Independent Assessment of Myanmar’s Constitutional Referendum
May 2008

This report is an assessment of to what extent Myanmar’s constitutional referendum of 10th May 2008 meets democratic norms and international standards. It was conducted by a team of international experts who, due to the sensitivity of their work, will not be identified.

In addition to fieldwork in a number of states in different parts of Myanmar to assess the pre-election environment and referendum day itself, a basic analysis of the legal framework and regulations issued to polling officials was undertaken. The extent to which the constitution drafting process and the draft constitution meets democratic standards is outside the scope of this report. The wider political, human rights, and media environment has been documented extensively by others and will not be repeated here.

Ten key recommendations are made at the end of the report which, if implemented before 2010, would lead to an election held to a higher standard than this referendum. Significant political and electoral reform is required for future elections in Myanmar to be held with substantive participation of the people and meet democratic standards.

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Executive Summary

The results of the referendum held on 10th May cannot be considered a credible reflection of the will of the people due to the severely constrained campaign environment, flaws in the legal framework (particularly in the counting and aggregation of results), negligible voter education and, to a lesser extent, problems on referendum day itself. The 92.4% approval rate in areas that voted on 10th May is not consistent with the widespread
dissatisfaction expressed by voters with the draft constitution and/or the government more generally. Similarly, the 99% turnout contrasts with the relatively low number of people seen at polling stations and cynicism amongst voters about the potential for the constitution to bring change. The early release of results, before the referendum is held in areas affected by Cyclone Nargis on 24th May, may unduly influence the referendum process: voters will be discouraged to exercise their vote when the result is mathematically impossible to overturn.

The pre-election environment was marked by the widespread use of threats and intimidation by local officials – primarily against voters, but also against ‘vote no’ campaigners and government officials pressured to ensure a ‘yes’ vote in their areas. The Referendum Commission was a highly biased institution at all levels, working together with the SPDC and USDA to unambiguously advocate for the passage of the draft constitution, through the use of both propaganda and intimidation. The political bias of referendum officials and local government officials such as village headmen had a significant impact on the referendum process, facilitating voter impersonation and multiple voting. Such factors artificially inflated the voter turnout and did not allow the people to freely express their choice on whether or not to approve the constitution.

The legal framework contains some positive provisions but is critically undermined by poor or absent regulation in a number of areas. Most critically, there is very little transparency in the counting process and the aggregation of results; any final result announced by the Referendum Commission cannot be independently verified. Regulations (or the lack thereof) regarding campaigning, the compilation of the voter list, voter identification, and complaints are inadequate. Advance voting is particularly poorly regulated and susceptible to abuse.

While most people in Myanmar were aware of the constitutional referendum and when it would be held, there was very low awareness of the contents of the draft constitution. Copies of the constitution were for sale at a cost of 1000-1200 kyat, beyond the reach of most people. Public debate about the constitution was severely constrained, both legally and in practice.

**Background**

The draft constitution put to a referendum on 10th and 24th May 2008 is the culmination of a constitution drafting process that began in May 1992 when the National Convention Convening Commission was formed. The Convention completed drawing up the “basic principles” for the referendum on 3rd September 2007 and appointed a 54-member Commission
for Drafting the State Constitution in October 2007 to draw up the final text of the draft constitution. On 9th February 2008, the SPDC announced that a referendum would be held on the draft constitution some time in May 2008, declaring on 9th April that it would be held on 10th May. The draft constitution was completed on 19th February and released for sale in Burmese and English on 9th April at a cost of 1,000 kyat. The text is 194 pages with 15 chapters and 457 provisions.

There are an estimated 27 million eligible voters in Myanmar out of a total population of 54 million. The minimum turnout required for the result of the referendum to be valid is 50% of all eligible voters, of whom a simple majority must vote ‘yes’ for the draft constitution to pass.

**Legal framework**

Though the legal framework for administering the referendum does contain some positive provisions and includes a very basic framework that may be built on in the future, it suffers from critical weaknesses and lacks the necessary safeguards to ensure a credible referendum.

The law regulates the operation of the Referendum Commission, preparation of the voter roll and voter eligibility, polling, counting, and the declaration of results, with further detail provided in manual and guides for Sub-Commissions. Particular aspects of the referendum are governed either very weakly (e.g. advance voting, the polling process, the counting process, the responsibilities and operation of the Referendum Commission and polling officials, the responsibilities of civil servants, and the aggregation and tabulation of results) or not at all (e.g. campaigning, the presence of election observers, media coverage, and the complaints process).

