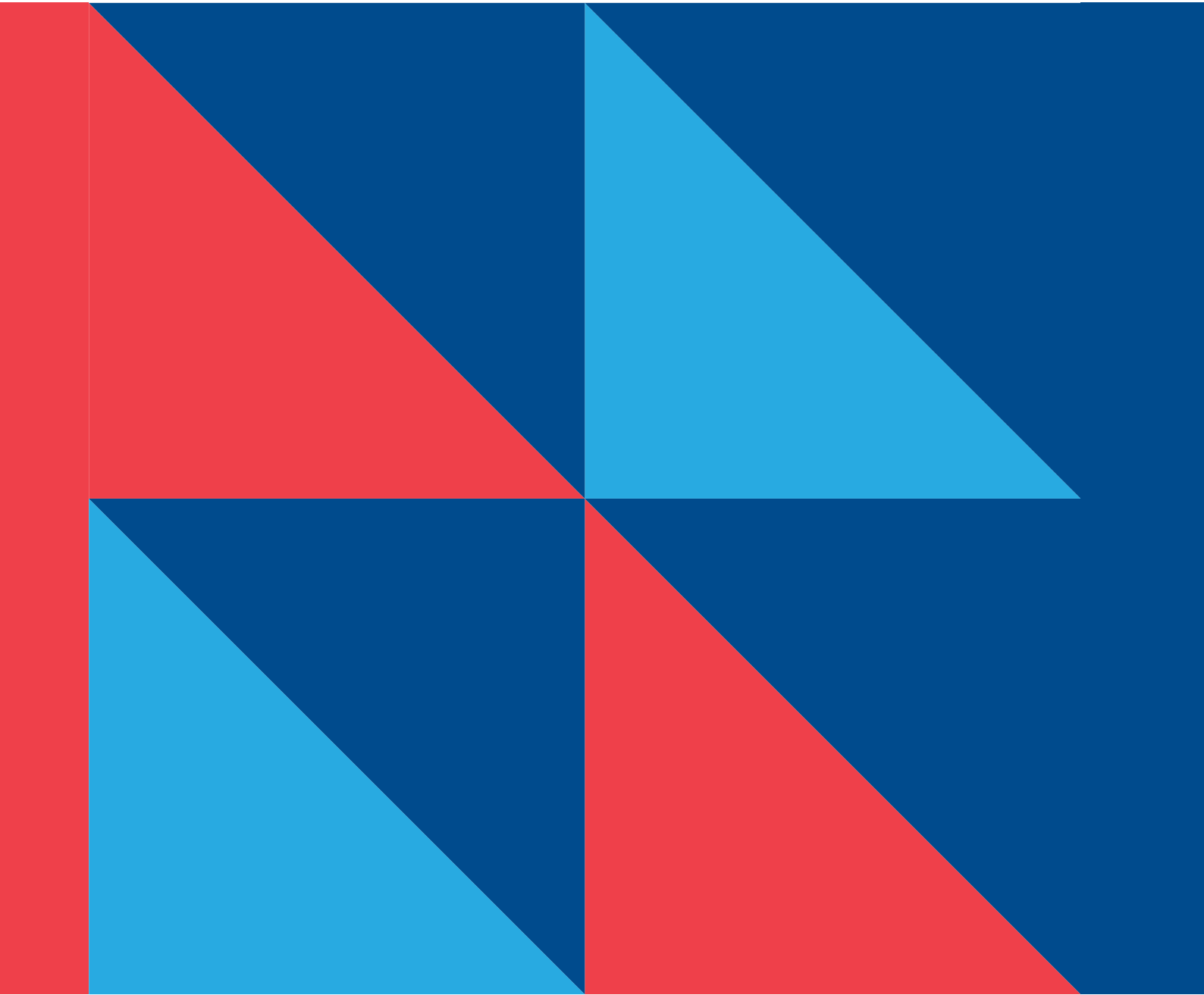




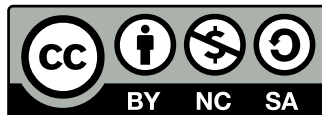
INTERIM ELECTORAL MANAGEMENT AND ELECTORAL SYSTEM DESIGN IN MYANMAR

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International IDEA
Strömsborg
SE-103 34 Stockholm
SWEDEN
Tel: +46 8 698 37 00
Email: info@idea.int
Website: <https://www.idea.int>

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International IDEA
Strömsborg
SE-103 34 Stockholm
SWEDEN
+46 8 698 37 00
info@idea.int
www.idea.int

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Contents

Acknowledgements	iv
Key recommendations	3
Executive summary	5
Chapter 1	
Background	6
Chapter 2	
The case for an interim EMB for Myanmar	8
Key considerations on elections in a future democratic Myanmar	10
Ensuring and safeguarding the EMB's independence	10
Protecting the EMB's mandate and capacity over the election process	11
Selection of EMB members to ensure professionalism and inclusiveness	12
Promoting transparency, accountability and integrity in an EMB	13
Define and explain the pros and cons of electoral systems in a consultative process	15
Chapter 3	
Conclusion	18
Annex A	
Some comparative examples	20
Formation of interim EMBs	20
Formation of independent EMBs	20
Participatory electoral system change	21
References	22
About the author	24
About International IDEA	25

