

Annual Review of Constitution-Building

Processes: 2015

4. Between endurance and change in South-East Asia: the military and constitutional reform in Myanmar and Thailand

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International IDEA resources on constitution-building processes

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This is an extract from Annual Review of Constitution-Building Processes: 2015 (Stockholm: International IDEA, 2016)

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4. Between endurance and change in Southeast Asia: the military and constitutional reform in Myanmar and Thailand

Melissa Crouch and Tom Ginsburg

Introduction

Up until the 2000s, patterns of constitution-making in Southeast Asia were influenced by colonialism, communism, revolution and evolution (Tan 2002). Most countries in Southeast Asia originally adopted a constitution after independence from colonial rule from the 1940s to 1960s. Some more recent constitution-making experiences involve the introduction of a new constitutional text.

For example, new constitutions were introduced in Laos (in 1991), Cambodia (1993), Timor Leste (2002), Myanmar (2008) and Vietnam (2013), while Thailand introduced an Interim Constitution in 2014, and a permanent Constitution in 2016. Another frequent trend in constitutional change in Southeast Asia has been a resort to formal constitutional amendment as a mechanism for major constitutional change; the most recent formal amendments were made to constitutions in Indonesia (1999–2002), Brunei (2014), Cambodia (2014), Myanmar (2015) and Singapore (2015).

More broadly, contemporary constitutionalism in Southeast Asia can be characterized as 'genuine', 'communist-socialist' or 'hybrid' (Chen 2014). These classifications adapt and expand on earlier work by Loewenstein (1957) and Sartori (1962) in the context of Asia. The only country in Southeast Asia that Chen classifies as exhibiting genuine constitutionalism is Indonesia (alongside a number of countries in Asia, broadly speaking, including India, South Korea, Hong Kong and Taiwan).

Chen classifies Vietnam (and China) as adhering to communist-socialist constitutionalism. Cambodia, Malaysia, the Philippines, Singapore and Thailand (to which Brunei, Myanmar and Timor Leste could be added) are categorized as hybrid constitutional systems—that is, those in which authoritarian and liberal ideas coexist. Therefore, the study of constitutionalism in Southeast Asia has great potential to expand understandings of hybrid constitutionalism.

This chapter focuses on two major sites of constitutional change in 2015—Myanmar and Thailand, two majority-Buddhist countries in the region. The two countries have somewhat different histories: Myanmar experienced many decades of military-led socialist rule and then direct military rule without a constitution, until the 2008 Constitution ushered in a new quasi-military regime. Thailand's constitutional history has been chequered, to say the least, but has featured regular elections and periods of democratic rule.

The military in both countries sought to maintain and consolidate its role in the constitutional order in 2015. In Myanmar, proposed amendments did not address the reserved powers of the military under the 2008 Constitution. Similarly, in Thailand the military regime seemed intent on consolidating its role as national guarantor, overseeing the latest constitution-making process.

While these are primarily national debates, constitutional developments in the two countries have at times intersected. For example, in mid-2014 the Myanmar Government warned the National League for Democracy (NLD) that its rallies in support of constitutional change must not provoke social unrest, or else this may necessitate a declaration of emergency and military takeover similar to what occurred in Thailand. Government officials in Myanmar used these references to developments in Thailand to engender a sense of instability and fear that a state of emergency might be declared, and allow the military to take control. This incident is a reminder that constitution-making rarely happens in geographic isolation.

The two examples of constitutional change discussed in this chapter in some respects represent opposite extremes in constitutional law. Myanmar is a case of constitutional endurance due to the extreme rigidity of its Constitution, while Thailand's experience illustrates constant change of the constitutional order. The background of each of the respective debates in 2015 is outlined, followed by a discussion of the procedure and processes for change and an analysis of the core constitutional reform issues at stake.

