INTRODUCTION

The collection of case studies examined here illustrates constitutional reform in Chile, Indonesia, South Korea, South Africa and Nepal. Each case highlights how specific political contexts influence and shape processes of constitutional reform and their outcomes.

The case studies shed light on key questions related to constitutional reform that emerge during political transitions: what should the negotiation process look like? How can the process engage and accommodate a broad range of stakeholders, including those who favour the status quo? What opportunities can be created for public participation and outreach? The cases focus in particular on where the military played a significant role, such as in Chile, Indonesia and South Korea. In addition, South Africa and Nepal are included as cases with stronger inclusiveness and transparency of the constitutional reform process.

1. CONSTITUTIONAL REFORM PROCESSES IN COUNTRIES TRANSITIONING FROM MILITARY RULE

Chile, Indonesia and South Korea represent countries in which negotiated transitions from military to civilian governments had a strong constitutional dimension. Despite the different types of processes that they experienced, an important parallel between the cases is the prevalence of elite bargaining and the limited degree of public involvement in the reform process.

1.1 Constitutional Reform Process in Chile: A Negotiated Transition.

The recent political history of Chile offers key insights for countries undergoing a transition from military rule to civilian government. Chile’s military Junta wrote the 1980 Constitution and brought it into force through a closed and non-transparent process. The main purpose of the new Constitution was to provide a framework for Chile’s transition from fully-fledged military rule to a “protected” democracy 1 in which the military would continue to play a leading role. Given its purpose, the 1980 Constitution contained both permanent provisions and transitional provisions. The Constitution’s transitional provisions applied to an eight-year transition period overseen by the military, whereas its permanent provisions were designed to enter into force thereafter. 2 Moreover, the Constitution stipulated that a national plebiscite must be held at the end of the transitional period – that is, in 1988 – in which citizens would vote to extend the term of the incumbent president, General Augusto Pinochet.

The permanent provisions enshrined in the 1980 Constitution aimed to safeguard the role of the military in political life and decision-making. The text provided for the creation of a National Security Council (NSC), four of whose seven members would be high-ranking military officers. The 1980 Constitution mandated the NSC to

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scrutinise all matters deemed to "gravely undermine the basis of the institutional system." In practice, this empowered the NSC to intervene in the affairs and decision-making of civilian state institutions. Moreover, the Constitution’s permanent provisions introduced a complex amendment procedure, further entrenching the role and power of the military.

However, the referendum held at the end of the transitional period resulted in General Pinochet’s defeat. Pinochet’s regime and opposition forces then tabled constitutional reforms in order to transfer power to a civilian government at the next general elections, called in 1989, as provided for in the Constitution. The reforms were discussed within a limited circle of political actors: the opposition, the military government and right-wing conservative political parties that had ties to the Junta. Only 30 people - about a dozen of them legal experts - participated in the negotiation process.

The opposition and the conservative parties aligned with the regime formed a ‘technical committee’ without the involvement of the military, in which they reached consensus on the proposals previously negotiated with the leaders of the Junta. After eight months of protracted, closed-door negotiations, during which each of the parties involved made counter proposals, they reached an agreement that was subsequently put to a referendum. The Chilean electorate approved the constitutional amendment in June 1989.

A new civilian seat was introduced to the NSC, balancing the number of civilian and military representatives on the Council (four civilian, four military). Moreover, some of the NSC’s decision-making powers were brought under the direct control of the President. These concessions were made by the opposition parties with the aim of progressively reducing the involvement of the military in politics.

The constitutional amendment process in Chile was characterised by limited public participation and consultation. Nevertheless, the amendments enjoyed broad support and legitimacy, which showed clearly when supported by 85% of voters in the 1989 referendum. With


4 The Organic Constitutional Law of the Armed Forces required a four-sevenths majority in both the Upper House and Lower House of Parliament to be amended.

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The approval of the amended constitution represented a success for the opposition, as it removed or amended a substantial number of the authoritarian provisions written into the 1980 constitution and paved the way for a civilian government to take office after the 1989 elections. However, the parties to the negotiation process agreed to maintain a number of provisions – and in some cases introduce new measures – guaranteeing a privileged role for the military. For example, the successful promulgation of the Organic Constitutional Law of the Armed Forces secured the military a considerable degree of institutional and financial autonomy, as well as limited civilian oversight, with limited risk of future amendment.

