

The 1997 Constitution: the path of reform

A Presentation for the Thai Update 2003 Conference in Canberra

Thailand's 1997 constitution raised great expectations for political reform. Constitution-drafters aimed to clean up Thai politics and foster a new type of politician. They aimed to institute effective curbs on state powers and even to rearrange the very mechanisms of state operation. The content of the Constitution reflected these lofty goals. There was criticism, of course – from both established political interests who feared scrutiny or loss of power, and from reformers who felt that it did not go far enough to force changes on the Thai polity, and even from other observers concerned about the lengthy charter's legalistic style.

It has now been more than five years since the Constitution was promulgated in October 1997. As the five-year anniversary approached, Thais began to evaluate the Constitution's impact on the political system.

The Constitution itself included a sort of formalized evaluation mechanism in Section 336, which empowered the Election Commission, the National Counter Corruption Commission, and the Constitutional Court to propose amendments to the National Assembly or the Cabinet five years after promulgation.

Informally, evaluation of the Constitution made its way into the public discourse with parliamentarians, academics, political commentators in the media, and civil society groups discussing the performance of the Constitution and even suggesting possible amendments.

King Prajadhipok's Institute joined in and tried to promote this discourse through its fourth Congress with the theme "Five Years of Political Reform under the New Constitution". For the congress, KPI

commissioned 15 research studies on various aspects of the Constitution, and results were presented and discussed in five group discussions: Rights, Liberty and People's Participation; the New Election System and Inspection of the Exercise of State Power; People's Politics; Political Institutions; and Independent Constitutional Organizations.

I will not dwell on the exact content of the Congress IV discussions, except to say that many of the ideas I am about to address were raised. If you are interested in the Congress proceedings, summaries and support documents are available from KPI.

Today, however, I want to give you my personal evaluation of the 1997 Constitution and the path of political reform. I will begin with the strengths and weaknesses of the Constitution. Next I want to comment on the absence of formal recommendations for amendments, and finally I would like to make some near-term predictions about the relationship between the Constitution and the political scene.

To begin with the strengths.

The Constitution provided many particular structural or procedural measures to improve the political system and to politically empower and protect Thai citizens. The list of such measures is long, but notable among them are election reforms, especially the counting of ballots at central counting stations rather than at polling stations; controls on political office-holders, such as asset declaration requirements; and the mandate for decentralization. The details of such improvements have already been thoroughly discussed elsewhere. Instead of repeating those details, I wish to turn to the broad strengths of the Constitution.

One of those broad strengths is the strides it made in the inspection of the exercise of state power. New directives, like the asset declarations, and new or remodeled institutions, like the National Counter Corruption Commission, the Administrative Courts, the Constitutional Court, the Auditor-General's Office, and the Senate, were designed to, in a sense, provide a fourth branch of the state, an inspection branch, to compliment the traditional executive, legislative, and judicial branches.

The system is not yet completely in place. For instance, the full compliment of three Ombudsmen, who are supposed to deal with complaints concerning government and state officials' actions, has yet to be appointed, and the ombudsman mechanism is still largely untested. And even for institutions that have been operating for several years already, such as the NCCC, the limits of their authority have not yet been fully tested and challenges to their authority still emerge.

Nevertheless, the fact that these institutions exist and operate holds the promise that state institutions and actors can be made to work for the benefit of the Thai people and the good of the nation rather than for their own interests.

Another broad strength of the Constitution is its legitimacy. By this I mean that the process of drafting the constitution was more broadly inclusive than those used to produce previous constitutions, and that the Thai public has more reason to embrace the constitution.

As most of you know, the Constitution Drafting Assembly included a wide range of members – 23 scholars from various fields of expertise, and 76 provincial representatives selected from among lists of nominees chosen by the people of each province. In the course of the drafting, public meetings were held throughout the country to seek comment on the contents of the

draft. While the “people’s constitution” aspect of this constitution is perhaps overemphasized, when one recalls that Thailand’s past constitutions had been drafted privately by small military or political cliques it is appropriate to applaud the comparatively open process and broad participation that produced the current constitution.

