

CHAPTER IV

GENERAL LEGAL FRAMEWORK OF THE ASEAN REGION

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THE REGULATORY LEGAL FRAMEWORK OF SOUTHEAST ASIAN (ASEAN) COUNTRIES

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I. INTRODUCTION

This Chapter aims to understand the current regulatory legal framework of the ten country members of South East Asian Nations (ASEAN) and their possible ties of legal interconnection of regional integration. Since its establishment in 1967, ASEAN has grown significantly in two aspects: its memberships and the nature of the Association. Initially, ASEAN state members were five sovereign South East Asian countries namely Indonesia, Malaysia, Singapore, The Philippines, and Thailand. The state members of this Association have grown into 10 South East Asian countries so far. They are Indonesia, Thailand, Singapore, The Philippines, Malaysia, Brunei Darussalam, Viet Nam, Cambodia, Laos, and Myanmar. In addition, the nature of ASEAN as an organization also shifted from a non-interference association into more mature one. In the past, ASEAN was considered as cooperation among the five South East Asian countries rather than integration through law. But ASEAN has grown into an institution with rule based rather than relationship-based. This paper acknowledges the fact that there is considerable diversity among South East Asian countries including ethnicity, language, religion, culture, history and economic development. Considering such diversity, how is the most recent development of the regulatory legal framework of South East Asian Countries? Is it going to be divergence or convergence? It argues that while

the regulatory framework among SE Asian countries are significantly differences, in certain aspects such as constitutional review and unamendable constitutional provision they reflect significant commonalities. Part I examines the birth and the development of ASEAN, an association aims to build cooperation among diverse societies in South East Asia. Part II describes the regulatory legal framework of the ten ASEAN Countries. The description includes the constitutional organs, the sources of law and types of legislation. Part III analyses the most recent constitutional development in ASEAN Countries with special focus on constitutional adjudication and unamendable constitutional provision. The paper will end with conclusion.

PART I. BUILDING COOPERATION IN DIVERSE SOCIETIES: HOW DOES ASEAN GROW?

While South East Asian countries lies in the same region, they are diverse in many respects. The diversity of SE Asian countries is not only reflected in their historical legacies, their strategic outlook, and their composition of population, the diversity of this region can also be reflected in their ethnicities, languages, religions, cultures and economic development (Severino, 2008). For example, most of Indonesians and Malaysians are Malays, while Singaporeans are mainly Chinese. *Bahasa Indonesia* (the national language of Indonesia) widely used in Indonesia but this is not the case in Thailand where the official language is Thai and the Philippines with Tagalog as its national language. With regards to religions, Muslims are dominant in Brunei, Indonesia and Malaysia, but this is not the case of Thailand where Buddhism is the majority, and the Philippines where Christians and Catholicism are dominant. In terms of economic development, most of South East Asian Countries are developing countries but this is not the case of Singapore. Singapore with its high GDP considered as a developed country. History also tells that most SE Asian countries -except Thailand- have experienced western colonialization. For Rodolfo C. Severino (2008), this situation reflected an “unpromising circumstances”.

The colonialism in SE Asia Countries had significant impact toward the form of states, the governmental systems, constitutions and politics of the respected SE Asian countries. Some SE Asian countries such as Indonesia, Singapore and the Philippines are republic, but there are also monarchies (Thailand, Malaysia, Cambodia and Brunei) and socialist arrangement (Vietnam and Lao PDR). The presidential systems as well as parliamentary systems are also practiced in this region. For instance, Indonesia and the Philippines adopt presidential system while Thailand and Singapore implement parliamentary system.

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While it is true that South East Asian countries are so diverse, there is a common sense among them to foster close cooperation particularly in economics and politics (Severino, 2008). This is because they are in the same region and building close cooperation with neighboring countries will help them to advance their economy and increase their bargaining power internationally. Such cooperation, however, must consider the diversity of South East Asian Countries. This is important to maintain the stability and good relationship among them. This raises a question what kind of cooperation is appropriate for South East Asian Countries: cooperation with less formality and less legally binding instrument or with formal and legally binding instrument?

The above-mentioned approaches often label as the western model and the Asian model (Tripathi, 2015). Western model considers the institutionalization of regional organizations is not merely a forum of discussion, more than that it is an organization with clear mandates and organizational structure. Its decisions are also binding for its members (Tripathi, 2015). The above characteristics are important to ensure the effectiveness in reaching consensus and in implementing its programs. Enforcement of organizational structure and binding agreement are regarded as important factors in establishing regional organizations.

Asian model believes that consensus to achieve agreement is an important factor in establishing regional institutions. This model emphasizes an 'informal, spontaneous, and consensus-oriented approach'(Suryadinata, 2005). This model is suitable for regions with huge diversity because it is also more tolerant, negotiable in reaching decision and implementing policy. As a result, it may reduce the possibility of conflict. The fact that there is a great diversity among South East Asian countries is certainly one of the reasons why the governments of South East Asian Countries establish a form of regional cooperation which has informal, flexible in nature such as ASEAN. Three main features of ASEAN are (1) Principle of non-interference (2) Principle of Informality and (3) No legally binding decision (Severino, 2008). The adoption of non-interference principle can be found in numerous documents such as: the 1967 Bangkok Declaration which states that the Association is based on "the spirit of equality and partnership" (The 1967 Bangkok Declaration). The 1971 Declaration on the Zone of Peace, Freedom and Neutrality determines "every state has the right to lead its national existence free from outside interference." The 1976 ASEAN Concord and the Treaty of Amity and Cooperation: no states shall interfere in the internal affairs of one another.

The informality of ASEN can be seen in its organizational structure. In its early start, ASEAN did not have permanent secretariat. It has very simple bureaucratic apparatus. In addition, ASEAN does not have multilateral

mechanism rather it prefers to have dialogue forum like ASEAN Regional Forum. The adoption of these two principles clearly reflects the cautious approach of the member states of ASEAN in building their relationship. It may prevent confrontation and the development of intra associational groups or factions.

No legally binding decision is preferable because it provides flexibility in discussing sensitive issues without disrupting ASEAN harmony. This “ASEAN Way” proved to be effective in maintaining the peace among ASEAN members and can accommodate the diversity of ASEAN in its early starts (Manalo and Wong, 2009). With more challenging circumstances, such as issues on human rights and environmental issues, ASEAN transforms its organizational structure into a more mature organization (Manalo and Wong, 2009).

Since the 1980, some Southeast Asian Countries conducted constitutional reform. They introduced new constitutions or revise the existing constitutions. The result was most of the updated constitutions transformed into modern constitutions. The updated constitutions adopt important features of constitutionalism such as human rights, rule of law and separation of powers. In the late 2000s, with significant the pressure from civil society and some ASEAN leaders, ASEAN committed to establish a new body with the mandate to monitor human rights. ASEAN also establish ASEAN Economic Community. The organization grew significantly in trade, economic and security integration. The constitutional development and the pressure from civil society arguably played important roles in the introduction of ASEAN Charter in 2008. With the new Charter, ASEAN now is growing into a more mature association.