Opposition parties agreed to retain the number of military-appointed senators in the Upper House of Parliament in exchange for an increase in the number of directly elected senators. This saw the number of elected representatives in the Upper House rise from 26 to 40 senators, reducing the influence of military representatives in decision-making. Similarly, opposition forces compromised on the National Security Council, agreeing to maintain the body with its composition and mandate substantially modified.
the military determined to secure its power and privilege, it is unclear whether attempts at broad-based public participation and consultation could have changed the constitutional reform process or its outcomes.

Twenty-five years after the beginning of the democratic transition, the 1980 Constitution remains in place. Since its first amendment in 1989, however, the Constitution has undergone further substantive modifications through more inclusive reform processes. The constitutional reform process is now entering a new phase as Chile seeks to replace the amended 1980 constitution. Responding to increased demand from its citizens, the current Chilean government is seeking to introduce a new Constitution through an inclusive and participatory reform process.

1.2 Constitutional Renewal in Indonesia: A Step-by-Step Process

While in the past successive authoritarian governments in Indonesia used the 1945 Constitution to legitimise their rule, the Constitution has become the main basis of democratisation in recent years. Written in only 20 days, the 1945 Constitution was originally designed by the leaders of the struggle for independence as a temporary, emergency document to assert Indonesia’s identity and independence; it was not intended to establish a long-lasting democratic system of governance. The context in which the document was written and promulgated helps account for the flaws that enabled authoritarian governments to use the text to justify their grip on power. Nevertheless, a majority of Indonesians continue to broadly support the 1945 Constitution, as they consider it to be an almost sacred document that embodies the nation’s independence and identity. This context helps explain the unique way that the constitutional reform process unfolded between 1999 and 2002.

The need for constitutional renewal arose out of the collapse of President Soeharto’s authoritarian regime in May 1998. The first steps of the transition included: 1) the repeal of five repressive laws, 2) the release of political prisoners, 3) the strengthening of freedom of press and expression, and 4) the adoption of new laws on general elections, registration of political parties and the composition and structure of national and regional legislatures. Upon the request of interim President Bacharuddin Habibie, a group of professors known as “Team Seven” crafted new laws related to these issues through a closed-door process, before being ratified by the Parliament in November 1998. These initial steps represented an effort to secure basic freedoms and contribute to a free and open atmosphere in which constructive debates about future reforms could take place.

Constitutional reform only emerged as a priority for the transition process after general election in April 1999. Given the continued symbolic importance of the 1945 Constitution, the various factions in Indonesia’s Parliament unanimously agreed to amend the text, rather than draft an entirely new constitution, and to maintain the preamble that set out the unitary state structure and the presidential system of governance. Due to the continued involvement of the military in politics, the parliamentary factions designed a process that allowed for gradual, closed-door negotiations that could accommodate the military. A progressive reform process (i.e. a series of amendments) was agreed upon as the method through which to conduct the constitutional reform process. No specific time frame was defined or target set for the amendment process to be completed.

According to the provisions of the 1945 Constitution, the body in charge of amending the Constitution was the People’s Consultative Assembly (PCA). Composed of 700 members in total, the PCA included 500 Members of Parliament and 200 appointed delegates including 135 regional representatives appointed by provincial parliaments, and 65 representatives from civil society groups appointed by the president.

The PCA negotiated, drafted and ratified the first amendment over the course of 12 days in October 1999. The first amendment sought to remove the risk of authoritarian relapse, in particular by limiting powers of the President and investing more power in Parliament. A 25-member PCA committee was tasked with preparing and drafting the amendment proposal. Drafted in four days, the proposal was then discussed by a commission of 171 PCA members before a plenary session subsequently discussed and approved it. Despite its limited scope and public participation, the first amendment represented an important legal and symbolic achievement. In particular, its changes to the balance of power between the executive and the legislative branches signalled that the 1945 Constitution could not only be reformed, but could become a viable basis for Indonesia’s democratisation.

