

ARTICLE

The Union Election Commission of Myanmar 2010–2020

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Abstract

The 2008 Constitution of the Union of Myanmar establishes the framework for a ‘discipline-flourishing’ constitutional democracy in which the *Tatmadaw*, the Burmese military, retains a significant degree of power. Under this Constitution, the Union Election Commission (UEC) is vested with significant authority to supervise elections, regulate political parties and electoral campaigns, register voters, suspend elections, and to make conclusive determinations in electoral disputes. Between 2010 and 2020, the UEC oversaw three consecutive general elections and three by-elections. Following a term under the former military leadership, the country’s major democratic opposition party, the National League for Democracy (NLD), won a resounding victory in the 2015 elections. In the years that followed, civilian-military relations were a source of tension, as the NLD attempted to reform the executive and legislative roles for the military guaranteed by the Constitution. These tensions became in particular tangible during the 2020 elections, which the NLD again won in a landslide victory. The military alleged the election was marred by fraud while the UEC rejected this allegation. On 1 February 2021, hours before the new parliament was to convene, the *Tatmadaw* staged a *coup d’état*. This article reviews the UEC in its constitutional and political context. It identifies its institutional features, significant points in its brief history, and the impact of UEC leadership as a contributing factor in fostering confidence in the electoral process.

Keywords: Constitutional Democracy

On 1 February 2021, a few hours before the constituting session to inaugurate the third term of parliament under the 2008 Constitution, the Burmese military – the *Tatmadaw* – staged a *coup d’état*. This was the third military coup since Myanmar (Burma) gained independence from British colonial rule in 1948.¹ The coup brought to an end a decade of transitional endeavours instigated and pursued by the military elites. Elections played a key role in the architecture of transition. The constitutional referendum of 2008, which took place in the immediate aftermath of Cyclone Nargis, was reportedly manufactured by the military to result in an overwhelming acceptance of the Constitution.² Following this, three general elections took place in five-year intervals, in November 2010, 2015, and 2020. By-elections, which are legally required to fill vacant seats, were held in 2012, 2017, and 2018. All elections were organised by the Union Election Commission (UEC), a constitutionally mandated body appointed by the President. According to the *Tatmadaw*, the immediate precipitating cause of the 2021 coup was the UEC’s refusal to investigate allegations that the November 2020 general election, in which the military-supported party suffered

¹Previous *coup d’états* took place in 1962 and 1988. See Mary Callahan, *Making Enemies: War and State Building in Burma* (Cornell University Press 2003).

²Catherine Renshaw, ‘Disasters, Despots, and Gunboat Diplomacy’, in David Caron, Michael J Kelly & Anastasia Telesetsky (eds), *The International Law of Disaster Relief* (Cambridge University Press 2014).

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a heavy defeat, was marred by widespread voter fraud.³ Immediately following the coup, the sitting UEC was dismissed and a new UEC appointed, which annulled the November 2020 election results.

Myanmar's historical experience of elections is limited. General elections took place in 1952, 1956, and 1960.⁴ From 1960 until 1988, Burma was ruled by General Ne Win and the Burma Socialist Program Party (BSPP). Elections took place in 1990 after a popular uprising and the installation of a caretaker military government, the State Law and Order Restoration Council (SLORC), called the State Peace and Development Council (SPDC) from 1997 onwards. The major democratic opposition party, the National League for Democracy (NLD) led by Aung San Suu Kyi, the daughter of independence hero General Aung San, won a resounding victory in the 1990 elections. The SLORC refused to transfer power. Instead, the SLORC invited the NLD to participate in a National Assembly to draft a new Constitution.⁵ The NLD refused, maintaining that the 1990 elections gave it a mandate to govern. The 1990 general elections must be recognised as a seismic historical event in the political consciousness of the principal actors, rendering the experience of elections a potential precursor to another military *coup d'état*.⁶

The *Tatmadaw's* central political role in the life of the state is reflected in the Constitution of the Republic of the Union of Myanmar (the Constitution), which provides that one of the Union's consistent objectives is enabling the Defence Services to participate in the national political leadership of the state.⁷ The military's primary goal since independence has been to maintain the Union in the face of multiple claims for self-determination by armed ethnic organisations across the country.⁸ These claims have resulted in decades-long civil conflict between the military and ethnic minority groups. From the perspective of the *Tatmadaw*, while there is even a remote possibility of secession and the disintegration on the Union, the military must retain a degree of political power and independence. The *Tatmadaw* has never claimed a right to govern *per se*; rather its self-image is that of a guardian of the state, stepping in at times of crisis to put the country back on track.⁹ Military power is entrenched in the Constitution, which reserves one quarter of seats in Union and State/Region parliaments for unelected members of the military and provides that Defence Services personnel must be appointed as Union Ministers of the Departments of Defence, Home Affairs, and Border Affairs.¹⁰ The unelected parliamentary seats in the *Pyidaungsu Hluttaw*, the bi-cameral national parliament, serve as a blocking minority for the military to any substantive constitutional change.¹¹

The constitutional framework was intended to enable the *Tatmadaw* to maintain its influence in a power-sharing arrangement with an elected government. The military did not anticipate the depth of electoral support for the NLD and the party's subsequent mandate to challenge the military's hold on power. The NLD boycotted the 2010 elections because the Political Parties Registration Law 2010 (PPRL) prohibited convicted persons – such as Aung San Suu Kyi at that time – from being members of a political party.¹² The elections were won by the military-proxy Union

³The Office of the Commander-in-Chief of Defence Services, 'Information for the People' (2 February 2021) <<http://dsinfo.org/>> accessed 3 February 2021, but no longer publicly available.

⁴Robert H Taylor, 'Elections in Burma/Myanmar: For Whom and Why', in Robert H Taylor (ed), *The Politics of Elections in Southeast Asia* (Cambridge University Press 1996).

⁵Derek Tonkin, 'The 1990 Elections in Myanmar: Broken Promises or Failure of Communication?' (2007) 29(1) *Contemporary Southeast Asia* 33.

⁶Catherine Renshaw, 'Poetry, Irrevocable time and Myanmar's Political Transition' (2020) 14(1) *International Journal of Transitional Justice* 14.

⁷Constitution of the Republic of the Union of Myanmar, s 6(f).

⁸Robert Taylor, 'Myanmar: From Army Rule to Constitutional Rule' (2012) 43(11) *Asian Affairs* 221.

⁹Morten Pedersen, 'The Politics of Burma's "Democratic" Transition' (2011) 43(1) *Critical Asian Studies* 49.

¹⁰Melissa Crouch, *The Constitution of Myanmar: A Contextual Analysis* (Hart Publishing 2019).

¹¹Marco Bünte, 'Perilous Presidentialism or Precarious Power-Sharing? Hybrid Regime Dynamics in Myanmar' (2018) 24 (3) *Contemporary Politics* 346.

¹²Political Parties Registration Law, s 12(a)(6).

Solidarity and Development Party (USDP). The election commission, which had been appointed by the SPDC, was accused of altering results in favour of the USDP *inter alia* by the use of military advance votes.¹³ Nonetheless, the 2010 elections mark the beginning of a path towards a more democratic government. The reforms initiated under President Thein Sein's administration since 2011 – including the release of political prisoners, the invited return of dissidents from overseas, new media freedoms, the renewal of peace talks, and a general opening of the country to the world – were broadly welcomed domestically and internationally.¹⁴ The 2012 by-elections marked a critical waypoint in this process, as the NLD decided to participate in these elections under changed rules. This was the first time that elected NLD representatives including Aung San Suu Kyi entered parliament. In the 2015 elections, the NLD was triumphant across the two houses of parliament, taking almost 60 per cent of the popular vote and almost 80 per cent of the elected seats in Myanmar's first-past-the-post electoral system. In 2020, the now ruling party was able to surpass its previous success. In both the 2015 and 2020 elections, the USDP suffered a significant defeat, with the number of elected seats decreasing in 2020, and ethnic minority parties also faring less well than expected. Aung San Suu Kyi remained the dominant figure in the political party landscape.

A number of scholars have studied authoritarian elections¹⁵ as well as the relations between electoral management bodies (EMB) and perceptions of electoral integrity¹⁶. This article aims to contribute to the growing scholarly attention to EMBs¹⁷ by noting the UEC's structural weaknesses and challenges in the context of the precarious political circumstances of Myanmar's attempted transition from military rule towards a constrained form of constitutional democracy. The article discusses three issues directly relevant to an understanding of the UEC in its constitutional context: (i) freedom of expression in the electoral process, (ii) rights of political participation, and (iii) the temporary cancellation of elections. The article analyses the UEC's leadership as a contributing factor to its level of effectiveness and concludes with an overview of the UEC's role in the *coup d'état*.

Structure, role, and jurisdiction

Under the 2008 Constitution, general elections take place every five years.¹⁸ Voters elect 330 representatives to the *Pyithu Hluttaw* (lower house) from constituencies defined by the UEC on the basis of existing townships and 168 representatives (twelve from each state and region) to the *Amyotha Hluttaw* (upper house).¹⁹ These are joined by appointed military representatives, 110 and 56 for the lower and upper houses respectively. Both houses together form the *Pyidaungsu Hluttaw*, the

¹³Burma Bulletin (November 2010) 2–6, cited in Tin Maung Maung Than, 'Myanmar's 2010 Elections: Continuity and Change' [2011] Southeast Asian Affairs 190; see also Neil A Englehart, 'Two Cheers for Burma's Rugged Election' (2012) 52(4) Asian Survey 666.

