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**Chapter 23: Constitution making
and public participation in
Southeast Asia**

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Chapter 23: Constitution making and public participation in Southeast Asia

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One trend in constitution making around the globe is the increase in public participation in constitution making. From the Middle East to Africa and Central and Eastern Europe, there have emerged new and innovative ways for citizens to participate and contribute to constitution-making processes. Southeast Asia offers an important and yet overlooked vantage point from which to understand public participation in constitution making and its limitations. This chapter presents a review of processes of constitution making across Southeast Asia, arguing that genuine participation is often dependent on broader social, political, and contextual prerequisites. Formal constitutional amendment remains a key means of constitutional change in the region, and is often less conducive to direct public participation than a process of constitution making.

The history of the emergence of constitutions in Southeast Asia has been shaped by diverse colonial powers, the influence of communism and regime change.¹ Contemporary constitution-making experiences include the introduction of a new constitutional text in Laos in 1991, Cambodia in 1993, Timor Leste in 2002, Myanmar (Burma) in 2011, Vietnam in 2013, and Thailand in 2017. A frequent feature of constitutional change in Southeast Asia is resort to formal constitutional amendment as a mechanism for major constitutional change, with formal amendments made or proposed to Indonesia's Constitution between 1999–2002, Brunei and Cambodia in 2014, Myanmar and Laos in 2015, and Singapore in 2017, among others.

This chapter considers contemporary constitution-making efforts across Southeast Asia in the last four decades (1980s–2010s), with a specific focus on the process of constitution making

¹ Kevin Y.L. Tan 'The Making and Remaking of Constitutions in Southeast Asia' (2002) 6 *Singapore Journal of International and Comparative Law* 1–41.

and the forms and extent of public involvement. This survey is undertaken in the context of the broader global emphasis on public participation in constitution making and responds to the call for greater attention to Southeast Asia in the study of comparative constitutional law.² I focus on two forms of constitution making in Southeast Asia: drafting a new constitution, and constitution making via formal constitutional amendment.³ My discussion on constitution making in Southeast Asia is based on the presumption that the political conditions under which constitution making takes place influences the legitimacy of processes that claim to facilitate public participation, and that the history of participation in constitution making affects the extent of participation in contemporary efforts at reform. In this respect, I explore constitution making under United Nations administration (Timor Leste and Cambodia); constitution making under military rule (Thailand and Myanmar); constitution making under socialist rule (Vietnam and Laos); constitutional amendment under dominant party rule (Singapore, Malaysia); and constitution making as part of democratic transition (Indonesia and Philippines). I consider the most recent constitution-making exercise in each country, in light of past approaches, in order to offer new comparative insights and suggest future directions for research in comparative constitution making.

[A]I. PUBLIC PARTICIPATION IN CONSTITUTION MAKING

Public participation in constitution making has become something of a catchcry by academics, organizations that support constitution-making processes, and local actors directly involved in constitution making in many parts of the world.⁴ The forms of public participation may vary and occur at different stages of the process.

Several forms of participation are relevant or common in constitution-making processes across Southeast Asia. The first measure of participation is the representativeness of the body responsible for constitution making. Most constitution-making processes have one main body in

² Andrew Harding, 'Comparative Public Law: Some Lessons from Southeast Asia' in A. Harding and E. Orucu (eds.), *Comparative Law in the 21st Century* (Kluwer Law International 2002) 249–266.

³ While formal amendments may range from minor issues to major change, in this chapter I only have room to focus on major amendments.

⁴ Justin Blount, 'Participation in Constitutional Design' in T. Ginsburg and R. Dixon (eds.), *Comparative Constitutional Law* (Edward Elgar 2011); Angela Banks, 'Expanding Participation in Constitution-making: Challenges and Opportunities' (2008) 49(4) *William and Mary Law Review* 1043–1070; Z. Elkins, T. Ginsburg and J. Blount, 'The Citizen as Founder: Public Participation in Constitutional Approval' (2008) 81 *Temple Law Review* 361–382.

charge. This may be elected members of parliament, or a specially elected ad hoc committee. In military or socialist regimes, this may be a body appointed directly by the regime itself. If the body consists of elected representatives, this is an indirect form of public participation. This body may then have control over whether, and if so how, direct public participation can take place. One aspect of such a body is the extent to which it is inclusive and accommodates different political views or the opposition. This element of inclusion is a particular issue in Southeast Asia, where constitutions in Timor Leste, Cambodia, Singapore, and Malaysia, have either been drafted by the wishes of a single political party or come under the control of the dominant party in power.

The second mechanism is public participation and engagement prior to the approval of the constitution. This could include a wide variety of initiatives, from inviting public submissions, town hall meetings, civic education campaigns, or the release of a draft constitution for comments. In societies with largely oral-based cultures, where illiteracy rates are high or there are multiple dialects, effective participation may require the development of visual aids, oral materials, or translations. In a range of countries, campaigns on TV, radio, songs, and the Internet such as Facebook have helped to raise awareness among people and invite participation in the process. For example, the use of social media was prominent in Iceland and Ireland. The media can also play an important role in covering the drafting process. In some contexts the response has been overwhelming, such as in Uganda (1988–1994) when over 25,000 submissions on constitutional reform were received. Consideration needs to be given as to what weight will be placed on public submissions, whether a submission by a representative of a group has more weight than a single submission, and how these recommendations will be fed into the wider constitution-drafting process.⁵

Public participation may help to build mutual trust between actors and promote democratic practice, lead to a clearer articulation of the needs of the people and prompt the inclusion of socio-economic rights in the constitution.⁶ Processes that allow for public participation indicate that those in power are subject to (and must listen to) the people. Greater participation can also enhance the legitimacy of the constitution and generate a shared sense of ownership and future. The process of drafting a constitution may be critical to a peace process and help to foster inclusive national

⁵ Jason Gluck and Michele Brandt, *Participatory and Inclusive Constitution Making: Giving Voice to the Demands of Citizens in the Wake of the Arab Spring* (United States Institute of Peace 2015).

⁶ Claude Klein, 'Constitution-Making as a Process' in Michele Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

dialogue. It may also help to enhance government legitimacy and clarify the limits of its power. A participatory constitution-drafting process may signal a break from an authoritarian past and help to engender a new sense of belonging and national unity. Yet there are also potential negative consequences of public participation. If the process is not inclusive, it may risk excluding certain groups, causing society to further polarize. It can be costly and time consuming for the state if the process is thorough and comprehensive. The process may also lead to high and unrealistic expectations unless consensus is emphasized. Participation may also be just for show and lack legitimacy.

This leads to the critical issue of what counts as genuine and legitimate participation. Efforts at genuine participation may differ depending on the context. In countries where knowledge of the constitution is low, participation in constitution drafting by discussing technical constitutional provisions may not be a logical first step. Instead, genuine participation may require a civic education campaign about what a constitution can or should do. Public participation in constitution making may be used to achieve a range of purposes, such as gathering information, recommendations, and opinions on initial ideas or on the actual draft of the text.