**Convening the referendum**

The law states the date on which the referendum is to be held should be announced 21 days in advance of the referendum itself. This is an insufficient period of time for campaigners to prepare themselves, for voter education to take place, and for polling and referendum officials to be adequately trained.

**Voter roll**

While the law clearly states that the every person who is entitled to vote shall be mentioned in the voting roll, delegating this responsibility to Ward or Village-tract Sub-commissions, the process by which the voter roll is compiled is not clearly outlined. Similarly, while Township sub-commissions are granted the power to add and amend the voter roll, how precisely this is achieved is not clear. Nor is the process of awarding temporary ID cards defined in the referendum law – no figures for the number of people

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awarded such cards have been released. The positive provisions in the law clearly stating the enfranchisement of all eligible voters are undermined by this lack of clarity, casting doubt over the integrity of the voter roll. Such failings typically lead to a greater risk of both multiple voting and voter disenfranchisement.

A final voter roll should, according to the law, be declared at least seven days in advance of the poll. This is an insufficient amount of time prior to the referendum for any concerns about the accuracy of the voter roll to be challenged.

Voter eligibility

The law does broadly provide for the enfranchisement of most eligible voters. However, a number of groups are excluded, including members of all religious orders and persons serving prison terms. Practice in other Buddhist countries regarding the eligibility of monks as voters varies, with Thailand excluding them but Cambodia and Sri Lanka including them. Nevertheless, international standards preclude the mass disenfranchisement of groups on religious grounds. Practice also varies regarding prisoners, with most countries not granting them the right to vote, though there are notable exceptions such as the Philippines and Nepal. However, given the weakness and lack of independence of the judiciary in Myanmar, many convicted prisoners may be unjustly denied the right to vote.

Out-of-constituency and overseas voting

Given the scale of migration within Myanmar and outside of the country, it is positive that there are provisions that allow for people to vote outside of their constituency or outside of the country, a right that is not afforded to voters in some other countries in the region. To prevent the same person from appearing on the voter roll in more than one place, the Township Sub-commission “shall be informed to cancel the list of the names of such persons from the voting roll of the referendum areas where they originally resided”. However, clear deadlines for the process need to be enshrined in the law to instill confidence that multiple voting will be prevented.

Aside from the large numbers of illegal migrants abroad, whose enfranchisement would pose an enormous challenge for election administrators anywhere, there are reports that Embassies of Myanmar have been selective in choosing which legal Burmese citizens can vote, enfranchising only those who pay tax, and have suffered some administrative problems such as a lack of ballot papers.

Polling
The provisions governing polling are extremely sparse in the referendum law, though procedures are detailed more thoroughly in the “Referendum Commission Polling Official and Staff Manual”. While it is not unusual for the precise polling procedures to be governed through regulations/manuals rather than the law, some basic principles should be enshrined in the law itself, particularly so when the regulations are not publicly available. For example, the law should clearly state the means by which voters will be identified and the principle that no one other than polling officials and voters are allowed in the polling station, so that voters themselves – not just polling officials – are aware of what is and is not legally allowed.

The polling manual does contain many of the important elements required in such a document, such as: the size of the polling station in relation to the population\(^2\); the roles and responsibilities of polling officials\(^3\), a clear statement of how many ballots are required in proportion to the number of registered voters, a list of which officials may enter the polling station, and instructions on closing the polling station. However, as with the referendum law, there is a lack of detail and rigour, as well as several key procedural weaknesses:

- The means by which voters will be identified is not rigorous, lacking safeguards that prevent multiple voting (e.g. by applying indelible ink applied to voter’s fingernails) and voter impersonation. The polling manual indicates a heavy reliance on the voter identifying themselves rather than being identified through documentation such as an ID card. Instead, ineffective checks are proposed, such as demanding that polling staff allow a person to vote “after explaining that he will be punished if he is pretending” to be another person.

- Before polling begins, the empty ballot boxes are shown by the polling officer to the other polling station members so as to prove there are no pre-marked ballots already in the ballot box. The law should be amended so that the ballot box is shown to public, as showing the box to junior polling officials alone is a weak check-and-balance.

- There is no provision allowing for observation by the public of the transportation of counted and unused ballots to Township Sub-Commissions.

