This article will illustrate the constitution as a result of bargaining and negotiation among the elites to allocate power and mitigate tension among them. Combining the elite’s concept and its nature of a continuous struggle for power with the approach that investigates the constitution as a contract among the powerful ruling class, this article will reveal how power is allocated among the elites. As a result, this article provides a fundamental notion of the approach called “elite-constructed constitution”. This approach delivers the instrument to investigate the constitutional making process as a negotiation mechanism among the elites, which reflects into constitutional provision. Therefore, because this type of constitution has been constructed under the contract’s notion, constitutional endurance is unexpected because this type of constitution requires a high level of trust among the contract parties. This is in contrast to the notion of the elite’s continuous struggle.

Keywords: Constitution-making, Elite, Elite-constructed constitution, Thailand

Introduction

Under the rise of the democratic ideal and the modern constitution-making concept, it could be undeniable that a constitution has been used to stipulate a limited governance system. Under this duty, a constitution establishes the institution to operate the regime and limit its performance. The primary purpose of these tasks is to protect the rights and liberty of individuals. This, therefore, creates a stable regime where individuals can live peacefully and enjoy using their rights and liberty (Grimm, 2010).

In a country like Thailand, however, constitutions have never functioned in that way. Since 1932, the country's constitutions have been abolished and reconstructed more than 20 times by coup d’état. When the new constitution has been created, the coup leader typically claims that they will offer the real democratic constitution to the country. Unfortunately, the claims have never been archived. Even after twenty different constitutions, the country is still far from democratic, given the army's significant role over the government and the parliament. Moreover, a constitution’s average life span in Thailand is only four years and a half, which is extremely short and contrasts with what could be expected from the constitution that drafting under the modern constitution-making concept.

Another approach becomes necessary to explain the Thai constitution’s situation rather than the modern-constitution-making concept. This article aims to deliver the framework of the approach used to describe the Thai constitution’s situation. The approach is called the “elite-constructed constitution”.

The notion of the elite-constructed constitution approach is simple. This approach admits that the
constitution, in many cases, is not a tool to elucidate the will of the people. A constitution is a tool created by the elites under the notion of contract, which benefits themselves and not the people. The constitution could be created in various forms, including democracy. If the constitution is written in a democratic engagement, it will not fully function in its promise because a focal point of the constitution is on the elites' benefit, not the people. Therefore, the constitution's unendurable could be expected, specifically when the constitution sets up in the sense of a real contract among the elites. This requires tremendous trust between contract parties. However, to consider which constitution is elite-constructed, some assumptions related to the elites' existence and its role over the constitution-making processes are required. It will be provided in the final part of this section simultaneously with the tool using to investigate the constitution under the elite-constructed constitution approach.

The article will construct the concept of an elite-constructed constitution through three different sections. The first section of this article will try to identify the elite and explain its constant conflict. According to the work of John Higley and Michael Burton (2006), the elites appear in every nation-state. The role of the elite over politics is inevitable. A constitution cannot be established without the involvement of the elites (Higley & Burton, 2006).

The constitution's concept will be reconsidered more pragmatically and realistically in the second section. The constitution will be described as a actual contract that aims to transform and constrain the elites’ struggle and allocate power. Therefore, the contract theory of the constitution presented by Tom Ginsburg and the approach that considers the constitution as a strategic instrument of power given by Ran Hirschl will be used to assess the constitution. In short, for Ginsburg (2013), the emergence of the constitution can be described by using the modern concept of the contract where the contractual parties seek an appropriate way to conclude the deal over the specific topic through the negotiation process. Therefore, Hirschl (2013) provided a practical approach to consider the constitution as a product of the struggle between political groups that try to shape a political system through the conflict and bargaining processes. After that, the concept of an elite-constructed constitution as a framework that molts other ideas will be developed in the final section.

The Elite and the Never-Ending Conflict

Defining an elite and compartmentalizing which person or group person could be identified as an elite are critical questions for this work. Therefore, the first part of this section will deal with these questions. The second part will elucidate the nature of continuous conflict among the elites.

The Meaning and the Identification of an Elite.

Consider the meaning of the word “elite.” This word could be defined in various ways: the wealthiest people, the most influential people, or the best-educated people. Typically, when the meaning of the word elite has been given, it often relates to the wealthiest people in society. In many cases, the elite can refer to another group of people who may not be wealthy or well educated but are still powerful in politics (Acemoglu & Robinson, 2006). However, such definitions are too extensive and cannot be utilized here because it does not create a strong relation to the constitutions.

