Federal Law Academy (FLA)

New State Organs AND State Institutions in Burma/Myanmar

For Security of People, Stability of Federal Democracy Union and Protection of Human Rights

A Legal and Constitutional Research

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In regard to this report, for more information, please contact :

Mr. Aung Htoo

Principal of Federal Law Academy

Human Rights Lawyer and Founder of Legal Aid Network (LAN)

Email: legalaidnetwork@gmail.com

Website: legalaidnetwork.org

Federal Law Academy is located in Mai Ja Yang, Kachin State, Burma.

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New State Organs and State Institutions in Burma/Myanmar

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Protection of Human Rights)

Executive Summary

Starting a few years ago in the modern world, the tension between two superpowers, USA and China, has arisen from the extent to which the two nationalisms—the American and Chinese nationalisms— might conflict with each other. Whenever nationalism arises to an extreme extent, human rights are infringed upon. In this case, upholding the rule of law is the last resort. This situation is relevant not only nationally but globally—in the case of the latter, the international rule of law applies. Both China and the US have been involved with the underlying issues of Burma, in which ethnic nationalism attributed to the military dictatorship has noticeably arisen. In support of maintaining global peace, Burma should not be the spark to increase the existing tensions between the two superpowers. To facilitate a resolution, the entire paper focuses on the crucial role of the rule of law.

In the aftermath of the February 1, 2021 military coup, Burma has clearly become a lawless society. Most notably, the state security institutions—army, police, and other intelligence forces that have become accustomed to committing human rights violations—under the command of the military council, the self-proclaimed State Administrative Council (SAC), are no longer reliable organizations that ensure people's security. A serious concern has thus arisen: How can these abusive institutions be replaced?

This paper briefly explores how the status of state security institutions and the judiciary extensively impact human rights situations and how the military council uses the judiciary as an oppressive tool to buttress the coup in Burma. In this regard, the cases of Daw Aung San Suu Kyi and a few NLD leaders are also introduced on the aspect of a fair trial. This research therefore contrasts the situation in Burma with situations found in other countries—such as Turkey, Iraq, Ethiopia, China, USA, and so on—while focusing on the crucial role of the rule of law.

Finally, the values enshrined and the flaws inherent in the Federal Democracy Charter (FDC) produced under the initiative of the Committee Representing the Pyidaungsu Hluttaw or Union Assembly (CRPH) are unveiled and scrutinized. With this underpinning, Federal Law Academy recommends drawing up and producing a provisional/interim federal democracy constitution—one reflecting the values contained in both the FDC and the FCDCC Federal Constitution (second draft)— in conjunction with the provisional constitutions of the respective ethnic states/provinces to be applied while struggling against the military dictatorship.

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Part-I

(A) A Comparative Analysis of State Security Institutions in Burma and Turkey

It was following the November 2015 elections in Burma that the NLD government officially assumed power on March 30, 2016.[1] A little over three months later in Turkey, a coup attempt conducted by a faction of Turkish Armed Forces occurred. However, the coup was crushed by the President Erdoğan-led civilian government: around 18,044 suspects, including 9,500 army officials, were arrested and faced legal actions.[2] In connection with the coup, 99 generals and admirals were formally charged.[3] In the following five years, the Turkish government has continued its action against the attempted coup. About 80,000 people are still being held pending trial.[4] The support of the Turkish people ultimately allowed the elected civilian government in Turkey to activate state security institutions that followed government commands[5] to suppress the future potential of a military dictatorship.

The Turkish Constitution grants the president the following powers and responsibilities:[6] "Acting as the Commander in Chief of the Turkish Armed Forces and authorizing the use of the Turkish Armed Forces;[7] appointing the Chief of Staff;[8] calling on the National Security Council to convene; [and] chairing the National Security Council meetings."[9] It can be observed below:[10]

[1] The Global New Light of Myanmar (31 March 2016). <https://www.burmalibrary.org/sites/burmalibrary.org/files/obl/docs21/31_Mar_16_gnlm.pdf> accessed 9 November 2021.

[2] Gonul Tol, Matt Mainzer, Zeynep Kemekci, 'Unpacking Turkey's failed Coup: Causes and Consequences', (16 August 2016). <https://www.mei.edu/publications/unpacking-turkeys-failed-coup-causes-and-consequences>

[3] BBC, 'Turkey coup attempt: Charges laid against 99 General and Admirals' (20 July 2016). <https://www.bbc.com/news/world-europe-36843180>

[4] Reuter, 'Turkey orders arrest of 158 in military probe over Gulen links', (21 October 2021). <https://www.reuters.com/world/middle-east/turkey-orders-arrest-158-military-probe-over-gulen-links-2021-10-19/>

[5] See Figure 3 diagram below.

[6] Hale Akay, Security Sector in Turkey: Questions, Problems, and Solutions (Turkish Economic and Social Studies Foundation, Istanbul 2009). Available at https://www.files.ethz.ch/isn/113849/ENGguvenRaporKunyaDuzelti10_03_10.pdf

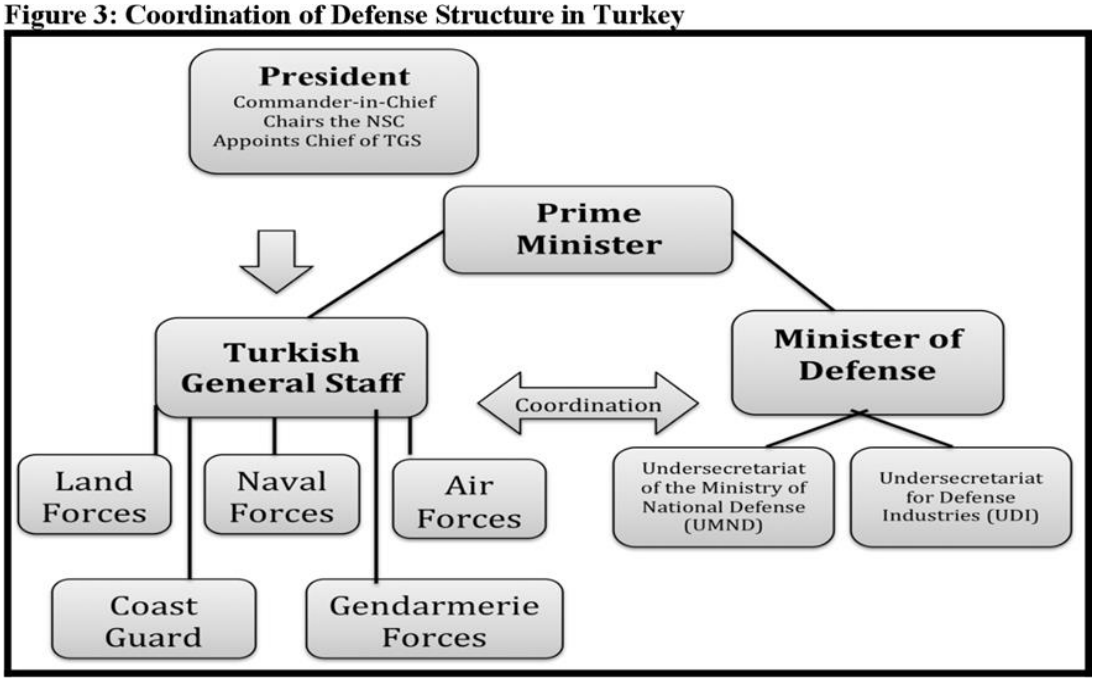
[7] Article 104 of Turkey's constitution. https://www.constituteproject.org/constitution/Turkey_2017.pdf?lang=en

[8] Article 117 of Turkey's constitution. https://www.constituteproject.org/constitution/Turkey_2017.pdf?lang=en

[9] Article 118 of Turkey's constitution.

[10] Ibid, (n 6) Hale Akay 12.

Figure 3: Coordination of Defense Structure in Turkey



Conversely, on February 1, 2021, the civilian government in Burma could not stop the military coup. The major distinction was that the NLD government, operating under the 2008 Constitution, lacked the authority at command any state security institution.[11] Major intelligent institutions—such as the Bureau of Special Investigation (BSI), Special Branch (SB), and Criminal Investigation Department (CID)—operate under the supervision of the Union Minister for Home Affairs, an army official appointed by the c-in-c. Military Affairs Security, the most powerful intelligent institution, serves under the direct command of the c-in-c. Hence, neither the president nor any other civilian government ministers received accurate information prior to the coup.

The civilian-elected president of Burma is not entrusted with power like the president in Turkey or in any other presidential systems globally. Even if chairing the meetings of the National Defense and Security Council (NDSC), the most powerful institution under the 2008 Constitution,[12] the president and other civilian members are outnumbered by military officials: at least 6 of 11 council members are incumbent military officials. During the five-year period the NLD government was in power, both vice-presidents were former military officials. Thus, only 4 (mentioned in red text below) of the following 11 members were civilian representatives:

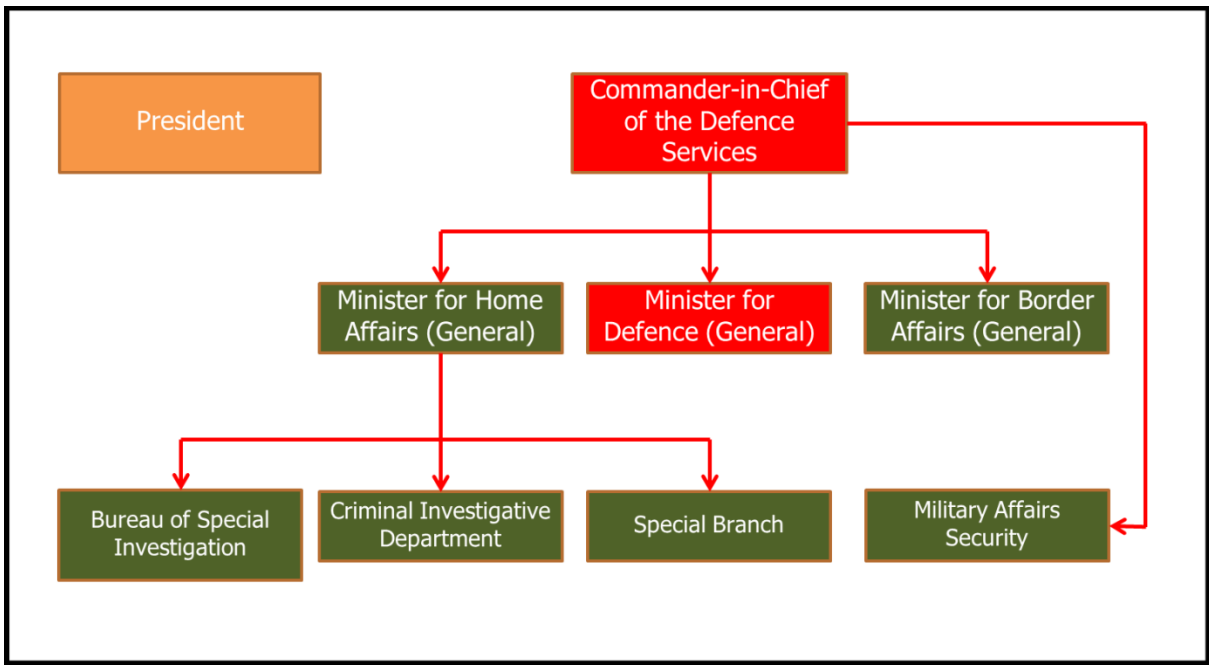
(a) U Win Myint, the President
(b) U Myint Swe, Vice-President (1)
(c) U Henry Van Thio, Vice-President (2)
(d) U Ti Khun Myat, Speaker of the Pyithu Hluttaw (Peoples' Assembly)
(e) Mahn Win Khaing Than, Speaker of the Amyotha Hluttaw (National Assembly)
(f) Senior General Min Aung Hlaing, Commander-in-Chief of the Defense Services
(g) Vice-Senior General Soe Win, Deputy Commander-in-Chief of the Defense Services
(h) Lieutenant General Sein Win, Minister for Defense
(i) Daw Aung San Suu Kyi, Minister for Foreign Affairs

[11] 2008 Constitution, Article 338.

[12] 2008 Constitution, Article 201.

(j) Lieutenant General Kyaw Swe, Minister for Home Affairs
(k) Lieutenant General Ye Aung, Minister for Border Affairs

Given the above, during the previous five-year period, the civilian president dared not formally convene the NDSC meetings until the coup. Otherwise, the military leaders would constitute a permanent majority in the NDSC and outnumber the civilian leaders, giving military leaders an opportunity to formally and legally control the country. Under the 2008 Constitution, the president is not entrusted the power to command any state security institution. Rather, the C-in-C commands all state security institutions, in addition to the armed forces and the police. The following diagram outlines the stated situation



(B) Is the Turkish Model That Exercises Rigid Centralization Suited to Burma?

While the Turkish civilian-elected government's role in suppressing the coup attempt by declaring a statement of emergency is appreciable, many serious concerns have arisen. The Erdoğan government, for instance, continued consolidating and abusing power after the state of emergency was formally lifted in July 2018.[13] Under a state of emergency, objections against the presidential decrees can no longer be lodged with the Constitutional Court, and the government exercises far-reaching influence in the composition of the Council of Judges and Prosecutors. Thus, having now redefined its role in a changing international order, the Turkish government's recent foreign policy poses a serious challenge to the EU.[14]

[13] 'Freedom in the world 2021: Turkey' (Freedom House 2021) <https://freedomhouse.org/country/turkey/freedom-world/2021> accessed 11 December 2021.

[14] Sinem Adar and Günter Seufert, *Turkey's Presidential System after Two and a Half Years: An Overview of Institutions and Politics* (SWP Research Paper 2, Stiftung Wissenschaft und Politik, Berlin, April 2021). <https://doi.org/10.18449/2021RP02>

The Turkish model is not well-suited to Burma. To start, Turkey exercises a unitary system, whereas Burma is trying to establish federalism. The powerful presidential system practiced in Turkey is contrary to the situations in Burma where political negotiation is extensively required under a parliamentary system. In the aftermath of the coup attempt in Turkey, apart from the subjugation of the judiciary to the executive, the president is also entrusted with more rigid power to prevent similar future coups. In Burma, however, to achieve the same objective, the state power must be decentralized by granting and legitimizing the formation and operation of the security institutions, primarily in the constituent units of the union, in terms of the ethnic states/provinces. Importantly, Burma must uphold the rule of law, in which the independent, impartial, efficient, and resource-rich judiciary plays a central role.

