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Henning Glaser (ed.)

Norms, Interests, and Values

Conflict and Consent in the Constitutional Basic Order

Nomos

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Preface

This second volume of the *CPG Series of Comparative Constitutional Law, Politics and Governance* on "Norms, Interests, and Values – Conflict and Consent in the Constitutional Basic Order" is the product of related projects of the German-Southeast Asian Center of Excellence for Public Policy and Good Governance (CPG) in particular including its second annual conference on this topic at Lebua at State Tower Hotel in Bangkok.

The approach is comparative with a range of selected country studies presenting some of the currently most relevant constitutional systems in Europe and Asia, namely Belgium, Germany, Hungary, Indonesia, Italy, the Netherlands, Pakistan, Singapore, Taiwan, Thailand, and Turkey as well as the dominantly Confucian influenced parts of South-East Asia as a distinct socio-political space characterized by particular patterns of political conflict and consent.

Particular thanks is, first and foremost, owed to the authors for their time and efforts to make this collection possible. Their analyses and reflections from a broad variety of vantage points are most appreciated.

For his opening of the second annual conference we have to thank HE Prof. Dr. Suchart Thada-Thamrongvech, Minister of Education of the Kingdom of Thailand, representing the Prime Minister.

Furthermore, this publication was only made possible due to the constant support of our work by a number of individuals and institutions. Since many years now, our Center of Excellence, CPG, which is formed by the universities of Frankfurt am Main, Münster and Passau as well as Thammasat University as a joint institute located at Thammasat University in Bangkok, is enabled by the generous support of the German Foreign Ministry, the Federal Foreign Office, the German Academic Exchange Service (DAAD) as well as Thammasat's Faculty of Law being the host of CPG.

Not only to them but also to the scholars representing CPG as an inter-regional academic institution great thanks is extended, namely, among many others, Assoc. Prof. Narong Jaiharn, Dean of Thammasat University's Faculty of Law, Prof. Dr. Ingwer Ebsen (Frankfurt), Prof. Dr. Dr. h.c. Dirk Ehlers (Münster) and Prof. Dr. Robert Esser (Passau) who all care for the wellbeing of our institution with greatest efforts.

Warmest gratitude is extended to those who tirelessly contributed to make the publication of this collection possible, namely Dr. Duc Quang Ly, Siraprapa Chalermphao, Dr. Sabine Carl, Terence Freibier, Sarah Popp, and Konstantin Trott.

Henning Glaser

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Crisis, Conflict and Consensus in the Constitutional Basic Order – An Introduction

Henning Glaser

The topic of the this volume is the foundational consensus manifested in the constitutional basic order, the question how it is challenged by conflict and crisis and the way constitutional systems experience and respond to it. Touched upon is the fundamental and yet opaque zone of ordering where the socio-political and the legal-constitutional sphere are closely intertwined. This intersection becomes most visible in the moments of conflict and crisis, which lucidly reveal its nature with respect to the foundation, integrity and continuance of each order. Here, central problems of constitutional and political theory are affected. Such issues include the conception of sovereign power, the constituent power and constitutional change, legitimacy and hegemony in the constitutional order, the identity of the constitutional subject and the integration of the political community, the inherent tension between domination and pluralism, liberty and militant democracy, just to name a few of them.

However, a thorough examination of this fundamental dimension of social, political and legal ordering is an endeavor which is too immense to be exhaustively addressed even from only one of the various related disciplinary perspectives. This collection thus restrains to present some selected country studies to invite further discussion. Some of the as to that relevant constitutional systems in Europe and Asia, namely *Belgium*, *Germany*, *Hungary*, *Italy, Indonesia*, *the Netherlands, Pakistan, Singapore*, *Taiwan, Thailand and Turkey* will be covered. Consideration will also be given to the Confucian influenced parts of Southeast Asia as a distinct socio-political space characterized by particular patterns of political conflict and consent. Most of these country studies represent constitutional systems which currently experience a more or a less severe crisis of their constitutional basic order. The only two countries enjoying a remarkably stable constitutional basic order among the presented cases are Singapore and Germany. Insofar, the focus of interest lies in the existing mechanisms to prevent or to deal with such challenges, whereas the value of these defensive mechanisms is assessed quite differently in the respective papers (see the contributions of *Thio*, *Esser*, and *Wittreck*).

In general, the presented collection reflects on a timely and current phenomenon which at the same time belongs to some of the 'eternal' issues and problems of constitutional law and political ordering.

A. Contentious Constitutional Politics Pertaining to the Fundaments of Order as a Sign of the Times

The initial optimism toward new democracies that emerged during the 1990s in Asia, Latin America and Africa – most strikingly embodied by *Fukuyama's* claim of the "end of history" – has trailed off among political observers and scholars.[1] The actual signs seem to indicate the presence of fundamental constitutional conflict and crisis in countries and regions all over the globe.