Third, I focus on the process for approving a draft constitution, whether a referendum is used and if so, whether the conditions in which it takes place are free and fair. A referendum is a vote by the people for constitutional amendment, for the adoption of a constitution, or to gauge public opinion on an issue of public and political significance. Referendums have become a more common part of the process of constitutional amendment or constitution-building in recent decades. According to Blount, in 1980, just five percent of constitutions in force around the world required a referendum to approve constitutional amendments, but 30 years later this had risen to 40 percent.⁷ Referendums may serve as an indication of popular sovereignty, because they allow the people to endorse any constitutional change.⁸ In this sense they represent one aspect of the deliberative process at the heart of a democracy. Referendums can also enhance transparency, because information on the proposed amendment needs to be shared with the wider public. This may lead people to familiarize themselves with the process and content of the proposed constitutional amendment in the lead-up to the referendum, and engage in a meaningful way with

⁷ Justin Blount, 'Participation in Constitutional Design' in T. Ginsburg and R. Dixon (eds.), *Comparative Constitutional Law* (Edward Elgar 2011).

⁸ Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press 2014).

the constitution. The binary nature of a referendum – and yes/no vote on proposals – means that the voting process is simple and easy to understand.

The use of a referendum does not always facilitate genuine participation nor guarantee a democratic outcome. For example, the binary nature of a referendum may be a weakness because if an entire constitution is put forward for approval, but a significant number of people disagree with part of it, then the entire proposal may fail. While a referendum may be about a particular issue or the approval of an entire constitution, those in power usually decide how it is framed. Thus there is the risk a referendum may be misused to enhance the power of particular groups or individuals. In some cases, such as Sudan and Zimbabwe, the text of the draft constitution was changed prior to submitting it to referendum. Referendums have been used by authoritarian regimes in the past where people do not have the freedom to vote for their preferred option. Referendums may also represent populist demands at the expense of the rights of minority groups.

These three dimensions of the constitution-making process then are not necessarily goods in themselves, and the impact of any public participation mechanism is likely to depend on both the political context and on the historical trajectory of constitution making in a country.

[A]II. CONSTITUTION MAKING UNDER UNITED NATIONS ADMINISTRATION

Two countries in Southeast Asia were under United Nations administration while the constitution-making process took place: Timor Leste and Cambodia. While the presence of the UN inevitably creates some pressure to be seen to adhere to international guidelines in constitution making,⁹ these cases suggest that this process may be overshadowed by the influence of a political party with a majority of the seats on a constitution-making body.

Timor Leste introduced its first Constitution in 2001 after voting for independence from Indonesia.¹⁰ The independence of Timor Leste was facilitated by a body known as the United Nations Transitional Administration in East Timor (UNTAET). The debate on a constitution began in December 2000 and concluded with the adoption of the Constitution by the Constituent

⁹ The 2009 Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes was followed in 2014 by the UNDP Guidance Note on Constitution-making Support.

¹⁰ See generally Louis Aucoin and Michelle Brandt, 'East Timor's Constitutional Passage to Independence' in Laurel Miller (ed.), *Framing the State in Times of Transition* (US Institute for Peace Press 2009) 245–274; Laura Grenfell, *Promoting the Rule of Law in Post-Conflict States* (Cambridge University Press 2015); Joanne Wallis, *Constitution Making during State Building* (Cambridge University Press 2014).

Assembly in March 2002. A fairly rigid and articulated timeline was followed for the drafting of the constitution. In 2001, various regulations were passed that mandated a civic education program, public consultations via Constitutional Commission hearings, registration for the Constituent Assembly election, and the election of the Constituent Assembly. The Constituent Assembly had 90 days to produce a draft constitution. As a result of this short timeframe, other models such as a more representative Constitutional Commission or a referendum were not included as part of the process. Public hearings were held as part of the process, and some civil society groups made submissions, although observers were very critical of this and questioned how meaningful it was.

On 30 August 2001, elections for the Constituent Assembly were held under the watch of international observers. In what was widely considered to be a free and fair process, 91 percent of the population turned out to vote with a majority of seats won by the resistance movement turned political party Fretilin (the Revolutionary Front for an Independent East Timor). Timor Leste presented a difficult context in which to attempt genuine participation. Numerous Constitutional Commissions were created to conduct civic education and gather input from citizens on content for a constitution. From March to July 2001, these Commissions held more than 200 public hearings that more than 38,000 people participated in.¹¹ However many people were unable to attend these meetings because they remained displaced in refugee camps in West Timor. Low levels of literacy were a challenge to civic education campaigns, as were the logistics of transportation and communication. The language of the constitution-making process was Portuguese, even though less than ten percent of the population speak this language. In early 2002, public consultation was held at the district level, although little information was given to the public in advance.

Despite these efforts at participation, Fretilin members paid little attention to the reports from the UNTAET district commissions as unelected bodies. There were several international consultants involved in the process, however no major modifications to the Fretilin draft constitution were made. After the Fretilin draft was complete, further consultations were held. But some claimed that these meetings, although they raised a wide variety of issues, were often more about providing information about the draft constitution than about openness to receiving input.¹²

¹¹ Randall Garrison, *The Role of Constitution Building Processes in Democratisation: East Timor* (International IDEA 2005), www.constitutionnet.org/sites/default/files/cbp_timor-leste.pdf, p 11.

¹² *Ibid*, 20.

Fretilin controlled two-thirds of seats in the Constituent Assembly and so was able to push its own draft through without a referendum. The Assembly adopted Fretilin's draft by 72 for and 14 against (one absence). Observers note that although opposition parties put forward alternative drafts, they were ultimately sidelined in the process. Similar concerns about the dominance of a single political party in the constitution-making process were evident in Cambodia.

The process of constitution making under UN administration was slightly different in Cambodia,¹³ although this did occur a decade earlier in the 1990s when there was less emphasis on public participation globally. The 1991 Paris Agreements signaled the end of the brutal Khmer Rouge regime and required the election of a Constituent Assembly to write a constitution. The United Nations Transitional Authority in Cambodia (UNTAC) was established by the end of 1992, and free and fair elections for the Assembly were held in 1993. The 120 seats were spread among a number of political parties, with 58 seats going to the National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia (FUNCINPEC), and 51 seats to the Cambodian People's Party (CPP).¹⁴ On 30 June, the Assembly appointed a 26-member Draft Committee from the various political parties. The 12 members of the Draft Committee were appointed in proportion to each political party's share of seats and included six members from FUNCINPEC; five members from Cambodian People's Party; and one member from the Buddhist Liberal Democratic Party.