PART II. BRANCHES OF GOVERNMENTS AND SOURCES OF LAW OF SOUTH EAST ASIAN COUNTRIES

Part II analyses the legal framework of all ten South East Asian Countries namely: Thailand, Cambodia, Malaysia, Brunei Darussalam, Indonesia, Singapore, Viet Nam, Laos, Myanmar (Burma) and the Philippines. The analysis includes the constitutional organs, sources of law and types of legislation. This Part is arguing that while the constitutional arrangement of each ASEAN country is unique, the ten ASEAN countries share similar features in some respects. They can be loosely classified into three main systems i.e. liberal democracy, constitutional monarchy and socialist countries. First, Indonesia, the Philippines and Singapore to a certain degree represent liberal democracy. They are all ruled by an authority based general election on regular basis and not based on blood line or hereditary. Such mechanism invites active public participation in determining the national leader. Second,

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Thailand, Cambodia, Malaysia and Brunei constitutional systems reflect the adoption of constitutional monarchy. These four countries are ruled by King, Sultan or Prince based on hereditary and not based on election. The word “constitutional” means that the monarch’s powers are limited by the Constitution. The third group is Vietnam, Myanmar and Lao PDR which are representing socialist countries. The party system in these three countries based on single party system (state party). Thus, party has significant roles in governing the country. The analysis below will elaborate the above-mentioned category.

THE CONSTITUTIONAL MONARCHY: THAILAND, CAMBODIA, BRUNEI DARUSSALAM, AND MALAYSIA

THAILAND

Kingdom of Thailand is the only country in South East Asia which never experienced Western colonialization. Thailand is often considered as a civil law country as its primary legal sources are statutes passed by the legislature and various government agencies. In practice, when a dispute arises, the disputing parties will bring the case before the court. Judges will decide the case based on an interpretation of statutory provision. The court decision will not bind the lower courts when they decide similar cases in the future. In other words, the court interpretation will not act as the binding precedent or *stare decisis*. However, the Supreme Court decisions often used by the lower court, as persuasive authority, in deciding cases. This practice somehow reflects the civil law system with the common law tradition influence.

Under Thai Constitution, the King is the head of the State (Menzel and Hill, 2009). The head of the government is the Prime Minister (Menzel and Hill, 2009). The dual authorities in these two different bodies reflects the adoption of parliamentary system. The Prime Minister and its cabinets are responsible for the administration of state affairs and establishing government policies. Prior to 2017, the Prime Minister was appointed and approved by the House of Representatives. But the 2017 Constitution stipulates that the Prime Minister is appointed by the King (Section 81 of Constitution of the Kingdom of Thailand). The King possesses considerable authority such as issuing emergency decree but such emergency decrees must be submitted to the National Assembly for further consideration (Article 172 of Constitution of the Kingdom of Thailand).

Thailand has four types of Courts: The Constitutional Court, the Court of Justice, the Administrative Courts and the Military Courts. The Constitutional Court determines whether the provisions of law and regulations are consistent with the Constitution. The Court of Justice adjudicate all cases except where otherwise specified by the Constitution or other laws. It consists of



Courts of First Instance, Court of Appeal and the Supreme Court of Justice. The Administrative Courts have jurisdiction to adjudicate cases between a government entity or official and a private individual or another government entity or official. Military Courts are authorized to adjudicate criminal cases against individual subjects to the jurisdiction of the Military Courts.

The Thai Constitution also introduces independent constitutional organs such as the election commission, the Ombudsmen, the National Counter Corruption Commission and the State Audit Commission (Chapter XII Part 2, 3, 4). The Constitution also stipulate additional constitutional organs such as Public Prosecutors, the National Human Rights Commission and the National Economic and Social Council (Chapter XII Part 5 and 6). The independency of the constitutional organs mentioned-above is provided by laws. Besides the constitutional arrangement above-mentioned, Thailand has numerous sources of law. These include:

1. The Constitution. Thai Constitution explains the basic structure of the government such as the powers of the King, the National Assembly, the Council of Ministers, the Courts and Constitutional organs. In addition, the Constitution also stipulates the rights, liberties and duties of the peoples and mentions directive principles of fundamental state policies focusing on national security, social and cultural affairs, foreign affairs, the economy and the environment. The Constitution may be amended by vote of more than one-half of the members of the National Assembly, with the approval of the King, or if the King shall not approve the amendment, give a vote of not less than two thirds of the members of the National Assembly. Amending the form of government is constitutionally prohibited.
2. Codified Laws Acts, Treaties and Administration of Laws. There are four fundamental laws as reflected in the four different codes: The Civil and Commercial Code, the Penal Code, the Civil Procedure Code and the Criminal Procedure Code. Apart from the four Codes mentioned above, there are many social and economic aspects regulated in acts. These acts are adopted by the National Assembly, either with the approval of the King or, in the event that the King does not approve a bill, with the approval of at least two thirds of the members of the national assembly. The updated Constitution stipulates the King may enter into treaties with other countries and international organizations. However, treaties that change the territories over which the King of Thailand has sovereignty or jurisdiction require the enactment of an Act for their implementation. Other material treaties must be approved by the National Assembly.
3. International Treaties. International treaties are entered into by the Ministry of Foreign Affairs. and then incorporated into Thailand domestic law by parliamentary approval and signed by the King (Section 178 Of Thai Constitution).

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4. Judicial decisions. Unlike in common law tradition where the court decisions are binding for lower courts, Thailand is a civil law country therefore court decisions are not binding for the lower courts but it may be persuasive for the lower courts. In addition to the above-mentioned legislation, there are several important areas of Thai Law such as Family law,¹ land law² intellectual property law (Barizah, 2017), employment law and criminal law.

CAMBODIA

Similar to Thailand, Cambodia's legal system is primarily based on the French civil law tradition. However, Cambodia also a socialist country. Under the 1993 Constitution, Cambodia is a constitutional monarchy with Prince as its head of state (Art. 7 of the 1993 Coambodia Constitution). The head of government is an elected Prime Minister (Art. 118). Legislative power is vested in a bicameral parliament (Art. 116), while the judicial power is in the hand of Supreme Court and its lower courts (Art. 128). The 1993 Constitution provides separation of powers between executive, legislative and judiciary. It also contains citizens fundamental rights such as the right to life, the right of peaceful protest, the right of legal ownership and the right to freedom of expression and association (Chapter III). The Constitution also places responsibility to the State to respect the right of children and prohibits all forms of discrimination against women. Capital punishment is prohibited.

CAMBODIA'S THREE BRANCHES OF GOVERNMENT

The Executive. Cambodia adopts parliamentary executive government in which the executive is formed by party that acquires the greatest number of seats in the National Assembly at national elections. The Prime minister is appointed by the King on the recommendation of the President and Vice President of the National Assembly. The Prime Minister has the right to appoint a Council of Ministers.

The Legislative. Cambodia implements bicameral system. The Parliament consist of The National Assembly (with 123 members and serve five-year terms of office) and the Senate (with 62 members and six-year terms).

1 Thai family law such as parental rights, paternity and divorce is stipulated in Thailand Civil and Commercial Code. Generally, assets acquired during a marriage are presumed to be marital assets shared equally by both spouses. However, Thai Marriage Law allows spouses either to enter or opt-out prenuptial agreement. Thai Surrogacy Act allows commercial surrogacy with certain ethical standards. Thai Child Abduction Act allows a parent who has had their child unlawfully taken to another country to petition for their child return. Abortion is illegal without medical necessity.

2 The 1954 Thai Land law was the fundamental legislation systemizing land laws in Thailand. Besides, there are provisions in Civil and Commercial Code as well as in rules and regulations of Ministry



Judicial Branch (Chapter XI). The judiciary consist of district courts, courts of appeal and supreme court. The jurisdiction of district court and court of appeal covers their respective provinces and municipalities. Rulings of the Courts of first instance can be appealed on questions.

