

HOW AUNG SAN SUU KYI CAN FREE BURMA FROM FEAR

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Abstract

Last November, Burma held its first elections in twenty years. Nobel laureate Aung San Suu Kyi was released from house arrest soon after the elections. This paper examines the role of the law in Burma, suggesting that law has influenced military decision making at key points in Burma's history. First, the right of secession granted in Burma's 1947 Constitution accelerated military coups in 1957 and 1962, and the issue of secession will not be completely resolved until the Burmese government properly negotiates with ethnic minority groups. Second, during the heated years of 1988 to 1990, Suu Kyi's party, the National League for Democracy (NLD), made a significant mistake when it invoked the law and proclaimed that military officials would be subject to Nuremberg-style trials. Lastly, because the junta fears the exercise of legal power against it if it were to transfer legal power to civilians, the junta is extremely unlikely to cede power while its senior officials are still alive. Burma needs to learn from its past legal failures, and the elections and release of Suu Kyi provide an opportunity—if Burma chooses to take it.

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I. INTRODUCTION

There is an enduring myth that in 1948, when it achieved independence from Britain, Burma was a rich country with every reason to expect a bright future, and that the policies and practices of the military government alone are to blame for today's miseries. It is beyond dispute that many of these policies and practices have been disastrous. But there is a deeper history of misfortune which needs to be understood.

—Thant Myint-U

Grandson of Former United Nations Secretary General U Thant¹

Freedom is the substance of dreams for the people of Burma, who live in a reality that makes that dream seem hopelessly difficult to attain. Burma is ruled by a military junta that imposes harsh prison sentences for voicing political dissent, beats and sometimes kills its own people in the street, and has kept a Nobel laureate advocate for peace and democratic governance under house arrest for fourteen of the past twenty years.

Another public figure who has run afoul of the junta is the popular comic Zarganar, who is currently serving a prison term of forty-five years imposed in 2008 for criticizing the junta's slow response to Cyclone Nargis in interviews with foreign news services.² A former dental-student-cum-satirist, Zarganar has a history of upsetting the junta, having previously been arrested for activities as diverse as criticizing an "effective ban" on certain water festival traditions (an important Burmese cultural event), being an "instigator" in the 1988 student-led uprising, giving political speeches during the 1990 elections, and creating a junta-critical movie titled *Run Out of Patience* that was banned by the junta in 2006.³ Zarganar's draconian prison sentence fits the pattern of other sentences given to more than one hundred other dissidents of previous government action, including sixty-five years to key members of the 1988 uprising and sixty-eight years to Ashin Gambira, the leader of the monks' alliance that led last year's anti-government uprising.⁴ President Thein Sein has since released Zarganar from prison and the comedian is now working with the Clinton Global Initiative.

The junta has an active law, State Law and Order Restoration Council (SLORC) Order 2/88, which forbids assembly of more than five people; it was

¹Thant Myint-U, *What to Do About Burma*, LONDON REV. BOOKS, Feb. 8, 2007, at 31, available at <http://www.lrb.co.uk/v29/no3/-thantmyint-u/what-to-do-about-burma>.

²*Burma Comic Jailed for 45 Years*, BBC NEWS (Nov. 21, 2008, 1:48 PM), <http://news.bbc.co.uk/2/hi/7741653.stm>.

³Ko Thet, *Laughing All the Way to Prison* (June 2006), IRRAWADDY, http://www.irrawaddy.org/article.php?art_id=5823&page=1.

⁴*Burma Comic Jailed for 45 Years*, *supra* note 2.

enacted to stifle activism.⁵ SLORC Order 3/90 stipulates that assemblies must take place at a prescribed place and only with government permission.⁶ The SLORC Orders are responses to the anti-junta student protests in 1988, which culminated in the so-called 8888 Uprising and subsequent killing of as many as ten thousand people by the junta.⁷ Later, in violation of Burmese Buddhist norms, the junta beat and killed peacefully protesting monks during the 2007 Saffron Revolution.⁸

The government is known not only for its oppression, but also for its administrative inefficiencies. After Cyclone Nargis struck Burma in early May 2008,⁹ many international observers said that the junta's slow response to Cyclone Nargis contributed to the deaths of 85,000 people and left 54,000 missing.¹⁰ As this article will discuss below, the junta has a history of failed policies such as the Burmese Way to Socialism¹¹ and the demonetization of the Burmese kyat in the 1980s.¹² The government's administrative inefficiencies have caused massive deaths and widespread tragedy among impoverished Burmese citizens. The junta has targeted ethnic minorities, who have protested through political means and even by taking up arms.

⁵ U Tin U, *Rule of Law in Burma Under SLORC*, in HUMAN RIGHTS YEARBOOK 1997–98: BURMA 35 (1998).

⁶ JAMES GOLDSTON, HUMAN RIGHTS IN BURMA (MYANMAR) 6 (1990).

⁷ Jackie Bennion, *Burma: A Political Timeline*, PUBLIC BROADCASTING SERVICE, <http://www.pbs.org/frontlineworld/stories/burma601/timeline.html#> (last visited Dec. 14, 2011).

⁸ The Oscar-nominated documentary *Burma VJ* chillingly captures the image of one of the murdered monks floating face-down in a lake. Michelle Kung, "Burma VJ: Reporting From A Closed Country" *Spotlights Citizen Journalists*, WALL ST. J. SPEAKEASY (Feb. 24, 2010, 12:00 PM), <http://blogs.wsj.com/speakeasy/2010/02/24/burma-vj-reporting-from-a-closed-country-spotlights-citizen-journalists/tab/article/>.

⁹ *Burma Death Toll Jumps to 78,000*, BBC NEWS (May 16, 2008, 5:40 PM), <http://news.bbc.co.uk/2/hi/asia-pacific/7405260.stm>.

¹⁰ *Cyclone Nargis*, N.Y. TIMES, http://topics.nytimes.com/topics/news/international/countriesandterritories/myanmar/cyclone_nargis/index.html (last updated Apr. 30, 2009).

¹¹ See Mark Tallentire, *The Burma Road to Ruin*, GUARDIAN (Sept. 28, 2007, 9:17 AM), <http://www.guardian.co.uk/world/2007/sep/28/burma.uk> ("General Ne Win imposed his rigid blueprint, The Burmese Way to Socialism, in an effort to create a self-sufficient state free of capitalist and communist influence. But within a decade the economy had all but collapsed, with rice exports dwindling from 1.7m tonnes a year to 170,000 tonnes. Although the flawed experiment has yet to be abandoned, the general was replaced in the 1988 crackdown.").

¹² The demonetization of parts of the Burmese kyat led to civil unrest and eventually, the deaths of thousands of Burmese.

A. Burma's Ethnic Minorities

No discussion of Burma would be complete without reference to ethnic minorities. The junta has been fighting ethnic minority groups since Burma first threw off the yoke of British colonial rule in 1948.¹³ The junta claims that its actions are necessary to maintain order and stability in the country. Without the military, it argues, Burma would disintegrate into civil war and eventually balkanization.¹⁴ There is some credence to this argument. The 1947 Constitution of Burma granted a right of secession to the Shan and Karenni states, a right some members of the Shan State considered invoking in 1958.¹⁵ Many ethnic minority groups have threatened to secede from the Union in the years succeeding its formation. The interests of other countries, notably China and the United States, may intertwine with those of some of these groups if the country were to devolve into civil war.

In 2006, the United Nations reported that the junta was targeting minority civilians in ethnic areas.¹⁶ In 2010, Amnesty International reported that some

¹³ See THANT MYINT-U, *THE RIVER OF LOST FOOTSTEPS: HISTORIES OF BURMA* 258 (2006). "The Burmese civil war is the longest-running armed conflict in the world and has continued, in one form or another, from independence to the present day. In a way Burma is a place where the Second World War never really stopped. Ever since the first Japanese bombers hummed overhead and dropped their payloads over downtown Rangoon, the country has never known peace." *Id.* (internal footnotes omitted).

¹⁴ Hannah Beech, *Inside Burma's War*, TIME (Sept. 21, 2009), <http://www.time.com/time/magazine/article/0,9171,1921485,00.html> ("Two decades after Burma's army dictatorship reached an uneasy peace with a patchwork of ethnic militias, the country is again poised on the brink of civil war. The junta has long maintained a tense relationship with the up to 40% of the country's population that is composed of ethnic minorities. When Burma won independence from the British in 1948, political groups representing some of the country's 130-plus ethnicities agreed to join the union in exchange for autonomy. But uprisings quickly proliferated in the country's vast frontier, only worsening after the military regime wrested control of the country in 1962 and began limiting ethnic freedoms. Beginning in 1989, cease-fires were signed with 17 rebel militias, and certain ethnicities were granted a measure of self-rule."); *China Stresses Border Stability at Than Shwe Meet*, IRRRAWADDY (Sept. 9, 2010), http://www.irrawaddy.org/article.php?art_id=19429 ("Than Shwe agreed on the 'vital importance for both countries to maintain peace and stability in the border areas'").

¹⁵ RICHARD BUTWELL, *U NU OF BURMA* 89 (1969); Naw May Oo, *The Same Old Road to Nowhere*, IRRRAWADDY (Apr. 1, 2010), http://www.irrawaddy.org/print_article.php?art_id=18174.

¹⁶ See *Crimes Against Humanity in Eastern Myanmar*, AMNESTY INTERNATIONAL, <http://www.amnestyusa.org/all-countries/myanmar-burma/page.do?id=1011205> (last visited Nov. 16, 2010) ("The General Assembly should follow up on its recommendation in Resolution 61/232 (2006) that the SPDC 'take urgent measures to put an end to the military operations targeting civilians in ethnic areas and the associated violations of human rights and humanitarian law against persons belonging to ethnic nationalities, including widespread rape and other forms of sexual violence persistently carried out by members of the armed forces, and to facilitate a fact-finding mission comprising representatives of relevant United Nations agencies to help to identify measures to

147,000 persons were internally displaced in the Kayin State and the Bago Division.¹⁷ Amnesty also observed that the junta had committed crimes against humanity against Karen civilians.¹⁸ The United Nations Commission on Human Rights (UNCHR) in 1992 criticized the junta's restrictions on political dissidents and the forcible removal of hundreds of thousands of Muslim Rohingyas to Bangladesh¹⁹ and Karen refugees to Thailand.²⁰ The UNCHR also concluded that the junta conducted detentions "without minimum guarantees for persons under custody" and carried out "torture, cruel, inhuman or degrading treatment, disappearances and arbitrary execution."²¹ The United Nations International Labour Organization (ILO) asserted in a 1998 report that the junta imposed forced labor frequently.²² In 2009, the ILO noted the continuing seriousness of the forced labor situation²³ despite the fact that Burma's 2008 constitution expressly prohibits the imposition of forced labor except as punishment for "crime duly convicted."²⁴

Burma has also been marred by devastating twists of fate at important points in its history. The national hero who led the Burmese out of British colonialism, General Aung San, was assassinated months before Burma officially gained independence.²⁵ Aung San united minority interests; had he

alleviate the humanitarian and human rights consequences of the conflict in Karen State").

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Situation of Human Rights in Myanmar, Comm'n on Human Rights Res. 1992/58, U.N. Doc. E/CN.4/RES/1992/58, ¶ 2 (Mar. 3, 1992).

²⁰ International Human Rights Clinic of Harvard Law School, Crimes in Burma 14 (2009), and sources cited therein.

²¹ Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Myanmar, Report on the Situation of Human Rights in Myanmar, In Accordance With Commission Resolution 1992/58, U.N. Doc. E/CN.4/1993/37 (Feb. 17, 1993).

²² Governing Body, International Labour Organization, Forced Labor in Myanmar (Burma): Report of the Commission of Inquiry Appointed under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), ¶ 528 (July 2, 1998), available at [http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar5.htm#\(3\)](http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar5.htm#(3)).

²³ Governing Body, International Labour Organization, Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), GB.304/5/1 (Rev.) (Mar. 2009), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_100325.pdf.

²⁴ MYANMAR CONST. (Sept. 2008) art. 359 (hereinafter "2008 CONST."). As a matter of personal observation, during the car ride to Naypyitaw, the author saw many villagers in straw hats painstakingly constructing the broad avenues to and from the new capital. Many of the workers were young children.

²⁵ See *Ceremony for Myanmar's Assassinated Gen. Aung San*, BOSTON GLOBE (July 19, 2010), http://www.boston.com/news/world/asia/articles/2010/07/19/ceremony_for_myanmars

lived, he might have saved Burma from subsequent factionalism and military dominance. The man who stepped up in his place, U Nu, lacked Aung San's political skills and was unable to negotiate with the Karenni minority.²⁶ This resulted in an insurrection launched by the Karen National Union (KNU) in January 1949 against U Nu's government.²⁷ His inept governance, culminating in his willingness to give up the parliamentary government to General Ne Win's caretaker regime in 1958, is widely believed to have "paved the way for the military to usurp political power forever."²⁸

More recently, Burma came very close to becoming a civilian-governed state when Aung San Suu Kyi's National League of Democracy party won the 1990 elections. Two events stand out as contributing to the junta's rejection of the NLD's sweeping victories. The first event involved the takeover of a Ministry building by students in September 1988, where the troops in the building failed to defend themselves.²⁹ In response to the takeover, General Saw Maung led a coup that resulted in the deaths of over one thousand Burmese citizens and the end of the 8888 Uprising protests.³⁰ Saw Maung led the coup in response to a growing fear within the military that the student protests would lead to chaos.³¹ Second, immediately after the election, several members of the NLD called for "Nuremberg-style trials" for senior officers of the junta.³² Invoking legal action before the junta had actually transferred legal and political power to a civilian government was a serious error and likely contributed to the junta's dishonoring of the election results.³³

_assassinated_gen_aung_san/ ("Suu Kyi, who is under house arrest, did not attend the Martyr's Day event, which marks the deadly attack by a political rival on Aung San along with six Cabinet ministers and two officials, six months before Myanmar's independence from Britain.").

²⁶ See Min Zin, *60 Years On: Where did it all go wrong?*, IRRRAWADDY (Jan. 4, 2008), http://www.irrawaddy.org/article.php?art_id=9814 ("In October 1947, U Nu's cabinet offered the Karen a state that would have included the Karenni State, the substate of Mongpai, Salween District and some of the Thaton, Toungoo and Pyinmana hill tracts. However, the Karen National Union demanded much of the delta as well, including the whole of the Irrawaddy Division and Insein and Hanthawaddy districts. From the perspective of U Nu's government, the controversial demands made further negotiations impossible.").

²⁷ *Id.*

²⁸ *Id.*

²⁹ DAVID I. STEINBERG, *BURMA: THE STATE OF MYANMAR* 11 (2001).

³⁰ Robert McG. Thomas Jr., *Saw Maung Is Dead at 68; Led a Brutal Burmese Coup*, N.Y. TIMES (July 27, 1997), <http://www.nytimes.com/1997/07/27/world/saw-maung-is-dead-at-68-led-a-brutal-burmese-coup.html>.

³¹ STEINBERG, *supra* note 29, at 2, 28.

³² Myint-U, *supra* note 1.

³³ Two events complicate the conventional Manichean narrative of Burmese history. The military faced a challenge to its continuing existence during the 8888 Uprising and

How did Burma become who she is today? Why does the junta insist on severe limitations on civil liberties and harsh sentencing? Is there anything that can be done about the issues that plague the country? These are questions that this article considers through a legal lens, a point of view that has been overlooked. Discourse over Burma's problems has generally centered on the separate binary conflicts between Aung San Suu Kyi and the junta and warring ethnic minority groups and the junta,³⁴ without considering the influence of Burmese constitutional law and Burmese history in incentivizing the actions of these factions. This article argues that in order to understand how Burma and her different actors came to the place they are today, one must understand Burmese law. Also, this article acknowledges the limits of the law and notes where coincidence or fate steps in.

Part I sketches out how Burmese law today inhibits political liberalization, providing an overview of Burma's most famous dissident, Nobel laureate Aung San Suu Kyi. It addresses Suu Kyi's recent release from house arrest, arguing that she would not have been able to run for election even in the absence of John Yettaw's unfortunate swim across Inya Lake.

Part II looks back to another crucial point in Burmese history where law and misfortune collided: the formation of the first Panglong agreement; it suggests that the flawed first Panglong agreement has been at the root of Burma's present problems. It created a flaw in the Constitution in the form of a right of secession, which left unsettled the issue of cooperation with ethnic minorities. The right of secession resulted in the first military takeover, leading to the ongoing violence between the junta and ethnic minorities that persists to this day.

Part III argues that the failure of Burmese actors to understand the role of Burmese law has inhibited social change. It critiques the mistakes Suu Kyi's party made twenty years ago: specifically, the ill-advised and premature invocation of legal power by certain NLD members after their 1990 election victories and advocacy for "Nuremberg-style trials" for senior army officials. By citing legal powers before the junta had actually transferred real power to the NLD, the NLD essentially forced the junta to dishonor the 1990 election results.

Part IV suggests that if real social change is to occur in Burma, political actors need a robust understanding of Burmese law and history. It explores alternatives to the 2010 elections and concludes that the junta will not be displaced, since the possibility of foreign intervention is remote. Part V ties

acted in accordance with its own self-interest and its asserted interest in protecting the country from collapsing into civil war. It is doubtful that the military has properly balanced Burma's national security interests against civil liberties. Indeed, it is not evident that such a balancing needs to take place. The concern for the country's solidarity does not amount to *carte blanche* for the military's infringement on civil liberties and rights, its economic debacles, and the brutal oppression and outright murder of some of its citizens. But it muddies the one-dimensional portrait presented to the West by the international media.

³⁴ See, e.g., Seth Mydans, *Monks' Protest Is Challenging Burmese Junta*, N.Y. TIMES (Sept. 24, 2007), <http://www.nytimes.com/2007/09/24/world/asia/24myanmar.html>.

together Suu Kyi's release, Burma's legal history, and the past mistakes of Suu Kyi's party. It lays out the lessons of these events and teaches how Suu Kyi and her party may prevent Burmese history from repeating itself.

II. AUNG SAN SUU KYI'S HOUSE ARREST

A. Before the Swim Across Inya Lake

Throughout its rule, the junta has met opposition by the Burmese people for its poor governance. In response, the junta has imprisoned dissidents and enacted laws that prevent activists from congregating. The travails of most, if not all, of these individuals has gone largely unnoticed by the international community. Burma's most prominent dissident, however, has attracted the attention of the outside world in recent years: Nobel laureate Aung San Suu Kyi, leader of the National League of Democracy (NLD), who has been the leader of the central opposition movement against the junta.³⁵ She is the daughter of Burmese national hero General Aung San, who freed the Burmese people from British and Japanese rule.³⁶ He briefly united Burma's ethnic minorities with the majority Burman ethnic group before he was assassinated at the Secretariat building in Yangon just months before Burma formally won independence. At the time of the assassination, Suu Kyi was only two years old.³⁷ She attended St. Hugh's College, Oxford.³⁸ After graduation, she worked at the United Nations in New York City. She married British academic Michael Aris in 1972,³⁹ went on to receive her Doctorate of Philosophy at the School of Oriental and African Studies (SOAS), and spent time working and teaching in England and India.⁴⁰

Suu Kyi's importance in Burmese history started out as a coincidence. On March 31, 1988, a little more than two weeks after student protests commenced against the military, Suu Kyi was informed by telephone that her mother had

³⁵ See *About the National League for Democracy (Liberated Area)*, NLD(LA) (2008), http://www.nldla.net/?page_id=2; Saw Yan Naing, *NLD Apologizes for Failed Struggle*, IRRRAWADDY (Apr. 6, 2010), http://www.irrawaddy.org/article.php?art_id=18209.

³⁶ Myint-U, *What to Do About Burma*, *supra* note 1.

³⁷ Randy James, *Aung San Suu Kyi*, TIME (May 15, 2009), <http://www.time.com/time/world/article/0,8599,1898692,00.html>.

³⁸ *Id.*

³⁹ *Before the Storm: Aung San Suu Kyi Photograph Peels Back the Years*, GUARDIAN (June 18, 2009, 2:36 PM), <http://www.guardian.co.uk/world/2009/jun/18/aung-san-suu-kyi-burma-photograph>.

