A Brief Analysis on the Legitimacy of SPDC's National Convention and its Constitution

The Burma Lawyers’ Council

Summary

The Military Regime, now known as the State Peace and Development Council (SPDC), resumed its National Convention (NC) on December 5, 2005. Many analysts presume that the regime may complete its constitution making process in 2006, force the people to approve its constitution and attempt to prolong its military rule indefinitely.

Since November 1995, the National League for Democracy, the election winning party, withdrew from the NC. The majority of ethnic leaders from the Union Nationalities League for Democracy (UNLD), the ethnic alliance inside Burma that participated in 1990 May election and won the second largest seats in the parliament, have not yet joined the NC. The Karen National Union and the Karenni National Progressive Party, the two major ethnic resistance organizations, are still standing against the NC. The New Mon State Party, one of the ethnic cease-fired organizations that joined the NC, very recently announced that they will no longer participate in the NC. These are the factors that indicate the denial of people to provide legitimacy to the military junta to rule the country in accordance with a military dominated constitution.

The current polity of Burma is, in brief, the legitimacy struggle centering on the constitution making process. This BLC’s analysis paper revives its background; and also introduces the essence of the SPDC’s constitution, aiming to seek support of the international community in order that democratic transition of Burma may take place through a genuine constitution making process that guarantees the participation of its own people within and without the country for the emergence of a future democratic constitution.
Part (A)

A Brief Analysis on the Current Constitution Making Process of the Ruling Military Regime

Background

Over fifteen years have now passed since general elections were held to elect representatives to the Burma’s Parliament. Burma’s military rulers have denied the people’s representatives an opportunity to convene their Parliament on the fallacious pretext that a parliament cannot be convened in the absence of a constitution. For almost thirteen years the military has been drafting a new constitution under the cloak of a “National Convention”. The National Convention has been contrived by the military to legitimize an undemocratic constitution entrenching a “leading role in national politics” for the military. The degradation of the constitutional drafting process by the military denies the people of Burma an opportunity to establish a genuine democratic system of responsible government.

The 1990 General Election: Elections for the People’s Assembly

General elections were held in Burma on 27 May 1990 following over two years of civil disturbance against the military’s rule. The National League for Democracy (NLD), under the leadership of Daw Aung Suu Kyi, won over 80 percent of the seats in the new parliament. Political parties dedicated to the restoration of democracy, including the NLD, won all but 10 seats in the 485-seat legislature. These elections had been called “to elect representatives of the People’s Assembly” (According to the introductory words of the State Law and Order Restoration Council Order Law No. 14/89 of 31 May 1989. Also referred to as the ‘People’s Assembly Election Law’). A “People’s Assembly” (i.e. Parliament) was established by Burma’s 1974 constitution and operated (under the control of the military) until it was dismissed by the military on the 18 September 1988. According to Article 41 of the 1974 constitution: “The People’s Assembly is the highest organ of state power. It exercises the sovereign powers of the State on behalf of the people” While Burma’s parliament and other state institutions were abolished by the military in September 1988, the Constitution of 1974 remained in effect though suspended by implication of the military’s coup.

In its first announcement on assuming power on 18 September 1988, the military’s State Law and Order Restoration Council (SLORC) advised that it had assumed state power, inter alia, “to stage democratic multiparty general elections”. The SLORC quickly promulgated the Political Parties Registration Act and permitted political parties to register, recruit members and to engage in limited political
activities. On the 31 May 1989 the SLORC enacted the People’s Assembly Election Law “In order to hold free and fair multi-party democratic general elections and to elect representatives of the People’s Assembly”. According to Article 3 of the Election Law: “The People's Assembly shall be formed with the People’s Assembly representatives who have been elected in accordance with this law”.

Although the 1974 constitution remained effective, the SLORC advised in its 43rd News Conference of the 9 June 1989: “Presently we have two constitutions in our country; that is the 1947 Constitution and the 1974 constitution … The elected representatives can choose one of the constitutions to form a government, and we will transfer power to the government formed by them. We are ready to transfer power to the government that emerges according to the constitution. If they do not like the two existing constitutions, they can draw up the constitution … The elected representatives are to draw up the constitution”

The military refuse to convene the People’s Assembly

Following the stunning victory of the democracy parties in the May 1990 elections, it quickly became apparent that the military had no intention of transferring power to the newly elected Parliament. At least, it would not transfer power to a parliament dominated by pro-democracy parties. The military had anticipated a victory by the pro-military, National Unity Party, the successor organization of the former ruling Burma Socialist Program Party, which was heavily financed and backed by the military.