¹⁴Catherine Renshaw, 'Human Rights under the New Regime', in Andrew Harding & Khin Khin Oo (eds) *Constitutionalism and Legal Change in Myanmar* (Bloomsbury 2019).

¹⁵For example Gail Buttorf & Dion Douglas, 'Participation and Boycott in Authoritarian Elections' 29(1) Journal of Theoretical Politics 79; Jennifer Gandhi, 'The Role of Presidential Power in Authoritarian Elections', in Tom Ginsburg & Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014); Daniela Donno, 'Elections and Democratization in Authoritarian Regimes' (2013) 57(3) American Journal of Political Science 703; Shaheen Mozaffar & Andreas Schedler, 'The Comparative Study of Electoral Governance – Introduction' (2002) 23(1) International Political Science Review 5.

¹⁶For example Toby James et al, 'Electoral Management and the Organisational Determinants of Electoral Integrity: Introduction' (2019) 40(3) International Political Science Review 295; Helena Catt et al, *Electoral Management Design* (rev ed, International IDEA 2014); Rafael López-Pintor, *Electoral Management Bodies as Institutions of Governance* (UNDP 2000).

¹⁷For example Toby James, *Comparative Electoral Management* (Routledge 2019); Pippa Norris 'Conclusions: The New Research Agenda on Electoral Management' (2019) 40(3) International Political Science Review 391; Michael Pal, 'Electoral Management Bodies as a Fourth Branch of Government' (2016) 21 Review of Constitutional Studies 85.

¹⁸Constitution of the Republic of the Union of Myanmar, s 119.

¹⁹Self-administered zones (one in Sagaing Region, five in Shan State) each have one designated seat among the 12 *Amyotha Hluttaw* seats from the respective State or Region.

bi-cameral parliament at Union level.²⁰ Concurrent to the elections for the *Pyidaungsu Hluttaw*, elections are held for representatives for 14 State and Region *Hluttaws*. State and Region *Hluttaws* are comprised of two elected members of parliament per township, together with appointed military representatives at a number that equals a third of the elected representatives. In addition, several State or Region *Hluttaws* include separately elected ethnic representatives, so-called ethnic affairs ministers (overall 29). The UEC has jurisdiction to manage all of these elections, but not ward/village-tract (local) elections, which are managed by municipal authorities. The general elections use a majoritarian first-past-the post electoral system with single-member constituencies based on townships. Constituencies were drawn up in preparation for the 2010 election and have been little revised since. The numbers of voters across constituencies are very uneven, violating the principle of equal suffrage, in particular due to differences in constituency size for the *Pyithu Hluttaw*. No accountability mechanism is in place for constituency revision.²¹

UEC structure and composition

The UEC is a permanent body, mandated by and established pursuant to section 398 of the Constitution, which provides that ‘the President shall constitute a Union Election Commission’. Headquartered at the UEC in the capital of Nay Pyi Daw, the election administration has a multi-tier structure reflective of the administrative units of the country. The UEC has established a sub-commission for each level, resulting in 15 State or Regional sub-commissions, including the Nay Pyi Daw Union Territory; 83 district sub-commissions (including six self-administrative zones and divisions); 326 township sub-commissions; and 15,870 ward or village tract sub-commissions.²²

Appointment of chairman and members of the commission

The UEC is appointed by the President. The appointment of UEC members is set out in the Constitution and follows the same procedure as for the appointment of Union Ministers.²³ The President compiles a list of suitably qualified persons and submits the list to the *Pyidaungsu Hluttaw* for approval. The *Pyidaungsu Hluttaw* is required to approve the list unless it can be established that nominated persons do not possess the necessary qualifications. Unlike other judicial and executive functions appointed by the President, notably the Attorney General, the Auditor General, the Chairperson of the Union Civil Services Board, and the Chief Ministers of States and Regions, the term of the UEC and its Chairman is not provided for in the Constitution. Section 6 of the Union Election Commission Law (UEC Law) provides that the term of the UEC is the same as the term of the President and also states: ‘[h]owever, the Commission currently acting, after expiry of the term, shall continue to perform its duties and mandates until the President has formed a new Commission under the Constitution of the Republic of the Union of Myanmar.’ In practice, the UEC’s term is tied to that of the government. This can be problematic regarding perceptions of its independence and also in terms of expertise and institutional memory; only one member of the UEC at the time of the 2015 elections was also a member at the time of the 2020 elections.

²⁰The electoral college of the *Pyidaungsu Hluttaw* elects the President. Elected members of both *Hluttaws* and the combined group of military appointees of both houses each nominate a candidate; the candidate with the highest number of votes is elected President, and the two others become Vice Presidents.

²¹Michael Lidauer & Gilles Saphy, ‘Elections and the Reform Agenda’, in Melissa Crouch & Tim Lindsey (eds), *Law, Society and Transition in Myanmar* (Hart 2014).

²²The numbers have slightly changed over the last decade and reflect the recent figures as provided by the Myanmar Electoral Resource and Information Network (MERIN) <<https://merin.org.mm/en/union-election-commission>> accessed 20 February 2021.

²³Constitution of the Republic of the Union of Myanmar, s 398.

Qualifications for appointment and disqualification

The Constitution provides that – other than in relation to age – the Chairman and members of the UEC must have the same qualifications as representatives in the *Pyithu Hluttaw*.²⁴ *Pyithu Hluttaw* members are required to be citizens, born of two parents who are citizens; and have resided in Myanmar for at least ten consecutive years up to the time of their election.²⁵ Whereas *Pyithu Hluttaw* representatives must have attained 25 years of age, members of the UEC must be at least 50 years of age.²⁶ Section 398(b) of the Constitution states that members of the UEC must have served as either Chief Justice of the Union, Judge of the Supreme Court of the Union, Judge of the High Court of the Region or State, or a similar position for a minimum of five years; or as a Regional or State judicial officer for 10 years; or have served as a practising lawyer for a minimum of 20 years as an Advocate; or be deemed by the President to be an eminent person. Section 398 also provides that members of the UEC shall have integrity and experience; be loyal to the State and its citizens; not be a member of a political party of a *Hluttaw* representative; and not be otherwise employed.²⁷

There is no required interval between involvement in politics and appointment to the UEC. In 2014, representatives of the NLD petitioned the UEC with a proposal that called for commissioners to abstain from any affiliation with a political party for three to five years before becoming a member. The UEC rejected this request on the grounds that it would require a constitutional amendment, which is not within the power of the UEC.²⁸ Section 400 of the Constitution provides that the President may impeach the Chairman or the members of the UEC for one of the following reasons: high treason; breach of a provision of the Constitution; misconduct; disqualification on conditions prescribed for the representative concerned; or inefficient discharge of duties. The indeterminacy of several provisions of the Constitution, such as the provision stating that it is the duty of every citizen to ‘uphold the non-disintegration of national sovereignty’ (section 383 (b)) means that Commissioners are vulnerable to dismissal according to the will of the President. Commissioners have no opportunity for redress in the case of sudden and unjustified dismissal. Political parties have identified the ambiguity of these provisions as ways by which the government may influence the actions of the commissioners.

Size of the commission

According to section 398(a) of the Constitution and the UEC Law, the President may appoint a minimum of five members to the Commission, including a Chairman. No maximum number of members is prescribed. The first UEC formed under the 2008 Constitution was nominated by the SPDC in March 2010. This UEC was composed of 18 persons. In the lead-up to the 2015 general elections, the membership of the UEC was fifteen members and its composition included one woman and members of several ethnic minority groups. Following the 2015 elections and shortly after his own election in March 2016, President Htin Kyaw appointed a new commission with five members, and another two members in June 2017. In March 2019, President Win Myint expanded the UEC again to 15 members.²⁹ All but one member of the recent commission were male Bamar Buddhists of a certain age, and hence did not reflect the diversity of the electorate.

²⁴Constitution of the Republic of the Union of Myanmar, s 398 (b)(5).

²⁵Constitution of the Republic of the Union of Myanmar, s 120.

²⁶Constitution of the Republic of the Union of Myanmar, s 398(b)(1) (e).

²⁷The list of disqualifications which apply to representatives standing for election in the *Pyithu Hluttaw* also apply to members of the UEC.

²⁸Shwe Aung, ‘Election Commission backtracks on new campaign rules’ *DVB Online* (2 August 2014) <<https://www.dvb.no/news/election-commission-backtracks-on-new-campaign-rules-burma-myanmar/42947>> accessed 22 January 2021.

²⁹The presidency changed during the last term. President Htin Kyaw held this office from March 2016 to March 2018. After his resignation, President Win Myint held power until he was deposed from the presidency by the *Tatmadaw* on 1 February 2021.