There was little participation from NGOs or even from members of the Constituent Assembly itself.¹⁵ There was no public involvement and no referendum.¹⁶ However, the UN did try to engage the public in the constitutional process by providing constitutional literacy programs, as well as hold constitutional forums.¹⁷

The drafting process itself came under criticism, as the Committee's draft constitution was not adopted. Instead, in September 1993, the Assembly adopted a draft constitution that was presented to the Assembly by the CPP leader Hun Sen, and FUNCINPEC chairperson. The CPP has gone on to win every election (except 1993) since then, and the same Prime Minister, Hun

¹³ See generally Trevor Findlay, *Cambodia: the Legacy and Lessons of UNTAC* (Oxford University Press 1995); Stephen P. Marks, 'The New Cambodian Constitution: From Civil War to a Fragile Democracy' (1994-1995) 26 *Colum. Hum. Rts. L. Rev.* 45; David Chandler, *A History of Cambodia*, second edn (Silkworm Books 1993); Jorg Menzel, 'Cambodia from Civil War to a Constitution to Constitutionalism?' in Hor Peng, Kong Phallack and Jorg Menzel (eds.), *Cambodian Constitutional Law* (Konrad Adenauer Stiftung 2016) 5-40.

¹⁴ Marks, 'The New Cambodian Constitution', 59.

¹⁵ Aurel Croissant, 'Ways of Constitution-Making in Southeast Asia: Actors, Interests, Dynamics' (2014) 31(1) *Contemporary Southeast Asia* 23-50, 37.

¹⁶ *Ibid.*, 34.

¹⁷ Marks, 'The New Cambodian Constitution', 61.

Sen, has ruled Cambodia for more than two decades. Under the Constitution, the power to propose an amendment lies with the King, the Prime Minister, and the President of the National Assembly, and requires approval from two-thirds majority vote in the National Assembly. The King is formally required to consult with the Constitutional Council on all proposals to amend the Constitution, although no changes can be made to the constitutional monarchy or the multiparty system. There have been several amendments since then, the most recent being in 2014 when the National Assembly approved an amendment to establish the National Election Committee as a separate and independent body.

While there may be an expectation that UN-administration may enhance the potential for public participation in constitution making, the reality is that it may be overshadowed in contexts like Timor Leste and Cambodia where one political party dominates the process, largely with disregard for the concerns of opposition political parties. More broadly, this may suggest a need to think creatively about how constitution-making processes should enable political inclusion even in the presence of a dominant political party.

[A]III. CONSTITUTION MAKING UNDER MILITARY RULE

Two countries in the region, Thailand and Myanmar, have experienced constitution making while under military rule. These examples illustrate that while military rule does not necessarily exclude all forms of public participation, the processes and procedures that take place are often under heavy scrutiny and there may be serious criminal consequences for opponents of the constitution-making process.

Thailand is notorious for having had over 20 constitutions, and there is an equally large body of scholarship on this topic.¹⁸ In 2014, a constitution-making process was initiated after the military coup of 22 May in which Prime Minister Yingluck Shinawatra was deposed from office. An interim constitution was introduced by the King, and this interim constitution stipulated the process for drafting a new constitution. A draft constitution was prepared by the National Council

¹⁸ Bjorn Dressel, 'Thailand's Elusive Quest for a Workable Constitution, 1997–2007' (2009) 31(2) *Contemporary Southeast Asia* 296–325; Andrew Harding and Peter Leyland, *The Constitutional System of Thailand: A Contextual Analysis* (Hart Publishing 2011); Kobkua Suwannathat-Pian, *Kings, Country and Constitutions: Thailand's Political Development 1932–2000* (Routledge 2013).

for Peace and Order (NCPO), which consists of army generals, and the 36-member Constitutional Drafting Committee, a civilian body of legal experts although it excluded politicians.¹⁹

In August 2015, a draft was sent for approval to the National Reform Council, a body that consists of representatives chosen by the King. Instead the draft constitution was rejected in what appears to have been a change in opinion on the part of the military.²⁰ This necessitated the formation of a new drafting Committee. A new National Reform Steering Assembly, appointed by the Prayuth Chan-ocha as head of the NCPO, was established to replace the National Reform Council. The new committee was given 180 days to draft another constitution. Compared to the 2015 draft, the 2016 draft is less democratic because it institutes a fully unelected Senate and provides for the military to retain its role until a new cabinet is appointed, meaning that it will have control over the first government elected under this constitution. Wide immunity provisions appear to shelter both the military and potentially government officials.

The new draft constitution was made public in March 2016, although there was no formal opportunity for the public to comment on the draft. In fact, the National Council for Peace and Order banned debate about the constitution and campaigning ahead of the referendum. Many were arrested and detained for voicing criticism of the draft constitution or for proposing alternatives to the draft constitution. The referendum had a turnout rate of about 55 percent, although the approval rate of 61.4 percent was below the military's anticipated 80 percent.²¹

In October 2016, the revered King Bhumibol Adulyadej of Thailand passed away at the age of 88. This occurred just months after the country went to a referendum approving the draft constitution. As a result, this led to discussion and debates over the chapter in the constitution on the King, given that his son, King Maha Vajiralongkorn, now held the throne. In early 2017, the King asserted his royal authority to seek changes to the draft constitution. The requested changes to the new Constitution were made in January 2017. This set of amendments, which included abolishing the requirement that the king must appoint a regent if he is out of the kingdom, was not

¹⁹ Duncan McCargo, 'Thailand in 2014: The Trouble with Magic Swords' (2015) *Southeast Asian Affairs* 335.

²⁰ For a brief review of the substance of the 2015 draft, see Melissa Crouch and Tom Ginsburg, 'Between Endurance and Change in Southeast Asia: The Military and Constitutional Reform in Myanmar and Thailand', in *Annual Review of Constitution Building* (International IDEA 2016).

²¹ Patrick Jory, 'The Real Meaning of Thailand's Referendum' *New Mandala*, 22 August 2016, www.newmandala.org/real-meaning-thailands-referendum/.

circulated publicly for discussion.²² The amendments were made despite the fact that the draft constitution had already been approved at a national referendum.

Otherwise, the drafting of the 2016 Constitution showed similar patterns to earlier constitution-making processes in Thailand. For example, a 100-member Constitutional Drafting Assembly was set up by the Council for National Security, the military body responsible for the coup in 2006, to draft the 2007 Constitution.²³ A smaller Constitution Drafting Committee of 25 people were appointed, along with ten experts appointed by the military. A time frame of six months was set under the 2016 Interim Constitution. Various guidelines were issued on the drafting process, and the military kept a close watch on the process. There were again claims that civic education had taken place via the distribution of drafts of the constitution had been distributed to 20 million households prior to the referendum.²⁴ Yet public statements were made to the effect that if the public rejected the draft, the Committee would revert to one of Thailand's many former constitutions. Any one who opposed or criticized the draft was threatened with fines or imprisonment. The referendum was then held, with a turnout rate of 57.6 percent and an approval rate of 56.9 percent.²⁵ Referendums have been a feature of constitution-making processes in Thailand since the 2006 Interim Constitution.

