

The Myanmar Elections

I. OVERVIEW

Myanmar will shortly hold its first elections in twenty years. Given the restrictive provisions of the 2010 Political Parties Registration Law that bar anyone serving a prison term from membership in a political party, many imprisoned dissidents will be excluded from the process, unless they are released in the near future. Aung San Suu Kyi – whose suspended sentence and house arrest possibly exclude her also – has condemned the legislation, and her National League for Democracy (NLD) has decided not to participate and has, therefore, lost its status as a legally-registered party. There has rightly been much international criticism of the new constitution and of the fact that the elections will not be inclusive, but the political and generational shift that they will bring about may represent the best opportunity in a generation to influence the future direction of the country.

The balloting will take place in the framework of the new constitution, adopted under highly questionable circumstances in 2008. That document, which will come into force following the elections, will entrench the military's power. It gives the institution significant autonomy, as well as considerable political influence, by reserving a quarter of the seats in national and regional legislatures for it and creating a powerful new national defence and security council controlled by the commander-in-chief, who also receives control of key security ministries and other extraordinary powers.

It seems very likely that the vote will go ahead without any moves by the regime to address concerns. At the same time, the problematic nature of the process should not lead observers to underestimate its significance. The elections and the constitution they will bring into force will define the political landscape for years to come and will influence what opportunities there are to push for long-overdue social, economic and political reforms in Myanmar. An understanding of the political dynamics they will create is, therefore, vital.

It is clear that the top leaders, Generals Than Shwe and Maung Aye, will step aside after the elections, making way for a younger generation of military officers. Although the old guard may continue to wield significant influence behind the scenes, the reins of power will be in new hands,

and the new political structures make it unlikely that any single individual will be able to dominate decision-making in the way that Than Shwe has in recent years. Myanmar has been under military rule for half a century. The attempts by the regime to introduce a more civilian and plural character to governance, however tentative and flawed they may be, should be critiqued but not dismissed.

These were the messages of Crisis Group's August 2009 report, *Myanmar: Towards the Elections*, and they continue to be valid. This briefing updates recent developments, including an analysis of the electoral legislation issued in March. It provides a timeline for the implementation of the new constitutional structures after election day, including the formation and initial functioning of the new legislatures. It also examines the critical question of the impact on the ethnic conflict and concludes that renewed fighting in areas where ceasefires currently hold should be of concern but remains on balance unlikely. A brief assessment of the recent mass sell-off of public assets, which was driven in part by the uncertainty of post-election rent-seeking opportunities, suggests that this could have greater impact on the political economy than the elections themselves, by providing significant off-budget resources that will help the army take advantage of the considerable autonomy and political influence written into the constitution for it.

The electoral legislation is in most respects almost identical to the laws governing the 1990 poll, including provisions that led to a broadly fair count. The most significant departures are highly restrictive provisions in the Political Parties Registration Law. This suggests strongly that, as in 1990, the elections will be characterised by a campaigning period that is highly controlled and far from free, but that the voting on election day may well be relatively fair. Such a scenario presents important challenges, as well as opportunities, to domestic stakeholders and to the international community.

II. ELECTORAL LEGISLATION

On 8 March, the Myanmar authorities released the long-awaited legislation governing the 2010 elections.¹ The five laws covered the functioning of the election commission, the registration of political parties and the election of representatives to the national and regional legislatures.² The commission was appointed three days later and within six days of its creation had issued a series of bylaws, setting out in detail the procedures for implementing the various laws.³ Official English language translations of these laws were made available a month later; the various unofficial translations that were available prior to this were generally of poor quality. To date, no official or unofficial translations of the bylaws are available.⁴

This legislation and subsequent announcements answer most of the outstanding questions about how the elections will be conducted, but the date has yet to be announced. The time-line is as follows:

8 March: Electoral laws issued.

17 March: Bylaws issued.

6 May: Deadline for existing parties to notify the election commission that they wish to continue to operate (parties that failed to do so have been automatically deregistered).⁵ There is no deadline for registration of new parties.

¹For background on the electoral process, see Crisis Group Asia Report N°174, *Myanmar: Towards the Elections*, 20 August 2009.

²These laws are the Union Election Commission Law (SPDC Law no. 1/2010), the Political Parties Registration Law (SPDC Law no. 2/2010), the Pyithu Hluttaw Election Law (SPDC Law no. 3/2010), the Amyotha Hluttaw Election Law (SPDC Law No. 4/2010) and the Region Hluttaw or State Hluttaw Election Law (SPDC Law no. 5/2010).

³SPDC Announcement no. 1/2010 (11 March 2010) appointed the seventeen-member commission. The four sets of bylaws were issued as election commission notifications 1/2010, 2/2010, 3/2010 and 4/2010, all dated 17 March 2010. Each set accompanies one of the electoral laws, with the exception of the election commission law, for which none have been issued.

⁴Only the Burmese-language versions of the laws and bylaws are authoritative. Crisis Group has, therefore, based its analysis on the original texts.

⁵Ten parties were legally registered as of March 2010 (all contested the 1990 elections): National Unity Party (NUP), National League for Democracy (NLD), Shan Nationalities League for Democracy (SNLD), Kokang Democracy and Unity Party, Union Karen League, Union Pa-O National Organisation, Mro or Khami National Solidarity Organisation, Shan State Kokang Democratic Party, Wa National Development Party and Lahu National Development Party.

To be announced: Deadline for filing of nomination papers by candidates (independent, or from registered parties) who wish to contest a legislative seat (Bylaws section 16b).

To be announced: Election day.

There have been no elections for twenty years and no opportunity during that time for new political parties to form.⁶ This has left a limited time for parties to organise and campaign. In 1990, the political party registration law was issued twenty months in advance of the poll, and the election law one year in advance. Nevertheless, a period of a few months could allow parties a reasonable time to reach out to the electorate, if it were not for the fact that political space in the country is extremely constrained. Draconian restrictions on freedom of association and assembly remain in force. And while parties are permitted to publish campaign materials without approval of government censors, provided they do not violate certain regulations, the possibility for the media to report freely and accurately on political matters remains very constrained.⁷

A. KEY FEATURES OF THE LEGISLATION

The 2008 constitution establishes a bicameral Pyidaungsu Hluttaw (Union Assembly) at the national level, made up of the Pyithu Hluttaw (People's Assembly, the lower house) and the Amyotha Hluttaw (National Assembly, the upper house). It also establishes fourteen regional legislatures. Although the new constitution will only come into force after the elections, the legislation that has been issued is in conformity with its provisions. On election day, therefore, voters will cast three separate ballots – one for each legislature.⁸

⁶The last election was held on 27 May 1990.

⁷A directive issued by the information ministry on 17 March 2010 (copy obtained by Crisis Group), states that political parties must apply within 90 days of registration with the election commission to obtain exemption certificates (pursuant to §22, 1962 Printers and Publishers Registration Law) allowing them to publish campaign materials without need to submit them to the censorship board. A fee of 100,000 kyat (about \$100) and a deposit of 500,000 kyat are required. Exempted publications must adhere to appended regulations, including not opposing the regime or insulting or sowing dissent in the military. (Central Supervisory Committee for Printers and Publishers Registration and Press Scrutiny and Publishing, Directive no. 42, 17 March 2010.) There were similar provisions for the 1990 elections (Martial Law Order 3/89, 17 June 1989; Printers and Publishers Central Registration Committee, Directive no. 39, 18 July 1989).

⁸Voters from certain ethnic groups in certain regions/states may in addition be entitled to elect a separate ethnic representative to the region/state legislature, in accordance with §161(b),(c) of

One quarter of the seats in all these legislatures are reserved for members of the armed forces appointed by the commander-in-chief (Than Shwe). The elections will be for the other three quarters of the seats. These are legislative elections and do not choose a government. The Union Assembly, however, will serve as an electoral college to choose a president from among three candidates nominated, respectively, by the elected members of the upper house, the elected members of the lower house and the military appointees of both houses. The two unsuccessful candidates will be appointed as vice presidents. It will then be for the president to select the members of the government, who need not be members of one of the legislatures.

Just as the 2008 constitution drew heavily on previous constitutions, most of the provisions of the 2010 election laws are identical to the legislation governing the 1990 election. Most of the departures from precedent simply repeat the new constitutional provisions, which is necessary because the constitution is not yet in force. Some of these clauses may be objectionable, but they should not be surprising, since it was clear that the laws could not contradict the constitution. The remaining provisions – those that were not included in the previous legislation and which do not merely repeat the 2008 constitution – are few in number, but they are highly significant, as they may give some indication of the regime's intentions with regard to the elections.

Of all the new laws, the Political Parties Registration Law can be seen as the most restrictive and as departing the most from precedent. It is substantially narrower than the 1988 party registration law, which was skeletal. In particular, its prohibition on “persons serving a prison term as a result of a conviction in a court of law” joining or remaining members of political parties is harsh, all the more so in light of the fact that many opposition figures are incarcerated. If there is no general amnesty for political prisoners well in advance of the elections, this provision will be seen as undermining the inclusiveness, and hence the credibility, of the polls.

