

CONSTITUTIONAL STRUCTURES AND HUMAN RIGHTS IN SOUTHEAST ASIA: CAMBODIA, INDONESIA, THAILAND AND VIETNAM

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The relationship between rights carefully carved into a written constitution and the observance of these rights is a much examined question. An obvious and immediate response is that in many countries there is little relationship between the words and political reality. This gap is explained by political factors, socio-economic expectations and cultural differences. The intent of this paper is not to replicate or reiterate these factors as possible explanations for perceived rights protection failures. Rather, the goal is to offer another factor for consideration – that written constitutions have different purposes in different states. A principal role associated with the written constitution in North America – civil and political rights protection – is not necessarily of the same significance for constitutions in other countries, even for those constitutions with similar human rights language. Such constitutional language may exist for different purposes and be intended to have different effects.

The goal of this contribution is to provide an overview of the principal constitutional documents of four Southeast Asian countries, Cambodia,¹ Indonesia,² Thailand³ and Vietnam,⁴ focusing on the human rights content of these constitutions, and to examine the “role” played by the written constitutions in the different countries

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¹The 1993 *Constitution of the Kingdom of Cambodia* is reproduced in A.P. Blaustein, “Cambodia” in G.H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, N.Y.: Oceana Publications, loose-leaf) release 94-8, November 1994.

²The Indonesian Constitution is reproduced in G.A. McBeath and K.M. Boyle, “Indonesia”, in Flanz, *supra* note 1, April 1990.

³Thailand has a new Constitution as of October 1997. No official or complete English translation is yet available. An English translation of parts of the draft Constitution submitted to the Thai Parliament was produced by *The Nation*, a daily newspaper in Bangkok and is available on *The Nation's* Internet web site at www.nationgroup.com.

⁴The 1992 *Constitution of Vietnam* is reproduced in Phuong-Khanh Nguyen, “Vietnam”, in Flanz, *supra* note 1, release 92-8, December 1992.

as a way of explaining the perceived gap between constitutional text and human rights observance.

Written Constitutions Versus Constitutionalism

Simply put, a constitution is a document that sets down a series of rules designed to govern state activities.⁵ Complementing, amending and extending formal constitutional documents are such things as constitutional customs, constitutional conventions, ordinary statute laws with constitutional significance and judicial precedent which interprets written constitutions and these other sources. Together, these elements regulate the exercise of political power within the public sphere. While the particular mix of these different elements will vary from country to country, a complete canvass of a country's constitutional structure would consider them all. Canada, for instance, provides an example of a complex constitutional structure. A reading of the Canadian constitutional acts⁶ in isolation would lead to the belief that the Governor-General is the most powerful individual in the country, a situation which once Canadian political convention is understood, clearly is not the case.⁷ So, too, the existence of political parties, of cabinet government, and even of responsible government (a cornerstone of the parliamentary tradition) are not recognized in Canada's written constitution. Yet all lie at the centre of Canada's true constitutional government, their existence rooted firmly in constitutional convention. Furthermore, although it was only in 1982, with the enactment of the Canadian *Charter of Rights and Freedoms*,⁸ that Canada formally included expansive political and civil rights protection within its written constitution, it would be false to suggest that, prior to 1982, legal and political rights had no protection or acceptance within Canada. In fact, constitutional jurisprudence, statutory law and constitutional practice provided significant recognition and protection of these rights prior to 1982.⁹

The emphasis in this contribution, however, will be on the *written* constitution as opposed to the conventional, judicial, or political constitutionalism that may exist within Cambodia, Indonesia, Thailand and Vietnam. Admittedly, there is a danger in putting too much emphasis on a written constitution, since such a document may reflect little of the true situation within a country. This may be because of additional legal, political

⁵J. Lane, *Constitutions and Political Theory*, (Manchester: Manchester University Press, 1996) at 5-7; K.C. Wheare, *Modern Constitutions* (London: Oxford University Press, 1966) at 1-2.

⁶The *Constitution Act, 1867*, The *Constitution Act, 1982*, Schedule B, , *U.K. Statutes*, 1982, c. 11.

⁷The *Constitution Act, 1867* vests general executive authority for Canada in "the Queen" and confers a number of specific powers on a "Governor-General." However, by convention, both the Queen and her representative in Canada, the Governor-General, act upon the advice of the federal cabinet.

⁸*Canada Act 1982*, Part 2, Schedule B.

⁹In the strictly legal context, this is discussed by P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1997 Student Edition) at 604-609.

and conventional elements that are essential parts of a state's constitutional structure. It may also be because constitutions can be, in practice, irrelevant to a state's actual governance. A written constitution no more guarantees constitutional rule than the absence of a formal document designated as the constitution indicates the absence of a constitutional framework.¹⁰ Constitutional documents may have little to do with the real character of state institutions in a country, operating, instead, as "camouflage constitutions".¹¹

Nevertheless, a written constitution frequently is the most important legal document in a state and usually is the cornerstone of the public law sector of a legal system. There is an international expectation that an independent state will have a formal, documentary constitution and the term "constitution" most commonly designates this narrower, textual element of a state's constitutional structure.¹² Beyond this external factor, governments establish written constitutions in order to legitimize their actions and status in the eyes of their domestic populations. Indeed, even in those states where the written constitution appears largely incongruent with the real structures of the state, the written constitution may still feature significantly in the state's political life.¹³ Thus, while undue emphasis cannot be placed on written constitutions, particularly as regards the exercise of political power, documentary constitutions are important indicators of a state's legal and political culture.

The establishment of constitutions by those with political power is a purposeful action engineered to bring about particular results. A constitution may be enacted to ensure political stability, the legitimacy of a particular group, a certain mix of individual freedom and regulatory power or a specific economic system. It is most frequently true that the enactment of a new constitution marks the desire of a state's political elite to make a "fresh start" — to re-structure the existing state and begin again with a new or at least a modified state structure.¹⁴

Written constitutions are characterized by distinct features, which separate constitutional rules from other categories of legal rules or laws. Constitutions set out citizen rights and public competences.¹⁵ Specifically, the contents of written constitutions fall into four categories: rules establishing the nature of the state; rules setting out the rights of individuals; rules elaborating the powers of the state; and rules

¹⁰Lane, *supra* note 5 at 8.

¹¹*Ibid.* at 119.

¹²Indeed, only a few countries do not have a special document designated as their constitutions. The United Kingdom, Israel, and Saudi Arabia are some examples of those countries which lack such a document. Lane, *supra* note 5 at 6.

¹³Lane, *supra* note 5 at 124.

¹⁴Wheare, *supra* note 5 at 6.