Secretariat and sub-commissions

The UEC Law states that the UEC is funded through the state budget. In practice, the UEC lacks budgetary independence. During the 2015–2020 term, the UEC relied in part on international donors for technical assistance – especially training – which was primarily funnelled through the government. The UEC Law provides that the UEC can request help from other ministries, departments and individuals in conducting elections, which is reflected in its administrative composition.³⁰

From a human resources perspective, the UEC relies strongly on government officials and ministries to recruit permanent and temporary staff. At the national level, the management of the UEC rests with the Director-General, who works with several Directors within the UEC Secretariat. At the sub-national level, election commissions are composed of civil servants belonging to the General Administration Department (GAD), the Ministry of Labour, Immigration and Population (MoLIP), and the Advocate General Office. In December 2018, the government announced the transfer of the GAD from the Ministry of Home Affairs – a ministry under the authority of the Commander-in-Chief – to the Ministry of the Union Government under civilian administration. This move was interpreted by some as a signal that military influence over elections was diminishing.³¹

The actual work of running elections (preparing voter rolls; running polling stations; arranging advance voting; counting votes; declaring elected candidates) is delegated to the sub-commissions³², with the level of township being operationally the most significant. The composition of sub-commissions is not defined by law; the UEC Law just mentions ‘at least three persons trusted and respected by the people’.³³ No clearly defined criteria for the appointment of the members is spelled out in the laws, other than being non-partisan, trusted and respected as well as having dignity and experience.³⁴ In practice, sub-commissions typically have a chairperson, several members, and a secretary appointed by the UEC. While the appointed members usually finish their term after five years unless they are re-appointed, the secretaries remain longer in office and provide institutional memory. In 2020, the majority of these ‘election officers’ at State/Union level were former military officers and had helped to organise several elections. Ward or village tract sub-commissions are usually staffed by individuals from the GAD.

Role and jurisdiction

The UEC’s jurisdiction and responsibilities are set out in Article 399 of the Constitution, supplemented by the UEC Law, the PPRL, and three pieces of legislation that govern elections for the *Amyotha Hluttaw*, *Pyithu Hluttaw* and State and Region *Hluttaws* (electoral laws).³⁵ The latter three laws are almost identical in structure and content. All these laws have been in force since 2010, with several amendments.³⁶

³⁰UEC Law, s 11.

³¹Matthew Arnold, ‘Why GAD Reform matters to Myanmar’ (East Asian Forum, 24 August 2019) < <https://www.eastasiaforum.org/2019/08/24/why-gad-reform-matters-to-myanmar/>>.

³²Pyithu Hluttaw Election Law, Chapters IX and X.

³³UEC Law, s 14.

³⁴UEC Law, s 16.

³⁵Amyotha Hluttaw Law 2010 (State Peace and Development Council Law No 4/2010, Pyithu Hluttaw Law 2010 State Peace and Development Council Law No 3/2010, and Region Hluttaw or the State Hluttaw Election Law (State Peace and Development Council Law No 5/2010) (electoral laws).

³⁶For example, the 2011 amendment to the Political Parties Registration Law that enabled Aung San Suu Kyi to stand for election. Recent amendments to the electoral laws include the possibility to retain and update the voter register instead of preparing a new one; the removal of military polling stations without observer access inside military installations to polling stations for members of the military and their families in publicly accessible locations; and the reduction of residence requirements from 180 to 90 days as a prerequisite to apply for a vote transfer from one constituency to another.

The Constitution provides that the duties, powers and privileges of the Chairman and UEC members shall be prescribed by Law.³⁷ According to section 399 of the Constitution, the duties of the UEC are: holding elections for *Hluttaws*; supervising elections and forming and supervising sub-commissions; designating and amending constituencies; compiling and amending voter lists; postponing elections in circumstances where free and fair elections are not possible due to natural disaster or local security concerns; prescribing the rules relating to elections or to political parties in accordance with the Constitution and issuing procedures or directives in accordance with relevant laws; constituting election tribunals; performing other duties that may be assigned under a law.

The UEC Law reiterates the UEC's roles and responsibilities as outlined in the Constitution.³⁸ The law does not specify the decision-making processes of the UEC, whether decisions are made by consensus or majority vote, how internal rules or procedures should be adopted, or whether decisions should be made public. The UEC Law provides that the UEC can issue rules, procedures, orders and directives as necessary³⁹ and that the UEC can request help from other ministries, departments and individuals in conducting elections.⁴⁰ Exercising its functions under the Constitution and the UEC Law, the UEC decides the timeframe and modalities for the compilation of voter lists and their display, the timeframe for candidate registration, access for observers, the transparency of ballot printing and results consolidation, and whether and the terms under which there will be election campaigns. Lidauer and Saphy describe the UEC as having 'an unusual margin of discretion' in relation to key aspects of the election process, as the UEC enjoys vast and largely unchecked powers in the exercise of its competencies.⁴¹ What is more, the Constitution does not offer an effective remedy in electoral matters.⁴² The UEC Law states that the decisions and performance of the UEC are 'final and conclusive', without recourse to the courts, in relation to: (a) election functions; (b) appeals and revisions relating to the decisions and orders of the election tribunals; and (c) performance under the PPRL.⁴³

Chapter X of the Constitution provides for the existence of political parties. Under the Constitution, political parties must have as their objectives the three national causes (non-disintegration of the Union, non-disintegration of national solidarity, and perpetuation of sovereignty), and they must be loyal to the state.⁴⁴ Political parties must also accept and practice 'a genuine and discipline-flourishing multi-party democratic system'; they must 'abide and respect the Constitution and the existing laws'; and they must be formed and registered in accordance with the law.⁴⁵ Section 406 of the Constitution guarantees that a political party shall have the right to organise freely, and to participate and compete in elections. Section 408 stipulates that parties will lose their right to be registered if they are declared to be an unlawful association; if they directly or indirectly contact or abet insurgent groups; if they directly or indirectly receive financial or other assistance from a foreign government, religious association or foreigner; or abuse religion for political purpose.

The relevant law for the purpose of licensing political parties and vetting parliamentary candidates is the PPRL. The PPRL provides that the UEC is responsible for supervising political parties. According to this law, organisations applying for registration are required to declare their commitment to the constitutionally mandated three national causes and to safeguard law and order and

³⁷Constitution of the Republic of the Union of Myanmar, s 402.

³⁸UEC Law, s 8.

³⁹UEC Law, s 13.

⁴⁰UEC Law, s 11.

⁴¹Lidauer & Saphy (n 21).

⁴²Constitution of the Republic of the Union of Myanmar, s 402.

⁴³The Constitutional Tribunal has confirmed that decisions of the Election Commission cannot be challenged in the Tribunal, so see Kachin Race Case No 1/2014 (September) cited in Crouch (n 10) 71.

⁴⁴Constitution of the Republic of the Union of Myanmar, s 404.

⁴⁵Constitution of the Republic of the Union of Myanmar, s 405.

tranquillity. Organisations are also required to abstain from writing and speech that may cause conflict or effect dignity and morals relating to nationality or religion; to abstain from abuse of religion; to respect and obey the Constitution; and to not accept aid or influence from foreign organisations or countries or religious organisations.⁴⁶ The UEC is vested with power to register, suspend, or deregister political parties and here, again, the decisions of the UEC are final and conclusive.⁴⁷ Key requirements for membership of a political party are that a person holds citizenship, has attained 18 years of age and has not been convicted of an offence under the Narcotic Drugs and Psychotropic Substances Law 1993. Foreigners, members of religious orders, civil service personnel and members of insurgent organisations are not permitted to belong to political parties. The UEC has the power to suspend or cancel membership in political parties.

Unusually, election campaigns are not regulated by legislation. The UEC regulates election campaigns by a limited number of rules and directives, which provide time frames for campaigns and procedures for requesting public venues, the size of campaign posters or flags, and airtime on broadcast media.⁴⁸ This leaves it largely up to the UEC to decide whether there is a meaningful campaign or not, how vibrant it will be, how much information voters receive, and how parties are able to convey their message. It may also keep election contestants in the dark until very late regarding how they can organise their campaigns. Most importantly, the absence of a legal framework inhibits guaranteeing legal protection of voters' and candidates' rights to freedom of expression, peaceful assembly and association, all of which can be at stake during campaigns (see below). In 2020, the body of campaign directives was also complemented by orders from the Ministry of Health and Sports (MoHS), intended to prevent Covid-19 contagion.

Procedures regarding disputes about results and qualifications for candidacy are set out in Chapter XV of the *Pyithu Hluttaw Election Law* and its counterpart laws. All matters concerning electoral objections must be administered by Election Tribunals appointed by the UEC.⁴⁹ The UEC's decision to investigate objections to election results appears to be discretionary.⁵⁰ No eligibility criteria or qualifications are laid out for the members of the Election Tribunal, other than that they must not be members of political parties and must include at least one UEC member.⁵¹ Election Tribunals have the power to declare an election void or to reverse its outcome in case of malpractice or violation of the law or in a situation where 'it is apparent that the election is not free and fair.'⁵² Decisions of the Election Tribunal may be appealed to the UEC on questions of law and the UEC may approve or set aside the Tribunal's decision.⁵³ The Tribunal may seek

⁴⁶Political Parties Registration Law, s 5(a).

⁴⁷The UEC has deregistered a total of 35 parties since 2010; 9 for not being able to contest elections in at least three constituencies, 18 as they merged with others, 4 for not abiding by the Law or UEC directives, and 4 deregistered on their own initiative.

⁴⁸The UEC issued Directive No 1 of 2014, which regulated the campaign ahead of the 2015 general elections, with highly prescriptive rules appearing to limit campaign freedom. The directive was amended in 2015 to extend the campaign period to 60 days ahead of the elections, with a campaign silence on the day before the polls. Ahead of the 2020 elections, UEC instruction 173/2020 referenced earlier notifications and added the political parties Code of Conduct (amended from a 2015 version), guidelines related to Covid-19 issued by the Ministry of Health and Sports, and orders and instructions by relevant local administrations for parties to follow: cf Michael Lidauer and Gilles Saphy, 'Running Elections under Stringent Covid-19 Measures in Myanmar' *International Institute for Democracy and Electoral Assistance* (8 July 2021) <<https://www.idea.int/sites/default/files/elections-under-stringent-covid19-measures-in-myanmar.pdf>> accessed on 26 October 2021).