In this work, the “elite” represents people or groups of people who directly participated in the constitutional making process where they can design the country’s governance system. In short, the elites influence politics. Therefore, the meaning of the word “elite” must identify within the realm of politics.
To define an elite in a political sense, we have to understand the meaning of the word “politics” first. According to Wouter van der Brug and Eelke Heemskerk (2017), it is hard to find a generally accepted definition for the word, “politics”. However, when considering politics, three elements are frequently mentioned: decision-making, conflict, and power (van der Brug & Heemskerk, 2017). Those three-elements associate with the word “politics” in different but related aspects. When considering decision-making, politics is when someone or a group of people create a decision that binds the other. The binding decision is typically rendered after the conflict occurs between individuals who live in the same society. Moreover, the decision can force the conflicting parties to consent even when they do not fully agree about the decision’s detail. It is because the people who render the decision have enough power to enforce it (van der Brug & Heemskerk, 2017).

However, when considering the mentioned relation, not all of the power that can render a binding decision over the conflict necessarily identifies politics. We could agree that the personal dispute and the dispute’s decision cannot be considered part of politics. In this case, using the meaning given by the political science scholar, David Easton, could be useful for shaping and understanding the meaning of the word “politics”. In his book *A Systems Analysis of Political Life*, Easton (1965) defined politics as “interactions through which values are authoritatively allocated for a society (p. 21)”. According to the definition, politics is an interaction among several individuals who have the power to render the decision and determines the value that binds another individual in the society (values are authoritatively allocated for a society). Therefore, because Easton never defines the meaning of the word “society” in his work, it is possible to interpret it in terms of a nation.

Let us consider three elements of politics together with Easton’s meaning. We can summarize that politics is the interaction of individuals who are powerful enough to render the binding decision that could solve the conflict and define an appropriate value for the whole nation. The binding decision comes into sight in various forms. The constitution is one form of binding decision.

Therefore, from the definition of politics, the elite could be defined as the people or groups of people who sit in a position that can render the decision that binds the nation. The definition of the elite given here is similar to the definition given by C. Wright Mills. In his book, he states that

the power elite is composed of men whose positions enable them to transcend the ordinary environments of ordinary men and women; they are in positions to make decisions having major consequences. Whether they do or do not make such decisions is less important than the fact that they do occupy such pivotal positions. (Mills, 1956, p. 10)

From the proposed definition and Mills’ definition, the elite can be understood as society’s ruling class; therefore, because the constitution-making process is a part of politics; so, as a ruling class, the elite can directly participate in a constitution-making process that will allow them to define the country’s structure.

It seems ironic when the first requirement to understand the constitution, in the era of democratization, is to realize the ruling class’s existence and the impossibility of creating an egalitarian society. It is necessary to admit that the ruling class exists. The availability of the class is also vital to the existence of the modern state. This assumption is related to the suggestion of John Higley and Michael Burton (2006), in their famous book *Elite Foundations of Liberal Democracy*, that for the modern and complex societies, the existence of an elite is inevitable. The main reason for the elite’s existence is that experts must operate the organization for a complex organization, like every modern state (Michels, 1966). The same logic could also be found in legal scholars’ famous works that significantly influenced modern-day democracy, like Jean Jacques Rousseau and
Emmanuel-Joseph Sieyès. The experts’ group calls the government needed to be set up and work under the people’s sovereign power for the former (Rousseau, 1762). For the latter, the representative is necessary to represent the will of the nation (Sieyes, 1789). However, when a small group of people can hold power, they gain control over state funds, information flow, and other state functions. Immediately, state power becomes concentrated in the hands of the few; after that, the ruling class has been unavoidably established (Higley & Burton, 2006).

Giving meaning to the word “elite” is one thing, but identifying the elite is another. The elite’s definition is expansive; even the definition has been scoped under politics. Every people or group of people who could influence politics by their position could be identified as an elite. So, it is merely impossible to locate the elite completely (Angolano, 2011). Under that definition, monarch, politicians, military, or even a stand-alone businessperson could be identified as an elite if they can obtain a powerful position. However, it is still necessary to identify the elite, at least in a broad sense.

The act of identifying the elite, given by Michael Albertus and Victor Menaldo (2016), is preferable. Their work on elite-biased democracy theories identifies the elite by classifying two categories: political elite and economic elite. The political elite is the group of people who can directly use their power to influence the decision-making process due to their position and intensity. Therefore, figures, like the monarchy, military, and politicians, perfectly fit this category, because they are powerful.

The political elite can also divide into two subcategories: the incumbent political elite who already gains power and those using their power to render the binding decision. This type of political elite tends to preserve its benefit and status quo (Albertus & Menaldo, 2016). A different kind of political elite is the outsider political elite. This elite type is sitting in a position with enough power but cannot render the binding decision because they are blocked by the former or do not obtain the country’s top position (Yakovlev, Marques, & Nazrullaeva, 2012). Therefore, the latter elite type typically looks for the possibility to change the status quo (Eisenstadt, LeVan, & Maboudi, 2017). The outsider political elite might include people who gain enough power and resources, making them strong enough to challenge the incumbent. Consequently, this type of elite could emerge from the incumbent’s social and economic process (Haggard & Kaufman, 2016).