⁴⁰ *A Biography of Aung San Suu Kyi*, BURMACAMPAIGNUK.ORG, <http://www.burmacampaign.org.uk/index.php/burma/about-burma/about-burma/a-biography-of-aung-san-suu-kyi> (last visited Oct. 20, 2010).

suffered a severe stroke in Yangon.⁴¹ Suu Kyi took a plane the next day to Yangon to visit her mother at the hospital and then moved her mother to the family home by Inya Lake.⁴² Her appearance in Burma coincided with the student protests, and she soon became involved in the pro-democracy movement. On August 24, 1988, Suu Kyi made her first speech, addressing an audience at Rangoon General Hospital.⁴³ On August 26, 1988, Suu Kyi gave a speech to half a million people in front of Burma's most revered monument, the Shwedagon pagoda.⁴⁴ "This great struggle has arisen from the intense and deep desire of the people for a fully democratic parliamentary system," Suu Kyi said as she announced her decision to join the struggle for democracy and called for democratic government in Burma.⁴⁵

On September 27, 1988, Suu Kyi and several colleagues founded the National League for Democracy (NLD).⁴⁶ On December 27, 1988, Suu Kyi's mother Khin Kyi, for whom Suu Kyi returned to Burma, died.⁴⁷ A large funeral procession in her honor turned into a peaceful protest against military rule.⁴⁸ Indicative of the cultural prestige Suu Kyi's bloodline maintains, some senior members of the ruling military government attended the funeral.⁴⁹ On April 5, 1989, Suu Kyi survived a close brush with death. She confronted army soldiers at gunpoint while campaigning in Danu Byu Township, Irrawaddy Delta.⁵⁰ An army major intervened, ordering the soldiers to lower their weapons.⁵¹ Suu Kyi was placed under house arrest for the first time on July 20, 1989, under a martial law allowing her to be detained without charge or trial for six years.⁵² Suu Kyi would be placed under house arrest on and off for fourteen of the last twenty-one years.⁵³ Suu Kyi's campaigning was effective in pressuring the government to hold democratic elections. In a result unexpected by the junta,

⁴¹ *The Nobel Peace Prize 1991: Aung San Suu Kyi*, NOBELPRIZE.ORG, http://nobelprize.org/nobel_prizes/peace/laureates/1991/ (last visited Oct. 25, 2010).

⁴² *Id.*

⁴³ *Suu Kyi's Eventful 21 Years in the Political Spotlight*, IRRAWADDY (June 19, 2009), http://www.irrawaddy.org/article.php?art_id=16119.

⁴⁴ *Id.*

⁴⁵ *Id.* See also *Timeline: Aung San Suu Kyi*, GUARDIAN (Nov. 12, 2010), <http://www.guardian.co.uk/world/2010/nov/12/suu-kyi-timeline-burma>.

⁴⁶ *Suu Kyi's Eventful 21 Years in the Political Spotlight*, *supra* note 43.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

the NLD won 392 of the 485 seats contested in the 1990 elections, but the junta to this day has not honored the election results.⁵⁴

On December 10, 1991, Suu Kyi was awarded the Nobel Peace Prize.⁵⁵ Students celebrated by demonstrating at Rangoon University on December 10 and 11, with more than two hundred arrested and sentenced to long terms of imprisonment.⁵⁶ On September 20, 1994, Senior-General Than Shwe and General Khin Nyunt held their first meeting with Suu Kyi, calling for national reconciliation and dialogue, something which the meeting did not accomplish.⁵⁷ After six years of house arrest, Suu Kyi was released on July 10, 1995.⁵⁸ On November 9, 1996, Suu Kyi survived another close brush with death when the vehicle she and other senior NLD members occupied was attacked by some two hundred government-backed personnel armed with knives and clubs on the Kabaraye Pagoda Road.⁵⁹ Her driver managed to maneuver the vehicle and its occupants away to safety.⁶⁰ Subsequently, Suu Kyi attempted to leave Rangoon to meet NLD officials in Irrawaddy Division on July 23, 1998, but her efforts were stymied by road blockades put in place by security officials.⁶¹ A five-day standoff ended on July 29 when authorities seized her car and drove her back to her house against her will.⁶²

On September 16, 1998, Suu Kyi and the NLD formed the Committee Representing the People's Parliament (CRPP) after the State Peace and Development Council (SPDC), the official form of the junta at that time, failed to respond to renewed calls to recognize the results of the 1990 elections.⁶³ The CRPP acted as an independent parliamentary government. The committee was chaired by Aung Shwe and had ten positions, and it received support from 251 parliament members.⁶⁴ The CRPP declared all laws annulled that were promulgated since September 18, 1998 and called for the release of all political prisoners.⁶⁵ Dr. Saw Mra Aung, chairman of the Arakan League for Democracy (ALD), was elected as the president of the CRPP.⁶⁶

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Committee Representing the People's Parliament (CRPP)*, IRRRAWADDY (Jan. 1, 2003), http://www.irrawaddy.org/research_show.php?art_id=448.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

The SPDC's response was immediate: 110 NLD members of Parliament and officials were arrested, including Dr. Saw Mra Aung, who was detained from September 1998 to June 14, 2001.⁶⁷ By the end of 1998, the SPDC had shut down forty-three NLD offices and insisted on the dissolution of the CRPP as a precondition for the resumption of talks with the opposition.⁶⁸ On October 23, 2002, the CRPP expanded its membership from ten to thirteen, with new members representing three leaders from ethnic groups.⁶⁹ Shortly after her latest release from house arrest in November 2010, Suu Kyi met with CRPP members, where CRPP members said they believe a Panglong-style conference is necessary to achieve national reconciliation and improve Burma's situation.⁷⁰

On August 24, 2000, Suu Kyi's travel path again was blocked by security forces when she tried to visit Kungyangone and Kawmu townships.⁷¹ A nine-day standoff ended on September 2 after a force of nearly two hundred riot police compelled Suu Kyi to return home.⁷² On September 21, 2000, the junta had enough of merely turning Suu Kyi back. Security forces blocked another attempt by Suu Kyi to travel by train to Mandalay with NLD Vice Chairman Tin Oo and several other NLD party members.⁷³ This time, Suu Kyi was arrested and held under house arrest until May 6, 2002.⁷⁴

On May 30, 2003, a convoy carrying Suu Kyi and other senior NLD members was attacked by members of the pro-regime Union Solidarity and Development Association (USDA) near Depayin Township in Sagaing Division.⁷⁵ The regime reported that four people were killed and fifty injured in the attack, but the true number is believed to be much higher.⁷⁶ Suu Kyi and Tin Oo were taken into what the regime called "protective custody."⁷⁷ All senior NLD officers were placed under house arrest, party offices across the country were closed, and the party's phone lines were cut.⁷⁸

On September 22, 2007, Suu Kyi was seen in public for the first time since the start of her current period of house arrest when she went to the gate of her

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Sai Zom Hseng, *Suu Kyi Meets with CRPP*, IRRAWADDY (Nov. 27, 2010), http://www.irrawaddy.org/article.php?art_id=20194.

⁷¹ *Suu Kyi's Eventful 21 Years in the Political Spotlight*, IRRAWADDY (June 19, 2009), http://www.irrawaddy.org/article.php?art_id=16119.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

compound and greeted a huge crowd of monks who led demonstrations that were brutally suppressed by the regime.⁷⁹ The monks gathered in front of her home, chanting the *Metta Sutta* (the Buddha's words on loving kindness).⁸⁰

B. John Yettaw's Swim Across Inya Lake

On May 5, 2009, John Yettaw put on a pair of flippers and swam across Inya Lake. Yettaw, a fifty-three-year-old American Mormon and Vietnam War veteran, met with Aung San Suu Kyi, the "Lady in Burma," at the house that sat at the edge of the lake where she was serving her latest stint under house arrest. Yettaw warned her of his vision in which she was killed by terrorists.⁸¹ Regarding the visit, Yettaw later said, "I want to free Myanmar. I want to stop the suffering there. I am anti-junta. I will never be at peace, emotionally or psychologically, until that woman is free, until that nation is free."⁸²

Unfortunately, Yettaw's nocturnal visit freed neither Suu Kyi nor Burma. In fact, his visit was particularly ill-timed. Suu Kyi had been under house arrest on and off for fourteen of the last twenty-one years⁸³ and was set to be released on May 27, 2009,⁸⁴ just weeks after Yettaw's swim. As a result of Yettaw's uninvited visit, Suu Kyi was charged with breaching the terms of her detention.⁸⁵ Yettaw was also arrested⁸⁶ and charged with illegally entering a restricted zone, carrying a maximum penalty of five years in prison, and breaking immigration laws, punishable by up to one year in jail.⁸⁷ At her May 18 trial,⁸⁸ Suu Kyi pled not guilty, claiming that she had not committed any

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Tim Johnston, *Burma Releases Detained American*, WASH. POST (Aug. 17, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/16/AR2009081600241.html>.

⁸² Tony Dokouppli, *The Swimmer Speaks*, NEWSWEEK (Aug. 20, 2009, 8:00 PM), <http://www.newsweek.com/id/213129>.

⁸³ Wai Moe, *Suu Kyi Questions Burma's Judiciary, Constitution*, IRRAWADDY (Aug. 3, 2009), http://www.irrawaddy.org/highlight.php?art_id=16470.

⁸⁴ Maeve Kennedy, *Lake Swimmer Could Cost Suu Kyi Her Freedom*, GUARDIAN (May 14, 2009, 6:14 AM), <http://www.guardian.co.uk/world/2009/may/14/suu-kyi-lake-swim-yettaw>.

⁸⁵ Tim Johnston, *Burma Opposition Leader on Trial*, FIN. TIMES (May 19, 2009, 3:00 AM), http://www.ft.com/cms/s/0/8e95cfc2-440c-11de-99be-00144feabdco.html?nclink_check=1.

⁸⁶ Saw Yan Naing, *Suu Kyi to Face Trial Following Unauthorized Visit*, IRRAWADDY (May 14, 2009), http://www.irrawaddy.org/highlight.php?art_id=15634.

⁸⁷ Maria Sudekum Fisher, *Motives of "Suu Kyi Swimmer"*, IRRAWADDY (May 15, 2009), http://www.irrawaddy.org/article.php?art_id=15646&page=1.

⁸⁸ *Id.*

crimes, as Yettaw was an uninvited visitor.⁸⁹ Despite this defense, the court found Suu Kyi guilty of violating the terms of her house arrest and sentenced her to an additional eighteen months of house arrest.⁹⁰ International critics of the junta cited the eighteen-month sentence as pretense to prevent Suu Kyi from taking part in the November 2010 elections, the first since 1990. United Kingdom Prime Minister Gordon Brown described the trial as a “sham,” French president Nicolas Sarkozy called for new sanctions against Burma, and United States Secretary of State Hillary Clinton stated that Suu Kyi should not have been convicted and Yettaw should be released.⁹¹ U.S. Senator Jim Webb was able to secure Yettaw’s release by traveling to Burma and securing a rare meeting with junta leadership to ask for Yettaw’s release on humanitarian grounds.⁹²

Yettaw’s actions and Suu Kyi’s continued house arrest seemed like a case of bad luck—an instance of unfortunate timing. However, looking at the myriad instances of awful coincidences in the larger tapestry of Burmese history, an observer begins to wonder whether the Burmese people are snakebitten. Maybe there is some truth to the ominous prognostications of Burmese astrologers.⁹³ In this case, the junta would likely have barred Suu Kyi from participating in the 2010 elections one way or another. Yettaw simply provided them with an excuse. The language of the 2008 Constitution contains several provisions which could have barred Suu Kyi from participating in the 2010 elections. The following section will analyze these provisions to show how the military junta had anticipated Suu Kyi’s eventual release, and how she was constitutionally barred from running for election even without Yettaw’s interference.

C. The Constitution of Burma and the 2010 Elections

The 2008 Constitution of Burma would have prevented Aung San Suu Kyi from participating in the 2010 elections. According to Home Minister Major General Maung Oo, the term of her house arrest was set to end in November

⁸⁹ *Myanmar Court Charges Suu Kyi*, WALL ST. J. (May 23, 2009), <http://online.wsj.com/article/SB124297046869446591.html>.

⁹⁰ *Burma Court Finds Suu Kyi Guilty*, BBC NEWS (Aug. 11, 2009, 1:50 PM), <http://news.bbc.co.uk/2/hi/asia-pacific/8194596.stm>.

⁹¹ *Id.*

⁹² Johnston, *supra* note 81.

⁹³ Astrology plays a major role in Burmese culture and has been used by Burmese political leaders throughout the centuries in making important political decisions. *See, e.g.,* Richard C. Paddock, *Abrupt Relocation of Burma Capital Linked to Astrology*, BOSTON GLOBE (Jan. 1, 2006), http://www.boston.com/news/world/asia/articles/2006/01/01/abrupt_relocation_of_burma_capital_linked_to_astrology/.

2010.⁹⁴ Most observers predicted that the 2010 elections would take place on October 10, 2010.⁹⁵ The military junta moved the election date to November 7, 2010, which was not relevant to Suu Kyi: she was not released from house arrest until November 13, 2010.⁹⁶ The Constitution conceivably could have barred Suu Kyi from running for a number of reasons, including marriage to a Westerner, the foreign citizenship and residence of her children, her past record of activism and detention, and her affiliation with Western powers.

The 2008 Constitution designates the existing seven divisions of the country, maintains the existing seven states,⁹⁷ establishes certain self-administered areas, and denominates a Union territory, Naypyitaw.⁹⁸ It creates a bicameral federal legislature (Pyidaungsu Hluttaw) at the Union level comprised of an upper (Amyotha Hluttaw) and lower (Pyithu Hluttaw) house.⁹⁹ The Amyotha Hluttaw has a total of 224 seats¹⁰⁰ and the Pyithu Hluttaw has 440 seats.¹⁰¹ However, the Commander-in-Chief of the Defense Services reserves the right to nominate 56 of the 224 seats in the Amyotha Hluttaw¹⁰² and 110 of the 440 seats in the Pyithu Hluttaw.¹⁰³ Amendment proposals require the approval of seventy-five percent of the representatives of the Pyidaungsu Hluttaw before being put to a nationwide referendum. Because military personnel hold twenty-five percent of the total seats in the bicameral legislature, the military has de facto veto power over any proposed constitutional amendment.¹⁰⁴

The 2008 Constitution reserves many powers in the Commander-in-Chief, who is the supreme commander of all the armed forces.¹⁰⁵ The Commander-in-Chief has nomination powers over Defense Services personnel as well as over twenty-five percent of the total seats in the bicameral legislature. More importantly, the Commander-in-Chief has the right to take over and

⁹⁴ Kocha Olarn, *Minister: Suu Kyi to be Freed in November*, CNN (Jan. 25, 2010, 6:04 AM), <http://www.cnn.com/2010/WORLD/asiapcf/01/25/myanmar.suukyi/index.html>.

⁹⁵ Dayanath Singh, *Burma Demands Return of Democracy*, ASSAM TIMES (Feb. 1, 2010), <http://www.assamtimes.org/Neighbours-World/3705.html>. Junta officials would see October 10, 2010 as an auspicious date.

⁹⁶ *Id.*; *Burmese Dissident Is Freed After Long Detention*, N.Y. TIMES (Nov. 13, 2010), http://www.nytimes.com/2010/11/14/world/asia/14myanmar.html?_r=1&hp.

⁹⁷ 2008 CONST., *supra* note 24, art. 9(a).

⁹⁸ *Id.* art. 50.

⁹⁹ *Id.* art. 74(a)–(b).

¹⁰⁰ *Id.* art. 141.

¹⁰¹ *Id.* art. 109.

¹⁰² *Id.* art. 141(b).

¹⁰³ *Id.* art. 109(b).

¹⁰⁴ *Id.* art. 436(a).

¹⁰⁵ *Id.* art. 20(c).

implement martial law whenever a “state of emergency” arises,¹⁰⁶ though it is unclear who has authority to decide whether that condition exists. The Constitution notes with concern that a state of emergency “could cause a disintegration of the Union, disintegration of national solidarity, and loss of sovereign power or attempts therefore by wrongful forcible means such as *insurgency or violence*.”¹⁰⁷ The constitution’s concern for insurgency is a matter that will be addressed in Part II below.

There are two other kinds of situations that qualify as states of emergency under the Constitution, and they may be seen as lesser in severity. The President can exercise executive and even legislative powers if a region, state, or a self-administered area is unable to perform executive functions on its own.¹⁰⁸ If the life and property of the people are endangered in a region, state, or a self-administered area, the Defense Services has the authority to prevent that danger and provide protection.¹⁰⁹

1. Section 121 and Standing for Election in the Pyithu Hluttaw

If John Yettaw had not chosen to swim across Inya Lake, would it have been possible for Suu Kyi to run in the 2010 elections? Section 121 of the 2008 Constitution of Burma, titled “Disqualification for the Pyithu Hluttaw Representatives” states that a person cannot be elected as a Pyithu Hluttaw representative if she is presently “serving [a] prison term, having been convicted by the Court concerned for having committed an offence.”¹¹⁰ A Rangoon Northern District Court sentenced Suu Kyi to eighteen additional months of house arrest on August 11, 2009.¹¹¹ She was initially sentenced to three years imprisonment, but at the sentencing hearing, the home minister walked into the courtroom and announced that Senior-General Than Shwe had halved the sentence and would allow Suu Kyi to serve it in her Yangon home.¹¹² Than Shwe said he had reduced the sentence to “maintain peace and tranquility” and because Suu Kyi was the daughter of Aung San, the revered

¹⁰⁶ *Id.* art. 40(c).

¹⁰⁷ *Id.* (emphasis added).

¹⁰⁸ *Id.* art. 40(a).

¹⁰⁹ *Id.* art. 40(b).

¹¹⁰ *Id.* art. 121(a).

¹¹¹ Wai Moe, *Suu Kyi Sentenced to 18 Months House Arrest*, IRRAWADDY (Aug. 11, 2009), http://www.irrawaddy.org/highlight.php?art_id=16527.

¹¹² *Id.* See also “Monstrous”: Gordon Brown Slams Burma Junta’s Latest Conviction of Pro-Democracy Leader Aung San Suu Kyi, DAILY MAIL (Aug. 12, 2009, 1:57 AM), <http://www.dailymail.co.uk/news/worldnews/article-1205797/Burma-junta-stop-Aung-San-Suu-Kyi-competing-elections-new-conviction-described-monstrous-Gordon-Brown.html>.

Burmese national hero.¹¹³ A European diplomat said that Than Shwe's message was "carefully calibrated to deliver the word that 'I am a reasonable man and I've listened to what the international community said and here is proof of this.'"¹¹⁴

Aung Naing Oo, writing in the Thailand-based paper the *Irrawaddy*, believes that Section 121(a) disqualified Suu Kyi from standing for election.¹¹⁵ Neither "prison term" nor "prison" are defined in the 2008 Constitution, and house arrest may not fall within the plain meaning of "prison." In fact, the Rangoon Northern District Court specifically reduced Suu Kyi's sentence from a prison term of three years, which would obviously fall under Section 121(a), to eighteen months of house arrest. Due to the textual ambiguity, it is unclear whether Burmese courts would have found house arrest to be within the meaning of "prison term." If Section 121(a) applies to Suu Kyi's house arrest, then she would be unable to run for a seat in the Pyithu Hluttaw if detained during the elections.

2. Section 59 and Standing for Candidacy for President and Vice-President

According to a provision in the 2008 Constitution, Suu Kyi cannot be appointed president or vice-president. Section 59(f) requires that the spouse and any legitimate children of the president or vice-president not owe allegiance to a foreign power, not be the subject of a foreign power or citizen of a foreign country, and not be persons entitled to enjoy the rights and privileges of a subject of a foreign government or citizen of a foreign country. Suu Kyi was married to Michael Aris, a British citizen and academic.¹¹⁶

Some have asserted that her marriage to Aris bars her from running for any election,¹¹⁷ but this is inaccurate; the nationality of Suu Kyi's spouse would only bar her from running for *president or vice-president*, not a seat in the Pyithu Hluttaw. There is also historical precedent for believing that Suu Kyi's marriage to Aris would be a bar, since the military adduced this as one of the grounds supporting her inability to stand for election in 1990.¹¹⁸ But Michael Aris died in 1999,¹¹⁹ meaning that technically Suu Kyi has no spouse (she has

¹¹³ *Id.*

¹¹⁴ Seth Mydans, *Burmese Activist Receives New Term of House Arrest*, N.Y. TIMES (Aug. 11, 2009), <http://www.nytimes.com/2009/08/12/world/asia/12myanmar.html>.

¹¹⁵ Aung Naing Oo, *Suu Kyi's Election Year Role Still in Doubt*, IRRAWADDY (Feb. 23, 2010), http://www.irrawaddy.org/print_article.php?art_id=17871.

¹¹⁶ Tallentire, *supra* note 11.

¹¹⁷ Ian MacKinnon, *Burma Draft Constitution Bars Suu Kyi*, GUARDIAN, Apr. 1, 2008, at 24, available at <http://www.guardian.co.uk/world/2008/apr/01/burma>.

¹¹⁸ Derek Tonkin, *Suu Kyi and the 2010 Elections*, MIZZIMA (Mar. 11, 2008, 12:12 AM), <http://www.mizzima.com/forum/341-suu-kyi-and-the-2010-eelections.html>.

¹¹⁹ *Obituary: A Courageous and Patient Man*, BBC NEWS (Mar. 27, 1999, 1:44 PM), <http://news.bbc.co.uk/2/hi/asia-pacific/305487.stm>.

not remarried). Therefore, the 1990 argument used by the military would not work today, even under the purview of the 2008 Constitution. However, Suu Kyi has two sons who were born in England in 1973 and 1977, respectively.¹²⁰ Her sons, who are British citizens, disqualify Suu Kyi from the office of president or vice-president under Section 59(f) of the 2008 Constitution.