More importantly, there is reason to believe that this greater legitimacy has helped many Thai citizens to identify with the Constitution. Since the promulgation of the Constitution, we have seen many groups centering advocacy efforts and protests around constitutional arguments. For example, opponents of the Prachuap Khiri Khan power plants and the Thai-Malaysian gas pipeline turned to constitutional provisions for public participation in the planning of state projects as a major foundation for their protests. At least in part because of its legitimacy, this constitution has become entrenched in the popular consciousness to a degree that preceding constitutions have not been.

Yet another broad strength of the Constitution is that it guarantees a broad range of rights and freedoms unprecedented in Thai politics. Rights and freedoms are so important in the Constitution that the entire Chapter 3 is devoted to them, coming after the chapter for General Provisions, which include a guarantee to protect human dignity, rights, and liberties of the people, and the chapter concerning the King. Elsewhere in the Constitution, mechanisms and institutions, such as the National Human Rights Commission, are provided to safeguard rights and freedoms.

Guarantees of rights and freedoms are obviously good for their own sake. They protect citizens from the arbitrary exercise of state power and are even meant to compel the state to work to improve the quality of life for the people.

At least as importantly, certain rights and freedoms ensure space for the public in the country's political decision-making processes, and foster a more inclusive political system that should contribute to political stability.

Political stability itself is a broad strength of the Constitution. The notion of political stability was very important in the drafting the Constitution because of Thailand's long and often painful experience of instability in civilian governments. For the past 30 years, Thailand has sought to achieve stable civilian government, and it appears that the Constitution has taken the country in that direction.

In addition to encouraging the previously-mentioned inclusiveness, the Constitution provides many mechanisms for encouraging stable civilian governments. The most direct of these mechanisms are those that encourage the formation and continuation of large, stable political parties – a direct attempt to discourage the formation of fractious coalition governments that have been the norm in Thailand.

Mechanisms include the provision of party list seats in the House of Representatives, and restrictions on MPs' ability to switch parties at will. The provisions concerning no-confidence motions, requiring that two-fifths of the House must agree to launch a no-confidence motion against the prime minister, and that a replacement prime minister be named before the motion is made, are also aimed at preventing the frequent break-up of coalition governments.

These stability mechanisms have apparently worked, as evidenced by the current Thai Rak Thai government. The Thai Rak Thai party itself enjoys a majority of seats in the House, and it firmly leads a seemingly stable coalition of other parties in governing the country. Despite the Thai Rak Thai party's size, and the fact that it was cobbled together of several

different factions, one of which is infamous for making and breaking coalition governments, its government has endured for two years and shows no significant signs of self-destructing before the end of its term. In fact, it is widely expected that the party will win a second term in office, and its leader, Thaksin Shinawatra, has predicted that his party will govern Thailand for 20 years.

This remarkable achievement is not solely due to constitutional provisions – Thaksin adopted innovative political marketing techniques and used unprecedented amounts of money in his campaign. He also absorbed local political figures and relied on traditional political canvassing techniques.

But in addition to these factors, constitutional mechanisms have played a role in the rise of Thai Rak Thai, especially in allowing Thaksin to keep a strong hold over his party, his House coalition, and his cabinet.

On this note it is time to turn to the weaknesses of the Constitution.

One weakness is that the Constitution has perhaps done too much to strengthen political parties and ruling governments.

A common complaint is that under the new Constitution parties have too strong a hold over their members. With the requirement that MPs must be members of parties, and minimum membership duration requirements for candidates in House elections, parties can quite conceivably expel dissenters and cut them out from membership in the House. There are concerns that this power could stifle legitimate, constructive dissent.

Another criticism is that with stronger government, the Opposition is powerless. We see that the current opposition has been almost completely ineffective both in and out of parliament. Although it has worked hard

through its positions in House committees and through the media to challenge the government, especially with allegations of corruption, most of the Opposition's formal actions are blocked in parliament. While this ineffectiveness is possibly due at least in part to the Opposition's own shortcomings, we can see that a strong government has the ability to make the opposition procedurally impotent.

Similarly, it appears that there may be too much scope for a strong government to circumvent or just ignore the watchdog institutions that are supposed to inspect its exercise of power.

Some of the independent constitutional organizations, notably the National Human Rights Commission, are weak and have little in the way of formal powers to exercise against the government. Even relatively strong institutions, like the National Counter Corruption Commission, are beginning to see the government challenging their authority. A case in point is the Veeraphol Duangsoongern dismissal case, where the government readily supported the Civil Service Commission in undermining the NCCC's order that Veeraphol should be dismissed. Another example is government indifference to asset declaration evasion charges against first Thaksin and now Deputy Transport Minister Pichet Sathiratchawal.

