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## Set the Torturers Free: Transitional Justice and Peace vs Justice Dilemma in Burma/Myanmar

**Abstract:** Burma/Myanmar seems to be a perfect ground for transitional justice with both long-failed transitions to democracy that seemed to succeed in 2015 finally and smouldering civil war taking place there since 1948 (since the 1990s limited to Borderlands). Unfortunately, the political realities in Burma/Myanmar make it unlikely, if not impossible, for transitional justice to be applicable in Burma/Myanmar. The victorious in 2015 elections democratic opposition party, National League for Democracy (NLD) came to power thanks to the political deal with the former military government and is consequently being forced to co-habitate politically with the army that still holds critical political checks over the government. It made NLD's leader, Aung San Suu Kyi to conduct moderate domestic policy without trying to charge the generals for their former crimes. In this circumstances, transitional justice is unwanted by mainstream political actors (NLD, the army) and seen as threatening to peace by many in the Myanmar society. This approach firmly places Burma/Myanmar on one side of the 'peace vs justice' dilemma. It answers the "torturer problem", one of the central problems of transitional justice – how to deal with members of the previous regime which violated human rights – in 'old fashion' way, by granting them full amnesty. As such Burma/Myanmar case also falsifies an optimistic claim that transitional justice is necessary for political reforms.

**Keywords:** *Burma; Myanmar; transitional justice; transitional justice in Burma/Myanmar; Aung San Suu Kyi; torturer's problem*

### Introduction

Burma/Myanmar has been a marginal case study in transitional justice literature until 2011<sup>1</sup>. Due to the unlikeliness of political change scholars consoled themselves with wishful thinking ("while it is unclear when Burma will be free, it is certain that it will eventually

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<sup>1</sup> Among exceptions, see: David & Holliday, 2006.

become a democracy”, Sarkin, 2000) and/or considered hypothetical scenarios in the future (David & Holliday, 2006). It happened so because for two decades Burma/Myanmar’s development had been blocked by a political stalemate between ruling military regime and popular democratic opposition that finally ended with remarkable transformation in 2011–2015. Ruling military junta introduced political and economic reforms in 2011 that resulted in the electoral victory of democratic opposition of National League for Democracy (NLD) under Aung San Suu Kyi in 2015. Myanmar’s transformation has led to an increased attention from transitional justice scholars (see e.g. David & Holliday, 2012, pp. 121–138; Dukalskis, 2015, pp. 83–97; Dukalskis, 2017, pp. 150–151; Tan, 2011), yet the prospects of achieving (some sort of) transitional justice in Burma/Myanmar are today as remote as they had been before 2011. The victorious NLD is still being forced to cohabitate politically with the army (Tatmadaw) that still holds key political checks over the government. This forces Suu Kyi – a rational political actor – to maintain non-confrontational policy towards the Tatmadaw where charging generals for their former crimes is politically out of the question: it would undermine – or even topple – the NLD’s government. Thus, from transitional justice Burma/Myanmar represents an interesting case in the “peace vs justice” dilemma politically firmly settled in favour of the former.

### **Transitional Justice, Torture Problem and the Peace vs the Justice Dilemma**

Transitional justice is a concept in transitional studies and human rights studies that “refers to the ways countries emerging from periods of conflict and repression address large scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response” (ICTJ, 2017a). This concept are linked with a country’s transition from totalitarianism/authoritarianism to more democratic systems and/or from conflict to peace and reconciliation. There is no single definition of transitional justice: the available ones can be classified as ‘narrow’ ones (that focus on legal aspects: (re)establishing the rule of law through legal mechanisms prosecutions) and ‘broader’ ones (which include also post-conflict practices such as peacebuilding and pay more attention to culture aspects, Nagy, 2008, p. 277–278; Teitel, 2000; Mani, 2002, p. 17; Roht-Arriaza, 2006, p. 2). United Nation takes the broader approach where transitional justice is “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, to ensure accountability, serve justice and achieve reconciliation” (UNRIC, 2010).

According to latest UNGA document, these activities include: “the promotion of healing and reconciliation, a professional, accountable and effective security sector, including through its reform, and inclusive and effective demobilization, disarmament and reintegration programmes, including the transition from demobilization and disarmament to reintegration, are critical to the consolidation of peace and stability, promoting poverty reduction,

the rule of law, access to justice and good governance, further extending legitimate State authority and preventing countries from lapsing or relapsing into conflict (UNGA, 2016). The International Centre for Transitional Justice (ICTJ), defines the major issues of transitional justice as following: criminal justice, reparations, truth and memory, institutional reform, gender justice and children and youth (ICTJ, 2017b). Despite these broad views, however, a predominance for the legalist paradigm in the transitional justice literature which arises from (Western) perception of law as neutral and universal way of international interaction is still perceivable (Oomen, 2006, p. 893; on the other hand it is fair to admit that recent scholarship has limited this legalistic bias, see among others: Verdeja, 2009; Millar, 2011). Due to this legalistic predominance in IT literature, transitional justice tends to focus on violation of human rights and/or on criminal acts and often leaves aside such issues as structural violence and social injustice (Nagy 2008, p. 284) and often implicitly “assumes that a legal response should be the primary measure by which progress toward rebuilding societies torn apart by communal violence should be judged”, Fletcher et al., 2009, p. 166).

