Reflection on the National Convention
(The road map in Burma)

The National Convention is targeted to design the future constitution of Burma. By and large, the constitution evolves as the result of interactions of various forces of the society. The Constitution making process is vital to the evolution of the constitution. The more the process is participatory, the more it is debated, there is increasing probability of the evolution of a durable, sustainable and democratic constitution.

Burma’s 50 million people had watched the drama of the Bangkok Process open and wondered if the world would stay involved and help Burma rebuild itself. It desperately needs the substantial and committed involvement of the international community if it is to have any hope of breaking out of the national death trap that more than 4 decades of ceaseless warfare have created. Conceived in the process meant to give democracy a chance to flower, the nascent experiment of an accountable government will however end in failure because of mistrust and instability. The institution of the national convention is marked by military domination and highly arbitrary rules of procedure which prevent the goal from ever being reached.

The international community has a limited window of opportunity to aid Burma’s transition. Many approaches have been tried including sanctions, constructive engagement, half measures, and pursuing a “contain and isolate” strategy. Time has come to review the situation. The international community has the capacity to deal with the dictators of Burma but ironically it stands paralyzed. This is because everything has been left to the US, which is now deeply involved in multi-faceted global problems. Recently, a coalition of the willing has been assembled to commence a project called that Bangkok Process. The UN Secretary General and US Secretary of State in unambiguous terms have given the mandate to the regional forum to push forward for effective political change in Burma.
Case study of Afghanistan

In December 2001, the Bonn Accords were signed by 4 non-Taliban groups, and a six-month interim authority was established. Under the Accords, the first step in a process leading to a new constitution was for Loya Jirga to take place in June 2002. By December 2003, the second Loya Jirga was to lay down the structure of a new government. By mid 2004, a move to regularize the government was to take place by holding of a nationwide election. In Jan 2002, a meeting of donor states in Tokyo resulted in pledges of massive help for reconstruction. The focus was founding a workable government. It may be noted that the vehicle for transition has been the Accords and the time frame entrenched in them. While there have been many criticisms of the process, Afghanistan is moving forward.

It is not suggested that the same process should be adopted in Burma as it cannot be. The conditions of the two countries differ fundamentally in many respects. Instead, the point being argued is that constitution making process is vital to sustain the movement. However brilliant the design of a constitution may be, if the process is full of flaws, the entire exercise will be doomed and instability and chaos will prevail.

The Loya Jirga was designed to be as representative of the population as possible. Using the existing 32 provinces and 370 administrative districts as a starting point, 1,051 delegates were indirectly elected, with each district guaranteed at least one representative. In the Phase I voting, adults of both sexes from a given district or urban ward gathered to choose between 20 and 60 electors. A few weeks later, these electors met to name from among themselves a designated number of delegates to the Loya Jirga. To administer these elections, the country was divided into nine regions, each centered on a major city. Each region had an election team to conduct the Phase I and II elections in that zone. The teams were headed by members of the 21 persons Loya Jirga Commission and assisted by political officers of the UN Assistance Mission to Afghanistan. Twenty-seven international monitors were also dispersed around the country to observe the elections, offer guidance and assistance where possible, and report irregularities.

Phases I and II elections began in late April 2002 and continued through early June 2002. In addition to the 1,051 elected members, 399 seats were supposed to be provided to members of the Interim Authority, refugee population living outside Afghanistan, internally displaced persons, nomads, religious and civil society elites, and women (who were guaranteed a hundred seats). The grand total of Loya Jirga delegates was supposed to be 1,450, but Loya Jirga Commission members approved last-minute appointments meant to ensure Karzai’s election. This brought the total number of official delegates to more than 1600. Yet, the key points are that there was an accord, representative assembly and open discussion in the first steps of the constitution-making process.
Case study of Iraq

Iraq and Burma are two different countries, two different societies with difficult problems. However, what is of relevance importance to Burma is the rapidity with which progress towards a process for designing a constitution has been made in Iraq. This essay is meant to highlight how time is important if there is political will.

In Burma, the constitution making process was supposed to commence from the date that the National Convention was convened in June 1996, years after the election result of May 1990 was declared. Whenever there is a democratic election, there should be changes in regime according to the results. In the case of Burma, it was contended that no transfer of power could be made in light of the absence of a constitution. If that be a genuine legal contention, what will the elected body then do? It is an insult to the intelligence of the people that the matter has been kept in the freeze for the last 13 years. An extra-constitutional, arbitrarily selected body, called by the grandiose name of the National Convention has been created.

