp. 169-170 and the sources cited therein.

xvii. See Myint Zan, 'Myanmar (Burma) From Parliamentary System to Constitutionless and Constitutionalized One-Party and Military Rule' in Clauspeter Hill/Jorg Menzel (ed) *Constitutionalism in Southeast Asia*. pp. 191, 195 (especially at end note ii), 197, pp. 205-209.

xviii. See for e.g. Aljazeera news report, 3 November 2010 'Restrictions Mar Myanmar Election', http//english.aljazeera.net / vide/asiapacific/2010/20101131035128807 70.html (accessed 27 February 2011). See also 'Myanmar bars outsider from polls' (18 October 2010) (accessed 27 February 2011), Voting ends in Myanmar elections' (7 November 2010), (accessed 27 February 2011) at the same website.

xix. The English translation of the *2008 Constitution* does not translate these terms into English but transliterate them. *Amyohtha Hluttaw* can be roughly and unofficially described as the 'Upper House' and *Pyithu Hluttaw* can be roughly and unofficially described as 'House of Representatives' or 'Lower House'. The formation of the *Pyithu Hluttaw* is mentioned in Article 109 of the *2008 Constitution*, the formation of the *Amyotha Hluttaw* is mentioned in the Article 141 of the *2008 Constitution* and the formation of the joint session of the *Amyotha Hluttaw* and the *Pyithu Hluttaw* called the *Pyidaungsu Hluttaw* ('Union Legislature') is stated in Article 74 of the *2008 Constitution*.

xx. Article 321 and 327 of the *2008 Constitution* uses the term 'Chairperson' in relation to the Constitutional Tribunal of the Union.

xxi. In contrast to the term used for the Constitutional Tribunal, Article 398 and Article 400 of the *2008 Constitution* uses the term 'Chairman' in relation to the Union Election Commission

xxii. The *2008 Constitution* was adopted on 29 May 2008. Article 441 reads 'A nation-wide referendum held for adoption of this Constitution where more than half of the eligible voters voted, of which the majority of voters adopted this Constitution, shall come into operation throughout the Union from the day the first session of the *Pyidaungsu Hluttaw* is convened'. As such, the Constitution came into 'operation' on 31 January 2011 when the *Pyidaungsu Hluttaw* was convened.

xxiii. Article 444(a) states that '[t]he government that exists on the day this Constitution comes into operation shall continue to discharge the respective duties until the emergence of the new Government formed and assigned duties [sic] in accord with this Constitution'.

xxiv. Article 445 states that '[a]ll policy guidelines, laws, rules, regulations, notifications of the State Law and Order Restoration Council and State Peace and Development Council shall devolve on the Republic of the Union of Myanmar'. Article 446 states: 'Existing laws shall remain in operation in so far as they are not contrary to this Constitution until or unless they are repealed or amended by the *Pyidaungsu Hluttaw*'. Hence virtually all of the laws including the decrees ''('laws') made by the State Law and Order Restoration Council and State Peace and Development Council will continue to be in force.

xxv. Prime Minister General Thein Sein retired from the military and 'contested' the elections held in November 2010 from the Union Solidarity Development Party in which Senior General (head of the State Law and Order Restoration Council and State Peace and Development Council) since 23 April 1992 and still (even after relinquishing his role as the head of the military council which was abolished on 30 March 2001 is the Patron of the USDP. On 30 March 2011 with the formation of the 'new' government the State Peace and Development Council was abolished and also a new Commander in Chief of Defence Forces was also sworn into office. Hence Senior General Than Shwe can be stated to have retired from the posts of Chairman of the State Peace and Development Council and also from that of the Commander in Chief of the Defence Forces though he retained the post of Senior General and also Patron of the ruling Union Solidarity Development Party. On 4 February 2011 the combined session of the two Legislatures elected Prime Minister Thein Sein as President but in the third week of March 2011 he has still not formally taken up the position of President as yet and official government newspapers continue to refer to U Thein Sein (in early March 2011) as 'the elected President'. For example in the news item '12th- day regular session of First *PyidaungSu Hluttaw* held, Approval sought for appointment of Supreme Court Judges Persons Suitable to be appointed as members of the Union Election Commission nominated'(*New Light of Myanmar*, 7 February 2011) the term elected President was used.

xxvi. *The New Light of Myanmar*, (English language newspaper), 15 September 2009, as reported in Asian Legal Resource Centre, Hong Kong, Diagnosing the Unrule of Law in Burma: A submission to the UN Human Rights Council Universal Periodic Review ('Diagnosing the Unrule of Law'), Part V, Role of the Judiciary as Enforcer of executive policy: official statements. Paragraph 10.

xxvii. *The New Light of Myanmar*, 13 May 2009, as reported in 'Diagnosing the Unrule of Law'. Ibid. See also, Nick Cheesman, 'Thin Rule of Law or Unrule of Law in Myanmar' (2009/2010) / 82 (4) *Pacific Affairs* 507-613. (hereafter Nick Cheesman 'Thin Rule of Law').

xxviii. See the statement of the 2003 report of the Special Rapporteur of the Situation of Human Rights in Myanmar, UN Document E/CN.4/2003/41, para. 58.

xxix. See for e.g. 'Parliamentary Debate to be Concluded before April', *The Irrawaddy*, http://www.irrawaddy.org/article.php?art-id=20890 (accessed 8 March 2011).

xxx. SLORC Order No.6/1988 of 24 September 1988. The translation of the Order can be seen in 25 September 1988 issue of The Working People's Daily (Rangoon).

xxxi. See 'Myanmar: 'No Law At All: Human Rights Violations under Military Rule', (1992); see also Article19, Burma: No Law At All (1996).

xxxii. Section 445 of *The Constitution of the Republic of the Union of Myanmar*. The English translation of the *2008 Constitution* used the word 'Section' rather than 'Articles' in referring to the numbered provisions of the Constitution. The *1974 Constitution* uses the term 'Articles' and the 1947 Constitution uses the word 'Sections'.

xxxiii. *Ibid*.

xxxiv. Section 294 of the *2008 Constitution* states that 'In the Union, there shall be a Supreme Court of the Union. Without affecting the powers of the Constitutional Tribunal and the Courts-Martial the Supreme Court of the Union is the highest Court of the Union'.

xxxv. Section 322 of the *2008 Constitution* states the powers and function of the Constitutional Tribunal. It does not include adjudicating matters concerning the military personnel and matters concerning the military.

xxxvi. Section 71 of the *2008 Constitution*.

xxxvii. Ibid. Under the *2008 Constitution* there are two Vice Presidents.

xxxviii. Section 233 of the *2008 Constitution*.

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

xl. Section 302 of the *2008 Constitution*.

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

xlii. Under the pre-*2008 Constitution* period and governmental structures the ruling military Councils the SLORC and SPDC can be considered as Legislatures since these Councils have 'promulgated', repealed, amended and at times merely 'ignored' or 'superseded' existing laws in their actions and practices, The government (the executive) in the pre-*2008 Constitution* period is different from that of the military Council and when new laws (decrees) are issued it is not the executive arm (the government) but the military Councils which issued these laws which would 'devolve' on the 'new' government formed on 30 March 2011when the current session of the *Pyidaungsu Hluttaw* ended,.

xliii. See references in above note xxxi.

xliv. The official term used is 'elected President'

xlv. This Section is embodied in Chapter I of the *2008 Constitution* 'Basic Principles of the Union'.

xlvi. Section 436 (a) of the *2008 Constitution*.

xlvii. Article 6 (a) of the *2008 Constitution*.

xlviii. Section 418 (a) of the *2008 Constitution*

xlix. See Sections 413,417,. 418,419, 420 of the *2008 Constitution*. Under Section 436 (a) all of these Sections can be amended only 'with the prior approval of more than seventy-five percent of all the representatives of the *Pyidaungsu Hluttaw*, after which in a nation-wide referendum only with the votes of more than half of those who are eligible to vote'.

l. See for e.g. the late Dr. Maung Maung's justification of former Burmese leader U Ne Win's announcement on radio and television in what turned out to be his last public speech to the nation on 23 July 1988 that 'if the Army shoots it shoots to hit, it does not shoot into the sky' by reference to the Riot Manual of 1940, Dr. Maung Maung, The 1988 Uprising in Burma, (Yale University South East Asia Studies, p.90). See Myint Zan, 'Misremembrance of an Uprising' (2000) 4(2) *Newcastle Law Review* 101. p. 112.

li. The name of the military Council which ruled Burma by decree from 2nd March 1962 to 2nd March 1974 and which issues of over one hundred laws by decree during the period. Article 199 of the now defunct 1974 Constitution of the Socialist Republic of the Union of Burma states 'All policy guidelines, laws, rules, notifications, proclamations measures, responsibilities and rights of the Revolutionary Council of the Union of Burma shall devolve on the Socialist Republic of the Union of Burma'. Compare the almost identical first sentence of Section 445 of the *2008 Constitution*.

lii. The SLORC also ruled the country by decrees by issuing laws from 18 September 1988 to 15 November 1997.

liii. The SPDC ruled the country from 15 November 1997 and issued laws through decrees and as this Report is being written in the third week of March 2011 it is still formally in existence. Section 445 of the *2008 Constitution* states: 'All policy guidelines, laws, rules, regulations, notifications and declarations of the State Law and Order Restoration Council and the State Peace and Development Council or actions, rights and responsibilities of the State Law and Order Restoration Council and the State Peace and Development Council shall devolve on the Republic of the Union of Myanmar'.

liv. For e.g., in the National Report submitted in accordance with paragraph 15 (a) to the annex to the Human Rights Council resolution 5/1 Myanmar A/HRC/WG.6/10/MMR/1 at paragraph 30, end notes xv and xvi the Code of Procedure section 423 (1) was referred to support the Myanmar government's contention that'[e]veryone convicted of the crime has the right to his conviction and sentence being reviewed by the higher tribunal according to law'.

lv. The *1975 Law Protecting the State from Hostile Subversive Elements* was not officially translated into English. An extensive commentary in English with translations of major provisions of the legislation can be found in P Gutter and BK Sen, 'Burma's State Protection Law[;] An Analysis of the Broadest Law in the World' (Burma Lawyer's Council, Bangkok 2001).

lvi. Article 14 of *The Law Protecting the State from Hostile, Subversive Elements*. See also, P. Gutter and B.K. Sen, Ibid.

lvii. See generally Gutter and Sen Ibid, p. 40.

lviii. Most of the colonial laws as well as early post-independent laws are compiled in the 12-volume Burma Code. At least some of them are available only in the original English. Some immediate post-independent laws made by the then Burmese Parliament are in Burmese and English. In some cases, laws that are in Burmese are not officially translated into English. On the other hand at least a few colonial era laws were not officially translated into Burmese. The Penal Code based on the Indian Penal Code was translated into Burmese in the late 1940s or early 1950s and can with some difficulty be found and bought mainly in used book stores.

lix. Section 107 of the *2008 Constitution*.

lx. Wai Moe, 'Than Shwe Grants Himself Power to Access Special Funds' www. Irrawady.org/article.php.?art_id = 20878 (accessed 14 March 2011).

lxi. *Ibid*.

lxii. UN Document A/HRC/13/48, para 36.

lxiii. See Asian Legal Resource Centre, Diagnosing the un-rule of law in Burma, above note xxvi.

lxiv. *Ibid*.

lxv. The administration of justice shall be based upon the following principles; '(e) dispensing justice in open court unless otherwise prohibited by law; (f) guaranteeing in all cases the right of defence and the right of appeal under the law'.

lxvi. Criminal Procedure Code (1898) Section 61 'No police officer can detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to [the police-station, and from there to the Magistrate's Court].

lxvii. 1872 Evidence Act, Section 24, Criminal Procedure Code Sections 162, 164 (1).

lxviii. 1991 Myanmar Law Reports, (Special Bench) p.63. The ruling was written in Burmese. The Rapporteur cites from the Asian Legal Resource Centre submission to the Human Rights Council Universal Periodic Review.

lxix. *Ibid*.

lxx. See for e.g. Association for the Assistance of Political Prisoners (AAAP), Political Prisoner Profile, AAPP Case No. 055, *http://bbppn.net/wp-content/uploads/2008/03/Khunt-Htun-Oo-11* July 200-pdf (accessed 15 March 2011).

lxxi. Amnesty International, 'Myanmar[;] Amnesty International submission to the UN Universal Periodic Review', Tenth Session of the UPR working Group, January 2011, p.4. ('Amnesty International Submission') Amnesty International also reported that '[t]wenty three members of the 88 Generation Students Group including Mie Mie and Nilar Thein' for peacefully taken part in the anti-government protests of August-September 2007' (Ibid).for e.g. 'Ko Wild, 'Min Ko Naing bestowed Kwang Ju Human Rights award, Mizzima News, 24 April 2009, http;//www.mizzima.com/news/regional/2013min-ko-naing-bestowed-Kwang Ju human rights award (accessed 15 March 2011). See also Amnesty International, 'Myanmar political prisoners still fighting for their rights behind bars' www.amnesty.org/en/news-and-updates/myanmar-political-prisoners-still-fighting-for-their-right-behind-bars (accessed 19 March 2011).

lxxii. See for e.g. Amnesty International Submission above note lxxii, p.3, end note vi.

lxxiii. United Nations General Assembly, Draft Report of the Working Group on Universal Periodic Review, Myanmar, UN Document, A/HRC/WG.6/10/L.7, (hereafter 'Draft Report of Working Group') paragraph 51.

lxxiv. UN Document A/HRC/7/10/Add.1, paragraphs. 183–185.

lxxv. See United Nations Working Group on Arbitrary Detention, Opinion No. 7/2008 on the case of Ko Than Htun and Ko Tin Htay Opinion No. 26/2008 on the case of Hkun Htun Oo, Sai Nyunt Lwin, Sai Hla Aung, Htun Nyo, Sai Myo Win Htun, Nyi Nyi Moe and Hso Ten; and, Opinion No. 44/2008 on the case of U Ohn Than, all in A/HRC/13/30/Add.1. See also, 'Diagnosing the Unrule of Law' above note xxvi at under Part B' Institutional Framework' paragraphs ii to iv of the Report where details of the names, cases, courts and judges involved are mentioned.

lxxvi. 'Draft Report of Working Group', above note lxxiv.

lxxvii. A/RES/64/238, paragraph. 7. See also A/HRC/RES/13/25, paragraph 9. For only a small sample of provision of fairly detailed information of the use of torture or degrading treatment see 'Diagnosing Unrule of law' above note xxvi under the sub-heading 'Torture' as well as 'Deaths in Custody'.

lxxviii. See for e.g. the Myanmar delegation statement at the Universal Periodic Review tenth session, 'Draft Report of Working Group' above note lxxiv at paragraphs 89-103.

lxxix. Since 1991 until the year 2010 the United Nations General Assembly has passed resolutions expressing its concerns regarding 'The Situation in Myanmar'. All of these resolutions can be accessed at the United Nations web site *www.un.org*

lxxx. See UN Document S/PRST/2007/37.

lxxxi. See for e.g. The Special Rapporteur on the situation of human rights in Myanmar, Report of the Special Rapporteur on the situation of human rights in Myanmar, delivered to the General Assembly, U.N. Doc. A/61/369, ¶ 32 (Sept. 21, 2006) (hereinafter Myanmar Rapporteur 2006 I). Mr. Pinheiro was Special Rapporteur from 2000-2008) and Special Rapporteur Tomás Ojea Quintana, the UN's special rapporteur on the situation of human rights see UN Doc. A/HRC/13/48.

lxxxii. 'Diagnosing the Unrule of Law' above note xxvi, under the heading 'Lack of Means of Redress and Counter Complaints Against Redress'.

lxxxiii. Section 25 of the [defunct] *1947 Constitution*. True to its guarantee in just over two years of independence in at least two cases the late Supreme Court exercised its prerogative to issue writs and the late Supreme Court directed the executive government to release detainees. See the 1949 Supreme Court decision of *Ma Ah Mar v. The Commissioner of Police and One* (above note i) and the decision in the year 1960 *Tinsa Maw Naing (Applicant) v. The Commissioner of Police, Rangoon and Another (Respondent), 1950 Burna Law Reports,* (Supreme Court) 17.where the Supreme Court directed the executive government to release forthwith the detainee Bo Yan Naing who was the husband of the applicant who applied for habeas corpus to the Supreme Court that her husband be released which the Supreme Court duly ordered.

lxxxiv. The late U Myint Thein, M.A. LL.B (Cambridge), LL,D (Honoris Causa) (Rangoon), Barrister-at-law (1900-1994).

lxxxv. That Supreme Court Justice was the late Dr, E Maung, (1898-1977) who as acting Chief Justice of the Union, and in a decision written by him 'directed' the then executive government to release the detainee the late Bo Yan Naing in response to a habeas corpus application brought in by his wife Tinsa Maw Naing directed that Bo Yan Naing be released. See Tinsa Maw Naing case above note lxxxiii. In the case of detentions of the Chief Justice U Myint Thein, former Justice U E Maung, and Justice U Chan Htoon, they themselves were unable to avail themselves of any of the writs 'guaranteed' under the 1947 Constitution for these writs together with the 1947 Constitution has died soon after the March 1962 military coup which led to the detention of the Chief Justice and a former (as of March 1962) as well as serving Supreme Court Justice.

lxxxvi. Section 441 of *2008 Constitution*.

lxxxvii. See the web site of the Assistance Association for Political Prisoners Burma (AAPPB) *www.aappb.org* (accessed 16 March 2011). The web site states and categorises the types political prisoners. AAPPB states that among the political prisoners were 254 monks, 12 members of Parliament (the 'Parliament'- which was never held in the aftermath of the now cancelled 1990 elections), 275 students, 169 women, 397 NLD [National League for Democracy] members etc. Note however the Myanmar delegation's tart statement that in the UN Human Rights Council Universal Periodic Review that 'political prisoners' and 'prisoners of conscience' are in prison because they had breached their prevailing laws and not because of their political beliefs'.

lxxxviii. The establishment, formation and members of the Supreme Court (first formed by the State Law and Order Restoration Council) in September 1988 and as of third week of March 2011 is still in existence is different from the 'Union Supreme Court' consisting of a Chief Justice and six other Judges nominated by the elected President U Thein Sein and approved by the *Pyidaungsu Hluttaw*.

lxxxix. See for e.g. 'Supreme Court Rejects NLD Appeal to be Reinstated', Irrawaddy Web Site, *www.irrawaddy.org/cartoon.php?art_id=20158* (accessed 17 March 2011).

xc. See Sections 95 to 107 of the *2008 Constitution* for procedures that need to be followed for the laws to be enacted by the *Pyidaungsu Hluttaw*.

xci. Only a few laws whose contents and repressive provisions have been criticized and enacted by SLORC and SPDC would be mentioned here. They include but would not be limited to 1988 *Association Formation Law*, 1996 *Anti Subversion Law*, *1996 Television and Video Law*, *2004 Electronic Transactions Laws*, *2010 Military Conscription Law*. The Electoral laws in relation to the 2010 elections have also come under criticism from a human rights law standpoint. See for e.g. Amnesty International, Myanmar's 2010 Elections: A Human Rights Perspective, Amnesty International Document ASA/16/007/2010.

xcii. For example the *2010 Military Conscription Law*, states that failure to report for military service could get three years in prison and those who intentionally avoid conscription through [faked] illnesses or inflicting injury on themselves could be imprisoned for up to five years, fined or both, according to the law'.

xciii. All newspapers with the exception of the Myanmar Times newspapers (in English and Burmese which in any case is not published daily) are controlled by the government.

xciv. See how ever the comments about the 'confidential' circulation only among top officials of 'Special Funding Law' see above notes lx to lxi.

xcv. See UN Document A/HRC/13/48, para.13. See also A/HRC/10/19, paragraph 99.

xcvi. 'Diagnosing the Unrule of Law', above note 26 Part B, The Institutional Framework, paragraph 12. The Annex of the Asian Legal Resource Centre also state actual cases which occurred in relation to 'closed trials', 'procedurally incorrect cases', 'evidenceless and groundless cases' , 'denial of defendant's rights and targeting of defence lawyers', 'lack of means of redress and counter complaints against defendants'. (Annex of the Report).The submission can also be accessed at *www.alrc.net*

xcvii. The Union Solidarity and Development Party won 129 seats out of the 168 elected (and 56 appointed military seats) in the *Amyotha Hluttaw* (consisting of 76.79% of the seats) and it won 259 (out of 330 elected) (consisting of 78.48% of seats) and 110 military appointed seats in the *Pyithu Hluttaw*. Source Xinhua news agency 'Myanmar election commission publishes election final results' *http://www.newsxinhuanet.com/english2010/world/2010-11/17/c-13611242.htm* (accessed 18 March 2011) hereafter Xinhua news report.

xcviii. Section 109 (b) of the *2008 Constitution*.

xcix. Section 141 (b) of the *2008 Constitution*.

c. See for e.g. Myo Thant, 'Some MPs not prepared to raise questions and make motions', *www.mizima.com* 14 March 2011 (accessed 18 March 2011).

ci. The National Democratic Force (NDF) is a splinter group of the main (now officially dissolved) National League for Democracy (NLD) Party. The NDF broke with the NLD decided to and did contest the November 2010 elections. The NDF won 4 seats (out of a total of 224 elected and appointed seats in the *Amyotha Hluttaw* (consisting of 2.38% of the seats) and it won 12 seats out of 440 elected and appointed seats in the *Pyithu Hluttaw* (consisting of 3.64% of the seats in the *Pyithu Hluttaw*) (Source Xinhua news report at lxvii)).

cii. 'NDF to Raise Reform Issues in Parliament', The Irrawaddy Web Site, *www.irrawaddy.org/aricle.php?art-id20732* (accessed 18 March 2011) (NDF to Raise Reform Issues'). See also Ko Htwe, 'No Amnesty for Prisoners' The Irrawaddy, *www.irrawaddy.org /*article.php?art_id=20995 (accessed 25 March 2011) where it was stated by the Home Minister (in relation to a proposal –note not a 'Bill'- for Amnesty for political prisoners made by a member of the *Pyithu Hluttaw*) that '[g]ranting amnesty for prisoners is not the concern of the *Hluttaw* or judiciary … only the president has the grant a pardon and only on the advice of the National Defense and Security Council'. It could be briefly stated here that in ordinary legal parlance the issuing of Amnesty and the granting of pardons are not the same. Under Section 204 (a) of the *2008 Constitution* 'the President has the power to grant a pardon' and under Section 204 (b) he also has the 'power to grant amnesty in accord with the recommendation of the National Defence and Security Council'. The point here is not to elaborate on these legal topics even vis-à-vis the Home Minister's statements but to state how difficult –legal, procedural, practical- it is for 'opposition' members of the Legislature to even 'propose' for topics in which the military and the government parties are not willing to entertain.

ciii. 'According to parliamentary regulations, an MP must inform the House Speaker 10 days in advance if he or she wishes to raise a question, 15 days in advance for a proposal, and no less than 30 days to propose a new law. Other opposition leaders who did not take part in the elections are sceptical about the NDF approach since the parliament sessions in Naypyidaw are totally dominated by the military and its proxy Union Solidarity and Development Party (USDP). 'Questions and proposals must be tabled at least 10 days in advance, which means the USDP and military officers will have time for pre-emptive responses,' said Aye Thar Aung, an Arakan leader who is secretary of the Committee Representing the People's Parliament. 'Less than 20 percent of parliament is non-USDP and non-military,' he added. 'Therefore, we are faced with a situation where absolutely nothing may happen in Parliament.' As cited in 'NDF to Raise Reform Issues' Ibid.

civ. Section 89 of the *2008 Constitution*.

cv. See above note lxxiii.

cvi. See United Nations *Special Rapporteur Report on the Situation of Human Rights in Myanmar* where it was specifically stated that there is a lack of independence of judiciary in the country and weak rule of law UN Document 'HRC/13/48, para.13. See also A/HRC/10/19, paragraph 99. See also 'Diagnosing the Unrule of Law in Burma' above note xxvi.

cvii. In 1948 the country was officially named as 'Burma' hence the use of the term 'Burmese' without reference to 'Myanmar'.

cviii. See Myint Zan 'A Comparison of the First and Fiftieth Years of Independent Burma's Law Reports' (2004) 35 (2) Victoria University of Wellington Law Review, pp. 385-416.

cix. See p.24-25 of 'Diagnosing the Unrule of Law' above note xxvi.

cx. *Ibid*.

cxi. As the decision of the Supreme Court was apparently given in February 2011, this decision was not given by the 'new' Supreme Court formed under the *2008 Constitution* but was given the Supreme Court appointed by the State Peace and Development Council.

cxii. Joesph Allchin, 'Burma's snatches power from judges', *www.dvb.no/news/burma-snatches-power-from-judges* (accessed 19 March 2011).

cxiii. Section 18 and Section 19 of the *2008 Constitution* and Chapter 6 concerning 'Judiciary' from Sections 293 to 336.

cxiv. Section 299 (c) (i) of the *2008 Constitution*.

cxv. Some of the qualifications (for the Chief Justice of the Union) and Supreme Court judges of the Union as stated in Section 301

include '(a) [the person being] not younger than 50 years and not older than 70 years …. and (d) (i) who has served as a Judge as High Court of the Region and or State for at least five years; or who has served as a Judicial Officer or Law Officer [for] at least 10 years not lower than that of the Region or State level; or (iii) who has practiced as an Advocate for at least 20 years; or (iv) who is, in the opinion of the President, an eminent jurist; (e) loyal to the Union and its citizens (f) who is not a member of a political party; (g) who is not a *Hluttaw* representative.

cxvi. Section 232 (d) of the *2008 Constitution*: 'The appointment of a person as a Union Minister nominated by the President shall not be refused by the *Pyidaungsu Hluttaw* unless it can clearly be proved that the person concerned does not meet the qualifications of the Union Minister'.

cxvii. Section 237 (b) of the *2008 Constitution*.

cxviii. Section 242 (b) of the *2008 Constitution*.

cxix. Section 328 of the *2008 Constitution*.

cxx. Section 302 (a) (b) and (c) of the *2008 Constitution*.

cxxi. Sixty-four judges including five Supreme Court justices were simultaneously 'permitted to retire'. The five senior judges were removed via Order No. A.0694(I) (15 November 1998), which simultaneously dealt with the foreign affairs minister, two deputy ministers and five members of the Civil Service Selection and Training board.

cxxii. See *The Working People's Daily* (Rangoon, Burma), 28 September 1988 for the State Law and Order Restoration Council Order No. 5 (27 September 1988) forming the Supreme Court and appointing U Aung Toe as 'Chief Judge'. More than 22 years later as of third week of March 2011 U Aung Toe is still the Chief Justice – the longest tenure of all the Chief Justices or Head of Judiciary of Burma since Independence. U Aung Toe was to use a term (though not officially used in his case) 'permitted to retire' (at the age of 85) on 30 March 2011. U Aung Toe was a retired registrar of the Central Court of Justice (the nomenclature of the apex court formed under the *1974 Constitution)* when he was appointed by the State Law and Order Restoration Council as Chief Judge/Chief Justice of the Supreme Court. On 17 February 2011 both House of the Legislature 'approved' the nomination of (soon to be former Deputy Chief Justice) Tun Tun Oo to be the new Chief Justice. See, 'Eighth Day Regular Session of *Pydaungsu Hluttaw* held Approval sought for appointment of Union Chief Justice Person Suitable to be appointed as Union Election Commission Chairman Nominated' *New Light of Myanmar*, 18 February 2011, p.1 (also accessible at *www.myanmar.com/newspaper/nlm/Feb18_o1.htm*) (accessed 20 March 2011).

cxxiii. Section 302 (a), (b) and (c) of the *2008 Constitution*.

cxxiv. The age requirements (in addition to other requirements) are not only with regard to retirement. Section 301 (a) of the *2008 Constitution* states Chief Justice or a Supreme Court judge must not [be] younger than 50 years old and not older than 70 years'.

cxxv. Section 335 of the *2008 Constitution*.

cxxvi. *Ibid*.

cxxvii. Even if it arguably involve constitutional issues if the constitutionality or otherwise of the actions and interpretation of Constitutional provisions and laws of affecting the military is involved under Article 20 (b) and 392 (b) of the *2008 Constitution* the Constitutional Tribunal may not have or may decline to exercise jurisdiction.

cxxviii. Section 322 (a) to (g) of the *2008 Constitution*.

cxxix. Section 20 (b) of the *2008 Constitution*.

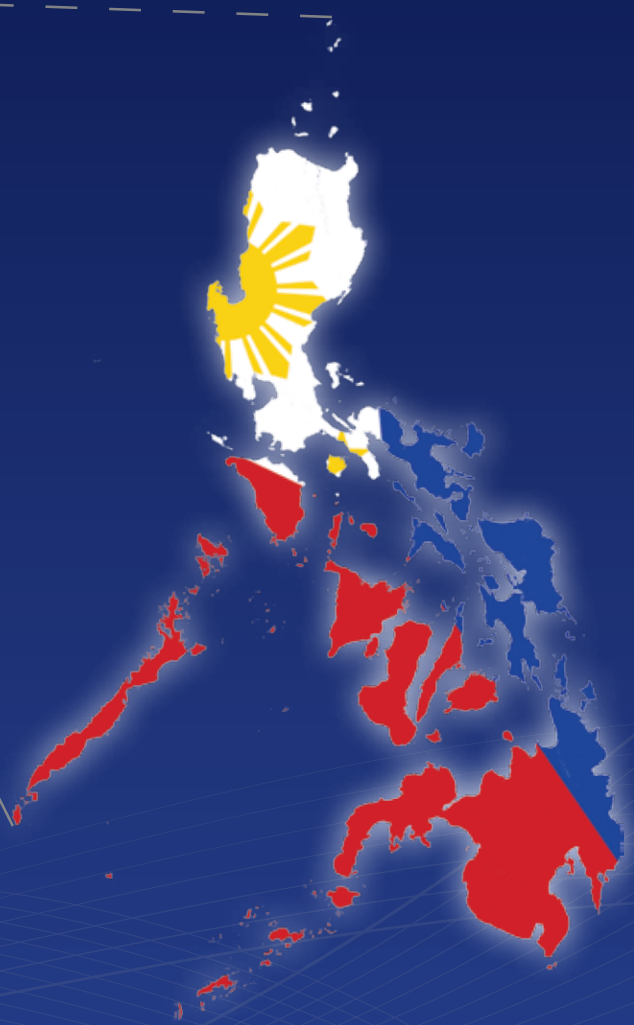
cxxx. Section 293 of the *2008 Constitution*.

cxxxi. Section 343 of the *2008 Constitution*.

cxxxii. Section 325 of the *2008 Constitution*.

cxxxiii. Emphasis added.

The Republic of The Philippines



Philippines

Faith Suzzette Delos Reyes-Kong

Snapshot[i]

Formal Name	Republic of the Philippines
Capital City	Manila
Independence	12 June 1898 (Independence from Spain) 4 July 1946 (Independence from the United States)
Historical Background	The Philippines became a Spanish colony during the 16th century and was ceded to the United States in 1898 following the Spanish-American War. It became a self-governing commonwealth in 1935. In 1942, during World War II, it fell under Japanese occupation. US forces and Filipinos fought together in 1944-45 to regain control. The Philippines attained its independence on 4 July 1946. In 1972, President Ferdinand E. Marcos declared martial law; his rule ended in 1986, when a "people power" movement ("EDSA 1") installed Corazon Aquino as president. There were coup attempts during her presidency that prevented full political stability and economic development. Fidel V. Ramos became president in 1992 and his administration saw increased stability and progress on economic reforms. Joseph Estrada was elected president in 1998. His Vice-president, Gloria Macapagal-Arroyo, assumed as President in January 2001 when Estrada's impeachment trial broke down and another "people power" movement ("EDSA 2") demanded his resignation. Gloria Macapagal-Arroyo was elected as President in May 2004. Impeachment charges were brought against Arroyo for allegedly tampering with the results of the 2004 elections, but were dismissed by Congress. In the 2010 elections, Benigno S. Aquino III won the presidency in the first automated national elections of the Philippines.[ii]
Size	Total: 300,000 sq km Country comparison to the world: 72 Land: 298,170 sq km Water: 1,830 sq km
Land Boundaries	Archipelago of 7,107 islands between the Philippine Sea and the South China Sea
Population[iii]	88.57M (August 2007) 94.01M (Projected Population 2010)
Demography:	0-14 years: 35.2% (male 17,606,352/female 16,911,376) 15-64 years: 60.6% (male 29,679,327/female 29,737,919) 65 years and over: 4.1% (male 1,744,248/female 2,297,381) (2010 est.)
Ethnic Groups	Tagalog 28.1%, Cebuano 13.1%, Ilocano 9%, Bisaya/Binisaya 7.6%, Hiligaynon Ilonggo 7.5%, Bikol 6%, Waray 3.4%, other 25.3% (2000 census)
Languages	Filipino, English (Official) Tagalog, Cebuano, Ilocano, Hiligaynon/Ilonggo, Bicol, Waray, Pampango, Pangasinan (Major regional languages)
Religion	Roman Catholic 80.9%, Muslim 5%, Evangelical 2.8%, Iglesia ni Kristo 2.3%, Aglipayan 2%, other Christian 4.5%, other 1.8%, unspecified 0.6%, none 0.1% (2000 census)
Adult Literacy Rate[iv]	93.4 % (2007)
Gross Domestic Product	USD324.3 billion (2009 est.) Country comparison to the world: 36
Government Overview	Executive Branch: President and Vice President Legislative Branch: Senate and House of Representatives Judicial Branch: Supreme Court
Human Rights Issues	Internally displaced persons (fighting between government troops and insurgents and rebel groups), human trafficking, extralegal killings, enforced disappearances, Illegal arrests, arbitrary detention, torture, and human rights abuses by militias, paramilitaries and private armies

Membership in International Organisations	ADB, APEC, APT, ARF, ASEAN, BIS, CD, CP, EAS, FAO, G-24, G-77, IAEA, IBRD, ICAO, ICC, ICRM, IDA, IFAD, IFC, IFRCS, IHO, ILO, IMF, IMO, IMSO, Interpol, IOC, IOM, IPU, ISO, ITSO, ITU, ITUC, MIGA, MINUSTAH, NAM, OAS (observer), OPCW, PIF (partner), UN, UNCTAD, UNDOF, UNESCO, UNHCR, UNIDO, Union Latina, UNMIL, UNMIS, UNMIT, UNMOGIP, UNOCI, UNWTO, UPU, WCO, WFTU, WHO, WIPO, WMO, WTO
Human Rights Treaties Ratified[v]	International Convention on the Elimination of All Forms of Racial Discrimination International Covenant on Civil and Political Rights International Covenant on Economic, Social and Cultural Rights Convention on the Elimination of All Forms of Discrimination against Women Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Convention on the Rights of the Child International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Convention on the Rights of Persons with Disabilities

Overview

The Philippines is a democratic and republican state. Executive power is vested in the President; legislative power in a bicameral Congress, except for the extent reserved to the people by initiative and referendum; and judicial power in an independent Supreme Court and lower courts established by law.

The President is the chief of state and the head of government and is elected for a single six-year term. The territorial and political subdivisions are provinces, cities, municipalities, and barangays. These units enjoy local autonomy but are under the general supervision of the President. The Constitution provides for the creation of autonomous regions in Muslim Mindanao and the Cordilleras. The Organic Act for the autonomous region of the Cordilleras did not obtain the required number of votes. Thus, presently, the only autonomous region is the Autonomous Region of Muslim Mindanao.[vi]

The twenty-four members of the Senate are elected at-large to serve six-year terms, with one-half of them elected every three years. The House of Representatives provides proportional representation, thus the number of representatives varies. Representatives serve three-year terms and are elected by legislative districts or as party-list representatives. National elections were held in May 2010. Currently there are 283 members in the House of Representatives, with 57 of them being party-list representatives.[vii]

The Supreme Court is composed of 1 Chief Justice and 14 Justices who are appointed by the President following the recommendations of the Judicial and Bar Council. The Supreme Court sits en banc or in divisions of 5. The judiciary consists of the Supreme Court; Court of Appeals; Sandiganbayan, an anti-graft court that tries public officers; Court of Tax Appeals; Regional Trial Courts; Metropolitan Trial Courts (MeTCs); Municipal Trial Courts in Cities (MTCCs); Municipal Trial Courts (MTCs); Municipal Circuit Trial Courts (MCTCs); and the Sharia Courts.[viii]

The Supreme Court is the highest court. There is no separate constitutional court. The Supreme Court hears cases involving constitutionality en banc. Lower courts may decide matters involving constitutionality. However, a declaration of unconstitutionality by inferior courts binds only parties in the case and does not become precedent binding to all.[ix] All courts are subject to the Supreme Court's administrative supervision and follow the rules on pleading, practice, and procedure set by the Supreme Court.[x]

There are quasi-judicial agencies, such as the National Labour Relations Commission and the Department of Agrarian Reform Adjudication Board, which are authorised to resolve cases involving violation of rights. Their decisions are reviewable by the head of the department, whose decision may be appealed to the Court of Appeals. The 2007 General Appropriations Act identified 24 quasi-judicial agencies in the national government, most of which are under the administrative supervision of the President.[xi] The Administrative Code of 1987 prescribes procedure for the performance of quasi-judicial functions, such as standards for notice and hearing, rules of evidence, powers of subpoena, protection of rights to due process of law, internal appeals within the agency, finality of administrative decisions, and judicial review.[xii]

Separation of government powers, liberty, and due process are key values that are protected by the 1987 Philippine Constitution, mainly as a result the country's colonial history and experience with martial law.[xiii]

According to its Preamble, the Constitution aims at building a just and humane society and establishing a Government that embodies the people's ideals and aspirations, promotes the common good, conserves and develops patrimony, and secures the "blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace".

The Constitution adopts generally accepted principles of international law as part of the laws of the land. The courts may use international law to settle domestic disputes.[xiv] Of the nine core international human rights treaties, the Philippines have only not ratified the International Convention for the Protection of All Persons from Enforced Disappearance.[xv]

The Philippines has institutions mandated with human rights promotion and protection. The Constitution created an independent Commission on Human Rights (CHR); and the independent Office of the Ombudsman, which is tasked to protect citizens from governmental corruption and abuse. In the executive branch, the Presidential Human Rights Committee monitors and coordinates human rights compliance. Both Houses of Congress have committees on human rights. The judiciary is observed to have consistently upheld human rights protection under the rule of law.[xvi]

The Supreme Court's Action Program for Judicial Reform (APJR), initiated in 2001, and is founded on these fundamental principles: A judiciary that is fair, accessible and efficient, independent and self-governed, with a streamlined institutional structure, decentralised, information systems-based, giving competitive and equitable compensation, continuously improving its competence, transparent and accountable, encouraging consensus building and collaboration. The APJR has these major reform components: (1) Judicial Systems and Procedures, (2) Institutions Development, (3) Human Resource Development, (4) Integrity Infrastructure Development, (5) Access to Justice by the Poor, (6) Reform Support Systems.[xvii] The APJR concluded in 2006; however reforms begun prior to 2006 continue to be implemented.[xviii] The Program Management Office of the Supreme Court monitors and reviews the implementation and status of the reform program of the judiciary.

