Comparative Constitution Drafting Processes in the Philippines, Thailand and Burma: Drafting Process plays Crucial Role for Contents

For a society where fundamental human rights and civil rights are guaranteed, laws that are made in a way without upholding the consent of governed may not be considered as fair. This ideas will apply most importantly in constitution making. It does not necessarily mean that all the people must be involved in all law making processes, but it is necessary that those who make laws have the people's mandate.

While many are interested to debate the contents of the constitution, we should not neglect that the drafting process itself is the primary determiner of the contents of the constitution.

For a nation where democratic atmosphere has prevailed may start their debates on the contents, nations where any form of an authoritarian governance is existing must start debates on the constitution making process. We can also lean that how the world longest lasting constitution of United States of America was made. Delegates to the constitutional convention could really represent the will of the to-be-governed by the upcoming constitution. Other examples also exhibit that a free and fair constitution making process can guarantee a lasting constitution. Australia, Sweden, Norway, Japan, Federal Republic of Germany are among good examples.

Likewise, the collapse of constitutions written under totalitarian and authoritarian regimes reflect that the constitutions did not take into account the will of the governed when drafted. The constitutions in such countries were approved by totalitarian regimes in a way that the regime could ab-
olutely control. It became clear the government-sponsored drafting process determined the contents of the constitutions.

It may be rather difficult to say that the contents of one constitution are better or worse than that of others, because the contents may vary from country to country depending their political needs. But what we can conclude from a comparison among the different constitutions is whether the constitutions represent the will of the people or not. Most constitutions of western countries attempt to represent the will of the people while all totalitarian and authoritarian constitutions have the characteristic of not representing the will of the people. This differences result from how the constitutions are drafted.

There are also some relevant experiences in ASEAN nations that constitution drafting process can determine the contents in final draft of the constitution. Recent Thai constitution drafting process and Burma's present constitution drafting process demonstrate the best examples. The Philippines, Indonesia and Cambodia have also given very good lessons about whether or not a constitution represents the will of people due to how it was drafted and approved.

Although there is no international blueprint for how a constitution drafting process should be carried out, it is not acceptable if the process is totally controlled by those who illegitimately hold state power. For the purpose of this paper, I will examine the constitution drafting processes in three countries— the Philippines, Thailand and Burma.

**The Philippines:**

The Philippines' present constitution, also known as the 1987 Constitution, is the fourth one in the Philippines' political history. It was written after Ferdinand Marcos was forced to step down by a People's Power Revolution. The constitution clearly reflects the people's strong desire to prevent the re-emergence of dictatorship. The Filipinos were able to write the 1987 constitution in a way that represents their will because they were able to control the process.

The 50 member-Constitution Commission was appointed on April 23, 1986 by the Ms. Corazon Aquino, who was serving as interim president at that time under the temporary constitution, also known as freedom constitution. When the Constitution Commission drafted the constitution they tried to bring the opinions of the people into account at all points during the drafting process.
Eighteen sub-committees were formed under the Constitution Commission to work out the details on special issues. These committees collected the opinions of the people and combined commonly held ideas into the constitution. The Commission arranged public hearings, plenary sessions and public consultations in different parts of the country. Generally, the constitution drafting process of the 1987 constitution was probably the fairest ever in The Philippines.

The experiences of two previous constitution drafting processes are the experiences leading to the 1987 constitution making in terms of emergence of the constitution making that will take into account the will of the to-be governed. The 1935 constitution was drafted during a transitional period when The Philippines was under US control. That constitution was drafted by a Constitutional Convention as provided by the Philippines Independence Act approved by US president Franklin D. Roosevelt. The 1935 constitution was ratified by the Filipino electorate.

The political atmosphere in the early 1970s was a major factor for the emergence of the 1973 constitution. Ferdinand Marcos, who has been president of the Philippine since 1965, suffered from the 1971 Senate election results. Marcos' opponents won six of eight seats in the Senate. An increase in the people's support for Benigno Aquino forced Marcos to make changes in the constitution. On March 16, 1967, the Congress passed a resolution to convene a constitutional convention in 1971. Marcos declared martial law on September 23, 1972. Marcos placed several members of the political opposition under arrest, made major changes in government, and took control of the mass media.

The most important point was Marcos' attempt to change the system of government from a presidential one to a parliamentary one. Aquino's popularity among Filipino indicated he would probably defeat Marcos in the upcoming presidential election. In order to prevent this, Marcos administration introduced a parliamentary government system in the 1973 constitution. Commentators pointed out that whatever system Marcos chose, Marcos would be disqualified from running in the third presidential election, because of the stipulation in the 1935 constitution. Aquino was most likely succeed him. Marcos governed the country without elections for the executive post under the 1973 constitution until he was defeated by the people's power revolution. Instead, Marcos chose the rule through a series of referenda.