Constitutional Council (Chapter XII). This new constitutional body aims to guarantee the respect of the constitution, to interpret the Constitution and the Law adopted by the National Assembly and definitively reviewed by the Senate. In addition, this body also has the right to examine and to decide on the dispute of elections of the Members of the National Assembly and the elections of the Senators.

SOURCES OF LAW

1. Royal Decrees. Royal decree is an executive regulation proposed by the Council of Ministers and signed by the King or the acting Head of State. promulgated by the executive branch through its ministers. they are authorized under a specific Act to set forth the details under the guideline of the Act for example Royal Decree to revise the tax rates under the Revenue Code.
2. Sub-Decrees. A sub-decree is an executive regulation usually prepared by relevant ministries, adopted by the Council of Ministers and signed by the Prime Minister.
3. Proclamations. A proclamation is an executive regulation made at the ministerial level. It is prepared by the relevant ministries and signed by the relevant minister(s).
4. Decision. A decision is an executive regulation made by the Prime Minister, and relevant ministers as referred to Article 150 of the Constitution
5. Emergency Decree. This Decree is enacted by the executive branch. As reflected in its name, this Decree is enacted in an emergency to protect the country from imminent harm but subject to subsequent confirmation of the Parliament.
6. Administrative Agency orders. Administrative agencies are empowered by the legislature to promulgate rules and regulations to carry out government functions
7. Cabinet Resolutions. Cabinet Resolution will influence the Government Agencies in enforcing or interpreting rules and regulations. However, there is no binding effect.
8. International Treaties. International treaties are entered into by the Ministry of Foreign Affairs. and then incorporated into Thailand domestic law by parliamentary approval and signed by the King. Cambodia is a party to various international treaties and conventions including treaties on human rights protection such as ICCPR, ICESCR, CEDAW, CAT and some other international treaties.

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9. Judicial decisions. Unlike in common law tradition where the court decisions are binding for lower courts, Cambodia is a civil law country therefore court decisions are not binding for the lower courts but it may be persuasive for the lower courts.
10. Bylaw. A bylaw is legal rule approved by Councils at sub-national level. Council at sub national level means capital council, provincial councils, Municipal Councils, Districts Councils. These Council
11. Municipal Ordinances. Local government may issue ordinance or local government laws such as codes for building, health and city planning.

The 1993 Cambodia Constitution is the highest law of the land. It sets human rights, women's rights and children rights. Custom may affect the application of the law. For example, if a contractual provision is not clear, it shall be interpreted according to common practices or customs of the place where the contract was drafted. The tradition of conciliation remains an important part of dispute resolution before being heard by court of first instance.

BRUNEI DARUSSALAM

Unlike Thailand and Cambodia, Brunei legal system influenced by the English Common law. In general, Brunei adopts dual legal systems. In the past, Brunei legal system based on customs. The introduction of British residential system marks the start of the two legal systems: the Islamic legal system and the common law system derives from the English legal system. The Constitution does not expressly mention the adoption of dual legal systems. However, it specifies the official religion and His Majesty the Sultan as the Head of the Islamic Religion (Part II Religion and Adat Istiadat Brunei Constitution). The Constitution determines His Majesty is assisted and advised by six councils namely the Privy Council, the Religious Council, the Council of Ministers, the Adat Istiadat Council, the Legislative Council and the Council of Succession (Country Profile 2017-18 Local Government in Brunei Darussalam). The Council of Ministers carries out executive matters, the Privy Council advises His Majesty on the appointment of people to customary ranks, titles, honours and positions (Section 6 (1) b Brunei Darussalam Constitution). The remaining four councils advise other state matters. His Majesty may make laws in respect matters related to the Islamic Religion with the advice of Religious Council (Section 3 (3) of the Brunei Darussalam Constitution. The lawmakers are the Legislative Council and His Majesty the Sultan (Section 39 of the Constitution). The sultanate Brunei is the only country in South East Asia which define itself as a non-secular "Islamic state (Section 3(1)). Brunei is an Islamic monarchy governed by a Sultan with significant executive powers. The Sultan is prime minister,

minister of finance, minister of defense, minister of foreign affairs and trade, and head of Islam Section 4(1) (1A) (1B) (2) (3) (5) (6) and (9). There are no substantial powers of the legislative. It plays advisory role to the Sultan. Brunei identifies its national ideology as Malay Islamic Monarchy (Malay Islamic Monarchy) or MIB (Müller, 2016). This means Brunei shall forever be a Malay Islamic Monarchy.

Brunei Shariah legislation has been based on a dual legal system: the Islamic religion and customs (Part II Religion and Adat Istiadat). There is no local government in Brunei but local administration takes place through the four districts and three municipal boards responsible for urban areas.

MALAYSIA

I consider Malaysia as constitutional monarchy because it led by King (*Yang dipertuan Agung*). Even though there is a regular election of the Head of State of Malaysia, such election is very limited only for the Sultans of the nine states. The Federation of Malay gained its independence from British in 1957. It left greater impact upon the law of the country. The legal system of Malaysia was resembled the English legal system which practice parliamentary system. The *Yang di-Pertuan Agung* (the King) is the head of the country (Part IV of the Malaysia Federal Constitution). The *Yang di Pertuan Agung* is elected by the Conference of Rulers for a five-year term from among the Rulers of the nine states in the Federation which are ruled by Sultans. The nine states are Perlis, Kedah, Perak, Selangor, Negeri Sembilan, Johor, Pahang, Terengganu and Kelantan. Apart from the nine states, there are four states Melaka, Pulau Pinang, Sabah dan Sarawak headed by the *Yang di Pertua Negeri* or Governor of the State. The *Yang di-Pertua Negeri* is appointed by the *Yang di-Pertuan Agung* for four-year term.

Malaysia is a federal country. Malaysia practices separation of powers. Legislative power is vested in a bicameral parliament comprises the Dewan Negara (Senate) and Dewan Rakyat (House of Representatives) (Chapter 4 Article 44 Malaysia Constitution). The Dewan Negara has 70 members of whom 44 are nominated by the *Yang Di-Pertuan Agung* (Article 45), and 26 elected by State Legislative Assemblies. The Dewan Rakyat has 222 members and all are elected (Article 46). The executive is vested with the authority to govern and administer the law. The Chief of Executive is the Prime Minister. The power to govern that is vested in the *Yang di-Pertuan Agung* is exercisable by Cabinet of Ministers headed by the Prime Minister (Article 43). The *Yang di-Pertuan Agung* appoints a Cabinet –a council of ministers– to advise him the exercise of his functions (Article 43 (2)). The ministers hold different portfolios and are collectively responsible for all decisions made by the Cabinet which is the highest policy making body in the country

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(Article 43 (3)). Judicial power consists of Superior Courts and Subordinate Courts (Article 121(1)). The Superior Court comprises of the Federal Court (the highest), the Court of Appeal and two High Courts (Article 121(1)). The Federal Court of Malaysia is the Supreme Court and highest judicial organ in the country, as well as the final court of appeal in Malaysia (Article 121 (1)). The Federal Court reviews decisions referred from the Court of Appeal; it has original jurisdiction in constitutional matters and settling disputes between states or between the federal government and a state (Article 121 (2)). All members of the judiciary are appointed by the *Yang di Pertuan Agong* (Article 122(1A)).

