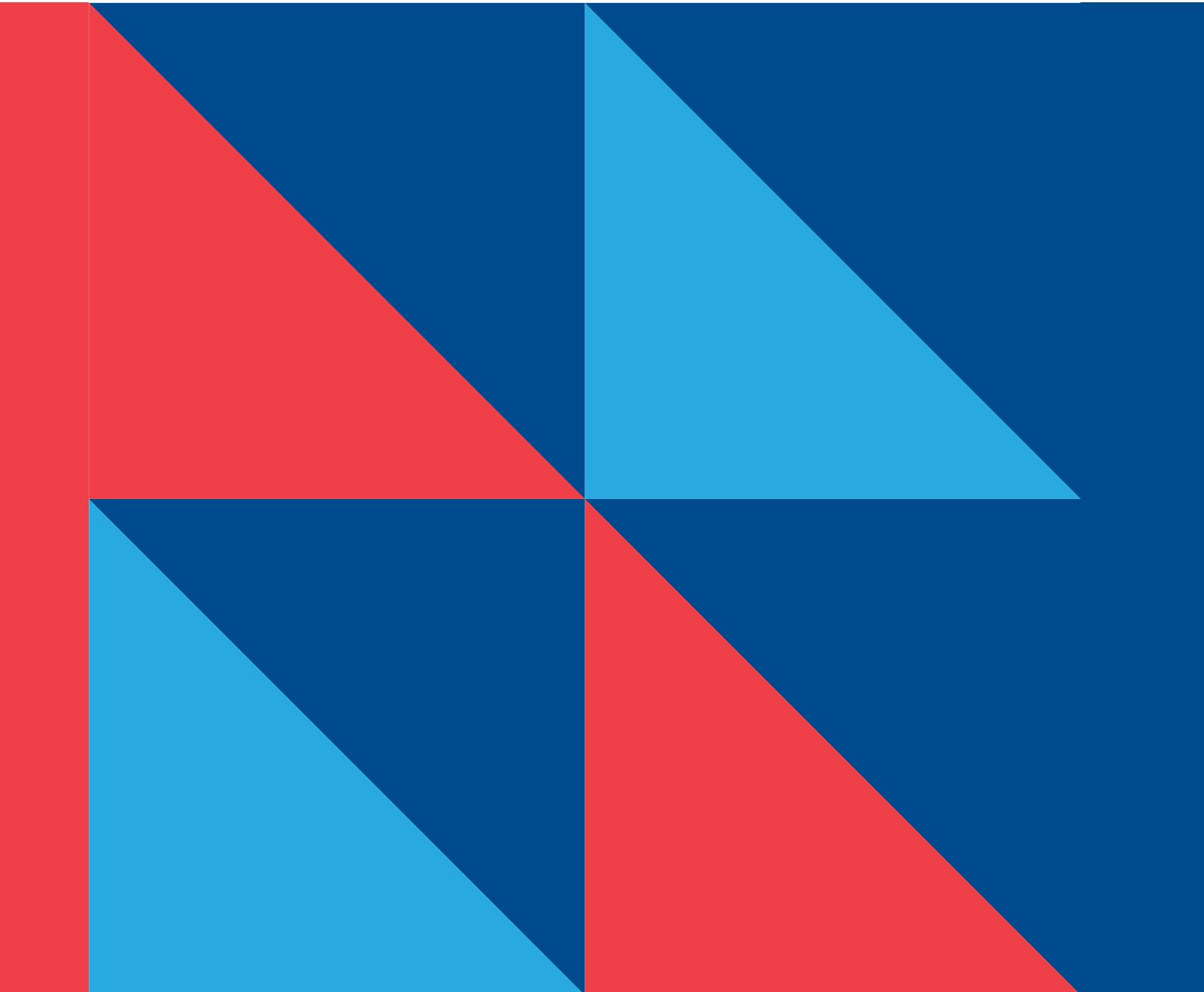




ELECTIONS AT A CROSSING POINT: CONSIDERATIONS FOR ELECTORAL DESIGN IN POST-COUP MYANMAR

International IDEA Policy Paper No. 26, October 2022



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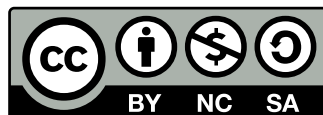
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Abbreviations

BSPP	Burma Socialist Programme Party
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRPH	Committee Representing the Pyidaungsu Hluttaw
EDR	Electoral dispute resolution
EMB	Electoral management body
FDC	Federal Democracy Charter
FPTP	First-past-the-post
GNLM	Global New Light of Myanmar
ICCPR	International Covenant on Civil and Political Rights
ID	Identity
MP	Member of parliament
NLD	National League for Democracy
NUCC	National Unity Consultative Council
PR	Proportional representation
SAC	State Administration Council
TRS	Two-round system
UDHR	Universal Declaration of Human Rights
UEC	Union Election Commission
USDP	Union Solidarity and Development Party

EXECUTIVE SUMMARY

Myanmar's military junta has sought to justify the 1 February 2021 coup d'état with dubious allegations of electoral fraud surrounding the 8 November 2020 general elections. While the country is experiencing unprecedented resistance to the military's attempts to establish control by force, its State Administration Council (SAC) perpetuates a narrative of electoral fraud and claims to be preparing fresh elections, including by making changes to election and political party laws, implementing a new electoral system and updating the voter list.

At the same time, pro-democracy forces—some of which remain in the country while others are in exile—are not only supporting civil disobedience and opposition to military rule, but also seeking to reconfigure the constitutional framework for a future democratic and federal Myanmar. Democratically elected representatives and interim institutions have begun to prepare a new institutional framework, in particular with the adoption of the 2022 Federal Democracy Charter (FDC), in preparation for a new permanent federal constitution to be adopted by a Constituent Assembly.

In the context of developing a constitutional framework for a future democratic and federal Myanmar, it is advisable to factor in questions of electoral design from an early stage.

In this context, it is advisable to factor in questions of electoral design from an early stage, which can also assist in countering the military's problematic narratives. In this endeavour, guidance can be found in international human rights law, which provides principles for and guidelines on holding democratic elections. Guidance can also be found in Myanmar's past electoral experiences, as the next generation of lawmakers and election administrators inherit a host of lessons learned from dealing with long-standing systemic and structural problems in the electoral process.

Against the background of Myanmar's recent electoral history and ongoing political crisis, this paper proposes key areas to consider with regard to elections in the context of a federal constitutional design: the overall electoral legal framework, electoral system choice, electoral management, voter registration, including a clear framework for suffrage rights, and electoral dispute resolution.

This paper is primarily meant as a contribution to ongoing discussions among democratic forces regarding options for electoral design within a federal framework. It is also intended to contribute to the international community's understanding of the centrality of elections, in both the military's strategies and a future federal path chosen by democratic forces. International IDEA focuses on three main themes in its work: electoral processes, constitution-building processes, and political participation and representation. This paper has been produced to support Myanmar stakeholders in all these areas.

RECOMMENDATIONS

Taking past experience and the long-standing shortcomings of democratic elections in Myanmar into account, the following general recommendations can contribute to discussions among political stakeholders on a new federal framework.

LEGAL FRAMEWORK

1. In revising the legal framework for elections, weaknesses inherited from the 2008 Constitution and the legislation in force thereunder should be addressed beyond the mere question of the military presence in parliament and government, to strengthen judicial human rights protection mechanisms, the rule of law and protection for electoral rights, among other things.
2. In the context of a future federal framework, ensuring equality and consistency in the implementation and protection of electoral rights across the entire territory will be essential, as well as ensuring that the legal framework is clear, stable and predictable. The constitution(s) should determine at which level the various elements of the electoral legal framework should be provided for and should be comprehensive in that regard.

ELECTORAL SYSTEM

3. Should the system of FPTP be retained, the political stakeholders should consider reviewing electoral constituencies in line with the principle of equal suffrage. Should this be undertaken, it would be desirable to subject redistricting to strict criteria and clear procedures.

4. Should a new electoral system be considered, it should respect equal and universal suffrage, be adopted after an open and consultative process, and aim to enhance the representation of women.

ELECTORAL MANAGEMENT

5. In crafting the electoral administration for a federal system, mechanisms should be adopted that would guarantee the independence of the future EMB, its legitimacy and authority across all the territory, as well as its transparent and inclusive functioning.
6. Cooperation among and between EMB officials and representatives from other authorities needs to be established with greater clarity in the election legislation.

VOTER REGISTRATION

7. Addressing the structural weaknesses of voter registration in Myanmar would involve strenuous efforts to improve population registers and the issuance of identity documents, regardless of which approach to voter registration is chosen. The long-term quality of voter lists would benefit from the establishment of a permanent, centralized and computerized, and regularly updated voter register.
8. In a federal framework, a clear division of tasks and responsibilities is essential between the centre and the federal units. While federal units may be responsible for drawing up lists, principles related to the definition of citizenship, voter eligibility and registration methods must be uniform across the territory.

ELECTORAL DISPUTE RESOLUTION

9. When devising a new institutional framework, attention should be paid to addressing the issues inherited from the 2008 framework, including by providing judicial review of the electoral administration's decisions, a clear timeframe for adjudicating complaints, and guarantees on transparency and independence.
10. In a federal system, the EDR mechanisms should be particularly solid and enjoy the confidence of all the constituent parts of the federation.

INTRODUCTION

Myanmar's military upended a decade of transitional opening with a coup d'état on 1 February 2021 that prevented the democratically elected parliament from convening to commence a new term. The coup was based on a fabricated narrative of electoral fraud intended as a corrective to redirect the course of national politics according to military preferences. The coup leaders quickly announced that they would organize fresh elections, but underestimated the scale of public resistance to their actions—in particular from a younger generation. As the junta resorted to brutality to suppress the uprising among civil society and political opposition while upholding the pretence of the legality of its actions, it became apparent within a few months of the coup that the country was becoming increasingly ungovernable (Faulder, Robinson and Macan-Markar 2021).

The coup had not only brought Myanmar's democratic opening to an end, but also called into question the validity of the legal order created by the 2008 Constitution.

In addition to voter list updates, political party audits and other changes to the electoral legal framework, the military administration soon announced a change of the electoral system as a centrepiece of its electoral overhaul, albeit within the framework of the 2008 Constitution. The coup had not only brought Myanmar's democratic opening to an end, but also called into question the validity of the legal order created by the 2008 Constitution and subsequent electoral legislation. Political forces had only reluctantly agreed to participate in elections under that framework in 2010 and 2012, and after the coup expressed a clear view that the 2008 Constitution was no longer valid (Frontier 2021).

In this context, members of parliament (MPs) elected in the November 2020 elections formed the Committee Representing the Pyidaungsu Hluttaw (CRPH), which was mandated by 80 per cent of the elected MPs to act on behalf of the legitimate legislature (the Union Parliament). On 31 March 2021, the CRPH launched the Federal Democracy Charter (FDC), which defines the values and principles of the future federal union and provides elements of an institutional framework. The FDC was adopted in a revised version by the People's

Assembly convened by the National Unity Consultative Council (NUCC) in January 2022.¹

The charter sets a federal democratic union as a goal and lists human rights—including minority rights, equality and self-determination, and democratic rights, as well as collective leadership—among the values of the future Union. The FDC is understood as a political rather than a legal document and does not constitute a sufficient framework to operate as a fully-fledged interim constitution (International IDEA 2022). The challenge in elaborating a new institutional system for the future of the country is therefore to elaborate a functional democratic framework while at the same time moving from a unitary to a federal system of governance.