KEY RECOMMENDATIONS

- 1. Ensuring and safeguarding an interim electoral management body (EMB)'s independence:** An interim EMB requires a place in the institutional framework of state administration and a model that supports and enacts its structural and behavioural independence. An EMB needs to be institutionally independent of, and autonomous from, other executive branches of government when it organizes and delivers elections. It needs to act based on legislation that is transparent and democratically legitimate. It therefore needs a governance structure with an independent executive—such as an independent commissioner or a multiparty or non-party-affiliated commission—to make strategic and operational electoral management decisions. EMBs should demonstrate professionalism and independence in their actions, without undue influence from political parties, government or other partisan actors.
- 2. Protection of the EMB's mandate and capacity over the election process:** An interim EMB must have a mandate to undertake its work effectively and independently, as well as the necessary functional independence in terms of capabilities, staff and resources to conduct an election successfully and to create and maintain a 'level playing field' among political actors. The EMB needs the necessary resources and authority to plan, prepare and implement quality control over the electoral process, including its integrity, from the production of the voter register and voter lists to an explicit mandate to certify its use in the election. There must also be alignment between mandate and functions, to allow it to determine the most appropriate form and degree of implementation of its functions. An EMB needs the authority and political will to issue and enforce regulations based on legislation that interprets, elaborates and enacts its core functions. An EMB must be able to autonomously manage its budget and be subject to standards of financial integrity for public institutions.
- 3. Selection of EMB members to ensure professionalism and inclusiveness:** The selection of EMB members (in cases of multi-member electoral

An interim EMB must have a mandate to undertake its work effectively and independently, as well as the necessary functional independence in terms of capabilities, staff and resources.

commissions) and senior staff should promote diversity and inclusiveness—particularly in terms of ethnicity (in large heterogeneous societies) and gender. In cases of multiple-member appointments, the composition of an EMB should: (a) reflect the population’s ethnic composition and gender balance; (b) demonstrate transparent, efficient and equitable recruitment and appointment of EMB staff; (c) appoint qualified candidates, in terms of citizenship, reputation, professional background and knowledge; (d) ensure that its members make a commitment to integrity and impartiality; and (e) include a wide range of skills, perspectives and backgrounds.

Three critical qualities enhance an EMB’s professional competence and electoral integrity: (a) knowledge, skills and capacity for electoral management, including public communication and stakeholder outreach; (b) resourcefulness, including human resources, to administer well-run elections and sustain progress from one election to the next; and (c) resilience to electoral manipulation, including financial and political independence.

An EMB must have strong public outreach and communications capacity, and engage with key electoral stakeholders through confidence-building mechanisms.

4. **Promoting transparency, accountability and integrity in an EMB:** An EMB must have strong public outreach and communications capacity, and engage with key electoral stakeholders, such as political parties and civil society, through confidence-building mechanisms. These can include codes of conduct or consultative committees as forums for dialogue. In relation to the public, two periods during an election are key to an EMB ensuring the integrity of the election process—voter registration and polling. Highly visible efforts by an EMB to address deficiencies in the voter list are not just a technical requirement. They are a valuable opportunity for direct engagement with the electorate to gain trust and demonstrate independence. The development and implementation of a communications strategy and the transparent communication of key decisions to the public can help maintain the confidence of the electorate. Such a strategy should include measures on regular engagement with traditional media and the effective use of social media. EMBs should pay close attention to and learn to use social media channels effectively at all levels.
5. **Define and explain the pros and cons of electoral systems in a consultative process:** To be successful, electoral system design processes must build understanding and trust among policymakers, civil society, political parties and citizens because the choice of electoral system influences the legitimacy of institutions. The following non-exhaustive criteria should be useful when considering the advantages and disadvantages of different electoral systems in the specific context of Myanmar: (a) providing representation; (b) electoral system design and the constitutional arrangements for federalism are closely interlinked and interdependent; (c) providing incentives for conciliation; (d) facilitating stable and efficient government; (e) holding the government and individuals accountable; (f) encouraging political parties; (g) promoting legislative opposition and oversight; (h) making elections accessible and meaningful; and (i) taking account of international standards.

EXECUTIVE SUMMARY

In the current interim period in Myanmar, with an illegitimate military regime in power and efforts by the interim governance institutions under way to build and enable a transition to a genuine democracy, the formation of an interim EMB—like a government and a legislature—is urgent and necessary as a key institution to support and prepare for the restoration of democracy. There are no standard models for establishing EMBs in transition periods and during conflict. However, it is important that key stakeholders in Myanmar agree on a road map for future constitutional and electoral reform informed by the lessons learned from the 2015 and 2020 general elections. These include the need for an independent interim EMB and informed discussions on key aspects of election reform, including those changes to the electoral system currently called for by the military-appointed illegitimate Union Election Commission (UEC).

An interim EMB provides an opportunity for policymakers to make institutional choices that can strengthen the credibility, impartiality, capacity and professionalism of and trust in an EMB. The actions of such an EMB will have an impact on the quality and inclusiveness of elections in the future. Its set-up under the constitutional and legal framework will influence how prepared it is to conduct future elections, implement electoral reform, and act and be seen to act as an independent body that makes legitimate decisions.

An interim and future constitutional EMB in Myanmar will need to be independent, professional and trusted, and its foundations must be anchored in the constitutional and legal framework. In addition, the pros and cons of a future electoral system need to be carefully weighed in a broad consultative process that enables their consideration and regulation. Some essential aspects are outlined in this Policy Paper.

In the current interim period in Myanmar, the formation of an interim EMB is urgent and necessary as a key institution to support and prepare for the restoration of democracy.