Long established constitutional democracies in Europe like Belgium (see the paper of *Adams*) and Italy (see *Luther*), especially some of those countries severely hit by the Euro-crisis such as Greece, have been joined in recent years by the United States and Canada in encountering escalating difficulties to constructively deal with emerging political divisions over the basis of constitutional law. The same is true for many of the younger European democracies, like Bulgaria, Hungary (see *Toth*), Romania, the Ukraine and Turkey (see *Inceoğlu*). Asian countries such as Pakistan (see *Siddique*), Malaysia, Thailand (see *Glaser*) and Taiwan (see *Hwang*) seem to be captured by a persisting division over the constitutional basic order. Meanwhile, countries like India and Indonesia (see *Machmudi*) at least show signs of potentially critical tensions affecting the societal and constitutional basic consent.

In some of these countries like Hungary, Turkey or Thailand constitutional conflict and national division are directly related with attempts to restate the constitutional order by constitutional reform/ amendment. The constitutional reform in Hungary and Turkey have left the countries deeply divided and at least on the threshold of massive transformation under more (Turkey) or less (Hungary) authoritarian auspices after their constitutional basic order has been replaced or modified respectively. In contrast, Thailand faced a struggle over a constitutional reform project which caused mass protests, political violence

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1 See Carothers, "The End of the Transition Paradigm," 2002, pp. 5-21.

and radicalization, eventually contributing to a military putsch which prevented the changes from being effective and adjusted the old order with the overarching purpose to preserve it. Even if the junta has for the time being frozen the conflict, the country remains deeply divided, the fundamental consensus a rigidly hegemonic friction. This foreshadows a possibility of future outbreaks and crisis of an even higher scale, if the divisive issue stays unsettled or spirals out of control.

Similarly shaped by protracted constitutional conflicts is the situation in a range of Middle Eastern countries. A good deal of the hopes created by the 'Arab Spring' quickly turned into skepticism of how dissenting political views could be harmonized by integrative and enduring constitutional settings. Failure to do so led to a state of severe crisis in countries like Egypt, Iraq, Libya and Syria, bringing some of them to the brink of civil war. Concurrently, other countries, such as Jordan and Israel, whose rule can be upheld only by massive security regimes, are held in a seemingly inescapable conflict related to the fundamental consensus.

In many of these countries the long-term stability of political order is at stake in one way or another, while the respective constitutional order seems unable to provide sufficient options for adjustment. However, despite the usual associations with the term 'crisis' many countries seem to live with a protracted constitutional crisis for a long time, making it a somewhere normal part of the political setting, without hope for a clear break and compromised restatement. In other countries, severe and protracted constitutional conflicts may be seen as a transformative period of the constitutional and political discourse necessary to rebuild the social contract or acknowledging long existing, yet suppressed streams of political formation, which are gaining increasing relevance under changed circumstances.

In sum, a significant number of political communities in the contemporary world are facing severe conflicts about how they should be ordered and governed, about which fundamental norms and constitutional design should enjoy priority, and how challenges to the basic conflict should be addressed. Notable in this context is the fact that in the contemporary world the quest for an appropriate political order is increasingly formulated in terms of constitutionalism – be it by those in power or those

who challenge it.[2] Indeed, the recent increase of internal tension and struggle for political ordering appears to be articulated in the language of constitutional law in a more and more mea-ningful way than ever before, even if this does not exclude the possibility of massive, violent conflict in the respective settings. Equally notable is the fact that a supposed uniform model of constitutional governance (as a subject of national consent) does not exist. This contravenes the mentioned paradigm of the 1990s according to which constitutional systems would achieve a lasting equilibrium and evolve toward a supposedly uniform model of western-style constitutionalism, rule of law and democracy representing the goal for development for all the transforming nations around the globe. *Carothers*, more than a decade ago deconstructed this transition paradigm, aiming at its core assumptions "that any country moving away from dictatorial rule can be considered a country in transition toward [western-style] democracy."[3] A closer look at the globally increasing scenarios of conflict and crisis in the constitutional basic order seems to prove him right, not only with respect to the fact that the desired transformation toward the 'one right' model failed to materialize, but also in consideration of the diversity of distinct models of constitutional governance competing for dominance instead. These observations make one realize that beyond the classical distinction between normative, nominal and semantic constitutionalism introduced by *Loewenstein*, and describing a dominant notion of global constitutional development during the Cold War period, today more and more political communities seem to be in sincere search of a constitutionalism on new and own terms. The question is not chaos or order, real (normative) constitutionalism or fake/failed (semantic or nominal) one, but which substantially particular model of constitutional governance prevails in the given context – be it more on the level of compromise or unilaterally imposed hegemonic rule. This opens up a space for contentious constitutional politics at the fundaments of political formation not aiming to avoid or neutralize but to occupy and dominate the constitutional form. This somehow newly emerged pattern of political ordering around the globe, defined by a highly charged competitive and even contentious constitutionalism, deserves to

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2 See Hirschl, *Constitutional Theocracy*, 2010, p. 241, who appreciates the "triumph of constitutionalism as the prevalent form of governance" as one "of the most important phenomena in the late 20th and early 21st century politics."

3 Carothers, "The End of the Transition Paradigm," 2002, p. 6.

be appreciated as a specific expression of the post-Cold War period, even if not as one of the most significant signs of our times with respect to consti-tutionalism and politics. Some expressions of the emergence of this more dense and dynamic appearance of contentious constitutional politics in the contemporary world might be highlighted.