¹⁵Lane, *supra* note 5 at 141.

setting out the process for amending the constitution.¹⁶ The first category of rules concerns whether the state is unitary or federal. The second and third categories – rules which elaborate state powers and individual rights – have to do with the internal and external boundaries of state power.¹⁷ The last category – rules which govern the process for constitutional change – is concerned with constitutional continuity and stability. Rules which ensure the exceptional nature of constitutional change preserve what Lane has termed “constitutional inertia” which is, in turn, a guarantee that the constitution will retain its formal status as the superior law.¹⁸ Not all constitutions have rules conforming to all of these categories but most do.¹⁹

The focus in this paper will be on those aspects of the examined constitutions which have, as their objective, the limitation of the exercise of state power in relation to individual citizens. More than any other area of constitutional representation of a state’s political and legal structure, written guarantees of rights can be deceptive. Declarations of rights are meaningless if the state is determined to ignore them and, arguably, unnecessary if the state is committed to their observance. Yet, almost all written constitutions list protected rights. Cambodia, Thailand, Vietnam and, to a much lesser extent, Indonesia are no exceptions; each has a documentary constitution which articulates protected human rights.

The Emphasis on Civil and Political Rights

The starting place for constitutional recognition of human rights lies with civil and political rights, a category that includes rights of expression, religion, association and the freedom from arbitrary arrest. Such rights are termed first generation rights, a label which denotes their primary place in the development of rights theory. Traditional understandings of these rights identify the state and the collective power it wields as the greatest threat to the interests protected by these rights. The traditional viewpoint is that

¹⁶Lane, *supra* note 5 at 110.

¹⁷The use of the term “internal” is meant to indicate the balancing of power between the various organs – the legislative, executive and judicial – of the state itself. Reference to “external” boundaries signifies the limits of state power in the relationships the state has with the individual. Lane, *supra* note 5 at 125.

¹⁸Lane, *supra* note 5 at 114.

¹⁹For instance, the Constitution of New Zealand is one of the few constitutions in the world which lacks extraordinary procedures for constitutional amendment and, therefore, can be amended by ordinary legislative process.

such rights exist to be asserted against governments and governmental organs.²⁰ Here, the role of a constitution in limiting state power is most strongly evident.

However, notions of the interests protected by rights have evolved significantly, as has the understanding of the positive role the state must play in protecting even political and civil rights.²¹ Recent constitutional documents reflect this evolution.²² Human rights now protected in various rights documents include socio-economic rights, such as rights to health care, food, education and housing. These rights rest upon an increasingly sophisticated understanding of state power. The state is viewed not only as a source of coercive limitation of individual freedom but also as an active and positive participant in the attainment of rights.

The differences between civil and political rights, on the one hand, and social and economic rights, on the other, have resulted in different expectations about state obligations in relation to each type of right.²³ Generally, state obligations in relation to civil and political rights are held to be of immediate and full application. This is not the case with respect to social and economic rights, where the notion of progressive achievement often informs what is required of the state.²⁴ Different expectations arise from the reality that full attainment of social and economic rights may demand more resources than a state has available. In this way, then, economic and social rights exist primarily as standards which the state undertakes to promote and to achieve progressively.²⁵

²⁰J. Waldron, *Nonsense on Stilts: Bentham, Burke and Marx on the Rights of Man*, (London: Methuen, 1987). The philosophical foundations to this understanding have their main roots in the liberal democratic tradition of Western Europe, itself heir to "Greek philosophy, Roman law, the Judaeo-Christian tradition, the Humanism of the Reformation and the Age of Reason." A.H. Robertson, revised by J.G. Merrills, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights*, (Manchester: Manchester University Press, 1994) at 3.

²¹For discussion of this latter point, see Waldron, *supra* note 20 at 157: "So it is not true to say that the traditional liberal rights require from governments nothing more than omissions whereas modern socio-economic rights involve costs. All rights—even rights to liberty—are costly to uphold."

²²See, for example, sections 26, 27 and 29 in the South African Constitution (The *Constitution of the Republic of South Africa*, 1996, Act 108 of 1996).

²³A concrete illustration of the common acceptance of such differences is the decision of the General Assembly of the United Nations that there should be separate Covenants dealing with the two types of rights: the *International Covenant on Civil and Political Rights*, done 16 December 1966, entered into force 23 March 1976, reprinted in (1967), 6 *International Legal Materials* 368 and the *International Covenant on Economic, Social and Cultural Rights*, done 16 December 1966, entered into force 3 January 1976, reprinted in (1967), 6 *International Legal Materials* 360.

²⁴For a brief discussion of the standard understanding of this difference, see T. Buergental, *International Human Rights in a Nutshell*, (St. Paul, Minn.: West Publishing Co., 1995) at 53-55.

²⁵For a discussion of this in relation to the *International Covenant on Civil and Political Rights*, *supra* note 23 and the *International Covenant on Economic, Social and Cultural Rights*, *supra* note 23, see A.H. Robertson, *supra* note 20 at 230.

It has been argued that the gap between the written constitution and observance of civil and political rights arises for different reasons than the gap between the written constitution and the attainment of socio-economic human rights goals. Clearly, failure to observe either set of rights is often due to a lack of political will to redistribute political and material resources. However, the additional possibility exists, at least in the case of more impoverished states, that a failure to observe constitutionally mandated socio-economic rights may be a product of inadequate resources. This distinction does bear on the descriptive focus of the sections in this paper which deal with the constitutions of the four examined states but it is enough, for our present purpose, to focus on civil and political rights as the most straightforward illustration of the gap between written constitutions and their corresponding practical constitutional regimes.

The Four States: Constitutional History and Human Rights

Introduction: Shaping Factors

The four states to be examined in this contribution have different political and cultural histories which shape the relationship between the written constitutional documents and the political/social realities within each state.

Colonial Influences²⁶

Cambodia, Indonesia and Vietnam were political and economic colonies of European nations, whereas Thailand remained free from direct colonial rule. Cambodia and Vietnam, as overseas possessions of France, had French law applied directly to them.²⁷ While Dutch law applied in Indonesia, the Dutch recognized the existence of indigenous law (*adat*) and respected and encouraged its existence within the colony.²⁸ To avoid colonization, Thailand adopted and adapted its legal system through a process that drew

²⁶There are a number of excellent political and social histories of Southeast Asia which describe and analyze in detail the colonial influences on the region. A readable introductory text is J.H. Esterline and M.H. Esterline, *How the Dominoes Fell: Southeast Asia in Perspective* (Lanham, Maryland: Hamilton Press, 1991). For Vietnam, see pp. 15-65; Cambodia, see pp. 67-103; Thailand, see pp. 239-271; and Indonesia, see pp. 273-314.

²⁷See generally M.B. Hooker, *A Concise Legal History of South-East Asia* (Oxford: Clarendon Press, 1978) at 153-183.

²⁸*Ibid.* at 187-213.

upon French, German and British law, in addition to indigenous sensibilities.²⁹ Thus, the colonial legal legacy is different for each of the four Southeast Asian states.

Moreover, Vietnam and Indonesia have documentary constitutions rooted in post-1945 wars of independence from their European colonizers. Cambodia's constitutional roots are also in the post-1945 years, although the path to independence was negotiated rather than achieved through force of arms. Thailand's written constitution arose from the internal overthrow of the absolute monarchy in 1932. Generally, Cambodia, Indonesia and Vietnam had their constitutional histories shaped by the struggle against foreign interests, whereas Thailand's constitutional history has been shaped principally by internal factors.

