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Thailand's Constitutional Amendment Process Halted in its Tracks

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The sudden demise in parliament of the constitutional amendment bill on 17 March has dealt Thailand yet another debilitating blow. Political temperatures are rising again because of the continuing failure of the administration of Prime Minister Prayut Chan-ocha to improve the country's 2017 Constitution. In this picture, a man holds a sign that reads, "We are tired of Prayut, stop the 2017 constitution" during a demonstration calling for the creation of a new constitution in Bangkok on March 13, 2020.

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EXECUTIVE SUMMARY

- Six months after it began, the contentious constitutional amendment process in the Thai parliament ground to a halt on 17 March when the draft bill on amending the 2017 Constitution was rejected in its final reading.
- This came after the Constitutional Court ruled that the approach taken in the bill would be tantamount to abolishing the existing constitution, and that such a drastic move required a national referendum in order to be constitutional.
- Prime Minister General Prayut Chan-ocha was immediately blamed for failing to support the constitutional amendment process. Amending the constitution was one of the “urgent” policy issues that he highlighted in Parliament at the start of his administration in mid-2019.
- General Prayut left it to the Phalang Pracharat Party to manage the amendment process, but the core government party has never been keen on altering a constitution from which it benefits enormously, and secretly teamed up with a group of senators to delay and eventually block the bill.
- General Prayut and his cabinet have one last chance to salvage the initiative by quickly organising a national referendum on the constitution to let voters decide whether to amend it.

INTRODUCTION

The sudden demise in parliament of the constitutional amendment bill on 17 March has dealt Thailand yet another debilitating blow. Political temperatures are rising again because of the continuing failure of the administration of Prime Minister Prayut Chan-ocha to improve the country's 2017 Constitution. The stillborn attempt to tackle the problematic charter has also soured relations among government parties and threatened to split the ruling coalition.

Ironically, one lucky beneficiary of the growing divisiveness is the prime minister. Since the constitution remains unchanged, he can continue to count on most of the appointed 250 senators to back his premiership, and to vote for his return as prime minister after any early general election. The parliament's selection of a new prime minister would in that case still follow existing constitutional provisions, which allow senators to join elected MPs in voting for the head of government.¹

General Prayut has done practically nothing to support the arduous process of amending the constitution – even though its amendment, particularly easing the tough rules impeding constitutional amendment itself – as one of the twelve “urgent” policy issues that he announced in Parliament on 25 July 2019.² The premier, who has shunned joining any political party, chose to leave the thankless task to the Phalang Pracharat Party (PPP), the leading member of the ruling coalition.

The PPP has never shown enthusiasm to do any heavy lifting to change the 2017 Constitution. The party has benefited from the existing constitutional framework.³ Even though, for example, it came second behind the Phuea Thai Party in the 2019 general elections, its nominee, General Prayut, won the premiership with 500 votes (251 MPs and 249 of the 250 senators practically hand-picked by the junta that he formerly led).

Parliament's current failure to make headway in amending the constitution is now widely suspected to result from a behind-the-scenes effort to prolong General Prayut's time in power. But remaining in power without improving the constitution will in the long run further erode General Prayut's legitimacy. It will also provide potent ammunition for protesters to use in escalating their attacks on him and his administration.

PROMISE RENEGED ON, NO ACTION

In the wake of recurring youth-led protests demanding his resignation, the drafting of a new constitution, and reform of the Thai monarchy, General Prayut went on national television on 13 August 2020 to call for an end to “the old-fashioned politicking” which he blamed for spreading the “disease of divisiveness”. He claimed to have recruited highly capable persons to join his cabinet as the “combined Thai team for nation-building”. In his 16-minute monologue, he acknowledged that the future belonged to the younger generations, who are people with the energy to move the country forward.

However, his speech did not address any of the protesters' demands. Neither did he explain how he and his administration would tackle the “urgent” issue of amending the 2017 Constitution.⁴

General Prayut could have asked his cabinet to formulate a bill on constitutional amendment and submit it to Parliament. Doing so would have sent a clear signal of his intent to all parliamentarians. But he did not take such a proactive move.

Instead, the prime minister left it to the PPP to take the lead in the constitutional amendment process. After six months, his convenient but irresponsible solution resulted in a painful national disappointment.

The PPP was never seriously interested in exerting effort to amend the 2017 Constitution.⁵ It thus teamed up with some members of the Senate to slow down the constitutional amendment process. Eventually, it managed to block the final passage of the constitutional amendment bill, even though the bill awaiting final reading was essentially based on the original bill sponsored by the ruling coalition. The PPP showed no concern for the ardent wishes of its two major allies in the ruling coalition, the Bhumjaithai and Democrat parties.