⁴⁹Pyithu Hluttaw Election Law, s 69(d).

⁵⁰Pyithu Hluttaw Election Law, s 69(a) states: the Commission 'may' form the following Election Tribunals to examine into electoral objection...'

⁵¹The other tribunal members may be 2 other members of the UEC; or 2 other legal experts. They must not be members of any political party.

⁵²Pyithu Hluttaw Election Law, s 71.

⁵³Pyithu Hluttaw Election Law, ss 74(a) and 75.

advice from the Attorney General.⁵⁴ In terms of procedure, Election Tribunals have the same powers as those vested in courts under the Civil Procedure Code (to call evidence and witnesses). Election Tribunals can order the losing party in the complaint to pay for all the costs of the adjudication process. A plaintiff who dishonestly or fraudulently lodges criminal proceedings relating to elections is liable to three years imprisonment.⁵⁵ In contrast, electoral offences such as exhortation or inducement carry a maximum penalty of only one year imprisonment.⁵⁶

Democratic controversies

Campaigning and freedom of expression

The 2010 elections took place in an environment of fear and uncertainty. Freedom of speech was repressed and genuine campaigning did not occur.⁵⁷ After 2012, the opening of the media landscape and the end of pre-publication censorship became a hallmark of the early transitional period under President Thein Sein.⁵⁸ However, from 2013, the Penal Code 1861 in conjunction with section 66(d) of the Telecommunications Law 2013 that criminalises online defamation were used to silence criticism of the government. Ahead of the 2015 elections, television and radio remained largely controlled by the state, and widespread self-censorship prevailed. During the 2015 election campaign, state-funded media largely ignored political contestants, but the UEC allowed – with certain limitations – the broadcasting of equal air-time to all registered political parties.⁵⁹ Prior to the 2020 elections, although there was a broader media landscape and more detailed and frequent election-related coverage than previously, the media struggled to carry out rigorous campaign coverage due to the threat of defamation charges. Editors continued to report particular concern about 66(d) prosecutions, and state that they effectively self-censored online and print content to protect their news organizations.⁶⁰

It is against this backdrop that the UEC's role and track record in regulating election campaigns should be considered. Already in 2010, the UEC allowed controlled broadcasting on state media for those political parties who decided to engage with the restrictive framework provided by the 2008 Constitution and to participate in the elections. These elections were widely condemned by the international community. Ahead of the next general elections, in August 2015, the UEC announced that each registered party would be granted two free-of-charge 15-minute slots to air a political address on state radio and television, as well as space in state newspapers. The decision contained a list of limitations on what should be avoided, such as speeches that could cause the disintegration of the Union, damage national solidarity, or misuse religion for political purposes. The authorities and the military

⁵⁴Pyithu Hluttaw Election Law, s 70.

⁵⁵Pyithu Hluttaw Election Law, s 64, states: 'whoever is found guilty of dishonestly and fraudulently lodging any criminal proceedings against any person regarding offences relating to elections shall, on conviction be punishable with imprisonment for a term not exceeding three years or with fine not exceeding three hundred thousand kyats or with both'.

⁵⁶Pyithu Hluttaw Election Law, s 61.

⁵⁷Turnell describes widespread instances of intimidation, fraud and other irregularities, that did not allow for free speech, as well as low voter turnout. See Sean Turnell, 'Myanmar in 2010: Doors Open, Doors Close' (2011) 51(1) *Asian Survey* 148.

⁵⁸Michael Lidauer, 'Democratic Dawn? Civil Society and Elections in Burma/Myanmar 2010/2012' (2012) 31(2) *Journal of Current Southeast Asian Affairs* 87.

⁵⁹EU Election Observation Mission to Myanmar (EU EOM), 'General Elections 2015, Final Report' (2016) 4f <<https://ec.europa.eu/info/strategy/reasons-non-eu-countries/types-relations-and-partnerships/election-observation/mission-recommendations-repository/missions/91>> accessed 20 February 2021.

⁶⁰Freedom House, 'Freedom on the Net 2020: Myanmar' (2020) <https://freedomhouse.org/country/myanmar/freedom-net/2020#footnote1_8bzecnm> accessed 21 January 2021; Free Expression Myanmar, 'Myanmar's Media Freedom at Risk' (May 2018) <<https://freeexpressionmyanmar.org/wp-content/uploads/2018/05/myanmars-media-freedom-at-risk.pdf>> accessed 21 January 2021; Hanna Ellis-Petersen, 'Censorship and Silence: South-east Asia Suffers under Press Crackdown' *The Guardian* (London, 25 February 2019) <<https://www.theguardian.com/media/2019/feb/25/censorship-and-silence-south-east-asia-suffers-under-press-crackdown>> accessed 21 January 2021.

were exempted from limitations. In addition, scripts of election speeches were required to be sent to the UEC for approval. Reportedly, 85 of 91 registered parties took advantage of this opportunity.⁶¹

In the lead-up to the 2020 election, the UEC's oversight of campaigning was also restrictive. On 23 July 2020, the UEC issued Directive 138/2020, which prohibited speech that 'can harm dignity and morality', that 'questions' or 'disrespects' existing legislation, that criticizes the *Tatmadaw*, that 'defames' the nation or 'tarnishes' the image of the country, that 'tarnishes the Union's sovereignty and territorial integrity' or 'incites civil servants to oppose the Government'. As during previous elections, political parties were required to submit to the UEC a script of all political messages prior to broadcast, and those scripts were subject to approval. Political parties said that their campaign speeches were censored based on the guidelines released by the UEC. The party chairman of the People's Party (PP) said that the edits the UEC made to his election campaign speech prevented him from airing the party's full political stance ahead of the elections.⁶² Seemingly benign statements in the PP script, about the hardships of local entrepreneurs in competing with foreign investors due to high bank interest rates, as a backdrop to a campaign pledge for tax reforms, were rejected by the UEC. The vice-chairwoman of another party told media that the word 'oppressed' was not allowed in her party's campaign speech, and nor was discussion of children's rights.⁶³ A third party accused the NLD government of using similar methods as the former military regime: 'This censorship seems like something the dictatorship did. They shouldn't mess with the party's tone. Shouldn't there be freedom of expression? As a political party, we should be able to express our opinions and beliefs.'⁶⁴

The regulation of election campaigns is largely at the UEC's discretion. Prior to the 2015 elections, the UEC drafted campaign guidelines, shared them with political parties and was responsive to criticism that the rules were overly restrictive due to unreasonably short timelines and prohibitive registration requirements for campaigning.⁶⁵ It was also reported that stringent campaign regulations were often not enforced.⁶⁶ Prior to the 2020 elections, there were criticisms that the UEC was less receptive to engagement with political parties and civil society actors. Representatives of civil society, the media, and opposition political parties noted the absence of consultative outreach on the part of the UEC, as had occurred in 2015. In the first half of 2019, critics observed that 'the perceived lack of transparency in the work of the UEC and a lack of regular communication with stakeholders were viewed as critical shortcomings in its performance'.⁶⁷ The absence of consultation and transparency yielded notable distrust in the UEC.

⁶¹However, the second round of broadcasts was aired on digital rather than nationwide-available terrestrial channels, and both state funded newspapers terminated publication of party presentations after the first round, see EU EOM 2015 (n 59) 26.

⁶²Nay Myo Htun (reported) & Ye Kaung Myint Maung (tr), 'Myanmar Censorship of Party Messages on State Media Draws Fire' *Radio Free Asia* (30 September 2020) <<https://www.rfa.org/english/news/myanmar/party-censorship-09302020201609.html>> accessed 2 February 2021.

⁶³San Yamin Aung, 'Political Party Withdraws Election Broadcast After Censorship by Myanmar Authorities' *Irrawaddy* (21 September 2020) <<https://www.irrawaddy.com/elections/political-party-withdraws-election-broadcast-censorship-myanmar-authorities.html>> accessed 2 February 2021.

⁶⁴Phadu Tun Aung, 'Election Officials Censor Parties' Campaign Speeches 'Like the Dictatorship did' *Myanmar Now* (24 September 2020) <<https://www.myanmar-now.org/en/news/election-officials-censor-parties-campaign-speeches-like-the-dictatorship-did>> accessed 2 February 2021.

⁶⁵Shwe Aung, 'Controversial Campaign Guidelines Drafted' *DVB Online* (12 May 2014) <<https://www.dvb.no/news/controversial-campaign-guidelines-drafted-burma-myanmar/40592>> accessed 2 February 2021; Shwe Aung, 'Election Commission Backtracks on new campaign rules' *DVB Online* (2 August 2012) <<https://www.dvb.no/news/election-commission-backtracks-on-new-campaign-rules-burma-myanmar/42947>> accessed 2 February 2021.

⁶⁶The Carter Center, 'Observing Myanmar's 2015 General Elections. Final Report' (1 February 2016) <https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/myanmar-2015-final.pdf> accessed 20 February 2021.