Despite Suu Kyi's disqualification from candidacy for president or vice-president in accordance with the 2008 Constitution, there is no such provision in Section 121, which deals with disqualification for Pyithu Hluttaw candidates.¹²¹ Now that Suu Kyi has been released from house arrest, it may be possible for her to run for the Pyithu Hluttaw in future elections.

3. Other Grounds to Prevent Suu Kyi from Standing for Election

Although she is the most prominent, Suu Kyi is not the only individual who is barred by the 2008 Constitution.¹²² Under Section 121(b), any person who has been disqualified from the Pyithu Hluttaw in the past is also disqualified from standing for election to the Pyithu Hluttaw in the future.¹²³ Burmese foreign minister Nyan Win said at the ASEAN Regional Forum in July 2010 that Suu Kyi "can run if freed," but this statement is inconsistent with the 2008 Constitution.¹²⁴ Section 121(b) may disqualify Suu Kyi and many other Burmese political dissidents based on past detentions. In addition, Section 121(e) disqualifies any person who owes allegiance to a foreign government, is subject to a foreign government, or is a citizen of a foreign country from running for the Pyithu Hluttaw.¹²⁵ What amounts to "allegiance" or being "subject" to a foreign government is left undefined. This last subsection is a broad, catchall provision that the junta can potentially use to bar any person deemed to be unduly influenced by foreign powers.

The importance of these provisions is that the junta would have barred Suu Kyi from standing for election even if John Yettaw had not made his ill-fated swim across Inya Lake. The junta had strong legal barriers in place to prevent Suu Kyi from standing for election even if she had been released on May 27, 2009. However, had she enjoyed freedom of movement at that point,

¹²⁰ *A Biography of Aung San Suu Kyi*, *supra* note 40.

¹²¹ 2008 CONST. art. 121.

¹²² Among others excluded are Khin Khin Win and Win Ma Ma, two female companions of Suu Kyi who live with her and help take care of her home. Associated Press, *Suu Kyi Barred From Voting*, IRRRAWADDY (Sept. 20, 2010), http://www.irrawaddy.org/article.php?art_id=19510.

¹²³ 2008 CONST. art. 121(b).

¹²⁴ Francis Wade, *Suu Kyi "Can Run if Freed": Burma FM*, DEMOCRATIC VOICE OF BURMA (July 22, 2010), <http://www.dvb.no/elections/suu-kyi-%E2%80%99can-run-if-freed%E2%80%99-burma-fm/10851>.

¹²⁵ 2008 CONST. art. 121(e).

the social change she might have catalyzed may have led to a movement on par with the Saffron Revolution of 2007.

III. THE RATIONALE UNDERLYING THE JUNTA'S LAWS

Why does the junta insist on harsh constitutional provisions that bar Suu Kyi and other democratically-minded activists from running for office? In order to understand the military's behavior, one must look to Burma's long, complicated, and often tragic legal, economic, and political history.

A. The Secession Clause in the 1947 Constitution

Save as otherwise expressly provided in this Constitution or in any Act of Parliament made under Section 199, every State shall have the right to secede from the Union in accordance with the conditions hereinafter prescribed.

—1947 *Constitution of the Union of Burma*, Chapter X, Article 201¹²⁶

Burma has not been a unified nation for much of its long and complicated history. Prior to the nineteenth century, Burma existed as a collection of territories ruled by various ethnic groups.¹²⁷ The current Burmese government recognizes eight major ethnic groups: Kachin, Kayah, Kayin, Chin, Bamar, Mon, Rakhine, and Shan.¹²⁸ The Bamar, or Burmans, are the largest ethnic group populating the center of the country.¹²⁹ In 1824, the British and the Burmese commenced the first of what would be three Anglo-Burmese Wars, culminating in complete British colonization of the country in 1885.¹³⁰

General Aung San was an important figure in Burmese history, arguably the most important in the modern period. He was the leader of the so-called "Thirty Comrades."¹³¹ Although the Thirty Comrades' original plan was to join China, they wound up in Japan, where the Japanese Army provided them with

¹²⁶ BURMA CONST. (Sept. 24, 1947) art. 201 [hereinafter 1947 CONST.], available at http://www.blc-burma.org/html/Constitution/1947.html#RIGHT_OF_SECESSION.

¹²⁷ JOSEF SILVERSTEIN, BURMA: MILITARY RULE AND THE POLITICS OF STAGNATION 3-5 (1977).

¹²⁸ *Facts About Myanmar*, MYANMAR MINISTRY OF HOTELS AND TOURISM, <http://www.myanmar-tourism.org/FactsaboutMyanmar/index.htm#POPULATION> (last visited Aug. 8, 2011).

¹²⁹ MARTIN SMITH, BURMA: INSURGENCY AND THE POLITICS OF ETHNICITY 29-30 (1991).

¹³⁰ SILVERSTEIN, *supra* note 127, at 4-6.

¹³¹ *Background Biographies: Gen. Aung San (1915-1947)*, IRRAWADDY (Jan. 1, 2003), http://www.irrawaddy.org/research_show.php?art_id=443#aungsan; *Background Biographies: Gen. Ne Win (1911-2002)*, IRRAWADDY (Jan. 1, 2003), http://www.irrawaddy.org/research_show.php?art_id=443#newin. The Thirty Comrades was a group of elite soldiers of which the first leader of Burma's future military junta, General Ne Win, was a member.

military training.¹³² During World War II, the Thirty Comrades invaded Burma alongside the Japanese, having determined that the Japanese were preferable to the British.¹³³

Aung San and his Thirty Comrades were wrong. Japan granted Burma formal independence on August 1, 1943, with Dr. Ba Maw, the prewar prime minister, becoming the leader.¹³⁴ Aung San was appointed number two, turned down for the top job by the Japanese because “they had found him too unimpressive in appearance and style and preferred the bigger and better-looking Ba Maw for their puppet.”¹³⁵ Ba Maw ruled in the mold of a fascist dictator, but in reality was subservient to the Japanese who were pulling the strings.¹³⁶

Meanwhile, in the midst of World War II, the British were licking their wounds and considering the best time to take back Burma.¹³⁷ As the tide turned toward the Allies in late 1943 to early 1944, the British seized their chance. After fighting off a massive Japanese front in Manipur in early 1944 with American air support, the British Fourteenth Army, which consisted primarily of units of the Indian Army, crossed the Chindwin River and then the Irrawaddy River, fighting off the Japanese all along the way.¹³⁸ Mandalay was retaken, and the British headed to Yangon.¹³⁹

Observing the British advance, Aung San, Ne Win, and the rest of the Burmese leaders decided that their only loyalty was to Burma and began considering full independence,¹⁴⁰ creating the Anti-Fascist People's Freedom League (AFPFL).¹⁴¹ On March 27, 1945, Aung San declared war against the Japanese, and in an ironic twist, the British and the Allies came to Burma's aid, driving out the Japanese.¹⁴² After the Allies' victory in World War II, the British presented the AFPFL with a White Paper that proposed the postwar Burmese political system.¹⁴³ The White Paper called for elections after the economy recovered and rule of law was restored, with a new government adhering to

¹³² NARAYANAN GANESAN & KYAW YIN HLAING, MYANMAR: STATE, SOCIETY, AND ETHNICITY 98 (2007). See also KEAT GIN OOI, SOUTHEAST ASIA: A HISTORICAL ENCYCLOPEDIA 1329 (2004); Myint-U, *supra* note 1.

¹³³ MYINT-U, *supra* note 13, at 229–31.

¹³⁴ *Id.* at 232.

¹³⁵ *Id.*

¹³⁶ *Id.* at 233.

¹³⁷ *Id.* at 234–36.

¹³⁸ *Id.* at 237.

¹³⁹ *Id.* at 237–38.

¹⁴⁰ *Id.* at 238; CHRISTINA FINK, LIVING SILENCE: BURMA UNDER MILITARY RULE 21 (2001).

¹⁴¹ *Id.*

¹⁴² MYINT-U, *supra* note 13, at 240.

¹⁴³ *Id.* at 244.

the 1935 Constitution and home rule within a new British Commonwealth.¹⁴⁴ Reginald Dorman-Smith addressed a reception in Rangoon City Hall, saying "Burma will—no longer 'may'—take her place among the fully self-governing nations . . . Burma's battle for freedom is over."¹⁴⁵ But Dorman-Smith still required an election, as the White Paper suggested, and he also appointed an advisory council to take charge of the government.¹⁴⁶ Aung San saw the return of the British as a perpetual problem that needed to be eliminated in order for Burma to move forward in her own right.¹⁴⁷

In response to the White Paper, Aung San made a counteroffer with a demand the British could not possibly accept: a majority of seats on the council for the AFPFL and authority to determine which AFPFL members would receive which appointments, including control over the police.¹⁴⁸ Dorman-Smith refused the counteroffer, and the AFPFL denounced him as a fascist.¹⁴⁹ Aung San hinted of an armed uprising to Dorman-Smith.¹⁵⁰ The pressure on the British gradually increased, ratcheting up especially after the killing of a British loyalist by Aung San and his men.¹⁵¹ The British internally debated over whether to arrest Aung San, and whether such an arrest would lead to outright rebellion.¹⁵² The authorities vacillated, at first issuing an order for his arrest, and then quickly canceling it.¹⁵³ Aung San, leery of provoking outright war, turned himself in.¹⁵⁴ Aung San, now in full control, met with Prime Minister Attlee, who was ready to grant Burma full independence, saying before Parliament in December 1947, "We do not desire to retain within the Commonwealth and Empire any unwilling peoples. It is for the sake of Burma to decide their own future."¹⁵⁵

By January 24, 1948, a new agreement was made. The interim government would be respected as a full dominion government, as with Canada and Australia, and would control the Burma Army as soon as all Allied forces left the country.¹⁵⁶ A constituent assembly would be elected, and the final

¹⁴⁴ *Id.* at 241.

¹⁴⁵ *Id.* at 245.

¹⁴⁶ *Id.*

¹⁴⁷ *See id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 248.

¹⁵² *Id.* at 248-49.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 249.

¹⁵⁵ *Id.* at 251-52.

¹⁵⁶ *Id.* at 252.

constitution would be presented to the British Parliament for approval.¹⁵⁷ The British military would continue to assist the AFPFL in putting down the Communists.¹⁵⁸ London accepted that the “objective of both His Majesty’s Government and the Burmese Delegates [was] to achieve the early unification of the Frontier Areas and Ministerial Burma . . . with the free consent of the inhabitants of those areas.”¹⁵⁹ With that end in mind, a conference would be convened at Panglong to solicit the views of the ethnic minority leaders, and a Frontier Areas Committee of Enquiry (FACOE) would take evidence and determine the wishes of the peoples of the Frontier Areas.¹⁶⁰ After the Attlee–Aung San Agreement was published on January 29, the Karen National Union was formed, and its first resolution reaffirmed the Karens’ aspirations for a separate state.¹⁶¹

While Aung San had handled the British masterfully, it was not without cost. His right hand man, Than Tun, left the AFPFL and took up leadership of the Communist Party, where he warned of a sham independence, resulting in domination by the British and Americans of commercial and military interests.¹⁶² The prewar prime minister, U Saw, began making similar claims.¹⁶³ U Saw had fallen a long way since his days as prime minister, spending the war in a detention camp.¹⁶⁴ After he returned to Burma, a jeep pulled up next to his car and a revolver was fired at him from close range.¹⁶⁵ The window deflected the bullet, but shattered glass hit U Saw in the face and a piece lodged in one eye, resulting in the loss of the eye.¹⁶⁶ U Saw blamed the league and vowed revenge.¹⁶⁷ U Saw could not find a place of power in the new Burma and became frustrated by the AFPFL’s popularity, which made a political comeback difficult.¹⁶⁸ He hated Aung San, and did not trust him, seeing him as a Japanese collaborator, and strongly felt that the British had made a mistake in giving Aung San leadership over him.¹⁶⁹ With the British on board, Aung San now only had to get ethnic minorities to join the new agreement and

¹⁵⁷ *Id.*

¹⁵⁸ SHELBY TUCKER, *BURMA: THE CURSE OF INDEPENDENCE* 120 (2001).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 121.

¹⁶² MYINT-U, *supra* note 13, at 252.

¹⁶³ *Id.*

¹⁶⁴ MICHAEL W. CHARNEY, *A HISTORY OF MODERN BURMA* 68 (2009).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ MYINT-U, *supra* note 13, at 252.

¹⁶⁸ CHARNEY, *supra* note 164, at 68.

¹⁶⁹ *Id.*

partake in the Burmese independence.¹⁷⁰ On February 12, 1947, General Aung San and representatives from the Shan, Kachin, and Chin ethnic groups signed the Panglong Agreement, which allowed Aung San to form a federal government.¹⁷¹ However, in reaching the Agreement, Aung San made several concessions to the ethnic minority groups, which left unsettled issues of autonomy and rights of minority groups. Even then, the Karen leaders refused to agree, and remained opposed to the elections.¹⁷² These unsettled issues were memorialized in the 1947 Constitution in the form of the right of secession.

One of the concessions made by Aung San to induce the ethnic representatives to sign on to the agreement was the assurance that the right to secede would be embodied in a constitution drawn up after the Panglong Agreement was signed.¹⁷³ This express constitutional right of secession is nearly unique, with the Soviet Union being the only other government in modern history to grant such a right to its people.¹⁷⁴ The Panglong Agreement reflected the concessions made to ethnic minorities in Clause 5:

Though the Governor's Executive Council will be augmented as agreed above, it will not operate in respect of the Frontier Areas in any manner which would deprive any portion of these Areas of the autonomy which it now enjoys in internal administration. *Full autonomy in internal administration for the Frontier Areas is accepted in principle.*¹⁷⁵

Though the word "secession" does not expressly appear anywhere in the Panglong Agreement, Clause 5 indicates that the minority groups who signed the Panglong Agreement did so because they would retain full autonomy in the internal administration of their particular regions.¹⁷⁶ Indeed, they expected to be independent from British and Burmese interference in their internal affairs.¹⁷⁷ This clause would prove immensely consequential for Burma's political future.

¹⁷⁰ MYINT-U, *supra* note 13, at 253.

¹⁷¹ Aye Lae, *Burmese Ethnic Groups Call for Another Panglong Agreement*, IRRRAWADDY (Feb. 12, 2008), http://www.irrawaddymedia.com/article.php?art_id=10344.

¹⁷² MYINT-U, *supra* note 13, at 253.

¹⁷³ *Irrawaddy: Broken Promises and a Broken Nation – Editorial*, BURMANET NEWS (Feb. 12, 2010), <http://www.burmanet.org/news/2010/02/12/irrawaddy-broken-promises-and-a-broken-nation-editorial/>.

¹⁷⁴ KONSTITUTSIJA SSSR (1977) [hereinafter USSR CONSTITUTION] art. 17 ("The right freely to secede from the U.S.S.R. is reserved to every Union Republic.").

¹⁷⁵ Telegram from Aung San to Lord Pethwick-Lawrence (Feb. 12, 1947), in 2 HUGH TINKER, *BURMA: THE STRUGGLE FOR INDEPENDENCE 1944-1948*, at 405 (1984) (emphasis added).

¹⁷⁶ See TUCKER, *supra* note 158, at 122 (2001).

¹⁷⁷ *Id.* at 122.

The ethnic minorities repeated to FACOE their intent to be independent. The Yawnghwe *saopha*, as chairman of the Supreme Council of the United Hill Peoples, told FACOE: "We want to associate with Burma on the condition that full autonomy is guaranteed in our internal administration," a view echoed by Kachin and Chin witnesses.¹⁷⁸

B. The 1947 Constitution of Burma and the Right to Secede

On April 7, 1947, Burma held elections.¹⁷⁹ The Karens continued their boycott, joined by many of Aung San's enemies.¹⁸⁰ In the absence of the Karens, the AFPFL won a huge majority.¹⁸¹ Aung San's Executive Council normally met under Sir Hubert's chairmanship at Government House, but on the morning of July 19, it met at the Secretariat instead.¹⁸² Just before 10:30 in the morning, five men dressed in Twelfth Army uniforms pulled up to the Secretariat in a jeep bearing a false license plate.¹⁸³ Police waved them in.¹⁸⁴ While the Council was seated in a room in the western block of the building, four men, Maung Soe, Maung Sein, Thet Hnin and Yan Gyi Aung, wearing jungle-green uniforms with Twelfth Army flashes and bush hats, armed with tommy guns and a Sten gun, forced their way past the lone unarmed guard into the room.¹⁸⁵ They opened fire upon the members of the Council and fled the Secretariat in a getaway jeep. Thu Kha drove the jeep to U Saw's residence at 4 Ady Road on Inya Lake, where the police later apprehended them.¹⁸⁶ All but three of the Council members died from their wounds; Aung San was among the dead.¹⁸⁷ It became apparent that U Saw was the leader of the assassination plot.¹⁸⁸ On July 19, the authorities raided U Saw's house, and government forces arrested both him and the four men who were ultimately accused of having carried out the attack.¹⁸⁹ U Ba Nyun, a prosecution witness in the trial that followed, testified that the jeep had returned immediately to U Saw's house, where the license plate was replaced and the jeep's real number

¹⁷⁸ *Id.* at 125.

¹⁷⁹ MYINT-U, *supra* note 13, at 253.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 254.

¹⁸³ CHARNEY, *supra* note 164, at 68-69.

¹⁸⁴ *Id.* at 69.

¹⁸⁵ TUCKER, *supra* note 158, at 138-39.

¹⁸⁶ *Id.* at 139.

¹⁸⁷ *Id.*

¹⁸⁸ MYINT-U, *supra* note 13, at 255.

¹⁸⁹ CHARNEY, *supra* note 164, at 69.

was painted again on its side.¹⁹⁰ The criminals dumped the guns and license plate into Inya Lake and burned the uniforms.¹⁹¹

The death of Aung San severely damaged Burma's hope for the reconciliation and peaceful unification of ethnic minorities and the majority Burman ethnic group. The goodwill among Burmans and ethnic minorities that Aung San had fostered and memorialized in the Panglong Agreement eroded.¹⁹² None of the AFPFL leaders were more sympathetic to the ethnic minorities' interests than Aung San had been.¹⁹³ He favored "a broad measure of regional autonomy and constitutional safeguards for ethnic rights and was at odds with colleagues precisely because he rejected Burman hegemony."¹⁹⁴ In an AFPFL convention speech on May 23, 1947, less than two months before he death, he said:

Only true democracy can work for the real good of the people, real equality of status and opportunity for everyone, irrespective of class or race or religion or sex. [N]obody can deny that the Karens are . . . a national minority. . . . Now, when we build our new Burma, shall we build it as a Union [federation] or a Unitary State? In my opinion, it will not be feasible to set up a Unitary State. We must set up a Union with properly regulated provisions as should be made to safeguard the rights of national minorities. We must take care that "united we stand," not "united we fall."¹⁹⁵

In another speech on June 17, 1947, Aung San stated, "Burma should consist of specific autonomous states . . . with adequate safeguards for minorities."¹⁹⁶ By contrast, Aung San's successor stated, "I am cent per cent [sic] against the creation of Autonomous States for Karens, Mons, and Arakanese."¹⁹⁷

But there was one piece of Aung San's legacy for ethnic minorities that survived his death: the first Constitution of Burma. The 1947 Constitution created a right of secession but extended it only to the Shan and Karenni States, not the Kachin State.¹⁹⁸ Article 202 imposed a ten-year waiting period

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² JOSEF SILVERSTEIN, *BURMESE POLITICS AND THE DILEMMA OF NATIONAL UNITY* 108 (1980).

¹⁹³ TUCKER, *supra* note 158, at 151.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 152.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See 1947 CONST. arts. 5-7 (creating and designating the Shan State, the Kachin State, and the Karenni State as constituent units of the Union of Burma), 9 ("The term 'State' means the executive or legislative authority of the Union or of the unit concerned

from the date of constitutional enactment before the Shan or Karenni States could invoke the right to secede.¹⁹⁹

The formal language of the 1947 Constitution does not mention the concessions made in the Panglong Agreement. However, as noted above, Aung San himself argued before the pre-constitutional convention that the best form of government to protect minority interests was a "Union," not a "Unitary State."²⁰⁰ Echoing Aung San's sentiments, many ethnic minorities preferred independence to a unified state.²⁰¹

The constitutional drafters enlisted the FACOE to inform them how best to integrate minority interests into the 1947 Constitution.²⁰² The committee comprised equal numbers of persons from Ministerial Burma, nominated by the Council, and persons from the Frontier Areas, with a neutral Chairman from outside Burma.²⁰³ Frontier Areas witnesses communicated the following to FACOE:

[We] do not want to join anybody because in the past we have been very independent. . . . We have not thought about [our future] because we are wild people. We never thought of the administrative future. We only think about ourselves. As for the future, we would like to remain as in the past—that is, independent of other people. We want to associate with Burma on the condition that full autonomy is guaranteed in our internal administration.²⁰⁴

FACOE concluded that the Frontier Areas were divided on the fundamental issue of union with Burma. The Shan and Kachin witnesses desired "the fullest possible autonomy" within a federal Burma, and the Chins

according as the context may require."), 178 ("The provisions of Chapter X of this Constitution shall not apply to the Kachin State.").