(C) A Comparative Analysis of Burma and Iraq from the Aspect of Judicial Independence

In Burma, before and during the coup, all government ministers led by the president were both extremely vulnerable to security threats and unable to crush any coup attempt. Unlike in Turkey, almost all civilian government authorities in Burma were detained[15] by the coup makers and indicted in the courts normally subservient to military rulers. Similar situations apply to a few thousand protesters. Such conditions are concerning because, under the 2008 Constitution, the judiciary lacks independence.[16] In terms of military-executive interference, the direct involvement of ex-military personnel in the courts has thus given rise to a serious concern: one is that the current Chief Justice of the Supreme Court was appointed by former President Thein Sein, who was also a former military general. Several other Supreme Court judges also have military backgrounds.[17]

Since the military coup, Min Aung Hlaing has further subjugated and abused judicial institutions to buttress his military coup.[18] The military council or the self-proclaimed State Administrative Council (SAC) tribunals have sentenced 65 people to death penalties in relation to incidents in areas of Yangon, where the junta declared martial law in March.[19] The SAC using the courts as a tool to suppress democracy, human rights activists, and the NLD leaders, including Daw Aung San Suu Kyi violates the fair trial standards and constitutes a crime against humanity given that such violations were widespread and systematic.[20] This situation

[15] BBC, Myanmar coup: 'Aung San Suu Kyi detained as the military seizes control', (1 February 2021). <https://www.bbc.com/news/world-asia-55882489>

[16] Note: Under the 1947 Constitution, Article 143 guarantees the judicial tenure. However, there is no similar provision enshrined in the 2008 Constitution.

[17] Melissa Crouch, 'Judicial Power in Myanmar and the Challenge of Judicial Independence', Cambridge University Press, (07 December 2017) 264-266. Available at https://doi.org/10.1017/9781316480946.014; book chapter available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2923962. accessed 09 December 2021.

[18] Note: UN rights chief Michelle Bachelet said the verdict was the result of a "sham trial".
UN News: General Assembly defers decision on Afghanistan and Myanmar seats, (6 December 2021). <https://news.un.org/en/story/2021/12/1107262>

[19] Human Rights Watch, Myanmar: Junta Tribunals Impose 65 Death Sentences, on July 21, 2021, Available at < https://www.hrw.org/news/2021/07/21/myanmar-junta-tribunals-impose-65-death-sentences> accessed 4 December 2021

[20] Rome Statute of the International Criminal Court, Article 1.

contrasts a similar one in Iraq when the country was under the rule of Saddam Hussein, the late President of Iraq.

One event regarding the status of the judiciary under Saddam's rule in Iraq is notable. In the 1990s, while traveling, he and his bodyguards stopped at a restaurant in the University of Baghdad and enjoyed hamburgers for lunch. When the restaurant owner refused to receive money, Saddam asked what he could do for the owner. The latter then mentioned his dispute over land with his brother at the court. Afterward, without hearing the rest of the story, Saddam simply gave his cohorts the order to tell the judge to resolve the case in favor of the restaurant owner.[21]

During Saddam Hussein's regime, many courts were not a part of the judiciary because the Ministry of Interior, the General Security Agency, and the intelligence agencies established courts outside the judiciary system.[22] Moreover, the "Special Courts and the Revolutionary Court" were independent from the Council of Justice and the Ministry of Justice that existed after 1968.[23] Mostly, these courts were established for a temporary purpose, but some associated with the Ministry of Interior and the General Security Agency were permanent.[24] Saddam Hussein's government authorities used the Iraq Revolutionary Court to sentence 148 Shi'a to death for allegedly participating in an assassination attempt on Saddam.[25]

The Iraq High Tribunal, which tried Saddam after his arrest, examined whether the trial of 148 al-Dujail residents by the (abolished) Revolutionary Court was legitimate or a sham by framing 17 questions of fact and law.[26] The High Tribunal later ruled the trial was a sham, referring to the following points:[27] Immediately after the receipt of the order from Saddam's office, the trial commenced and lasted just two weeks. Prior to the promulgation of the arraignment order, 50 of the al-Dujail residents had been eliminated; the court area was not large enough to prosecute 148 persons as it did not exceed one hundred square meters. In addition, no indicator was found that a defense attorney worked in the controversial court. The conviction ruling and the verdict also did not refer to any criminal exhibits. In the trial, the statements of the defendant 'Awwad al-Bandar, who served as the chair of the Revolutionary Tribunal, were contradictory. Regarding the pressure created by Saddam, he asserted that he was in a difficult position. Finally, on November 5, 2006, Saddam Hussein was sentenced to

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[21] Joseph Braude, *The New Iraq: Rebuilding the Country for Its People, the Middle East, an the World* (Basic Books and Perseus Books Group, Cambridge MA 2003) 173.

[22] Raid Juhi al-Saedi, Regime Change and the Restoration of the Rule of Law in Iraq, International Law Studies – Volume 86, the War in Iraq: A Legal Analysis, this article is derived from Raid Juhi al-Saedi, 'Glance into the Criminal Procedures under the Iraqi Judiciary' CREIGHTON LAW REVIEW 713, (2008) 5. < https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1094&context=ils> accessed 16 December 2021

[23] Ibid, 6.

[24] Ibid.

[25] Judgment of the Dujail Trial at the Iraqi High Tribunal (11 May 2006). Available at <https://www.asser.nl/upload/documents/3272012_3403305-11-2006%20%C2%A0Iraqi%20High%20Tribunal%20Judgement%C2%A0Saddam%20Hussein.pdf> accessed 7 November 2021.

[26] Ibid, (n) Judgment of the Dujail Trial, 51-52.

[27] Ibid.

death by the Iraq High Tribunal for the Dujail case. Immunity was not granted to Saddam, albeit being the President of Iraq, with respect to crimes against humanity.[28]

Not lesser than the status of Saddam Hussein, Min Aung Hlaing is accountable for not only for crimes against humanity but also war crimes and genocide. Regarding Min Aung Hlaing, the sovereign immunity issue does not arise as he is not the President of Burma. Although Saddam was not granted immunity by virtue of crimes against humanity, the Iraq High Tribunal did not sufficiently scrutinize whether the Dujail trial alone amounted to a "widespread and systematic" extent.[29] If any similar tribunal comes into existence for Min Aung Hlaing in Burma, the "widespread and systematic" requirement would have been met as the scope of the gravest crimes allegedly committed spans the entire country,[30] in addition to him having used the subjugated courts.[31]

In regard to the gravest crimes of international concern, allegedly committed by Min Aung Hlaing and his military accomplices, Tun Tun Oo, Chief Justice of the Supreme Court,[32] operating under the control of Min Aung Hlaing, provided a written instruction possibly to its inferior courts to not accept any arrest warrant or a summons to appear issued by the International Criminal Court (ICC) and the Argentina Federal Court.[33] Chief Justice Tun Tun Oo signed this instruction letter in which a reference issued by the State Administrative Council was made.[34] This letter is evident in regard to subjection of the civilian courts to the military rule. It is coincident with the situations related to the ICC and the Argentina Court below.

The International Criminal Court (ICC) has already authorized opening of an investigation into the situation in Bangladesh/Myanmar since 14 November 2019.[35] The Argentina Court decided to open a case for the alleged commission of genocide against the Rohingya by the Myanmar military leaders.[36] With this underpinning, both the Pre-Trial Chamber of the ICC and the Argentina Court may be conducting procedural processes effectively, including issuance of a summons to appear or a warrant of arrest[37] against Min Aung Hlaing and his military accomplices.

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[28] The Public Prosecutor in the High Iraqi Court et al. v. Saddam Hussein Al Majeed et al. <https://www.internationalcrimesdatabase.org/Case/187/Al-Dujail/> accessed 22 December 2021.

[29] Rome Statute of the International Criminal Court, Article 7.

[30] UN News, Myanmar: UN expert says current international efforts failing, urges 'change of course'(22 September 2021) < https://news.un.org/en/story/2021/09/1100752> accessed 22 December 2021. Rebecca Henschke, Kelvin Brown and Ko Ko Aung, Tortured to death: Myanmar mass killings revealed, BBC World Service (21 December 2021). https://www.bbc.com/news/world-asia-59699556 BNI Myanmar Peace Monitor, the Kani Massacre, (21 December 2021) https://www.mmpeacemonitor.org/308651/the-kani-massacre/

[31] Ibid (n 19) Human Rights Watch.
Note: the cases the NLD leaders, primarily Daw Aung San Suu Kyi, will be elaborated in the next chapter.

[32] Note: Tun Tun Oo was a former Major General in the Tatmadaw.

[33] Supreme Court's Instruction related to the ICC and Argentina Courts (27 December 2021) <https://drive.google.com/file/d/1qOvEVUOKT6gXdiBbRL3JW2JVRfsbd3f6/view?usp=sharing>

[34] Ibid.

[35] ICC Press Release: 14 November 2019. https://www.icc-cpi.int/Pages/item.aspx?name=pr1495

[36] Financial Times, Argentine court to hear Myanmar Rohingya genocide case', (28 November 2021) <https://www.ft.com/content/0a2c1a4c-269a-4121-b37f-0da41e53a618>

[37] Rome Statute of the ICC, Article 58: Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear.

In fact, the analogous commission of crimes, amounting to a crime against humanity, was conducted by the then military junta 16 years ago. On 9 February 2005, nine Shan national leaders—including Khun Htun Oo, Chairman of the Shan Nationalities League for Democracy (SNLD)—were detained by the then-military regime, State Peace and Development Council (SPDC), for their attempt to form a committee, called the "Shan State Academics Consultative Council", aiming to re-establish the Union and to align it with genuine federalism. The detained Shan leaders were charged by the military based on accusations that they were trying to secede from the union in a way that criminalized their non-violent political actions. After invoking several criminal sections[38] in the trials, the leaders were finally convicted of serious crimes and given severe punishments on 2 November 2005. Chairman Khun Htun Oo was sentenced to 93 years imprisonment, Secretary Sai Nyunt Lwin to 85 years, member Sai Hla Aung to 79 years, U Myint Than to 79 years, U Htun Nyo to 79 years, Sai Myo Win to 79 years, Sai Nyi Moe to 79 years, and General Hso Ten to106 years.[39]

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38The following 7 sections were invoked: (1) Penal Code 1861 Section 122(1)—High Treason; (2) Penal Code 1861 s 124(a)—Sedition; (3) Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention against Disturbances and Oppositions 1996 Section 4; (4) Law Relating to Forming of Organizations 1988 Section 6; (5) Printer and Publisher Registration Act 1962 Sections 17 and 20; (6) The Public Property Protection Act 1947 Section 3; (7) Control of Import and Export (Temporary) Act 1947.

39 Burma Lawyers' Council, 'The Statement on the 60th Anniversary of Union Day Regarding the Unjust Convictions of Shan Ethnic Leaders' (12 February 2007) <https://docs.google.com/document/d/1i8SbD3Bt2BwNCFEYNJ4BdoIZFjeFErONW2mR5oND7vE/edit?usp=sharing> accessed 27 March 2020.

Part-II

Legal Analysis of the Litigation in Which NLD Senior Leaders Were Sentenced to Disproportionately Long Imprisonment

On February 1, 2021, the coup leader Min Aung Hlaing detained Daw Aung San Su Kyi and President U Win Myint; the chief ministers of some states and regions; and other high-level government officials.[40] The military regime also targeted civilians who participated in protests against the coup, civil servants who joined CDM, Gen-Z youths, press and media, human rights and political activists, and some NLD supporters. All these groups were arbitrarily arrested, detained illegally, and tried without due process of law. Some individuals were even tortured to death during detention, without ever having appeared at trial.[41]

At present, NLD leaders, including Daw Aung San Su Kyi, are being tried with farcical charges, which carry sentences of life-long imprisonment, at the junta-controlled courts; some leaders have already been convicted and given the highest sentences.

Case Summary of Daw Aung San Su Kyi, U Win Myint, Dr. Zaw Myint Maung, and Daw Nan Khin Htwe Myint

On the morning of February 1, 2021, Daw Aung San Su Kyi, State Counselor and NLD Chair; U Win Myint, NLD Deputy Chair (1); and the president were arrested at their residences, and later that day, the military council declared a state of emergency across the country. In the following days, the regime subsequently arrested prominent NLD leaders and high-level government officials, including Dr. Zaw Myint Maung, Chief Minister of Mandalay Division and NLD Deputy Chair (2); Daw Nan Khin Htwe Myint, Member of Central Executive Committee and the Chief Minister of Kayin State.[42] After the NLD government senior officials and leaders were detained using armed forces, the military-run television broadcasted the following statement:

> Afterwards, the Commander in Chief of Defence Services continued his report, saying that the Tatmadaw will carry out all duties of the State handed over by the Acting President as of today by abiding by provisions of the Constitution (2008). In discharging the State duties, the Tatmadaw will follow the provisions of the Constitution (2008) and existing laws which are not beyond the Constitution.[43]

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[40] RFA, "Tatmadaw arrests Daw Aung San Su Kyi, President Win Myint and MPs" (31 January 2021) https://www.rfa.org/burmese/news/aung-san-suu-kyi-arrest-myanmar-politic-01312021182202.html

[41] Irrawaddy, "Verdict on Aung San Su Kyi and U Win Myint's cases will be delivered on November 30" (16 November 2021) https://burma.irrawaddy.com/news/2021/11/16/247526.html

[42] RFA, "Tatmadaw arrests Daw Aung San Su Kyi, President Win Myint and MPs" (31 January 2021) https://www.rfa.org/burmese/news/aung-san-suu-kyi-arrest-myanmar-politic-01312021182202.html
List of persons detained in February 1 coup
https://www.rfa.org/burmese/documents/military_coup_arrest-list-02012021150308.html

[43] National Defence and Security Council of the Republic of the Union of Myanmar holds meeting

Currently, NLD Chairperson and State Counsellor Daw Aung San Su Kyi is being detained by the junta and has multiple charges filed against her. Subsequently, she is being charged with the following 12 offenses carrying life-long imprisonment: one case with Article 67[44] of the Telecommunication Law; two cases with Article 15 (2)[45] of the Natural Disaster Management Law; one case each with Section 505 (b)[46] of Penal Code, Section 3 (1) (c) [47] of the Official Secret Act, and Article 8[48] of the Export and Import Law; and Six cases[49] with Article 55[50] of the Anti-Corruption Law. On November 30, 2021, another two charges of corruption and election fraud were also added, making 13 charges in total.