During the inaugural address of President Aquino in June 2010, among the priorities mentioned were: to lift the nation from poverty through honest and effective governance; to have leaders who are ethical, honest, and true public servants; review midnight appointments; strengthen the armed forces and the police; uphold the right to information on matters of public concern; and strengthen consultation and feedback process.[xix]

The appointment of former Commission on Human Rights Chairperson Leila De Lima as Secretary of Justice is seen as indication of high-level attention to human rights and reform of the country's justice system.[xx] The Department of Justice is mandated to "uphold the rule of law by serving as the principal law agency of the government". It serves as the government's prosecution arm and administers the government's criminal justice system by investigating crimes, prosecuting offenders and overseeing the correctional system. The Department of Justice also provides free legal services to indigents.[xxi]

The President created a Truth Commission which was declared unconstitutional by the Supreme Court for violating the equal protection clause because it singles out corruption committed only during the previous administration.[xxii] While some legislators said the ruling was a setback to efforts of bringing public officials to account, others said it signalled "triumph of the rule of law" and struck down incursions of the President into legislative authority.[xxiii]

The President committed to a peaceful and just settlement of the conflict in Mindanao. An International Monitoring Team monitors the ceasefire, socio-economic and humanitarian agreements between the government and the Moro Islamic Liberation Front (MILF).[xxiv] In August 2008, the government and MILF agreed in principle on a territorial agreement. The Supreme Court ruled that the draft agreement was unconstitutional. Thereafter, fighting flared up and continued sporadically in central Mindanao until a cease-fire was agreed upon on 29 July 2009.[xxv] The Government intends to hold exploratory talks with MILF in 2011.[xxvi] President Aquino also intends to pursue peace talks with the New People's Army and Moro National Liberation Front.[xxvii]

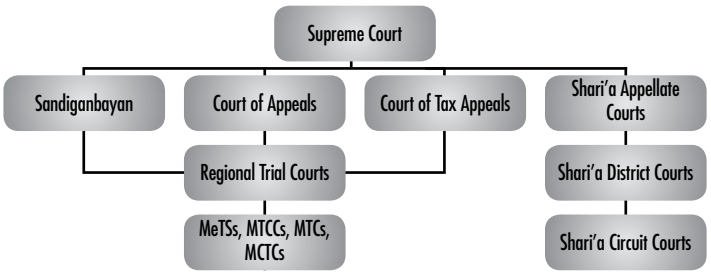
The Asian Development Bank has documented a strong tradition of support for the rule of law in the Philippines.[xxviii] However, it also said that the quality of the rule of law in the Philippines is perceived to be poor. Reforms have helped improve the credibility of justice sector institutions, but human and financial resources and physical infrastructure are inadequate or poorly allocated and managed. Workloads are unrealistically high. Court dockets are congested and delays are perceived to be excessive. The jail population is growing because of prisoners awaiting trial. Conviction rates are low. The private sector is deemed frustrated by uncertainties about the law, its interpretation, and application. Delays, costs, uncertainties, and, in some cases, physical remoteness of courts impede access to justice.[xxix]

According to the World Justice Project Rule of Law Index 2010, the Philippines ranked very low, even when compared to countries similarly situated, in the areas of stable laws, access to justice, and corruption.[xxx]

Administration of Justice Grid

Indicator	Figure
Number of judges in country	1,790 justices and judges as of 31 December 2009[xxxi] (Around 1 judge per 51,523 Filipinos[xxxii])
Number of lawyers in country	More than 40,000[xxxiii] (Around 1 lawyer per 2,306 Filipinos[xxxiv])
Annual bar intake and fees	2009: 5,903 examinees, 1,451 (24.58%) examinees who passed[xxxv] 2008: 6,364 examinees; 1,310 (20.58%) examinees who passed[xxxvi] 2007: 5,626 examinees; 1,289 (22.91%) examinees who passed[xxxvii] 2011 Membership fee: • PHP1,000 (USD 23) annual payment or • PHP12,500 (USD 287) for lifetime membership
Standard length of time for qualification to take bar examination[xxxviii]	• Study of law for 4 years; and • Bachelor's degree in arts or sciences prior to study of law
Availability of post-qualification training	• Mandatory Continuing Legal Education (MCLE) Committee: Implements and administers Bar Matter No. 850 requiring members of the Integrated Bar of the Philippines to comply with the Mandatory Continuing Legal Education program • Philippine Judicial Academy: Mandated by Republic Act 8557 to provide training to justices, judges, court personnel, lawyers and aspirants to judicial posts
Length of time from arrest to trial (criminal)	Date of filing of Information/Date accused appeared before the court to Arraignment: maximum of 30 days • For accused under preventive detention: case should be raffled and records transmitted to the judge within 3 days from filing of the information or complaint; the accused shall be arraigned within 10 days from date of the raffle[xxxix] Trial should start within 30 days from arraignment[xl] The Speedy Trial Act and the Rules of Court, however, enumerate reasonable delays that are to be excluded from the computation of the time limit within which trial should commence[xli]
Length of trials (from opening to judgment)	Trial should not exceed 180 days[xlii] Cases submitted to the Supreme Court must be resolved within 24 months from the filing of the last pleading; within 12 months for those before lower collegiate courts, and within 3 months for all other lower courts.[xliii] Criminal and civil cases appealed to the Supreme Court were found to have remained in the court system for an average of 5 years before decision. The Supreme Court requires an average of 1.43 years to decide a case; the Court of Appeals, 1.32 years; the Court of Tax Appeals, 2.6 years; the Sandiganbayan, 6.6 years.[xliv]
Accessibility of individual rulings to public[xlv]	• Rules of Court require court proceedings and records to be public, except when the court forbids publicity in the interest of morality or decency • Supreme Court decisions are published and are public records • Decisions of the trial and appellate court are not published but are public records and can be obtained from the clerk of court • Transcripts of proceedings are public records and copies are available for a fee • Decisions and resolutions of the Supreme Court are available on the website of the Supreme Court and through private online sources

Structure of the Judiciary



Cases before the Commission on Human Rights in 2009[xlvi]

Number of Complaints Received: 499
Cases Resolved: 777
- For Filing and Monitoring: 180
- For Closure/Termination:417
- For Archiving: 180

Legal Assistance: 1,229 clients nationwide
Financial Assistance: Total of more than P2 million in financial assistance to 190 human rights victims and their families

Administrative Complaints against Justices and Judges before the Supreme Court in 2009[xlvii]

	Cases Filed	Cases Decided/Penalty		Complaint Dismissed
SC Justices				
CA Justices	12	16		16
Sandiganbayan Justices	1	1		1
CTA Justices				
RTC Judges	276	6	Admonished	229
		4	Dismissed from Service	
		50	Fined	
		1	Reprimanded	
		5	Suspended	
		Total: 66		
MeTC, MTCC, MTC, MCTC Judges	125	3	Admonished	117
		1	Dismissed from Service	
		20	Fined	
		1	Reprimanded	
		2	Suspended	
		Total: 27		
Shari's District Court Judges	1			
Shari'a Circuit Court Judges	1			1

Cases against Government Officers before the Office of the Ombudsman in 2009[xlviii]

12,736 complaints received
- around 3,700 criminal and 3,500 administrative cases undergoing preliminary investigation and/or administrative adjudication
- 4,000 referred for fact-finding investigation

Almost 8,000 cases disposed
2,300 fact-finding investigations completed
189 Informations filed before the Sandiganbayan
1,394 Informations filed before regular courts
500 public employees sanctions
- 175 (34%) dismissed from the service
- At least 80 placed under preventive suspension.

328 lifestyle check complaints received
217 lifestyle check investigation completed

A. Country's practice in applying central principles for rule of law for human rights

1. The government and its officials and agents are accountable under the law.

a. Constitutional Limitations on Government Powers

The Constitution gives the compositions, powers, and functions of the Legislative Department, Executive Department, and Judicial Department. The powers, responsibilities, resources, and officials of local government units are detailed in the Local Government Code, in accordance with the Constitution.

The Philippines adheres to the doctrine of separation of powers and system of checks and balances.[xlix] The President gives final approval to legislative acts. However, he cannot act against laws passed by Congress and needs its concurrence to complete significant acts such as amnesties, treaties and international agreements. Money can be released from the treasury only by authority of Congress. The Supreme Court has the power to declare acts of the President or Congress unconstitutional.[l]

The Constitution prescribes substantive limitations, mainly found in the Bill of Rights, and procedural limitations on the manner government exercises its functions.[li] When government actions exceed constitutional limitations, the Constitution vests in the courts the power of judicial review.[lii]

On 24 February 2006, President Arroyo issued Presidential Proclamation 1017, declaring a state of national emergency; and General Order No. 5, implementing the Proclamation. These were issued because of a suspected conspiracy among some military officers, leftist insurgents, and political oppositionists to unseat or assassinate President Arroyo. In May 2006, the Supreme Court declared the Proclamation unconstitutional as far as it gave the President authority to promulgate "decrees". Legislative power is vested in Congress and neither Martial Law nor a state of rebellion nor a state of emergency justifies a president's exercise of legislative power.[liii] When a President declares a state of emergency or rebellion, she may use her powers as Commander-in-Chief to call the Armed Forces to help the police maintain order.[liv] However, the exercise of emergency powers, such as taking over privately owned public utility or business affected with public interest, requires delegation from Congress. A portion of the General Order calling the armed forces to suppress "acts of terrorism" was declared unconstitutional as the term was not yet defined and punishable by law at the time of the issuance.[lv]

On 24 November 2009, following the killing of 57 people in Maguindanao, President Arroyo declared a state of emergency in the provinces of Maguindanao, Sultan Kudarat and the City of Cotabato. On 04 December 2009, the President, through Proclamation 1959, declared a state of martial law in the province of Maguindanao and suspended the privilege of the writ of habeas corpus.[lvi] President Arroyo lifted martial law on December 12. Some members of Congress said the declaration of martial law had no basis because there was no actual rebellion as required by the Constitution.[lvii] On 14 December 2009, the Senate passed a resolution declaring martial law in Maguindanao unconstitutional.[lviii] The state of emergency remained in effect one year after its declaration, despite a change of administration. President Aquino said authorities were still trying to arrest persons wanted for the massacre and recover arms of private armies in the area.[lix]

On a scale of 0 to 1, where 1 signified higher adherence to the rule of law, the Philippines scored 0.57 for Limited Government Powers in the World Justice Project Rule of Law Index 2010. While the Philippines ranked 6th out of the seven (7) countries in the East Asia and Pacific Region, it is 3rd out of 12 countries in the lower middle income Level. The project focused on adherence to the rule of law in practice and Limited Government Powers measured the extent to which those who govern are subject to law.[lx]

b. Constitutional Amendments and Revisions

The Constitution provides for the following modes of proposing amendments or revisions to the Constitution: 1) by the Congress acting as a constituent assembly, 2) by a constitutional convention, 3) by the people through initiative.[lxi]

Amendments or revisions are proposed by Congress by three-fourths (3/4) vote of all members; or by constitutional convention. A constitutional convention is called by two-thirds (2/3) vote of all members of Congress. By majority vote of all members, Congress may also submit to the electorate the question of calling a convention.[lxii]

Constitutional amendments, but not revisions, may be directly proposed by the people through initiative.[lxiii] This requires a petition of at least twelve percent (12%) of the total registered voters, of which every legislative district must be represented by at least three percent (3%) of the registered voters therein. Amendment through this process is authorised only once every five years. Congress is to provide for the implementation of the exercise of this right.[lxiv]

Any amendment or revision of the Constitution becomes valid when ratified by a majority vote cast in a plebiscite.[lxv]

No revision or amendment has yet been made to the 1987 Constitution.

In 1997, an attempt to amend the Constitution through people's initiative failed after the Supreme Court ruled that there was no enabling law for people's initiative. The Initiative and Referendum Act was found "incomplete, inadequate, or wanting in essential terms and conditions insofar as initiative on amendments to the Constitution is concerned".[lxvi] Currently, there is no enabling law for the exercise of people's initiative. Proposed bills have, however, been filed in Congress.[lxvii]

In 2000, President Estrada abandoned attempts to amend economic provisions of the Constitution after massive opposition.[lxviii]

During the administration of President Arroyo, she expressed the need for charter change and created a Consultative Commission to propose revision of the Constitution.[lxix] In 2006, the Supreme Court dismissed a petition to amend the Constitution through people's initiative as what was sought was a revision; violating the provision of the Constitution limiting initiatives to amendments. Further, the signature sheets only asked if the people approved of a shift from the Bicameral-Presidential to Unicameral-Parliamentary system of government. In an initiative, the full text of the proposed amendment should be shown before people sign the petition.[lxx]

c. Accountability of Government Officials

The Constitution requires public officers to be accountable to the people and several statutes provide for criminal, civil, and/or administrative liability.[lxxi]

The President, Vice-President, members of Supreme Court, members of Constitutional Commissions, and Ombudsman may be impeached for culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust. The House of Representatives has the exclusive power to initiate impeachment and, by a vote of at least one-third of all members, decides if an impeachment complaint should be forwarded to the Senate for trial. A two-thirds vote of all members of Senate is necessary to convict an official.[72]

Each House of Congress may punish members for disorderly behaviour, and suspend or expel a Member.[lxxiii] The Supreme Court has the power to discipline or dismiss judges of lower courts.[lxxiv]

The Office of the Ombudsman investigates any public employee or agency for acts or omissions that appear "illegal, unjust, improper, or inefficient". The Ombudsman Act of 1989 authorises the Ombudsman not only to investigate but to also prosecute. It mandates the Ombudsman to enforce administrative, civil and criminal liability. The Ombudsman's power to investigate, while primary[lxxv], is not exclusive. Prosecutors of the Department of Justice may also conduct preliminary investigations against public officers.[lxxvi]

The Ombudsman has administrative disciplinary authority over all public officials, except those removable by impeachment, members of Congress, or members of the judiciary.[lxxvii] Administrative disciplinary authority is not exclusive to the Ombudsman but is shared with other agencies, such as the Civil Service Commission, heads of offices, Office of the President, legislative councils of local government units, and regular courts.[lxxviii] The body which first takes cognizance of the case acquires jurisdiction to the exclusion of other tribunals.[lxxix] There is also a

Presidential Commission on Good Government (PCGG), which assists in the recovery of ill-gotten wealth of former President Ferdinand E. Marcos, his family, relatives, subordinates and associates.[lxxx]

In 2000, an impeachment trial was held to oust President Estrada. The Senate declared the impeachment court functus officio after President Estrada was deemed to have relinquished the presidency and then Vice President Arroyo took her oath as President.[lxxxi] The Ombudsman filed Information for plunder and perjury against President Estrada. In September 2007, the Sandiganbayan found him guilty of plunder but acquitted him for perjury.[lxxxii] In October 2007, President Estrada received executive clemency after six years detention, mostly under house arrest.

In 2009, the Ombudsman received 12,736 complaints and completed around 2,300 fact-finding investigations. It filed a total of 189 Informations before the Sandiganbayan and 1,394 Informations before regular courts. The Ombudsman sanctioned at least 500 public employees nationwide; of this, 175 (34%) were dismissed from service. At least 80 employees were placed under preventive suspension.[lxxxiii] Despite these, the Office of the Ombudsman is not always seen as effective. A spokesperson of the President said that Ombudsman Merceditas Guitierrez is close to former President Arroyo and justice cannot be had from her.[lxxxiv] Two impeachment complaints have been filed against Gutierrez for betrayal of public trust and culpable violation of the Constitution. She allegedly sat on the graft and corruption cases against President Arroyo and her husband.[lxxxv]

On 16 December 2010, retired Maj. Gen. Carlos F. Garcia, who was facing non-bailable plunder charges for amassing at least PHP303 million as comptroller of the Armed Forces, was released after he pleaded guilty to the lesser crimes of indirect bribery and violation of the Anti-Money Laundering law. He posted bail at PHP60,000.[lxxxvi] The plea bargaining agreement entered by the Office of the Ombudsman through the Office of the Special Prosecutor was met with criticisms as evidence for the prosecution was considered strong. President Aquino ordered his office to review the plea bargain agreement and to study options for intervention.[lxxxvii] In an inquiry by the Senate into the plea bargain, a former budget officer revealed a military tradition of paying top officials, including PHP5 million in monthly allowance and PHP50 million send-off money to former Armed Forces Chief of Staff Angelo Reyes.[lxxxviii]

UN Rapporteur Philip Alston observed lack of "evidence of a good faith effort on behalf of the Government to address the myriad of extrajudicial killings by the military" and reforms to institutionalise reduction of killings and ensuring command responsibility have not been implemented.[lxxxix]

The 2009 Trafficking in Persons Report says corruption among law enforcers is pervasive. Government officials are involved in or profit from trafficking. Law enforcers allegedly extract protection money in exchange for tolerating illegitimate operations.[xc]

The Corruption Perceptions Index 2010, which measures the degree public sector corruption is perceived to exist, scores the Philippines a 2.4 on a scale of 10 (very clean) to 0 (highly corrupt). In a list ranking 178 countries from very clean to highly corrupt, Philippines is 134th. It is 25th out of the 34 countries in the Asia Pacific Region.[xci]

The Philippine National Police Chief admitted "serious breach in discipline" among policemen. From January 2010 to November 2010, 2,165 administrative cases were filed against police officers. Commission on Human Rights Chairperson Loretta Rosales has condemned the high incidents of police brutality.[xcii]

There are 7 agencies or key officials internal to PNP with disciplinary authority over police officers and 11 agencies or officials external to PNP.[xciii] For instance, complaints against police officers can be filed with the PNP Internal Affairs Service, PNP Human Rights Office, National Police Commission and Peoples Law Enforcement Board; the Asian Legal Resource Centre, however observed that these agencies lack independence.[xciv]

2. Laws and procedure for arrest, detention and punishment are publicly available, lawful and not arbitrary; and preserve the fundamental rights to physical integrity, liberty and security of persons, and procedural fairness in law.

a. Publication of and Accessibility to Penal Laws

Statutes need to be published as a condition for effectivity, which begins fifteen (15) days after publication unless a different effectivity date is fixed by the legislature. Publication should be made in the Official Gazette or in a newspaper of general circulation in the Philippines.[xcv]

The Supreme Court has ruled that there would be no basis to apply the maxim that ignorance of the law excuses no one without notice and publication.[xcvi]

Covered by the rule on publication are presidential decrees and executive orders of the President whenever legislative powers are delegated by the legislature or directly conferred by the Constitution.[xcvii]

Administrative rules enforcing or implementing laws also require publication. Interpretative regulations and issuances that regulate only personnel and not the public need not be published.[xcviii]Copies of administrative rules are to be filed with the University of the Philippines Law Center and every agency is required to keep a register of all rules, which are to be open for public inspection.[xcix]

The official languages of the Philippines are Filipino and English, with the regional languages as auxiliary official languages in the regions.[c] The website of the House of Representatives shows that the 14th Congress passed 647 Republic Acts; two of these had translations to Tagalog, Bikol, Cebuano, Hiligaynon, Ilokano, Kapampangan and Maranao.[ci]

Laws are available at the websites of the Senate and House of Representatives.

b. Understandability, Non-retroactivity, Predictability in Application and Consistency with other Laws of Penal Laws

The legislature must inform citizens with reasonable precision what acts are prohibited. This requirement, known as the void-for-vagueness doctrine, states that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates due process of law".[cii]

The Constitution prohibits ex post facto laws or bills of attainder and the Revised Penal Code states that felonies are not punishable by any penalty not prescribed by law before its commission.[ciii] Laws generally have no retroactive effect.[civ] However, penal laws may be applied retroactively when they favour felons who are not habitual criminals.[cv]

Judicial decisions form part of the legal system of the Philippines.[cvi] For the sake of certainty, a conclusion in one case should be applied to those that follow if the facts are substantially the same.[cvii] This doctrine may only be abandoned for strong and compelling reasons, such as when a previous decision is later found to be an erroneous application of law or requires rectification.[cviii]

For instance, in 1998, the Supreme Court unanimously ruled that an outgoing President could no longer fill vacancies in the judiciary two months before elections. Section 15, Article VII (Executive Department) of the Constitution prohibits an outgoing President from making appointments starting two months from the elections. Section 4 (1), Article VIII (Judicial Department), however, directs the President to fill vacancies in the Supreme Court within 90 days from vacancy. On 17 March 2010, the Supreme Court overturned its 1998 ruling and declared that the ban did not extend to vacancies in the Supreme Court. The Court said that if the framers of the Constitution wanted to include the Supreme Court in the midnight-appointment ban, they should have explicitly stated so. Senior Associate Justice Antonio Carpio and Associate Justice Conchita Carpio-Morales, however, withdrew their nominations as they believed that President Arroyo could no longer appoint anyone to the judiciary under the Constitution.[cix]

Laws are repealed only by subsequent ones. Courts can declare a law void when it is inconsistent with the Constitution. Administrative or executive acts, orders and regulations are valid only when they are not contrary to the laws or the Constitution.[cx] Implied repeals are not favoured; all efforts should be made to harmonise and give effect to all laws on the same subject.[cxi]

In a survey, while 43% of judges found decisions to be "predictable", only twenty-three percent of lawyers said court decisions were "predictable".[cxii] In the World Justice Project Rule of Law Index 2010, the Philippines scored poorly on the factor Clear, Publicised, and Stable Laws. On a scale of 0 to 1, with 1 signifying higher adherence to the rule of law, the Philippines scored 0.43. It had a global ranking of 24/35; regional ranking of 6/7; and income group ranking of 8/12 for this factor.[cxiii]

c. Laws Relative to Detention without Charge or Trial

The Constitution prohibits deprivation of liberty without due process of law and guarantees the right of the people to security in their persons, papers, houses and effects. Search warrants or warrants of arrest should only be issued after personal determination of probable cause by a judge.[cxiv]

The rule that persons may not be arrested except with a warrant is subject to these exceptions: (1) when the person to be arrested has committed, is actually committing, or is attempting to commit an offense; (2) when an offense has just been committed and there is probable cause to believe based on personal knowledge of facts or circumstances that the person to be arrested has committed it; and (3) when the person to be arrested is a prisoner who has escaped.[cxv]

Unlawful arrests or arbitrary detentions are criminal offenses.[cxvi] Persons validly arrested without warrants are to be delivered to judicial authorities within 12 hours for offenses punishable by light penalties; 18 hours for offenses punishable by correctional penalties; and 36 hours for offenses punishable by afflictive or capital penalties. Otherwise, the officers detaining them beyond the time allowed by law may be criminally charged.[cxvii] Recourse may be made to courts for issuance of a writ of habeas corpus in cases of illegal confinement.[cxviii]

The President, in case of invasion or rebellion and when public safety requires it, may suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law for a maximum of 60 days. The suspension of the privilege of the writ applies only to persons charged for rebellion or offenses inherent in or directly connected with invasion. While the privilege of the writ is suspended, a person arrested or detained shall be judicially charged within 3 days, otherwise he shall be released. A proclamation of a state of martial law does not automatically suspend the privilege of the writ of habeas corpus. The right to bail is not impaired even when the privilege of the writ of habeas corpus is suspended.[cxix] Congress may revoke such proclamation or suspension. This revocation shall not be set aside by the President. The Supreme Court may review the sufficiency of the factual basis of the proclamation, suspension, or its extension.[cxx]

In August 2010, the Department of Justice filed the first case under the Human Security Act of 2007 against the Abu Sayyaf Group to have them proscribed as a terrorist organisation.[cxxi]

The Human Security Act has been criticised for having no clear test as to when it is applicable and for being violative of due process because it gives the courts power to classify terrorist groups without giving a clear definition of terrorism. It is said to violate equal protection because there is no clear distinction due to the difficulty in defining terrorism. The difficulty in defining terrorism is also "odious to free association". The broad access provided by the law to intercept communications because, or in furtherance of, terrorism may also violate the freedom of speech. Special Rapporteur Martin Scheinin said that, although there is a need to take effective measures to prevent and counter terrorism, he is concerned that many provisions of the Human Security Act are not in accordance with international human rights standards.[cxxii]

Law enforcement officers were reportedly reluctant to use the powers under the Human Security Act due to strict punishments for rights violations. The Human Security Act authorises detention for 72-hours of suspects without charge and allows surveillance, wiretapping and seizure

of assets. On the other hand, officers who perform unauthorised wiretapping or violate the rights of a detainee could face up to 12 years in prison.[cxxiii]

d. Laws Relative to Extra-Legal Treatment or Punishment

The Constitution prohibits secret detention places, solitary, incommunicado, or other similar forms of detention.[cxxiv] Physical, psychological, or degrading punishment against any prisoner or detainee or the use of penal facilities under subhuman conditions are prohibited. Excessive fines, cruel, degrading or inhuman punishment are not to be imposed.[cxxv]

The 1987 Constitution disallowed the imposition of death penalty, unless Congress allows it for compelling reasons involving heinous crimes.[cxxvi] Republic Act 7659 restored death penalty in 1993. It was abolished in June 2006 with the approval of Republic Act 9346.

The Penal Code punishes maltreatment of prisoners.[cxxvii] Congress recently passed the Anti-Torture Act of 2009. Also, Republic Act 9851 classifies enforced or involuntary disappearance as "Other Crimes Against Humanity" when committed as part of a widespread or systematic attack.[cxxviii]

Impunity for extrajudicial killings, torture, unlawful disappearances, and warrantless arrests and detentions are considered major problems.[cxxix] In 2007, the Supreme Court held a national consultative summit because of the number of unsolved political killings and disappearances and the seeming impunity with which these crimes were committed.[cxxx] During the summit, Court of Appeals Justice Lucas Bersamin pointed out the limitation of the writ of habeas corpus as it cannot be used to obtain evidence of the whereabouts of a person or the person who abducted him.[cxxix]

The Supreme Court issued the Rule on the Writ of Amparo in September 2007 and the Writ of Habeas Data in January 2008. The writ of amparo may be used to direct a person to show that he did not violate or threaten the right to life, liberty and security of a person; the actions he took to determine an aggrieved person's fate; and the person/s responsible for the violation. The writ of habeas data is available to persons whose right to privacy is violated or threatened by a person or entity engaged in gathering, collecting or storing of information. The court may enjoin the act complained of, or order the deletion or rectification of erroneous information.

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.[cxxxii]

Violations continued in the Aquino administration. During President Aquino's first four months in office, Karapatan listed 20 victims of extrajudicial killings; 2 victims of enforced disappearance; 16 victims of torture; 4 victims of frustrated extralegal killings; 23 victims of illegal arrest and detention, and 29 victims of illegal search.[cxxxiii]

Former President Arroyo formed Task Force Usig and the Melo Commission to investigate extrajudicial killings. President Aquino announced that a new task force will be formed to review cases of extrajudicial killings and enforced disappearances.[cxxxiv]

The Philippines has not yet signed the International Convention for the Protection of All Persons from Enforced Disappearances. There is presently no law that sufficiently punishes extralegal killings or enforced disappearances. Instead cases are usually filed under kidnapping, murder, or serious illegal detention. Separate bills have been filed in the House of Representatives and Senate to criminalise the same.[cxxxv]

e. Laws Relative to Presumption of Innocence

The Constitution states that an accused is presumed innocent until proven otherwise.[cxxxvi] A person's innocence of a crime is a disputable presumption.[cxxxvii] The prosecution must prove guilt beyond reasonable doubt and its evidence "must stand or fall on its own weight and cannot be allowed to draw strength from the weakness of the defense".[cxxxviii]

An accused may move for demurrer to evidence after the prosecution has rested its case and seek for a decision without presenting evidence if he believes his guilt has not

been established beyond reasonable doubt. The court, on its own, may also dismiss the action on the ground of insufficiency of evidence.[cxxxix] The grant of a demurrer to evidence is tantamount to acquittal.[cxl]

f. Laws Relative to Access to Legal Counsel

Under Republic Act 7438, a person arrested, detained or under custodial investigation[cxli] shall at all times be assisted by counsel. Officers should inform the person arrested, detained or being investigated of his right to counsel, preferably of his own choice. This should be done in a language known and understood by the person arrested, detained or under investigation. If such person cannot afford the services of counsel, the investigating officer is mandated to provide one. Counsel shall at all times be allowed to confer privately with the person arrested, detained or under custodial investigation. In the absence of any lawyer, the law prohibits the conduct of custodial investigation. Penal sanctions are imposed for violation of this law. These duties are also obligatory upon police officers under PNP Operational Procedures.[cxlii]

The Constitution provides for the right of the accused in criminal prosecutions to be heard by himself and counsel.[cxliii] Under the Rules of Court, an accused has the right to be present and defend himself in person and by counsel from arraignment to promulgation.[cxliv] The court has the duty to inform the accused of his right to counsel before he is arraigned and to assign a counsel de officio, unless the accused is allowed to defend himself or has employed his own counsel.[cxlv] The court, in appointing a counsel de officio, shall choose from members of the bar in good standing who can competently defend the accused. In localities where lawyers are not available, the court may appoint a resident of good repute for probity and ability.[cxlvi]

Indigent persons may seek free legal representation, assistance, and counselling from the Public Attorney's Office.[cxlvii]

g. Laws Relative to the Right to be Informed of Charges, to Prepare Defense, and Communicate with Counsel

The Rules of Court and PNP Operational Procedures require persons conducting arrests to inform the person arrested of the cause of arrest. If a warrant has been issued, he should be informed of such fact.[cxlviii]

The Constitution states that an accused has the right to be informed of the nature and cause of accusation.[cxlix] Under the Rules of Court, an Information or Complaint charging an accused should contain the acts or omissions complained of.[cl] The Information must be written in terms sufficient to enable a person of common understanding to know what offense is being charged and the qualifying and aggravating circumstances present.[cli] Before arraignment, an accused may move for a bill of particulars so he can properly plea and prepare for trial. The motion should contain the defects of the complaint or information and the details desired.[clii]

The Rules of Court allow motions to quash Informations that fail to state the acts constituting the offense, which shall be granted if the prosecution fails to correct the defect.[cliii] A complaint or information may also be quashed when it charges more than one offense, unless a single punishment for various offenses is prescribed by law.[cliv] Duplicity of charges is prohibited to avoid confusing the accused in preparing his defense.[clv]

When the court appoints a counsel de officio for the accused, counsel should be given reasonable time to consult with the accused as to his plea before arraignment is conducted.[clvi] During arraignment, the judge or clerk should give the accused a copy of the complaint or information and read it to him in the language or dialect he knows.[clvii] After arraignment, the Rules of Court and the Speedy Trial Act require that the accused be given at least 15 days to prepare for trial.[clviii]

h. Laws Relative to the Right to be Tried without Undue Delay, to Defend in Person and Examine Witnesses and Evidence

The Constitution provides for the right of the accused to speedy trial and speedy disposition of cases before judicial, quasi-judicial, or administrative bodies.[clix]

The Speedy Trial Act requires arraignment within 30 days from the filing of information or from the date an accused appeared before the court where the charge is pending, whichever date last occurs. If an accused is under preventive detention, the Rules of Court require his case to be raffled and records transmitted to the judge within 3 days from the filing of the information or complaint; the accused shall be arraigned within 10 days from the date of the raffle.[clx]

Trial shall start within 30 days from arraignment, with the accused having at least 15 days to prepare for trial; otherwise, the Information shall be dismissed on motion of the accused.[clxi] The Speedy Trial Act and the Rules of Court enumerate reasonable delays that are to be excluded from the computation of the time limit within which trial should commence.[clxii] Cases must be set for "continuous trial on a weekly or other short-term trial calendar" and trial period should not exceed 180 days.[clxiii]

Cases submitted to the Supreme Court must be resolved within 24 months from the filing of the last pleading; within 12 months for those before lower collegiate courts, and within 3 months for all other lower courts.[clxiv]

In 2006, the American Bar Association's Asia Law Initiative said the Speedy Trial Act of 1998 and related Rules of Court were ineffective in curing judicial delays because they contain numerous exclusions and exceptions for granting continuances, only provide for speed during actual trial, and were not uniformly enforced.[clxv]

The Supreme Court held that, in spite of the prescribed time limits, "speedy trial" is a relative term and flexible concept. To determine if the accused has been deprived of his right to speedy disposition of the case and speedy trial, the following are considered: (a) length of delay; (b) reason for the delay; (c) defendant's assertion of his right; and (d) prejudice to the defendant.[clxvi]

The judiciary is developing court automation systems (Court Administration Management and Information System, Case Flow Management, and Case Management Information System) to address delay and perceived inefficiency of the courts.[clxvii]

The Asian Development Bank said that, as of 2003, criminal and civil cases appealed to the Supreme Court remained in the court system on an average of 5 years before decision. The Supreme Court requires an average of 1.43 years to decide a case; the Court of Appeals, 1.32 years; the Court of Tax Appeals, 2.6 years. Cases filed in the Sandiganbayan required an average of 6.6 years for decision.[clxviii]

Heavy workloads and case backlogs make it difficult for judges to meet prescribed periods and judges have been observed to have adjourned a trial for more than 1 month at a time in violation of the Rules of Court.[clxix] According to the National Statistical Coordination Board, court-case disposition rate has improved from 0.59 in 1999 to 0.85 in 2007.[clxx] In 2008, the courts, excluding the Supreme Court, disposed 107.12% of the number of cases filed within the year, but cleared only 36.64% of their total caseload. Although they disposed more cases than were filed for the year, clearance rate did not improve because of backlogs already pending at the beginning of the year.[clxxi]

The Speedy Trial Act and Rules of Court do not cover delays during police investigation, preliminary investigation, and enforcement of judgments.[clxxii] As an example, the complaint of "Abadilla 5", who alleged they were tortured by policemen into confessing responsibility for murder, reached the Office of the Ombudsman in 2004.[clxxii] The Ombudsman recommended the filing of criminal charges only on 10 January 2011.[clxxiv]

Under the Constitution, an accused has the right to be heard by himself and counsel, to meet witnesses face to face, and to have compulsory process to secure attendance of witnesses and production of evidence. After arraignment, trial may proceed in the absence of the accused if he has been notified and his failure to appear is unjustifiable.[clxxv]

Examination of witnesses is to be done in open court and the adverse party may cross-examine them on matters covered during direct examination.[clxxvi] An accused may move for the court to order the prosecution to produce and allow inspection and copying or photographing of evidences in the possession or control of the prosecution or law investigating agencies.[clxxvii] The right to examine, copy or photograph evidences is available to respondents in preliminary investigation.[clxxviii]

i. Laws Relative to Appeal

Any party to a case may appeal from a judgment or final order so long as the accused is not placed in double jeopardy.[clxxix]

In cases where the death penalty[clxxx] is imposed, the same is to be automatically reviewed by the Court of Appeals and, thereafter, the Supreme Court.[clxxxi] When the Court of Appeals finds that the penalty to be imposed is death, reclusion perpetua, or life imprisonment, it shall render judgment but refrain from entering the same. Instead, the Court of Appeals is to certify the same and elevate the record to the Supreme Court for review.[clxxxii]

The Supreme Court held that the right to appeal is not a natural right and is not part of due process. Appeal is a statutory privilege, and may be exercised only in accordance with law. The party who wants to appeal must comply with the requirements of the Rules the Court, otherwise, the right to appeal is lost.[clxxxiii] Thus, an appeal must be made within 15 days from promulgation of judgment or notice of final order and it must be made to the higher court and in the manner specified in the Rules of Court.[clxxxiv]

j. Laws Relative to Coerced Confessions and the Right to Remain Silent

The Constitution states that no person shall be compelled to be a witness against himself.[clxxxv] A person being investigated for an offense has the right to be informed of his right to remain silent. If he wishes to waive his right to remain silent or to counsel, his waiver must be made in writing and in the presence of a counsel.[clxxxvi] The Constitution states that torture, force, violence, threat, intimidation, or other means that violate free will shall not be used.[clxxxvii] Confessions or admissions violating any of the foregoing are inadmissible as evidence.[clxxxviii]

Arresting, detaining, or investigating officers should inform of the right to remain silent and counsel in a language understood by the person arrested, detained, or being investigated. For an extrajudicial confession to be admissible, it should be written and signed in the presence of counsel. If the person has waived his right to counsel, the confession or admission should be signed in the presence of any of the parents, elder brothers and sisters, spouse, mayor, judge, district school supervisor, or priest or minister of the gospel chosen by him.[clxxxix]

The PNP Operational Procedures mandate police officers to inform persons arrested of the right to remain silent and that any statement made could be used against them. The arresting officer should inform of the right to communicate with a lawyer or immediate family.[cxc]

On 08 December 2010, President Aquino ordered the Department of Justice to withdraw the information against 43 health workers thought to be trainees of the New People's Army because of questions on legality of their arrests. The detainees were charged with illegal possession of firearms and explosives. The detainees said, at the time of arrest, they were not informed of the cause of arrest nor of their rights to remain silent or to legal counsel. Some detainees filed complaints with the Commission on Human Rights for torture and ill-treatment.[cxci]

k. Laws Relative to Being Tried or Punished Twice for an Offense

The Constitution prohibits putting a person twice in jeopardy of punishment for the same offense. If an act is punished by a law and an ordinance, conviction or acquittal under either bars another prosecution for the same act.[cxcii]

Under the Rules of Court, previous conviction, acquittal, or termination of a case without consent of the accused is a ground to quash a complaint or information. It bars another prosecution for the offense charged, its attempt or frustration, or for any offense which necessarily includes or is necessarily included in the offense charged in the former complaint or information.[cxciii]

To constitute double jeopardy, the following must be present: (1) there is a complaint or information sufficient in form and substance to sustain a conviction; (2) the same is filed before a court of competent jurisdiction; (3) there is valid arraignment or plea to the charges; and (4) the accused is convicted or acquitted or the case is terminated without his express consent.[cxciv]

Judgments of acquittal are final, not reviewable and immediately executory. The Supreme Court said, after an accused has established his innocence at a first trial, it would be unfair to give the government another opportunity to prove guilt of the accused and to strengthen weaknesses it had at the first trial. The State may challenge an acquittal on the ground that a judgment is void on jurisdictional grounds. However, no review of facts and law on the merits or of the decision's error or correctness is to be made.[cxcv]

I. Laws Relative to the Right to Seek Timely and Effective Remedy before Courts

The Local Government Code provides for a Katarungang Pambarangay System (Barangay or Village Justice System) with authority to call parties to a dispute residing in the same city or municipality for amicable settlement. Some cases are required to be submitted for mediation before they can be considered by the courts.[cxcvi] This system settled more than 4 million cases from 1980 to 2005, around 160,000 cases per year. This number has grown to about double this average in recent years. The Barangay Justice System provides access to justice for people whose needs the formal court system is less able to meet.[cxcvii]

The two major law enforcement agencies are the Philippine National Police (PNP) and the National Bureau of Investigation (NBI). Evidence collected by investigators is turned over to agencies exercising prosecution functions for them to determine "probable cause" to believe that a crime has been committed. The National Prosecution Service is primarily responsible for prosecution. Violations of anti-corruption laws filed at the Sandiganbayan are prosecuted by the Office of the Special Prosecutor of the Office of the Ombudsman.[cxcviii]

The Department of Justice Action Center (DOJAC), a function of the National Prosecution Service and the Public Attorney's Office, provides lawyers and paralegals rendering free legal assistance and other services of the Department of Justice.[cxcix]

The mandate of the Commission on Human Rights includes: investigate human rights violations involving civil and political rights; provide measures for protection of human rights and legal aid services; exercise visitorial powers over jails, prisons, or detention facilities; and monitor government's compliance with international treaty obligations on human rights.[cc] The Commission is observed to have safeguarded its independence and mandate. However more resources are needed for effective investigations.[cci]

The Commission has only investigative and advocacy powers. A bill is pending in Senate proposing to grant it prosecutorial powers.[ccii] UN Rapporteur Philip Alston said that, while it is tempting to give the Commission prosecutorial powers because cases submitted to a prosecutor or ombudsman seldom prosper, the risks outweigh the benefits. There are already agencies prosecuting cases and granting the Commission prosecutory powers would be redundant and would compromise its responsibility to monitor other agencies for human rights compliance. Prosecutory powers would also increase the security risks of the Commission's investigators and witnesses.[cciii]

3. The process by which the laws are enacted and enforced is accessible, fair, efficient, and equally applied.

a. Publicity of Legislative Proceedings

The Constitution requires bills to embrace only one subject, for each to pass three readings on separate days, and for printed copies to be distributed to Members of Congress at least three days before its passage.[cciv] These rules intend to apprise people of subjects of legislation so they may have opportunity to be heard.[ccv] The President may certify to the necessity of the immediate enactment of a bill to

meet a public calamity or emergency; in which event, requisites for readings on separate days and for the bill to be printed in final form and distributed three days before the third reading is dispensed with.[ccvi]

A bill is referred to the appropriate committee during the first reading. If necessary, the committee schedules public hearings, issues public notices and invites resource persons. If the Committee finds a public hearing unnecessary, it schedules the bill for Committee discussions.[ccvii] Both the House of Representatives and the Senate of the Philippines post notices of committee meetings on their websites.

b. Availability of Drafts of Laws and Transcripts

The right to information and, subject to limitations set by law, access to documents pertaining to official acts is recognised in the Constitution.[ccviii] Houses of Congress are required to keep a journal of their proceedings. Except parts affecting national security, the journal is to be published. Each House should also keep a record of its proceedings.[ccix] The records and books of accounts of Congress are to be open to the public.[ccx] Journals are usually abbreviated accounts while records are word-for-word transcripts.[ccxi]

The website of the House of Representatives has information on rules of proceedings, concerns discussed on session days, schedule of committee meetings, and voting and attendance records of House Members.[ccxii] There are information on bills referred to committees, including who the principal author is, its status, history and full text. Congressional records of the House of Representatives are accessible online. *Bills*, *Resolutions*, *Journals*, *Committee Reports* and *Republic Acts* are available on the websites of both Houses of Congress.

c. Thresholds for Legal Standing

In private suits, standing is covered by the "real-parties-in interest" rule in the Rules of Court. The "real-party-in interest" is "the party who stands to be benefited or injured by the judgment in the suit or the party entitled to the avails of the suit."[ccxiii]

As regards "public suits" assailing an illegal official action, taxpayers, voters, concerned citizens, and legislators may be accorded standing to sue when the following are met: (1) the cases involve constitutional issues; (2) for taxpayers, there must be a claim of illegal disbursement of public funds or that the tax measure is unconstitutional; (3) for voters, there must be a showing of obvious interest in the validity of the election law in question; (4) for concerned citizens, there must be a showing that the issues raised are of transcendental importance which must be settled early; and (5) for legislators, there must be a claim that the official action complained of infringes upon their prerogatives as legislators.[ccxiv]

In a decision involving seven (7) consolidated cases questioning the validity of a Presidential Proclamation and a General Order of the President, the Supreme Court applied the "transcendental importance" doctrine and held that all petitioners had locus standi.[ccxv]

While the Supreme Court has taken the liberal stance in cases of transcendental importance, courts of justice settle only "actual controversies involving rights which are legally demandable and enforceable."[ccxvi] Thus, it refused to exercise judicial review in two petitions to nullify a House Resolution calling Congress to convene to consider proposals to amend or revise the Constitution as there was yet no usurpation of power or gross abuse of discretion to warrant an intervention.[ccxvii]

d. Publicity of Decisions and Hearings

The Constitution requires decisions to express the facts and law upon which they are based.[ccxviii] Conclusions of the Supreme Court are reached in consultation before the Court's opinion is written. Members who took no part, dissented, or abstained must state their reasons. These requirements are also mandatory on lower collegiate courts.[ccxix]

The Rules of Court require court proceedings and records to be public, except when the court forbids publicity in the interest of morality or decency.[ccxx] The American Bar Association found proceedings to be open by law and in practice. Supreme Court decisions are published and are public record. Decisions of the trial and appellate court are not published but are public records and anyone

can obtain copies of decisions from the clerk of court. Transcripts of proceedings are public records and copies are available for a fee.[ccxxi]

Decisions and resolutions of the Supreme Court are posted on the website of the Supreme Court. Many decisions and laws are available through private online sources, such as Chan Robles Virtual Law Library and LawPhil Project.