Amending the 2008 Constitution in Myanmar: built to endure

Constitutional developments in Myanmar in 2015 were the result of a process of formal amendment that commenced in 2013 under President Thein Sein (March 2011–March 2016). In order to understand the importance of these developments, the country's formal procedure for constitutional amendment is described, followed by a characterization of the process in the lead-up to 2015, including its ultimate failure to provide genuine forums for

participation. The outcome of the proposals for amendment indicate the deep divisions within Parliament over the question of constitutional reform, as well as Parliament's broader disregard for the courts.

The procedure for formal amendment

The 2008 Constitution was the result of a protracted and heavily restricted drafting process that stretched from 1993 to 2007 (Crouch 2014; Williams 2014). The formal amendment process under the 2008 Constitution is detailed and specific. A proposal to amend the Constitution must be submitted in the form of a bill solely for the purpose of constitutional amendment (section 433). The proposed bill must be supported by at least 20 per cent of all members of the Union Parliament (664 members, including 166 from the military) (section 434). This means that the process of initiating a bill can begin with non-military members of Parliament (MPs), yet ultimate approval requires some level of support from the military.

The Constitution sets out two different levels of amendment, depending on the provision concerned. Both tiers require more than 75 per cent approval in the Union Parliament. Tier 1 is the higher threshold: it requires more than 75 per cent approval in Parliament plus a nationwide referendum with the votes of more than half of those who are eligible to vote (section 436(a)). This approval process applies to most of the provisions on the powers of the government and the military: Chapter I on Basic Principles, Chapter II on State Structures; the qualifications for president and vice president; the formation of all houses of parliament at the national and state/region levels, which ensures protection of the unelected military seats in Parliament; the formation of the Union Government, the National Security Council (the most powerful and nebulous body), and the president's powers over the states/regions and self-administered zones; the hierarchy of the court system; emergency powers; and the amendment provision itself.

Tier 2, in contrast, requires more than 75 per cent of approval of MPs in the Union Parliament (section 436(b)) but no national referendum, which ensures that the military MPs have the final say on these provisions. Section 436(b) covers all sections of the 2008 Constitution other than those specifically mentioned in section 436(a) discussed above. This includes the appointment and impeachment of MPs, the process of passing legislation, the process of forming parliamentary committees, the rights of citizens and remedies for protecting these rights, and elections. The clear inference of this two-tier structure of constitutional amendment is that the power of the military should not be subject to change, while individual rights are subject to change by Parliament and the military.

Background to the 2015 constitutional amendment proposals

The bills for constitutional amendment that were deliberated by Parliament in mid-2015 were the culmination of the momentum for reform since 2011 and the calls for a formal process of constitutional change that commenced in 2013. The 2008 Constitution came into force in 2011 (see Box 4.1 for a timeline of events). It was not until mid-2012 that the NLD, one of the main proponents of democratic change, agreed to participate in the by-election and won every seat that it contested (43 seats). Calls for constitutional amendment from the NLD and the 88 Generation led to an official process of formal amendment, which was ultimately marred by a lack of genuine participation.

The process commenced in February 2013, when President Thein Sein announced that a Constitutional Review Committee would be established. By July 2013 the Union Parliament had approved the committee (Notification 41/2013). According to its terms of reference, the committee was responsible for proposing constitutional amendments to promote peace, national unity and democratic reforms in Myanmar. This decision was welcomed with enthusiasm, although there was little debate about whether the existing Parliament was the most appropriate body to be undertaking the review

process. The committee consisted of 109 existing MPs. Most were from the Union Solidarity and Development Party (USDP), the military or ethnic-based political parties, and were elected in the 2010 elections, which were not considered to be free and fair. The participation of these members raised legitimacy concerns about the process. The committee also included seven NLD members elected in the 2012 by-election, which was considered to be free and fair, although Nobel Peace Prize Laureate Daw Aung San Suu Kyi was not a member of the committee.

By October 2013, a shift to allow some form of public participation appeared to take place, as the committee issued an official call for submissions (Order No 1/2013). This provided room for public engagement and generated public debate and constitutional campaigns across the country as political parties, social organizations, ethnic groups, and religious groups held discussions and finalized submissions to the committee. The committee received a large number of submissions from a wide range of groups and individuals. Yet how (or whether) the committee assessed and reviewed these submissions remains unclear.