Daw Aung San Su Kyi's Trial

Since November 30, Daw Aung San Su Kyi has been facing 12 different charges, and the hearings for five charges[51] were being held regularly on Monday and Tuesday every week in a special court created in the Nay Pyi Taw Council compound and investigated by Zabu Thiri township judge U Maung Maung Lwin. Corruption charges filed against her were being investigated by Mandalay Division Court Judge U Myint San and the offences related to the Official Secret Act by U Ye Lwin at the same special court respectively.[52] The junta announced

https://www.myawady.net.mm/node/7912

[44] Telecommunication Law Article 67 - Whosoever convicted of possessing or using telecommunication equipment that is prescribed to use under a license without any license is liable to an imprisonment not exceeding one year or a fine or both.

[45] Natural Disaster Management Law, Article 25 - Whoever, if the natural disaster causes or is likely to be caused by any negligent act without examination or by wilful action which is known that a disaster is likely to strike, shall be punished with imprisonment for a term not exceeding three years and may also be liable to fine.

[46] The Penal Code, Section 505 (b) – Whoever makes, publishes or circulates any statement, rumour or report with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility shall be punished with imprisonment which may extend to two years, or with fine, or with both.

[47] Official Secret Act, Article 3 (1) (b) If any person for any purpose prejudicial to the safety or interests of the State makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy he shall be punishable with imprisonment for a term which may extend to fourteenyears and in other cases to three years.

[48] Export and Import Law, Section (8): Whoever violates the prohibition contained in section 5 or section 6, on conviction, shall be punished with imprisonment for a term not exceeding three years or with fine or with both. [Section (5): No person shall export or import restricted, prohibited and banned goods.Section (6): Without obtaining license, no person shall export or import the specified goods which is to obtain permission.]

[49] Myanmar Now, "The military Council has filed six corruption cases against Daw Aung san Su Kyi so far" 1 December 2021. https://myanmar-now.org/mm/news/9498

[50] The Anti-Corruption Law, Section (55): Any person who possesses the political post commits the bribery, on conviction, he shall be punished with imprisonment for a term not exceeding 15 years, and shall also be liable to fine.

[51] Myanmar Now, "The allegations against Aung San Suu Kyi will be investigated early next month" (17 September 2021) https://www.myanmar-now.org/mm/news/8443

[52] Ibid.

Myanmar Now, "Lawyer access to Aung San Suu Kyi's court restricted" (30 September 2021)

that corruption charges filed at the Yangon court would be tried in the same special court, but the junta has yet to announce that another charge of corruption, filed on November 30, 2021, will be tried.

Since being detained, Daw Aung San Su Kyi has been denied the right to receive legal counsel from her lawyers. Her first court hearing was held via video conferencing on February 16, 2021 and she could not meet her lawyers until May 24, 2021 when an in-person hearing was convened at the special court in the Nay Pyi Taw council compound. Daw Aung San Su Kyi and U Win Myint were convicted together and sentenced to a four-year prison term—two years in prison for each case—for the charges filed under the Natural Disaster Management Law and Penal Code section 505 (b).[53]

Analysis of Daw Aung San Su Kyi's Cases from the Perspective of Fair Trial Rights and Procedural Law

In international human rights laws, [54] every person is guaranteed the right to a fair trial, which entails three stages: pretrial, trial, and post-trial. In each stage, the government must ensure the rights of both the accused and plaintiffs are protected. The three stages start the moment the accused is arrested by law enforcement officers, continue throughout the hearing before the court until it renders a judgement, and conclude after the review of the appeal. However, the junta has clearly continuously denied Aung San Su Kyi's fair trial rights.

(A) Arrest without a clear and knowable procedure ruled by law

The International Human Rights Instruments[55] prevent any detention based on mere suspicion and without factual evidence. In fact, the Myanmar Army arrested Daw Aung San Su Kyi based on accusations of election fraud and attempts to illegally obtain state sovereignty, [56] without due process of law. According to Myanmar's criminal procedure law, a police officer may arrest an accused person under normal circumstances;[57] however, in a unique situation, any private person may also arrest the accused in the absence of police officers.[58] Additionally, a magistrate can arrest an offender if the offence is committed in the magistrate's presence. [59]

https://www.myanmar-now.org/mm/news/8625

[53] RFA; Daw Aung San Suu Kyi and President Win Myint sentenced to four years in prison for the first time https://www.facebook.com/rfaburmese/videos/633026804501624/

[54] ICCPR Article 14, Child Rights Convention Article 40, Migrant Workers' Convention Article 18, International Convention on the Elimination of Racial Discrimination on (ICERD) Article 5 (a), Convention against Torture (CAT) Article 15.

[55] No one shall be subjected to arbitrary arrest, detention or exile;- UDHR Article (9)' ICCPR Article (9), CPRMW Article (16), CRPD Article (14) etc.

[56] National Defence and Security Council of the Republic of the Union of Myanmar holds meeting https://www.myawady.net.mm/node/7912

[57] The Code Criminal Procedure, Section 54, 55, 56, 57.

[58] Ibid, Section 59.

[59] Ibid, Section 64.

Nonetheless, Daw Aung San Su Kyi was clearly arrested arbitrarily by the junta using armed forces.[60] During her arrest, the junta troops violated her right to know the identity of the person in charge and whether that person was authorized to make the arrest. Such an arrest is a blatant violation of the procedures ruled by the code of criminal procedure and the police manual.

(B) Violation of the right to legal counsel and support of lawyers

Initially, the hearing for Daw Aung San Su Kyi's cases had been convened via closed video conferencing, and she had been denied her right to seek legal counsel from her lawyers.[61] Her lawyers also faced undue delay in registering the power of attorney.[62] On trial days, her lawyers repeatedly requested the court allow them to see Daw Aung San Su Kyi in person, but the judge would only ask the police officer's opinion and overruled the lawyers' request. [63]

Fair trial rights include the right to seek legal counsel and the support of lawyers, and the right to access legal aid from independent legal institutions. Nonetheless, the military council restricted Daw Aung San Su Kyi from fully accessing her fair trial rights. Despite being charged with 12 cases that carry heavy punishment, Daw Aung San Su Kyi was, for the first time since being detained, allowed to see her lawyers for less than half an hour on May 24.[64] The military council has therefore been blatantly violating the fair trial rights of the detained NLD leaders.

(C) Disconnected from the outside world

Daw Aung San Suu Kyi was cut off from the outside world as she was arrested. After she faced 16 days of detention in secrecy, the first hearing was convened via video conferencing, but she was not allowed to see her lawyers or engage in any other communication. Although she repeatedly requested for the court to allow her to see her lawyers in person, she was often rejected.[65] It was on May 24, 2021 that Daw Aung San Suu Kyi first

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[60] Irrawaddy, "Daw Aung San Suu Kyi testifies for charges of natural disaster law" (1 November 2021) https://burma.irrawaddy.com/news/2021/11/01/247208.html

[61] Myanmar Now, "Detained leaders have not yet been allowed to meet with lawyers" (15 February 2021) https://www.myanmar-now.org/mm/news/5746

[62] Myanmar Now, "Lawyers will ask to see Aung San Suu Kyi, who has been locked up for almost two months" (23 August 2021) https://www.myanmar-now.org/mm/news/7885
သမ္မတ နှင့် အတိုင်ပင်ခံ၏ ရုံးချိန်းကို အာဏာသိမ်းစစ်ကောင်စီ ထပ်ရွှေ့၊ ၂၄ မတ် ၂၀၂၁။
https://www.myanmar-now.org/mm/news/6234

[63] Myanmar Now, "Police Chief still evade Lawyers' access to Suu Kyi" (26 April 2021) https://www.myanmar-now.org/mm/news/6609

[64] Myanmar Now, "Daw Aung San Suu Kyi says the NLD will exist as long as the people exist" (24 May 2021) https://www.myanmar-now.org/mm/news/6866

[65] Myanmar Now, "Military Council open another case against Daw Aung San Su Kyi" (16 February 2021) https://www.myanmar-now.org/mm/news/5760

appeared in trial after being detained in secrecy. Even Daw Aung San Su Kyi did not know the location of her own confinement. [66]

In terms of freedom of expression, the junta banned Aung San Su Kyi's lawyers from responding to the media, both local and international, invoking section 144 of the Code of Criminal Procedure.[67] Only a district magistrate, sub-divisional, or other magistrate specially empowered by the president, or the district magistrate can act under this section, however. The prohibition of the lawyers to exercise freedom of expression by junta's puppet administrators is therefore illegal. The International Human Rights Instruments clearly state that blanket isolation of detainees from the outside world not only violates human rights but also potentially amounts to mental and physical torture.[68]

(D) Violation of the right to be tried without undue delay

After Daw Aung San Su Kyi was arrested, there was no credible evidence regarding whether police officers reported to the relevant magistrate nor whether she was remanded on charges within 24 hours. Not to mention, the location of her custody was unknown. She was held hostage for 16 days as she appeared in trial for the first time on February 16, 2021.[69] The junta, therefore, obviously violated section 167[70] of the Code of Criminal Procedure. When U Khin Maung Zaw, Daw Aung Su Kyi's lawyer, went to Dakkhina District Court on February 15, 2021 to inquire about her whereabouts, the district magistrate replied that she was remanded until February 17, 2021.[71] It appears that, although the court can issue a remand for Daw Aung Su Kyi for up to 15 days under charges of violating the Export and Import Law and Natural Disaster Management Law, she was unlawfully remanded for 17 days. According to section 403 of the Courts Manual, the magistrate may not issue remand for the accused unless the accused is brought before the court and/or the accused is given voice to defend why he/she should not be held in remand. Hence, Daw Aung San Su Kyi was remanded in custody for 17 days in violation of the Courts Manual.

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66 Irrawaddy; "The secret detention of Daw Aung San Suu Kyi is a violation of human rights" (20 September 2021) https://burma.irrawaddy.com/news/2021/09/20/246107.html/

67 RFA, "Aung San Suu Kyi herself has been barred from speaking out about the case" (27 October 2021) https://www.rfa.org/burmese/news/dassk-case-10272021072849.html

68 ICCPR Article 7

69 Myanmar Now, ဒေါ်အောင်ဆန်းစုကြည်ကို အာဏာသိမ်းစစ်ကောင်စီက အမှုတခုထပ်ဖွင့်၊ 16 February 2021. www.myanmar-now.org/mm/news/5760

70 The Code of Criminal Procedure, Section 167.

71 "Detained leaders have not yet been allowed to meet with lawyers" Myanmar Now (15 February 2021) https://www.myanmar-now.org/mm/news/5746

(E) Denial of the rights to bail and the right to appeal

The International Human Rights Instruments establish the principle that the right to liberty is the rule to which detention must be the exception.[72] Myanmar's Code of Criminal Procedure also states that any person accused or detained shall have the right to bail.[73] The code also provides that the court may direct that any person under age 16, any woman, or any sick or infirm person accused of an offence punishable with death or with transportation for life shall be released on bail.[74] In fact, the court could do more to ensure the rights of the accused; instead, the court simply ignored those rights.[75] Although Daw Aung Su Kyi's lawyers tried to appeal the junta's submission of false evidence against her, the Dakkhina District Court overruled the appeal in a summary trial.[76]

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[72] Liberty is the rule, to which detention must be the exception.

[73] The Code of Criminal Procedure Sec, 496 "In what Cases bail to be taken". Sec, 497 "When bail may be taken in cases of non-bailabel offence.

[74] Ibid.

[75] Myanmar Now, ပုဒ်မပေါင်း ၁၁ ခုဖြင့် အမှုရင်ဆိုင်နေရသည့် ဒေါ်အောင်ဆန်းစုကြည်က အပတ်စဉ် ရုံးချိန်ကို နှစ်ပတ်တကြိမ်ရွှေ့ပေးရန် တောင်းဆိုခဲ့သော်လည်း တရားသူကြီးက ပယ်ချသည်။/11 October 2021. https://www.myanmar-now.org/mm/news/8767

[76] Myanmar Now, ဒေါ်အောင်ဆန်းစုကြည်တို့ဘက်မှ ကန့်ကွက်သမျှ တရားရုံးပယ်ချ, 6 July 2021. https://www.myanmar-now.org/mm/news/7369

Part-III

A Comparative Analysis of Burma and Other Countries from the Perspective of the Rule of Law

(A) Contrasting Burma with China

China gained independence in 1949, one year later than Burma. From 1948 to 1962, the economic status of Burma was relatively higher than that of China. In Burma, following the 1962 military coup, the status of the rule of law was desperately threatened, civil war gained momentum, human rights violations increased, and the economic status downgraded significantly. Currently, Burma is one of the poorest countries in Southeast Asia, while China, with state functions leading to undeclared federalism, is becoming a developed country. In this regard, the role of the rule of law should be heeded.

The Chinese legal system emanated from Chinese culture which is represented in the philosophy, 'Heaven and Man combining into one, and all things on earth is an organic whole'.[77] Accordingly, the value of collectivism was formed. While social stability, emperor's rule and hierarchy in society were maintained, individual value was neglected and individualism was strictly controlled.[78]

Law exists in this case not to empower and protect individuals from the state, but as an instrument of governmental control; any rights that do exist are granted by the state and may be retracted.[79] During the Mao period, the purpose of law was to serve the state and not to protect individual rights.[80] Thus the Cultural Revolution (1966-1976) was sanctioned, resulting in a decade-long period in which people were deprived of their individual rights and freedoms.[81] With the desire for social justice and the needs of a market-based economy,[82] the rectification of the Cultural Revolution, initiated by Deng Xiao Peng with the underpinning of

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[77] Sun Yaogang, 'The Tradition of Legal Culture in East Asia - the Forming of Chinese legal family' (4th Conference of Asian Jurisprudence, University of Hong Kong 17-19 Jan 2001); 'The Rule of Law in East Asia: Formation and Development' vol II. Aung Htoo, 'Seeking Judicial Power: With a Special Focus on Burma's Judiciary' Centre for Comparative and Public Law Faculty of Law, The University of Hong Kong, Occasional Paper No. 20 (October 2011) 23. https://ccpl.law.hku.hk/content/uploads/2018/03/Pub/OP/OP%20No%2020%20Aung%20Htoo%20V2.pdf accessed 23 December 2021.

[78] Ibid

[79] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, Cambridge 2003). <https://www.cambridge.org/core/books/judicial-review-in-new-democracies/0000FE1406D329B985D16312A18768E7> accessed 23 December 2021.

[80] "Competing Conceptions of the Rule of Law in China", Randall Peerenboom, Conference on Comparative Conceptions of the Rule of Law in Asia, the University of Hong Kong, Hong Kong, China, 20-21 June 2002, p.9.

[81] Maurice Meisner, *Mao's China and After: A History of the People's Republic* (3rd edn Free Press, New York 1999) 445. < https://www.amazon.com/Maos-China-After-History-Republic/dp/0684856352> accessed 23 December 2021.