National Unity and Religion

In comparison with many other nation states, Cambodia, Thailand and Vietnam are relatively homogenous in socio-cultural and linguistic terms. The vast majority of the population in each of these states shares a single religion, language and cultural heritage. Of course, this is not uniform. Thailand, for example, has a well-defined Muslim minority in its southern provinces.³⁰ Moreover, both Thailand and Vietnam have large Chinese populations although, in Thailand, the integration of the Sino-origin population is more marked.³¹ The Buddhist religion common to the three countries has not had a profound impact on the day-to-day political struggles or constitutional structures of the states, although the role of Buddhism in legitimation of power, law and order, and societal relations is a defining characteristic of the three countries.³²

²⁹The legal history of Thailand is complicated because of this legal borrowing and because of Thailand's non-colonial position. Concerning the "modernization" of Thai law in the 1900s and the influence of non-Thais on this process, see: *Thailand Official Yearbook-1968* (Bangkok: Government of Thailand, 1968) at 254-258; Hooker, *supra* note 27 at 183-185 and more generally A. Petchsiri, *Eastern Importation of Western Criminal Law: Thailand as a Case Study* (Littleton, Colo.: Rothman & Co. 1987).

³⁰See generally C.F. Keyes, *Thailand: Buddhist Kingdom as Modern Nation-State* (Boulder: Westview Press, 1987) at 131-132.

³¹See D.K. Wyatt, *Thailand: A Short History* (New Haven: Yale University Press, 1984) at 292 and Keyes, *supra* note 30 at 133-135. The Chinese-origin population in Thailand is further described in several contributions in D. Chirot and A. Reid, eds., *Essential Outsiders: Chinese and Jews in the Modern Transformation of Southeast Asia and Central Europe* (Seattle: University of Washington Press, 1997). More generally, on the Chinese-origin population in Southeast Asia, see L.Y.C. Lim and L.A.P. Gosling, eds., *The Chinese in Southeast Asia* (2 Volumes) (Singapore: Maruzen Asia, 1983).

³²Buddhism in Thailand is the state religion and identified by some as an essential characteristic of being Thai. See K. Hewison, "Of Regimes, State and Pluralities: Thai Politics Enters the 1990s" in K. Hewison, *et al.*, eds., *Southeast Asia in the 1990s: Authoritarianism, Democracy & Capitalism* (St. Leonards, Australia: Allen and Unwin, 1993) at 180-181. More generally, see Somboon Suksamran, "Buddhism, Political Authority, and Legitimacy in Thailand and Cambodia" in T. Ling, ed., *Buddhist Trends in Southeast Asia* (Singapore: Institute of Southeast Asian Studies, 1993) at 101-153.

By contrast, Indonesia is a country of many differing linguistic and cultural groups dominated by the Javanese.³³ Government-mandating of an official language was seen as necessary.³⁴ Moreover, although Islam is the predominant religion, views differ on the efficacy of adopting Islamic Law as national law, particularly with respect to its application to the public sector. As a consequence, there is a constant friction between theocracy and secular legal domains which has significant implications on political and societal stability within Indonesia.³⁵ Not surprisingly the central concern of constitution-makers in Indonesia has been the establishment and maintenance of a unified state.

Military, Civilian Rule and Democracy³⁶

None of the four countries is currently gripped by a “classic” military dictatorship. None of the four written constitutions specifically directs that there is to be a political role for the military. However, in all four countries there is a tension – sometimes overt, sometimes subtle – between military and civilian rule.³⁷

Cambodia has an elected civilian government.³⁸ The civilian, dual leadership coalition which emerged from the 1993 elections broke down in 1997 when Hun Sen relied on force to consolidate power.³⁹ The relationship between the military and the Cambodian civilian government is still evolving but the continuing internal security threat from the Khmer Rouge and opposition to the consolidation provides the military with political paramourty.

³³See generally R.W. Liddle, “Politics and Culture in Indonesia” in R.W. Liddle, ed., *Leadership and Culture in Indonesian Politics* (Sydney: Allen & Unwin, 1996) at 63-106.

³⁴*Ibid.* at 66-68.

³⁵The intersection of Islam and political change in Indonesia is discussed in M.R.J. Vatikiotis, *Political Change in Southeast Asia* (New York: Routledge, 1996) at 137-158 and 163-166.

³⁶The meaning and application of democracy in Southeast Asia as opposed to the Western world has been a topic of intense debate. An introduction to the discussion is provided by Vatikiotis, *supra* note 35 at 82-108 and A. Laothamatas, “Development and Democratization: A Theoretical Introduction with Reference to the Southeast Asian and East Asian Cases”, in A. Laothamatas, ed., *Democratization in Southeast and East Asia* (Singapore: Institute of Southeast Asian Studies, 1997) at 1-20.

³⁷This is a complex topic which has been examined carefully by observers of the four countries. A good, although dated, overview is provided in Z.H. Ahmad and H. Crouch, eds., *Military-Civilian Relations in South-East Asia* (Singapore: Oxford University Press, 1985).

³⁸Respecting the 1993 election in Cambodia, see the excellent article by K.G. Frieson, “The Cambodian Elections of 1993: A Case of Power to the People”, in R.H. Taylor, ed., *The Politics of Elections in Southeast Asia* (Cambridge: Cambridge University Press, 1996) at 224-242.

³⁹See generally Abdul Gaffar Peang-Meth, “Understanding Cambodia’s Political Developments” (1997) 19 *Contemporary Southeast Asia* at 286-308.

In Thailand, the military has long been an important political actor, convinced of its own role as the ultimate protector, both internally and externally, of the Thai state.⁴⁰ However, the Thai military has been uneasy with direct rule, preferring to exercise influence on compliant elected civil governments.⁴¹ The 1997 *Constitution of Thailand* specifically diminishes the formal ways in which the military can influence the civilian government.

In Vietnam, there is a civilian government but the role of the Vietnamese Communist Party is paramount⁴² and the relationship between the Party and the military is close, although veiled.⁴³ In Indonesia, the military plays a direct role in almost all government structures and it is asserted that the Indonesian military has a dual role as state defender and as a socio-economic force (*dwifungsi*).⁴⁴ The electoral process in Vietnam is designed to ensure no surprises in the one-party state.⁴⁵ Elections for the civilian leaders in Indonesia involve complex management and tight controls such that expectations are met.⁴⁶

It would be unfair to say, without qualification, that in all four states the military is unaccountable to the civilian government and, therefore, uncontrolled. However, in all four states, the civilian governments are either highly integrated with the military or civilian government control over the military must be exercised with a deft hand.

⁴⁰An articulation of this view in an historical context is provided by J.L.S. Girling, *Thailand: Society and Politics* (Ithaca, N.Y.: Cornell University Press, 1981) at 119-186 and Suchit Bunbongkarn, "Political Institutions and Processes" in Somsakdi Xuto, ed., *Government and Politics of Thailand* (Singapore: Oxford University Press, 1987) at 42-58.