\(^2\) The polling manual states that three sizes of polling station may be constructed, depending on the size of the voting population: For populations up to 1000 voters, polling stations will have 5 staff and 2 polling booths for voters to use; for populations of 1001-2000 voters, polling stations will have 7 staff and 4 polling booths for voters to use; for populations of 2001-3000 voters, polling stations will have 10 staff and 6 polling booths for voters to use

\(^3\) Four roles are envisaged for polling officials: the station officer who oversees all activities and other staff, the voter registration auditor who is responsible for voter identification, the officer who gives out the ballots, and security staff. The roles and responsibilities of these staff are reasonably well defined
Counting and tabulation

In the referendum law there is very limited information about the counting process, with only limited additional detail in the polling manual.

Of greatest concern is the lack of transparency or any strong check-and-balance on counting by polling officials. While the law does provide for “the presence of not less than ten persons” to “inspect the ballot boxes” immediately after closing the polling booth, it does not clearly state that these ten persons can observe the counting, nor how they will be chosen. The polling manual is equally vague, stating that “the polling booth officer has to open the ballot boxes in front of the polling booth members and voters according to the specifications”. Even if ten persons are allowed to observe the closing or counting process, the risk with having a small predetermined number is that polling officials may select ten people they know will not challenge them.

The rough process by which counting takes place is outlined: the total number of ballots are counted, then separated into ‘yes’, ‘no’ and ‘cancelled’ ballots and counted again, and all materials (including the list of voters, votes in favor/against/cancelled, and the used and unused ballot papers) are sent to the Ward or Village-tract Sub-Commission. However, a number of essential safeguards in the counting process are missing. For example:

- How the counting will take place is not specified. Best practice demands that each ballot paper is clearly shown to those present, the result called out and recorded on a document that is clearly visible to members of the public or observers.
- It is essential to undertake a “reconciliation” of the number of ballots counted with the number of voters on the voter roll who cast their vote, as a means to deter “ballot stuffing”. While the polling officer is mandated to compare these numbers, there are no procedures outlined if the two figures do not match, rendering the comparison meaningless.
- Even though the law does not mandate it, it may be possible for “not less than ten persons” to observe the counting and the final result from the polling station. However, international and regional norms are to post results outside of the polling station if counting takes place there. By not doing so, it becomes extremely difficult to cross-check the official final result with those from the polling stations.
- Unused ballots are typically marked in some way to prevent potential misuse later, while in this referendum they are simply transported to the Ward or Village-tract Sub-Commission.
- The counting of overseas votes will be conducted by the Referendum Commission while advance votes within the country will be counted by Township Sub-commissions. What little oversight is available for counting at polling
stations is not provided for in the law for the counting of overseas/advance votes, allowing results to be easily manipulated if desired.

The tabulation, or aggregation of results nationwide, is arguably the weakest area in the law and the most open to abuse. The Referendum Commission will receive all of the results and tabulate them and declare whether the referendum has passed. However, since there is no legal requirement to release the breakdown of the data, there is no means to assess the integrity and accuracy of the final result. Experience from elections in the region and internationally shows that election authorities often take advantage of this lack of transparency and release results that are not an accurate reflection of the will of the people. A deadline for the release of results is also not stated.

Areas not covered by the law – complaints, observers, campaigning

A major omission in the law is the lack of any formal complaints mechanism. There are no procedures defined for voters or other groups to complain to the Referendum Commission about any perceived irregularities in the voter roll, the performance of the various sub-commissions, polling officials, counting and tabulation, or any other part of the referendum process. Without such a mechanism in place, irregularities can be committed with impunity.

The law does not allow for the accreditation of domestic observers, whether they are partisan observers affiliated to political parties or independent observers. Nor are international observers granted access. Without either kind of observer, Myanmar is deprived of an important check and balance on the activities of the Referendum Commission and other referendum stakeholders.

The referendum law makes very little attempt to regulate the conduct of campaigning. Both campaigners’ rights (e.g. to free assembly and to freedom of speech) and responsibilities (e.g. to campaign without the use of intimidation or bribery, or to abide by a “quiet” or “cooling” period 24 hours before polling begins) should be clearly stated. The responsibilities of other stakeholders in campaigning – such as the need for the media and civil servants to remain impartial – are also missing. The sole reference to campaigning is to prohibit “lecturing, distributing papers, using posters … to destroy the referendum”, punishable by three years imprisonment and/or a 100,000 kyat (or roughly $90) fine. This wording of the law allows it to be used against those who advocate against the draft constitution, constituting a gross breach of the right to campaign freely.
Campaigning is also, of course, constrained by a range of other repressive laws\textsuperscript{4} and the restrictive political environment.