[82] Zhu Suli, 'The Party and the Courts' in Randall Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press, Cambridge 2009) 52, 62, 63.

modern Chinese nationalism, dictated the application of the formal features of the rule of law in China.[83] The 15th Congress of the Chinese Communist Party embraced the rule of law after the reconstruction of its legal system in 1978.[84]

Although the cultural revolution caused China to fall behind other developing countries, under the initiative of Deng Ziaoping, China created a rule of law foundation by establishing the core institutions of a legal system; building a legal order that might prevent recurring chaos; reestablishing courts and law schools; completing basic codes, criminal law, and criminal procedure; and promulgating a new constitution (actually two, one in 1978 and one in 1982).[85] The "rule of law" was first expressed in the constitution of China in 1999.[86]

While the terms "socialist characteristics," "socialist legality," and "a socialist legal system with Chinese characteristics" resistant to Western-style rule-of-law norms[87] are worth observing, China laid a rule-of-law foundation in 1978, just two years after the end of the cultural revolution. Judicial reform also started as early as December 1978.[88] Under the stated reform of China, although independent status of the judiciary remains controversial regarding political issues,[89] the judiciary is sufficiently independent to bring economic development.[90] Accordingly, the rate of economic development increased from an average of 4.4 percent annually before 1978 to an average of 9.5 percent after 1978.[91]

> Since China began to open up and reform its economy in 1978, GDP growth has averaged almost 10 percent a year, and more than 800 million people have been lifted out of poverty.

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[83] The Constitution of the People's Republic of China 1982, Preamble.

[84] Benjamin L Liebman, 'China's Courts: Restricted Reform' The China Quarterly 620, 624 (2007) 191. <https://scholarship.law.columbia.edu/faculty_scholarship/1537/> accessed 23 December 2021.

[85] Britannica, Early Westernization to the Cultural Revolution. <https://www.britannica.com/topic/Chinese-law/Early-Westernization-to-the-Cultural-Revolution> accessed 23 December 2021.

[86] The Constitution of the People's Republic of China 1982 art 5: 'The People's Republic of China governs the country according to law and makes it a socialist country under rule of law.'; this article was inserted by Article 13 of the Third Constitutional Amendment Law 15 March 1999, adopted at the Second Session of the Ninth National People's Congress. After the last amendment made on March 14, 2004, this article has continued to exist. <http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/node_2825.htm> accessed 23 December 2021.

[87] Ignazio Castellucci, 'Rule of Law with Chinese Characteristics' Annual Survey of International & Comparative Law Volume 13 | Issue 1 (2007) 36-38. https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1112&context=annlsurvey accessed 24 December 2021.

[88] Zou Keyuan, 'Judicial Reform in China: Recent Development and Future Perspective', Published by American Bar Association, (2002) 1039. <https://www.jstor.org/stable/40707698> accessed 24 December 2021.

[89] R Peerenboom, 'Introduction: Biblioteca Cejamericas', (2016)18-22. <https://biblioteca.cejamericas.org/bitstream/handle/2015/2263/Judicial-Independence-in-China.pdf?sequence=1&isAllowed=y>

[90] Yanrong Zhao, The Way to Understand the Nature and Extent of Judicial Independence in China, Cambridge University Press, (20 September 2018). <https://www.cambridge.org/core/journals/asian-journal-of-law-and-society/article/way-to-understand-the-nature-and-extent-of-judicial-independence-in china/AB4928C262678A013F5536B164671468>

[91] Chenggang Xu, The Fundamental Institutions of China's Reforms and Development University of Hong Kong, (May 2010). <https://hub.hku.hk/bitstream/10722/153452/2/Content.pdf?accept=1> accessed 24 December 2021.

> There have also been significant improvements in access to health, education, and other services over the same period.[92]

In Burma, in the aftermath of the 1962 military coup, the rule of law was desperately undermined. Yet no serious debate surrounding the rule of law emerged among the resistance forces, democratic or ethnic. Since then, the independence of the judiciary has ceased to exist, regardless of whether there were constitutions.[93] The foundation for the rule of law was laid in China in 1978, but in Burma, the 1974 Constitution was in effect; thus, the minimum rule-of-law norms were denied. In the aftermath of the 8888 popular democratic uprisings, the military juntas have constantly exercised rigid centralization, desperately violating the rule-of-law norms. Despite that the term "rule of law" was constantly reiterated in the NLD party's election campaign manifestos over the past 10 years, no clear definition is found in this regard, and the mixed conception of "rule of law" and "rule by law" remained until the latest military coup. When the NLD party joined the legislative assembly after the 2012 "By Elections," "the rule of law and tranquility commission" was established. Nevertheless, it was unable to achieve anything, particularly with promoting the status of the judiciary. Without upholding the rule of law, federalism can never be achieved.

In China, given the effective decentralization, the structure of the state has led to the transformation into a federal state.

> Most government functions are carried out by sub-national governments. Although by constitution China is not a federal state, in many important economic issues Chinese sub-national governments are more powerful than their counterparts in federal countries around the world, since they are responsible for much broader regional matters than simply fiscal issues.[94]

Meanwhile, in Burma, the Communist Party of Burma (CPB) has struggled against the successive military juntas, so the CPB has played a significant role in the contemporary history of the country.[95] The party ultimately failed, however; in addition to other legal, societal, and geopolitical factors, the CPB exercised rigid centralization. The NLD and other democratic and ethnic forces might not underestimate the positive and negative aspects of centralization. The attitude of the NLD's top leading body, albeit not an official party policy, has somewhat indicated the practice of rigid centralization. For instance, after winning the 2020 elections in a landslide, one top NLD leader publicly claimed that the ethnic forces must enter the NLD if they wished to establish federalism.

Unfortunately, in Burma, on the one hand, the successive military regimes exercised rigid centralization. On the other hand, major political and armed resistance forces, as stated above, conducted a similar practice in competition with X. The National Council of the Union of Burma (NCUB), the relatively largest democratic and ethnic alliance, operated in the 1990s and failed. In addition to other operational flaws, the NCUB could not find an optimal centralization with the underpinning of the 1990 election results. Currently, following the November 2020 elections, the NLD/CRPH/NUG are facing analogous problems.

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[92] The World Bank (12 October 2021). <https://www.worldbank.org/en/country/china/overview#1>

[93] Note: Between 1962 and 2021, there were two constitutions: the 1974 Constitution and 2008 Constitution.

[94] Ibid 9, (n 46) Chenggang Xu.

[95] အမောင်ကြားက ဗမာပြည်၊ အနီးခေတ်ဗမာပြည်နိုင်ငံရေးလှုပ်ရှားမှု သမိုင်းအကျဉ်း (၁၉၄၈-၂၀၀၂) ဝင်းတင့်ထွန်း။

The NUG has existed for nine months. To date, no powerful ethnic army has placed itself under the command of the NUG Ministry of Defense, and none are likely to do so in the future. Albeit claiming to struggle against the military dictatorship, any political force engulfing the entire country in a top-down manner may never be successful in practicing rigid centralization. Therefore, the only other alternative is for an optimal centralization to be sought with a bottom-up approach.

This situation exists for two reasons: One is that the Peoples' Defense Forces (PDFs), which have been noticeably struggling against the military council, have come into existence by themselves in recruiting, organizing, and maneuvering at the local level, though not under the direct command of any political force operating at the central level. More importantly, another reason is that, in forming the federal union of Burma, the constituent units of the ethnic states/provinces may enjoy provincial sovereign status per the Pang Long Accord, which is binding under national and international law. With this backdrop, a formal combined force of the EROs and PDFs may systematically emerge in each state/province; afterward, the horizontal relationship among the ethnic states/provinces may be established legally. An optimal centralization can thus be sought. This dynamic establishes the "form" element.

At the same time, "essence" is more important than the form. The "essence" element relates to how the amalgamation of "nationalism" and "human rights" should be practiced. In this regard, the armed conflicts occurring among EROs in major ethnic states/provinces such as Karen, Shan, Rakhine, Kachin, Karenni, Mon, and so on must be observed. These conflicts are normally attributed to competing claims of territorial control, levied taxes, the conscription of soldiers, and the exploitation of natural resources. They prescribe competitions between the interest of each national or egoistic group on the one hand and that of the promotion and protection of human rights on the other.

To facilitate a resolution, there are at least five requirements. First, human rights awareness should be promoted. The more human rights awareness is promoted, the less the practice of extreme nationalism can be found. Second, the protection of human rights and the development of economic status can be achieved only when the rule of law is upheld. The observation of the minimum standards for the rule of law should thus be expanded. Third, all ethnic nationalities, in terms of the public in every ethnic state/province, must express their opinions or impose pressure on the relevant stakeholders to peacefully resolve conflicts. In crucial decision-making processes that might affect daily life, stakeholders' participation should be encouraged, even in times of conflict. Fourth, the underlying issues arising between the ethnic states/provinces should be primarily resolved via negotiation and mediation, and such process must be legalized in accordance with the constitution, as has been the case in Switzerland. In Burma, to this end, a provisional constitution should be enforced during the period of struggle against the military dictatorship. Fifth, the emergence of an independent, impartial, efficient, and resource-rich judiciary in each ethnic state/province should be heeded. All EROs may resort to adjudication in the courts to resolve the underlying disputes stated in the above paragraph, rather than attempting to use armed means.

Given the above, the emergence of a horizontal authoritative body in accordance with the provincial constitutions in each state and a provisional federal democratic constitution of the Federal Union of Burma, given the underpinning of the 2020 elections result, may be an answer to seek an optimal centralization. It would be a daunting task, of course, but not an impossible one. The key concern is how to establish the foundation for the rule of law to promote and protect human rights even during the struggle against the military dictatorship.

(B) Contrasting Burma with the United States of America

In the United States, which is widely considered to be a bastion of the rule of law, the doctrine is intimately connected to a liberal culture and liberal political system which was reflected in the American Declaration of Independence, issued on July 4, 1776. It states, inter alia, that all men are created equal, and among the inalienable rights are life, liberty, and the pursuit of happiness.

Individual liberty is championed by liberalism and its goal is to curb the intrusion of governmental authority against individuals and to seize control of the power to exercise that authority.[96] With the background of liberal culture and liberalism, the US Supreme Court stands as the most powerful institution for protecting individual rights and maintaining the rule of law by exercising the power of judicial review. According to the concept of liberalism, tolerance for other community views is forced upon the people by the fact of coexistence.[97]

Judicial Review in the US and the Potential for Judicial Review in Burma

In Burma, most people are interested in the type of federalism practiced in the US, whose presidential system may be one of the best globally. However, authoritarian regimes have also emerged in many Latin American, eastern European, and Asian countries (e.g., Indonesia, the Philippines, South Korea, and Burma) that practiced presidential systems. The American presidential system has been successful for several reasons: In the US, the rule-of-law foundation has been laid over 200 years. The US constitution also guarantees individual freedoms and the rights of states. An independent media and powerful CSOs can uncover government abuses, if any. And normally, the US Congress serves as a check against the power of the president, particularly during the Trump administration. Finally, the US Supreme Court plays a significant role in checking the abuse of the executive branch by using judicial review. Although such a presidential system is not well-suited to Burma, other positive factors in the US presidential system are worth observing.

Generally speaking, the United States of America has adopted the doctrine of separation of powers asserted by John Locke. The British idea of a Mixed Regime where the King, the Lords, and the Commons—in terms of the One, the Few, and the Many—highlighted by Aristotle, Polybius, Cicero, St. Thomas Aquinas, and Machiavelli were cited as the best forms of regimes in practice because they led to a system of checks and balances. It is the origin of the U.S. Constitution's separation of powers.[98] With this underpinning, the Supreme Court of the U.S exercises the power of judicial review.

All exercises of authorities conferred by law are reviewable by the court to ensure that the law is observed.[99] Judicial review gives a court the power of deciding the validity of the

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[96] Brian Z Tamanaha, 'Rule of Law in the United States' in R Peerenboom (ed), *Asian Discourses of Rule of Law* (Routledge, London 2003) 56.

[97] Ibid

[98] Steven G Calabresi, Mark E Berghausen and Skylar Albertson, 'The Rise and Fall of the Separation of Powers' (2012) 106 Northwestern University Law Review 527.

[99] The Rt Hon the Lord Clyde and Denis J Edwards, *Judicial Review* (W. Green, Edinburgh 2000) 65.

law enacted by a legislative body[100] and that of checking abuse of executive power. It is worthwhile to ask whether it will be beneficial for society if complete independence of the judiciary and ideals of judicial review were to be exercised immediately. In this regard, a landmark case of the US should be noted. Many people in the US had concerns about the ruling of the Supreme Court with its 5-4 split decision in Bush vs. Gore, claiming it was a political, not a judicial, decision. Regardless of whether right or wrong, the then Supreme Court undertook its responsibility for what it needed to do[101] even though judicial review power is not enshrined in the US Constitution. Generally speaking, the US is well-known for its independent court system and political interference in the judiciary is relatively rare.

In the case of U.S. President Richard Nixon, the House Judiciary Committee conducted an inquiry. The Supreme Court decision regarding the Nixon Watergate tapes allowed admission of evidence which culminated in the voting of three articles of impeachment against the President. This judicial action played a central role in President Nixon's resignation from office, in spite of some commentators' suggestions that the judiciary refrain from deciding constitutional conflicts between Congress and the President.[102] The Court rejected and abjured a rigid view of separation of powers in favor of a perspective emphasizing checks and balances.[103]

> It explicitly rejected a rigid demarcation of the three branches emphasizing that "the Constitution by no means contemplates total separation of each of (the) three essential branches of Government" while recognizing both the value of dispersing power to safeguard liberty and the need for sufficient interaction of the branches to promote effective government. [104]

In modern Burma, the NUG's efforts to be recognized by the UN and the international community are highly valuable. There are, however, some flaws in X. In the absence of a Union Legislative Assembly, it is unclear which Burmese laws would be regarded as just laws and be enforced by the NUG in operating the government. The non-existence of the judiciary to check the potential power abuses of the government has also created a concern that the NUG, albeit being the executive, dislikes the idea of having a check on the abuse of executive power. In addition, no law exists regarding the information adopted by the NUG, so people lack the right to know about the NUG's activities. It is unclear as well whether the NUG functions as a transparent and accountable government given that the Federal Democracy Charter adopted by the NUG lacks related provisions. For example, below:

> Obligations and Terminations from National Unity Federal Government[105]
>
> (A) Every two weeks, all the members of the cabinet, as specified in article (161) of this Constitution, shall have a coordinating meeting led by the Federal Prime Minister under the

[100] S P Sathe, *Judicial Activism in India* (2nd edn Oxford University Press, Oxford 2003) 82.