Both the second and the third largest government parties consider amending the constitution to be one of their primary political missions. In fact, it was one of the Democrats' conditions for joining the coalition and supporting Prayut's quest for premiership. Thailand's oldest political party at first campaigned against offering leadership of the government to an unelected outsider such as General Prayut. After the general elections of 24 March 2019, however, the PPP and General Prayut succeeded in wooing the Democrat Party to join the PPP-led coalition by promising to amend the 2017 Constitution.

Leader of the Opposition Sompong Amornvivat, head of the Phuea Thai Party, now insists that General Prayut and his chief legal counsel Deputy Prime Minister Dr Wissanu Krea-ngam, be held responsible for the aborted constitutional amendment bill. "I believe there was an order [to scuttle the bill]", said Sompong in a meeting of opposition parties on 18 March.⁶

Has General Prayut in fact reneged on his promise to change Thailand's 2017 Constitution? No, not quite, according to Dr Wissanu, who countered that he himself also had done nothing wrong,⁷ and furthermore, General Prayut had long maintained that he had no control over the Senate.⁸

BLAME THE SENATORS OR THE PPP?

Chapter 15, Section 256 (3), of the 2017 Constitution requires that a majority of the combined two chambers of parliament, the House and the Senate, as well as no fewer than one-third of senators, or 84 of the 250 senators, endorse a proposed constitutional amendment. This crucial stipulation has put the members of the Senate in a commanding position to defend the current constitution. And, in fact, only two senators voted in support of the scuttled bill on 17 March.⁹

Clear reluctance to amend the constitution on the part of the senators led the PPP to ask for more time for consultations. But without consulting its two chief allies, the PPP went ahead to propose on 24 September 2020 the formation of an *ad hoc* parliamentary committee to study each of seven proposed constitutional amendment bills.¹⁰

All opposition parties boycotted the committee, whose formation they dismissed as a delay tactic. The committee, headed by veteran Democrat MP Pirapan Saleeratvipak, spent about a

month consulting senators and listening to experts, including advocates of a “people’s draft constitution” from the NGO iLaw.¹¹

The bill proposing the “people’s draft constitution” was rejected from further consideration in Parliament on 18 November 2020. However, Parliament did accept the opposition’s five draft bills and the ruling coalition’s one draft bill for second readings in detail.

These six draft bills were subsequently merged into one, based essentially on the ruling coalition’s bill. Two significant changes to that bill emerged. One was provision for the formation of a 200-member constitution drafting assembly, with members chosen through direct election. The second was a new rule on constitutional amendment, requiring a vote of merely three-fifths of the members of the combined two chambers of Parliament and not the addition of at least one-third of the senators.

Surprisingly, at first most senators appeared to go along with the emerging draft constitutional amendment bill. But out of the blue, on 9 February the PPP struck again. Party deputy leader MP Paiboon Nittitawan and Senator Somchai Sawaengkan – two fanatic defenders of the 2017 Constitution – succeeded in calling for parliamentary approval to submit a request to the Constitutional Court to see whether what the parliamentarians were seeking to do was constitutional.

A SPANNER IN THE WORKS FROM THE COURT

On 11 March, just one week before the pending constitutional amendment bill was due for its final reading, the Constitutional Court literally threw a spanner into the works. Its ruling could be summarised as follows.

- Parliamentarians do have the authority to amend the 2017 Constitution.
- But what they were going to do, including the formation of a constitution drafting assembly, would be tantamount to abolishing the current constitution. Before they went that far, voters must be consulted in a national referendum to determine whether a majority of them would like to have a new constitution.
- In addition, a new draft constitution prepared by the proposed constitution drafting assembly must also be subject to a national referendum.¹²

The court’s ruling raised more questions than answers. What was to be done about the pending constitutional amendment bill? Was the ongoing amendment to Section 256 not within the authority of parliamentarians? If it was, then could a national referendum be held after the final passage of the pending bill?

On 17 March, 43 MPs and senators took nearly 14 hours debating the court’s ruling. The battle lines were drawn clearly. Senators wanted to abandon the pending bill; they did not want to vote on its final reading for fear of offending the Constitutional Court. The Democrat Party — with support of the Bhumjaithai Party and another small government party, Chat Thai Phattana — proposed returning to the court for a clarification of its 11 March ruling.

The opposition parties, on the other hand, pushed for a vote on the pending bill – in order to let the whole Thai nation see who actually supported amending the 2017 Constitution, and who was “lying”.