The process of drafting previous constitutions in Thailand bears remarkable similarities to this process, with the military in control of who gets to sit on the drafting body and how that drafting body functions. Each time there have been efforts at consultation and participation, but the atmosphere and overall environment of military rule after a coup has brought into question the extent to which individuals could freely participate. The exception to this is that the drafting process for the 1997 Constitution was seen as part of a more genuine public participation process.²⁶

Turning from Thailand to Myanmar, the 2008 Constitution was also a result of a constitution-making process after the military takeover from socialist rule in 1988.²⁷ On 27 July 1990, General Khin Nyunt made a public statement that a National Convention would be

²² Khemthong Tonsakulrungruang, 'Chaos, Kings, and Thailand's 20th Constitution', *Blog of the International Journal of Constitutional Law*, 11 April 2017 <http://www.icconnectblog.com/2017/04/chaos-kings-and-thailands-20th-constitution>

²³ Dressel, 'Thailand's Elusive Quest', 303.

²⁴ *Ibid*, 306.

²⁵ Croissant, 'Ways of Constitution-Making in Southeast Asia', 38.

²⁶ Khemthong Tonsakulrungruang, 'Thailand', in David Law et al. (eds.), *The Oxford Handbook of Constitutions in Asia* (Oxford University Press 2018).

²⁷ Melissa Crouch, *The Constitution of Myanmar: A Contextual Analysis*. Hart Publishing, 2019, see generally chapter 2; see also Crouch and Ginsburg, 'Between Endurance and Change in Southeast Asia'.

established for the sole purpose of drafting a new constitution. In October 1992, the State Law and Order Restoration Council (SLORC) established the National Convention Convening Commission. The first stage of the convention was held from 1993 until April 1996, with a total of 30 meetings. At the first meeting in January 1993, SLORC brought together 702 delegates in Rangoon to consider the guidelines for a new constitution. The original representatives of the National Convention were chosen by SLORC. Only 99 of the 485 candidates who successfully contested seats in the 1990 elections were allowed to participate.

The National Convention Procedure Code 1993 set out the rules of behavior for delegates. All delegates were required to maintain the confidentiality of secret documents, and it was forbidden to leak secret documents of the proceedings to the public. The National Convention Convening Working Committee had the power to revoke a delegate's position at any time. The code reaffirmed the military's leading role in governance and politics. Delegates were only allowed to read from pre-prepared and approved papers, and were not allowed to speak at the convention about matters not in their speeches. The code also specified a list of prohibitions that would attract criminal prosecution. In 1996, some delegates were expelled from the convention in alleged breach of this code, and the National Convention was suspended.

In 1996, a law was passed to prohibit criticism of the National Convention or the draft Constitution. The law prohibited any oral or written statements, actions or attempts, including speeches or the distribution of written information that is perceived to undermine the stability of the state and national unity. It included a prohibition on any efforts to undermine, criticize, or promote misunderstanding of the National Convention and the process of constitution building. It also criminalized efforts to draft or distribute a draft constitution without the permission of the government. The penalty for any of these actions ranges from five to 20 years in prison. The threat of criminal sanctions against opponents is a tactic shared by those in control of constitution-making processes in Thailand and Myanmar.

On 17 May 2004, the National Convention reconvened for an initial period of seven days under the leadership of General Thein Sein. There were 1,088 delegates who were chosen to represent one of eight groups: elected representatives (from the 1990 elections), peasants, workers, intellectuals, civil servants, political parties, national races, and special guests. Representatives from various official ethnic groups, including those who had agreed to ceasefires with the military, made up more than half of the delegates. Given that there were only 702 delegates during the first

stage of the National Convention process, many representatives in the final stages of the Convention were not in fact involved in the initial proceedings. In 2008, a referendum was held, not long after Cyclone Nargis devastated communities in lower Burma. The high approval rating was inconsistent with broader public sentiment that cast the process as illegitimate.²⁸ Nevertheless, the Constitution came into effect in 2011 and a new political regime has been introduced. There were efforts in 2013-2015 that resulted in very minor constitutional amendments. In 2018-2019, the National League for Democracy-led government was pursuing constitutional reform through the legislature, though faced the challenge of obtaining approval from military legislators.

While studying constitution making under military rule can prove particularly challenging, we should not dismiss the agency of those involved in the process. For example, in Myanmar's constitution-making process the inclusion of the constitutional writs as remedies for the protection of individual rights against the state is one way that actors were able to open up the Supreme Court to hear cases against state agencies. In Thailand, academics are often used by the military regime to assist in constitution making, and this raises the dilemma of whether they refuse to engage or whether to engage in a flawed process in the hopes of still influencing change. There is a broader potential for a research agenda to consider how public participation in constitution making works under conditions where the military maintains significant political control.

[A]IV. CONSTITUTION MAKING UNDER SOCIALIST RULE

A contemporary example of public participation and dialogue in constitution making under socialist rule is the 2013 Constitution of Vietnam. In 2011, there was an announcement that a committee would be formed for the purpose of reviewing the 1992 Constitution and proposing amendments. By late 2013, this led to a vote in the National Assembly to approve both the addition of 12 new articles and amendments to 101 of 120 articles of the 1992 Constitution. The case of Vietnam is an important example of how constitutional debates emerge and develop in authoritarian regimes, while exposing the differences in interpretations and experiences of the process and its outcomes.²⁹

²⁸ For further analysis on why the Constitution is considered by many pro-democracy actors to be illegitimate, see Melissa Crouch, *The Constitution of Myanmar: A Contextual Analysis*. Hart Publishing, 2019.

²⁹ This constitutional debate is the subject of an important special journal issue in the *Asian Journal of Comparative Law* (2016) 11(2).

The Constitutional Revision Committee consisted of 30 members.³⁰ There was also an Editing Board, and most of the members on this board were scholars educated in the former Soviet Union and East Germany.³¹ Six teams were formed to evaluate the 1992 Constitution. Scholars have highlighted the range and diversity of views that were able to be expressed as part of the constitutional debate. By all accounts, the scale and scope of participation in constitution making was unparalleled in the history of Vietnam. According to official state figures, over 26 million comments were submitted on the draft amendments, and over 28,000 seminars were held on the draft constitution. Copies of the draft constitution were printed and distributed widely throughout the country.³² A report was issued that detailed the range of opinions and views submitted on constitutional reform.³³ In 2012–2013, major issues were the subject of the debate, from the centrality and relevance of the party-state; to core issues of human rights protection and enforcement; to economic reform; and property rights. From January to March 2013, the public was invited to comment on the initial draft. Even businesses and provinces made submissions for reform. The most well-known opposition group, the “Group of 72,” named after 72 intellectuals, former officials, and veterans, drafted its own constitution and also organized a petition signed by about 15,000 calling for the separation of powers and the end of one-party rule.

Some human rights organizations and scholars such as Gillespie suggest that the actual outcome of the constitutional debate indicates that the public discussion had less impact on the actual text than hoped, and should cause us to question the legitimacy of the process itself. They point out that the party state attempted to control and mediate debate on the constitution. Although the supremacy of the party and its dominance over the political system was contested, the position of the party remains unchallenged in the 2013 constitutional text.³⁴ The party also opposed any constitutional revision that would introduce a separation of powers, any form of legally enforceable rights, and the private ownership of land. This is a reminder that liberal constitutional reform does not inevitably follow relatively free public debate.³⁵

³⁰ Duy Nghia Pham, ‘From Marx to Market: The Debates on the Economic System in Vietnam’s Revised Constitution’ (2017) 11(2) *Asian Journal of Comparative Law* 263, at 274.