Under the 1973 constitution, Marcos concurrently held the positions of president and prime minister. The government could not be dismissed by
the legislature with a vote of no confidence, as is allowed in most parliamentary system of governments. Marcos extended preserving his own family by appointing his wife as Mayor of Manila, and later minister post, his daughter as leader of youth movement and his son as presidential assistant.

Filipino people might have learnt form their suffering under the dictatorial rule of Marcos what sort of constitution they need to guarantee their rights, how to restrict the power of the president, and how the constitution should be drafted and ratified.

The drafters of the 1987 constitution included special provisions for how to prevent dictatorship. The 1987 constitution also extends fundamental rights and civil rights. People's dreams were made possible in the constitution as the drafting process was under the control of those who represented the will of the governed.

**Thailand:**

Probably one of the most important events in recent Thai political history is the Black May 92 crisis, which was also a constitutional crisis. Leading this constitutional crisis is the fact that previous constitutions were drafted and approved under different types of authoritarian and semi-authoritarian governments resulting lack of peoples' rights. The fact that Thailand's politics was highly influenced by army personnel may make people's disappointment and led to the 1992 constitutional crisis.

Thailand became constitutional a monarchy in 1936. Since then, the country has not enjoyed political stability under any of subsequent constitutions. 15 constitutions have been enforced during the last 65 years of constitutional monarchy in Thailand.

Recently completed constitution making process derived from the peoples' dissatisfaction with previous constitution.

In 1991 there was a military coup in Thailand in which a regime calling itself the National Peace Keeping Council (NPKC) seized power from the elected government of Chatichai Choonhavan. The NPKC carefully picked twenty members to form a commission to draft a permanent state constitution.

In December 1991 the NPKC passed a permanent constitution for the
Kingdom of Thailand which raised several controversial points, including allowing a non-elected person to become prime minister and an increase in power of non-elected Senators. Under these provisions, Gen. Suchinda Kraprayoon, one the coup leaders subsequently became prime minister of Thailand.

These events angered many people and finally led to mass demonstrations. The government countered these mass demonstrations with violence that, according to confirmed sources, resulted in 52 dead, 700 injured, 200 missing and 3500 detained. The upheaval, one of the most bloodiest in modern Thai history, was later known as Black May 92. The conclusion that can be drawn from the experience of Black May 92 is that many lives of Thai people were sacrificed for a more democratic political system, including an elected Prime Minister and a democratic constitution.

Although successive governments amended the 1991 constitution, these charges failed to meet the democratic expectations of the people who continued to demand a fully democratic constitution drafting process. Consequently, the present constitution drafting process of Thailand and the events leading up to it, are a good lesson for how people can struggle against authoritarian pressure for an emergence of democratic constitution drafting process. The whole Thai constitution making process is solely in hands of those who are willingly to reflect the will of people.

Burma:

After the 1988 uprising, The State Law and Order Restoration Council (Slorc) staged a coup on September 18, 1988. After they took power, they issue Statement No. 1 which said that they would hold a multi-party democratic general election in 1990 and transfer power to the elected people’s representatives.

The Slorc expected its political party National Unity Party (NUP) would win, but instead the National League for Democracy (NLD) under the leadership of Daw Aung San Suu Kyi, captured over 80% of the seats. In order to justify their refusal to recognise the newly elected government, the Slorc issued Order No. 1/90 which stated that the duty of 1990 elected representatives was not to govern but rather to draft a new constitution.

The NLD had attempted to adopt a temporary constitution and to assume, but Slorc's Order No. 1/90 prohibited this. In mid 1992 Slorc de-
declared plan to convene a Nation Convention to lay down the guidelines and basic principles for a new constitution.

By initiating a constitution drafting process under its strict control, the Slorc has been able to delay transfer of power to the elected people's representatives from the 1990 election and to make sure that army will play the leading role in national politics in the future. The National Convention held its first session on 9 January 1993. Sessions of the National Convention have been postponed several times. After 4 years the National Convention still has not yet been completed.

The Formation of the National Convention

More than 600 out of 702 total delegates to the National Convention were hand-picked up by the Slorc. Only 99 elected representatives were entitled to take part in the National Convention and the rest represented seven other categories of representatives such as workers, peasants, government servants, leaders of political parties (no matter of election or not), intellectuals, army personnel and respected politicians, who were believed to be Slorc-appointees. Slorc unilaterally declared that the National Convention was convened to achieve 6 aims. The primary stipulation was that the Tatmadaw (army) would take the leading role of national politics in the future.

The Slorc made clear that there could be no questioning of the principles of military's leading role in politics in future Burma. The freedom of speech of the delegates is strictly prohibited. Action can be taken against any delegate who is considered delivering speech or circulating pieces of paper criticising National Convention.