The core of transitional justice is the very notion of justice. Initially, in the 1940s, transitional justice originated from need for ‘justice’ as a normative expectation (“when a wrong is committed, justice has to be done or at least must be seen to be done”), derived from Western moral and legal tradition *lex talionis* (‘an eye for an eye’, in today’s language: retributive justice (Suren, 2009, p. 348). Since then has, however, developed (particularly in late 1980s and 1990s) in multiply dimensions (the institutions of international criminal tribunals, the emergence of a “right to truth” and “right to reparation” under international law, transnational proliferation of truth and reconciliation commissions as well as the expansion of transitional justice scholarship and the birth of international and regional transitional justice NGOs., Nagy, 2008, p. 274) and transformed into “a form of justice that seeks to be a response to a wrong while at the same time seeking to be a form of justice which avoids the legal absolutism of retributive justice” (Suren, 2009, p. 349). Nevertheless, transitional justice is still often perceived (at least in Southeast Asia) as an imported concept from different cultural traditions (David & Holliday, 2006, p. 102). This is due to the fact that transitional justice is “steeped in Western liberalism, and often located outside the area where conflict occurred [...] almost always in non-Western, developing countries”, hence “may be alien and distant to those who actually have to live together after atrocity” and is being prone to accusations of Western universalism (Nagy, 2008, p. 275–281). It can also be blamed for being “ahistorical or decontextualised” (Fletcher et al., 2009, p. 208). Finally, it may be, too, considered as an “a discourse and practice imbued with power” (Nagy, 2008, p. 286). Although recent scholarship on transitional justice showed that this is not entirely the case (Verdeja, 2009; Millar, 2011), this critical understanding of transitional justice still holds true, at least in Southeast Asia.

In its assumptions, transitional justice seeks to find national strategies to confront with difficult past which can help to achieve accountability and restore harmony in the state-to-citizen relationship. Transitional justice has been used as a hope to “overcome historical

divisions, achieve justice, and build a more inclusive society based on reconciliation and trust.” (*Prospects...*, 2015), and “become central to the efforts of those who prioritise the need to end conflicts and wars because it allows for the consideration of instruments that simultaneously take note of wrongs committed and are amenable to ‘principled compromises’” (Suren 2009, p. 350). Hence, transitional justice became an “umbrella term” that analysis how to deal with an abusive former official, with roughly two main policies: to punish them or to pardon them (Holliday, 2011, p. 96; Holliday, 2014, p. 192).

Transitional justice measures to deal with the past include prosecution, compensation, and truth-telling, establishing accountable institutions and the rule of law, making access to justice a reality for the most vulnerable in society, advancing the cause of reconciliation and others. According to broader views, it encompasses four main approaches: criminal prosecutions for at least the most responsible for the most serious crimes, “truth-seeking” (or fact-finding) processes into human rights violations by non-judicial bodies (commissions), reparations for human rights violations taking a variety of forms, reform of laws and institutions including the police, judiciary, military and military intelligence (ICTJ, 2017a). Others narrow the most important institutions of transitional justice to two only: truth and reconciliation commission and lustration system (Holliday, 2011, p. 97–98). Finally, the institution of transitional justice can be divided into retributive (accountability for mass abuses, such as international courts) and restorative justice mechanisms (that rehabilitate victims of human rights abuses and reintegrate them back into their communities, such as truth commissions (ICTJ, 2017a). Examples of transitional justice include Eastern Europe, Latin America, Africa and – most importantly here because of the regional context – Cambodia and East Timor (for a detailed study of these two Southeast Asian countries’ transitional justice, see: Fletcher et al., 2009)

One of the themes within transitional justice that apply to Burma/Myanmar is the so-called “torturer problem”, present in the democratisation literature of the “third way of democratisation” and of the transitions of the 1990s (David & Holliday, 2006, Herz, 1982; Huntington, 1991). It focuses “on how to deal with massive human rights violations, killings, extrajudicial punishments, torture, corruption and fraud committed by, for or at the behest of a departing, or departed, regime” and differentiate the following policy option: “from impunity to sanctions, from pardon and forget to prosecute and punish” with initially two major ones: amnesty and prosecution; these two (thanks to the birth of truth and reconciliation commissions and by the development of lustration systems) were later complemented by reconciliation and lustration (David & Holliday, 2006, p. 93–94). Hence, the torturer problem may be resolved either by amnesty or prosecution or by hybrid scenarios (reconciliations/lustrations strategies).

Another important issue within transitional justice that applies to Burma/Myanmar case is the so-called justice versus peace dilemma that arises following conflicts or after the transition from authoritarianism to more democratic systems. On one side there are victims of the warfare or those repressed by the old regime (and their families), local and

international NGOs, some international institutions and engaged individuals: they all demand “justice”, that is some “form of accountability be imposed on the perpetrators of gross human rights violations and war crimes”, citing accountability for the sake of victims, their survivors, society at large, deterrence and the (re)building of democracy and the rule of law (Sriram 2009, p. 1–2). On the other side are those who advocate peacebuilding/peace-making in order not to make the conflict re-emerge or the transition to democracy reverse; they do not question the value of justice or accountability, but warn that enforcing it may destabilise fragile post-conflict or under-transition states. Fletcher and others (2009, p. 219) after having examined seven international countries that experienced transitional justice (including two Southeast Asian – Cambodia and East Timor), wrote that “we cannot assume that peace equals democracy [...] the international emphasis on avoiding impunity as the highest priority may be ill-advised. If we can accept the possibility that retributive justice may be delivered at a later time, justice delayed is not justice denied”.