¹⁹⁹ See *id.* art. 202 ("The right of secession shall not be exercised within ten years from the date on which this Constitution comes into operation.").

²⁰⁰ Josef Silverstein, *The Idea of Freedom in Burma and the Political Thought of Daw Aung San Suu Kyi*, 69 PAC. AFF. 211, 221 (1996).

²⁰¹ See, e.g., MYINT-U, *supra* note 13, at 253 (stating that Karen leaders wanted a separate Karen state in the British Empire, similar to Pakistan); SMITH, *supra* note 129, AT 85-87 (2d ed. 1999) (discussing demands by the Karen National Union (KNU) for a Karen Autonomous State and the KNU's military preparations for independence).

²⁰² See Frontier Areas Committee of Enquiry (FACOE), *Report of the Frontier Areas Committee of Enquiry, 1947* (1947), Chapter II, 3-43, available at <http://www.shanland.org/oldversion/index-3143.htm> ("The terms of reference of the Committee appear to restrict us to enquire and report on the best method of associating the frontier peoples with the working out of the new constitution for Burma.").

²⁰³ TUCKER, *supra* note 158, at 123.

²⁰⁴ *Id.* at 124-25.

sought to continue "to administer their tracts as at present."²⁰⁵ FACOE suggested that ethnic minorities were to be eligible for places on all committees, though their participation would not commit them to union with Burma, and no proposal affecting minority governance could pass without a majority of the votes of the minority representatives.²⁰⁶ FACOE also stated that "all of the witnesses expressed without hesitation the desire that representatives of their States or local areas should take part" in the assembly.²⁰⁷ Frank Donnison, the British chief secretary, stated as follows:

As far as independent Burma was concerned, a committee was to be set up to inquire "as to the best method of associating the frontier peoples with the working-out of the new constitution for Burma." It is clear that it was not intended that the minorities should be consulted on the question that was really exercising them. . . . What [the minorities] agreed to was *co-operation*, and co-operation, not with independent Burma, but with the interim Burmese government, which still had a British governor, and under which they had been guaranteed that there would be no diminution in the independence they had hitherto enjoyed from control by the government set up under the constitution of 1937.²⁰⁸

In accordance with the spirit of FACOE and the Panglong Agreement, the 1947 constitution created a Chamber of Nationalities and gave the chiefs (*Saohpas*) of each state sole authority to elect themselves to serve as members representing each state in the 125-member body.²⁰⁹ The Burmese drafters balanced the rights of the at-large citizenry against this concession to the chiefs by barring the chiefs from holding seats in the more important Chamber of Deputies.²¹⁰ This compromise allowed the chiefs to retain their prestige and power, but gave the people of the states more authority over legislation.²¹¹ Along these same lines, the incorporation of the right of secession likely resulted from the interviews of frontier peoples by FACOE and Aung San's legacy of vouching for ethnic minority interests. A majority of witnesses requested that the right of secession be included in the Constitution, and the

²⁰⁵ *Id.* at 125-26.

²⁰⁶ *Id.* at 126.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 127 (emphasis in original).

²⁰⁹ See, e.g., 1947 CONST. art. 154(2) ("All the representatives from the Shan State in the Chamber of Nationalities shall be elected by the Saohpas of the Shan State from among themselves. The Saohpas shall not be eligible for membership of the Chamber of Deputies.").

²¹⁰ *Id.*

²¹¹ SILVERSTEIN, *supra* note 127, at 3-5.

committee recommended that their demands be incorporated into the 1947 Constitution.²¹²

The 1947 Constitution created a parliament and granted it the “sole and exclusive power” to make federal law.²¹³ The 1947 Constitution granted the exclusive power to make state law to State Councils while acknowledging federal superiority in the Supremacy Clause of Article 94(2).²¹⁴ The members of Parliament representing a state constituted the State Council of that state.²¹⁵ The State Councils had the authority to exercise the right of secession requiring a two-thirds vote of the total number of council members.²¹⁶

It was Chapter X of the 1947 Constitution and the secession right contained therein that would have long-lasting effects on Burma and its peoples. In 1962, Brigadier General Aung Gyi said the following:

In Burma we had economic, religious, political crises, with the issue of federalism as the most important reason for the coup. . . . A small country like Burma cannot afford division. The states enjoy autonomy and the right of secession guaranteed by the Constitution, but if secession were to be exercised, small and independent Burma would sink like Laos and Vietnam.²¹⁷

Yet the Panglong Agreement of February 12, 1947 and the secession promises General Aung San made may have been necessary. For a country that had long struggled with unification, Aung San had accomplished quite a feat—persuading the leaders of several ethnic minority groups to agree to peaceful unification. Additionally, due to his charisma and personality, Aung San drew minority members to his cabinet, which bolstered the legitimacy of his young leadership.²¹⁸ The 1947 Constitution and its secession chapter were enacted a little over two months later on September 24.²¹⁹

²¹² FACOE, *supra* note 91, at 28–29.

²¹³ 1947 CONST. art. 90.

²¹⁴ See *id.* art. 94(2) (“Nothing in this section shall restrict the power of a State Council to make any law which, under this Constitution it has power to make, but if any provision of a State law is repugnant to any provision of a Union law which the Parliament has under this section power to make, the Union law, whether passed before or after the State law, shall prevail, and the State law shall, to the extent of the repugnancy, but so long as the Union law continues to have effect, be inoperative.”).

²¹⁵ See, e.g., *id.* art. 154(1) (“All the members of the Parliament representing the Shan State shall constitute the Shan State Council.”).

²¹⁶ *Id.* art. 203.

²¹⁷ David W. Chang, *The Military and Nation-Building in Korea, Burma and Pakistan*, 9 ASIAN SURVEY 818, 825 (1969).

²¹⁸ MYINT-U, *supra* note 13.

²¹⁹ Nehginpao Kipgen, *What Does Union Day Mean to Ethnic Minorities?*, IRRAWADDY (Feb. 14, 2007), http://www.irrawaddy.com/opinion_story.php?art_id=6704.

After Aung San's death, U Nu replaced Aung San as Burma's Prime Minister. Compared to Aung San, he was an ineffective, weak leader.²²⁰ Aung San's diverse coalition disintegrated, and factional interests tore at the possibility of amicable unification.²²¹ A Communist faction led by Than Tun called the independence a "sham" and advocated for a people's revolution. It began an armed insurrection, attacking government posts along the Irrawaddy Valley.²²² Longtime Communist outsider Thakin Soe, and the Islamic Mujahidin in Arakan, revolted.²²³ The thakins (meaning "lords" or "masters") were members of the Do Bama ("We Burmans") Society, a Burmese-Marxist nationalist organization.²²⁴ They organized groups of mill works and oil company employees, espoused Nietzsche's philosophy, and bore the creed "live dangerously."²²⁵ Ironically, Aung San had helped organize the Burmese Communist Party (BCP) prior to the outbreak of World War II.²²⁶

The Communists split into two factions in 1945. While Aung San and Than Tun collaborated with the Japanese, the more radical Thakin Soe spent the war years moving around rural Burma, building support.²²⁷ In mid-1945, Than Tun ousted Soe from the party leadership, creating a schism between the more moderate BCP "White Flags" under Than Tun and the smaller and more radical Communist Party of Burma (CPB) "Red Flags" led by Soe.²²⁸ The British declared the CPB illegal, which alienated the CPB and marked the beginning of the civil war.²²⁹

Part of Aung San's own paramilitary organization, the People's Volunteer Organization (PVO), joined Than Tun's Communist group in its attacks.²³⁰ Aung San's army splintered apart, with military factions joining the insurrection. Many cities and towns in Southern Burma fell to bandits and local militias.²³¹ Mandalay fell under the joint control of Communists and the Karen.²³² In February 1949, Yangon was facing widespread insurgency, with

²²⁰ *Burma: The Way to Socialism -- & Havoc*, TIME, Aug. 30, 1963, available at <http://www.time.com/time/magazine/article/0,9171,940705,00.html>.

²²¹ SILVERSTEIN, *supra* note 192, at 108.

²²² Myint-U, *supra* note 1.

²²³ *Id.*

²²⁴ SILVERSTEIN, *supra* note 192, at 214.

²²⁵ *Id.*

²²⁶ CHARNEY, *supra* note 164, at 73.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ SILVERSTEIN, *supra* note 127, at 206.

²³¹ *Id.*

²³² Myint-U, *supra* note 1.

General Ne Win, formerly Aung San's deputy and now Commander-in-Chief, barely holding onto control of the City.²³³

On top of the Communist uprising, major ethnic rebellions broke out. The KNU, along with two Mon separatist groups, demanded independence to form a Karen-Mon State.²³⁴ The Burmese government refused the request in December 1948, resulting in an unofficial KNU rebellion, followed by the Third Battalion Karen Rifles and the First Kachin Rifles.²³⁵ The rebellion became official in January.²³⁶

General Ne Win and his officers were barely able to push back the Communists and the Karen.²³⁷ They were not given much opportunity for rest: an entirely new army, consisting of Chinese Nationalist forces, the Kuomintang (KMT), had arrived.²³⁸ They were fleeing from Mao Tse-tung, who had formally proclaimed the establishment of the People's Republic of China on October 1, 1949.²³⁹ The defeated remnants of Chiang Kai-shek's Nationalist armies retreated across the border into Burma.²⁴⁰ Alarmed by their presence, units of the Burmese army moved on them in July 1950.²⁴¹

The United States armed and supplied these Chinese Nationalists; naturally, Burmese protests to the United Nations were ignored.²⁴² The Burmese government felt that if China attacked, national extinction would follow shortly thereafter.²⁴³ The lesson for General Ne Win, according to Thant Myint-U, was that "Burma couldn't rely on the UN or international declarations of friendship; it had instead to build up a professional military machine, able to crush the insurgencies but also to defend itself against all its enemies."²⁴⁴

Myint-U argued that after pushing the ethnic minority armed groups back, the military had to take over control of government administration because political rivalries and ethnic minority armed group conflict had

²³³ *Id.*

²³⁴ CHARNEY, *supra* note 164, at 74.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ MYINT-U, *supra* note 13.

²³⁸ SILVERSTEIN, BURMA: MILITARY RULE, *supra* note 127, at 298.

²³⁹ MYINT-U, *supra* note 13, at 273.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 274.

²⁴² Myint-U, *supra* note 1.

²⁴³ See MARY CALLAHAN, MAKING ENEMIES: WAR AND STATE BUILDING IN BURMA 156 (2005) ("The Nu government . . . feared that the continuation on Burmese soil of U.S.-backed preparations for a KMT invasion into China would provoke the Chinese Communists into simply annexing all of Burma.").

²⁴⁴ MYINT-U, *supra* note 13.

decimated the civil institutions and human capital necessary for the government to function.²⁴⁵ This is true, but the period between 1948 and 1962—the civilian interstice between British colonialism and outright military rule—came to an end not merely due to increasing military encroachment on civilian politics, but also due to the threat from civil war and the Chinese the Burmese government perceived. The military took firm control of civil administration because it believed that a military-infused society at all governmental levels was necessary to protect against the constant threat of insurgency.²⁴⁶

Insurrection has been, and remains, a constant threat to Burmese stability. Ongoing ethnic minority armed group warfare continues to this day, with ethnic minority groups fighting against the junta.²⁴⁷ This very year, a member of one such group asserted his rights as stated by Clause 5 of the Panglong Agreement and embodied in the 1947 Constitution right of secession, saying “We will not [become a border guard as proposed by the junta], or disarm, until they have given us a place in a federal union and ethnic rights as was agreed in 1947.”²⁴⁸

²⁴⁵ *Id.*

²⁴⁶ See *id.* (“In the meantime, General Ne Win and his Japanese-trained officers were doing the actual fighting in the countryside. And it wasn’t easy. Barely had Ne Win’s small army managed to push back the Communists and the Karen when an entirely new enemy emerged in the eastern Shan hills. In 1949, with the fall of Peking and the retreat of Chinese Nationalist forces to Taiwan, a small remnant of Nationalists had retreated southwestward into Burma. The United States began arming and supplying them. The Burmese protested vigorously against this at the UN but in vain. The lesson for Ne Win was clear: Burma couldn’t rely on the UN or international declarations of friendship; it had instead to build up a professional military machine, able to crush the insurgencies but also to defend itself against all its enemies. As the ethnic minority armed groups were pushed back, the army began taking over administrative tasks, largely because the civil structures were so fragile and so compromised by political rivalries. The military fretted about political interference in their affairs, and believed that party politics – often corrupt and violent – were too messy to meet Burma’s needs. In the early morning of 2 March 1962, tanks and mechanised units loyal to Ne Win rolled into Rangoon, surrounding Government House and the Secretariat, arrested U Nu and all the other senior political figures, and installed the military dictatorship that survives to this day.”).

²⁴⁷ See MYINT-U, *supra* note 13, at 258 (“The Burmese civil war is the longest-running armed conflict in the world and has continued, in one form or another, from independence to the present day. In a way Burma is a place where the Second World War never really stopped. Ever since the first Japanese bombers hummed overhead and dropped their payloads over downtown Rangoon, the country has never known peace.”) (internal footnotes omitted).

²⁴⁸ Alastair Leithead, *Burma’s Kachin Army Prepares for Civil War*, BBC NEWS (Feb. 22, 2010, 5:42 PM), <http://news.bbc.co.uk/2/hi/asia-pacific/8528985.stm>.

C. Burma's Ethnic Minorities: Why Civil War Has Not Ended

As long as the military junta and pro-democracy groups do not directly address the demands and needs of Burma's ethnic minorities, Burma will always remain at the brink of balkanization. One way of understanding why the civil war persisted in Burma is to examine Burmese history from the point of view of its beleaguered ethnic minorities. To look at Burmese history from their perspective is, in part, to invert the cultural assumptions the Burmese people have about colonialism, religion, and government. Instead of feeling oppressed by British rule, many Burmese minorities, living in the Frontier Areas and facing indirect rule, have positive accounts of their time with the British.²⁴⁹ Many believe that British rule was a reprieve from the oppression of Burman overlords.²⁵⁰ The British heavily recruited Burmese minorities into the British army and in turn, the minority groups became well acquainted with their rulers.²⁵¹ British missionaries evangelized some minority groups, notably the Karen.²⁵² The Burmans, in contrast, became heavily suspicious of British rule and its foreign influences.²⁵³

During World War II, ethnic minorities helped the British retreat to India after the British were defeated by the Japanese.²⁵⁴ Minorities then fought against the Japanese and assisted the British and Americans in preparing for a counter-invasion when the Japanese overstayed their welcome.²⁵⁵ By contrast, the Aung San-led Thirty Comrades initially trained and allied themselves with the Japanese on the rationale that Asians should unite to fight against European colonialism.²⁵⁶ The Thirty Comrades saw the minorities as traitors and committed violence against them.²⁵⁷ Many ex-soldiers of the British Army were Karens. Two Karens were bayoneted in public, one allegedly for rape, one for theft. Their bodies were hacked into small pieces.²⁵⁸ A Burma Independence Army (BIA) unit was sent to subjugate Karens in Papun,

²⁴⁹ David C. Williams, *Constitutionalism Before Constitutions: Burma's Struggle to Build a New Order*, 87 TEX. L. REV. 1657, 1662 (2009).

²⁵⁰ *Id.* (citing SMITH, *supra* note 129 (referring to what has been called the "Pax Britannica" or British peace)).

²⁵¹ SMITH, *supra* note 129, at 44.

²⁵² Many members of these groups are now devout Christians. *Id.* at 44-45.

²⁵³ *Id.* at 45-46.

²⁵⁴ WILLIAM SLIM, *DEFEAT INTO VICTORY* 89-110 (Cassell & Co. Ltd., 2d ed. 1956) (chronicling the evacuation from Burma to India).

²⁵⁵ CHRISTOPHER BAYLY & TIM HARPER, *FORGOTTEN ARMIES: THE FALL OF BRITISH ASIA, 1941-1945*, at 204-06, 279, 352-53 (2004) (recounting the Kachin resistance to the Japanese as allies of the Allied nations).

²⁵⁶ See Williams, *supra* note 249, at 1662; MYINT-U, *supra* note 13, at 228-30.

²⁵⁷ SMITH, *supra* note 129, at 62-63.

²⁵⁸ TUCKER, *supra* note 158, at 44.

imprisoning and massacring the elders, looting and incinerating the villages, and molesting women.²⁵⁹ The BIA unit occupying Kadaingti announced that the Japanese had licensed them to kill Christians, who tended to be ethnic minorities.²⁶⁰ In Myaungmya, the BIA massacred 152 men, women, and children in cold blood, set fire to a priest's house, and burned the priest and the two men who were looking after him.²⁶¹ BIA members burned the church and shot a priest who they encountered at an orphanage, entering the orphanage to cut down the girls inside.²⁶² The youngest victim was a baby of six months.²⁶³ After finishing the slaughter, the BIA razed the remaining buildings to the ground.²⁶⁴ Fifty-two people were killed on the other side of town, all Karens, including men, women and children.²⁶⁵ A few days later, forty-seven Karen men were bayoneted to death.²⁶⁶ Aung San, feeling remorseful for the actions of the BIA during this time, managed a reconciliation with some Karen leaders, but the Karens never forgot the bloodshed.²⁶⁷

In light of these atrocities, the minorities wanted the British to remain behind long enough for Burma to gain full independence so that the British could develop a constitution that would protect minority groups against the Burmans.²⁶⁸ It was the British government that encouraged Aung San to negotiate with the minorities.²⁶⁹ Many minority groups preferred having independent states of their own as opposed to being part of a unified Burmese state.²⁷⁰ It was Aung San's leadership that held these various interests together.

With Aung San's assassination, Burma no longer had a leader that could ease a transition from rule by the sword to rule by the pen. And it is the constitutional defects left in place, most notably codified in the right to secession, that would prevent Burma from ever truly putting down the sword.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 44-45.

²⁶² *Id.* at 45.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ See Williams, *supra* note 249, at 1663 (citing BERTIL LINTNER, BURMA IN REVOLT, OPIUM AND INSURGENCY SINCE 1948, at xiv (1994)).

²⁶⁹ MYINT-U, *supra* note 13, at 247-48.

²⁷⁰ See *supra* note 90.

**D. The End of the Civilian-Governed Armistice:
The Right of Secession and Continuing Civil War**

In part, it was the law that enabled the ethnic minority armed groups to return. The right of secession in the 1947 Constitution ultimately played a major role in Burmese history. The ten-year grace period required by the Constitution before the right could be invoked amounted to a ticking time bomb, a legal incendiary device waiting to go off at any moment.

Sectarianism reigned as competing heirs to Aung San vied for leadership in the power vacuum that was left after his assassination.²⁷¹ This resulted in the splintering of Burma's political parties.²⁷² The constitutional provisions that denied self-determination to various sects led members of those groups to take up the sword where the pen had failed them. The Communist Party took up arms as it was barred from political office.²⁷³ Having been denied the right to self-rule by the 1947 Constitution, the Karens armed themselves and advanced their forces within sight of Rangoon.²⁷⁴

On January 4, 1958, the same date Burma would celebrate its tenth year of independence, the ticking time bomb of secession counted down to zero.²⁷⁵ In the preceding years, Burma's most powerful ethnic minority group, the Shan, was well aware of the right of secession. Though the Shan chiefs had agreed to the compromises that resulted in the 1947 Constitution, they were never comfortable with relinquishing their power. The Shan chiefs and the Burmese government had been engaged in secret negotiations regarding transfer of power since 1952.²⁷⁶ On July 17, 1953, the chiefs had presented the government seventeen demands in exchange for full relinquishment of their powers.²⁷⁷ A rift over the transfer of powers subsequently arose among the chiefs, and in late 1956, a faction of the Shan chiefs formed a new party called the Shan State Unity Party.²⁷⁸ This party passed resolutions advocating secession rather than surrender of their authority.²⁷⁹ It is unlikely that the close proximity to the end of the ten-year grace period of the right of the secession was coincidental.²⁸⁰

²⁷¹ See Williams, *supra* note 249, at 1664–65 (citing SMITH, *supra* note 129, at 107).

²⁷² *Id.* at 1664.

²⁷³ SMITH, *supra* note 129, at 106.

²⁷⁴ See Williams, *supra* note 116, at 1665 (citing LINTNER, *supra* note 268, at 15).

²⁷⁵ Josef Silverstein, *Politics in the Shan State: The Question of Secession from the Union of Burma*, 18 J. ASIAN STUD. 43, 43 (1958).

²⁷⁶ *Id.* at 53–54.