For the economic elite, there is a group of upper-class people who could influence the decision-making process because of their wealth and economic power. This elite group may not directly decide the politic. Typically, the economic elite is the wealthiest in society, including landowners or manufacturers. The private actors who play a significant role in the economic system also fit in this category. Thus, because the elite in this category are typically only in the economic field, they could be considered only financially powerful. They are often not directly involved in politics. However, the economic elite usually uses its power to support the political elite’s work when they share the same interest. Therefore, the economic elite divides into two subcategories: the incumbent economic elite, which is the elite working closely with the incumbent political elite, and the outsider economic elite, which is the economic elite whom their interests do not depend on the work of the incumbent political elite (Albertus & Menaldo, 2016).

The elite in this article refers to the people or groups of people who have enough power to render the decision that binds society or can influence the process of decision-making. Under this definition, the elite can separate into the political elite and the economic elite. However, because this article aims to develop the concept of the elite’s constitution tailor-made, the article will pay most attention to the political elite’s role in the constitution-making process. Meanwhile, the economic elite’s role is regarded as a factor influencing the
political elite’s decision. In a limited situation, the economic elite may transfer themselves from their former position to become an elite in the political field.

The Never-Ending Conflict of the Elites

In a larger society, like a national state, it is impossible to find that every citizen shares the same interests. In some respects, the interests of one group of people will shatter the interest of others. Therefore, conflict among people arises (van der Brug & Heemskerk 2017; Praag, 2017). In the natural state of humankind, nothing is left but chaos. Even now, humanity left the state of nature and created a national state with rules to constrain the conflict among them; however, such conflict is never solved. In a complex society, conflict is rarely solved but only disappears and reappears (Little, 2008). The elites share this nature of the continuous conflict. Among the elites who play the power game and seek a chance to run the regime, these conflicts are particular and distinct from individuals’ conflicts.

As we consider in the former part, the concentration of power is necessary to the nation-state’s emergence. Also, the elite, as a ruling class, has to emerge to operate the state organization. Realistically, when the elites gain state power, they can immediately use and control state’s function. The concentration of power in the hands of a few, even under a democratic rule or not, tends to corrupt automatically. Therefore, it is not surprising if the elite uses that power for their pleasure and benefit (Domhoff, 2012). Thus, when the ability to dominate the state is shared among the few people or groups of people who can classify as an elite who gain power and who are in a position that can achieve the power immediately enter the conflict’s terrain.

The conflict among the elites typically occurs between the incumbent political elites who try to protect their position and the outsider political elites who want to influence politics by their will. The former will try to preserve the status quo while the latter will try to destroy it. The elite’s continuous conflicts are typically related to only two questions. The first one: How to gain power? The second one: How to preserve it?

While the conflict among the elites has never been solved, it is possible to constrain the conflict for a while using the constitutional rule, which we will discuss in the next section (Banting & Simeon, 1984). Whenever the rule cannot restrain the conflict, or the rule has been used to tear down the balance of power among the elites, it may be possible that the elites will dismantle the rule. Then, the elites will create a new constitution to preserve their power or some time to allow the new player to the game. If the changed situation has been galvanized by the external factor, such as the request for democratization, the new constitution may introduce a democratic regime. In case that the elite embraces the democratic concept by themselves, it is possible only that because they want to preserve an advantage under the new regime. Dan Slater and Joseph Wong (2013) called this type of scenario “conceding-to-thrive” (p. 11). However, various factors have to be considered in this case. The factors differ depending on different societies. It is impossible to view all of the factors in the span of this article.

In conclusion, this section has given meaning to the word “elite” by explaining that the meaning of the elite preferred in this article is the people or group of people who have enough power to render the decision that bides the society or can influence the process of decision-making to their will. It is possible to classify the elite into two categories: the political elite and the economic elite. The political elite is only one group that plays a significant role in rendering an abiding decision to society. However, the elite still has a nature of the continuous conflict. As a part of humankind, they cannot share the same interest in every aspect—the conflict among the elites usually related to political power. In the next section, we will consider the rule that constrains
the struggle among the elite named constitution. The constitution is not the imagination contract among the state’s citizens but the actual contract that allows the elite to negotiate and allocate their power.

**The Constitution: The Contract to Transform the Conflict and Allocate the Power**

This section of the article will present two different ways to consider what a constitution is more realistically. We will not consider the constitution as a part of hypothetical contract like a social contract, like social contracts. Constitution will be considered as an actual contract. After that, we will give the contract more specific purpose to explain the constitution’s use as a tool to transform uncontrolled conflict into a set of rules that constrain the conflict itself and allocates power among the elites.

**Constitution as Contract**

In an orthodox way, the constitution has been explained in terms of an imagination contract among the citizens through a “social contract” to describe the constitution’s legitimizing among the individual. Many scholars disagree with the social contract theory because not every citizen in the state participates in the contracting process. The social contract theory is also incapable of explaining why the next generation of citizens bind themselves under the rule that the older generation has created. However, without an expounding constitution in the sense of contract, it may seem impossible to clarify the origin of the constitution.

