Drafting a Constitution in Burma:
A Struggle for Participatory Process

By Burma Lawyers' Council

Following the nation-wide demonstration in August-September 1988, the Burmese army on September 18 staged a coup, assumed all power and installed a military junta named the "State Law and Order Restoration Council" (SLORC), now known as the State Peace and Development Council (SPDC). The elections were held in May 1990 to form the Pyithu Hluttaw, (People's Assembly) that normally exercises legislative power and forms the government. This is according to Burmese constitutional conventions and supported by the 1989 Election Law under which the 1990 elections were conducted.

Following the electoral victory of the opposition party, the National League for Democracy (NLD) led by Nobel Peace Prize winner Daw Aung San Suu Kyi, the military junta issued Order 1/90 to justify their refusal to recognise the election result. Order No. 1/90 stated that the duty of the elected representatives is to firstly draft a new constitution, before the People's Assembly could be convened.

The military junta's constitution drafting process

In mid 1992, the SLORC announced their plan to convene a National Convention, or Constituent Assembly, to lay down guidelines and basic principles for a new constitution. The National Convention held its first session on 9 January 1993. Sessions of the National Convention have been postponed several times. After almost six years, the National Convention still has not completed its work.

The Formation of the National Convention

More than 600 of the 702 delegates to the National Convention were chosen by the SLORC. Even though their Order 1/90 specifies the duty of elected representatives as being to draft the constitution, only 99 elected representatives were entitled to take part in the National Convention; the remainder represented seven other categories of representatives, such as workers, peasants, government servants, leaders of political
parties (no matter elected or not), intellectuals, army personnel and respected politicians. All non-elected representatives were SLORC nominees.

Principles laid down by the National Convention

SLORC unilaterally declared that the National Convention was convened to achieve six aims, with the primary stipulation that the Tatmadaw (army) would take the leading role in national politics in the future. Freedom of speech of the delegates to the National Convention was strictly prohibited by order and through the military intelligence officers monitoring of all sessions. Through the initiation of a constitution drafting process under its strict control, the military junta has embarked on a process designed to entrench the army’s leading role in national politics. In short, the constitutional model the Burmese military junta is planning to impose on Burmese society is almost identical to the Indonesia model of the previous Suharto regime. Many believed that the Burmese military has sought the advice of the Suharto regime to guide their machinations in national politics.

The question of the legality of the National Convention

The National Convention is highly controversial and arguably illegal: it is evident that the military junta has no political mandate or legitimacy to convene it. This became clear after the NLD withdrew from what many have called the "shady manoeuvrings" of the regime. Today, only 15 of the 485 representatives elected in the 1990 election participate in the National Convention.

Many international commentators including the United Nations through its annual General Assembly, have openly pointed out that the SLORC's National Convention is not the proper body to draft the state constitution. Additionally the principles being laid down by the National Convention do not meet the will of the people and the needs of Burma's diverse ethnic groups.

The NLD's Constitution drafting process

Since the election campaign in early 1990, the NLD has clearly expressed its views on the future constitution of Burma. The NLD has also made it clear that the basic principle for a lasting state constitution is that a constitution could only be adopted by a genuine participatory and national reconciliation convention.

After winning the 1990 general election, the NLD adopted a temporary constitution (a slightly modified 1947 constitution) to facilitate the transfer of power from the SLORC. On the eve of the NLD's meeting where they declared their constitutional intentions, the SLORC issued Declaration No. 1/90. That Order also states that the military, which held power under martial law, was not bound by any constitution, and would hold power until it ensures that a sufficiently strong constitution is in place.
The NLD party congress in May 1996 again confirmed that the NLD would draft a state constitution in consultation with the people, while continuing to boycott the National Convention. The SLORC angrily responded, because the NLD plan directly challenged the legality of the National Convention. The SLORC issued law No. 5/96, prohibiting any body from writing or discussing a state constitution, or from criticising the National Convention, with a five to twenty year imprisonment penalty.

NCUB Constitution Drafting Process

The National Council of the Union of Burma (NCUB), an opposition alliance formed in the liberated areas outside the military junta's control, is now working actively on drafting a democratic constitution.

The NCUB is preparing for the future by entering into free and frank discussions about constitutional matters. The NCUB has organised four international seminars and several local seminars on its proposed draft constitution. Representatives of the different ethnic and political organisations have attended all seminars.

The NCUB has made it clear that their draft constitution is designed to stimulate debate and learning and is one model that could be presented to a constituent assembly, and the people of Burma when Burma achieves democracy.

Points to Compare with Constitution Drafting Processes in the Philippines and Thailand

With constitution drafting generally, the control of the process and the final text of the constitution are mutually interdependent. The Philippines and Thailand have proved that they moved along the right path in constitution drafting. The Burmese people may be able to learn from their experiences about how important the drafting process is.

Generally, there are two types of selection methods for the drafters of the constitution: bottom-up and top-down. If the drafters are chosen to represent the will of the governed, the selection process can be said to be bottom-up. If the drafters represent the will of those who are in power, the selection method is top-down. There have been enough examples to know that those who pay special attention to the will of the people are those chosen by the bottom-up method.