⁴¹Respecting elections in Thailand, see Suchit Bunbongkarn, "Elections and Democratization in Thailand", in Taylor, *supra* note 38 at 184-200 and A. Laothamatas, "A Tale of Two Democracies: Conflicting Perceptions of Elections and Democracy in Thailand", in Taylor, *supra* note 38 at 201-223.

⁴²There is an extensive literature on the Vietnamese Communist Party. A good overview is provided by G. Porter, *Vietnam: The Politics of Bureaucratic Socialism* (Ithaca: Cornell University Press, 1993) at 64-87. A recent look at the V.C.P. is provided by Taveporn Vasavakul, "Vietnam: The Third Wave of State Building" (1997) *Southeast Asian Affairs* 337 at 338-341.

⁴³See H.C. Hebbel, "The Vietnamese Military's Changing Role" [1993] *Southeast Asian Affairs* 364-372.

⁴⁴A convenient introduction to the dual role of the military in Indonesia (*dwifungsi*) is provided by R.W. Liddle, "Suharto's Indonesia: Personal Rule and Political Institutions" in Liddle, *supra* note 33 at 28-30. See also Ngandani, "Leadership and Security in Indonesia: The Institutional Role of ABRI" in S. Chee, ed., *Leadership and Security in Southeast Asia* (Singapore: Institute of Southeast Asian Studies, 1991) at 26-52. For a recent analysis of the military in Indonesia, see J. B. Haseman, "Indonesia and ABRI: Challenges to the Future" (1997) *Southeast Asian Affairs* at 27-140.

⁴⁵The 1992 elections in Vietnam are discussed in C.A. Thayer, "Recent Political Development: Constitutional Change and the 1992 Elections" in C.A. Thayer and D.G. Marr, eds., *Vietnam and the Rule of Law* (Canberra: Australian National University, 1993) at 55-74.

⁴⁶See R.W. Liddle, "A Useful Fiction: Democratic Legitimation in New Order Indonesia" in Taylor, *supra* note 38 at 34-60. See also: A. Santoso, "Democratization: The Case of Indonesia's New Order", in Laothamatas, *supra* note 36 at 21-45.

*Thailand*⁴⁷

Constitutional History

Since the end of the absolute monarchy in 1932, Thailand has had sixteen written constitutions. The most recent is that of October 1997. These numerous constitutions must be correlated with thirteen successful military coups, the most recent in February 1991, and twenty-one elections, the most recent in 1996. This long relationship between constitutions, coups and elections has been described as the cycle of Thai politics: a military coup suspends the old constitution; a new constitution is proclaimed; elections are held; time passes until a perceived crisis leads to another military coup.⁴⁸ The 1997 Constitution, which replaces the 1991 Constitution, appears to be a break from this pattern since its adoption did not directly follow a coup. However, the better view is that the 1997 Constitution is simply a reverberation from the 1991 coup.

Except for the 1991 military coup, which might best be seen as a political hiccup, Thailand has, since 1978, had a relatively stable written constitution and a civilian-led government which has evolved into Thai-style democracy.⁴⁹ Political and government stability in Thailand has been enhanced by the role of the much-revered monarch, King Bhumibol. The King's role in political and social cohesion is more significant in practice than that ascribed to the Monarchy by the written constitutions where his role is described as only that of a constitutional monarch.⁵⁰

The transitory nature of Thailand's written constitutions must be contrasted with the underlying consistency of certain principles that are constitutional in nature. These include the role of the Monarchy, the existence of civilian government, the independence

⁴⁷This section draws from T.L. McDorman, "The 1991 Constitution of Thailand" (1995) 3 Pac. Rim L. & Pol'y J. (University of Washington) 257-298 and T.L. McDorman, "Constitutional Change and Continuity in Thailand in the Aftermath of the 1991 Coup" in G.A. Ferguson and D.M. Johnston, eds., *Asia-Pacific Trends in Legal Development: Sectoral and Cross-Sectoral Studies* (Vancouver: University of British Columbia Press) (in press).

⁴⁸See Chai-anan Samudavanija, "Thailand: A Stable Semi-Democracy" in L. Diamond, et al., eds., *Democracy in Developing Countries: Asia* (Boulder, Colorado: Lynne Rienner, 1989) at 336 and Likhit Dhiravegin, *Demi-Democracy: The Evolution of the Thai Political System* (Singapore: Time Academic Publishing, 1992) at 147.

⁴⁹Thai-style democracy is discussed in many of the political studies of Thailand. A recent analysis is provided by Surin Maisrikrod, "The Making of Thai Democracy: A Study of Political Alliances Among the State, the Capitalists and the Middle Class", in Laothamatas, *supra* note 36 at 141-166.

⁵⁰The political and institutional role of the Monarchy is succinctly noted in Bunbongkarn, *supra* note 40 at 58-60. The unique character of King Bhumibol Adulyadej is described in R. Tasker, "Sovereign Guide" (13 June 1996) *Far Eastern Economic Review* at 20-21 and M. Vatikiotis and G. Fairclough, "Advice and Consent" (13 June 1996) *Far Eastern Economic Review* at 21-22.

of the judiciary and the lack of large-scale social, economic, religious or political repression.⁵¹

Constitutional Human Rights

The 1997 *Constitution of Thailand*, like most of that country's recent written constitutions, establishes the well-recognized catalogue of political-legal human rights: equal protection of the law; freedom from arbitrary arrest; freedom of speech and association; and the right to property.

In previous Thai constitutions, the scope of the protection offered by these rights was hedged by a number of factors. Many rights were qualified by the caveat that a right existed only to the extent that the right was not restricted by other laws. Thus constitutional rights were to yield in the face of conflicting legislation. A more general limitation was that individual rights were not to be exercised "against the country, religion, the King, and the Constitution." Finally, there was no direct avenue for judicial review of rights abuses which arose from alleged governmental breaches of the Constitution. All cases which raised constitutional issues were to be reviewed by a ten-member Constitutional Tribunal composed of senior legal and political officials.

The 1997 Thai Constitution is acknowledged as having expanded both the scope of individual rights protected and the manner in which those rights are to be protected. Article 29 provides that constitutional liberties are to be restricted only by laws consistent with the Constitution, thus replacing the more wide-open approach of previous constitutions. The 1997 Constitution expressly allows citizens to bring their cases to any Thai court when liberties allegedly have been infringed by the government. Indeed, the 1997 Constitution appears to create a constitutional judicial review authority in Thai courts although the courts have yet to assume this role. Moreover, the 1997 Thai Constitution creates a National Human Rights Commission with a mandate to monitor human rights violations and report regularly to Parliament. One commentary concluded that the 1997 Constitution "gives more to the people than any other charter in Thai history."⁵²

⁵¹These underlying principles of Thai constitutionalism are discussed in detail in McDorman, "Constitutional Change and Continuity in Thailand", *supra* note 47. In this context, it is also of interest that the global history of constitutional change is far more dynamic than the experiences of Canada and the United States would indicate. Indeed, according to Lane, *supra* note 5 at 158, "[c]onstitutional longevity is more of an illusion than a real phenomenon."

⁵²Thongbai Thongpao, "Charter promotes rights", *Bangkok Post* (Daily) (12 October 1997) at 7.