Some of the most significant features of the legislation are as follows.

1. Dilemmas for some existing political parties

Existing parties were given limited time to decide how to react to the new legislation. In order to continue as legal parties, they had to apply to the election commission by 6 May 2010. (As existing parties, they did not need to re-register, merely to apply to the commission to continue

their registration, on the prescribed form.⁹) The NLD decided on 29 March that it would not do so.

Parties cannot boycott the elections if they wish to remain legally registered. Any party that does not field candidates in at least three constituencies will be deregistered, as was the case in 1990. These may be constituencies at any of the three legislative levels (not one constituency from each level, as some unofficial translations of the law have suggested).

If an existing party wanted to continue its activities, in filling out the prescribed form it had to:

- ❑ provide full details on its leader and deputy leader;¹⁰
- ❑ agree to adhere to the provisions of the 2010 Political Parties Registration Law;¹¹
- ❑ meet the stipulated minimum party membership requirements within 90 days of election commission approval of the application (1,000 members for parties that contest at the national level, 500 at the region/state level); and
- ❑ declare that the party is not in violation of the provisions of section 7 of the Political Parties Registration Law, nor an organisation involved in illegal drug activities.

No immediate expulsion of members in prison would appear to be required. Since parties are given 90 days to meet membership requirements and submit lists of members to the election commission, they would seem to have 90 days after commission approval of their application to resolve those matters.¹² The Shan Nationalities League for Democracy (SNLD), which won the second-highest number of seats in the 1990 election, after the NLD, faced serious difficulties, since its key leaders (Chairman Khun Tun Oo and Secretary Sai Nyunt Lwin) are in prison.¹³ It has declared that it will not participate unless they are released.

⁹ Form E-1, attached to the 2010 Political Parties Registration Bylaws.

¹⁰ For the NLD, this would be Chairman Aung Shwe and Vice-Chairman Tin Oo, not General-Secretary Aung San Suu Kyi.

¹¹ One provision is that parties must safeguard the constitution, although no specific declaration is required on the form.

¹² The commission could take a more restrictive view on application of §§5(f), 10 and 12(a)(vi) of the Political Parties Registration Law to existing parties; in practice, however, it seems likely it could only act after being notified by a party of its list of members.

¹³ Other parties with members in prison, such as Arakan League for Democracy, are no longer officially registered, so would have to re-form in any case.

Another dilemma for these parties was that the new election law voided the results of the 1990 election, on the basis that the 2008 constitution established a new legislative structure incompatible with those elections (which were for a unicameral legislature).¹⁴ While no party had demanded or expected the results of the last elections to be implemented after twenty years, it was an important point of principle – and a key condition set by the NLD for participation in new elections – that those results should be symbolically recognised in some way.¹⁵

2. Ethnic parties and the Border Guard Forces proposal

In April 2009, the authorities informed ethnic ceasefire groups that they had to transform their armed units into “Border Guard Forces” under the partial control of the army. This met significant resistance from many ceasefire groups, who saw it as a major concession that would significantly reduce their autonomy, in return for which the government offered no quid pro quo. A series of revised deadlines – the latest being the end of April – have been set by the government for all ceasefire groups to accept the proposal, but the impasse remains and tensions are high.

Nevertheless, as discussed in more detail below, a return to armed conflict is unlikely; the regime’s response will probably be political rather than military. Section 12(a)(iii) of the 2010 Political Parties Registration Law could be problematic for ethnic parties (whether existing or newly-formed). In particular, it is conceivable that any of the ceasefire groups that refused to transform into Border Guard Forces could be declared illegal organisations. Any political party having direct or indirect links with those organisations (such as the Kachin State Progressive Party does with the Kachin Independence Organisation ceasefire group) could then be denied registration or de-registered. This clause repeats a provision of the 2008 constitution (section 407b). There was no such provision in the 1988 law.¹⁶ The election commission has delayed the approval of Kachin parties, likely due to the Kachin Independence Organisation’s refusal to agree to the border guard proposal.¹⁷

3. Citizenship requirements

The citizenship requirements are more inclusive than in 1990. Citizens, including naturalised citizens, as well as associate citizens¹⁸ and holders of temporary (non-citizen) registration certificates, all have the right to form and join political parties and to vote (however, as before, only those citizens both of whose parents were citizens are permitted to stand for election). Extending such rights to temporary certificate holders enfranchises the Rohingya Muslims, which must be seen as positive, but they continue to be denied citizenship.

Previously, the situation was somewhat different. The issuing of temporary registration certificates began only after 1990. Nevertheless, in spite of the fact that under the 1989 election law, only citizens, associate citizens and naturalised citizens had the right to vote, the Rohingya held other forms of identification that enabled them to cast ballots in 1990.¹⁹

These provisions of the 2010 law also enfranchise many people of Chinese and Indian descent who have been denied citizenship, as well as ethnic people in remote and ceasefire areas who have never been under state control. The numbers are significant. People of Chinese and Indian descent may constitute as much as 5 per cent of the population, and previously-unregistered ethnic populations could be of a similar size.²⁰

4. The cost of registration

Myanmar is a very poor country, so the expense for registering political parties and candidates and for obtaining permission to print party materials is a significant barrier to political participation. Although in real terms this does not differ greatly from 1990, fees and maximum expenditure levels may favour wealthy, elite candidates.²¹ There is

¹⁴ 2010 Pyithu Hluttaw Election Law, §91(b).

¹⁵ See the NLD’s “Shwegondaing Declaration”, 29 April 2009.

¹⁶ However, a similar provision in the 1989 Pyithu Hluttaw Election Law (§10h) applied to those standing for election.

¹⁷ These parties are the Kachin State Progressive Party, the Northern Shan State Progressive Party and the United Democracy Party (Kachin State).

¹⁸ Persons who do not meet the requirements of full citizenship under the 1982 Myanmar Citizenship Law may be granted “associate citizenship”, if they can meet certain other stipulated requirements, or if they had an application for citizenship pending under the (less restrictive) 1948 Union Citizenship Act.

¹⁹ Many had a national registration card (no longer valid) or could vote by producing their official household registration list.

²⁰ The last official census (1983) indicated that people of Chinese descent were 3 per cent of the population, those of Indian descent, 2 per cent. A senior ethnic representative recently estimated there could be around 3 million ethnic people – about 5 per cent of the population – outside state registration systems. Crisis Group interview, Yunnan, February 2009. Many temporary registration certificates have been issued in ceasefire areas prior to the 2008 constitutional referendum or since.

²¹ See, for example, Htet Aung, “Party registration regulations favour wealthy”, *The Irrawaddy*, 18 March 2010. The 500,000 kyat registration fee for candidates equals about \$500; the de-

also a significant difference that benefits wealthy parties. Previously, the registration fee that legislative candidates were required to pay was a deposit, which was returned to anyone who obtained at least one-eighth of the total valid votes.²² This time, the registration fee is non-refundable, even to victors.²³ For large and potentially successful parties that wish to contest most or all of the 498 national constituencies, this is a significant cost – around a quarter of a million dollars.²⁴

5. State paternalism towards political parties

The provisions governing the establishment and functioning of political parties reveal a strikingly paternalistic approach. Lists identifying all party members must be submitted to the authorities (a provision that could even be seen as sinister). Parties must also maintain minimum membership levels – 1,000 for national parties, 500 for regional parties – or they will be deregistered. Party assets (funds and property) devolve to the state upon deregistration or dissolution of a party, even though parties receive no state funding, giving the impression that the authorities view them as public assets in some sense.²⁵ As noted above, parties are also required to contest a minimum of three constituencies, in any legislature. Even their organisational structure is stipulated: they must have geographical formations that conform to the administrative subdivisions.²⁶ They also need the advance permission of the election commission to amend their manifesto/policies and their constitution and structure.

posit set by the 1989 Pyithu Hluttaw Election Rules (§20c) was 10,000 kyat (then about \$330). The maximum expenditure per candidate is now 10 million kyat (about \$10,000); the 1989 Pyithu Hluttaw Election Rules (§79) limited this to 75,000 kyat (then about \$2,500). Once decreases in purchasing power over twenty years are also taken into account, the real-term differences are minimal.

²² 1989 Pyithu Hluttaw Election Rules, §§40-41. Then as now, fees were returnable if a candidate died before the election or the application was rejected.

²³ 2010 Pyithu Hluttaw Election Bylaws, §§37-38, and the corresponding provisions of the Amyotha Hluttaw and Region/State Hluttaw bylaws.

²⁴ This concern has been raised by Thu Wai, head of the newly-registered Democratic Party. See Aye Nai, “Democratic Party registers for elections”, *Democratic Voice of Burma*, 31 March 2010.

²⁵ It could, however, be argued that this avoids the risk of people setting-up profit-making enterprises – or fraudulent donation-gathering schemes – under the guise of political parties.

²⁶ For example, a national party must have region/state, district and township branches in line with the administrative subdivision of the country.

