

## Deconstructing the (Draft) Constitution

Passions are inflamed currently in Thailand for reasons that are self-evident. The drafting of the new Constitution has been a polarized rather than consensus-based affair, brought about by the fact that Thailand's 16<sup>th</sup> Constitution (1997) – known as the People's Constitution – was overturned by a coup in 2006. Intriguingly, the current text of the proposed new Constitution has fewer articles than the 16<sup>th</sup> Constitution had, but it is longer in wording. It deserves to be deconstructed to reveal its constituents transparently.

The current draft reaffirms the central role of the monarchy in the constitutional process. As it now stands, the proposed Constitution – the 18<sup>th</sup> - which will be put to a national referendum on 19 August reads a little better than an earlier draft of this Constitution. It shies away from the idea of a totally selected (appointed) Senate by opting instead for a mixture of selected (74 in number) and elected (76 in number) Senate, partly to appease those who feel that a totally selected body would simply not be credible. The earlier proposal to include the possibility of setting up a National Crisis Council, which would have provided even more elbow room to the military to administer the country in times of so-called national crisis, has also been omitted from the current draft.

However, when tested against both the form and substance of the 1997 Constitution, there are key challenges at hand. As it stands, the draft is evidently a reaction against the previous Government which was embroiled in perceived or real conflict of interests, personified by the media-magnate premiership ultimately ejected by military action.

On the one hand, there are some innovations of note. First, there are many limits imposed on the executive branch of Government, especially the top-notch of the executive branch. For example, a person elected as Prime Minister cannot stay in power for more than 8 years. The Premier, the spouse and underaged children must declare their assets fully, and they are not allowed to have a hand in companies, especially those in the media and telecommunications industry. A minimum of one fifth of parliamentarians (lower house) can propose a no-confidence vote against the Prime Minister, a lower number than the two-fifths rule under the 16<sup>th</sup> Constitution.

Second, there are more detailed provisions concerning human rights in the current draft. For instance, the rights of communities particularly in safeguarding the environment are expanded, and these communities as collectivities will be entitled to take action in courts. The tendency of the 16<sup>th</sup> Constitution to subject various rights to the condition that they were to be enjoyed "as stipulated by law" has also been discarded to some extent. That phrasing meant that in order to exercise those rights, one had to look to other laws, e.g. Acts of Parliament, in addition to the Constitution, to enjoy those rights in practice. Thus the current draft makes such rights directly applicable in the courts without the need to have other laws.

Third, under the current draft, various independent agencies have more powers to protect people. The National Human Rights Commission will be able to take cases directly to court, in its own name and on behalf of the victims – a power lacking under

the 16<sup>th</sup> Constitution. The Ombudsperson will be able to scrutinize the conduct of parliamentarians for ethical purposes.

Fourth, the courts will have more power under the draft Constitution. High ranking judges will sit in various selection committees to vet candidates for key organs such as the Senate and independent agencies, such as the Counter Corruption Commission and the Election Commission. Given the recent role of the Constitutional Tribunal in dissolving the Thai Rak Thai party for electoral malpractices and removing the electoral rights of over one hundred of its executives, including the previous Premier, for five years in May 2007, judicial power would seem to be on the rise.

Fifth, the ordinary people will be able to question politicians more easily under the new draft as well to submit laws and seek transparency in Government. A minimum of 10,000 people will be able to propose a new law, as compared with 50,000 under the 16<sup>th</sup> Constitution. A minimum of 20,000 persons will be able to petition the Senate to dismiss the Prime Minister and other office-holders. Local Government bodies will have to submit their plans and related budgets to the local people, as well report their implementation for scrutiny.

On the other hand, there are various grey areas affecting the current draft Constitution, inviting deep reflection.

**First, the typology of democracy.** Clearly, given the circumstances giving birth the new Constitution, the march towards democracy is managed directly or indirectly by the ruling elite. The process is more along the line of “directed democracy” rather than full-fledged democracy of a participatory kind. This is manifested by the drafting process of the new Constitution which has avoided the use of broad-based consensus building techniques which the process leading the 16<sup>th</sup> Constitution used, such as public hearings throughout the whole country. Rather, a select group has been in charge of the current draft and they owe their appointments to the Council for National Security (composed of the armed forces) which came to power as a consequence of the coup. It should also not be forgotten that the interim Constitution – the 17<sup>th</sup> Constitution, introduced in late 2006, enables the Council for National Security to adopt another Constitution if the draft text is rejected by the forthcoming referendum.