Chapter 1

BACKGROUND

Following the military coup d'état of 1 February 2021, which was unconstitutional even by the undemocratic terms of the 2008 Constitution, the Myanmar military set up a State Administrative Council (SAC), which in turn installed a new Union Election Commission (UEC) (Harding 2021). The military made reference to alleged irregularities such as inaccuracies in the voter list as the main pretext for the coup, in addition to claimed misuses of advance voting and Covid-19 guidelines, and breaches of election campaigning and media regulations. These allegations have been shown to be false and are in fact highly manipulative. The military later detained key UEC members, including the Chairperson and other Commissioners, and tasked its new UEC with investigating electoral fraud and preparing for new elections within one or two years, at which time it would transfer power to a newly elected civilian government. On 26 July 2021, the UEC 'annulled' the 2020 general election results, even though there was no legal basis for this decision. In its efforts to prepare for a future election, the military-appointed UEC has also proposed changing Myanmar's electoral system from first-past-the-post (FPTP) to one based on proportional representation (PR). It continues to purport to be a legitimate constitutional body, which it is clearly not.

Since February 2021, no credible evidence has been presented to support the alleged shortcomings of the 2020 general elections that would justify the annulment.

Since the coup was unconstitutional, the establishment of the military-appointed UEC and its directives, including the annulment of the 2020 general elections, have no legal authority. The 2008 Constitution has become defunct as a result of the coup and persistent violations and has lost the respect of the population. The military decision to annul the elections was not based on transparent election dispute mechanisms and did not follow a decision of an electoral tribunal. No election complaints were investigated by the military. Since February 2021, no credible evidence has been presented to support the alleged shortcomings of the 2020 general elections, including that possible voter list errors amounted to election fraud on a scale that would justify the annulment (ANFREL 2021). Any decisions taken by the new UEC in relation to a future electoral system or the preparations for an election will be illegitimate.

Immediately after the coup in February 2021, the duly elected members of the Pyidaungsu Hluttaw (the bicameral national parliament) established a Committee Representing the Pyidaungsu Hluttaw (CRPH), which subsequently reached out to a wide range of other groups opposed to the coup and jointly established a National Unity Government (NUG) and a National Unity Consultative Committee (NUCC). These legitimate interim democratic governance institutions are composed of lawmakers elected in the 2020 general elections, government officials, civil society activists from the Civil Disobedience Movement (CDM), ethnic armed organizations (EAOs), strike committees and regional groupings. The interim governance institutions seek the restoration of genuine democracy, eradication of the military-led dictatorship and the establishment of a federal democratic union as outlined in the Federal Democracy Charter. To do so, the CRPH and the NUG have embarked on a process of designing and planning genuine democratic state-building for Myanmar.

To contribute to this process, this paper seeks to outline key considerations for Myanmar's interim governance institutions—the CRPH, the NUG and the NUCC—and the international community regarding the establishment of a legitimate interim EMB, and its agenda during the current interim phase and the future transition period in Myanmar.

The interim governance institutions seek the restoration of genuine democracy, eradication of the military-led dictatorship and to build a federal democratic union as outlined in the Federal Democracy Charter.

Chapter 2

THE CASE FOR AN INTERIM EMB FOR MYANMAR

In the current interim period in Myanmar, with an illegitimate military regime in power and efforts by the interim governance institutions under way to build and enable a transition to a genuine democracy, the formation of an interim EMB—like a government and a legislature—is urgent and necessary as a key institution to support and prepare for the restoration of democracy. To some extent, it will have to draw on existing capacities and established procedures.¹

According to election observers, even though they featured several significant shortcomings in relation to international standards, the 2020 general elections in Myanmar reflected the genuine will of the voters (Carter Center 2020; ANFREL 2021). However, system- and management-related legacy weaknesses must be discussed by democratic stakeholders, and a future EMB must be equipped to manage the required reforms from a legislative and institutional perspective. The shortcomings related to the 2008 Constitution, such as the appointment of commissioners exclusively by the President which undermines their independence, can perhaps now be overcome more easily. However, the legislative framework for elections is linked to complex electoral issues, such as malapportionment resulting from the assignment of constituencies to townships and the lack of a right to appeal EMB decisions before an independent and competent court (Carter Center 2020). These are just two examples of how the parameters of the 2008 Constitution predefined features of the electoral system and limited the space for electoral reform. In addition, large sectors of the population remained disenfranchised, including many ethnic Rohingya, and the definition of citizenship remained a cause for disenfranchisement. Despite some promising steps towards legal reform initiated by the old UEC in 2016, the electoral legal framework has not changed significantly since 2015 and lacks measures to actively promote

¹ For additional details on the legacies of electoral management and reform requirements, see Lidauer and Saphy (2014), which establishes a good baseline for the earlier transitional period and is still largely valid. See also, Renshaw and Lidauer (2021), which builds on the existing work and revisits the UEC in its constitutional context.

the participation and representation of women, youth or other disadvantaged groups.

There are no standard models for establishing EMBs in transition periods and during conflict. However, it is important that key stakeholders in Myanmar agree on a road map for future constitutional and electoral reform informed by the lessons learned from the 2015 and 2020 general elections. These include the need for an independent interim EMB and informed discussions on key aspects of election reform, including those changes to the electoral system currently called for by the military-appointed illegitimate UEC.

An interim EMB provides an opportunity for policymakers to make institutional choices that can strengthen the credibility, impartiality, capacity and professionalism of and trust in an EMB. The actions of such an EMB will have an impact on the quality and inclusiveness of elections in the future. Its set-up under the constitutional and legal framework will influence how prepared it is to conduct future elections, implement electoral reform, and act and be seen to act as an independent body that makes legitimate decisions. An interim EMB will also be able to represent Myanmar and cooperate in international election forums,² and keep abreast of international good practices in relation to elections. In the future, the interim EMB could be turned into a permanent structure under a new constitutional framework yet to be established. Until an interim EMB is in place, this work could be done by legal and other experts on interim institutions dedicated to electoral questions.