6. Constituencies

In 1990, there were 492 constituencies for the unicameral legislature, considerably more than the number of townships.²⁷ In the forthcoming elections, the number of elected seats is 498 in the national legislature and more than 650 in region/state legislatures, but the constituencies are more complicated:

- There will be 330 constituencies for the lower house elected seats (a further 110 seats are reserved for military appointees), approximately equal to the current number of townships (325). The five largest townships by population will be split into two constituencies; in all other cases, constituencies will correspond to townships. This means that there will be wide variation in the number of voters in a constituency, since townships differ greatly in population.
- There will be 168 constituencies for the upper house elected seats, twelve per region/state (a further four seats per region/state are reserved for military appointees). Constituencies will also be based on township boundaries, but since the number of townships in regions and states varies widely, in some cases townships with relatively small populations will be split into two constituencies, while in other cases two or more townships with relatively high populations will be combined into a single constituency.²⁸ The effect will be to give disproportionately high representation to some small ethnic states (Chin, Kachin and Kayah states), consistent with the notion that the upper house is a “chamber of nationalities”. But some ethnic states with relatively high population densities (Mon and Karen states) will be underrepresented.
- There will be two constituencies per township in the region/state legislatures, so the number of elected seats will vary widely between regions/states, from fourteen in Karen and Kayah states, to 110 in Shan State (not including additional ethnic seats, see next point). Further seats in these legislatures will be reserved for military appointees, who will again make up one-quarter of the total. In all, there will be 650 elected seats in the region/

²⁷ At that time, voting did not take place in seven of these constituencies due to the security situation. The country was divided into 317 townships in 1990.

²⁸ Two examples illustrate this. Kayah State has a low population per township; five of its seven townships will be split into two constituencies each, for a total of twelve, giving each constituency a population of about 24,000. At the other end of the scale, Ayeyarwady region has a high population per township; all constituencies will be made up of at least two townships (there are 26 townships in total), giving each a population of about 300,000.

state legislatures, plus perhaps a score of additional ethnic seats.

- There will be additional seats in the region/state legislatures for ethnic groups that have a population of more than about 57,500 (0.1 per cent of the national population) in that region/state, provided that they do not already have a self-administered area there and are not its majority group.²⁹ There has been considerable confusion about this provision. It implies, for example, that the Mon would qualify for a seat in the Karen State legislature (but obviously not in their own Mon State legislature), the Karen would qualify for a seat in the Ayeyarwady, Bago, Mon, Tanintharyi and Yangon region/state legislatures, and the Burmans would qualify for a seat in most of the state legislatures with the exception of Chin and Rakhine; the Wa would not qualify for a seat in the Shan State legislature, since they have a self-administered area in Shan State.³⁰ It appears that there will be very few such seats – most likely, between zero and four per region/state.

7. Electoral rolls

The procedure laid down for the preparation of electoral rolls is fairly inclusive, in line with the citizenship requirements for political party membership and voting (see point three above). Voting rolls were prepared in advance of the 2008 constitutional referendum, which will presumably serve as a basis. Included on the rolls are “those outside the country with government permission”, such as registered migrant workers and probably also those who are unofficial migrants but maintain their passports by making periodic payments to Myanmar embassies.³¹ Electoral rolls will be prepared for each constituency and published in advance, to allow errors and omissions to be corrected – as regards both the failure to include an eligible voter and the inclusion of someone who is ineligible. There is provision for appeal to the township-level commission.

²⁹ 2008 constitution, §161(b),(c); 2010 Region Hluttaw or State Hluttaw Election Law, §22(b) and §§24-27.

³⁰ This list is not exhaustive and is based on government statistics for ethnic populations in each region/state. It is not clear what procedures will be used to determine ethnicity and population and whether only major ethnic groupings will be counted or other recognised minorities such as Akha and Lisu will also be eligible for ethnic seats.

³¹ Section 14(b) of the 2010 Pyithu Hluttaw Election Law and the corresponding provisions of the other Hluttaw election laws.

8. Voting

As in 1990, all contests will be on a first-past-the-post basis, with each voter choosing one candidate in a given constituency. As before, voting is not compulsory. The candidate who obtains the highest number of votes, which need not be a majority, is elected. This is the same method used in 1990, which gave an overwhelming victory to the NLD: just under 60 per cent of the votes and more than 80 per cent of the seats, compared to the establishment National Unity Party’s 21 per cent, but only 2 per cent of the seats.

This system favours a large party facing multiple smaller opponents. Now that the NLD has decided not to contest, nearly all the parties will be relative unknowns. Choices will probably be made more on the basis of the reputation of individual candidates, rather than voter support for a particular party. This may well favour the regime’s Union Solidarity and Development Party, which, although deeply unpopular in many quarters, has a formidable organisation and huge resources and has been wooing prominent and respected local personalities to stand on its behalf. It will also benefit independent candidates.

This is very different from the situation in 1990, when almost any candidate on an NLD ticket was successful, regardless of background or strength of local profile. There were few independent candidates, very few of whom were successful. If the NLD had decided to compete, it is likely that – despite the decline in its organisational base since 1990 – its candidates would have fared well, because it is still symbolic of the aspirations of a majority of the people and benefit from the association with Aung San Suu Kyi. This would have been so even if she were under house arrest (as in 1990) and if the party had had to suspend her in accordance with the election laws until her sentence expired.

As in 1990, there is provision for the election commission to establish ad-hoc tribunals to hear electoral disputes.³²

B. WIDELY-HELD MISCONCEPTIONS

Much of what has been written in the media, and even commentary by political activists and some foreign governments, has been based on a hasty, often erroneous reading of the provisions. Some of the most-repeated misconceptions are:

³² Such tribunals will also hear objections to the appointment of members of the “leading bodies” of self-administered areas under §276(h) of the 2008 constitution. This provides that any minority ethnic group having a population of more than 10,000 in any self-administered area has the right to a representative on the “leading body” of that area.

1. That Aung San Suu Kyi cannot stand for political office because her late husband was British

There is no constitutional or legal restriction on individuals with foreign spouses contesting legislative seats. She would not be prevented from contesting the election on this basis, even if still married. She cannot be a presidential candidate, however, because her sons have British nationality, and there is a constitutional restriction on presidential candidates having spouses, children or children-in-law who are foreign citizens.³³ Of course, house arrest may prevent her from being a leader/member of a party or standing for a legislative seat, though this is not certain from the constitution and legislation (see next).

2. That individuals with a criminal record cannot stand for election, be members of political parties, or vote

The prohibition on these activities applies only to “persons currently serving a prison term as a result of a conviction in a court of law”.³⁴ There are no restrictions on former prisoners, which implies that if Aung San Suu Kyi were released – and her party had not been deregistered – she could remain part of the NLD, vote and stand as a parliamentary candidate.

It is not clear whether Aung San Suu Kyi would be regarded as currently serving a “prison term”, since her sentence has been suspended. If not, she would not be restricted from party membership or standing for election, even while under house arrest, although reported comments indicate that she has no interest in participating in the elections. The electoral laws governing the 1990 elections also prohibited prisoners from standing as candidates. At that time, she was also under house arrest (although under a different law and not as a result of a court conviction) but was able to submit nomination papers. Her application was rejected on several grounds, but not house arrest.³⁵

There is some reason to think that since her sentence is not yet completed, the prohibition may extend to her, but the election commission would have to rule on this. A commentary in the state media noted that:

[A] convict is a person who is in jail according to the judgment of a certain court ... pointing to this fact, some say the law is designed to ban a certain person from standing for election. If it is intended for the said person, an article would have ... referred to a specific crime so that the person will be banned from the election forever [or] it would have ... prescribed that a person charged under this law shall have to wait for a certain period even after being released [as provided in the 1948 constitution for legislative representatives].³⁶

While this is unequivocal that only current detainees are barred, it leaves open Aung San Suu Kyi’s present status.

3. That the laws disenfranchise members of religious orders

Buddhist monks and nuns and the clergy of other religions (other than Islam, which is not mentioned), cannot stand for election, join political parties or vote. However, the clergy have never in modern times been enfranchised. It has long been a view of the Buddhist clergy that politics and religion should not be mixed, and monks should not be tainted by politics. This has been so since well before independence and was strongly supported by Aung San, the independence hero and Aung San Suu Kyi’s father, who said, “if we mix religion and politics, then we offend the spirit of religion itself”.³⁷ It was included in the 1947 independence constitution and all constitutions and election laws since.³⁸ Similar cultural considerations apply in Thailand, whose constitution also contains such a provision.³⁹

C. WILL THE VOTE BE FAIR?

Significantly, the authorities have made no obvious attempt to facilitate manipulation of the election results. Thus, the features of the 1990 polls that prevented such manipulation are in place again. This is positive, in contrast to the 2008 referendum, which would have provided a much

³³ See §§59(f) and 120-121, 152-153 of the 2008 constitution. However, consistent with the regime’s twenty-year effort to prevent her from assuming a political role, there are several other vaguely-worded constitutional provisions that could be used to bar her from the legislature.

³⁴ Ibid, §392b; 2010 Political Parties Registration Law, §§2(l), 4(e), 10(e).