**Second, the presence of the military.** An analysis of the draft text cannot be self-contained. While the drafting process has been taking place, the military have been consolidating their power over the country. This has been bolstered by a rise in the national budget allocated to the armed forces as well as replenishment of the secret funds under their control. Uniformed personnel are thus the unwritten power behind the constitutional process and are able to use various intermediaries as their interlocutors. The draft Constitution also has a provision giving them blanket amnesty for the events leading the demise of the previous civilian Government.

**Third, the judicialisation process.** Interestingly, the role of judges has expanded significantly because of their role in the drafting process as well as in the contents of the text; the draft Constitution has thus been “judicialised”. There are a large number of judges and lawyers on the 35 member drafting committee. It is likely that they helped to introduce the notion of the “rule of law” which now appears prominently for

the first time in a Thai Constitution. In addition to the increased powers of the judges in the various selection committees noted above, the judiciary will also be able to propose laws under the new Constitution. This poses an intriguing question as to how to balance the functions of the legislature, the judiciary and the executive. From the angle of scrutiny of the assets of parliamentarians, the mandate has been shifted from the Constitutional Tribunal to the Supreme Court (Criminal Division for Politicians). This is a consequence of the unsettling fact that the Constitutional Tribunal under the previous administration found in favour of the media-magnate Premier in a case where he had been charged with failure to declare his assets.

**Fourth, the mind-set towards politicians.** The draft text clearly shows a degree of mistrust towards politicians, especially those in the executive. In future, all parliamentarians will have to declare their assets and many controls are to be introduced on them. The draft Constitution has a key section on conflict of interests, and measures to address them, such as scrutiny by the Counter Corruption Commission and the Supreme Court. A Code of Ethics will be evolved to test the conduct of politicians. The power of the Prime Minister in controlling the cabinet ministers is to be reduced, since in future those appointed as ministers will not lose their parliamentary seats – unlike under the 16<sup>th</sup> Constitution whereby those who became ministers automatically lost their seats, and as a result, became more beholden unto the Prime Minister for further benefits.

However, the rule under the previous Constitution which stipulated that a candidate needed to be a member of his/her political party for at least 90 days to be eligible to run as a candidate is now modified under the current draft Constitution; there is an exception in regard to dissolution of Parliament, in which case the candidate need only have been a party member for 30 days or more.

**Fifth, adjustments of the political party system.** Under the new text, large-scale parties are likely to be diluted. There is to be a lower house of representatives with 480 Members of Parliament (MPs) – 400 will be elected on a constituency basis and 80 will be elected through proportional representation. This is different from the 16<sup>th</sup> Constitution which provided for 500 MPs, out of whom 100 would come through proportional representation. Unlike under the 16<sup>th</sup> Constitution, there will no longer be a single candidate, first-past-the post system. Rather there will be bloc voting in the sense that voters will be voting for up to three MPs per constituency.

As for those to be chosen by means of proportional representation, smaller parties will benefit from the abolition of the old rule under the 16<sup>th</sup> Constitution whereby each party needed to obtain at least 5% of the total votes in the country (as a single constituency for the purpose of proportional representation) to be eligible to a share of the seats allocated. The country will also be divided up into smaller areas (possibly 8) under the new Constitution for the purpose of computing the seats for proportional representation, thus enabling smaller parties to benefit from the arrangement. The possibility of coalition Governments will arise more frequently in future.

**Sixth, the nature of the mixed Senate.** It should not be forgotten that under the 16<sup>th</sup> Constitution, there was provision for only elected senators. This contributed to the country's democratization process, although the quality of senators varied and some were more subjected to political influence from the ruling party than others. The new

Constitution reduces that process, since out of the projected 150 senators, 74 will be selected by a selection committee with inputs from a variety of professional and other organisations. While the details of the selection procedure will be evolved under a separate Act of Parliament, the possibility of selected/appointed senators lends itself to a greater degree of instrumentalization by the powers-that-be.

**Seventh, human rights in principle and practice.** While it can be claimed that the draft Constitution is more detailed in listing a whole series of rights, ranging from those pertaining to non-discrimination to a variety of civil, political, economic, social and cultural rights, the problem in Thai society, as elsewhere, has often been lax implementation and poor quality law enforcement, rather than a lack of stipulations in the Constitution and other laws. Conceptually, the current text, as with previous Constitutions, also limits the section on rights to the “rights of the Thai people”, thus differing from human rights in international law which pertain to all persons irrespective of nationality and other origins. In reality, the safeguards for ordinary people have tended to come from the Criminal and Civil Codes and Criminal and Civil Procedure Codes which have remained constant for many years, rather the seemingly ever-changing nature of Thailand’s Constitutions.