Malaysia legislation comprises of: The Federal Constitution; Constitutions of each of the 13 States of Malaysia; Federal Acts of Parliament; State Enactments and Subsidiary Legislation. The Federal Constitution is the supreme law of the Federation (article 4 (1)). It explains the Malaysia Federal arrangement which consists of central government and 13 state governments. Power is divided between the federal government and the various state governments. Below Federal Constitution there are Acts of Parliament, State Enactments and Subsidiary Legislation. The Malaysian common law system relies heavily on case law or judicial rulings. International Treaties/Conventions play significant roles in developing citizen constitutional rights. The courts upheld freedom of speech and in redressed gender discrimination by linking constitutional guarantees to international conventions such as UDHR. Islam is the religion of the Federation (Article 3 of Malaysia Constitution). However, the Malaysian legal system to a certain extent secular as explained by Supreme Court in the case of *Che Omar bin Soh v Public Prosecutor* the religion of Islam became separated into two separate aspects, the public aspect and the private aspect. The role of Islam was limited only to the private aspect the personal law of Muslim such as marriage, divorce, inheritance, maintenance, and the like (Rahman, 2019).

Sources of Law in Malaysia are divided into two written sources and unwritten sources. The written sources mean sources of law which formally enacted into legislation or subsidiary legislation. The written sources at federal level are:

1. Federal Constitution
2. Federal statutes or Acts of Parliament by elected parliament.
3. Emergency Ordinances by the *Yang di-Pertuan Agong*
4. Federal subsidiary legislation
5. British Law in case there is no local legislation
6. Pre-Independence laws

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The written sources at state level are:

1. The 13 State Constitutions;
2. State Enactments
3. State subsidiary legislation /by-law
4. British statutes

Unwritten sources

1. British common law and equity
2. Judicial precedents of superior courts

Unwritten non-legal sources:

1. The principles of the Syariah
2. Customary law
3. Native practice
4. Chinese and Hindu customs
5. Conventions of the Constitution
6. International law
7. Quasi legislation.

LIBERAL DEMOCRACY: INDONESIA, THE PHILIPPINES, AND SINGAPORE

INDONESIA

Since the beginning, Indonesia declares itself as republic. Indonesia gained its independence in 1945 after over three centuries under the Dutch colonial government. It is not surprising if the Indonesia legal system resembles the Dutch civil law system. Until today, some of the Dutch codes such as civil code, commercial code and criminal code are still adopted by Indonesia. Indonesia's first Constitution was drafted during revolutionary era in 1945. It contained Preamble, 37 Articles and Elucidation. Since then there has been four different constitutions adopted by Indonesia: the 1945 Constitution (1945-49); the 1949 Federal Constitution (1949-50); the 1950 Provisional Constitution (1950-1959); the reinstatement of the 1945 Constitution (1959-1999).

The 1998 financial crisis changed the political landscape in Indonesia. The New Order government under President Soeharto collapsed and changed into *Reformasi* (reformation). This new era was marked by amending the 1945 Constitution. The constitutional amendments were conducted in four consecutive year in 1999 to 2002.

The new constitution contains significant features of liberal democracy such as the introduction of new constitutional bodies; the elaboration of human rights provisions and the introduction of direct elections for president

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and vice president. In practice Indonesia had held free and fair direct election since 1999. President and vice president were directly elected by the people. With regard to human rights protection, Indonesia has its national human rights monitoring, the human rights court and the constitutional court where people can challenge government policy if it allegedly violates citizen's constitutional rights.

Post 1999-2002 constitutional amendments also marked by the establishment of state auxiliary bodies such as the National Human Rights Monitoring (the Komnas HAM), Anti-Corruption Commission (the KPK), and General Election Commission (the KPU). The establishment of these institutions was because the work of the existing institutions was unsatisfactory. These bodies are expected to enhance the execution of the tasks of the existing institutions. As a result, the performance significantly improved.

THE PHILIPPINES

The Philippines legal system is mixed systems of customary, religious (Islamic) law, civil law and common law. Based on 1987 Constitution, the Philippines was a republic (Section 1). The powers are divided into three different branches: the executive, the legislative (Article VI: Legislative Department Section 1), and the judiciary. President and Vice President are the executive. The president is both head of government and the Commander in Chief of all Armed Forces of the Philippines. The President and Vice president are directly elected by the people for a term of six years. The President serves for one term while the vice president may serve up to two terms. President nominates cabinets members subject to the confirmation of the Commission on Appointment. They are public officers who are "accountable to the people, serve them with utmost responsibility, integrity, loyalty and efficiency" (Article XI Accountability of Public Officers Section 1 of Philippines Constitution of 1987). The legislative power shall be vested in the Congress of the Philippines which shall consist of a Senate and a House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum (Article VI: Legislative Department Section 1 of Philippines's Constitution of 1987). Judiciary consists of Supreme Court and the lower courts (Court of Appeals and Regional Trial Courts/Shariah District Courts (Article VIII Judicial Department Section 1 of Philippines's Constitution of 1987). There are two important sources of law namely *statutes and jurisprudence*. *Statutory law* is defined as written legal documents. Statutory law includes constitutions, treaties, legislative statutes, municipal charters, municipal legislation, court rules, administrative rules and orders, legislative rules and issuance of government agencies. *Jurisprudence or case law* sources of law originated from court rulings.

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Classification of Legal Sources:

1. Constitution,
2. Legislative statutes passed by congress
3. Decisions of the Supreme Court, appellate courts, lower courts and other quasi-judicial agencies,
4. Executive issuances/ Presidential issuances,
5. Ratified international treaties by the Philippines,
6. Ordinances,
7. Rules and regulations of government agencies.

SINGAPORE

Singapore was a British colony from the nineteenth century through the mid twentieth. Singapore gained increasing internal self-government through the 1950s. Full self-government arrived in 1963. Singapore is a republic with parliamentary system of government based on the Westminster model. The three branches of government are the legislature, executive and judiciary. The legislature consists of the President and the Parliament of Singapore (Part VI: The Legislature Section 38 of Singapore's Constitution of 1963 with Amendment through 2010). The Parliament comprises elected Members of Parliament and Nominated Members of Parliament. The Executive is headed by the President and the Cabinet (Chapter 2 Singapore Constitution). The Cabinet is led by the Prime Minister of Singapore and other ministers appointed by the President on the advice of the Prime Minister (Section 25). Government agencies including the Attorney General also part of the executive. The judiciary consists of the Supreme Court and Subordinate Courts and the judges appointed to those courts (Section 93). Cabinet Ministers are required to be Members of Parliament. There are regular elections for citizens to elect their representatives in Parliament (Section 39 (1) a). Singapore adopts the binding precedents in which the superior courts possess law making powers through their rulings. While separation of powers is the main feature of the Constitution, there is also a check and balances mechanism among these three branches of government.

With regards to the sources of law, the 2002 Interpretation Act defines written law as

1. The Constitution and all previous Constitution having application to Singapore;
2. Any Act of Parliament, Ordinances and enactments;
3. Subsidiary legislation made under such enactments;

The Constitution is the highest law of Singapore. That said all laws and regulations must be consistent with the constitution. This is followed by statutes enacted by the Legislature. Next is subsidiary legislation and then

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the common law rules laid down by judges. International law will be part of the Singapore law only if it is incorporated in the domestic law of Singapore (Chang and Lee, 2018). or by the court recognition of customary international law as the common law rules.