With the ratification of the first amendment, the PCA established the Panitia Ad Hoc I (PAH-I), a PCA committee specifically tasked with further reviewing the constitution. The PAH-I examined each provision of the 1945 Constitution and submitted a draft of a second amendment to the PCA in August 2000, proposing to amend 16 chapters of the Constitution. However, when the draft amendment was discussed in plenary, the members of the PCA only succeeded in reaching consensus on seven
of the chapters. In order to avoid deadlock and secure the agreed changes, the PCA opted to ratify immediately the provisions on which its members had agreed, leaving the more contentious issues for later discussions. The second amendment succeeded in granting greater powers to the Parliament and further decentralising power in Indonesia. Most significantly, the amendment introduced a genuine Bill of Rights that marked a crucial step in Indonesia’s transition to democracy.

The PAH-I then reviewed the proposed changes that the PCA did not ratify as part of the second amendment. These were discussed between September 2000 and October 2001 and the support of an expert team was sought to find alternative solutions. During this third amendment process, PAH-I Chairperson Jakob Tobing played a decisive role in facilitating inter-party dialogue and negotiations between senior members of the PAH-I. Members of the PCA managed to reach agreement on all but two issues, which – as in the previous amendment round – were postponed for future amendments. The third amendment succeeded in securing 1) a balanced system of government, 2) a bicameral legislature, 3) guarantees for judicial independence and 4) a Constitutional Court, thereby creating a referee for the new political-constitutional process. Overall, the third amendment strengthened the democratic features of the 1945 Constitution through the introduction of crucial checks and balances in Indonesia’s political system.

By allowing key actors (conservative parties, pro-democracy parties and the military) to gradually build trust among each other, the reform process facilitated the peaceful retreat of the military from political life. The first step in this process was the reduction of the number of military appointees in the parliament from 75 to 38. As part of the second amendment, it was agreed that as of 2009, the parliament would be solely composed of elected representatives. Finally, during debates regarding the fourth amendment, which was adopted in 2002, the military declared that it would fully withdraw from politics and all representative institutions before the 2004 elections.

Constitutional reform in Indonesia unfolded gradually and represented an exclusive and largely opaque process. The factions represented in the PCA made the majority of the decisions that shaped the process, with limited space for outside stakeholders to voice their preferences. Despite the handful of attempts that the PCA made to include the public in the second and third amendments, constitutional reform remained a high-level political process only. The PCA held several public consultations; however, these outreach efforts were largely limited to urban areas, and discussions therein were largely dominated by local government officials and community leaders. Crucially, the process suffered from the absence of a clear roadmap, which made it difficult for the public to follow and contribute at key points.

Despite the non-participatory nature of the reform process, Indonesia succeeded in transforming the 1945 Constitution into a democratic document in less than four years. Through four consecutive rounds of amendments, the reforms defined new rules for the political process and drastically changed Indonesia’s institutional landscape. Given the long-standing involvement of the military in politics, this step-by-step approach represented a pragmatic way forward.

1.3 Transition from Military Rule in South Korea: A Process Initiated by the Civil Society, Negotiated by the Political Elite and Controlled by the Military.

Following the independence of South Korea in 1948, a succession of military-led regimes governed the country until the late 1980s. This military monopoly of politics was only interrupted by a handful of popular uprisings calling for democracy. Each of these uprisings were repressed. Exploiting the long-standing military tensions with North Korea, successive military regimes in Seoul used the threat of war to justify and perpetuate restrictions on human and political rights.

Constitutional instability remained a constant in military-ruled South Korea, with the constitution of the country undergoing nine substantive amendments since 1948. With every change of regime, the Constitution underwent revisions to reinforce the new military leadership and strengthen the powers of the new leader. The presidents further consolidated their positions through repressive legal means, such as emergency powers and national security laws.

A series of large-scale corruption cases weakened the military regime of Chun Doo-Hwan during the mid-1980s. As the regime faltered, the middle class, whose ranks had swollen with the country’s economic growth, turned against Chun. However, it was the torture and killing of a young political prisoner in 1987 that triggered mass protests and led to the popular movement known as the ‘June Democratic Uprising’. For the first time in South Korea’s history, student movements and worker unions gained the support of the middle class and opposition parties. Joining forces, they took to the streets and demonstrated against the military dictatorship.

The constitutional reform process in South Korea took place over four months and unfolded in four different steps.

