



Analysis of the Federal Democracy Charter

Introduction

The emergence of the Federal Democracy Charter (FDC), produced under the initiative of the Committee Representing Pyidaungsu Hluttaw (CRPH), which was formed mostly by the NLD leaders, elected in the 2020 elections, has been two years now. In struggling against the State Administration Council, also known as the Military Council, and attempting to lay foundations for federalism, the NLD, CRPH, NUCC and NUG generally articulate, refer to, or invoke, the FDC whenever it is necessary. Unfortunately, for all Myanmar and non-Myanmar ethnic nationalities, the road to freedom, justice and peace is still vague. It is time to scrutinize the major factors that hinder unyielding efforts of people, in terms of various ethnic nationalities, who have been sacrificing their countless lives.

From this aspect, our LAN analyses the FDC, proposes a federal union suited to Burma, and recommend the two factors:

1. For the emergence of the provisional/interim constitutions;
2. For the international community of states as a whole to take their obligation for seeking accountability and ending impunity in Burma in a way that *jus cogens* norms are effectively observed and enforced.

1 Background of the Charter

In a democracy, although “majority rule” is indisputable, the rights of minorities must be guaranteed in accordance with the constitution.¹ The NLD barely focused on protecting “minority rights,” particularly the rights of ethnic minorities, under a federal democratic constitution. Until the military coup on February 1, 2021, the NLD leaders expected that amending the 2008 Constitution one step after another would bring about a federal union. To

¹ Barbara Thomas-Woolley & Edmond J. Keller, ‘Majority Rule and Minority Rights: American Federalism and African Experience’ *The Journal of Modern African Studies* (1994). <<https://www.jstor.org/stable/161982>> accessed 21 March 2023.

this end, they exerted efforts but failed. Hence, the party lacked any concrete proposal for a federalism suited to Burma.

Contrary to NLD expectations, when the military coup transpired, the party lacked any systematic preparation on how to approach the ethnic forces, particularly the EROs. Afterward, by urgently consulting with available ethnic leaders, efforts were made to hastily produce a Federal Democracy Charter within a few weeks. On April 1, 2021, two months after the coup, the CRPH officially publicized the Charter.² On the one hand, some valuable federalism principles appeared in the Charter; on the other hand, significant flaws exist as well, as further developed below.

2 The characteristics of the Charter

The Charter remains unclear regarding whether it posits a political commitment, indicates a political roadmap, or lays a constitutional foundation. The political commitment is not required given the existence of the historic Pang Long Accord, which is legally binding within both national and international law. How the Pang Long Accord would be actualized, however, needs to be established. If the Charter is regarded as a political roadmap, including the convening of a constitutional convention to draft and approve a federal democratic constitution,³ such a process is incorrect even if it is stated in the Charter. It is because such a process should involve a “bottom-up” approach rather than a “top-down” one. Regarding final approval of the Federal Democratic Constitution, as with the experience in the US,⁴ the decision shall be made by the constitutional units of the Ethnic States/Provinces in Burma; Unfortunately, given that the Charter adopts a top-down approach, serious concern can be expressed that a genuine federalism suited to Burma may never be achieved.

3 The valuable federal constitutional foundations in the Charter

In the Charter, in terms of reasonable federal constitutional foundations, some valuable provisions are found. Constitutionalism is guaranteed,⁵ and the values of the Union are sought.⁶ Within the member states, equal rights and self-determination are ensured;⁷ the right to draw up constitutions by the respective member states is recognized,⁸ and civilian supremacy is asserted.⁹ As the most crucial value, the sovereignty of member states and that of people in the

² Federal Democracy Charter, Declaration of Federal Democracy Union (2021). <<https://crphmyanmar.org/wp-content/uploads/2021/04/Federal-Democracy-Charter-English.pdf>> accessed 21 March 2023.

³ *The Federal Democracy Charter*, pt 1, ch 3, para 10, 11.

⁴ Constitution Daily, ‘The day the Constitution was ratified’, (21 June 2021): Under Article VII, it was agreed that the document would not be binding until its ratification by nine of the 13 existing states. <<https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified>> accessed 21 March 2023.

⁵ *Federal Democracy Charter, Part I*, ch 3, para 12.

⁶ *ibid* ch 3, pt 1.

⁷ *ibid* ch 4, pt 2 para 2; ch 4, pt 3, para 1, 2.

⁸ *ibid* ch 4, pt 2, para 3..