Besides the fact that contemporary constitutionalism on a global scale is much more complicated than it has been expected in the beginning of the 1990s, contentious constitutional politics tend to emerge in various regional and global patterns.

For instance, the different role of political ideologies in this context is striking. The older European democracies seem often in-clined to see a manifest decline of ideologically shaped constitutional politics in the wake of an underlying, widely unexpressed consensus across the party lines, in a direction of what might be called 'neoliberal' politics and the corresponding fading of classical party cleavages. Political phenomena of critical impact for the social contract or the basic consti-tutional order actually arise much less in the constitutionally formalized political arena of party politics and inter-agency cooperation in these countries but outside, in the societal space. Here it is precisely this drain of contentious mega-politics from formal constitutional politics which constitutes a growing cognitive dissonance among those groups feeling unrepresented and excluded. As a consequence, it might challenge the fundamental consensus as being manifested by this political-constitutional order which seems to be defined less by fighting for substansive compromise but by carefully avoiding any contentious substance in fundamental issues.[4] In this respect, it might be no accident that two of the contributions to this volume dealing with one of the most stable European democracies examine the constitutional instruments to redress resistance against the basic constitutional order which might spring from dissatisfaction with this kind of post-ideological constitutional politics.

A totally different image emerges when looking at Latin America, where the fundamental principles and the corresponding constitutional

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4 In this sense a book like Pierre Rosannvallon's *Counter Democracy – Politics in an Age of Distrust*, 2008, hits a nerve. The problem of the counter-formalistic movement against post-ideological stiffness and perceived shallowness is that the informal, mainly street based counter-movements themselves often lack any consistent programmatic frame producing an ideological volatility which might prove detrimental to the initial consensus of these movements.

basic order are heavily affected or even reshaped under the influence of a left, pro-gressive, democratic ideology which, however, meets fierce resistance form the conservative and liberal segments within the respective political orders. The South American *pink tide*, the turn of a great number of coun-tries to the left in the wake of the strongly emerging global and national security paradigm after 9/11 2001, replaces the dominance of the Washington consensus during the 1990s on the continent, including all of its assumptions of universal constitutionalism and a universal transition paradigm.[5]

Another distinct regional development, in terms of conflict and crisis over the constitutional basic order, has arisen in form of the already mentioned Arab Spring and its aftermath where the dominant role in defining constitutional governance is not so much given to the classical political ideologies of the West but those defined by distinctions between secular and religious on the one hand and more liberal-democratic and authoritarian notions of shaping the constitutional basic order on the other hand. While an underlying thread of socialist-islamic notions of social justice runs through most of the political programs in question, all of them are often challenged by ethnic-tribal forms of political ordering. The resulting conflicts in the constitutional basic order pertain to the fundamental priorities and understandings of nearly all constitutional principles and state institutions. This also includes the clash of substantially different legal sources, including universalistic Islamic law, secular state law and particularistic normative orders in the form of tribalism. Particularly interesting is the enduring appeal of secular, populist-nationalist authoritarianism besides all the upcoming shades of Islamic constitutionalism and more western-like notions of secular constitutionalism that express a general potential of this sort of leadership to not only divide but also to gain popular approval and to unite broad segments of the population.

Many of these exemplary dynamics of contentious constitutional politics on a fundamental level are furthermore related to two grand paradigms of global normative ordering in manifold ways: the neoliberal Washington

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5 The regional impact of the *pink tide* becomes obvious if one considers the scope of countries affected by it on more or less radical terms ranging from Argentina, Brazil, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Paraguay, Peru, Uruguay, Venezuela accompanying traditionally socialist countries like Cuba and Nicaragua.

consensus and the post-9/11 security paradigm which link the national, regional and international level in shaping governance. A third catalyzing factor for the actual dynamics of conflict and crisis at the fundaments of political ordering is the resurgence of religions as major formative force of political ordering (see *Machmudi* for Indonesia).[6]

It might be concluded that all these factors and developments generically represent an immense dynamization of the various struggles for dominance in the project of fundamentally ordering the political, in a broad range of countries, with national, regional and international tendencies mutually reinforcing each other. Thus, the issue of conflict and consent in the basic constitutional order is indeed of actual importance, especially where constitutional and political theory have to respond to practical needs, be it in terms of constitution making, institution building, or conflict settlement.[7]

B. Conflict and Crisis in the Constitutional Basic Order – the Fundamental Frame

Despite its topicality, the perspective on conflict and crisis in the constitutional basic order is embedded in a fundamental frame of great abstractness and complexity. A major point of reference of this volume is the constitutional basic order or basic structure respectively. This term, especially important for instance in the German or Indian constitutional doctrine, refers to something more specific than just the constitutional order or all constitutional law in sum, but the "unquestionable core"[8] or, in the words of *Carl Schmitt*, the "fundamental political decision" of the political community pertaining to the normative fundament and the central institutions and principles of the constitutional order.[9] Correspondingly, talking about the basic constitutional order in terms of conflict and crisis is not to take an interest of simply any constitutional dispute or failure, but

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6 See Hirschl, *Constitutional Theocracy*.