*Vietnam*⁵³

Constitutional History

Since Vietnam's declared independence in 1945, there have been four written constitutions, the most recent of which is that of 1992. A review of Vietnam's experience with constitutional change must take into account socialist ideology and the perceived role of constitutions in a socialist legal system.

As articulated by one observer, constitutions in a socialist legal framework "are not intended to serve as permanent documents reflecting the timeless political and philosophical values of a given society."⁵⁴ They do not seek to regulate relations between state and society, nor do they have a determinative legal function. The primary purpose of a constitution in a socialist state is "to chart the progress of the society as it evolves through stages of growth to a final state of classless communism."⁵⁵ At each stage of revolution, a new constitution is developed to establish the policies of that stage, to motivate the populace and to set forth the objectives to be achieved in preparation for the next stage. It is not surprising, therefore, that "stability in the Constitution and unconditional adherence to its provisions are ... not considered necessary, or even desirable, goals."⁵⁶

Vietnam's 1992 Constitution is an attempt to implement free-market economic reform without upsetting the political domination of the Communist Party of Vietnam. The need for economic renovation in the face of poverty conditions, a demand for foreign investment and Vietnam's desire to join the Association of Southeast Asian Nations (ASEAN) were clearly the motivations for the constitutional change.

Constitutional Human Rights

Article 2 proclaims that the Vietnamese state "is of the people, by the people, and for the people" and that "(a)ll state power belongs to the people based on the worker-peasant-intellectual alliance." Chapter V contains the fundamental rights and duties of the citizens of Vietnam and the relationship between rights and duties is manifested in Article 51 which reads:

⁵³This section draws from J. Harrington, T.L. McDorman & W.A.W. Neilson, "The 1992 Vietnamese Constitution: Economic Reform, Political Continuity" in Ferguson and Johnston, *supra* note 47.

⁵⁴W.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, 1992) at 331.

⁵⁵*Ibid.*

⁵⁶M. Beresford, *Vietnam: Politics, Economics and Society* (New York: Pinter, 1988) at 98-99.

Citizens' rights are not separated from their duties. The state guarantees all citizens' rights. Citizens must fulfill their obligations to the state and society.

The catalogue of political-legal rights in the 1992 Vietnamese Constitution includes most of the familiar rights such as speech, association, religion, due process, freedom from arbitrary arrest and equality. Many of these rights are qualified in that the right exists "as prescribed or stipulated by law." In other words, legislation or regulation can delineate the right. Such legislation or regulation is not constitutionally inconsistent since the right specifically includes the ability of the state to limit the scope of the right.

As Article 51 directs, "the state guarantees human rights." In undertaking this duty, the state also determines the content of rights and the ability to assert rights against the state apparatus. It is important to recognize that, unlike in Thailand where courts have a tradition of independence,⁵⁷ in Vietnam the separation of the judiciary from the executive and legislative branches of government is not recognized. Thus judicial protection or enforcement of constitutional human rights against the government cannot be expected.⁵⁸

Indonesia

Constitutional History⁵⁹

Like Vietnam, Indonesia traces its constitutional history to a declared independence in 1945, when a brief constitution was promulgated. Indonesian independence solidified only in 1949 with the creation of the Republic of the United States of Indonesia and a new federalist constitution. Soon afterward, the Federation crumbled and was replaced in 1950 by the Republic of Indonesia. The new Republic had a Provisional Constitution which remained in place until 1959. The Provisional Constitution required the creation of a Constituent Assembly (Konstituante) which would be charged with drafting a new constitution. Established in 1956, the Constituent Assembly failed to discharge its mandate.

The new constitution appeared to be an impossible task, given the unbridgeable differences between the Islamic faction and nationalist, communist and other small

⁵⁷Judicial independence in Thailand is discussed in McDorman, "The 1991 Constitution of Thailand", *supra* note 47, at 285-288 and McDorman, "Constitutional Change and Continuity", *supra* note 47.

⁵⁸See Duiker, *supra* note 54 at 347; B.K. Chi, "The Role of Law in Vietnam" [1994] *Asia-Pacific Constitutional Yearbook* 254 at 260-261; and P. Nicholson and P.N. Toan, "Vietnam" [1995] *Asia-Pacific Constitutional Yearbook* 335-344.

⁵⁹Indonesia's tangled constitutional history is set out clearly in M. Solly Lubis, "Indonesian Constitutional Law" in C.V. Sison, ed., *Constitutional and Legal Systems of ASEAN Countries* (Manila: University of the Philippines, 1990) at 45-52.

factions. Each faction stubbornly insisted on its own draft and refused to compromise. The Islamic faction wanted a state based on Islamic Law, while the others rejected such an idea outright. The *Konstituante* was forced into a deadlock which created even stronger discontent.⁶⁰

In the face of deadlock and political instability, President Sukarno dissolved the Assembly and, by unilateral decree, reactivated the 1945 Constitution. The 1945 Constitution has remained in place since that time, a fact that gives it a constitutional longevity surpassed in East Asia only by the American-drafted Constitution of Japan.

Three central features of the 1945 Constitution can be identified. First, the document is skeletal; it contains only 37 articles which are directed to the most basic aspects of governance. Second, the governing structure is one that gives the central government's executive predominant authority. Third, the manner in which the Constitution applies – in which government authority is to be exercised – is directed by the guiding philosophy set out in the preamble to the Constitution. This third feature, the Indonesian state philosophy, termed *Pancasila*, has five principles:⁶¹

- Belief in the One Supreme God;
- A just and civilized humanity (humanitarianism);
- Indonesia should be a unified state (nationalism);
- The state should be based on the sovereignty of the People (democracy guided by consensus); and
- The state should strive for social justice.

Pancasila Democracy is the description used for the governing system. It has been characterized as the “antithesis of Western Democracy” because it denies that voting is key to the decision-making process.⁶²

Constitutional Human Rights

Compared to the written constitutions of Cambodia, Thailand and Vietnam, the 1945 Indonesian Constitution is relatively barren of provisions which deal explicitly with human rights. Only six provisions deal with human rights issues. These cover freedom

⁶⁰T.M. Lubis, *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966-1990* (Jakarta: PT Gramedia Pustaka Utama, 1993) at 62.

⁶¹*Pancasila* is described in detail in P. Wahjono, “Republic of Indonesia: Democracy in Indonesia – *Pancasila* Democracy” in Beer, *supra* note 54 at 462-506.