³¹ *Ibid* at 275.

³² *Ibid*, 273.

³³ Giao Cong Vu and Kien Tran, ‘Constitutional Debate and Development on Human Rights in Vietnam’ (2017) 11(2) *Asian Journal of Comparative Law* 235, at 251.

³⁴ Thiem Hai Bui, ‘Constitutionalising Single Party Leadership in Vietnam: Dilemmas of Reform’ (2017) 11(2) *Asian Journal of Comparative Law* 219.

³⁵ John Gillespie, ‘Public Discourse and Constitutional Change: A Comparison of Vietnam and Indonesia’ (2017) 11(2) *Asian Journal of Comparative Law* 209.

Although scholars have highlighted the intense and unique nature of the constitutional debates during this period, much of the form and process of constitution making bears similar characteristics to previous constitution-making exercises. The drafting of the 1992 Constitution took place over a number of years, beginning in the 1980s.³⁶ The Constitutional Amending Committee established included political and legal officials and a few academics. Sidel describes the discussion that took place between party officials, individuals, and academics as “frank, sometimes fiery debate.”³⁷ Again several drafts of the constitution were released to the public. From this perspective, while new levels of public debate were allowed over the 2013 Constitution, it appears that opinion is divided over how much that process actually influenced the final draft.

Aside from Vietnam, another country in Southeast Asia that has a constitution drafted under communist rule is the Laos Peoples Democratic Republic. The most recent constitution-making exercise was the 1991 Constitution. Early work can be traced back to 1975, when the task of drafting a Constitution was delegated to the Supreme People’s Assembly.³⁸ A Constitutional Drafting Committee was formally named, although no action was taken for many years. In 1982, General Secretary Kaysone Phomvihane declared that the party should begin preparing a socialist constitution, and work began under Sisomphon Lovansay (Politburo member), helped by East German advisors. A new Supreme People’s Assembly was elected in March 1989 (not free and fair elections), and a 17-member Committee was established by the Politburo, the highest body of the Communist Party. Following socialist lines, in 1990 a draft constitution was approved by the Politburo and then circulated for consultation. There were invitations for submissions from party branches, ministries, mass organizations, and provincial authorities. A second draft that claimed to take on board some of the criticisms of the first draft was issued in early 1991, and then in August 1991 a third a final draft was approved by the Supreme People’s Assembly. This constitution replaced the 1947 Constitution (revised in 1957) written by the French, which had been cancelled in 1975.³⁹ The Laos People’s Revolutionary Party has governed from 1975 to the present.⁴⁰

³⁶ Mark Sidel, *The Constitution of Vietnam: A Contextual Analysis* (Hart Publishing 2009).

³⁷ Mark Sidel, ‘The Re-Emergence of Legal Discourse in Vietnam’ (1994) 43(1) *International and Comparative Law Quarterly* 163.

³⁸ Martin Stuart-Fox, ‘Laos 1991: On the Defensive’ (1992) *Southeast Asian Affairs* 163.

³⁹ Tan, ‘The Making and Remaking of Constitutions in Southeast Asia’, 21.

⁴⁰ For an incisive analysis of state power in contemporary Laos, see Simon Creak and Keith Barney, ‘Conceptualising Party State Governance and Rule in Laos’ (2018) 48(5) *Journal of Contemporary Asia* 693–716.

Constitutional amendment requires a two-thirds vote by the National Assembly, which has taken place in 2003 and 2015. The amendments in 2003 effected major changes to the judiciary. The Supreme Court is now required to report to the National Assembly; the appointment and dismissal of judges is done by the National Assembly at the request of the President of the Supreme Court; and the Supreme Court has taken over administration of the local courts from the Ministry of Justice. In 2015, further major changes were made, including the introduction of provincial assemblies that would have responsibilities as a local parliament, and also limitations imposed on the presidential term of office, prohibiting holding office for more than two consecutive terms. Constitution making under socialist rule has clearly varied over time. The most recent example of constitution making in Vietnam suggests that the current global pressures and expectations have led to greater efforts at constitutional dialogue as part of a constitution-making process. However this must be tempered by the reality that many features of the 2013 Vietnam Constitution continue to enshrine the ascendancy of Communist Party rule. The example of Laos – introducing further certainties on the role of the president, introducing local parliaments, and clarifying the administration of the courts – suggests that constitutional reform under socialist rule can take place in the absence of public participation, that is, as the internal impetus of a ruling regime.

[A]V. CONSTITUTION MAKING UNDER DOMINANT PARTY RULE

In Singapore and Malaysia, significant constitutional amendment over the past 60 years has occurred within the context of dominant-party rule. The shared history of these constitutions and the way in which the constitutional amendment provisions, combined with dominant party rule, has led to frequent changes to these constitutions by elected representatives in favor of the ruling party. This strategy of maintaining the original independence constitution promotes stability and continuity, avoiding the possibility of unwanted proposals for reform if an entirely new constitution was to be drafted. It allows for an incremental, adaptive strategy of constitutional amendments to continue to ensure dominant party rule. This has the latent risk that the dominant party must maintain electoral dominance to ensure it has the numbers to pass a constitutional amendment. While the public have demanded greater justification for changes that have been made, this has not necessarily led to greater public participation in the amendment process.

Similarly, Brunei's Constitution is dominated by the Sultan, who retains the final say on any constitutional reform without need to involve the public.

In 2017, Malaysia's Constitution entered its 70th year, being the only constitution of the country since independence from British rule in 1957. Constitution making in Malaysia is therefore largely a story of constitutional amendment.⁴¹ The limitations on public participation in drafting the constitution is largely consistent with trends in constitution making of the time. In early 1956, at the London conference between the British Government, the Rulers and the Government of Malaya, it was agreed that a Constitutional Commission would be established for the purpose of making recommendations on a constitution and terms of reference were formulated. This came in the wake of initial failed efforts by the British to form a Union, due to growing pressure for a federal system. This Commission, known as the Reid Commission, involved a limited form of participation with the broader public. The Commission was led by Scottish jurist Lord Reid and consisted of four other foreigners: Sir Ivor Jennings, a former Australian judge, and an Indian and Pakistani judge.⁴² The process clearly favored constitution making by outside experts, excluding any Malays from the Commission. The model reflected this foreign orientation, with the Constitution based on the Westminster tradition and borrowing ideas from the constitutions of Ireland, India, and the United States. This process is a contrast to the constitution-making process that had taken place in other former British colonies, such as India and Myanmar (then Burma), both of which involved elections to a Constituent Assembly that was then responsible for drafting a constitution.