**Referendum administration**

The referendum law passed by the SPDC on 26\textsuperscript{th} February 2008 established the 45-member Referendum Commission, as well as four levels of Sub-Commissions at the various levels of government administration (State or Divisional Sub-commissions, District Sub-commissions, Township Sub-commissions, and Ward or Village tract Sub-commissions). Each Sub-Commission comprises of 15 members, apart from Ward or Village-tract Sub-commissions which comprise of between 5 and 20 members. State or Divisional Sub-commissions appoint the District Sub-commissions and Township Sub-commissions, while the Township Sub-commissions appoint the Ward or Village tract Sub-commissions. Rough outlines of the responsibilities of each Sub-Commission are provided in the law, with further detail in handbooks provided to them, though there are no provisions in the law that demand any transparency in the Commission’s decision making and activities.

Typically, election laws establish an executive decision-making authority and a Secretariat/administrative arm to carry out the policies set by such an authority. No such divisions are outlined in the referendum law. A 45-member central Commission responsible for administering the referendum is a comparatively small to carry out both decision-making and administration, raising concerns about the overall capacity of the Commission to manage the referendum process. Furthermore, the short period of time between the announcement of the referendum and the referendum itself provides for a very limited opportunity for referendum and polling officials to be adequately trained.

There are no explicit provisions in the law which demands that the Commission, its Sub-Commissions, or polling officials should remain politically neutral, nor are there any consequences if political bias is shown. Indeed, no criteria are specified for appointing referendum and polling officials. Politically affiliated individuals and/or civil servants, despite large potential conflicts of interest, can be legally appointed, a weakness which severely damages the credibility and independence of the Referendum Commission. This is exemplified in the SPDC’s choice of the Referendum Commission’s Chairman, Aung Toe, who was the head of the Constitution Drafting Committee and therefore has a vested interest in seeing the Constitution passed.

\textsuperscript{4} e.g. Law 5/96 which can lead to 20 years imprisonment for critics of the “Roadmap to Democracy”
Pre-referendum environment

Campaign environment

The campaign environment was characterised by the widespread use of threats and intimidation: primarily against voters, but also those campaigning against the draft constitution, as well as local government and referendum officials who were pressured by their superiors to ensure a strong turnout and a ‘yes’ vote. Ordinary citizens did not have the freedom of association, speech, and movement and were not allowed to debate issues relating to the referendum and constitution in the public sphere.

Various tactics were employed by the state to influence voters to vote ‘yes’. Local people in the market in several townships stated that they were threatened with closure if they did not vote to approve the draft constitution. Door-to-door visits by military intelligence threatening unspecified punishment for voting against draft constitution were reported in a number of villages. Voters in some areas were told that the authorities could monitor how they vote in the polling stations using CCTV cameras and that they would be questioned or punished if they voted against the constitution. Attempts were made to the state to press monks to tell laymen in their villages to vote ‘yes’ in the referendum. Tallied with such harassment were inducements such as promises to improve the livelihoods of ethnic minorities if they voted for the constitution.

The pervasive culture of fear lead even those who did not receive threats themselves to vote ‘yes’, fearing that there would be some way for the government to find out they voted ‘no’ and that they would take revenge.

A nationwide pro-yes media campaign was given heavy coverage by state television (Myawadi, MRTV, MRTV3 and MRTV4), radio, and newspapers. No reference was made to the possibility of voting against the draft constitution in such media. ‘Vote yes’ songs played extensively in the lead up to and on the day of the referendum, banners, and even postal stamps were produced to encourage voters to approve the constitution. Limited evidence was seen of the ‘vote no’ campaign, with ‘X’s graffitied on the street swiftly painted over by the government. Most voters were unaware of the ‘vote no’ campaign taking part in other parts of the country.
This widespread ‘pro-yes’ campaign did little to educate people about the contents of the draft constitution and its possible merits and demerits. The lack of substantive voter education was evidenced in interviews with voters, almost all of whom had no knowledge of either the draft constitution’s contents or the voting process itself. There was also reluctance on the part of voters to actively seek out information about the draft constitution due to their widespread cynicism about the potential for the constitution to change anything.

Advance Voting

Provisions to vote in advance are intended to be for those civil servants or others who will be on duty on referendum day, though the opportunity for advance voting was also granted to other groups without reasons being specified. The date on which people voted in advance varied widely.