²⁷⁷ *Id.* at 54.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ Cf. FINK, *supra* note 140, at 27 (“As 1958 approached, heredity Shan *sawbwas*, or princes, and young Shan leaders began debating the status of the Shan states in public meetings. According to the 1947 Constitution, the Shan *sawbwas* could continue to

The Burmese government continued negotiations with the Shan State, but on January 4, 1958, the parties had reached no settlement.²⁸¹ Other ethnic groups, perhaps inspired by the Shan secession movement, formed their own armies and began collaborating with the Communists who were still fighting the Burmese army.²⁸² More and more groups, seeing their interests left unfulfilled by official legal bodies and taking note of the secession movement, chose armed resistance.²⁸³

Meanwhile, Prime Minister U Nu faced dissension within his own Union Party.²⁸⁴ Adding more fuel to the fire, the Karen National Defense Organization (KNDO), which was heavily involved in the attacks on the army after the ratification of the 1947 Constitution, continued to engage in insurrection along with the Kuomintang.²⁸⁵ U Nu's party, the Anti-Fascist People's Freedom League (AFPFL), split as a result of the dissension in 1958 into the "Clean" faction led by U Nu and Thakin Tin and the "Stable" faction led by Ba Swe and Kyaw Nyein.²⁸⁶ U Nu's government survived a no-confidence vote by a mere eight votes.²⁸⁷

The military, fighting its battles of violence with the Communists and other ethnic minorities, began a battle of rhetoric of its own, questioning the civilian government's effectiveness and the existence of civil disobedience.²⁸⁸ U Nu, faced with growing civil disobedience and the threat of civil war due to the active right of secession and the outspoken threats of some members of the

govern their territories as principalities, with representatives to one of the two houses in the state council elected from the people and representatives to the other selected among the princes. *They also had the right to leave the union in 1958 if political integration wasn't working out.* The central government wanted them to stay in the union, but among the Shans, feelings were mixed. Some princes close to the government supported the union, while many Shan students and farmers favoured independence. Many Karennis felt the same. This concerned Tamadaw leaders, who did not want any of the ethnic states to secede.") (emphasis added).

²⁸¹ *Id.* at 55.

²⁸² *Id.* at 29.

²⁸³ SMITH, *supra* note 90, at 129.

²⁸⁴ Frank N. Trager, *The Failure of U Nu and the Return of the Armed Forces in Burma*, 25 REV. POL. 309, 311 (1963).

²⁸⁵ *Id.*

²⁸⁶ Kay Latt, *Here Today, Gone Tomorrow*, IRRAWADDY (Nov. 30, 2009), http://www.irrawaddymedia.com/article.php?art_id=17136. The "Clean" AFPFL is so called because when it broke away, it declared itself "cleansed of impurity." The "Stable" AFPFL is so called because when the "Clean" AFPFL broke away, remaining leaders Ba Swe and Kyaw Nyein stayed put, declaring their faction "stable." Bruce Grant, *All Asia Is Watching Burma's Democratic Election*, AGE, Feb. 8, 1960, available at <http://news.google.co.uk/newspapers?id=iX41AAAAIBAJ&sjid=GKwDAAAAIBAJ&pg=6787,1182226&dq=>.

²⁸⁷ *Id.*

²⁸⁸ FINK, *supra* note 140, at 29.

Shan State Unity Party, temporarily handed over the controls of civilian government to General Ne Win in 1957.²⁸⁹ The caretaker government lasted until December 1960, when it held promised elections.²⁹⁰ Like the elections held in the 1940s, it perhaps shows a tradition of elections in Burmese history even in the face of martial law. U Nu, incredibly, returned to power in a landslide victory, evidence of his personal charisma.²⁹¹ In response, he continued his ineffectual ways, taking to the Rangoon party scene, worrying about his sinuses, and complaining that as acting prime minister he did not have enough time for golf.²⁹² Later, the Burmese government declared Buddhism to be the official state religion, which offended many ethnic minorities that were predominantly Christian. In response, these minority groups called for greater federalism and, unsurprisingly, secession.²⁹³ The military, having had a taste of rule and believing it could do better than U Nu, responded to the ever-present threat of secession by taking over permanently in 1962.²⁹⁴ The ethnic minorities, however, did not suddenly lay down their arms in the face of military control of the country.²⁹⁵ Every major ethnic group formed a resistance force.²⁹⁶ Most of these groups, drawing on the right of secession embodied in the 1947 Constitution, demanded independence from Burma.²⁹⁷

The laws barring Suu Kyi's ability to stand for election are certainly due to the military leaders' interests in maintaining power. However, as Burmese history informs us, there are additional reasons. The junta has had to manage a long history of ethnic conflict. It has also witnessed the results of an ineffectual civilian government that exacerbated factional tensions, creating dangerous divisions in both the AFPFL and the Shan State. And, as Part IV will outline, the junta is concerned that a transfer of legal and political power to a civilian government would immediately result in retribution against the military.

IV. THE BURMESE WAY TO SOCIALISM, THE 1990 ELECTIONS, NUREMBERG-STYLE TRIALS, AND LEGAL NORMS

The military junta governed Burma without a constitution from 1962 to 1973. In 1973, Burma adopted a socialist constitution implementing the "Burmese

²⁸⁹ LINTNER, *supra* note 268, at 143-45.

²⁹⁰ MYINT-U, *supra* note 13, at 285.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ See Williams, *supra* note 249, at 1665 (citing SMITH, *supra* note 129, at 192).

²⁹⁴ LINTNER, *supra* note 268, at 169.

²⁹⁵ SMITH, *supra* note 129, at 273-76.

²⁹⁶ See Williams, *supra* note 249, at 1665 (citing SMITH, *supra* note 129, at 93-94).

²⁹⁷ See, e.g., FINK, *supra* note 140, at 28 (describing the Shans' and Karennis' threats of secession).

Way to Socialism.”²⁹⁸ This governance strategy resulted in horrible economic mismanagement, with the most pernicious blunders due to the quixotic decisions of General Ne Win and his penchant for astrology.²⁹⁹ Student uprisings occurred in 1974, and ethnic conflict has persisted since 1948.³⁰⁰

A. Burmese Economics and the Burmese Way to Socialism

1. U Nu’s Government

In the modern era, Burma has always had a suspicion of capitalism and Western foreign investment. In May 1947 at the Sorrento Villa Conference, Aung San promised that capitalism would never again dominate Burma.³⁰¹ This statement came from the Burmese experience of colonial rule and the exploitation of Burma’s resources by foreign companies.³⁰² Aung San called for the incremental construction of a socialist state. First, the state would take control of Burma’s natural resources, power, and its communications and transportation infrastructure.³⁰³ After this period, Burma would begin the implementation of state socialism, whereby the state or people’s cooperatives would assume control of all means of production while allowing private

²⁹⁸ SMITH, *supra* note 129, at 199.

²⁹⁹ See *Burma: The Way to Socialism-- & Havoc*, *supra* note 220 (“Burma’s business is virtually at a standstill, credit is nonexistent, foreign investment has vanished—all because Dictator Ne Win insists on instant, total socialism. . . . Ne Win also produced a vague document called “The Burmese Way to Socialism” and nationalized industry, collectivized agriculture, and took complete control of foreign trade. . . . Industrial production has fallen 40% in three months and urban unemployment has soared. The few remaining private companies are clamoring for nationalization, hoping to get a better break on raw material allocations and some protection against strikes.”); Robert Horn, *In Thailand, A Little Black Magic Is Politics as Usual*, TIME (Mar. 20, 2010), <http://www.time.com/time/world/article/0,8599,1973871,00.html> (“But the most occult obsessed nation in the region is easily Burma. Former dictator Ne Win was so consumed by numerology that in 1987 he demonetized all bank notes and reissued ones only with the number nine or divisible by the number nine. That was his lucky number, but it proved less auspicious for the millions who had their savings wiped out in the move. On the advice of astrologers, he also shot his reflection in a mirror to foil anyone plotting his assassination and rode on a rocking horse inside a plane that circled a pagoda nine times. Burma’s feared former intelligence chief Gen. Khin Nyunt was rumored to have dressed up as a woman to perform black magic ceremonies, known as yadaya che in Burmese, supposedly to sap the power of his female archrival democracy leader Aung San Suu Kyi.”).

³⁰⁰ LINTNER, *supra* note 268, at 232.

³⁰¹ CHARNEY, *supra* note 164, at 81.

³⁰² *Id.*

³⁰³ *Id.* at 82.

ownership.³⁰⁴ The Sorrento Villa Conference established the economic policy that would inform Burma's national planning until 1988.³⁰⁵

During Nu's government, Nu argued that a small class of foreign capitalists had dominated the Burmese economy during the colonial period.³⁰⁶ The AFPFL started nationalizing foreign businesses, a measure which Winston Churchill strongly criticized.³⁰⁷ Nu's government took steps to control the flight of foreign investment, first by placing strict export controls on precious stones, controlling Sterling Area currency and security transactions, and placing limits on single normal business remittances of one hundred pounds.³⁰⁸ Nu did not want foreign business elites to be removed and replaced by Burmese business elites, intending state socialism instead, which he perceived to be the only solution to the social inequalities that had racked Burma during the colonial period.³⁰⁹ By 1950, Nu had implemented the Pyidawtha ("pleasant country") plan that aimed for government-directed economic development and the creation of a welfare state.³¹⁰ Burma was growing: state investment was increasing, and Burma's GDP was thirty percent greater in the mid-1950s than it had been from 1950 to 1951.³¹¹ However, Burma was still heavily reliant on its main export, rice, and so the success of its domestic economy hinged on the fluctuating demand for rice in the global market.³¹² The Korean War bolstered rice prices, but after its end, prices collapsed.³¹³ Burma turned to other sources of revenue, including a reparation agreement with Japan in November 1954 under which Japan agreed to pay Burma \$200 million in goods and services over a ten-year period, with another \$50 million allocated to joint enterprises over that same period.³¹⁴ In December 1955, Nikita Krushchev arrived in Yangon and promised Russian aid for Burmese economic development, including industrial plants and major irrigation works, in exchange for Burmese rice.³¹⁵

However, like many Burmese, Nu had underestimated the importance of the ongoing civil war. In his own words: "Our greatest blunder . . . [was] our diversion to economic and social welfare activities as soon as the law and order

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.* at 83.

³¹¹ *Id.* at 83-84.

³¹² *Id.* at 84.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

situation improved slightly, instead of concentrating all our energies on the complete restoration of law and order in the country."³¹⁶

2. The Burmese Way to Socialism

With the 1962 coup, a new state ideology was instituted: elimination of freedom of the press, elimination of monastic autonomy, and other forms of strict social control.³¹⁷ Aung Gyi was the political mastermind behind the retooling of Burmese economics.³¹⁸ He implemented Import Substitution Industrialization (ISI), advocating a reduction of foreign dependency by boosting domestic industrial production while at the same time trying to attract foreign investment.³¹⁹ Tin Pe, the "Red Brigadier" and Minister for Agriculture and Forests, Minister for Cooperatives and Supply, and Acting Minister for Finance and Revenue, was behind the cooperative movement in Burma's agricultural sector.³²⁰ He implemented a new system of granting agricultural loans based on the crops to be cultivated.³²¹

But the ideological lynchpin of the new military government was the publication of the BSPP declaration titled *The System of Correlation of Man and His Environment* on January 17, 1963.³²² The declaration was a mixture of Marxism, historical dialecticism, and Buddhism. It advocated that man reject those social and economic systems that permit his own exploitation and oppose the classes that perpetuate these systems, and that socialist society was the only answer.³²³ Under Tin Pe's guidance, a sweeping nationalization of Burma's economy took place. All domestic rice purchases and the import and export trade were completely nationalized, as well as all private business and industry.³²⁴

The results were catastrophic. The economy steadily worsened over ten years, with shortages of consumer goods being common.³²⁵ The government's reaction was to control the economy even further, but that failed.³²⁶ The black

³¹⁶ *Id.*

³¹⁷ *Id.* at 120.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.* at 121.

³²¹ *Id.* at 122.

³²² *Id.*

³²³ *Id.* at 122-23.

³²⁴ *Id.* at 123.

³²⁵ *Id.*

³²⁶ *Id.* at 124.

market exploded.³²⁷ At the end of 1965, Ne Win admitted to the BSPP in a seminar that the economy was a “mess” and that widespread starvation would have taken place if Burma were not an agricultural country.³²⁸

B. Beginnings of Social Unrest: 1987–1988

The Burmese Way to Socialism amounted to major economic mismanagement of Burma’s considerable resources, resulting in severe currency devaluation.³²⁹ On September 5, 1987, General Ne Win demonetized sixty percent of the currency in circulation without compensating the holders.³³⁰ The adduced rationale for the demonetization was the elimination of the black market and border trade controlled by ethnic minority groups who were still seeking autonomy.³³¹ The reality appeared to be rooted in Ne Win’s numerological interests.³³² Supporting the astrological theory is the fact that Ne Win kept 45- and 90-kyat notes in circulation: Burmese astrologers consider the number 9 lucky.³³³ The 2008 Constitution includes provisions which guard against such mistakes. Section 36(e) prohibits the Union from demonetizing any currency legally in circulation.³³⁴ Ne Win’s bizarre demonetization resulted in economic chaos, wiping out the life savings of many Burmese who kept their savings in currency.³³⁵ People raced to dispose of their cash as soon as possible for fear of further demonetizations.³³⁶ They loaded up on nonperishable commodities with the cash they had on hand.³³⁷ The economic fallout acutely affected college graduates, as demonetization

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ BERTIL LINTNER, *OUTRAGE: BURMA’S STRUGGLE FOR DEMOCRACY* 192 (1990).

³³⁰ STEINBERG, *supra* note 29, at 131.

³³¹ WORLD BANK, *MYANMAR: POLICIES FOR SUSTAINING ECONOMIC REFORM* 1 (1995).

³³² STEINBERG, *supra* note 29, at 131.

³³³ *Former Dictator Ne Win Dies*, BBC NEWS (Dec. 5, 2002), <http://news.bbc.co.uk/2/hi/asia-pacific/2544975.stm>.

³³⁴ 2008 CONST. art. 36(e). However, there is constitutional ambiguity as to whether this prohibition would apply to those currencies still in circulation that have had their status of legal tender revoked in the demonetizations of 1964, 1985, and 1987. See Sean Turnell, *A State-Run “Market Economy”*, IRRAWADDY (Nov. 16, 2009), http://www.irrawaddy.org/print_article.php?art_id=17222.

³³⁵ SMITH, *supra* note 129, at 25–26.

³³⁶ STEINBERG, *supra* note 29, at 131.

³³⁷ *Id.*

and its effects wiped out their savings and increased unemployment.³³⁸ Protests spread throughout the country and most cities and towns.³³⁹

On March 12, 1988, the tension reached a high point. A fight broke out between Rangoon Institute of Technology (RIT) students and local residents at the Sandar Win tea shop.³⁴⁰ The reasons for the fight were not clear and may not have been political.³⁴¹ Riots ensued the next day as university students clashed with riot police. The police opened fire on students, injuring dozens and killing at least one.³⁴² RIT students demanded a report on the killings and compensation for the families of those killed.³⁴³ In response, on March 15, soldiers and police raided the RIT campus, beating students with batons and conducting mass arrests, with state radio claiming the students were completely at fault for the raid.³⁴⁴

The RIT incidents became the catalyst for political activism in Burma. Students increased their protests in response to Ne Win's demonetization.³⁴⁵ In March 1988, small groups of Burmese students took to the streets of Yangon demanding political change.³⁴⁶ Ne Win ordered his men to fight the protestors. In one incident, forty-one wounded students suffocated to death in a police van.³⁴⁷ At the end of March, Suu Kyi would receive word of her mother's poor health and make her fated trip to Burma, returning to Yangon to sit at the bedside of her dying mother.³⁴⁸

Stunningly, on July 23, 1988, Ne Win, in a televised address, announced his resignation as chairman of the ruling political party, the Burma Socialist Program Party (BSPP), and called for a referendum on Burma's political future.³⁴⁹ In his resignation speech, Ne Win gave a stern warning to protestors: "When the army shoots, it shoots to hit; it does not fire in the air to scare.

³³⁸ *Id.* at 132.

³³⁹ See Williams, *supra* note 249, at 1665 (citing LINTNER, *BURMA IN REVOLT*, *supra* note 268, at 373).

³⁴⁰ GOLDSTON, *supra* note 6, at 3.

³⁴¹ WHITNEY STEWART, *AUNG SAN SUU KYI: FEARLESS VOICE OF BURMA* 69 (1997).

³⁴² The person killed was named Maung Phone Maw. *Id.*

³⁴³ CHARNEY, *supra* note 164, at 149.

³⁴⁴ *Id.*

³⁴⁵ Megan Clymer, *Min Ko Naing, "Conqueror of Kings": Burma's Student Prisoner*, 8 J. BURMA STUD. 34 (2008), available at http://www.niu.edu/burma/publications/jbs/vol8/Abstract2_ClymerOpt.pdf.

³⁴⁶ AUNG SAN SUU KYI, *THE VOICE OF HOPE: CONVERSATIONS WITH ALAN CLEMENTS* (2008) 11.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

Therefore, I warn those causing disturbances that they will not be spared if in the future the army is brought in to control disturbances."³⁵⁰

Ne Win's party members immediately opposed his request.³⁵¹ Sein Lwin was named the new Chairman of the BSPP, and thus the President of Burma.³⁵² Outraged, millions of Burmese citizens marched in every city and town throughout the country.³⁵³ Protests reached a fever pitch in August 1988, when the famed 8888 Uprising occurred. Students planned for a nationwide demonstration on August 8, 1988, an auspicious date in Burmese numerology. The government responded by killing thousands of protestors when troops opened fire on marching civilians.³⁵⁴

On August 12, 1988, in response to intense domestic and international criticism, Sein Lwin resigned as Chairman of the BSPP, bringing demonstrations to a halt.³⁵⁵ Dr. Maung Maung, who had received his J.S.D. from Yale Law School in 1962,³⁵⁶ replaced Sein Lwin on August 19, 1988.³⁵⁷ Maung Maung made several concessions to demonstrators, including the declaration that newspapers, journals, and magazines were now allowed to be published.³⁵⁸ Previously nationalized publications and presses were denationalized and returned to their owners.³⁵⁹ Despite these gestures, Maung Maung, due to his longstanding affiliation and friendship with Ne Win, remained unpopular among the people.³⁶⁰ Demonstrations continued, and indeed, the number of demonstrators grew.³⁶¹

It was at this moment that Aung San Suu Kyi became involved. On August 26, 1988, she made her first public speech, announcing her decision to enter the struggle for democracy at a rally attended by an estimated 500,000 people who had gathered on the grounds close to the Shwedagon Pagoda in Yangon.³⁶² Suu Kyi said of the event: "This great struggle has arisen from the intense and deep desire of the people for a fully democratic parliamentary

³⁵⁰ CHARNEY, *supra* note 164, at 152.

³⁵¹ SUU KYI, *supra* note 346, at 11.

³⁵² CHARNEY, *supra* note 164, at 151.

³⁵³ SUU KYI, *supra* note 346, at 11.

³⁵⁴ *Regret, Anger for Burma's '88 Uprising Exiles*, ABC NEWS (Aug. 8, 2008), <http://www.abc.net.au/news/stories/2008/08/08/2328270.htm?section=world>.

³⁵⁵ CHARNEY, *supra* note 164, at 153.

³⁵⁶ DR. MAUNG MAUNG: GENTLEMAN, SCHOLAR, PATRIOT 13 (Robert Taylor comp., 2008).

³⁵⁷ CHARNEY, *supra* note 164, at 153.

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.* at 154.

³⁶² SUU KYI, *supra* note 346, at 12.

system. I could not, as my father's daughter, remain indifferent to all that was going on."³⁶³ The protests took on a meaning greater than their economic origins: they began to symbolize the Burmese people's desire for the rule of law and the ability to rule themselves in a democratic government.³⁶⁴

Demonstrators gave the Maung Maung government a September 7 deadline to resign, or they would launch national strikes and demonstrations.³⁶⁵ That deadline came and went, with the Maung Maung government saying that Burmese could "no longer live in peace and security" and that some people were only demonstrating for looting opportunities.³⁶⁶ The government released ten thousand criminals from prison, which some saw as an effort to sow civil discord so the military would be prompted to take over.³⁶⁷

BSPP delegates attended an emergency congress on September 10 to vote on a national referendum to determine whether Burma should continue as a one-party state or change to a multi-party state.³⁶⁸ Seventy-five percent of delegates voted against holding a national referendum, instead voting in favor of holding a general election.³⁶⁹ Multi-party general elections were to be held within three months.³⁷⁰

The protestors wanted the military government removed, and under Suu Kyi's leadership, they employed tactics of nonviolence and civil disobedience in pursuit of democracy.³⁷¹ However, the protests became more physical and confrontational, escalating on September 15, 1988, when student demonstrators almost took over the Ministry of Defense,³⁷² only deterred by the urging of Aung Gyi.³⁷³ On September 17, protestors surrounded government buildings, including City Hall and the Central Bank.³⁷⁴ Most importantly, on that date, demonstrators took over the Ministry of Trade.³⁷⁵ At this point, the military became extremely alarmed and believed that the complete breakdown of

³⁶³ *Id.*

³⁶⁴ See LINTNER, *supra* note 268, at 374 (describing the rise of the pro-democracy National League for Democracy (NLD) party as led by Aung San Suu Kyi).

³⁶⁵ *Id.* at 155.

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 156.

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ SUU KYI, *supra* note 346, at 12.

³⁷² STEINBERG, *supra* note 29, at 2.