³⁵ For a detailed discussion, see Derek Tonkin, “Burmese perspectives”, 14 February 2008, at www.networkmyanmar.org.

³⁶ “The right decision and choice”, *New Light of Myanmar*, 20 March 2010, p. 9.

³⁷ See Gustaaf Houtman, *Mental Culture in Burmese Crisis Politics*, Research Institute for Languages and Cultures of Asia and Africa (ILCAA), Tokyo University of Foreign Studies (Tokyo, 1999), chapter 12.

³⁸ Section 76(4), 1947 constitution; article 178(a), 1974 constitution; §392(a), 2008 constitution; §§7(a), 10(a), 1989 election law.

³⁹ Section 94(2); many, but not all, of Thailand’s previous constitutions have included such a provision.

more restrictive precedent. Ballots are to be counted at close of voting in each polling station, in the presence of the candidates or their nominated agents and members of the public, the key feature ensuring a fair count in 1990 (referendum ballots were counted at a central location).

This suggests that while the authorities may try to manipulate the campaign process and influence which parties register – and have already taken steps to ensure that the playing field is not level – they are not planning to manipulate the count itself. This does not mean irregularities will not arise; voters may fear that their ballot will not be secret, all the more so if there are many polling booths with a small number of voters in each, and there may be more overt attempts at intimidation at the local level. But it sets the scene for an election with some characteristics similar to 1990.

The elections will again not be free: the political space is tightly controlled, many political actors are imprisoned, there are tight restrictions on parties and continued restrictions on freedom of expression and assembly. However, the count itself may well be reasonably fair, as it was felt to have been in 1990. The regime's biggest risk was the emergence of a party with broad popular support that contested a majority of seats; only the NLD could have plausibly posed such a risk, and its decision not to contest has all but guaranteed that the 1990 landslide against the regime will not be repeated.

III. PRE-ELECTION POLITICAL DYNAMICS

In the months leading up to the elections, the political environment will be influenced by a number of domestic factors. This section provides a brief overview of the most important. The international response is also reviewed. While they are unlikely to have much immediate influence over events, international reactions in the pre-election period can help to set the tone of engagement with the future government in Naypyitaw.

A. PRIVATISATION AND THE POLITICAL ECONOMY

The 2009-2010 fiscal year has seen mass privatisation of state assets breathtaking in its scope. The sell-off, which has accelerated in 2010, includes the ports and related infrastructure; much of the transport sector, including the state airline, shipping line and many highways, as well as Yangon airport terminal and ground-handling rights; much of the energy sector, including the national fuel import, distribution and sales network, as well as some hydroelectric dams; rights to operate private-sector health and

education services; scores of government factories, state-owned enterprises and mineral and gem mines; and probably soon parts of the telecommunications sector. Many state buildings have also been sold off, including government buildings on prime sites in Yangon that have stood empty since the move to the new capital, Naypyitaw, in 2005.⁴⁰

Many, but not all the sales have been mentioned in the state media, but the process has been lacking in transparency and accountability. No systematic information has been made available on what assets are for sale or how to purchase them. The sales form part of a slow process over many years to reverse the nationalisation of almost all private enterprises in the 1960s. They can also be seen in the context of recent government efforts to improve economic performance by shedding state-owned enterprises that are a massive drain on public-sector finances – something that has been urged by successive IMF Article IV missions.

In some ways, then, even a hasty and imperfect privatisation can be seen as positive for public sector finances and the economy as a whole. But its nature and timing raise serious questions. Many observers have suggested that a key reason is to build a war chest for the elections. But while there may be something in this – under the electoral laws, parties may use business funding but not public-sector resources – the scale of the privatisation goes far beyond what would be needed for the campaign.⁴¹ The motive would rather seem to be linked to the elections differently. The elections will bring about a major institutional reorganisation and a significant shake-up in patronage networks, leading to uncertainties about the availability of economic rents for current power-holders. The sell-off can be seen as a way to transfer state assets and economic rents to the military (through holding companies it controls), regime proxy companies and the private business interests of existing leaders or their cronies. The less centralised post-election power structure may be more susceptible to corrupt influence from these quarters.

⁴⁰ See Wai Moe and Ba Kaung, "Junta puts more State-owned properties up for sale", *The Irrawaddy*, 22 January 2010; "Burmese tycoon takes over fuel imports and sales", *The Irrawaddy*, 27 January 2010; "Myanmar moves to privatise key State enterprises", *The Wall Street Journal*, 19 February 2010; "Burma to privatise ports", *The Irrawaddy*, 26 February 2010; Ba Kaung, "Selling off the State silver", *The Irrawaddy*, vol. 18, no. 3, March 2010; "Myanmar's ruling junta is selling State's assets", *The New York Times*, 7 March 2010; and Aung Thet Wine, "Junta transferring State enterprises to holding company", 10 March 2010.

⁴¹ A party that spent the maximum permitted per candidate and fielded candidates in all national and regional constituencies would need some \$10 million. The value of the assets being sold off is many hundreds of millions, if not billions, of dollars.

This could have a critical impact on the post-election political economy and in some ways more significance for the political landscape than the elections. As has happened in Indonesia, Thailand and elsewhere in the region, it means that while the military and its budget may gradually come under the control of politicians, its off-budget resources will give it – and the old military elite – considerable autonomy and political influence for the foreseeable future.

Few private-sector actors have the necessary resources to acquire these assets. This means that there is a risk some will be acquired by cartels seeking to launder profits from the drug trade, deepening the links between criminal enterprises in the lawless hinterlands and the mainstream economy. It also risks extending the reach of overseas business interests – predominantly Chinese and Taiwanese, but also Indian – in the domestic economy, something that is already leading to tensions in upper Myanmar.

B. ETHNIC TENSIONS

Ethnic ceasefire groups have come under increasing pressure from the regime over the last year to transform into “Border Guard Forces” under the partial control of the military. The authorities have repeatedly extended the deadline, but despite considerable pressure, no major ceasefire group has yet agreed. When the various ceasefires were concluded, and repeatedly since, the authorities have indicated that, as an interim administration, they did not have the authority to discuss a political settlement; this would be the responsibility of a future elected government. The groups – recognising that their weapons are their key bargaining chip and guarantee of security in the interim – have been unwilling to disarm without such a political settlement. Their concern is that they are being asked to take a significant step to reduce their autonomy, though they have had almost no influence over the constitutional process and have not been given any political guarantees.⁴²

The military’s August 2009 move against the Kokang group, which sent 37,000 people fleeing into China, alarmed many of the other groups, as well as the Chinese authorities.⁴³ Rather than a broader initiative to confront the ceasefire groups militarily, it was more likely an opportunistic step to seize territory by taking advantage of internal divisions in the Kokang. It also sent a message to the other ceasefire groups ahead of further talks. These

groups have sent their own messages to the regime, putting their forces on alert and making it known they are preparing to fight. Both sides have an interest to appear tough ahead of negotiations, but all are keen to avoid military conflict. A war would not be sustainable for the ceasefire groups, particularly given China’s emphasis on maintaining border stability.⁴⁴ For the regime’s leaders, it would undermine what they see as their main legacy of bringing the hinterlands under central control and ending the fighting that has plagued the country since independence. The risk, however, is that with increased militarisation and tension, the situation could easily flare up.

At the same time, most ceasefire groups have either established proxy parties to contest the elections or are encouraging or endorsing ethnic parties to do so. For example, the Kachin State Progressive Party has close links to the two main Kachin ceasefire groups (the leader of the party, Dr Tu Ja, is the former vice chairman of the Kachin Independence Organisation), and a Pa-O political party (the Pa-O National Organisation) is closely connected to the ceasefire group of the same name. A number of ethnic parties had previously indicated that they would focus on the region/state level; but that strategy has shifted, with a number of these parties aiming to contest all constituencies (national and regional) in their areas. This makes sense: the electorate will vote for all three legislatures, so parties stand to gain more influence if they contest at all levels, provided they have the candidates and resources to do so.

There is still a feeling, however, that with the new constitution concentrating power at the national level, the authorities may allow greater political space at the state/region level, where they may likewise find it harder to control outcomes. At a minimum, this means most legislators in the states will be ethnic, as probably will be many of the (non-security) ministers in state governments. For this reason, many ethnic leaders believe that even though the devolved powers will be very limited, it will be possible to promote ethnic languages in schools, open private ethnic schools, establish ethnic-language media outlets and promote ethnic culture and identity more broadly. That would be only limited progress, but it would not be insignificant, since there is little space for ethnic aspirations today.

By contrast, ethnic organisations still actively engaged in armed conflict against the regime (the Karen National Union, Shan State Army–South, and Karenni National Progressive Party) have rejected the constitutional process and elections.⁴⁵ While they are prohibited by law from

⁴² Crisis Group interviews, representatives of a number of ceasefire groups, January–July 2009.

⁴³ See Tom Kramer, “Burma’s cease-fires at risk: consequences of the Kokang crisis for peace and democracy”, Transnational Institute, September 2009.

