



Elections at a crossing point

Considerations for electoral design in post-coup Myanmar

Gilles Saphy and Michael Lidauer

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At a glance

Following a decade of democratic opening and three general elections organized under the framework provided by the 2008 Constitution, Myanmar's military upended this period with a coup d'état on 1 February 2021. The military leadership has established a governing body called the State Administration Council (SAC) and sought to justify the coup with a narrative of electoral fraud regarding the November 2020 elections. This narrative has since been extended, as the election results were cancelled, political leaders and election administrators arrested and convicted, and 'evidence' was fabricated to legitimize these actions.

The SAC quickly announced that it would hold fresh elections, possibly in 2023. To this end, it is planning changes to the election and political party registration laws; seeks to change the electoral system, with the apparent aim of manufacturing electoral outcomes in its interests; attempts to co-opt or coerce small political parties to join it in these undertakings; and is preparing a new voter list. The military is likely to perpetuate its narrative of electoral fraud and make preparations for elections aimed at legitimizing its hold on power. It is therefore critical that the international community does not provide any recognition of the junta's undertakings.

At the same time, the country is experiencing unprecedented resistance to the military's attempts to establish control by force. Pro-democracy actors, some of which remain in the country while others are in exile, are not only supporting civilian disobedience and opposition to military rule, but also seeking to reconfigure the constitutional framework for a future democratic and federal Myanmar. Democratically elected representatives and interim institutions created since the coup have begun to prepare a new institutional framework, in particular with the adoption of the Federal Democracy Charter (FDC) in January 2022, in preparation for a new, permanent federal constitution to be adopted by a constituent assembly.

In this context, it is advisable to factor in questions of electoral design from an early stage. This can also help to counter the military's problematic narratives. In this endeavour, guidance can be found in international human rights law, which provides principles for and guidelines on holding democratic elections. Guidance can also be found in Myanmar's past

electoral experiences, as the next generation of lawmakers and election administrators inherits a host of lessons learned from dealing with long-standing systemic and structural problems with the electoral process. By building on an overview of Myanmar's recent electoral history and deconstructing the SAC's election-related claims, this paper proposes key areas for consideration in the process of federal constitutional design with regard to elections: the overall legal framework for elections, the choice of electoral system, election management, voter registration, including a clear framework for suffrage rights, and dispute resolution.

The shape of the federal system eventually chosen will have a strong impact on the conduct of elections, and the federal constitution will determine at which level and how the electoral legal framework is legislated for. Federal systems provide for a division of powers between the centre and the federal units, allowing the two levels of government to function partly autonomously. Comparative experience suggests that in federal systems elections are most often, but not always, an area of concurrent powers, in which national legislation regulates national level elections, and federal unit legislation regulates elections at the local level. While there may be different approaches to devolution, the federal framework should protect equality of political rights and be consistent within the federation. Federal election frameworks can in practice be complex arrangements, as both the central and the federal unit levels would be involved in running elections. This requires a clear definition of competencies in election legislation and a common arbiter—generally a court—that is strong and independent enough to protect the federal pact.

Electoral system choice has been a recurring topic in Myanmar since the political opening. Political and academic reflections have largely revolved around the effects, in particular on smaller political parties and minority groups, of the existing majoritarian system of first-past-the-post (FPTP) using single-member constituencies based on townships inherited from the colonial period, as well as on the choice between the existing FPTP system and some form of proportional representation (PR). This debate had particular meaning in the context of the 2008 Constitution, which granted the military 25 per cent of the seats in parliament. This was a clear violation of basic democratic norms and principles that was exacerbated by extreme malapportionment between township-based constituencies.

Choosing a new electoral system could prove complex as the political actors involved may have different understandings and expectations with regard to the potential benefits of each system. There are a variety of systems, all of which are in principle equally acceptable from the point of view of democratic principles but produce different outcomes. Awareness of different electoral systems and their effects must be part of the discussion at an early stage. The chosen system should enjoy broad agreement and adhere to the principle of equal suffrage, which under FPTP would mean engaging in transparent and inclusive redistricting.

There is no perfect or universal model for electoral management, but a range of possibilities for how this responsibility could be assumed in a federal system. There is a certain level of correspondence between the shape of the election legislation and the shape of the election management body (EMB). In federal contexts, election governance will be determined by the articulation between federal and state laws, the degree of decentralization of the EMB, the

capacity to supervise implementation of the legislation in a decentralized EMB and the need for the EMB to obtain cooperation from executive authorities at national and state level.

It will be essential that the drafters of a future federal constitution develop an election administration structure that inspires confidence in both the population and political stakeholders. The independence and impartiality of the election administration is crucial for establishing not only confidence between state institutions and citizens, but also to foster the bond between the federal units that compose the federation. The quality of the electoral process will be instrumental to the legitimacy of the elected federal and local institutions, and ultimately to addressing long-standing conflicts.

Voter registration must be approached from two angles: defining who is eligible to vote and defining the process by which eligible persons become voters. While federal units may be in charge of the process of voter registration, common rules must apply for voter eligibility in a federal system, in particular as regards citizenship. Lack of voter inclusion—by law or through the process of voter registration—can greatly undermine an electoral process. Therefore, a shared understanding needs to be reached on who should be eligible to vote and how the voter list should be drawn up. Two issues raise specific concerns in a federal system. First, divergent definitions or practices when as regards granting citizenship and/or issuing identity documents, if implemented at the federal unit level, could have a considerable impact on the quality and legitimacy of an election process. Similarly, registering voters would typically require some form of involvement of local authorities. Drafters of the future federal constitution would need to keep these aspects in mind, and the potential impact on the running of elections when agreeing on a division of powers.

The absence of a functional system for election dispute resolution (EDR) was one of the many weaknesses of the 2008 Constitution and should be addressed regardless of which institutional framework is chosen in the future. EDR models tend to be influenced by the institutional set-up in a country, in particular the structure of the judiciary and of the EMB. Global practice shows that EDR can be handled by ordinary courts, special/electoral courts, election commissions and courts, ad hoc committees or constitutional courts, or by a combination of bodies. In a federal context, a fully functioning EDR system—in essence, a functioning, competent, independent judiciary—is not just there to protect the rights of citizens, but to play a role in protecting the integrity of the federation. To the extent that the federal bond might be at stake during an election process, the EDR system is one of the tools required to preserve the federal union.

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

Recommendations

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

Legal framework

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

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

Electoral system

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

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

Election management

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

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

Voter registration

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

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

Election dispute resolution

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

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

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International IDEA
Strömsborg
SE-103 34 Stockholm
Sweden

Tel: +46 8 698 37 00

Website: <<https://www.idea.int>>