Even the theory that tries to explain the constitution in more practical ways, like coordination theory, still reflects the sense of contract over the constitution. In detail, the coordination theory offers two modes to elucidate the existence of the constitution and its nature of self-enforcement. First, the establishment of the constitution and the government, with its power to govern, has been raised from the coordination and the consent of humankind (Hume, 1987). Second, the constitution is enforceable because the state's people are coordinated to live under the rule (Hardin, 2013) where humankind submits themselves as the subject to the authority of the constitution and government by consent (Hume, 1987). While the latter offers the best answer to why the constitution can bind the people who may not participate in the constitutional construction process, the former cannot explain its establishment without reference to its contract nature. In other words, the coordination in the first place has to be described as the coordination between contractual parties in order to create a constitution. Considering the work of Tom Ginsburg thoroughly will provide the best explanation about the constitution in terms of the contract.

In his work *Constitution as Contract, Constitution as Charters*, Ginsburg (2013) agreed that the coordination theory does a superior job explaining the nature of the constitution’s self-enforcement regarding the citizen’s coordination for some specific reason, like a fear of the penalties or to protect their rights and liberty. Nevertheless, it is better to explain the origin of the constitution in terms of the contract. Such an explanation also helps us understand the constitution clearer when the constitution has been seen as a product produced by the bargaining process between some parties.

However, to examine the constitution under the private contract approach, three main objections must be considered. First, the agreement’s notion seems not entirely fit with the constitution because not every citizen can participate in the bargaining process. However, the constitution’s origin appears perfectly fit as an agreement when considering it as an agreement of a few. In his work, Ginsburg agrees that not all citizens can participate in the bargaining process to create an agreement called a constitution. The constitution bargaining process only allows powerful people; in other words, only the elites participate. Therefore, to say the
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constitution is the agreement document means that the agreement lines among the powerful parties, not the ordinary ones (Ginsburg, 2013). This claim is commonly shared among many legal and political scholars (Albetus & Melnaldo, 2018; 2016; Archerman, 2019; Vergara, 2013).

The second objection related to the private contract approach is to consider some documents as a contract. The third-party must enforce the document. The constitution also lacks this component entirely. Even considering the constitutional court as an enforcer of the constitution still does not correctly fulfill the third-party requirement. The constitutional court operates under the constitution. However, according to the author, some constitutions could be enforced by external power, such as international organizations in East Timor or an occupation country in Afghanistan (Ginsburg, 2013). For Ginsburg (2013), international involvement as a third-party to enforce the constitution is becoming more the norm than the exception. Therefore, constitutions do not lack the third-party-enforcing component completely.

The third objection is related to time and purpose. The private agreement typically forces the contracting party to fulfill a specific task in a limited time. In contrast, the tasks set by the constitution are not that simple. The governing mission is an ongoing task that cannot limit by time, making the constitution’s nature entirely contrasted with the contract’s nature.

These are the reasons, according to Ginsburg (2013), that could go against this objection. Like many contracts, the constitution establishes the institution to operate the nation, set a specific purpose, and limit its power. These notions are not different from the corporate charter with another form of private contract (Ginsburg, 2013). The notion of the constitution as a charter sets a specific task, binding the government’s action under the guideline conducted by the specific collective purposes also shared by Jeff King (2013).

Therefore, due to the objection related to the unlimited time of enforcing the constitution, the constitution explicitly sets a period of performance for transitional provision in many cases (Ginsburg, 2013). Moreover, according to Ginsburg’s work with Elkins and Meltron, constitutional endurance around the world is approximately nineteen years. After the expected years passed, the elites seem to renegotiate over the constitution or breach it and create a new one (Elkins, Ginsburg, & Melton, 2009). Thus, even the basic rule of the state appears to have a specific time of enforcement.

For all the reasons stated above, it is possible to consider the constitution as a contract. When the constitution has been considered in this sense, it allows us to examine the constitutional making process as a process of bargaining. We can now see the institution, like a constitutional assembly or the rule of constitution-making, as a tool for the elite to negotiate and bargain regarding the constitution. Also, the constitution is an agreement that resulted from the former process where it is texts have become the negotiation product. Importantly, this approach allows us to understand that, if the constitution is a result of the bargaining process, it is possible that some of the parties can simply break the constitution because the outcome of the negotiation is unpreferable.

The Constitution as a Tool to Transform the Conflict and Allocate Power

How is the constitution used as a tool to transform conflict into a general rule? The rule reduces the damage from intractable conflict, provides constraints, and gives the conflicting parties direction to continue their struggle to limit unfavorable circumstances. Moreover, the constitution plays a significant role by allocating power among the elites, which mitigates the tension among them. The rule allows incumbent political elites to maintain their influence and provide the outsider political elites to participate and have a
chance to become a part of the power game. In other words, these results are the objective of the contract called “constitution”.