⁶⁷Heinrich Böll Foundation Yangon, 'Myanmar on the Road towards the 2020 Elections. A Pre-Electoral Assessment' (July 2020) <https://mm.boell.org/sites/default/files/2020-07/HBS_Myanmar_Pre-elections_Assessment_EN_July_2020.pdf> accessed 20 July 2021, following European Commission, 'EU Election Follow-Up Mission (EFM) Myanmar 2019, Final Report' (5 June 2019) <<https://ec.europa.eu/info/strategy/relations-non-eu-countries/types-relations-and-partnerships/election-observation/mission-recommendations-repository/missions/161>>.

Prior to the 2020 elections, already existing infringements of freedom of expression were exacerbated in the online environment. As a consequence of Covid-19, and against the backdrop of vastly increasing Internet penetration and usage in Myanmar since 2012, campaigns for the 2020 election were conducted more extensively online than in previous elections. However, only 41 per cent of the population have access to the Internet and digital literacy is still relatively low.⁶⁸ The Internet as a primary tool for election communication is problematic. The Post and Telecommunication Department under the Ministry of Transport and Communication can request the blocking of websites and mobile data exchange without a court order or appeal, contravening basic principles of transparency and accountability. Before and after the 2020 elections, several such requests were made. Most notably, Internet accessibility was blocked in seven townships in Rakhine State and one in neighbouring Chin State, effectively depriving around 1.4 million people from digital communications from June 2019 until after the 2020 elections. This was considered to be part of the *Tatmadaw's* counter-insurgency tactics against the Arakan Army (AA). Campaigning was heavily limited due to the combined effects of insecurity, Covid-19 lockdown measures, and Internet restrictions.

Facebook's role in defending against disinformation and hate speech came under particular scrutiny in the lead-up to the 2020 election, and measures put in place by the platform were not entirely effective. After the advent of Covid-19, advertising spending on Facebook increased and issues of mis- and disinformation were prevalent. Online campaign spending partially circumvented campaign expenditure limits, against the backdrop of an ineffective campaign finance framework. Hate speech, directed at female candidates and ethnic and religious minorities, was accessible to millions of Facebook users. Anti-Muslim sentiments, prominently known since the 2015 electoral period⁶⁹, formed part of negative campaigning between political parties. The UN Special Rapporteur on Myanmar reported that nationalist groups used social media platforms, in particular Facebook, to post hate speech targeting State Counsellor Aung San Suu Kyi and members of the Government, as well as Muslims, Rohingya, and political parties deemed supportive of freedom of religion.⁷⁰ The UEC did not play a proactive role in addressing any of these phenomena.

Citizenship and electoral rights

The issue of citizenship and consequent political rights is one of the most vexed and least understood issues in Myanmar. Only citizens have the right to vote.⁷¹ The Constitution defines 'citizens' as 'persons born of parents both of whom are nationals of the Republic of the Union of Myanmar; or persons who are already citizens according to law on the day the Constitution comes into operation.'⁷² The Constitution provides that citizenship, naturalisation and revocation of citizenship shall be defined by law.⁷³ The relevant law is the 1982 Myanmar Citizenship Law, according to which three types of citizenship can be conferred by the state: (i) citizen; (ii) associate citizen; (iii) naturalized citizen.

The Citizenship Law provides that Myanmar citizenship is reserved for eight main ethnic groups: Kachin, Kayah, Karen, Chin, Burmese, Mon, Rakhine, or Shan and any ethnic groups contained within those main groups. Section 7 of the Citizenship Law appeals to the *jus sanguinis* principle,

⁶⁸Simon Kemp, 'Digital 2020: Myanmar' (Datareportal, 18 February 2020) <<https://datareportal.com/reports/digital-2020-myanmar>> accessed 20 February 2021.

⁶⁹Matthew J Walton & Susan Hayward, *Contesting Buddhist Narratives: Democratization, Nationalism, and Communal Violence* (East-West Center 2014).

⁷⁰UN Secretary General, 'Situation of Human Rights in Myanmar' (1 September 2020) UN Doc A/75/335.

⁷¹Constitution of the Republic of the Union of Myanmar, s 391.

⁷²Constitution of the Republic of the Union of Myanmar, s 345.

⁷³Constitution of the Republic of the Union of Myanmar, s 346.

stating that citizenship is for a child whose parents are Burmese citizens, regardless of whether the child is born in or outside of the territory. Citizenship can also belong to a third-generation child born to one citizen, a naturalized citizen, or an associate citizen, and one parent who is the second generation of naturalized or associate citizen parents.⁷⁴ In 1989, 'Citizenship Scrutiny Cards' were introduced, color-coded to facilitate the categorization of the bearer's citizenship status: pink cards for full citizens; blue cards for associate citizens; green cards for naturalized citizens.⁷⁵ In 1995, the military government issued white 'Temporary Registration Certificates' (TRCs) which provided holders with limited rights to movement and employment, the right to gain a marriage license, the right to travel and eligibility to participate in certain political processes, including the right to vote in national elections. The voter registration process that preceded the 2010 elections led to the enfranchisement and political empowerment of approximately 850,000 holders of TRCs.⁷⁶

In 2015, however, there was a decision to deny the vote to holders of white identity cards, many of whom were Rohingya Muslims concentrated in Rakhine State. This political move was effected through a longer, formal process of legal denial. Crouch points out that '[i]n a set of calculated legal moves, the parliament, the Constitutional Tribunal and the Union Election Commission acted to ensure that 'white card' holders (that is, primarily the Rohingya) could not vote in the 2015 elections'.⁷⁷ Lidauer⁷⁸ writes:

The debate about the legal status of the population concerned – and, with that, their fundamental rights to political participation and representation – entered the electoral process with an amendment to the political party registration law in September 2014, which deprived white-card holders of the right to found or be members of political parties. As a consequence, the UEC required all parties to change their membership lists. This process exceeded UEC-specific policy and approaches, as anti-Muslim sentiment was widely shared within the pre-elections legislature and across all political camps.

In the beginning of 2015, the President declared the expiry of white identity cards altogether. The result of this was that white-card holders were not included in the voter list updates, which commenced at around the same time as the decision to abolish these identity documents. Estimates are that half a million voters were disenfranchised by these changes in the legal framework.

Prior to the 2015 election, anti-Muslim sentiments had already affected the candidate registration process managed by the UEC.⁷⁹ Among the 99 candidates initially rejected by the UEC, the number of Muslim candidates was disproportionately high. Only twenty-eight of more than 6,000

⁷⁴The distinction between citizens and associate or naturalized citizens is significant. Associate citizens are determined by a central body that exists under the auspices of the Ministries of Home Affairs, Defence Service, and Foreign Affairs. Associate citizens cannot become full citizens, even if they marry a full citizen. Naturalized citizens are those who have conclusive evidence of their naturalization by the former Union Citizenship Act of 1948. Sections 43 to 45 of the Citizenship Law provide the qualifications for naturalization, which include a family record history, national language (Bamar) proficiency, adult age, good character and good morality. Children lose the right to nationality if their parents fail in applying.

⁷⁵There were also other colours introduced, such as brown cards for monks.

⁷⁶Gabrielle Paluch, 'Myanmar Begins Controversial Citizenship Verification Process' *Voice of America Online* (7 July 2014) <<http://www.voanews.com/content/myanmar-begins-controversial-citizenship-verification-process/1952081.html>> accessed 2 February 2021; Yen Snaing, 'President signs Amended Law barring Non-Citizens from Politics' *The Irrawaddy* (3 October 2014) <<http://www.irrawaddy.org/burma/president-signs-amended-law-barring-non-citizens-politics.html>> accessed 20 February 2021.

⁷⁷Melissa Crouch, 'States of Legal Denial: How the Rohingya Lost the Right to Vote and the Role of Legal Denial in Myanmar' (2021) 51(1) *Journal of Contemporary Asia* 87.

⁷⁸Michael Lidauer, 'Boundary Making in Myanmar's Electoral Process: Where Elections do not take place' [2021] *Modern Asian Studies* 1.

⁷⁹Nyi Nyi Kyaw, 'Islamophobia in Buddhist Myanmar: The 969 Movement and Anti-Muslim Violence'; and Nicholas Farrelly, 'Muslim Political Activity in Transitional Myanmar', in Melissa Crouch (ed) *Islam and the State in Myanmar* (Oxford University Press 2016).

candidates approved to contest the elections were Muslim, and none of the key electoral parties fielded a single Muslim candidate. Following the disenfranchisement of predominantly Rohingya voters and candidates, the 2015 Union parliament subsequently did not include a single representative of Muslim faith for the first time since independence.⁸⁰

At the time of the 2020 elections, the electoral participation of the Rohingya was no longer intensively debated among political stakeholders. However, Muslim candidates prepared again to contest the elections.⁸¹ The predominant reason why the UEC rejected the candidacy applications of Muslims was the disputed citizenship status of candidates' parents. At least one rejection also occurred on grounds of relations with a member of an unlawful or terrorist organisation. In this case, the Ministry of Home Affairs provided comments to the UEC, referring to the Unlawful Associations Act as well as to the PPRL. In cases pertaining to citizenship issues, the Ministry of Labour, Immigration and Population informed the UEC's decisions.⁸²

Prior to the 2020 elections and five weeks after the UEC published the approved list of candidates, some candidates started receiving notifications that their candidacy was revoked. While these cases occurred in a variety of geographical areas, the predominant reason for disqualification was again the lack of proof of ancestral citizenship. Several observers of the process shared the impression that these late candidate rejections, in particular those relating to citizenship, were conducted in an arbitrary and discriminatory manner, including cases of candidates who had in fact provided evidence of their parents' citizenship.⁸³

The cancellation of elections

The UEC's competencies include the authority to cancel or postpone elections at sub-national level, based on article 399(e) of the Constitution together with the UEC Law (section 10f) and the electoral laws (sections 50 and 51). The legal framework provides for cancellation or postponement⁸⁴ for security reasons or natural disasters. As with other elements of the law, the language of the relevant sections is ambiguous, in particular with regard to the partial cancellation of voting in a given electoral constituency. The law does also not provide a timeframe for when prior to the elections the declaration of cancellations or postponements should occur.

