



A Legal Suggestion to Hold New Elections by the Ethnic and Democratic Resistance Forces in Burma to Promote Human Rights through the Rule of Law

“Recognition of the 2020 election result, but not legally”

The Legal Aid Network has generally¹ recognized the results of the elections held in November 2020. However, due to the military coup on February 1, 2021, the election-winning party, the NLD, has been unable to implement its results empirically, nor is the party willing to use it for the emergence of, or in support of, a federalism suited to Burma effectively.

“The combination of de jure and de facto standards”

We welcomed the formation of the NUG, which emerged with the combination of de jure and de facto standards; the former partially implements the November 2020 elections while the latter creates formal political positions, particularly for the leaders of some Ethnic Resistance Organizations (EROs), which have their own armies, administrative departments, designated territories, and supported peoples. However, unfortunately, in operating the NUG, transparency and accountability are seen thinly.

“The lack of both legislative assembly and independent Judiciary”

The operation of the NUG has spanned almost two years now. However, its ministries are unable to submit comprehensive public reports.² As such, the people did not realize the advantages and disadvantages of operating the respective ministries, nor were they provided the opportunity to make suggestions for how the NUG might become an accountable, transparent, and efficient democratic government. Despite the Federal Democracy Charter guaranteeing a parliamentary system, the NUG is operating by itself without the supervision of any legislative assembly. In addition, independent existence of the Judiciary which practices the power of judicial review in accordance with the Constitution is also lacking. Hence, apart from other grounds, due to the above

¹ Note: But not “legally”, for the reasons: 1. The November 2020 elections were held under the 2008 Constitution which has embedded the military dictatorship; 2. They were not held on the basis of, or while practicing, the “provincial sovereignty” standard. However, LAN recognized the will of the general public.

² Note: Despite that quite a few ministries of the NUG submitted public reports, they are too general for the people to evaluate their status, validity and improvements.

factors, the NUG has been facing hardships in attempting to seek a formal recognition of other sovereign states as a legitimate government of Burma.

“The importance of independent, impartial, efficient and resource-rich Judiciary”

The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.³ While struggling against the military dictatorship, in both provincial and federal level governmental institutions, the emergence of independent judiciaries is a sine qua non. They should operate in accordance with a new judicial law under the Provisional/Interim Federal Democratic Constitution, which is desperately required to deal with the diversity of various Ethnic States/Provinces.

“A brief analysis of the legislative assembly likely to be formed by the CRPH”

It is known that the Committee for Representing Pyidaungsu Hluttaw (CRPH) is about to convene a formal legislative assembly merely based on the 2020 election results without practicing the combination of de jure and de facto standards stated above. In this regard, our organization is highly unlikely to formally recognize the legality of such a legislative assembly for the following reasons:

- (1) The 2020 elections were held under the 2008 Constitution. The CRPH had already repealed that Constitution. It has not yet formally approved any Constitution as of today. Thus, **for such a legislative assembly to be formed by the CRPH, the constitutional framework is lacking.** If so, making laws by the stated legislative assembly will be extremely worrying. It will lead to the practice of a unitary system, rather than laying down a federal democratic foundation; and as a result, civil war will persist even if the military dictatorship can be terminated.
- (2) **The Federal Democracy Charter, adopted by the NLD, CRPH, NUG and NUCC, assumes no constitutional power.** Its role is just to enshrine valuable norms. Instead, will a powerful constitution be able to exercise constitutionalism and limited government.
- (3) **The 2020 elections were held in line with the First Past The Post (FPTP) electoral system.** This system alone is not suited for Burma as it marginalizes non-Myanmar ethnic minority political parties by denying them proper seat allocations.
- (4) A majority of Myanmar ethnic nationalities were allowed to vote only when they had resided in the Non-Myanmar Ethnic States/Provinces for 90 days.
- (5) **The right to vote for Internally Displaced Persons (IDPs) was denied.** Following the 2021 military coup, the number of IDPs has dramatically increased due to the armed oppression of the State Administrative Council led by Min Aung Hlaing. Unfortunately, the ethnic and democratic

³ UN Human Rights Office of the High Commissioner, ‘Basic Principles on the Independence of the Judiciary’, adopted 06 September 1985.

<<https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary>>

resistance forces still do not have any program to implement the right to vote of the IDPs, not only in the Non-Myanmar Ethnic States/Provinces but also in the Myanmar Ethnic State, which might be formed by the Sagaing, Mandalay, and Magway Divisions.

“The NDAA law for non-lethal assistance”

In the NDAA law⁴ provided by the United States for Burma’s resistance movement, non-lethal assistance is guaranteed. What is non-lethal assistance? It should be approached, inter alia, from the aspect of holding new elections. Even if the NUG is still unable to control the territory of the entire country, similar situations lie with the SAC. Currently, the SAC is coercing the people to cast their ballots in the 2023 elections, particularly in many towns and adjacent areas under their direct control and denying all types of IDPs their right to vote.

“The requirement of non-lethal assistance for new elections in Burma”

When war broke out in Ukraine, the country faced threats of Russian cyberattacks and shelling that had the potential to take down the Internet. Elon Musk assisted Ukraine to keep the country online with the provision of Starlink satellite Internet service.⁵ Such type of assistance is non-lethal. It can be used for new elections. Elections are the symbol of democracy and make a fundamental contribution to democratic governance. If the new elections for both provincial and federal levels are initiated by the Ethnic and Democratic Resistance Forces in Burma, not only the USA but also other democratic countries may provide the required assistance, particularly non-lethal, for online voting in combination with the casting of ballots by voters in person in many territories designated by the EROs in Ethnic States/Provinces.

