



## *Managing the risks of inclusion and participation: Thailand as a case study*

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### *The approach taken to inclusion in the constitution building process in preparation for the 1997 Constitution*

The drafting process of the 1997 Constitution is rather complicated. Immediately after the 1992 Black May Uprising, in which people pressured the military to give up its hold of political power, the public began to discuss political reforms which could consolidate Thailand's democracy. But this goal would not be realised until five years later. It was not until 1994 that the government reluctantly appointed the Democratic Development Commission (DDC) to study the possibility of making a new constitution. The DDC was comprised mostly of academics who identified 15 agendas that Thailand would need in order to reform its politics. They produced 15 research reports as a foundation of the political reform.

Later, in 1996, the government amended the 1991 Constitution to set up the Constitution Drafting Assembly (CDA). The CDA comprised 99 members: 23 technocratic experts and 76 provincial representatives. Having provincial representatives, who were elected from each province, was a novel practice. The CDA appointed 21 members as the drafting commission. It later submitted an approved draft for parliamentary vote in 1997.

Although not mandatory, the CDA held several rounds of non-binding hearings throughout the country. It utilised a network of NGOs, local administrations and universities to hold consultations. However, the CDA did not hold a referendum as many had suggested. The final decision on the new constitution rested with the Parliament. Only if the Parliament voted down the draft would it be put to a referendum. Nonetheless, popular support for the draft was strong, evident when thousands displayed green flags in support of the draft on the day the Parliament was voting on the law. This pressured politicians to vote the draft into the constitution.

In summary, there were two forms of public participation in the drafting of the 1997 Constitution. First, there was the formal channel in which local representatives sat and debated the draft. Secondly, there was an informal channel in which a wider group had a chance to express their opinions.

### *Who was included in the constitutional reform process?*

The 1997 Constitution is mainly the product of two forces. It was spearheaded by technocrats with support from NGOs. The term 'technocrats' refers to middle-class elites. Many of them were academics or experts, with experience in policy-making, but they were not conventional elected politicians. Despite their familiarity with Thai politics at high level, they wished for more liberal politics

and less influence of money. NGOs, on the other hand, were the grassroots movements. Their main objectives were to empower marginalised people and decentralisation.

The DDC was purely elitist by nature. The 15 reports were produced by experts, mostly law and political science professors. Prawes Wasi, who led the DDC, was a medical doctor, but he was respected by many NGOs and elites.

The 99-member CDA reflected a combination of the two groups. As noted above, the CDA consisted of two groups: 23 experts and 76 representatives. Among the 23 experts, eight were public law experts, eight were political scientists, and seven had experience in politics or public administration. The CDA was co-led by Ananda Punyarachun and Uthai Pimchaichon. Ananda was a former bureaucrat from the foreign service and a businessman. He was appointed Prime Minister twice during times of political crisis because of his distance from the conventional politics of election. Uthai might be a politician but he was very prominent and well-respected. Other notable members, such as Borwornsak Uwanno, Kian Teerawit, Thongthong Chantarangsu and Panat Tassaneeyanond were scholars but many of them were also local businessmen, former civil servants, and part of NGOs.

Within the 76 local representatives no particular groups were identified as stakeholders to be specifically represented, such as women, LGBT, ethnic minorities, or religious minorities. Representation was based on geography, with one member from each province. The selection of CDA members was purely random.

Once the CDA was appointed, they selected from among themselves 21 members to form the CDC who prepared the actual draft. The CDC was comprised of six provincial representatives, six public law experts, six political scientists, and three experts in politics, public administration, or constitution drafting. There were eight academics, four lawyers, eight former politicians, and one journalist. The CDC's orientation was very technocratic.

Obviously, the military was not included. However, the reform was not extended to the military despite their adverse role in Thailand's democratisation. Excluded as well were politicians. They had long been identified as the source of Thailand's political ills. The common narrative was that politicians were local mafias who bought their seats in the House. Because of their corruption, the military found a justification to stage a coup. As a result, both 'troublemakers' were excluded from the process. Another reason for this exclusion was because of the CDA's plan to introduce more checks-and-balances and decentralisation in the new constitution. As the plan would directly reduce the power of members of parliament and the bureaucracy, it met with strong protests from politicians and bureaucrats. The 1997 Constitution reflected the increase in the private sector's role in public sphere. Private actors were dissatisfied with Thailand's bureaucratic state which was so cumbersome and obsolete that Thailand fell behind in the globalisation of the 1990's.