In January 2014 the committee submitted its report to Parliament. The report, however, was far from what was expected. The committee had the mandate to make recommendations to Parliament, yet it avoided this responsibility in its report. This was the first major sign that the amendment process was

Box 4.1. Timeline of constitutional events in Myanmar, 2008–16	
May 2008	Junta announces Constitution has been approved at a national referendum
March 2011	The new Parliament commences under the 2008 Constitution
February 2013	President Thein Sein announces a constitutional amendment process
July 2013	Parliament approves Constitutional Review Joint Committee
January 2014	First report of the Committee made public
February 2014	Second Implementation Committee constituted
June 2015	Two bills proposed in Parliament for constitutional change. All proposals failed to receive support, with the exception of changes to Schedules 2 and 5.
2016	New NLD government takes office

not going to be as genuine or inclusive as had been hoped. The report set out the number of submissions that sought to amend different provisions of the Constitution, but it failed to explain in detail what the proposals for amendment were. The report did not offer any of its own suggestions or recommendations for reform. It collated data on the number of provisions that were suggested to be amended and those that should stay the same. It did not reach any conclusions on which provisions should be amended, although it was emphatic on which should not be amended.

The report and information on submissions received was published in various forms, such as in press releases in the government-run *New Light of Myanmar* newspaper (see Box 4.2). The press release is silent on what suggestions or recommendations were made, and only lists the total number of submissions received in relation to each chapter of the 2008 Constitution.

The most controversial aspect of the report was its reference to three key aspects of the Constitution that should not be amended, based on what it claims to have been a petition signed by 106,102 people, presumably from the USDP. These three aspects are the role of the military in politics, the presidential requirements of sections 59f and 436 on the amendment process. Under section 59f, a person whose partner or children hold foreign citizenship is prohibited from taking office as president, and so this is perceived to bar Daw Aung San Suu Kyi from this role because her children are British nationals.

These proposals were met with widespread criticism and were perceived as a direct attempt to preserve military control. The fact that the petition was signed by unidentified people was seen as an underhanded tactic, and prodemocracy groups argued that it was unfair that they had not been told that petitions could be submitted to the committee.

In the second formal stage, in February 2014, Parliament established an Implementation Committee that was chaired by USDP member U Nanda Kyaw Swa, deputy speaker of the Pyithu Hluttaw, or lower house (Order No 20/2014). The committee consisted of 31 MPs, including seven from the military—far short of the requirement that at least 20 per cent of MPs are required in order to propose an amendment. As a show of diversity and inclusion, an additional nine honorary members—representing the Chin, Wa, Karen, Kachin, Palaung, Inn and Danu ethnic groups—were permitted to attend the meetings but were not allowed to vote on any decisions.

The Implementation Committee was responsible for reviewing the report submitted by the first Committee, which lacked legitimacy. By this stage the process had clearly lost all legitimacy in the eyes of the public. The second report issued by the Implementation Committee did not generate as much interest or recognition, and many civil society actors were disillusioned by the process.

Proposals for constitutional change

Despite this loss of legitimacy, two bills for constitutional amendment were proposed in Parliament in June 2015. The first bill, dated 11 June 2015 and published in *Myanma Alin*, concerned amendments under section 436a, or Tier 1, which require a nationwide referendum. This first proposal contained six issues that were voted on by MPs (Office of the President of Myanmar 2015). The only amendment that was approved was to change the wording of section 59(d) on presidential requirements. Under this provision, a person nominated as a presidential candidate must be familiar with military affairs. The proposal was to change the word *sit-ye* ('military') to *kagwe-ye* ('defence'), and this was approved by a vote of 88 per cent of MPs, but the referendum required to enact the amendment was never held. The other five proposals only received 58 to 61 per cent support, which failed to meet the 75 per cent threshold. The most significant of these failed proposals was the suggestion to amend section 436(a) to reduce the approval threshold to 70 per cent.

