Burma, South-East Asia and
The Road to Democratic Constitution

By Vitit Muntarbhorn*

In 1997 the destinies of Burma and other South-east Asia countries became intertwined when Burma became a member of the Association of South-east Asian Nations (ASEAN). In terms of inter-State solidarity, this was welcomed by the governments of the region. However, in terms of democracy, human rights and the constitutional process, it was a decidedly paradoxical affair.

The paradox emanates from the fact that Burma is still governed by junta rule, a direct contradiction with aspirations of democracy. It is rife with human rights violations, a shameful travesty of international norms. It is replete with oppression and a manipulative process whereby the junta is seeking to finalise a new so-called national Constitution which flies in the face of popular participation in the constitution-drafting process.

The world may need to be reminded that the junta stole the elections from the people in 1990. It was the democratic groups that won those elections. Yet, they saw themselves deprived of the fruits of their labour. The elections themselves were preceded by massive persecution of the proponents of democracy with widespread repression in 1988. To this may be added the longstanding armed conflict between the junta and ethnic groups in Burma, such groups have been seeking self-determination since the end of Second World War. As a result, there are hundreds of thousands of internally displaced persons in Burma and a multitude of those who have crossed borders in search of safe refuge elsewhere. Thailand itself is a temporary home to over 100,000 Burmese refugees.

Face to face with South-east Asia, one of the most intriguing developments is the economic mess which has gained momentum since 1997. The economic growl of the so-called tigers has become the anaemic miaow of the Siamese cat. Millions of persons are now out of work, poverty is on the rise, the real sector is in the doldrums, migrants are being expelled, and the debt situation is gargantuan. Yet, behind the bane, there is the boon; there is a blessing in disguise.

It is a time for reform and restructuring. Without the economic maelstrom, those tigers would not be reforming their financial systems which have all too often been plagued by lack of transparency and a pervasive presence of cronyism. A major lesson from the crisis is that that economic maelstrom will not subside unless there is also political reform. Those countries which are democratic are emerging more rapidly than those
countries beset with authoritarian or undemocratic regimes. Aptly, it is the economic chaos which is the key factor pressing for political reform. In such context, it is timely to take stock of existing Constitutions and the constitution-making process.

It is worth remembering that not so long ago, most South-east Asia countries were colonised by outside powers. The Constitutions which were born at the time of the independence of these countries in the post-Second World War era tended to be a contract between the colonisers and elites who negotiated independence for their countries. They were not essentially a social contract between the State and its peoples whereby the State, particularly the Governments, would undertake to abide by the rights of the various peoples populating the land. Several of these Constitutions failed to reflect the rights of minorities and indigenous communities, thereby recognising a kind of "majoritarian absolutism". Other Constitutions were evolved by authoritarian regimes seeking to perpetuate their power without a popular base, whether among the majority or the minority. These tended to be a stranglehold exerted by various cliques to destroy or limit people-based participation.

Burma and Thailand personify those experiences poignantly. Burma's first Constitution of 1947 failed to settle the issue of the rights of ethnic communities, and this was a key factor in the escalation of armed conflicts between those groups and the Government. In 1974 another Constitution in Burma emerged after a coup d'etat staged by the military. It was obvious that such a document would be an instrument of authoritarianism. By comparison, until the 1997 Constitution of Thailand (its sixteenth), most of the previous Constitutions of Thailand had been written by military elements and their friends responsible for over 20 coups and failed coups in the country.

Yet, the tide is coming. Thailand's latest Constitution has been lauded generally as a participatory Constitution due to the drafting process which involved many members of the community and public hearings throughout the country prior to its adoption. It has a concrete section on rights and freedoms, while establishing many innovative checks and balances against undemocratic government. These include a Constitutional Court, a national Counter Corruption Commission, a national Electoral Commission and a national Human Rights Commission.

In addition, there are more guarantees for transparency, such as the obligation of cabinet ministers and their families to reveal their assets before and after taking office. The Thai public has been astounded by the wealth so far revealed (in the billions), and one newspaper has printed such wealth appropriately under the heading "The Millionaire's Club". Interestingly, many politicians' spouses are twice as rich as the politicians themselves, and often they pay no tax at all!

However, there is a bottom-line underlying the process of evolving this new Constitution for Thailand. Were it not for the economic whirlpool, the new

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Constitution might not have been born. It was this magnetic mess which mobilised the public to seek the passage of the new Constitution as a political cure for economic ills, granted that those ills were greatly the consequence of the nexus between political misdeeds and economic mishaps. Those politicians who had previously rejected this Constitution ultimately yielded to its adoption as they did not want to be seen as countering the public sentiment or losing their credibility.

Current conditions in Burma are, of course, very different. Given the iron stamp rule of the junta, it is highly unlikely that the junta will consult the public genuinely about the possibility of a new Constitution in Burma. Whatever draft of a new Constitution it has under wraps is likely to prolong its rule and protect its impunity, while incorporating various obstacles to prevent the leaders of the democratic groups from attaining power.

For these reasons, one can and should welcome the draft of a new Constitution prepared by the democratic groups under the umbrella of the National Council of the Union of Burma. This is a constructive alternative voice based upon these tenets:

- commitment to a multi-party democratic system;
- guarantee of basic rights and freedoms;
- direct applicability of international human rights standards;
- due process of law and access to justice;
- federalism based upon respect for different ethnic groups;
- elected people’s assembly;
- independent courts and a national Human Rights Commission;
- restrictions imposed on declaration of a state of emergency.