³⁷³ *Id.*

³⁷⁴ CHARNEY, *supra* note 164, at 159.

³⁷⁵ STEINBERG, *supra* note 29, at 2.

government authority was close at hand.³⁷⁶ As protests intensified, believing that democratic changes were imminent, General Ne Win summoned Saw Maung to his private residence on September 17 and ordered him to organize a coup the next day.³⁷⁷

On September 18, Saw Maung staged the coup, toppling Maung Maung's civilian government.³⁷⁸ The rule of Burma was turned over to a twenty-one-member group of military commanders known as the State Law and Order Restoration Council (SLORC).³⁷⁹ SLORC instated martial law, punishing gatherings of more than four people by imprisonment; imposing a night

³⁷⁶ CHARNEY, *supra* note 164, at 159. Maung Maung was negotiating with Suu Kyi on the terms of the transfer of power from the temporary civilian government to Suu Kyi and her colleagues. Maung Maung was receiving input during negotiations from Saw Maung, who was the Defense Minister and the head of the army at that time. The reason for the discussion between the two was that Saw Maung's condition for transfer of power was the military's retention of the Ministry of the Interior (which contained the police forces) and Ministry of Defense (which contained the military). Saw Maung was concerned that there would be reprisals against the police and the military if governmental power was transferred to Suu Kyi. He believed that there would be massacres of government personnel in the event of a transfer, which would lead to the deterioration of Burma's security forces, resulting in anarchy and sectarian violence. Maung Maung demanded of Saw Maung that the police and military could not take any actions against the protestors—no shooting, no detainment, and no beatings. In Saw Maung's view, the handcuffing of the military resulted in chaos: granaries and stores were ransacked, police stations were taken over, and people were beheaded in the streets. The tension between Saw Maung and Maung Maung reached a boiling point with the takeover of the Ministry of Trade. Demonstrators raided the building on September 17, 1988, surrounding the several dozen soldiers within. The soldiers surrendered and were taken hostage. Likely spooked by the building takeover, Saw Maung was said to have visited General Ne Win at his palatial home on Inya Lake that same evening and again on the morning of the following day, presumably to discuss the prospect of the coup that was instituted the next day. *Id.*

³⁷⁷ *Id.* It is unclear whether the coup was planned in advance or as a response by the military to continuing civilian encroachment on military personnel and facilities. See STEINBERG, *supra* note 29, at 2 ("There were persistent rumors in Burma and Thailand that before the coup, Saw Maung flew to Chiangmai and met with General Chavalit Yungchaiyudh, Thai supreme commander. At that time, Saw Maung is said to have informed Chavalit that a coup would be forthcoming that was necessary; otherwise anarchy would prevail and the communists would take over, and this would be a danger to Thailand. If true, it would not preclude the possibility that timing was determined by conditions in Burma, such as those on September 15 at the Ministry of Defense and the September 17 siege at the Ministry of Trade. These rumors are given further credence by the fact that in February 1991, General Suchinda Kraiprayoon, the Thai commander at that time, was in Rangoon meeting with the Burmese military hierarchy, and the day following his return to Bangkok there was a coup against the Thai government. The speculation is that the Thai reciprocated the Burmese courtesy of giving early warning.").

³⁷⁸ CHARNEY, *supra* note 164, at 159.

³⁷⁹ SUU KYI, *supra* note 346, 12.

curfew; and replacing civilian courts with military tribunals, among other measures.³⁸⁰ The military broke up demonstration and strike centers and shot students who resisted.³⁸¹

Regional and local Law and Order Restoration Councils (LORCs) were established at the divisional, township, ward, and village levels.³⁸² Each township council would have a military officer as chairman and in other positions of power.³⁸³ At the ward and village tract level, the LORCs consisted of three local elders, one of whom would be selected by a higher-ranking LORC (a military official, most likely) as chairman, and a local council clerk with no history of involvement in political organizations.³⁸⁴ After the coup, Saw Maung laid out SLORC's four immediate tasks: promoting law and order, peace and tranquility; creating secure and smooth transport; easing the food, clothing, and shelter needs of the people; and holding democratic multi-party general elections.³⁸⁵

Suppression associated with Saw Maung's coup led to between eight thousand and ten thousand deaths.³⁸⁶ SLORC enacted the Political Parties Registration Law on September 27, 1988, requiring all parties that wished to run for election to register with the Election Commission,³⁸⁷ a requirement that would be repeated for the 2010 elections.³⁸⁸ By the February 28, 1989 deadline, 233 parties had registered, many of them military-backed.³⁸⁹

In the meantime, the KNU had been training students who had fled the military crackdown in guerilla warfare and mortar use.³⁹⁰ The idea was to launch a guerrilla campaign against Saw Maung's regime with an end goal of establishing a democratic government in Burma.³⁹¹ By October 9, 1988, there were two thousand students and protestors training in one KNU camp

³⁸⁰ *Id.*

³⁸¹ CHARNEY, *supra* note 164, at 160.

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.* at 161.

³⁸⁷ *Id.*

³⁸⁸ See MICHAEL F. MARTIN, CONG. RESEARCH SERV, R41218, BURMA'S 2010 ELECTIONS: IMPLICATIONS OF THE NEW CONSTITUTION AND ELECTION LAWS (2010), available at <http://www.fas.org/sgp/crs/row/R41218.pdf>.

³⁸⁹ CHARNEY, *supra* note 164, at 161.

³⁹⁰ *Id.* at 163.

³⁹¹ *Id.*

alone.³⁹² In response, SLORC announced an amnesty program for students who returned to government-held areas by November 18.³⁹³

The military did follow through on its promise to hold elections, which may explain in part why it held elections again in 2010. However, the election results were not honored. The Election Law Drafting Committee published an election timetable in February 1989, scheduling general elections for May 1990.³⁹⁴ The NLD was formed in September 1988³⁹⁵ with Suu Kyi as General Secretary.³⁹⁶ Tin Oo was Vice Chairman; he was a former defense minister and commander-in-chief of the armed forces, who resigned from both posts in 1975 and was later imprisoned.³⁹⁷ Aung Gyi was the League Chairman.

The NLD swept the elections with over 7.9 million votes, winning 392 of the 447 (87.6%) seats contested.³⁹⁸ SLORC was shocked by its defeat, expecting a handy victory for its major military-backed party, the NUP.³⁹⁹ Saw Maung explained in late June 1990 that before SLORC could hand over power, the 1947 Constitution, which he argued was seriously flawed, would have to be rewritten.⁴⁰⁰ While many thought Saw Maung's motivation was to delay or prevent a power transfer to the NLD,⁴⁰¹ his claim was not necessarily wrong. The 1947 Constitution contains the right of secession which ethnic minorities assert to this day. While Saw Maung's motivation for raising that argument may be contested, the fact remains that the 1947 Constitution needs to be dealt with before Burma can move forward.

The NLD did not help itself with its response to its smashing victory in the 1990 elections. In a politically imprudent moment, some NLD members declared that military officials deserved legal reprisal for their actions. This naturally stirred up agitation within the junta. In July 1990, senior NLD member U Kyi Maung in an interview with *Asiaweek* magazine said that certain military senior officials, such as Major-General Khin Nyunt, might feel insecure about the prospect of facing a Nuremberg-style trial.⁴⁰² Philippine Foreign Minister Raul Manglapus echoed this sentiment when he visited the generals in Yangon in December 1990, stating that the generals seemed

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.* at 164.

³⁹⁵ *Id.* at 165.

³⁹⁶ *Id.* at 166.

³⁹⁷ *Id.*

³⁹⁸ *Id.* at 168.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 174.

⁴⁰¹ *Id.*

⁴⁰² See Kay Latt, *Constitutional Impunity for Generals in Burma*, IRRRAWADDY (Jan. 4, 2010), http://www.irrawaddy.org/article.php?art_id=17518. See also Myint-U, *supra* note 1.

obsessed by fears of “Nuremberg-type” trials if they handed over power to the NLD.⁴⁰³ The calls for Nuremberg-style trials by members of the NLD contributed to the junta’s eventual decision to dishonor the 1990 election results and alerted the junta generals to the possibility that if they transferred substantial legal power to a civilian government, they could face retribution.⁴⁰⁴

What were the grounds for the coup? After all, Burma appeared to be on the brink of democratic rule. Why should the military contest this social and political movement? Most obviously, self-interest. Also, the military was concerned about chaos in Burma after the removal of military rule.⁴⁰⁵ Most of the ethnic minority groups wanted to exercise their right of secession under the 1947 Constitution.⁴⁰⁶ These groups would still be present after military rule. How would ordinary citizens defend themselves and the democratic government against them? Such concerns must have crossed the minds of the military leaders. The military could have negotiated with Suu Kyi, the NLD, and other civilians, but instead, it chose the path of imprisonment, detainment, and violence. The military could have decided to cooperate with Suu Kyi to reach a solution by which the military and the civilian government could peacefully coexist. Instead, the military, ethnic minorities, and members

⁴⁰³ Associates to Develop Democratic Burma, *General Saw Maung Has Nervous Breakdown*, 3 BURMA ALERT 1 (1992), <http://www.burmalibrary.org/docs/BA1992-01.pdf>.

⁴⁰⁴ See Associated Press, *3 Policemen Beheaded in Burma Riots; Death Toll Reaches 78 as 30 Protestors Are Gunned Down*, L.A. TIMES (Aug. 10, 1988), http://articles.latimes.com/1988-08-10/news/mn-325_1_death-toll; Burma Watcher, *Burma in 1988: There Came a Whirlwind*, 29 ASIAN SURVEY 178 (1989).

⁴⁰⁵ See *History of Burma’s Transition 1988–2009*, MIZZIMA, <http://www.mizzima.com/political-background/history-of-burmas-transition.html> (last updated Jan. 5, 2010) (“In the first attempt for talks, NLD vice-chairman Kyi Maung stated that he would send a message to the SLORC for talks without conditions on a speedy transfer of power on the basis of the 1947 constitution which, slightly amended, was already prepared for use. The army leadership had made it clear that they viewed the constitution as fatally flawed because it grants the right of secession to the Shan and Kayah states; and was tainted with colonial heritage because it had been written before independence. The SLORC refused to respond and factions within the NLD debate what they should do.”).

⁴⁰⁶ See *Chin*, UNREPRESENTED NATIONS AND PEOPLE’S ORGANIZATION (Mar. 25, 2008), <http://www.unpo.org/members/7866> (one of the Chin ethnic group’s stated demands is to ensure “the national states’ right of secession must be included in the federal constitution”); *Karenni State*, UNREPRESENTED NATIONS AND PEOPLE’S ORGANIZATION (Mar. 25, 2008), <http://www.unpo.org/members/7886> (“1948 Burma became independent from the British Empire and the Karenni State was incorporated into Burma. The Karenni people refused to accept Burma’s rule and because of that, military administration was imposed on them.”); *Mon*, UNREPRESENTED NATIONS AND PEOPLE’S ORGANIZATION (Mar. 25, 2008), <http://www.unpo.org/members/7897> (“The desires of the ruling Burmese were forcefully imposed on the Mon people and resulted in a civil war. The Mon revolted against the central Burmese government in 1962 through the New Mon State Party (NMSP). A partially autonomous Mon state, Monland, was created in 1974 covering Tenasserim, Pegu and Irrawaddy. Resistance continued until 1995 when NMSP and SLORC agreed to a cease-fire.”).

of the pro-democracy movement perceived their struggle as an “us versus them” dynamic, which prevented each group from understanding the perspectives of opposing parties and seeing the possible negative consequences of its own views.

Saw Maung suffered from what appeared to be a mental breakdown from December 1991 to January 1992, and his two most powerful subordinates, Than Shwe and Khin Nyunt, competed for succession.⁴⁰⁷ Than Shwe won. In 1992, he assumed Saw Maung’s positions as defense chief and head of the army, replaced him as SLORC Chairman, and assumed the prime ministership.⁴⁰⁸ The 1990 election results have not been honored to this day, and Burma has been in a state of stasis ever since. It is scarred by military rule and lacks a democratic government, and its people and civilization are frozen in time, isolated from the West.

V. BURMA TODAY

Most of the popular discourse involving Burma today advocates removal of the military junta. Even assuming the junta could be removed, the potential state of the country after the junta’s removal is worth considering. The junta asserts that without a constant military presence to protect the country from ethnic minority groups, the country will disintegrate into full-scale civil war and eventually dissolve.⁴⁰⁹ In support of this argument, the junta points out that it has weakened ethnic opposition groups⁴¹⁰ and signed written as well as oral ceasefire agreements with many groups during the mid-1990s.⁴¹¹

Recently, the junta suggested to the seventeen armed ceasefire groups that they transform their armies into Border Guard Forces,⁴¹² a misguided and unlikely but perhaps well-intentioned proposal rooted in the idea of national unity. The United Wa State Army (UWSA), the largest armed ceasefire group,

⁴⁰⁷ *Id.* at 177.

⁴⁰⁸ *Id.*

⁴⁰⁹ Many have suggested that Burma has been in a state of ongoing partial civil war since 1948. See, e.g., Mae Sot, *Child’s View of Burma’s Civil War*, C.S. MONITOR (June 22, 2005), <http://www.csmonitor.com/2005/0622/p15s01-wosc.html>.

⁴¹⁰ THAILAND BURMA BORDER CONSORTIUM, PROGRAMME REPORT JULY TO DECEMBER 2008, at 150–51 (2008).

⁴¹¹ TAYLOR & FRANCIS GROUP, EUROPA WORLD YEARBOOK 2, at 3014 (45th ed. 2004); AMNESTY INTERNATIONAL, 1995 ANNUAL REPORT FOR MYANMAR (BURMA) (1995), <http://www.amnestyusa.org/annualreport.php?id=ar&yr=1995&c=MMR> (showing written ceasefire agreements); STEINBERG, *supra* note 29, at 187 (signing of cease-fire agreements). A seventeen-year ceasefire agreement with the Kachin Independence Army (KIA) is soon coming to an end, and some suggest a civil war could take place. Leithead, *supra* note 248.

⁴¹² Salai Han Thar San, *Uneasy Calm Prevails Between Junta and Ceasefire Groups*, MIZZIMA (Jan. 20, 2010), <http://www.mizzima.com/news/inside-burma/3404-uneasy-calm-prevails-between-junta-and-ceasefire-groups.html>.

did not comply with the Border Guard conversion request by the February 28, 2010 deadline.⁴¹³ There is speculation that large-scale conflict will take place between junta and UWSA forces.⁴¹⁴ The junta believes that ethnic violence is a real threat without its presence.

The hard reality is that the junta will continue to be the one certainty in Burma for the future. It is unlikely that something akin to the no-fly zone approved by the United Nations for Libya will be put in place in Burma. The Libyan resolution passed with ten Security Council votes over abstentions from Russia, China, Germany, Brazil, and India.⁴¹⁵ But China's and Russia's track records show they do not abstain on Security Council votes involving Burma.⁴¹⁶

On January 12, 2007, the UN issued a press release noting that the Security Council failed to adopt a draft resolution on the "situation in Myanmar" which would have had the following effects:

[It] would have urged the Government to respond in a concrete, complete, and timely manner to the Secretary-General's efforts to fully enable his "good offices" mission. It would have also called on the Government to take concrete steps to allow full freedom of expression, association and movement by unconditionally releasing Daw Aung San Suu Kyi and all political prisoners, lifting all constraints on all political leaders and citizens, and allowing the National League for Democracy (NLD) and other political parties to operate freely.⁴¹⁷

There were nine votes in favor and three against (China, the Russian Federation, and South Africa).⁴¹⁸ Congo, Indonesia, and Qatar abstained.⁴¹⁹ The Chinese representative explained his position, stating as follows:

[I] would vote against the draft, as the matter [is] an internal affair of a sovereign State and [does] not pose a threat to international or

⁴¹³ Wai Moe, *Troop Buildup Continues as BGF Deadline Passes*, IRRRAWADDY (Mar. 4, 2010), http://www.irrawaddy.org/article.php?art_id=17954.

⁴¹⁴ *Id.* See also Salai Han Thar San, *supra* note 412.

⁴¹⁵ Dan Bilefsky & Mark Landler, *As U.N. Backs Military Action in Libya, U.S. Role Is Unclear*, N.Y. TIMES (Mar. 17, 2011), <http://www.nytimes.com/2011/03/18/world/africa/18nations.html>.

⁴¹⁶ See, e.g., Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Myanmar, Owing to Negative Votes by China, Russian Federation, U.N. Press Release SC/8939 (Jan. 12, 2007), available at <http://www.un.org/News/Press/docs/2007/sc8939.doc.htm>.

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

regional peace and security. While no one would dispute that Myanmar was faced with a series of grave challenges, similar problems existed in many other countries as well. The Council's involvement on the issue of Myanmar would not only exceed its mandate, but also hinder discussions by other relevant United Nations agencies.⁴²⁰

Given the support of China and Russia, the junta must be dealt with as something that will remain, not something that can be removed. The ethnic minorities have seventeen armed rebel groups and have made renewed demands for secession; their desire for ethnic rights is not going to go away and must be settled. And the pro-democracy groups spearheaded by Suu Kyi and the NLD are not going to go away until their interests are addressed.

One solution, as suggested by Professor David C. Williams, is dialogue among the military, ethnic minority, and pro-democracy groups.⁴²¹ There is some international agreement on this point.⁴²² In order to have an effective tripartite dialogue, certain defects in Burmese law and mistakes by Burmese actors must be addressed, namely: (1) the right of secession for ethnic minority groups, (2) the inclination of pro-democracy groups to invoke legal principles before actual legal and political power has been transferred to pro-democracy groups, and (3) the possibility that the generals will never transfer legal power to a civilian government so long as they fear the civilian government will use that legal power against them. The following subsections will deal with these issues and how they should be discussed during possible tripartite dialogue.

A. The Right of Secession

Tripartite dialogue will take the form of a determination of what constitutional, legal, and political content should be codified in Burma's laws. It is here that all parties should be acutely aware of the role law has played in Burma's history. The law has been inappropriately invoked and used at important tension points in the past, resulting in longstanding hardship, oppression, and suffering of the Burmese people. The right of secession, the defect created in the 1947 Constitution, must be addressed. The grant of full autonomy with a vested right of secession, if allowed to persist, will only result in the continuation of Burma's status quo: civil war among the junta and various armed ethnic groups. This will support the junta's primary argument for its need to maintain complete power: preventing the country from splintering. If the junta truly wishes for peace and total unification, it must not

⁴²⁰ *Id.*

⁴²¹ Williams, *supra* note 249, at 1686.

⁴²² See, e.g., G.A. Res. 63/245, ¶5(a), U.N. Doc. A/RES/63/245 (Jan. 23, 2009) (asking the junta to engage in tripartite dialogue); Letter from Twenty Former Heads of State to the Honorable Hu Jintao, President, P.R.C. (Oct. 5, 2007), available at www.oslocenter.no/index.php?option=com_content&task=view&id=92&Itemid=44 (urging China's president to apply his leverage with the regime in favor of this dialogue).

treat ethnic minorities as lesser beings to be oppressed, abused, forcibly removed to other countries, internally displaced within their own country, and killed. Rather, it must treat them as full Burmese citizens with all the civil rights and liberties that inhere with that distinction.

To do so, the junta must redistribute a higher percentage of GDP to ethnic minority groups, as well as to the Burmese people in general. The Soros Foundation has estimated that Burma's government spends around forty percent of its GDP on the military.⁴²³ By contrast, public health spending was less than one percent in 2010, and education spending was roughly one percent in 2001.⁴²⁴

B. Dealing with the Military's Fear of a Civilian Government

As articulated in Part III, on the cusp of transfer of legal and political power to a civilian government in 1990, the generals panicked, fearing that civilians would use legal power against the generals in the form of Nuremberg-style trials. Numerous senior military officials from that era are still in power today, and Senior-General Than Shwe has only recently stepped down. In February 2011, Than Shwe appointed three military generals to top posts: Lieutenant-General Ko Ko became Minister of Defense, Major-General Hla Min became Minister of Home Affairs, and Major-General Thein Htay became Minister of Border Affairs.⁴²⁵ Under Section 232(b)(ii) of the 2008 Constitution, the commander-in-chief has the power to nominate the ministers of defense, home affairs, and border affairs, submitting a nomination list of names to the president for approval. These officials, handpicked by Than Shwe, are likely to have the same fears as General Saw Maung and his cohorts.⁴²⁶

In a surprising move, Than Shwe officially stepped down as commander-in-chief of the junta on March 30, 2011.⁴²⁷ Than Shwe's successor as commander-in-chief is fifty-four-year-old Min Aung Hlaing, part of a younger

⁴²³ Simon Roughneen, *Burma Threatens Thailand's Stability: Bangkok Governor*, IRRAWADDY (Dec. 9, 2009), http://www.irrawaddy.org/article.php?art_id=17375; see also MICHAEL VON HAUFF, *ECONOMIC AND SOCIAL DEVELOPMENT IN BURMA/MYANMAR: THE RELEVANCE OF REFORMS* 25 (2010).