Submissions from select individuals and organizations were invited, primarily from the Rulers, and from the Alliance. Over 130 proposals were submitted to the Commission. The Commission held 81 hearings in support of the memoranda. After this process, the Commission put together a draft constitution that was then considered by a Working Party that made further recommendations. The Working Party was only slightly more inclusive, with four Alliance members (the party that won all seats bar one in the 1955 elections to the Federal Legislative

⁴¹ Andrew Harding, *The Constitution of Malaysia. A Contextual Analysis* (Hart Publishing 2012); Andrew Harding, 'The Constitutional Amendment Process in Malaysia' in Mads Andenas (ed.), *The Creation and Amendment of Constitutional Norms* (British Institute of International and Comparative Law 2000) 250–264.

⁴² Joseph Fernando, 'Sir Ivor Jennings and the Malayan Constitution' (2006) 34(4) *Journal of Imperial and Commonwealth History* 577.

Council), four Rulers and two British officials. In July 1957, after little time for discussion in the Council, the final draft of the constitution was approved by the Federal Legislative Council.

The Malaysia Constitution has however been subject to frequent constitutional change because of the amendment formula in the context of a dominant party state. Any formal constitutional amendment requires a Bill in parliament that is approved by two-thirds of both Houses of Parliament. There are some exceptions, such as that amendments to certain sections of the Constitution require the consent of the Conference of Rulers. There have been a large number of amendments to the Constitution since 1957, and while many are minor changes and updates, others have led to fundamental changes to the constitutional fabric and the weakening of democratic safeguards. Among these changes include the abolishment of the Judicial and Legal Service Commission; incorporation of the states of Sabah, Sarawak, and Singapore; and the change of the name of the country from Malaya to Malaysia. Changes that wound back democratic freedoms and institutional safeguards include the post-1969 amendments that sought to respond to the race riots by enabling parliament to restrict constitutional rights; changes to electoral laws that enhanced the discretionary power of the government; and the amendments of 1988 that gave the parliament far reaching control over the courts, and revisions to the jurisdiction of the Syariah courts' as separate from that of the civil courts.

In 2009, constitutional amendments occurred in Malaysia by order of the monarch (the Yang di-pertuan Agong). The Constitution was amended to provide that the Federal Court will comprise a Chief Justice and not more than 11 other judges (increased from four). The Constitution was amended to provide that the Court of Appeal would consist of a President and not more than 32 other judges (up from ten). In 2017, public debate focused on suggestions to include the Rukunegara, a statement of national ideology issued in 1970 after that racial riots of 1969, as a preamble to the Constitution. Since May 2018 and the historic general election that saw the formation of a new government (Pakatan Harapan), the political sphere has opened for a new kind of proposals for constitutional reform, such as potentially redrawing electoral boundaries and redefining the role of the Attorney General. No changes have yet been made, in part because the new government does not hold sufficient seats in the Dewan Rakyat (house of representatives) to approve an amendment. The Malaysia example shows how a dominant party can control the process of constitutional amendment over time to prolong their rule.

The Constitution of Singapore has similarly withstood the test of time by being subject to numerous revisions by the ruling party, the People's Action Party (PAP), which has maintained its dominance of the unicameral parliament.⁴³ Between 1956 and 1958, discussions regarding self-government for Singapore, formerly part of British Malaya, took place in London. In 1958, this led to agreement on the terms of a new constitution, and this was passed as the Singapore (Constitution) Order-in-Council 1958, although the intention of the British was for Singapore to remain an independent state within the Federation of Malaya. Although this was formalized in the Malaysian Agreement and led to a new state constitution in 1963, relationships broke down due to the racial riots and in 1965 Singapore seceded from the Federation of Malaysia. Although Prime Minister Lee Kuan Yew initially promised a new constitution, it was later decided that a constitution would be formed from the existing 1963 State Constitution and by borrowing aspects of the Malaysian Constitution.⁴⁴ There was no referendum on the adoption of the constitution.

Section 5 of the Constitution permits amendments to be made by a two-thirds vote of parliament, with some exceptions. Up until 1979, the PAP had changed this rule to a simple majority, to ensure it could make any changes need as a result of independence from Malaysia.⁴⁵ The Constitution of Singapore has been amended on 47 occasions. Significant post-independence constitutional amendments include changes to the judiciary; changes to the composition of parliament; and the shift to an elected presidency.⁴⁶ In 2010, amendments were passed that increased the number of non-constituency members of parliament from six to nine, and make the position of nominated members of parliament a permanent part of the system. Non-constituency membership is designed to ensure minimum representation from a political party or parties not forming government, while nominated members are distinguished individuals (such as academics) who are appointed by the President on the advice of a Special Select Committee.

As a result of the report by a major constitutional commission, in 2017 two constitutional amendments came into force. The first targeted the requirements for President, tightening the circle of eligibility by requiring candidates who claim private sector experience to have served for over three years of companies with an average shareholder equity equivalent to USD 376 million for the past three years. Second, the office of the President must now be held by a minority ethnic

⁴³ See Kevin Y.L. Tan, *The Constitution of Singapore: A Contextual Analysis* (Hart Publishing 2015).

⁴⁴ *Ibid*, 30.

⁴⁵ *Ibid*, 45.

⁴⁶ *Ibid*, 29–41.

community, that is, Chinese, Indian, or Malay, at least once every five years.⁴⁷ This later reform was marketed by the PAP as a desire to affirm racial harmony and for the office of President to contribute to national unity. By effectively backdating this rule to 1991, the PAP was able to block Dr Tan Cheng Bock, a Chinese Singaporean and former member of PAP, from becoming president. After the death of long-standing authoritarian Lee Kuan Yew in 2015, there is concern that the PAP needs to do more to ensure its hold on political power in the future in the absence of a strong leader,⁴⁸ and constitutional amendment remains one tool to ensure this occurs.

Finally, aside from Singapore, Brunei was also formerly administered as part of the Federation of Malaya. In 1953, Sultan Omar Ali announced his intention to draw up a written constitution. In September 1957, there were talks about independence held in London. The Constitution was part of the British grant of self-government to Brunei, and reflected the desire of the Sultan to maintain sovereignty.⁴⁹ The Constitution was passed without public engagement. Any formal constitutional amendment is at the sole power and discretion of the Sultan. Significant amendments to the Constitution were made in 1971, 1984, and 2004.⁵⁰ In 2004, constitutional amendment allowed the Sultan to hold two additional posts concurrently: the Prime Minister, and the Supreme Commander of the army. In Brunei there has been no public participation in constitution making, and there is little space for it to emerge in the future.

Participation in constitutional change in Singapore and Malaysia is limited to elected representatives who have the opportunity to vote on proposed amendments in parliament. Given the change in government in Malaysia in 2018, this may lead to new constitutional reforms in the future.

[A]VI. CONSTITUTION MAKING AS PART OF DEMOCRATIC TRANSITION

Two Southeast Asian countries embarked on constitution making within an atmosphere of democratic transition and without the monopoly of one political party: the Philippines and

⁴⁷ Jack Tsen-Ta Lee, 'Singapore' in David Law et al. (eds.), *The Oxford Handbook on Constitutions in Asia* (Oxford University Press forthcoming).

⁴⁸ MD Barr, 'Ordinary Singapore: The Decline of Singapore Exceptionalism' (2016) 46(1) *Journal of Contemporary Asia* 1–17.