Similarly, the choice of electoral system—including any possible variations at different levels in recognition of Myanmar's future as a decentralized federal state—will influence the future composition and stability of governments in Myanmar, the inclusiveness and representativeness of its future legislature, and the level of accountability of its governments at different tiers. Deliberations on the advantages and disadvantages of electoral systems and the choice of electoral system should therefore involve, and be accepted by, citizens; for example, in a referendum which would require detailed preparation.

An interim and future constitutional EMB in Myanmar will need to be independent, professional and trusted, and its foundations must be anchored in the constitutional and legal framework. In addition, the pros and cons of a future electoral system need to be carefully weighed in a broad consultative process that enables their consideration and regulation. Some essential aspects are outlined for consideration below.

System- and management-related legacy weaknesses must be discussed by democratic stakeholders, and a future EMB must be equipped to manage the required reforms from a legislative and institutional perspective.

An interim EMB provides an opportunity for policymakers to make institutional choices that can strengthen the credibility, impartiality, capacity and professionalism of and trust in an EMB.

² For instance, the Association of World Election Bodies (A-WEB) or the regional cooperation of EMBs in ASEAN.

KEY CONSIDERATIONS ON ELECTIONS IN A FUTURE DEMOCRATIC MYANMAR

The key points outlined below are not exhaustive and are offered on the assumption that any electoral process organized under the current military authority will lack democratic legitimacy and essentially serve to reinforce and entrench military rule. Any such elections are likely to be widely rejected by the population and key democratic stakeholders, such as political parties (with actual voter bases) and civil society. The international community should avoid giving any credence to or bestowing any legitimacy on such pseudo-democratic exercises that will not lead the country back to democracy.

Ensuring and safeguarding the EMB's independence

An interim EMB requires a place in the institutional framework of state administration and a model that supports and enacts its structural and behavioural independence.³ An EMB needs to be institutionally independent of, and autonomous from, other executive branches of government when it organizes and delivers elections. In addition, it needs to act based on legislation that is transparent and democratically legitimate. It therefore needs a governance structure with an independent executive—such as an independent commissioner or a multiparty or non-party-affiliated commission—to make strategic and operational electoral management decisions. EMBs should demonstrate professionalism and independence in their actions, without undue influence from political parties, government, or other partisan actors. In this way, they can ensure the effective exercise and fulfilment of the electoral rights enshrined in international human rights law. However, the choice of an independent model of EMB is only a starting point for instilling an independent culture of decision-making in an EMB and will need to be tested throughout the preparation and holding of elections. Research suggests that if the foundations of independence of an EMB are strong, independence in decision-making is more likely to take root and tends to replicate itself over time, contributing to the institutional resilience of an EMB in the face of authoritarian challenges (Birch 2011).

The foundations of an EMB's independence are set out in a country's legal framework and should be anchored in the constitution, which offers the strongest authority and legal protections for upholding such independence. The EMB's mandate and functions should be defined in legislation that allows for cautious, inclusive and consensus-based amendment. While allowing flexibility, procedures for changing the EMB's mandate and functions should have additional safeguards, such as consultations with civil society organizations (CSOs), a broad and representative range of political parties and the EMB itself. Otherwise, there is a risk that the EMB's independence may be undermined through modifications to its mandate and functions

An EMB needs to be institutionally independent of, and autonomous from, other executive branches of government when it organizes and delivers elections.

³ International IDEA distinguishes between three models of EMB design: independent, governmental and mixed. Each model has distinct legal and institutional arrangements. Independent EMBs can be established through the constitution or other legislation. The mixed model usually sees two or more institutions administering elections. Some EMBs are part of the judicial branch of government. This Policy Paper argues for an independent model as its premise is to protect the public good of democracy in line with international standards (Joseph 2021).

introduced by a self-interested majority in the legislature (International IDEA 2012; McLoughlin 2018). The EMB also needs to be established to function independently through access to a competent staff that is politically neutral.

Protecting the EMB's mandate and capacity over the election process

An interim EMB must have a mandate to undertake its work effectively and independently, as well as the necessary functional independence in terms of capabilities, staff and resources to conduct an election successfully and to create and maintain a 'level playing field' among political actors.

The 2008 Constitution mandated the Myanmar UEC to hold and supervise Union-level as well as state and regional Hluttaw elections; establish and oversee sub-commissions at various levels; designate and amend constituencies; prepare the voter list; postpone or cancel elections due to security concerns; form tribunals to adjudicate on election disputes; and supervise and guide political parties to act in accordance with the law. The UEC also had the power to adopt by-laws, working guidelines, procedures, instructions and notifications to carry out its mandate. Therefore, the UEC had a broad set of core functions, but not always the necessary degree of oversight and independence to implement them. In practice, for example, the UEC was dependent on the General Administration Department (GAD) and other state services, such as schools, to field the necessary temporary polling station personnel during elections. In addition, its central administrative apparatus was largely controlled by military-affiliated civil servants who retained a degree of loyalty to the military rather than the Constitution, as became apparent after the coup. The UEC also submitted election by-law amendments that fell within its remit to parliament, despite the absence of any requirement in law to do so, leading to delays in their adoption.⁴

The EMB needs the necessary resources and authority to plan, prepare and implement quality control over the electoral process, including its integrity, from the production of the voter register and voter lists to an explicit mandate to certify its use in the election. There must also be alignment between mandate and functions, to allow it to determine the most appropriate form and degree of implementation of its functions. An EMB therefore needs the authority and political will to issue and enforce regulations based on legislation that interprets, elaborates and enacts its core functions (International IDEA 2012). An EMB must be able to autonomously manage its budget and be subject to standards of financial integrity for public institutions. It must also be provided with the required funds in a timely manner without the possibility of political manipulation. Ideally, an EMB will have two budgets: one to fund and maintain itself as an institution, and an operational budget for the conduct of elections (International IDEA 2012; McLoughlin 2018). In the case of Myanmar, the UEC did not always dedicate sufficient funds to building its internal capacities in line with its Strategic Plan 2019–2022 or to core functions such as voter education and communication.⁵

The EMB needs the necessary resources and authority to plan, prepare and implement quality control over the electoral process.