More disturbing to some is the possibility that a government may be able to undermine the independence of the Senate. So far, the Senate has served as a major brake on government power through its roles in reviewing legislation, accepting and forwarding petitions from aggrieved persons, and selecting members of other independent constitutional watchdog organizations.

There is now, however, evidence of increasing numbers of pro-government senators in the Senate, even though senators are supposed to be

politically neutral. Based on Senate voting records, there is reason to believe that the pro-government faction, which earlier had been perhaps 60 of the Senate's 200 members, may now be as large as 130 senators. A Senate biased in favor of the government could in turn undermine the independence of other watchdog agencies through its role in selecting the members of those agencies. There are some fears that this may have happened already in the recent appointment of four Constitutional Court judges who apparently have links with the government.

Another weakness of the Constitution, related to fears of excessively strong government, is that the Constitution may be too easy to amend. The few formal controls on amendment are listed in Section 313. Basically, amending the Constitution requires only a proposal from cabinet or at least 1/5 of parliamentarians, followed by three readings in which the amendment must receive the support of at least half the number of current members of both Houses.

The organic laws that provide implementation details for directives mandated in the charter are even easier to amend - they can be amended as ordinary acts of parliament.

It is possible that a strong government with a parliamentary majority could simply amend the constitution at its whim. Of course, there would likely be public resistance stemming from the Constitution's legitimacy, but a government could conceivably ignore such resistance.

Not that amendment would necessarily be bad. There are certainly provisions in the Constitution that are controversial. For instance, the requirement that candidates for election to the House must possess at least bachelor degree level education can reasonably be interpreted as undemocratic, and a contradiction of promises of rights to political

participation. Similarly, party membership requirements on House candidates rob politicians of the ability to run for office freely and independently. These, and many other procedural problems, have been widely considered as likely candidates for amendment.

This begs the question, why, now that the five-year mark has been passed, have there been no formal recommendations for amendment from those bodies – the Election Commission, the Constitutional Court, and the National Counter Corruption Commission - empowered under Section 336 to propose amendments?

In the approach to the fifth anniversary of the Constitution there was a great deal of discussion about possible amendments. The media widely reported discussion among MPs about amending Section 107 to make it easier for MPs to switch parties.

So far, however, the only semi-formal suggestion has come from an Election Commission working committee, suggesting a change in the constituency basis of Senate elections. Currently, for the purpose of Senate elections each province is a constituency, with most provinces having sufficient population to have multiple members, as many as 18 for Bangkok. The EC committee has suggested that for the purposes of Senate elections, multi-member provinces should be divided into multiple constituencies, apparently each electing a single senator.

It appears that this suggestion was made not to fundamentally change the character of senate elections, though it would likely do so, but rather to reduce the difficulty and cost of conducting re-elections in the event that candidates are disqualified – something that drew much attention over the multiple rounds of the first Senate election.

The EC has not yet formally proposed the suggestion to cabinet or parliament.

So why the absence of formal suggestions?

One reason is that in the public discussion on possible amendments in the approach to the anniversary of the Constitution, the test balloons proposed did not fly. Amendment suggestions, especially suggestions about amending Section 107, were met with significant public resistance, primarily from academia and the media.

Another reason is that the organizations empowered to propose amendments are afraid of being seen to want changes for their own benefit rather than for the benefit of the country. The EC probably believed that its suggestion on changing Senate elections would be well-received because of the public's frustration with seemingly-endless rounds of voting during the last Senate election, but even this suggestion has been criticized.

Finally, there is probably a concern in these agencies, and certainly in academia and the media, that any amendment proposals at all would open the floodgates to wholesale amendment of the Constitution at government discretion. Many politicians want Section 107 amended so they can switch parties more easily. Many senators want changes to allow them to be elected to consecutive terms. While the risks and benefits of these and other changes are debatable, few observers are comfortable with the idea of the government being able to undertake such amendments purely on the grounds of its own political calculations.

So, we see that after five years the Constitution has exhibited certain strengths and weaknesses. There are areas that may deserve possible amendment, but there is pressure to avoid making any amendments

whatsoever. Where will this situation lead? I will make a few predictions for the near future.