⁴⁴ For detailed discussion, see Crisis Group Asia Report N°177, *China’s Myanmar Dilemma*, 14 September 2009.

⁴⁵ The head of the Karen National Union said, “these elections will only compound the suffering of our ethnic people” and urged the international community to denounce them and refuse

participating, it would still be possible for them to endorse proxy parties that would stand on an ethnic-rights platform. But their approach seems to be one of boycott rather than pragmatic attempts to gain as much as possible from the flawed electoral process. In any case, given that the registration law provides for the deregistration of any political party having direct or indirect links with these armed groups, an endorsement of registered political parties would be very risky.

Recently, a number of bomb blasts – including a deadly grenade attack during the annual Burmese new year celebrations, and explosions at the construction site of a controversial hydroelectric dam in Kachin state – have highlighted simmering tensions across the country. However, it is unlikely that any militant group, Burman or ethnic, has the capacity to derail the process.

C. REGIME STRATEGY

In late April, Prime Minister Thein Sein and more than twenty ministers and deputy ministers resigned from the armed forces and applied to the election commission to register a political party. The entity, the Union Solidarity and Development Party (USDP) is an offshoot of the junta's Union Solidarity and Development Association mass organisation. Under the party registration law, civil servants and members of the armed forces are prohibited from forming or being members of political parties, and parties are prohibited from accepting or using direct or indirect state support, including money and property.⁴⁶ This is why these people had to resign their commissions, but they look set to retain their cabinet posts, as the election commission has controversially claimed that ministers are not civil servants.⁴⁷

Many concerns have been aired about the possibility of state funding and other support to the party, given its very close links to the regime.⁴⁸ There are already strong indi-

to recognise the results. "Myanmar guerrilla chief warns of war ahead of vote", Associated Press, 19 March 2010; a Shan State Army-South representative said, "we will not participate in elections – they are their elections". "Elections mean nothing to Myanmar's ethnic armies", Reuters, 10 February 2010.

⁴⁶ See 2010 Political Parties Registration Law, §§4(d), 10(d) and §7(c), 12(a)(v). The laws governing the 1990 elections had similar provisions. See 1989 Pyithu Hluttaw Election Law, §10(l) and 2010 Pyithu Hluttaw Election Law, proviso to §10(k).

⁴⁷ See "US Assistant Secretary of State meets SPDC Spoke Authoritative Team, Foreign Affairs Minister, Science and Technology Minister, UEC Chairman, Labour Minister, USDA Secretary-General in Nay Pyi Taw", *New Light of Myanmar*, 12 May 2010, p. 10.

⁴⁸ The USDA has a vast network of offices (more than 15,000) across the country, is well funded, and has a stated membership

of 24 million, around 40 per cent of the population. See its official website at www.usda.org.mm.

cations as to which senior government figures will stand in which areas, as they are campaigning intensively, if informally, there. But if, as seems likely, the party contests all constituencies at national and regional levels (some 1,150 seats), it will have to identify many more candidates.

At the last elections, the establishment party was the National Unity Party, the successor to the socialist party that had ruled the country prior to the 1988 uprising. It was not, as often claimed, a proxy of the military regime (which had explicitly rejected the failed socialist policies of the past); but of all the parties that contested the 1990 elections, it was the one the regime would have been most comfortable with. Such was popular disaffection though, that it obtained only 21 per cent of the votes and very few seats. In 2010, the USDP will compete alongside, and possibly against, the National Unity Party, which has distanced itself even more from the authorities over recent years.

Given its massive unpopularity, the regime will be aware that the USDP will likely fare poorly. It will be reassured by the military's bloc of reserved seats and also by the expectation that – due to the NLD's absence – the protest vote will be reduced and diluted. Without the main opposition party, many voters may choose not to vote or will cast spoiled ballots. Those that do vote may spread their votes over several non-government parties, none of which may particularly stand out. The regime will hope that the first-past-the-post voting system may translate this into a disproportionately large number of seats for its proxy party, compared with the proportion of votes that it receives.

D. OTHER PARTIES

Many observers have suggested that the military's strategy in 1990 was to encourage as many political parties as possible to register to create a cacophony that would confuse the electorate and split the opposition vote. If so, it spectacularly failed to take account of the massive popular appeal of the NLD and Aung San Suu Kyi. This time, the more restrictive provisions will significantly limit the number of parties that register. Some restrictions have been introduced to create difficulties for existing opposition parties, particularly the NLD. In addition, the authorities may have decided to tighten the legislation in order to limit spurious registrations, reduce the election commission's workload and lessen general confusion. To date, 40 parties have registered (See Appendix B below). In 1990, the permissive rules and certain privileges available meant 235 parties registered, though only 93 were able to nomi-

of 24 million, around 40 per cent of the population. See its official website at www.usda.org.mm.

nate candidates in the required minimum three constituencies, and only 27 won any seats.⁴⁹

One consequence of the tightened registration requirements and non-refundable candidate registration fees is that it is difficult for very small parties to register and contest the elections. There is nothing to prevent independent candidates from doing so, and they avoid some of the costs and many of the restrictions. In 1990, only 87 of the 2,296 candidates stood as independents (six were elected). This time it is likely that the proportion of independent candidates will be higher. There is no deadline by which new political parties must register. However, there is a deadline for the filing of nomination papers by candidates (which the election commission will presumably fix when it sets the election date), that will be a de facto deadline for registration of parties.

So far, few registered parties are in a position to contest a majority of seats across the country. 23 represent specific ethnic groups, mostly concentrated in a small number of townships, and many other parties have parochial support bases. Apart from the USDP and the NUP, only two or three others have the political stature and organisational capacity to run national campaigns; whether they have the financial resources to do so remains to be seen. The prospects for the party organised by former NLD members, which is due to register shortly, are discussed below.

E. WHAT NEXT FOR THE NLD?

In many ways, the NLD's decision not to contest the elections is understandable. Its landslide victory in 1990 was never implemented and has now been brushed aside.⁵⁰ None of its concerns about the constitutional and electoral process were taken into account. Many of its prominent members serving prison sentences would have to be expelled from the party – possibly including Aung San Suu Kyi.

A number of senior party members argued for a different approach, but the internal debate was cut short by an intervention from Aung San Suu Kyi, conveyed by her lawyer directly to the media. A week before the party met to decide about participation, Nyan Win – who is also a member of the central executive committee – emerged from a meeting with his client to report that she “would not even think of registering” the party.⁵¹ It was inconceivable that the NLD would go against her wishes. In

what it described as a “show of unity”, it scrapped plans for a secret ballot and decided unanimously not to contest the elections. Chairman Aung Shwe, known to favour participation, did not attend the meeting.

While there has been widespread sympathy with the NLD's stance, there has also been considerable criticism, particularly of its broader strategy.⁵² Two issues in particular can be pointed to.

First, a potential opportunity to take the political initiative was missed. The party could have notified the election commission on the 6 May deadline that it wished to continue to operate. This would seemingly not have required any expulsion of imprisoned members, including Aung San Suu Kyi, since parties have a further 90 days to meet requirements and submit lists of members.⁵³ This would have given until early August to apply to the commission on her status (a decision on whether house arrest is “serving a prison term”) and possibly to ask for decisions on other party members who are in prison.⁵⁴ It would also have given time for international and domestic efforts to push for releases from prison before the 90-day deadline. There would have been nothing to prevent the NLD from deciding at the end of this period not to contest the elections, or even to find ways to meet the legal requirements without expelling imprisoned members – for example, by elevating them to an honorary committee or some such.

Secondly, the manner in which the NLD reached its decision – unanimous rejection following public comments by Suu Kyi – will tend to undermine democrats who do contest the elections. An alternative scenario would have

⁴⁹ 1990 election statistics from Khin Kyaw Han, “1990 Multi-party Democracy General Elections”, at www.ibiblio.org/obl/docs4/1990_multi-party_elections.pdf.

⁵⁰ Section 91(b) of the 2010 Pyithu Hluttaw Election Law declares the 1990 results “automatically invalidated”.

⁵¹ Ba Kaung, “Suu Kyi against NLD joining elections”, *The Irrawaddy*, 23 March 2010.

⁵² See, for example, Martin Petty, “Has Myanmar's NLD shot itself in the foot?”, Reuters, 29 March 2010; Trevor Wilson, “Burma's National League for Democracy: A fateful choice?”, eastasiaforum.org, 30 March 2010; “Whether 'tis nobler: The opposition's boycott of planned elections is understandable and principled – but still regrettable”, *The Economist*, 31 March 2010; “Editorial: End of the road?”, *The Irrawaddy*, 31 March 2010; Khin Maung Swe, “The NLD's long march”, *The Irrawaddy*, 6 April 2010.

⁵³ According to the 2010 Political Parties Registration Bylaws, parties were required to submit this notification on form E-1, which requests information on the leader and deputy leader of the party (that is, Chairman Aung Shwe and Vice-Chairman Tin Oo, not General-Secretary Aung San Suu Kyi). A harsh reading of the law could potentially allow the regime to abolish the party at any time after the election commission's approval, for failing to meet the requirements under §10; however, it seems likely that in practice the commission could only act after being notified by a party of its list of members.