The President, Department of Justice, Senate, media and families of victims called for the Supreme Court to allow live coverage of the trial of the accused in the Maguindanao Massacre.[ccxxii] The Court Administrator said the Supreme Court would consider "conflicting values" and cited a decision disallowing live media coverage of the trial against former President Estrada.[ccxxiii] In said decision, the Court said that media can influence witnesses and judges directly and through the shaping of public opinion. While courts recognise freedom of the press and right to public information, the overriding consideration within the courthouse is still the right of the accused to due process. The Supreme Court explained the right to public trial as follows:

> An accused has a right to a public trial but it is a right that belongs to him, more than anyone else, where his life or liberty can be held critically in balance. A public trial aims to ensure that he is fairly dealt with and would not be unjustly condemned and that his rights are not compromised in secrete conclaves of long ago. A public trial is not synonymous with publicised trial; it only implies that the court doors must be open to those who wish to come, sit in the available seats, conduct themselves with decorum and observe the trial process. In the constitutional sense, a courtroom should have enough facilities for a reasonable number of the public to observe the proceedings, not too small as to render the openness negligible and not too large as to distract the trial participants from their proper functions, who shall then be totally free to report what they have observed during the proceedings.[ccxxiv]

The Court, however, allowed audio-visual recording of the proceedings for documentary purposes only, to be available for public showing after promulgation of the decision.[ccxxv]

e. Laws Relative to Equal Protection of the Law

The Constitution states that no one shall be denied equal protection of the laws.[ccxxvi] The Supreme Court has said that the equal protection clause requires equality among equals as determined according to a valid classification, which has these requisites: (1) classification rests on substantial distinctions; (2) it is germane to the purposes of the law; (3) it is not limited to existing conditions only; and (4) it applies equally to all members of the same class.[ccxxvii]

Penal laws are obligatory on everyone within the Philippines, subject to public international law principles and treaty stipulations.[ccxxviii] Laws on family rights and duties, or status, condition and legal capacity bind all citizens, even though living abroad.[ccxxix]

The Code of Muslim Personal Laws was passed in 1977. It covers personal status, marriage and divorce, matrimonial and family relations, succession and inheritance, and property relations between and among Muslims.[ccxxx] Shari'a Circuit Courts and Shari'a District Courts are established in Islamic regions or provinces to interpret and apply the Code of Muslim Personal Laws. Their decisions are appealable to the Shari'a Appellate Court.[ccxxxi] The Shari'a Appellate Court has, however, not yet been organised; thus, decisions of Shari'a District Courts may be brought to the Supreme Court.[ccxxxii] Muslims who live in places in the Philippines where no Shari'a courts have been organised may file their cases in the Shari'a courts nearest them.[ccxxxiii]

The Indigenous Peoples Rights Act of 1997 says the state recognises customary laws on property rights or relations in determining ownership of ancestral domain.[ccxxxiv] The act recognises the right to use indigenous peoples' commonly accepted justice systems, conflict resolution institutions, peace building processes, and other customary laws and practices.[ccxxxv] This law created the National Commission on Indigenous Peoples, which resolves on appeal disputes involving rights of indigenous peoples and cases relating to the implementation and interpretation of the Indigenous Peoples' Rights Act. The commission hears a case only after remedies under customary laws have been exhausted, as certified by a council of elders or other leaders. Decision of the Commission, like the decisions of other quasi-judicial agencies, may be appealed to the Court of Appeals.[ccxxxvi]

In September 2009, Republic Act 9710 or the Magna Carta of Women became effective. Its Implementing Rules and Regulations became effective in July 2010. This law says that the "State realises that equality of men and women entails the abolition of the unequal structures and practices that perpetuate discrimination and inequality" and that it will "endeavour to develop plans, policies, programs, measures, and mechanisms to address discrimination and inequality in the economic, political, social, and cultural life of women and men."[ccxxxvii] According to the law, the State shall take steps to review, amend and/or repeal existing laws that are discriminatory to women within three (3) years from its effectivity.[ccxxxviii] The IRR states that amendment or repeal of particular discriminatory provisions in the following laws shall be given priority: Family Code of the Philippines; Revised Penal Code; Labor Code; Rules of Court; Code of Muslim Personal Laws; and Republic Act 8353, on removal of criminal liability of rapist when victim marries him.[ccxxxix]

f. Access to Judicial Institutions

The Constitution states that no one is to be denied free access to courts and quasi-judicial bodies and adequate legal assistance because of poverty.[ccxl] The Rules of Court exempt indigents from paying docket and other fees, including transcripts of stenographic notes.[ccxli] Indigent litigants are those (1) whose gross income and that of their immediate family do not exceed double the monthly minimum wage and (2) who do not own real property with a fair market value above PHP300,000.00 pesos. If a person does not meet both requirements, the court should use discretion to determine the prayer for exemption.[ccxlii]

The Public Attorney's Office and some private organisations offer free legal services. The Integrated Bar of the Philippines and law school–based legal aid clinics are prominent legal aid providers. However, the Asian Development Bank observed, even if the counsel for the accused provides free services, a poor family is likely to be unable to pay legal fees. The Free Legal Assistance Group (FLAG) estimated that a criminal case handled pro bono can be as high as PHP70,300, which is three times the average annual savings of a Filipino family. The poor would have difficulty in posting bail, providing travel costs for witnesses, or complying with documentary requirements. For paid representation, private legal practitioners charge acceptance fees of usually more than PHP10,000 and appearance fees per hearing of around PHP1,000.[ccxliii]

The Supreme Court has advocated alternative dispute resolution to improve access to speedy and less expensive dispute settlement. It established the Philippine Mediation Center (PMC) in 2001 and set up 125 PMC units in 12 provinces. From 2002 to 2006, 38,913 cases were referred for mediation, of which 27,094 cases or 70 percent were settled.[ccxliv] The Supreme Court also held a multisector summit to enable the Supreme Court to consider reforms that would increase access to the courts for the poor.[ccxlv]

Congress also passed the Alternative Dispute Resolution Act of 2004 and its Implementing Rules and Regulations (IRR) became effective on 31 December 2009. The IRR of the law is expected to promote party autonomy in out-of-court resolution of disputes, expedite speedy and impartial justice, and unclog court dockets.[ccxlvi]

To increase access to justice, the judiciary implemented the Justice on Wheels (JOW) project. The JOW is a bus with two courtrooms and is deployed to different areas of the country. In 2008, the Enhanced JOW Program released 731 inmates; gave medical and dental services to 5,386 inmates; gave legal aid to 595 inmates; successfully mediated 3,409 cases; and lectured to 6,700 participants.[ccxlvii]

In 2008, responding to a finding that 70% of caseloads of metropolitan trial courts involve small claims, the Court issued the Rule of Procedure on Small Claims Cases involving purely money claims of PHP100,000 and below. Attorneys are not allowed and forms are provided. Decisions are rendered on the first day of hearing and are final and unappealable except by a special civil action of certiorari to the Supreme Court.[ccxlviii]

Depending on the imposable penalty, criminal actions are initiated by filing a complaint with prosecution agencies for preliminary investigation, or directly with Municipal Trial Courts or Municipal Circuit Trial Courts. If the accused was arrested without warrant, an inquest proceeding

is conducted instead.[ccxlix] Resolutions of investigating prosecutors are approved by the provincial or city prosecutor or chief state prosecutor or the Ombudsman or his deputy. Resolutions are reviewable, upon petition, by the Secretary of Justice.[ccl]

On 16 April 2009, then Justice Secretary Alberto Agra, acting on a petition for review, dropped charges against two suspects in the Maguindanao massacre. Prosecutors denounced the Secretary's order and staged a walkout.[ccli] The Chief State Prosecutor, reading a statement on behalf of the National Prosecution Service, said: "We are deeply concerned that the resolution will all the more convince a long skeptical public that our criminal justice system is impotent when the accused are politically influential."[ccliii] On 05 May 2010, Secretary Agra reversed his own resolution after new testimony convinced him of probable cause.[ccliii]

g. Effective, Fair and Equal Enforcement of Laws

UN Rapporteur Philip Alston stated that there was failure to arrest, convict and imprison persons responsible for extrajudicial executions. Law enforcement officials focused on prosecuting civil society leaders rather than killers. The police hesitate to investigate crimes allegedly committed by the military. Prosecutors do not guide police officers in gathering evidence as they determine existence of probable cause and should appear impartial. Limited access to forensic laboratories and experts has resulted to over reliance on testimonies of witnesses. He found the Ombudsman lacking in independence and that it chooses not to conduct investigations unless there is already strong evidence leading to the involvement of a public official. He also observed that trials are delayed and changes of venue on the basis that witnesses have relocated are seldom granted.[ccliv]

On 23 November 2009, 57 people were killed in Maguindanao. Then Mayor Andal Ampatuan Jr., together with about 100 members of their militia and dozens of policemen, allegedly flagged and gunned down a convoy on its way to file a certificate of candidacy for governor.[cclv] Human Rights Watch observed that government has failed to "seriously investigate atrocities by powerful ruling families, ban abusive militia forces, or curtail access of officials to military weaponry."[cclvi] No one had been convicted a year after the massacre. Of the 82 suspects in custody, only 15 were undergoing trial. As of November 2010, 20 police tracker teams were hunting 112 suspects still at large.[cclvii]

The Speaker of the House of Representatives said, beyond the massacre, the issue of private armies should be addressed.[cclviii] Human Rights Watch called attention to the support national government gave ruling families and the impunity their militias enjoy. The military and police were found to provide them with manpower, weapons, and protection from prosecution. Militias have existed since late 1940s; they were organised to defend against communist insurgents and separatist groups. In Maguindanao, paramilitary forces were under the command of the Ampatuan family and were converted into their private army. The militia in Maguindanao is just one of more than an estimated 100 private armies throughout the Philippines.[cclix]

Legislation is necessary to curb abuse of powers granted to local chief executives under the law. The report of the Independent Commission Against Private Armies says:

> (L)ocal executives direct, superintend, oversee, and inspect police units and forces, they also possess administrative and disciplinary power; authority to choose the chief of police; recommend the transfer, reassignment or detail of PNP members outside their respective areas and recommend the appointment of new members of the PNP. Given the extensive areas of authority granted to the local officials, the abuse of such power is not uncommon.[cclx]

h. Laws Relative to Reparation to Victims

There is a Board of Claims under the Department of Justice for victims of unjust imprisonment, detention, or violent crimes. Compensation for unjust imprisonment or detention should not exceed PHP1,000 per month. In all other cases, the maximum amount is only PHP10,000.[cclxi] The Anti-Torture Act of 2009 requires certain agencies to formulate a rehabilitation program for victims of torture and their families. The program should provide for physical, mental, social, psychological healing and development.

Everyone who is liable for a crime is also civilly liable.[cclxii] Civil liability includes restitution, reparation of damage caused and indemnification for consequential damages.[cclxiii] Under the Civil Code, persons who suffer loss because (1) a public employee neglected, without just cause, to perform his official duty, or because (2) a public officer or any individual violated or impaired certain rights and liberties may file for damages.[cclxiv]

In January 2011, a US District Judge in Hawaii approved the distribution of USD1,000 to each of the 7,526 members of a class-action lawsuit for torture, execution and kidnapping under the regime of President Ferdinand Marcos. The distribution provides victims their first opportunity to collect something since they sued in 1986. A USD2-billion judgment against the Marcos estate was rendered in 1995. Disputes over Marcos' property delayed payments to victims; however, 12 victims received compensation checks on 28 February 2011. They are the first group, among thousands of victims, who will receive payments; it has been estimated that payments of about $1,000 will go to 7,526 claimants.[cclxv] Robert Swift, the lead attorney, said the case is groundbreaking because it was the first class-action lawsuit filed anywhere in the world for human rights violations. The case was filed in Hawaii because Marcos fled to Honolulu to live in exile after he was deposed in 1986.[cclxvi] Swift and his Filipino co-counsels, with the assistance of the Commission on Human Rights, will distribute checks to claimants or their heirs.[cclxvii]

Survivors of the "comfort women system" during World War II have asked the Supreme Court to compel the Executive Branch to exercise its constitutional duties and international obligations to ensure their rights to redress. Their petition was denied in April 2010 by the Supreme Court and motions for the reconsideration of the decision have been filed.[cclxviii] Among the prayers in the supplemental motion for reconsideration is for the Supreme Court to order the "Secretary of Foreign Affairs and the Executive Secretary to espouse the claims of Filipina 'comfort women', specifically demanding an official apology from the State of Japan and legal compensation for the rapes Filipina 'comfort women' endured from the hands of the Japanese military in World War II."[cclxix]

i. Practices Relative to Protection of Victims and Witnesses

The Witness Protection, Security and Benefit Program is administered by the National Prosecution Service of the Department of Justice. In 2009, the program admitted 148 witnesses. It was instrumental in obtaining 254 convictions out of 266 cases with primary witnesses supported by the program.[cclxx]

Failure to reform the witness protection program is considered a significant cause of impunity for extralegal killings in the Philippines. The absence of witnesses is said to cause the failure of 8 out of 10 cases involving extrajudicial killings to move from initial investigation to prosecution.[cclxxi]

Housing, health and education benefits under the program are insufficient.[cclxxii] The ALRC observed that no interim protection is available for persons being screened as witnesses and there is no time limitation for resolution of applications for protection. The law lacks provisions for breaches of confidentiality by persons who are not part of the government and who put witnesses at risk by exposing their identities.[cclxxiii] At-risk family members are not admitted into the program. When a case fails to prosper, the witness is expelled from the program although he may still be at risk. Further, prosecutors are expected to be impartial in the early phases of a case, thus making them reluctant to propose witness protection.[cclxxiv]

Policemen and military cannot be admitted into the program; thus, it would be difficult for them to testify against their superiors.[cclxxv]

On 14 June 2010, Suwaib Upham, a witness to the 2009 Maguindanao massacre whose application for inclusion in the protection program was rejected in April 2010, was murdered. His killing is attributed to failure to protect his identity and lack of accountability in preserving confidential information.[cclxxvi]

4. Justice is administered by competent, impartial and independent judiciary and justice institutions.

a. Independence and Accountability of Prosecutors, Judges and Judicial Officers

A Supreme Court justice must be at least forty years old and a judge of a lower court or engaged in law practice in the Philippines for at least fifteen years. All members of the judiciary are required to be of "proven competence, integrity, probity, and independence".[cclxxvii]

The Judicial and Bar Council (JBC), which recommends appointees to the judiciary, is composed of the Chief Justice, the Secretary of Justice, and a representative of Congress. It also has the following members, who are all appointed by the President with the consent of the Commission on Appointments: a representative of the Integrated Bar, a professor of law, a retired member of the Supreme Court, and a representative of the private sector.[cclxxviii] Whenever there is a vacancy in the judiciary, the President appoints from a list of at least 3 nominees submitted by the JBC. These appointments need no confirmation.[cclxxix] Vacancies in the Supreme Court are to be filled within 90 days from occurrence. Vacancies in lower courts are to be appointed within ninety days from submission of JBC's list.[cclxxx]

The Rules of the JBC require publication of the list of applicants or recommendees once in a newspaper of general circulation in the Philippines and once in a newspaper circulating in the province or city where the vacancy is located. Copies of the list are posted in three places where the vacancy is located and furnished to the Integrated Bar of the Philippines, and when practicable, to major non-governmental organisations.[cclxxxi] The website of the JBC publishes vacancies in the judiciary, the list of applicants, interview schedules, and announcements of appointments.

A 2005 Social Weather Stations survey showed that 53% of judges and 63% of lawyers were dissatisfied with the selection process of appointees to the judiciary.[cclxxxii]

In December 2010, the Supreme Court declared a "Truth Commission" unconstitutional which was created by President Aquino for violating the equal protection clause.[cclxxxiii] The Secretary of Justice said that former President Arroyo's "wise investments" in the high court was paying off.[cclxxxiv] An official from the public information office of the Supreme Court, however, said that, of the fifteen Justices, only one was not appointed by former President Arroyo. She said four of the five Justices who dissented were appointees of the former President; this means that the case was resolved based on what the Justices felt was right and based on the law.[cclxxxv]

Anent the current Justices of the Supreme Court being mostly appointees of former President Arroyo, the Supreme Court said as follows:

> Neither the outgoing President nor the present Members of the Court had arranged the current situation to happen and to evolve as it has. None of the Members of the Court could have prevented the Members composing the Court when she assumed the Presidency about a decade ago from retiring during her prolonged term and tenure, for their retirements were mandatory.[cclxxxvi]

Members of the Supreme Court and lower courts hold office until they reach 70 years or become incapacitated to discharge their duties. The Supreme Court has the power to discipline judges of lower courts.[cclxxxvii] Members of the Supreme Court are removable only by impeachment.[cclxxxviii] Salaries of justices and judges are fixed by law and may not be decreased during their continuance in office.[cclxxxix] Justices and judges may not be designated to any agency performing quasi-judicial or administrative functions.[ccxc]

The Supreme Court has the power to issue rules concerning pleading, practice, and procedure in all courts and admission to the practice of law, appoint all officials and employees of the judiciary, and exercise administrative supervision over all courts and personnel.[ccxci]

In 2004, the Supreme Court adopted a New Code of Judicial Conduct for the Philippine Judiciary. The New Code adopts the Bangalore Code of Judicial Conduct and contains 6 canons: (1) independence; (2) integrity; (3) impartiality; (4) propriety; (5) equality, and (6) competence and diligence. Court personnel should abide by the Code of Conduct for Court Personnel. All lawyers should observe the Code of Professional Responsibility and notaries public the 2004 Rules on Notarial Practice.

In 2008, Court of Appeals Justice Vicente Q. Roxas was dismissed and four other CA Justices subjected to disciplinary action.[ccxcii] In 2009, the Supreme Court disciplined 66 Regional Trial Court judges; 27 Metropolitan Trial Court, Municipal Trial Court in Cities, Municipal Trial Court, and Municipal Circuit Trial Court judges; and 181 first- and second-level court personnel. It administratively disciplined 19 Supreme Court employees and dropped three others from the roll for being absent without leave. The Supreme Court also imposed a PhP500,000 fine on a retired Supreme Court justice for grave misconduct for leaking a confidential internal document. One hundred twenty nine members of the Bar were disciplined for various administrative offenses.[ccxciii]

On 28 April 2010, the Supreme Court denied the petition of survivors of the "comfort women system" during World War II who were seeking redress. It was discovered that portions of the Supreme Court's decision lifted from works of International Law authors without acknowledging them. It was also alleged that the decision twisted what the authors said in their works. Thus, a motion was filed showing that the misrepresentation "erroneously laid the foundation for the Court's decision to deny the petition".[ccxciv]

On 15 October 2010, the Supreme Court dismissed charges of plagiarism, twisting of cited materials, and gross neglect against Justice Mariano C. del Castillo. The Court held that Justice del Castillo's researcher accidentally deleted the attributions.[ccxcv] In her dissenting opinion, Justice Maria Lourdes Sereno, said as follows:

> Unless reconsidered, this Court would unfortunately be remembered as the Court that made "malicious intent" an indispensable element of plagiarism and that made computer-keying errors an exculpatory fact in charges of plagiarism, without clarifying whether its ruling applies only to situations of judicial decision-making or to other written intellectual activity. It will also weaken this Court's disciplinary authority — the essence of which proceeds from its moral authority — over the bench and bar.[ccxcvi]

The law faculty of the University of the Philippines issued a statement asking the ponente of the decision, Justice Mariano del Castillo, to resign from the Court. The statement said that, instead of acting with urgency, the Court delayed its resolution for almost seven years and dismissed the petition "based on polluted sources".[ccxcvii]

On 19 October 2010, the Supreme Court issued a Resolution directing members of the law faculty of the University of the Philippines to show why they should not be disciplined as lawyers. The Court found their statement "unnecessary, uncalled for and a rash act of misplaced vigilance". A motion for reconsideration of the decision allegedly containing plagiarised materials was still pending and the Court had previously held that any publication pending a suit tending to influence a decision is contempt of court. According to the Supreme Court, it should be permitted to dispose of its business "in an orderly manner, free from outside interference obstructive of its functions and tending to embarrass the administration of justice."[ccxcviii]

Although Justice del Castillo was cleared by the Supreme Court, some members of the House of Representatives have initiated an impeachment complaint against him.[ccxcix]

b. Training and Resources for Prosecutors, Judges and Judicial Officers

Continuing legal education is required of all members of the Integrated Bar of the Philippines.[ccc] Prosecutors receive continuing legal education for free. In 2009, the National Prosecution Service distributed electronic copies of "Laws and Jurisprudence for Philippine Prosecutors" nationwide and conducted basic orientation seminars, which were attended by at least 300 new prosecutors.[ccci]

The primary concern of the National Prosecution Service is severe manpower deficiency. In 2009, the National Prosecution Service had 1,908 prosecution officers out of 2,406 existing plantilla positions (21% vacancy). It had 1,643 administrative support staff out of 1,945 plantilla positions (16% vacancy). Local government units and other sources augmented around 1,000 support staff of the National Prosecution Service.[cccii]

Each prosecution officer conducted an average of 183 preliminary investigations. Around 900,000 to 950,000 criminal cases were prosecuted in the trial courts; thus, each prosecutor handled around 472 to 498 court cases for 2009.[ccciii]

The Philippine Judicial Academy (PHILJA) is the "training school for justices, judges, court personnel, lawyers and aspirants to judicial posts". No appointee may commence his functions without completing its prescribed courses. The Judicial and Bar Council, which recommends appointments and promotions, is directed by law to consider the participation of prospective judges in the programs of PHILJA.[ccciv]

The Supreme Court distributes books and manuals and disseminates updates of jurisprudence to judges. Judges with internet access can use the Court's online e-library; others receive periodic CDs with recent decisions.[cccv]

The Constitution grants the judiciary fiscal autonomy. Appropriations may not be reduced by the legislature below the amount appropriated the previous year and should be automatically and regularly released.[cccvi]

In 2007, the Judiciary received 0.76% of the national budget; 0.88% in 2008; 0.94% in 2009; and 0.87% in 2010.[cccvii] The Court Administrator said that judges have not been receiving full wages and allowances since 2007. Retired judges and justices continue to wait for their benefits and pensions. Courtrooms are dilapidated. Most local courts have only two computers when the ideal number is at least six units. Budget constraints prevent the judiciary from hiring enough personnel and judges to improve case disposition rates. Each judge services around 50,000 inhabitants; the ideal ratio is 1 judge for every 10,000 constituents. The Family Courts Act of 1997, which appropriated funds for creation of child and family courts remain unimplemented and unfunded.[cccviii]

From December 2004, when vacancy rate exceeded 30%, vacancies declined to about 19.7% by the end of 2007. The decline seems to be due to legislation that authorised a 100% increase in compensation for judges and the recruiting effort of the JBC.[cccvix] However, by the end of 2009, vacancy rate increased to 22.74% (522 vacancies out of 2,295 available judicial positions), with distribution as follows:[cccx]

Supreme Court	1
Court of Appeals	6
Sandiganbayan	2
Court of Tax Appeals	0
Regional Trial Courts	191
Metropolitan Trial Courts	23
Municipal Trial Courts in Cities	32
Municipal Trial Courts	96
Municipal Circuit Trial Courts	147
Shari'a District Courts	5
Shari'a Circuit Courts	19
TOTAL	522

Around 85.0% of the annual national budget for the judiciary goes to salaries and allowances, 13.0% for maintenance and other operating expenses, and 1.5% for capital outlays. The judiciary retains and spends fees it collects and deposits these revenues in the Judicial

Development Fund (JDF). Eighty percent of the JDF is allocated to personnel costs and 20% to capital outlays. The JDF augmented the funds of judiciary by around PHP1 billion (USD20 million) annually in recent years.[cccxi]

The President reduced the judiciary's proposed 2011 budget of around PHP26 billion to around PHP14 billion of the total PHP1.645-trillion national budget. The administration said that all agencies did not get the amounts they wanted because of the country's fiscal situation.[cccxii]

Prosecutors of National Prosecution Service of the Department of Justice, however, received over PHP25 million for their salary increase. The increase in compensation is in accordance with Republic Act 10071 (Prosecution Service Act of 2010).[cccxiii] In 2007, Republic Act 9406 granted officials and lawyers of the Public Attorney's Office special allowances of not more than 100% of their basic salary. Special allowances amounting to a 100% increase in compensation, which increase was phased over a 4-year period, were allowed to justices, judges and court officials with the equivalent rank of Court of Appeals justices or Regional Trial Court judges in 2003 by Republic Act 9227.

The budgets of principal quasi-judicial agencies are also insubstantial. As was found by Asian Development Bank to be the pattern in the justice sector, personal services consume the greatest part of the budget of quasi-judicial bodies, with very small amounts dedicated to capital investment.[cccxiv]

c. Impartial Judicial Proceedings

Graft and corruption in the judiciary is measured primarily through public opinion surveys. Within the judiciary, graft and corruption is mainly indicated by information on administrative cases filed against its members. It is accepted, however, that the judiciary's operations are vulnerable to corrupt practices. Thus, since January 2007, the Office of the Chief Justice has been requiring reports on the issuances of Temporary Restraining Orders (TROs) by appellate courts to address allegations of corruption in its issuance. The Supreme Court is also planning to establish a system of lifestyle-checks on clerks of court and court sheriffs. An Integrity Unit will also be established to ensure the proper management of funds at the regional level.[cccxv]

The Supreme Court launched the Strengthening the Integrity of the Judiciary (SIJ) Project in 2008. The SIJ Project is the result of the Integrity Development Review for the Judiciary, which aims to eliminate opportunities for corruption by examining integrity measures and identifying institutional weaknesses.[cccxvi]

Survey results released in 2005 showed the following: 6% of lawyers surveyed said that "very many" judges are corrupt, 18% said "many" are corrupt, and 37% answered that "some" are corrupt. Among judges surveyed, only 1% said "very many" judges are corrupt, 6% said "many", and 31% said "some". Forty-nine percent of lawyers said they were aware of a case where a judge took a bribe; however, only 8% of such lawyers said they reported the bribery, mainly because they could not prove it.[cccxvii]

Survey also showed that 69% of lawyers asked were satisfied with the general performance of trial judges in the Philippines. Seventy-five percent of judges asserted that the poor can get justice under the judicial system; however, only 53% of lawyers agree that the poor can get justice. Eighty-two percent of judges are satisfied with judicial procedure in the Philippines; while only 49% of lawyers are satisfied with judicial procedure.[cccxviii]

In a Political and Economic Risk Consultancy (PERC) survey, the judicial system of the Philippines scored 6.10, where zero represented the best performance and 10 the worst. The Philippines ranked 6th among Asian judicial systems. PERC said that although Philippines is a democracy, expatriates did not look favourably on their judicial system because of corruption. Executives working in Asia were asked to rate the judicial systems in the countries they reside according to protection of intellectual property rights, corruption, transparency, enforcement of laws, freedom from political interference, and experience and educational standards of lawyers and judges.[cccxix]

d. Competence and Sufficiency of Lawyers for Accused Persons

The Public Attorney's Office defends indigent accused persons. It extends free legal services to indigent persons or to their immediate families in civil, administrative, labor and criminal cases.[cccxx]

In 2009, the Public Attorney's Office manpower of 1,407 lawyers served 4,154,587 clients. PAO lawyer-client average ratio for clients is 1:2,953; PAO lawyer-client average ratio for cases handled is 1:420. Through PAO's Jail Visitation and Decongestion Program, 5,342 inmates were released in 2009.[cccxxi]

The Public Attorney's Office faces the following concerns: fast turnover and heavy workload of its lawyers; scarcity of office equipment; and lack of attractive retirement benefits. [cccxxii] The law requires the ratio of one public attorney to an organised sala.[cccxxiii] However, as of December 2009, its 1,407 lawyers handled criminal and civil cases before 2,182 courts nationwide.[cccxxiv]

The Supreme Court passed a Rule requiring lawyers to render a minimum of sixty (60) hours of free legal aid services per year.[cccxxv] This Rule should have taken effect in July 2009, but its effectivity was deferred.[cccxxvi] Chapters of the Integrated Bar of the Philippines have opposed the program.[cccxxvii] There is a law allowing a lawyer or professional partnerships to deduct from the gross income the amount that could have been collected for actual free legal services.[cccxxviii]

Negligence and mistakes of counsel are generally binding on the client. The Supreme Court, however, has allowed the following exceptions: (1) where the reckless or gross negligence of counsel deprives client of due process; (2) when application of the rule will result in outright deprivation of the client's liberty or property; or (3) where interests of justice so require. The Supreme Court has said that a clear abandonment of the client's cause by counsel must be shown. Simple negligence will not justify the annulment of proceedings that already took place.[cccxxix]

e. Safety and Security for Accused, Prosecutors, and Judicial Officers

According to the National Union of People's Lawyers, at least 15 lawyers and judges were killed in 2009 in attacks believed to be linked to their work.[cccxxx]

From 1999 to 2008, 16 judges were killed. The Supreme Court has taken measures to curb work-related killings of judges. In 2004, the heinous crimes courts were abolished because of low caseloads and they made heinous crimes court judges easily identifiable. In 2005, the Supreme Court allowed judges who receive direct threats to apply for protective security. The Court signed an agreement with the PNP in 2005 for them to coordinate in the processing of permits to carry firearms of members of the judiciary. In August 2007, the Supreme Court designated the Deputy Court Administrator and an officer of the National Bureau of Investigation (NBI) as contact persons in case of threats. In January 2008, the Supreme Court and the NBI created Task Force Judiciary Protection to provide protection from threats and investigate killings or attempted killings.[cccxxxi]

Atty. Allan Contado, former NBI Liaison Officer to the Supreme Court Task Force for Judiciary Protection, said they conducted security assessments of some courts and did a pilot project in Cebu City for other courts to pattern security measures after. Metal detectors were recommended but a low budget prevents the courts from purchasing them.[cccxxxii]

Judges have received security trainings on threats assessment, prevention, firearms orientation, marksmanship and technical proficiency. In 2008, PHP10 million was set aside by the Supreme Court for judges who wished to avail of a hand gun loan.[cccxxxiii] Further, PHP1 million was set aside by the Supreme Court as reward money for information that can lead to the arrest and conviction of the perpetrators of killings and attempts on the life of members of the judiciary.[cccxxxiv]

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The Republic of Singapore

Singapore

Cheah Wui Ling

Snapshot Box

Country Name	Singapore
Independence	1965
Historical Background	see below
Size	712.4 sq km
Land Boundaries	
Population	5076700
Demography	> 15 yrs – 654400; 15-64 yrs - 2,778900; 65 yrs & over 2 - 338400
Ethnic Groups	Chinese (74.1%), Malays (13.4%), Indians (9.2%), Others (3.3%).
Languages	English (official language), Mandarin, Malay, Tamil, other dialects.
Religion	Buddhism/Taoism (44.2%), Christianity (18.3%), Islam (14.7%), Hinduism (5.1%), Other Religions (0.7%), No Religion (17.0%).
Education and Literacy	95.9%
Welfare	Singapore maintains a social security system that is structured on "self-reliance". As described by the Singapore authorities in its Universal Periodic Review Report, this system comprises of (1) housing, (2) universal healthcare coverage, (3) retirement savings (4) Workfare, and (5) the Government's Community Care Endowment Fund (Comcare Fund). The first three components are secured through the Central Provident Fund, a "mandatory, defined contribution social security scheme that helps Singaporeans save for housing, medical and retirement needs." The CPF also contributes to Workfare. (Singapore Universal Periodic Review Report, paras. 59-60)
Gross Domestic Product (GDP)	($m) 303,652.2 at current market price see Ministry of Trade and Industry website *(http://app.mti.gov.sg/default.asp?id=725)*
Membership in International Organizations and Human Rights Human Rights Treaties ratified & incorporated by local legislation	(see below)
	Human rights treaties (as listed by the UN Office of High Commissioner for Human Rights) [i] Convention on the Rights of the Child Optional Protocol on the Involvement of Children in Armed Conflict Convention on the Elimination of All Forms of Discrimination against Women International initiatives/organizations (see Ministry of Foreign Affairs Website http://app.mfa.gov.sg/2006/idx_fp.asp?web_id=9) AMED APEC ASEAN ASEM FEALAC G77 & NAM The Commonwealth UN UNSC WTO

1. History

Singapore was "founded" by Sir Stamford Raffles in 1819 and became a British Crown Colony in 1867. As a result of constitutional negotiations, the British Parliament passed the State of Singapore Act on 1 August 1958. This granted Singapore internal self-governance. The newly elected Singapore government decided on a merger with the Federation of Malaya to achieve complete political independence and to guarantee Singapore's economic survival. However, due to disintegrating political relations between the leaders of Singapore and the Federation, Singapore left the Federation of Malaysia on 9 August 1965.

2. State Institutions

The Singapore Constitution sets out the basic structure of Parliament, the Executive, and the Judiciary. Article 23 of the Constitution expressly recognises "executive authority" to be vested in the President. This power is to be exercised in line with the Constitution by the President, the Cabinet, or any Minister authorized by the Cabinet. Article 17 of the Singapore Constitution recognises the President as the "Head of State" whose "powers and functions" are set out in the Constitution and any other written law. Prior to 1991, the Singapore President was a constitutional Head of State with very limited powers in line with the Westminster tradition which Singapore inherited from the British. In 1991, the Constitution was amended to make this an elected office and to give the President additional powers. The President has the right to refuse to give assent on certain public service appointments and topics that are considered particularly important, such as that relating to the use of governmental reserves and preventive detention authorized by Part XII of the Constitution. These powers have been described as "negative" or reactive in nature, as the President does not have the power to initiate decision-making processes.

Article 24 (2) of the Singapore Constitution empowers the Cabinet to have "general direction and control of the Government." It also requires Cabinet to be "collectively responsible" to Parliament. The Prime Minister is appointed in accordance with Article 25 (1) of the Constitution which requires the President to appoint a Member of Parliament who in his judgment is likely to command the confidence of the majority of the Members of Parliament. In line with the Westminster tradition, the leader of the ruling majority political party is appointed as Prime Minister as he is deemed to command such "confidence" by virtue of being the leader of the dominant party in Parliament. Once appointed, the Prime Minister and his Cabinet holds office for the duration of the elected government and until the dissolution of Parliament for election purposes. The Cabinet is composed of the Prime Minister and his Ministers. Article 28 (1) of the Constitution empowers the Prime Minister to appoint Ministers and Article 30 of the Constitution gives him the power to direct, revoke, or vary the responsibility of the Minister. In brief, the Prime Minister is empowered to select and replace his ministers.

Article 38 of Singapore's Constitution vests "legislative power" in the Legislature, which is to be composed of the President and Parliament. The Constitution provides for different types of Members of Parliament (MPs) – elected, non-constituency, and nominated members. Elected members represent either Single Member or Group Representation Constituencies (GRCs). The concept of GRCs was initially established to ensure multi-racial representation in Singapore. They refer to electoral areas represented by teams of 4-6 MPs. Each team must have a member from a minority race. Elected MPs are elected into Parliament during General Elections on a first-past-the-post basis. Non-constituency MPs refer to members from opposition political parties who were not voted in by the first-past-the-post system. Nominated MPs are appointed by the Singapore President on the recommendation of a Special Select Committee of Parliament. They are appointed for two and a half years and are intended to be independent and non-partisan.

Article 93 of the Singapore Constitution vests "judicial power" in the "Supreme Court" and "such subordinate courts as may be provided by any written law for the time being in force." Article 94 (1) of the Constitution expressly recognises the "Supreme Court" composed of the "Court of Appeal" and the "High Court". The Court of Appeal functions as Singapore's final court of appeal. It also recognises that the "jurisdiction" and "powers" of the Supreme Court is as set out in the Constitution or "any written law". Further details of the Supreme Court's role and relationship with the Subordinate Courts are set out in the Supreme Court of Judicature Act. Supreme Court

judges are composed of the Chief Justice, the Judges of Appeal, Judges, and Judicial Commissioners. The structure and powers of the Subordinate Courts of Singapore are set out in the Subordinate Courts Act. It is composed of the District Courts, Magistrate Courts, the Juvenile Court, the Coroner's Court and the Small Claims Tribunals. Some District Courts and Magistrate Courts function as specialist courts such as the Community Court and the Family Court. Section 9 (1) and 10 (1) of the Subordinate Courts Act authorizes the President to appoint District Judges and Magistrates on the recommendation of the Chief Justice. These judges hold concurrent appointments as Deputy Registrars, Coroners, and Referees of the Small Claims Tribunals. The Subordinate Courts deal with a significant caseload. In 2009, it heard altogether 19 636 cases.

The Singapore Constitution also establishes a variety of institutions that play an advisory role in various subject matters, such as the Advisory Board that makes recommendations on preventive detention issues and the Presidential Council for Minority Rights which considers and reports on "matters affecting persons of any racial or religious community in Singapore as may be referred to the Council by Parliament or the Government" and reviews legislative bills and subsidiary legislation for any "differentiating measure" (Articles 76 & 77, Singapore Constitution).

Administration of Justice Grid

No. of judges in country	75 Subordinate Court judges (as listed in Singapore govt directory – 1 April 2010); 18 Supreme Court Judges (http://app.supremecourt.gov.sg/default.aspx?pgID=40)
No. of lawyers in country	3800
Annual bar intake? Costs / fees	200 Ordinary members: If more than 12 years have elapsed from the date of admission as an advocate and solicitor or appointment as a legal officer, whichever is the earlier date: $374.50 If not less than 7 years but not more than 12 years have elapsed from the date of admission as an advocate and solicitor or appointment as a legal officer, whichever is the earlier date: $288.90 If less than 7 years have elapsed from the date of admission as an advocate and solicitor or appointment as a legal officer; whichever is the earlier date: 128.40 (http://www.sal.org.sg/content/LI_mbrshp_OM.aspx)
Standard length of time for training/qualification	Preparatory Course and Singapore Bar Examinations - 18 teaching weeks, 2 examination preparation weeks and 2 examination weeks; Training period – 6 months (*http://www.sile.org.sg/adm_prep_course_part_b.html; http://www.sile.org.sg/adm_process_practice_training_period.html*)
Availability of post-qualification training	Yes. Continuing Professional Development.
Average length of time from arrest to trial (criminal)	
Average length of trials (from opening to judgment)	N/A
Accessibility of individual rulings to public	Yes. Full court decisions available on Lawnet. Recent judgments are available to the general public by link on the public websites of the Supreme Court and the Subordinate Court as well as Singapore Law Watch's public website.
Appeals structure	See below for general court structure as well as court processes.

Cases before national human rights commission or other independent commissions (if applicable)	N/A
Complaints filed against police, judiciary or other state institutions (per year)? How many resolved?	N/A. The CPIB annual report provides figures related to corruption (see main report).