Before considering the argument presented above, let us consider the definition of a constitution. As provided by Denis J. Galligan and Mila Versteeg (2013), the constitution, especially the written one, is the document that “establishes a system of government, defines the powers and functions of its institutions, provides substantive limits on its operation, and regulates relations between institutions and the people” (p. 6). This definition is neutral but at the same time isolates the constitution from various conflicts that drive the political society. It also prevents us from considering the constitution as a tool to transform the conflict and allocate power. Therefore, as suggested by Ran Hirschl (2013), to understand the constitution fully, we cannot solely consider it without its relation to political or economic conflicts.

Hirschl is trying to develop the constitution’s strategic foundations by relinking the constitution with conflict that shapes the constitution. In his work, Hirschl provides the objection to two canonical approaches using to understand the constitution also the process of constitutionalization. The approach he objects to includes ideational and functional approaches. The ideational approach, in summary, is the concept that elucidates the use of the constitution as the tool to establish a system of liberal constitutionalism where the supremacy of the constitution has been promoted. Meanwhile, the system creates the institution of limited government with other institutions to civilize their action and protect the individual’s fundamental rights and freedom. The main reason for the ideational approach to support the process of creating a constitution and the constitution’s use to promote liberal constitutionalism is that it is the right thing to do. Only in this way can a stable democratic regime be created. It also prevents despotism by the government. This approach strongly believes that the constitutionalization process has reliable support from the country’s mass majority (Hirschl, 2013).

However, the ideational approach cannot explain differentiation regarding a constitutions establishment, context, and function. It cannot explain the differentiation of constitutional establishment in each country in terms of times. Also, in different countries, the constitution has a different context and functions oppositely. The explanation’s failure is mainly, because the approach fails to recognize that, in many countries, the constitution is the document drafted by a few to create a constitution that serves specific purposes. For Hirschl (2013), constitutional revolution or constitutional establishment typically happened under the elites’ initiative, which may or may not consider the people’s will. Sometimes, the elite can use the phrases “liberal constitutionalism” or “the will of the people” to cover their agenda and create the constitution that shrouds itself under liberal constitutionalism but functions differently (Hirschl, 2013). The constitution in countries, like Taiwan, Indonesia (Slater & Wong 2013), and Thailand (Higley & Burton, 2006) is the perfect figure for the argument.

The other objection is on the functional approach. This is commonly known as the approach that supports the constitutional establishment, because the constitution can be active as a tool for two specific purposes. The first reason is political. The constitution can create a stable and functional system of governance. The constitution makes abiding rules and procedures that the government and any state officers must adhere to (Hirschl, 2013.). Secondly, for economic purposes, the constitution creates a governance system that increases legal security and predictability. The investors benefit from stable and predictable systems; the stability is too valuable for the country’s economic growth (North & Thomas 1973). In other words, the process of constitutionalizing seems like a pre-commitment for the stable system of governance that is profitable in terms
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of politics and economics. However, Hirschl (2013) expected the constitution to complete that commitment seems impossible. Like the ideational approach, the functional approach ignores the fact that the elites’ group created the constitution. Hirschl (2013) stated that the elites “have a crucial self-interest” (p. 163). Thus, it is possible to expect that the written constitution created under such crucial self-interest will only establish the system and institutions shaped to serve a personal purpose and cannot fulfill the commitment that is given to the people.

After objecting to both ideational and functional approaches, Hirschl invites us to consider the constitution as a strategic instrument of power. Under this view, the constitution has to be seen as a pragmatic rather than a principled document. When the constitutional making process is seen as pragmatic, it will reflect the political opponents’ bargaining process. Each opponent enters the bargaining process for two primary purposes. First of all, they want to mitigate the tensions between them. These tensions could be from the group of people they represented or the tensions from the struggle for power. Second, they want to shape the constitution using their will. During the process, they will create tools to mitigate tensions, build trust, and allocate power (Hirschl, 2013).

Consider the explanation of the constitution by Hirschl; the relationship between the constitution and conflict is instantaneously detected. We can consider the conflict that the constitution aims to transform into two aspects—first, the conflict among individuals. As mentioned before, in the complex society of humankind, conflicts are imminent. Each individual has its interest, which typically differs from others. According to differentiated interests, disputes among individuals quickly appear. Letting the individual deal with their conflict without the rule to constrain or without the third party to solve the conflict will create chaos. As seen by the scholar John Locke (1823), the state and constitution have been developed to prevent chaotic situations. In a modern view, constitutional scholars, like Vivien Hart, believe that in forming a complex society, like a nation-state, they are many aspects of conflict that have to be considered and constrain by the constitution. The conflicts may have included religion, gender, sexual orientation, and inequality between different social classes or others. Such conflict could be resolved or constrained by the constitution, using the constitution-making process to negotiate and bargain between conflictual parties to set a median rule acceptable for all conflictual parties (Hart, 2001).