House Speaker Chuan Leekpai, who chaired the joint parliamentary session on the evening of 17 March, was unsure about what should be done. He played safe by asking the meeting to vote on each of the three proposed courses of action: that proposed by the senators, that proposed by government parties, and that proposed by the opposition.

Before any new decision could be made, PPP deputy leader Paiboon surprised many parliamentarians with a proposed motion to vote on the pending constitutional amendment bill — much to the chagrin of the Bhumjaithai and the Democrat Parties, which were counting on buying more time with a new request for the Constitutional Court to elaborate on its ruling.

Both the Bhumjaithai and the Democrat Parties tried but failed to save the pending bill, which incorporated significant compromises that could improve the constitution. To that end, the Bhumjaithai Party was even prepared to set aside consideration of the pending bill in favour of holding a national referendum on the creation of a constitution drafting assembly first.

Bhumjaithai deputy leader Chada Thaised denounced as “nonsense” the alleged self-centred ploy to thwart the constitutional amendment on the part of the PPP. He led his party’s MPs in a protest walk-out, because he did not wish to work with “liars” who had a “hidden sword [hidden agenda]”.¹³

The subsequent voting on the constitutional amendment bill produced the predictable outcome shown in the table below.

	Supported the bill	Opposed	Abstained	Did Not Vote	Total
MPs	206	--	10	9	225(a)
Senators	2 (b)	4	84	127	217(c)
Total	208 (d)	4	94	136	442
<p><i>a. A majority of the 488 serving MPs did not take part in the voting, not least for fear of being charged with a misdemeanour for disregarding the ruling of the Constitutional Court, which bound all government entities, including the Parliament.</i></p> <p><i>b. In order to pass, the bill needed the votes of 84 senators.</i></p> <p><i>c. A large majority of the senators participated, but they mostly either abstained or stated that they did not wish to vote.</i></p> <p><i>d. The bill also needed a majority in the combined two chambers, at least 369 votes, to pass.</i></p>					

LET THE VOTERS DECIDE

Parliamentarians’ attention now has temporarily turned to the draft national referendum bill. After Parliament ran out of time to work on this legislation on 18 March, an extraordinary

parliamentary session on 7-8 April also failed to finish the second reading of the bill. Parliamentarians will have to continue working on the draft when they meet again in May.

The law is needed to support new constitutional amendments that require the consent of a majority of voters. In addition, the cabinet will be empowered to call a national referendum when it is deemed necessary.

Once the national referendum law is in place, General Prayut and his cabinet will have an opportunity to redeem themselves. They can organise a national referendum to let voters decide on two points: whether they want a new constitution, and whether they want the formation of an elected constitution drafting assembly.

Such a national referendum can be held on the same day as the elections for the sub-district of *tambon* councils in the 76 provinces, not including Bangkok. The *tambon* elections are expected to take place in late June, about three months after the provincial municipal councils election of 28 March. Voters in Bangkok can vote on the referendum on the same day as their compatriots in the provinces vote on both the referendum and in *tambon* elections. This would save a lot of money. Holding a stand-alone national referendum would cost much more.

Most of the opposition parties, other than the Move Forward Party, have agreed with the ruling coalition that the existing Chapters 1 and 2 of the 2017 Constitution be left unchanged. Chapter 1 contains general provisions including those specifying that “*Thailand is one and indivisible kingdom.*” and “*Thailand adopts a democratic regime of government with the king as head of state.*” Chapter 2 contains provisions concerning the king, starting with that reading, “*The king shall be enthroned in a position of revered worship and shall not be violated.*”¹⁴

The Move Forward Party believes that every chapter in the 2017 Constitution can be improved to keep the document up to date and relevant to the rapidly developing Thai constitutional monarchy. The leaders of recent protests have been more direct; they want to ensure that the king reigns under the constitution, and not be above it.

NEW BATTLE LINES DRAWN

Even now, new battle lines for the next fight on the constitutional amendment are being drawn. Opposition parties are determined to propose new bills on revising a few crucial individual sections of the 2017 Constitution when Parliament reconvenes in ordinary session in May. They pushed for the vote on the previous constitutional amendment bill, even though they knew it would be defeated, because they wanted to “expose” those who were conspiring to block changes to the charter.

The Bhumjaithai (61 MPs), the Democrat (51), and the Chat Thai Phatthana (12) Parties — all members of the ruling coalition — also want to submit their joint constitutional amendment proposals. With their combined strength of 124 MPs, the three like-minded government parties have enough votes to submit the proposals without relying on support from the PPP. Sponsoring a constitutional amendment bill requires the support of at least one-fifth of the existing number of MPs — currently, that would mean 98 MPs.

