(3) The National Convention through the Prism of the Rule of Law

By B.K Sen

The SPDC National Convention (NC) is now in its final stage, which means that subsequent steps in the road map are to follow. The 6 basic principles and 104 principles on which the constitution is to be drafted have been given a rubber stamp of approval. The constitution thereafter can be marketed as legitimate.

A few comments from the legal point of view are necessary to remind the powers that be that the entire proceedings of the National Convention are in violation of the rule of law and the universally accepted legal procedure followed in drafting a constitution. In the case of Burma, the matter is very simple as the rulers themselves had held the general election in May 1990. The NLD won a landslide victory. This historical event cannot be diluted or put on the back burner. The military junta stated there was no constitution. The prior need was to draw up the constitution, have a referendum and then hold elections to transfer power to the winning party. If there was sincerity in the junta’s efforts, the only legal way to proceed was to declare that the winning members constituted the Constituent Assembly, and thereafter vest it with powers to frame its rules and evolve a framework compatible with rule of law. The Junta created a national convention dominated by its handpicked people and included a few of the winning members of the election. The NC was the birth of the junta’s illegal child. To make the illegality more colorful, it clamped it with hundreds of restrictions, especially on freedom of expression. This is rule by men. But the rule of law has inherent components of freedom of expression. The Junta knows that the illegal evolution of its child, the NC, will devour it.

The evolution of the illegality of the NC is clear if we look at a few examples. Burma’s neighbor Thailand is ruled by the military. But it has installed a civilian government. The constitution-making body allowed drafting of the constitution not by the military, but by a group composed of civilians. The political parties are free to function. There is free press and a time frame to hold elections. Similarly in Fiji, although there is a military dictatorship, a civilian government including the ex-Prime Minister has been put in place and a time frame to hold the election is fixed. In Bangladesh a civilian government rules even though the army is in control, and the constitution is in force. In Pakistan the parliament is functioning even though the head of the army is the chief of the civilian government. There is free press and a judiciary. No society under military dictatorship is so closed as it is in Burma. The rule of law is not a challenge to power if the power is judiciously shared and its source is the people’s will. The junta had to unwillingly admit it into its basic principles. It has asked that one third of the
administrative power be exempted from election, with elections for the rest to be set. The army has been entrenched in its role in the governance of the country for decades. It has tasted power. Obviously it will create a power sharing arrangement that protects its security and maintains its powerful position. This basic conflict between the rule of men and the rule by law has to be resolved through dialogue and reconciliation. Otherwise the crisis between the army and the opposition will deepen. The ball is in the court of the army. It had talks with the opposition and great hopes were raised. Subsequently it took a u-turn when it detained the leaders of the opposition, giving some leaders fake trials and harsh imprisonment. Over 2000 political prisoners are detained in prison.

A new chapter has to be opened with at least a minimum respect for the rule of law. The State Protection Law must be abolished and the detained freed. The talks and dialogue have to be revived and the peace process continued. Further proceedings in the road map have to be suspended. A timely, agreed-upon process must be established. The National Convention can be revived after withdrawal of the law prohibiting organizations and the Publisher and Printer Law. The opposition hopefully will respond and negotiate easy terms for a peaceful transition through a constituent assembly election.

The NC was wrongly conceived as the instrument for restoration of the rule of law in Burma. Admittedly its main goal is to develop a constitution. The positive aspect is that the basis is the will of the people, but it has been negotiated in a manner in which the junta’s vested interests are fully protected. That manner is unacceptable as it is against the very concept of the rule of law. The rule of law was thrown overboard in its constitution, deliberation and decision-making. The NC was not a representative body, deliberation was clamped with restrictions and decisions were formed as they always have been. As stated, a new chapter has to be opened. Much water has flowed down the Irrawaddy. Generations have come and gone. It is high time that all players think hard and a new road to reform and change is effected. There is no magic formula but there is a universally accepted yard stick for conflict resolution. That yard stick is the rule of law. The crucible of the rule of law shines light on all problems and shows what step to take. The old political system has to be replaced and a new one transplanted which will lead to growth and development and when that is based on the rule of law there is certainly trust and hope.

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