⁹ *ibid* ch 4, pt 2. para 5..

states is safeguarded;¹⁰ the application of residual power by the member states is also affirmed.¹¹ Fiscal federalism is practiced as well,¹² and the rights of member states/provinces to manage land and natural resources are enshrined;¹³ in extraction and production of natural resources, the right of the local communities to express their will is provided as well.¹⁴ Gender equality is stipulated.¹⁵ Diversities of the ethnic nationalities are addressed.¹⁶ And finally, a federal union security system is explored,¹⁷ and inter-governmental relations are introduced.¹⁸

4 Charter vagueness

Vagueness characterizes the entire Charter. For instance, who are the drafters? The phrase “organizations and individuals”¹⁹ does not suffice to determine who they are. The stated vagueness has implications for the formation of the Constitution Drafting Committee. Which body would have power to form such a highly significant committee? According to the Charter, the stated body shall comprise “the members who participate and collaborate in this Charter.”²⁰

The entities mentioned under the title of “Members of the Charter”²¹ are too general—for instance, *inter alia*, “political parties”²² and “ethnic armed revolutionary organizations.”²³ Fifty-three political parties joined the meetings of the new UEC, formed by the SAC,²⁴ to participate in the next elections to be held under the sponsorship of the SAC. Their political stance indicates continued adherence to the military rule concept created under the 2008 Constitution. The term “Ethnic Armed Revolutionary Organizations” (EAROs)²⁵ is even more controversial. What does “revolutionary” mean? What about the EROs still adhering to the NCA while facing the demands of the SAC? To maintain the NCA, almost all the stated organizations need to refrain from providing security to their local populations. Can such organizations still be regarded as revolutionary?

¹⁰ *ibid* ch 4, pt 3, para 4..

¹¹ *ibid* ch 4, pt 3, para 6..

¹² *ibid* ch 4, pt 3, para 18..

¹³ *ibid* ch 4, pt 3, para 20..

¹⁴ *ibid* ch 4, pt 3, para 23..

¹⁵ *ibid* ch 4, pt 3, para 27. .

¹⁶ *ibid* ch 4, pt 3, para 43,44,45,46. .

¹⁷ *ibid* ch 4, pt 3, para 55-60..

¹⁸ *ibid* ch 4, pt 3, para 63,64..

¹⁹ *ibid* ‘Preamble’..

²⁰ *ibid* ch 4. ‘Development of Federal Democracy Union Constitution’.

²¹ *ibid* ch 2.

²² *ibid* ch 2, para 2..

²³ *ibid* ch 2, para 3.

²⁴ The Irrawaddy, ‘Chairman of Myanmar Military Govt’s Election Body Says NLD’s Win Invalid’ (26 February 2021). <<https://www.irrawaddy.com/news/burma/chairman-myanmar-military-govts-election-body-says-nlds-win-invalid.html>> accessed 21 March 2023.

²⁵ Note: In the English translation, the term ‘revolutionary’ is omitted. It is unclear why.

Another term characterized by vagueness is “collective leadership.”²⁶ Which organizations and/or individuals will participate in the collective leadership? What are the criteria, or minimum paradigm or required capacity, for the stated entities to participate in the leadership group? Which body will select or elect those candidates? The term “collective leadership” is akin to the words “all-inclusive principle” used under the NCA.²⁷ Invoking the latter, the UPDJC, which is heavily influenced by the military leaders or ex-military personnel, selected organizations and individuals to participate in the NCA process.²⁸

5 Charter inconsistencies

The Charter also contains various inconsistencies. Even though the term “constitutionalism”²⁹ is reiterated, no provision directly relevant to the limited government concept is found. One paragraph³⁰—analogous to the provision in the 2008 Constitution,³¹ which might be related to separation of power—is also confusing. Accordingly, by using the term “reciprocal check among the three branches of sovereign powers,”³² judicial independence is compromised. In the provision related to the judiciary,³³ there is not a single sentence guaranteeing its independence.

Other inconsistencies include: in a parliamentary system, the Head of State (i.e., the President) does not constitute a part of the government led by the Prime Minister. Although the Charter affirms the parliamentary system,³⁴ the President and Vice-President participate in the formation of the government.³⁵ In addition, the Charter stipulates the right of self-determination in full, guaranteeing the power of the three government branches to be exercised by member states/provinces, separate from the Union.³⁶ This provision is inconsistent with a genuine

²⁶ Federal Democracy Charter, Part 1, ch 4, pt I, para 3.

²⁷ Para 22 (a) of the Nationwide Ceasefire Agreement:

‘Representatives from the government, Hluttaws and the Tatmadaw, representatives from the Ethnic Armed Organizations, representatives from registered political parties, ethnic representatives and other relevant representatives shall participate in political dialogue that is based on an all-inclusive principle.’

