



People demonstrating in Yangon in February last year after the Myanmar military took power through a coup a day before newly elected MPs were due to be sworn in. The military junta has not honoured a five-point consensus adopted by Asean that seeks, among other things, immediate cessation of violence in Myanmar and giving the bloc's special envoy access to all parties concerned. PHOTO: NYTIMES

## Should Asean be an organisation based on the rule of law?

This is the key question for the regional bloc as it grapples with the issue of Myanmar

**Tommy Koh**

For *The Straits Times*

Myanmar joined Asean in 1997 and has been a troublesome member, presenting the regional grouping with two serious problems. The first is the inhumane manner in which it has treated its Rohingya minority. The second is the military coup against the elected government on Feb 1 last year. In this essay, I will focus on the second problem.

The coup occurred one day before newly elected Members of Parliament were due to be sworn in. All had won office in an election on Nov 8, 2020, which took place under a Constitution written by a previous military government known as the State Law and Order Restoration Council. In the November polls, the National League for Democracy (NLD), led

by State Counsellor Aung San Suu Kyi, won 138 seats while the Union Solidarity and Development Party, linked to the military, managed to secure only seven seats. The military has rejected the results of the election, claiming that massive fraud had been committed by the NLD.

President Win Myint, Ms Suu Kyi, other ministers, deputy ministers and Members of Parliament have been arrested and detained. Ms Suu Kyi is being prosecuted for several criminal offences, and if convicted on all charges, she could be put away for more than 100 years.

Many people in Myanmar have opposed the coup and there have been widespread protests. The peaceful protests have been suppressed by violence, and more than 1,700 civilians, including children, have been killed. Three prominent NLD members died while in police custody and four pro-democracy activists were executed last month.

### ASEAN REACTION

On April 24 last year, Asean convened a special leaders' meeting in Jakarta. The head of the Myanmar junta, Senior General Min Aung Hlaing, was invited to attend the meeting, at the end of

which the leaders adopted a five-point consensus on Myanmar. The five points were:

1. There shall be immediate cessation of violence in Myanmar.
2. Constructive dialogue among all parties concerned shall commence to seek a peaceful solution in the interests of the people.
3. A special envoy of the Asean chair shall facilitate mediation of the dialogue process, with the assistance of the secretary-general of Asean.
4. Asean shall provide humanitarian assistance through the Asean Coordinating Centre for Humanitarian Assistance on disaster management.
5. The special envoy and delegation shall visit Myanmar to meet all parties concerned.

Senior General Min Aung Hlaing accepted the five-point consensus in Jakarta but he and his State Administration Council have not honoured it. The Myanmar military has not only continued to use force to suppress dissent and has not stopped the violence, but has also refused to allow the Asean special envoy to meet Mr Win Myint and Ms Suu Kyi. On top of

that, the military has refused to return to the negotiating table.

In view of the non-cooperation by the military on the implementation of the five-point consensus, Asean leaders at their summit on Oct 26 last year decided that Myanmar should be represented by a non-political representative at Asean meetings. Brunei was the Asean chair last year. During its tenure, the bloc's special envoy, Brunei's Second Foreign Minister Erywan Yusof, did not visit Myanmar because the military would not give him access to the detained NLD leaders.

Cambodia is the Asean chair for this year, and Prime Minister Hun Sen has visited Myanmar in an attempt to break the deadlock. He met Senior General Min Aung Hlaing but not the detained NLD leaders. The Cambodian special envoy, Deputy Prime Minister and Foreign Minister Prak Sokhonn, has visited Myanmar twice. On both occasions, he was not given access to the detained elected leaders.

### COMPLAINTS AGAINST ASEAN

Mr Prak Sokhonn made two complaints during an interview with CNA. First, he questioned the legality of the decision taken by the Asean leaders to downgrade

Myanmar's representation to a non-political level. Second, he complained of double standards because Asean did not take such a strong position in the case of military coups in another member country in the past.

My answer to his second complaint is that the Asean Charter is against military coups. I base my conclusion on Article 2, paragraph 2(h) of principles in the charter. The specific language I am referring to is the principle of "adherence to the rule of law, good governance, the principles of democracy and constitutional government". In other words, Asean is for "constitutional government" and against "unconstitutional government", such as a government resulting from a military coup. I make this point with some confidence because I was the chairman of the High-Level Task Force that drafted the Asean Charter.

There was a coup in Thailand in 2014, after the charter came into force in 2008. The coup had the consent of the Thai King. The Thai military also did not kill protesters in an arbitrary manner.

My response to Mr Prak Sokhonn's first complaint is twofold. First, Article 7, paragraph 2(a) of the charter describes the Asean Summit as the "supreme

policymaking body of Asean". Second, Article 7, paragraph 2(d) gives the summit the power to "address emergency situations affecting Asean by taking appropriate actions". I would argue that, in view of the recalcitrance of the military regime in Myanmar, the decision of the Asean Summit to downgrade Myanmar's representative to the non-political level is an "appropriate action". Some friends have suggested that we should suspend Myanmar's membership. I don't think the charter would permit us to do so.

When we were drafting it, we asked the Asean foreign ministers whether to include the words "suspension" and "expulsion". We were told not to do so.

In conclusion, the key issue for Asean is this. Is it an organisation based on rule of law or an organisation based on the rule that might is right? If it is the latter, we should accept the coup as a reality and recognise the government resulting from it. If it is the former, we must hold the military government to account and remain committed to the five-point consensus.

• Tommy Koh served as chairman of the High-Level Task Force that drafted the Asean Charter in 2007.