7 Also in this respect things have become more complicated compared to the 1990s where the failed state scenario represented the dominating approach in which conflict and crisis in the constitutional basic order have been themed.

8 See Albert, "The Cult of Constitutionalism," 2012, p. 390; see also Simson, "Zur Theorie der Legitimität," 1971, p. 459. The term 'basic structure' became popular with the Indian Supreme Court's 'basic structure doctrine'.

9 Schmitt, *Constitutional Theory*, 2008 (1928).

only those pertaining to the normative fundaments shaping the very identity of the political community.

More than other parts of constitutional law, the basic structure is normally embedded in a whole dimension of narratives, symbols and myths which legitimize, stabilize and concretize the entire legal structure. In this sense, the basic structure is particularly rooted in interwoven historical trajectories, communal experiences, preferred values and virtues and canonic interpretations of history reinforcing them.

In positive constitutional law, the basic structure is often most prominently expressed in the constitution's preamble, in the most fundamental provisions pertaining to the form of state and government or the basic rights; further, in provisions regulating constitutional amendments (exempting the basic structure from changes), and, eventually, in the mechanisms of militant constitutionalism providing a defense against acts being detrimental to the constitutional basic order. In some constitutions, the basic structure might cover both, the 'efficient' and the 'dignified' part of the constitution to speak with *Bagehot*, the one pertaining to institutions commanding 'real' power and the one regulating institutions which enjoy high esteem without such power but represent central political values and preferences.[10]

Due to its centrality it might be desirable or functional to place the basic structure, to a certain degree, beyond the ordinary contentious constitutional discourse "to take certain questions 'off the table' and thereby limit normal […] politics to questions that do not challenge that fundamental consensus."[11] As far as this is true, it does not mean that critical questions pertaining to the interpretation of, or being relevant for, the basic structure should necessarily be excluded from the constitutional discourse by political style or the rules of militant constitutionalism. This applies at least to more liberal settings: some constitutional orders prefer to strictly assume that the basic structure is virtually off limits of any discussion banning them from public debate.[12] A certain mode to address

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10 See Bagehot, *The English Constitution*, 1963 (1867). Such dignified parts of the constitution belonging to the basic structure or being disputed to belong to it might be constitutional institutions or confessions representing particular religious ties for example.

11 Kautz et al., "Introduction: The Idea of Constitutionalism," 2009, p. 3.

12 A good example is the Malaysian *Sedition Act*. The act inherited from British colonial rule – similar acts can be found in many former British colonies – criminalizes speech with "seditious tendency", in particular those which would

the social contract and constitutional basic structure in public debate, however, is practiced in almost all countries, especially those which rigidly protect it by exempting it from critical or non-affirmative debate. This is the case where the basic structure is subject of 'constitutional patriotism' as 'constitutional faith', often even appearing in the form of a nearly ritually reproduced constitutional mantra of quasi-moral quality and expression which might be required by social convention or, directly or indirectly, even by law.[13] Normatively forming the core of the constitutional order, the basic structure, including its embeddedness in the narrative and symbolic dimensions, often provides a valuable yet underrated analytical tool. Following *Loewenstein*, who lucidly envisioned the analysis of constitutionalism in terms of *cratology*, for the study of power within the realm of constitutional law[14] it is specifically the basic structure which seems to be worth being identified as the most promising subject of that sort of studies. For the one who looks for the architecture of political power in terms of constitutional law, the basic structure seems to ideally provide the constitution's sound formula to understand the factual power flow, its sources, channels, transformers, amplifiers, and necessary resistors. It is all the more surprising that the basic structure is rarely themed as a distinct normative complex. It mostly appears as either an empty space of constitutional macro analysis or a simplification in essentialist terms when it comes to appeal to a common policy goal, or to teleologically attest to a presumed political inferiority of non-Western countries. In European discourses on the basic structure, the focus often lies in the shared common denominator of the Ius Publicum Europaeum. The latter consists of a merely abstract set of constitutional concepts like democracy, separation of powers, rule of law and rights. Nevertheless, it

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"bring into hatred or contempt or to excite disaffection against" the government or engender "feelings of ill-will and hostility between different races". In effect, it prohibits to critically address those parts of the Malaysian constitution which are considered to form the basic structure and the social contract respectively. Despite some exceptions from seditious behavior acc. sect. 3 (2) the act effectively bans nearly any critical, even if constructively meant and formulated comment on this hegemonic basic consent with a punishment up to three years in prison with a very high conviction rate while, according to sect. 3 (3), uphold by the Federal Court, "the intention of the person charged at the time he did or attempted [a seditious act, …] shall be deemed to be irrelevant".