Court Structure

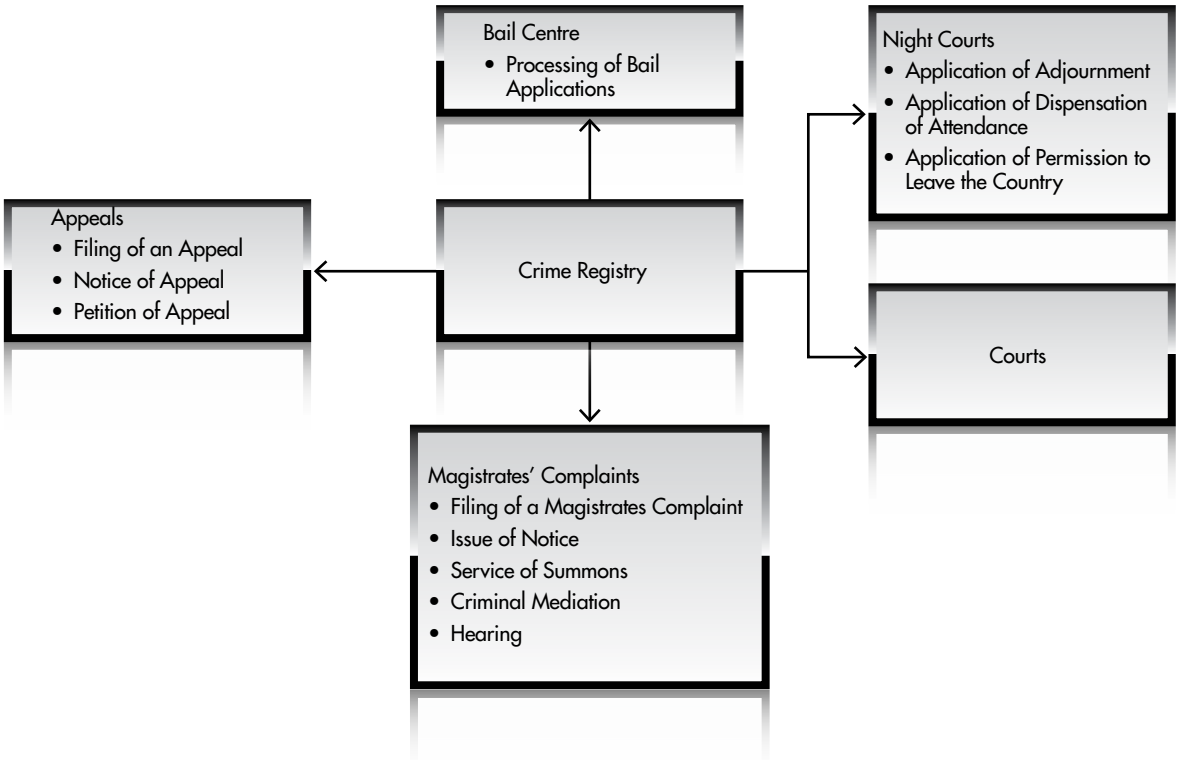
A. Supreme Court

(http://app.supremecourt.gov.sg/default.aspx?pgID=43)
Court of Appeal
High Court

SUBORDINATE COURTS (from 2009 Subordinate Courts Annual Report, p14)

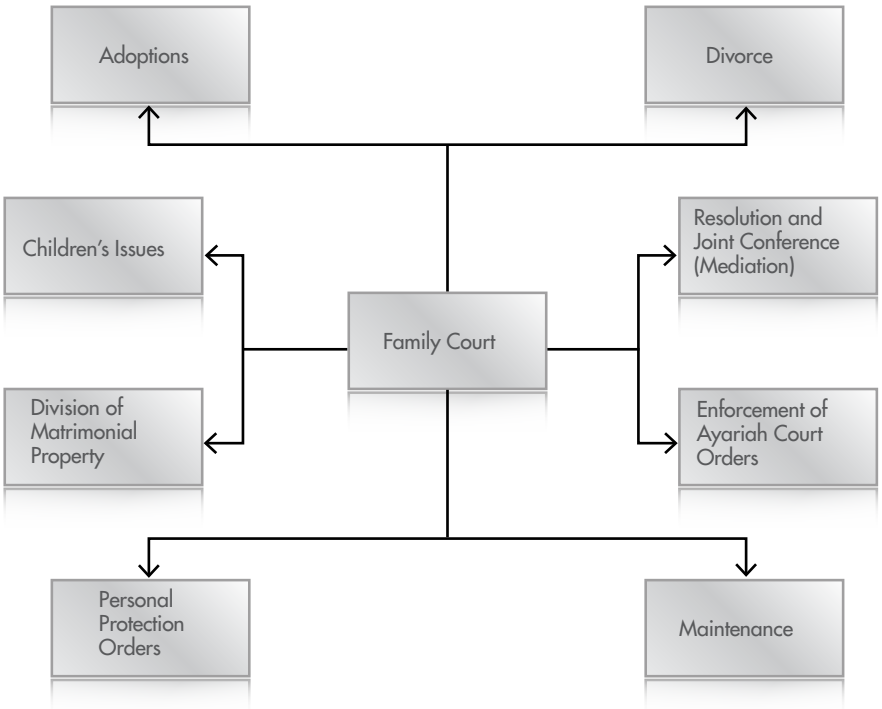
Civil Justice Division	Family & Juvenile Justice Division	Criminal Justice Division
Civil Justice Division • Civil Trial Courts • Bailiffs Section • Primary Dispute Resolution Centre • Small Claims Tribunals • Civil Registry	Family and Juvenile Justice Division • Family Trial Courts • Juvenile Court • Counselling & Psychological Services • Family Resolutions Chambers • Maintenance Mediation Chambers • Family Registry	Criminal Justice Division • Criminal Trial Courts • Specialist Courts - Bail Court - Centralised Pre-Trial Conference Court - Community Court - Coroner's Court - Criminal Mentions Courts-NeighbourhoodCourt - Night Courts - Traffic Court • Crime Registry

Criminal Justice Process Chart
(*http://app.subcourts.gov.sg/criminal/index.aspx*)

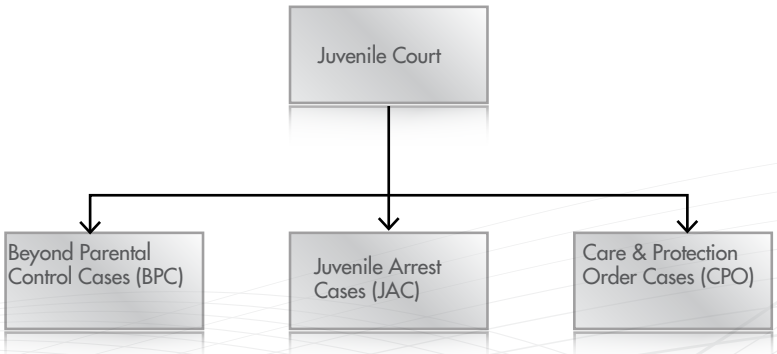


Civil Justice Workflow Chart
(*http://app.subcourts.gov.sg/civil/index.aspx***)**

Civil Justice Workflow Chart
(*http://app.subcourts.gov.sg/civil/index.aspx*)



Juvenile Justice Process Flowchart
(*http://app.subcourts.gov.sg/juvenile/index.aspx*)



Overview

This section describes how the Rule of Law is presented and discussed within Singapore's public arena, focusing in particular on recent developments. State officials continue to subscribe to a relatively "thin" version of the Rule of Law that emphasizes adherence to formal procedure and equal implementation of the law as opposed to a "thick" version of the Rule of Law that may include human rights standards or other substantive principles. In 2009, the Chief Justice emphasised that the "Rule of Law simply means supremacy of the law, without reference to whether the law is just or unjust. The law must apply to all and be above all."[ii] In contrast, opposition members and local organisations in Singapore advocate a "thicker" version of the Rule of Law which includes human rights standards and other substantive ideals.

The "thin" Rule of Law version, as subscribed to by state officials, is nevertheless associated with certain substantive ideas, such as good governance, honest administration, fair if firm treatment of the individual, and a responsive approach to changing societal needs. The Rule of Law requires state officials to be bound by the law and strictly observe the law. As further explained below, the Singapore authorities take corrupt practices seriously and the public service is required to comply with high standards of conduct. Priority is given to ensuring society's uniform and consistent adherence to the law's letter, and this explains the Government's deterrent approach towards crime. During parliamentary debates on amendments to the Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits) Act, the Government highlighted that "money laundering can undermine the Rule of Law and legal systems, erode financial markets' integrity and damage countries' reputation."[iii]

The executive is afforded a significant amount of discretion under a number of laws in Singapore. This enables the executive to take quick responses that are tailored to individual cases. Anticipating criticism on the discretion afforded to the executive under the Public Order Act (POA) during its 2009 parliamentary debate, the Government emphasised that these discretionary powers do "not mean rule by man as opposed to rule in accordance with the law. But it means striking the balance in such a way that quick, effective, efficient action is possible to take our country forward." For example, during a 2007 parliamentary debate on amendments to the Employment of Foreign Workers Act, questions and concerns were raised regarding the need for work permit decisions to be subject to administrative principles of decision-making and judicial review.[iv] In response, the Government justified its decision to exclude certain permit decisions of the Minister and Controller from judicial review on grounds of national security.

Local organisations and MPs have called for greater accountability of executive discretion. For example, during parliamentary debates on permit and licensing schemes established under the Public Order Act and Employment of Foreign Workers Act, MPs emphasised the need for permit and licensing decisions to be subject to judicial review in line with the Rule of Law.[v] State officials themselves recognise that the Rule of Law requires executive discretion to be subject to checks and balances. The Chief Justice emphasised how the Rule of Law "implies that all powers of the state have limits."[vi] This idea of limited power in turn highlights the important role to be played by the judiciary in serving as a check on executive and legislative power. The former Attorney-General Walter Woon noted that "the Rule of Law in Singapore depends on three things: firstly, the independence of the judiciary; secondly, the incorruptibility of the enforcement authorities; and thirdly, the integrity and competence of the Legal Service."[vii]

The Rule of Law is viewed as an important guarantee of stability in the context of Singapore's multi-racial society. The Government has observed that in "a multi-religious society, the primacy of the secular law is especially vital. If we are to have maximum space to pursue our interests with equal basic protection, we must also observe equal basic liability and obligations. Not everyone likes this or that law. But everyone must abide by the law and respect its authority. Civil disobedience cannot be acceptable. In fact, more than even the political interest groups, the religious individual may lay greater claim to a moral basis to choose to disobey laws which are not in accord with his beliefs. If we allow this, our society will be torn apart."[viii]

While the Singapore authorities generally promote a "thin" version of the Rule of Law, it has nevertheless recognised a number of substantive principles as falling within the scope of this "thin" version. In 2007 the Government confirmed that it "is absolutely committed to upholding the presumption of innocence, as a core principle in our commitment to the Rule of Law."[ix] Singapore courts have repeatedly confirmed that the Constitution's reference to "law' includes principles of natural justice. The Rule of Law is viewed the responsibility of society. During a 2007 parliamentary debate, when discussing the duty of certain private individuals to report suspicious financial transactions, the Government observed that "everyone has a role in upholding and maintaining the rule of law and the reputation and integrity of Singapore's financial sector."

The Singapore Government takes a flexible and responsive approach towards legal change. Laws are frequently revisited and amended to keep up with local and global developments. When the case at hand involves significant legal changes, the Government has undertaken significant public consultations. For example, consultations were undertaken with respect to the 2010 Criminal Procedure Code (CPC) and the 2011 amendments of the Employment Agencies Act. When introducing the CPC in Parliament, the Singapore Minister of Law affirmed the Government's commitment to the common objective of ensuring a "fair criminal justice system," recognising this as a "continuing exercise" by which it would "continue to look at best practices, make changes where necessary, and seek to ensure that the system is fair and robust."[x] Consultations were also undertaken in preparing for Singapore's Universal Periodic Review.[xi] Such consultations have been welcomed by civil society actors, who have indicated their desire for more "interaction" during these exercises.[xii]

A. Rule of Law Indicators

1. The Government and its officials and agents are accountable under the law.

a. Are the powers of the government are defined and limited by a constitution or other fundamental law?

As explained in the Introduction (Snapshot) to this report, the Singapore Constitution sets out the functions of the Executive, Parliament, and the Judiciary. Part IV of the Constitution sets out a list of individual liberties: the liberty of the person (Article 9); the prohibition on slavery and forced labour (Article 10); the protection against retrospective criminal laws and repeated trials (Article 11); equal protection (Article 12); the prohibition of banishment and freedom of movement (Article 13); freedom of speech, assembly and association (Article 14); freedom of religion (Article 15); and rights in respect of education (Article 16). Some of these liberties apply only to Singapore citizens: the prohibition of banishment and freedom of movement (Article 13); freedom of speech, assembly and association (Article 14); freedom of religion (Article 15); and rights in respect of education (Article 16). Other liberties are stated as generally applying to "every person".

Article 4 states that the Constitution is to be the "supreme law" of Singapore. Any law "inconsistent" with the Constitution is therefore to be considered void to the extent of its inconsistency. Ordinary laws and legal amendments need to be supported by a simple parliamentary majority, but Article 5 (1) of the Constitution requires a constitutional amendment bill to be "supported on the Second and Third Readings by votes of not less than two-thirds of the total number of the elected Members of Parliament".

In its 1966 report the Wee Chong Jin Constitutional Commission recommended that Part IV's guarantees of fundamental freedoms be subject to a more stringent amendment procedure.[xiii] The Commission proposed that any amendment of Part IV be subject to a two-thirds parliamentary vote and a two-thirds national referendum vote.[xiv] This recommendation was not adopted. Given the

realities of Singapore's political landscape and the ruling party's over-whelming majority in Parliament, it is relatively easy to pass a constitutional amendment by two-thirds parliamentary vote.

b. Can the fundamental law may be amended or suspended only in accordance with the rules and procedures set forth in the fundamental law?

Part XI expressly authorises Parliament and the Executive to act contrary to certain parts of the Constitution in situations of subversion or emergency. This part of the Constitution was originally designed to counter the communist insurgency that Singapore faced during her early years of independence.[xv] Article 149 gives Parliament the power to pass legislative acts that may contravene certain constitutional provisions if the act expressly recite that "action has been taken or threatened by any substantial body of persons, whether inside or outside Singapore — (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; (b) to excite disaffection against the President or the Government; (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or (e) which is prejudicial to the security of Singapore to address certain subversive situations." Laws passed pursuant to Article 149 are considered valid even if they are inconsistent with certain provisions of the Constitution, namely, Article 5, Article 9, Article 11, Article 12, Article 13, or Article 14.[xvi] Such laws are also valid even if they fall outside the legislative powers of Parliament.[xvii] In addition, questions on the validity of executive decisions or acts taken pursuant to a law passed under Article 149 are to be determined solely by the same law.[xviii] These laws are also not to be considered in contravention of Article 93's vesting of "judicial powers" in the Judiciary, regardless of the extent to which they restrict or exclude judicial review.[xix]

Article 150 addresses situations of "grave emergency' in which "the security or economic life of Singapore is threatened."[xx] When the President is "satisfied" that such a situation exists, he may issue a Proclamation of Emergency which sets into motion a number of exceptional consequences.[xxi] If the President's Proclamation is issued while Parliament was not sitting, the President should summon Parliament as soon as practicable.[xxii] Until Parliament convenes, the President may promulgate ordinances which have the force of law if he is "satisfied that immediate action is required."[xxiii] Once Parliament convenes, the Proclamation and any ordinance that was promulgated should be presented to Parliament which may decide to annul it by resolution.[xxiv] During the emergency period, Parliament may pass laws inconsistent with any part of the Constitution - except for a number of specifically identified provisions (Articles 22E, 22H, 144(2) and 148A) - as long as it "appears to Parliament that the law is required by reason of the emergency."[xxv] Constitutional provisions which continue to apply generally relate to the President's discretion, religion, citizenship, or language.[xxvi]

Article 149 and Article 150 in effect authorises the executive to "suspend" constitutional provisions by permitting the executive to take action and decisions contrary to constitutional provisions in certain circumstances. Article 151 puts in place minimum protective standards that are to be observed when the preventive detention of individuals is undertaken under Articles 149 and Articles 150. Article 151 (1) (a) requires the detaining authority to inform any detainee "as soon as may be" of detention grounds and allegations of fact. This obligation is, however, subject to considerations of national security.[xxvii] The detainee should also be given the opportunity to make representations against the preventive detention order.[xxviii] Article 151 (3) requires the establishment of an Advisory Board. This Board is to be composed of a chairman, who shall be appointed by the President and who shall be or have been, or be qualified to be, a Judge of the Supreme Court; and two other members, who shall be appointed by the President after consultation with the Chief Justice. The Board is to be "constituted for the purposes of" Article 151; it hears the representations of detainees and makes recommendations on their release or continued detention. Singapore citizens may not be preventively detained for more than 3 months unless the Advisory Board has considered their representations and made recommendations to the President.[xxix] If the Board has recommended the detainee's release but the Executive disagrees, the detainee should be released unless the President authorizes the detainee's continued detention.[xxx]

c. Are government officials and agents, including police and judicial officers, accountable under the law for official misconduct, including abuse of office for private gain, acts that exceed their authority, and violations of fundamental rights?

State officials who have transgressed the law may face criminal or administrative proceedings. In 2009 Singapore ratified the United Nations Convention against Corruption (UNCAC).[xxxi] According to the 2010 Transparency International's Corruption Perception Index, Singapore was jointly ranked with Denmark and New Zealand as the least corrupt of countries within a list of 178 countries.[xxxii] The Prevention of Corruption Act (PCA) empowers officers from the Corrupt Practices Investigation Bureau (CPIB) to investigate and arrest individuals involved in corruption. Section 5 of the PCA adopts a broad definition of corruption or "gratification". "Gratification" includes: "(a) money or any gift, loan, fee, reward, commission, valuable security or other property or interest in property of any description, whether movable or immovable; (b) any office, employment or contract; (c) any payment, release, discharge of liquidation of any loan, obligation or other liability whatsoever, whether in whole or in part; (d) any other service, favour, advantage of any description whatsoever, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary or penal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and (e) any offer, undertaking or promise of any gratification within the meaning of paragraphs a, b, c and d."

The PCA takes a serious view of corruption involving government officials. Section 8 states that in cases where "gratification has been paid or given to or received by a person in the employment of the Government or any department thereof or of a public body by or from a person or agent of a person who has or seeks to have any dealing with the Government or any department thereof or any public body", there is to be presumption that such "gratification" was "paid or given and received corruptly as an inducement or reward." In other words, the accused has the burden of proving that the "gratification" was not undertaken "corruptly as an inducement or reward." PCA offences attract significant levels of punishment. For example, anyone found guilty of soliciting or receiving gratification may be convicted of a fine of up to $100 000 or to imprisonment for up to five years or both.[xxxiii]

According to its 2009/2010 report, the CPIB received a total of 921 complaints in 2009, out of which 66% were corruption cases.[xxxiv] Individuals made these complaints to the CPIB through mail, fax, the CPIB's 24-hour toll-free line, personal visits to the CPIB, and the CPIB's internet website. Complaints may be made on an anonymous basis, and all complaints are subject to a preliminary examination by the CPIB's Complaints Evaluation Committee that decides whether an investigation should be opened. Out of the 921 complaints received in 2009, a total of 234 cases were registered for investigations. Out of these registered cases, 71% concerned the private sector. 229 of these cases went to court and resulted in 179 convictions, 4 acquittals, and 5 withdrawals of charges. A public perception survey conducted by the CPIB indicates general public confidence in the CPIB's work.[xxxv] 85% of those surveyed rated corruption control in Singapore as excellent, very good, or good. 90% strongly agreed or agreed that the CPIB is effective in maintaining low corruption levels in Singapore. 87% strongly agreed or agreed that the CPIB has done well in solving corruption offences.

The Government has emphasised the fact that the Singapore Public Service prioritizes maintaining a "track record of clean and effective governance."[xxxvi] During a 2010 parliamentary debate, the Government described the internal procedures put in place by the Civil Service to facilitate the report of wrongful practices by its officers.[xxxviii] Reports on abusive or corrupt practices may be made by Civil Service Officers to their supervisors, the Human Resources department, or the Permanent Secretary or the Head of Civil Service. Matters involving discipline may be reported to the Public Service Commission. To prevent fraudulent practices, all 64 of Singapore's statutory boards are required to establish internal audit committees and undergo internal and external auditing. The Auditor General's Office provides a second check by focusing on selective areas of internal audit in each audit cycle, and receives about 50 cases of possible wrongdoings every year. These auditing practices are revisited on a regular basis. In 2010, a high-profile

fraud by civil servants prompted the Ministry of Finance to launch a review of public sector procurement rules.[xxxviii] The individuals involved were criminally charged, and the agencies concerned undertook internal investigations. The Government also set up independent Internal Review Panels to identify how the fraud took place and to prevent future similar occurrences. When questioned on this case in Parliament, the Government explained that it has tried to "strike a balance between adding more layers of checks and the resultant reduction in operational efficiency."[xxxix]

2. Laws and procedure for arrest, detention and punishment are publicly available, lawful and not arbitrary; and preserve the fundamental rights to physical integrity, liberty and security of persons, and procedural fairness in law.

a. Are the criminal laws and procedures, including administrative rules that provide for preventative detention or otherwise have penal effect, published and widely accessible in a form that is up to date and available in all official languages?

All laws passed by Parliament are available free-of-charge on the Attorney-General Chamber's website.[xl] These are made available in the English language. Currently, copies of subsidiary legislation are not available on this public website. However, the Attorney-General's Chambers plans to launch, sometime in 2011, a new database that is expected to allow the public free access to subsidiary legislation.[xli] Important subsidiary legislations are currently made available on the public websites of the respective ministries or government agencies.[xlii]

b. Are these laws accessible, understandable, non-retroactive, applied in a consistent and predictable way to everyone equally, including the government authorities, and consistent with the other applicable law?

As mentioned above, Singapore officials emphasise the equal application of laws consistent with the Rule of Law. For certain vulnerable groups, additional steps may be required to ensure substantive access to, and protection of, the law. Migrant workers are a particularly vulnerable group in Singapore. This section deals with access and implementation problems faced by migrant workers who are unfamiliar with Singapore's legal system. The Ministry of Manpower has sought to increase awareness among foreign workers by publishing information kits in foreign languages, running a hotline, and requiring compulsory attendance of a safety awareness course for newly arrived foreign domestic workers. Though channels for complaints exist, practical problems stand in the way of their full utilisation. Migrant workers often do not have access to the documentary evidence that is needed to prove their claims against their employers.[xliii] As noted by local organisations working with migrant workers, employers may withhold employment records from migrant workers. Employers may also unilaterally cancel their workers' work permit and repatriate them once they learn that they are facing a complaint. There is also a more direct problem of ensuring that employers obey existing laws. As pointed out by local organisations, the Employment of Foreign Manpower Act and the Passports Act prohibit employers from retaining their worker's identity documents. In practice many employers continue to retain the identity documents of their employees.[xliv]

With respect to the consistent and predictable application of laws in Singapore, local organisations and opposition members have made critical observations regarding the exercise of discretionary executive powers, particularly in the case of permit schemes governing public processions and assemblies.[xlv] Public processions and assemblies are currently governed by the 2009 Public Order Act (POA). Section 5 of the POA prohibits the organisation of public assemblies and processions unless the Commissioner is notified and a permit granted. Such public assemblies and processions are broadly defined in the POA. Assembly is defined as "a gathering or meeting (whether or not comprising any lecture, talk, address, debate or discussion) of persons the purpose (or one of the purposes) of which is (a) to demonstrate support for or opposition to the views or actions of any person, group of persons or any government; (b) to publicise a cause or campaign; or (c) to mark or commemorate any event."[xlvi] This includes "a demonstration by a person alone for any such purpose referred to in paragraph (a), (b) or (c)." A procession is defined as "a march, parade or other procession (whether or not involving the use of vehicles or other conveyances) (a) comprising 2 or more persons gathered at a place of assembly to move from that place substantially as a body of persons in succession proceeding by a common route

or routes; and (b) the purpose (or one of the purposes) of which is (i) to demonstrate support for or opposition to the views or actions of any person, group of persons or any government; (ii) to publicise a cause or campaign; or (iii) to mark or commemorate any event."[xlvii] It "includes any assembly held in conjunction with such procession, and a march by a person alone for any such purpose referred to in paragraph (b) (i), (ii) or (iii)."

The POA sets out grounds upon which the Commissioner may decide to refuse granting a permit. Section 7 (2) states that permits may be refused if the Commissioner has "reasonable ground for apprehending that" the said assembly or procession may "(a) occasion public disorder, or damage to public or private property; (b) create a public nuisance; (c) give rise to an obstruction in any public road; (d) place the safety of any person in jeopardy; (e) cause feelings of enmity, hatred, ill-will or hostility between different groups in Singapore; (f) glorify the commission or preparation (whether in the past, in the future or generally) of acts of terrorism or any offence or otherwise have the effect of directly or indirectly encouraging or otherwise inducing members of the public to commit, prepare or instigate acts of terrorism or such an offence; or (g) be held within or enter a prohibited area, or an area to which an order or a notification under section 13 applies." The Commissioner's decision may be appealed to the Minister whose decision "shall be final".[xlviii] During the POA's debate in Parliament, an MP questioned if the Minister's decision is subject to judicial review.[xlix] The Minister of Law confirmed that the POA "does not preclude judicial review."

The POA's conditions upon which permits may be denied are relatively broad, and this may give rise to impressions of uneven implementation. More importantly, the POA's broad conditions do not provide adequate guidance to those seeking a permit. For example, in 2010 the well-established local migrant worker organisation HOME requested a permit to organise a procession to commemorate the 20th anniversary of the UN International Convention for the Protection of Migrant Workers and Members of their Families.[l] Among the activities proposed were the distribution of flyers by 20 volunteers and the driving of a lorry along select routes to highlight the dangers faced by migrant workers transported on the open deck of lorries, which is a common practice in Singapore. HOME's permit application was refused. In an open letter appealing the permit's denial to the Minister, HOME highlighted events organised by other organisations on a larger scale but which had nevertheless been permitted, explaining that it was not clear why their own "modest activity" had been prohibited.

c. Do these laws authorize administrative/ preventative detention without charge or trial during or outside a genuine state of emergency?

As mentioned above, Part IX of the Constitution foresees the possibility of preventive detention when dealing with situations of subversion or grave emergency pursuant to Article 149 and Article 150. Passed pursuant to Article 149, the Internal Security Act (ISA) is subject to the minimal protective measures set out in Article 151. ISA detentions fall under the mandate of the Internal Security Department whose powers are largely set out in the Criminal Procedure Code, the Internal Security Act, and the Maintenance of Religious Harmony Act. In its 2011 Universal Periodic Review report, the Singapore state authorities explained that the ISA is used "to pre-emptively neutralise threats to national security such as racial and religious extremists, espionage and subversion."[li] It emphasised that preventive detention of JI members under the ISA "have effectively neutralised the group in Singapore."[lii]

According to its public website, the ISD commits itself "working towards greater transparency in the dissemination of information connected to its work."[liii] In 2002, it established the ISD Heritage Centre. Educational tours to the centre may be organised.[liv] ISD officers have met with over 53 000 people to talk about their work. The ISD website publishes the details of certain cases: the communist insurgency from the late 1940s to the 1980s; race riots in 1950; religious extremism aimed at causing communal unrest in the 1980s; terrorist threats, the most recent of which were crack-downs against Jemaah Islamiyah in the 2000s; and espionage cases. Some statistics are also made publicly available. For example, the ISD website reports that there are currently 37 individuals being detained for terrorism-related activities in support of the JI and or the MILF. Information on select individual cases is also provided to the public via press releases. For example, the Government released information on ISA arrests made in the wake of September

11.[lv] These press releases are generally brief; among details included are the names of detained individuals, the grounds for their arrest, the length of their detention, and their release if applicable. During a 2007 parliamentary session, the Government explained that it is not possible to publicise all ISA detention cases as this may compromise on-going operations or seriously harm national interests.[lvi] As of 2007, a total of 54 individuals have been detained under the ISA and 39 remain detained since 1999.[lvii]

The Criminal Law (Temporary Provisions) Act (CLTPA) was enacted in 1955, and was originally intended to counter the threat of communist insurgency.[lviii] Today, it is primarily used against secret society members, drug traffickers, and individuals involved in organised crime, such as loansharking.[lix] Article 30 of the CLTPA notes that when the Minister "is satisfied" that an individual "has been associated with activities of a criminal nature", the Minister may, with the consent of the Public Prosecutor, detain the individual for a period not exceeding twelve months if he is "satisfied" that such detention is "necessary" for "public safety, peace and good order". The CLTPA needs to be renewed every five years by Parliament, and it last came up for parliamentary renewal in 2010. As an alternative to detention under the CLTPA, the Minister may order an individual to be subject to police supervision for a period not exceeding three years if he is "satisfied" that this is "necessary".

Every order is to be submitted by the Minister to an advisory committee together with a written statement of the grounds on which the order is based. This committee is to then submit a written report and recommendations to the President who will consider the report and decide on the order's cancellation, confirmation, or amendment. According to Article 39 of the CLTPA, these advisory committees are appointed by the Minister and compose of at least two people who are "prominent private citizens, who are also respected senior lawyers." During the 2010 parliamentary debate on the CLTPA's renewal, the Government described the review procedure applicable to CLTPA detentions.[lx] As of 2010, six advisory committees have been appointed under the CLTPA. Four of these committees are responsible for considering fresh orders. Another advisory committee, named the Review Committee, considers all detention orders on an annual basis. A different advisory committee, named the Review Board, considers cases of detention extending beyond ten years. All these committees are composed of different members. Since 1999, 60 to 80 detention orders were issued each year. In 2008, 64 detention orders and six police supervision orders were issued.

In its 2011 Universal Periodic Review report, the Government emphasised that detainees are "not held in secret", have their detention "reviewed regularly", are "treated humanely", and "allowed to have regular family visits."[lxi] In addition independent boards composed of "50 Justices of the Peace and community leaders" undertake unannounced visits to detention centres.[lxii] Local organisations have criticised the ISA's historical use in cases of "political detentions".[lxiii] However, they note that "[s]ince the detentions of the alleged "Marxist conspiracy" in 1987, there have been no known political detentions under the ISA" and "ISA detentions have been in connection with alleged terrorist-related activities and alleged radicals."[lxiv] Some local organisations have called for "the amendment of the ISA and the CLTPA, to comply with international norms pertaining to transparency and natural justice in cases of preventive detention."[lxv] Others have taken a stronger stand against preventive detention and called for the ISA and CLTPA's abolishment and replacement.[lxvi]

d. Do these laws protect accused persons from arbitrary or extra-legal treatment or punishment, including inhumane treatment, torture, arbitrary arrest, detention without charge or trial and extra-judicial killing by the Sate? Is the right to habeas corpus limited in any circumstance?

Article 9 (1) of the Singapore Constitution expressly prohibits a person to be "deprived of his life or personal liberty save in accordance with law." Article 9 (2) of the Constitution states that where "a complaint is made to the High Court or any Judge thereof that a person is being unlawfully detained, the Court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the Court and release him." This power of the High Court is expressly recognised in the Supreme Court of Judicature Act as the power to issue an "order for review of detention".[lxvii] It should be noted that this order was formerly known as the writ of habeas corpus.

Article 9 (4) of the Constitution requires that where "a person is arrested and not released, he shall, without unreasonable delay, and in any case within 48 hours (excluding the time of any necessary journey), be produced before a Magistrate, in person or by way of video-conferencing link (or other similar technology) in accordance with law, and shall not be further detained in custody without the Magistrate's authority." It should be noted that Article 9 was amended in 2009 to allow an individual to be produced before a Magistrate "by way of video-conferencing link (or any similar technology)." This amendment was proposed by the Government in light of advancements in technology and its potential to save manpower resources. Though Parliament eventually adopted this amendment, concerns raised during its debate because the accused person's actual physical presence was seen as crucial to ensuring that the Magistrate is able to accurately determine if the accused has been subject to coercion or abuse.[lxviii]

Once probable cause is shown by the individual, Singapore courts have no discretion to refuse an order for review of detention.[lxix] The order only applies to detentions that are "unlawful" in nature. This has been interpreted by Singapore courts as excluding previous procedural irregularities. In the preventive detention case of *Lee Mau Seng v Minister for Home Affairs*, the Singapore High Court found that detainee had been wrongfully denied access to counsel.[lxx] However, it held that this by itself did not make his detention "unlawful". The individual could seek other remedies for this illegality but the writ of habeas corpus, as the order for review of detention was formerly known as, was not applicable. Since then, the same principle has been applied in an ordinary criminal law case. In *Son Kaewsa & Ors v Superintendent of Changi Prison & Anor*, the Singapore High Court confirmed that "the court is not concerned with past illegality unless such illegality subsists and vitiates the present detention."[lxxi] In that case, the individuals concerned had been held in custody on the basis of several remand orders, a number of which were ultra vires.

Defendants charged with drug trafficking offences pursuant to the Misuse of Drugs Act (MDA) and facing the mandatory death penalty (MDP) have argued that the MDP is "arbitrary" in nature as it prevents judges from differentiating between cases which fall within the category of cases for which the MDP is required by law, and this situation contravenes the right to equal treatment as guaranteed under Article 12 of the Singapore Constitution.[lxxii] Local organisations have called for change to the MDP. In 2009, the Law Society recommended "a provision to empower the sentencing court to deviate from the mandatory death penalty and impose life imprisonment in any other circumstance deemed appropriate and necessary by the court."[lxxiii] The MDP's constitutionality has been challenged in several local cases, and was most recently considered by the Singapore Court of Appeal in the 2010 case of *Yong Vui Kong v Public Prosecutor*.[lxxiv] The Court of Appeal held that Singapore's Constitution did not expressly or implicitly prohibit the MDP. While it acknowledged that the Constitution should as far as possible be interpreted in line with Singapore's international legal obligations, including customary international law, it affirmed the court's earlier position that a domestic statute would prevail over CIL in the event of any conflict. It emphasised: "If any change in relation to the MDP (or the death penalty generally) is to be effected, that has to be done by Parliament and not by the courts under the guise of constitutional interpretation."[lxxv] In its Universal Periodic Review report, the Singapore Government explained that "Singapore considers capital punishment as a criminal justice issue, rather than a human rights issue, that remains legal under international law."[lxxvi] It highlighted that capital punishment applies "only for the most serious crimes", "sends a strong signal to would-be offenders", and has a "deterring" effect.[lxxvii]

While Singapore continues to maintain a tough approach towards crimes such as drug trafficking, it has further developed a rehabilitative approach towards less serious offences. In its Universal Periodic Review report, the Singapore state referred to comprehensive rehabilitative programmes established by the Singapore Prison Service, affirming that it "believes strongly in the rehabilitation and reintegration of prisoners."[lxxviii] Such a rehabilitative approach has resulted in a reduction in recidivism rates from 44.4% in 2000 to 25.1% in 2008.[lxxix] More information on the efficacy of certain programmes, such as Reformative Training Centres (RTC), has been requested by local organisations. Specifically, the Association of Criminal Lawyers in Singapore has highlighted stories of abuse among inmates in RTCs and have suggested that an "in depth study" of RTCs be undertaken to "test the veracity

of this hearsay."[lxxx] The new Criminal Procedure Code introduces a number of new community-based sentences (CBS) as alternatives to traditional forms of punishment. The Association for Criminal Lawyers in Singapore referred to these developments as "excellent" and reflective of "a paradigm shift towards a more enlightened sentencing philosophy."[lxxxi] CBS applies to offences with rehabilitative potential, such as regulatory offences, offences involving younger offenders, and offenders with specific and minor mental conditions. The new CPC recognises five types of CBS orders: (a) a mandatory treatment order (MTO); (b) a day reporting order (DRO); (c) a community work order (CWO); (d) a community service order (CSO); and (e) a short detention order (SDO). A court may pass a CBS order that comprises of one or more of these orders.

e. Do these laws provide for the presumption of innocence?

The Constitution does not expressly recognise the presumption of innocence. However, Article 9 (1) guarantees that "[n]o person shall be deprived of his life or personal liberty saves in accordance with law." The phrase "in accordance with law" has been judicially interpreted to include principles of natural justice. In the case of *Haw Tua Tau v Public Prosecutor*, the Privy Council held that a "fundamental" natural justice rule in the area of criminal law is that one should not be punished for an offence "unless it has been established to the satisfaction of an independent and unbiased tribunal" that the individual had committed it.[lxxxii] The Government has confirmed its commitment to the principle of proof beyond reasonable doubt as part of the Rule of Law.[lxxxiii]

A number of Singapore's criminal laws reverse the burden of proof. Upon the establishment of certain facts by the prosecutor, the burden of proof then shifts to the accused person. For example, the Misuse of Drugs Act provides that upon establishing that the accused person possesses a certain amount of drugs, it is then for the accused person to show on a balance of probabilities that he was not engaged in drug trafficking.[lxxxiv] In the 1981 case of *Ong Ah Chuan v PP*, the Privy Council held that such reversals of the burden of proof are not contrary to Article 9 as such "[p]resumptions of this kind are a common feature of modern legislation concerning the possession and use of things that present danger to society like addictive drugs, explosives, armed and ammunition."[lxxxv]

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

This section deals with how the individual's right to counsel, as stated in Article 9 (3) of the Constitution, has been interpreted and implemented in practice. The framework addressing legal representation for indigent persons will be addressed below in section D.4. Article 9 (3) of the Singapore Constitution guarantees an individual's right to counsel upon his arrest, recognising that "[w]here a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice." The text of the Constitution does not state when the accused has access to counsel. Singapore courts have held that the individual's right to counsel is not "immediate". Instead, it is to be exercised in "reasonable time" in light of investigative needs. In the 1994 case of *Jasbir Singh v PP* the Singapore High Court held that access to counsel may be denied for two weeks consistent with an accused person's right to counsel.[lxxxvi] In the 2006 case of *Leong Siew Chor v Public Prosecutor* the Singapore Court of Appeal held that the denial of counsel for 19 days after arrest was "justifiable in the circumstances" and was a "question of balancing an accused person's rights against the public interest that crime be effectively investigated."[lxxxvii] The court noted the statement concerned had been taken five days after the accused person's arrest.

The Singapore Government most recently defended this position in Parliament, arguing that it "strikes a balance between the rights of the accused and the public interest in ensuring thorough and objective investigations."[lxxxviii] It also cited a recent police study that showed that more than 90% of arrested persons are released within 48 hours to prevent unnecessary remand. Since 2007, the police have implemented an "access to counsel" scheme that grants the accused access to counsel before the remand period ends. The Government has argued that affording immediate access to counsel may result in, at least some cases, the individual being advised not to

cooperate with the police. In deciding when counsel should be afforded, there needs to be consideration of law enforcement interests as well as the "public interest in making sure that the statements taken are taken in a process with integrity and the statements represent the truth."[lxxxix] Singapore lawyers have consistently argued that there is a need to ensure that accused persons' have earlier access to counsel. The Law Society has suggested that a literal reading of Article 9 (3) requires access to be granted "as soon as may be" and that while public interest may at times require access to be reasonably denied, this should be an exception rather than the rule.[xc] It has suggested that when the accused states that he or she wishes to exercise his right to counsel, he or she should be given up to two hours to contact a lawyer during office hours. Investigative authorities should only start interviewing the accused after the accused has consulted with counsel.[xci]

The text of Article 9 (3) does not expressly require that the accused be informed that he has a right to counsel. In the 1998 case of *Rajeevan Edakalavan v PP* the Singapore High Court held that the constitutional right to counsel is "a negative right" because the Constitution's text states that an accused "shall be allowed" access to counsel but does not require the accused to be informed of his right to counsel. [xcii] The court refused to find a positive obligation to inform the accused of this right, noting that to do so would "be tantamount to judicial legislation." In proposing that that this right be expressly included into the new CPC, the Law Society has suggested that it is "counterintuitive to have a right to counsel without also clearly stipulating when the accused is to be informed of his right to consult a lawyer, and how he can go about contacting a lawyer."[xciii] It has suggested that arresting officers be required to verbally inform the accused of this right or show this information to the accused in writing.[xciv]

In *Rajeevan* the Singapore High Court held that the constitutional right to counsel involves "the right to a counsel of one's choice."[xcv] This means that the accused has the "constitutional right to select a legal practitioner who he can consult and who can defend him." This right is, however, not absolute in nature. According to the Singapore High Court in the 1996 case of *Balasundram v PP,* the sole fact that counsel had failed to turn up or was not willing or able to act does not automatically mean that the accused's right to counsel has been violated.[xcvi] To determine whether such a violation has taken place, the court will examine whether there has been a "miscarriage of justice". The High Court observed that the accused did in fact have access to a lawyer who was "willing and able" to conduct the case though she was not of his choice, he had displayed a "plainly unreasonable" attitude, and the trial judge had also proceeded "very carefully" with the trial. Upon considering all this, the High Court concluded that there had been "no failure of justice" and that the accused's right to counsel had not been violated.

Singapore courts have also considered the scope of the individual's right to counsel in the trial context. In the 2008 case of *Tan Chor Jin v PP*, the accused had first elected to be unrepresented but subsequently changed his mind before closing submissions.[xcvii] The Singapore Court of Appeal noted that the constitutional right to counsel "cannot be said to be untrammelled or enduring and/or unwaivable right." A denial of counsel would "[p]rima facie" and "almost invariably be considered to be unduly prejudicial to the accused and, quite plainly, unconstitutional." But much would depend on the facts of the case, and it was "necessary to balance the rights of and prejudice to the accused, on the one hand, and to the other parties involved in the proceedings, on the other." In deciding whether an accused has "waived" his right to counsel, a nuanced and "holistic approach" was to be adopted in considering "the competing interests (if any) of other concerned parties" and "whether any undue unfairness or prejudice" was caused to the accused. Importantly, the Court of Appeal noted that this presupposes "that the accused has already been given an opportunity to avail himself or his right to counsel." The Law Society has observed that these principles should equally apply to pre-trial proceedings and that steps should be taken to ensure that the accused understands the consequences of waiving any right to counsel before or during police interrogations. [xcviii] Specifically, the Law Society proposed that "a standard form be prepared wherein all necessary information on the right to counsel be set out (this form could also serve the purpose of informing arrested persons of their right to counsel) and that arrested persons who wish to waive their right to counsel be made to sign an acknowledgement that they are making an informed decision to do so and have done so of their own accord."[xcix]

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

Article 9 (3) sets out the rights of an arrested individual to be informed "as soon as may be" of the grounds of his or her arrest. Apart from the grounds of his or her arrest, an accused person should be given access to adequate information that will enable him or her to conduct a defence. The new CPC provides the accused with wider access to evidence that is in the prosecutor's possession. In Singapore's Universal Periodic Review report, these changes were presented as intended to "enhance the rights of accused persons by structuring and formalising the pre-trial discovery of the evidence to be used at trial."[c] Specifically, the defence is to have access to statements made by the accused and recorded by law enforcement officers "in relation to the charge of charges which the prosecution intends to proceed with at the trial."[ci] This discovery framework applies to all cases in the High Court and the majority of cases in the District Court. On questioned why this right of discovery does not apply to all cases, the Government noted that the Subordinate Courts deal with around 250000 charges a year.[cii] In Parliament, questions were raised as to why prosecutorial witness statements are not covered by the discovery process. The Government explained that this exclusion was necessary for public policy reasons as witnesses may be unwilling to come forward if they are aware that their statements are supplied to the accused and witnesses may themselves be threatened by the accused.[ciii]

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

The right to a speedy trial is not expressly recognised by the Singapore Constitution. In cases of undue delay resulting in an injustice to the accused, the High Court may exercise its powers of revision and order a retrial. In the case of *Yunani bin Abdul Hamid v PP*, it was more than a decade before the accused was charged, pled guilty, and was convicted.[civ] The Singapore High Court held that this lapse of time affected the accused person's ability to conduct his defence and contributed to pressurizing him to pleading guilty. As a result, the High Court exercised its powers of criminal revision and sent the case back to the lower courts for a retrial. Singapore courts have also dismissed overly delayed prosecutorial appeals. In *PP v Saroop Singh*, the High Court dismissed an appeal by the prosecutor because 17 years had passed since the offence.[cv] In deciding whether to exercise its discretion, the High Court considered who was responsible for the delay and whether a fair trial was possible.

The CPC sets out the procedure according to which criminal trials are to be conducted and recognises the accused person's ability to present evidence and question witnesses. Part XII of the CPC sets out the procedure to be followed during trial. Section 230 (e) recognises that upon the prosecutor examining his witnesses, "each of them may in turn be cross-examined by the accused and every co-accused, after which the prosecutor may re-examine them." Section 230 (j) states that upon considering the prosecution's case, if "the court is of the view that there is some evidence which is not inherently incredible and which satisfies each and every element of the charge as framed by the prosecutor or as altered or framed by the court, the court must call on the accused to give his defence". Section 230 (n) recognises that the accused may then decide to plead guilty or give his defence. Section 230 (p) states that the accused may give evidence in his own defence and sets out the relevant sequence of events, including his or her cross-examination by any other co-accused. This is to be followed "by any witness for the defence of the accused shall give evidence and they may in turn be cross-examined first by the other co-accused (if any) and then by the prosecutor after which he may be re-examined."