⁴⁹ Tsun Hang Tey, 'Brunei's Revamped Constitution: The Sultan as the Grundnorm?' (2007) 9(2) *Australian Journal of Asian Law* 265.

⁵⁰ Ann Black, 'Brunei Darussalam: Ideology and Law in a Malay Sultanate' in G. Bell and A. Black (eds.), *Law and Legal Institutions of Asia* (Cambridge University Press 2011) 299–329.

Indonesia. The processes of drafting the 1987 Philippines Constitution and the constitutional amendments in 1999–2002 in Indonesia were however very different. In both contexts there remain discussions about constitutional reform, particularly in the Philippines.

The 1987 Constitution of the Philippines was introduced against a background of Marcos' rule and, prior to that, rule by the Spanish from 1521 until 1898, when Spain ceded territory to the US.⁵¹ By the early 1900s, steps were taken for independence and in 1934 the Philippines Independence Act 1934 was passed. There was an election for a Constitutional Convention, which had responsibility for drafting the 1935 Constitution.⁵² The election was free and fair, and in this regard the Convention delegates were representatives of the people.⁵³ While there was no public involvement in drafting, there was a plebiscite held for approval of the constitution. In 1965, Ferdinand Marcos was elected as the President of the Philippines, and he ruled under the 1935 Constitution until the adoption of the new Constitution in 1973. The drafting of the 1973 Constitution began in 1971, although in 1972 Marcos declared martial law. Nevertheless, in 1973, a plebiscite was held to approve the new constitution although it was not considered to be a free and fair vote. The plebiscite was declared a success and the 1973 Constitution, quite similar to the 1935 Constitution, was adopted by a Constitutional Convention. The final wording of the 1973 Constitution bore similarities to the 1935 Constitution. It was not until 1986 that the momentum of the People Power movement dismantled the Marcos regime.

President Cory Aquino was installed as the new President and she used her presidential power to introduce an interim constitution and establish a Constitutional Commission.⁵⁴ The Constitutional Commission was not elected but consisted of 50 representatives selected by the President, with moderate conservatives holding a majority of the positions.⁵⁵ There was some public involvement and education campaigns, with country-wide consultations, and coverage of the Commission's debates on national radio and television.⁵⁶ The overall emphasis of the constitution-making process was to return to a democratic system, to reduce the powers of the

⁵¹ T. Burke, 'Philippine Constitution' (1987) 28(2) *Harvard International Law Journal* 568–574. Enrique M. Fernando and Emma Quisumbing-Fernando, 'The 1987 Constitution of the Philippines: The Impact of American Constitutionalism Revisited' in Lawrence W. Beer (ed.), *Constitutional Systems in Late Twentieth Century Asia* (University of Washington Press 1992).

⁵² Tan, 'The Making and Remaking of Constitutions in Southeast Asia', 7.

⁵³ S. Maisrikrod, 'Changing Forms of Democracy in Asia? Some Observations on the Thai and Philippine Constitutions' (1999) 23(3) *Asian Studies Review* 355–373.

⁵⁴ Tan, 'The Making and Remaking of Constitutions in Southeast Asia', 33.

⁵⁵ Maisrikrod, 'Changing Forms of Democracy in Asia?', 365.

⁵⁶ Croissant, 'Ways of Constitution-Making in Southeast Asia', 35.

president and limit the term of office, to ensure the protection of human rights, and to subordinate the military to executive control. The Constitution also borrowed from the US model, instituting the separation of powers and other measures to mitigate against the possibility of a future dictatorship. In late 1986, the Commission approved the final text of the Constitution. The draft Constitution was then put to a national plebiscite, held under free and fair conditions, with a high turnout rate of 89.3 percent and an approval rate of 77.1 percent.⁵⁷ The 1987 Constitution has not been amended since it was introduced, although there have been intermittent calls for Charter Change (commonly referred to as “Cha Cha”). The Constitution provides for three means of amendment, and all require approval by a majority vote in a national referendum. The Constitution of the Philippines is the only constitution in Southeast Asia that enables the people to initiate a proposal for constitutional amendment, as long as it is supported by a least 12 percent of registered voters.

In 2016, Rodrigo Duterte was elected as President after running a campaign platform partly based on a promise of constitutional reform. Given his past experience as mayor of Davao City, Mindanao, Duterte has suggested reforms along federal lines to give more power to the regions, and to introduce parliamentarism, and has even claimed he will step down once this is achieved.⁵⁸ The atmosphere of criminality that has been unleashed since Duterte took over, including thousands of extrajudicial killings, has created an unprecedented level of uncertainty and lawlessness. Duterte has issued an executive order, mandating a Consultative Committee to review the 1987 Constitution concerning the national and local government powers and structure. In July 2018, the Consultative Committee (known as “Con-Com”) put forward a draft constitution to the House of Representatives. In December 2018, the House passed a resolution to approve a different draft constitution, which includes changes as removing the two term limit on the terms of senators.⁵⁹ The draft remains to be passed by the Senate and ratified by a majority of voters cast in a plebiscite if it is to come into effect. The 2019 mid-term elections have increased Duterte’s support in the Senate.

⁵⁷ Ibid, 36.

⁵⁸ Aries A Arugay, ‘Duterte’s Plan to Revive Philippines Democracy’ 28 October 2016, *New Mandala*. www.newmandala.org/dutertes-plan-revive-philippine-democracy/.

⁵⁹ Mara Cepeda, ‘Major Changes the House wants Under Federalism’ 5 Dec 2018, *Rappler*, www.rappler.com/nation/218210-list-major-changes-house-draft-constitution-federalism.

Indonesia is often held up as a shining example of democratic transformation in the region, despite the fact its constitution-making process was largely elite driven and lacking in public participation mechanisms.⁶⁰ After the fall of Suharto in 1998, a constitutional reform process was initiated in four stages between 1999 and 2002. This began after the first free and fair elections were held in June 1999. The responsibility for amending the Constitution was given to the People's Consultative Assembly (MPR) (the upper house of the legislature), according to the 1945 Constitution. Of the 695 members in the MPR, 462 had been elected to the national legislature (DPR) alongside 38 from the military and police; and 135 elected and 65 functional members appointed to the Regional DPR.⁶¹ There were meetings and consultations held that were open to the press and public.⁶² NGOs engaged the MPR as the body tasked with drafting the Constitution.⁶³

The amendments from 1999 to 2002 instituted major changes to the text of the Constitution, affirming the separation of powers; separating the police from the military; reducing the powers of the president; creating a Constitutional Court; and affirming judicial independence.⁶⁴ The most detailed consideration of why the Indonesian constitution-making process was successful in supporting the transition to democracy, despite the elite driven nature of the process, has been offered by Horowitz.⁶⁵ According to Horowitz, the process of constitutional amendment in Indonesia had several unique features, including that the process was insider dominated; that elections were held before constitutional change was initiated; and that constitutional amendment took place incrementally over a staged period of time. Despite this Horowitz suggests that an unconventional process can lead to democracy. One of the reasons for success is that it allowed the newly constituted MPR to learn to work together to achieve political outcomes. This is important given the size of the legislature in Indonesia and the fact that no political party has a majority in the legislature.