⁵⁴ For example, the commission could have been asked to rule on whether any party members who have completed their sentences but are still being held under the 1975 state protection law or other emergency powers of the executive count as “serving a prison term as a result of a conviction in a court of law”.

been to reject the elections but endorse another party (perhaps made up of younger leaders in favour of contesting) to stand on a similar platform. Such a new party would have been perceived as carrying forward the NLD's struggle – allowing the NLD to stick to its principles but also face the regime on its own playing field, by putting up a challenger that included a link to Suu Kyi.

A number of NLD leaders have decided to form a new party (provisionally called the National Democratic Force) in the wake of the NLD's deregistration, but they were concerned that it might be portrayed as splitting the NLD, undermining the unanimity of its decision and going against Suu Kyi's wishes.⁵⁵ The same may be true for NLD members who stand as independents. This would further strengthen the regime's hand in the elections. These concerns have been validated by critical comments on the new party by senior NLD figures, including some attributed to Suu Kyi.⁵⁶

It seems clear that emotion – including loyalty to Suu Kyi and a desire to confront the regime – more than strategy drove the NLD's decision not to participate. Win Tin, a party figure of enormous stature and a key proponent of non-participation, made this clear in a media interview explaining the decision, when he likened the regime to “a political rapist” intent on destroying the party by stripping it of its earlier election victory.⁵⁷

A separate question is what message the NLD has sent to the electorate. While the party has stopped short of calling for a voter boycott, some members have done so, and observers have noted that the party's decision will be seen by many as a signal not to vote.⁵⁸ Others who do vote will be deprived of an obvious pro-democracy choice.⁵⁹ The risk is that the democratic vote will be weakened and divided, hurting candidates not aligned with the regime, so narrowing the range of voices in the legislatures. Since

there is no stipulated minimum voter turnout, a boycott cannot prevent a candidate from being elected.

What will be the NLD's future? It has been automatically deregistered following the 6 May deadline, making continued party activities illegal. The party has suggested that it will transform itself into a social organisation, “working on social welfare programs for the people as well as programs to provide aid and protect people from suffering ... our party won't just sit and watch”, in the words of Win Tin.⁶⁰ There have also been suggestions that it will become an underground political movement.⁶¹

Either approach carries considerable risk. It would be very difficult for an illegal party to conduct social welfare activities, and recipients of such assistance would be in an exposed position. A confrontational underground strategy would be very different from the party's longstanding political posture, so perhaps one that it is not well-equipped to pursue. If it attempts both approaches, “social programs that have a political purpose” in the words of one NLD leader,⁶² the risks would be even higher. The politicisation of its social assistance would not only put recipient communities at risk, but also threaten the work of non-political NGOs and civil society organisations, perhaps seriously undermining humanitarian space at the grassroots level.

Regardless of the party's future, however, Aung San Suu Kyi will continue to wield considerable moral and political authority, within the country and internationally. Indeed, the fact that she is no longer associated with the opposition could potentially enhance her role as a national figure, standing above party politics. She had contemplated taking such a step in the past, when the dialogue between her and the regime appeared to have some momentum, but had been reluctant to abandon her party – a concern that is no longer relevant.

F. THE INTERNATIONAL COMMUNITY

The international reaction to the electoral laws was fairly strong. Notwithstanding its new engagement-oriented stance towards Myanmar, the U.S. said it was “deeply disappointed” with the party registration law, calling it “a step in the wrong direction” that “makes a mockery of the democratic process”, and noting that “given the tenor of the election laws that they put forward, there's no hope

⁵⁵ Crisis Group interviews, April 2010.

⁵⁶ See Ko Htwe, “Suu Kyi criticises NDF faction”, *The Irrawaddy*, 14 May 2010; “Win Tin calls NDF ‘crows in peacock feathers’”, *Mizzima News*, 14 May 2010.

⁵⁷ See “‘The regime is a political rapist’: Win Tin”, *The Irrawaddy*, 3 April 2010.

⁵⁸ Senior party member Win Tin has been reported as suggesting that the NLD would lobby for a boycott by the electorate following deregistration. Saw Yan Naing, “NLD apologizes for failed struggle”, *The Irrawaddy*, 6 April 2010. Party members in some parts of the country have also been reportedly distributing leaflets with the message “citizens have the right not to vote”. Min Naing Thu, “NLD focuses on electoral rights”, *Mizzima*, 14 May 2010.

⁵⁹ See Aung Htet Wine, “People sad to see NLD go, uncertain about future”, *The Irrawaddy*, 30 March 2010; Khaing Thwe, “Many won't vote without NLD”, *The Irrawaddy*, 6 April 2010.

⁶⁰ See Myint Maung, “NLD to plunge itself headlong into social work”, *Mizzima News*, 2 April 2010.

⁶¹ Saw Yan Naing, “NLD to survive as ‘political movement’, leaders say”, *The Irrawaddy*, 31 March 2010.

⁶² Ohn Kyaing, quoted in Ko Htwe, “NLD will cease to exist: CEC”, *The Irrawaddy*, 1 May 2010.

that this election will be credible”.⁶³ The then UK Prime Minister Gordon Brown stated that “sadly, the Burmese regime has squandered the opportunity for national reconciliation”; his spokesperson added that “regrettably, recent announcements mean there is no prospect of [the elections] being free, fair or inclusive”.⁶⁴

UN Secretary-General Ban Ki-moon, who convened a meeting of the Group of Friends on Myanmar to discuss the issue, stated that “all the political prisoners, including Daw Aung San Suu Kyi, should be released as soon as possible, so that all of them can take part in elections . . . Without the participation of Daw Aung San Suu Kyi and all key political prisoners the elections would not be inclusive”.⁶⁵ At a UK-proposed informal Security Council briefing on Myanmar on 24 March, divisions were clear: while the UK defended the need for Council scrutiny, saying that the laws “fell short of the expectations set up in previous [Council] statements”, China said that elections in any country were a domestic matter, and it was “very important for the international community and the Security Council to help Myanmar promote a constructive, healthy environment conducive to the coming general election”.⁶⁶

The chairman’s concluding statement at the Association of South East Asian Nations (ASEAN) annual summit in April avoided direct criticism, saying only that the grouping “underscored the importance of national reconciliation in Myanmar and the holding of the general election in a free, fair, and inclusive manner, thus contributing to Myanmar’s stability and development”.⁶⁷ A number of member states had earlier expressed strong criticism of the electoral laws. Philippines Foreign Secretary Alberto Romulo told the media that “unless they release Suu Kyi and allow her and her party to participate in the elections, it’s a farce and, therefore, contrary to their Road Map to Democracy”.⁶⁸ Critical comments were also made by Indonesia and Singapore. Side-stepping the past practice of mutual non-interference, the Indonesian foreign minister, on a trip to Myanmar, said his government supported

an election that was credible, free, participatory and inclusive.⁶⁹

In May, US Assistant Secretary of State Kurt Campbell made his second trip to Myanmar (the first was in November 2009). He was able to meet with Aung San Suu Kyi, but his sessions with the government were at ministerial level only. At the end of his trip, he expressed “profound disappointment” with the response of the leadership and on the elections noted: “Unfortunately, the regime has chosen to move ahead unilaterally – without consultation from key stakeholders . . . [a]s a direct result, what we have seen to date leads us to believe that these elections will lack international legitimacy. We urge the regime to take immediate steps to open the process in the time remaining before the elections”.⁷⁰ A detailed account of his official meetings was published in the Myanmar state media.⁷¹

It is important that governments continue to voice their concerns about the electoral process and highlight where it fails to meet international norms and expectations. With the constitution and electoral legislation in place, there is limited scope to influence the process. The authorities could still take some steps that would have a significant impact, however, including a mass amnesty for political prisoners that would permit them to participate if they chose, and allowing space for parties and candidates to campaign, including access to the domestic media.

It is also important that, while criticising its flaws, governments not dismiss the process. Many political actors have made clear that they do not believe it is worth participating. But many others are taking considerable risks by attempting to make the best of a bad situation and thereby to maximise the diversity of views in future legislatures. They are fully aware of the constraints but do not believe that participation is futile. If governments dismiss the process out of hand, this will tend to undermine rather than strengthen the position of these democrats in the legislatures. It will also be critical after the elections to engage the new Myanmar government on the multiple challenges – political, economic, social and human rights – that the country faces and to push for necessary fundamental reforms. This will be much harder if the elections have been condemned in advance as a step backwards, rather than the flawed but small step forward that they probably represent.

⁶³ “U.S. calls Myanmar election laws ‘a mockery’”, Reuters, 10 March 2010.

⁶⁴ Andrew Woodcock, “Gordon Brown laments ‘unfair’ Burmese election”, *The Independent*, 30 March 2010.

⁶⁵ Unofficial transcript of Secretary-General’s press encounter upon return from Chile, New York, 8 March 2010.

⁶⁶ “Security Council mulls Myanmar’s electoral laws”, Agence France-Presse, 24 March 2010.