The second bill fell under Tier 2, and thus did not require a referendum. The bill was again submitted to Parliament by a member of the USDP, U Thein Zaw. It contained three main elements. First, the proposed amendments

Box 4.2. Joint-Committee for Reviewing the Constitution of Republic of the Union of Myanmar Press Release (4/2013)

Third, the proposal sought to decentralize power within the existing legal framework. It suggested changing from a system in which the president appoints the chief minister of each state or region to one in which chief ministers are appointed by the approval of a majority of the relevant state or regional lower house.

A large number of other proposals were also included in the two bills. However, the only proposal that was successful related to the division of legislative power and taxation power (Law No. 45/2015). The proposal added a longer list of powers to schedules 2 and 5 of the 2008 Constitution, which would allow the 14 states and regions to collect income tax, customs duties and stamp duty, and levies on services (tourism, hotels, private schools and private hospitals) and resources including oil, gas, mining and gems. This issue arose because states and regions have considerable autonomy in legislation and taxation matters.

Since 2011, this has raised many questions as the new state and regional parliaments began to assert their power and test the boundaries of their authority. The proposal was also in response to a case heard in the Constitutional Tribunal on the issue of state legislative and taxation powers, in which the tribunal declined to interpret the legislative and taxation powers of the states and regions; it suggested this is a matter to be negotiated with the central government (Crouch forthcoming).

In short, the constitutional amendments suggest that only the Union Parliament has the ability to expand the list of matters under state control. The tribunal has little power to interpret schedules 2 and 5. Going forward, this could lead to a difficult situation in which, rather than allowing the tribunal to fulfil its mandate to interpret the Constitution, any new issue that arises that is not directly mentioned in the schedules may require a formal constitutional amendment. In short, the schedule lists narrowly circumscribe the scope of legislative power.

In late 2015, the constitutional amendment process became second-rate news as election fever took hold. With the majority of seats won by the NLD, the new government that took office in 2016 will undoubtedly continue to push for further constitutional change. While the NLD will be able to pass any laws that it chooses, it cannot pass a proposal for constitutional amendment without the agreement of at least some members of the military.

Drafting a new constitution in Thailand: built for change

Oscillating between military and civilian rule

Thailand's political history is cyclical, as it has oscillated between military and civilian governments since the establishment of the constitutional monarchy in 1932. Each of these changes in power has been accompanied by the adoption of a new constitution, so, depending on how one counts, the current draft will be Thailand's twenty-first if adopted. The most recent iteration in the cycle was touched off by the May 2014 military coup that deposed Prime Minister Yingluck Shinawatra and her Puea Thai Party government (see Box 4.3 for a timeline of events).

Since then the military junta, under the name of the National Council for Peace and Order (NCPO), has followed the script of earlier coup makers by promulgating an Interim Constitution and promising a return to constitutional democracy. The centrepiece of this interim period has been the drafting of a new constitution, which continues the pattern of looking for a post-political basis of legitimacy for the country (Ginsburg 2009). This constitution-making process is taking place in an environment in which public discourse evidences a deep distrust of elected officials and political parties.

On 22 July 2014, the Interim Constitution was promulgated by King Bhumibol, an indication of the role of the monarchy in Thai politics. The Interim Constitution lays out the drafting process of a permanent constitution in articles 32–35. It requires the formation of an appointed Constitutional Drafting Committee of 36 members (who cannot be politicians or political party members), 20 of whom are designated by the National Reform Council (the secretariat of the House of Representatives), and five each nominated by the National Legislative Assembly, the Council of Ministers and the NCPO. The NCPO has the authority to nominate the chairperson of the Constitutional Drafting Committee.

The Constitutional Drafting Committee, headed by the noted legal scholar Borwornsak Kuwanon, completed the first draft of a new constitution on 17 April 2015 (Tonsakulrungruang 2015). Prime Minister and junta leader Prayuth Chan-ocha expressed optimism about the document, arguing that it would 'effectively resolve' the country's protracted political crisis (Parameswaran 2015). The Constitutional Drafting Committee hoped that the bill would guard against 'parliamentary dictatorship' (Niyomyat 2015). However, many analysts found the first draft highly fraught in several respects.