The cancellation or postponement of elections can have different consequences, depending on the size of the administrative units concerned. Vacant seats in the legislature occur only where elections are cancelled for entire constituencies as in Shan State in 2015, or in the Wa Self-administered Division, where the governmental administration required to organize elections was entirely absent. Conversely, the partial cancellation of elections in a number of wards or village tracts smaller than a constituency does not translate into vacant seats but leads to the disenfranchisement of the voters residing in the cancelled areas, as the election goes ahead regardless of their participation.⁸⁵

In October 2020, the UEC issued notifications postponing or cancelling elections in locations across the country due to insecurity, following similar patterns of decisions in 2010 and 2015 but at unprecedented scale.⁸⁶ The UEC decisions on election cancellations and postponements temporarily disenfranchised 1.2 to 1.3 million voters and left 22 seats in the Union parliament vacant.

⁸⁰Lidauer (n 78).

⁸¹Ei Ei Toe Lwin, 'We won't retreat': Muslim Candidates prepare for Election Battle' *The Frontier* (27 July 2020) <<https://www.frontiermyanmar.net/en/we-wont-retreat-muslim-candidates-prepare-for-election-battle/>> accessed 21 February 2020.

⁸²Michael Lidauer, 'The Politics of Election Cancellations in Myanmar' *Oxford Tea Circle* (19 May 2021) <<https://teacircleoxford.com/2021/05/19/the-politics-of-election-cancellations-in-myanmar/>> accessed 26 October 2021.

⁸³ibid.

⁸⁴The UEC Law uses both 'cancellation and 'postponement, while the electoral laws only use the latter term.

⁸⁵Lidauer (n 78).

⁸⁶TCC, 'Carter Center Interim Statement 2 on Myanmar General Elections October 30, 2020', <https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/myanmar-interim-statement-103020.pdf> accessed 21 February 2021.

In Rakhine State, three quarters of all registered voters were disenfranchised by these measures. The UEC's position was that the security environment in significant parts of the State did not allow voter list updates, public campaigns, or other election preparations. Since late 2018, there has been violent conflict between the Arakan Army (AA) and the *Tatmadaw*.⁸⁷ Conflict continued in the lead-up to the 2020 elections, exacerbated by the fact that in the 2015 elections, the Arakan National Party had won a majority of seats but was not awarded the position of Chief Minister. Instead, the President appointed a Chief Minister from the NLD. While conflict-prone areas in northern and south-eastern parts of Myanmar have seen less fighting ahead of the 2020 elections, Rakhine State experienced some of the most sustained and intense local warfare in the country in decades.⁸⁸ In October 2020, three NLD candidates were abducted by the AA while campaigning.

The selection of locations for cancellation was criticized for inconsistency: decisions were not supported by clear criteria set out in advance, resulting in the perception that they were made in an arbitrary and inconsistent manner. The discretionary nature of these decisions led them to be perceived as partly targeted at ethnic political parties which were expected to win in these areas, thereby marginalising them even further and fuelling resentment against the ruling party and the UEC. Lacking any transparency, the decision-making process led to suspicions that postponements were politically motivated, aimed at either disenfranchising certain populations or lowering the number of civilian seats in the *Pyidaungsu Hluttaw*, thus by default raising the proportion of military seats in the legislature.⁸⁹

While in practice these decisions are informed from lower levels, and both sub-commissions as well as institutions in the security sector provide the UEC with relevant information, the final decisions and authority lies with the UEC. The decision-making process to cancel elections became a public point of controversy between the *Tatmadaw* and the civilian government at a high political level, further undermining the UEC's credibility. Mutual accusations of shortcomings between the civilian and the military leadership brought the rifts between the respective decision makers to the fore.⁹⁰

A contributing factor: UEC leadership

Successive UECs have been criticised by the political opposition during their respective terms for close ties to the *Tatmadaw*, to the USDP under President Thein Sein, and more recently to the NLD. This is unavoidable in a situation where the EMB is effectively nominated by the ruling party. Some UECs have demonstrated, however, that association with the appointing institution or figure – in Myanmar's case, with the President under the 2008 Constitution – does not *per se* undercut independence, credibility, and effectiveness. Public perceptions about the personal qualities and skills of UEC members, and particularly of the Chairman, have proven to be key predictors of perceptions regarding the legitimacy of the UEC. Following the fall of the Burma Socialist Program Party (BSPP) in 1988, the caretaker government of Dr Maung Maung appointed a five-

⁸⁷Mary Callahan & Myo Zaw Oo, 'Myanmar's 2020 Elections and Conflict Dynamics' (United States Institute of Peace, Report No 146, April 2019) <https://www.usip.org/sites/default/files/2019-04/pw_146-myanmars_2020_election_and_conflict_dynamics.pdf> accessed 21 February 2021.

⁸⁸In the interim, the AA and *Tatmadaw* became unlikely allies in demanding that the cancelled elections should take place before the formation of the new *Hluttaws*. In mid-December 2021, this demand was supported by the President, and the Rakhine State sub-commission reportedly started preparations. Fighting has ceased and tens of thousands have reportedly been able to return home. In mid-January 2021, the Rakhine State *Hluttaw* passed a proposal to urge the government to remove the AA's 'terrorist' designation which had been seen as an impediment to ceasefire negotiations. cf Radio Free Asia, 'Myanmar President Appeals for Rakhine Elections Amid Truce in Conflict' (15 December 2021) <<https://www.rfa.org/english/news/myanmar/president-appeals-12152020175950.html>> accessed 2 February 2021. See also International Crisis Group, 'From Elections to Ceasefire in Myanmar's Rakhine State' (23 December 2020) <<https://www.crisisgroup.org/asia/south-east-asia/myanmar/b164-elections-ceasefire-myanmars-rakhine-state>> accessed 21 February 2021.

⁸⁹Lidauer (n 82).

⁹⁰*ibid.*

member election commission to oversee the 1990 elections. The commission was headed by retired financial commissioner U Ba Htay. Fears that the commission would favour the National Unity Party, which was a proxy for the former BSPP led by General Ne Win, were proven groundless by the NLD's electoral victory in that election.⁹¹

In 2010, the military regime appointed U Soe Thein as UEC Chairperson. Soe Thein was a former major general and judge advocate general, later a deputy chief justice of the Supreme Court and member of the commission that drafted the 2008 Constitution. The 2010 UEC barred international media and foreign election observers from covering the election and enforced election laws which were *inter alia* designed to restrict the campaigning ability of the NLD. When commenting on the possibility of allowing international election observation in 2010, Soe Thein said: 'We don't need foreign observers. We have abundant experience in holding elections... we don't need to clarify the credibility of these elections to other people.'⁹²

In 2011, President Thein Sein replaced U Soe Thein with U Tin Aye, another retired general and a former military colleague of the President, as UEC Chairman. U Tin Aye was elected to parliament in 2010 as a member of the USDP and resigned his seat in parliament to assume his new role. As he had been a powerful figure under the SPDC, it was reported that he may have had aspirations to assume even higher office in the semi-civilian government, and anecdotally shared that he said he would 'take revenge by running clean elections'.⁹³

Under U Tin Aye's leadership, the UEC transferred former military personnel to its Secretariat and as election officers to the sub-commissions, allowing a functional chain of command where elections officers shared a common background. The UEC was also expanded, with President U Thein Sein acquiescing to calls for some greater ethnic minority representation on the Commission; moreover, one of the Commissioners chosen was a woman. In 2014, the President appointed eight new members of various ethnic backgrounds, each of them responsible for a specific State. In the 2015 general elections, for the first time, international election observers were officially invited to monitor the electoral process, and the commission cooperated with international agencies, civil society organizations, and political parties. In a media interview, U Tin Aye said that 'a courageous man who dares to speak out is needed for this position'.⁹⁴

Nevertheless, the close association between the Chairman and the President remained controversial. U Tin Aye also made comments that were interpreted by some observers as foreshadowing a military coup in the case of post-election instability.⁹⁵ The Chairman was criticized for accompanying President Thein Sein on campaign trips, and did not shy away from his close association with the USDP, nor from the fact that he wished them success in the forthcoming 2015 elections: 'They are my friends, my colleagues who I have known for 20 or 30 years. They are my close friends. I love them. I am willing to help them anytime for personal matters. But if they ask me to help them win the election, I would say "sorry".'⁹⁶

In 2016, the NLD-led government established the first UEC that consisted only of civilians of a certain age, usually retired academics and bureaucrats with legal backgrounds. U Hla Thein, formerly the rector of Meiktila University, was appointed as UEC Chairman. Prior to his appointment, U Hla Thein had led the district election sub-commission in Meiktila in Mandalay Region since 2010. Until late in the process, he maintained a low profile, rarely meeting with election

⁹¹Robert Taylor, 'Myanmar 1990: New Era or Old?' [1991] *Southeast Asian Affairs* 199.