1. The first step of the process was the so-called “Eight Member Political Talks” (EMPT), during which leaders of the military regime and the two main opposition parties (then working as a coalition) negotiated a proposal for a constitutional amendment. The EMPT took place behind closed doors over a four-week period. On certain issues, such as the design of the Constitutional Court, the EMPT


did not begin discussion and negotiation from square one; instead, it started from the 1960 constitution, which had never entered into force due to the 1961 military coup.

The second step involved the establishment of a Special Committee for Constitutional Revision in the National Assembly. The official aim of the Committee was to solicit the input of minor opposition parties for the proposal upon which the EMPT had agreed. However, the limited time allocated for this task proved insufficient to offer smaller parties genuine opportunities to pursue fundamental changes. In practice, the main purpose of the Committee was to draft a formal constitutional amendment bill based on the proposal upon which the EMPT had agreed.

The National Assembly adopted the bill in a plenary session on 18 September (step three), before the people ratified it via a referendum on 27 November 1987 (step four). While the constitutional reform process in South Korea modified the existing constitution rather than creating an entirely new one, the 1987 amendment process yielded significant democratic improvements. The changes reduced the powers of the president, establishing a five-year, non-renewable term. Additional changes included 1) an increase of the parliament’s powers, including the right to impeach the president, 2) constitutional recognition and protection of human rights, such as the freedom of expression and the right to fair trial, and 3) the establishment of an independent constitutional court.

The revised Constitution also enshrined in its Article 5 a new role for the military that was the result of a compromise reached during the negotiation. It reads: “the armed forces shall be charged with the sacred mission of national security and the defence of the land, and their political neutrality shall be maintained”. Similarly, the constitutional amendment restricted the use of emergency powers, mitigating the risk of authoritarian backsliding.

Further reforms were necessary to advance democratic practices in the country. Benefitting from competition between the two main opposition parties, Roh Tae Woo, the former military general and the handpicked successor of Chun, became the first president under the new constitutional framework after winning the 16 December 1987 elections. The Roh government (1987-1992) undertook very limited democratic reforms; however, it succeeded in building a coalition government with opposition parties, thereby demonstrating a respect for the new constitutional framework and breaking with former governments’ use of emergency powers to marginalise the opposition.

It was not until the early 1990s that the most meaningful reforms were pursued. The Kim Young Sam government (1992-1997) dissolved the Hanahoe faction, an influential group of politicised military leaders that was in favour of continued military involvement in politics. In addition, the Kim Young Sam administration charged former Presidents Chun and Roh with political corruption and treason for their role in the massacre and bloody repression that occurred during the era of military dictatorships.

Under the two subsequent presidents, Kim Dae Jung (1997-2002) and Roh Moo Hyun (2002-2007), South Korea saw the establishment of a National Human Rights Commission, new regulations for the funding of political parties, public administration reforms and anticorruption campaigns, among other initiatives to further democratise the state. The Constitutional Court played a key role in the reform process that gathered momentum in the late 1990s and early 2000s, delivering rulings on the strict control of emergency powers.

The constitutional reform process in South Korea represented a compromise toward limited democratisation. Civil society requested the changes through demonstrations, the leaders of the two main opposition parties and the military negotiated and implemented them. While the 1987 constitutional amendment constituted a significant advance for democracy, continuous political and legal reforms in subsequent decades proved necessary to consolidate democratic practices. As in Chile, there remains an ongoing debate regarding further reforms of the constitutional framework through an inclusive and participatory process. However, such proposals have not yet received sufficient support in parliament to be pursued.

2. CONSTITUTIONAL REFORM PROCESSES WITH BROAD BASED PUBLIC REPRESENTATION IN POST-CONFLICT COUNTRIES

South Africa and Nepal both pursued constitutional reform following sustained periods of civil unrest and conflict. While public participation featured strongly in the constitutional reform processes in both countries, the role and overall success of this participation differed considerably between the two.

2.1 The South African Experience: A New Constitution Through an Inclusive and Participatory Process

The constitutional reform process in South Africa began with the Convention for a Democratic South Africa (CODESA) in 1991, a series of multi-party dialogues aimed at finding common ground for the country’s future. This national dialogue was followed by a Multi-Party Negotiation Process (MPNP), during which political parties outlined a roadmap for constitutional reform and agreed upon 34 binding constitutional principles to guide the process. With the promulgation of an interim constitution in November 1993 – a document devised to ease and frame the transition process – all citizens gained the right to elect representatives to the National Constituent Assembly (NCA). Subsequently, exercising their voting rights in the April 1994 General Election, South Africans elected 490 representatives to the NCA from all major political parties and liberation organisations.