The question of the legality of the National Convention

The legality of the National Convention is highly controversial. This became clear after the National League for Democracy withdrew from what many have called the "sham" maneuverings of the regime. Today, only 15 of all of the 485 elected representatives from 1990 election are participating in the National Convention.

Many have openly pointed out that the Slorc's National Convention is not the proper body to draft the state constitution. Total control of the Slorc in the National Convention is due to the text they need. The princi-
ples laid down by National Convention do not meet the will of the people and the needs of Burma's diverse ethnic groups.

The NLD's Constitution drafting process:

The NLD had expressed its own view on the future constitution of Burma since the election campaign period in early 1990. However the NLD has made clear that basic principles for a lasting state constitution should only be adopted by a genuine national reconciliation convention.

After winning in the 1990 general election, the NLD prepared to adopt a temporary constitution. Elected representatives of the NLD gathered in Ghandi meeting hall in Rangoon in July 1990 and adopted a temporary constitution aiming for the transfer of power from the Slorc. On the eve of the meeting, the Slorc issued Declaration No.1/90 stating that it held power under martial law and was not bound by any constitution and would hold power until it had ensured that a sufficiently strong constitution was in place. A new wave of arrests followed, in which mainly elected people's representatives from the NLD were imprisoned.

The May 1996 NLD party congress confirmed again that the NLD was to draft a state constitution while continuing boycott the National Convention. The Slorc angrily responded to the NLD's plan to write a constitution, because it directly challenged the legality of the National Convention. The Slorc issued a new law No. 5/96, prohibiting any body from writing or discussing a state constitution or from criticising the criticism of National Convention.

NCUB constitution drafting Process

The National Council of the Union of Burma (NCUB), an opposition alliance formed in liberated areas, that is the areas out of Slorc's control, is now working actively on drafting a democratic constitution.

The NCUB has made it clear that the constitution being drafted by the NCUB is to be presented to the constituent assembly or a similar body which will be convened when Burma achieves democracy. The NCUB has organised three international seminars and several local seminars on its proposed draft constitution to which representatives of different ethnic
and political organisations were invited. The NCUB is just preparing for the future by beginning a free and frank discussion about constitutional matters, which is needed amongst the different ethnic groups and the political organisations.

The nature of NLD constitution is temporary while the NCUB is proposing a draft for a democratic Burma to be presented in a genuine National Convention, or Constituent Assembly, when Burma achieve democracy.

**Comparative points**

The control of the process and the final text of the constitution are mutually interdependent. While the Philippines and Thailand are moving along the right path in the constitution drafting, Burmese people may be able to learn from their experiences about how important the drafting process is. In inclusion, I would like to make some comparative points.

1. **Bottom-up and Top-down drafter-selection methods**

Generally, I would say that there are two types of selection methods for the drafters: the bottom-up method and the top-down method. If the drafters are chosen to represent the will of the governed, that drafter-selection process can be said the bottom-up. If the drafters are to represent the will of those who are in power, the drafter-selection method is top-down. There has been clear enough examples that those who pay special intention on the will of the people are chosen by bottom-up method. We can say that most of the Thai Constitution Drafting Assembly (CDA) - members were chosen by a bottom-up method. Despite criticisms that the appointing power may influence the works of Constitution Commission (CC), the CC members to draft the 1987 Philippines constitution were also selected in a bottom-up method. In every work throughout the constitution drafting process, the Constitution Commission took into account the will of the people. As long as the drafters are chosen to represent the will of the people, the drafter-selection method may be considered as bottom-up.

It is still early to say what type of drafters selection method of both NLD and NCUB. However it is clear that Slorc's drafter-selection method is absolutely top-down since delegates to the National Convention have no right or chance to include the will of the people in the constitution.
2. All forces working together in a single drafting process is essential

All forces in Thai society, including the opposition and ruling parties, worked together to draft a single constitution. However, as a result of the illegitimacy of the Slorc's constitution drafting process, the National Convention, different political forces in Burmese society are now involved in drafting two other constitutions—the NLD's one and the NCUB's one. As long as these rivals processes are going on, it is questionable as to how diverse political and ethnic groups can attain national reconciliation in Burma.

3. People's participation is key to the emergence of any democratic constitution drafting

Despite the fact that the Slorc constantly claims that the emergence of a state constitution is the duty of all Burmese citizens, they issued Law No 5/96 prohibiting any citizen or political party, including the NLD, from drafting a constitution outside the National Convention. In reality, therefore, the duty of Burmese citizens in the formation of the state constitution is merely to be silent.

The participation of the people such as exists in the Philippines and in Thai constitution drafting process is what the Burmese people so greatly desire. Having debates, agreements or disagreements over the articles, arguing clauses of the charter, and explanations of the CDA and so on have an enormous effect on the contents of the final draft.