Although each country is unique and usually the dichotomy justice vs. peace is muted by a mixture of both positions (in “transitology” literature many claim that there exist “a consensus that moved past the initial debates of ‘peace versus justice’ there can be no lasting peace without some accounting”, Nagy, 2008, p. 276), the Burma/Myanmar example provides a good example that the opposite is true: the dichotomy is still well and alive. Burma/Myanmar presents itself as “old-fashion” example of “peace”-oriented strategies (in Galtung’s “negative peace” understanding: negative because something undesirable, such as violence, stopped happening; contrary to “positive peace”, which means restoration of relationships, the creation of social systems that serve the needs of the whole population and the constructive resolution of conflict, Galtung, 1996). In Burma/Myanmar justice is still being considered as threatening to peace and unwanted by mainstream political actors and by many in the society.

### **The Settings: Burma/Myanmar’s Political Circumstances until 2015**

Burma/Myanmar seems to be a perfect ground for transitional justice as has been a playground for civil war since 1948 (in last three decades limited to Borderlands) and long-failed transition to democracy that seemed to finally succeed in 2015. Unfortunately, the political realities in Burma/Myanmar make it unlikely, if not impossible, for transitional justice to become applicable on the ground.

Burma/Myanmar, along with the closed and isolated country, hit the world’s headlines in 1988 when mass protests toppled (temporarily) the military government, responsible for Burma’s economic plight. Once the Burmese army (Tatmadaw) regained its position after September 18, 1988, it bided farewell to socialist (non)development and embarked on (wild) capitalism which perpetuated the systemic poverty of the majority of the society and led to and the emergence of “crony capitalism”. The terms depict a group of several families that grew rich with the help military regime (they relied on favours from the army-controlled

state; the system reserved lucrative contracts for favoured businessmen) and dominated the economy (Szep & Marshall, 2012). While Myanmar was getting poorer, the “crony capitalists” were getting more prosperous and Western sanctions did not stop them from becoming the new commercial elite.

From the perspective of transitional justice, however, it was not Tatmadaw ineffective governance and mismanagement in the economic sphere that matters, but Burmese army’s extraordinary brutality. The long list of gross abuses of human rights in Burma/Myanmar include, among others: legacy of mass atrocities against ethnic minorities, arbitrary arrest and detention, extrajudicial execution, torture, forced labour and forced relocations, human trafficking, and sexual violence against women (mass rapes, forced prostitution), institutionalized attacks on religious, educational, art, charity buildings (such as hospitals), forced use of civil porters by the army (see: UN 1989–2017 reports, e.g. *Situation...*, 2011). The enormous brutality of Tatmadaw has forced the people of Burma to “live in silence” (Fink, 2009) and evoked international calls – originating even from UN Envoys to Burma/Myanmar – for inquiry committee or even war crimes tribunal-like mechanisms against Burmese junta (Quintana, 2010, p. 29).

Gross violating of human rights was one of the reasons why the West has introduced sanction against Burma/Myanmar (since 1997, extended in 2004 and 2008). Although there has been a living debate about the impact on sanctions (with both sides having honest arguments), generally it must be admitted that the sanctions failed to produce anticipated results (Burma/Myanmar’s transition to democracy) due to non-participation of Asian neighbours in the sanctions scheme and the xenophobic nature of Burmese regime (Thant Myint-U, 2007, p. 342–346, Holliday, 2005). In a way the sanctions even prolonged the political deadlock in Myanmar – stalemate between the ruling army and democratic opposition under Suu Kyi supported by the West – as it empowered politically Suu Kyi and allowed her to withstand the might of the generals for two decades (Lubina, 2016, p. 135–142, Lubina, 2017, p. 44-45). With new international circumstances (US pivot to Asia and Burmese generals pivot to the USA) that resulted in Naypyidaw-Washington rapprochement, however, the regime introduced reforms and sanctions were no longer needed. (Egretau & Jagan, 2013, p. 432-50).

In 2011 Senior General Than Shwe, Burma/Myanmar’s dictator from 1992 (officially retired while his nominee, gen. Thein Sein, representative of the progressive fraction within military-dominated Union Solidarity and Development Party (USDP), became president and embarked on a series of political reforms. These were “top-to-bottom”, elite-driven reforms: initiation of a political dialogue with the opposition, the release of political prisoners, liberalisation of media (lifting of censorship, unblocking Internet). Internationally, Myanmar re-gained acknowledgement the on the international scene, with Western sanctions being lifted in 2012 and many grants and loans offered afterwards (Bünté & Portela, 2012; Lubina, 2013, p. 443–458).

Crucial to the reforms was Aung San Suu Kyi’s behaviour. Having struggled twenty years in vain with the army, Suu Kyi “saw the writing on the wall” and yielded. She accepted

the political reality of Tatmadaw's political dominance and decided to manoeuvre herself a leading position within the Army-constructed system (until 2011 she tried in vain to overthrow the military-dominated system). She made many political compromises, such as accepting donations from army cronies, declaring love for Tatmadaw, participating in army's parades, not backing the peasants in their struggle with Chinese-controlled company over their lands and – most importantly for the West – silencing over Rohingya's plight (Lubina, 2016, pp. 137–145). The essence of Suu Kyi-Tatmadaw's unwritten agreement has been “inclusion, consensus and stability” (Holliday, 2014).