[101] *Nergelius* (n 74).

[102] Jonathan L Entin, 'Separation of Powers, the Political Branches, and the Limits of Judicial Review' (1990) 51 Ohio State Law Journal 178.

[103] Ibid 187-188.

[104] Ibid 189.

[105] The Provisional Constitution of the Federal Democratic Union of Burma (Proposed Revised Draft) (3 May 2021) <https://drive.google.com/file/d/14ZY9N8Q1Weaeawf_TsSDKBDtwLC8a7oP/view?usp=sharing>

supervision of the Federal President or Vice President, during the first stage of the Interim period. There shall be a plenary meeting once a month. In addition to the Federal ministers, deputy ministers shall attend evaluation meetings every three months. The progress report of the National Unity Federal Government shall be released every four months.

(B) The Federal President or Vice President shall have the right to oversee the cabinet meeting, whenever they deem fit, in order to draw and implement the policy and strategic plan of the Interim National Unity Federal Government.

(C) When the Federal Union Prime Minister is unable to attend the meeting, the Federal Deputy Prime Minister shall attend the meeting. If a minister of the Federal Union Minister cannot attend the meeting, the Federal Deputy Minister shall attend the meeting.

(D) The cabinet meeting may be held if two thirds of the members of the cabinet are present, as specified in article (161) of the Constitution. In order to hold the cabinet meetings effectively, attendance of the respective Federal Minister shall be enough. The Deputy Ministers shall, however, be able to attend the meeting as observers with the permission of respective Federal Ministers.

(E) A Federal Union Minister may take leave from attending the cabinet meeting if he/she is on duty leave, sick leave with prior request, and leave of absence for security reasons. However, without these exceptions, if a Federal Minister is absent for three consecutive meetings and fails to direct the Federal Deputy Minister to attend the meeting on behalf of him/herself, the Federal Prime Minister may officially warn the respective cabinet minister. Further failure to attend the meetings, two additional times after the warming, may lead to suspension from his/her duty or termination from the position upon the approval of the Federal President.

(F) If a Minister is unable to fulfill his/her duties or is unable to serve the duty assigned, the Prime Minister may warn the Minister three times in consultation with the Deputy Prime Minister. Despite the warning, if any progress or growth is not found, the minister could be terminated by reporting to the President. If a similar scenario is found in a deputy minister, the Federal Prime Minister may suspend the deputy minister from his/her duty and position by consulting with the respective minister and Deputy Prime Minister.

(G) The Prime Minister or Deputy Prime Minister may request monthly reports from the Ministers and Deputy Ministers on the implementation and progress of their assigned duties. Furthermore, according to the article (161) (A), (1) and (2), once every four months, reports shall have to be submitted to the respective mother organizations where they are selected to get involved.

(H) If a member of the cabinet fails to fulfill the duties assigned, the minister may be terminated by the respective mother organization according to the article (161) (A), (1) and (2). If there is still no progress made after three warnings, the minister may be suspended by the voting decision of over half of the members of the respective organization. According to the article (161) (A), (3) and (4), under the direction of the Federal Prime Minister, the ministers who fail to fulfill their duties may be suspended by the decision of the meeting of the cabinet.

(I) Any Federal Prime Minister or the Deputy Prime Minister may be suspended from duty for any of the following reasons:

(1) High treason to the Federal Union

(2) Breach of any provision of the Constitution

(3) Serious misconduct

(4) Inefficient discharge of duties assigned or inability to execute their duties

(J) In addition to the criteria enumerated under subsection (I) above, for any other reasons, one hundred thousand of all the citizens, and three-quarters of all the ethnic states may submit a signed letter to the Parliament of the Federal Union, formed in accordance with Article (97), requesting the dismissal of the Federal Prime Minister or Deputy Prime Minister from duty.

(K) A request to suspend the Federal Prime Minister or Deputy Prime Minister from duty shall be discussed at the Parliament of the Federal Union. The proposal may be approved or refused with the voting of over half of the total number of the parliament. If the proposal is approved, the Federal President or Vice President shall have to promulgate with signature the suspension of that Federal Prime Minister or Deputy Prime Minister from duty.

(L) National Unity Government of the Federal Union may submit a list of qualified names for the vacant Federal Prime Minister or Deputy Prime Minister position to the Candidate for its approval. If the Federal Union Parliament approves the submission of the list, the Federal President or Vice President shall have to appoint the Federal Prime Minister or Deputy Prime Minister by executing with signature.

Based on the 1990 May election results, the National Coalition Government of the Union of Burma (NCGUB) emerged that year. Despite making some achievements,[106] the NCGUB terminated after 22 years merely as a lobbyist exile government. It transpired because, apart from other political and operational flaws, the NCGUB operated primarily without the formal existence and support of the legislature and judiciary, created in cooperation with the ethnic states/provinces, under a provisional/interim constitution drawn up reflecting the Pang Long Accord. In struggling against the military dictatorship, the NUG arising from the 2020 November election results may be facing the second, or probably last, chance to lay down a foundation of federalism in Burma. The NUG should, in other words, not waste any more time. It should therefore seek to establish the legislature and judiciary, along with other state security institutions, in accordance with a provisional/interim federal democratic constitution.

[106] Note: The NCGUB was primarily able to achieve the following: (1) The Federal Constitution Drafting and Coordinating Committee led by the NCGUB Federal Affairs Minister Khun Marko Ban completed the federal constitution drafting process, in which about 27 elected MPs actively participated, and produced a second draft. (2) In cooperation with the ethnic, democratic, CSO, women, and youth organizations, the NCGUB lobbied the UN to promote and protect human rights in Burma. (3) The NCGUB also shared responsibilities for the National Council of the Union of Burma (NCUB) in education and health affairs for the ethnic states/provinces. (4) The NCGUB negotiated with the Norwegian Government for the emergence of the Democratic Voice of Burma (DVB) as the voice of an exile government.

(C) Contrasting Burma with Ethiopia

Since 1994, Ethiopia has established a federal system in which different ethnic groups can practice self-rule.[107] The ethnic federalism being practiced in Ethiopia guarantees the right to secession in the constitution[108] and primarily actualizes two types of sovereignty.[109] Under the system, Ethiopia shifted from being the world's poorest country to one with a strong, broad-based growth averaging 9.9 percent, compared to a regional average of 5.4 percent.[110]

> Since the early 1990s Ethiopia has experienced reduced state repression, a relatively stable political climate, and has made encouraging strides to improve the living standards of its people. Education, health, infrastructure and economic growth have all improved, especially in the past decade.[111]

Unfortunately, the 1995 Constitution of Ethiopia failed to establish the foundation for the rule of law, although the term "independence of judiciary" is mentioned.[112] In Burma, the independent judiciary existed under the 1947 Constitution from 1948 to 1962. But such a judiciary never existed in Ethiopia. Although Emperor Haile Selassie I injected the idea of an independent judiciary and adjudication according to law under two constitutions in 1931 and 1955, the military junta made the judicial system amenable to the executive.[113] The Ethiopian public therefore constantly challenges the quality of justice.[114] Like the status of judiciary under the 2008 Constitution in Burma[115] and its low levels of impartiality, integrity, and competency, the Ethiopian courts may still be sluggish but less slavish to the demands of the state. In sensitive cases, politicians and bureaucrats have frequently meddled. Meanwhile, the judiciary

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[107] BBC, Ethiopia's Tigray war: The short, medium and long story, (29 June 2021). <https://www.bbc.com/news/world-africa-54964378>

[108] Constitution of the Federal Democratic Republic of Ethiopia: Art 39(1). <https://www.refworld.org/docid/3ae6b5a84.html> accessed 23 December 2021.

[109] Ibid, Article 50:

> 3. Supreme power of the Federal Government shall reside in the Council of Peoples' Representatives which shall be accountable to the Ethiopian people. Supreme power of states shall reside in the State Parliament which shall be accountable to the people of the state which elected it.
> 8. The respective powers of the Federal Government and the States is determined by this Constitution. Powers of the Federal Government shall be respected by the States and powers of the States shall be respected by the Federal Government.
> 9. The Federal Government, may, when it deems it necessary, delegate to the States, some of the powers given to it under Article 51 of this Constitution. States may also delegate some of their powers and responsibilities to the Federal Government.

[110] The world bank in Ethiopia:<https://www.worldbank.org/en/country/ethiopia/overview> accessed 15 September 2020.

[111] Stellah Kwasi and Jakkie Cilliers, 'Study, measured reform would help Ethiopia each its potential'(20 February 2020): <https://issafrica.org/iss-today/steady-measured-reforms-would-help-ethiopia-reach-its-potential> accessed 15 September 2020.

[112] Ibid, (n 33) Constitution of the Federal Democratic Republic of Ethiopia, Articles 78-84.

[113] Vibhute, K. I., 'The Judicial System of Ethiopia: From 'Empire' to 'Military Junta' to 'Federal Democratic Republic': A Legacy Perspective.' *Christ University Law Journal*, *4*(1), 1-31 (2015). <https://doi.org/10.12728/culj.6.1> accessed 23 December 2021.

[114] Harvard University, The Evolution of Judicial Evaluation in Ethiopia - Part 1: How did it all start? (18 August 2016). <https://projects.iq.harvard.edu/measureofjustice/blog/evolution-judicial-evaluation-ethiopia-part-1-how-did-it-all-start> accessed 23 December 2021.

[115] Ibid, (n 17) Melissa Crouch.

has been inaccessible, corrupt, politicized, and under-funded, and justice has remained elusive. Further, the sector showed few signs of improvement until 2018 when Prime Minister Abiy Ahmed's government initiated judicial reforms.[116]

Conflicts between PM Abiy Ahmed's federal government and Tigray state then occurred since November 2020 primarily given the non-recognition of the elections held in Tigray state by the federal government.[117] Neither side resorted to the adjudication in the Federal Supreme Court of Ethiopia. Burma must learn lessons from Ethiopia. Even though ethnic federalism under the name of federal democracy is practiced in Ethiopia, the country has again become chaotic since the rule of law cannot be upheld. For Burma, the crucial issue is based on the rule of law and how provincial sovereignty can be practiced to avoid an experience like that in Ethiopia.

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[116] Leul Estifanos, 'Judicial reform in Ethiopia: Inching towards justice' (Ethiopia Insight Election Project EIEP series, Ethiopia Insight, 5 September 2021) <https://www.ethiopia-insight.com/2021/09/05/judicial-reform-in-ethiopia-inching-towards-justice/> accessed 22 December 2021.

[117] BBC news: A conflict between the government of Ethiopia and forces in its northern Tigray region has thrown the country into turmoil. (29 June 2021) <https://www.bbc.com/news/world-africa-54964378>

Part-IV

The Concerns Surrounding the Doctrine of the Provincial Sovereignty

The provincial sovereignty principle, underpinned by the Pang Long Accord and also asserted by the NLD/CRPH/NUG under its Federal Democracy Charter,[118] is not a supernatural-driven panacea that can treat all diseases once and for all. The stated principle should instead be scrutinized based on its pros and cons or advantages and disadvantages. For the former, the principle is of course an essential foundation required to establish a federal system suited to Burma. For the latter, there are several concerns.

The first one is straightforwardly related to the promotion and protection of human rights. Under federalism, the federal government is primarily responsible for protecting the basic rights and security of all individual citizens if violations are committed by a state/province government. Currently, for instance, by forcefully taking over the government, the military council has been seriously violating the basic rights and security of all people in Burma. Even after the military dictatorship is overthrown at the central/federal level, similar desperate practices might transpire in any state/province in a future federal union.

To help resolve this possibility, it must be considered which type of state security institutions would be placed under the command of the future federal government; and, such practice should start now in accordance with a provisional/interim federal democracy constitution. This is the first alternative. The second alternative is the action would be taken against the respective violator state/province government by utilizing the security forces of other states/provinces. The third alternative is the amalgamation of the first and second appropriately. To seek the best alternative, the NLD/CRPH/NUG may collect the will of the ethnic states/provinces first in line with the provincial sovereignty principle and apply it as soon as possible.

The second concern is related to a prominent norm or standard; in other words, prevention is better than a cure. Whenever authoritarian regimes assume power at the federal or provincial levels, human rights violations commonly take place. From this aspect, an example situation that occurred at the provincial level can be seen, inter alia, in the experience of the former Yugoslavia, which was a federal union. Further, power abuses, including corruption, can be conducted by a minister of a state/province government alone or the entire government. In this regard, examples can be observed in Malaysia, which remains a federal union, at both levels: the federal government and the government of Saba State. To deter such abuses, even when struggling against a military dictatorship, the emergence of independent law enforcement mechanisms and the judiciary in states/provinces is required in accordance with the respective provisional/interim state constitutions.

[118] Note: It will be elaborated in Part VI.

The third concern arises from Ethiopia's incumbent experience. Given the non-recognition of the elections convened in Tigray state by the federal government led by the Prime Minister Abiy Ahmed, a serious problem arose. In Burma, during the 2020 November elections, the NLD government did not actualize the demand of the ULA/AA regarding some flaws of the elections in Rakhine State. As a result, the contention between the NLD and the UNA/AA noticeably arose, and the Tatmadaw (currently the military council) took advantage of the situation. To avoid similar or analogous situations in the future, both federal and state/province constitutions must guarantee the right of the ethnic states/provinces to promulgate the elections and related laws, to freely hold elections, and to independently elect their own leaders.

The fourth concern is relevant to the attitude of the NLD/CRPH/NUG led by a majority of Myanmar national leaders. They appear extremely reluctant to actualize the emergence of the Myanmar state/province, as demanded by the non-Myanmar ethnic nationalities for about six decades, so that national equality among all ethnic states/provinces can be established. This reluctance may create a tremendous hardship for the emergence of a genuine federal union.

The fifth concern is related to a demand for a confederal system.In the UWSP's 30th anniversary speech, General Tun Myat Naing, the Commander-in-Chief of the ULA/AA,[119] stated that their political goal is to achieve a confederate system with a level of autonomy no lower than the status of the UWSP.[120] Adoption of a confederal system by a constituent unit—in this case, the Rakhine State—implies that the Rakhine State would continue to be part of a certain type of union, rather than a separate X. Accordingly, how to form the above union is, albeit not objectionable, a concern that should be determined by all member states of the union. Rakhine State alone should not engineer the entire union as it desires, reiterating and solely utilizing its self-determination. In this regard, Rakhine State may negotiate with the other ethnic states comprising the union and participate in the constitutional dialogues.

The sixth concern is related to empirical situations on the ground in Burma. So long as any state constitutes a part of the federal union, all states must bring equal, albeit not absolute, development of the constituent units, in terms of ethnic state/province, of the entire union. Only then will the rule of law have been upheld.