The Burmese scenario raises a variety of interlinked concerns for the birth, reform and implementation of national Constitutions in South-east Asia including the following:

(i) **Legitimacy**
   The legitimate entry point for the preparation of a Constitution is the involvement of the broad mass of the population and its representatives. The junta or an unelected government is evidently illegitimate as a proponent or drafter of a national Constitution. Yet, such shameless travesty persists in South-east Asia.

(ii) **Democratic Rule of law**
   This implies the need for multi-party systems, free and fair elections, Government by means of the elected representatives of the people, equality before the law, constitutional guarantees for the protection of individuals and groups.

(iii) **Process Orientation**
   The process of drafting a Constitution should be very open and participatory. The process of bringing together people from all walks of life is often as important as the ultimate written text of the Constitution as it is a means of empowering and mobilising the community to feel that the Constitution belongs to them rather than being an instrument superimposed from the top.

(iv) **Human Rights**
   Most Constitutions have a section on rights. However, many Constitutions in the
South-east Asia region refer to the rights of citizens or nationals rather than the rights of all persons on their territory. From the angle of human rights, it is important to reinforce the principle of non-discrimination advocating the rights of all persons rather than only the rights of citizens or nationals. In terms of human rights, it is international standards which must prevail over those national standards which are lower than the former.

(v) **Fair Constraints on Rights**

The constraints imposed on human rights are often in the form of duties or restrictions on the basis of national security or public order. Although in international law, some constraints are acceptable, they need to be fair, and these are to be measured from the angle of whether they are permissible in a democratic society. The criterion has to be what is allowed or restricted in a democracy rather than in an autocracy.

(vi) **Pluralism**

This calls into play the concerns of the plurality of peoples and communities in the country. It counters the "majoritarian absolutism" noted earlier and requires the consultation and inclusion of minorities, indigenous peoples and other groups within the territory, coupled with guarantees for their rights.

(vii) **Justiciability**

This implies that individuals and groups should be able to invoke directly in the courts the various rights and freedoms stated in the Constitution to test the validity of laws, policies and programmes linked with the Government and to seek their nullification if necessary.

(viii) **Good Governance**

This is rapidly becoming a key principle for measuring how power is exercised whether in the public or private sphere. It is inherently linked with the need for transparency and accountability (at least) of the machinery and personnel of Government, with remedies against dishonesty and redress for grievances.

(ix) **Check and Balances**

Most Constitutions refer to the various organs of Government and administration such as executive, parliamentary and judicial branches. They need to be based upon checks and balances against abuse of power. On one front, it is important to keep the military in the barracks. On another front, although there is usually a call for independence of the judiciary, this is incomplete; an honest and transparent judiciary is still an aspiration rather than a reality in many countries. Other mechanisms should be evolved to be more accessible to the people. These include national human rights commissions, ombudsmen, and administrative courts. These formal entities should also be balanced with non-formal entities such as non-governmental organisations, community leaders and the mass media so that they can act as watchdogs to monitor the formal instruments of Government.

(x) **Subsidiarity with Responsibility**

This refers, in particular, to the need to provide for decentralisation with responsibility. Many matters are best planned and implemented at the local levels,
and the localities should thus enjoy the subsidiary power to control and manage local resources. However, the localities should also be under a responsibility to be open and accountable to the electorate.

(xii) 

Complementary Legislation
Inevitably, the Constitution in most countries tends to provide a broad framework which needs to be supported by subsequent laws providing more details for operations. In some countries, the latter are known as organic laws. They may also be linked with delegated legislation giving powers to various authorities to evolve a sub-set of rules and regulations particularly for the administration of government. It is imperative that these subsequent laws be consistent with the spirit of the Constitution and the community should be on guard against the powers-that-be that sometimes seek to dilute the substance of the Constitution by means of other laws. However, by contrast, one may note that in those cases where the Constitution is itself undemocratic, the saving grace may be to bypass the Constitution by evolving other laws such as a Criminal Code or Criminal Procedure Code which is more in keeping with international standards than the Constitution intends to be. The ultimate test is complementarity of the national Constitution and other laws when tested against international standards.

Popular Participation
This is axiomatic and need to be integrated and mainstreamed into all laws, policies, programmes and practices. While much related to national elections and Government, it also pertains to other walks of life, including the localities, communities and families. It demands more public hearings prior to decision-making concerning actions which may affect the livelihood of communities. It calls for more public inquiries and remedies if there are infringements of people's interests. It is interrelated with particular attention for vulnerable groups, including women, children, the elderly and those with disabilities.

These yardsticks are essential for the evolution of all Constitutions. They are particularly pertinent today to the Constitution-making process and democratisation of South-east Asia precisely because the region is still faced with vestiges of undemocratic rule and antiquated Constitutions and/or those superimposed by vested interests. As this year is the 50th anniversary of the Universal Declaration of Human Rights, that great global Charter of our rights adopted by the United Nations half a century ago, it is time to turn over a new leaf. The tree of life ultimately depends upon democracy, human rights, people-based sustainable development, peaceful prevention and settlement of disputes, and environmental protection. The greener pastures will only grow with the cross-fertilisation of people-based solidarity.

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