However the popularity of Daw Aung San Suu Kyi and the NLD had skyrocketed and the people’s disenchantment with the military and awareness of democratic alternatives were at a peak.

To deflect the mounting domestic and international pressure to recognize the election results and to convene the People’s Assembly the SLORC announced that a new constitution must first be approved before the People’s Assembly could be convened.

In the SLORC’s first official statement of its position since the May elections, Maj-Gen Khin Nyunt, First Secretary of the SLORC, announced during the SLORC’s 100th News Conference on 13 July 1990: “At the present time we should consider the choice between the 1947 Constitution and the 1974 Constitution. It is evident, because of changing times and conditions, that neither constitution is now suitable or usable. So which constitution should we use in transferring power? We should draft a new constitution. For a strong government to emerge we should proceed systematically according to the law.

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The winning parties are to work for the emergence of a resolute constitution in the long term interests of the state and the entire people. The political parties are responsible for drafting the constitution. As for our SLORC, we will not regard it as something that is of no concern to us. I would like to say that the SLORC would give as much possible assistance as possible. ...it is of concern to us and we are responsible for it.”

Two weeks later, on the eve of a meeting of NLD representatives elected to the People’s Assembly, the SLORC issued Announcement No. 1/90.

“... a political organization does not automatically obtain the three sovereign powers of legislative, administrative and judicial powers by the emergence of a People’s Assembly. These powers can only be obtained based on a constitution. ... the representatives elected by the people are responsible for drafting a constitution for the future democratic state. Drafting an interim constitution to obtain state power and to form a government will not be accepted in any way, and if it is done, effective action will be taken according to the law.”

The elected representatives of the people would not be permitted to convene the People’s Assembly. They would, according to these announcements, be permitted to draft the constitution, but not an interim constitution.

In its Announcement No.1/90 the SLORC also announced its three guiding tasks: “the prevention of disintegration of the Union, the prevention of disintegration of national unity and the perpetuation of sovereignty”. These principles have become the guiding principles for the drafting of SLORC’s own constitution. These principles of extreme nationalism are designed to deny equality and self-determination to Burma’s numerous ethnic nationalities.

The demands of the People’s Representatives

Despite SLORC’s Announcement No. 1/90, the NLD’s elected representatives to the People’s Assembly gathered at Gandhi Hall in Rangoon to discuss the issue of the transfer of power and the formulation of an interim constitution.

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NLD parliamentarians, representing over 80 percent of the elected representatives of the People’s Assembly, endorsed the NLD’s “1990 Provisional Constitution (draft)”.
In respect of the drafting of a permanent constitution the NLD representatives declared in point 9 of the Gandhi Hall Declaration:

“Only the People’s Assembly has the responsibility to adopt the new constitution. … A constitution drawn up at any time and at any place other than the People’s Assembly … will not have an executive power [and] will not have any honour. It is of vital importance to convene the People’s Assembly expeditiously so as to draw up a new constitution which aims at building a new democratic union aspired by the people.”

It was also resolved to call on the SLORC to convene the People’s Assembly in September 1990 and for the SLORC to engage in a dialogue with the NLD. In a joint statement dated the 29th August 1990, representatives from the NLD and the Union Nationalities League for Democracy (who collectively represented over 95% of all elected representatives of the People’s Assembly) issued the Bo Aung Gyaw Declaration No.1. This declaration endorsed the resolutions of the Gandhi Hall Declaration and further stated that “the People’s Assembly should write and promulgate a lasting constitution”. A committee of suitable persons, including representatives of Burma’s ethnic peoples, was to be established under the supervision of the People’s Assembly to formulate principles for the drafting of a new democratic constitution.

Emergence of the National Convention

The SLORC refused to convene the People’s Assembly or to enter negotiations with the NLD. The SLORC soon hinted that it would establish a National Convention to draw up the constitution. However over two and a half years passed before the SLORC’s National Convention held its first session in January 1993.

According to the National Convention Procedural Code (1993) the National Convention was tasked with “laying down principles for the drafting of a ‘firm’ constitution”. Theoretically, the People’s Assembly remained responsible for drafting the final constitution, and once the constitution was finalized the transfer of power to a democratically elected government would be effected by the military. The SLORC’s National Convention has many superficial qualities creating the appearance of a genuine constitutional drafting institution. The term “National Convention” itself is frequently used to refer to constitutional drafting institutions established by democratic nations seeking popular participation in their constitutional making processes.