13 See Levinson, *Constitutional Faith*, 2011.

14 See Loewenstein, *Political Power and the Governmental Process*, 1957, a book which is revealingly titled in its German translation as 'constitutional theory'.

has an effective legal-political function for and due to the membership in the European Union and the Council of Europe. Moreover, there is growing interest in analyzing unity and diversity of the European constitutional orders from comparative perspectives in more detail including the project to unfold the historical identity of a joint cultural-political heritage. From this perspective, the particularities of the respective basic structures might find more interest and be related more closely to the shared normative deep structure of Europe's constitutional law. An interesting case in point is the (non-binding) report of the Venice Commission of the Council of Europe on the new Hungarian Constitution – in this volume critically discussed by *Toth*. Here the con-stitution of a member state of the Council of Europe was critically measured against those rules forming the minimum European requirements for the constitutional basic structure *à la Europeanne*. However, especially when looking east, western observers of non-western constitutional systems sometimes overlook the fact that the same constitutional elements often have a different function in the architecture within European and non-European constitutions. While the nexus of civil and political rights and representative democracy is an essential part of the basic structure of European systems, many non-European systems provide rights and mechanisms of electoral democracy as important parts of their respective constitutional design, *just only not* as the interwoven fabric of the constitutional core.[15] In sum, the constitutional basic structure of a particular political community seems not only to be more complex, dynamic and country-specific than often acknowledged but nothing less than the crux of the whole constitutional and political order. Therefore it is the most critical part of the legal and political system to be exposed to conflict and crisis. Thus, the understanding of severe constitutional and political crisis necessarily requires a sound understanding of the basic structure, especially from a comparative point of view.

Finally, conflict and crisis of the constitutional basic order are understood here as being equivalent to the challenge or failure of the underlying fundamental consent. This relation deserves some exploration. First, it may be said that those constitutions which are normatively more meaningful are *inclined* to fully express what can be called the 'social contract or 'fundamental consensus'. Insofar, the constitutional basic

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15 See Glaser, "Multiple Constitutionalizations – 'Constitutionalism and Good Governance in European-Asian Perspectives'," 2014, pp. 45 ff.

order/structure can be seen as manifestation of the fundamental consensus in form of constitutional law. Therefore, severe conflict pertaining to it is raising questions about the fundamental consensus. Due to its vagueness the term, however, is difficult to operationalize.

Insofar, it is interesting to recall *Schmitt's* definition of the constitutional core, which he calls "the constitution" in distinction to "constitutional law" which is, in his view, "only possible because the essence of the constitution is not contained in a statue […]. Prior to the establishment of any norm, there is a fundamental political decision by the bearer of the constitution-making power."[16]

While *Schmitt* refers to an underlying political concept of the written constitution as its very essence and condition, he purportedly avoids the term 'consensus'. Without engaging in the vast classical literature dealing critically with the theory of the social contract[17], of which *Schmitt's* account is a part, it is indeed interesting to ask about the nature and impact of the fundamental consensus (and the corresponding societal fundament of the constitutional basic structure) with reference to the specific notion of force in *Schmitt's* formulation, embedded in his favorite term 'decision'. While it seems evident that no political order is able to exist without a certain "underlying basic consent"[18], the term has to be concretized, what be-comes particular interesting in the light of this notion of force and with reference to the fact that any political order inevitably includes dissent and conflict pertaining to its normative fundaments.[19] While it is not possible to deeply explore the nature of the fundamental consensus here, it is helpful to recognize the triangle of *consent, force and dissent* as a constitutive frame for the fundamental dynamics of (re)producing constitutional and political orders.

Especially the existence of a certain kind of dissent pertaining to the constitutional basic structure might even have also productive, stabilizing and integrative functions and thus form a condition for success of constitutional orders, which embrace a sort of diversity in their very

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16 Schmitt, *Constitutional Theory*, p. 77.
17 See Urbinati, "Representative Democracy and its Critics," 2011, pp. 23-49.
18 Dahl, *A Preface to Democratic Theory*, 1956, p. 132, fn. 14.
19 See Foucault, *The History of Sexuality: An Introduction*, 1978, p. 95: „Where there is power, there is resistance."

foundation:[20] "The strength of the constitutional fabric consists in the interweaving of different threads […]"[21] but even of those which might oppose each other. In other words: Whatever the nature of this consensus[22], it does not rest on the friction-less harmony of a once for all established compromise. Rather, its 'result' will remain fluid and to a certain degree even partly inconsistent whereas the dynamic evolving from the resulting tensions will determine its possible stability or weakness.[23] However heterogeneity in the constitutional fabric includes the potential that its diverging normative 'threads' and the social and political forces linked to them strive for dominance. As long as this is staged within the frame of the 'original truce' and the established constitutional basic order, this contributes to the phenomenon of constitutional change. If it goes be-yond, if some 'threads' transcend the original truce, attempting to use the constitutional setup for the purpose of substantially restating it, constitutional conflict and crisis emerge.

The constitutional basic order, in this sense, can be further understood not only as reflecting a dynamic social contract which is at least partly based on the *fiction* of a coherent fundamental consensus, but at least also

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20 See Denninger, "Nachwort," 1998, p. 143 f.; Sunstein, *Why Society Needs Dissent*, 2003, p. 211. Unrealistic expectations towards the consistency of the fundamental consent might on the other hand only create a vulnerable rigidity or vanishing affection of the people in supporting the system. See Wefer, *Kontingenz und Dissens. Postheroische Perspektiven des politischen Systems*, 2004, p. 88.