After organising its work through the establishment of thematic committees – each of which was tasked with drafting a chapter of the future constitution – and a coordination committee, the newly-elected NCA decided to engage the general public in the constitution-making process. As such, it launched a widespread civic education campaign to sensitise South Africans to the process. The
thrust of this initiative was to provide the public with a fundamental understanding of the constitution in order to facilitate their effective participation in the reform process. Nation-wide information sessions and workshops were held to inform South Africans about 1) the purpose and process of making a constitution, 2) their right to participate, and 3) the potential of a constitution to recognise and protect the rights of the people. To include illiterate persons in the process, the government also used cartoons, comics and booklets with graphics. This civic education campaign was estimated by an independent survey to have reached 73% of all South African adults.10

In tandem with education programmes, the government also launched an extensive advertising campaign aimed at fostering the interest of citizens and encouraging public participation throughout the process. Slogans such as “you’ve had your mark, now have your say” and “the constitution is being written by the most important person: you!” were broadcast on TV, radio, billboards and newspaper across the country11.

Throughout the drafting of the constitution, the NCA worked to make the process as transparent as possible by providing daily news updates on the drafting process through a well-planned communication policy. Every two weeks, the Constituent Assembly published 160,000 hardcopies of an eight-page newsletter outlining the most recent debates and points on the agenda. In addition, the NCA broadcast a series of talk shows focused on the constitutional reform process throughout the drafting process. The NCA also provided continuous information to the public via its radio programme, which it aired in eight different languages on national and local radio stations.

In addition to its efforts to achieve transparency and information, the NCA designed numerous direct interaction tools to enable civil society groups as well as the general public to make proposals and have their voices heard. The NCA implemented direct interaction mechanisms in three stages. The first direct interaction stage began in January 1994 when the thematic committees of the NCA invited the public to submit suggestions for the production of a collective “wish list”. To facilitate this first round of public consultation, NCA members held public meetings in their constituencies to present their work and review the progress of the drafting process. These public meetings provided the public with an opportunity to raise questions, concerns and comments as well as make proposals. Constituent Assembly members and experienced CSOs also held meetings to discuss technical issues.

The NCA collected and then summarised the suggestions made by the public and CSOs, which its experts subsequently reviewed. Pertinent suggestions were then submitted to the relevant NCA committees for discussion. The technical committees of the NCA were tasked with maintaining records of the submitted suggestions, listing the authors of the suggestions and informing them about whether the Constituent Assembly had taken the suggestion into consideration and on what basis.

The second direct interaction phase took place after the finalisation of the first draft constitution in September 1995. The NCA published 5 million copies of the draft constitution and called upon the public and CSOs to submit written statements about – and proposals for – the text. In response, the NCA received more than 250,000 suggestions. The NCA discussed the proposals and incorporated a number of them into the draft text of the constitution. The NCA then released an updated draft one month later, distributing it directly to each person who had submitted a suggestion.

The NCA then hired linguistic experts to make the legal terminology contained in the draft constitution more accessible, so that all South Africans could understand the provisions granting them fundamental rights. The NCA

subsequently adopted the Constitution on 8 May 1996. In a matter of weeks after the adoption of the Constitution, however, the Constitutional Court refused to certify the new Constitution. The Court ruled that the Constitution failed to comply with some of the 34 binding constitutional principles – especially in relation to the decentralisation of power – that were agreed upon during the MPNP phase. Consequently, the NCA produced a new draft based on the ruling of the Constitutional Court.

The third direct interaction phase took place following the adoption of the new Constitution (which 85% of the NCA supported) and its entry into force in March 1997. In the subsequent “National Constitution Week”, the NCA distributed millions of copies of the Constitution across the country in the eleven official languages of the country. The NCA also distributed booklets with illustrations and graphics for illiterate South Africans. These endeavours were primarily designed to develop a sense of public ownership of the Constitution and consolidate awareness of its contents, thereby informing and empowering every South African to be able to reference the foundational text of their fledgling democracy.