Myanmar's first post-independence Constitution (1947–1962) provided for some form of asymmetrical federalism which gave different degrees of autonomy to the various ethnic groups but kept the Bamar-majority areas under a unitary framework. It also granted a right to secession to some of the states. There are differing perceptions of the merits of the 1947 Constitution and its capacity to address tensions between centrifugal trends and the preservation of unity (cf. Bulmer 2022). It remains the only federal attempt in Myanmar's post-independence history, as both the 1974 and the 2008 constitutions in essence provided a unitary framework, although both constitutions foresaw degrees of decentralization. Notably, the 2008 Constitution provided for elected state and regional legislatures and a designated list of powers assigned to the subnational entities.

This paper does not treat the SAC's announcement to hold elections in Myanmar in the foreseeable future as a legitimate claim, but instead seeks to deconstruct this narrative. It discusses the need to use the principles of international human rights law—and indeed the FDC's own commitments to human rights and inclusion—to ground future democratic processes. The SAC might proceed with an electoral exercise in the territories controlled by the military in 2023, or hold one later, but this will neither be seen as legitimate by the majority of the population nor help to resolve the protracted crisis. However, democratic elections will eventually return to Myanmar as a result of some form of transition to genuine democratic governance. It is for that time that this Policy Paper seeks to provide a baseline.

Against this background, this paper first briefly recapitulates Myanmar's recent electoral history, analyses the military's electoral narrative on the coup and highlights the risks and threats related to the announcement of fresh elections by the SAC. Second, and to contrast these developments, it examines the electoral framework and its long-standing weaknesses from the point of view of international human rights law combined with features of federal systems. This examination comprises consideration of the legal and institutional framework for holding elections, the question of electoral system choice, election administration, voter registration and electoral dispute resolution. Each section concludes by making key recommendations.

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¹ NUCC, Statement of the First People's Assembly, 30 January 2022.

Chapter 1

MYANMAR'S TRANSITIONAL ELECTIONS

1.1. IN BRIEF: MYANMAR'S ELECTORAL HISTORY

Myanmar has struggled to hold truly democratic elections since independence. Three multiparty elections—in 1951, 1956 and 1960—were held before the first military coup d'état in 1962. During General Ne Win's regime, on the basis of the 1974 Constitution, one-party elections similar to those held in the Soviet Union characterized the rule of the Burma Socialist Programme Party (BSPP). These were held on four occasions until 1985. Following student protests in 1988, the first multiparty elections since 1960 were held in 1990. Daw Aung San Suu Kyi's newly founded National League for Democracy (NLD) emerged as the unexpected winner. The military, however, decided to not hand over power to a civilian government until a new constitution had been drawn-up and a new government formed, a process that took two decades without another election.

Following a coerced constitutional referendum in 2008, and in fulfilment of the 2003 'roadmap to discipline-flourishing democracy', the general elections of 7 November 2010 were widely condemned as a sham and not in line with international standards. They were held under the newly adopted 2008 Constitution and paved the way for the rule of the Union Solidarity and Development Party (USDP), a military proxy party that won most of the seats in the elected legislatures at the Union and state/region levels in 2010. As provided for in the 2008 Constitution, the military continued to occupy a quarter of the seats in the legislature, which had been 'reserved' for it, and to hold a power of veto over constitutional change.

To the surprise of many, President Thein Sein's government launched a reform process in its first few months of office and an unprecedented opening of the country. As part of this process, some legal changes created the conditions

for the NLD, which had boycotted the 2010 elections, and the party's leader, recently released from house arrest, to participate in by-elections for a limited number of seats on 1 April 2012, which they won by a landslide. When Aung San Suu Kyi took up her seat in the Union Parliament, the NLD de facto accepted the 2008 Constitution as the basic legal framework under which a transition was taking place, albeit with the aim of changing it in the coming years.

Although only a small number of seats were contested, the April 2012 by-elections had great symbolic and demonstrative value in paving the way for Aung San Suu Kyi's entry into parliament. They also opened a pathway for more genuine political competition in the 8 November 2015 general elections, which, despite considerable shortcomings in the legal framework, were widely considered credible and transparent (cf. e.g., ANFREL 2016; EU EOM 2015; PACE 2016; Carter Center 2017). These elections marked an unprecedented change of power in 2016 from a semi-military government led by a military proxy party to one led by the NLD. Aung San Suu Kyi became State Counsellor, as she was constitutionally barred from the presidency. However, under the 2008 Constitution, and analogous to the reserved seats in the legislature, key ministries remained under military control and others were offered to the USDP as a goodwill gesture.

The power-sharing arrangement between the civilian and military elements of the state apparatus established by the 2008 Constitution did not bode well for a further transition to genuine democracy. Earlier reforms and peace processes begun under Thein Sein's government slowed or came to a halt. A military counterattack against an Islamist terrorist organization in August 2017 served as a pretext for the mass expulsion of 700,000 Rohingya to Bangladesh, bringing Myanmar eventually before the International Court of Justice and the International Criminal Court amid strong international criticism and allegations of genocide. Two further by-elections were held during this period, in 2017 and 2018, but did not result in any significant political change.

As international criticism mounted, amid the significant shortcomings in the electoral legal framework inherited from previous (semi-)military rule and new challenges resulting from the Covid-19 pandemic, the country steered towards a third general election in a decade on 8 November 2020. The elections were held against a background of severe operational and security challenges. With high turnouts in the areas where the vote was held, the NLD was able to exceed its electoral success from five years before, while the USDP fell to a historic low and ethnic political parties won a smaller number of seats than expected.² Despite considerable challenges, not least the continued exclusion of the Rohingya from voting and a lack of transparency in the election administration's decision-making, overall, the election was considered valid and legitimate (ANFREL 2021).

The power-sharing arrangement between the civilian and military elements of the state apparatus established by the 2008 Constitution did not bode well for a further transition to genuine democracy.

² Election results in historical comparison: Lower House 2010: USDP 259, NLD –, others 66, 2015: USDP 30, NLD 255, others 38, 2020: USDP 26, NLD 258, others 31; Upper House 2010: USDP 129, NLD –, others 39, 2015: USDP 12, NLD 135, others 21; 2020: USDP 7, NLD 138, others 16.

Election results announced on 15 November gave a strong victory to the incumbent NLD and were a resounding expression of a popular vote against military rule or domination by proxy. However, the military and its affiliates began to allege strategic manipulation and electoral fraud by the NLD-appointed electoral administration after the elections and launched an avalanche of complaints. The post-elections contestation between the NLD and the military dramatically culminated in a coup d'état on 1 February 2021, the day of the planned inauguration of the newly elected parliament, effectively undoing a decade of opening and relative progress and beginning a new chapter of conflict, human suffering and resistance. It was claimed that the unconstitutionally declared state of emergency would last one year, after which, fresh elections were pledged. This timeframe has since been extended.

1.2. THE 'ELECTORAL NARRATIVE' OF THE COUP

From the beginning, the junta sought to legitimize the coup d'état using a narrative of electoral fraud (cf. Lidauer 2021b).³ In preparation for this scenario, the military leadership had commented on weaknesses in the 2020 electoral process on several occasions before and even more so after the elections, referring among other things to the challenges of organizing elections under the restrictions of the Covid-19 pandemic, and to inconsistencies in the voter lists (cf. Ardeth Maung Thawngmung 2021). Having accepted the election results on election day, military affiliates later fielded numerous objections and rejected the results in the weeks leading to the coup, and ultimately blamed the government—not just the election administration—for the alleged shortcomings.⁴

To counter this rhetoric, 12 civil society organizations released a statement declaring that 'the elections were credible and reflected the will of the majority voters' (PACE 2021). This was followed by publications to demonstrate that the data provided by the SAC to justify the voter fraud narrative were incorrect (The Insights 2021). International election observers concluded that despite a number of challenges, the outcome of the 2020 elections represented the will of the people (ANFREL 2021). At the same time, international experts, academics and policymakers provided evidence that the coup was unconstitutional (e.g., Choudry and Welikala 2021; Crouch 2021; Harding 2021; ICJ 2021; Noël 2022).

The coup leaders have sought not only to delegitimize and formally invalidate the 2020 elections, but also to prepare fresh elections to legitimize and entrench their power takeover.

Since then, the coup leaders have sought not only to delegitimize and formally invalidate the 2020 elections, but also to prepare fresh elections to legitimize and entrench their power takeover. This is not entirely new. Authoritarian elections are not the exception but the norm in Southeast Asia (Morgenbesser and Pepinsky 2019), and authoritarian regimes employ a whole set of

³ The Office of the Commander-in-Chief of Defence Services, 'Information for the People', 2 February 2021 (no longer available online).

⁴ The Office of the Commander-in-Chief of Defence Services, 'Stance on Situation of the Pre-2020 Multiparty Democracy General Election', 2 November 2020 (no longer available online).

manipulation techniques to justify their hold on power through elections (cf. e.g., Gandhi and Lust-Okar 2009; Schedler 2002). Previous incarnations of authoritarian rule in Myanmar held one-party elections to extend the longevity of their regime (under the BSPP, until 1988), did not allow the formation of an elected legislature (in 1990), and engineered elections to generate the outcomes they desired (in 2010) (Morgenbesser 2015). Thus, staging a coup and announcing fresh elections is history repeating itself. Like other electoral autocracies in mainland Southeast Asia (Cambodia and Thailand), Myanmar's military under Commander-in-Chief General Min Aung Hlaing is now building on and extending this historical repertoire. To see such an electoral exercise through, however, requires a critical level of effective territorial and administrative control, and the consent of at least part of the population.

On 2 February 2021, the military announced the formation of an 11-member State Administration Council (SAC), led by the Commander-in-Chief. In addition to the President, the State Counsellor and other leading officials, the Union Election Commission (UEC) Chairperson and some UEC members were also arrested. Other UEC personnel were temporarily detained, along with close to 100 members of and officials in the election sub-commissions across the country. In fact, the UEC became the institution most targeted with arrests and interrogations, underscoring the centrality of elections in both the coup and the junta's subsequent plans (AAPP 2021).

In a move mimicking the 2003 military government's 'roadmap to discipline-flourishing democracy' which eventually led to the 2010 elections that began a form of transition to semi-civilian rule, the SAC promulgated a five-step roadmap. The first and the last points refer to elections:

(1) The Union Election Commission will be reconstituted and its mandated tasks, including the scrutiny of voter lists, shall be implemented in accordance with the law.

(5) Upon accomplishing the provisions of the state of emergency, free and fair multiparty democratic elections will be held in line with the 2008 Constitution, and further work will be undertaken to hand over State duties to the winning party in accordance with democratic standards.