⁶²S. Arinanto, “Indonesia: Democratization of Constitutional and Political Life” (1993) *Asia-Pacific Constitutional Yearbook* 55 at 58.

of assembly, speech, the press and religion. They also cover the rights to work, to education and to equality before the law. While the 1945 Constitution is silent with respect to independence of the judiciary and the courts' role in dealing with human rights, the elucidation or official explanation of the Constitution indicates that judicial authority is to be independent of government influence.⁶³

The unwillingness to detail rights further in the 1945 Constitution is attributed to the reservations held by Indonesian leaders that "the notion of the universality of rights ... might lead to individualism and liberalism".⁶⁴ In both 1945 and 1959 the central purpose of the written constitution was achievement and preservation of national unity. The projected ideology was that the state was the guardian of the people. The "overall well-being of the people" is the state's priority and this priority encompasses, or subsumes, individual rights. As one author has commented, "Indonesian integralism thus provides a foundation for the state which is different from and, in fact, established in opposition to foundations based on individualism or totalitarianism."⁶⁵

Cambodia

Constitutional History

Prior to adoption of the 1993 Constitution, Cambodia had generated six different documentary constitutions.⁶⁶ The first arose, in 1947, from a joint Cambodian-French commission and received ratification by an elected constituent assembly. With Cambodia's independence, achieved in 1954, Prince Sihanouk engineered constitutional change, in 1956, to enhance his own authority. The monarchy came to an end in 1970 and a republican constitution was proclaimed in 1972. Despite the devastation caused by the Khmer Rouge, a new constitution was adopted for Democratic Kampuchea in 1976. The removal of the Khmer Rouge and the ensuing political turmoil led to still more constitutional change in the 1980s; a new constitution in 1981 and another in 1989 both reflected Cambodia's recent socialist heritage.

In 1993, Cambodia adopted a new constitution as part fulfillment of the expectations of the 1991 Paris Peace Accords.⁶⁷ The 1991 Accords elaborated six principles which

⁶³See Lubis, *supra* note 60 at 96-109. For a recent comment on judicial independence in Indonesia, see Satya Arinanto, "Indonesia" (1994) *Asia-Pacific Constitutional Yearbook* 83 at 84-86.

⁶⁴Lubis, *supra* note 60 at 78 and 82.

⁶⁵Wahjono, *supra* note 61 at 464.

⁶⁶These constitutions are collected and briefly commented upon in R.M. Jennar, *The Cambodian Constitutions (1953-1993)* (Bangkok: White Lotus, 1995).

⁶⁷*Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia*, done and entered into force 23 October 1991, reprinted in (1992), 31 *International Legal Materials* 200. See generally S.R. Ratner, "The Cambodia Settlement Agreements"

committed Cambodia to a western-style governmental structure and constitution. As one observer noted, "the Paris Accord commits ... [Cambodia] to a constitution that has little relationship to recent legal and political practices and traditions in Cambodia."⁶⁸ A thirteen-member committee of the elected Constituent Assembly worked to draft a constitution. Advice and support from the United Nations Transitional Authority in Cambodia (UNTAC) was rejected. As William Shawcross reported:

At the end of August UNTAC was finally allowed to see a draft, which appeared to give undue power to the chief of state and too little protection to the rights of citizens Also missing were provisions for an independent judiciary and the specific prohibition of torture. UNTAC submitted suggestions, and some were accepted.⁶⁹

The adoption of the Constitution, in September 1993, marked the re-establishment of Prince Sihanouk as the Cambodian head of state and the end of the UNTAC mission in Cambodia.⁷⁰

Constitutional Human Rights

One authority has stated that "Cambodians have always been abused by authority".⁷¹ Reference can be made to the "arbitrary" rule of Prince Sihanouk, the Khmer Rouge period and the 1980s authoritarian rule. It is not surprising that UNTAC took, as one of its primary purposes, the development of knowledge and structures to deal with human rights.

Chapter Three of the 1993 Constitution catalogues an impressive list of human rights guarantees. These include: equality before the law; the right to vote; the right to life, personal freedom and security; equal pay for equal work; the right to strike; rights against physical abuse and unwarranted detention; freedom of expression, religion, press, publication and assembly; and explicit abolishment of "all forms of discrimination against women." Chapter Nine directs that the judiciary is to be independent and paragraph two of Article 109 states, "The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of citizens". However, it is the Constitutional Council which has the authority to safeguard and interpret the Constitution and to examine the

⁶⁸Y. Ghai, *Some Thoughts on the Cambodian Constitution* (Hong Kong: University of Hong Kong, Faculty of Law Working Paper, 1993) at 5.

⁶⁹W. Shawcross, *Cambodia's New Deal* (Washington: Carnegie Endowment, 1994) at 32. A slightly different perspective is provided by T. Findlay, *Cambodia: The Legacy and Lessons of UNTAC* (New York: Oxford University Press, 1995) at 95-97.

⁷⁰There is a growing literature analyzing and describing the UNTAC mission in Cambodia. See Findlay, *supra* note 69 and C. Hughes, *UNTAC in Cambodia: The Impact on Human Rights* (Singapore: Institute of Southeast Asian Studies, 1996).

⁷¹Shawcross, *supra* note 69 at 58.

constitutionality of national laws. The relationship between the Constitutional Council and the judiciary is not clear.

Human Rights and Written Constitutions

Why Human Rights are in Written Constitutions

There are three obvious reasons why written constitutions contain human rights provisions even though it may be beyond the capacity or willingness of a state to adhere to such rights provisions. First, there is the external influence of international human rights documents such as the *Charter of the United Nations*,⁷² the 1948 *Universal Declaration of Human Rights*,⁷³ the 1966 *International Covenant on Economic, Social and Cultural Rights*⁷⁴ and the 1966 *International Covenant on Civil and Political Rights*,⁷⁵ to name only a few of the key multilateral documents. As one Vietnamese law expert commented about the human rights provisions of the 1992 Vietnamese Constitution, "we can assert that our country, our people and our state really respect human rights and respect the Universal Declaration and other conventions on human rights."⁷⁶ Not surprisingly, the 1993 Cambodian Constitution directs that Cambodia is to:

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.

Second, there is the external influence of other constitutions which contain human rights provisions. Examples set by the explicit inclusion of human rights provisions in the American and French constitutions of the late 1700s have been followed by many states. One study showed that "82 percent of the national constitutions drafted between 1788 and 1948 and 93 percent of the constitutions drafted between 1949 and 1975 provided some sort of human rights and fundamental freedoms."⁷⁷

Third, traditions within specific countries are consistent with the recognition of human rights and, therefore, become reflected in the written constitution. For example, many of the human rights provisions within the 1997 Thai Constitution are consistent with the practices of the Thai people of tolerance and religious freedom. In the case of

⁷²The *Charter of the United Nations* was completed on 26 June 1945 and entered into force as of 24 October 1945. 1 *United Nations Treaty Series* xvi.

⁷³*United Nations General Assembly Resolution 217A*, U.N. Doc. A/810 (1948) at 71.

⁷⁴*Supra* note 23.

⁷⁵*Ibid.* note 23.

⁷⁶N.B. Tanh, "The 1992 Constitution and the Rule of Law", in Thayer and Marr, *supra* note 45 at 106.

⁷⁷H. van Maarseveen and G. van der Twang, *Written Constitutions: A Computerized Comparative Study* (1978) 191-195 cited in M.W. Janis, *An Introduction to International Law*, 2d ed. (Toronto: Little Brown and Co., 1993) at 245.