An unlawful establishment as a small country within Burma

The United Wa State Party (UWSP) has the second largest army, apart from the Tatmadaw, in Burma, established in an area in the northeast part of Shan State. In the past 32

[119] Note: According to the unconfirmed, but liable, reports, the Arakan Army, has become the third largest army in Burma as it has, at least, over 40,000 fighters.

[120] Sai Tun Aung Lwin, 'Ethnic groups are moving towards one country two systems government: (d) AA leader is in favour of Wa autonomy' (BBC News Burmese 23 Aug 2019) <https://www.bbc.com/burmese/in-depth-49450775> accessed 3 September 2021.

years, except with a few other local EROs in its adjacent areas,[121] the UWSP has never been in armed conflicts with the Tatmadaw. Rather, the UWSP primarily concentrated on the growth of its own organization while taking advantage of business interests in other ethnic states/provinces.[122] There is no clear evidence of the UWSP supporting the well-being of the Union, except in assistance given to some EROs active in areas surrounding the UWSP's liberated area. A rather large territory with six townships, designated by the UWSP with the name of Wa State, has become a small independent country within a large independent state (Burma). Over the previous three decades, X has been used for the UWSP. Although the UWSP stands as the government of the Wa region, the party ignored its responsibility as an Armed Non-state Actor (ANSA) under international law.

It is now time to end the unlawful establishment as a small country within Burma that lasted for more than three decades through an agreement between the Tatmadaw and the UWSP. Rather, the party should primarily attempt to legally achieve the status of Wa State/Province in accordance with the Federal Constitution. Otherwise, it would be meaningless to establish such a big armed force. The USWP finds itself in a situation where the interests of Wa nationals are seemingly and rhetorically focused, while the benefits and well-being of the entire Union are intentionally ignored. With a strong army equipped with the most sophisticated and powerful weapons and strong financial resources, the UWSP imposes a serious threat to the emergence of a genuine federalism in Burma so long as the party does not show its political will to this end.

Over the past three decades, the development of the Wa territory under the leadership of the United Wa State Party (UWSP) is noteworthy, remarkable, and appreciable. However, how the UWSP undertook such development is unethical, illegal, and unconstitutional, and establishes support for prolonging the military dictatorship. The development was unethical because the UWSP alone enjoys such development, while other states have been suffering from various atrocities. More specifically, the party brought development for Wa territory at the expense of other states/provinces. The development was illegal and unconstitutional because almost all measures undertaken by the UWSP over the previous three decades for the stated development have not been in accordance with the effective laws and constitution. Rather, the development occurred through negotiating with and serving under the successive military juntas, thereby embedding the military perpetrators who have committed the gravest crimes of international concern.

In this regard, the international community of states is primarily responsible for dealing with this serious human rights violation issue from the aspect of international norms.

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[121] UN Security Council, Report of the Secretary-General on children and armed conflict in Myanmar, (22 December 2017) Para 9. <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2017_1099.pdf> accessed 2 November 2021.

[122] Global Witness, Jade and Conflict: Myanmar's Vicious Circle, (June 2021) (42-46) https://drive.google.com/file/d/18Y4p92PsQbHjg74CHlArk8wWJ8EUBwNO/view?usp=sharing

Part-V

International Norms: From responsibility to protect (R2P) to jus cogens norms

Even if the concept of the responsibility to protect (R2P), a global political commitment, remains active, it is extremely unlikely to be practiced in the contemporary ASEAN region as a living reality. Underlying that unlikelihood is the weaker position of Western countries, led by the US, apart from the balance of power notably exercised by the three superpower UNSC members—China, Russia, and the United States.

Several major events that happened over the past few months have weakened the position of the US related to not only tackling the ASEAN but also influencing the UNSC: the US submarine deal with Australia has enraged France, which is also on the Security Council,[123] and the withdrawal of the US from Afghanistan somewhat disgraced both the US and NATO.[124] Rhetorically articulating humanitarian intervention, the bombing of Yugoslavia by NATO[125] in the absence of UN Security Council approval was controversial with respect to whether it constituted a legitimate action under international law.[126] It is highly unlikely that the US would initiate a similar practice, conducted by NATO over two decades ago, in today's ASEAN region, which would impose a serious threat to China.[127] Albeit being a superpower party to the Genocide Convention,[128] the US or US-led Western military powers are unlikely to apply the military mean in Burma. The US[129] has thus explicitly focused on ASEAN's "Five-Point

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[123] The New York Times, In Submarine Deal With Australia, U.S. Counters China but Enrages France(16September 2021). <https://www.nytimes.com/2021/09/16/world/europe/france-australia-uk-us-submarines.html>

[124] Martin Jacques, 'Defeat in Afghanistan a complete humiliation for the US', Global Times, (15 August 2021) <https://www.globaltimes.cn/page/202108/1231540.shtml>
Jamie Shea, 'NATO withdraws from Afghanistan: short-term and long-term consequences for the Western alliance'(3 Sep 2021). <https://www.friendsofeurope.org/insights/nato-withdraws-from-afghanistan-short-term-and-long-term-consequences-for-the-western-alliance/> accessed 27 October 2021. Nato and Afghanistan (16 September 2021) <https://www.nato.int/cps/en/natohq/topics_8189.htm>

[125] Maja Zivanovic and Serbeze Haxhiaj, '78 Days of Fear: Remembering NATO's Bombing of Yugoslavia', Belgrade, (March 22, 2019). <https://balkaninsight.com/2019/03/22/78-days-of-fear-remembering-natos-bombing-of-yugoslavia/> accessed 27 October 2021.

[126] Security Council, NATO Action Against Serbian Military Targets Prompts Divergent Views As Security Council Holds Urgent Meeting on Situation in Kosovo, (24 March 1999).
<https://www.un.org/press/en/1999/19990324.sc6657.html> accessed 27 October 2021.

[127] Jeffrey D. Sachs, William Schabas, 'The Xinjiang Genocide Allegations Are Unjustified', Project Syndicate, (20 April 2021). <https://www.project-syndicate.org/commentary/biden-should-withdraw-unjustified-xinjiang-genocide-allegation-by-jeffrey-d-sachs-and-william-schabas-2021-04?barrier=accesspaylog> accessed 27 October 2021.

[128] United Nations Treaty Collections: Convention on the Prevention and Punishment of the Crime of Genocide <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en>

[129] The White House, 'Statement by NSC Spokesperson Emily Horne on National Security Advisor Jake Sullivan's Meeting with Burmese NUG Representatives' (25 October 2021) <https://twitter.com/eAsiaMediaHub/status/1452840419792863241> accessed 27 October 2021.

Consensus," including engaging in a constructive dialogue.[130] Conceivably reflecting these underpinnings, the UN Special Rapporteur elaborated on a definition of the R2P, accentuating the situations in Burma.[131]

> I think that is definitely appropriate, this is exactly the situation in which we do have a responsibility to protect. And Chapter VII [of the UN Charter, by which the Council can use force]; using this is one of the reasons that the Security Council exists, to engage in just this kind of emergency. So, the question becomes, what to do, how to act, what is the best way to act? Some have the belief – it is an erroneous belief – that responsibility to protect or R2P means military engagement. It is not what it means. Military engagement is an option, but it is not what R2P is.
> R2P means going in to protect, in the best way possible. We need to look at options within certain parameters. Options that have the most potent impact on the junta, but also, that will have the minimum negative impact on the people. Protect the people of Myanmar. And I am afraid that any kind of military intervention would lead to a massive loss of life.

Albeit not legally binding, the R2P global commitment is highly appreciable and directly relevant to the situations in Burma, apart from many other countries, quoting in part that "national authorities are manifestly failing to protect their populations" from the four crimes and violations.[132] This underpinning suggests that, even if the military mean is impracticable or inappropriate to hold the perpetrators of the stated international crimes accountable, the international community, particularly the ASEAN, is liable for finding a more efficient pathway. To this end, non-derogatory obligation arising from a peremptory of general international law (jus cogens) must be heeded.

Obligation of the International Community of States as a Whole to Comply with Jus Cogens Norms

The "Five-Points Consensus" does not include an action plan for ending impunity in compliance with jus cogens norms. Rather than attempting to seek accountability, the ASEAN itself is undermining the rule-of-law principles by encouraging a so-called dialogue with the military junta. Only if amnesty or pardons are provided to the Tatmadaw leaders, who allegedly perpetrated the gravest international crimes,[133] would the dialogue process be possible. Such

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[130] Chairman's Statement on the ASEAN Leaders' Meeting (24 April 2021) <https://asean.org/wp-content/uploads/Chairmans-Statement-on-ALM-Five-Point-Consensus-24-April-2021-FINAL-a-1.pdf> accessed 24 October 2021.
[131] "*MYANMAR CRISIS: Stand with the people and protect them, urges UN rights expert,*" UN News, 19 April 2021, available at https://news.un.org/en/story/2021/04/1090012 (accessed 22 Oct 2021)
[132] Secretary General Defends, Clarifies 'Responsibility to Protect Act' at Berlin Event <https://www.un.org/press/en/2008/sgsm11701.doc.htm> accessed 31 October 2021.
[133] UNGA, Human Rights Council Thirty-ninth session, 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar' (17 September 2018). <https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf> accessed 24 October 2021. UNGA, Seventy-sixth session, 'Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives'; Situation of human rights in Myanmar Note by the Secretary-General, (2 September 2021). <https://undocs.org/A/76/314> accessed 24 October 2021.

actions would be against international law, according to which amnesty or pardons for jus cogens status of serious international crimes are impermissible.[134]

> The "most conspicuous consequence" of a crime reaching jus cogens status is that it cannot be derogated from by states, either "through international treaties or local or special customs or evegeneral customary rules not endowed with the same normative force (Prosecutor v Furundzija, case no IT-95-17/1-T, judgment, Trial Chamber, December 10, 1998 ("Furundzija decision"), para 153)."[135]

Within ASEAN's "Five-Point Consensus," the two are related to a constructive dialogue. What does that mean? Regarding the term "constructive," no accurate definition is found. The word "dialogue" sounds interesting as it somewhat reflects a peaceful action. Unfortunately, however, the three-decade experience of Burma has only produced negative results. Multiple UN General Assembly resolutions calling for a dialogue[136] were unable to seek accountability, let alone a fundamental societal change.

In connection with ceasefires, the so-called political dialogues initiated by the military junta and spanning at least three decades utterly failed, both before and after the emergence of the NCA.[137] The causes of that failure should be scrutinized. Apart from other reasons, such as the lack of an independent international third-party monitoring or supervision mechanism, talks failed primarily because, in all dialogue processes stated above, the accountability issue arising from the previous human rights violations was not addressed at all. More importantly, background legal, constitutional, and political issues hampering the societal change were also not tackled.

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[134] Anees Ahmed and Merryn Quayle, 'Can genocide, crimes against humanity and war crimes be pardoned or amnestied?' (28 January 2008) 18. <https://sas-space.sas.ac.uk/2563/1/Amicus79_Ahmed%26Quayle.pdf> accessed 24 October 2021.

[135] Ibid, Ahmed 18.

[136] General Assembly, Third Committee Approves Resolutions on Human Rights in Myanmar, Iran, Democratic People's Republic of Korea (18 November 2010). <https://www.un.org/press/en/2010/gashc3998.doc.htm> accessed 10 November 2021. The representative of China said that dialogue was the only way to promote human rights, and finger-pointing would not help to solve problems. The representative of India said his country believed that human rights could be achieved through dialogue.

[137] Bertil Lintner, Why Burma's peace efforts Have Failed to End its Internal Wars, United States Institute of Peace, (October 2020). <https://www.usip.org/sites/default/files/2020-10/20201002-pw_169-why_burmas_peace_efforts_have_failed_to_end_its_internal_wars-pw.pdf> accessed 10 November 2021. Conclusion: Almost seventy years of "peacemaking" in Burma point to repeated failures because the military and other central authorities have always demanded that the rebels surrender but never offered them more than rehabilitation and business opportunities.

Part-VI

An Analysis of the Federal Democracy Charter

Following the military coup, the Committee Representing the Pyidaungsu Hluttaw (CRPH) formed by the representatives elected in the November 2020 elections has played a significant role. The CRPH produced a Federal Democracy Charter (FDC) in the end of March 2021. Afterward, under the initiative of the CRPH, the National Unity Consultative Council (NUCC) and the National Unity Government (NUG), which currently stands as a parallel government, have come into existence. In this part, the values enshrined and the flaws inherent in the FDC are unveiled and scrutinized.

The characteristics of the charter

The charter remains unclear regarding whether it posits a political commitment, indicates a political roadmap, or lays a constitutional foundation. The political commitment is not required given the existence of the historic Pang Long Accord, which is legally binding within both national and international law. How the Pang Long Accord would be actualized, however, is required. If the Charter is regarded as a political roadmap, including the convening of a constitutional convention to write and approve a federal democratic constitution,[138] such a process is incorrect even if it is stated in the charter. The process of attempting to establish a federal union, based on a federal constitution, is highly important. That process should involve a "bottom-up" approach rather than a "top-down" one.

Regarding a federal constitution-making process, the bottom-up approach imposes the three required situations: 1) In every constitution-making process, the will of the people shall be reflected by creating a democratic process with full democratic discussions.[139] In the case of federal countries, particularly Burma, the will of the diverse ethnic nationalities inhabiting the ethnic states/provinces should be collected first. Those collections, if they are not contrary to human rights, should then be enshrined in their own state/province constitutions. 2) Based on and reflecting the constitutions of the ethnic states/provinces, a new federal democratic constitution that engulfs the entire country may be drawn up.[140] 3). Regarding a final approval for the Federal Democratic Constitution, like the experience in the US,[141] the decision shall be made by the constitutional units of the ethnic states/provinces in Burma; Unfortunately, given

[138] The Federal Democracy Charter, para 6 & 7, Chapter 3, part 1.

[139] Vivien Hart, Democratic Constitution Making, Special Report, United States Institute of Peace (USIP), (July 2003) 4-5. <https://www.usip.org/sites/default/files/resources/sr107.pdf>

[140] Note: In this regard, see Part VII.

[141] Constitution Daily, 'The day the Constitution was ratified', (21 June 2021): Under Article VII, it was agreed that the document would not be binding until its ratification by nine of the 13 existing states. <https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified> accessed 28 December 2021.

that the charter regulates the top-down approach, a serious concern has arisen that a genuine federalism suited to Burma may never be achieved.