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

The Constitution does not expressly recognise a convicted person's right to appeal. The procedure for undertaking such an appeal is set out in applicable laws and the rules of court. In order to understand the appeal system, it should be noted that the judiciary in Singapore comprises of the Supreme Court, which is composed of the High

Court and the Court of Appeal, and the Subordinate Courts. In general, the High Court exercises original jurisdiction in "more serious offences" such as "murder, culpable homicide not amounting to murder, drug trafficking, arms offences, kidnapping, rape and carnal intercourse."[cvi] For cases in which the High Court exercises original jurisdiction, an appeal may be made to the Court of Appeal. If original jurisdiction is exercised by the Subordinate Courts, an appeal may be made to the High Court.

The procedure for criminal appeals is set out in the CPC. According to Section 374 of the CPC, an appeal "may lie on a question of fact or a question of law or on a question of mixed fact and law." A convicted person may make an appeal "against his conviction, the sentence imposed on him or an order of the trial court."[cvii] However, it does limit the right to appeal if the convicted person pled guilty before the trial court. Section 375 states that "an accused who has pleaded guilty and has been convicted on that plea in accordance with this Code may appeal only against the extent or legality of the sentence." The CPC sets out in detail the procedure for such appeal. For example, Section 377 requires a notice for appeal to be lodged by the appellant within 14 days with the Registrar of the original trial court.

In addition to its appellate powers, the High Court is empowered to exercise powers of revision in criminal matters. Section 23 and Section 26 of the Supreme Court of Judicature Act recognises that the High Court may "exercise powers of revision in respect of criminal proceedings and matters in subordinate courts" and "call for and examine the record of any criminal proceeding before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of that subordinate court.". Section 400 of the CPC elaborates on the procedure for such revision. The Singapore High Court has emphasised that the criminal revision process is not intended to act as a "backdoor appeal", and is to be used "sparingly" and instances of "serious injustice".[cviii]

j. Do these laws prohibit the use of coerced confessions as a form of evidence and do they guarantee the accused person's right to remain silent?

Section 258 of the CPC renders inadmissible statements which are caused by "any inducement, threat or promise having reference to the charge against the accused, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused grounds which would appear to him reasonable for supposing that by making the statement he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him." Prior to the new CPC, the inadmissibility test only applied to statements made by the accused to a police officer and not other enforcement personnel. Explanation 2 to Section 258 of the CPC sets out a number of circumstances which do not automatically render a statement inadmissible. For example, the fact that the statement was obtained "under a promise of secrecy, or in consequence of a deception practised on the accused for the purpose of obtaining it" would not in itself render a statement inadmissible. The fact that the accused was intoxicated does not render a statement inadmissible per se. Concerns were raised during parliamentary debates on potential unfairness of these provisions to the accused person.[cix]

The Singapore Constitution does not expressly state that an accused has the right to silence. Section 22 (2) of the CPC states that a person questioned by the police "shall be bound to state truly what he knows of the facts and circumstances of the case, except that he need not say anything that might expose him to a criminal charge, penalty or forfeiture." The CPC recognises that an adverse inference may be drawn if the accused elects not to give evidence in certain circumstances. Section 291 (3) of the CPC states that when the court calls on an accused to give evidence and the accused "refuses to be sworn or affirmed" or "having been sworn or affirmed, without good cause refuses to answer any question", the court "may draw such inferences from the refusal as appear proper." The CPC also requires the court to explain to the accused the consequences of his or her choosing not to give evidence or answer any question. It notes that this inference "does not compel the accused to give evidence on his own behalf" and that the accused "will not be guilty

of contempt of court" if he chooses not to give evidence. Section 291 (6) states that the power to draw an inference will not apply "if it appears to the court that his physical or mental condition makes it undesirable for him to be called on to give evidence."

The court's ability to draw an inference from the accused person's refusal to give evidence was first introduced into the CPC in 1979. Its constitutionality was challenged in *Haw Tua Tau v Public Prosecutor* on the basis that such an inference is contrary to Article 9 of the Constitution which guarantees that "life" and "personal liberty" can only be taken away "in accordance with law".[cx] The accused argued that this inference went against principles of natural justice included in Article 9's reference to "law". In response, the Privy Council found that this inference did not create a "compulsion" at law but only provided the accused with a "strong inducement" to give evidence. More recently, in the 2005 case of *Took Leng How v Public Prosecutor* the Singapore Court of Appeal emphasised that such an adverse inference is "only to be drawn in appropriate circumstances" and that it would be a "grave error" if an inference is drawn and used "solely to bolster a weak case".[cxi]

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

Article 11 (2) of the Singapore Constitution states that no person who has been acquitted or convicted of an offence may be tried again for the same offence except where the conviction has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted. Based on Singapore case law, the bar against double jeopardy only applies when one is faced with "two sets of the same sort of proceedings". In the 1998 case of *Lim Keng Chia v PP*, the accused was detained in a drug rehabilitation centre pursuant to section 37 (2) of the MDA.[cxii] Upon his release, he was charged with drug consumption as an offence under section 8 (b) of the MDA based on the same facts for which he had been sent to the drug rehabilitation centre. The accused argued that his conviction contravened Article 11 (2), but the Singapore High Court distinguished between his detention proceedings and subsequent trial proceedings which employed different standards of proof. The court also observed that Parliament must have intended the MDA's detention provisions to "complement" its penal sanctions.

The doctrine of double jeopardy was recently considered by the Singapore High Court in the context of sentencing. In *PP v NF*, the court emphasised that care needs to be taken when considering the relevance of prior criminal records in sentencing as "it would be wrong to penalize someone again for his past misdeeds, particularly if he has already served his sentence for them. To do so would be tantamount to a violation of the constitutional safeguard eschewing double jeopardy."[cxii] Sentences should not be "mechanically" enhanced simply because the accused has a criminal record. However, this record could be relevant for other sentencing purposes such as drawing "inferences about the accused's character, attitude and likelihood of rehabilitation."

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

With respect to criminal proceedings, the violation of an individual's rights may result from the abuse of a constitutional power or a statute-based power. An example of the former is the Attorney-General's exercise of prosecutorial powers. This question was raised in the 1998 case of *Law Society of Singapore v Tan Guat Neo Phyllis*.[cxiv] There, the Court of Appeal drew a strict distinction between the court's constitutional powers and the Attorney-General's constitutional powers. Article 35 (8) of the Singapore Constitution provides that the Attorney-General "shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence." Given this, it was held that courts do not have the power to intervene, over-ride, or prevent the Attorney-General's exercise of powers. However, the Court of Appeal emphasised that the Attorney-General's discretionary power is not absolute in nature and is subject to judicial review. In exercising judicial review, a court may declare a prosecution to be unconstitutional or an infringement of constitutional rights.

The exercise of statute-based discretionary powers is generally subject to judicial review by the Supreme Court. Public law remedies may be sought and prerogative writs referred to in the Supreme Court of Judicature Act applied for (e.g. a mandatory order, a prohibiting order, a quashing order, or an order for review of detention).[cxv] The application procedure is set out in Order 53 of the SCJA Rules of Court. Private law remedies of damages, injunctions, and declarations may also be pursued. These are to be sought via originating summons as set out in Order 28 of the SCJA Rules of Court. In undertaking judicial review, courts scrutinize the exercise of discretionary powers to ensure their compliance with administrative law principles. In the 2006 case of *Chee Siok Chin and others v Minister for Home Affairs and another,* the Singapore High Court considered the applicants' complaint that the police had wrongfully exercised its discretionary powers of arrest.[cxvi] The High Court affirmed that police actions are subject to judicial review, and that it would "intervene in a decision and/or the implementation of a decision on the basis that it is *ultra vires* the statute and/or where there is illegality, irrationality or procedural impropriety in the manner in which a decision is made or implemented." However, the court's review is "limited to the decision-making process and does not extend to a review of the merits." A decision may be quashed if "it is so outrageously defiant of logic and propriety that it can be plainly seen that no reasonable person would or could come to that decision."

Alternatively an individual may commence a private action under the Government Proceedings Act. Section 5 states that "the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent." It goes on to note that "any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government." The same Act sets certain limits on the Government's liability. Section 6 (4) notes that no proceedings should lie "unless that officer was at the material time employed by the Government and paid in respect of his duties as an officer of the Government wholly out of the revenues of the Government, or any fund certified by the Minister responsible for finance for the purposes of this subsection or was at the material time holding an office in respect of which the Minister responsible for finance certifies that the holder thereof would normally be so paid."

3. The process by which the laws are enacted and enforced is accessible, fair, efficient, and equally applied.

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

The dates and times of upcoming parliamentary sessions are announced by the Singapore Parliament on its public website.[cxvii] These are open to the public, including foreigners. The website also lists the agenda for the day before the parliamentary sitting. Bills introduced in parliament and Special Select Committee Reports are also made available on the website.

After a bill is read for the second time, Parliament may decide to send the bill to a Select Committee that is composed of selected MPs. The Select Committee may invite the public to make representations on the bill. Additionally the Government has conducted public consultations prior to the bill's debate in Parliament. With respect to the new CPC, the Government formed a working group composed of representatives from several agencies, the Singapore Law Society, the Association of Criminal Lawyers in Singapore and universities. The Working Group examined proposals received as a result of public consultations and made recommendations to the Ministry of Law. The Ministry then took these recommendations into account before the bill was debated in parliament in 2010. It should be noted that a number of individuals and local organisations have called for wider use of the Select Committee procedure.[cxviii]

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

The Singapore Parliament makes available an "Official Report" of a particular Parliament Sitting on its public website 10 days after the sitting. All transcripts may be accessed directly through Hansard. The website also

makes available copies of bills introduced into parliament on a prompt basis. Special Committee Reports from 19 January 2004 onwards are also made available on the same official website. Public consultations have been conducted for certain bills which deal with important social or legal issues. During such consultations, draft bills are provided and feedback requested from the public.

c. Are the thresholds for legal standing before courts clearly specified, not discriminatory and not unduly restrictive?

On the issue of standing in seeking remedies for violations of constitutional rights, the Singapore Court of Appeal in Chan *Hiang Leng Colin and others v Minister for Information and the Arts* articulated a broad standing rule for individuals seeking remedies from the court with respect to constitutional violations. Specifically, the court held that an applicant only needs to show "sufficient interest."[cxix]

d. Are judicial hearings and decisions public and made readily available to affected parties?

As noted by the Subordinate Courts Act and the Supreme Court of Judicature Act, judicial hearings and decisions are to be open and generally accessible by the public. The court may make exceptions for "the interests of justice, public security or propriety, or for other sufficient reason [s]."[cxx] Lists of hearings are published on the courts' official websites.[cxxi]

e. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law?

Article 12 of Singapore's Constitution states that "all persons are equal before the law and entitled to the equal protection of the law." Article 12 (2), which only applies to citizens, explicitly prohibits any discrimination on the basis of religion, race, descent, or place of birth unless this is provided for by the constitution itself. The Constitution also recognises the interests of racial and religious groups and the special position of Malays in light of their indigenous status.[cxxii] Article 12 (3) notes that Article 12 does not invalidate or prohibit "any provision regulating personal law" or "any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion." Article 153 of the Constitution requires that Parliament "shall by law make provision for regulating Muslim religious affairs and for constituting a Council to advise the President in matters relating to the Muslim religion." Parliament has enacted the Administration of Muslim Law Act (AMLA) and establishes the Islamic Religious Council of Singapore (MUIS), the Registry of Muslim Marriages, and the Syariah Court. As explained in Singapore's Universal Periodic Review, while AMLA governs Muslim marriages and the Women's Charter governs other civil marriages, "Muslim women are not denied the protection of the Women's Charter, for Syariah Court orders are enforced by the Family Court."[cxxiii] When Singapore became a party to CEDAW, it attached certain reservations to the convention explaining that these were necessary to respect "the freedom of minorities in the practice of their personal and religious laws."[cxxiv]

Low-skilled migrant workers in Singapore are particularly vulnerable to discriminatory and abusive treatment. The number of migrant workers in Singapore numbers 1.05 million as of December 2009.[cxxv] In its Universal Periodic Review report, the authorities explained that Singapore's small size has required it to "carefully manage the inflow and stay of low-skilled and unskilled foreign workers."[cxxvi] Singapore's migrant worker laws and policies have been criticised by international and local organisations, but these same organisations have also recognised that the Singapore Government takes the criminal abuse of workers seriously and has taken steps of late to increase migrant worker protection.[cxxvii] For example, in 2011, the Employment Agencies Act was amended to increase governmental regulation of employment agencies. Penalties imposed on the running of illegal employment agencies have been significantly increased. Local organisations have called for further steps to be taken, such as the enactment of specific minimum wage and a weekly day off for domestic workers.[cxxviii]

f. Do persons have equal and effective access to judicial institutions without being subjected to unreasonable fees or arbitrary administrative obstacles?

In the Chief Justice's 2010 keynote address on the Subordinate Courts' 2010 Workplan, he noted that

accused persons represent themselves in about one-third of criminal cases. In addition more than 90% of the parties in maintenance and family violence cases represent themselves.[cxxix] The Chief Justice has pledged that the courts remain committed to being "litigant-friendly so that parties who cannot afford the services of lawyers to comfort and protect them will not feel lost having to appear in court."[cxxx] In line with this, the Subordinate Courts has established the HELP Centre ("Helping to Empower Litigants-in-Person") which provides resources and assistance to litigants-in-person on court procedures and practices. This does not extend to the giving of legal advice.

Hearing fees are set out in the SCJA Rules of Court (Rule 90A) and subject-specific legislation such as the new CPC. In 2010, there was a significant fee increase - from $5 to $50 – in the fees that an individual has to pay when appealing his or her case. A number of local lawyers noted this fee increase with concern.[cxxxi] Fees regarding family matters are set out in the second schedule of the Women's Charter. For example, a writ for divorce costs $42, a statement of claim costs $7, a statement of particulars costs $7, and entering any judgment or order costs $35. The Registrar has the power to vary these fees or direct that they be borne by specific parties. For example, in addressing the $5 - $50 fee increase, the Subordinate Courts confirmed that: "There will be no change to the current practice of waiving the fee for accused persons who are unrepresented and serving sentence at the time the fee is payable. We will also continue to waive the fees for pro bono cases."[cxxxii] In general, court fees continue to remain reasonably accessible.[cxxxiii]

g. Are the laws effectively, fairly and equally enforced? Are persons seeking access to justice provided proper assistance?

The Singapore Judiciary is internationally praised for its efficient processing of cases. In 2010, the World Bank's Doing Business Report ranked Singapore the 3rd most efficient judicial system in Asia with respect to contract enforcement. For the year 2009 – 2010, the World Economic Forum Global Competitiveness Report ranked Singapore as the first of the 133 countries assessed for having an efficient legal framework in settling disputes. The Judiciary has continued to stress the need to maintain this efficiency while adopting a more people-centred approach which ensures accessible justice for ordinary persons. In the Subordinate Courts' 2009 Annual Report, the Chief District Judge of the Subordinate Courts stated that there is a move from a "court-centric culture", which enabled "effective case management that cleared our backlog of cases", to a "service-centric one", which aims "to serve our court users better" and improve "service standards, physical infrastructure and processes with the court users' needs in mind."134 Recognising the economic downturn's impact on ordinary individuals, the Chief Justice in 2009 stated that "it is the duty of the courts not to unfairly or unnecessarily increase their legal burdens, as far as we can, within the limits and limitations of the law."[cxxxv] He went on to note that justice as "one of the ultimate human goods" but that "it means nothing if there is no practical access to it."[cxxxvi]

The Subordinate Courts have established a number of initiatives aimed at meeting the needs of ordinary litigants in a practical and effective way. The Small Claims Tribunals deal with claims below $10000 or up to $20000 with the consent of both parties.[cxxxvii] These tribunals hear a variety of civil disputes commonly faced by the ordinary person, such as contractual disputes over the sale of goods. Parties are not represented and procedure aims to be both informal and accessible. The Subordinate Courts has published a "Small Claims Tribunal DIY kit" on its public website.[cxxxviii] In 2006 the Community Court was founded within the Subordinates Court. It applies a practical, community-based, and rehabilitative approach as opposed to a punitive approach. Cases dealt with include those involving offenders aged 16 -18 years, cases of attempted suicide, family violence, and race relations. A Neighbourhood Court has also been established to work alongside the Community Mediation Centre (CMC). The latter provides mediation services and deals with social, community or family disputes that do not involve a seizable offence. As of 2010, three CMCs have been established across Singapore. These are supported by 139 volunteer mediators who have conducted 750 mediations with a settlement rate of 70% in the year of 2009-2010.

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

The new CPC requires courts to consider directing a convicted individual to compensate victims. This power to order victim compensation existed prior to the new CPC, but it was underutilised.[cxxxix] Section 359 (1) of the new CPC states that courts "shall, after the conviction, consider whether or not to make an order for the payment by that person of a sum to be fixed by the court by way of compensation to the person injured, or his representative." In addition, the CPC provides that such compensation "shall not affect any right to a civil remedy for the recovery of any property or for the recovery of damages beyond the amount of compensation paid under the order." Any claim made for civil damages for the same injury "shall be deemed to have been satisfied to the extent of the amount paid to him under an order for compensation." Section 228 (2) of the CPC states that when addressing the court on sentence, the prosecutor may refer to any victim impact statement. Section 228 (7) defines a victim impact statement as "any statement relating to any harm suffered by any person as a direct result of an offence, which includes physical bodily harm or psychological or psychiatric harm." Upon being queried in Parliament, the Government clarified that the level of victim compensation is to be based on such victim impact statements.

Apart from direct victims of crime, there are those indirectly victimised by crime, such as the dependant families of a convicted offender. The Subordinate Court has put in place an early-referral scheme by which it works together with the Ministry of Community Development, Youth and Sports and the Family Resource Centre of the Singapore Prisons Service to identify needy families and refer them to welfare agencies.[cxl] These programs aim to ensure that dependants and families are able to get access to support as soon as possible.

i. Do the laws provide for and do prosecutors, judges and judicial officers take measures to minimize the inconvenience to witnesses and victims (and their representatives), protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect their interests?

To minimize trauma and inconvenience to vulnerable witnesses and victims, courts may require evidence to be taken through video or television links if certain conditions are fulfilled, such as if the witness is below 16 years of age or if the court is satisfied that it is in the public interest to do so.[cxli] The CPC also allows courts to pass a number of orders to protect witnesses, such as by ordering the witness be accompanied or by ordering certain persons be kept away while the witness is giving evidence.[cxlii] The Children and Young Persons Act places certain restrictions on the type of information that may be published regarding court proceedings involving children and young persons. For example, section 35 (1) (a) places a general prohibition on the publication or broadcast of information related to court proceedings that may lead to the identification of children and young persons involved in the proceedings.[cxliii]

The Subordinate Courts works with the Singapore Children's Society to administer a vulnerable witness programme for young witnesses and victims involved in court proceedings.[cxliv] This programme benefits witnesses below the age of 16 who are victims to a crime or witnesses to a crime and who are required to give evidence in court. Those who are over 16 years of age but have a mental age of 16 may also benefit from this programme. The SCS assigns a Volunteer Support Officer to the said vulnerable witness. The VSO will take steps such as meeting with the witness and his or her family before the trial, briefing them on the trial procedure, assisting with stress management, and arranging for a familiarisation visit to the court before the trial itself. The VSO will accompany the child to court and will provide follow-up support after the trial proceedings.

4. Justice is administered by competent, impartial and independent judiciary and justice institutions.

a. Are prosecutors, judges and judicial officers appointed, re-appointed, promoted, assigned, disciplined and dismissed in a manner that fosters both independence and accountability?

Article 95 of the Singapore Constitution charges the President with appointing the Chief Justice, Judges of Appeal, and Judges of the High Court. This is done in concurrence with the Prime Minister's advice. In turn, the Prime Minister confers with the Chief Justice before advising the President on the appointment of the Judges of Appeal and Judges of the High Court. Article 94 (3) also provides for the appointment of Judicial Commissioners who have the powers of a Judge of the Supreme Court and are appointed for such period or periods as the President deems fit. The decisions of Judicial Commissioners carry "the same validity and effect" as a Supreme Court Judge's decision. Section 9 and 10 of the Subordinate Courts Act provides for the appointment of judges at the Subordinate Courts level. The President appoints District Judges and Magistrates on the advice of the Chief Justice.

Article 98 of the Constitution states that Supreme Court Judges are guaranteed tenure till the age of 65, but they may remain in office up to 6 months thereafter if the President approves. Article 98 (6) requires Parliament to by law provide for the remuneration of Supreme Court Judge which "shall be charged on the Consolidated Fund". While in office, their remuneration cannot be reduced. The Singapore Constitution sets out the procedure for the discipline and dismissal of Supreme Court Judges. Article 98 (3) states that where the Prime Minister or the Chief Justice after "consulting" the Prime Minister informs the President that a Supreme Court Judge should no longer hold office on the basis of inappropriate conduct or incapacity from "infirmity of body or mind or any other cause", the President must appoint a Tribunal and refer the matter to it, and can act on the Tribunal's advice to remove the said Judge. According to Article 98 (4), this Tribunal is to be composed of at least five members who are current or former Supreme Court Judges. However, if the President believes that it is "expedient" to do so, he or she may decide to appoint to the tribunal members who hold or have held the equivalent position anywhere in the Commonwealth.

The Legal Service Commission is responsible for the appointment, promotion, transfer, discipline and dismissal of Legal Service Officers.[cxlv] The Commission comprises of the Chief Justice "as President", the Attorney-General, the Chairman of the Public Service Commission, and "at least 3 but not more than 6 other members"[cxlvi]. The last category of members are to comprise of "(a) at least one but not more than 2 persons nominated by the Chief Justice; (b) at least one but not more than 2 persons nominated by the Chairman of the Public Service Commission; and (c) at least one but not more than 2 persons nominated by the Prime Minister."[cxlvii]

The judiciary of the Subordinate Courts is composed of District Judges and Magistrates who concurrently hold office as Registrars, Deputy Registrars, Coroners and Referees of Small Claims Tribunals. They are appointed by the Chief Justice to their concurrent positions as Registrars and Deputy Registrars. In other words, judges of the Subordinate Courts both members of the Judicial Branch and of the Singapore Legal Service. This system has been justified by the Government as a necessary and beneficial feature.[cxlviii] The holding of concurrent positions facilitates the rotation of legal officers to different branches of the legal service and enables them to gain experience in different areas of work. Opposition members in Parliament have argued that this possibility of rotation undermines judicial independence.[cxlix]

The Chief District Judge, who is in turn is answerable to the Chief Justice, oversees the management of judicial officers in the Subordinate Courts. Standards of conduct are set out in the Subordinate Court Act. Section 67 (1) states that if a Subordinate Court Officer is accused of "extortion" or "misconduct", the Chief District Judge may appoint a District Judge to look into the case in a "summary manner." According to Section 67 (3), the appointed District Judge may issue an Order for the return of the money "extorted", payment of the money required, or impose a fine on the offending Subordinate Court officer capped at $100 for each charge . If the appointed District Judge holds that the accused officer "has wilfully and corruptly exacted or accepted any fee or reward", that officer will be ordered to repay the money and can no longer serve as Subordinate Court officer.[cl] The officer concerned may appeal to the Chief

Justice, and this is to be his or her final avenue of redress.[cli] Generally, the salaries of Legal Service Officers are comparable to that of their peers in the private sector.[clii]

b. Do prosecutors, judges and judicial officers receive adequate training, resources, and compensation commensurate with their institutional responsibilities? What percentage of the State's budget is allocated for the judiciary and other principal justice institutions, such as the courts?

The Government Administration Sector is composed of the Ministry of Finance, the Ministry of Law, the Prime Minister's Office, and the Organs of State. Funding for Organs of State, which includes the Judicature and the Attorney-General's Chambers, has been fairly consistent over the years. This funding has stood at 0.1% of GDP from 2001 – 2010.[cliii]

The Annual Reports of the Subordinate Courts and the Attorney-General's Chambers reflect a commitment to the training and upgrading of legal knowledge, technological developments, and people skills. Within the Subordinate Courts, the Strategic Planning and Training Division is responsible for developing existing judicial education programmes and the training of personnel.[cliv] In 2009, a Service Relations Unit was established within the Subordinate Courts to build "a culture of service excellence".[clv] Among others, the new unit is to "set standards concerning service" and "supervise service-related activities". The Centre for Research and Statistic (CReST) within the Subordinate Courts conducts community and internal users' surveys with the aim of enhancing court services and standards.[clvi] Topic-specific reports and statistics are published on the Subordinate Courts' public website.

As for the Attorney-General's Chambers, it has an active policy of promoting training and continuing education. In 2009, the Human Resource Development Unit of the Attorney General's Chambers "processed 500 training applications for local courses", "managed 160 travel arrangements", and "organised 40 in-house programmes for AGC officers".[clvii] The Attorney-General's Chambers also conducts training for public officers. For example, the Attorney-General's Chambers (Civil Division) organizes a training session on "The Legal Liability of the Government" which explains the different bases on which the Government may be sued by ordinary members of the public.[clviii] The Attorney-General's Chambers co-organizes with the Civil Service College and the Institute of Public Administration and Management the Public Officers' Law Seminar which covers, among others, the legal basis for government, the contrast between public law and private law, and judicial review.[clix] A basic international law course is also offered.[clx] Members of the Judiciary and Attorney-General's Chambers regularly attend regional and international conferences.

c. Are judicial proceedings conducted in an impartial manner and free of improper influence by public officials or private corporations?

The Singapore Subordinate Courts conducted public perception surveys in 1997, 1998, 1999, 2001, and 2006.[clxi] These surveys are conducted by independent research bodies. The 2006 survey showed that 95% of respondents were of the opinion that "there was trust and confidence in the fair administration of justice in Singapore." 96% of respondents "agreed that the courts administered justice fairly to all regardless of actions by or against individuals, companies or the government." 97% of respondents "agreed that the courts administered justice fairly to all regardless of language, religion, race or social class."

A number of local and international organisations have critically commented on the Singapore Judiciary's independence.[clxii] These criticisms are generally based on the Judiciary's decisions in cases of defamation, public order, and contempt of court cases involving members of the political opposition and others critical of the Government or the Judiciary. Singapore state officials consider judicial independence as a crucial aspect of the Rule of Law, and this is reflected in how seriously the Attorney-General's Chambers and the Judiciary treat cases involving contempt of court. Article 14(2) (a) of the Constitution expressly authorizes Parliament to provide against contempt of court.[clxiii] Parliament has passed the Supreme Court of Judicature Act which authorizes the High Court and the Court of Appeal to punish for contempt.[clxiv]

In 2009 the former Attorney-General emphasised judicial independence as one of the three pillars of the Rule of Law, the others being incorruptibility of the enforcement authorities and the integrity and competence of the legal service.[clxv]

A recent contempt of court case that has attracted local and international attention is the case of Alan Shadrake, a British author who had written a book alleging that the Singapore Judiciary was biased in its application of the death penalty. In the 2010 case the Singapore High Court revisited the rationale for contempt of court: "It is in the public interest that the public confidence in the courts to administer justice in accordance with law does not falter. On this the cases speak with one voice. It is therefore an axiom of the common law that justice should not only be done, but should manifestly and undoubtedly be seen to be done. It is similarly imperative that the public continues to maintain an active interest and trust in the administration of justice."[clxvi] The Singapore High Court did recognise the importance of public debate, and emphasised that an individual charged with contempt may claim the defence of fair criticism. In order for the defence to succeed, the criticism should have "some objective basis" that "must be stated together with the criticism".[clxvii] It should also be made in good faith. Though it does not need to be phrased in "refined language," "abusive, intemperate or outrageous language" should be avoided. There are no limits on the substantive type of criticisms that may be made as long as other conditions of fair criticism are met.

d. Are lawyers or representatives provided by the court to accused persons, witnesses and victims competent, adequately trained, and of sufficient number?

Earlier this year, Singapore's Chief Justice emphasised that there is a need to encourage younger lawyers to get involved in criminal practice, which does not pay as well as commercial work, and to promote pro bono criminal legal work.[clxviii] The Legal Aid Bureau, which is part of the Ministry of Law, provides pro bono legal advice on civil matters to individuals who satisfy a financial eligibility test. In general, the Legal Aid and Advice Act provides that only those with a disposable income of not more than $10,000 a year and a disposable capital of not more than $10,000 a year satisfies this means test. The Director is given discretion under the Legal Aid and Advice Act to provide certain deductions if the applicant is facing "hardship". However, it should also be noted that section 8 (3) of the Legal Aid and Advice Act authorizes the Director to "refuse legal aid if it appears to him unreasonable that the applicant should receive it in the particular circumstances of the case." As of 2010, the LAB has about 200 active volunteer lawyers.

The Supreme Court has established a Legal Assistance Scheme for Capital Offences (LASCO).[clxix] Under this scheme, all defendants who face the death penalty in the High Court are automatically entitled to legal representation by volunteer lawyers on LASCO's Register of Counsel. Defendants who face serious "non-capital" charges pursuant to the Corruption, Drug-trafficking and Other Serious Crimes (Confiscation of Benefits) Act are also entitled to legal representation under this scheme. Defendants do not need to meet a Means or Merits tests. Under the LASCO scheme, defendants are represented by two counsels: one lead and one assisting counsel. Volunteer lawyers who do not have sufficient years in practice or who have not had enough experience in criminal trials may seek permission from the Supreme Court Registrar to appear as Junior Assisting Counsel. Community legal aid clinics have been established as a joint initiative of the Law Society and other government departments.[clxx] Needy Singaporeans and Permanent Residents are able to obtain free basic legal advice from qualified volunteer lawyers. However, such advice is not intended to substitute substantive legal advice and those seeking advice are required to sign an Indemnity Form indicating that he or she will not seek any damages or claim for the advice given at the legal clinic.

Those facing criminal proceedings but not falling within LASCO may seek legal aid from the Law Society's Criminal Legal Aid Scheme (CLAS) or the Association of Criminal Lawyers in Singapore (ACLS), both of which are not state entities. CLAS maintains a means test while ACLS currently does not have a means test. Criminal defendants not falling within LASCO or who are unable to get onto the CLAS or ACLS scheme will not be assigned lawyers by

the court. These defendants will have to appear in court as litigants or defendants in person.[clxxi] It is noteworthy that the Chief Justice, in his 2009, noted that the judiciary would be consulting the Law Society on the feasibility of reviving the "dock brief" system where the court may appoint any lawyer who is available and who happens to be in court to represent an indigent.[clxxii]

e. Do legal procedures and courthouses ensure adequate access, safety and security for accused persons, prosecutors, judges and judicial officers before, during and after judicial, administrative, or other proceedings? Do they ensure the same for the public and all affected parties during the proceedings?

Safety issues are taken seriously in the Subordinate Courts and the Supreme Court of Singapore. All those entering the court are subject to scans of their persons and their belongings to ensure that no dangerous or prohibited materials are brought into the building. Police officers are stationed in the building to ensure safety and non-violence. For example, in early 2011, a man was arrested at the Subordinate Courts for hitting a glass wall located on the second floor of the building.[clxxiii] It has been reported that since 2003, the police have enhanced the lock-up's security by "adding security grilles" and "enhancing the CCTV system." In 2008 two detainees attempted an escape at the Subordinate Courts. In response, investigations were undertaken and a number of additional security measures were implemented.[clxxiv]

Endnotes

i. Note that in Singapore's 2011 UPR, the government highlighted a number of other international instruments that Singapore is party to in addition to the main human rights treaties listed here. These include the 1949 Geneva Conventions, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 2005 UN Convention Against Corruption, the 1980 Hague Convention on Civil Aspects of International Child Abduction, the 1930 ILO Forced Labour Convention, the 1949 ILO The Right to Organise and Collective Bargaining Convention, the 1951 ILO The Equal Remuneration Convention, the 1973 ILO The Minimum Age Convention, the 1999 ILO The Worst Forms of Child Labour Convention, and the 1976 ILO The Tripartite Consultation (International Labour Standards) Convention, paras. 29-30.

ii. Chief Justice Chan Sek Keong, Keynote Address, New York State Bar Association Seasonal Meeting, October 27, 2009, 7, accessed April 4, 2011, *http://app.supremecourt.gov.sg/data/doc/ManagePage/3021/CJ%20Keynote%20Address%20at%20NYSBA%20International%20Seasonal%20Meeting_27%20Oct%202009.pdf*. CJ Chan was the first Asian to receive an award from the International Council of Jurists, Nov 26, 2009, accessed April 5, 2011, *http://app.mfa.gov.sg/pr/read_content.asp?View,14140*.

iii. Corruption, Drug Trafficking and other Serious Crimes Act, Singapore Parliamentary Debates, vol. 83 at col. 1965 (19 September 2009).

iv. Employment of Foreign Workers Act, Singapore Parliamentary Debates, vol. 83 at col. 928 (22 May 2007).

v. Public Order Act, Singapore Parliamentary Debates, vol. 85 at col. 3656 (14 April 2009); Employment of Foreign Workers Act debate, ibid.

vi. Chief Justice Chan Sek Keong, Keynote Address, para15.

vii. Singapore Attorney General's Chambers Annual Report 2009, 2, accessed April 4, 2011, *http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBQQFjAA&url=http%3A%2F%2Fwww.agc.gov.sg%2Faboutus%2Fdocs%2FAGC_Annual_Report_2009.pdf&ei=dOmbTYXKPIPqrQf8_dGLCg&usg=AFQjCNFqnGrrAkWYhOH1k8YPQCxXfRyXGQ*

viii. Multi-racial Society, Singapore., Parliamentary Debates, vol. 84 at col. 1125 (28 August 2008).

ix. Presumption of Innocence, Singapore., Parliamentary Debates, vol. 84 at col. 2981 (25 August 2008).

x. Criminal Procedure Code, Singapore., Parliamentary Debates, vol. 87 at col. 407 (18 May 2010).

xi. National Report, Singapore Universal Periodic Review, *http://www.mfa.gov.sg/upr/process.html*, para. 2

xii. Imelda Saad, "Singapore's Human Rights Record under UN Scrutiny", Channel News Asia, February 25, 2011. Accessed April 4, 2011. *http://www.channelnewsasia.com/stories/singaporelocalnews/view/1113004/1/.html*

xiii. For an overview of the Commission's recommendations, see Kevin YL Tan "A Short Legal and Constitutional History of Singapore", in Essays in Singapore Legal History, ed. Kevin YL Tan (Marshall Cavendish, 2005), excerpted in Kevin YL Tan and Thio Li-ann, Constitutional Law in Malaysia & Singapore (3rd ed., LexisNexis, 2010),69-79.

xiv. Idem 75.

xv. Idem 180.

xvi. Constitution of the Republic of Singapore ("Singapore Constitution"), Article 149 (1) (e), accessed April 4, 2011. *http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?actno=REVED-CONST&doctitle=CONSTITUTION%20OF%20THE%20REPUBLIC%20OF%20SINGAPORE%0A&date=latest&method=part*

xvii. Singapore Constitution, Article 149 (1) (e).

xviii. Singapore Constitution, Article 149 (3).

xix. Ibid.

xx. Singapore Constitution, Article 150.
xxi. Singapore Constitution, Article 150 (1).
xxii. Singapore Constitution, Article 150 (2).
xxiii. Ibid.
xxiv. Singapore Constitution, Article 150 (3). Article 150 (3) notes that such annulment is "but without prejudice to anything previously done by virtue thereof or to the power of the President to issue a new Proclamation under clause (1) or promulgate any ordinance under clause (2)".
xxv. Singapore Constitution, Article 150 (4).
xxvi. Note that some of these constitutional provisions relating to the President's discretionary powers have not yet entered into force.
xxvii. Singapore Constitution, Article 151 (3).
xxviii. Singapore Constitution, Article 151 (1) (a).
xxix. Singapore Constitution, Article 151 (1) (b).
xxx. Singapore Constitution, Article 151 (4).
xxxi. Singapore ratified the UNCAC on 6 November 2009. See *http://app.cpib.gov.sg/cpib_new/user/default.aspx?pgID=173*. Accessed April 4, 2011.
xxxii. For a full list of rankings, see *http://app.cpib.gov.sg/cpib_new/user/default.aspx?pgID=146*, accessed April 4, 2011; see also Corrupt Practices Investigations Bureau Report 2009/2010 ("CPIB Report 2009/2010"), 3.
xxxiii. Prevention of Corruption Act, Section 5.
xxxiv. CPIB Report 2009/2010, 5-9.
xxxv. Idem,13.
xxxvi. Alleged Fraud at Singapore Land Authority, Singapore. Parliamentary Debates, vol. 87 (22 November 2010).
xxxvii. Ibid.
xxxviii. Ibid.
xxxix. Ibid.
xl. "Singapore Statutes Online", accessed April 4, 2011. *http://statutes.agc.gov.sg/*.
xli. Speech of Attorney-General Sundaresh Menon SC, Opening of the Legal Year 2011, 7 January 2011, accessed April 5, 2011, *http://www.agc.gov.sg/docs/OpeningofLegalYear2011.pdf*, para. 22.
xlii. For example, "Legislation," Corrupt Practices Investigation Bureau, accessed April 4, 2011, *http://app.cpib.gov.sg/cpib_new/user/default.aspx?pgID=201 and "Legislation"*, accessed April 4, 2011, *http://www.mom.gov.sg/employment-practices/trade-unions/Pages/legislation.aspx*.
xliii. Universal Periodic Review Joint Submission by Members of Solidarity for Migrant Workers, May 2011 , accessed April 4, 2011, *http://www.home.org.sg/downloads/UPR_Report_011110.pdf* , para 12.
xliv. Idem., para 24.
xlv. An Open Letter to the Minister for Home Affairs and Law, Humanitarian Organisation For Migration Economics, 14 December 2010, accessed April 4, 2011, *http://home.org.sg/downloads/PM_InternationalMigrantsDay_Appeal.pdf2*; Universal Periodic Review Joint Submission of COSINGO (Coalition of Singapore NGOs) , , accessed April 4, 2011, *http://maruahsg.files.wordpress.com/2010/11/universal-periodic-review-singapore-cosingo-final-hrc-30oct10.pdf*, para.14.
xlvi. Public Order Act, Section 2.
xlvii. Ibid.
xlviii. Public Order Act, Section 11(1)(c) .
xlix. Public Order Act, Singapore Parliamentary Debates, vol. 85 at col. 3656 (14 April 2009).
l. Open Letter to the Minister for Home Affairs and Law.

li. Singapore Universal Periodic Review, para. 128.
lii. Ibid.
liii. "Security Education". Internal Security Department, accessed April 4, 2011, *http://www.mha.gov.sg/isd/se.htm*
liv. For example, NUS students from the Criminal Justice Club participated in a recent educational tour of the centre.
lv. Singapore Government Press Statement on ISA Arrests", Ministry of Home Affairs, 11 January 2002, accessed April 4, 2011, *http://www.mha.gov.sg/news_details.aspx?nid=MjgzHVbv3ryewWc%3D.*
lvi. Internal Security Act detentions, Singapore Parliamentary Debates, vol. 83 at col. 171 (9 April 2007).
lvii. Ibid.
lviii. Criminal Law (Temporary Provisions) Act, Singapore Parliamentary Debates, vol. 85 at col. 3276 (13 February 2009).
lix. Singapore Universal Periodic Review Report, para 127.
lx. Criminal Law (Temporary Provisions) Act, Singapore Parliamentary Debates.
lxi. Singapore Universal Periodic Review Report, para. 129.
lxii. Ibid.
lxiii. Singapore Universal Periodic Review Report, para. 129.
lxiv. Ibid.
lxv. Idem, at para 20.
lxvi. Think Centre Universal Periodic Review Submission, accessed April 4, 2011, http://maruah.org/upr/ /, at para 39.
lxvii. Supreme Court of Judicature Act, First Schedule, Rule 1 (d).
lxviii. Video-conferencing amendment, Singapore Parliamentary Debates, vol. 87 at col. 53 (26 April 2010).
lxix. *Kamal Jit Singh v Minister for Home Affairs* [1991] 1 SLR 24.
lxx. *Lee Mau Seng v Minister for Home Affairs* [1971] 2 MLJ 173.
lxxi. *Son Kaewsa & Ors v Superintendent of Changi Prison & Anor* [1992] 1 SLR 276.
lxxii. *Ong Ah Chuan v PP* [1981] 1 MLJ 64. The defence argued that the mandatory nature of MDP was arbitrary because "it debarred the court in punishing offenders from discriminating between them according to their individual blameworthiness." This arbitrariness was argued to be not "in accordance with law" as required by Article 9 (1) of the Constitution and "against the principle of equality before the law entrenched in the Constitution by article 12 (1), since it compels the court to condemn to the highest penalty of death an addict who had gratuitously supplied an addict friend with 15 grammes of heroin from his own private store, and to inflict a lesser punishment upon a professional dealer caught selling for distribution to many addicts a total of 14.99 grammes." These arguments were rejected by the Privy Council.
lxxiii. "Report of the Law Society on the Draft Criminal Procedure Code Bill 2009", accessed April 4, 2011, *http://www.lawsociety.org.sg/feedback_pc/pdf/ReportofCouncilLawSocietyDraftCPCBill2009.pdf*, p 56.
lxxiv. *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489.
lxxv. *Yong Vui Kong*, para. 121.
lxxvi. Singapore Universal Periodic Review Report, para. 120.
lxxvii. Ibid.
lxxviii. Idem, para.125.
lxxix. Ibid.
lxxx. Association of Criminal Lawyers Criminal Procedure Code Consultations, on file with author, para 91.
lxxxi. Idem, para. 104.
lxxxii. *Haw Tua Tau v Public Prosecutor* [1981] 2 MLJ 49.
lxxxiii. Presumption of Innocence, Singapore Parliamentary Debates.
lxxxiv. Misuse of Drugs Act , Section 17.