In Iraq the Coalition Provisional Authority (CPA), appointed a 25 member Iraqi Governing Council (IGC) with wide-ranging decision making authority. It named a 25-member Cabinet of Technocrats to manage the ministries. Veteran US diplomat Paul Bremer holds veto power over the IGC but has not used it. This is important because the occupying power and the cabinet are not put in an adversarial relationship. The principle of inclusiveness, as far as practical purposes go has been followed. Even the Secretary General of the Communist Party of Iraq is a member. Although IGC lacked legitimacy, the CPA ended up accepting the IRC’s position and agreeing on a political process of democratic transition and constitutional design that was almost in tune with IGC thinking. The cabinet also went about with its business with no CPA interference. There was a tremendous surge of local self-government and civil society. Many centers have forged governing councils chosen through consensual processes often avoiding elections. The city of Baghdad, itself, has 88 neighborhood councils with a 37-member council for the whole city. The key to the situation is that the occupying force did not suppress freedom of expression, resulting in an unprecedented amount of open debate and citizen participation. There are at least twenty political parties operating. The grip of the Bath Party’s ideology over the Iraqi people has vanished except in sporadic insurgencies.

The professional syndicates which Saddam controlled broke away, ousted the old man, and inducted the newly elected. Public discussion is becoming central to Iraq’s political consciousness which gives hope for the future of the country. Although Iraq is war-torn and devastated, the transition to democracy from authoritarian rule is making pace in spite of insurmountable obstacles. Burma, by comparison, is by far in an advantageous position. Here, there is no political
vacuum. The players have to show greater political will, and importantly, the key is open public debate and citizen participation. Recent news confirms that the parties in Iraq have inked an interim charter. Yet, it was on the verge of collapse. The Shiites who make up 60% raised objection to the undue power given to the Kurds, an ethnic minority group. Burner said, “not every body got every thing they wanted in this law, but that is the way democracy works”. This act cleared a major hurdle in handing over power to a sovereign Iraqi government. The interim constitution enshrined basic freedoms and the protection of human rights in Iraq after decades of living under dictatorial rule. The issue of sovereignty remains crucial as the occupying forces have not yet left and the UN has not taken up a role.

African Democracy

In April 2003, 350 representatives of African Parliaments, electoral management bodies, civil society, academia etc., gathered at a conference and produced a declaration outlining principles for constitutional and legal frameworks, electoral systems, political parties, election-related conflicts, observation and monitoring, and electoral processes, as well as a number of recommendations. This sort of inclusive conference is necessary to sort out many problems particularly in the context of Burma’s historical baggage.

The National Convention, which has been made the target, is admittedly not to draft the future constitution. Instead, it is to evolve the principles of the constitution: the so-called 104 principles have been, by and large, drafted though arbitrarily. The National Convention has no further function to perform. The question that confronts junta is how to draft the constitution on those 104 principles. There lies the dilemma. Who drafts the constitution, who forms the new body and what mandate is required to vest the body with constitution drafting power to give it legitimacy? It appears that the junta has brought the entire situation under a vicious circle.

From the above it emerges that a constitution making process must have the following characteristics;

1. There must be democratic discussion, debate and accountability to people;
2. Participation must be include different ethnicities, minorities, and other groups;
3. There must be transparency and the people must be informed of all the developments;
4. The representatives must have decision making power;
5. The principle of consensus must be followed;
6. A legitimate body for writing a draft constitution must be formed;
7. The constitution has to be put to referendum and accepted by people's mandate;
8. A general election must be held in accordance with the provisions of the constitution and Parliament is formed;
9. The incumbents must transfer power according to the mandate of the election;
10. The majority winning the election forms the government;

Even in a country like Afghanistan, the democratic process in constitution drafting is being followed. This process had to be written down into the Bonn Accords between the players in the transition. It cannot be a unilaterally drafted and decided document. Rules of any game cannot be decided by only one team. Another hard question that will be confronted is how will the transitional government be organized. Will there be a power-sharing arrangement or will there be some form of a transitional administration to give legitimacy to the transition? The rules of procedure which the last National Convention followed raised questions about the validity of the process. The very first step necessary is to change these rules and not to merely march to drum beat of the seven steps. Obviously, no lessons have been drawn from the past. The opportunity presented in the Bangkok Process will be squandered and the bitterest tragedy will be the fate of the country which has known little but tragedy for far too long.

Assuming that the National Convention produces agreed upon principles of the constitution, these are still not the constitution itself. Who then is the competent body to draft the final constitution? Not the National Convention as it was vested with only a narrow scope, namely to develop the principles. If the National Convention goes beyond that scope, it will be illegal and void. The junta cannot solve the dilemma and bypass the NLD. The 1990 election result has become an albatross in the neck of the junta. Ironically, the constitution making process itself will become unconstitutional and without legitimacy. The only way is to compromise with the mandate holders and develop a new road map which does not invalidate the fundamentals of the 1990 elections.