We will not see any amendments to the Constitution any time soon. Concern about public perception and fear of opening floodgates will prevent any of the actors involved from seriously pursuing amendment.

We will see a struggle between independent constitutional organizations, especially the National Counter Corruption Commission, and the government as they jockey to define the extent of their powers. The National Counter Corruption Commission will be interesting to watch, not only because of its wide role but still somewhat vaguely-defined powers, but because it will later this year be changing over to a new team of NCCC members. Observers are anxious to see whether the NCCC's active stance survives a leadership change.

Another area to watch is the Administrative Courts, which have begun to figure prominently in controlling the exercise of state power. While the Administrative Courts of First Instance have made some bold decisions overturning particular exercises of state power, the Supreme Administrative Court has not made enough rulings yet to establish a clear picture of how aggressive it will be in performing its function.

The Constitutional Court should be observed to see whether fears of a growing pro-government bias are founded.

Other organizations that may prove interesting are the ombudsmen and the National Human Rights Commission as they begin to operate and try to influence the government.

If the government is seen to systematically ignore or undermine these institutions, the long-term stability of the political system could be threatened.

The Senate is possibly the key institution to be concerned about. While the ideal of a politically neutral Senate was probably never entirely possible to achieve, an overtly partisan Senate would undermine the perceived legitimacy of the Constitution and threaten the long-term stability of the political system.

Another prediction is that we will continue to see the public, in the form of individuals and interest groups, try to assert influence on political decisions through constitutional mechanisms such as petitions and public hearings.

So far, the success of such attempts has been very limited and the current government is showing a lack of interest in dealing with the public through these constitutional mechanisms. Some members of the activist community are growing dissatisfied with the situation and are beginning to lose faith in constitutional channels for pursuing their grievances. If the perceived legitimacy of the constitution is undermined, the long term stability of the political system, and Thai democracy itself will be threatened.

While my next point is not really a prediction, I want to mention a few words about decentralization. Decentralization of many powers and responsibilities to local government organizations is mandated in the Constitution, and details of decentralization have been set in the Decentralization Act. Among those details is the directive that 35% of state budget should be allocated to local governments by 2006.

Decentralization is potentially very important. It has major potential impact on the people's lives through the delivery of state services. The mandate for decentralization is a major change for Thailand, which has long

delivered state services through centralized ministerial structures rather than through local governments.

At this time it is not clear how decentralization will progress. At issue are the ability of local government structures to perform expanded roles, and the willingness of central state structures and the government to devolve responsibility, authority, and money to local governments. The government does not appear anxious to pursue decentralization, and has even openly challenged to Decentralization Act's agenda for allocating state budget to local governments. If the constitutional mandate for decentralization can be ignored with impunity, what does that say about the importance of following other directives in the Constitution? It will be interesting to observe what happens.

Now, slightly more than five years after the promulgation of the 1997 Constitution, Thailand is still trying to fully implement the Constitution's provisions and figure out its political implications. The Constitution is still hailed by many as a triumph for political reform, but there are growing numbers who complain that important ideals expressed in it have not been and may not be realized. If more progress is made towards realizing ideals, especially concerning public participation and transparency, the Constitution could be the foundation for enduring democratic civilian rule in Thailand. If the ideals are undermined, the Constitution may end up being just one more in a long line of disposable charters on Thailand's rocky path of political turmoil.

Added to this threat of failure, there is also the threat of success – will the government-strengthening mechanisms in the Constitution lead Thailand to stable democracy or give some government an authoritarian monopoly on

power? Success in this area could lead to an overall failure of the Constitution.

These things said, I do not want to sound too negative. The path for political reform has been paved. Observers, and Constitution drafters may not be completely satisfied because of their high expectations. Still, many of the Constitution's aims have been achieved. Politics is being cleaned up. Thailand has, for good or ill, the strong government that it wanted. The prime minister is able to control his party and his government, to command the loyalty and obedience of members of parliament and to remove inefficient cabinet members from office.

These are all improvements over the instability of past civilian governments. While there are still causes for concern, we must not discount the important achievements made under the new Constitution. I am personally optimistic about the prospect for further improvement in Thailand's political stability, respect for the people's rights and freedoms, and the growth of a vibrant, inclusive, participatory democracy.

Thank you.