Box 4.1. Timeline of constitutional events in Thailand, 2014–16

May 2014 Military coup, martial law

July 2014 Interim Constitution promulgated

April 2015 Draft constitution released, but heavily criticized

August 2015 Final draft released

September 2015 Draft rejected; new drafting commission formed

March 2016 New draft constitution released

August 2016 Constitution adopted by referendum

Controversy over the 2015 draft constitution

One of the most controversial clauses was a set of options to select the prime minister that seemed to allow the possibility of an unelected individual taking the post. Some saw this as a ploy by General Prayuth Chan-ocha, the current Prime Minister, to retain power (BBC News 2015). At a minimum, as constitutional law scholar Khemthong Tonsakulrungruang noted (2015), this would institutionalize the apolitical 'middleman' that has historically come in to resolve political deadlock in Thailand, whether it be the monarch, the Privy Council or, more recently, the military.

Another feature of the draft was immunity for the military generals involved in the May 2014 coup. It also featured a Senate that was only partly elected: of the 200 Senate seats, 77 were directly elected at the provincial level. The rest would be non-elected members, the usual hallmark of a Thai constitution produced by a military government. All of these characteristics placed it squarely within the country's constitutional tradition.

The draft also contained innovations, especially a heavy moralistic ethos and a new institution, the National Virtue Assembly (translated in the draft as 'National Moral Assembly', see article 74). The moralism reflects broader regime practice: General Prayuth has promulgated 12 core 'Thai values' that are now taught in schools. Constitutional rhetoric seeks to ensure that 'good people' are in control of government. According to Tonsakulrungruang (2015), a 'good person' in this context means 'one who is ethical and free from political influence'. McCargo (2016) noted that the rhetoric reflects 'a quest for a system in which benevolent and morally upstanding elites are able to exercise very substantive control and jurisdiction over what's going on in the society'.

Once finalized in late August 2015, the draft was sent to the National Reform Council (NRC) for adoption. The NRC rejected the draft constitution on 6 September, by a vote of 135 to 105, which surprised observers. While it is not clear why the council rejected the draft, some observers noted that elements of the military changed their views on it and lobbied for its rejection (McCargo 2015). Whether it did so out of concern for democratic criticism or because the document was insufficiently authoritarian is unclear, but there is some clue in subsequent developments.

As stipulated in the Interim Constitution, the NRC was disbanded after rejecting the draft and a new 21-member Constitution Drafting Committee (CDC) was convened. Meechai Ruchupan replaced Bowornsak as the head of the new committee, and a National Reform Steering Assembly was appointed to take over the role of the now-defunct NRC. While the Interim Constitution called for the creation of the NRC, Prime Minister Prayuth Chan-ocha simply appointed the new Steering Assembly in the absence of any provision calling for a new NRC. Media coverage referred to its goal of avoiding the 'mistakes' of the NRC, which presumably included genuine deliberation on the draft, along with its ultimate rejection. This suggests that the current process may be more effectively managed by the military.

Beyond 2015

The new CDC issued another draft constitution in late January 2016; a final version was released in March, to be put to a public referendum in early August (Lefevre and Thepgumpanat 2016). Public discussion was highly constrained by government repression of 'criticism' of the draft, but on 7 August the referendum approved the Constitution with 61 per cent of voters in favour. Turnout was relatively low, at 55 per cent. The new Constitution is less democratic than the prior draft in several ways: it moves to an entirely unelected Senate, and allows the junta and its institutions to remain in place until the appointment of a new cabinet, giving it de facto approval over the formation of the first elected government. In addition, there is a long list of reforms that will constrain the government going forward. It also grants the Constitutional Court wider powers (Mérieau 2016). One notable difference is that the National Virtue Assembly is absent from the new draft. Nevertheless, there is still the possibility of an unelected prime minister.