NLD's conciliatory position after 2011 led to the strengthening of the position of the cronies. They repositioned themselves as ‘new faces of Myanmar Inc’ and spawned a second generation elite, a class of entrenched business dynasties; this all made Myanmar transformation being carved up between the generals, cronies, some NLD members and emerging-markets investors (Szep & Marshall, 2012). Structurally, it meant “entrenched political role for the military in nominally democratic institutions” (David & Holliday, 2006, p. 91). Despite significant political rapprochement with the generals after 2011, Suu Kyi was unable to convince them to change the constitution that guarantee military dominance (three ministries: defence, home affairs and border affairs; budget autonomy and legal option of staging a coup, and 25 percent of the seats in the parliament for the army) and blocks Suu Kyi from becoming president (Constitution, 2008). Suu Kyi, however, did not give in. She bet all her cards on the parliamentary elections of November 2015 and won (these elections were “to-be-or-not-to-be” for her: if she would not win it decisively, she could not have to say farewell to her political career). This election, however crucial and necessary for Suu Kyi, were just the beginning of the real negotiations for power.

From the perspective of transitional justice, the fact that it was the military government (not Democrats from the opposition) that planned and implemented the reforms, was crucial. Tatmadaw prepared itself carefully not to be charged by former atrocities. The army from the beginning hoped that there would be no questions of transitional justice: “if the country really does have to embrace democracy without adjectives, then let it come in a gradualist way that never creates an opening for analysis of past injustice” (Holliday, 2011, p. 96). Just in case, the military-based authors of the 2008 Myanmar's Constitution have written impunity clause into it. The Article 445 prevents any legal possibility for judging Tatmadaw's past atrocities by stating: ‘no proceeding shall be instituted against the said Councils (former junta's Councils) or any member thereof or any member of the government, in respect of any act done in the execution of their respective duties.’(Constitution, 2008). The fact that “the current constitution is inconsistent with international human rights law, which deems amnesties for genocide, crimes against humanity, and war crimes unacceptable” (Impunity Watch, 2014) does not bother the generals. The Burmese military leaders are brought up in a political culture that places non-interference and domestic affairs above any universal rights (and the generals are politically too strong to accept any international legal supervision over Burma/Myanmar).

Tatmadaw's stance (predictably) has not changed after political reforms started. The military has released most of the political prisoners (though not all) but has done little in the way of reparations for them. Despite setting up Myanmar National Human Rights Commission (MNHRC) by Thein Sein government in 2011 (despite opposition from part of the military: the parliament, or Hluttaw, declared this decree to be unconstitutional which showed opposition to Thein Sein's reforms within the army, Holliday, 2014, p. 195), when several cases of rights abuses were filed to the Commission (as well as to Supreme Court), these were rejected (cases of Kachin woman Samlut Roi Ja abducted by Tatmadaw in 2011 and another one of Ja Seng Ing probably killed by Burmese armed forces, FIDH 2014, *Who killed...* 2014; Impunity Watch, 2014). The latter case turned out to be symptomatic: "complainant was successfully sued by the military for defamation and fined", which "continues to exert a chilling effect" on any other attempts to make Tatmadaw accountable for past crimes (Thomson, 2016).

Military's unwillingness to accept its past misdeeds remains the most important obstacle for transitional justice to take roots in Burma/Myanmar. It is complemented by other, structural reasons. The fundamental one is poverty: despite recent impressive economic development Burma/Myanmar remains a very developing country, and people are more engaged in improving their lives. In such environment transitional justice "is often seen as a luxury that can only be afforded once other developmental challenges are solved (...) large parts of the population tend to focus on 'moving on', addressing daily economic needs, and seeing questions of justice as jeopardising their efforts in achieving social and economic stability" (Impunity Watch, 2014). That is why Burmese conditions (so far) falsify the claim that the "popular dissatisfaction" is an argument against applying amnesty in transitional justice (David & Holliday, 2006, p. 95). The argument about popular resentment over amnesty is generally right per se, but not so in local, Burmese conditions where above mentioned "move on" attitude and cultural fatalism (Spiro 1982, p. 439; Burmese society is accustomed to injustice of their rulers – probably none of the Burmese kings deserved the title *Dhammaraja* – and certainly none of the military leaders they were rather considered traditionally as one of the "five enemies" of the people) made amnesty a possible option. Naturally, one may argue that this attitude of not favouring the pursuit of transitional justice originates from the fear that "oppressive forces will once again rise and assume power" (Sarkin, 2000), but in the end, regardless of motivations, the result is the same: the society is rather skeptical about transitional justice. If transitional justice most important questions – that is "what is most beneficial to the people whose lives have been disrupted or even destroyed by the perpetrators of violence?" and "what the affected society wants in the immediate aftermath and how can the response be tailored to the particular cultural, social and economic context?" (Fletcher et al., 2009, p. 165) – is often being answered in Burma/Myanmar as "forget and move on", then it must be taken into consideration. Otherwise, transitional justice may be considered ideological and "may become suffused with accusations that international-sponsored "justice" is (yet) another instance of foreign or Western



imposition” (Fletcher et al., 2009, p. 212). Naturally, Burmese social fatalism belongs to the category of “cultural” arguments prone to criticism (“what cannot be explained in terms of rationality or logic is expelled into the realm of culture”, Philpott, 2000, p. 79) and/or can be counter by claims of “country’s dominant Buddhist culture of compassion, forbearance and unconditional forgiveness” that is consistent with transitional justice (Holliday, 2011, p. 101). Nevertheless one should not dismiss cultural arguments out-of-hand: in transitional justice literature it is admitted that “culture and traditions shaped the response of a country to its past period of repression or mass violence” and that there is “a dynamic relationship among the racial, ethnic, and religious identity of those persecuted, their political power, and the social values to which political leaders could appeal in crafting the state’s response to the violence [...] context matters, and it matters considerably” (Fletcher et al., 2009, p. 207). Hence, in Burma/Myanmar culture (or, to be exact, traditional fatalism of the significant part of the society) plays a role in obstructing transitional justice. This is a minor one only. The most important obstacle remains political: it is the nature of Burmese transition which produces lack of political will towards transitional justice.