4. Final approval process must be fair, no group should enjoy special privileges

The most interesting step in the Thai constitutional process for most Burmese is the way in which the constitution is approved. The process to approve the Thai constitution was clearly announced. If the Thai parliament might have failed to approve the draft, the people had the opportunity to do so in a referendum. This is the process that the Burmese people have been asking for, because at present the Burmese process is very secret and no one knows how a constitution will be approved.

As the CDA which represents the will of the people intends to achieve political reform through this constitution, there are many provisions that restrict the behaviour of politicians. Some governing politicians had publicly expressed their opposition to the draft, but they finally approved it
due to intense pressure from the present economic crisis.

If the constitution might have gone to a popular referendum, many are saying that there would have been conflicts between politicians and the people. Some academics warned that all key players in Thai politics should be careful to avoid confrontations like that of Black May 92. Thai people still remember their experiences and victory during the constitutional crisis in 1991-92.

The present Philippines constitution was approved at a time when the country was not under repressive rule. If Burma's constitution is to be approved under such a condition, a properly authorised constitutional assembly alone may approve. Under the present political situation, a people's referendum is probably the best way to approve the constitution since the constitution drafting process does not include the opinions of all major political forces and, most importantly, the will of the people.

5. People should have the ultimate power to alter any provision of an already-approved or amended constitution

Although the Slorc has not passed a constitution, the principles that have been laid down by the National Convention clearly demonstrate that only a person with military skills can be president. That criteria reflects absolutely military domination. Burmese people might be interested to learn how the Thai people responded when Gen. Suchinda Kraprayoon seized the position of prime minister without being elected.

What to be careful is whether the legislature alone should be allowed to make amendments to the constitution without the consent of the people who played important role in approving this new Thai constitution. We can not assume that the present Thai legislature sincerely approved the constitution; it did so it was afraid of people's pressure while the people are suffering from an economic crisis. The way Thai constitution was approved, therefore, is likely the way that is highly influenced by people's participation.

The constitution should be amended by the same method as that of approved. Some Thai politicians who oppose this -new constitution have publicly expressed that they will amend the constitution later in the legislature. It is very likely that the politicians will cut some provisions in the constitution that restrict politicians while promoting the right of the citizens. For these provisions, the CDA worked hard with the support of the
people. Therefore, if there the constitution is to be amended by the legislature, the amendment should have the people's approval.

The present Philippine constitution prohibits the president from running for reelection for a second-term. President Fidel Ramos' attempt to alter that provision was terminated by a people's campaign under the leadership of the former president Aquino. President Ramos' attempt to amend the constitution is not conformity with what the drafters had intended.

We should not forget that some of the provisions especially provisions relating to making amendments to the constitution are part of drafting process. It is meant that any constitution amendment process should give special consideration how the constitution was drafted and approved. If the Filipino people really want to restrict presidential re-election, the constitution should not allow the governing authority alone to amend the provision. Such an amendment should have to be approved by the people.

6. What Burmese can learn form others' constitution drafting processes

Constitutional development in Burma is currently very unsatisfactory, but the Burmese people can learn from what has happened in the Philippines under the 1973 constitution and how 1987 constitution came into force. In addition, Burmese may learn from what has happen in Thailand's constitutional history over the past six years. If Burmese people are aware of the Thai experience, they can use this knowledge to achieve a democratic constitution. However, Burmese should also be aware weak points in those two countries' constitution drafting processes.

Endnotes:

1. There had been three constitution in Philippines before the 1987 constitution. These are the 1898 constitution, the 1935 constitution and the 1973 constitution.

2. The constitution drafters were not hand picked, but formed a body to draft accordance with the colonial law. What is important to note concerning the drafting of the 1935 constitution is that the US imposed some restrictions to the contents of the constitution.

3. For the international community, there was a variety of views critiquing the National Convention. While the United Nations, for example, pointed out the weakness of the process and asked for the open participation of democrats including Daw Aung San Suu Kyi, ASEAN nations are just urging the Slorc to complete the National
Convention.

4. This meaning was expressed by Daw Aung San Suu Kyi at 42nd anniversary of Union Day. She read a NLD’s Statement No. 9 which mainly deal with constitutional matters including the approval a new constitution and ethnic issues. See, Analysis of constitutional principles laid down by NLD and Mannerplaw Agreement, Shwe Hka-maunt Bulletin, December 1995, published in Burmese by NLD - LA.


7. The decision was declared at the completion of the NLD party meeting held on 26-28 May 1996, the sixth anniversary of the 1990 election.


9. Democratic Alliance of Burma, one of NCUB members, since middle of 1990 started drafting the constitution since before NCUB was formed. NCUB took over the process in 1994.