Indonesia's 1945 Constitution, it has been observed that the composers had been educated in Western Europe and were aware of comparative constitutional practices and theories which "were then adapted to the Indonesian context in order that they be in line with the fundamental convictions of the Indonesian people."⁷⁸

The Role of Written Constitutions

Six Primary Purposes

The reasons for inclusion of human rights provisions in written constitutions are easily understood. However, there often exists a substantial gap between the statement of the right and what takes place in practice. While there is a variance in the severity of human rights problems in the four states discussed, in all four states a significant gap does exist.⁷⁹ The next part of this article's discussion is an examination of how one might understand such gaps in terms of constitutional objectives.

A written constitution can be seen as a necessary and useful state instrument for a number of reasons. First, the primary role of a written constitution may be *organizational*. This role of a constitution has been described as the "charter of government."⁸⁰ The written constitution can be the legal source of governmental structures and institutions which detail division of authorities and questions of by whom and how state power is to be exercised. Second, the principal motivation for a written constitution may be *legitimation* of the politically powerful or other interests that exercise governmental authority. This role of a constitution has less to do with the actual contents of the document. Rather, it relates to the purpose that a constitution is to perform. Legitimacy may be particularly relevant in societies where political and economic conditions have not yielded a broad consensus and leadership is attained or maintained

⁷⁸Wahjono, *supra* note 61 at 462.

⁷⁹For a pointed summary of current patterns of human rights violations in each of the countries this paper considers, see *Amnesty International Report 1997* (London: Amnesty International, 1996). Yash Ghai argues that certain characteristics of the general situation of Asian countries provide a distinctive cast to questions of human rights observance in the region. Among the features he points to are such things as the "grinding poverty" of many of the states and the implications of such poverty for realization of both political and economic rights, large scale violations of rights in both the state and civil spheres of society and the impact of ethnic conflicts. Y. Ghai, "Human Rights and Governance: The Asia Debate," (November 1994) *Occasional Paper No. 4: Occasional Paper Series*, (San Francisco: The Asia Foundation's Center for Asian Pacific Affairs, 1994) at 2.

⁸⁰W.F. Murphy, "Constitutions, Constitutionalism, and Democracy" in D. Greenberg, *et. al*, eds., *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford: Oxford University Press, 1993) at 8. See also A.C. Cairns, *Charter Versus Federalism: The Dilemmas of Constitutional Reform* (Montreal & Kingston: McGill-Queen's University Press, 1992) at 7, who writes of this aspect as establishing a "government's constitution."

without the direct consent of the population.⁸¹ Third, the purpose of a written constitution may be *unification* where the document is attempting to impose unity on a diverse people. In contrasting developed and developing worlds, Yash Ghai has written:

In the developing countries, constitutions were expected to carry a much heavier burden. *They had to foster a new nationalism, create national unity out of diverse ethnic and religious communities, prevent oppression and promote equitable development, inculcate habits of tolerance and democracy, and ensure capacity for administration.*⁸²

Fourth, the principal motivation for a written constitution may be *ideological*. The objective is to promulgate a document which sets forth a statement of beliefs and guiding principles of the state.⁸³ Fifth, a written documentation may be *aspirational*, a statement of intentions and goals to be achieved rather than an operational document. The aspirational aspect may turn a document into "a holy symbol of the people themselves" and attain a semi-sacred status.⁸⁴ The US Constitution is a stunning example of this phenomenon. Of course, all written constitutions partake of many or all of these considerations to varying degrees.

A sixth purpose is exemplified by the Canadian and American constitutions. Here, an essential purpose of the written constitution is to *act as a restraint* on the authority of the governing institutions and their organs.⁸⁵ From this perspective the constitution stands as the "guardian of fundamental rights,"⁸⁶ constituted as a "citizen's constitution" that regulates the axis of power between the citizen and the state.⁸⁷ In Canada and the United States, it is the courts which measure the action of government against the written constitution. Within constitutional orthodoxy, both the governed and the governing accept the institution of judicial review because of the courts' perceived impartiality, the

⁸¹A detailed discussion of political legitimacy is beyond the scope of this paper. An insightful analysis in the Southeast Asian context is provided by the contributions in M. Alagappa, ed., *Political Legitimacy in Southeast Asia* (Stanford: Stanford University Press, 1995). See, in particular, M. Alagappa, "The Anatomy of Legitimacy," *ibid.* at 11-30.

⁸²Y. Ghai, "The Theory of the State in the Third World and the Problem of Constitutionalism" (1991) 6 Conn. J. Int'l L. 411 at 416 [emphasis added].

⁸³See the comments, under the subheading *Vietnam: Constitutional History*, *supra*, about the role of a constitution in a socialist state. Beresford, *supra* note 56 at 99, commented that socialist constitutions inevitably bear "little relation to the actual functioning of the system." Regarding the *Constitution of the People's Republic of China*, see W.C. Jones, "The Constitution of the People's Republic of China" in Beer, *supra* note 54 at 57 - 60. For a concise comparison of Anglo-American and Soviet attitudes, see W. Butler, *Soviet Law* (London: Butterworths, 1983) at 135 - 136.

⁸⁴Murphy, *supra* note 80 at 9.

⁸⁵As one commentator argues, "[t]he American innovation...was the political theory whereby the state was objectified and thus made a mere instrument of a separate sovereign." P. Bobbit, "Methods of Constitutional Argument," (1989) 23 U.B.C. L. Rev. 449 at 450.

⁸⁶Murphy, *supra* note 80 at 8 - 9.

⁸⁷Cairns, *supra* note 80 at 7.

respect the court has earned, the expertise with which judges carry out their tasks and the belief that no other institution is better able to perform the necessary role. The acceptance of so central and powerful a role for the courts rests upon faith in the distinction between law and politics. While both the Canadian and American constitutions also have organization, legitimation, unification and ideological purposes, the aspect of these documents concerned with citizens' rights lends the dominant flavour to popular perceptions of the constitutions.⁸⁸

Application in Southeast Asia

A discussion of human rights in the Asian context would be incomplete without reference to the debate over the relevance of human rights discourse to governance issues within the region – the so-called “Asian values” debate.⁸⁹ The debate centers on the perceived assertion by the West of the primacy of human rights in constitutional government. Various Asian leaders have argued that human rights are not universal and indivisible. Rather, they contend, human rights are relative and are appropriate only for select cultures and religions.⁹⁰ Underlying this viewpoint are a number of concerns: resentment of what is perceived to be Western bullying or belittling of “Asian values;” confidence in an economic success generated by reliance on a strong, unhampered state;⁹¹ suspicion that the West's insistence upon rights observance masks a hidden agenda to slow Asian economic growth; bitterness that human rights campaigns are mounted by the region's former colonial powers; and a strong belief that the “global” human rights model promoted is a Western one which is unnecessary and ill-suited for Asian societies.⁹² This brief summary of a complex ideological and cultural debate ignores the range of nuance in the positions advanced by the participants. It also ignores the variety of groups which, from within different Asian nations, support, to varying degrees, recognition of a universal human rights agenda. As Yash Ghai points out, ethnic and other minorities often occupy inferior positions in relation to the prevailing ruling group, those who purportedly speak on behalf of Asian values. Moreover, many intellectuals and the growing communities of non-governmental organizations within Asian societies also tend to regard human rights in ways more consonant with the universal model. Thus, it may be the case that statements made by Asian government leaders which question the validity

⁸⁸The 1982 addition of the *Charter of Rights and Freedoms* to Canada's constitutional texts has made this point relevant for the Canadian Constitution.