According to the first aspect of the constitutional transformation of conflict, whether the constitution has been created under the elite’s will, it still needs to consider solving the conflict among the individual. Even at the smallest level, the attention over the individual’s need is a minimum requirement to gain coordination from the masses. Without this coordination, the constitution is impossible to operate. Also, the elites, especially the incumbent, will risk losing their position (Haggard & Kaufman, 2016).

The second aspect of conflict transformation is the transformation of the conflict among the elites. The constitution-making process should be considered in the arena for the elite to fight for access to the policy-making power (van der Brug & Heemskerk, 2017). Winning over the fight means the elites can create the government system and determine its function to benefit them (Moe, 1990). However, by making the rule that binds themselves, the ruling elites who typically fight for gaining more power will create the document that will either impose a governing system that favors their benefit or the document will constrain their power. This paradox seems more peculiar when considering that some elites lose the struggle but still deprive themselves under the opposing rule.

The nature of the constitution as a contract must be considered again at this point. Before entering the bargaining process to create a contract, the contractual parties typically agree that the bargaining process must
benefit them. They may also not want to risk themselves on the cost if they do not enter the bargaining process. The same idea can adapt to the case of the elites and the constitution. The elites need a consensus to enter the bargaining process to create the constitution, because it otherwise may risk them living under continuous conflict or because the situation of constitutionalization cannot be averted. The tension between elites seems to transform and constrain themselves when the constitution sets up the governance model that favors some particular elites, but not too much (Grossman, 2004).

The constitution that can transform the elite’s conflict into a fluent medium rule is the constitution that allows the incumbent political elites to take a benefit from the stipulated rule. It will also enable the outsider political elites to participate in the game under the consensus rule.

In other words, if the bargaining process and the constitutional texts appropriately allocate the power among the elites, it could be considered a success using the constitution as a tool to transform the conflict into rules. After the conflicts have been settled and the power-sharing mechanism has been established, if a liberal or stable political regime has been created under this circumstance, it will not come from the theoretical framework’s pre-commitment. In contrast, the liberal or stable regime will be made under the structure that most opponents fully agree with (Hirschl, 2013).

The constitution is the law that establishes the system of governance for the state. However, the constitution does not stipulate the people’s imagination contract but the few elites’ actual contract. The contract among the elites has two related purposes. The first one is to transform the conflict in society into a set of rules that, on the one hand, mitigate a variety of tension among the citizen, aiming to gain their coordination with the constitution. The tension among the elites in terms of the continuous struggle for political power is also mitigated.

By mitigating the tension among the elite, the second purpose of the contract can be identified. The second purpose of the constitution as the contract among the elite is to allocate power among them. The elites enter the bargaining process to create an agreement that constrains the conflicts among themselves and sets the rule that allows a variety of incumbent political elites to share and participate in exercising state power. The rule also oppresses outsider political elites’ desire to start to revolt by giving them a chance to participate in the game under the rules that incumbent elites created. For them, having a seat and an opportunity under the new constitution could be better than being left outside the game (Albertus & Menaldo, 2016).

Therefore, the constitution can be established only when those two purposes of the contract have been reached. It is not surprising if the state institutions created by the constitution are functioning in favor of some specific group of elites because, since the beginning, the constitution has been designed to favor the elites. The constitution can create a stable regime. The constitution may be breached shortly because the elite’s conflict is not solved but suppressed by the constitutional rule. When the rule does not function properly, the elites may design to renegotiate through the amending process. In a severe scenario, the elites will demolish the old and create a new one.

**The Elite-Constructed Constitution**

This article is trying to develop the concept of an elite-constructed constitution for two primary purposes. First, in some countries, the constitution has been enacted under democratic cloth and promises that an egalitarian society will be created to benefit every citizen equally. However, in reality, the constitution has been established to profit the elites specific group. Secondly, the constitution established in this way is fragile. The
constitution shaped under this notion has a short life span. The constitution has been destroyed repeatedly under
the claim as well as the promise of creating a constitution that fully embraces the democratic concept. However,
even the new pro-claimed democratic constitution has been made. The new constitution will shortly demolish
under undemocratic or corruption of the government claimant. After that, the vicious circle seems fully
established. The fundamental constitutional concept, like a social contract where the constitution kept isolating
from the politics and elite, is incapable of explaining the dilemma.

This situation could be more accessible to understand if the constitutionalization process has been seen as
a floor for the elites to negotiate and bargain for power. The elite-constructed constitution is the approach that
tries to illustrate this explanation. It is more like a framework that brings the elite’s concept and the concept of
a constitution as a contract to transform the conflict and allocate the power together.

Therefore, to elucidate the elite-constructed constitution approach’s notion, two sets of explanations will
be provided— the first is the relation between the elite and the constitution; and the second is the notion of the
elite-constructed constitution.