⁴²⁴ Background Note: Burma, U.S. DEPARTMENT OF STATE, (July 28, 2010), <http://www.state.gov/r/pa/ei/bgn/35910.htm>; *The World Factbook: Country Comparison, Education Expenditures*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2206rank.html>.

⁴²⁵ Ba Kaung & Wai Moe, *Military Generals Assume Key Ministries*, IRRAWADDY (Feb. 9, 2011), http://www.irrawaddy.org/article.php?art_id=20715.

⁴²⁶ See Marwaan Macan-Markar, *Soldiers Strip Their Khakis in Myanmar*, ASIA TIMES (Aug. 31, 2010), http://www.atimes.com/atimes/Southeast_Asia/LH31Ae01.html ("Than Shwe also seems to believe that it is better for him to handpick the new generation of military leaders before the elections to make sure of their loyalty.").

⁴²⁷ *Than Shwe Retires as Burma Military Chief*, JAKARTA GLOBE (Apr. 4, 2011), <http://www.thejakartaglobe.com/international/than-shwe-retires-as-burma-military-chief/433415>.

generation of Burma generals.⁴²⁸ He is reported to be “a professional soldier keen on restoring the prestigious image of the army tainted by the repression after the uprising of 1988, and the twenty-two years of authoritarian rule that followed.”⁴²⁹ Than Shwe, at seventy-eight years of age, probably felt it was time to pass the torch. Academic Win Min believes that he “is likely to be pulling the strings from behind the curtain. He will use his influence behind the scenes, relying on personal patronage and connections.”⁴³⁰

Also at the end of March, Than Shwe officially dissolved the junta by signing into effect the dissolution of the SPDC.⁴³¹ Along with the SPDC, other state and division level, district level, township level, and ward and village level Peace and Development Council offices have been dissolved and ordered to shut their doors.⁴³² These moves seem to signal to the world that the junta is sincere in its intentions to gradually open the country up to civilian rule. However, as skeptics note, whether that will happen in reality remains to be seen. Maung Zarni, a researcher at the London School of Economics, said: “If anyone thinks this new government is a step towards democracy[,] they are sadly mistaken.”⁴³³ On the other hand, these gestures at least hint at the possibility of a more open political system, a hope that a “transition similar to what has happened in Bangladesh, Indonesia, and Thailand in the last twenty years” will take place.⁴³⁴

Members of the military are unlikely to fully grant legal and political power to the civilian government so long as senior officials who have committed, sanctioned, or otherwise condoned human rights violations and outright murder are still alive. But it is plausible that the military may gradually transfer power to a civilian government as senior officials retire and are replaced by a new generation of military officers. On the other hand, the status quo may simply continue.⁴³⁵ Senior-General Than Shwe has evinced an understanding of his legacy in the construction of the Uppatasanti (meaning, unsurprisingly, “development and stability”) Pagoda in the new capital,

⁴²⁸ *Id.*

⁴²⁹ Larry Jagan, *Military Plays a Civilian-Looking Game*, IRRRAWADDY (Apr. 12, 2011), http://www.irrawaddy.org/article.php?art_id=21114&Submit=Submit.

⁴³⁰ *Id.*

⁴³¹ Wai Moe, *Than Shwe Officially Dissolves Junta*, IRRRAWADDY (Mar. 30, 2011), http://www.irrawaddy.org/article.php?art_id=21040.

⁴³² *Id.*

⁴³³ Jagan, *supra* note 429.

⁴³⁴ *Id.*

⁴³⁵ See *id.* (“Whoever takes [Than Shwe’s and Maung Aye’s] places will not be more enlightened or more progressive, simply because they have all been inculcated with thuggish, racist, sexist, and neo-totalitarian leadership values, and only junior generals who are their mirror image have been promoted,” said Zarni.”).

Naypyidaw.⁴³⁶ Historically, Burmese kings have constructed pagodas in order to build social and spiritual esteem. The construction of the Naypyitaw pagoda may be an indication that Than Shwe cares about his spiritual legacy or may be influenced by how he is perceived in the lights of Buddhism.⁴³⁷

C. The Military's Differential Treatment of Legal and Political Power

"Legal power" includes judicial power, such as control over judges and the judicial process; constitutional power, or the ability to draft and ratify a constitution; and rule of law, upholding due process and the imposition and enforcement of civil and criminal sanctions. "Political power" is defined as the ability of a particular individual or group to draft legislation and be elected to political office. The military's holding of elections in 2010 suggests that the military treats legal power differently from political power. The 2010 elections and the 2008 Constitution indicate that the military may be willing to cede some political power, but it is extremely unlikely to give up legal power.

This latter idea is embodied in the 2008 Constitution. The 2008 Constitution keeps judicial power, particularly constitutional legal power, in the military's hands. For instance, the junta created the Constitutional Tribunal, which is wholly separate from the rest of the judicial system.⁴³⁸ The usual court of last appeal, the Supreme Court, has no jurisdiction over constitutional issues. Instead, jurisdiction is granted exclusively to the Constitutional Tribunal.⁴³⁹ It is a nine-member court. The President submits the candidate list and can select three members; the Speakers of each house each select three as well.⁴⁴⁰ The Constitutional Tribunal, at least on paper, has real powers. It is able to interpret the 2008 Constitution⁴⁴¹ and render decisions that are deemed final and conclusive.⁴⁴² A candidate for the

⁴³⁶ Maung Aung Myoe, *The Road to Naypyitaw: Making Sense of the Myanmar Government's Decision to Move its Capital* 14 (Asia Res. Inst., Working Paper No. 79, Nov. 2006), available at http://www.ari.nus.edu.sg/docs/wps/wps06_079.pdf.

⁴³⁷ See *Naypyidaw's Version of Shwedagon Pagoda Nears Completion*, IRRAWADDY (Mar. 6, 2009), http://www.irrawaddy.org/article.php?art_id=15256 ("Historians suggest that Burma's pagodas were built by rulers as acts of penance for the wars they conducted, and the construction of the Naypyidaw pagoda is being seen by many Burmese as a continuation of this tradition by a regime intent on building 'a modern nation with flourishing, disciplined democracy.'"). However, the brutal crackdown against Burmese monks is evidence against this line of thinking.

⁴³⁸ 2008 CONST., art. 320.

⁴³⁹ *Id.* arts. 294, 295(a)(ii)–(iii).

⁴⁴⁰ *Id.* art. 321.

⁴⁴¹ *Id.* art. 322(a).

⁴⁴² *Id.* art. 324.

Constitutional Tribunal can be disqualified under Section 121, the same section governing candidates of the Pyithu Hluttaw.⁴⁴³

One may look at the Constitutional Tribunal and the provisions governing it in the 2008 Constitution and conclude that the junta has ceded some real legal power to the civilian government. And it may have, insofar as legal power is being enforced *against civilians*. But the junta immunizes itself from any potential legal proceedings with the Immunity Clause in Section 445 of the 2008 Constitution.⁴⁴⁴

All policy guidelines, laws, rules, regulations, notifications, and declarations of the State Law and Order Restoration Council and the State Peace and Development Council or actions, rights, and responsibilities of the State Law and Order Restoration Council and the State Peace and Development Council shall devolve on the Republic of the Union of Myanmar. *No proceeding shall be instituted against the said Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties.*⁴⁴⁵

The Immunity Clause is an escape hatch allowing the junta to transfer political power to a civilian government but still retain legal power by immunizing itself from legal consequences. This is precisely in line with the generals' fear of legal retribution in Nuremberg-style trials. Additionally, the junta has a de facto veto of amendments to the Constitution. At least twenty-five percent of seats in the Pyithu Hluttaw must be filled by legislators appointed by the junta. Constitutional amendments require a seventy-five percent vote.⁴⁴⁶

The junta's rationale for treating legal power differently from political power is likely similar to its reluctance to transfer legal and political power *in toto*. While the junta hopes that the 2010 elections and the 2008 Constitution politically legitimize its rule, it cannot afford to give up any legal power until it believes that, once transferred, the legal power will not be invoked against it.

D. The 2010 Elections and Burma's Future

Elections were held on November 7, 2010 for seats in a two-chamber parliament and fourteen regional assemblies.⁴⁴⁷ Forty-two political parties

⁴⁴³ *Id.* art. 333(c).

⁴⁴⁴ INT'L CENTER FOR TRANSNAT'L JUST., IMPUNITY PROLONGED: BURMA AND ITS 2008 CONSTITUTION 32-33 (2009).

⁴⁴⁵ 2008 CONST., art. 445 (emphasis added).

⁴⁴⁶ *Id.* arts. 436(a)-(b).

⁴⁴⁷ Pro-Military Party "Wins" Burmese Election, BBC NEWS (Nov. 9, 2010, 5:14 AM), <http://www.bbc.co.uk/news/world-asia-pacific-11715956>.

registered for the 2010 elections, including many ethnic minority groups.⁴⁴⁸ The largest ethnic minority party, the Shan Nationalities Democratic Party,

⁴⁴⁸ See *List of Political Parties Registered For Burma's 2010 Elections*, CHINLAND GUARDIAN (Oct. 17, 2010), <http://www.chinlandguardian.com/news-2009/1070-list-of-political-parties-registered-for-burmas-2010-elections.html>:

1. All Mon Region Democracy Party (AMRDP)
2. Chin National Party (CNP)
3. Chin Progressive Party (CPP)
4. Democracy and Peace Party (DPP)
5. Democratic Party (Burma) (DPM)
6. Democratic Party for Myanmar New Society (DPMNS)
7. Ethnic National Development Party (ENDP)
8. Inn National Development Party (INDP)
9. Kaman National Progressive Party (KNPP)
10. Kayan National Party (KNP)
11. Kayin People's Party (KPP)
12. Kayin State Democracy and Development Party (KSDDP)
13. Khami National Development Party (KNDP)
14. Kokang Democracy and Unity Party (KDUP)
15. Lahu National Development Party (LNDP)
16. Modern People Party (MPP)
17. Mro (or) Khami National Solidarity Organization (MKNSO)
18. Mro National Party (MNO)
19. Myanmar Democracy Congress (MDC)
20. National Democratic Force (NDF)
21. National Democratic Party for Development (NDPD)
22. National Development and Peace Party (NDPP)
23. National Political Alliances League (NPAL)
24. National Unity Party (NUP)
25. Pa-O National Organization (PNO)
26. Peace and Diversity Party (PDP)
27. Phalon-Sawaw Democratic Party (PSDP)
28. Rakhine Nationalities Development Party (RNDP)
29. Rakhine State National Force of Myanmar (RSNF)
30. Regional Development Party (Pyay) (RDPP)
31. Shan Nationalities Democratic Party (SNDP)
32. Taaung (Palaung) National Party (TPNP)
33. The 88 Generation Student Youths (Union of Myanmar) (88GSY)
34. The Union of Myanmar Federation of National Politics (UMFNP)
35. Union Democratic Party (UDP)
36. Union Kayin League (UKL)
37. Union Solidarity and Development Party (USDP)
38. United Democratic Party (United DP)
39. Unity and Democracy Party of Kachin State (UDPKS)
40. Wa Democratic Party (WDP)
41. Wa National Unity Party (WNUP)
42. Wunthanu NLD (Union of Myanmar) (WNLD)

Other lists have fewer parties. See, e.g., *Q&A on Elections in Burma*, HUMAN RIGHTS WATCH (Nov. 3, 2010), <http://www.hrw.org/en/news/2010/11/02/qa-elections-burma#AllRegisteredParties> (37 registered parties).

ran candidates in 157 seats.⁴⁴⁹ Notably, a splinter faction of Suu Kyi's NLD party, the National Democracy Force (NDF), participated in the elections,⁴⁵⁰ contesting 163 of the 1100 seats available in the two houses of parliament.⁴⁵¹ The group split off from the NLD after that party was stripped of its status as a party for failing to register for the elections.⁴⁵² (The NLD chose not to register on the ground that the military-orchestrated political process was unjust and unfair.)⁴⁵³

Reports indicated that the junta-allied Union Solidarity and Development Party (USDP) won anywhere from seventy-five to eighty percent of the available parliamentary seats in the November 7 elections.⁴⁵⁴ Many allegations of election fraud followed the elections,⁴⁵⁵ with registered parties making formal complaints to the Election Commission.⁴⁵⁶ The Election Commission has warned that false complaints about fraud and vote rigging will not be

⁴⁴⁹ R.C., *Following the Life of the Party*, ECONOMIST (Nov. 18, 2010, 11:06 AM), http://www.economist.com/blogs/asiaview/2010/11/myanmars_opposition.

⁴⁵⁰ Aung Hla Tun, *Suu Kyi Party Splits, Faction to Run in Myanmar Poll*, REUTERS (May 6, 2010, 4:13 PM), <http://www.reuters.com/article/idUSTRE6455UR20100506>.

⁴⁵¹ R.C., *supra* note 449.

⁴⁵² *Burma: Chronology of Aung San Suu Kyi's Detention*, HUMAN RIGHTS WATCH (Nov. 13, 2010), <http://www.hrw.org/en/news/2010/11/12/burma-chronology-aung-san-suu-kyi-s-detention>.

⁴⁵³ Aung Hla Tun, *Myanmar Opposition Party's Vote Boycott Angers Some*, REUTERS (Mar. 30, 2010, 12:41 PM), <http://uk.reuters.com/article/idUKTRE62T1U420100330>.

⁴⁵⁴ See Aung Thet Wine & Wai Moe, *Election Results a Joke*, IRRRAWADDY (Nov. 19, 2010), http://www.irrawaddy.org/article.php?art_id=20131 ("Based on official statistics, China's state-run Xinhua said the USDP won 76.5 percent of the three types of parliamentary seats in the elections."); Ron Corben, *Pro-Military Party Claims Almost 80 Percent of Votes in Burma Election*, VOICE AM. (Nov. 9, 2010), <http://www.voanews.com/english/news/Pro-Military-Party-Claims-Almost-80-Percent-of-Votes-in-Burma-Election--106947774.html> ("Burma's pro-democracy parties conceded defeat Tuesday after the largest pro-military party, the Union Solidarity and Development Party, said it had won up to 80 percent of the parliament seats being contested."); *Pro-Military Party "Wins" Burmese Election*, *supra* note 447.

⁴⁵⁵ See Wine & Moe, *supra* note 454 ("On Nov. 16, the state-run-newspapers corrected a previous report that stated 102.09 percent of voters had turned out in No. 1 constituency in Taungoo Township, Pegu Region, saying the correct figure was 99.57 percent and said the turn out in Taungoo's No. 2 constituency was 87.6 percent and not 85.64 percent as earlier reported. . . . Further corrections were published on Nov. 17 for Ann Township in Arakan State, replacing a 104.28 percent turnout with 71.74 percent. . . . The newspapers also announced two USDP candidates as winning in two constituencies where the election had been previously cancelled for security reasons.").

⁴⁵⁶ See Corben, *supra* note 454 ("At least six political parties have made formal complaints to the Election Commission, citing the practice of advance voting, in which government workers-civil servants and soldiers-were escorted to polling booths in the days before the poll.").

tolerated.⁴⁵⁷ Anyone who files fraudulent charges of vote cheating could get three years in prison, a 300,000 kyat fine (USD 300), or both.⁴⁵⁸

Immediately following the elections, international observers criticized the elections. United States President Barack Obama decried them as “neither free nor fair, [having] failed to meet any of the internationally accepted standards associated with legitimate elections.”⁴⁵⁹ As elaborated in Part I, Aung San Suu Kyi and many other political dissidents were not able to participate in the 2010 elections.

Suu Kyi was finally released from house arrest just after the elections on November 13.⁴⁶⁰ Adoring crowds met her at the gates of her compound.⁴⁶¹ However, many observers are concerned about Suu Kyi’s place in Burmese politics; significant domestic and international cultural, technological, and social changes have taken place in recent decades. Priscilla Clapp, the former chief of mission in the American Embassy in Burma and a principal adviser to the Asia Society task force on United States Burma policy noted, “It’s not the same environment that existed when she was taken into detention seven years ago. She has come out into a different world, and I think she is trying to feel her way into it.”⁴⁶²

Thant Myint-U, a Burma historian and former United Nations official, made the following statement:

It’s certainly not going to be easy for her. This is a very, very different political landscape than when she was released the last time. The

⁴⁵⁷ Asia News, *Myanmar: Junta to Jail People Who Complain about Election Fraud, Warns Aung San Suu Kyi*, SPERO NEWS (Nov. 18, 2010), <http://www.speroforum.com/site/article.asp?idCategory=33&idsub=128&id=43516&t=Myanmar%3A+++Junta+to+jail+people+who+complain+about+election+fraud%2C+warns+Aung+San+Suu+Kyi>.

⁴⁵⁸ *Id.*

⁴⁵⁹ Barack Obama, *Statement by President Obama on Burma’s November 7 Elections*, WHITE HOUSE, Nov. 7, 2010, available at <http://www.whitehouse.gov/the-press-office/2010/11/07/statement-president-obama-burmas-november-7-elections>. President Obama specifically made note of the “regime’s continued detention of more than 2,100 political prisoners, including Aung San Suu Kyi, thereby denying them any opportunity to participate in the process. The unfair electoral laws and overtly partisan Election Commission ensured that Burma’s leading pro-democracy party, the National League for Democracy, was silenced and sidelined. The regime denied the registration of certain ethnic parties, cancelled elections in numerous ethnic areas, and stage-managed the campaign process to ensure that pro-democracy and opposition candidates who did compete faced insurmountable obstacles. Ultimately, elections cannot be credible when the regime rejects dialogue with opponents and represses the most basic freedoms of expression, speech, and assembly.”

⁴⁶⁰ *Myanmar Junta Frees Dissident Daw Aung San Suu Kyi*, N.Y. TIMES (Nov. 13, 2010), <http://www.nytimes.com/2010/11/14/world/asia/14myanmar.html>.

⁴⁶¹ *Id.*

⁴⁶² Seth Mydans, *Difficult Issues Clamor for Advocate’s Attention*, N.Y. TIMES (Nov. 16, 2010), <http://www.nytimes.com/2010/11/17/world/asia/17myanmar.html>.

country is facing a whole slew of new challenges and opportunities. . . . In many ways Myanmar is not the isolated, closed-off country that it was ten or twenty years ago. It's a very complex place. I think we could say for sure that this year, these couple of years, are without a doubt the country's most important watershed in a generation.⁴⁶³

Aung Zaw, the editor of the *Irrawaddy*, a Thailand-based exile magazine that has commented on the Burmese military junta, said, "She'll be facing a mountain of expectation and challenges. She is just a private citizen, but a lot of people still believe that she is the leader of the democratic movement, not just a leader of the NLD. People want her to expand her leadership."⁴⁶⁴ However, Bertil Lintner, the author of several books on Burma, stated as follows:

This is not an ordinary military dictatorship we are talking about. This is a military that has become expert at staying in power. . . . [The liberation of Suu Kyi is] a public relations exercise for foreign opinion after a totally fraudulent election, rather than part of political reform, which it's not. I don't think there's a place for Aung San Suu Kyi in the new state that the military has created."⁴⁶⁵

There is much that can go wrong in the aftermath of the 2010 elections. With the elections, the junta has decreed a new flag, a new national anthem, and a new name for Burma: the Republic of the Union of Myanmar.⁴⁶⁶ These moves are in line with the junta's previous decisions to reinvent the country, such as relocating the capital to Naypyidaw.⁴⁶⁷ One thing is certain: the 2008 Constitution, which sets up the bicameral national parliament, fourteen regional parliaments, a president, cabinet, a constitutional court, and other new governmental institutions will give military rule a much more complex form.⁴⁶⁸ Commentators have highlighted several issues that stand in Burma's way after its first elections in two decades.⁴⁶⁹ Does it matter that the elections

⁴⁶³ Myanmar Junta Frees Dissident, *supra* note 460.

⁴⁶⁴ *Id.*

⁴⁶⁵ Mydans, *supra* note 462.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Built to Order: Myanmar's New Capital Isolates and Insulates Junta*, N.Y. TIMES (June 24, 2008), <http://www.nytimes.com/2008/06/24/world/asia/24myanmar-sub.html>.

⁴⁶⁸ Mydans, *supra* note 462.

⁴⁶⁹ See, e.g., Tomas Ojea Quintana, *What is Important Now: Free and Fair Elections*, IRRAWADDY (Mar. 5, 2010), http://www.irrawaddy.org/article.php?art_id=17960; Wai Moe, *Burma's "15-Minute" Parliament*, IRRAWADDY (Feb. 22, 2011), http://www.irrawaddy.org/article.php?art_id=20803; Daniel Schearf, *Burma Set for Elections, Military to Stay in Power*, VOICE AM. (Nov. 6, 2010), <http://www.voanews.com/english/news/-Burma-Set-for-Elections-Military-to-Stay-in-Power-but-Opposition-May-get-a-Voice-106815648.html>;

were not free and fair by any conventional metric? Does the creation of a bicameral legislature, regional governments, constitutional court, and executive positions create an illusion of open governance that conceals the perpetuation of oppressive military rule? Will Burma change at all with these new political and legal institutions? And where is Suu Kyi's place in all of this? Did the elections work, in part, to cabin Burma off from Suu Kyi, with her considerable international prestige?