21 Tully, *Multiplicity. Constitutionalism in an Age of Diversity*, 1995, p. 197. See also Harris II, "Constitution of Failure. The Architectonics of a Well-Founded Constitutional Order," 2010, pp. 66-87.

22 Practically, a kind of basic consent seems to be not only based on very diverging yet pronounced points of view, but also exists beyond this dimension of 'informed' and explicit consent. In this other dimension, what can be described as an expression of a certain fundamental consensus depends on notions of non-decision-making and docility supported by opportunism, force, more passive reflexes of belonging and loyalty, or reciprocity. See Neidhardt, "Formen und Funktionen gesellschaftlichen Grundkonses," 2000, p. 18, and with a different accentuation also *Habermas'* Theory of Communicative Action distinguishing between an apriori-background consensus and a discursive argumentative consent. Habermas, *Der philosophische Diskurs der Moderne*, 1985, p. 375.

23 In Western societies the co-existence of such different and partly strongly diverging political ideologies like conservatism, liberalism and progressive democracy within the normative fabric of Western societies and constitutions is a good example for both, the possible strength or failure of the respective order.

as partly expressing a *hegemonic* construct. It faces its greatest challenge where former counter-hegemonic normative forces gain the constitutional position to rewrite the constitutional order in their favor revealing the volatile character of the foundational consent and the influence of force on its construction and preservation.

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Conflict and Consent in the Constitutional Order of Italy: Lessons for (and from) Thailand?

Jörg Luther

A. Constitutional History as a Starting Point for Comparative Dialogue

The argument of this conference could have been formulated from a Western point of view that consent and order are not necessarily synonymous with societal harmony. If we look from Asia to modern Western societies, conflict seems to precede and stay with consent, especially in the constitutions of the post-authoritarian European democracies what have the shared value of preventing totalitarianism.

Even from the Italian point of view, conflicts played a fundamental role during the nation building process. The Italian State was founded around 150 years ago as a national unitary state governed by a constitutional and confessional monarchy. The national history of Italy was early on characterized by tensions and more or less open conflicts between supporters of monarchists and republicans, secularism and Catholicism, the industrial North and the agrarian South, liberalism and authoritarianism, right wing fascism and left wing socialism or communism, military interventionism and pacific neutralism etc. These conflicts have medieval roots in the European clash between Emperors and Popes, later in the diatribes between Guelphs and Ghibellines that have inspired the classic theories of monarchy and republic in the classical thought of Dante and Machiavelli. This specific "divisivity"[1] of Italy is what historians and politicians rediscover from time to time as a fundamental element of the national political culture. This is also the case of the "transition" post 1989. The shift from proportionality and extreme multipartitism to a majoritarian electoral system with an imperfect bipolarism has rendered the divisivity more visible, increasing the main areas of conflict outlined in the following analysis.

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1 Nucci and Loggia, eds., *Due nazioni. Legittimazione e delegittimazione nella storia dell'Italia contemporanea,* 2003.

But does it make sense to study the Italian constitution in Thailand? Thailand is proud to be the least colonized country of South-East Asia.[2] Even if the "Phra Thammasat" has been integrated by civil and commercial codes drafted under Belgian advisers,[3] it is perceived as a country that prefers Buddhist harmony to divisive political conflict.[4] The "physique de la servitude", described by *Montesquieu* as a natural condition of the Asian cultures, has not precluded Thailand to become one of the first Asian countries open for ideas of Western "constitutionalism" and democracy.[5]

Still today, teachers of constitutional comparative law are sceptical about the perspectives of a truly intercultural dialogue. European and Asian political empires and legal cultures are often seen as having more differences than similarities. So what can Thailand and Italy learn from each other? Could Thailand learn to live with political conflicts through institutions of democracy and the rule of law? Could Italy learn the virtues of duty and harmony? Notwithstanding the enormous social, cultural and economical differences between them, there are many similarities between *Thaksin Shinawatra* and *Silvio Berlusconi*, as echoed by *Tom Ginsburg's* recent study on the "postpolitical" constitution of Thailand.[6] Indeed, constitutionalism is no longer a national devise, but a worldwide common learning process that is promoted both by the European Union and by the ASEAN Charter commitment for "adherence to the rule of law, good governance, the principles of democracy and constitutional government" (Article 2 [2g] ASEAN Charter). The experiences of globalization demand for new common patterns of law and politics under constitutions that are devoted not simply to upholding the authority of national states and powers, but also to facing the new societal challenges of inclusion, innovation and security. *Andrew Harding's* play for a "sympathetic

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2 See Mezzetti, *Teoria e prassi delle transizioni costituzionali e del consolidamento democratico*, 2003, p. 801.

3 See Hooker, *A Concise Legal History of South-East Asia*, 1978, pp. 25 ff., 183 ff.

4 See Engel, *Tort, Custom and Karma*, 2010, pp. 153 ff.

5 See Tania Groppi, "The Codification of Rights in the Thailand Constitution: A Comparative Point of View," 2007, accessible at http://www.unisi.it/dipec/en/agora.php; Harding and Leyland, *The Constitutional System of Thailand*, 2011, p. 12, favours the Westminster model.