The SLORC has also incorporated the terminology (but not the spirit) of Bo Aung Gyaw Street Declaration No. 1. Hence the National Convention is tasked
with “laying down principles” rather than drafting a constitution itself. Also, representatives from several ethnic peoples and other appropriate organizations and individuals are said to be participating in the convention.

The National Convention also appears to be a predominately civilian organization, with delegates coming from an apparently diverse range of social groups. The SLORC therefore argues that it is engaging in widespread public consultation in its constitutional making processes. A small number of elected representatives were also allowed to participate in the National Convention.

The National Convention Procedural Code contains several features to cloak the National Convention in a veil of legitimacy. For example, one (of the six) of the aims of the constitution is the “development of genuine multi-party democracy” (Art. 1(d)). Delegates “have permission to openly discuss their ideas and suggestions …” (Art. 5 (c)). There all also vague references to “efforts for consensus” between delegate groups (Art. 30(a)).

**The nature of the National Convention: Total control of the military**

In reality the National Convention is a sham. It is tightly controlled by the military to ensure its acquiescence to a constitution drafted entirely by the military. In reality the representatives from the election winning party, the National League for Democracy, and those from the United Nationalities League for Democracy, the largest ethnic alliance that participated in 1990 May election and won second largest seats in the parliament, have been entirely excluded from the constitution drafting process.

The military directly controls the proceedings of the National Convention through its organizing committees (including the NCCC and the NCCWC). These committees are dominated by senior military officers and co-ordinate and manipulate every aspect of the convention. For example, every speech must be approved by the military’s NCCWC committee and every session of the National Convention is chaired by a member of the NCCWC. A row of military officers (being members of the NCCC and NCCWC) sit along the front row of the National Convention creating an intimidating environment for each speaker. All delegates to the National Convention are constantly monitored by military intelligence. A delegate expressing any dissatisfaction with the military or the National Convention is quickly removed. One delegate was arrested and expelled for suggesting, in private, that the current military rulers were the same as the former ruling Burma Socialist Program Party.

The National Convention Procedural Code, on the whole, is the primary instrument for the suppression of free dialogue at the National Convention. All discus-
sions and principles derived by the National Convention must be within the aims set out in Article 1 of the code, and include the “participation of the military in the leading role of national politics” (art. 1(f)), the “non-disintegration of national unity” (art. 1(b)) and the “stability of sovereignty” (art. 1(c)).

A delegate may only speak before the National Convention if approved by the military’s NCCWC (art. 5(c), 16(c) & 37). To obtain approval a delegate must first submit a discussion paper to the NCCWC for its approval. If approved, the delegate’s discussion paper may be substantially edited by the NCCWC. A delegate may only speak in accordance with the approved discussion paper (art. 45(j)). All “discussions” (i.e. recitation of the discussion paper) during the National Convention must be limited to promoting the aims set out in Article 1 of the Procedural Code (art. 5(c)). Further, delegates must not indulge in “grandstanding speeches” (art. 45(i)), nor “use language damaging to national unity” (art. 45(b)), nor speak “defamatorily against the beneficence of the State” (art. 45(a)). Delegates must not indulge in speeches “damaging the prestige of other organizations” (i.e. the military) (art. 45(i)) and a delegate must not distribute any papers on the convention premises, without the permission of the NCCWC (art. 47(e)).

Breaches of these provisions are severely dealt with by the military authorities. One delegate, Dr Aung Khin Sint, was arrested and sentenced to 20 years imprisonment for distributing a paper among delegates.

The military controls the flow of all information from the National Convention. All information in relation to the National Convention, including discussion papers, are regarded as “state secrets” (Code art. 8(j), 16(h), 47(f)). All “news” in relation to the National Convention may only be released by the military’s NCCWC (Code art. 8(j)). It is theoretically illegal to discuss even the colour of the floor coverings at the National Convention. Any criticism of the military’s constitution expressed by a delegate on the floor of the National Convention will never reach the ears of the Burmese public. In fact it would be very difficult to know what happens in the National convention if it was not for the information supplied by former delegates who have fled Burma.