(Myanmar Digital News 2021)

The SAC quickly proceeded to fill the positions and replace the legitimate office holders in various institutions, including the Supreme Court, the Constitutional Tribunal and a new five-member 'UEC'. It reappointed U Thein Soe, who had overseen the 2010 elections, as chairperson, and promoted the previous director general, a retired military officer who had overseen the technical conduct of the 2020 elections, as a member of the commission (cf. Myanmar Now 2021a). On 5 February 2021, the military-appointed UEC announced it had 'begun its investigation into the voter fraud in the 2020 general elections' (Myanmar News Agency 2021). Since then, it has manufactured evidence in an effort to substantiate claims of electoral fraud and presented implausible data

The UEC became the institution most targeted with arrests and interrogations, underscoring the centrality of elections in both the coup and the junta's subsequent plans.

about the voter lists and ballots used in the 2020 elections in the governmental newspaper, the Global New Light of Myanmar (GNLM), and through repeat public communications. In mid-March 2021, a spokesperson for the SAC-appointed UEC announced a revision of the electoral legal framework and changed the electoral system to a system of proportional representation (PR).

Since then, apart from providing updates about its work in press conferences and announcements in the governmental newspaper, the SAC-appointed UEC has convened meetings with around 60 registered political parties—most of which having never won a single seat (Nachemson and Frontier 2022). The parties were told that the NLD-led government had influenced the UEC in multiple ways to win the 2020 elections, and that the new UEC had investigated electoral fraud in the vast majority of townships, asking those present to provide evidence of illicit activities. In July 2021, the official election results, which had been declared final by the lawful UEC before the coup, were cancelled.⁵ In November, election-related charges were filed against Daw Aung San Suu Kyi, President U Win Myint, UEC Chair U Hla Thein and two commissioners, among others (The Irrawaddy 2021b).

Throughout 2022, the SAC-appointed UEC continued to hold press conferences and to perpetuate the narrative of electoral fraud under the NLD government, while purportedly preparing fresh elections. This has included preparations to change the electoral system, the auditing of political parties and the preparation of new voter lists. At a press conference in June 2022, the UEC stated that 85 of the 92 registered political parties had been audited, and that sub-commissions had completed checking population registries in over 300 of the 330 townships.⁶

According to the SAC-appointed UEC, the relevant electoral laws and by-laws have already been revised, but the detailed changes to the electoral laws have not yet been made public.⁷ One procedural change was announced: that voters would have to prove their identity inside the polling station with an identity card and a household registration card in order to be eligible to cast a ballot. Previously, there had been no such requirement.⁸

Meanwhile, the SAC-appointed UEC proceeded with prosecutions against perpetrators of the election process, vote fraud and malpractice during the 2020 general elections. A UEC spokesperson explained there were 1,091 election-related cases, 200 had been dismissed, 546 were being investigated based on election law and 345 cases were going to trial. Dozens of ‘perpetrators’ had been sentenced or were awaiting sentence, including the President, State Counsellor, the UEC Chairperson and members, Minister U Min Thu, the Chair of Nay Pyi Taw Council, State and Regional Chief Ministers,

⁵ 13th SAC Press Conference, 27 April 2022.

⁶ 16th SAC Press Conference, 16 June 2022.

⁷ 16th SAC Press Conference, 16 June 2022. However, already during the course of 2021, the SAC-appointed UEC stated that changes will concern voter registration and voter list scrutiny, the conduct of the electoral campaign, advance voting, vote counting and election result announcements, and provisions for recalling an elected representative, among others.

⁸ 13th SAC Press Conference, 27 April 2022.

candidates, political parties' campaign managers, and members of UEC sub-commissions. A number of convictions were of members of the UEC's own administrative apparatus prior to the coup (2,173 perpetrators identified in 369 cases).⁹ In July 2022, the dismissed UEC officials were sentenced to three years in prison while the State Counsellor's and the President's election-related charges were added to other sentences (cf. Ko Cho 2022). On 2 September, Daw Aung San Suu Kyi was sentenced to three years in prison with hard labour for election fraud, adding to the 17-year sentences from 10 previous cases (RFA 2022). In none of these cases was any convincing evidence presented, and these political show trials have been condemned by international organizations and human rights groups (Wee and Paddock 2021).

1.3. ATTEMPTS TO ENTRENCH THE MILITARY'S HOLD ON POWER

The developments described above demonstrate SAC strategies to engineer elections for the purpose of legitimizing the military's hold on power. Several areas have emerged as critical for the SAC to ensure its grip on future electoral processes. These are summarized below.

1.3.1. Changing the electoral system

The idea behind changing the electoral system from first-past-the-post to proportional representation, which is seen as the centrepiece of the junta's orchestrated reforms, is to increase the prospects of the USDP at the ballot box. It also reportedly found a consensus among those political parties which had met with the SAC on four occasions by June 2022. Together with the 25 per cent seats in the legislature reserved for the military, this should create parliamentary majorities in favour of the military establishment, as was the case in 2011–2016. At the same time, the discourse on the change to PR creates the fiction that smaller political parties—including the so-called ethnic parties—might be in a better position to win seats. Linked to the settlement patterns of ethnic populations in electoral constituencies—and resting on the dual assumption that ethnic voters vote for ethnic parties that do not fragment each other's votes—some of these parties might profit from electoral system change but others may not. This becomes most apparent when analysing how electoral constituencies are intended to be delineated under the new electoral system.

The 2008 Constitution prescribes the number of elected seats for each legislature—the bicameral Pyidaungsu Hluttaw (Union Parliament) as well as the state/region hluttaws—and sets out that elected members of the Pyithu Hluttaw (lower house) should be elected 'on the basis of townships and population'. According to the SAC-appointed UEC's declarations, the predominant model for a new PR electoral system will be closed party lists (with largest remainder, simple quota and a threshold) in multi-member

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⁹ 17th SAC Press Conference, 1 July 2022.

Another SAC strategy for forthcoming elections seems to be to influence the playing field between political parties through changes to the political party registration law and other means.

constituencies, presumably based on districts.¹⁰ The number of 330 elected seats in the lower house would be maintained, but 25 seats would be shifted from the (ethnic) States to the (predominantly Bamar) Regions, presumably resulting in fewer chances for the smaller ethnic groups' parties at the ballot. Although not all the questions regarding the announced electoral system change had been resolved prior to the publication of this paper, in particular those related to the allocation of elected representatives to townships as required by the 2008 Constitution, the UEC has apparently begun to train electoral sub-commission personnel on PR (DMG 2022). The question of electoral system change is discussed in more detail below.

1.3.2. Affecting the political environment

In addition to changing the electoral system, another SAC strategy for forthcoming elections seems to be to influence the playing field between political parties through changes to the political party registration law and other means. The SAC-appointed UEC is reportedly planning to prepare a new law and issue a by-law accordingly. In addition to new requirements for party membership and party funding, one announced change concerns new requirements on the educational qualifications of candidates.¹¹ Past exclusions from the right to vote and the right to stand, including those of the Rohingya, are not expected to be rectified in elections organized by the SAC.

During the audit of political parties, the audit team reportedly found 'weaknesses that need to be addressed'. If parties are found not to be 'correcting their weaknesses', they can be prosecuted in accordance with the law.¹² Threats of deregistration or banning in connection with failing to be audited concern the NLD in particular. The SAC-appointed UEC has stated that, as the NLD has not been audited, its funding sources remain unclear. They have tried to contact the NLD, but 'some of its members are detained and some are in hiding. Hence, the commission can decide on the statement only after it has talked with the party'. Meanwhile the NLD has released a statement reiterating the unconstitutionality of the coup and subsequent actions, and that the NLD will not recognize an election planned by the military regime.¹³ As outlined above, the State Counsellor and many others remain in unlawful detention, effectively depriving the party of its leadership. The UEC announced its intention to dissolve the NLD in 2021, but has not yet carried out its threat.

The SAC-appointed UEC has also announced that it is working on legislation that would impose punishments for various new electoral offences, such as intentionally making a false complaint regarding an election, with sentences of at least three months but not more than three years imprisonment plus a fine up to MMK 300,000. Based on its own statements, the SAC-appointed UEC is also preparing legislation that would introduce heavy penalties for those who try to or are involved in disrupting elections. This reportedly followed

¹⁰ 12th SAC Press Conference, 24 March 2022.

¹¹ 16th SAC Press Conference, 16 June 2022.

¹² 18th SAC Press Conference, 26 July 2022.

¹³ NLD News Release No 7/2022, 9 July 2022.

statements by the opposition that they would seek to disrupt and discredit elections organized by the SAC both militarily and politically.¹⁴

1.3.3. Electoral security and election cancellations

The above highlights the security conditions under which the junta's elections will take place. Elections in Myanmar do not have much of a history of electoral violence, in the form of either targeted attacks on the process or violence among contenders and their supporters, although the electoral period in 2020 saw some increase in this regard. This is likely to change, given the unprecedented levels and forms of non-violent as well as armed resistance since the coup, which has extended to areas hitherto largely unaffected by conflict such as regions in central Myanmar and major cities (cf. Loong 2022). A report by the Special Advisory Council on Myanmar stated that the military maintains effective control over only approximately 17 per cent of the territory, with a downward trend (SAC-M 2022). Increasing conflict across the country casts serious doubt about the feasibility of electoral operations or the legitimacy of electoral results obtained under such conditions.

Increasing conflict across the country casts serious doubt about the feasibility of electoral operations or the legitimacy of electoral results obtained under such conditions.

Myanmar's electoral legal framework foresees the possibility of cancelling elections at the local level for security reasons. This procedure, which is usually informed by military intelligence and the subnational administration, has been poorly regulated and commonly handled in a non-transparent manner, with decisions about partial election cancellations taken by the UEC (Lidauer 2021a). While this practice occurred in both the 2010 and 2015 general elections, predominantly in areas where the state had no administrative presence and an electoral register had never been established, it was used on an unprecedented scale in 2020, when election cancellations extended over large parts of Rakhine State, but also Chin, Kayin, Kachin and Shan states, where active conflict was taking place or territory was under the control of ethnic armed organizations. Some of these cancellations were also interpreted as politically motivated (Lidauer 2021b). If the SAC continues with its plans to hold elections, the widespread use of such cancellations by the SAC-appointed UEC seems likely. This would be a means to influence electoral constituencies even further, and in essence to gerrymander electoral outcomes through conflict. There is no minimum threshold for how many seats have to be filled to constitute a legislative body under the 2008 Constitution.

1.3.4. International relations and recognition

Lastly, another set of strategies relates to selective manipulation of international involvement. According to their spokesperson, the SAC-appointed UEC has received visits from the Chinese Ambassador, the Indian Ambassador, the Minister of Foreign Affairs of the Sultanate of Brunei, a Russian delegation and a political science professor from the United States.¹⁵ Such exchanges risk legitimizing the SAC and UEC actions in a similar way to fake election observers who are increasingly employed to provide credibility to elections that take place in shrinking or closed civic spaces, and may be invited to provide

¹⁴ 17th SAC Press Conference, 1 July 2022.

¹⁵ 16th SAC Press Conference, 16 June 2022.

testimony and thus lend legitimacy to the junta's elections once they are held (cf. Debre and Morgenbesser 2017).