On its part, the PPP with 121 MPs is once again working with some senators to pre-empt any significant change to the 2017 Constitution. MP Paiboon has already announced the PPP's basic game plan: go for uncontroversial amendments that do not require a national referendum, but avoid touching Section 256 — especially the part concerning the ground rules for constitutional amendment.¹⁵ This approach should suit most senators, who want to continue playing an important political and governmental role until the end of their non-renewable five-year term in mid-2024.

CONCLUSION

Organising a national referendum to let voters decide on whether they want to improve the constitution, and if so how, is the best and most feasible solution for Thailand.

Without new and proactive steps on the part of General Prayut, the fading dream of amending the 2017 Constitution will soon turn into an even worse nightmare. His excuse of having “no control” over the senators must be taken with a pinch of salt. It was not a miraculous coincidence that 249 of the 250 senators voted him into the premiership in June 2019.

Prolonging the deadlock could force the three unhappy government parties to re-examine the rationale for staying with the PPP in the ruling coalition. The political cost that they incur in shoring up General Prayut's premiership is growing, and they are increasingly concerned that their supporters will turn against them in the next general election, for failing to fulfil their 2019 campaign promises to amend the 2017 Constitution.

If the Bhumjaithai, Democrat and Chat Thai Phatthana Parties just quit, the ruling coalition will lose its majority control in the House. General Prayut will have either to resign, or dissolve the House and call an early general election.

Failure to keep his word on amending the 2017 Constitution and on restoring peace and security is eroding General Prayut's legitimacy. Such a critical political impasse will anger more Thais and send them to the streets to join the youth-led protests. More violence will then be inevitable.

Thailand and its people deserve a much better constitution and a brighter political future than this sorry status quo of unending deceit and divisiveness.

¹ All but one of the 250 senators — the exception being Senate President Dr Pornpetch Vichitcholachai, who abstained — and 251 government MPs voted for General Prayut, enabling him to win the premiership on 5 June 2019 with 500 votes in the Parliament. He edged out the opposition's nominee Thanathorn Juangroongruangkit, leader of the Future Forward Party, who could garner only 244 votes from seven opposition parties. Section 272 of the 2017 Constitution provides for the participation of the 250 senators in the selection of a new prime minister during the first five years after it took effect. The military regime set up after the coup in May 2014, the National Council for Peace and Order (NCPO) headed by General Prayut, supervised the drafting of the charter. A search committee headed by General Prawit Wongsuwan, a leading figure in the coup, handpicked 194 of the 250 senators. Fifty others were chosen by representatives of various professions. Six more would join the Senate in their ex-officio capacities as the Defence Ministry Permanent Secretary, the

Commander of the Armed Forces, the Army Commander, the Navy Commander, the Air Force Commander and the Police Commander.

² “**คำแถลงนโยบายของคณะรัฐมนตรี**” [The Cabinet’s policy statement] at the Government House website (www.thaigov.go.th/uploads/document/66/2019/10/pdf/Doc_20190725085640000000.pdf, accessed 19 March 2021), p. 33.

³ Under the electoral system based on the 2017 Constitution, the party scoring the biggest victory does not take all or gain more House seats than it “deserves”. The Phuea Thai Party, which won in 137 (single seat) constituencies, did not therefore get any share of the 150 party-list seats. The party’s candidates collected altogether 7.92 million votes, or about 22.3 per cent of the total votes won by all parties. Consequently, the party “deserved” to have only 111 MPs (22.3 per cent) in the 500-member House. Since it had already won 137 seats in constituency races, it did not “deserve” any additional House seats from the allocation of the 150 party-list seats. On the other hand, the Phalang Pracharat Party won 8.433 million votes, or 23.7 per cent of the total votes cast, but it won only 97 constituency seats. Therefore it was given 21 party-list seats to make a total of 118, which is about 23.7 per cent of the 500 seats in the House. If the allocation of the party-list seats were to be carried out under normal proportional allocation, the Phuea Thai Party would have been given another 33 party-list seats (22.3 per cent of the 150 party-list seats) to make a total of 170 MPs. The Phalang Pracharat Party would have received 36 party-list seats (23.7 per cent of 150) to make a total of 133 MPs. The party that benefited most from the system turned out to be the Future Forward Party, the predecessor of the Move Forward Party. The two-year-old party won only 30 constituency seats, but it collected the third largest number of votes at nearly 6.266 million or 17.63 per cent of the total. The party was thus allocated 57 party-list seats – the largest share – to make for a total of 87 seats in the House, in which it “deserved” to be the third largest party.