The right to cast one’s vote secretly was not guaranteed during advance voting. Rarely were polling booths provided – voting for civil servants took place mostly in their own offices. Instead, voters were required to write their names, ID card details, on the ballot paper itself. Ballot papers were placed inside an envelope with a piece of paper attached that had the voter’s ID card number written on it. After the envelope was sealed, it was given to their superiors in their office. Such procedures lead civil servants to vote for the draft constitution for fear of losing their jobs otherwise.

Referendum day

Polling process

Most polling stations were conveniently located in places such as schools and temples. The set up of polling stations was carried out well in line with the regulations in the polling station manual. Though the law does not demand it, at some polling stations polling officers demonstrated in the presence of voters that ballot boxes were empty. Essential materials such as ballot boxes, ballot papers, pens to mark ballot papers, etc., were available, though the quality of such materials was low: the design of ballot papers was very simple and without any secure mark or design that could prevent fake ballot papers being produced, and ballot boxes were made of hard cardboard paper painted in white and were not well sealed.
Most polling booths were divided with partitions and curtains to ensure that no one could see how you were marking your ballot. There was some variation as to where the ballot box was located, some inside polling stations and others outside with a polling official sitting next to the box. In some polling stations, ballot boxes were placed inside the room while others were outside with polling officers sitting next to the ballot boxes.

Polling was scheduled to start at 6am and finish at 4pm. These times were not well adhered to. In some townships, polling officers justified extended the time in order for latecomers to cast their votes.

Upon arrival at the polling stations, some voters brought invitation slips/letters and ID cards with them to show polling officers. Those who did bring ID cards but were considered to be on the voter roll by polling officers were still allowed to cast their vote. Ballot papers were given to voters once they had signed their name on the voter list. Voters holding the ID cards of their family members were allowed to cast votes on their behalf, as were employers on behalf of their employees. After casting their ballots, voters were often given drinks and biscuits by polling station staff.

Polling station staff appeared to adhere to their duties, though were sometimes engaged in activities outside of their mandate. For example, some polling officials responsible for identifying whether a voter was on the voter roll were also seen undertaking “security” functions, taking photos of people or vehicles they considered suspicious.

It was difficult to determine who precisely were the individuals serving as polling officials, though both village chiefs and USDA members were seen serving as polling officers. Reports were received of USDA members pressing voters to vote ‘yes’ inside polling stations.

The scepticism amongst voters about the potential for the new constitution to change the country’s governance manifested itself in low voter turnout in many polling stations.

**Counting process**

Counting in the urban areas was conducted at polling stations themselves, though ordinary voters were asked to leave the polling station upon closing in all polling stations observed. No results of voting were announced or posted from the polling stations in the areas where experts were present. Requests by voters for information from polling officials were ignored. No information could be obtained about how, when and where the ballot papers for advance voting and overseas voting were counted.

There was some inconsistency in the method of counting that may have depressed the ‘no’ vote. Where ballots were marked with an ‘X’ that was not completely contained within the square on the ballot paper it was considered invalid, whereas a tick that exceeded the bounds of the square was considered valid. This amounted to large numbers of invalid ballot papers (200 in one polling station).
Some educated voters with knowledge of voting practices elsewhere remarked about the lack of transparency and accountability in the counting method used in Myanmar compared to other countries in the region.

**Recommendations to the SPDC**

1. Ensure that the law for elections scheduled for 2010 meets international standards, accepting technical assistance in its drafting
2. Establish a permanent and politically independent Elections Commission that has the trust of all political stakeholders in Myanmar
3. Undertake a full and transparent voter registration process to ensure an accurate voter roll
4. Allow for a free and open campaign environment where all views can be voiced openly, including within the media, and tally this with a comprehensive voter education programme
5. Allow for the enfranchisement of all citizens of Myanmar, including religious officials, IDPs, and ethnic minorities
6. Revise the system of advance voting to increase its transparency and safeguard the right to vote in secret, particularly for civil servants
7. Grant accreditation to both domestic and international election observers. Both partisan local observers linked to political parties and non-partisan observers are necessary to check-and-balance election authorities.
8. Provide greater opportunities for women and ethnic minorities to take part in the election process and administration, such as by producing ballot papers and voter education materials in local languages
9. Prevent threats and intimidation by strengthening the independence of the judiciary and establishing an electoral complaints mechanism
10. Provide comprehensive training for electoral officials at all levels