lxxxv. *Ong Ah Chuan*
lxxxvi. *Jasbir Singh v PP* [1994] 2 SLR 18.
lxxxvii. *Leong Siew Chor v Public Prosecutor* [2006] SGCA 38.
lxxxviii. Criminal Procedure Code, Singapore Parliamentary Debates.
lxxxix. Ibid.
xc. Report of the Law Society on the Draft Criminal Procedure Code Bill, para. 2.7, p. 16.
xci. Idem, para. 2.36, p. 24.
xcii. *Rajeevan Edakalavan v PP* [1998] 1 SLR 815.
xciii. Report of the Law Society on the Draft Criminal Procedure Code Bill, para. 2.13, p. 20.
xciv. Idem, para. 2.15, p. 20.
xcv. *Rajeevan Edakalavan v PP* [1998] 1 SLR 815.
xcvi. *Balasundram v PP* [1996] 2 SLR 331.
xcvii. *Tan Chor Jin v PP* [2008] 4 SLR 306.
xcviii. Report of the Law Society on the Draft Criminal Procedure Code Bill, para. 2.18, p. 21.
xcix. Ibid.
c. Singapore Universal Periodic Review Report, para. 124.
ci. Criminal Procedure Code, Section 198.
cii. Criminal Procedure Code, Singapore Parliamentary Debates.
ciii. Ibid.
civ. *Yunani bin Abdul Hamid v PP* [2008] 3 SLR (R) 383.
cv. *PP v Saroop Singh* [1999] 1 SLR (R) 241.
cvi. "Criminal Trials", Singapore Supreme Court, accessed April 4, 2011, *http://app.supremecourt.gov.sg/default.aspx?pgID=1362*.
cvii. Criminal Procedure Code, Section 374 (4).
cviii. *Yunani bin Abdul Hamid v Public Prosecutor* [2008] 3 SLR(R) 383.
cix. Criminal Procedure Code, Singapore, Parliamentary Debates.
cx. *Haw Tua Tau v Public Prosecutor* [1981] SGPC 1 (Privy Council).
cxi. *Took Leng How v Public Prosecutor* [2006] 2 SLR(R) 70.
cxii. *Lim Keng Chia v PP* [1998] SGHC 1.
cxiii. *PP v NF* [2006] 4 SLR 849.
cxiv. *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR (R) 239.
cxv. Supreme Court of Judicature Act, First Schedule.
cxvi. *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR (R) 582.
cxvii. Parliament of Singapore, accessed April 4, 2011, *http://www.parliament.gov.sg/*.
cxviii. Association of Criminal Lawyers Criminal Procedure Code Consultations, para. 3; Public Order Act, Singapore Parliamentary Debates.
cxix. *Chan Hiang Leng Colin and others v Minister for Information and the Arts,* [1996] 1 SLR(R) 294.
cxx. Subordinate Courts Act, s. 7 (1) & (2); Supreme Court of Judicature Act, s. 8 (1) & (2).
cxxi. Judges' Hearing Lists, Supreme Court, accessed April 5, 2011, *http://app.supremecourt.gov.sg/default.aspx?pgID=76*; Hearing Lists, Subordinate Courts accessed April 5, 2011, *http://app.subcourts.gov.sg/subcourts/page.aspx?pageid=4408*

cxxii. As formally recognised by the Singapore state authorities, the Constitution imposes "a responsibility on the Government to care for the interests of racial and religious minorities in Singapore." In recognition of "the special position of Malays", the Government has "the responsibility to protect, support and promote the political, educational, religious, economic, social and cultural interests of Malays." Singapore Universal Periodic Review Report, para. 24.

cxxiii. Idem, para. 65.

cxxiv. See United Nations Treaty Collection, OHCHR website, accessed April 5, 2011, *http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en*

cxxv. Singapore Universal Periodic Review Report, para. 97.

cxxvi. Idem, para 98.

cxxvii. Human Rights Watch Report, "Slow Reform: Protection of Migrant Domestic Workers in Asia and the Middle East", April 27, 2010, , accessed April 4, 2011, *http://www.hrw.org/en/reports/2010/04/28/slow-reform-0,4*.

cxxviii. Solidarity Universal Periodic Review Submission, para. 15 & 21.

cxxix. Keynote Address by CJ Chan Sek Keong, Subordinate Courts Workplan 2010 26 February 2010, accessed April 4, 2011, *http://app.subcourts.gov.sg/Data/Files/File/Workplans/Workplan2010/CJ's%20Keynote%20Address%20Feb%202010.pdf*, para 6.

cxxx. Keynote Address by CJ Chan Sek Keong, Subordinate Courts Workplan 2009-2010, 27 February 2009, accessed April 4, 2011, *http://app.subcourts.gov.sg/Data/Files/File/Workplans/Workplan2009/CJKeynoteAddress_Feb2009.pdf*, para 21.

cxxxi. Leong Wee Kiat, "Appeal Fee to be raised to $50 from the current $5", 31 December 2010, Today, accessed April 4, 2011, *http://news.xin.msn.com/en/singapore/article.aspx?cp-documentid=4551310*.

cxxxii. "Changes to Fees Payable in The Subordinate Courts under Criminal Procedure Code 2010,", Subordinate Courts Press Release, 30 December 2010, accessed April 4, 2011, *http://app.subcourts.gov.sg/subcourts/newsdetails_print.aspx?pageid=26601&amp%3Bcid=52979*

cxxxiii. Fees (Subordinate Courts of Criminal Jurisdiction) Order, accessed April 5, 2011, *http://app.subcourts.gov.sg/family/page.aspx?pageid=21534*

cxxxiv. Subordinate Courts Annual Report 2009, accessed April 4, 2011, *http://app.subcourts.gov.sg/subcourts/page.aspx?pageid=4469, 4*.

cxxxv. Keynote Address by CJ Chan Sek Keong, Subordinate Courts Workplan 2009-2010, para 6.

cxxxvi. Ibid.

cxxxvii. Small Claims Tribunals Act.

cxxxviii. Small Claims Tribunal, accessed April 4, 2011, *http://app.subcourts.gov.sg/sct/index.aspx*.

cxxxix. CJ Keynote Address Subordinate Courts Workplan 2008-2009, para. 30.

cxl. Keynote Address by CJ Chan Sek Keong, Subordinate Courts Workplan 2009-2010, para 7.

cxli. Criminal Procedure Code, section 281 (1).

cxlii. Criminal Procedure Code, section 281 (1).

cxliii. Children and Young Persons Act, section 35 (1) (a),. Note that s. 35 (2) recognises that the court or the Minister may "if satisfied that it is in the interests of justice so to do" dispense with the general prohibitions as imposed by s. 35 (1) (a) and (b).

cxliv. "Vulnerable Witness Guidelines", accessed April 4, 2011, *http://app.subcourts.gov.sg/criminal/page*.aspx?pageid=3262.

cxlv. Singapore Constitution, Articles 111 (1) & 111 (3).

cxlvi. Singapore Constitution, Art 111 (2d).

cxlvii. Singapore Constitution, Art 111 (2A).

cxlviii. Legal Service Commission Constitutional Amendment Singapore Par. Debates., Vol 83, col. 1035 (16 July 2007).

cxlix. Ibid.
cl. Subordinate Courts Act, Section 67(4).
cli. Subordinate Courts Act, Section 67 (5).
clii. Singapore Legal Service, "Appointments in the Singapore Legal Service", accessed April 4, 2011: *http://app.lsc.gov.sg/data/index.htm*; the then Chief Justice's Speech, "Investing in People in the New Legal Service", 30 June 2000, accessed April 4, 2011, *http://app.subcourts.gov.sg/Data/Files/File/eJustice/Archives/CJSpeech_InvestingInPpl.pdf.*, p1.
cliii. Ministry of Finance, Singapore Budget 2010, 'Budget Highlights Statistical Annex, Table 8.1: Overall Fiscal Position for FY2001 to FY2010 ($ million), accessed April 5, 2011, *http://www.mof.gov.sg/budget_2010/download/FY2010_Budget_Highlights_Statistical_Annex.pdf*
cliv. Subordinate Courts Annual Report 2009, p 22.
clv. Idem, p 5.
clvi. Idem, p 22.
clvii. Attorney General's Chambers Annual Report 2009, p 44.
clviii. Idem, p 17. See course description at "Course Details", Legal Liability of the Government, Civil Service College, accessed April 5, 2011, *http://www.cscollege.gov.sg/page.asp?id=75&course_id=1123*.
clix. This seminar was previously known as the Constitutional & Administrative Law Seminar. It has been renamed to reflect the scope of the topics it covers and its suitability for Public Officers. "Course Details", Public Officers' Law Seminar 2011, Civil Service College, accessed April 5, 2011,*http://www.cscollege.gov.sg/page.asp?id=75&course_id=1139*
clx. "Course Details", International law, Civil Service College, accessed April 5, 2011, *http://www.cscollege.gov.sg/page.asp?id=75&course_id=1179*
clxi. Subordinate Courts Annual Report 2007, p 102.
clxii. Think Centre UPR Submission, para 20; COSINGO UPR Submission, para 9 & 12.
clxiii. Singapore Constitution, Article 14 (2) (a).
clxiv. 1969 Supreme Court of Judicature Act, Section 7 (1).
clxv. Attorney General's Chambers Annual Report 2009, p 2.
clxvi. *Attorney-General v Shadrake Alan* [2010] SGHC 327.
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clxxii. Keynote Address, Supreme Court Workplan 2009-2010, para. 9.
clxxiii. Shaffiq Alkhatib, "Man arrested in Subordinate Courts for hitting glass wall", Channel News Asia, 15 February 2011, ,accessed April 4, 2011, *http://www.channelnewsasia.com/stories/singaporelocalnews/view/1110898/1/.html*
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The Kingdom of Thailand

Thailand

Kitti Jayangakula

Snapshot Box

Country Name	The Kingdom of Thailand
Capital city:	Bangkok
Independence:	1238 (traditional founding date; never colonised
Historical Background:	The Thai Kingdom was formed in the mid-14th century, known as Siam until 1939, when it was changed to Thailand. Thailand is the only Southeast Asian country never to have been taken over by a European power during the colonial era. Thailand was governed under an absolute monarchy until the bloodless revolution in 1932, which led to a constitutional monarchy. There have been number of military coups in Thailand; the most recent being in September 2006 for ousting PM Thaksin Shinawatra. In 2009, the Democrat Party formed a new coalition government and Abhisit Vejjajiva became Prime Minister.
Size:	513,120 sq km: land 510,890 sq km and water 2,230 sq km
Land Boundaries:	Thailand is located in the centre of peninsular Southeast Asia. Myanmar is to the west, Laos to the north and east, Cambodia to the southeast, and Malaysia to the south. The south coast of Thailand faces the Gulf of Thailand.
Population:	63,525,062: Male 31,293,096 and Female: 32,231,366 (2009)[i]
Demography:	(July 2010 est.) 0-14 yrs. =20.8%; 15-64 yrs. =70.5%; 65 yrs and over=8.7%; Median age: 34 yrs. (male 33.2 yrs. female 34.8 yrs.); Growth rate: 0.653%; Birth rate: 13.01 births/1,000 population; Death rate: 6.47 deaths/1,000 population[ii]
Ethnic Groups:	Thai 75%, Chinese 14%, other 11%
Languages:	Thai, English (secondary language of the elite), ethnic and regional dialects
Religion:	Buddhist 94.6%, Muslim 4.6%, Christian 0.7%, other 0.1%
Education and Literacy:	Adult literacy rate: 94% of the population over 15 can read and write (2003-2008); Youth literacy rate (15yrs-24yrs) 98% (2003-2007)[iii]
Welfare:	Thailand has social welfare and social insurance systems.
Gross Domestic Product (GDP):	2.6% USD 26,377 million (2009); -2.2% (2010)[iv]
Government Overview:	
Executive Branch:	Thailand is a constitutional monarchy with a democratically elected Parliament. The country has a multiparty political system, albeit one often dependent on the formation of coalitions of numerous parties in order to form a government.
Legislative Branch:	Thailand has a legislature called the National Assembly, which consists of two chambers: House of Senators and House of Representatives. The Senators being elected from each province, and the rest number selected by the Senator Selection Commission. The members of the House of Representatives being elected on a constituency basis and a proportional representation basis.
Judicial Branch:	Thailand has four categories of court: a three-level court system collectively known as the Courts of Justice (i.e., Courts of First Instance, Court of Appeal and Supreme Court, including specialised Courts of Justice such as the Central Bankruptcy Court, the Labour Court, the Juvenile and Family Court and the Central Intellectual Property and International Trade Court); Constitutional Court; Administrative Court; and Military Court.
Membership in International Organisations and Human Rights Treaties ratified:	Thailand belongs to many international organisations, in particular, the United Nations and the Association of Southeast Asian Nations (ASEAN). Thailand is a signatory to seven human rights treaties namely: CERD, ICCPR, ICESCR, CEDAW, CAT, CRC and CRPD

Overview

The Kingdom of Thailand is located in the Southeast Asian Region and is one of the founders of the Association of South East Asia Nations (ASEAN), which was formed on August 8, 1967. Thailand's legal system is based on a civil law system with influences of common law. The supreme law of the country is the Constitution of the Kingdom of Thailand, which is higher than all other laws, decrees, administrative rules and regulations. Since the mid-14th century, Thailand had been governed under an absolute monarchy until the first revolution during the reign of the King Rama VII in 1932. After the revolution, the absolute monarchy was replaced by a constitutional monarchy under the first Constitution of the country on June 26, 1932 (Temporary Charter for the Administration of Siam Act of 1932). After that, the Temporary Charter was replaced by the Constitution of the Siam Kingdom of 1932, which was the first permanent Constitution, which was promulgated on December 10, 1932 and King Rama VII became the first king under the constitutional monarchy.

The Siamese revolutionary change appeared for a glimpse to brighten the future of the rule of law and democracy for Thailand. In the letter delivered by King Rama VII to the nation before becoming the first king under the constitutional monarchy be stated that: "*I am willing to relinquish the power which previously belonged to me, to the people in general, but I refuse to hand these powers to any specific person or group to exercise them in an absolute way and without the real voice of the people*"[v]

Since then, Thailand has been ruled by democratic government with the King as head of state. The power of the King is limited by the constitution and the King is portrayed as a symbolic head of state. Ideally, the rule of law should limit arbitrary power, and in that respect, aptly describes the way a King should act and the how legislative, executive, and judiciary powers are exercised in a Thai regime of constitutional monarchy.[vi]

During 78 years of a constitutional monarchy in the country, several constitutions were promulgated, amended as well as revoked. Since 1932, Thailand has had 18 constitutions and charters[vii] (the latest version of the constitution is the 18th Constitution of the Kingdom of Thailand, promulgated in August 2007 ['the 2007 Constitution']), 57 governments and a number of military coups forming the democratic regime (the most recent of which took place on September 19, 2006). Thailand's constitutional credibility has been constantly eroded by military coups and political figures who often act in self-interest instead of acting for the people.[viii] Importantly, the number of constitutions (and frequency of military coups) reflects the high degree of political instability in Thailand since the 1930s. The large number of military coups in Thailand has been widely criticised as seen as a denudation of the rule of law in Thailand. In this sense, Thai constitutions have been seen as nominal rather than normative and represent realities of power relations more than being the source of politic legitimacy.[ix]

The highlight of the country's reforms is the 16th Constitution of the Kingdom of Thailand of 1997 (the 1997 Constitution), which is often considered to be the best constitution Thailand ever had. It was known as the *'People's Constitution'*, which introduced measures to hold the government accountable, protect civil liberties and reform Thai criminal justice. Furthermore, it offered Thailand a great chance to incorporate judicial review into administrative procedure, in particular, establishing the Administrative Court and other measures to prevent monopoly of the executive arm.

In 2006, the 1997 Constitution was abrogated after a military junta seized power from the interim caretaker government of Thaksin Shinawatra and dissolved the National Assembly, the Council of Ministers and the Constitutional Court. The Junta then promulgated the Constitution of the Kingdom of Thailand (Interim) 2006, which specified a process for drafting yet another new permanent constitution.

The 2007 Constitution was drafted by a committee established by the military junta and brought into force on August 24, 2007. It affirms the sovereign power of the Thai people with the King as a head of state (Section 3(1)) and provides that the King shall exercise such power through the three independent separate branches: the National Assembly, the Councils of Ministers and the Courts.

The rule of law has been continuously recognised in the provisions of the Constitutions since 1932. The 2007 Constitution reaffirms the rule of law in the following terms: "*The performance of duties of the National Assembly, the Council of Ministers, the Courts, and the constitutional organs as well as State agencies shall be under the Rule of Law*"[x]. Moreover, Section 78(6) provides for the State: "*to take action enabling law agencies which have legal duties to give opinions on the operation of the State and scrutinise the law-making of the State to perform their duties independently to ensure that the administration of State affairs shall be in compliance with the Rule of Law principle*".

In accordance with the principles of the separation of power enshrined in the Constitution, the power to enact legislation rests with the legislative power branch, normally exercised by the National Assembly. In an emergency, however, the government may approve a law on condition that such law be ratified by the Assembly as soon as possible.[xi] As a result, the executive branch is entitled to enact and enforce emergency rule before taking it through the legislative mechanism of the Assembly.

Despite the recognition of the rule of law, Thailand has always faced problems of violation of the rule of law, especially in the conflicts in the south of Thailand. For the last 7 years, the southern conflicts resulted in 4,370 deaths (3,825 civilians, 291 soldiers and 254 policemen), 5,111 orphans and 2,188 widows.[xii] According to the Report of the Bureau of the Budget of Thailand, the Thai Government allocated a budget equivalent to THB 14.5 billion to solve the problems during 2004–2010.[xiii] The government declared the state of emergency over the three southern-most provinces: Yala, Pattani and Narathiwat in July 2005 and passed the Emergency Decree on Public Administration in Emergency Situation, B.E. 2548 of 2005 (2005 Emergency Decree) under Section 218 of the 1997 Constitution. Since then, the emergency has presented a major rule of law issue *vis-à-vis* the emergency decree, especially with the enformcent of the Emergency Decree and Martial Law in these three deep-South provinces.[xiv] Since 2005, 7,680 security cases were dealt with in the south. Among these, the investigation of 5,296 cases were terminated because of the absence of suspects. Recently, the conviction of *Durunee Charnchaoenpakula* for a speech allegedly offensive to the monarchy; the pending charge against *Chiranuch Premchaiporn*, webmaster of the independent news site Prachathai; and the failure to resolve and continued impunity in the case of *Somchai Neelapaichit*[xv] and *Imam Yapa Kaseng*, have brought to fore, the challenging issues of the rule of law in Thai society.

During the demonstrations (April-May 2010), the government declared of a state of emergency in Bangkok and another 17 provinces in northern, north-eastern, and central Thailand. The ensuing government crackdown on the protestors in Bangkok,[xvi] which left at least 91 dead and more than 2,100 injured, has questioned the sanctity of the rule of law in Thailand.[xvii] On December 21, 2010, the government ended the emergency in Bangkok and neighboring provinces, but it nevertheless remains in force in the three provinces of Yala, Pattani and Narathiwat.

Historically, Thailand has witnessed various changes concerning human rights. The country voted for the 1948 Universal Declaration of Human Rights (UDHR). Gradually, Thailand has become party to a number of human rights treaties, having acceded to seven major human rights treaties: the Convention on the Elimination of All Forms of Racial Discrimination (CERD); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD). Even though several reservations to these treaties have been made, those reservations have gradually been withdrawn. Presently, there are only a few remaining reservations such as the right to women with respect to non-discrimination in family in CEDAW, the right to acquire nationality and the right of refugee children in CRC or the meaning of self-determination in ICCPC and ICESCR.[xviii]

As a State party to these human rights instruments, Thailand has an obligation to implement these obligations at a domestic level through domestic legislative transformation. After the judicial reform under the 1997 Constitution, the Court of Justice has been given more power and duties to protect fundamental individual rights. The 2007

Constitution gives power to the Supreme Court of Justice to try and adjudicate election -related cases as well as the suspension of the right to vote at an election of members of the House of Representatives and acquisition of senators. The Court of Appeal is also empowered to adjudicate election -related cases and the suspension of the right to vote at an election of member of the local assembly or local administrations.[xix] Furthermore, according to Section 219, the Supreme Court of Justice is granted powers to try and adjudicate criminal cases of persons who hold political office. Through these powers, the Constitution protects the civil and political rights of the general public by providing for judicial scrutiny over executive action.[xx]

The rule of law is one of important principles under the current government's Policy on Law and Justice. This was delivered by Prime Minister Abhisit Vejjajiva as the Policy Statement of the Council of Ministers to the National Assembly on December 29, 2008 *"to bring laws up-to-date with current socio-economic situations and the protection of individuals' rights in accordance with the rule of law".*[xxi]

Since then, the government frequently reaffirms the application of rule of law as its policies in many forms both domestically and internationally. For example, the speech by PM Abhisit Vejjajiva on "Thailand's Economic Development Roadmap" that *"…democracy is not just about elections and majority rule but must also uphold the rule of law, transparency and accountability."*[xxii]

The above demonstrates the need for all branches of government to act in accordance with the rule of law.

Administration of Justice Grid

Indicator	Figure
No. of judges in country	Gross (per capita): 4,296[xxiii]
No. of lawyers in country	Gross (per capita): 55,320[xxiv]
Annual bar intake? Cost/fees	Gross (USD equivalent): Yes, USD 100 fees
Standard length of time for training/ qualification	Years: 1-2
Availability of post-qualification training	Required, Providing by Judicial Training Institute
Average length of time from arrest to trial (criminal)	48 hours – 7 days
Average length of trials (from opening to judgment)	2-3 months to 2-3 years depends on the nature and complexity of the case
Accessibility of individual rulings to public	Required, accessible in summarised form
Appeal structure	Court of First Instance, Court of Appeal and Supreme Court
Cases before the National Human Rights Commission (NHRC)	Gross per year: 695 cases (2009)[xxv]
Complaints filed against police, judiciary or other institutions (per year)? How many resolved?	Gross per year: Before NHRC: police 96 cases; judiciary 5 cases and others governmental institutions 90 cases (2009)[xxvi] Before the Department of Discipline of the Royal Thai Police: 5,015 cases (2009)[xxvii]

A. Country's practice in applying central principles for rule of law for human rights

1. The government and its officials and agents are accountable under the law.

a. Are the powers of the government are defined and limited by a constitution or other fundamental law?

The separation of powers has been enshrined in all Thai constitutions since 1932. The 1932 Temporary Charter mandated that the King, who is the head of state, exercise sovereign power in conformity with the provisions of the Constitution, through the People's Assembly (legislature), the People's Committee of Siam (executive) and the Courts of Law (judiciary). From then on, the separation of power has been continually ensured by every constitution, including the current 2007 Constitution, which also stipulates such concept in Section 3.

Under the 2007 Constitution, the legislative branch, called the National Assembly, consists of two chambers: the Senate and the House of Representatives. The Senate is elected from each province, one member from each province, and in the number equivalent to the total number of provinces.[xxviii] The members of the House of Representatives are elected on a constituency and proportional representation basis.[xxix]

The executive branch consists of the King as the head of state, and the Prime Minister, who is elected from among members of House of Representatives, as head of government. The leader of the political party commanding a majority of seats or is best placed to organise a majority coalition usually becomes prime minister. He is appointed by the King and his term is limited to two four-year terms.[xxx] In addition to the Prime Minister, there is a Council of Ministers whose duty it is to carry out the administration of State affairs with collective accountability.[xxxi]

The judicial branch is vested with the power to try and adjudicate cases in the Courts in the name of the King. Thailand has four categories of Court: Court of Justice, Constitutional Court, Administrative Court and Military Court. *The Courts of Justice* has a three-level court structure, comprising Courts of First Instance, the Court of Appeal and the Supreme Court, and also includes other specialised courts such as the Central Bankruptcy Court, the Labour Court and the Central Intellectual Property and International Trade Court. *The Constitutional Court* is an independent court established under the 1997 Constitution with jurisdiction over the constitutionality of parliamentary acts, royal decrees, draft legislations, as well as the appointment and removal of public officials and issues regarding political parties. The *Administrative Court* has jurisdiction over disputes arising from administrative acts of state officials and the *Military Court* was established to deal with military personnel and persons arrested during periods of martial law.

Under the constitutional monarchy, the constitution affirms that the sovereign power belongs to the Thai people and the King shall exercise such power through three separate organs. In addition, the rule of law is inserted in the 2007 Constitution that all separated organs shall perform duties of office by the rule of law. Where the administration is not democratically carried out and the rule of law is not maintained, the King may intervene in accordance with the Constitution.[xxxii] He may refuse to give his assent to the bill, if he does not agree with such bill[xxxiii]; and he also plays a role by appointing the Prime Minister and other ministers.[xxxiv] For example, he intervened in the *14 October Uprising* in 1973 and royally-appointed Prime Minister after the uprising.[xxxv] The King is also influential in the sense that he continues pleading that judges be impartial, and is also empowered by the constitution to grant a royal pardon.[xxxvi]

The Constitution clearly defines and limits the exercise of powers of each branch of State. The legislative power includes the power to enact an Act in accordance with legislative procedure; the power for the constitutional control of the enactment of laws; the power to control the administration of state affairs; the powers to enact an Emergency Decree, to declare war or to declare a state of emergency; and the exercise of judicial powers to trial and adjudication are clearly defined and the exercise of separated powers is being limited and inspected by the mechanism provided by the constitution. The inspection mechanism requires that persons holding political positions have their assets and liabilities inspected by

the National Anti Corruption Commission (NACC). In addition, to prevent a conflict of interests, these persons are not allowed to hold any position or have any duty in a government agency, State agency or State enterprise, or hold a position as a member of a local assembly, local administrator or local government official.[xxxvii] Moreover, the constitution forbids a political position holder holding form or intervening in mass communication businesses (Section 48), and there are other prohibitions of senators (Section 116), ministers (Section 174), governmental officials (Section 194) and judges (Section 197, 205 and 207). In addition, the separated powers are also limited by the provisions on the Inspection of State power the organic laws, and the Constitutions of Court of Justice and other specialised Courts.

One notable objective of the 2007 Constitution was to eliminate the abuse of state powers. Accordingly, the Constitution puts in place a number of measures to prevent the monopoly of the executive arm, for instance, in issuing an Emergency Decree. The government is subjected to scrutiny by the Constitutional Court (Section 185). In addition, the Administrative Court has been set up to use judicial powers, similar to the Court of Justice but has special competence to investigate and to decide disputes arising from administrative acts by state officials, whether that matter concerns a state organ and private individual or is one between state organs themselves.[xxxviii]

b. Can the fundamental law may be amended or suspended only in accordance with the rules and procedures set forth in the fundamental law?

Section 291 stipulates rules and procedures for amending the Constitution. Any motion for amendment – with no effect of changing the democratic regime of government with the King as Head of State or changing the form of the State – must be proposed by the Council of Ministers; member of the House of Representatives or/and senators; or persons having the right to vote in the numbers as stated in the Constitution.[xxxix]

A motion must be proposed in the form of a draft Constitution Amendment and the National Assembly will consider and vote on it in three readings. After the resolution has been passed, the draft will be presented to the King for his signature and it shall come into force after being published in the Government Gazette. In this regard, even though the role of the King is passive and symbolic, the legislative power may be influenced by the King and in cases where he does not agree with that draft; he can refuse to give his accent to that draft. For instance, in 1992, the King did not sign the *Amendment of the Civil Code Bill* because the Bill would have allowed much higher damages for defamation committed by the press and publishers.[xl] In addition, the King was concerned that the Bill would obstruct the freedom of speech and the right to information.[xli] However, according to the Constitution, his rejection is not absolute because if the Parliament reaffirms the draft with the required number of votes, the draft can be enforced as law as if the King has signed it. [xlii]

The enactment of ordinary legislation is governed by Sections 142 to 153 of the Constitution. In cases of an unavoidable emergency where there is a need to maintain national or public safety or national economic security, or avert a public calamity, the King may issue an Emergency Decree which shall have the force of an Act. Those rules and procedures can be waived under certain circumstances. The enactment of an Emergency Decree is regulated under Section 184 of the 1997 Constitution, which shall be made only when the Cabinet is of the opinion that it is a case of emergency and of necessary urgency. However, the Cabinet shall submit the Emergency Decree to the Parliament for its consideration immediately at the next succeeding sitting.

If the House of Representatives approves an Emergency Decree but the Senate disapproves it, the House of Representatives can re-approve the Degree. If the re-approval is obtained by less than one-half the total number of existing members of the House, the Emergency will lapse. On the other hand, if the re-approval is obtained from more than one-half the total number of the existing members of the House, it will be valid and continue to have the force of law. Nothing will affect any act done during the enforcement of such an Emergency Decree.

Thereafter, the Prime Minister shall cause the approval or disapproval of the Emergency Decree to be published in the Government Gazette. Where it has been approved, it shall be effective from the day following the date of its publication in the Government Gazette (mainly 30-60 days after being promulgated). The consideration of

an Emergency Decree by the House of Representatives and the Senate in case of reaffirmation of an Emergency Decree must take place at the first opportunity when those two Houses hold their sittings.

In this regard, the rules and procedures for the amendment of the constitution and other fundamental laws as well as the enactment of the emergency decree are stated in the provisions of the Constitution; therefore, the amendment shall be done in accordance with those provisions respectively. Hence, the Thai constitution may be amended or suspended in accordance with rules and procedures set forth in the provisions of the Constitution.

Historically, there were some situations, where the Thai constitutions were abrogated in unconstitutional ways, that is, after the military coups. According to the decision of the Supreme Court, it held that the coup is empowered to change, rectify and repeal laws so as to continue to administer the nation, for if that were not the case, the nation could not exist peacefully (Supreme Court Decision, Dika No. 45/2496 and No. 1662/2505),[xliii] however, the Court held not to recognise the law enacted by the particular group that had taken authority, if such law provided a criminal penalty with a retro-active effect or if such law set up a committee having the power to adjudicate cases, similar to that of the courts (Supreme Court Decision, Dika No. 921/2536).[xliv]

c. Are government officials and agents, including police and judicial officers, accountable under the law for official misconduct, including abuse of office for private gain, acts that exceed their authority, and violations of fundamental rights?

The Thai judicial reform in 1997 set up the mechanisms for dealing with cases of misconduct, corruption, acts that exceed authority and violations of fundamental rights committed by government officials and agents. The mechanisms established by the Thai Constitution of 1997 namely: the Constitutional Court, Administrative Court, NHRC, Ombudsman, Supreme Court's Criminal Division for Persons Holding Political Positions and National Anti Corruption Commission (NACC).

Under Thai law, government officials and agents are liable both in criminal law as well as under the Act on Liability for Wrongful Act of Official B.E. 2539 (1996) for any misconduct. This Act does provide many remedial options, such as compensation or action between the administration agency with private sector or administrative agency with state officials. Victims can obtain compensation from administration agencies. The Administrative Court can investigate and to decide disputes arising from administrative acts of state officials.

In addition, misconduct and violation of fundamental rights may be brought to the attention of the Ombudsman. Under the 2009 Organic Law on Ombudsman, the Ombudsman may consider and investigate complaints against civil servants, members or employees of a government agency, state enterprise, or local government if they violate the law or exceed limits of their authority; or for any act or omission by civil servants, members or employees of a government agency, state enterprise, or local government that causes harm, damage or injustice to an individual or to the general public. Action can also be brought in the event of negligence of duties or malfeasance by the statutory agencies and the Courts.[xlv]

Under the National Human Rights Commission Act B.E 2542 (1999), the Commission is authorised to investigate alleged human rights violation cases, to act upon complaints regarding governmental and non-governmental commissions or omissions of acts which violate human rights.[xlvi] According to complaints statistics of the NHRC during 2007-2009, fundamental rights, especially the violation of the right to justice and the right to life and body, more than 60% of cases involved violations by police officers.[xlvii]

The NACC has powers to deal with state officials who become unusually wealthy or have committed an offence of corruption, malfeasance in office or judicial office, including any state official or government official who has colluded with the said state official or government official to commit a wrongful offence or other offences.

The NACC is empowered to inspect the accuracy, actual existence, as well as change of assets and liabilities of persons holding political positions and submit the case to the Supreme Court's Criminal Division for Persons Holding

Political Positions,[xlviii] which has jurisdiction over such cases. Between 2006 and 2010, 39 cases of official misconduct were brought to this Division by the NACC. In the last five years, most cases concerned the corrupt acts of Thaksin, his wife and ministers in his government (Case Nos. 1/2551-20/2551)[xlix] and in October 2008, the Supreme Court's Criminal Division for Persons Holding Political Positions sentenced Thaksin to two-years' imprisonment on corruption charges.[l] He currently lives in the United Kingdom as an exile.[li]

Official misconduct, abuse of power and excess of jurisdiction is also dealt with by the various disciplinary boards established under internal codes for each organ, such as the civil service commission, the judicial officers commission, and the police commission. In 2009, 5,015 cases of police misconduct were investigated by the Department of Discipline of the Royal Thai Police.[lii]

2. Laws and procedure for arrest, detention and punishment are publicly available, lawful and not arbitrary; and preserve the fundamental rights to physical integrity, liberty and security of persons, and procedural fairness in law.

a. Are the criminal laws and procedures, including administrative rules that provide for preventative detention or otherwise have a penal effect, published and widely accessible in a form that is up to date and available in all official languages?

In Thailand, the laws and procedures regarding preventative detention or arrest are governed by the Thai Criminal Procedure Code and other administrative rules such as the Ministerial Regulations on Rules and Procedure relating to detention, imprisonment and provisional release. Under the Constitution, the approved law before the National Assembly shall be presented to the King for his signature and if he agrees, it comes into force upon its publication in the Government Gazette.

All laws are written in the Thai language, the only official language of Thailand, and this makes it quite easily for the public to read and understand the law. Beyond publication in the Government Gazette, they are also published on the official web site of Governmental organs. Hence, Thai laws are widely and easily accessible for everyone both in hard copy and on-line versions. The printed Government Gazette series can normally be found in the collections of libraries of Universities and governmental organs and the on-line version of laws, which are published in the Government Gazette can be found at the website of the Government Gazette <http://www.ratchakitja.soc.go.th> or at the website of the Office of the Council of State <http://www.krisdika.go.th>.

b. Are these laws accessible, understandable, non-retroactive, applied in a consistent and predictable way to everyone equally, including the government authorities, and consistent with the other applicable law?

As aforementioned, laws and procedures for arrest, detention and punishment are printed and published in the Government Gazette, and published on-line via the official web site of governmental organs. Hence, these laws and procedures are accessible for everyone. Adult literacy rate in Thailand is 94%.[liii] If an arrested person does not understand the Thai language, the criminal procedure law requires that the inquiry officials provide a translator for the arrestee.[liv]

Under the Constitution, a law will come into force after being published in the Government Gazette, generally 30–60 days after being promulgated. Laws do not generally have retroactive effect. The Constitution provides that: *No person shall be subjected to a criminal penalty unless he has committed an act which the law in force at the time of commission provides to be an offence and provides a punishment therefore, and the punishment to be imposed on such person shall not be greater severity than that provided by law in force at the time of the commission of the offence.*

Moreover, the Thai Penal Code reaffirms this doctrine in Articles 2(1) and (2): *"If, according to the law as provided afterwards, such act is no more an offence, the person doing such act shall be relieved from being an offender"* and *"if there is a final judgment inflicting the punishment, such person shall be deemed as not having ever been convicted by the judgment for committing such offence. If, however, such person is still undergoing the punishment, the punishment shall forthwith terminate."*

This doctrine is respected even after a military coup. Coup leaders are not allowed to perpetrate or enforce non-retroactive acts. The Supreme Court does not recognise any law that creates a criminal penalty with a retroactive effect.

While laws and procedures are published in the Thai language and is theoretically accessible to everyone, the reality is that laws are written in legal and technical language which is not easy for people lacking legal knowledge to understand, especially the poor in rural areas and displaced persons.[lv]

c. Do these laws authorise administrative/ preventative detention without charge or trial during or outside a genuine state of emergency?

Any arrest or detention must be made by the order or warrant of the Court or upon other causes provided by law. The Court may issue an order or a warrant according to the rules and procedures designed by the President of the Supreme Court.[lvi] Normally, to protect the people from arbitrary arrest and detention, government officials and police officials are unable to arrest anyone without an arrest warrant or the Court's order, except that a police officer may arrest a person without a warrant for a crime committed in the presence of the officer.[lvii] In addition, the Court will issue the warrant of arrest, detention and imprisonment only when evidence reasonably show that the accused has committed an offence and there is cause to believe that he will escape or interfere with the evidences.[lviii]

Normally, arrest without provisional release is limited to 48 hours from the time the arrested person is taken to the inquiry official-house, which is generally the police station. However, the police or the Public Prosecutor may request the Court for a warrant of detention for up to 48 days depending on the punishment of the offence and the circumstance of the case.[lix]

However, the 2005 Emergency Decree, which applied in three provinces: Yala, Narathiwat and Pattani, provides broad powers to the Prime Minister, permitting the delegation of sweeping emergency power to law enforcement officials and reduced accountability to the parliament and the courts. In particular, the Prime Minister may give a competent official the power of arrest and detention over persons suspected of having a role in causing the emergency situation.[lx] In addition, it allows competent officials to arrest and detain a person for an initial period of seven days, with possible extensions for up to 30 days.[lxi] The competent official must seek authorisation from the court for the detention and extension. The ordinary procedure for detention under the Criminal Procedure Code only applies at the end of this period of detention.[lxii]

The Internal Security Act empowers the Internal Security Operations Command (ISOC) to undertake operations in the insurgency in the deep-South of Thailand, narcotics prevention and suppression, illegal immigration, human trafficking and natural resources and environmental protection.[lxiii] The Emergency Decree gives broad powers to the executive arm in the case of a genuine emergency situation and shall not exceed three months with the possibility for extension (Section 5).[lxiv] In reality, the emergency rules have been continual applied in three provinces in the south of Thailand by the government in response to the conflict since 2005. The fact that these rules have applied to the South for over five years reflects the inefficiency of governmental measures dealing with the Southern conflicts.

d. Do these laws protect accused persons from arbitrary or extra-legal treatment or punishment, including inhumane treatment, torture, arbitrary arrest, detention without charge or trial and extra-judicial killing by the Sate? Is the right to habeas corpus limited in any circumstance?

Thailand is a party to the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Constitution recognises the prohibition of a torture, brutal acts, or punishment by cruel or inhuman means. This is also recognised under the Criminal Procedure Code: *"the inquiry official shall be prohibited to make or to be made any act as deception, threat, promise, torture, coerce to the accused to make any particular statement in the charge against him"*.[lxv] As a result, the arrest or detention or imprisonment of a person can only be made under an order or warrant of the Court. To prevent arbitrary arrest, sufficient evidence must be adduced to give the Court grounds for issuing such an order or warrant.[lxvi]

Even though torture is prohibited, the Report of the Asian Legal Resource Centre shows that torture is routinely practiced and accepted in Thailand. It is used by all security agencies, especially the Royal Thai Police.[lxvii] Ordinarily, the police are associated with routine physical abuse and humiliation of persons in their custody. Unusually cruel forms of tortures are also inflicted both on persons taken into custody over special crimes such as terrorist activities or ordinary crimes. Remarkably, no domestic law efficiently addresses the use of torture even though Thailand is a party to the CAT.

The 1997 Constitution prohibited arbitrary arrest and detention, but government forces occasionally arrested and detained persons arbitrarily. NGOs and legal organisations continue to report that the Thai police occasionally tortured and beat suspects to obtain confessions.[lxviii] On September 19, 2006, the military coup leaders revoked the Constitution and decreed martial law. Four former high-level government officials were detained without formal charges, but they were all released on October 1, 2006.[lxix]

Extra-judicial killings in Thailand are prohibited although the police has wide powers to deal with a fugitive who resists arrest or attempts to escape.[lxx] Regarding this, extra-judicial killing may be undertaken by the officials only for self-defence[lxxi] or to prevent the suspects from escaping. Furthermore, the inquiry officers must investigate to determine the causes of death in extra-judicial killing cases as required in Article 150 of the Criminal Procedure Code.

The reality is somewhat different. In 2003, extra-judicial killings suspected drug traffickers claimed some 1,300 suspected drug traffickers during the Thaksin's "War on Drugs" campaign. This campaign was one of the justifications for the 2006 coup.[lxxii] On December 14, the Ministry of Justice's Department for Special Investigations opened four investigations of possible extra-judicial killings associated to the 2003 War on Drugs. Unfortunately, no one has been brought to justice to date.[lxxiii]

The Court is required to find reasonable evidence before issuing a warrant to detain or imprison the accused person; nevertheless if there is a claim regarding illegal detention, such detainees shall have the right to *habeas corpus*. The Thai Criminal Procedure Law recognises the right to *habeas corpus* in the case of any person is detained in a criminal case or in any other case unlawfully. According to the law, the detainee himself, the public prosecutor, the inquiry official, the head of the jail or the jail officer, or spouse or relatives of the detainee are entitled to file a petition with the Court to be empowered to trial the criminal case to be released. The Court shall proceed without delay and if the jail officer is unable to satisfy the Court that the custody is lawful then the Court shall order to release the detainee without delay.[lxxiv]

e. Do these laws provide for the presumption of innocence?