Burma stands at a crossroads. The 2010 elections have provided a tantalizing opportunity, however evanescent, to open up its political structures. The election represents a chance for the junta to transfer some political power to a civilian government while retaining legal power. The junta's behavior, while vulnerable to criticism, is rational in that the generals reasonably fear that if they transfer legal power, it may be used against them in Nuremberg-style trials. This time around, the NLD, other pro-democracy groups, and ethnic minority groups should be aware of the generals' fear of the very law they wield so ruthlessly, and not invoke legal powers before the junta has actually transferred such legal power to a civilian government. Even then, those groups should exercise prudence, because the military will continue to have a dominating presence in Burma, and the junta still has an advantage in terms of capability to use deadly force.

Additionally, elections may serve as a bridge to integrate ethnic minorities into public office and work towards eroding the issue of secession. Despite widespread allegations of election fraud, ethnic minority parties made some inroads. The Shan Nationalities Democratic Party (SNDP) took fifty-seven seats: eighteen in the House of Representatives, three in the House of Nationalities, and thirty-six regional seats.⁴⁷⁰ The Rakhine Nationalities Development Party (RNDP) took thirty-five seats: nine in the House of Representatives, seven in the House of Nationalities, and nineteen regional seats.⁴⁷¹ The NDF and the All Mon Region Democracy Party (AMRDP) each took sixteen seats in the national and regional parliaments.⁴⁷² Other ethnic minority parties took a handful of seats.⁴⁷³ Despite the allegations of election fraud, there is reason to hope that the presence of ethnic minorities in Burmese government can encourage reconciliation. In the same vein, with pro-democracy elements such as NDF members serving in the Pyithu Hluttaw, there is an opportunity for reconciliation and dialogue among ethnic minorities, pro-democracy groups, and the junta.

Universal Periodic Review: Myanmar, OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/UPR/CPAGES%5CMMSession10.aspx>; Lalit K. Jha, *Burma Has a "Long Way to Go": US, IRRRAWADDY* (Apr. 11, 2011), http://www.irrawaddy.org/article.php?art_id=21109.

⁴⁷⁰ *Myanmar Election Commission Publishes Election Final Results* [sic], XINHUA (Nov. 17, 2010, 11:20 PM), http://news.xinhuanet.com/english2010/world/2010-11/17/c_13611242.htm.

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ *Id.*

There is early evidence that the elections have started to bridge the divisions among the various interest groups. In the days leading up to the November 7, 2010 election, politicians representing pro-election parties expressed support for the "Kale Declaration," which called for a federal system based on equality and democracy to be established through a second Panglong conference.⁴⁷⁴ Aye Maung, chairman of the Rakhine (Arakan) Nationalities Development Party (RNDP), said, "We support their call [for a Panglong-type conference], and all the ethnic groups should negotiate. It is time to compromise peacefully."⁴⁷⁵ Immediately after the November 7, 2010 elections, Lieutenant-General Yawd Serk, commander of the Shan State Army-South, referenced the Panglong Agreement, stating: "It's important to work for a federal state. Without it, our problems will never end. If we have a dialogue with the government based on the Panglong agreement, it might help to find a solution."⁴⁷⁶ On November 13, 2010, Senior NLD leader Win Tin stated:

All the ethnic leaders wish to call for a second Panglong Conference. That shows [that] the call for dialogue remains very relevant. In this situation, Daw Suu and Senior-General Than Shwe are still critical players. Please remember that Suu Kyi and the rest of us called for a genuine union, although we are cautious about using the term "federal state" since the junta might call us "separatists."⁴⁷⁷

On November 16, 2010, Thawng Kho Thang, a senior member of the United Nationalities League for Democracy (UNLD), suggested that a second Panglong conference be held online, with discussions held at the state level which could then be sent to a central website for an exchange of ideas: "Although we might not be able to unite in one place, we can know the opinions of everyone and develop policy."⁴⁷⁸ Suu Kyi herself has proposed a second Panglong conference in her first speech in front of the NLD headquarters after her release, stating: "A second Panglong conference addressing the concerns of the twenty-first century is needed for national reconciliation."⁴⁷⁹

There seems to be a role for Suu Kyi after all after the elections, notwithstanding the skepticism of some commentators. She met with ethnic

⁴⁷⁴ Ko Htwe, *Pro-Election Parties Support Second Panglong Conference*, IRRAWADDY (Oct. 27, 2010), <http://www.irrawaddy.org/election/news/550-pro-election-parties-support-second-panglong-conference.html>.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Interview with Lt-Gen. Yawd Serk*, IRRAWADDY (Nov. 10, 2010), http://www.irrawaddy.org/article.php?art_id=20029.

⁴⁷⁷ *Interview with Senior NLD leader Win Tin*, IRRAWADDY (Nov. 13, 2010), http://www.irrawaddy.org/article.php?art_id=20065.

⁴⁷⁸ Ko Htwe, *Second Panglong Conference Proposed Using Internet*, IRRAWADDY (Nov. 16, 2010), http://www.irrawaddy.org/article.php?art_id=20098.

⁴⁷⁹ *Id.*

leaders on November 16, 2010, including Naing Ngwe Thein, the chairman of the AMRDP; Naing Tun Thein of Mon National Democratic Front (MNDF); Pu Cin Sian Thang, a spokesman for the United Nationalities Alliance; Thar Ban, the acting chairman of the Arakan League for Democracy and a veteran journalist and politician; Sai Shwe Kyuu, a Shan leader accompanied by Sai Tin Aung and Thawng Kho Thang; the UNLD; the Committee Representing People's Parliament (CRPP); and Saw Harry, a Karen ethnic leader, at the headquarters of the NLD.⁴⁸⁰ NLD senior deputy Tin Oo said at the meeting, "Daw Aung San Suu Kyi discussed the particulars of convening a 21st Century Panglong Conference, and how to . . . bring more unity and confidence among all ethnicities."⁴⁸¹

Suu Kyi, like her father Aung San before her, can function as a mediator among the pro-democracy groups, the ethnic minority groups, and the military junta, ideally culminating in three-way dialogue, a second Panglong conference, that can quash the secession issue that has plagued Burma for so long, and set the country on the path to liberalization and success. This issue is at the root of Burma's political troubles, leading to the threats to secede by the Shan and Karenni chieftains in the late 1950s, the permanent military takeover in 1962, the enactment of the Burmese Way to Socialism by the military junta, the demonetizations by General Ne Win in the 1980s, the subsequent student protests led by Suu Kyi, and the eventual violent crackdown by the military.

Economic mismanagement has also played a major role in Burma's tumultuous history, with the demonetizations by General Ne Win and the Burmese Way to Socialism leading to economic stagnation. In addition, economic sanctions against Burma may have been a factor in Burma's troubled past. Senator Jim Webb⁴⁸² and Professor David I. Steinberg⁴⁸³ have criticized

⁴⁸⁰ *Id.*

⁴⁸¹ Khin Hnin Htet, *Suu Kyi reignites push for ethnic autonomy*, DEMOCRATIC VOICE OF BURMA (Nov. 17, 2010), <http://www.dvb.no/elections/suu-kyi-reignites-push-for-ethnic-autonomy/12920>.

⁴⁸² See Justin McCurry, *Senator Jim Webb's Burma Visit Raises Speculation of New US Policy*, GUARDIAN (Aug. 14, 2009, 7:21 AM), <http://www.guardian.co.uk/world/2009/aug/14/us-senator-jim-webb-burma> ("Webb, who chairs the Senate foreign relations subcommittee on East Asia and Pacific affairs, countered that years of sanctions and condemnation had failed. He said: 'What I think we should be doing in Burma is trying to open up diplomatic avenues where you can have confidence builders . . . and through that process work toward some way where you can remove sanctions.'"); Jim Webb, *We Can't Afford to Ignore Myanmar*, N.Y. TIMES (Aug. 25, 2009), <http://www.nytimes.com/2009/08/26/opinion/26webb.html> ("For more than 10 years, the United States and the European Union have employed a policy of ever-tightening economic sanctions against Myanmar, in part fueled by the military government's failure to recognize the results of a 1990 election won by Aung San Suu Kyi's party. While the political motivations behind this approach are laudable, the result has been overwhelmingly counterproductive. The ruling regime has become more entrenched and at the same time more isolated. The Burmese people have lost access to the outside world. Sanctions by Western governments have not been matched by other countries, particularly Russia and China. Indeed, they have allowed China to dramatically increase

United States and European Union policies of economic sanctions against Burma. United States sanctions have banned new investment⁴⁸⁴ and the exportation, re-exportation, and facilitation of financial services,⁴⁸⁵ and they have blocked property of members affiliated with the military junta⁴⁸⁶ and the importation of goods of Burmese origin⁴⁸⁷ (notably including rubies and jade, as Burma has huge ruby and jadeite resources).⁴⁸⁸

These sanctions have been mostly ineffective and have led to perverse consequences because China, Thailand, and India, among other countries, do not adhere to them.⁴⁸⁹ Burma supplies roughly eighty percent of Thailand's gas.⁴⁹⁰ Just this year, China has surpassed Thailand to become the largest

its economic and political influence in Myanmar, furthering a dangerous strategic imbalance in the region.”).

⁴⁸³ See David I. Steinberg, *Is Burma on the Verge of Transformation?*, WASH. POST (Aug. 21, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/20/AR2010082005021.html> (“The plight of the Burmese people has long distressed many. But imposing additional sanctions on Burma’s regime or forming still more commissions will only salve our consciences. Neither will help the Burmese people, persuade the government to loosen its grip on the population, or even assist the United States in meeting its strategic or humanitarian objectives. In fact, such moves would hinder negotiations and relations with a new government that, even if far from a model for governance, would probably give the Burmese more political voice and freedom than they have had in half a century. If our concerns are for the well-being of the people and U.S. national interests in the region, then we might well wait for the elections and whatever government comes into power. Then will be the time to judge whether there has been a step forward and how to achieve our goals.”); David I. Steinberg, *Burma and National “Plagiarism”*, IRRAWADDY (Jan. 25, 2010), http://www.irrawaddy.org/opinion_story.php?art_id=17650 (“Sanctions have proven to have been ineffective in changing patterns of authoritarian governance and repression, and the Chinese have been the largest number of tourists and perhaps (unofficially) the largest investors. The US has called for regime change over the years, although this has recently changed. Instead, through obstinate nationalism and the assistance of its neighbors, the Burma authorities have outlasted their critics and have even a stronger grip on the country.”).

⁴⁸⁴ Exec. Order No. 13,047, 31 C.F.R. §§ 537.204, 537.311(a) (1997).

⁴⁸⁵ Exec. Order No. 13,047, 31 CFR §§ 537.202, 537.205(a) (1997).

⁴⁸⁶ Exec. Order No. 13,047, 31 CFR § 537.517 (1997).

⁴⁸⁷ Exec. Order No. 13,047, 31 CFR § 537.203 (1997).

⁴⁸⁸ Dan McDougall, *The Curse of the Blood Rubies: Inside Burma’s Brutal Gem Trade*, DAILY MAIL (Sept. 18, 2010, 10:01 PM), <http://www.dailymail.co.uk/home/moslive/article-1312382/The-curse-blood-rubies-Inside-Burmas-brutal-gem-trade.html#ixzz15z5ouU92>.

⁴⁸⁹ See, e.g., Francis Wade, *China Weapons Giant to Mine Burma*, DEMOCRATIC VOICE OF BURMA (June 24, 2010), <http://www.dvb.no/news/china-weapons-giant-to-mine-burma/10433>; STEINBERG, *supra* note 29, at 132, 154.

⁴⁹⁰ Francis Wade, *Foreign Investment in Burma “Down 70%”*, DEMOCRATIC VOICE OF BURMA (July 14, 2010), <http://www.dvb.no/news/foreign-investment-in-burma-%E2%80%99down-70%E2%80%99/10748>.

foreign investor in Burma, with its investment reaching \$9.6 billion, surpassing Thailand's \$9.5 billion.⁴⁹¹ China's investment includes more than \$3 billion in the electrical power, oil, and natural gas sectors.⁴⁹²

Even American corporations have gotten in on the resource extraction game with Chevron's Yadana pipeline⁴⁹³—though, in fairness, the pipeline agreement predated the 1997 sanctions. Senator Webb has argued that the lack of Western investment in Burma only served to starve the people, as the military junta keeps its coffers full from China and India, and also prevents Western influence in the form of business that could prompt Burma to slowly liberalize.⁴⁹⁴ Suu Kyi has indicated that she may be open to changing her once hard-line position in favor of sanctions on Burma.⁴⁹⁵ (She has vacillated on this issue, at first stating that she was open to removing sanctions,⁴⁹⁶ but most recently saying that targeted sanctions should remain.⁴⁹⁷)

V. CONCLUSION

It is unlikely that the 2010 elections were free or fair.⁴⁹⁸ Even so, the potential benefit to the elections is significant. The elections can provide a civilian government with political power and give civilians a vehicle to voice non-military views.

Though they only received a small percentage of the total available parliamentary seats, ethnic minority groups now have some governmental representation. The Burmese people voted, and though their votes were likely

⁴⁹¹ Ko Pauk, *China Now Largest Foreign Investor in Burma*, MIZZIMA (Feb. 22, 2011), <http://www.mizzima.com/business/4914-china-now-largest-foreign-investor-in-burma.html>.

⁴⁹² *Id.*

⁴⁹³ Myanmar, CHEVRON, <http://www.chevron.com/globalissues/humanrights/myanmar/> (last updated May 2010).

⁴⁹⁴ Webb, *supra* note 482.

⁴⁹⁵ Ian Black, *Aung San Suu Kyi Could Call for Lifting of Burma Sanctions*, GUARDIAN, Nov. 14, 2010, at 17, available at <http://www.guardian.co.uk/world/2010/nov/14/aung-san-suu-kyi-burma-sanctions>.

⁴⁹⁶ Zoe Daniel, *Aung San Suu Kyi Shifts Position on Sanctions*, ABC NEWS (Nov. 14, 2010, 10:27 PM), <http://www.abc.net.au/news/stories/2010/11/14/3065937.htm>.

⁴⁹⁷ David Pilling, *Suu Kyi Says Burma Sanctions Should Remain*, FIN. TIMES (Jan. 28, 2011, 8:11 PM), <http://www.ft.com/cms/s/0/c6d7a6bc-2bof-11e0-a65f-00144feab49a.html#axzz1JnczC9sb> ("The great majority of Burmese, who are working in agriculture, are not affected at all," she said, blaming the dire standard of living of most Burmese on "crony capitalism" and the economic ineptitude of the junta that has ruled the country since 1962.).

⁴⁹⁸ Ba Kaung, *Election Day Marred by Fraud, Intimidation*, IRRRAWADDY (Nov. 8, 2010), http://www.irrawaddy.org/article.php?art_id=19986.

not fairly counted,⁴⁹⁹ the idea that elections actually occurred and that there are some non-junta parties in the government is an important psychological event for the people. Moe Tun, who ran for a seat in Insein township, said the voters he met on the streets were like “thirsty people falling in the well. They haven’t seen this kind of [candidacy] pamphlet for 20 years. They are anticipating it. They want to read. They took these pamphlets bravely. Some also got scared. But they were just a few.”⁵⁰⁰

Thirty-seven political parties participated. India’s National Security Advisor, Shivshankar Menon, said, “We’ve tried to engage with Myanmar and to encourage Myanmar in what they themselves say is their attempt to rebuild democracy and to come back to the international mainstream. . . . [The election in Burma] could be one step and a significant step in their transition, but I think we all have to work at it with the Myanmar people to see that it comes out right.”⁵⁰¹

There are also possibilities for real political change, not simply a psychological shift. Suu Kyi has met with ethnic leaders and has joined calls for a second Panglong conference. Suu Kyi should step into the shoes of her father, Aung San, and demand that all parties work through tripartite dialogue to eliminate the right of secession written into the 1947 Constitution. She should also press Western governments to reconsider their sanctions against Burma. Targeted sanctions against Burmese military officials are appropriate: the Burmese Freedom and Democracy Act of 2003 (BFDA) and the Tom Lantos Block Burmese JADE (Junta’s Anti-Democratic Efforts) Act of 2008 (JADE Act) require the President to freeze assets and ban visas of certain Burmese officials on a Specially Designated Nationals List.⁵⁰²

Further, the sanctions on the provision of financial services by U.S. citizens need to be reconsidered.⁵⁰³ Most ordinary Burmese citizens only possess cash, and the lack of financial investment in Burma could detract from economic growth that would provide jobs and wage growth for Burmese citizens. Sanctions that generally target the Burmese people, such as the BFDA provision that blocks the importation of manufactured goods from Burma and

⁴⁹⁹ See, e.g., Ashley South, *Post-Election Politics in Burma—Glimmers of Hope?*, IRRRAWADDY (Dec. 13, 2010), http://www.irrawaddy.org/opinion_story.php?art_id=20301 (“it became apparent that many non-government candidates had been beaten to the finish line by their pro-government opponents, largely due to a massive influx of ‘advanced votes’ which were introduced late in the day.”).

⁵⁰⁰ *Opposition Hopeful Takes to the Streets*, DEMOCRATIC VOICE OF BURMA (Oct. 12, 2010), <http://www.dvb.no/elections/opposition-hopeful-takes-to-the-streets/12176>.

⁵⁰¹ Lalit K. Jha, *India Says Burma Election Offers Hope*, IRRRAWADDY (Oct. 1, 2010), http://www.irrawaddy.org/article.php?art_id=19600.

⁵⁰² MICHAEL F. MARTIN, CONG. RESEARCH SERV., R41336, U.S. SANCTIONS ON BURMA (2011), available at <http://www.fas.org/sgp/crs/row/R41336.pdf>.

⁵⁰³ See Exec. Order No. 13,047, 31 CFR § 537 (1997); Exec. Order No. 13310, 15 CFR § 744.22 (2003).

the JADE Act ban on the importation of Burmese jadeite and rubies,⁵⁰⁴ may wind up causing more harm than good to the Burmese people.

Suu Kyi, when stating this year that Burma sanctions should remain, said, "The great majority of Burmese, who are working in agriculture, are not affected at all."⁵⁰⁵ However, Western foreign investment into non-agricultural industries, and the conditions of such investment, may result in opportunities for agricultural Burmese to move into the cities or other industrial areas, as occurred in China in the last several decades.

One thing is certain: despite the wishes of those in the activist and human rights community, Burma's transition to democracy, if at all possible, will be done in an incremental way. As Brahma Chellaney, a professor of strategic studies at the New Delhi-based Center for Policy Research, wrote:

With no hope of a "color revolution" in Myanmar, demilitarization of the polity can at best be a step-by-step process. In that context, the recent elections, although far from being free or fair, have helped revive a long-dormant political process, given birth to new political players and institutions (including a bicameral national Parliament, 14 regional parliaments and the impending appointment of a president and civilian federal government), and implicitly created a feeling of empowerment among the people.⁵⁰⁶

In addition, we must keep in mind the fact that Burma has been a country engaged in civil war for more than a half century. To some extent, the military junta has brought stability. Moving forward, reform measures must be carefully balanced against the delicate stability of the country. The 2010 elections, however corrupt, mark a step in the right direction. They amount to a partial concession by the junta of democratic and liberal principles and a transfer of some political power. This may lead the junta to internalize democratic and liberal principles, which will provide the conceptual space for social activism to be more effective in Burma's future. Elections have provided opportunities for ethnic minorities to run for and be elected to public office, and in that sense, elections can serve as a bridge between ethnic minorities and the majority Burman government. Indeed, Shans, Chins, Mons, Kachins, Kyains, Inns, Taaungs, and Was won seats, some in the Amyotha and some in the Pyithu Hluttaw.⁵⁰⁷ Furthermore, there are calls for a second Panglong conference by military junta, pro-democracy groups, and ethnic minorities alike. Such dialogue could provide the opportunity to address issues of minority rights, secession, and the gradual liberalization of the country. It is unlikely that the junta will give up legal power within the lifetime of its senior

⁵⁰⁴ MARTIN, *supra* note 388, at 1–2.

⁵⁰⁵ See Pilling, *supra* note 497.

⁵⁰⁶ Brahma Chellaney, *Why Single Out Myanmar For Sanctions?*, N.Y. TIMES (Nov. 17, 2010), <http://www.nytimes.com/2010/11/18/opinion/18iht-edchellaney.html>.

⁵⁰⁷ *Myanmar Election Commission Publishes Election Final Results* [sic], *supra* note 470.

officials, but the recent transfer of political power provides a reason for optimism.

Despite the junta's reluctance to hand over legal power, the 2010 elections signal the possibility of a transfer of some political power to a civilian government, which presents an opportunity for progress. With the junta's ongoing existence in mind, and the twin dangers of civil war and balkanization in the event of the army's collapse, Suu Kyi should propose to the ethnic minorities, the military junta, and the pro-democracy groups that they use the newly created civilian government as a new platform for communication. Suu Kyi's calls for a second Panglong agreement indicate that she is indeed considering that. Moving forward, Suu Kyi and the NLD must be mindful of Burma's history, the military junta's legitimate interests in national stability and security, and the ethnic minorities' interests in the right of secession.