²⁸ Interviews with the CSO leaders – Khun Markoban, Sai Kyaw Nyunt and Naw Hser Hser who participated in the Union Peace Conferences – in October 2018.

²⁹ Federal Democracy Charter, Part 1, ch III, para 12.

³⁰ The Federal Democracy Charter Para 5, part 3, Chapter 4, PART I.

³¹ Constitution 2008 Art. 11 (a).

³² Federal Democracy Charter, Part 1, ch 4, Part 3, para 5 ‘Federal Parliament’.

³³ *ibid*, pt 2, Interim Constitutional Arrangement 2021.

³⁴ *ibid*, pt 1, ch 4, pt 3, para 8..

³⁵ *ibid*, pt 2, ch 6 para 39..

³⁶ *ibid*, pt 1, ch 4, pt 3:

3. Every member state of the Union shall have separate legislative power, separate executive power and separate judicial power.’

‘1. Federal Democracy Union shall be built to meet the characteristics of a federal union exercising full rights of democracy and equal rights and rights to self-determination in full. . . 3. Every member state of the Union shall have separate legislative power, separate executive power and separate judicial power.’

federal union in which the state powers can never be practiced separately by the federal and provincial level governmental institutions.

6 Perpetuating the mistaken legacies of the past

A new constitution normally avoids the mistakes of the past, addresses the current underlying issues occurring on the ground, and lays a foundation for a better future society. In Burma, history has described that, under democracy, the majoritarian electoral system – also known as the First Past the Post or winner take all, being practiced since independence – is unfit for the minority ethnic nationalities and their states/provinces.

Since independence in 1948, a First Past The Post electoral system, in terms of majoritarian democracy per se, has been practiced over seven decades now. As such, although elections were held a number of times, the ethnic minorities were marginalized. They neither occupied sufficient seats in the legislative assemblies nor influenced law-making processes at all.³⁷ Hence, apart from the FPTP, a Proportional Representation (PR) system needs to be practiced in a way that a certain number of seats can be allocated primarily to the ethnic minority political parties. If the PR system is applied, nationwide – or at least state/province or county/district wide –³⁸ constituencies shall be created.

Under the 2008 Constitution, a FPTP system alone is guaranteed. The practice of a PR system is potentially prohibited as merely “township constituency” is fixed.³⁹ The Charter displays a similar mistake by repeatedly using the term “township constituency” in connection with the population provided for in the 2008 Constitution,⁴⁰ thereby blocking the PR electoral system that would enhance ethnic minority representation in Parliament.

In addition, the Charter makes a similar mistake by establishing the position of State Counsellor.⁴¹ Under the Charter, the State Counsellor ranks above the Prime Minister, who is the Chief Executive.⁴² This hierarchy contradicts the practice of any democratic country that practices a parliamentary system. Further, the Charter does not prescribe how the President and Deputy President are elected by setting out a presidential election system. Their positions appear to be carried over from the 2008 Constitution.⁴³ Given the above, the Charter incorporates the mistaken legacies of the past.

³⁷ The related issue was raised by the UWSP along with its submission for political dialogue, while demanding permanent reservation of seats for the ethnic minorities.

³⁸ The composition of a Legislature where members are elected using PR usually better reflects the proportions of votes received by candidates on a State or Territory-wide basis than houses where members are elected to single seat electorates. Proportional Representation Voting Systems of Australia’s Parliament. <<https://www.ecanz.gov.au/electoral-systems/proportional>> accessed 21 March 2023.

³⁹ *Constitution 2008* Art. 109 (a).

⁴⁰ Federal Democracy Charter, Part 1, ch 4, pt 3, para 7.

⁴¹ *ibid*, Part 2, ch 6 para 39 (b)..

⁴² *ibid*.

⁴³ Note: There is no country – in which a military official chosen and sent by the Commander-in-Chief of the Armed Forces can become the President or even the Deputy President – in accordance with the Constitution. Nor

7 Major concerns in upholding the rule of law

Under the 2008 Constitution, the President, as Chief Executive, is entrusted with the power to nominate persons to be appointed as Chief Justices.⁴⁴ As a result, the judiciary lacks independence. Under the 1947 Constitution, a similar practice was conducted, but an independent judiciary still largely emerged because the President, who appointed the Chief Justices, was not the Chief Executive but the Prime Minister.⁴⁵ The President at the time served only as the ceremonial Head of State.⁴⁶ Importantly, in accordance with the 1947 Constitution, for the Supreme Court Justices, judicial tenure was guaranteed,⁴⁷ something omitted in the 2008 Constitution. The Charter prescribes an analogous provision⁴⁸ provided for in the 2008 Constitution.⁴⁹ The Charter is unclear whether the President is the ceremonial Head of State or the Chief Executive as he ranks at the top of the entire government even during the prescribed interim period.⁵⁰