6 See Ginsburg, "Constitutional Afterlife: The Continuing Impact of Thailand's Post-Political Constitution," 2009, pp. 83 ff.

engagement" with the "New Asian Constitutionalism"[7] suggests that there are not just technologies of power framing in circulation. European and Asian countries can learn from each other about the interdependence of economic, cultural and constitutional development.

The exchange of constitutional experiences is impossible without a clear understanding of the relevant theories of the constitution. In order to design the lines of "conflict" and the institutions of "consent" within the constitutional order of a country, the Italian science of constitutional law is used to distinguish the written constitution of 1947 from its substantial counterpart and context, the so called "material constitution" or "the material and spiritual forces that hold together a social and political organisation in stable relationships."[8] This material constitution is the basis of the constitution making power and the condition of the validity, primacy and stability of the written constitution. It can be seen as a sort of basic constitutional order. The dynamics of the material constitution are studied both by political and by legal sciences, but constitutional history seems to be the best way to approach both the written constitution and its context.[9] The following pages will therefore start from a reading of the Italian constitution text in its historical context from a (merely virtual) contemporary Thai perspective. The paper will end with an experimental reading of the Constitution of Thailand from an Italian perspective.

B. The Original Basic Consensus: From the Failure of Monarchy to the Myth of "Resistenza"

"Italy is a democratic republic, founded on work. Sovereignty belongs to the people, which exercises it in the forms and within the limits of the Constitution." (art. 1) The constitutional discourse starts with the name of Italy, originally a geographical denomination that expanded during Roman Empire from Calabria in the south of the peninsula to the northern provinces *(italicae*). Since the revolutions of the modern age, Italia is the name of a "nation", an allegorical personification of the spirit of

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7 Harding, "Asian Law, Public Law, Comparative Law Stir-Fry: Theory and Method Considered," 2008, pp. 19 ff.

8 Mortati, *La costituzione in senso materiale*, 1998; See also Crisafulli, "Costituzione," 1975, pp. 1030 ff.

9 See Pinelli and Dogliani, "Italien," 2007, pp. 273 ff.

citizenship.[10] The Italian national state was founded much later, in 1861, when the powerful Kingdom of Sardinia transformed itself through annexations and plebiscitary acts in the Kingdom of Italy. From a formal point of view, no revision occurred to the constitutional statutes adopted during the European revolutions of 1848, just the entitlement of the laws to the King was changed to "by Grace of God and the will of the Nation".[11] The very short "statute" of the constitutional monarchy had been made by the advisers of the House of Savoy, but interpreted by Cavour and the liberal elites as a flexible constitution based on elastic principles. The guarantee of the catholic religion as the "sole religion of the State" (art. 1) could not avoid the incorporation of the State of the Pope in 1871. The "Monarchical Representative Government" (art. 2) was more closed to the French type of a King that "reigns and governs", but became *de facto* a semi-parliamentary form of government with a parliament that could weaken the powers of the King, holding responsible the ministers he appointed and getting re-elected by the people in case of dissolution. The constitution was flexible and the British model of democratization was not excluded. Since no freedom of association was granted, fascism could establish an authoritarian and totalitarian regime based on corporatism.

The failure of the monarchy was caused by the refusal to defend the constitution against the fascist coup d'état in 1922 through a declaration of the state of emergency as requested by the government. On the one hand, the King did not exercise veto powers in order to prevent the fascist dictatorship and signed even the laws for the persecution of Hebrews (1938). He accepted the titles of "Emperor of Ethiopia" as an outcome of the war of Abyssinia (1936), of "First Marshal of the Empire", the same title conferred to Mussolini in derogation to the supreme command clause of the Statute (art. 5), and of King of Albania (1939), before entering into second World War (1940). On the other hand, the King supported in 1943

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10 Dante, *Purgatorio*, canto 6: "Ahi serva Italia, di dolore ostello, nave sanza nocchiere in gran tempesta, non donna di province, ma bordello! (76ss.). – Ché le città d'Italia tutte piene son di tiranni, … (124)." [Ah! servile Italy, grief's hostelry! A ship without a pilot in great tempest! No Lady thou of Provinces, but brothel!" – "For all the towns of Italy are full of tyrants, ..."]

11 See Colombo, *Storia costituzionale della monarchia italiana*, 2001; Martucci, *Storia costituzionale dallo Statuto Albertino alla Repubblica (1848-2001)*, 2002; Volpe, *Storia costituzionale degli italiani*, 2009; Ghisalberti, *Storia costituzionale d'Italia 1848-1948*, 1974.

another coup d'état, ordered the arrest of *Mussolini* and established a government in the south at Brindisi that still excluded the antifascist opposition and continued war with Germany and Japan. He left the army without any command when the government negotiated a ceasefire with the US-troops, so that Germany occupied the country and created a concurring Italian Social Republic in Verona faced by "Resistenza".