Concurrently, on 11 August 2022, the SAC-appointed UEC released a letter for political parties regarding meetings with foreign organizations, together with a message to international organizations themselves. The letter reminds the parties to seek approval from the SAC-appointed UEC before meeting with any foreign organizations or personnel, and claims that the commission found that voter fraud, malpractice and other electoral offences during the 2020 general elections were caused by the interference of Myanmar-based foreign embassies, international NGOs and local civil society organizations. Based on this letter, existing legislation will be more strictly enforced than used to be the case and political parties' contacts with international officials could be criminalized in the future, potentially leading to deregistration.¹⁶

The world must remember that the junta's planned election is intended solely to entrench military rule.

All of the above-mentioned activities that the SAC-appointed UEC has undertaken since the coup, or has announced it will undertake, combine a mix of tools to legitimize fresh elections that will generate its desired outcomes: a fabricated discourse aimed at delegitimizing the 2020 election process; forms of electoral-system engineering, the potential effects of which remain to be assessed; co-optation and other measures affecting the political party landscape; selective internationalism; and repressive tools aimed at silencing potential criticism. As Frontier (2022) has written: 'No matter the outcome, the world must remember that the junta's planned election is intended solely to entrench military rule and undermine the democratic opposition inside and outside the country. In doing so, it will only move the country further away from resolving the current crisis'.

¹⁶ UEC Letter to Political Parties, 11 August 2022.

Chapter 2

GROUNDING ELECTIONS IN INTERNATIONAL LAW

As shown in Sections 1.2 and 1.3, the SAC is seeking to legitimize future elections by illegitimate means and coercive measures. The February 2021 coup demonstrated that the 2008 constitutional framework was inadequate for allowing a democratic opening and addressing persistent centre-periphery conflicts, primarily due to the entrenchment of military dominance and impunity. While the military claims to uphold the 2008 Constitution, the democratically elected representatives and interim institutions have embarked on a process to devise a new constitutional framework in the form of a federal democratic union that does not foresee any political role for the military. This section seeks to support this undertaking by grounding the discussion on elections in international human rights law while considering the long-standing shortcomings and structural problems of the electoral framework (cf. Ebead 2022).

The shortcomings of Myanmar's protracted democratic transition since the political opening in 2011 are well known and have been extensively analysed (e.g. Bunte 2016). They relate to the persistent power of the military within the state and lack of civilian control over the armed forces (e.g. Selth 2015, Croissant 2021); insufficient judicial control over the executive and absence of the rule of law (e.g. Crouch and Lindsey 2014); a lack of effective judicial remedy in electoral matters; excessive restrictions on the right to vote and stand in elections; and the lack of safeguards in the conduct of electoral processes (e.g. Lidauer and Saphy 2014, 2021), as well as a political space that is increasingly marred by violence (cf. ICG reports). Election-specific problems have also been reiterated by national and international election observers (e.g., EU EOM 2015; Carter Center 2017; ANFREL 2016, 2021; PACE reports). Many of these issues, which are briefly rehearsed here, were entrenched in the 2008 Constitution, and addressing them should be taken into account in the process of drafting a new constitution.

The February 2021 coup demonstrated that the 2008 constitutional framework was inadequate for allowing a democratic opening and addressing persistent centre-periphery conflicts.

2.1. LEGAL FRAMEWORK

2.1.1. International norms for elections

International norms provide essential references for establishing legal frameworks conducive to the holding of democratic elections. The main reference documents on these matters are the Universal Declaration of Human Rights (UDHR) and the 1966 International Covenant on Civil and Political Rights (ICCPR):

UDHR article 21

1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives;

3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

ICCPR article 25

Every citizen shall have the right and the opportunity ... without unreasonable restrictions:

(a) to take part in the conduct of public affairs, directly or through freely chosen representatives

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors

A sound legal framework is essential for the conduct of elections in line with international obligations.

A sound legal framework is essential for the conduct of elections in line with international obligations, in particular as spelled out in article 25 of the ICCPR, which state parties have an obligation to give effect to the rights in the Covenant.¹⁷ Typically, an electoral legal framework contains constitutional provisions, and primary legislation related to elections and electoral rights, as well as secondary legislation issued by the electoral authorities. It should be noted that, despite its ratification of a number of human rights treaties, Myanmar is one of very few countries that have not signed and ratified the ICCPR (OHCHR n.d.). The ICCPR is applicable international law with almost universal status, and as such can be considered a benchmark for electoral frameworks even in countries not yet formally bound by it.

In its General Comment to article 25, the UN Human Rights Committee establishes a number of criteria for assessing an electoral legal framework, specifically that: '(a)ny conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria

¹⁷ Article 2.2 of the ICCPR provides that: 'Each State Party [to the ICCPR] undertakes to adopt such laws or other measures to give effect to the rights recognised in the Covenant.'

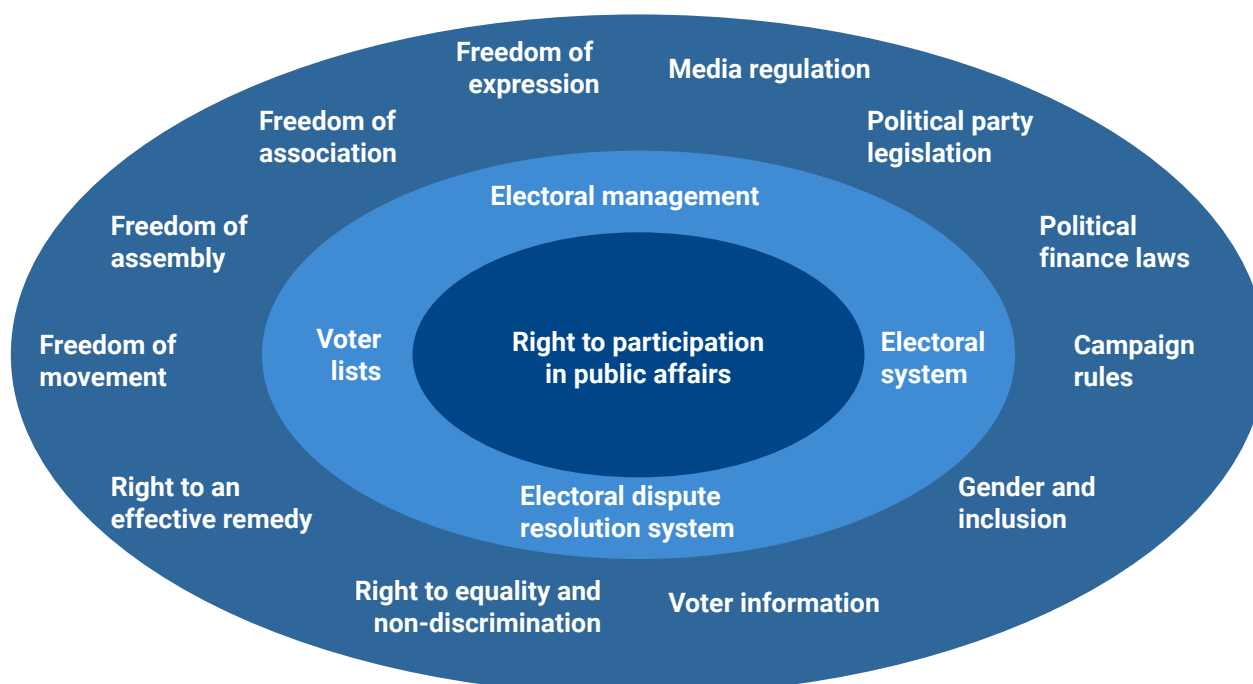
and may not be suspended or excluded except on grounds which are established by law, and which are objective and reasonable' (paragraph 4). It follows from this, in line with the rule of law principle, that election legislation should provide adequate detail on all aspects of the process, thereby limiting opportunities for arbitrary implementation. This aspect was assessed as particularly weak in the context of Myanmar where the vagueness of aspects of the election legislation created room for arbitrariness in its implementation (Lidauer and Saphy 2014).

2.1.2. Essential components of an electoral legal framework

The set of legal norms typically needed to conduct democratic elections is quite extensive and there is no universal way of representing it (cf. International IDEA 2002). For ease of understanding, three concentric circles are shown in Figure 2.1. At the core are the norms defining voting rights. The second circle comprises norms defining the infrastructure needed for their implementation and the third represents the norms needed for an enabling environment.

The core of an electoral legal framework is the definition of voting rights, the right to vote and to stand in elections. The following eight principles are listed in the ICCPR: periodic and genuine elections, universal and equal suffrage, a secret ballot, the right to vote, the right to stand, and respect for the free expression of the will of the voter. 'Periodic' means that elections have to take place at regular intervals; 'genuine' means that voters should have a genuine choice between a plurality of political options; 'equal' refers to the principle

Figure 2.1. The legal norms typically needed to conduct democratic elections



of ‘one person—one vote’; ‘secret’ means that the voter cannot be forced or compelled to reveal his or her choices and that ballots are not attributable. The ‘right to vote’ and ‘the right to stand’, and the ‘free expression of the will’ mean that voters should be able to vote freely, without interference or pressure, and that their choice should be respected, specifically that the votes should be counted and tabulated accurately, and election results implemented.

The exercise of voting rights requires a regulatory and administrative framework to ensure their implementation. This raises questions of institutional design aimed at conducting elections that give effect to voting rights, and these institutional design questions raise specific issues in a federal context, especially in one that features a significant degree of decentralization. This infrastructure includes institutions to administer the elections, for example an electoral commission; an electoral system in order to regulate how votes are translated into elected seats; and a system of rules to register voters and create voter lists, without which the right to vote would remain purely theoretical. Finally, the legal framework must provide a system for electoral dispute resolution (EDR). The EDR system is the mechanism through which these rights are guaranteed, the decisions of the election administration can be controlled and corrected, and violations and electoral offences can be sanctioned.

Electoral rights cannot be exercised meaningfully without an enabling environment in which other adjacent rights are protected, such as the rights to equality and non-discrimination, freedom of opinion and expression, and freedom of peaceful assembly and association.

In addition, electoral rights cannot be exercised meaningfully without an enabling environment in which other adjacent rights are protected, such as the rights to equality and non-discrimination, freedom of opinion and expression, and freedom of peaceful assembly and association. For further reference see, for example, OHCHR (2021). A set of legislative provisions that aims to create an enabling environment might include, among other things, legislation on political party registration, party and campaign finance, access to the media, voter information, and gender and inclusion. These are essential to guarantee the fairness and openness of any electoral competition.

2.1.3. Implications and practice in federal systems

Federalism has long been considered an avenue that allows the integration of the interests of a diverse set of political entities within a common framework of government. Specifically, federal systems provide a division of powers between the centre and the federal units, with the two levels of government functioning partly autonomously. To varying degrees, the question of the centre-periphery division of powers and their articulation has an impact on all electoral topics, from the shape of the legal framework to the conduct of electoral processes. This articulation is largely determined by the federal framework agreed on by the constituents of a federal constitution and by the division of competencies between the centre and the federal units.

While there is no unique model of federalism, it is nonetheless common that various interests are represented within federal institutional frameworks: those of the people, those of the federal units and those of the federal constitution. Typically, a lower house represents the population, an upper house represents

the interests of the federal units and an independent authority—most often a court—represents the interests of the constitution.