The Relation Between the Elite and the Constitution

The relation between the elite and the constitution has already been explained in the previous sections.
However, before the notion of the elite-constructed constitution will be examined in the next part, it could be
profitable to reconsider the relation. Indeed, the connection between these two figures will be explained under
one central question. Why does the constitution matter for the elite, especially for the political elite?

According to the ruling class’s existence, as described in the first section of the article, the ruling elites
existed even before the written constitution was established. Because those elites who lived before the age of
written constitution were already powerful, it seems unreasonable when the elite existed from the stage of
unlimited power and limited themselves to the constitution.

However, many scholars suggest that the elites volunteer to exist from the authoritarian stage, event concedes
to change to the democratic regime, when the adjustment tends to benefit them rather than remain entrenched
with old power. According to Slater and Wong’s (2013) work, many powerful elites are inclined to accept or
even initiate the transitional change when they are confident that they can control the transitional process which
guarantees their benefit even under the new regime. Furthermore, the transition will be persuaded, especially
when they receive the signal showing that the highest point of their domination has been passed. The signal, in
many cases, means constitutionalization (or event democratization) is inescapable (Slater & Wong, 2013).

The elites ominous signals could appear in various forms, such as the protest of the masses, the rebel of
the outsider political elite, or even an economic problem. Under this circumstance, the elites have to prepare
themselves for the change. Therefore, this is when the focal points of the elites will be concentrated on the
constitution. The constitution matters for the elites, because if they can control and shape the
constitutionalization process by their will, they can guarantee their place of power and their benefit in the new
regime (Albertus & Menaldo, 2016).

In summary, controlling the constitution-making process means the elites can design the outline for all of
the new regime’s political relationships, allocate the power among them, and create a safeguard to eliminate the
risk of eradication after the regime change (Banting & Simeon, 1984). If the regime transition is inevitable, the
constitution will be an essential tool to protect the elites during the transformation phase. Furthermore, shaping
the constitution by themselves allows them to remain in power in the new regime.
The Notion of Elite-Constructed Constitution

Constitution matters for the elites, as can be understood from the last section. For them, especially during the transitional period, firmly gripping on the constitution-making process means they can guarantee and secure their life and properties after the transition. Furthermore, they can preserve their seats in the new regime directly through the constitution. The elites have to construct their collateral prudently.

To understand the notion of the elite-constructed constitution, three preliminary assumptions are required.

First, the elite’s existence as a ruling class with continuous struggle must be recognized. The elite could be classified into two categories: the political elite and the economic elite. Only the political elite plays a direct role in the constitution-making process. The political elites’ continuous struggle is typically about gaining the power to rule the countries and protect themselves from losing power.

Second, the constitutionalization process must be initiated by the elites. The requirement of change may come from external factors, such as economic problems, disasters, or riots. The elites still initiate and construct the constitution by themselves. Entering the constitution-making process will cost less for them than becoming entrenched with old power. The elites must and will play a significant role during the constitutional making process to negotiate for their benefit. Therefore, the elites will typically concentrate on constructing the governance system and institutions that can benefit them most. The section related to citizens’ rights and liberty will typically not be the focal point under this type of constitution. However, when citizens’ coordination is necessary, the focal point will be expanded to cover the topics.

Third, the constitution has been used to constrain conflict and allocate political power among the elites. Thus, the constitution can function only when the contract parties can maintain trust with another. The same logic can apply to the expectation of constitutional endurance. Whenever the elites lose their confidence in the constitution and believe that demolishing the constitution is costless, they tend to create a coup (Acemoglu & Robinson, 2006). So, constitutional endurance is unanticipated. According to complexity theory, the constitution never solves the conflict among the elites; it represses the conflict and makes it disappear. However, the conflict can still reappear at any time (Little, 2008).

Under these three assumptions, it is possible to see how the elite construct their constitution and how the notion of the constructed constitution is upheld.

The elite-constructed constitution is entirely constructed under the will of the elites. It is safe to say that the requirement for constitutionalization could be triggered by various factors, including external factors, such as an economic crisis or internal factors, like rebellion from the outsider political elites. However, in the state where elites obtain the power to rule for sufficient time, they will initiate the constitution-making process rather than let the external figure begin the process. Therefore, it is possible that both incumbent and outsider political elites together will join in the initiation process.

On the constitutional making floor, the elites will start negotiating and bargaining about their future. The negotiating process typically begins with the creating of legitimate authority to construct a constitution. The authority of that so-called constitutional assembly will mostly consist of the elites themselves from both incumbents and outsiders (Albertus & Menaldo, 2016).

In the gathering of the constitutional assembly, the elites will negotiate and shape their relationship by allocating power between corresponding figures. Therefore, the elites’ negotiation will focus on constructing the constitutional institutions that will exercise the state power. Moreover, if the constitutionalization process
correlated with the regime change, the negotiation about the incumbent elites’ status from the old regime under the new one will be included. Additionally, in the regime where the state apparatuses have been created and function under the incumbent political elites for a certain period, the constitution-making process will favor the incumbent side.