Delegates to the National Convention are not permitted to form a collective view on any issue. Delegates are only permitted to discuss issues in relation to the constitution, which have been approved by the military’s NCCWC. Delegates are not permitted to vote on any issue or attempt to form any type of consensus. The Procedural Code makes no provision for voting, secret or otherwise, on any issue before the National Convention.
In reality, delegates to the National Convention have not approved the constitutional principles emanating from the National Convention. This is not their function. Delegates to the National Convention may only express an opinion of support for constitutional principles submitted by the military.

Finally, the National Convention is being held in Burma, which has been ruled by the military since 1962. There is no freedom of speech, freedom of press or freedom of association. Human rights abuses by the military are widespread throughout Burma. Delegates to the National Convention are frequently subjected to intimidation by the military while the convention is out of session. One delegate, Sai Soe Nyunt, was severely beaten by a group of soldiers in December 1996. Suffering from severe injuries, including a broken jaw, he was bound and dragged to a military camp of Infantry Battalion 58. After further beatings he was taken to Maj. Win Thu who told him “…National Convention. It is full of whores, drug abusers, and drug runners. It is nonsense! Get out of it!”. Sai Soe Nyunt received no medical treatment for his injuries, and no action was taken against his attackers.

The National Convention established by the military lacks any credibility as a constitutional making body. It is un-elected and unrepresentative. There is no freedom of speech or discussion. There has been no public consultation or participation. Public discussion outside the National Convention is prohibited. The National Convention is a front. The draft constitution presented to the media has been fully drafted by the military without any significant assistance from the National Convention.

The NLD and the National Convention

The National League for Democracy, elected to represent the Burmese people in the May 1990 elections, is prevented from forming a government and has been denied the opportunity of taking any significant role in the constitutional drafting process.

There were initially 88 members of the NLD invited to attend the military’s National Convention. Only one member of the NLD was permitted to join the 45 person “presidium”, which was given a minimal role in chairing the National Convention. During the early sessions of the National Convention the NLD members were given limited opportunities to express their opinions in relation to the proposed constitutional principles. However the views of the NLD were not subject to a free and fair vote and were not publicised outside the National Convention.
It quickly became apparent that while the military was engaging in the pretence of hearing the views of the NLD on some constitutional issues, it was refusing to incorporate any suggestions of the NLD into its new constitution. The latest draft of the military’s constitutional principles entirely exclude any suggestions of the NLD.

On 27 November 1995, the National League for Democracy sent a letter to the SLORC requesting the proceedings of the National Convention to be liberalised. The military rejected the NLD’s appeal and on the 28 December 1995 the NLD withdrew from the National Convention. Almost immediately all delegates from the NLD were expelled by the military from the National Convention. Very few elected members of the People’s Assembly are now participating in the National Convention.

**Law No. 5/96**

Following its dismissal from the National Convention the NLD announced that it would continue to work on a new democratic constitution for Burma based of respect for human rights and the equality for all of Burma’s peoples. As a direct consequence the military issued law No 5/96 titled: “The Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention Against Disturbances and Opposition”.

This draconian law provides for the imprisonment of any person for up to 20 years or the banning of an organisation who/which:

- “draft and disseminate the constitution of the state” (cl. 5(d))
- “carry out the functions of the National Convention” (cl 5(d))
- “deliver speeches or make statements to undermine, belittle and make people misunderstand the functions being carried out by the National Convention” (cl 5(c))
- “deliver speeches or make statements in order to undermine the stability of the State” (cl 5(a)).

It therefore became illegal for any person in Burma to draft a new constitution, or to discuss alternative constitutional principles or alternative constitutional drafting processes. Burma has therefore become the only nation in the world to assert that its constitution is drafted with the participation of the public while at the same time threatening to imprison a person for 20 years for criticising the constitution drafted by its rulers.
Part (B)

A Brief Analysis on the SPDC’s Proposed Constitution

The “Chief of Staff of the Defense Forces” is above the constitution

The military is effectively established as an ultra-constitutional organization. It is to be above the constitution and above the law. The “Chief of Staff of the Defense Forces” is the most powerful person under the constitution. His appointment and removal are not referred to in the constitution. It is anticipated that he will be beyond the control of a civilian government. The Chief of Staff of the Defense Force and the military will be regulated by the military’s own regulations, which will override the constitution. The Chief of Staff of the Defense Forces is entitled to nominate twenty five percent of all members of the People’s Assembly, the National Assembly and the State and Regional Assemblies. The Chief of Staff of the Defense Forces is also entitled to nominate the Minister for Defense (i.e. the Chief’s own boss), the Minister for the Interior and the Minister for Border affairs.