Most of the members of the Thai Constitution Drafting Assembly (CDA) were chosen by this method. Despite criticisms that the appointing power would influence the work of the Constitution Commission, the members drafting the 1987 Philippines constitution were selected by a bottom up method. Throughout the constitution drafting process, the Constitution Commission took into account the will of the people.

It is clear that the SLORC's drafter-selection method is absolutely top-down, since the
delegates to the National Convention have no right nor opportunity to reflect the will of the people in their deliberations.

All forces in Thai society, including the opposition and ruling parties, worked together to draft a constitution. This is the ideal situation so that upon its completion the people feel ownership of the document. However, as a result of the illegitimacy of the SLORC's National Convention, different political forces in Burmese society are now involved in drafting two other constitutions—the NLD and the NCUB.

Law No. 5/96 as stated above, prohibits any citizen or political party, including the NLD, from drafting a constitution outside the National Convention. Therefore the duty of Burmese citizens in the formation of the state constitution is merely to be silent. The Burmese people greatly desire their participation similar to that of the people in the Philippines and in the Thai constitution drafting process. The ability to debate, agree and disagree over the various articles, to argue about clauses and explanations of the Thai Constitution Drafting Assembly (CDA) and so on has had an enormous effect on the contents of the final draft.

For the Burmese experience the most instructive part of the Thai constitutional process is the way in which the constitution is approved. The process to approve the Thai constitution was clearly announced. If the Thai parliament failed to approve the draft, the people had the opportunity to do so in a referendum. This is the process that the Burmese people have been asking for. At present the Burmese process is very secret, and no one knows how a constitution will be approved.

In Thailand, the CDA, representing the will of the people, intended to achieve political reform through the constitution. Therefore, there are many provisions that restrict the behaviour of politicians. Some governing politicians publicly expressed their opposition to the draft, but they finally approved it due to intense pressure from the people desiring democratic rule.

If the constitution had gone to a popular referendum, many are saying that there would have been conflict between politicians and the people. Some academics warned that all key players in Thai politics should be careful to avoid confrontation like that of Black May 92. Thai people still remember their experiences during the constitutional crisis in 1991-92.

The present Philippines constitution was approved at a time when the country was not under repressive rule. If Burma's constitution is to be approved, a properly authorised constitutional assembly alone or a people's referendum must approve it.

Although the SLORC has not passed a constitution, the principles that have been laid down by the National Convention clearly demonstrate that only a person with a military background can be president. That criterion reflects the absolute domination of the military. Burmese people might be interested to learn how the Thai people, during Black May 1992 events, responded when Gen. Suchinda Kraprayoon seized the
position of Prime Minister without being elected.

An important consideration is whether the legislature alone should be allowed to make amendments to the constitution. We cannot assume that the present Thai legislature sincerely approved the constitution; it approved the constitution because it was afraid of the pressure from a people suffering in an economic crisis. The way the Thai constitution was approved, therefore, was influenced by people's participation.

The constitution should be amended in the same way it was approved. Some Thai politicians who oppose this new constitution publicly said that they would amend the constitution later, in the legislature. It is very likely that the politicians will cut out some provisions that promote the rights of the citizens while restricting those of the politicians. The CDA, with the support of the people, worked hard for these provisions. Therefore, if the constitution is to be amended by the legislature, the amendment should have the people's approval.

The present Philippine constitution prohibits the president from running for re-election for a second-term. President Fidel Ramos' attempt to alter that provision was thwarted by a people's campaign under the leadership of former President Aquino. President Ramos' attempt to amend the constitution was not in conformity with what the drafters had intended.

We should not forget that some of the provisions, especially provisions relating to making amendments to the constitution, are part of the drafting process. Therefore, any constitution amendment process should give special consideration to how the constitution was first drafted and approved. If the Filipino people really want to restrict the presidential re-election, the constitution should not allow the governing authority alone to amend that provision. Such an amendment should have to be approved by the people.

The People of Burma can learn valuable lessons from others' constitution drafting processes. As unsatisfactory as the constitutional development in Burma currently is, the people of Burma can be heartened from the Philippines experience concerning how the 1987 constitution replaced the 1973 constitution. In addition, the people can gain many insights from Thailand's recent constitutional history, particularly that of the past six years.

If the people are aware of the Thai experience, they can use this knowledge to help them further their aim of achieving a democratic constitution. Equally instructive is for the people of Burma to be aware of the deficiencies in those two countries' constitution drafting processes.

For those concerned about ensuring participatory processes the most salient characteristics gleaned from examining the constitution drafting processes of the Philippines and Thailand are as follows:

1. The method of bottom-up and not top-down is desired.
2. All forces, particularly political forces, should work together, so the process has to be inclusive.
3. People's participation has to be paramount at all steps in the process.
4. The final approval process has to ensure equity and fairness and no interest group should be given special privileges.
5. People should be the final arbiter of any constitutional change or amendment.

It is exciting to know that two of our neighbours have been able to move from military and authoritarian rule to constitutional and democratic governance, with of course some upheaval and loss of life, but that the people were the instruments of change in both countries.

Let us hope that these examples can inspire us to work even more effectively to wrest the changes in our country.