⁶⁷ Chairman’s statement, sixteenth ASEAN summit, Hanoi, 9 April 2010, para. 50.

⁶⁸ “New Burma election law criticised by Philippines Foreign Secretary”, *Business Mirror* (Manila), 12 March 2010.

⁶⁹ “Press Interview Transcription Minister of Foreign Affairs, Yangon”, Indonesian foreign ministry, 1 April 2010.

⁷⁰ “Assistant Secretary Campbell’s Remarks on Visit to Burma”, U.S. Department of State, Yangon, 10 May 2010.

⁷¹ *New Light of Myanmar*, 12 May 2010, pp. 5–7, 10.

IV. WHAT WILL HAPPEN AFTER THE ELECTIONS?

A. THE PROCESS OF FORMALLY TRANSFERRING POWER

The formal transfer of power will likely not occur for several weeks after the election, and possibly up to three months. On election day, voters will choose three-quarters of the representatives in the three legislatures; the remaining one-quarter will be appointed by the commander-in-chief (Than Shwe). The current State Peace and Development Council regime will exercise sovereign powers until the 2008 constitution comes into force, and a new government is in place.

The next step will probably be the convening of a special session of the Pyithu Hluttaw (the lower house), which will mark the formal start of the five-year legislative term; a chairperson will be elected.⁷² Not more than seven days after that, the first regular session of the Amyotha Hluttaw (the upper house) will be held. Representatives will take an oath of office, after which they will elect a speaker, who will also serve as the speaker of the Pyidaungsu Hluttaw (the national legislature, comprising the lower and upper houses).⁷³

Shortly thereafter, the speaker will convene the first regular session of the Pyidaungsu Hluttaw. Only then will the 2008 constitution come into force. At this point, the president and vice-presidents will be elected by the Pyidaungsu Hluttaw, acting as the presidential electoral college.⁷⁴ The president will then begin the process of selecting the government, although the commander-in-chief (again, Than Shwe, as he will presumably retain that post until power is transferred) will nominate appointees to the key security ministries.⁷⁵ Around the same time, the State Peace and Development Council will convene the first regular sessions of the fourteen region/state legislatures. Representatives will take an oath of office, and the respective speakers will be elected.⁷⁶

The last step in the process of transferring power to a new government will be for the State Peace and Development Council to convene the first regular session of the Pyithu Hluttaw (the lower house), at which it will formally hand over sovereign powers. This must take place within 90 days of the election (possibly it will be on the day the constitution comes into force). The Pyithu Hluttaw representatives will take an oath of office before the chairperson. A lower-house speaker will then be elected, who will take over the functions of the chairperson.⁷⁷ The Pyidaungsu Hluttaw's approval of the members of the government chosen by the president is required before the administration can start functioning, but in practice it will have limited scope to reject his selections.

B. POST-ELECTION POLITICAL DYNAMICS

On 2 March 1974, Ne Win – who had ruled the country for twelve years as head of the Revolutionary Council junta – addressed the first meeting of the Pyithu Hluttaw and declared the formal transfer of state power to the newly-elected assembly. The transition from military junta to socialist one-party state changed little. Ne Win was appointed president, and other junta leaders were assigned positions in the new ruling council.

If all goes according to plan, Than Shwe in a few months will similarly address a newly-elected Pyithu Hluttaw and hand over state power. The central question is what will change as a result. He will not take up a formal role in the new political order, although a few of the younger members of the regime will. Significantly, the constitution divides powers between the president and commander-in-chief, who cannot be the same person, in ways that should prevent the emergence of a new strongman. This appears to be the key to Than Shwe's exit strategy, ensuring that he will not suffer the same fate as Ne Win, whom he arrested, along with his family, in 2002. This, and the fact that the transition is to a multi-party system, not the one-party state of 1974, allows a degree of hope that a gradual political opening can take place. But any such change is unlikely to be fast or unproblematic. The military will retain significant political and economic influence, and even on a best-case scenario, it will take many years to reverse two generations of authoritarianism as well as social and economic stagnation.

⁷² See §119 and §110 of the 2008 constitution.

⁷³ *Ibid.*, §154, §155, §76(a), §143.

⁷⁴ *Ibid.*, §44, §60. This first regular session of the Pyidaungsu Hluttaw must be held within fifteen days of the first session of the Pyithu Hluttaw (§78). However, it is possible that a special session could be convened earlier, to elect the president and vice presidents.

⁷⁵ *Ibid.*, §444(a).

⁷⁶ *Ibid.*, §172a, §173a. These sessions must also be held within fifteen days of the first session of the Pyithu Hluttaw (§171b).

⁷⁷ *Ibid.*, §124(a), §123, §125(a). An alternative and simpler sequence for the transfer of power would be a regular session of the Pyithu Hluttaw (must be within 90 days of the elections), followed by regular sessions of the Amyotha Hluttaw and the Pyidaungsu Hluttaw. This, however, would contradict §124(a), which provides that the first regular Pyithu Hluttaw session is to be held only once the constitution enters into force – that is, after the first session of the Pyidaungsu Hluttaw (§441).

Much will also depend on how the new government chooses to handle the ethnic issue. If ethnic parties do well in the elections and are able to have a reasonable influence over policies in their areas – in particular, through appointment of credible ethnic figures as ministers in region/state governments – this could lay a foundation for discussions on broader measures to address grievances, with both cease-fire and non-cessfire groups. But if the new government continues a take-it-or-leave-it approach, demanding disarmament or incorporation into the national army without offering any political solutions, and uses the legitimacy conferred by its elected status to try to solve the conflict militarily, the stage could be set for a renewed cycle of conflict with major domestic and regional implications. This must be a key element to any engagement with the new government, for which it would be relatively straightforward to secure broad international consensus.

Progress on the many challenges facing the people of Myanmar cannot take place without a sustainable solution to the ethnic question, which has eluded resolution since independence. There have been renewed tensions in the pre-election period, and any political settlement has apparently postponed. The new government must seize the opportunity to address this through negotiation and compromise, or a damaging new phase of military confrontation may ensue. This needs to be a key element of engagement with that government, one around which a strong and broad international consensus can be built.

Jakarta/Brussels, 27 May 2010

V. CONCLUSION

The first elections in twenty years will not bring genuine multi-party democracy to Myanmar. The constitutional and legislative framework is designed to ensure a leading political role for the military, and its control of major economic assets will ensure its autonomy and influence for many years to come. The main opposition party, the NLD, has decided not to participate and has thus been deregistered. Yet, other democrats, including leading figures from the NLD, will contest the elections. Many ethnic parties will also contest, believing that this is the best way to ensure representation of their communities in the political process and to give them some influence over their affairs. These individuals and parties face significant challenges; it is important that they are supported, not undermined.

A new generation of leaders will take the reins of power in Naypyitaw. There will be many familiar faces, but power will be divided between several individuals and institutions. Governance will continue to be authoritarian, but decision-making processes may become more rational and based on greater technocratic input. This would provide important opportunities for domestic and international stakeholders to push not only for political reform, but also for vital social and economic reforms. These opportunities should not be squandered. The new government should be pushed towards greater openness, not further into isolation.

APPENDIX A

MAP OF MYANMAR



APENDIX B

LIST OF REGISTERED POLITICAL PARTIES⁷⁸

1. 88 Generation Student Youths (Union of Myanmar)
2. All Mon Region Democracy Party
3. Chin National Party
4. Chin Progressive Party
5. Democracy and Peace Party
6. Democratic Party (Myanmar)
7. Difference and Peace Party
8. Ethnic National Development Party (ENDP)
9. Inn National Development Party
10. *Kachin State Progressive Party*
11. Kayan National Party
12. Kayin People's Party
13. *Khami National Development Party*
14. Kokang Democracy and Unity Party
15. Lahu National Development Party
16. Modern (or New Era) People Party
17. *Mro National Party*
18. Mro or Khami National Solidarity Organisation (MKNSO)
19. Myanmar Democracy Congress
20. Myanmar New Society Democratic Party
21. National Democratic Party for Development
22. National Political Alliances League
23. National Unity Party
24. *Northern Shan State Progressive Party*
25. Pa-O National Organisation (PNO)
26. Phalon-Sawaw Democratic Party
27. Rakhine Nationalities Development Party (RNDP)
28. Rakhine State National Force of Myanmar
29. *Regional Development Party (Pyay)*
30. Shan Nationals Democratic Party
31. Taaung (Palaung) National Party
32. Union Democracy Party
33. Union Kayin League
34. Union of Myanmar Federation of National Politics
35. Union Solidarity and Development Party
36. *United Democracy Party (Kachin State)*
37. United Democratic Party (UDP)
38. Wa Democratic Party
39. Wa National Unity Party
40. Wunthanu NLD (The Union of Myanmar)

⁷⁸ In alphabetical order, as of 24 May 2010. Parties in italics have not yet been given election commission approval to register.