The federal constitution and/or legislation provides for the lower house's electoral system, for the principles for the delineation of constituencies (single member or multi-member), and often for systems ensuring minority and gender representation. Federal systems typically imply that the federal units have influence over policymaking at the centre, and this is most often achieved through a bicameral legislature where a second chamber represents the constituent units in some way. Experience suggests that these may be composed on different bases, with members directly elected, delegated from the legislatures of the federal units or appointed by the governments of the latter. The manner in which federal units delegate/elect their members to the upper house might be set in the federal constitution or left for federal units' constitutions or legislators to decide. A federal constitution should determine at which level this would be decided. While federal units can have their own constitution in some federal systems, the federal constitution would typically have supremacy to guarantee that relations between the centre and federal units are in line with agreed federal principles. Finally, an independent authority must be in place in order to guarantee that the federal pact is respected; this would generally be a Supreme Court or a Constitutional Court.

Comparative experience of federal systems suggests that elections are most often an area of concurrent powers, with national legislation regulating lower house elections and referendums, and in some cases also elections to the legislatures in the federal units, and defining minimum standards applicable to all elections, including local elections. Federal unit legislations might regulate elections at the subnational and local levels.

Federal systems offer different approaches to these matters. In India, Union legislation regulates elections to the lower house and to the legislative assemblies of the states, while local elections are regulated by legislation of the states. In Nigeria, federal law regulates the election of the president and vice-president, the members of the House of Representatives and Senate, the governors and vice governors and the state assemblies, while state legislations regulate local government elections.

Clarity in these matters is essential. In Ethiopia, federal law only regulates elections to the lower house and to the state assemblies while local elections are governed by state legislation, in spite of the fact that laws governing elections are listed in the federal constitution as among the competencies of the federal legislature—potentially leading to some confusion as regards jurisdiction and applicable norms.

These arrangements may be complex in practice, as both the centre and federal unit levels will be involved in one way or another at every step of an electoral process. This can raise questions of conflicts of competencies, non-adherence of the federal units to federal rules, lack of respect by the centre for federal unit competencies, and so on. In practice, looking at a variety of federal

Comparative experience of federal systems suggests that elections are most often an area of concurrent powers, with national legislation regulating lower house elections and referendums, and in some cases also elections to the legislatures in the federal units.

systems, it is common for federal level legislations to tend to define the right to vote and to stand, the competencies of the electoral management body, voter registration modalities, principles for boundary delineation, campaign rules, polling procedures, transparency and integrity safeguards and electoral litigation systems, while federal unit legislations tend to regulate the electoral system for unit-level or local elections, candidates' registration for local elections and a specific electoral litigation system.

Recommendations: Legal framework

In revising the legal framework for elections, weaknesses inherited from the 2008 Constitution and the legislation in force should be addressed beyond the mere question of the military presence in parliament and government, to strengthen judicial human rights protection mechanisms, the rule of law and protection for electoral rights, among other things.

In the context of a future federal framework, ensuring equality and consistency in the implementation and protection of electoral rights across the entire territory will be essential, as well as ensuring that the legal framework is clear, stable and predictable. The constitution(s) should determine at which level the various elements of the elections' legal framework should be provided for and should be comprehensive in that regard.

The electoral system regulates how votes are translated into elected seats, and thus constitutes the nuts and bolts of electoral mechanisms.

2.2. ELECTORAL SYSTEM

The electoral system regulates how votes are translated into elected seats, and thus constitutes the nuts and bolts of electoral mechanisms (cf. Reynolds, Reilly and Ellis 2005). The basic elements of an electoral system are the electoral formula (the method by which seats are calculated and allocated), the ballot structure (single choice, party/candidate lists and preferences), and the constituency magnitude (the number of seats per constituency), all of which are typically established in the legal framework. There is no predefined or consensual classification of electoral systems, but they are generally divided in three large families: majoritarian, proportional and mixed. Within these categories, there are a wide variety of systems that are all in principle equally acceptable from the point of view of democratic principles but produce different outcomes. Those most relevant for Myanmar are discussed below.

As explained above, the electoral system is one of several dimensions of electoral design and, as such, is part of military/SAC election-related strategies. Against this background, it deserves some in-depth reflection, but electoral system choice is not the only element worth contemplating with regard to electoral reform in Myanmar, nor is its discussion entirely new.

2.2.1. A long-standing issue

It is not the first time that electoral system change has been discussed in Myanmar. Following the 2012 by-elections, some smaller political parties

brought the issue before the UEC, the Office of the President and the Constitutional Tribunal without a conclusive resolution (Lidauer and Saphy 2014: 217f; cf. Tha Lun Zaung Htet 2013). In 2014, a proposal to change from the existing majoritarian FPTP system to PR was submitted to parliament. While the USDP and smaller parties supported such a change, the NLD submitted an objection to the Constitutional Tribunal, which was dissolved soon after. The Speaker then concluded the debate by declaring that FPTP was the only electoral system in line with the constitution (Myanmar Now 2021b).

Electoral system change in Myanmar has also been discussed by various academics and policy analysts. Lidauer and Saphy (2014: 207, 217f) described the electoral system and the potential for electoral system change in the context of the overall electoral reform agenda following the 2012 by-elections. Based on the 2010 electoral constituencies, population data and election results, Selway (2015) projected the effects of the electoral system historically back to the period 1948–1962, and Marston (2014) proposed a mixed-member PR system. Prior to the 2015 elections, Lemargie et al. (2014) warned that the tendency of Myanmar's FPTP system to amplify wins and losses is a political liability, potentially undermining the fragile political calculus that had given military elites licence to open the country up for reform. They highlighted the lack of political accommodation that the system provides for ethnic minority parties, which is a key theme in most academic reflections.

Following the 2015 elections, Dukalskis and Raymond (2018) argued that the military and its allies did not understand electoral systems well enough, as they underestimated the effects of the electoral system and overestimated their support base relative to the NLD. Eventually, this 'failure of authoritarian learning' created great risks for the transition process, and the military reverted to a strategy of electoral system change only after the coup. Prior to the 2020 elections, Tan and Preece (2020) approached the analysis of the electoral system mainly through the prism of party system stability, with an eye on the criteria for ethnic party electability. Oswald and Courtin (2020) discussed the issue of the high degree of malapportionment inherent in Myanmar's electoral system and constituency delineation. They argued that malapportionment overrepresents some ethnic minorities and rural areas, but also that this has hitherto not been capitalized on by political actors, concluding that changes to the system would face acceptance problems.

Nu Tsen Mun (2020) compared the effects of FPTP and PR electoral systems based on the 2015 election results, finding that PR enhances political diversity. Following the coup, the same author (2022) explained why now is not the time to consider electoral system change, as this would primarily serve the junta's interests.

2.2.2. Majoritarian systems

The principle of majoritarian systems is that the candidate or the list that obtains the majority of the votes in the decisive round of voting is declared the winner. The system may only require a plurality or relative majority in a single-

round system (first-past-the-post, FPTP) or require an absolute majority of the votes (in a two-round system, TRS).

Majoritarian systems such as FPTP or TRS are simple to understand, tend to lead to clear governing majorities, tend to present clear-cut options for voters, can allow the formation of strong opposition parties, and create a stronger personal link between voters and their MPs. FPTP may also be favourable to some minority representation if it is geographically concentrated in such a way as to form a majority in a constituency, while their small number would prevent them from gaining representation under a proportional system. This has benefited some small ethnic parties in Myanmar in the past (see the examples mentioned in Tan and Preece 2020, and Nu Tsen Mun 2020).

Majoritarian systems, and particularly FPTP, are often criticized for leading to highly disproportional results, excluding smaller parties from representation and therefore preventing the parliament from being a fair reflection of the spectrum of opinions in a country. It is also reputed to be unfavourable to women, at least in some contexts, and leads to high rates of wasted votes. While past elections in Myanmar offer confirmation of some of the above-mentioned positive and negative effects of the system, several authors have noted that in Myanmar FPTP did not disproportionately affect small ethnic parties as much as might have been expected (Tan and Preece 2020).

2.2.3. Proportional systems

Typically, systems of proportional representation seek a close translation of vote shares into a share of the seats. While discussions on PR are ongoing in Myanmar, it is important to keep in mind that PR includes a broad variety of electoral systems, and that the functioning of these systems can be greatly influenced by other factors, such as the seat allocation formula, 'district magnitude', or the size of the constituency and the establishment of a legal threshold for access to representation. List PR systems are divided into two subgroups: those in which the allocation of seats is based on a quota, and those where it is based on a divisor.

Quota methods are also referred to as 'largest remainder' methods. The quota is the number of votes that guarantees a party a seat in a particular constituency. In its most basic form (Hare quota), it is calculated by dividing the total number of valid votes by the number of seats in the constituency, $Q = V / S$. Other similar quota methods use modified formulas,¹⁸ which allows a first allocation of seats in the constituency. The remaining seats are then allocated according to the list's largest remainder, or the number of votes left after the first allocation. Largest remainder PR systems, especially the Hare quota, tend to deliver results that are closest to the distribution of the votes, but this effect can easily be reduced by introducing a threshold or if constituencies have a low number of seats.

¹⁸ The Hagenbach-Bischoff quota is: $Q = V / S + 1$; the Imperiali quota is: $Q = V / S + 2$.

Divisor methods are also referred to as ‘highest average’ methods. The votes obtained by each party are divided by a series of divisors to obtain quotients. The seats are then allocated to the parties that have obtained the highest quotients. There are several methods. The most common is the D’Hondt method, where the divisors are: 1 – 2 – 3 – 4 – 5 – 6 – 7....¹⁹ Highest average PR methods, especially the D’Hondt formula, are known to give a slight advantage to the party in the lead in the constituency. This might have a limited impact if there is only one nationwide constituency but can have a significant cumulative effect if the country is divided in numerous multi-member constituencies.

List PR can operate within one nationwide constituency, regionally or with lower-level constituencies. In the case of Myanmar, simulations of election results under PR systems have been run with region/state level constituencies (see e.g. Nu Tsen Mun 2020). The method selected by the SAC-appointed UEC corresponds to highest remainder PR, with a simple allocation formula (Hare quota) and a threshold, the level of which has not yet been announced, to be implemented in constituencies following district boundaries or grouping several districts. Whichever system is considered must be analysed from the point of view of its potential impact.

The PR systems often apply a legal threshold, under which parties do not receive seats; in Germany it is 5 per cent, Austria 4 per cent, Israel 3.25 per cent, Mexico 3 per cent, and so on. The size of the constituency—that is, the number of seats in it or its magnitude—can create a ‘natural threshold’. The lower the number of seats available in a constituency, the higher the ‘price’ in terms of votes to obtain one. The rationale for holding PR elections in districts as opposed to regions or the whole state can be assessed against this principle. The potential effect of these thresholds must be assessed for its capacity to facilitate or hinder the representation of certain political forces.

There can be considerable variations in the distribution of seats depending on the chosen electoral system, not only between the FPTP system and others, but most notably between various PR systems. These systems also have different effects on the representation of minorities.

2.2.4. Provisions for ethnic minority and gender representation

International practice offers examples of options to facilitate the political representation of ethnic minorities, such as reserved seats in the legislature, exemption from the legal threshold, the overrepresentation of parts of the territory with large minorities, and specific tailor-made constituencies (cf. Ellis et al. 2007). Each possible solution has different effects and must be carefully studied and adopted in a consensual manner.