SOCIALIST COUNTRIES: LAO, MYANMAR AND VIETNAM

LAO PEOPLE'S DEMOCRATIC REPUBLIC (LAO PDR)

Lao PDR is a socialist State (Art. 2 Lao PDR Constitution) under one party system. Laos is a civil law country. The primary source of law is legislation. President is the head of state and prime ministers and its cabinets are the head of government. There are two types of legislation: legislation of general application and legislation of specific application. International treaties and agreement that had been ratified as also a source of law. In 1991, the Laos Constitution was adopted by the Supreme People's Assembly. This constitution was amended through constitutional amendments through 2015. The Constitution defines, among other things, the political regime, the socio-economic regime fundamental rights and obligations of citizens, National assembly, The President, the local administration and Peoples Court and Public Prosecutor (Lao PDR Constitution of 1991 with Amendment through 2003). The Party plays as leading nucleus of the political system and the Laos PDR is defined as a People's Democratic State (Art. 3). All organizations function in accordance with the principle of democratic centralism. The most important development to emerge from this general process of change was establishment of a judiciary and the evolution of a body of law. The National Assembly Standing Committee remains the final interpreter of the law, rather than the court, and has the power to remove judges Evans, 2002).

THE REPUBLIC OF THE UNION OF MYANMAR

Myanmar adopted common law tradition inherited the English common law in the late nineteenth and early twentieth centuries, when Myanmar was part of the British Empire. Myanmar gained its independence on January 4, 1948. There have been at least three Constitutions in Myanmar. The first Constitution from 1947 was part of the road to independence of the Union of Burma. The second Constitution was drafted in 1974 during the socialist period of the Burmese regime and in 2008 a Constitution was ratified to lead Myanmar into a democratic transition process (Lian Sakhong, 2018). Initially, Myanmar was a parliamentary democracy. In 1974 to 1998, it shifted to the regime of the Myanmar Socialist Program Party as a one-party state.

1993 to 2008 was the period of drafting a new constitution in Myanmar. The goal of the updated constitution is 'flourishing of a genuine, disciplined



multiparty democratic system” (Art. 7). The Defence Service is the sole patriotic defence force and responsible for safeguarding the Constitution (Art. 20 (f)). Also, to enable the Defence Services to participate in the National political leadership of the State. Some important features of the new Constitution are the Defence Services are mostly in the hand of military; This can be seen the Defence Services are responsible for appointing a quarter of all members of the legislature. A constitutional amendment requires a more than 75 per cent majority, the military has a de facto veto on any change (Art. 436).

The legislature consists two chambers *Amyotha Hluttaw* (House of Nationalities: 224 seats) and *Pyithu Hluttaw* (House of Representatives: 440 seats) (Section 74 a, b). One fourth of all seats in both houses are filled by Defence Services personnel based on directly appointment from Defence Services.

The executive branch lead by the president who acts as head of state and head of government. The Judicial institution consists of Supreme Court and its lower courts, Court-Martial and Constitutional Tribunal of the Union (Chapter VI Section 293).

Source of Law in Myanmar are:

1. Legislation;
2. Judicial decisions;
3. English Common Law;
4. Customary law dealing with private law such as marriage, divorce, adoption, succession, wills, and transfer of property.

VIET NAM

The legal system of Vietnam is influenced by four different systems: the French civil law system, Soviet communist legal ideology, feudal legal system and the legal system in period of integration and globalization. This legal system is established under the principle of socialist legality and democratic centralism (Art 2 of Vietnam Constitution). These two principles heavily influence the character of legislation in Vietnam. While National Assembly is in the hand of legislature, the executive plays important in legislation. Communist party plays primary roles in all aspects therefore legal system is under influences of Party’s policies (Art. 4). Law therefore should be in line with Party’s policies. Constitution is the highest legal validity. The Myanmar Constitution was ratified by referendum on May 10, 2008 and promulgated on May 29, 2008 (AACC, SRD Research, n.d.). It entered into force January 2011. Court decisions are not defined as laws because it is not legal documents. Source of law in Vietnam include The Constitution; Legislation; Guidelines on the interpretation of laws; Treaties; Customary Law. Article 2

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Law on Legislation 2008 determines the primary Sources of Law which include the following documents:

1. Constitution, Laws and resolutions of the National Assembly.
2. Ordinances and resolutions of the Standing Committee of the National Assembly.
3. Orders and decisions of the State President.
4. Decrees of the Government.
5. Decisions of the Prime Minister.
6. Resolutions of the Justices' Council of the People's Court and circulars of the Chief Justice of the Supreme People's Court.
7. Circulars of the President of the Supreme People's Procuracy.
8. Circulars of Ministers or heads of Ministry-equivalent Agencies.
9. Decisions of the State Auditor General.
10. Joint resolutions of the Standing Committee of the National Assembly or the Government and central offices of socio-political organizations.
11. Joint circulars of the Chief Justice of the Supreme People's Court and the President of the Supreme People's Procuracy; those of Ministers or Heads of Ministry-equivalent Agencies.
12. Legal documents of People's Councils and People's Committees

Apart from Article 2 Law on Legislation 2008, there are other sources of law such as international treaties and customary regulations. In Vietnam, only international treaties/conventions that is ratified by Vietnam is considered as source of law. This means international treaties/conventions are sources of law if they are applied directly or indirectly in Vietnam. Customary regulations will be adopted as a source of law if they are used to deal with specific case in reality. The Court system in Vietnam comprises the Supreme People's Court, Provincial People's Courts and District People's Courts (Art. 102 (2)). Vietnam has six types of courts: Administrative Court, Labor Court, Civil Court, Criminal Courts, Economic Courts, and Military Court.

The above-mentioned analysis has explained the regulatory framework of all ten South East Asian countries. It appears that they somewhat adopt different systems which often linked to their historical background. The Conclusion of this Part will be presented at the end of this paper. The following Part will analyze the recent constitutional development with special focus on judicial review and unamendable provisions.

PART III. RECENT CONSTITUTIONAL DEVELOPMENT, JUDICIAL REVIEW, AND UNMENDABLE PROVISIONS IN SOUTHEAST ASIAN COUNTRIES: SOME COMMONALITIES

How do we understand the constitutional arrangement in SE Asia countries? Scholars have attempted to classify types of constitutions based on various

categories. Karl Lowenstein classifies the normative, nominal, and semantic constitutions depending on whether the constitution is a living constitution, not live in practice, or exclusively for the benefits of the power holders (Loewenstein, 1957).³ Giovanni Sartori provides very similar notion with slightly different wordings i.e. “garantiste, nominal and fa ade constitutions” (Sartori, 1962). Albert Chen categories constitutions into: liberal, communist/socialist, and hybrid constitutions (Chen, 2014). For Dressel and Bünte, most constitutions in Southeast Asia best described as hybrid constitutions (Dressel and Bünte, 2014).

In general, the Constitutions of SE Asian countries are responsive to change.⁴ In the past, some of the SE Asian countries constitutions were somewhat brief and abstract. They did not adequately elaborate the principles of constitutionalism such as lack of human rights protection, rule of law and separation of powers. Since the 1980s, countries in SE Asia have undergone democratic transition- a transition from authoritarianism to democracy. According to Sriprapha Petcharamesree such democratic transition includes: “the victory of the People Power Revolution in the Philippines in 1986 which led to the fall of the Marcos regime and the rise of democratic governance; the adoption of a people’s Constitution in Thailand in 1997 when ordinary Thais actively participated in constitutional design; the *Reformasi* in Indonesia in 1998 where the autocratic government of President Suharto resigned and direct presidential elections were introduced; and in Myanmar, the landslide victory of Daw Aung San Suu Kyi’s National League for Democracy (NLD) in the elections of November 2015 (Petcharamesree, 2020).”