⁴ Technical Assessment of the 2020 general elections in Myanmar (internal document), July 2020.

⁵ Technical Assessment of the 2020 general elections in Myanmar (internal document), July 2020.

Voter education is indispensable for democratic consolidation and often included as part of an EMB's core functions. In Myanmar, the legal framework governing elections is silent on civic and voter education. The Constitution and election legislation covered voter registration but provided no explicit mandate for the UEC to conduct voter education, although the 2019 parliament already believed that this fell within the UEC's remit. The UEC's Strategic Plan 2019–2022 includes a goal to expand UEC civic and voter education activities.⁶ Voter education should be part of the EMB's core functions to avoid a situation where a government refuses to fund such activities. It should be conducted in cooperation with political parties, CSOs, the private sector, other government entities and the media, which can play a complementary role in ensuring that voters can make informed choices (International IDEA 2012).

A diverse, professional and representative interim commission would enhance trust in, the credibility and competence of, and public perceptions of the EMB.

Selection of EMB members to ensure professionalism and inclusiveness

A diverse, professional and representative interim commission would enhance trust in, the credibility and competence of, and public perceptions of the EMB. EMBs must uphold democratic values and promote equity. The selection of EMB members (in cases of multi-member electoral commissions) and senior staff should promote diversity and inclusiveness—particularly in terms of ethnicity (in large heterogeneous societies) and gender (McLoughlin 2018; International IDEA 2020).

If an EMB is perceived to be dominated by a group with an interest in the election's outcome, whether that is a political party, an ethnic group or a particular segment of society, it will be subject to an erosion of confidence and trust. In contrast, if its composition and staff reflect key socio-demographic characteristics of the population, the perception of inclusiveness and representativeness will be stronger. This in turn is likely to enhance support for the EMB from multiple strands of society, as well as ethnic groups, particularly with regard to its credibility and impartiality. It might also reduce the likelihood of contested election results.

In 2016, under the 2008 Constitution, the members of Myanmar's UEC were appointed by the President of the Union. During the 2020 general elections, the UEC had 15 members, the Chair and one member for each of the 14 regions and states. The ability of the executive to appoint UEC members without any inclusive and transparent process did not provide a mechanism that ensured impartiality and independence in line with international principles. While the UEC was nominally neutral, the fact that its members were all in effect political appointees of the incumbent government made the institution susceptible to accusations of bias. The composition of the UEC was criticized by CSOs and the international community as unrepresentative. All 15 members were male conservative legal scholars, and most were from the majority Bamar ethnic group. Only two were members of ethnic minority groups.⁷

⁶ Technical Assessment of the 2020 general elections in Myanmar (internal document), July 2020.

⁷ Technical Assessment of the 2020 general elections in Myanmar (internal document), July 2020.

In cases of multiple-member appointments, the composition of an EMB should:

- Reflect the population's ethnic composition and gender balance.
- Demonstrate transparent, efficient and equitable recruitment and appointment of EMB staff.
- Appoint qualified candidates, in terms of citizenship, reputation, professional background and knowledge.
- Ensure that its members make a commitment to integrity and impartiality.
- Include a wide range of skills, perspectives and backgrounds (McLoughlin 2018; International IDEA 2020).

Three critical qualities enhance an EMB's professional competence and electoral integrity:

- Knowledge, skills and capacity for electoral management, including public communication and stakeholder outreach.
- Resourcefulness, including human resources, to administer well-run elections and sustain progress from one election to the next.
- Resilience to electoral manipulation, including financial and political independence.

Prioritizing these qualities can enhance an EMB's trustworthiness, and a sense of legality and integrity when navigating electoral processes in difficult environments. Appointments should be made with a view to building an EMB with a diverse skillset and expertise in numerous fields, such as administrative and operational logistics, security and communications, among other things, which reflect the multitude of responsibilities of the EMB.

The appointments process itself should be open to observation by electoral stakeholders, including civil society. Political parties are frequent participants in a negotiated process to ensure that the main political groups can have a say in nominating members. Such processes of selection, nomination or even vetting can precede formal appointment by the president (as in the case for Myanmar) and are likely to enhance ownership of the process by electoral stakeholders. Nonetheless, the decision-making of the EMB, once appointed, should not be—or be perceived to be—on behalf or under the influence of political parties (International IDEA 2020).

Promoting transparency, accountability and integrity in an EMB

Building and maintaining public trust and confidence in an EMB over multiple electoral cycles is of paramount importance. Confidence among the electorate is determined by interconnected factors, such as how political parties engage with voters and whether the EMB can affirm and demonstrate its independence through public outreach such as civic education for voters and liaison with civil society (International IDEA 2012). An EMB must therefore have strong public outreach and communications capacity, and engage with key electoral stakeholders, such as political parties and civil society, through confidence-building mechanisms. These can include codes of conduct or consultative committees as forums for dialogue.

The appointments process itself should be open to observation by electoral stakeholders, including civil society.