### **The Post-2015 Burma/Myanmar’s Transformation Founding Deal**

Despite being a milestone and necessary step in NLD’s ascendance to power, the 2015 elections were politically not the turning point in Burma/Myanmar’s transition: this title goes to the deal that was struck afterwards behind closed doors between the military and Aung San Suu Kyi. The nature of this deal and the political reality that followed make it highly unlikely for transitional justice to become an attractive option for Burmese political elites.

In November-December 2015 the real political power was negotiated between Suu Kyi and the military regime. Having lost the elections army-backed party, USDP was shocked by its dramatic defeat in the polls. The generals had hoped for a divided parliament, in which no party has a majority, but NLD’s score (77%) ruined these calculations. It was not only well ahead of minimum 67% percent needed by this party to rule alone but also showed the unchanged extent of popular support for Suu Kyi (in 1990 she achieved 80%) and gave her a strong, popular (and international) mandate. Despite all that, politically it was the army which enjoyed better negotiation position by the privilege of being structurally advantaged by the constitution which forces every government to cooperate, cohabitate, if not co-rule, with the army. Suu Kyi, having remembered the year 1990 when the generals nullified victorious for NLD elections, knew that only a deal with the generals guarantees the handover of power (the danger that the army may not accept the results of the elections again was real). Being in weaker political position, she needed to persuade the army to give back the power.

What is crucial here, from transition justice, Suu Kyi politically couldn’t do what many in Myanmar hoped for: make a political reckoning with the past. For many people in Burma/Myanmar, a payback (making army accountable for past crimes and misdeeds) seemed the

proper action logically. For too many, the “blank slate” amnesty tactics went against the very notion of political justice. Unfortunately, what may seem right in the Weberian “ethnics of convictions” is not quite so in the “ethics of responsibility” (Weber, 1919/1946). Amnesty is “is often distasteful and unjust. It may inflict deep pain and suffer on victims and their families and friends. It may be difficult for opposition leaders to defend. At the same time, it may offer the only realistic way forward if violence and human rights violations are to cease” (David & Holliday, 2006, p. 93).

The same can be said about dealings with cronies, despicable by the majority of the society. Contrary to social expectations and contrary to the logic of “ethnics of convictions”, Suu Kyi couldn’t allow herself to be tempted by a political payoff; this would ruin her chances of persuading the army to accept her electoral victory, and perhaps even sabotage reforms and inflict repressions (and consequently ruin the achievements of last few years). Thus, after the elections, Suu Kyi presented a politically wise, conciliatory tone: she called for a dialogue, national reconciliation and did not criticise military-backing cronies (she already befriended some of them earlier). It opened her doors for negotiation power transition.

A series of Suu Kyi’s behind-the-scenes talks with military leaders (gen Min Aung Hlaing, the commander-in-chief of the army and gen. Than Shwe, former dictator), former Suu Kyi’s political opponents, if not enemies, took place in November and December 2015 (Aung Zaw, 2016a). The negotiations remained secret: no media was present, and no communiqués were published, and the details (where, where, who, how many meetings, what was discussed and what was agreed) are still unknown. This low profile style was done in purpose as this local equivalent of “cabinet diplomacy”, brokered behind closed doors was entirely consistent with Burmese political culture: this is the dominant pattern of making politics, followed for example by Suu Kyi’s father Aung San in Panglong in 1947.

Although the results are unknown, one may judge by what happened next. Suu Kyi and the generals must have agreed on basic principles of cooperation and kept the deal despite Suu Kyi’s attempt (in late January/early February 2016) to become the president (Suu Kyi’s political charge in late January 2016 made commentators hold their breath; later, however, it turned out that it was a “smoke screen” – while generals and commentators were busy trying to figure out Suu Kyi’s intentions, she nominated her loyal subordinate, Htin Kyaw for presidency and established the unique position of “state counsellor” for herself that gives her control over government). Suu Kyi’s relations with the army have remained good. NLD’s government has not tried to undermine the privileged position of armed forces, does not interfere in army’s clashes with ethnic minorities’ Northern Alliance, is indifferent to Rohingya’s plight, maintains cordial relations with crony capitalists and continues Myanmar’s traditional balancing foreign policy. In fact, Suu Kyi’s government is continuing rather than reversing former military’s policies (even the 21st Century Panglong Conference may be seen as the continuation of the National Ceasefire formula). It is unsurprising given the fact that political circumstances on the ground (2008 Constitution, the political might of the Tatmadaw) force NLD to cohabit with the army. Suu Kyi has accepted this reality and

has not challenged the army directly, at least not yet. Thanks to that, as some Burmese commentators say, Suu Kyi has been accepted by army's elite as Myanmar's political leader (Aung Zaw, 2016b).

Hence, on the systemic level, Suu Kyi's ascendance to power was possible thanks to the political deal with the army. Suu Kyi achieved Tatmadaw's consent in return for guaranteeing generals political security and dominance in the economic sphere. The army on its turn showed restraint by accepting the end of its full control over the state and the economy. Politically speaking, this "rotten compromise" was probably the best option for Myanmar. Given Tatmadaw's scale of military economic and social mismanagement in last five decades, army's poor human rights record (mass repressions), their corporate interests, their political might, any attempt to reckon with Tatmadaw could prompt resumption of repressions, withholding the reforms or even a new *coup d'état*. That is why Suu Kyi by guaranteeing military safe landing secured the results of her electoral victory and made it possible for her country to continue its reforms and modernisation. Judging by political perspective, *tabula rasa* tactics towards the army remains the best policy choice available on the ground.