### Who decided on who was included in the process?

As a compromise, the reformists agreed to let the Parliament decide on who was to be included in constitution making. The Parliament appointed the 23 experts to the CDA. The remaining 76 were selected from 76 provinces. Each province was required to submit no more than 10 candidates for the Parliament's consideration. If there were more than 10 candidates, the candidates had to vote among themselves.

## Reflections on the nature and extent of participation

Despite its reputation as ‘the People’s Constitution’, the contribution of the people to Thailand’s 1997 Constitution was actually limited. The draft was prepared by the CDC, whose members comprised a majority was lawyers and academics. They were concerned with a new electoral system design that could reduce vote-buying and new agencies to enforce accountability, such as the constitutional court, the administrative court, and other watchdog agencies. NGOs and people’s organisations were not very successful in pursuing their agendas. They had pushed for a more progressive charter of rights and liberties but, for example, the CDC refused to acknowledge calls for greater gender equality. The CDC did not allow rights and liberties to be enforceable by court as called for by NGOs. Some CDC members were quite sceptical about these lay participants and stressed that they could distract the CDC from its main agenda, claiming that the process needed to be carefully directed.

Perhaps, the greatest contribution from NGOs was their vast network through which the CDC communicated with the general public. The CDC set up two sub-committees, one for public relations and another for public consultation. The public relations sub-committee broadcast news and updates on constitution drafting through television and radio. There were at least 629,232 individuals attending provincial and regional hearings as well as answering questionnaires. Three hundred business, non-governmental, and advocacy groups participated in these forums too.

This level of participation, in the drafting assembly as well as through hearings, had never before been seen in Thailand. It left a very deep impression among Thais that this was ‘the’ constitution. For the first time, the constitution could be regarded as a social contract and gain respect.

However, the downside of public participation was that it led to misconceptions. In retrospect, the 1997 Constitution was not as liberal or progressive as many understood. The agenda was set principally by progressive conservatives who wished to prevent further political chaos. It was based on their mistrust in electoral politics. As a result, the 1997 Constitution focused on the scrutiny of political power. It introduced unelected bodies as the guardians of the constitutional order. Later, this reliance on unelected guardians would be abused by the 2007 and 2017 constitutions to further undermine democracy. Meanwhile, the 1997 process missed the opportunity to reform the military, which later staged the 2006 coup. The 1997 Constitution granted several new rights but was still very conservative. The 1997 Constitution also refused to recognise gender equality for LGBT, for example. Subsequently, many drafters did not hesitate to support 2006 and 2014 coup d’états in order to preserve control over elected politicians. Nonetheless, the elite’s distrust in the majority was sometimes proven right. When public input was welcomed, many people tried to abuse it. Several Buddhist organisations campaigned for the establishment of Buddhism as the national religion. The CDC could only avoid this after agreeing to mandate that the state would protect and support Buddhism and other religions. However, this distrust in the majority’s wisdom prevented the CDA from adopting a public referendum, opting instead for a normal parliamentary vote.

The success of the 1997 Constitution backfired too. Many people believed that a good constitution was a panacea for every political problem, which was wrong. It set high expectations but then disappointed many when the authoritarian populist Thaksin won the 2005 election. Since 2006, dissatisfied with the outcome of the 1997 Constitution which brought Thaksin Shinwatra to power, many CDC and CDA members would not hesitate to stage violent protests and call for military intervention, proving their conservative leaning.

Another downside of public participation is cost. The constitution drafting industry is lucrative. The CDA, CDC, and several sub-committees received generous meeting allowances and other perks. The public relations sub-committee spent a huge amount of money on public hearings. It is difficult to assess whether the outcome was worth it. But the amount would be dwarfed by the costs of subsequent drafting. The 2017 Constitution, with the referendum, consumed 4,000 million THB. In addition to remuneration, many CDA members were able to capitalise on their status in their political careers. Many would become members of the new Senate or watchdog agencies, claiming constitutional expertise from the days of the 1997 Constitution.

Compared to the two subsequent constitution drafting processes, the birth of the 1997 Constitution was unique in modern Thai political history. It was born out of the people's general consensus that they would like new politics where the military had to cease its presence in politics. Freedom of expression was on the rise so public discussion could be done freely. These conditions influenced the nature of public participation. Despite the absence of a national referendum, the level of public inclusion and hearings were unprecedented, widespread and meaningful. This might explain the failure of two following constitution drafting processes. Although the 2006 and 2017 CDC's organised public forums and adopted a national referendum, never could anyone claim that these charters were the people's constitution. There was no consensus on the role of military and the general direction of Thailand's democratic development. Freedom of expression was severely limited that it discouraged free and open discussion on many pressing issues. As a result, public participation in 2006 and 2017 was merely symbolic and sham.

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