The UEC leadership in Myanmar was criticized for a series of controversial decisions during the 2020 general elections, not least that it imposed additional observer accreditation requirements on CSOs. In addition, just three weeks before election day, the UEC announced the dissolution of the United Democratic Party (UDP) due to a reported breach of political finance laws by its party leader, which disqualified 16 per cent of the candidates (1,129) from competing in the election with no hearing or appeal. (This decision was probably justified but came very late in the process.) The UEC also cancelled elections in 54 constituencies for security reasons, a decision criticized for its lack of transparency and any rationale behind it. The decision effectively disenfranchised up to 1.6 million voters, who would have had to wait for by-elections under improved security conditions, causing anger among ethnic minority parties over the lack of consultation. The decision was based primarily on recommendations from security sector ministries.⁸

During the 2020 elections there were also several election administrative shortcomings, such as the failure to publish an electoral calendar, the lack of transparency and safeguards in the administration of advance voting, and a lack of adequate public communication regarding the number of registered voters and the number of polling stations. The UEC also failed to publish key election data, such as the number of polling stations and voters per polling station, prior to election day.⁹ While none of these decisions had any impact on the legitimacy of the vote or the validity of the outcome of the elections, the suboptimal communication and consultation around them caused a degree of unease among electoral stakeholders that was later exploited by the military in its efforts to cast doubt on the election results.

Highly visible efforts by an EMB to address deficiencies in the voter list are a valuable opportunity for direct engagement with the electorate to gain trust and demonstrate independence.

In relation to the public, two periods during an election are key to an EMB ensuring the integrity of the election process—voter registration and polling. Highly visible efforts by an EMB to address deficiencies in the voter list are not just a technical requirement. They are a valuable opportunity for direct engagement with the electorate to gain trust and demonstrate independence. In the case of Myanmar, enormous efforts will be required to account for and deal with the considerable displacement and long-standing discrimination many potential voters have experienced. Considerable ground-level administrative capacity and documentation have been lost in the past eight months. Close collaboration between the EMB and the civil registration and general administration authorities will be essential.

The development and implementation of a communications strategy and the transparent communication of key decisions to the public can help maintain the confidence of the electorate. Such a strategy should include measures on regular engagement with traditional media and the effective use of social media. EMBs should pay close attention to and learn to use social media channels effectively at all levels.

⁸ Technical Assessment of the 2020 general elections in Myanmar (internal document), July 2020. The UEC's own subordinate bodies also played a role (Lidauer 2021).

⁹ Technical Assessment of the 2020 general elections in Myanmar (internal document), July 2020.

Define and explain the pros and cons of electoral systems in a consultative process

No electoral system is perfect. The pros and cons of electoral systems cannot be considered in isolation from the wider context of constitutional and institutional design. An electoral system pertains to the arithmetic formula that transfers votes into seats in representative bodies or for individual offices. Electoral system design can add to the momentum of political change, encourage popular participation, enable conflict management, improve gender representation and lead to the development of political party systems. To be successful, electoral system design processes must build understanding and trust among policymakers, civil society, political parties, and citizens because the choice of electoral system influences the legitimacy of institutions.

The 2020 general elections and the military coup have highlighted the unique features of Myanmar's outdated version of an FPTP electoral system and its impact on the distribution of power. Elections in Myanmar are affected by a high degree of malapportionment due to the current system of delineating election boundaries or constituencies. The FPTP system means that the influence of votes in constituencies with few voters is larger than the influence of votes in constituencies with the most voters. Myanmar's level of malapportionment is one of the highest in the world.¹⁰ This situation violates the 'one person, one vote' principle of representative democracy, creating large scale inequalities in suffrage, and distorts the translation of parliamentary votes into seats, leading to biased electoral outcomes.¹¹

The FPTP system can also lead to the exclusion of women, youth and ethnic minority groups. However, smaller minority communities which demographically dominate smaller constituencies benefit from the system. The exclusion of minorities and women remains a concern because parties are more likely to select candidates who appeal to the most voters, typically those from the dominant power holder or group, which in Myanmar is likely to be men over the age of 30 belonging to the Bamar ethnic group. The FPTP system also affects legislative appointments for the same reason (International IDEA 2021). It should, however, be noted that the votes of ethnic minority communities do not necessarily go to ethnic-based political parties, and national parties have also managed to garner significant electoral support across the different population groups.

A change of electoral system to PR has been discussed for many years, but often at a rather superficial level without thorough analysis of the precise design features, constitutional/legal parameters, and political implications. It appears that the military and its military-appointed UEC have been peddling such an idea more recently and found some support from political parties, mostly those which failed to gain any electoral support in the 2020 elections. A change in electoral system may not, however, automatically

The pros and cons of electoral systems cannot be considered in isolation from the wider context of constitutional and institutional design.

¹⁰ There was a ratio of 281:1 between the largest (412,631 voters) and smallest (1,466) Pyithu Hluttaw constituencies and a ratio of 231:1 between the largest (895,442 voters) and smallest (3,874 voters) Amyotha Hluttaw constituencies in 2020.

¹¹ Technical Assessment of the 2020 general elections in Myanmar (internal document), July 2020.

lead to more influence for certain groups, such as ethnic minority parties. Myanmar elects representatives from constituencies that correspond with administrative township boundaries for the Pyithu Hluttaw and from segments or combinations of these for the Amyotha and regional or state Hluttaws. It has therefore always been known that introducing a PR system would require constitutional amendments to the existing system of single-member constituencies to create multi-member constituencies.¹² The 2008 Constitution must be considered defunct and inapplicable and therefore no longer an obstacle to the introduction of a new electoral system. This could, however, only be done by the legitimate legislative authorities and through a consultative and inclusive process, not as a sham by the military seeking to cement its power and exclude its main challengers.