The valuable federal constitutional foundations in the charter

In the charter, in terms of reasonable federal constitutional foundations, several valuable provisions are found. Constitutionalism is guaranteed,[142] and the values of the union are sought.[143] Within the member states, equal rights and self-determination are ensured;[144] the right to draw up constitutions by the respective member states is recognized,[145] and civilian supremacy is asserted.[146] As the most crucial value, the sovereignty of member states and that of people in the states is safeguarded;[147] the application of the residual power by the member states is also affirmed.[148] Fiscal federalism is practiced as well,[149] and the rights of member states/provinces to manage land and natural resources are enshrined;[150] in extraction and production of natural resources, the right of the local communities to express their will is provided as well.[151] Gender equality is stipulated.[152] Diversities of the ethnic nationalities are addressed.[153] And finally, a federal union security system is explored,[154] and inter-governmental relations are introduced.[155]

The vagueness

Vagueness overwhelms the entire Charter. For instance, regarding the drafters of the charter, accountability has disappeared. The phrase "organizations and individuals"[156] is wholly insufficient. To date, nobody knows who drafted the Charter. The stated vagueness speaks to, or aligns with, the formation of the Constitution Drafting Committee. Which body

[142] Para 8, Chapter III, PART I.

[143] Part 1, Chapter IV, PART I.

[144] Para 2, Part 2, Chapter IV, PART I; and, para 1-2, Part 3, Chapter IV, PART I.

[145] Para 3, Part 2, Chapter IV, PART I.

[146] Para 5, Part 2, Chapter IV, PART I.

[147] Para 4, Part 3, Chapter IV, PART I.

[148] Para 6, Part 3, Chapter IV, PART I.

[149] Para 16, Part 3, Chapter IV, PART I.

[150] Para 20, Part 3, Chapter IV, PART I.

[151] Para 21, Part 3, Chapter IV, PART I.

[152] Para 25, Part 3, Chapter IV, PART I.

[153] Para 26-27, Part 3, Chapter IV, PART I.

[154] Para 33, Part 3, Chapter IV, PART I.

[155] Para 36-37, Part 3, Chapter IV, PART I.

[156] Preamble

would have power to form such a highly significant committee? According to the charter, the stated body comprises "the members who participate and collaborate in this Charter."[157]

The entities mentioned under the title of "Members of the Charter"[158] are too general—for instance, inter alia, "political parties"[159] and "ethnic armed revolutionary organizations."[160] Over 53 political parties have already registered with the new UEC, formed by the SAC,[161] to participate in the next elections to be held under the sponsorship of the SAC. Their political stance indicates continued adherence to the military dictatorship concept created under the 2008 Constitution. The term "Ethnic Armed Revolutionary Organizations" (EROs)[162] is even more controversial. What does "revolutionary" mean? What about the EROs still adhering to the NCA while appeasing the SAC? To maintain the NCA, almost all the stated organizations did not protect their own local people. Can such organizations still be regarded as revolutionary? Should they be entrusted with the power to form a Constitution Drafting Committee to draw up a new federal democratic constitution?

Another term is "collective leadership,"[163] which sounds impressive but is also inaccurate. Which organizations and/or individuals will participate in the collective leadership? What are the criteria, or minimum paradigm or required capacity, for the stated entities to participate in the leadership group? Which body will select or elect those candidates? The term "collective leadership" is akin to the words "all-inclusive principle" used under the NCA.[164] Invoking the latter, the Union Peace Dialogue Joint Committee (UPDJC), which is heavily influenced by the military leaders or ex-military personnel, selected organizations and individuals to participate in the NCA process.[165]

Inconsistencies

In the charter, various inconsistencies are present as well. Even though the term "constitutionalism"[166] is reiterated, no provision directly relevant to the limited government

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[157] Chapter 4 Part I, Development of Federal Democracy Union Constitution

[158] Chapter 2

[159] Chapter 2 (2).

[160] Chapter 2 (3).

[161] ၂၀၂၀ ရွေးကောက်ပွဲရလာဒ် ပျက်ပြယ်သွားပြီလို့ ကော်မရှင်သစ်ပြော https://www.rfa.org/burmese/news/new-uec-meeting-with-50-parties-02262021011009.html

[162] In the English translation, the term 'revolutionary' is omitted. It is unclear why.

[163] Preamble, Chapter 2, Chapter 4 Part (1) Union Value (3), Conclusion of Part I.

[164] Para 22 (a) of the Nationwide Ceasefire Agreement: 'Representatives from the government, Hluttaws and the Tatmadaw, representatives from the Ethnic Armed Organizations, representatives from registered political parties, ethnic representatives and other relevant representatives shall participate in political dialogue that is based on an all inclusive principle.'

[165] Interviews with the CSO leaders who participated in the Union Peace Conferences in October 2018.

[166] Para 8, Chapter 3, PART I of the Charter.

concept is found. One paragraph[167]—analogous to the provision in the 2008 Constitution,[168] which might be related to separation of power—is also confusing. Accordingly, by using the term "reciprocal check among the three branches of sovereign powers,"[169] judiciary independence is compromised. In the provision related to the judiciary,[170] there is not a single sentence guaranteeing its independence.

The inconsistencies continue: in a parliamentary system, the Head of State (e.g., the President) does not constitute a part of the government led by the Prime Minister. Although the charter affirms the parliamentary system,[171] the President and Vice-President are included in the formation of the government.[172] In addition, the charter stipulates the right of self-determination in full, guaranteeing the power of the three government branches can be exercised by member states/provinces, separate from the Union.[173] At the same time, X is violated.[174]

Carrying the mistaken legacies of the past

A new constitution normally avoids the mistakes of the past, addresses the current underlying issues occurring on the ground, and lays a foundation for a better future society.[175] Under the 2008 Constitution, in terms of the electoral system, a FPTP system alone is guaranteed, but the practice of a PR system is potentially prohibited.[176] The charter carries a similar mistake by continuously adopting the term "township constituency" in connection with the population provided for in the 2008 Constitution,[177] thereby blocking the PR electoral system that would enhance the ethnic minority representation in parliament. The charter also cannot guarantee reserved seats in the parliament for ethnic nationalities without passing

[167] Para 5, part 3, Chapter 4, PART I of the Charter.

[168] 2008 Constitution, Article 11 (a).

[169] Para 5, Chapter 3, PART I of the Charter.

[170] Chapter 6, PART II of the Charter.

[171] Para 8, part 3, Chapter 4, PART I of the Charter.

[172] Para 8, Chapter 3, PART II of the Charter.

[173] Para 3, part 3, Chapter 3, PART I of the Charter: Fundamental Policies for Building Federal Democracy Union Form of the Union: 1. Federal Democracy Union shall be built to meet the characteristics of a federal union exercising full rights of democracy and equal rights and rights to self-determination in full. 3.Every member state of the Union shall have separate legislative power, separate executive power and separate judicial power.

[174] Para 29, part 3, Chapter 3, PART I of the Charter: Federal Parliament shall develop and enact security and defense policies and laws of the Union. Federal Parliament shall examine and approve the defense and security expenditures.

[175] Note: The researcher, Mr. Aung Htoo, learnt the lessons from the experience of the emergence of the Basic Law of the Federal Republic of the Germany, elaborated by an anonymous German national constitutional expert, during constitutional observation trip in 2007.

[176] 2008 Constitution, Article 109(a).

[177] Para 7, part 3, Chapter 3, PART I of the Charter:

through elections. As such, X will only be a continuation of majoritarian democracy, which has been one cause of the civil war in the country.

In the November 2020 elections, a substantial dispute arose involving the independent status of the UEC, operated under the 2008 Constitution. Generally, all UEC members are selected and appointed by the President alone[178] without input based on the will of the constituent units of the Federal Union, in terms of ethnic states/provinces.[179] Regarding how to form an independent election commission, the charter is silent.[180] In addition, the charter makes a similar mistake by continuously adopting the position of State Counsellor.[181] Under the charter, the State Counsellor ranks above the Prime Minister, who is the Chief Executive.[182] This hierarchy desperately contradicts the practice of any democratic country that exercises a parliamentary system. Further, the charter does not prescribe how the President and Deputy President are elected by mentioning presidential election system. Their positions appear to be carried over from the 2008 Constitution.[183] Given the above, the charter incorporates the mistaken legacies of the past.

Major concerns in upholding the rule of law

Under the 2008 Constitution, the President, being the Chief Executive, is entrusted with the power to submit the nomination of the persons to be appointed as Chief Justices.[184] As a result, the judiciary lacked independence. Under the 1947 Constitution, a similar practice was conducted, but an independent judiciary still largely emerged because the President, who appointed the Chief Justices, was not the Chief Executive but the Prime Minister.[185] The President at the time had to serve only as the ceremonial Head of State.[186] Importantly, in accordance with the 1947 Constitution, for the Supreme Court Justices, judicial tenure was guaranteed,[187] something omitted in the 2008 Constitution. The charter prescribes an analogous provision[188] provided for in the 2008 Constitution.[189] The Charter is unclear whether the

[178] The 2008 Constitution, Article 398.

[179] The Constitution of the Federal Republic of the Union of Burma (Second Draft) Article 187.

[180] Para 15(b), part 3, Chapter 3, PART I of the Charter.

[181] Para 7(b), Chapter 3, PART II of the Charter

[182] Ibid.

[183] Note: There is no country – in which a military personal chosen and sent by the Commander-in-Chief of the Armed Forces can become the President or, at least, the Deputy President – in the world in accordance with the Constitution. The practice of presidential electoral system under the 2008 Constitution is also extensively contrary to all countries in which presidential system has been practiced successfully in the world.

[184] The 2008 Constitution, Article 299 (c) (1).

[185] The 1947 Constitution, Article 114.

[186] The 1947 Constitution, Chapter V.

[187] The 1947 Constitution, Chapter VIII, Article 143.

[188] Para 9, part 3, Chapter 4, PART I of the Charter.

[189] 2008 Constitution, Article 299 (c) (1).

President is the ceremonial Head of State or the Chief Executive as he ranks at the top of the entire government even during the interim period.[190]

It also remains unclear whether the Charter was produced for debate, for raising awareness among the public, and/or for being applied empirically on the ground starting from the date of publication. In practice, the second situation has not yet happened over the previous nine months, and the public did not receive any information about how to establish a relationship with the NUG government invoking the charter.

Major concerns to terminate the civil war

Some provisions relevant to fiscal federalism, land, and natural resources contained in the charter[191] are vague, albeit valuable. Although the other provisions[192] are relatively more specific, the entire Charter fails to establish, on the one hand, the nexus between the appropriate representation of ethnic nationalities in the legislatures and, on the other hand, ethnic nationalities' right to fiscal federalism and to the ownership, management, and preservation of land, natural resources, and environment. This failure thus connotes that ethnic minorities, due to the lack of the former, would not enjoy the latter even if the charter is later transformed into a constitution. If the above situation persists, ethnic nationalities will continue suffering from atrocities. As a result, civil war might not be terminated even if the military dictatorship has been overthrown.

Given the above, the charter is clearly neither a legal text that would be transformed into a constitution to establish a foundation for the rule of law nor a comprehensive political agreement that might motivate full participation of almost all stakeholders, except for the military council, particularly the EROs and political parties. However, as stated under the title of "the characteristics of the charter," political commitment is not required given the existence of the historic and legitimate Pang Long Accord.

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[190] Para 8, Chapter 3, PART II of the Charter.

[191] The Federal Democracy Charter, para 17 to 19, Part III.
[192] Para 20-21, part 3, Chapter 3, PART I of the Charter.

Part-VII

A Conclusive Analysis

Notwithstanding its many flaws, the charter has significant values. Some paragraphs mentioned under the title of "the valuable federal constitutional foundations in the charter," as stated above, are priceless. They somewhat constitute the focal points for establishing a federal union. That the leaders of the NLD, EROs, ethnic political parties, and CSOs worked together to produce such a precious part of the charter is remarkable. It can even be regarded as a positive result of the military coup.

However, an important question remains: How can the stated priceless principles be transformed into a legal form—for example, a provisional/interim constitution—as the first step toward X? If this transformation cannot occur, the charter would remain simply a piece of paper. This type of a charter is not legally binding, like the 1941 Atlantic Charter that merely prescribes a statement of values and does not meet the threshold of the UN Charter and its fully enshrined enforcement mechanisms.

This X Charter portrays the NLD's effort to win the trust of the ethnic nationalities and their own states/provinces as remarkable. Such effort must, of course, be highly valued. Nevertheless, contemporary history has showed that, regarding the Pang Long Accord, the NLD just referred to one word ("spirit") in terms of the spirit of the stated accord, but not the entire text, as a valid agreement. In addition, until the military coup, the NLD's so-called "national reconciliation" was primarily focused on conciliation between the leaders of the military (Tatmadaw) and those of the NLD, marginalizing not only the ethnic states/provinces[193] but also the public, particularly the victims of heinous crimes. Still, the efforts of the current NLD leaders should indeed be welcomed and highly valued.

Both sides must establish trust. One-sided blame should not be imposed only on the NLD. Particularly the EROs, the ethnic political parties, and the ethnic CSOs operating in each ethnic state/province are also responsible. If seeking to actualize the Pang Long Accord under which provincial sovereignty is granted, these groups may be responsible for the emergence of provincial powers—in terms of the state/province legislatures, executives, and judiciaries—in accordance with state/province constitutions. Conversely, the situations in the ethnic states/provinces are not equally developing to the extent that provincial sovereignty is effectively practiced. For example, the following situations can be observed.

In Karen State, the KNU is playing a double game. On the one hand, KNU leaders are attending the meetings organized by the CRPH or the NUG, including those drawing up the stated controversial charter. In some KNU divisions, the democracy activists who transformed

[193] Note: Participation of the ethnic leaders in the Union Peace Conferences was also just a sham. For example, in the last conference led by Daw Aung San Suu Kyi, Sai Nyunt Lwin—chairperson of the Shan Nationalities League for Democracy (SNLD)—was allowed to deliver a formal speech. It was a wonderful opportunity for his party. Afterward, he posited that the Pang Long Accord should be heeded and complied with. In this regard, there was no official resolution, and in practice, his submission was unequivocally ignored.

from Generation Z but committed to armed struggle are being trained. On the other hand, the same leaders are maintaining a formal, but confidential relationship with the military council (Tatmadaw) while adhering to the NCA.[194] This situation tremendously and negatively impacts the entire struggle against the military dictatorship. Due to unclear policy of the KNU, in addition to some other groups, the operation of the NUG remains in limbo. Importantly, nothing indicates that the KNU or any other Karen political group is currently organizing all other stakeholders for the emergence of a new government engulfing the entire Karen State in accordance with a provisional/interim state/province constitution.