An accused person is presumed innocent until proven guilty. The presumption of innocence is recognised by ICCPR and reaffirmed by the Constitution; in particular before a final judgment an accused person shall not be treated as a convict.[lxxv] In addition, only a person who has been charged in the court with the commission of an offence is called an accused, and a person who has not yet been charged in the court is called an alleged person.[lxxvi] There is no provision in the Criminal Procedure Code to explicitly reaffirm the presumption of innocence. However, the Code recognises that where any reasonable doubt exists as to whether or not the accused has committed the offence, the benefit of doubt shall be given to him, therefore, the presumption of innocence is also guaranteed by such provision.[lxxvii]

An arrestee may receive provisional release.[lxxviii] The presumption of innocence mirrored in the Criminal Procedure Code that the arrestee in custody must be released as soon as possible. The arrestee may be kept in custody, in general, for not more than forty-eight hours from the time of his arrival at the office of the administrative or police official. However, if necessary, this period may be extended as long as such necessity persists, but in no case shall it be longer than seven days.

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

The right to counsel or having trusted persons present during interrogation are recognised by the Constitution.[lxxix] The law on criminal procedure requires that after the arrest, the arrested person or the accused is entitled to meet and talk with the person, who will be their lawyer and has the right to let their lawyer or trusted person present during interrogation.[lxxx] In addition, the accused person is entitled to be informed of these rights at the time of arrest.[lxxxi]

The alleged persons have the right to legal assistance from counsel, including the right to choose counsel themselves. They are entitled to be represented by counsel in the preliminary examination or trial in the Court.[lxxxii] Before the start of criminal hearings, if the accused has no counsel, one will be appointed by the Court if the charge carries a maximum sentence of death or by request where the accused is aged 18 or younger. According to the Criminal Procedure Code, in cases where the accused is not more than 18 years old, before being informed of the offence, the inquiry officer may ask whether he has counsel or not. If he requests one, the state shall appoint one.[lxxxiii] The lawyer fees will be paid by the Court according fees prescribed by the Rules of the Ministry of Justice. Nevertheless, lawyer fees are very low, and are determined by the judge based on the complexity of the case. Fees range between THB 2,000-10,000 (approx. USD 70-350).

In the case of poor persons, who are unable to afford legal counsel, they are entitled to find legal counsel through the legal aid unit. Generally, there are several legal aid organisations and programs in Thailand. Some of them are supported and funded by the national government while others are supported with funds from private enterprises. The Government funds the Office of Public Legal Aid which provides legal aid. For many years, the Government has made great efforts to improve and promote the legal profession and develop the legal aid system in Thailand.

In cases where poor persons are unwilling to find legal counsel themselves or unable to afford to find the legal counsel, they are entitled to submit an application to the Court and the Court has the power to appoint counsel. The appointed counsel has the right to receive a gratuity and expenses according to the regulations of the Justice Executive Committee. [lxxxiv]

Moreover, under the Criminal Procedure Code, in the case of the death penalty or where the accused is less than eighteen years old, the inquiry official or Court must ask the accused if they have a lawyer or not. If he/she does not have one then the state shall appoint one.[lxxxv] The appointed lawyers are entitled to receive a gratuity and expenses from the Court pursuant to the rules designed by the Administrative Committee of Court of Justice.[lxxxvi]

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

The arrestee has the right to be informed of the precise charges against him. The criminal procedure law stipulates: *"After being arrested, the arrestees must be transferred to the inquiry official-house without delay and the inquiry officials has to notify the charges and details in respect of the cause of arrest to the arrested persons"*.[lxxxvii] Moreover, it provides that in the case where an accused person is summoned or brought or appears voluntarily before the inquiry official, the official shall notify him of the charges.[lxxxviii] Regarding this, the Thai criminal procedure law guarantees the accused persons' right to be informed of the precise charges against them.

In criminal cases, the Constitution provides that the suspect or accused has the right to defend himself and to examine or be informed of evidence as necessary with legal assistance from an attorney.[lxxxix] Furthermore, the right to communicate with their legal counsel is reaffirmed by the provision of the Criminal Procedure Law that 'the arrestee or accused person is entitled to be informed of the right to meet and talk with their lawyer, and the accused is

entitled to communicate with their lawyer.[xc] In addition, the accused is entitled to have the lawyer or trusted person present during interrogation[xci] and to appoint the lawyer to deal with preparing their defence in any stage of the proceedings.

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

The right to a speedy trial was recognised under the 1996 Constitution until the present version of 2007. The constitutional right to speedy trial states that "a person shall have the rights in the administrative of justice to have the right to correct, *speedy* and fair trial of his or her case".[xcii] Thai criminal procedure law reaffirms such right by stating that 'from the time of entry of a charge, an accused is entitled to be tried speedily, continuously and fairly' and restates that the accused person is entitled to be examined rapidly, consecutively and impartially.[xciii]

Additionally, Thai criminal procedure law stipulates that the trial and taking of evidence shall be conducted in open Court and in the presence of the accused.[xciv] However, the trial and taking of evidence in the absence of the accused shall be done, if the accused and lawyer have the Court's permission not to attend the trial and the taking of evidence. However, the Court may issue an order that the trial be conducted within closed doors, in the interest of public order and morality or in order to prevent secrets concerning the security of the State from being disclosed to the public. Nevertheless, the judgment and order of such trial shall be read in open Court.

Matters of procedure not specially provided for in the Criminal Procedure Code shall be governed by the Civil Procedure Code.[xcv] The Civil Procedure Code provides that all parties are entitled to appoint legal counsel to examine witnesses and evidence against them, and to appeal the judgment and any decision of the court.[xcvi] In this regard, the accused persons have the right to defend themselves in person and the right to have legal counsel examine witnesses and the evidence against them. If the accused persons do not have counsel, the Court shall appoint one for them.[xcvii]

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

Thailand has a three-tiered court system collectively known as the Courts of Justice, which has jurisdiction over all cases except those specified by the Constitution or other written law. The Court of Justice comprises: Courts of First Instance; the Court of Appeal and the Supreme Court of Justice (DIKA Court). The Criminal Procedure Code recognises the right to appeal against the judgment or order on questions of fact or questions of law to a higher court, except where such appeal is prohibited under the law.[xcviii] When judgment has been rendered by the Court of First Instance, the parties have the right to appeal to the Court of Appeal and then all the way to the Supreme Court of Justice. [xcix]

j. Do these laws prohibit the use of coerced confessions as a form of evidence and do they guarantee the accused person's right to remain silent?

Thai Criminal Procedure Law prohibits the use of coerced confessions, deception, threat, inducement, or torture to induce the accused to make any statement in the charge against him.[c] Moreover, Thai Evidence Law provides that where it appears to the Court that any evidence has been adduced by inducement, promise, threat, deception or other unlawful means, it is inadmissible.[ci]

Additionally, inquiry officials must inform the accused of his right to remain silent. If the accused is unwilling to make any statement, it shall be noted. This right to remain silent is guaranteed under the Criminal Procedure Code.[cii] At trial, the accused also has the right to remain silent by refusing to make any statement.[ciii]

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

The principle of *Ne Bis in Idem*, that no one shall be twice tried for the same offence, is recognised under the Penal Code and Criminal Procedure Code.

The Penal Code forbids punishment for the same act, and this includes offences committed outside the country. In the latter instance, where final judgment of a foreign court acquits or convicts the accused, such judgment is final and he may not be prosecuted again in Thailand.[civ] In addition, Article 39 of the Criminal Procedure Code prohibits prosecution twice of a case for the same cause of action: *"the right to institute a criminal prosecution is extinguished by the final judgment in reference to the offence for which the prosecution has been instituted"*. Hence the re-trial or re-punishment of an offence, where a person has already been convicted or acquitted is prohibited.

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

Under the 2007 Constitution, the right to seek remedy of the victims and witnesses is found in section 40(5) which stipulates: *"An injured person, suspect, defendant and witness in a criminal case shall have the right to necessary and appropriate assistance from the State. Remuneration, compensation and necessary expenses shall be as provided by law."*

Victims of crime suffer damage from their rights, *i.e.* the loss of property, bodily injury, death and mental suffering. It is therefore fair that they receive reasonable restitution. Such remedies may include the return of property, payment for harm or loss suffered, and reimbursement of expense incurred as a result of the proceeding or the issue or restitution order directly by the Court. Under the Criminal Procedure Code, the victim is entitled to claim compensation for any act causing death, bodily harm, mental harm, loss of bodily freedom, reputation or property damage arising from the accused person's committing the offence.[cv]

The injured party is not allowed to enter into the *partie civile*, a procedure in which the victim of crime can pursue a civil claim against the offender at the same time and in the same proceedings as the criminal trial. However, the criminal procedure allows the prosecutor, in some offences, (*ie*, in the case of theft, snatching, robbery, gang-robbery, piracy, extortion, cheating and fraud, criminal misappropriation and receiving stolen property) to apply for restitution of the property or the value thereof on behalf of the injured party. A civil case can also be instituted by the injured party in connection with the criminal case. However, it is difficult for them to receive adequate compensation or any compensation at all, because in many criminal cases offenders cannot be identified and brought to justice. In addition, the offenders may lack enough money to pay for a victim's damages or the victims themselves may not be able to collect enough evidence to sustain civil actions as well as to hire the lawyer.

Apart from claiming directly from the offenders, crime victims may be entitled to compensation from the State for monetary relief from the apprehension and conviction of the offender pursuant to the Damages for the Injured Person and Compensation and Expense for the Accused in Criminal Case Act, B.E. 2544.

3. The process by which the laws are enacted and enforced is accessible, fair, efficient, and equally applied.

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

Legislation may be introduced by four channels: the Council of Ministers, the members of the House of Representatives, the Court or the constitutional independent organ, or persons having the right to vote and the legislative proceedings will be held within the duration as stated in the provision of the Constitution.

After submitting the draft, the Act will be introduced to the National Assembly. The draft will be first considered by the House of Representatives and upon approval, submitted to the Senate. The Senate must consider the bill within sixty days and if the Senate agrees with the House of Representatives, the Prime Minister shall present it to the King for assent within twenty days from the date of the receipt of the draft Act from the National Assembly. The law comes into force upon its publication in the Government Gazette.

The Constitution requires legislative proceedings to be made publicly and conveniently accessible.[cvi] Every person has access to legislative proceedings by following and watching on-line, the sitting on the web site of the

Thai National Assembly at <*www.parliament.go.th*> or the official web site of the Senate of Thailand at <*http://www.senate.go.th*>. The draft Acts, recordings and transcripts of the sitting are uploaded on the website for universal access.

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

As stated above, legislative proceedings are publicly accessible in a convenient manner. When any Bill is submitted to the House of Representatives, it must be accompanied by an explanatory note summarizing essential contents of the law. Hence, everyone is able to get the official drafted laws for the legislative proceedings at the web site of the Thai National Assembly at <*http://www.parliament.go.th*>, the web site of the Senate of Thailand at <*http://www.senate.go.th*> or the website of the Office of the Council of State at <*http://www.krisdika.go.th*>.

Apart from watching a real-time web-cast of the National Assembly the National Assembly <*http://www.parliament.go.th*> or the web site of the Senate of Thailand at <*http://www.senate.go.th*>, everyone, who is unable to watch in real time, is able to access the day-by-day legislative proceeding by getting the transcripts or minutes of the sitting to consider via those web sites.

c. Are the thresholds for legal standing before courts clearly specified, not discriminatory and not unduly restrictive?

The threshold for standing for the Court of Justice is prescribed by the Criminal Procedure Code and Civil Procedure Code. Under the Criminal Procedure Code, cases can be brought by the Public Prosecutor and/or the injured person.[cvii] The threshold for criminal cases is where an injury is sustained as a result of any offence under the Penal Code and such injury resulted from the act of the accused (causation).

A criminal case may be brought by an injured person as a personal complaint and an inquiry will be conducted by the special investigators of the Department of Special Investigation, Ministry of Justice.[cviii] After the inquiry the law enforcement agencies will present the case and the accused to the Public Prosecutor, who may bring the case to court (Thai prosecutors are not empowered to initiate investigate or to institute the cases themselves). In addition, an injured person is entitled to associate himself with the Public Prosecutor in any stage. If the Public Prosecutor has an order of non-prosecution, the injured person is entitled to enter the action himself.[cix]

A criminal case may be withdrawn at any time before it is decided but if the Public Prosecutor withdraws a prosecution of a compoundable offence, he must obtain the written consent of the injured person. However, the withdrawal of cases concerning both compoundable and non-compoundable offences, by the Public Prosecutor does not preclude the injured person from re-instituting the suit. In the same way, the withdrawal of case relating to a non-compoundable offence by the injured person does not preclude re-institution of the case by the Public Prosecutor.[cx]

In civil cases, the plaintiff must establish a number of requirements before he has *locus standi* before a court of first instance. Under the Civil Procedure Code, the thresholds for legal standing before the civil court are: disputation involving his rights or duties under the civil law or willingness to exercise his right through a court. If the case meets these requirements, the plaintiff may submit his case to a civil court having jurisdiction and competence over the case.[cxi]

However, there is a traditional restriction the filing of suit. In "*Utthalum Cases*", a person is prohibited from filing a suit (whether civil or criminal), against his own parents or grandparents, unless the Public Prosecutor does so on behalf of the plaintiff.[cxii]

In the Supreme Court's Criminal Division for Persons Holding Political Position, a case may be submitted by the NACC under the Organic Act on Counter Corruption, pursuant to a request by the injured person. An injured party is entitled to submit a petition to a general meeting of the Supreme Court of Justice if the NCHR dismisses a petition for inquisition, or the inquisition has been unduly delayed, or the inquisition has concluded that there is no *prima facie* case in the accusation.[cxiii]

A case may be filed through the Constitutional Court by the Court, the Ombudsman, the NCHR or any person. The Court shall submit its opinion on the constitutionality of a law to the Constitutional Court. Similarly, the Ombudsman may submit a case concerning a question of constitutionality to the Constitutional Court. If the NCHR is of the view that a law is detrimental to human rights as guaranteed by the Constitution, it may raise the question of constitutionality to the Constitutional Court. Any person whose rights or liberties are violated has the right to submit a motion to the Constitutional Court for its decision as to whether the provisions of the law are contrary to or inconsistent with the Constitution.

Pending the enactment of the Organic Act on Rules and Procedure of the Constitutional Court, the Court is empowered to prescribe rules on procedures and the rendering of decisions (Section 300(5)). According to the Constitutional Court's Rules on Procedure, persons whose rights or liberties have been violated must first submit their complaint to the Court, Ombudsman or NCHR. Only if he is unable to exercise his right through those three channels, then he is entitled to submit his case to the Constitutional Court personally.[cxiv]

Apart cases submitted by the Ombudsman (Section 245) and the NCHR (Section 257), The Administrative Court may submit a case at the Court on behalf of any person who is aggrieved or injured in consequence of an act or omission by a State agency or a State official or who has a dispute in connection with an administrative contract or other case falling within the jurisdiction of the Administrative Court according to the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 and the Rule of the General Assembly of Judges of the Supreme Administrative Court on Administrative Court Procedure, B.E. 2543.[cxv]

The rules and procedures of the Military Court, including the requirements to submit the case before the Martial Court are found in the Constitution of Military Court. The Constitution of Martial Court allows militarily prosecutors as well as any injured person to bring a case in the Military Court.[cxvi]

d. Are judicial hearings and decisions public and made readily available to affected parties?

Thai criminal procedure law states the trial and the taking of evidence, including the reading of judgment or order shall be conducted in open Court.[cxvii] In addition the judgment and order shall be read in open Court. The decisions are then made available to parties in the case. Non-interested third parties have not access the full judgment of the Court of Justice, but only the summary of the judgments of the Supreme Court through the official web site of the Supreme Court at <*http://www.deka2007.supremecourt.or.th/deka/web/search.jsp*>. It provides two versions of summary: the short version and the long version. Unaffected parties wanting access to the full judgment of the Supreme Court must submit a request form and state their reasons for wanting a copy, along with payment of copy fees.

Judgments of other Courts, the Administrative Court and the Constitutional Court, are published publicly. Everyone can access the decisions of the and judgments of these Courts at the official web site of the Constitutional Court <*http://www.constitutionalcourt.or.th*> and the official web site of the Administrative Court <*http://www.admincourt.go.th*>.

e. All persons are equal before the law and are entitled to equal protection of the law without any discrimination?

Equality before the law, equal protection of the law and non-discrimination are guaranteed under the Constitution. The General Provisions recognise that human dignity, rights, liberties and equality of the people shall be protected and all Thai people shall enjoy equal protection under this Constitution, irrespective of their origins, sex or religion.[cxviii] Moreover, it also specifically recognises that *"all persons are equal before the law and shall enjoy equal protection under the law"* and *"the unjust discrimination against persons on the grounds of origins, race, language, sex age disability, physical or health condition, personal status, economic or social standing, religious belief, education or constitutionally political views, shall not be permitted."*[cxix]

In reality, this guarantee may well be flouted on account of one's political views. In 2009, the red-shirt (pro-Thaksin) protesters forced leaders of ASEAN and partner countries to flee from a summit venue in Pattaya; PM Abhisit Vejjajiva imposed a state of emergency as blockades and violence spread in Bangkok. A court promptly issued arrest warrants for the leaders of the red-shirted demonstrators. Some were quickly rounded up and detained, while others went into hiding. In contrast, in 2008, the yellow-shirts (anti-Thaksin) demonstrators took over Government House and occupied two international airports for an extended period. Yet they were allowed to stay put until the government was forced out through a court ruling on a narrow question under the army-imposed 2007 Constitution. The criminal inquiries were repeatedly postponed and it took a long time to have the yellow shirts' leaders were arrested and held in custody.

On November 29, 2010, the Constitutional Court head a case involving the ruling Democratic Party's suspected illegal use of political funds and handed down a not -guilty verdict in favour of the Democrat Party. While this meant that the Democrat Party avoided dissolution, the pro-Thaksin faction which had received guilty verdicts in 2007 and 2008 and had subsequently had been dissolved both times, has increased criticism of the *'judicial system's double standard'*, and there is concern that protest activities may increase.

f. Do persons have equal and effective access to judicial institutions without being subjected to unreasonable fees or arbitrary administrative obstacles?

The jurisdiction of the courts is divided into four sections: Civil Courts, Criminal Courts, Municipal Courts and Provincial Courts. The municipal courts hear smaller matters, where civil claim does not exceed THB 300,000 (approx. USD 10,000), or the fine or prison sentence does not exceed 3 years or a fine exceeding THB 60,000 (approx. USD 2,000). Another difference between the municipal courts and the general courts is the quorum. The general court requires two judges, whereas a single judge presides in the municipal court.

In 2010, Thailand had 232 courthouses of Court of Justice: 221 Courts of First Instance, 10 Courts of Appeal and 1 Supreme Court.[cxx] During 2006-2008, three new courts were established in Surat-thani, Lopburi and Songkhla provinces to provide access to the courts within one -and -a -half hours.[cxxi] Thailand also has a number of specialised courts such as the eleven courthouses of the Administrative Court, Administrative Courts of First Instance, one Supreme Administrative Court and one Constitutional Court.

Court fees are not an impediment to judicial access in criminal cases as there is no court fee in criminal cases. In civil cases, fees are 2 percent of the disputed sum. That said, the amount could still be quite high, in particular for poor people.[cxxii] In addition, there are some other administrative obstacles such as the justice services, which are very complicated and require legal knowledge. These obstacles increase inaccessibility to the courts for the poor.[cxxiii] Poor people may, however, access through the Legal Aid Unit in Thailand, particularly the Lawyer Council of Thailand.

g. Are the laws effectively, fairly and equally enforced? Are persons seeking access to justice provided proper assistance?

Under the Constitution, all Thai persons are equal before the law and everyone is entitled to equal protection by law. All Thais have equal access to justice. Thailandgives specific rights to Muslims in four provinces in the South: Satun, Yala, Pattani, and Narathiwat. There is no Sharia Court in Thailand but the Statute of the Court of Justice (the Law of Court Organisation) provides that in civil suits such as in family and succession cases, Islamic judges, called *"Dato Yuttidham"* also known as *"Kadi"* will preside. The Act on the Application of Islamic Law in the Territorial Jurisdictions of Pattani, Narathiwat, Yala and Satun Provinces, B.E. 2489 was promulgated in 1946 and applies to civil suits concerning families and inheritance among Thai Muslims. The decision to apply Islamic law stems from the fact that more than 80 percent of the population in these four provinces are Muslims. This law is applied when both parties are Muslim. The decision of the *Dato Yutitham* is final in such cases.

The poor are entitled to assistance for equal access to the courts. This is provided by the Legal Aid Unit of the Lawyer Council of Thailand. The Office of Public Legal Aid of the Lawyer Council of Thailand, was established in 1995 pursuant to the Lawyer Act. Its main aim is to support and provide legal aid services for the poor and special groups. It is administrated by the Lawyer Council of Thailand under the supervision of the Public Legal Aid Committee. It provides free consultation and advice on legal issues, free representation to eligible persons and legal dissemination activities. Moreover, it also runs a legal aid hotline from Mondays to Fridays and legal aid services via its web board. Moreover, the poor may also ask for any assistance from the Thai Bar or the Office of Attorney General.

The Office of Public Legal Aid relies on volunteer lawyers. The volunteer lawyers receive token remuneration under the rules made under the Lawyer Act. According to the Lawyer Act, funding of the Office of Public Legal Aids comes from four sources: National Government budget (annually around THB 50 million); Lawyer Council of Thailand (10% of its revenues); donations from the public; and interests earned from the abovementioned three sources.

According to the 2008–2009 statistics, the Office of Public Legal Aid had advised and assisted 54,620 cases in 2009 and 57,356 cases in 2008 and 6,955 cases were provided with actual legal representation services.[cxxiv] However, the Office of Public Legal Aid faces a number of issues and challenges. One major problem is the very low number of volunteer lawyers compared with the numbers of cases; and the small budget is not enough for the operation. In addition, the number of lawyers who work in local areas in Thailand is very small; 55,320 qualified lawyers are registered as members of the Lawyer Council of Thailand.[cxxv] While these numbers would ordinarily be sufficient, there are insufficient lawyers in rural areas where there is lack of a legal aid system and a shortage of lawyers.[cxxvi]

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

The right to seek remedy for the victims and witnesses is recognised under the 2007 Constitution as well as the Thai Criminal Procedure Code and victims are entitled to claim reparation both from the offenders directly pursuant to the criminal procedure law and from the State according to the Compensation for Victims of Crime Act B.E. 2544.

To claim reparation from the offender, the prosecutor may apply on the victims' behalf. In real life, it would be difficult to attain restitution since the injured party would need to have assistance from a lawyer and the lengthy civil proceeding would deter such practice. Then, it would be difficult for the victims to receive adequate compensation or any compensation at all from the offenders. Hence, the compensation from State would be more effective.

Under the Compensation for Victims of Crime Act B.E. 2544, an injured is one whose life, body or mind has been injured by a criminal offense, such as offences: relating to sexuality; against life and body; causing death or bodily harm; of abortion; and abandonment of children, sick or aged persons. The request may be submitted to the Committee via the Office of Monetary Assistance to Injured Person and Accused Person in Criminal Case, the Rights and Liberties Protection Department, Ministry of Justice or at the Office of Justice in every province within one year from the date the offence was committed and was known to the injured person.[cxxvii]

Victims in a criminal case have access to relevant information concerning violations and reparation mechanisms via the Office of Monetary Assistance to Injured Person and Accused Person in Criminal Case, the Rights and Liberties Protection Department, Ministry of Justice as well as the official web site of the Rights and Liberties Protection Department at <*http://www.rlpd.moj.go.th*>.

i. Do the laws provide for and do prosecutors, judges and judicial officers take measures to minimise the inconvenience to witnesses and victims (and their representatives), protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect their interests?

Under the Constitution, witnesses and victims have the right to appropriate treatment in the judicial process. The Act on the Protection of Witness in Criminal Cases Act BE 2546 provides for the general and special protection for witnesses in criminal cases, and for the consideration, compensation and allowances to witness. In addition, the Office of Witness Protection was established in 2003 to deal with the protection of witness.

The Judicial Officials Regulation on the Treatment of the Witness B.E. 2548 provides that witnesses be treated politely and in a non-discriminatory fashion, bearing in mind local customs and traditions. It also provides the allowances and measures for the convenience of witnesses as well as security measures for the witness including his family before, during and after presenting evidence. The witness is entitled to request special protection before the court and after giving oral evidence, the court has to provide an allowance to the witness. The victim, who is an important witness, is entitled to the same protection as the general witness.

The Criminal Procedure Code was amended to include a new procedure for the interrogation of children who were victims of violence, particular domestic violence, by allowing them to have a prosecutor, psychologist and social worker present during the interrogation. Teleconference testimonies may be provided during the hearing to reduce confrontation with the defendants.[cxxviii] In addition, the Compensation for Victims of Crime Act BE 2544 of 2001 also provides measures to consider the compensation for the victims or injured persons, in criminal cases.

4. Justice is administered by competent, impartial and independent judiciary and justice institutions

a. Are prosecutors, judges and judicial officers appointed, re-appointed, promoted, assigned, disciplined and dismissed in a manner that fosters both independence and accountability?

Previously, the judiciary was administered by the Ministry of Justice but in 2000, the judiciary was completely separated from the Ministry of Justice. The President of the Supreme Court acts as head of the judiciary. The courts have an independent central administrative body, the Office of Judiciary, which has powers and duties to support judicial proceedings in all aspects of administrative works, judicial affairs and judicial technical affairs, including cooperation with other governmental agencies.[cxxix] Additionally, to achieve judicial independence, the term of judges shall be secured by the rule of law, where a judge can only be removed through death, disability, resignation, retirement and deprivation of as a result of malpractices.

Section 197(2) of the Constitution affirms the independence of judges as follows: *"Judges are independent in the proper, swift and fair trial and adjudication of cases in accordance with the Constitution and laws"* and *"The transfer of a judge without his prior consent shall not be permitted except in the case of a periodic transfer, promotion to a higher position, being subject to a disciplinary action or becoming a defendant in a criminal case, being a case which prejudices justice in the trial and adjudication of cases or in case of force majeure or any other unavoidable necessity."*[cxxx]

Apart from these constitutional guarantees, there are some laws to ensure judiciary independence, such as the Law on Court Organisation B.E. 2543, which in Article 32 provides the responsibility for assignation, transfer and reclamation of the cases; and other Judicial Officials' Regulations Regarding Cases Management.

The appointment and removal from office of a judge is done by the King. In the case of the Court of Justice, the Judicial Commission oversees the appointment, promotion and discipline of judges, then the appointment and removal from office of a judge of a Court of Justice must

be approved by the Judicial Commission of the Courts of Justice before they are presented to the King. The promotion, increase of salaries and punishment of judges of the Courts of Justice must be approved by the Judicial Commission of the Courts of Justice. [cxxxi]

Hence, the judiciary and its functions are virtually independent from both legislative and executive arms. Judges are governed by the Regulation of the Judicial Service Act B.E. 2543 and may be dismissed from service only for proven misconduct, incapacity, or infirmity.

In practice, there are a number of cases regarding the removal of judges in the country. For instance, on 26 July 2009, *Judge Petchwat Watthanapongsirikul*, a lay judge in the Labour Court,[cxxxii] was dismissed by the King because of his unsuitable role as a leader of the red-shirt protesters. He was found guilty under Section 15(7) of the Establishment of the Labor Court and Procedure Act.[cxxxiii] On July 13, 2010, the King removed *Judge Toppong Thamnieb* and *Judge Chaipruk Himmaparn* because of their malpractices pursuant to the Regulation of the Judicial Service Act.[cxxxiv] On October 14, 2010, *Judge Prayuth Neerapol*, a judge at the Thon-buri Criminal Court was dismissed based on his inappropriate manner.[cxxxv] And, currently, the Judicial Commission of the Court of Justice decided to present the case of *Judge Somsak Chantakul* to the King for his order to remove because his inappropriate social life and infirmity which breaches the Code of Conduct of Judges.[cxxxvi]

b. Do prosecutors, judges and judicial officers receive adequate training, resources, and compensation commensurate with their institutional responsibilities? What percentage of the State's budget is allocated for the judiciary and other principal justice institutions, such as the courts?

Judges in Thailand are recruited by the Judicial Commission and are appointed by the King. Besides having certain qualifications – such as being of Thai nationality, passing the Thai Bar Examination -Law, being at least 25 years of age – a candidate must pass a highly competitive examination given by the Commission. Once recruited, they have to be trained as judge-trainee for at least one year. Those candidates who satisfactorily complete the training will be approved by the Commission and tendered to the King for royal appointment as judges.[cxxxvii] However, new judges do not have experience.

To become a prosecutor, Law graduates shall have qualifications as required by the Regulation of Public Prosecutor Officers Act B.E. 2521 (1978) such as having a Bachelor's Degree in law (LL.B.), being of Thai nationality, being not less than 25 years of age, passing Thai Bar Association as well as passing the public prosecutor -trainee examination. After passing prosecutor-trainee examinations, they will be called to participate in training and will be evaluated before appointment as Assistant District Public Prosecutor. Every public prosecutor-trainee must be trained by the Attorney-General's Office for not less than one year and must be evaluated by the Public Prosecutor Committee to determine whether he/she has obtained appropriate knowledge and ability and has the appropriate conduct to be appointed as an Assistant District Public Prosecutor[cxxxviii]

So, for prosecutors, judges and judicial officers, there are the institutions responsible for providing the training of people *i.e.*, the Judicial Training Institute for the judges and judicial officers, and the Training and Development Institute Office of the Attorney General for the prosecutors. These Institutes have oversight over all training as well as operating conferences, seminars and symposium for the judges, judicial officers and prosecutors in order to facilitate the works of the courts. In recent years the Court of Justice has pursued training programs overseas to promote a better understanding of international perspectives and instruments among judges.

Statistically, Thailand annually allocates a budget for the judiciary and other justice institutions such as the Court of Justice, the Administrative Court, the Constitutional Court, the Office of Prosecutor General, the Office of the Royal Thai Police, the NCHR and the NACC. According to Statistics, from 2006 to 2010[cxxxix], Thailand allocated the equivalent of 0.7% of State's budget to Courts, 0.3% to the Office of Prosecutor General, 3.8 % to the Office of Royal Thai Police, 0.008% to the NCHR and 0.04% to the NACC. For 2011, the budget allocated was the same percentage of the State's budget to those judiciary and justice institutions. Thailand allocates THB 14.5 billion (0.7%) to Court of Justice, Administrative Court and

Constitutional Court; THB 6.4 billion (0.31%) to the Office of Prosecutor General; THB 75 billion (3.62%) to the Office of Royal Thai Police; THB 182 million (0.008%) to the NCHR; and THB 1032.1 million (0.05%) to the NACC.[cxl]

c. Are judicial proceedings conducted in an impartial manner and free of improper influence by public officials or private corporations?

As stated earlier, the independence of the judiciary is guaranteed by the Constitution. To protect judges from outside pressures or influences from any other sources, their terms of office are secured by the rule of law. Moreover, judges are not allowed to be political officials or hold political positions.[cxli] These measures seek to prevent impartial manner and improper influence by public officials or any private cooperation.

Practically, however, the influences of public officials or private corporations in judicial proceedings have frequently been demonstrated. For example, in 2007, Thaksin's lawyer and his associates attempted to bribe court officials using THB 2 million. It was believed that this was an attempt to clear a way for a judge. In addition, the credibility of the Constitutional Court faced an important challenge during countdown to the verdict on the Democrat Party dissolution case in November 2010 because five video clips, showed former court employee, *Pasit Sakdanarong* and two judges discussing ways to fend off adverse impact from alleged fraud involving the recruitment of court officials, were uploaded to YouTube by "ohmygod3009".[cxlii]

d. Are lawyers or representatives provided by the court to accused persons, witnesses and victim competent, adequately trained, and of sufficient number?

As mentioned earlier, the Court is duty-bound to provide lawyers or legal counsel under the Criminal Procedure Code. To qualify as lawyers, the pre-requisite is an LL.B. degree from a Thai University as well as a pass in a 7–8 month training course provided by the Lawyers Council of Thailand. Alternatively, law graduates may serve as lawyer trainees (i.e., articled clerks) for one year in a law office and then pass the Lawyer Council examination before applying to the Lawyers Council for permission to practice law. Those who wish to do so may pursue a Barrister-at-Law degree, a further one-year course offered by the Bar Institute of Thailand.

As of August 20, 2010, the number of lawyers registered as members of the Lawyer Council of Thailand was 55,320. This is quite lot compared to the number of judges (4,296) and prosecutors (3,187). The number of lawyers registered as public defenders is only around 100–200 lawyers in each Court which is insufficient. Each year, the Court will assign 3–5 cases per year, and may pay a gratuity, depending on the Administrative Committee of Court of Justice's rules, of around THB 2,000-10,000 (approx. USD 70-350) per case. Most public defenders are male, between 25-36 years old, and having very little or no experience in being a public defender. Indeed, most registered public defenders are young lawyers who just passed the Lawyer Council examination. These lawyers gain practical experience, including mooting experience from assigned cases from the Court as public defenders.[cxliii]

The objectives of providing appointed lawyers by the Court to the accused are to protect the rights and liberties of the accused and to guarantee equality of arms in the proceedings. Alas, court-appointed public defenders are unable to protect the rights and liberties of the accused sufficiently. According to the complaints of the Asian Human Rights Commission, there are many cases where human rights protection challenges the role of public defenders and their failure to properly represent their clients.[cxliv]

e. Do legal procedures and courthouses ensure adequate access, safety and security for accused persons, prosecutors, judges and judicial officers before, during and after judicial, administrative, or other proceedings? Do they ensure the same for the public and all affected parties during the proceedings?

There is no specialised sector responsible for the security and protection of prosecutors, judges, judicial officers as well as courthouses. However, the Ministerial Regulation on National Security, B.E. 2552 states that all governmental organisations shall have their own security

mechanisms[cxlv] so the Official of Judicial officers, Office of Attorney General as well as Office of Court of Justice, including Administrative Court and Constitutional Court have to provide security for their personnel and institutions themselves. In the other words, they are empowered to hire security companies to protect themselves.

Normally, the security system at the courthouse will be set up by a private company to provide overall protection to persons in the courthouse. Only if the judges are being threatened, police officers in that area will be assigned to protect them. In some cases, when a judge takes risk to be a victim, he may ask for special security protection. These measures would be enough for normal civil or criminal case, but not for important cases, which may be influenced by political interference, in particular, criminal cases of persons holding political positions in the Supreme Court of Justice.[cxlvi]

There are some cases in which judges or prosecutors were killed. In 2004, Judge *Rapin Rueankaew*, a judge of the Pattani Provincial Court, was shot dead in Pattani.[cxlvii] In addition, harm is not only limited to these persons but also to their family members. In addition, in some circumstance, these persons and their family member become victims, for example, on March 3, 2009, *Judge Unita Limsinsomboon*, a lay judge of the Pitsanulok Provincial Court and the wife of the chief prosecutor in the Office of General Attorney, was killed in her house in Pitsanulok[cxlviii]; or on September 23, 2010, the wife of the chief prosecutor in Surat Thani was shot dead on a public bus in Ratchaburi.[cxlix] Recently, in the case pertaining to dissolving of the Democrat Party, judges received threats of death or bodily harm.

Members of the public, journalists, and affected parties enjoy the same protection provided by the Court. There have been some exceptions for example, victims and witnesses are entitled to enjoy special protection under the Act on the Protection of Witness in Criminal Cases Act B.E. 2546, the Compensation for Victims of Crime Act B.E. 2544, and other regulations such as the Judicial Officials Regulation on the Treatment of the Witness B.E. 2548 or the Judicial Officials Regulation on the Protection of and Allowance for the Witnesses in Criminal Cases, B.E. 2548.

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The Socialist Republic of Vietnam

Vietnam

Vu Cong Giao and Joel Ng

Snapshot Box

Country Name	Socialist Republic of Vietnam
Capital city:	Hanoi
Independence:	1945
Historical Background:	The Vietnamese trace the origins of their culture and nation to the fertile plains of the Red River Delta in northern Vietnam. After centuries of developing a civilisation and economy based on the cultivation of irrigated rice, in the tenth century the Vietnamese began expanding southward in search of new rice lands. Until the mid-nineteenth century, the Vietnamese gradually moved down the narrow coastal plain of the Indochina Peninsula, ultimately extending their reach into the broad Mekong River Delta. Vietnamese history is the story of the struggle to develop a sense of nationhood throughout this narrow, 1,500-kilometer stretch of land and to maintain it against internal and external pressures. China was the chief source of Vietnam's foreign ideas and the earliest threat to its national sovereignty. As a result of a millennium of Chinese control beginning in about 111 BC, the Vietnamese assimilated Chinese influence in the areas of administration, law, education, literature, language, and culture. Even during the following nine centuries of Vietnamese independence, lasting from the late tenth century until the second half of the nineteenth century, the Chinese exerted considerable cultural, if not political, influence, particularly on the elite. The conquest of Vietnam by France began in 1858 and was completed by 1884. It became part of French Indochina in 1887. Vietnam declared independence after World War II, but France continued to rule until its 1954 defeat by Communist forces under Ho Chi MINH. Under the Geneva Accords of 1954, Vietnam was divided into the Communist North and anti-Communist South. US economic and military aid to South Vietnam grew through the 1960s in an attempt to bolster the government, but US armed forces were withdrawn following a cease-fire agreement in 1973. Two years later, North Vietnamese forces overran the South reuniting the country under Communist rule. Despite the return of peace, for over a decade the country experienced little economic growth. Since the enactment of Vietnam's "Doi moi" (Renovation) policy in 1986, Vietnamese authorities have committed to increased economic liberalisation and enacted structural reforms needed to modernise the economy and to produce more competitive, export-driven industries.
Size:	Vietnam is located in the Indochinese peninsula of Southeast Asia and occupies about 331,688 square kilometres. The S-shaped country has a north-to-south distance of 1,650 kilometres and is about 50 kilometres wide at the narrowest point.
Land Boundaries:	China, Laos, Cambodia
Population:	85.8 millions (National 2009 Census), 49.4% (men), 50.6 % (women)
Demography:	0-14 years: 26.1% (male 12,069,408/female 11,033,738) 15-64 years: 68.3% (male 30,149,986/female 30,392,043) 65 years and over: 5.6% (male 1,892,505/female 3,039,078) (2010 est.)
Ethnic Groups:	54 ethnic groups. The Kinh ethnic group equals 73.594 million people (account for 85.7%) while 12.253 million people (14.3%) belong to other ethnic groups.
Languages:	Vietnamese (official), English (increasingly favoured as a second language), some French, Chinese, and Khmer; mountain area languages (Mon-Khmer and Malayo-Polynesian)
Religion:	*Buddhist* 9.3%, Catholic 6.7%, Hoa Hao 1.5%, Cao Dai 1.1%, Protestant 0.5%, Muslim 0.1%, none 80.8% (1999 census)
Education and Literacy:	Literacy rate for the population aged 15 years and over increased by 3.7 percentage points (from 90.3% in 1999 to 94.0% in 2009). There are only nearly four million people who have never attended school (5.0% of the total population aged 5 years and over) (2009 Census)
Welfare:	the poverty rate in Vietnam has been reduced by more than half, from 58.1% in 1993 to 14. 5% in 2008. The food poverty rate reduced by 2/3, from 24.9 to 6.9%.

Gross Domestic Product (GDP):	Between 2001 and 2010, the average GDP growth rate per annum was 7.2 percent. The average GDP per capita in 2010 is expected to reach 1,200USD which would be three times that of 2000. Vietnam is now considered a lower middle income country.[i]
Government Overview:	Executive Branch: The Vietnamese President functions as head of state and also serves as the nominal commander of the armed forces and chairman of the Council on National Defense and Security. The Prime Minister of Vietnam heads a cabinet currently composed of three deputy prime ministers and the heads of twenty-six ministries and commissions, all confirmed by the National Assembly. Legislative Branch: The National Assembly (or Quoc Hoi, having 493 seats and members elected by popular vote to serve five-year terms) is the highest representative body of the people and the only organisation with legislative powers. Judicial Branch: At the apex of the judiciary of Vietnam is the Supreme People's Court of Vietnam (SPC), which is the highest court for appeal and review. The SPC reports to the National Assembly of Vietnam, which controls the judiciary's budget and confirms the president's nominees to the SPC and Supreme People's Procuracy of Vietnam. The Supreme People's Procuracy holds the authority to issue arrest warrants. Below the SPC are district and provincial people's courts, military tribunals, and administrative, economic, and labour courts. The people's courts are the courts of first instance. The Ministry of Defense (MOD) has military tribunals, which have similar rules to the civil courts
Membership in International Organisations and Human Rights Human Rights Treaties ratified & incorporated by local legislation	Vietnam is a party to five of the nine major international human rights treaties and has signed some others (see Part B).

Overview

Foundation, Evolution and Interpretation of the 'Rule of Law'

In Vietnam, the rule of law must be understood in the context of a long history of foreign influence and struggle for self-determination. The main influence in pre-colonial history came from China, which ruled it during the first millennium AD, and continued to have considerable influence until the 19th century when France occupied Vietnam as the colonial power.

Confucian ideas supported the practice that virtuous morality would make laws unnecessary, and this suited a pre-colonial state with little ability to exert centralised control. Nearly a century of French rule (1867-1954) brought its own ideas of rule of law, but laws were geared towards the maintenance of colonial administration.[ii] Revolutionary changes in Republican France also introduced liberal ideas such as legal equality, liberty, religious freedom, freedom of speech, and these were eventually assimilated into anti-colonial struggles.[iii]

The third wave of influence came at independence of the Communist north, which purged the French-educated lawyers and judiciary, and introduced Soviet-educated legal practitioners. The explicit role for the Communist Party as leader of the state under the Constitution was a direct result of Vietnam's war for independence. The Third Party Congress of 1960 formally adopted the Soviet socialist legality doctrine (*sotsialisticheskaia zakonnost*). This doctrine suggested that "law is part of the 'superstructure,' which reflects the 'will of the ruling class' (*y chi cua giai cap thong tri*) and their domination over the means of production."[iv] Nevertheless, scholars have opined that Confucian "virtue-rule" continued to exert its influence outside the state apparatus.