APPENDIX C

SUMMARY OF THE ELECTORAL LEGISLATION

This condensed overview of the most important provisions in each of the new laws notes which are based on earlier precedents and which are new. The following legislation has been promulgated (official, but non-authoritative English translations have been issued for the five laws, but not for the bylaws):

1. Union Election Commission Law (SPDC Law no. 1/2010)
2. Political Parties Registration Law (SPDC Law no. 2/2010)
3. Pyithu Hluttaw (lower house) Election Law (SPDC Law no. 3/2010)
4. Amyotha Hluttaw (upper house) Election Law (SPDC Law no. 4/2010)
5. Region Hluttaw or State Hluttaw Election Law (SPDC Law no. 5/2010)
6. Bylaws under laws no. 2-5.

1. Union Election Commission Law

- Essentially repeats the provisions in §§398–403 of the 2008 constitution (can be seen as setting out interim arrangements consistent with the constitution, since the constitution is not yet in force).
- Provides that election commission members are appointed by the regime (which has already been done).
- Empowers election commission to designate constituencies, compile voter lists.
- Empowers election commission to postpone/cancel elections in constituencies for reasons of natural disaster or lack of security.
- Provides for the election commission to form election tribunals to hear electoral disputes and objections.
- Section 8(k) gives the election commission powers to regulate the activities of political parties; no such provision was in the 1988 law; this is seen as intrusive by many in opposition, including the NLD.
- Repeals the 1988 Multi-party Democracy General Elections Commission Law (SLORC Law no. 1/88).

2. Political Parties Registration Law (and Bylaws)

- New parties need at least fifteen people as “organisers”, who must sign a declaration (§4) that they meet the stipulated requirements relating *inter alia* to citizenship, age (at least 25), not being a member of a religious order, not being a civil servant, not being a prisoner (§4e), not being a foreigner or naturalized citizen of a foreign country, etc.
- “Prisoner” is defined in the same terms as in the 1989 Pyithu Hluttaw Election Law and the 2008 constitution, as “a person serving a prison sentence resulting from a conviction in a court of law”.
- The citizenship requirement is rather inclusive: citizens, associate citizens, naturalised citizens and holders of temporary (non-citizen) registration certificates can all form or join political parties.
- At the time of applying for registration, parties must submit details on their manifesto/policies and constitution and structure (§5b, c). These may only be changed with advance permission of the commission (Bylaws §24).
- Parties must declare that they will “safeguard the constitution” (§6c), seen as a problematic provision by those who have been critical of the constitution and the manner of its drafting. (Under the Bylaws, Form E-1, existing parties that wish to continue their registration need only make a general commitment to adhere to the provisions of the present law.)
- Party organisers and members must be free of foreign interference (§6f). This sub-section broadens the original characterisation of foreign interference in the 1988 law (§3d) to include “influence” (the Burmese expression used has a very broad meaning) and “direct or indirect” support from foreign countries or organisations. (§407c of the 2008 constitution does not include the term “influence”.)
- Within 90 days of registration, parties contesting at the national level must have signed up 1,000 members and regional parties 500 members. Members must meet the same citizenship requirements, be of age (eighteen) and meet the other requirements as for organisers (§10). This includes the requirement that party members not be presently serving a prison term resulting from a conviction in a court of law (§10e); this is more restrictive than the 2008 constitution, which contains no such provision (see §407).

- ❑ The election commission must be provided with lists of party members per township (on a detailed prescribed form, including all particulars of each member). (Bylaws §13 and forms H and H-1 and their attachments.)
- ❑ Parties are responsible for expelling members who do not meet the stipulated criteria. Failure to do so (or to meet other listed requirements) shall result in deregistration (§12a).
- ❑ There is a party registration fee of K300,000 (about \$300) (Bylaws §7b).
- ❑ Parties must contest at least three legislative seats (in any of the three legislative assemblies). [§12(a)(i); see also Bylaws §16]. The same provision was introduced in advance of the 1990 elections.⁷⁹
- ❑ Parties face deregistration if they have direct or indirect contacts with armed insurgent groups, terrorists or unlawful associations [§12(a)(iii)]. This repeats a provision of the 2008 constitution (§407b). There was no such provision in the 1988 law, although a similar provision in the 1989 Pyithu Hluttaw Election Law (§10h) applied to those standing for election.
- ❑ Parties are permitted to operate commercial enterprises as a source of funds [§15(a)(iii)], a new provision.
- ❑ The election commission is given wide powers to regulate the activities of political parties (§24b). No such powers were given explicitly in the 1988 law, but it did evolve such powers by the time of the 1990 elections.
- ❑ There are limits to the amount that a party may spend as a whole, and per legislative candidate, within each legislative term (§16). The maximum expenditure per candidate is K10 million (about \$10,000) (Bylaws §21).
- ❑ If a party disbands or is deregistered, assets (both funds and property) revert to the state (§19, read together with §2j). This provision is without precedent.
- ❑ Decisions of the election commission are final and conclusive (§20), as previously (1988 law, §8).
- ❑ Existing parties are required to apply to the election commission within 60 days of enactment (by 6 May 2010), if they wish to continue to be registered (§25, and Bylaws §8, Form E-1).
- ❑ Repeals the 1988 Political Parties Registration Law (SLORC Law No. 4/88).

3. Pyithu Hluttaw Election Law (and Bylaws)

- ❑ Almost all provisions are carried over verbatim from the 1989 law. Exceptions are: number of constituencies, right of temporary registration card-holders to vote and standards of conduct for electoral officials.
- ❑ Pyithu Hluttaw (lower house) constituencies (330) are approximately identical to townships, (§4); there are 325 townships; the five most populous will be split into two constituencies.
- ❑ Eligible voters are citizens, associate citizens, naturalised citizens and holders of temporary (non-citizen) registration certificates who have reached age eighteen, are on the electoral roll and are not members of a religious order, currently serving a prison term, of unsound mind, undischarged insolvents, foreigners or naturalised citizens of a foreign country (§§6, 7).
- ❑ To stand for election, candidates must be 25 or over, have lived the previous ten years continuously in Myanmar, be citizens born of parents who were both citizens and not violate the other constitutional restrictions on candidates (§§8, 10).
- ❑ Candidates are required to pay a registration fee of K500,000 (about \$500) (Bylaws §18c).
- ❑ Criteria for listing on the electoral roll are fairly inclusive, including of “those outside the country with government permission” (§14); the electoral roll is published in advance to allow errors and omissions to be corrected, with the possibility of appeal to the township-level election commission (§§16-18).
- ❑ Independent candidates are possible (§9); appointment of election agents is possible as in 1990 (self, or a nominated person meeting the requirements to stand for election) (§§29-30).
- ❑ Date of election to be determined by election commission (§34c), as in 1990 (1989 Law, §28c).
- ❑ Voting is by secret ballot, as before (§35). Advance voting procedures are as in 1990 (§§45-46). Those outside the country vote in advance (§47).
- ❑ Counting is to take place at each polling station in the presence of electoral agents and members of the public, as in 1990 (§48).
- ❑ Election commission officials are granted functional immunity (§87); an identical provision was in the 1989 Law (§80).

⁷⁹ Election Commission Announcement No. 337 of 5 December 1989, requiring each registered political party to contest at least three Pyithu Hluttaw seats

- ❑ Standards of conduct of electoral officials are set out (§§82, 83); these provisions are new.
- ❑ The results of the 1990 elections are declared void (§91b).
- ❑ Repeals the 1989 Pyithu Hluttaw Election Law (SLORC Law no. 14/89).

4. Amyotha Hluttaw Election Law (and Bylaws)

- ❑ Amyotha Hluttaw (upper house) consists of twelve elected representatives (plus four military appointees) from each of the fourteen regions and states (§3), as provided in the 2008 constitution.
- ❑ Amyotha Hluttaw constituencies are based on the combination or subdivision of townships according to a prescribed procedure (§4).⁸⁰
- ❑ Candidates for election must meet the same requirements as for election to the Pyithu Hluttaw, except that they must be aged at least thirty [§8(a)(i)].
- ❑ All other provisions are in line with the Pyithu Hluttaw Election Law.

5. Region Hluttaw or State Hluttaw Election Law (and Bylaws)

- ❑ Region/state legislatures are based on two constituencies per township (formed with approximately equal population without splitting wards/village tracts), plus one constituency corresponding to the whole state/region for election of ethnic candidates under section 161(b, c) of the constitution (§§3, 4).
- ❑ Eligibility requirements on candidates for election are the same as for the Pyithu Hluttaw, including age (§8, 10).
- ❑ Voters who are eligible to elect ethnic candidates under section 161(b, c) of the constitution may vote once for their chosen township constituency candidate and once for their chosen ethnic candidate (§44).
- ❑ All other provisions are in line with the Pyithu Hluttaw Election Law.

⁸⁰There are four states and one region – Chin, Kayin, Kayah, Mon and Tanintharyi – that have less than 12 townships, and in these cases a number of the most populous townships will be divided into two Amyotha Hluttaw constituencies; all other states and regions have more than 12 townships, and in these cases a number of the least populous townships will be combined to form single Amyotha Hluttaw constituencies.

APPENDIX D

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