8 Major concerns to terminate the civil war

Some provisions relevant to fiscal federalism, land, and natural resources contained in the Charter⁵¹ are vague, albeit valuable. Although the other provisions⁵² are relatively more specific, the entire Charter fails to establish, on the one hand, the nexus between the appropriate representation of ethnic nationalities in the legislatures and, on the other hand, ethnic nationalities' right to fiscal federalism and to the ownership, management, and preservation of land, natural resources, and environment. This failure thus connotes that ethnic minorities, due to the lack of the former, would not enjoy the latter even if the Charter is later transformed into a constitution. If the above situation persists, ethnic nationalities will continue to suffer hardships. As a result, civil war - with its risk of continued turmoil and even atrocities - might not end even if military rule is abolished.

Conclusion

Regarding Burma, the situations occurring on the ground vividly indicate that the old system must be eliminated so that a new system can emerge. The legal system must be replaced with a new one based on the rule of law principles that reflect international legal norms and

is the practice of the presidential electoral system under the 2008 Constitution in line with other countries applying a presidential system.

⁴⁴ Constitution 2008 Art. 299 (c) (1).

⁴⁵ *Constitution 1947* (n 12) Art. 114.

⁴⁶ *Constitution 1947* (n 12) Chapter 5.

⁴⁷ *Constitution 1947* (n 12) Chapter 8, Article 143.

⁴⁸ Federal Democracy Charter, Part 1, ch 3, para 9.

⁴⁹ Constitution 2008, Art. 299 (c) (1).

⁵⁰ Federal Democracy Charter, Part 1, ch 3 para 8.

⁵¹ *ibid* ch 4, pt 3 para 18-19..

⁵² *ibid* ch 4, pt 3 para 20-23..

bolster a genuine federal union. In support of this, the following characteristics of a federalism suited to Burma may be worth observing:

1. To facilitate the emergence of a successful federal union, promotion and protection of human rights must be a top priority and human rights must be protected by the rule of law;
2. The power of judicial review must be practiced by the independent, impartial, efficient and resource-rich judiciaries on federal and states/provinces levels of governments, as an implementation of constitutionalism that accentuates limited government;
3. The independent formation and operation of political parties and Civil Society Organizations (CSOs) need to be guaranteed;
4. The formation of transparent and accountable democratic governments, primarily representing the diverse ethnic minorities and indigenous peoples, is required in all three levels of the Federal Union; and,
5. Having met the above situations, with the participation of the Ethnic States/Provinces – as the constituent units, including Myanmar state/province, which exercises provincial sovereignty – a new federal union may be formed.

Recommendations

1. The emergence of the provisional/interim constitutions

With reference to the operational flaws that took place over the past two years, it is evident that the Federal Democracy Charter, which is not legally binding, no longer suffices as it is unable to seek and establish trust among various ethnic nationalities and their own States/Provinces.

To facilitate the emergence of a federal union suited to Burma, the production of, and compliance with, the provisional/interim constitutions in both federal and provincial levels is a sine qua non even during the struggle against the military dictatorship. It will undoubtedly be a daunting task given the lack of constitutional culture in Burma, but not impossible. The stated provisional/interim constitutions are required to reflect core values contained in some priceless parts of the Federal Democracy Charter, the Federal Constitution (First Draft), the FCDCC Constitution (Second Draft), and the provisions legitimizing the combinations of de jure and de facto standards and the others dealing with, or resolving, the current underlying issues taking place on the ground.

2. Obligation of states for seeking accountability and ending impunity in Burma

A comprehensive strategic program must be undertaken by both the national and international communities, or the struggle for freedom in Burma may take many more years. Regardless of how long it takes, however, unethical, unjust, and unlawful oppressions must be countered with ethical, just, and lawful actions. Chaotic, disarrayed, and random responses must be replaced with systematic, orderly, and planned measures. A combination of nationwide measures and worldwide legal, political, and constitutional campaigns must also be conducted.

To this end, with the emergence of provisional/interim federal democratic constitutions in Ethnic States/Provinces and a provisional/interim federal democracy constitution at the central level, a foundational rule of law must be established as soon as possible. In connection with global constitutionalism, the international rule of law should be activated in support of seeking global peace to promote and protect human rights.

Finally, but not least, the international community of states has a collective obligation to deal with the serious human rights issues in Burma. That obligation requires, at the very least, seeking accountability to end impunity in a way that *jus cogens* norms are effectively observed and enforced.

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