⁹²Election Watch Burma, 'Burma Post-Election Watch: November 2010 Parliamentary Elections' (The International Republican Institute, 7 November 2010) <<https://www.iri.org/sites/default/files/Burma%20Post-Election%20Watch,%20November%202010%20Parliamentary%20Elections.pdf>> accessed 2 February 2021.

⁹³Personal statement to one of the authors.

⁹⁴Kyaw Zwa Moe, 'Tin Aye: I want the USDP to Win, but to Win Fairly' *The Irrawaddy* (29 June 2015) <<https://www.irrawaddy.com/election/interview/tin-aye-i-want-the-usdp-to-win-but-to-win-fairly>> accessed 1 March 2021.

⁹⁵*ibid.*

⁹⁶*ibid.*

stakeholders or the press. As he remained publicly silent, his leadership came to be questioned by electoral stakeholders, and criticism against the Commission mounted during his tenure.⁹⁷

This UEC, which remained without women as members and lacked ethnic diversity, was criticised for failing to meet with political parties and civil society organizations, and was less receptive to international technical assistance than its predecessors. During U Tin Aye's term, and for the first time, political parties had agreed to sign a code of conduct ahead of the campaign, in a ceremony presided over by the UEC Chairman. Similar efforts were undertaken before the 2020 elections, but around a third of all parties did not agree to participate in the end. The dissonance between parties also led to discussions and criticism of the UEC during the signing ceremony.⁹⁸

A critical detriment to the UEC's reputation in the period 2015–2020 was its handling of citizen observer accreditations. Although a number of organisations were ultimately accredited, the biggest organisation – the People's Alliance for Credible Elections (PACE) – with some 2,900 observers ready to be deployed, experienced great hurdles and only became accredited after several months delay, when the electoral process was well underway. Observers criticised the UEC for not sufficiently building its capacity after the last elections, and noted some backwards trends in terms of engagement. The Director of PACE stated: 'With the previous commission, there were serious debates with CSOS. Some problems couldn't be solved, but at least we could talk'.⁹⁹ A blow to trust in the UEC also came from the NLD leadership. In the course of the public display of voter lists, a range of errors, omissions and duplications became apparent, followed by public criticism from the State Counsellor.¹⁰⁰ Overall, and despite remarkable achievements to organise reasonably well managed elections under the conditions of Covid-19, U Hla Thein's and his Commission's public communications, including during a press conference after election day, reduced stakeholders' trust in the UEC's performance.

Pre- and post-coup developments and perspectives

The *coup d'état* of 1 February 2021 brought the post-electoral process to a halt just before the inauguration of the new legislature, from where the election of the next (civilian) President, and subsequently the appointment of the new government, would have proceeded. Following this, in mid-2021, for the first time a President of civilian background would have appointed a new Commander-in-Chief. The incumbent, Senior General Min Aung Hlaing, was expected to retire at the prescribed age of 65.¹⁰¹ Instead, it seemed to many as though the events of 1990 were repeating, as the *Tatmadaw* took power and did not allow the elected *Hluttaws* to convene and the next civilian government to take office.

Prior to the November 2020 elections, in August, the Senior General met a group of political parties under the leadership of the USDP to exchange views and concerns regarding the electoral process. In October, public disputes around the problematic election cancellations brought dissonance between the civilian administration and the military in particular to the fore.¹⁰² In November 2020,

⁹⁷Ei Ei Toe Lwin, 'U Hla Thein: Myanmar's divisive election chief' *The Frontier* (5 November 2020) <<https://www.frontier-myanmar.net/en/u-hla-thein-myanmars-divisive-election-chief/>> accessed 21 February 2021.

⁹⁸Sith Aung Myint, 'USDP Risks Disorderly Election by Snubbing Code of Conduct' *The Frontier* (1 March 2021) <<https://www.frontiermyanmar.net/en/usdp-risks-disorderly-election-by-snubbing-code-of-conduct/>> accessed on 1 March 2021.

⁹⁹*ibid.*

¹⁰⁰San Yamin Aung, 'Myanmar Election Official Scramble to Correct Error-Riddled Voter List' *The Irrawaddy* (6 August 2020) <<https://www.irrawaddy.com/elections/myanmar-election-officials-scramble-correct-error-riddled-voter-lists.html>> accessed 21 February 2021.

¹⁰¹The Defence Services Act 1959 was amended in 2016 to prescribe the age of retirement. See media reporting on the issue: Ei Ei Thu, 'Commander-in-chief Retirement Age set at 65' *Myanmar Times* (21 July 2016) <<https://www.mmtimes.com/national-news/21491-commander-in-chief-retirement-age-set-at-65.html>> accessed 21 February 2021.

¹⁰²Nyein Nyein, 'Dozens of Myanmar Political Parties Seek Assurances From Military Chief Over Election Concerns' *The Irrawaddy* (15 August 2020) <<https://www.irrawaddy.com/elections/dozens-myanmar-political-parties-seek-assurances-military-chief-election-concerns.html>> accessed 21 February 2021.

the Senior-General criticised the UEC for shortcomings in the electoral process and attributed ultimate blame to the civilian government, as the NLD was responsible for the UEC's appointment.¹⁰³ He also addressed military officers during a broadcast online meeting, emphasizing the importance of voting for those who serve the interest of the state.¹⁰⁴

On election day, 8 November 2020, the Senior General told the media that he would accept the election results. However, on 11 November, the USDP together with some 16 other political parties, declared that they would not accept the results and they demanded that the elections be re-organised by the UEC together with the *Tatmadaw*. In a public statement, the Defence Services announced they would not support the USDP's demand.¹⁰⁵ However, beginning in late November and December, and then throughout the course of January 2021, the *Tatmadaw* issued a series of consecutive statements alleging irregularities in the voter lists. They demanded an investigation of the alleged irregularities, and that the inauguration of the incoming *Hluttaws* be put on hold. On 11 January, the military called on the government to convene a special session of the *Pyidaungsu Hluttaw*. Its petition was supported by 160 military members, 36 USDP members and several members from smaller parties. The Speaker of the *Pyidaungsu Hluttaw* declined to convene a session and argued that any complaints concerning the elections needed to be dealt with by the UEC, not by parliament.¹⁰⁶ The *Tatmadaw* also called upon the President to convene the National Defence and Security Council, the body that can mandate a state of emergency, which was also denied.¹⁰⁷

On 26 January, a military spokesperson refused to rule out the possibility of a coup, but the *Tatmadaw* reiterated shortly afterwards that the statement had been misunderstood. The UEC argued that the alleged irregularities would be investigated by electoral tribunals and, on 28 January, announced it had formed such tribunals to adjudicate 287 petitions.¹⁰⁸ In the midst of mounting tensions and aggravated rhetoric, twelve citizen election observer organisations issued a joint statement to reiterate their conclusions that 'the results of the elections were credible and reflected the will of the majority of voters'. They urged the *Tatmadaw* and political parties to respect the results and to collaborate to ensure post-election stability.¹⁰⁹ In its response to international concerns, the *Tatmadaw* stated on 31 January, one day before the coup (italics in the original):¹¹⁰

The Tatmadaw is the one pressing for adherence to democratic norms (...) It is not the *outcome itself* of the elections that the Tatmadaw is objecting to in its interaction with the UEC and the NLD-led government; why then did the government of U Thein Sein, backed by the

¹⁰³Sebastian Strangio, 'Myanmar's NLD Draws More Criticisms Ahead of National Poll' *The Diplomat* (4 November 2020).

¹⁰⁴Tatmadaw Information Team (5 November 2020) <<http://dsinfo.org/node/657>> accessed 6 November 2020 (no longer publicly available).

¹⁰⁵Htet Naing Zaw, 'USDP's Call to Re-Run General Election Doesn't Reflect Military View: Spokesman' *The Irrawaddy* (16 November 2020) <<https://www.irrawaddy.com/elections/usdps-call-re-run-general-election-doesnt-reflect-military-view-spokesman.html>> accessed 21 February 2021.

¹⁰⁶Melissa Crouch, 'Myanmar Coup has No Constitutional Basis' (3 February 2021) <<https://www.eastasiaforum.org/2021/02/03/myanmar-coup-on-the-pretext-of-a-constitutional-fig-leaf/>> accessed 21 February 2021.

¹⁰⁷The NLD's reluctance to convene the NDSC was a source of ongoing tension between the *Tatmadaw*, the USDP and the NLD prior to the elections. See Sithu Aung Myint, 'Discord and Manoeuvring over "National Security"' *Frontier Myanmar* (9 October 2019) <<https://www.frontiermyanmar.net/en/discord-and-manoeuvring-over-national-security/>> accessed 2 February 2021.

¹⁰⁸In a parallel legal challenge, on 5 January, the USDP and another party had applied to the Supreme Court for writs against the UEC Chairman and members, as well as against President Win Myint. It was unclear whether this court could accept the case, as section 402 of the Constitution declares decisions of the Election Commission to be final. On 29 January, the Supreme Court accepted to hear the cases.

¹⁰⁹Joint Statement by Domestic Election Observer Organizations' (PACE, 29 January 2021) <<https://www.pacemyanmar.org/mnobservers-statement-eng/>> accessed 21 February 2021.