Finally, reflecting a global trend towards the interaction of religion and constitutional form, Buddhist-majority countries such as Thailand have seen a rise in demands for state protection of the dominant faith (Schonthal 2016a; 2016b; Schonthal and Ginsburg 2016). In 2016, a movement of monks agitated to make Buddhism the state religion. This would be an expansion

of the traditional formula of Thailand's constitutions, which have required the king to be a Buddhist, and obligated the state to 'patronise and protect Buddhism' while preserving freedom of worship in general. The precise formula of (and justification for) Buddhism's special treatment changes with each document. The 2007 Constitution described Buddhism as 'the religion observed by most Thais for a long period of time' to justify state patronage. Arguably, the tone of the language privileging Buddhism has been firmer under periods of military rule than civilian rule, and the movement towards a state religion is a consolidation of the maximalist position.

The 2016 Constitution goes a step further than past constitutions: while still acknowledging religious freedom, it also obligates the state to protect Buddhism and take steps to prevent its desecration (Tonsakulrungruang 2016). How these two principles of religious freedom and patronage will be reconciled in practice may be up to judicial interpretation.

Conclusion

Myanmar and Thailand represent opposite ends of the spectrum of constitutional endurance. The 2008 Constitution of Myanmar is clearly intended to endure, and yet its longevity is premised on the idea that the military is central to governance and the political order. In Thailand, by contrast, constitutional oscillation is the norm, but the military also seems to be seeking to institutionalize its guardian role. In this regard, in both countries the military and its interests are central to the issue of constitutional reform. However, the military is not monolithic in either country, and in Thailand the rejection of the first draft of the permanent constitution shows there is disagreement even within the military regime about the proper way to move forward.

In both countries the military has asserted its role as a key actor in the process of constitutional reform. In Myanmar, the approval of military MPs is required for any constitutional amendment to be passed, while in Thailand the military regime is leading the constitution-making process. This military influence affirms previous observations that the experience of constitutionmaking across Asia has been marked by an absence of popular participation in constitutional change (Blount and Ginsburg 2014). While some efforts were made to receive suggestions about amending Myanmar's 2008 Constitution, there was little transparency in the process, and no evidence to suggest that these recommendations were considered in the process of drafting proposals for reform. In Thailand, constitution-making takes place in the absence of any substantial public consultation at the front end of the process. While the prospect of a public referendum at the back end of the process provides some constraint, elites seem squarely in control, and indeed are currently attempting to manipulate public discourse in advance of the referendum.

The relationship between Buddhism and the constitution-making process in Thailand is likely to remain an issue in the future. While Myanmar's constitutional amendment process has not yet raised the issue of recognizing Buddhism as the state religion, in 2015 monks influenced the legislative agenda by advocating the passage of four laws that they claimed would protect Buddhism (Crouch 2016). In this way, power holders in both Thailand and Myanmar must negotiate how religion is reflected in law and in the constitution, a challenge found in many countries around the world today (Schonthal and Ginsburg 2016).

Constitutional reform will remain on the agenda for both countries in the immediate future. The new NLD-majority government in Myanmar is likely to continue to make efforts towards constitutional change. In Thailand, while a draft constitution was approved at a referendum on 7 August 2016, it is unclear whether this will result in a return to democracy. The constitutional reform processes in both countries suggest that the military is set to maintain a role in constitutional law and politics in the future.

Notes

- For the full text of Myanmar's 2008 Constitution see http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf>.
- An unofficial translation of this version of the draft constitution is available on ConstitutionNet, http://www.constitutionnet.org/files/thai_constitution_17_april_2015.pdf>.

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Law amending the Union of Myanmar Constitution No 45/2015

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Observation and Evaluation Report on the Coordinating Committee on Assessment of the Constitution, 2014

Order No 20/2014 on the establishment of the Implementation Committee for the Amendment of the Constitution, 3 February 2014

Order No 1/2013 of the Constitutional Review Joint Committee, dated 3 October 2013

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