Under the 2008 Constitution, a number of instruments were used in relation to ethnic minority representation. These included the creation of self-

International practice offers examples of options to facilitate the political representation of ethnic minorities. Each possible solution has different effects and must be carefully studied and adopted in a consensual manner.

¹⁹ Other methods use other series of divisors, for example: Sainte-Laguë: 1 – 3 – 5 – 7 – 9 ..., or modified Sainte-Laguë: 1.4 – 3 – 5 – 7 – 9

administered zones/divisions in the areas most densely populated by specific ethnic groups, also corresponded to single-member constituencies for the upper house. There were also 29 Ethnic Affairs/National Minority Affairs Ministers at the state/region level directly elected by voters from the ethnic group concerned, where the respective state/region formed the constituency. These ministers joined the region/state assemblies as elected members, with one seat per minority ethnic group designated by the UEC as representing at least 0.1 per cent of the total population of the Union in a given state or region, excluding those which had already obtained a self-administered zone/division. The underlying population figures, ethnonyms and related identity documents were all highly controversial (cf. Ferguson 2015; TNI 2014).

A federal system can partly address questions linked to the political representation of the ethnic composition of the country, but there may be a need to devise specific mechanisms for the representation of those minorities without their 'own' federal unit.

These mechanisms must be seen as having operated in the context of a unitary state. A federal system can partly address questions linked to the political representation of the ethnic composition of the country, at least of the larger groups, but there may be a need to devise specific mechanisms for the representation of those minorities without their 'own' federal unit.

Under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), states parties have an obligation to take all appropriate measures to eliminate discrimination against women, and to ensure equality in the exercise of the right to vote and be elected, to participate in the formulation of government policy and its implementation and to hold public office (article 7). States should take 'temporary special measures' to accelerate the achievement of 'de facto or substantive equality for women' (General Recommendation 25 of the CEDAW Committee). In its Resolution 66/130 on Women and Political Participation (distributed March 2012), the UN General Assembly also urged states to 'review the differential impact of their electoral systems on the political participation of women and their representation in elected bodies and to adjust or reform those systems where appropriate'.

Quotas and reserved seats have been used across the world as affirmative action measures to realize de facto or substantive equality for women. Quotas are numerical targets that stipulate the number or percentage of women who must be included on a candidate list or the number of seats to be allocated to women in a legislature. Ranking candidate lists, such as 'zippered' (every second candidate) or 'double zippered lists' (every second candidate and every second list must have woman at the top), have been used increasingly worldwide as an efficient means for achieving de facto equality.

Myanmar ratified CEDAW in 1997 but did not introduce temporary special measures to fast-track de facto equality. Among the candidates elected to the Pyithu Hluttaw in 2020, only 12.5 per cent were women, and 11 per cent to the Amyotha Hluttaw. The Federal Democracy Charter adopted in January 2022 contains a commitment to a 30 per cent quota for women in all representative bodies. This general principle will obviously have to be reflected in future constitutional provisions, electoral systems and rules. (For a more in-depth account of these matters, see Ebead and Hirakawa 2022.)

2.2.5. The electoral system under the 2008 Constitution

Discussions on options for the electoral system in Myanmar have largely revolved around the alternative between the status quo inherited from the colonial period (FPTP in single-member constituencies based on townships) and some form of proportional representation. These discussions have in recent years been conducted within the institutional framework of the 2008 Constitution.

The 2008 Constitution provides for two houses at union level, both of which are directly elected: the Pyithu Hluttaw or lower house has 440 members, 330 directly elected and 110 seats (25 per cent) reserved for the military. The 330 seats were elected using FPTP, with single-member constituencies drawn up with reference to townships and population (article 109(a) of the 2008 Constitution). The upper house, Amyotha Hluttaw, has 224 members: 168 directly elected and 56 seats (25 per cent) reserved for the armed forces. Each of the seven regions and seven states was divided into 12 single-member constituencies. Where there were self-administered zones/divisions in the region or the state, 1 of the 12 seats was designated to represent each of them.

For the region/state level assemblies, FPTP was used to elect two seats per township. One seat was allocated to each minority ethnic group representing at least 0.1 per cent of the population of the Union, apart from the ethnic minorities that had already obtained a state/region or a self-administered zone/division.

The problems raised by the 2008 Constitution and the 2010 election laws are well known and have been commented on in detail by academics and in election observation reports. Specifically, the reserved seats for the military were in clear violation of article 21(3) of the UDHR, according to which 'the will of the people shall be the basis of the authority of government', and were a means to entrench the military's hold on power, in particular through a de facto veto on constitutional amendments.

This in-built advantage of the military in the legislature, added to their control of key security ministries, made it impossible for the NLD to surrender the disproportionate representation it enjoyed under the FPTP system as the largest party. In this regard, FPTP was seen as necessary to compensate for the undue representation of the military in the legislature. After the coup, the NLD consistently reiterated its position that 'as long as the military is in the Parliament and the constitution remains unchanged, we don't support switching to PR' (The Irrawaddy 2021a). From this angle, switching to PR under the 2008 Constitution can be seen as aggravating its undemocratic character.

The related issue of the high degree of malapportionment stems from the determination of single-member constituencies with reference to townships, which vary considerably in population. For example, in the 2020 elections, Pyithu Hluttaw constituencies ranged from 1,109 inhabitants in Cocogyun island (Yangon Region) to 439,622 inhabitants in Bago Township (Bago

The reserved parliamentary seats for the military were in clear violation of the UDHR and were a means to entrench the military's hold on power.

Region). Malapportionment led to highly unequal representation (1/400) and distortion of the electoral outcome. Basing single-member constituencies on townships also led to the overrepresentation of some segments of the electorate, or cases in which a small, concentrated minority was represented. It is worth noting that the government has the power to create, merge or modify townships and consequently to change electoral constituencies without the specific criteria or safeguards that should be applied when redistricting.

Linking constituencies to townships also meant that there was no need to draw electoral boundaries distinct from administrative ones. Redistricting is an exercise that requires considerable time and resources, and is politically sensitive. For the risk of gerrymandering it entails, and given the considerable impact it can have on electoral outcomes, redistricting can be a controversial exercise. It may respect the principle of equal voting but still be seen as manipulated if manifestly designed to achieve a particular political effect.

Recommendations: Electoral system

Should the system of FPTP be retained, political stakeholders should consider reviewing electoral constituencies in line with the principle of equal suffrage. Should this be undertaken, it would be desirable to subject redistricting to strict criteria and clear procedures.

Should a new electoral system be considered, it should respect equal and universal suffrage, be adopted after an open and consultative process, and aim to enhance the representation of women.

2.3. ELECTORAL ADMINISTRATION

While international law does not prescribe any particular form of electoral management body, it does refer to principles that must be respected.

2.3.1. International standards and principles of electoral administration

The electoral rights protected under article 25 of the ICCPR would be ineffectual without an elaborate administrative and procedural structure to enable their exercise, but the ICCPR is not specific regarding the shape of electoral management, and international law has left this matter up to states parties to decide (cf. Catt et al. 2014). Article 25 establishes rights but does not establish how these rights should be implemented. Nonetheless, while international law does not prescribe any particular form of electoral management body (EMB), it does refer to principles that must be respected:

ICCPR General Comment 25 (paragraph 20)

An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant. States should take measures to guarantee the requirement of the secrecy of the vote during elections, including absentee voting, where such a system exists.

Grounded in ICCPR General Comment 25, the principle of independence is key to the credibility of the EMB and is instrumental to the fulfilment of other electoral management principles such as impartiality. It has two dimensions. First, the institutional independence of the EMB refers to its capacity to fulfil its mandate without interference or hindrance; it essentially deals with financial and operational autonomy. Second, the personal independence of EMB members and staff refers to their capacity to fulfil their mandate free from pressure and favour. It essentially deals with the recruitment system, status and security of tenure, and mechanisms for internal accountability. Matters of institutional and individual independence concern all levels of the EMB structure.

Also grounded in ICCPR General Comment 25, the principle of impartiality means that an EMB's decisions should be based in law and taken based on objective criteria, irrespective of the political affiliation of the persons, parties or groups affected by it. The legal and regulatory framework can address possible issues of impartiality by reducing the potential for arbitrary interpretation and implementation. The law must be predictable in its effects and must therefore avoid any vagueness or loopholes.

In addition, in its General Comment 34, the UN Human Rights Committee has derived a principle of transparency from ICCPR article 19, based on the obligation of state institutions to put information of public interest in the public domain. This is also grounded in principles of transparency in the public sector, as established in the UN Convention Against Corruption (article 7). In practice, the transparency principle affects access to both election data, such as detailed voter registration data and disaggregated election results, which strengthens the trust of electoral stakeholders and the public in the accuracy and credibility of the process; and electoral administration information, such as the decisions of the board, and technical and operational documentation, which also greatly enhances the credibility of the EMB.

Finally, the principle of inclusivity deals with the EMB's duties to ensure effective participation of women and under-represented groups in the electoral process. It also implies that the EMB should endeavour to seek input from electoral stakeholders in the conduct of the elections.

Developing an electoral administration framework that, by adhering to the above-mentioned principles, inspires the trust and confidence of both the population and the political forces in Myanmar will be essential not only to the quality of the electoral process, but also to the legitimacy of the elected institutions and ultimately to addressing long-standing conflicts. This also clearly means that an election organized by an EMB unilaterally set up by the military and operating under the instructions of the SAC will not be able to engender an adequate level of trust and is thus not suited to preparing and holding an election that could ever meet the relevant international standards.

An election organized by an EMB unilaterally set up by the military and operating under the instructions of the SAC will not be able to engender an adequate level of trust.

In a federal system, the EMB's integrity supports not only the confidence between the state institutions and citizens, but also the bond between the various federal units that make up the federation.

2.3.2. Types of electoral administration systems in federal contexts

In a federal system, the EMB's integrity supports not only the confidence between the state institutions and citizens, but also the bond between the various federal units that make up the federation.

Types of electoral management in federal systems can vary quite substantially. Some federal countries have a unitary EMB structure where the entire structure is managed centrally, and regulatory power is exercised at the centre. Such a unitary structure can coexist with a plural legal framework. This is, for example, the case in Ethiopia, where the National Election Board conducts all elections. When administering local elections, the EMB implements the federal units' legislation. This can bring significant challenges if the various local legislative bodies are not consistent regarding electoral operations and procedural safeguards, among other things. It also requires legal provisions to empower the EMB to receive support from the administrations of the federal units, especially for logistics, staffing, security and population data.

Other federal countries have a plural EMB structure, with subnational EMBs separately appointed by each federal unit. In such cases, the central and federal unit levels exercise concurrent regulatory powers, depending on their respective competencies. The central EMB generally sets principles and standards, but the process is largely managed by federal unit EMBs, at least for local elections. This is the case, for example, in Nigeria where the Independent National Election Commission conducts parliamentary, presidential and gubernatorial elections, and the Independent Election Commissions conduct local government elections in the 37 states. The Election Commission of India conducts elections to the federal lower house and to the state legislative assemblies, but State Election Commissions conduct local elections. These arrangements are not uncommon in federal systems but can raise issues of lack of independence from local powers and insufficient capacity and expertise in federal unit EMBs, as well as issues of defining accountability for the conduct of electoral processes.