When the King agreed to suspend his own power and appointed his son and successor as "Luogotenente del Regno" (Lieutenant of the Reign) during the election of the new constituent assembly in 1944, the monarchy was still supported by *Churchill* and the US-government. The situation in the country was completely changed by the so called "three wars": the war against the foreign occupying forces, the war of antifascism against fascism and the war of the working class against capitalism.[12] The national identity was destroyed, the Patria was no longer the land of the fathers, just a land of nobody. The constitution making procedure was the only way to find a road back to peace and to find a new "resurgence" (Risorgimento). The elections for the assembly were combined with a referendum about the monarchy itself. The King tried to influence the choice by his unilateral decision to abdicate in favour of his son Umberto, but a thin majority of the people opted for the Republic favoured by most liberal, socialist, communist and catholic forces within the Committees of the National Liberation.[13] When Umberto left the country, the referendum was perceived as the beginning of a new era founded on the failure of monarchy and the myth of "Resistenza".[14] The transitory and final provisions of the Constitution prohibited any royal descendants from returning to Italy, a provision that was abrogated only in 2002.

The basic consensus of the new constitutional order implemented the will to learn from the failure of the monarchical Statute, to live in peace with the Catholic Church and to reshape institutions and society moving away from fascism. The Constituent Assembly was not controlled by a single party and reached an historic compromise between catholic, liberal,

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12 See Pavone, *Una guerra civile: Saggio storico sulla moralità della Resistenza*, 1991.

13 See Franceschini, Guerrieri and Monina, (eds.), *Le idée costituzionali della Resistenza*, 1997. See also the projects of Galimberti and Trentin in http://www.dircost.unito.it/altriDocumenti/documenti.shtml#XX_secolo.

14 Nevertheless, the constitution making assembly rejected the proposal to recognize the right to resistance, see Buratti, *Dal diritto di resistenza al metodo democratico*, Milano 2006.

socialist and communist components that was upheld even when the left wing parties have been excluded from government. The new Constitution of 1947 lasted longer than the Statute of 1848 and declared new fundamental principles for a democratic republicanism with the purpose to unite all parties. In order to be more flexible, the new Constitution created instruments of self-guarantee such as the Constitutional Court and a specific procedure of revision. In order to rationalize the parliamentary form of government, to stabilize the government and to prevent the degenerations of parliamentarism, the new President was authorized to represent unity, to nominate the members of government and to decide on the dissolution of parliament. The centralism of the executive and legislative power was reduced through the creation of regional authorities and the independence of the judiciary was increased through the independence of the High Council of the Judiciary. The main part of the basic consensus was construed through the system of constitutional rights established within the first part of the constitutional texture, including social and political rights.

C. A Republic Founded on Labour: From Social Rights to Financial Crisis

The democratic Republic was founded on labour, not necessarily directed to a socialist form of state, but also not to a capitalist form of society. The Italian constitution declared not just principles of social justice, but more social rights than other Western European constitutions. The Republic recognized on the one hand the "inviolable" rights of the human being not restricted to liberties, even "in the social groups where he expresses the own personality", on the other hand "imperative duties of political, economical and social solidarity" (art. 2). Social rights are grounded in "equal social dignity" and a specific guarantee of substantial freedom and equality: "It is the duty of the Republic to remove those obstacles of an economic and social nature which, really limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country." (art. 3 sect. 2) Effective participation

has long been construed as participation through conflict, justifying strikes even for political objectives and within public services.[15]

The first social right is the right to work: "The Republic recognizes the right of all citizens to work and promotes those conditions which will make this right effective. Every citizen has the duty, according to his possibilities and individual choice, to carry out an activity or a function which contributes to the material or spiritual progress of society." (art. 4) The right to work can not be legally enforced as a right to get an employment, but a great political question today is whether the choice of the legislator to grant a right to be reintegrated into work in case of unlawful dismissal (except for small enterprises) has to be reversed in order to promote more flexibility in the workforce. This right to get reintegrated is not directly from the constitution, but was created in the "Statute of workers" (1970) in order to resolve social conflict at the time. Still a decade ago, a referendum that aimed to set a payment in lieu of actual reintegration failed.[16]

The social conflicts are necessary and allowed, but work and capital imply both economic and social duties and have to contribute to the progress of society. They have to serve society, as specified by a clause that precedes the right of property: "Private economic initiative is free. It cannot be conducted in conflict with public weal or in such manner that could damage safety, liberty, and human dignity. The law determines appropriate planning and controls so that public and private economic activity is given direction and coordinated to social objectives." (art. 41) The partially Europeanized economic constitution is based on principles of freedom of investments and of freedom of competition, but the fundamental principle is work, not the market. This choice has been criticized and the last government presented a constitutional reform proposal in order both to enlarge the freedom of initiative to a freedom of economic activity and to establish a duty of loyal cooperation between citizens and public administration.[17]

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15 Corte costituzionale, sent. 124/1962, 290/1974.

16 Corte costituzionale, sent. 46/2000.

17 See Luciani, "Unità nazionale e struttura economica. La prospettiva della Costituzione repubblicana," 2011, pp. 636 ff., available also at http://www.associazionedeicostituzionalisti.it/sites/default/files/bandigare/Relazione%20Luciani-1.pdf.