The concept of a "rule of law state" was discussed at the 2nd plenum of the Communist Party of Vietnam (CPV) Central Committee of the 7th Tenure in the process of making amendments to the 1980 Constitution. Since then, developing a "rule of law state" was identified as a principle for reforming the State apparatus.[v] In the 8th Party Congress, the term "the socialist rule of law state" replaced the notion of "dictatorship of the Proletariat" and was finally accepted and noted in policy reports of the CPV and at the 9th National Congress of the CPV in 2001. Accordingly, the concept of the "rule of law state" was stipulated in amendments to the 1992 Constitution in December 2001 and is enunciated in Article 12 of the Constitution.

The question arises as to how the concept of the "rule of law state" is understood in this context and how it relates to the principles of the rule of law, good governance, and human rights as articulated in the ASEAN Charter.

As one might expect given the context in which it developed in the 1980's and 1990's, the concept of the "rule of law" in Vietnam derives from its relation to the state's ruling political ideology. While sharing the same basic terminology the understanding of the "rule" carries some different connotations to the Western notion that is usually linked to democratic principles of governance, as indicated in the following table:[vi]

Western "rule of law" concept	Socialist rule of law
Pluralist democracy	Non-pluralist democracy
Separation of state powers	Centralisation of state powers
The superiority of individual rights	Individual rights subordinate to social interests
Judicial independence	Judicial subordination
Freedom of information	Qualifications on freedom of information (Guaranteed by Article 69 of the Constitution but qualified in other decrees)
Access to justice principles	limited access to justice principles

However, a fourth wave of influence came as neo-liberal ideas began to exert pressure from the outside. Economic reforms were already needed by the 1980s as the state-led economy struggled to meet local needs. It thus began reforms known as *Doi Moi*, "Renovation" in 1986. The collapse of European Communist states further eroded external support for Vietnam, and it began to look increasingly to ASEAN countries for investment. This required fundamental shifts in attitude to private property (while rejecting liberal ideas from French law, that carried colonial baggage), and creating predictability and stability needed for the operation of a capitalist market economy. As Gillespie has said,

> "Command economic thinking strongly influenced the first drafting committee convened during the early stages of *doi moi*. *Nha nuoc phap quyen* (law-based state) doctrines introduced in 1991 opened lawmakers to new Western thinking about legality. After the Party endorsed international economic integration in 2001, many of the remaining epistemological objections to Western legality evaporated."[vii]

Today, Vietnam is still in the midst of reforming its laws, and the multiple layers of influence have come to represent a challenge for reform as incompatible notions may exist in each of the Confucian, French, socialist and neo-liberal legal frameworks. Since 1986, the Vietnamese government has said it enacted or revised some 13,000 laws and by-laws.[viii] Draft laws and ordinances of the National Assembly are open to public comment in the mass media, and Vietnam has asserted that its efforts have been commended by the United Nations and international partners.[ix]

Despite reforms, Resolution 8-NQ/TW issued in January 2002 continued to emphasise the primacy of Marxist-Leninist legal theories combined with Confucian virtue-rule. The private sector, different ministries and judicial departments may also have different attitudes and the conception of "rule of law" is not uniform in the country. The central research question raised by the ideological context of the concept of the "rule of law state" in Vietnam is how these conceptual differences impact the administration of justice and implementation of the rule of law in judicial practices and institutions.

Key Rule of Law Structures

The "socialist rule of law state" in Vietnam embodies some key principles widely associated with the rule of law:[x]

- Supremacy of Constitution and law,
- Equality of all people before the law,
- Respect of human rights as well as community values and social order,
- Democratic centralisation of state powers.

Human Rights Treaties

Vietnam is a party to 5 major international human rights treaties, including:

- the Convention on the Elimination of All Forms of Racial Discrimination (in force 4 January 1969), Vietnam acceded 9 Jun 1982, reserved Article 22)
- The International Covenant on Civil and Political Rights (ICCPR) (in force 23 March 1976), Vietnam acceded 24 Sep 1982.
- The International Covenant on Economic, Social and Cultural Rights (ICESCR) (in force 23 March 1976), Vietnam acceded 24 Sep 1982.
- The Convention on the Elimination of All Forms of Discrimination against Women (in force 3 September 1981), Vietnam acceded 17 Feb 1982, reserved paragraph 1 article 29.
- The Convention on the Rights of the Child (in force 2 September 1990), Vietnam acceded 28 Feb 1990.

In addition, Vietnam acceded and signed some other important international human rights conventions, which include:

- the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (acceded 9 Jun 1981)
- the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, 1968 (acceded 6 May 1983)
- the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973 (acceded 9 Jun 1981)
- The Convention on the Rights of Persons with Disabilities, signed 22 Oct 2007).

The major international human rights treaties which Vietnam have not been signed or ratified include:

- the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (in force 1 July 2003)
- The International Convention for all persons from Enforced Disappearance (entry into force 23 December 2010).
- the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (in force 26 June 1987)

The Vietnam government has stated it is in the process of acceding to the Convention against Torture[xi] and considering ratification of the Rome Statute of the International Criminal Court.[xii] Domestic legal documents are promulgated or amended to incorporate Vietnam's obligations under international treaties to which it is a party so as not to hinder their implementation (Articles 3 and 82 of the 2008 Law on the Promulgation of Legal Normative Documents).

Administration of Justice Grid

Indicator	Figure
Number of judges in country: about 5,500	Gross (per capita): about 1/15,455
Number of lawyers in country: about 6,000 practising lawyers and 2,500 trainee lawyers.	Gross (per capita): about 1/10,000
Annual bar intake? No information is available	Gross (USD equivalent)
Standard length of time for training/qualification:	6.5 years (4 years in law school, 6 months for professional competence and 2 years' probation)
Availability of post-qualification training: Rarely	Not Required?
Average length of time from arrest to trial (criminal)	No information available
Average length of trials (from opening to judgment)	No information available
Accessibility of individual rulings to public:	Required and Accessible.
Appeals structure:	Lower Court -> Appellate Court
There is no national human rights institution.	
Complaints filed against police, judiciary or other state institutions (per year)?	No information available

A. Country's practice in applying 4 principles for rule of law for human rights

1. The government and its officials and agents are accountable under the law

a. Constitutional arrangements

The authority of the principal organs of government is established by the Constitution and other legal instruments. The Government is the executive body of the National Assembly and the highest administrative State body of the Socialist Republic of Vietnam.[xiii] It is responsible and accountable to the National Assembly which comprises 493 members selected in a nationwide general election, the Standing Committee of the National Assembly[xiv] and the President of State.[xv] The National Assembly decides on the establishment or abolition of ministries and ministerial-level agencies at the proposal of the Prime Minister.[xvi] The Prime Minister may be elected, relieved from office and dismissed by the National Assembly at the proposal of the State President.[xvii] The administrative arm of the government is the People's Councils, which are also formally elected to office (Article 119 of the Constitution). People's Councils are divided into geographical regions to manage provinces and cities.

The authority of the Executive also derives from the Constitution. The President is the head of state of Vietnam under Article 101 of the Constitution, and is responsible for appointing the Prime Minister and the Cabinet from among the members of the National Assembly, basing his or her decision upon indications from the Assembly itself. Other offices the president holds include (nominal) Commander of the Vietnamese military, and Head of the Council on National Defense and Security. He is also generally a high-ranking member of Vietnam's ruling Communist Party, and the Communist Party of Vietnam is the leader of the State under Article 4 of the Constitution. The Prime Minister is the head of the executive branch of the Vietnamese government. The Prime Minister presides over the Vietnamese cabinet, and is responsible for appointing and supervising ministers.

The judiciary is formally subordinate to the National Assembly and People's Councils (Constitution, Article 135). The appointment of the Chief Justice and Chief Prosecutor is made by recommendation of the President to the National Assembly (Constitution, Article 103(3)) and he may appoint or dismiss other members of the judiciary without conferring with the National Assembly.

b. Laws, ordinances and amendments

Article 115 of the Constitution requires national issues, including laws, resolution and decrees, to be discussed collectively and decisions adopted by the majority of the National Assembly. According to Article 147 of the Constitution 1992 [On Amendments to the Constitution], the National Assembly alone shall have the right to amend the Constitution. An amendment to the Constitution must be approved by at least two-thirds of its total membership.

Vietnam has several tiers of laws and policies, however, beyond those spelled out in the Constitution and Acts. Critics have pointed out that many laws are too generically worded and just "frames" (*luat khung*), and secondary legislation is needed in order to enforce them.[xviii] Others have argued that the constitutions do not function as legally-enforceable texts.[xix] The most common secondary legislation are Decrees and Ordinances issued by the National Assembly and Standing Committee respectively, and while sometimes being instrumental for enforcement, have also resulted in inconsistencies in the law. The Strategy on Legal Reform to 2010 thus made it a policy to reduce the promulgation of laws by the National Assembly, ordinances by the Standing Committee, regulations guiding the implementation of the law by the Government, and legal normative documents by local government.[xx]

However, the judiciary has faced difficulties in seeking to properly understanding and interpreting the legal status and effect of these various instruments According to John Gillespie, court officials often resort to consulting government officials as to how to apply the law in specific cases, which militates against the separation of powers between the various branches of government in Vietnam.[xxi]

At the Universal Periodic Review before the UN Human Rights Council, NGOs have criticised the inconsistencies between these decrees, national laws and the Constitution, especially where the inconsistencies are used to suppress

freedom of speech. The International Federation of Human Rights (FIDH), for example, has criticised the contradiction between press freedom guaranteed by Article 69 of the Constitution with the Press and Publication Laws that strictly prohibits publications that oppose the State of the Socialist Republic of Vietnam, require payment of damages to persons harmed by their articles even when the reports are true, and provisions for fines that attack the "prestige of the state."[xxii] During its Universal Periodic Review in 2009, Vietnam rejected recommendations by several states to bring restrictions to press freedom and freedom of speech in line with the International Covenant on Civil and Political Rights, to which it was a signatory.[xxiii] It has also continuously rejected requests by UN Special Procedures to send rapporteurs to investigate specific allegations of human rights violations.[xxiv]

Because of the dominance of the Communist Party, multiple layers exist where the Party's rules may supersede the state's. As Salomon and Vu have argued:

> The Law on the Promulgation of Legal Documents also stipulates a hierarchy of texts/rules regulating the state's activities. Yet, in reality, this chain of command is still unclear, further complicating existing legislative inconsistencies and overlaps. The first challenge to this hierarchy is the role of the Party's regulations. Although *Doi Moi* and PAR [Public Administrative Reform] were supposed to separate the state from the Party's apparatus, in practice, party regulations still trump laws and are frequently the primary source of rules governing state regulation.[xxv]

One example they mention is that the Law on Elections allows any citizen to run for election, whereas the Party's rules state that Party members must obtain support from their Party unit and hierarchy. The Vietnamese government itself conceded as much at the Universal Periodic Review:

> Viet Nam is conscious of the shortcomings and difficulties and challenges to be addressed. The legal system of Viet Nam still lacks coherence while remaining overlapped and even contradictory in some areas. The development of the legal system has not matched the changes in life, leading to misinterpretation and difficulties in enforcement, affecting efforts to ensure constitutionality, feasibility and transparency. The effectiveness of information provision, education and awareness enhancement in relation to the law remains limited. The system of law enforcement needs to be strengthened. A segment of public servants remain unfamiliar with the human rights treaties to which Viet Nam is party and occasionally have insufficient knowledge of government policies and the law.[xxvi]

The recognition that Vietnam needs to resolve internal inconsistencies in its law, but refusal to do so in spite of international pressure, has left open the question of its commitment to reforms in certain areas.

c. Accountability of officials

Official misconduct is governed by Crimes Relating to Position (Chapter XXI) of the Penal Code. The language of Article 8 of the Ordinance on Judges and Jurors of the People's Courts and Article 37 of the Law on the Organisation of the People's Courts arguably opens judges to unusually open-ended liability for generic "damages" in carrying out their tasks.[xxvii] This potential liability could further affect judicial independence in making judgments. The media has increasingly played a role in exposing officials who abuse their power, and an increasing number of judicial officials have apologised for misdeeds.[xxviii] Several have also been charged and convicted under the Penal Code for law violations.[xxix] However, allegations of mistreatment, especially of political dissidents, have rarely been investigated or prosecuted.[xxx]

Although there is a lack of systematic research, the Government has manifested its concern for eliminating corruption by conducting a number of surveys on the issue, for example *The Diagnostic Study on Corruption in Vietnam*.[xxxi] This study found that nearly one-third of public officials and civil servants were willing to accept bribes. Over 50 per cent of public officials and civil servants responded that intermediate and higher-level offices are involved in corrupt activities. The situation of corruption was then examined by smaller scale surveys including the Investment Climate Survey Vietnam (WB 2005), the Provincial Competitiveness Index 2006 (VCCI 2006), and the Evaluation of Corruption after two years of implementing the Anti-corruption Law (CECODES 2008).

2. Laws and procedures for arrest, detention and punishment are publicly available, lawful and not arbitrary; and preserve the fundamental rights to physical integrity, liberty and security of persons, and procedural fairness in law

a. Accessibility and application of the law

The Criminal Procedure Code and other legal documents are publicly available in the websites of the National Assembly, Government of Vietnam and of various institutions. However, the multiple layers of codes have made accessibility and comprehensibility a real problem, especially where Ordinances and Decrees are incompatible or contradict fundamental law. The number of Ordinances and Decrees and the possibility that they may supersede laws make application difficult to conduct equally and fairly, and in practice, Ordinances or Communist Party policies take precedence over the law.

Nevertheless, the Judicial Reform Strategy has made improving the accessibility and transparency of judicial decisions a priority. This includes a plan for the publication of the judgments so as to enhance the accountability of the judiciary for issuing fair and professional judgments. A further step to promote transparency in the judiciary involves the establishment of the editorial board for the publication of judgments within the Supreme People's Courts. While such reforms are underway some commentators have opined that, "In general, the transparency of judgment remains low, as does the transparency of analysis leading to the judgments"[xxxii]. Whether or when the above-mentioned laws are subject to review will be indicative of the priorities of the Vietnamese state.

b. Administrative/preventive detention and arbitrary treatment

Deterrent arrests are permissible where the accused might interfere with the investigation, prosecution or adjudication or continue to commit offenses under Article 79 of the Criminal Procedure Code. While the formal framework for the administration of justice provides basic guarantees against arbitrary detention and for the rights of the accused, the Strategy for the Development and Improvement of Vietnam's Legal System to 2010 and the Judicial Reform Strategy to 2020 have acknowledged that problems of implementation persist. In this connection, the UN Human Rights Committee has recommended that Vietnam take steps to address problems associated with arbitrary restrictions of liberty.[xxxiii]

According to FIDH, Ordinance 44, "Regulating Administrative Violations" provides officials with the power to arrest and detain citizens. This extended the powers authorised by Decree 31/CP that allowed arrest and detention of citizens and further that they could be sent to mental institutions or "rehabilitation camps" without trial.[xxxiv] Article 120 of the Criminal Procedure Code allows up to four months detention for serious offenses, and this may be extended up to three times for four months each. Moreover, upon expiry, "other deterrent measures" may still be applied to detainees.

Article 298 of the Penal Code allows for prosecuting of those who use unlawful corporal punishment in the investigating, prosecuting, adjudicating or executing of a judgment. Article 282 also prohibits abuse of power that may damage the legitimate rights and interests of the citizens. Illegal detention by officials is prohibited in Article 123 of the Penal Code. Vietnam has stated it is in the process of joining the Convention against Torture.[xxxv]

c. Presumption of innocence

The presumption of innocence is provided in Article 9 of the Criminal Procedure Code. Article 10 places the responsibility of investigating authorities to demonstrate guilt of the accused. Article 63 further details what facts must be established in order to prove the case. Authorities examining persons known to be innocent for penal liability may be punished under Article 293 of the Penal Code.

d. Access to counsel

The Criminal Procedures Code (CPC) stipulates that all detainees and accused have the right to self-defence, by themselves or a counsel of their choosing (Article 11), and the right to choose and substitute attorneys (Article 57). Accused persons have an equal right to present before the court their evidence and to request and have debates before court (Article 19) as well as the right to ask for an alternative prosecutor (Article 43). Chapter IV of this Code elaborates the rights and responsibilities of detainees and the accused (Articles 48, 49, 50).

However, the Procuracy (which is functionally the state prosecutor) also has the right to grant or withdraw the defence counsel's certificates under Section 36(2)(c). This clause can be used to allow the procurators to deny permission to the defence counsel to visit the arrested person or be present during interrogations.[xxxvi]

e. Rights of defendants and accused persons

Section 49(2)(g) of the Criminal Procedure Code provides the accused with rights to receive decisions to institute criminal cases, to appeal against deterrent measures, receive written investigation conclusions, decisions to cease or suspend investigations and criminal cases against them, their indictments, decisions on their prosecution and other procedural decisions prescribed by the Code. Article 80(2) establishes that those executing a warrant must read the warrant, explain the warrant and rights and obligations of the arrestee, and record the minutes of the arrest when making arrests. Commune, ward or town representatives must be present to witness the arrest (alternatively, neighbours can be used as witnesses if the arrest is made at the person's residence).

In practice, however, charges are not always instituted or if they are, not made public. Human Rights Watch has listed at least 17 political and religious detainees for whom the charges have not been announced or are unknown.[xxxvii]

Time limits for investigation are stipulated in Article 121 of the Criminal Procedure Code. For less serious offenses, a maximum of two months for investigation is permitted, and for more serious offenses, three months is allowed. Extensions to this limit are permitted for serious cases provided the request is made at least 10 days in advance of the expiration date, and they may be extended only once for up to either two or three months depending on the severity of offenses. The time limit for a decision to prosecute is stipulated in Article 166, and should not exceed 20 or 30 days depending on the severity of the crime. They may be extended by 10 or 15 days. Trial preparation is limited to either 30 or 45 days under Article 176. These limits may be extended by 15 or 30 days again depending on the severity of the crimes.

The rights and obligations of the defence counsel are stipulated in Article 58 of the 1999 Criminal Procedure Code. These include the right to participate in questioning and arguing at court, to raise complaints about procedural decisions, and to access the client's file. However, according to one observer, these rights "are not widely implemented."[xxxviii] As a civil law system, the defence counsel of interested parties also has rights and obligations during trial, and these are stipulated in Article 59. The prosecution is not under obligation to answer questions or statements raised by the defence, and they typically do not.[xxxix]

Article 299 of the Penal Code prohibits coercion in gathering testimony, while Article 309 criminalises bribing or coercing witnesses or victims into making false declarations or to supply untrue documents. Furthermore, under Article 72 of the Criminal Procedure Code, confessions may not be used as the sole evidence for a conviction.

f. Right of appeal

Defendants, victims, plaintiffs and persons with interests have the right of appeal guaranteed under Articles 50, 51, 52, 53 and 54 of the Criminal Procedure Code. According to Vietnamese law, courts have a two-level trial regime where first-instance judgments may be appealed under Article 20 of the Code. Appellate court judgments have legal standing but can be reviewed if violations of the law are detected or new evidence emerges.

However, the nature of the appeal process is based on documents submitted by the parties. The court of appeal can be conducted without the presence of the parties, including counsel, although the court has the discretion to summon participants to hear opinions (Article 253). Appeals are also limited to a maximum of ten days before a decision must be reached.

g. Remedy

Current law provides for administrative court review of citizen's complaints in regard to arbitrary judicial decisions. The UN Human Rights Committee noted that while there appears to have been an increase in the number of complaints against the civil servants, some progress has

been made in dealing with people's complaints and petitions. Vietnam has stated that 80 percent of those making claims were granted cash compensations with the rest of the cases being settled.[xl]

The Law on State Compensation Liability 2009 provides for the State's liability to pay compensation to individuals and organisations suffering from damage caused by officials in the course of their official duties "in administrative management, legal proceedings and judgment enforcement activities, compensation procedures…" (Article 1). Future research will be needed to assess the effectiveness of the new legislation on handling abuse.

3. The process by which the laws are enacted and enforced is accessible, fair, efficient, and equally applied.

a. Legislative proceedings

An important step towards promoting transparency and improving public access to the process of legislation was through the amendment of the Law on the Promulgation of the Legal Normative Documents ("Law on Laws") which came into effect in January 2009. The key advantage of the Law on Laws is the requirement of mandatory public disclosure of the drafts of all legal normative documents within 60 days from the day it was proposed so as to allow public comment. This law provides a framework for increasing public participation in the legislative process, which according to some accounts previously had been quite low.[xli]

b. Judicial hearings

The CPC provides for the right to open court trials, except for special cases concerning matters of state secrets, national customs and traditions or at their own legitimate request (Article 18). However, public access to court decisions is not commonly provided for, despite requests especially from the legal profession for greater accessibility to rulings.[xlii] A court journal produced by the Supreme People's Court does exist (*Tap Chi Toa An Nhan Dan Toi Cao*), but does not produce full judgments and tends to be limited to case notes or summaries. The Judicial Reform Strategy has made it a policy to increase the publication of court judgments.[xliii]

Witnesses in criminal trials have the right to seek protection under Section 55(3)(a) of the Criminal Procedure Code during trial. Trial panels decide the measures to ensure the safety of witnesses and relatives under Section 211(5).

International PEN has raised concerns about the conduct and practice of "people's tribunals" used "to form orchestrated mock trials to criticise dissidents." During a trial in February 2007, a lawyer and Internet dissident was allegedly subject to a trial in which 200 people were mobilised to "insult and denounce him for being a 'traitor'."[xliv]

Lack of transparency over court decisions may be exacerbated by reports that the government decreed that statistics on capital punishment were considered state secrets. This runs counter to the calls for transparency in providing information on the death penalty in the UN's Moratorium on the Use of the Death Penalty, which Vietnam did not oppose.[xlv] However, Vietnam during its Universal Periodic Review stated that it had reduced the number of capital offences from 44 to 29 and is in the process of further reducing the number of offences that carry the death penalty.[xlvi]

c. Equality before the law

Equality before the law is guaranteed under Article 52 of the Constitution. Equal rights are implicitly or explicitly declared in other articles such as Articles 54 and 63 of the Constitution and Article 5 of the Civil Code. Civil rights are spelled out in Section 2 of the Civil Code. Freedom of religion is protected under Article 70 of the Constitution. Article 30 also requires that the State assume administration of cultural development, and certificates must be issued to allow practice. Those who practice "forms of superstition, causing serious consequences" (these consequences are unspecified) may be liable for a fine, non-custodial reform or imprisonment under Article 247 of the Penal Code. Furthermore, numerous human rights organisations raised serious concerns about the treatment of religious and ethnic minorities during Vietnam's Universal Periodic Review.[xlvii] These minority groups, particularly the ethnic Montagnard and Khmer Krom, Christians, and members of Falung Gong and the Unified Buddhist Church of Vietnam, faced difficulties in registration, assembly, and their leaders have been detained.

d. Access to justice and legal aid

Legal fees in Vietnam are still relatively high compared to incomes of the average Vietnamese. It has been suggested that legal fees could range between US$20 to 300 depending on the firm and expertise of the lawyers.[xlviii] Even at the lower end of this scale, fees would be prohibitive where the annual GDP per capita is only US$1200. However, Vietnam does have state-sponsored legal aid programs throughout the country, and these are augmented by NGO legal aid services, particularly training. 79 percent of respondents to a UNDP survey in 2004 cited cost as an important factor, and only 6 percent had used lawyers' services.[xlix]

The legal aid system in Vietnam was established in 1997 under Decision No. 734 of the Prime Minister. Since then legal aid services have been mainly provided by legal aid centres managed by provincial departments of justice (provincial units of the Ministry of Justice) with annual budget provided by the State. At present, there are 63 provincial legal aid agencies; five offices specialised on women affairs, 127 district branches, and 928 communes – level legal aids clubs[l]

To a certain extent, the state-run legal aid system has proved to be helpful in facilitating disadvantaged group's access to justice. However, in recent years, the need for legal aid of vulnerable groups has rapidly increased placing strains upon the resources of the system, As the state-run legal aid system becomes increasingly overloaded the Government is faced with difficulties in covering the increasing budget necessary for the system's operation.[li]

Another challenge increasingly encountered arises from the growing number of cases in which one party is a citizen while another is a state agency. Since the legal aid agency is state-run citizens may hesitate to bring their cases to the agency because of fears of lack of independence in regard to such matters such. Article 9 of the 2006 Law on Legal Aid prohibits legal aid providers from violating the interests of the State. Instead, people involved in litigation against state agencies often resort to legal consultancy centres run by none-state actors (NGOs, private law firms and school of laws, etc).[lii] Only four percent of Vietnamese used legal aid centres, according to a UNDP report from 2004.[liii] However, the same survey noted 79 percent of respondents considered cost a significant factor in making the decision to commence proceedings.

In addition, where both parties of a case are eligible for legal aid but they have conflict interests, the state-run legal consultancy centres can only undertake to help one party, leaving the other without assistance. Such kind of cases can only be dealt with if there are legal aid systems run by none-state actors concurrently operating, so that one party can go to a state online legal aid centre while the other can receive legal assistance from non-state actors.

In the area of legal aid reform measures are also underway to address the problems noted above, The Government of Vietnam has recently initiated a policy to socialise legal aid activities in order to reduce financial burden for the State on the one hand and to create more choices for citizens to access legal aid services on the other hand. This policy may potentially reduce the conflicts of interest where state-sponsored legal aid supports petitions against a state agency. In addition, the Strategy of Developing Vietnam's Legal System to the Year 2010 also stresses the importance of the legal aid socialisation policy in Vietnam.[liv]

e. Difficulties with fair and equal enforcement

Article 146 of the Constitution requires all other laws to be consistent with it. As mentioned earlier (Indicator II), there are numerous problems in reconciling laws with the Constitution due to the large number of decrees and ordinances. Critics have further raised the problem of ambiguous language in the Penal Code for crimes relating to national security.[lv] Section 80(1)(c) of the Penal Code, that covers "Spying", includes prohibitions against "supplying information and other materials for use by foreign countries against the Socialist Republic of Vietnam." This law has been used to detain bloggers, human rights activists and critics on the basis of emails or other data from Internet usage. Article 79 on "activities aimed at overthrowing the people's administration" has also been used to detain numerous activities for making criticisms of the government. Similar language is found in Article 86 ("undermining the implementation of socio-economic policies"), Article 87 ("Undermining the unity

policy"), and Article 258 ("Abusing democratic freedoms to infringe upon the interests of the State"). Article 91 on "fleeing abroad or defecting overseas with a view to opposing the people's administration" has also been used to arrest people on return from public engagements abroad where the state suspected them of issuing critical statements against the government. "Conducting propaganda against the Socialist Republic of Vietnam" is also illegal under Article 88.

Vietnam argues that "There are no so-called 'prisoners of conscience' and no one is arrested for criticizing the Government," and that these laws are strictly related to national security and social stability.[lvi] The application of these laws thus depends on the determination of what constitutes a threat to state "security", and how broadly these are seen as prosecutable offenses. What constitutes fair comment in this regard is the reserve of the State. Article 82 of the Constitution allows for foreign nationals, inter alia, "taking part in the struggle for freedom and national independence, for socialism, democracy and peace" to be granted asylum in Vietnam, and the factors that Vietnam considers valid for these criteria could be instructional for clarifying the laws on state security. The unspecific wording of these laws opens them to conflict with Article 19 of the International Covenant on Civil and Political Rights allowing freedom of opinion and expression, and Article 69 of the Constitution, guaranteeing freedom of speech, assembly and association. The frequent deployment of these laws to detain critics of the government has made it extremely difficult to conclude that laws are predictable, enforced consistently, and consistent with other applicable law.

4. Justice is administered by competent, impartial and independent judiciary and justice institutions.

a. Judicial independence

Judges in Vietnam are appointed according to criteria that requires loyalty to the motherland, good morality, a defender of socialist legality, a bachelor of law degree and training in trial work, judicial capacity, good health and requisite amounts of experience depending on the seniority of appointment (Law on Organisation of People's Court, Article 37 and Ordinance on Judges and Jurors of People's Courts, Article 5). They are typically chosen from among the Communist Party officials who work in the courts, and candidates must be endorsed by the Party.

Structural features of the organisation of the justice sector in Vietnam militate against a strong independent judiciary. Judicial institutions are subordinate to the National Assembly in several ways:

- The National Assembly possesses the authority to determine the organisation and activities of the People's Court, and to abrogate texts adopted by the Supreme People's Court which are incompatible with the Constitution, the laws and resolutions of the National Assembly.[lvii]

- The National Assembly elects the President of the Supreme People's Court and the Head of the Supreme People's Office of Supervision and Control and may release them from duty or remove them.[lviii]

- The National Assembly determines the budget of the court system based upon a budget plan submitted by the Government.[lix]

- The judiciary, through the Supreme People's Court has to submit annual reports to the National Assembly. These reports have to be submitted to the N.A Standing Committee and the Legal Committee before examination at plenary sessions of National Assembly.

Under special circumstances the National Assembly may also decide to set up Special Tribunals.[lx] Changes instituted in 2002 have limited the previous practice of direct influence of the Government over the operation of court system.[lxi] The Government is responsible for drafting the judiciary's budget plan.[lxii] The Ministry of Justice is still responsible for execution of civil judgments of the courts.[lxiii] However, under the mandate stipulated in Article 109 of 1992 Constitution, the Government still holds a position of authority vis-a-vis judicial bodies. An estimated 90 percent of judges were Communist Party members.[lxiv] However, others have argued that the Party's role in the state is not necessarily contrary to judicial independence.[lxv] Nevertheless, the UNDP found just 38 percent of interviewees said that the judgments of the courts were fair, and 36 percent said judges were impartial and independent.[lxvi]

The Judicial Reform Strategy discussed above aims to promote judicial independence by reducing the interference of SPP in the rulings of the judiciary. Under these reforms the SPP would be restricted to its procuracy functions.

b. Training and qualification of judicial officials

The state-run Hanoi Law University and Ho Chi Minh City Law University conduct training for judicial officials. The Judicial Academy passes qualifications to join the legal profession, the equivalent of Bar exams in Western countries. The Vietnamese state is responsible for judicial training and education, and this was reaffirmed in the two resolutions on legal reform[lxvii] by placing Hanoi Law University and Ho Chi Minh City Law University as focal institutions for continuing legal education. Resolution 49 stated:

> "There is still a shortage of judicial and judicial support staff. The professional qualifications and political ability of some officials are low. Some of them even have very low personal qualifications, moral and professional accountability."[lxviii]

Access to information and other resources, even for judges, can be extremely poor. A 2006 UNDP survey suggested just 15.7 percent of district court judges had computer access to laws and legal commentary.[lxix] The same survey found over 63.9 percent of judges had an "in-house" law degree issued by government institutions such as the Police College, Procuracy College, Security College or court training schools.[lxx] While called a "law degree certificate", these are not comparable to a normal Bachelor of Laws. This followed requirements for all judges to have a Bachelor of Law degree promulgated in the 1990s, but Resolution No. 37/NQ-TVQH9 passed in 1993 allows judges who have not met all the requirements (including academic qualifications and experience) to be appointed.

With approximately one lawyer per 10,000 people in the country (6,000 in total), legal representatives are few in number, and the level of qualifications and proficiency can vary. The Ministry of Justice had issued a target of 8,000 practising lawyers by 2010 and 20,000 by 2020.[lxxi]

c. Impartiality of judicial proceedings

Article 130 of the Constitution stipulates that judges and people's assessors are independent and subject only to the law. This should be understood in conjunction with Article 126 that requires an ideological commitment by the courts to protect socialist legality and the socialist system. Nevertheless, It was formally state practice that the court, procuracy and police would meet in pre-trial discussions (Joint Circular 06 1990 and Joint Circular 01 1994). This raised questions about the impartiality of judgments. As Nguyen has written:

> In reality, many people within and outside the justice system believe that the fact that a court decides to hear a case is in itself an expression of its consent to the views of the procuracy, and that it is a foregone conclusion that the case constitutes a crime. This attitude seriously affects the independence of the judicial system, and, of course, the role of defense counsel.[lxxii]

Endnotes

i. Vietnam – 2/3 of the way achieving MDGs and towards 2015,
ii. David Koh, 2007, "Modern Law, Traditional Ethics and Contemporary Political Legitimacy in Vietnam" in Stephanie Balme and Mark Sidel (eds.), *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam*, New York: Palgrave Macmillan, 220-221.
iii. John Gillespie, 2007, "Understanding Legality in Vietnam" in Stephanie Balme and Mark Sidel (eds.), *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam*, New York: Palgrave Macmillan, 141.
iv. Ibid, 143.
v. Document on the midterm plenum of the CPV Central Committee of the 8th Tenure, Hanoi, 1994.
vi. Nguyen Quoc Viet, *Explaining the transition to the Rule of law in Vietnam – the Role of Informal Institutions and the Delegation of Powers to Independent Court,* Ph.D Dissertation in Law and Economics, May 2006
vii. *Supra note iii*, 148.
viii. UN Human Rights Council, 2009, *National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1,* A/HRC/WG.6/VNM/1, para. 18.
ix. UN Human Rights Council, 2009, *Report of the Working Group on the Universal Periodic Review: Vietnam*, A/HRC/12/11, para. 9.
x. Ibid
xi. UN Human Rights Council, 2009, *Report of the Working Group on the Universal Periodic Review: Vietnam*, A/HRC/12/11, para. 77.
xii. UN Human Rights Council, 2009, *Report of the Working Group on the Universal Periodic Review: Vietnam - Addendum*, A/HRC/12/11/Add.1, para. 22.
xiii. Article 109 of 1992 Constitution amendment
xiv. The Standing Committee's powers and responsibilities are spelled out in Article 91 of the Constitution.
xv. Ibid, Article 109,110
xvi. Article 2 of the Law on the Organization of the Government 2001
xvii. Ibid, article 4
xviii. 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.
xix. W.J. Duiker, "The Constitutional System of the Socialist Republic of Vietnam" in L.W. Beer (ed.), *Constitutional Systems in Late Twentieth Century Asia*, Seattle: University of Washington Press, 331.
xx. Resolution 48-NQ/TW, *The Strategy for the Development and Improvement of Vietnam's Legal System to the Year 2010 and Direction for the Period up to 2020*, para 1.3.
xxi. John Gillespie, 2007, "Rethinking the role of Judicial Independence in Socialist-Transforming East Asia," *International Comparative Law Quarterly*, 56(3), 851-2.
xxii. FIDH, 2011, *ASEAN and Human Rights: A Vietnamese Perspective*, FIDH and Vietnam Committee on Human Rights mission to Indonesia, 27 February – 4 March 2011, 14-15.
xxiii. UN Human Rights Council, 2009, *Report of the Working Group on the Universal Periodic Review: Vietnam*, A/HRC/12/11, para. 102.
xxiv. UN Human Rights Council, 2009, *Summary Prepared by the Office for the High Commissioner for Human Rights in Accordance with Paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1*, A/HRC/WG.6/5/VNM/3, para.
xxv. *Supra note xviii.*
xxvi. Ibid, para. 22.
xxvii. Gary Chan, 2005, "Judicial Immunity and Independence of Vietnamese Judges: Reflections on the Ordinance on Judges and

Jurors and the Law on the Organisation of the People's Courts", Australian Journal of Asian Law, 7(2), 145-146.

xxviii. *Supra note ii, 229.*

xxix. Supra note xxvii.

xxx. See for example, FIDH (International Federation for Human Rights), *ASEAN and Human Rights: A Vietnamese Perspective*, FIDH and Vietnam Committee on Human Rights mission to Indonesia, 27 February – 4 March 2011.

xxxi. This survey was conducted by the Internal Affairs Committee of the Central Committee of the CPV (hereinafter CPV-IAC) in late 2005 with the support from Swedish International Development Cooperation Agency (SIDA). The objective of this Study was to identify the types and causes of corruption and the reasons for the limited impact of anti-corruption efforts to date. The study included quantitative and qualitative surveys in seven provinces and cities (Son La, Dong Thap, Hai Duong, Nghe An, Thua Thien-Hue, Hanoi and Ho Chi Minh City) and three ministries (Industry, Construction and Transport). It collected the opinions of nearly 5,500 public officials and civil servants, managers of enterprises and citizens in the seven localities. This is the first of its kind in Vietnam in terms of both CPV involvement and scope of coverage. It is also the first time the CPV has collaborated with the international donor community to assess corruption and anti-corruption activities.

xxxii. VDR 2010, *Modern Institutions,* Joint Donor Report to the Vietnam CG Meeting, Hanoi, December 3-4, 2009

xxxiii. UN Human Rights Committee, 2002, *Concluding Observations of the Human Rights Committee: Vietnam, 07/26/2002*, CCPR/CO/75/VNM, para. 8. These recommendations include that all persons deprived of their liberty are promptly brought before a judge or other officer authorized to exercise judicial power by law, and that they can only be deprived of their liberty on the basis of a judgment based on law, as required by article 9, paragraphs 3 and 4, of the ICCPR. The HRC also recommended that the government provide information on institutions where persons are detained and those detained there. (para. 8)

xxxiv. *Supra note xxii.*

xxxv. UN Human Rights Council, 2009, *Report of the Working Group on the Universal Periodic Review: Vietnam*, A/HRC/12/11, para. 77.

xxxvi. Nguyen Hung Quang, 2007, "Lawyers and Prosecutors under Legal Reform in Vietnam: The Problem of Equality" in Stephanie Balme and Mark Sidel (eds.), 2007, *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam*, New York: Palgrave Macmillan, 169.

xxxvii. Human Rights Watch, 2011, *Vietnam: Free Political and Religious Detainees: Peaceful Dissidents and Bloggers Arbitrarily Locked Up*, Press Release, 8 April 2011.

xxxviii. Pip Nicholson, 2010, "Access to justice in Vietnam: State supply – private distrust" in John Gillespie and Albert H.Y. Chen, *Legal Reforms in China and Vietnam: A comparison of Asian Communist regimes*, London & New York: Routledge, 199.

xxxix. *Supra note xxxvi.*

xl. UN Human Rights Council, 2009, *Report of the Working Group on the Universal Periodic Review: Vietnam*, A/HRC/12/11, para. 78.

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

xlii. *Supra note xxxviii.*

xliii. Resolution 49-NQ/TW, *Judicial Reform Strategy to 2020*, II.2.1.

xliv. International PEN, *Contribution to the Universal Periodic Review Mechanism: Submission on the Socialist Republic of Vietnam*, accessible at *http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRVNStakeholdersInfoS5.aspx* (9 April 2011),

xlv. UN General Assembly, 2007, "Moratorium on the use of the death penalty", *Resolution adopted by the General Assembly*, No. 62/149.

xlvi. UN Human Rights Council, 2009, *Report of the Working Group on the Universal Periodic Review: Vietnam*, A/HRC/12/11, para. 74.

xlvii. UN Human Rights Council, 2009, *Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1*, A/HRC/WG.6/5/VNM/3, part 4.

xlviii. Gary Chan, 2008, "Legal Aid and Access to Justice in Vietnam", *Research Collection School of Law*, Singapore Management University, Paper 486, 6.

xlix. UNDP, 2004, *Access to Justice in Vietnam: Survey from a People's Perspective*, Hanoi: UNDP, 11.

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

li. *Supra note xxxviii, 194.*

lii. The Law on Legal Aid (adopted by the National Assembly in 2006 and in force from 1 January 2007), provides that non-state run legal consultancy centres are entitled to provide legal aid services for people. Such centres receive no financial support from the Government.

liii. UNDP, 2004, *Access to Justice in Vietnam: Survey from a People's Perspective*, Hanoi: UNDP, 12.

liv. To date, some mass organizations in Vietnam including the Vietnam Lawyers' Association, the Farmers' Union, the Youth Union, and the Veterans' Association have established their own legal consultancy centres which focus on providing legal aid to disadvantaged people. However, the legal aid services of mass organisations are normally limited to their members.

lv. *Supra note xxxiv.*

lvi. UN Human Rights Council, 2009, *Report of the Working Group on the Universal Periodic Review: Vietnam*, A/HRC/12/11, para. 75.

lvii. Constitution 1992, Article 84.9

lviii. Ibid, Article 84.7

lix. Ibid, 84.4

lx. Ibid, Article 127 and Article 2, The Law on the Organization of People's Courts in 2002

lxi. The oversight functions of the Ministry of Justice over the operation and organization of local courts; and its mandate includes its decision on the annual budget of local courts

lxii. Ibid, Art. 112,113,114

lxiii. To Van Hoa, *The Independence of Courts System – Legal research on theoretical and practical in Germany, The United States, France and Vietnam and recommendations to Vietnam, p.423*

lxiv. Pip Nicholson and Nguyen Hung Quang, 2005, "The Vietnamese Judiciary: The politics of appointment and promotion", *Pacific Rim Law and Policy Journal* 14(1), 15.

lxv. *Supra note xxvii*, 153.

lxvi. UNDP, 2004, *Access to Justice in Vietnam: Survey from a People's Perspective*, Hanoi: UNDP, 15.

lxvii. Resolution 48-NQ/TW, *The Strategy for the Development and Improvement of Vietnam's Legal System to the Year 2010 and Direction for the Period up to 2020*, II.2.4 and Resolution 49-NQ/TW, *Judicial Reform Strategy to 2020*, III.2.4.

lxviii. Resolution 49-NQ/TW, preamble.

lxix. UNDP, 2006, *Report on Survey of Needs of District People's Courts Nationwide*, Hanoi: Judicial Publishing House, 43.

lxx. Ibid, 213.

lxxi. Cited in Bui Thi Bich Lien, 2010, "Legal education and the legal profession in contemporary Vietnam: Tradition and modification", 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, 306.

lxxii. *Supra note xxxvi.*

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