They were in the process of building of higher quality constitutional democracy. Some countries established new constitutions while others reformed the existing constitutions. The most recent constitutional amendments of South East Asian countries showed the transformation into more liberal constitutions. They inserted some important provisions which reflect constitutionalism such as articles on human right,⁵ constitutional court and

3 Normative constitution “a living constitution, one that is real and effective and faithfully observed, actually governing the dynamics of the power process. Nominal constitution: “not lived in practice because socio-economic conditions mitigate against it” Semantic” fully applied and activated, but its ontological reality is nothing but formalization of the existing location of political power for the exclusive benefit of the actual power holders.” Karl Loewenstein, *Political Power and the Government Process* (Chicago: University of Chicago Press, 1957).

4 These include the recent Vietnamese constitutional amendment in 2001 and 2013, Indonesia constitutional reform (1999-2002), Thailand Constitutional amendments (1997), the Philippines constitutional amendments (1986) and Cambodia Constitutional amendments.

5 These include the establishment of National Human Rights Institutions (NHRIs) such as Indonesia’s Komisi Nasional Hak Asasi Manusia (Komnas HAM), Malaysia’s Suruhanjaya Hak Asasi Manusia (SUHAKAM), the Myanmar National Human Rights Commission (MNHRC), Komisyon sa Karapatang Pantao in the Philippines (Philippines Commission on Human Rights, or PCHR), Thailand’s National

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the unamendable provisions.⁶ This constitutional development shows the emergence of constitutionalism in SE Asian Countries. This situation is arguably an important factor which lead to the introduction of ASEAN Charter in 2008. The features of the ASEAN Charter largely reflect some important features of SE Asian countries updated Constitutions. This Part will analyze the recent constitutional development in SE Asian Countries. The analysis below focuses on how far SE Asian countries conducted constitutional reform. Does the constitutional amendment introduce principles of liberal democracy? It argues that there is a tendency that the SE Asian countries updated constitutions to a certain degree adopt constitutionalism. This can be seen for instance the inclusion of constitutional adjudication, human rights protection, separation of powers and unamendable provisions in some SE Asian Countries updated constitutions. It indicates that majority of SE Asian countries have judicial review mechanism. In addition, Indonesia, Thailand, Myanmar, Cambodia and Lao expressly contain unamendable articles in their constitutions. Singapore and Malaysia do not explicitly mention unamendable provisions but they adopt basic structure doctrine. Vietnam Constitution and Brunei Darussalam are not clear about unamendable constitutional provisions.

1. CONSTITUTIONAL REFORM, JUDICIAL REVIEW AND UNAMENDABLE PROVISIONS: INDONESIA, THAILAND, MYANMAR, CAMBODIA AND LAO PDR INDONESIA

The most recent Indonesia's constitutional reforms carried out from 1999 to 2002. It was drafted by People's Consultative Assembly (the MPR) which consisted of People Representative Council (the DPR), Regional Delegates (*utusan daerah*) and functional delegates. (*utusan golongan*). Based on Articles 3 and 37 of the 1945 Constitution, the MPR has the power to amend the Constitution. While the MPR composition seems to be representative, the amendments process itself was criticized by civil society who were not optimally participated. Apart from such criticisms, the drafting process itself trigger intense public debate. This is why the updated constitution introduced comprehensive change such as the introduction of new state organs (constitutional court, judicial commission and regional representatives' council), expanded individual and collective rights, decentralization and electoral arrangement. The Introduction of constitutional court is significant for two

Human Rights Commission (TNHRC), and Timor-Leste's Provedoria dos Direitos Humanos e Justice (Provedor for Human Rights and Justice, or PDHJ).

⁶ unamendable provisions are provisions in the constitution which prohibit the drafter of the constitution to amend such provisions. Normally this provision contains fundamental values or principle of the constitutions.

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reasons. First, this Court aims to guard the norm of the Constitution and constitutional rights protection. Second, the Court also adjudicates disputes regarding general elections or disputes on competence among state organs. It also provides legal advice in impeachment motion. The expansion of human rights provisions also helps the citizens to defend their constitutional rights in case the government violates their constitutional rights. Judicial review mechanism also aims to protect the constitution as well as citizens' rights. Another significant change in the updated constitutions is the inclusion of unamendable provision which is absent in the old constitution. Article 37 (5) stipulates, "provisions relating to the form of the unitary state of the Republic of Indonesia may not be amended." This provision protects both the "unitary" form of the state and the "republic" as the form of government. This provision is important because in 1949 Indonesia experience federal system but it did not last long it ended less than one year. In addition, this provision also important because after the constitutional amendment, there was a tendency of disintegration and few discussions on the possibility to adopt federal arrangement. This provision is a commitment to maintain the unitary state of Indonesia and preventing Indonesia from adopting federalism.

THAILAND

Unlike the Indonesia case, Thai constitutional amendment was conducted by academics and provincial delegates. The process also invited significant public participation and civil society engagement. However, the composition of the drafters was questioned. There was also public referendum in this process. Some important issues come up such as the formation of the senate, the criteria for member of parliament, human rights and the establishment of new Courts. Similar to Indonesia, Thailand has a constitutional court which has significant power in judicial review and impeachment process. The debates on constitutional reforms have been in place for about twenty years. Thailand experiences shows how constitutional amendment invited intense discussion and debates not only among the drafters but also significant social actors who wanted to be accommodated by the constitution. It is likely that constitutional reform still to be a contested topic for Thailand. The way the Government manage this important process will likely determine how constitutionalism grow in Thailand.

On significant achievement from Thai constitutional amendment in the 1997 political reform was the introduction of Constitutional Court. The Court serves both judicial and non-judicial functions such as participate in the nomination commission and proposing bill to the House of Representative concerning his duties. The Court judicial duties include reviewing laws and law making, settling disputes, disqualifying public office holders and

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protecting the constitution and democratic values. In practice, Thai Constitutional Court expanded its powers which may weakened the concept of rule of law. Not only does the Court have the power to review the constitutionality of statues, the Court also has the power to disqualify politicians and invalidate political processes. Several cases have become critical turning points in Thai politics.

The Constitutional amendment also introduce unamendable provisions. earlier constitutions did not include any formal unamendability, the 1997 and further the 2007 Thai Constitutions prohibits “a motion for amendment which has the effect of changing the democratic regime of government with the King as Head of State or Changing the form of the State (Art. 313 of the 1997 Constitution and 291 of the 2007 Constitution).”

MYANMAR

Myanmar took 17 years to draft a new constitution. The current Constitution was adopted on May 29, 2008 (AACC SRD Research, n.d.) the military junta in Myanmar initiated a process of political reform under President Thein Sein (Bünthe and Dosch, 2015). A Constitutional Tribunal of Myanmar was formed modelled the German Constitutional Court (Marti, 2015). It established in 2011 (AACC, SRD Research, n.d.) the Tribunal consisted of nine members there nominated by each house of the Parliament, and by the President (Marti, 2015). the Court had the responsibility for deciding disputes related to the allocation of powers as well as interpretation of the Constitution. In 2012, the Court was called on to interpret the power of parliament against the government. It decided that parliamentary committees and commissions were not national bodies (BBC News, 2012). This means that they had limited power to summon government ministers for questioning. This resulted in the removal of all judges in September 2012 (BBC News, 2012). the Tribunal itself has been reformed. The Constitution provides amendment rules in which some articles may only be amended with special parliamentary majority and the consent of the electorate in a referendum (Section 436 (a) of Myanmar Constitution). Such articles include articles on state of emergency and the general principles of the Constitution. These provisions seem resembles the basic structure principles.