As noted above, a major challenge is to ensure cooperation, loyalty and trust between central and federal unit EMBs, and to ensure that all the federal unit EMBs respect the common requirements of independence and integrity. When discussing issues of election governance in a federal context, the drafters of the future constitution will need to decide, among other things, on the degree of decentralization of policymaking and decisions, the degree of control over implementation at the subnational levels and the modus operandi for cooperation with executive authorities on providing data (population), logistics (material, polling stations set-up) and staff (poll workers), as well as security and policing at polling stations and warehouses or for logistics escort.

2.3.3. The electoral administration under the 2008 Constitution

The electoral management system provided for in the 2008 Constitution and the 2010 Union Election Commission Law (UEC law) had no federal features and must be understood as functioning in a unitary state structure (see Ebead 2022). There was a single legal framework and a single EMB for conducting

all elections. The EMB needed the cooperation of executive authorities with regard to access to population data, staffing, logistics and electoral process security.

Elections in Myanmar were organized by the UEC and its sub-commissions. UEC members were appointed by the Union President and their term corresponded to that of the latter. At the central level, it was supported by a permanent secretariat that also provided institutional memory across several elections. In addition, there were 15 state/regional/Union territory sub-commissions, 83 district sub-commissions, 326 township sub-commissions and 15,870 ward/village tract sub-commissions. All sub-commission members were appointed by the UEC structures. No clearly defined criteria for the appointment of the members were spelled out in law. Sub-commissions would be supplemented by staff from local-level administrations, usually general administration, immigration, health, education, legal affairs, information, audit, electricity, municipal services, and so on. This system of appointment has been assessed as lacking in independence from the appointing authorities (cf. Renshaw and Lidauer 2021).

The 2020 election process demonstrated that there could be issues regarding cooperation among and between the EMB officials and representatives from other authorities. Cooperation needs to be established with great clarity in the election legislation. Myanmar's 2020 election process offers two examples where lack of cooperation and trust between the EMB and some branches of the state apparatus led to controversy. One was regarding election cancellations at the local level, and specifically the security assessments that led to those cancellations. There are conflicting interpretations as to which institution was responsible for the assessments and decisions (Lidauer 2021b). The other was related to the quality of the voter registration process. In Myanmar, voter lists were established by township election sub-commissions based on data provided by local branches of the Ministry of Labour, Immigration and Population and other bodies. Controversially, the SAC used shortcomings in voter lists as a pretext to justify the coup d'état.

These two controversies illustrate the importance of ensuring that executive authorities at the central and local levels provide loyal cooperation and support to the EMB. The issue of cooperation is even more sensitive in a federalist context because the central level has less direct control over the local level. In such a system, clearly established mechanisms for ensuring coordination and loyalty are essential. Even the most independent EMBs need support from among the executive authorities, in particular for the provision of personnel, the facilitation of election logistics, and the provision of security at polling stations. In many cases EMBs need the state authorities to provide population data in order to prepare voter lists or to draw electoral boundaries.

The issue of cooperation is even more sensitive in a federalist context because the central level has less direct control over the local level.

Recommendations: Electoral administration

In crafting the electoral administration for a federal system, mechanisms should be adopted that guarantee the independence of the EMB, its legitimacy and authority across all territories, and its transparent and inclusive functioning.

Cooperation among and between EMB officials and representatives from other authorities needs to be established with great clarity in the election legislation.

In a federal system, while the process of registering voters may be the responsibility of the federal units, shared rules must apply regarding the right to vote for a shared representative body.

2.4. VOTER REGISTRATION

Voter registration implies defining who is eligible to vote and how those who are eligible to vote become voters; that is, the process of compiling and updating voter lists as a basis for polling operations. In a federal system, while the process of registering voters may be the responsibility of the federal units, shared rules must apply regarding the right to vote for a shared representative body. These constitute the primary criteria for citizenship.

2.4.1. Universal suffrage

Universal suffrage extends to both active and passive voting rights, or the right to vote and the right to stand for office. Exercising these rights is commonly limited to citizens and may be subject to restrictions deemed reasonable under international law (ICCPR article 25). The process of not granting the right to vote, or depriving eligible voters of this right, is usually referred to as disenfranchisement. This may occur as an effect of legal provisions, due to deficiencies in the process or because of the context in which voter registration takes place, for example under conditions of conflict.

The ICCPR article 2(1) stipulates that each state party must respect and ensure that 'all individuals within its territory and subject to its jurisdiction' enjoy the rights recognized in the Covenant 'without distinction of any kind'. As outlined above, ICCPR article 25 gives the right to vote and to stand for election specifically to 'every citizen'. It is conceivable that non-citizens may also be eligible to vote or to stand as candidates in certain subnational elections, including in federal units. However, federal systems must come to a shared understanding on voting rights and citizenship.

Based on the principle of non-discrimination, ICCPR article 2(1) further specifies the circumstances in which the restriction of rights is acceptable.²⁰ The exercise of the rights protected by article 25 should be based on objective and reasonable criteria (General Comment 25, paragraph 4) and may not be suspended or excluded except on grounds that are established by law and that are objective and reasonable (General Comment 25, paragraphs 4 and 10). Common types of restrictions on universal suffrage extend to age and

²⁰ ICCPR article 2(1): 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

residency. Other cases of restrictions still encountered in some countries relate to persons serving a prison term, exclusions based on intellectual disability,²¹ military personnel and religious clerics. Southeast Asia is known to exempt members of the Buddhist sangha from the exercise of political rights. This is true of Myanmar, where members of other religious orders also do not have the right to vote, and of Thailand, but not in Cambodia and Sri Lanka (cf. Larsson 2016).²² Globally, there is a general trend towards broadening franchises.

There may also be specific residency requirements for local elections or elections in federal units. The granting of voting rights to citizens outside of their country of origin is more complex. There is no obligation in international law for a state to grant the right to vote or to stand in elections to their citizens residing abroad. In practice, out-of-country voting is relevant to diverse groups such as diplomats, business travellers, exchange students and tourists, as well as diaspora communities, working migrants and refugees. These are potentially important political forces whose votes could significantly influence election results. Some electoral systems specifically enshrine reserved seats for the diaspora, which may be tied to residency requirements. Questions to consider are whether to allow voting from abroad, and who should be permitted to vote from abroad, under what conditions and in what timeframe. Decisions are also needed on how voters from outside the country would be identified and whether there should be separate voter lists for such cases.²³

2.4.2. The voter registration process

Every voter registration process has its specificities. Various factors must be taken into account in designing the right approach: the political situation; the country's population and the number of voters; adherence to electoral law; the operational capacity of the EMB; the quality of existing registers; support to minority groups; support to persons with disabilities; out-of-country voters; and budgetary limitations, among other things.

Legal provisions on voter registration may be found in constitutional provisions, in provisions on voter registration in the electoral law(s), in specific law(s) on voter registration, in population or civil registration laws, in other relevant legislation, such as language or citizenship laws, and in administrative rules and regulations that detail procedures for the implementation of the legal provisions, at national level and at the level of federal units.

Elements that need to be specified in the legal framework include the right to vote and any restrictions on suffrage; the type of voter registration system; the administrative body/bodies in charge of voter registration; the procedural steps for voter registration, including guarantees on transparency and access to information; timelines for voter registration and updates; any requirements for

Every voter registration process has its specificities. Various factors must be taken into account in designing the right approach.

²¹ Jurisprudence is being developed by international human rights bodies in this regard. The Convention on the Rights of Persons with Disabilities (CRPD, 2006) grants suffrage rights to all persons with disabilities without restrictions.

²² The SAC-appointed UEC has confirmed it will maintain the existing prohibition on members of religious orders including Buddhism, Hinduism, Islam, and Christian churches (19th UEC Press Conference, 17 August 2022).

²³ For further reading on this topic see Ellis et al. (2007) and Erben, Goldsmith and Shujaat (2012).

voter identification documents; population data mentioned; any requirements for proof of residence; any procedures for out-of-country voting; any procedures for voters in hospital or prison; and the linkage between personal identity and location for voting.

Voter registration systems can be distinguished based on various criteria. Voter registration can be periodic or continuous, based on a civil register or a separate voter register, active or passive, compulsory or voluntary, and EMB-initiated or citizen-initiated (cf. OSCE/ODIHR 2012).

Periodic voter registration produces a new register for each election. Conversely, in continuous voter registration, a list of all currently eligible voters is continually updated to add voters who become eligible, to change voters' details, such as addresses, and to remove ineligible or dead voters. Voter lists can also be extracted from a civil registry. Civil registries typically hold a list of basic information on all citizens, such as name, nationality, age, gender, marital status and address. Citizens are usually required to update their information when changes occur.

Voter registration is said to be passive or state-initiated when creating the electoral roll does not require the direct participation of the electorate. Voter registration is said to be active or citizen-initiated when citizens must actively seek registration as voters. It is worthwhile noting that a population census cannot replace a civil register and does not result in a voter register, as the data collected are usually collected per household and anonymous while data on individuals are required for the voter register.

Inaccuracies in voter lists can undermine voters' and political stakeholders' trust, which is essential for the overall credibility of an election.

Voter registration methods can differ significantly from country to country but eventually they face similar issues regarding the accuracy of data, such as multiple entries or dead voters not removed from the database. Inaccuracies in voter lists—multiple entries, non-removed entries, omissions and discrepancies with population data—can undermine voters' and political stakeholders' trust, which is essential for the overall credibility of an election. In the case of Myanmar, discrepancies in the voter lists provided a pretext for the military to seed doubt and mistrust over the election results and to ultimately misrepresent and instrumentalize these systemic weaknesses to usurp power.

Open and broad identity (ID) options allow a wide range of ID documents or witness recognition to register to vote and be identified at the polling station. In some countries, a narrowly defined set of ID documents, such as the national ID card or a voter registration card, is valid and required for voter identification. Allowing only a single type of document as valid and required proof of voter identification is the most restrictive option. Not regulating proof of identity for voting at all is not considered a good practice. However, in post-conflict or less developed countries, eligible voters may not have sufficient identity documents, and the only way to enfranchise voters is to allow multiple avenues for proving identity.

There are a range of technical approaches to voter registration, from paper-based systems to biometric voter recognition. Some countries have developed voter registration or identification systems without sufficient analysis of the ability to carry them out. Breakdowns in technology can result in voter disenfranchisement. The choice of technology must be suitable for the conditions of the country and the capacity of an EMB and must be cost-effective. The choice of technology should also correspond with voters' and political stakeholders' trust in the process.

2.4.3. Historical shortcomings with voter registration in Myanmar

Suffrage rights and voter registration in Myanmar have been extensively criticized in the past. First and foremost, the 2008 Constitution maintained unreasonable restrictions on the right to vote and to stand in elections. In addition, the voter registration process relied on paper-based household registers, unclear procedures and insufficient data management technology, which led to criticism of its accuracy and transparency. The archaism of the voter registration system—and of the population registers it rests on—has largely been the reason for such criticism and a major vulnerability.

Myanmar's past elections suffered from multiple forms of exclusion. The law denies the right to vote to several categories of citizens, from members of religious orders to persons serving prison terms, persons declared of unsound mind and persons not cleared from bankruptcy. Some of these restrictions are not in line with the international standards outlined above, as has been repeatedly pointed out by observers.