**Eighth, the attitude towards civil society.** The current text provides for more access by civil society on some fronts in proposing laws and questioning the conduct of politicians. Interestingly, in future public hearings will need to be conducted before international treaties with key impact on Thai society and economy (such as Free Trade Areas) are to be concluded, thus enabling the public to have a greater say in international agreements. Yet, there is also a degree of hesitation towards fuller participation by civil society. For example, there is very little space for civil society in the various selection committees that will propose candidates to be appointed to the various independent agencies, such as the Counter Corruption Commission. The realities on the streets and in rural areas are also self-evident with a more subdued atmosphere for demonstrations and the enjoyment of freedom of expression, assembly and association through public action to question the power base.

**Ninth, the accountability issue.** In addition to the various methods for scrutinizing the conduct of politicians noted above, the new Constitution will also make national policies and those responsible for them more accountable. While in previous Constitutions, there was a tendency to treat national policies (impliedly including National Economic and Social Development Plans) as non-binding and thus exempt from action before the courts, in future these policies are to be backed by laws, with the possibility of the public questioning them through judicial and other processes. On another front, while the right of the public to resist, by peaceful means, attempts to subvert the Constitution is recognized, there remains a paradox when a group uses force to overturn a constitutionally elected government, even where the latter is seen to be corrupt. The quandary is furthered by the possibility of an amnesty granted to a group where it is tantamount to self-amnesty.

**Tenth, the checks and balances.** One of the problems of the previous administration was that not only was it in total control of Parliament, but also it was influential in many of the independent agencies which should have acted as checks and balances on executive power. This was seen in the pre-coup phase by the furore facing one group of election commissioners who were seen to be all too close to the executive branch

and were ultimately imprisoned for breach of the electoral law. There were also parallel problems facing a group of commissioners under the Counter Corruption Commission.

To the public, under the previous administration, the independent agency which seemed to be the most independent from the executive branch was the Human Rights Commission. Yet, that Commission was continually faced with an uphill struggle to get the executive branch to address human rights violations, such as in regard to extra-judicial executions in the war against drugs, abductions of human rights defenders, and the impact of the gas pipeline in Southern Thailand which was built without adequate public participation in impact assessment. It is thus not surprising that the new draft Constitution has adjusted the selection process concerning these independent agencies so as to pre-empt influence from the executive branch. Yet, there lingers the question whether there is to be an effective separation of powers and functions between the legislative, executive and judicial branches of Government.

**Eleventh, the rural mass and the equity issue.** It is well-known that part of the appeal of the previous government among the general populace was its populist policies which gave direct benefits to the rural people and those in the lower economic stratum, such as through the 30 baht health care for all and one million baht fund for every village in the country. It knew how to exploit the longstanding loophole based on the widening gap, and the lack of equity, between the rich and the poor, the urban and the rural. Part of the opposition to the current draft text from some members of civil society suggests that while the draft text talks of more local participation in decision making and guaranteeing various rights which will ultimately benefit the poor, not enough is said on how to share wealth more equitably. Much will thus depend on not only the new Constitution but also how development policies in the country can aim for greater incentives for the poor and for resource redistribution to nurture an enabling ambiance for pro-poor growth.

**Twelfth, the fluctuating political environment.** Even without a new Constitution, the country is faced with an age old problem of how to transition towards democracy and ensure that it is led by civilians rather than those in uniform. The current situation suggests that the tide has turned, to a lesser or greater extent, towards a closer coalition of the power base between uniformed personnel and the ruling elite, back in part by those at the middle stratum of economic development. Government and governance are thus en route to become more vertical than horizontal in their outreach. A disquieting development, side by side with the new Constitution, is the proposed draft National Security Act which will confer even more powers on the army chief to act as the focal point on security matters, even to the extent of overriding human rights and protecting officials from scrutiny. The draft law will exempt them from action in the administrative courts and will constrain other courts from exercising oversight, thus contributing to impunity for official malpractices.

Of critical importance also is the longstanding problem of Southern Thailand, a predominantly Muslim region, whose situation has become more aggravated by daily violence. While the current Prime Minister's apology to the local population in regard to various excesses committed in the South is welcome, this needs to be advanced by concrete measures such as more decentralization of power and respect for the particular identity of the region. While current law enforcement has been

claiming success in pursuing militants and apprehending them, there remains the longer term aspiration of reconciliation and peace awaiting the region which a merely militaristic approach is unable to fulfill.

In sum, the challenge facing the country is to revert to democracy and to nurture a progressive process of evolving democratic solutions – even imperfect ones – rather than fast-track measures through the use of force. The choice of the country in the march towards a new Constitution on 19 August will doubtlessly be influenced by a plurality of factors and social forces – based on faith, fervour, rigour, apathy, skepticism and/or resignation. Whatever the outcome of the referendum, there will be plenty of space for political versatility in the midst of all that volatility - deconstructed.

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