About transitional justice literature, Burma/Myanmar's founding deal follows the examples of other transitional countries, such as South Africa: "at the heart of the deals that have underpinned negotiated and nuanced transitions to democracy has usually been some form of impunity. It can take many guises, such as immunity from prosecution, selective prosecution and a statute of limitations" (David & Holliday, 2006, p. 92–93). However, the Burma/Myanmar case differs in one thing: the nature of the amnesty granted to the regime. When David and Holliday (David & Holliday, 2006, p. 92–93) offered a transitional model for Burma/Myanmar in the 2000s they rightly portrayed the necessary steps to be taken by the opposition (Suu Kyi). According to them, in order to prompt key members of the regime to sit down around the table, convince them to relinquish their power and avoid attempts of avenging justice afterwards, the opposition (here: Suu Kyi) needed to provide them with incentives and credible assurances of immunity from punishment, otherwise they wouldn't negotiate about real political reform: "it is necessary to set the junta free if Myanmar is to be coaxed along the road to democracy. By this, we mean two main things. First, the junta needs to be given an opportunity to release itself from the entrenched position it has taken over many years [...] Second, individual members of the regime need to be offered personal incentives to cooperate with a process of democratic change." This Suu Kyi has done. However, at the same time David and Holliday were wrong when they proposed qualified amnesty as the model for Burma/Myanmar ("qualified amnesty in exchange for truth") and stated that this amnesty "is necessary for political reform" (2006, p. 91–92). As 2015/2016 developments have showed, it turned out that qualified amnesty was not necessary at all. The model of qualified amnesty was based on the inexplicit conviction that it would be an opposition that will dictate the rules of transition, or simply be in stronger political position. Perhaps Suu Kyi herself, given a chance, would prefer the South African-based model of qualified amnesty (at least her interviews from 1990s where she frequently evoked South African

example might suggest that, Aung San Suu Kyi, Alan Clements, 1997/2008, p. 38, 218–219, 180; apparently she advocated a local version of “merciful justice”, Holliday, 2014, p. 189), but it was not on her to decide. In Burma/Myanmar after 2015, however, the Leninist rule “who will beat whom” was settled in favour of the army. Thus, Burma/Myanmar represents rather another type from transitional justice literature. It is a classical example of one of three broad types of political transition: the reform. In this scenario “old government plays a critical role [...] determines the type and pace of change” while “old forces still retain control at some level [...] since these former leaders retain much power, they have the ability, to a greater or lesser extent, to dictate what happens in the transitional process”; and, as a last resort, they may stage another coup d'état if provoked”; that is why in this model “an amnesty is likely” (Sarkin, 2000). This is precisely what happened in in Burma/Myanmar. Since change happened on generals’ terms they were the ones who decided about the conditions on the negotiations table; hence the only available option on the table was the full, unconditional amnesty (“blanket amnesty”). Without it, the generals would not relinquish the power, which is, by the way, a classic motivation of authoritarian rulers (Przeworski, 1991).

Blanket amnesty had traditionally been a favorite way of ending civil war or in a transition from democracy to authoritarianism. However, since the 1990s and 2000s, the transitional domestic justice in South Africa, the development of international tribunal courts (former Yugoslavia, Rwanda) and even the hybrid courts (Cambodia) blanket amnesty was losing favour (Dugard, 1999). Reasons cited for this were: inability to deliver fresh start, impossibility to demonstrate political change and unfeasibility with the international criminal law; that is why in the 2000s “blanket amnesty as a measure of transitional justice was almost completely off the agenda” (David & Holliday, 2006, p. 95). There emerged “an international consensus that atrocity crimes should not go unpunished. As a corollary, blanket amnesties are rejected as a necessary compromise to purchase peace” (Fletcher et al., 2009, p. 215). Burma/Myanmar case, however, suggests that perhaps in the circumstances of resurging worldwide authoritarianism of the 2010s this compromise is no longer valid; a blanket amnesty is perhaps again an attractive option for the transition. Out of three conditions apparently required for an amnesty to achieve success in the transitional country: suitability, discontinuity and feasibility (Przeworski, 1991, David & Holliday, 2006, p. 95) Burma/Myanmar’s blanket amnesty case fulfils suitability and feasibility but not discontinuity. A discontinuity, however, did not prove to be necessary for transforming Myanmar, at least so far.

This political reality of blanket amnesty has, however, produced a highly negative consequences for transitional justice to occur in Burma/Myanmar. Most of Burma/Myanmar’s today’s challenges to transitional justice (ongoing armed conflict between parties with different historical identities on the peripheries of the state; rising nationalism and Buddhist-Muslim tensions, presence of perpetrators of past human rights abuses in government; widespread corruption and cronyism; and continuing abuses and arbitrary detentions by security forces) originate from the nature of Burmese transition; and thus make “any attempt

to pursue comprehensive justice a tightrope walk” ICTJ]; as Holliday (2014, p. 183) wrote: “transitional justice may take years to gain a secure foothold in Myanmar”; in the Myanmar circumstances he may be considered an optimist, for he can believe that transitional justice would one day be possible there.

### **Burma/Myanmar: Not a Ground for Transitional Justice?**

The post-2015 political landscape in Burma/Myanmar has created circumstances where transitional justice is neither wanted by the majority of political actors nor possible in predictable future. There are several important political reasons behind this agenda, most of which can be classified as a “peace” argumentation within the peace vs justice debate.