PR systems require the establishment of an electoral threshold that parties must meet to be allocated seats in parliament. This can be either a percentage, such as 4 or 5 per cent, or a 'natural threshold' determined by the number of seats available. Ethnic minority parties would not have secured a single seat in any parliaments if the 2020 elections had been held under a PR system, as most were unable to obtain even 1 per cent of the votes (International IDEA 2021). The current FPTP electoral system therefore advantages certain ethnic minority areas, even though Myanmar is a highly centralized state (Ostwald and Courtin 2020). A PR system could, however, be more advantageous to women and younger candidates, and even ethnic groups, class/caste or Indigenous peoples, if affirmative action measures such as quotas were implemented, or political parties ensured that they stand as candidates.¹³

The following non-exhaustive criteria should be useful when considering the advantages and disadvantages of different electoral systems in the specific context of Myanmar (Reynolds et al. 2005).

- *Providing representation*: An electoral system should be a 'mirror of the nation' by ensuring not only geographical and ideological representation, but also representation of women and men, young and old, the wealthy and the poor, and different religious affiliations and ethnic groups within society. In a federal system, however, the union-level legislature would also need to reflect the federal structure of the system, most commonly in a bicameral form.
- *Electoral system design and the constitutional arrangements for federalism are closely interlinked and interdependent*: A key design question is the degree to which federal constituent units can determine their own electoral systems for their own structures and, in some cases, even for their representation at the federal level. A question for the EMB is whether it will have system-wide powers, or only at the federal level.
- *Providing incentives for conciliation*: Electoral systems can be a tool for conflict management within society, again in close connection with the overall constitutional design. If an electoral system rewards inclusiveness, it will provide incentives for political parties to conduct unifying campaigns

The 2008 Constitution must be considered defunct and inapplicable and therefore no longer an obstacle to the introduction of a new electoral system.

¹² Technical Assessment of the 2020 general elections in Myanmar (internal document), July 2020. The administrative basis of townships predates the 2008 Constitution and goes back to colonial times.

¹³ India and Nepal provide numerous examples of such measures and practices.

and put forward candidates from different groups of society, including disadvantaged groups.

- *Facilitating stable and efficient government:* The results produced by an electoral system can contribute to stable government at the different tiers of governance in a federal system. To do so, the electoral system needs to be seen as fair by the electorate, enable the government to efficiently enact legislation and govern by creating working majorities in the legislature, and avoid discrimination.
- *Holding the government and individuals accountable:* Electoral systems should be designed with the objective of enabling voters to influence the shape of government and hold their representatives accountable to the highest degree possible.
- *Encouraging political parties:* To ensure a stable political order in the long term, electoral systems should encourage the growth and maintenance of strong and effective political parties that are based on broad political values and offer voters a real choice.
- *Promoting legislative opposition and oversight:* The electoral system should ensure the presence of a genuine opposition that can critically assess legislation, question government performance, safeguard ethnic and other minority rights, and represent constituents effectively. A 'winner-takes-all' approach should be avoided when choosing an appropriate electoral system (Global Commission on Elections, Democracy and Security 2012).
- *Making elections accessible and meaningful:* The electoral system should make it easy and safe to vote and create a legislature with genuine democratic legitimacy as defined in a constitution. Voter-friendly ballot papers, an accurate voter list, easy access to polling stations and safeguarding the secrecy of the ballot are all key factors to be considered.
- *Taking account of international standards:* The choice of an electoral system should consider international standards as enshrined in the international covenants that Myanmar has acceded to, as well as the Sustainable Development Goals of Agenda 2030. These include the principles of free, fair and periodic elections that guarantee universal adult suffrage, the secrecy of the ballot and freedom from coercion, and a commitment to the principle of one person, one vote. They also include recognition of the importance of the fair representation of all citizens without discrimination, including women and people with disabilities.

The above-mentioned criteria need to be prioritized in the light of the political context of Myanmar and decisions made on who will be involved in the choice of electoral system and its regulation. There are several possibilities in this regard, such as setting up expert commissions to make recommendations to be put to either a national referendum or a parliamentary vote, or the establishment of non-expert citizen assemblies that make recommendations on the choice of electoral system that are put to a national referendum.

Chapter 3

CONCLUSION

The unconstitutional military coup on 1 February 2021 was rejected by the people of Myanmar and has thrown the country into serious disarray. The international community has called for the restoration of democracy, which ultimately requires new elections under a new constitutional framework that enjoys the trust of the people and their legitimate representatives. Even though the 2020 general elections were valid and reflected the will of voters, Myanmar will still need to address legacy shortcomings to restore genuine democracy to Myanmar.

Given the establishment of interim governance institutions in the form of the CRPH, the NUG and the NUCC, the establishment of an interim EMB for Myanmar should be considered by these legitimate democratic actors to enable the accomplishment of key election-related tasks, such as representing Myanmar in international EMB forums, facilitating consultations on electoral system reform within the emerging federal system, addressing institutional shortcomings and strengthening the capacities of a future legitimate EMB under the future constitutional set-up.

For the credibility of any future elections and electoral processes, a fresh start with a professional and untainted new EMB is essential.

Eventually, new elections and a referendum will have to be held. The military-appointed UEC in Naypyitaw, which has led the campaign to unlawfully discredit the 2020 elections, has no legal legitimacy, is discredited and cannot be tasked with making preparations for any future electoral processes, although it may be possible to integrate some technical capacities following a strict vetting process. For the credibility of any future elections and electoral processes, a fresh start with a professional and untainted new EMB is essential. The sooner such a body is set up, the earlier the capacity-building, consultations on future electoral design and technical preparations can begin.