⁸⁹The full debate is beyond the scope of this contribution. A convenient overview is provided by Ghai, *supra* note 79; A. Dupont, “Is There An ‘Asian Way’?” (1996) 38 *Survival* 13; D.K. Mauzy, “The Human Rights and ‘Asian Values’ Debate in Southeast Asia: Trying To Clarify the Key Issues” (1997) 10 *Pacific Review* 210.

⁹⁰Ghai, *supra* note 79 at 1.

⁹¹In light of the economic events of 1997, the Asian “economic” way is being tested severely.

⁹²These concerns are well-summarized by Mauzy, *supra*, note 89 at 212.

of the West's human rights priorities are targeted more at an internal, domestic audience than at the West itself.⁹³

However, the "Asian values" debate engages a different perspective on the issue of human rights in Asian society than is the focus of this paper. The argument addressed here is that the gap between formal rights guarantees of the four countries under analysis and patterns of actual human rights observance in those countries can be attributed, in part, to a difference in roles played by the written constitution in each country. Certainly, the documentary constitutions of Cambodia, Indonesia, Thailand and Vietnam all have components which are organizational, ideological and aspirational and are designed to enhance legitimation and unification. However, it can be asserted that the written constitutions of the four countries have "principal" purposes. As was previously noted, the primary aim of the 1945 Constitution of Indonesia was and continues to be unification. The principal purpose of the 1992 Vietnam Constitution is ideological. Historically, Thailand's constitutions have been instruments of legitimation,⁹⁴ although the 1997 Constitution may be more important for its organizational components. The 1993 Cambodia Constitution is primarily organizational since the document's focus is on recreating a governmental structure.

Implications for Human Rights

This last set of observations has implications for expectations about the relevance of written constitutional guarantees of human rights. Where a written constitution is motivated principally by organization, legitimation, unification, ideological or aspirational goals, there is usually little intention that citizens' rights provisions in the document are to have an *operational* effect, at least in so far as this would mean that the rights would be asserted against the government in a manner similar to the Canadian and American models. In fact, assertion of constitutional human rights against the government may be seen as antithetical to the primary purpose of the constitution. Hence, one can anticipate a gap between the written constitutional "guarantees" of human rights and the reality of human rights observance.

This gap is further explained where the human rights content of a written constitution is motivated by external considerations and expectations since the intended audience is outside rather than inside the country. It has already been noted that the reason why human rights provisions are found in many written constitutions, including the written constitutions of Cambodia, Indonesia, Thailand and Vietnam, has more to do with external expectations than internal considerations.

⁹³See Ghai, *supra* note 79 at 1-2.

⁹⁴See: M.S. Shin, *The Constitution of Thailand* (Washington: Library of Congress, 1981) at 59.

Finally, there is the issue of whether the constitution is understood as emanating from “the people” or from elite interests within a state. The *restraint* factor found in Canadian and American constitutional practices is philosophically attributed to the heuristic fiction that the governed consent to the authority of the government on the terms laid out in the written constitution. Western-style democracy, and the liberal theory which animates it, imbue both the populace and the governing elite with the attitude that the written constitution is a document of the governed. In none of the four states under examination in this paper, can it be asserted that the written constitution is understood as a document of the people, at least in the sense that liberal theory endorses. This is not a question of process, since no constitution can ever be drafted by “the people.” Rather it is a question of ideology which may be posed as follows: must the legitimacy of a written constitution rest on its relationship to the needs, interests and powers of the governed?

As well, the primary purposes of the written constitutions in the four Southeast Asian countries indicate that the courts of those countries will not have the same role in “constraining” government action as courts play in the Canadian and American constitutional systems. Even where courts are independent from the government, as in Thailand, it is not expected or even accepted that the judiciary will question directly or assess the constitutionality of government action. The primary purpose of the Thai Constitution does not contemplate this role for the judiciary. Thus, the mechanism for assertion of constitution rights against the government which is relied upon in the Canadian and American systems is anathema to the Southeast Asian systems.

The Human Rights Importance of Written Constitutions

It is an American conviction that human rights can only be adequately protected when they are entrenched in a written constitution. Constitutional practices throughout the world, however, dispute this assertion. The United Kingdom, for example, has found it possible to protect human rights without the need of a written constitution.⁹⁵ Moreover, even within the United States, the history of African-Americans, amongst others, is a reminder that written constitutional bills of rights do not guarantee human rights. This is simply to repeat the earlier point that respect for human rights comes not from paper but from societal, political and cultural acceptance.

Nevertheless, advocates of constitutional human rights protection argue that rights contained in a written constitution provide a standard for governments to reach for and to be measured against. It is argued that they can and do serve as rallying cries for larger political struggles, as reminders of collective values marked by the absence of state

⁹⁵Protection of civil and political rights within the British legal system has been dealt with by such vehicles as the *Habeas Corpus Acts* and the *Bill of Rights of 1689* which guaranteed the right to free elections, freedom of speech, the right to bail, freedom from cruel and unusual punishment and the right to trial by jury. See A.H. Robertson, *supra* note 20 at 4-5.

observance. However hollow the words, human rights language in a written constitution can provide both encouragement and support to the continuing struggle for improvement in the human condition.⁹⁶

Conclusion

Professor Beer has written that "constitutionalism is where national history, custom, religion, social values and assumptions about government meet positive law, economic force, and power politics"⁹⁷ and that

it is only in the latter half of this century that most countries in Asia have begun ... the autonomous development of a constitutional system which appropriately mingles the past and present, the indigenous and the foreign, the traditional and the new, to meet the needs of the future.⁹⁸

He concludes that "[m]odern constitutional traditions in Asia have just begun."⁹⁹

Written constitutions are part of these developing constitutional traditions, as are constitutionally entrenched human rights. It has been the argument of this contribution that the gap between constitutional human rights provisions and the reality of their observance may be explained, in part, by the fact that within the four countries examined, the written constitutions have as their primary purposes goals such as organization, ideology and unification which are inconsistent with, or do not provide encouragement for, constitutional human rights protection.

⁹⁶It must be noted that rights remain objects of significant controversy even in those states with comparatively strong human rights traditions. For example, the efficacy and desirability of the protection of rights embodied in the *Canadian Charter of Rights and Freedoms* is actively contested by Canadian legal scholars. The concerns in this context, however, are not that the legal system ignores the rights that the Constitution establishes but that, in various ways, enforcement of rights through judicial review is problematic and ineffective as a means of attaining social justice. See for example, J. Bakan, *Just Words: Constitutional Rights and Wrongs* (Toronto: University of Toronto Press, 1997); A. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995); M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, 1994).

⁹⁷L. W. Beer, "Introduction: Constitutionalism in Asia and the United States", in Beer, *supra* note 54 at 2.

⁹⁸*Ibid.* at 7.

⁹⁹*Ibid.*