In Karenni State, a similar situation can be found regarding the Karenni Multi-Nationalities Freedom Organization (known as Ka-La-La-Ta). Quite recently, four Ka-la-la-ta fighters—together with 35 civilians, including women and children[195] —were massacred by military council troops.[196] In response to this commission of a war crime, no concrete action was taken by the Ka-La-La-Ta other than condemnation. The Karenni National Progressive Party (KNPP), the most influential organization in Karenni State, has been operating with a form of its own de facto government for some decades. However, taking advantage of cooperation with the CRPH or NUG, the KNPP's defacto government has not yet formally, legally, and systemically expanded at the provincial level in accordance with a provisional Karenni State constitution.

In Shan State, the most sophisticated situations are taking place. After the coup against the BCP, the UWSP entered a ceasefire with the successive military juntas. To appease them, the X army fought against the Shan groups in southern Shan State and expanded its territory. Similarly, following the signing of the NCA, the RCSS troops moved forward to the northern part of Shan State to expand its territory, and as a result, armed conflicts occurred against the SSPP and TNLA.[197] Even after the recent military coup, the RCSS has continued its military maneuvers as stated above while providing some support to the Generation Zeros struggling against the military council. These situations desperately hinder the emergence of a new Shan State government with fair representation of the diverse ethnic groups across the province.

In Rakhine State, the ULA/AA is also playing a double game. On the one hand, the ULA/AA is assisting the KIO in fighting against the military council while providing support to the Generation Zeros. On the other hand, the ULA/AA has been in a ceasefire with the Tatmadaw since before the coup. This unclear policy means that, even if its territory was noticeably expanded and military power was aggrandized in Rakhine State, the ULA/AA has been unable to submit a unified policy encompassing the entire country of Burma or, at the very least, convince the other ethnic states/provinces to adopt the confederate status already proposed by the organization itself. Importantly, the stated unclear policy resulted in the organization's inability to uncover the truth regarding the crimes of international concern,

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[194] Note: As of today, the KNU has not yet officially declared that the NCA has been broken.

[195] The Irrawaddy, United Nations Condemns Myanmar Junta's Massacre of Civilians, (27 December 2021) <https://www.irrawaddy.com/news/burma/united-nations-condemns-myanmar-juntas-massacre-of-civilians.html>

[196] UNICEF condemns reported killing of at least 35 people, including four children and two humanitarian workers, in Kayah State, Myanmar. 28. December 2021.https://www.unicef.org/press-releases/unicef-condemns-reported-killing-least-35-people-including-four-children-and-two?fbclid=IwAR3hU4XDg_keTgkpTJwH4iBADe02Sd_yhQlZI1lE-x-_bk2RaViaNIK-91M

[197] Note: the FLA researcher interviewed the leaders of PSLF/TNLA in October 2017.

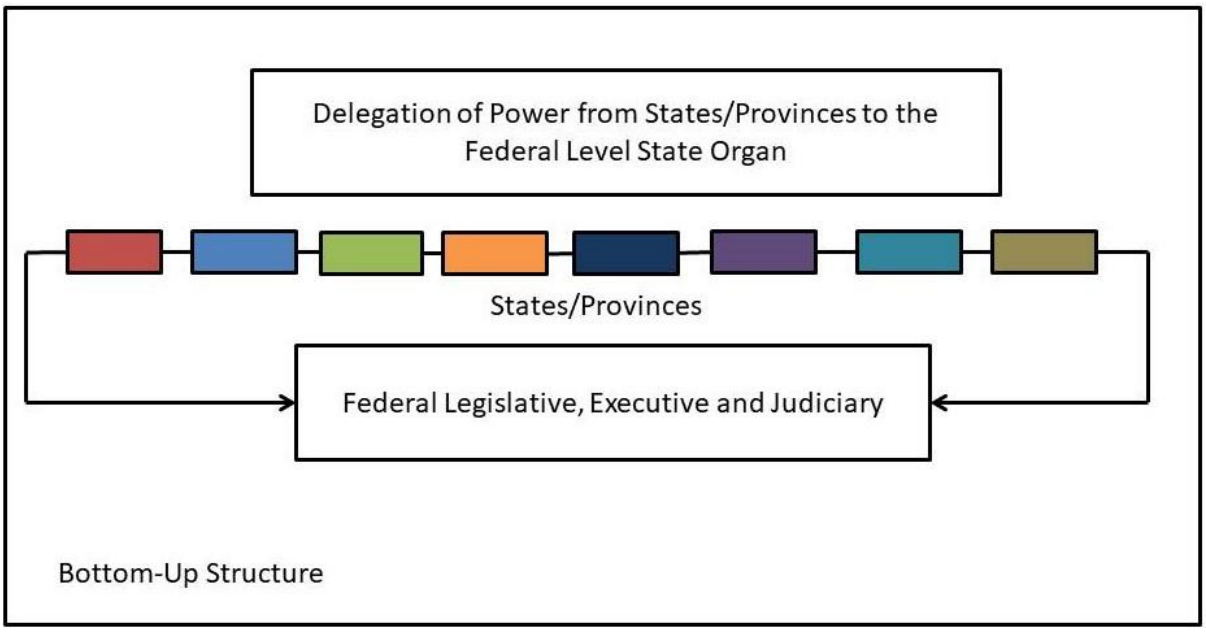
committed by the Tatmadaw against Rohingya, and to take legal action on the military perpetrators.

In Kachin State, several particular situations are taking place: 1) Following the military coup, the KIO has become the major organization that has been constantly and successfully fighting against the Tatmadaw to a noteworthy extent. 2) The KIO is somewhat closely cooperating with the NUG; it can be seen that the current Acting President of the NUG is Duwa Lashi La, who was elected by the KPICT, in which the KIO forms a part. 3) The KIO did not attend a recent meeting organized by the military council even though six of the seven organizational members of the FPNCC were present. However, nothing indicates that the KIO has been exerting efforts for the emergence of a new government for the entire Kachin State, at least as a formal, legal, and systemic expansion of its de facto government in accordance with a provisional Kachin State constitution.

However, the stated uneven progress outlined above can surely be transformed to even development, and the concept of provincial sovereignty can be empirically, uniformly, and constitutionally activated at the provincial level. With the backdrop of the rule of law, the entire country of Burma would then be on a path toward genuine peace where human rights will be promoted and protected.

In 1978, two years after the cultural revolution which ended in 1976, China was able to lay a rule of law foundation, as stated above. Following the military coup in Burma, it has already been almost one year. Unfortunately, discussions, debates and observations surrounding the rule of law in connection with human rights, federalism, and democracy have not yet sufficiently arisen. As per the lessons from Ethiopia, it is construed that only when the rule of law centering the independent judiciary, along with the emergence of new state security institutions, is effectively upheld will a federal democracy be feasible. As a result, security of people can be ensured, stability of the federal democracy union be maintained, and human rights be protected and promoted.

To this end, the only pathway is: firstly, to exert efforts for the establishment of trust between the NLD/CRPH/NUG and the ethnic states/provinces by undertaking the two constitution making processes simultaneously: one is for the federal level and another is for the state/province levels while the two levels are facilitating, adjusting and cooperating each other for the emergence of the respective provisional constitutions for the first step. Secondly, all stakeholders stated above need to comply with those constitutions, drawn up based on the doctrine of provincial sovereignty with a bottom-up approach, empirically.



For instance, currently the NUG is operating a top-down approach: the NUG's financial committee is formed only with its ministers marginalizing the ethnic states/provinces; the NUG alone is receiving and managing all fund donated by multi-ethnic nationals in the country, including those living in foreign countries, without sharing them to the ethnic states/provinces formally and transparently;[198] and, it indicates that the NUG will continue managing all federal budget to be received from other foreign states, the EU and the international funding agencies if the NUG is recognized by the UN and the international community. It is neither fair nor conducive to the emergence of a genuine federal union in which a provincial sovereignty doctrine is adopted. In addition, the NUG is unable to submit any financial report about the breaking down of its budget just under an overall item, but not in detail, to the public. The above practices by the NUG may threaten trust and create a lack of effective cooperation by the ethnic states/provinces as a whole.

To overcome this, the NUG is responsible to practice fiscal federalism, already committed to by itself in its Federal Democracy Charter, empirically by guaranteeing, let's say, a fixed allotment of the Union Budget in the provisional federal democracy constitution. For instance, out of all federal revenue and international financial assistance, a radio of 1 to 4 should be applied: 20 percent is for operation of the NUG while the remaining 80 is allotted to state/provinces and sub-states or local governments directly. For instance, if one billion dollars, deposited in the USA by the previous governments of Burma, can be withdrawn, 200 million dollars should be for the NUG while 800 million dollars should be shared to the ethnic provinces. For sure, at least this one-billion dollars would be the money from the extraction of natural resources, owned by the ethnic states/provinces.

[198] Note: If the stated fund is shared to some EROs in any states/provinces without a formal and transparent process, it is against the rule of law as selectivity is practiced; partisan politics are nurtured; and corruption is abetted.

Conclusion

Regarding Burma, the situations occurring on the ground vividly indicate that the old system must be eliminated so that a new system can be substituted. To this end, the entire legal system must be replaced with a new one based on the rule-of-law principles that reflect international laws and international legal norms.

Before the 1988 people's democratic uprising, it might have been possible to address the underlying political issues through political means per se. This possibility is no longer the case, however, since the successive military leaders have created a legal system that enables them to perpetuate heinous crimes with absolute impunity. Simply by adhering to the rhetorical claim that "the underlying political issue would be addressed by political means," a vicious circle attributed to the endless impunity may never be avoided. The ongoing atrocities happening since the February 1, 2021, coup have proven that the underlying political crisis must be dealt with through the minimum standards of the rule of law.

Even counting the period since the military coup, the struggle against the SAC has spanned 11 months. A comprehensive strategic program must be undertaken by both the national and international communities, or the struggle for freedom in Burma may take many more years. Regardless of how long it takes, however, the unethical, unjust, and unlawful oppressions must be countered with ethical, just, and lawful actions. The chaotic, disarrayed, and random responses must be replaced with systematic, orderly, and planned resistances. A combination of nationwide maneuvers and worldwide legal, political, and constitutional campaigns must also be conducted. To this end, with the emergence of a provisional/interim federal democratic constitution, the foundational rule of law must be established as soon as possible. In connection with global constitutionalism, the international rule of law should be activated in support of seeking global peace to promote and protect human rights.

With respect to the US and China—two superpower countries that have been getting involved in Burmese issues in one way or another—Burma's struggle for freedom should not rely only on one side and stand against another. Such a choice could spark regional war that threatens global peace. Burma's struggle for freedom should therefore seek assistance and cooperation from both superpowers. Simultaneously, the international community of states has a collective obligation to deal with the serious human rights issues in Burma. That obligation requires, at the very least, seeking accountability to end impunity in a way that jus cogens norms are effectively observed and enforced.

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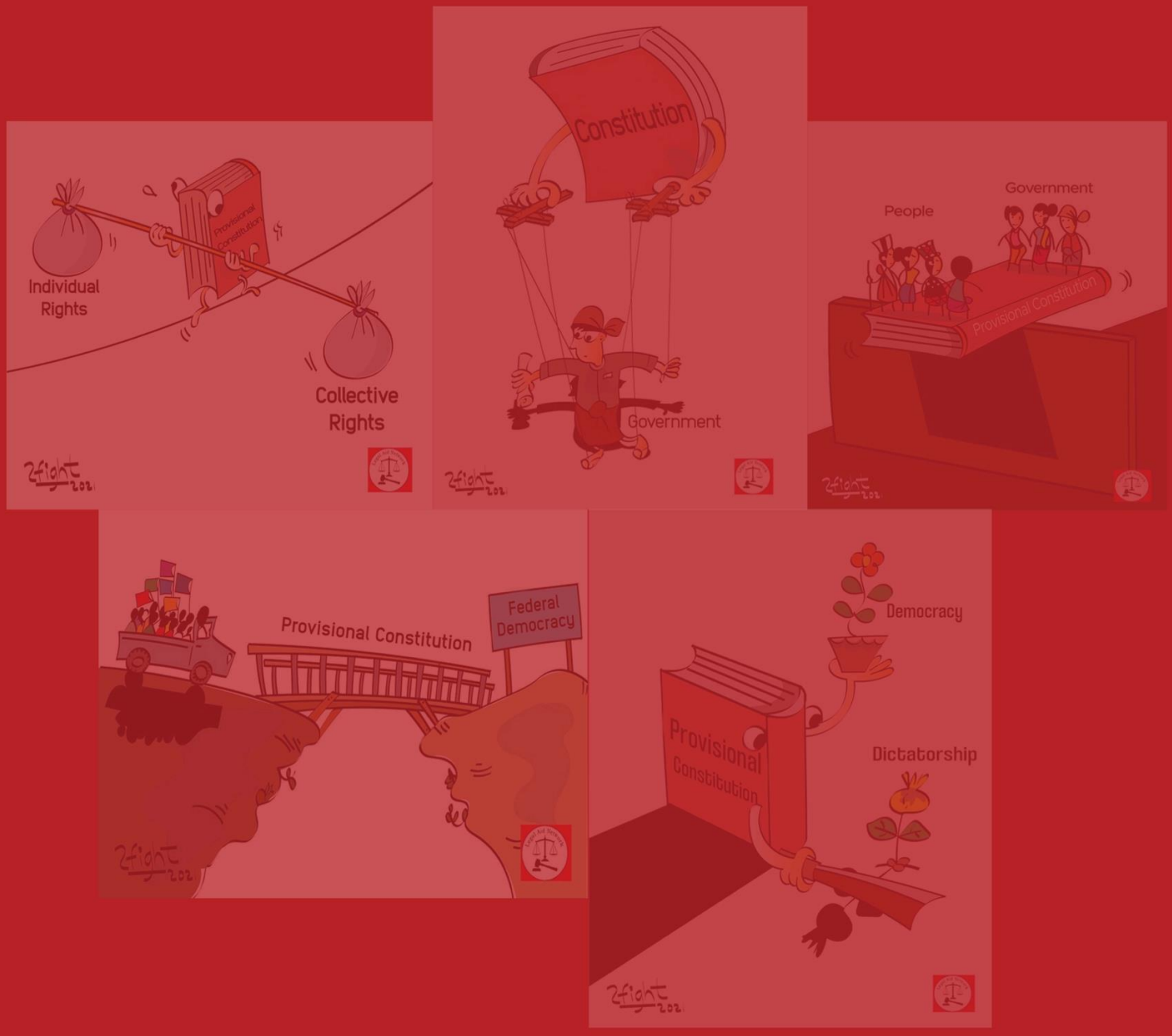

Federal Law Academy (FLA)

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