First of all, NLD government has “prioritised peace and reconciliation” and focused on “reconciliation between leaders of the NLD and the military”; in this approach, reconciliation is understood as between the NLD (the former democratic opposition) and the military (Thomson, 2016). Suu Kyi herself has repeated her message about “healing past wounds” between military and opposition many times (ICG, 2015, p. 5; ThaiBPS 2015; Zarni Mann, 2015). Moreover, Suu Kyi’s stance on restoring peace in the country (ending the smouldering, yet still active conflict on the peripheries) is vague (neither she nor her officials have not made any concrete statements) and based on the principle of non-irritating the military (“anything that might upset the military is off-limits, in order to secure its full cooperation on the NLD’s priority issues”, Thomson, 2016); so far this has not produced breakthrough results as Tatmadaw continues its traditional, violent approach to solving ethnic problems which backfires Suu Kyi (particularly on the Rohingya issue). Suu Kyi’s flagship project: the “new Panglong conference” (historically Third Panglong conference, now called 21st Century Panglong Conference) despite bringing most of the ethnic leaders into the negotiation table has not produced tangible results yet. Tatmadaw and ethnic military groups (‘old’, such as KIA, and ‘new’ such as Northern Alliance) remain non-flexible on their entrenched positions. In essence, Suu Kyi’s Panglong scheme does not differ much from military government National Cease Fire idea and as such can help in tactical gains but not in long-term resolution of the ethnic conflict in Burma/Myanmar. In theoretical terms, Suu Kyi’s peace agenda belongs to Galtung’s “negative peace” category (Galtung, 1996).

Second of all, “it appears that the NLD leadership does not believe transitional justice is necessary or desirable” as it “associate justice or transitional justice with criminal prosecutions motivated by revenge” (Thomson, 2016). This understanding of transitional justice derives from Suu Kyi’s personal attitude (she has many times stated that he does not seek revenge and can work with her former enemies who destroyed her family, placed her under house arrest and almost killed her in Depayin in 2003) based on her Buddhist convictions (e.g., see: Aung San Suu Kyi, Clements 1997/2008, p. 48, 119–195; Aung San Suu Kyi, 1991/2010, p. 170–171). However, leaving speculations about her personal feelings aside, her attitude is probably based on political calculations as well. One has to remember

that transforming a country and rebuilding the society is “a messy business and rebuilding efforts, despite uplifting rhetoric that often inaugurates such initiatives, are no less tidy” (Fletcher et al. 2009, p. 169); given this into account, Suu Kyi as a rational actor, has her right to prioritise other issues. However, if effective government indeed sustains of “ensuring basic security” – both from external enemies as well as internal insurgencies – “meeting the basic needs of its citizens” including health and education, and “maintaining legitimacy” (Weinstein et al., 2004), then Suu Kyi’s government met only the last condition.

What must be also said is that the above-mentioned attitude towards transitional justice is not confined to Suu Kyi only but it is followed by many, if not most of the Burmese society (many Burmese believe that transitional justice is “motivated by revenge or personal gain” and express “preference for privately negotiated compromise over public confrontation”, Thomson, 2016). Aside from “move on” attitude (in accordance with well-known Maslow’s pyramid of needs survival stands well ahead of justice, Holliday, 2014, p. 194), the most important factor behind this attitude seems to be the fear: the Burmese are anxious that “bringing up the past will provoke a coup by the military” (Pierce 2013, quoted in Holliday, 2014, p. 193). Furthermore, and this attitude is shared by many Burmese human rights defenders and political activists, too; they say “they want nothing for themselves because they have chosen to sacrifice for the cause of democracy” and prefer to “focus on pursuing justice for those with more immediate needs, like disabled torture victims and families of political prisoners who died in prison” and would rather be granted recognition for their contributions to the democratization process instead of receiving material reparations (Holliday, 2016).

Third of all, the political reality after 2015 produced a paradox situation where there is little room for voices critical of NLD in general and Suu Kyi in particular. Partially it has to do with uncomfortable the fact that NLD government has not revoked repressive anti-liberal laws (Amnesty International, 2017; sometimes the situation on human rights has even worsened, see, e.g. tightened control of social media). So people are afraid to speak out against military, and they refrain from reminding Tatmadaw its atrocities. NLD government – due to these political reasons (its anxiety over the military’s reaction) is even more nervous about any anti-Tatmadaw activities than the previous quasi-civilian government composed of former generals. For example in June 2016 NLD government has banned launching a report in public in Yangon about Tatmadaw’s atrocities in Northern Shan State, whereas “under the previous government, similar report launches were common in Yangon, and some ethnic minority activists have taken this and other incidents as a sign that their freedom of speech has shrunk since the NLD took power” (Thomson, 2016).

Fourth and final, many people in Myanmar are reluctant to criticise Suu Kyi’s government out of two reasons. The first one is the fear that criticism of NLD might undermine the civilian government and implicitly make military rule return possible; the second one is anxiety over public ostracism. Suu Kyi as Burma’s “Mother of Nation” is (still) beyond public controversy within the majority of Burmese society (though this does not concern

ethnic minorities, see below). Finally, the authoritarian policy style of Suu Kyi (visible since at least mid-1990s but noticed outside only in 2010s, *New York Times*, 2015) does not invite opinions and dissident voices from outside NLD, so people of Burma understood that their opinion is not welcome: “Suu Kyi has made numerous public and private comments on the theme that civil society is useless, unnecessary, and selfish” (Thomson, 2016). Suu Kyi’s governing style is, by the way, consistent with the traditional way of Burmese policymaking since royal times, so for many people, this is somehow natural; they are accustomed to this state of affairs.