The constitution of South Africa, and the participatory process through which it was drafted, is an instructive example of inclusive constitutional engineering in a transitional context. The success of the constitution-making process in South Africa was the result of 1) a comprehensive civic education campaign, 2) an effective and official communication policy, 3) accurate and detailed planning for participatory mechanisms as well as procedures to process suggestions the public made and 4) the overall willingness of the NCA to meaningfully involve the public.

2.2 Constitution-Making Process in Nepal: Balancing Public Participation with Elite Bargaining

Following years of civil war between government forces and Maoist insurgents, Nepal’s key political forces brokered a historic peace agreement in November 2006. The “Comprehensive Peace Accord” (CPA) brought an end to monarchy in Nepal and marked the beginning of the country’s political transition. At the heart of the peace accord was a commitment to the contested 1990 Constitution and promulgate a new constitution drafted by the elected constituent assembly. Nepal’s new Constitution was intended to serve as both a conflict management tool – crucial for preventing a relapse into violent conflict – as well as a framework for democratic governance and the inclusion of marginalised minority and indigenous groups.

The CPA paved the way for an interim constitution that was intended to bridge the gap between the old, discriminatory and highly centralised order and a new democratic and federal system of governance that would be created through the promulgation of a full constitution. One year after the promulgation of the interim constitution in 2007, elections for the Constituent Assembly (CA-I) were held, producing the most inclusive elected body in Nepal’s history.

The newly convened CA-I, which consisted of 601 members, actively involved the general public in the constitution-making process, holding a series of public consultations soon after the elections. In one month, 40 teams of CA-I members and Secretariat staff travelled across Nepal to hold public meetings at the local level. These teams explained the activities of the Constituent Assembly and gauged public opinion and expectations for the new constitution. Relevant committees of the CA-I designed questionnaires consisting of 290 questions that were distributed to the public to obtain feedback and input. However, these questionnaires, designed for first-time voters, proved overly complex and technical for citizens to engage with and make meaningful contributions.

The CA-I also allowed civil society and citizens to submit their points of view to assembly committees directly or, alternatively, to their local representatives at the district level. The CA-I received a total of 550,000 written submissions. However, despite the active participation of citizens, the Constituent Assembly’s consultation initiatives suffered due to its haphazard processing and analysis of proposals submitted by citizens and the lack of a serious extension effort. The failure of the CA-I to establish an impartial body and formal procedures to handle public proposals transparently represented a shortcoming of the process.

According to the Rules of Procedure of the CA-I, the technical experts of each thematic committee were mandated to process proposals related to its respective area of expertise. In practice, members of the CA-I performed this task manually, without uniform procedures, leaving each member to process approximately 900 proposals. These inefficiencies created a serious transparency deficit in the process, resulting in backlash from civil society. Numerous CSOs voiced concerns about the interference of partisan ideology with public input, with some CSOs alleging that the CA-I had failed to process proposals.

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The CA-I ultimately proved unable to draft a full constitution before the end of its mandate. The deliberations were blocked by a number of contentious issues, primarily relating to state structure and the rights of minorities and indigenous peoples. After months of uncertainty, the task of finalising and bringing into being a new constitution for Nepal was left to the successor assembly (CA II), which assumed power after the election in November 2013. Focused on reaching compromise on outstanding issues, CA-II pursued negotiations through informal discussions with senior party leaders outside of official processes. This approach represented a strategic shift from the previous inclusiveness and public participation. Not only did CA-II solicit the views of the public to a much lesser degree, but the constitution drafters also proved less willing to heed the input of policy advocates.

After months of bargaining behind closed doors, senior party leaders reached agreement on the points that had previously deadlocked the process. They subsequently released a final draft of the constitution to the public. The CA-II then allocated 15 days for a second round of public consultations in order to receive feedback on the draft. This attempt to involve the public proved controversial due to the extremely limited timeframe provided for citizen input. Nevertheless, Members of the Constituent Assembly adopted the new constitution in September 2015 with an overwhelming majority, providing Nepal with a new constitution after more than seven years of debate. Thus, despite initial political will to engage the public in the constitution-making process, public participation exerted only a limited degree of influence over the content of the final constitution.

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This publication has been produced with the financial assistance of the European Union as part of the project, “STEP to Democracy – Support to Electoral Processes and Democracy in Myanmar.” The contents are the sole responsibility of DRI and can under no circumstances be regarded as reflecting the position of the EU.