Members of the Union Assembly appointed by the Chief of Staff of the Defense Forces are entitled to nominate a Vice-President of the Union. The “elected” members of the Union Assembly nominate two further vice Presidents. Members of the Union Assembly then form an Electoral College to elect a President of the Union from among the three Vice-Presidents. It is anticipated that the members of the Union Assembly appointed by the military will form a block vote and unite with the political parties aligned with the military to ensure that the Vice-President nominated by the military is elected as the President.

The proposed system is essentially a presidential system, with extensive powers vested in the President who is subject to very few limitations. Apart from the ministers nominated by the military, the President nominates the ministers in the Union Government. A minister may come from inside or outside of the Union Assembly, and may or may not be a military officer.

Silence on the entire law making process.

The Union Assembly is the national legislature and will comprise of a Peoples Assembly and a National Assembly. The National Assembly, theoretically, represents the states and regions. Seventy-five percent of the membership of each Assembly is to be “elected”. The constitution is vague as to the true nature and functions of each Assembly. It is unclear whether the Assemblies may exercise any “legislative” powers at all.
The constitution is silent on the entire law making process. It is unclear who can initiate laws and whether laws must be passed through the one house or both houses of the Union Assembly. It is unclear whether the President and the Ministers of the Union Government are subject to laws passed by the Union Assembly. It is unclear whether the President can veto or ignore laws passed of the Union Assembly. These discrepancies are deliberant and are designed to give the military some flexibility in controlling the government.

The Existence of Powerless State Governments and Legislatures

The Union of Burma is to be divided into seven states and seven regions (similar to the division established by the military’s 1974 constitution). The President will appoint a Chief Minister for each state and region. A partially elected Legislative Assembly will also be established in each state and region. It is unclear whether the governments of the states and regions will have any administrative and legislative functions. No functions are guaranteed by the constitution. Any administrative or legislative functions must be delegated (and can be removed) by the President of the Union. The military has deliberately avoided the formation of any type of federal system of government in accordance with the demands of Burma’s ethnic nationalities. However the military is attempting to create the appearance of a federal system by establishing powerless state governments and legislatures.

No Constitutional Guarantee of Democratic Procedures

While seventy-five percent of each legislature established in the Union of Burma is to be “elected”, there are no constitutional guarantees of democratic procedures. There are no guarantees that the representatives will be elected by the people in a free and fair vote. There are no guarantees of free speech or political activity. There is no freedom for the media. There are no human rights protections. In fact there are no general protections for the people or at all in the constitution. There are no guarantees of equal rights or any special protections for Burma’s ethnic nationalities. Freedom of association is not protected by the constitution. At present it is not possible to establish or join a political party. It is anticipated that the military will establish a Suharto style democracy in which only political parties approved by the military are permitted to contest a staged election, which will be dominated by the military’s new political face, the Union Solidarity and Development Association (USDA). It was established in September 1993, under the patronage of Senior General Than Shwe, as an instrument for the mobilisation of support for the military government. The objectives of the USDA were almost identical the SLORC’s own objectives, i.e. “to strengthen state sovereignty, to prevent disintegration of national unity”, etc.
A Servile Judicial System

The constitution also establishes a servile judicial system comprising of a Supreme Court and subordinate courts. There are no guarantees for the rule of law or for the independence of the judiciary from interference from the military. Judges of the Supreme Court are to be nominated by the President and must be independent of “party politics”. The are no guarantees of tenure for the Judges who may be dismissed in the discretion of the President. While the constitution provides a mechanism for the impeachment of a Judge, the President is not obliged to follow this procedure or to comply with a negative outcome of a trial held in accordance with the procedure. The jurisdiction of the Supreme Court is neither detailed nor guaranteed by the constitution. It is unclear what matters the Supreme Court may consider. It is unclear whether the Supreme Court can even interpret the constitution. It is also unclear whether there are any limits on the court’s jurisdiction. There is nothing in the constitution to prevent the Supreme Court convicting a person on the basis or a retrospective law or in the absence of any law at all.

Conclusion

The National Convention has been a farce and a sham to camouflage a constitution drafted by the military to entrench its own role in the future political affairs for Burma. The military has abused the constitutional drafting process to cling to power while progressively dismantling the democratic opposition within Burma. The military’s undemocratic constitution will form the basis for a new mutation of military rule to extend its control of Burma, entrenched since 1962, into the foreseeable future.