The situation with ethnic minorities is a bit different. Ethnic minorities, traditionally the biggest victims of Tatmadaw’s atrocities (Smith, 1999), have supported Suu Kyi in 2015 elections despite the fact that Suu Kyi promised them little beyond platitudes (her stance on ethnic minority issues is also quite Burman-centric, Aung San Suu Kyi, 2010, p. 223; Aung San Suu Kyi & Clements, 1997/2008, p. 197). Now, many representatives of the ethnic minorities feel being used and left by NLD government. Thus, they are more vocal in their criticism (which is easily spotted in very popular in Myanmar social media). The ethnic minorities “feel particularly exposed; they feel criticism of the conflict will be taken as a criticism of the government [...] they would be even more vulnerable to arrest, attacks (in person or on social media), or being ostracised from mainstream civil society” (Thomson, 2016). Their anxieties are justified as in the recent political history of Myanmar it was the ethnic minorities who usually paid the highest price for the deterioration of centre (Burman) – periphery (the ethnic minorities) relations (Smith, 1999/1991; Lintner 1999).

Finally, there are other, minor reasons why transition justice faces a hard reality check in Burma/Myanmar: the existing state institutions (such as MNHRC) are not being seen as reliable; there is no witness or victim protection or confidentiality for complainants, and overall transparency is non-existent (Thomson, 2016). This is an unsurprising outcome: in transitional justice literature it is admitted that when “the judicial system remains marred by poorly trained, corrupt, or indifferent judges and staff (then) chronic lack of human and physical infrastructure contributes to the inability of these legal systems to administer justice”; hence in Burma/Myanmar, as in the examples of Cambodia and East Timor, “weak democratic structures and legal institutions pose considerable challenges for transitional justice initiatives [...] to contribute to long-term societal reconstruction” (Fletcher et al., 2009, p. 191-209).

Thus, the situation on the ground makes it difficult for transitional justice to take roots in a country. This all creates a highly challenging ground for transitional justice to take its roots in Burma/Myanmar. Despite that there are some minor, (pre)transitional justice initiatives in Burma/Myanmar that need to be listed, such as: cooperation between some Members of Parliament, NGOs and community leaders advocating for compensation for victims of land evictions, existence of several parliamentary committees for human rights violations against ethnic minorities (land confiscations, war crimes), documentation of human rights done by such groups as Network for Human Rights Documentation Burma

(ND-Burma), Women's League of Burma (WLB), Shan Women's Action Network (SWAN), Karen Human Rights Group (KHRG) and others, memorialization efforts by 88 Generation Student and Open Society commemorating 1988 student uprising, by e.g. writing letters to express their grievances (Impunity Watch, 2014, Levin, 2011, Holliday, 2014, p. 194–195). All these memorialization initiatives are important because “in addition to their value as mechanisms to provide acknowledgement to survivors of human rights violations and their families, memorialisation initiatives can - in the complete absence of formal transitional justice mechanisms- contribute to paving the way for further comprehensive justice initiatives as opposed to merely complementing them once in place” (Impunity Watch, 2014).

Nevertheless, despite existing and being autotelically valuable, these initiative are politically insignificant and socially marginal: they operate in opposition to Burmese political mainstream and many, if not to the majority of the society. Given “the continued climate of fear and intimidation” or even “a culture of impunity” (Holliday, 2014, p. 198) which creates limited space (both institutional and informal) for justice actions, “organisations working on transitional justice inside Burma/Myanmar usually operate on a low profile under the guise of ‘peacebuilding’, strictly avoiding public reference to sensitive issues such as claims for justice and accountability (their) initiatives remain confined to the unofficial, civil society level”; hence “the transitional justice process in Burma/Myanmar is in its fledgling stages” (Impunity Watch, 2014) and its agency “needs to be handled carefully” (Holliday 2014, p. 195)

This situation is unlikely to change as long as the political scene in Burma/Myanmar is cemented by NLD-Tatmadaw entente based on political convenience.

## **Conclusions: Peace, not Justice in Burma/Myanmar**

Burma/Myanmar represents an intellectually fascinating case of a country that implemented a retro, “old fashion” way to answer the transitional justice’s “torturer problem” (how to deal with the atrocities of the former regime members): blanket amnesty. Long considered as 1) no more acceptable way to deal with former perpetrators and 2) a regress in comparison to international developments of the 1990s and 2000s, blanket amnesty today, in the circumstances of resurging worldwide authoritarianism, re-emerges, perhaps, as an attractive option in the transitional period. Indeed it is the chosen option for Burma/Myanmar out of social, cultural but mostly political reasons. The nature of Burma/Myanmar’s political deal after 2015 and NLD’s choice afterwards produced a political situation where blanket amnesty remains the best possible political solution. Aung San Suu Kyi has let the torturers go to fulfil her dream of reforming country and fulfilling her ambitions. So far she was right to do so. Time will tell, however, whether this Burmese blanket amnesty scenario would be able to survive in the long term.

What is certain for now is that all significant political actors in Burma/Myanmar do not want transitional justice. The ruling NLD consider it as a threat to peace and transformation.



The army rejects it out of hand for obvious reasons. Many people, perhaps the majority, of the society are more preoccupied with improving their (dire) economic living conditions than with thinking about justice.

This all makes Burma/Myanmar an interesting local case in the discussion on peace vs justice, settled here firmly in favour of the latter. In these circumstances, transitional justices face a hard reality check in Burma/Myanmar and remains a future (an uncertain) scenario only.

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