It is also well known that persons with temporary residence cards (so-called white cards) were deprived of the right to vote, and thus of the right to stand, prior to the 2015 elections. This concerned primarily, but not exclusively, the Muslim Rohingya of Rakhine State whose citizenship rights had been denied.²⁴ Other forms of disenfranchisement also concerned potential voters in conflict-affected areas—whose names were often left off voter lists, or who were subject to election cancellations at the local level—as well as internally displaced persons (Lidauer 2021a). Temporary, seasonal and more permanent internal migration pose problems for voter registration in a system that ties voting rights to civil registration, and this can also result in disenfranchisement.

Voter lists—which are the responsibility of the UEC—were compiled at the local level by ward and village tract election sub-commissions based on data from the Ministry of Labour, Immigration and Population, and the General Administration Department. The lists were then displayed for public scrutiny. In July 2020, ahead of the November 2020 elections, there was some criticism of the public display of the voter lists, including by the State Counsellor (*Myanmar Times* 2020). The UEC took most of the blame, even though it relied on population data from other administrative departments. Corrective actions were undertaken, the public display was extended and the UEC later decided to

The archaism of the voter registration system—and of the population registers it rests on—has largely been the reason for criticism and a major vulnerability.

²⁴ This has proved to be one of the most contentious issues in Myanmar's electoral processes. The electoral rights of the Rohingya have been gradually revoked as part of a longer process of legal denial, culminating in their loss of citizenship all together (Crouch 2019b).

proceed with a second phase of public display in October 2020, even though the law did not require this. The UEC did not publish detailed voter registration numbers during the registration process but shared final voter list excerpts with election contestants. Aware of the fact that voter registration was an area where there had already been criticism, the military used this as a pretext to claim fraud in the 2020 general elections. However, the figures published by the SAC-appointed UEC appear devoid of any legitimacy (cf. The Insights 2021).

The lack of legitimacy of the SAC-appointed UEC and the non-transparency of the process make it unlikely that the voter registers produced will generate sufficient trust.

The issue of voter registration is at the forefront of the junta's claim to be organizing fresh elections. The SAC-appointed UEC is checking voter lists from states and regions using what it has called 'initial voter list scrutinizer software', and staff have reportedly been trained on the application of this program. The SAC-appointed commission held a workshop on voter registration on 6 July 2022, attended by all SAC-appointed state and regional ministers, where the Deputy Commander-in-Chief made the opening remarks. The UEC is planning to conduct voter education on voter registration and the new electoral system, and has reportedly been increasing staff and office space for this purpose.²⁵ However, the general lack of legitimacy of the SAC-appointed UEC and the non-transparency of the process, as well as the only partial access by the SAC bodies to the country's territory due to the conflict, make it unlikely that the voter registers produced thus far will generate sufficient trust among democratic stakeholders and the general public to be a basis for genuine democratic elections.

Recommendations: Voter registration

Addressing the structural weaknesses of voter registration in Myanmar would involve strenuous efforts to improve population registers and the issuance of identity documents, regardless of which approach to voter registration is chosen. The long-term quality of voter lists would benefit from the establishment of a permanent, centralized and computerized, and regularly updated voter register.

In a federal framework, a clear division of tasks and responsibilities is essential between the centre and the federal units. While federal units may be responsible for drawing up lists, the principles related to the definition of citizenship, voter eligibility and registration methods must be uniform across the territory.

2.5. ELECTORAL DISPUTE RESOLUTION

The role of an electoral dispute resolution system is to protect and restore electoral rights, correct administrative mistakes and irregularities, and penalize violations of election legislation (cf. Joseph and McLoughlin 2019). An EDR system should cover all phases of the electoral process, and there may be specific EDR procedures for each phase. These include pre-election aspects such as litigation related to fundamental freedoms, suffrage rights and the

²⁵ 18th SAC Press Conference, 26 July 2022.

conduct of the campaign; election day proceedings, as well as post-election elements such as announcing election results; and scrutiny of the campaign and political parties' finances.

EDR models tend to be influenced by the federal set-up, particularly the shape of the judiciary and of the EMB. Looking at global practice, EDR can be handled by the ordinary courts, by special/electoral courts, by electoral commissions and courts, by ad hoc committees, by constitutional courts or by a combination of different bodies (Orozco-Henríquez 2010). Even though there is no one-size-fits-all EDR model, there is a trend towards a 'judicialization' of electoral dispute resolution. In its 2002 Code of Good Practice in Electoral Matters, the Venice Commission of the Council of Europe establishes that: '(t)he appeal body in electoral matters should be either an electoral commission or a court. ... In any case, final appeal to a court must be possible' (Venice Commission 2002: 11).

The question of litigation related to election results is one of the most sensitive since it deals with the question of the extent to which results reflect the will of the people. It must be determined whether the alleged violations and/or irregularities had the effect of altering the election results, and thus the free expression of the will of the people. The system for adjudicating petitions challenging election results under the 2008 Constitution and the 2010 legislation was assessed as problematic by international and national election observer groups in the most recent elections, as it lacked judicial review, transparency requirements and independence from the UEC, and did not offer petitioners an effective remedy.

As discussed above with regard to the role of the EMB in a federal context, a fully functional electoral dispute resolution system is not just there to protect the rights of citizens, but also plays a role in protecting the integrity and functioning of the Union. To the extent that the federal bond could be at stake during electoral processes, the EDR system is part of the tools required to preserve a federal union.

Recommendations: Electoral dispute resolution

When devising a new institutional framework, attention should be paid to addressing the issues inherited from the 2008 framework, including by providing judicial review of the electoral administration's decisions, a clear timeframe for adjudicating complaints, and guarantees on transparency and independence.

In a federal system, EDR mechanisms should be particularly solid and enjoy the confidence of all the constituent parts of the federation.

To the extent that the federal bond could be at stake during electoral processes, a fully functional EDR system is part of the tools required to preserve a federal union.

CONCLUSIONS

Following a decade of democratic opening and three general elections organized under the framework provided by the 2008 Constitution, Myanmar's military upended this period with a coup d'état on 1 February 2021. The military leadership established the so-called State Administration Council and sought to justify the coup with a narrative of electoral fraud. This narrative has since been extended, as political leaders and election administrators were arrested and convicted, and 'evidence' fabricated to legitimize these actions.

As the military is likely to perpetuate its narrative of electoral fraud and election preparations, it is critical that the international community does not provide any recognition of the junta's undertakings.

The SAC quickly announced that it would hold fresh elections, either in 2023 or later, steering in this direction with changes to election and political party registration laws, and changes to the electoral system to manufacture electoral outcomes in the interests of the military, by co-opting or coercing small or insignificant political parties to join them in this undertaking and by preparing to update voter lists. As the military is likely to perpetuate its narrative of electoral fraud and election preparations, it is critical that the international community does not provide any recognition of the junta's undertakings.

At the same time, the opposition has begun to prepare a new institutional framework for a future democratic and federal Myanmar, in particular through adoption of the 2022 Federal Democracy Charter. To build on this, a roadmap has been laid out to develop a transitional constitutional framework and ultimately a new permanent federal constitution to be adopted by a Constituent Assembly. In this process, it will be advisable to factor in questions of electoral design at an early stage. This could also help to counter the military's problematic narratives. In this endeavour, guidance can be found in international human rights law, which provides principles and guidelines for holding democratic elections, but also in Myanmar's past electoral experiences. The next generation of lawmakers and election administrators inherit a host of lessons learned from dealing with long-standing systemic and structural problems in the electoral process. These have been amply documented by national and international election observers, among others.

Against this background, key areas such as a legal framework for elections grounded in international standards, electoral system choice, electoral management design, voter registration and EDR should be reconsidered in the context of debates on federalism. The shape of the federal system has a strong impact on the conduct of elections, and the federal constitution determines the level at which the electoral legal framework is legislated. While there are different approaches to devolution, the framework should protect the equality of political rights and be consistent within the federation. Whatever system is adopted, the same rights should be protected across the country. This would require a common arbiter, generally a court, that is strong and independent enough to protect the federal pact.

Discussions on electoral systems have largely revolved around a choice between the existing FPTP in single-member constituencies based on townships, and some form of PR. Whichever system is chosen should enjoy broad agreement and adhere to the principle of equal suffrage, which, under FPTP, would imply engaging in transparent and inclusive redistricting.

There is no perfect or universal model for electoral management but a range of possibilities for how this responsibility could be assumed in a federal system. There is a certain level of correspondence between the shape of the election legislation and the shape of the EMB. In federal contexts, electoral governance will be determined by the articulation between federal and state laws, the degree of decentralization of the EMB, the capacity to supervise implementation of the legislation in a decentralized EMB, and the need for the EMB to obtain cooperation from executive authorities on population data, staffing, election logistics and electoral security.

Voter registration must be approached from two angles: defining who is eligible to vote and defining the process of how eligible persons become voters. While federal units may be in charge of the process of voter registration, common rules must apply for voter eligibility in a federal system, in particular concerning citizenship. Lack of voter inclusion—by law or through the process of voter registration—can greatly undermine an electoral process. Therefore, a shared understanding needs to be reached of who should be eligible to vote and how the voter list should be established. Two issues raise specific concerns in a federal system.

Divergent definitions or practices in terms of granting citizenship and/or identity documents if enacted at the federal unit level can have a considerable impact on the quality and legitimacy of an electoral process. Citizenship is typically kept as a power of the central state in federal systems, even if limited to the definition of citizenship criteria. Similarly, registering voters would typically imply some form of involvement from the local authorities, including of the services in charge of population and/or civil status, which may be under the direction of the central administration or of the federal unit. Ensuring cooperation between the EMB and these services could raise different issues, depending on the authority responsible. The drafters of a federal constitution

Key areas such as a legal framework for elections grounded in international standards, electoral system choice, electoral management design, voter registration and EDR should be reconsidered in the context of debates on federalism.

would need to keep these aspects, and their potential impact on the running of elections, in mind when agreeing on a division of powers.

The absence of a functional EDR system was one of the main weaknesses under the 2008 Constitution and should be addressed regardless of which institutional framework is chosen in the future. In a federal context, a fully functional EDR system—in essence a functioning, competent, independent judiciary—is not just there to protect the rights of the citizens, but also plays a role in protecting the integrity of the Union. To the extent that the federal bond may be at stake during electoral processes, the EDR system is part of the tools necessary to preserve a federal Union.

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Myanmar's military junta has sought to justify the 1 February 2021 coup d'état with dubious allegations of electoral fraud surrounding the 8 November 2020 general elections. The State Administration Council perpetuates this narrative of electoral fraud and claims to be preparing fresh elections, including by making changes to election and political party laws, implementing a new electoral system, and updating the voter list.

At the same time, pro-democracy forces are not only supporting civil disobedience and opposition to military rule, but also seeking to reconfigure the constitutional framework for a future democratic and federal Myanmar. In this context, it is advisable to factor in questions of electoral design from an early stage, which can also assist in countering the military's problematic narrative.

Against the background of Myanmar's recent electoral history and ongoing political crisis, this Policy Paper outlines key areas to consider with regard to elections in the context of federal constitutional design: the overall electoral legal framework, electoral system choice, electoral management, voter registration, including a clear framework for suffrage rights, and electoral dispute resolution.