If the elites succeed in the negotiation process, the conflict and the tension before the time of constitutionalization will be transformed into the median rule called the constitution. In this case, the constitutional texts will echo the result of the negotiation. A tailor-made constitution will mostly reflect its notion as an elite-constructed constitution in various forms, such as the vote aggregation rules, defanging the opposition, and protecting former regime elements from the prosecution (Albertus & Menaldo, 2016). Therefore, the rule that stipulates the relationship between the state institution and its citizen will also be included in the constitution. If democratic rules are required to gain coordination from the citizens, the elites will introduce them to their constitution.

Because the constitution has been established under the sense of contract among the elite, its endurance is unanticipated. Whenever the elites believe that the current constitution cannot function to serve their benefit or cannot keep the conflict among the elites on track, the process of re-negotiation is anticipated. However, the process could appear in the form of a constitutional amendment or a suspension and creation of a new one.

Using the explanation of the elite-constructed constitution given above to testify which constitution is constructed by the elites, the chapter offers four states of testification, which could identify the elite's constitution.

(1) There should be a signal that threatens the incumbent political elites’ status quo, which catalyzes the constitutionalization process. The threat, in this case, could come from external or internal factors. The dire circumstance will liberate the elites' conflicts constrained by the constitution or basic rule governing the state in that period. Therefore, the emergence of conflict will allow us to identify the conflict parties whose struggle for political power.

(2) The elites will enter the bargaining process by stipulating the constitutional assembly. The members of the assembly will mostly consist of the elites. Therefore, they will negotiate for their benefits and shape the constitution that profits them.

(3) The constitutional text will reflect the result of the negotiation. The rules that benefit a specific group of elites will be stipulated. Moreover, we could see the shifting of the power between incumbent and outsider political elites by observing which side benefits most from the constitution.

(4) The short life span of the constitution created in this way could be expected because the constitution has been made under the contract notion, which requires the trust and balance of the benefits gain between contact parties to maintain the constitution’s endurance.

When the contract parties cannot maintain their trust in the constitution, also when the choice of demolished the enforcing constitution is attractive, the threat to the elites' status quo will reappear. The constitution will fail to constrain the conflict among the elites. Then, the constitution will be demolished, allowing the elites to renegotiate over the new constitution. From this point, the vicious circle will begin. The loop of creating and demolishing will not disappear as long as the elites believe that this circle will benefit them and cost less when compared with preserving the old system (Acemoglu & Robinson, 2006).

Because this article offers a draft concept of the elite-constructed constitution, four-steps of testification illustrate how you could identify the country’s constitution as elite-constructed. However, the result of the testification process could vary depending on the political factors in each state.
This article has focused on the role of the elite in the constitution-making process. Under the elite-constructed approach, recognizing a situation where the state’s basic rule is not created by the people and for the people is required. However, it still has space to embed the democratic concept or the people’s story into the constitution exquisitely netted by the elites. Nevertheless, that possibility will not merely arise because it is the right thing to do, as in the objection presented by Hirschl.

In contrast, injecting the democratic concepts into the elite-constructed constitution requires the possibility created by external factors, which directly imperil the elite’s status quo. In some cases, the factor could be a riot or a protest from the masses, which possess de facto political power and is designed to use that capacity to obtain democracy (Acemoglu & Robinson, 2006). This approach does not deny the possibility; however, it must be considered separately from the fact that there is a constitution constructed by the elites. Thus, with or without the democratic concept, the elite-constructed constitution will favor the elites, and its endurance generally depends on this.

Conclusion

This article presents a framework called the elite-constructed constitution. This approach melds the elite’s political concept and the pragmatic constitutional approach together. As a result, the approach that could be used to elucidate the notion of the constitution produced by the elites and for the elites existed. The elite-constructed constitution’s approach will help explain the constitution in a country like Thailand, where the elite has created constitutions under the veil of democracy but continue to demolish the constitution repeatedly.

The elite-constructed constitution approach shows the possibility to consider the constitution from a different perspective. Under this perspective, the elites fully participated in the constitution-making process. The constitution has been carefully crafted under the will of its designer. Therefore, it could be easier to recognize how fragile the constitutional approach is when it has been identified as the elites’ document. Under this perspective, the constitution could be created only when its subjects have been accepted by the elites who participated in the negotiation process. Also, the constitution will be demolished when it cannot function in the way expected by the elites.

However, this concept is still not fully developed. An in-depth investigation of the idea of elite, conflict, and constitution is required to develop a complete explanation of the concept of an elite-constructed constitution. Moreover, the effect of external factors such as economic crisis, disaster, riot, or revolution, and the elite constitution still needs to be considered carefully. This will be done through an examination of the history of failure of Thai’s constitutions, which is the primary purpose of developing this approach.

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