Key considerations for the establishment of such an interim EMB will be to ensure its independence and the professional and inclusive appointment of its members, that it can fulfil its mandate and that it has the capacity to deliver election reform and future elections and referendums. Establishing

inclusive political consensus on a road map for electoral reform by Myanmar's legitimate leadership will enhance public and stakeholder confidence in the integrity of future electoral processes and enable the constitutional reform needed to set Myanmar on the path to restoring democracy. It is hoped that this paper can contribute to this effort.

Annex A

SOME COMPARATIVE EXAMPLES

The selected comparative examples below illustrate how other countries have tackled the challenges of setting up interim EMBs, changing electoral systems through consultation and creating independent and professional EMBs.

Formation of interim EMBs

Transitional international EMBs are set up temporarily to facilitate transitional elections. They can be set up under the auspices of the international community, for example through the United Nations, and either fully comprise or include international experts as members. Transitional international EMBs have been set up in Cambodia (1993), Bosnia and Herzegovina (1996), Kosovo (2000) and Timor Leste (2000). The EMBs set up in Afghanistan in 2004 and South Africa in 1994 were national institutions with provision for the appointment of international members. The 1994 South African EMB had five international experts (ACE Project n.d.).

There are pros and cons to setting up temporary transitional international EMBs. Among the advantages are the impartiality and expertise that international electoral assistance providers can offer, which can facilitate conciliation and dialogue. However, the perception of local ownership of the institution and the election process can also be diminished and it can make establishment of a permanent EMB more difficult (McLoughlin 2018).

Formation of independent EMBs

Indonesia has an EMB (the General Elections Commission, Komisi Pemilihan Umum, KPU) and an election oversight body (the Bawaslu). The Constitution specifies that the KPU must be independent and establishes a Constitutional Court with powers to hear requests for the dissolution of political parties and resolve disputes over election results. Four of the nine commissioners appointed to the established independent KPU were involved in the discussions over the law on the operation of the body. Indonesia has an elaborate, non-partisan recruitment process for national election commissioners. The President of the Republic first forms a Selection Committee (typically of five

Transitional international EMBs are set up temporarily to facilitate transitional elections. They can be set up under the auspices of the international community and either fully comprise or include international experts as members.

persons) of election experts, academics and prominent civic leaders, none of whom can be a member of a political party. The Committee then announces an open vacancy and invites qualified applicants. Qualifications are set out in law. Applicants are selected by the committee in stages until candidates number twice the number of vacancies (typically 14 persons). The process is transparent and followed by observers from civil society throughout. Interviews are held in public and candidate information is made available throughout the process to enable public scrutiny. The next stage takes place in parliament, where the selection process is conducted by a parliamentary standing committee in the lower house in which all political parties in parliament are represented (International IDEA 2012, International IDEA 2020).

In **Ghana**, following a constitutional referendum, a new constitution established a formally independent EMB, the Electoral Commission (EC). Under the transition plan, the EC was mandated to conduct presidential and parliamentary elections in November and December 1992. The EC commissioners were nominated by the president and approved by the Council of State. They could not be removed except on the grounds of insanity or infirmity, either of which had to be certified by a medical professional. Once appointed, commissioners served until the age of 70 under the same conditions as High Court justices. The EC was given the authority to handle complaints arising from candidate and voter registration, and polling. All post-election disputes regarding the results were handled by the judiciary. A key power of the EC was to make its own regulations relevant to the electoral process, which gave it significant constitutional and operational autonomy (International IDEA 2012, International IDEA 2020).

Participatory electoral system change

Canada establishes commissions or boards of public inquiry to inform the development of public policy such as changes to electoral systems. These are usually composed of judges, experts and political leaders. The public is asked for submissions and a period of wider consultation follows, after which the commission issues a report, allowing the government to make decisions on which actions to take. Electoral reform for British Columbia was informed by a Citizen Assembly, which was set up based on terms of reference drafted by election experts. The 160 people appointed to the Citizen Assembly were citizens randomly selected from the electoral register. The membership was a balance of men and women that was also reflective of the age distribution of the population and included members of the Aboriginal community. Following a learning phase for the assembly, in which electoral system experts informed members of the different systems available and discussed their advantages and disadvantages, its preliminary conclusions were presented to the public in 50 public hearings involving 3,000 people. The objective was to identify essential elements for an electoral system, review all electoral system options and increase public awareness, inclusion and participation. The recommendations of the Assembly were published in a final report and finally put to a referendum (Reynolds et al. 2005).

In Ghana, a key power of the EC was to make its own regulations relevant to the electoral process, which gave it significant constitutional and operational autonomy.

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About the author

Nathalie Ebead is International IDEA's Programme Manager for the Myanmar MyConstitution programme. Previously she was International IDEA's Programme Manager for the European Union-funded Support to Elections and Democracy (STEP Democracy) Programme in Yangon, Myanmar. From 2016 to 2018 she established, managed and provided strategic direction to International IDEA's Democracy Assessment, Analysis and Advisory Unit. Ebead also conceptualized and managed the first edition of International IDEA's signature publication project, The Global State of Democracy, and its accompanying Global State of Democracy Indices.

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<<http://idea.int>>



International IDEA
Strömsborg
SE-103 34 Stockholm
SWEDEN
+46 8 698 37 00
info@idea.int
www.idea.int

In the current interim period in Myanmar, with an illegitimate military regime in power and efforts by the interim governance institutions under way to build and enable a transition to a genuine democracy, the formation of an interim electoral management body—like a government and a legislature—is urgent and necessary as a key institution to support and prepare for the restoration of democracy. There are no standard models for establishing EMBs in transition periods and during conflict. However, it is important that key stakeholders in Myanmar agree on a road map for future constitutional and electoral reform informed by the lessons learned from the 2015 and 2020 general elections.