CAMBODIA

The 1993 Cambodia Constitution established Constitutional Council with the power to conduct judicial review and to decide electoral disputes (https://www.ccc.gov.kh/whatisccc_en.php). The nature of this Council is a constitutional and apolitical body. The Constitution separates chapter on Constitutional Council and judiciary. The Constitutional Council members are not

considered judges but are regarded as public officials of the state institution. The Council, however, also adjudicate election disputes and has the final say on the question of constitutionality and constitutional interpretation (Art. 322). So far, the Council appears to be the only institution to survive without significant interruption in collaboration among state institutions and politicians. This is because of spirit of the Council to promote peaceful settlement of electoral, constitutional and legal disputes. In addition, the 1993 Constitution also include provision prevent amending or revising the constitution. Amendment cannot be done if (1) states is in emergency (Art. 154) (2) if affecting the liberal multi-party democracy system and constitutional monarchy regime (Art. 155). These two provisions according to Ratana Taing “may be an attempt to insure against repeated political regime changes which Cambodia had experienced since the first constitution was enacted in 1947 (Ratana, 2019).”

LAO PDR

The 1947 Lao Constitution included an express unamendability clause, “the provision relating to the monarchic, unitary and indivisible form of the state, the representative character of the regime and the principles of liberty and equality guaranteed by the present constitution may not be subject of any amendment (Article 33 of the 1947 Lao Constitution).” However, this provision is not included in The 1991 Constitution of People’s Democratic Republic which remain the same in The 2015 Constitution of the Lao PDR. The Constitution does not have explicit provisions limiting the amendment power. National Assembly owns the power both constituent and constitutional amendment (Bui, 2019).⁷ This tendency is against the global trend. For Ngoc Son Bui, the 2015 Constitution “introduced progressive constitutional amendments (Bui, 2019).” It redefined the structure and the functions of state bodies. it also committed to human rights protection and judicial independence. The process of constitutional amendment in Lao, according to Ngoc Son Bui, was more progressive compared to other socialist country such as China. Constitutional consultation was extended to private sectors and academia. However, citizens of Lao did not intensively engage in constitutional debate. This is different from the Vietnamese constitutional amendment in which the citizens pay attention to constitutional amendment.

⁷ However, it does not mean that there is no restriction at all. even though there is no explicit constitutional unamendability since judicial review is absent, in practice certain constitutional principles cannot be changed.

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CONSTITUTIONAL REFORM, JUDICIAL REVIEW AND BASIC STRUCTURE DOCTRINE: VIET NAM, MALAYSIA, SINGAPORE

MALAYSIA

The 1988 Constitutional reform amended Article 121 (1) which had created doubt about the adoption of separation of powers in Malaysia (Art. 121 (1) of the 1988 Malaysian Constitution). The amendment result in there is no longer be a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. While the Constitution does not specifically stipulate unamendable provisions, it arguably adopts implicit unamendability. The Malaysian Supreme Court adopt basic structure doctrine which prevent the parliament to enact laws that violate the basic structure. Any statutes offend the basic structure may be declared as unconstitutional. Through this basic structure doctrine, the principle of constitutional supremacy may be defended. In 2018 the Federal Court declared that “the power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of the Constitution and it cannot be abrogated or altered by Parliament by way of a constitutional amendment (Neo, 2016).

SINGAPORE

Article 5 (2) of the Singapore Constitution stipulates that a two-thirds parliamentary majority is required to amend the Constitution. The 2004 Constitutional amendment focused on citizenship. In 2007 there was another important amendment concerning the composition of the Legal Service Commission. The most recent constitutional amendments particularly focused three main issues: the composition of parliament, the presidency, and finance.

With regard to the composition of parliament, the updated Constitution promotes the unelected element of member of parliament or also known as Nominated member of Parliament (NMP) (Chng and Lee. 2018). Initially the unelected MP based on race or special trading interests. They are selected by Parliamentary Special Committee. The public may submit the name of potential candidates to the committee. In 1997 the number of the NMP increase significantly, from six to nine, which also include labor, business, and industry). This number was doubled in 2001 to include wider community groups such as social and community service organization, media, tertiary institutions, arts and sport organizations (Neo and Xian, 2019). The reason for this is to provide wider opportunity for non-partisan views including female political participation.

With regard to the presidency, recent constitutional amendment fundamentally changed the office of the President. Initially President was a ceremonial

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office. the President was the head of state with limited powers. The President was nominated and confirmed by Parliament. The shift from nomination to election was meant to strengthen presidential democratic mandate to support his constitutional roles. The elected President acts as a check and balance mechanism against the government with respect to finance, appointment of high rank civil service positions, and certain decisions which affect fundamental liberty.

The 2016 constitutional amendment were introduced to respond some suggestions from the constitutional commission. The suggestions are to safeguard minority representation in the presidency, to strengthen the eligibility criteria for presidential candidates and to review the role and the structure of the Council of Presidential Advisers. The commission suggests to change the open election to an election which may reserve for an ethnic group under limited conditions. In addition, the more stringent requirement regarding the eligibility for presidential candidate. Last, Enhancing the roles of presidential advisors so that it is more influential with respect to the balance of powers in government. The government responded that democratically elected president is the most workable mechanism for Singapore. In addition, the amendment was searching for workable balances. This means such changes were incremental and do not touch the basic structure of the constitution. The fact that the party system in Singapore is dominated by a state party makes the constitutional amendment is very easy to be conducted. At the same time the dominant political powers maintain the strong commitment to create a stable constitutional government.

Similar to Malaysia, Singapore to a certain extend adopt basic structure to maintain the important principles in the Constitution. Initially, the basic structure doctrine was rejected as the Supreme Court declined an argument that parliament's constitutional amending power was implicitly limited. A constitutional amendment is part of the Constitution. Therefore, it cannot be considered as invalid as long as it is in accordance with the amendment procedure. There is other view which hold that basic structure doctrine is applicable to Singapore. some aspects of the constitution are essential and important to the political system that is established. They are part of its basic structure. The Court however did not make any decisions on the implication of declaring something considered as basic structure of the constitution. In other words, the Court reluctant to declare a certain aspect of the constitution as unamendable.

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CONSTITUTIONAL REFORM, JUDICIAL REVIEW YET UNCLEAR UNAMENDABLE PROVISIONS: VIET NAM, THE PHILIPPINES AND BRUNEI DARUSSALAM

VIETNAM

In 1980, Vietnam conducted economic reform (*Doi Moi*). It is a transformation from the centrally planned economy to the socialist-oriented market economy. This economic reform was accommodated in the 1992 Constitution which established provision concerning liberalization of economic system. Apart from liberalization of economy, however, the content of the 1992 Constitution is similar that of the 1980 Constitution. The economic reform (*Doi Moi*) in fact needs supporting conditions such as strengthening the rule of law, distributing public powers, strengthening governmental responsibility, combating corruption, and improving administrative system. This is the reason why in 2001 there was further constitutional amendment.