The 1945 Constitution had legitimacy as the independence constitution, even though it was initially intended as an interim measure and was drafted in a short period at the end of World War

⁶⁰ Simon Butt and Tim Lindsey, *The Constitution of Indonesia* (Hart Publishing 2012).

⁶¹ Denny Indrayana, *Indonesian Constitutional Reform, 1999–2002: An Evaluation of Constitution-Making in Transition* (Kompas Book Publishing 2008).

⁶² Edward Schneider, 'The Role of Constitution-Building Processes in Democratization: Indonesia' (International IDEA 2005) 10.

⁶³ Gillespie, 'Public Discourse and Constitutional Change', 241.

⁶⁴ There has been a distinct focus on specialised courts in Indonesia as part of efforts at court reform: see Melissa Crouch (ed.), *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia* (Cambridge University Press 2019).

⁶⁵ Donald L. Horowitz, *Constitutional Change and Democracy in Indonesia* (Cambridge University Press 2013).

II. The Constitution was prepared in early 1945 by a 79-member Investigating Body for Preparatory Work for Indonesian Independence (BPUPKI), which had been formed by the Japanese occupying forces, and the draft was then approved within 20 working days.⁶⁶ There was no public education, no submissions, no draft circulated, and no referendum. A constitution based on a federal model was introduced in 1949, only to collapse soon after. In 1950, a provisional Constitution was put in place by the MPR, after been drafted by a small group of elites within just two months.⁶⁷ In the late 1950s, the Constituent Assembly was given the responsibility of drafting a new constitution.⁶⁸ However it failed to reach a consensus, and in 1959 President Sukarno issued a decree that suspended the 1950 Constitution and reverted to the 1945 Constitution. In 2016, the political party GERINDA called for a return to the 1945 Constitution. They called for a return to stronger and unchecked executive and presidential powers, and to abolish other accountability mechanisms such as the Constitutional Court.⁶⁹ This suggestion has not gained widespread traction.

The contrasting cases of the Philippines and Indonesia suggest that there are many ways by which a constitution-making process as part of a democratic transition may gain legitimacy, and it may not necessarily be by large-scale or deep public participation. In Indonesia, it was the fact that the original 1945 Constitution had legitimacy and that the 1999 elections were considered to be free and fair that enabled constitution making to be largely dominated by the parliament with little public input. In the Philippines, although the Constituent Assembly body was not elected by the people, its broader mandate in 1986 to move the country away from dictatorship and towards democratic reform had wide appeal. The current prospects for amendment in the Philippines may be crucial in determining the future trajectory of democracy in the country.

[A]VII. CONCLUSION

⁶⁶ Indrayana, *Indonesian Constitutional Reform 1999–2002*, 4.

⁶⁷ Schneier, 'The Role of Constitution-Building Processes in Democratization: Indonesia', 7.

⁶⁸ Adnan Buyung Nasution, *The Aspiration for Constitutional Government in Indonesia: A Socio Legal Study of the Indonesian Konstituante 1956–1959*. Doctoral Thesis, Rijksuniversiteit Utrecht 1992.

⁶⁹ Simon Butt, 'Returning to the 1945 Constitution: What does it Mean?' 18 June 2014, *New Mandala*, www.newmandala.org/returning-to-the-1945-constitution-what-does-it-mean/.

This brief survey of the scope of public participation in constitution making bears testimony to the great variety in approaches over time in Southeast Asia. I have explored three core processes in constitution making – the representation and role of the drafting body; the forms of public participation in the drafting process; and the final approval stage. These forms have been considered across constitution making under UN administration (Timor Leste and Cambodia); under military rule (Thailand and Myanmar); under democratic transition (Indonesia and Philippines); and under dominant party rule (Singapore, Malaysia). The conditions under which constitution making takes place effect the legitimacy of the processes for public participation, although it is not determinative.

In Southeast Asia, the representativeness of the body tasked with drafting the constitution and overseeing the constitution-making process varies from undemocratic and non-representative (chosen by military or socialist regimes), to elected representatives in free and fair elections. Some countries in the region have used a representative Constituent Assembly to draft the constitution. Others, such as Thailand, Myanmar, and Vietnam, have been drafted by unelected bodies that do not represent the people but instead are chosen by the military or socialist party. While in Cambodia and Timor Leste the bodies were elected, the fact that one party held a majority of votes meant that the constitution-making process was largely overridden by the desires of the dominant party.

There are patterns in the levels and types of public engagement prior to the approval of a Constitution. There have been few substantive civic education campaigns prior to constitution making, although Timor Leste is perhaps the main example, under difficult circumstances. It has been rare for public submissions to be invited. Even when there have been public submissions welcomed, there has been little transparency or clarity as to if or how public submissions are considered, and Myanmar's amendment process is one example. In many countries a draft of the constitution has been released for circulation and comment, although again whether or how any suggestions have been taken on board remains opaque. The case of Vietnam in particular raises the question of whether we should expect reforms to mirror the main ideas raised in a process of public participation.

There is a split in the region between countries that use referendums as part of the final approval process in constitution making, and those that do not. Constitution-makers who have used referendums include the Myanmar Constitution 1974 and 2008, Thailand 2016, and Vietnam,

while the Philippines requires a referendum for any constitutional amendment. Yet official reported turnout rates in some countries have been unrealistically high, or the conditions under which a referendum has been conducted were generally not considered to be free and fair. A majority of countries in the region do not use referendums to achieve constitutional reform, such as Cambodia 1993, Vietnam 2013, Indonesia 1999–2002, Malaysia, Singapore, Timor Leste, and Laos. The example of Indonesia suggests that there are many roads to democratic constitution making, even ones that do not follow trends in enhancing public participation.

Finally, one important aspect of constitution making in Southeast Asia is the centrality of formal constitutional amendment as a key to constitutional change. Singapore and Malaysia are examples of the way a constitutional amendment rule may, in the context of a dominant party state, enable the ruling party to further consolidate power and anticipate any threats to its power. Constitutional change is also often tied to ruling elites. The death of leading political figures – the King in Thailand (2016) and Lee Kuan Yew in Singapore (2015) – has been the impetus for constitutional change in these respective countries. The case of the Philippines may be one in which populism influences potential federal constitutional reforms.

This survey of public participation in Southeast Asia expands our knowledge of constitution-making and questions some of the assumptions about public participation in constitution making. The region of Southeast Asia requires us to reexamine the actual conditions or prerequisites for genuine participation in constitution making. Although various forms of participation have been employed, there have often been serious concerns raised as to the freedoms of individuals to participate and the perceived legitimacy of the final outcome. A future research agenda on public participation that adopts a more contextual approach could attend to the conditions necessary for genuine or direct public participation in constitution making; consideration of the forms of participation that are valued and trusted in local contexts; and how the past misuse of constitution-making procedures and forms of participation influences the legitimacy of future constitution-making processes.

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