⁴ “**แถลงการณ์นายกรัฐมนตรี วันที่ 13 สิงหาคม 2563**” [Prime minister’s announcement of 13 August 2020] (www.youtube.com/watch?v=q9ynyJrB8PA, accessed 20 March 2021).

⁵ The NCPO-appointed National Assembly on 6 September 2015 rejected with a vote of 135 to 105 a draft constitution from the committee headed by Dr Borwornsak Uwanno, an independent and respected law professor on the faculty of Chulalongkorn University. The NCPO set up a new drafting committee headed by Dr Meechai Ruchuphan, one of Thailand’s most experienced jurists and the only civilian on the NCPO. The Meechai draft constitution was subsequently accepted by the National Assembly. It was endorsed in a national referendum held on 7 August 2016, with 16.820 million votes — or about 61.35 per cent of the total — in its favour. Also endorsed with 15.132 million votes or 58.07 per cent of the total was the supplementary question concerning the draft Transitory Provisions. The latter included the appointment of 250 senators with significant roles, such as participation in the selection of the prime minister in the first five years following the new charter’s promulgation. The referendum was, however, hardly free or fair. Critics were either arrested or harassed. Many of those who voted for the Meechai draft constitution were misled by the NCPO to believe that an elected government could soon amend and improve the charter.

⁶ “**ผู้นำฝ่ายค้าน จี้ ประยุทธ์ - วิษณุ รับผิดชอบ หลังแก้รธน. แท้ง ทวงเคยรับปากไว้**” [Opposition Leader holds Prayut and Wissanu responsible after aborted constitutional amendment process, reminding them of their promise], *Khaosod Online*, 18 March 2021 (www.khaosod.co.th/politics/news_6154843, accessed 21 March 2021).

⁷ “**วิษณุ เผยแก้รธน. กำลังหารืออยู่ ‘ผมทำอะไรถึงต้องรับผิดชอบ’**” [Wissanu says constitutional amendment is under discussion, [and he asks] “What have I done to be held responsible?”], *Manager Online*, 19 March 2021 (www.mgsonline.com/politics/detail/9640000026481, accessed 21 March 2021).

⁸ “**ป้อง 250 ส.ว. มีเกียรติ ‘บักตู่’ ปิดล้อมบักย้อยแก้รัฐธรรมนูญ**” [Defending the 250 senators as honourable, PM dismisses allegation that he is lobbying for a delay in constitutional amendment], *Thai Rath Online*, 26 September 2020 (www.thairath.co.th/news/politic/1937750, accessed 21 March 2021).

⁹ Naowarat Pongpaiboon, a renowned poet, and Pisan Manwapat, a retired ambassador, voted for the bill.

¹⁰ See details of six of the seven bills at Termsak Chalermpanupap, “Constitutional Amendment Stalled: Thailand’s New Normal Politics Deadlocked”, *ISEAS Perspective* No. 2020/114, 12 October 2020 (www. https://www.iseas.edu.sg/wp-content/uploads/2020/09/ISEAS_Perspective_2020_114.pdf, accessed 22 March 2021), notes 1 and 4.

¹¹ iLaw is a Bangkok-based civil society organisation engaged in promoting knowledge of and public interest in the constitution and legal issues, as well as freedom of expression and human rights in Thailand. It organised a petition in August-September 2020 and collected 100,730 Thai voters’ signatures backing a bill on the “people’s draft constitution”. A public proposal to amend the 2017 Constitution needs the endorsement of only 50,000 voters.

¹² See the full text of the Constitutional Court’s ruling at https://www.constitutionalcourt.or.th/occ_web/download/article/article_202103151 , (accessed 22 March 2021).

¹³ “ ‘ชาดา’ แจงยับเหตุนำ ‘ภท.’ วอล์คเอาท์จะ ‘พปชร.’ ช้อนดาบ! ” [“Chada” explains why he led “Bhumjaithai” walkout, accusing “Phalang Pracharat” of having hidden sword], *Thai Post*, 17 March 2021 (www.thaipost.net/main/detail/96421, accessed 22 March 2021).

¹⁴ See English translation of the 2017 Constitution prepared by the Office of the Council of State at www.constitutionalcourt.or.th/occ_en/download/article_201704173022.pdf (accessed 22 March 2021).

¹⁵ “ ไพบูลย์ เล็งหารื้อ สว.- พท. เตรียมแก้รธน. ทยายมาตรา แต่ไม่แตะม. 256 ” [Paiboon to consult senators and the Phuea Thai Party on amending individual sections of the constitution, but without touching Section 256]. *Naew Na Online*, 20 March 2021 (www.naewna.com/politic/560656, accessed 22 March 2021).

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