The latest constitutional amendment was in 2013. This amendment aimed, among other things, to establish a new framework that support economic performance. However, there is no indication concerning the possibility for other political parties to compete. Also, there is no reference to any supervisory body to monitor the party's activities. These two features were heavily criticized by a group of 72 senior scholars who suggested that the updated constitution should include 7 points: first, there should be a competitive political system of different parties. Second, while the new constitution includes provisions of human rights, there was a substantial limitation such as national defense, security and social order which potentially open the doors from human rights repression. Third, the recognition of multiple forms of ownership of land including private ownership. Fourth, the practice of separation powers. Fifth, the suggestion that the armed forces should protect the fatherland and to serve the people and not to be loyal to any particular organization. Sixth the updated constitution should be approved by the people in a transparent and participative way. Finally, the petitioners suggest for extending the time for public consultation of the draft of the constitution (Bui, 2013).

This petition provides significant implications in a socialist context because this promotes transparency and participation in constitutional drafting. Bui (2014) study show that public discussion on the revised constitution was relatively transparent and participatory. Controversial issues during the public consultation on the draft included the referendum on the updated constitution; the alternate multiparty system; check and balances; and a stronger constitutional review body. Vietnam eventually rejected constitutional review in its new Constitution adopted in late 2013. In socialist country, legislation was traditionally conceived as expressive of the people's will

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beyond the review of judicial bodies. constitutional review was rejected because it conflicts with the fundamental principles and assumptions of socialist constitutional law.

The above-mentioned analysis demonstrates that Vietnam constitutionalism is moving forward to a modern constitutionalism. Bui (2014) concludes that Vietnam constitutionalism has been more liberal. This can be seen from the adoption of individual liberty; the more open national elections. In addition, the updated Constitution of Vietnam shows the tendency of internalizing modern constitutional values such as rule of law, distribution of powers and liberal economic rights. There is also a tendency that the constitutional discourse in Vietnam focused on important components of modern constitutionalism such as limited government; constitutional review and independence judiciary. In the future, the modern constitutionalism in Vietnam remains uncertain. On the one hand the wave of globalization compelled Vietnam to be more democratic. On the other hand, Vietnam owns its socialist political system. The dynamic of external force and existing values will be complex.

THE PHILIPPINES

The 1987 Philippines Constitution can be reformed into two ways: revision or amendment (Art. XVII). A revision can only be made by congress and satisfy a vote of three-fourths of its members while an amendment can be made not only by the congress but also by a constitutional convention or an initiative (Section 1 Article XVII). With this in mind, it violates the constitution if an initiative changes the constitution because it constitutes a revision and not merely amendment. People initiative may propose amendment of the Constitution but not revisions. Constitutional revision can only be conducted by congress. The Philippines Constitution does not expressly mention prohibition against an amendment. It does not contain express unamendable provisions. The Supreme Court, however, declared that the sovereign people might amend the constitution in any way it chooses as long as it does not contradict with *jus cogens* norms of international law (Roznai, 2013).

BRUNEI DARUSSALAM

For more than 50 years of the reign of Sultan Hassanal Bolkiah Brunei Darussalam implement the concept of the Malay Islamic Monarchy. Its proclaimed ideological compass of Melayu Islam Beraja or MIB. These three pillars of MIB- Malay culture, the religion of Islam and the institution of Monarchy- are long standing Bruneian features. Such ideology is crucial for filtering the modernization and development. It is also important guide in establishing laws and regulations. The 1959 Constitution as amended by

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the 2006 constitutional amendment stipulates the Sultan is the head of state with full executive power (Art. 4 Part III Executive Authority). No judicial review mechanism included in the constitution (Article 84 C).

With regard to the amendment of Constitution, The Sultan also play important roles in amending the constitution, as stipulated in Section 85 Part XII of the Constitution:

- (1) His Majesty the Sultan and Yang Di-Pertuan may by Proclamation, amend or revoke any of the provisions of the Constitution including this section; and this Constitution shall not otherwise be amended, added to or revoked.
- (2) His Majesty the Sultan and Yang Di-Pertuan shall consult the Privy Council in relation to the exercise of the powers vested in him by this section but shall not be obliged to act in accordance with the advice of that Council.
- (3) His Majesty the Sultan and Yang Di-Pertuan shall not make any Proclamation for the amendment or revocation of any provision of this Constitution unless a draft of the Proclamation has been laid before the Council to enable the Legislative Council to determine if any amendments to the Draft of the Proclamation should be made.
- (4) If no amendments are proposed by the legislative Council within 14 days, His majesty the Sultan and Yang Di-Pertuan may proceed to declare the Proclamation; if amendment are proposed by the Legislative Council within 14 days, the Speaker shall, within 14 days of that Council making proposal, submit a report to His Majesty the Sultan and Yang di_pertuan giving a summary of the debate and the reasons for the proposed amendments.
- (5) His Majesty the Sultan and Yang Di-Pertuan having considered the report of the Speaker may declare that the Proclamation shall be affect under Clause (1) either in the form in which it was laid before the Legislative Council or with such amendment as His Majesty the Sultan and Yang Di-Pertuan shall think fit.

PART IV. CONCLUSION

Part II has showed the distinct features of the regulatory framework of all ten ASEAN countries. They are heavily influenced by the experience they had in the past. Some are influenced by the English common law system while others are affected by the French civil law system or customary law. The features of their constitutional arrangements, however, are somewhat overlapping. They can be regarded as liberal democracy, monarchy constitutional or socialist arrangement. The liberal democratic constitutions as reflected in the constitution of Indonesia, Singapore and the Philippines mirror certain general features of the liberal democracies in the rest of the world, even

though the practice may vary. The monarchy constitutional as reflected in the Constitution of Thailand, Brunei Darussalam, Malaysia and Cambodia maintains the powers of the monarchs yet it is limited by the Constitution. The socialist constitutional system can be found in Vietnam, Lao and Myanmar which reflected in one party system. But there is attempts to reconcile the value of constitutionalism and one-party system.

With regard to the Constitutional development as analyzed in Part III, the updated constitutions of most SE Asian countries insert provisions concerning constitutional review and unamendable provisions or at least adopt basic structure doctrine in practice to maintain constitutionalism. The Philippines Supreme Court for instance has the power to conduct judicial review. This models the US Supreme Court. The Supreme Court of Singapore and Malaysia also have a competence to review law and government action on the basis of the Constitution. The Cambodian Constitutional Council resembles the French Constitutional Council. Constitutional tribunal becomes an important topic under the new constitution of Myanmar. In Vietnam, the establishment of constitutional review is under discussion. While Laos and Brunei Darussalam do not make a strong statement against judicial review. The most significant development of constitutional court in SE Asia is in Thailand and Indonesia. The constitutional courts in these countries are equipped by significant constitutional powers including settling political conflicts. It can be said that judicial review is on the rise in SE Asia.

In addition, most SE Asian Countries also include unamendable constitutional provisions or adopt doctrine of basic structure. The unamendable provisions and basic structure aim to limit the amendment of the constitutions. Not all provisions of the constitution can be amended. provisions which reflect the basic structure of the Constitution or contain fundamental principles are unamendable. It is, therefore, inaccurate to say that constitutionalism is an alien concept in this region. All Southeast Asian states have constitutions. There is a tendency to take them more seriously than in earlier phases of state development in the region.

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