¹¹⁰'Myanmar Tatmadaw's Response' (31 January 2021) <<https://dsinfo.org/929>> accessed 31 January 2021 (no longer available online).

Tatmadaw, fully accept the 2015 election results that gave the NLD a landslide victory? Rather, the Tatmadaw finds the *process* of the 2020 election unacceptable, with over 10.5 million cases of potential fraud, such as non-existent voters. Would any of the countries whose Missions issued the Statement accept such massive fraud?

On 1 February, the Tatmadaw arrested and detained President Win Myint, State Counsellor Aung San Suu Kyi, other senior members of the government, chief ministers, and a number of activists. *Tatmadaw*-appointed vice-president Myint Swe was declared president *pro tempore* by the military. Myint Swe immediately declared a one-year state of emergency and transferred all powers to the Commander-in-Chief of the Defence Forces, citing sections 417 and 418 of the Constitution.¹¹¹ The *Tatmadaw* continued to adhere to the 2008 Constitution in its rhetoric. On the day of the *coup*, the Commander-in-Chief released a Statement containing these points:

1. The Union Election Commission failed to address a large difference over the voter list used in the multiparty elections held on 8 November 2010. [...]
2. The Union Election Commission will be re-constituted to continuously take appropriate measures including checking the voting lists in accord with the law. [...]
3. When these tasks have been completed in accord with the provision of the State of Emergency, a free and fair multiparty general election will be held and then, State responsibilities will be handed over to the winning party meeting norms and standards of democracy.¹¹²

On 2 February the *Tatmadaw* announced the formation of an 11-member State Administration Council (SAC), headed by the Commander-in-Chief.¹¹³ The body proceeded with nominations to various institutions, including the Supreme Court and a five-member Union Election Commission, and re-appointed U Thein Soe, who had overseen the 2010 elections, as its Chairman.¹¹⁴ In the immediate aftermath of the coup, the Tatmadaw detained U Hla Thein, the previous UEC Chairman, and a Commissioner. Other UEC personnel were also temporarily detained, along with close to 100 members and personnel of township and other election sub-commissions across the country. The election administration was the single-most targeted institution following the coup.¹¹⁵ At the same time, the newly appointed UEC proceeded with its work and announced on 5 February 2021 that it had 'begun its investigation on the voter fraud in the 2020 general elections'.¹¹⁶ The petitions from January 2021 were no longer pursued, but within two weeks of the coup, the UEC published new figures that purported to demonstrate the inaccuracy of the voter lists.

¹¹¹Myanmar News Agency, 'Republic of the Union of Myanmar Office of the President Order Number (1/2021)' *Global New Light of Myanmar* (1 February 2021) <<https://www.gnlm.com.mm/republic-of-the-union-of-myanmar-office-of-the-president-order-number-1-2021/>> accessed 22 February 2021. For early analysis of the coup, see Crouch (n 77); Andrew Harding, 'The Tatmadaw's 1 February Actions are not an Emergency but a Coup' (Blog of the International Journal of Constitutional Law, 1 February 2021) <<http://www.iconnectblog.com/2021/02/the-tatmadaws-1-february-actions-are-not-an-emergency-but-a-coup/>> accessed 22 February 2021; Sujit Choudhry & Asanga Welikala, 'Myanmar's Military Coup d'État Is Unconstitutional' (Verfassungsblog, 15 February 2021) <<https://verfassungsblog.de/myanmars-military-coup-detat-is-unconstitutional/>> accessed 22 February 2021.

¹¹²Office of the Commander in Chief of Defence Services, Notification No. 1/2021, 1 February 2021.

¹¹³*Tatmadaw*, Notification 9/2021, 2 February 2021.

¹¹⁴The Irrawaddy, 'Myanmar's Coup Leaders Name a New Union Election Commission' *The Irrawaddy* (3 February 2021) <<https://www.irrawaddy.com/elections/myanmars-coup-leaders-name-new-union-election-commission.html>> accessed 22 February 2021.

¹¹⁵The Irrawaddy, 'Myanmar Military Rounds Up Former Election Commission Officials' (11 February 2021) <<https://www.irrawaddy.com/news/burma/myanmar-military-rounds-former-election-commission-officials.html>> accessed 23 August 2021.

¹¹⁶Myanmar News Agency, 'Announcement of Union Election Commission' *Global New Light of Myanmar* (5 February 2021) <<https://www.gnlm.com.mm/announcement-of-union-election-commission-2/>> accessed 22 February 2021.

The 2020 elections in Myanmar saw several challenges. They took place in a legal and political environment that curtailed fundamental and essential electoral rights, inherited the disenfranchisement of previously eligible voters, saw local election cancellations at an unprecedented scale, and took place under the challenging conditions of the Covid-19 pandemic. In some respect, the legal framework and its implementation had improved since 2015. In other respects, past performances indicated more accuracy, such as regarding the voter lists, and more openness and transparency. However, importantly, there are no indications that the 2020 elections were marred by strategic manipulation of ballots or fraud. Against all this, it must be noted that the voter list stood its test on election day, both in 2015 and in 2020, and observers have positively evaluated election day performances.¹¹⁷ Notwithstanding the challenges that came with the threat of Covid-19 contagion, turnout increased in 2020, and the results overwhelmingly confirmed the NLD's right to take office.

It is conceivable that the SAC will indeed seek to implement the plan it announced in the wake of the coup – to hold elections again in a foreseeable period. Until then, the *Tatmadaw* may plan to revise the voter lists, change the electoral rules in its favour, incapacitate the NLD, co-opt potential allies for future coalitions, and alter the electoral system towards a proportional model – which by itself is difficult to do, not only due to technical challenges, but also because the existing township-based system derives from the Constitution. Such an attempt, however, would follow the rationale of the 2008 referendum and 2010 elections, when the military organised electoral events to generate desired outcomes. The further outcome of this process remains uncertain.

Conclusion

This article has reviewed Myanmar's Union Election Commission in its constitutional context and against its performance and transformations during the period of transitional opening between 2010 and 2020. The article has also considered the UEC's role in the context of the military *coup d'état* of 1 February 2021, given that the *Tatmadaw* declared electoral fraud as the central motif for it taking power and announced plans to hold fresh elections.

The UEC has introduced a number of procedural and legal changes over the years, but with some notable exceptions the overarching framework for holding elections remained essentially unchanged. According to the *Tatmadaw*'s roadmap to disciplined democracy and rooted in the 2008 Constitution, the UEC was appointed by the President and equipped with vast powers, but dependent on other branches of the state administration in the execution of its tasks. Despite the fact that the framework for holding elections remained fraught with undemocratic principles and inequalities, international commentators¹¹⁸ viewed the 2020 elections much more critically than the 2015 polls. This can be attributed to the political outcomes of the 2015 elections, the coming to power of an NLD-led government, as well as critical developments that took place since, not least the mass exodus of the Rohingya to Bangladesh and subsequent international court proceedings related thereto. One element in this is the performance of the UEC and its Chairman, who contributed to perceptions of transparency and authority or ineptness and inaccuracy.

¹¹⁷See for example PACE, 'Election Day Observation Preliminary Findings' (9 November 2020) <<https://www.pacemyanmar.org/2020-eday-eng/>> accessed 1 March 2021; and Asian Network for Free Elections, 'ANREL IEOM to the 2020 Myanmar General Elections Interim Report' (10 November 2020) <<https://anfrel.org/anfrel-ieom-to-the-2020-myanmar-general-elections-interim-report/>> accessed 1 March 2021.

¹¹⁸For example Melissa Crouch, 'Why Myanmar's elections won't be free, fair or safe' *The Interpreter* (The Lowy Institute, 12 October 2020) <<https://www.lowyinstitute.org/the-interpreter/why-myanmar-s-elections-will-be-neither-free-fair-nor-safe>> accessed 1 March 2021; Human Rights Watch, 'Myanmar: Elections Fundamentally Flawed' (Bangkok, 5 October 2020) <<https://www.hrw.org/news/2020/10/05/myanmar-election-fundamentally-flawed>> accessed 28 February 2021; Sebastian Strangio, 'Myanmar Election Will Fail to Meet Proper Standards: UN' *The Diplomat* (24 September 2020) <<https://thediplomat.com/2020/09/myanmar-election-will-fail-to-meet-proper-standards-un/>> accessed 1 March 2021.

The impact on democratic consolidation of three consecutive general elections has been constrained by constitutional limitations on the UEC's independence, among other factors. Both previous UECs had to manage the perception that they were partisan. Ahead of the 2015 elections, it was the NLD who took opportunities to point out weaknesses in the election administration. Prior to, and following the 2020 elections, it was a political goal of the USDP to harm the UEC's credibility. Equipped with autonomy, power and trust from the highest level, U Tin Aye's Commission embraced the situation and implemented the *Tatmadaw's* longer-term goal, blue-printed in the roadmap to disciplined democracy. U Hla Thein's Commission was seen as more reserved, not only *vis-à-vis* (national and international) external stakeholders, but also towards the authorities who nominated it. The UEC in charge of organising the 2015 elections also performed during a more optimistic time when Myanmar enjoyed the support of the international community. Its successor prepared elections during a time of intense international criticism, severe armed conflict in Rakhine State, and challenges posed by a global pandemic. The UEC's leadership was thus a contributing factor to perceptions of its credibility and effectiveness, which have to be evaluated against the political circumstances of the transition and against the overall framework provided by the 2008 Constitution.

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