“The right of IDPs to vote and voter turnout in new elections”

In doing so, IDPs who reside in all territories, including remote mountainous areas, will be able to cast the ballots; voter turnout will be high; and new elections will be successful. Consequently, the results of the 2023 election, even if it is held by the SAC, would have been repealed.

Recommendations

1. To formally adopt the characteristics of a federalism suited to Burma

To facilitate the emergence of a successful federal union, the NLD, CRPH, NUG, and NUCC are encouraged to formally adopt the following characteristics of a federalism suited to Burma in a way that demonstrates a genuine commitment to the right to self-determination of the Ethnic States/Provinces under the historic Pang Long Accord, which is legal from the aspect of both national and international laws.

⁴ The National Defense Authorization Act – NDAA, 2022, United States of America

⁵ <https://www.washingtonpost.com/technology/2022/03/19/elon-musk-ukraine-starlink/>
<https://www.livemint.com/technology/tech-news/russiaukraine-crisis-elon-musk-activates-starlink-internet-service-in-ukraine-11645930702615.html>

- (1) Promotion and protection of human rights must be a top priority; human rights must be protected by the rule of law; and, upholding the rule of law should be a prime focus;
- (2) The power of judicial review must be practiced by the independent, impartial, efficient and resource-rich judiciaries on federal and states/provinces levels of governments, as an implementation of constitutionalism that accentuates limited government;
- (3) The independent formation and operation of political parties, which exercise diverse political ideologies, and of Civil Society Organizations (CSOs)⁶ need to be guaranteed;
- (4) The formation of transparent and accountable democratic governments, primarily representing the diverse ethnic minorities and citizens of the respective ethnic states, is required in all three levels of the Federal Union; and,
- (5) **Having met the four situations stated above**, with the participation and cooperation of the ethnic states/provinces – including Myanmar state/province, which exercises provincial sovereignty – a new federal democratic union should be formed.

In brief, the rigid centralization practiced in Burma with constitutions or without constitutions for over seven and a half decades must be discarded. Afterward, an optimal centralization shall be sought by practicing **the Ethnic States/Provinces based cooperative federalism**.

2. The emergence of the provisional/interim federal democratic Constitutions and steps of legal tech implementation

With the underpinning of recommendation (1), efforts shall be exerted for the emergence of the provisional/interim federal democratic Constitutions for both the Ethnic States/Provinces and federal-level government institutions. The constitution drafting processes should be potentially completed by the end of 2023. However, the abovementioned political forces may formally announce this process as soon as possible, at least by the end of June 2023, before the SAC's fraudulent election process starts.

- A. Immediately after the pronouncement of the above process, the emergence of a new legislative federal assembly with the combination of de jure and de facto standards should be undertaken. Otherwise, similar efforts to be exerted in Ethnic States/Provinces should be simultaneously facilitated and formally recognized. In that case, a potential for armed conflicts which occurred between the central federal government and Tigray Region/State, in Ethiopia in 2020, could have been avoided while laying down a solid foundation for a federal union suited to Burma with the underpinning of the rule of law.

⁶ Note: In a federal union existence and operation of such CSOs are vital, *inter alia*, for two reasons: they can check the power abuses of the three levels of government and their operations, transcending boundaries of one or more constituent units, tackling common issues confronting people inhabiting many constituent units, and facilitate the unification of the entire federal union. Although state agencies are highly valuable, they are not the only actors; the CSOs have proliferated in recent decades and their participation in global governance activities have increased dramatically.

B. The stated Federal Legislative Assembly or the Legislative Assemblies of the Ethnic States/Provinces may provide the following laws:

- (1) **The new laws related to the electoral systems** in which the FPTP system is expanded to the Second Ballot System for the ethnic minorities, the reserved seats are stipulated, and a proportional electoral system is applied;
- (2) **New judicial laws which guarantee independent, impartial, efficient, and resource-rich judiciaries** at both provincial and federal levels. The judiciaries should be authorized by laws and in accordance with the constitutions to take responsibility as final arbiters for election disputes in the forthcoming elections to be held possibly in 2024 depending on the election related provisions in the provisional/interim federal democratic constitutions. In addition, the stated judiciaries should exercise civilian judicial oversight of the Court-Martials;
- (3) During the armed conflicts, the protection of civilians – particularly women and children – should be a top priority. To this end, **in line with the Geneva Conventions, to which Burma has been a party, a military act should be enacted** to be applied in all courts in the entire country; and,
- (4) Under the federal constitutions stated above, **the law on Federal Union Army**, in which the formation and operation of Court-Martials are stipulated, should be produced.

“Holding new elections firstly in the Ethnic States/Provinces and non-lethal assistance”

The new elections may be held firstly in the Ethnic States/Provinces prior to the elections for the federal level governmental institutions. Under the NDAA law provided by the USA, Part 3 authorizes non-lethal assistance to EAOs/EROs for programs to strengthen federalism in and among ethnic states in Burma.⁷ Simultaneously, Section 5576 provides limitation that the EAOs which join, or work together with, or receive assistance from, the State Administrative Council or any organization or entity controlled by, or an affiliate of, the Burmese military, are not entitled to have access to the US fund. Other EROs – particularly those which met the five characteristics of a federalism suited to Burma, specified in the recommendation (1) – are encouraged to take advantage of the stated NDAA law and to seek financial and technical assistance from the US government. The assistance of the US government to those EROs to hold new elections in their Ethnic States/Provinces with an online voting system by using satellites certainly constitutes non-lethal assistance.

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