

LEGAL BRIEFER

Unlawful Edicts: Rule by Decree under the Myanmar Tatmadaw

Overview & Analysis

On February 1, 2021, the Myanmar military, the Tatmadaw, staged a coup, overthrowing the National League for Democracy (NLD) government, elected overwhelmingly by Myanmar citizens in the November 2020 elections. Claiming electoral fraud, the Tatmadaw declared a year-long state of emergency, transferred power to commander-in-chief Min Aung Hlaing, and replaced elected officials with military personnel.

Since February 1, the Tatmadaw has arrested over 1,200 people,¹ including politicians, activists, artists, journalists, and monks. The military has deployed violent force against peaceful protesters, using water cannons, tear gas, rubber-coated bullets, and live ammunition, resulting in scores of civilian deaths and many more wounded. The Tatmadaw has also regularly enforced internet shutdowns, social media restrictions, curfews, and assembly bans.

In the weeks following the coup, Tatmadaw leaders have issued a flurry of edicts aimed at increasing their power to suppress communications and civil society resistance. Their actions have been met with widespread opposition from the Myanmar people and the international community, including protests of hundreds of thousands of people, a mass civil disobedience movement and general strike, international sanctions, and calls for divestment from military-owned businesses.

In response to requests from local partners, ICNL has prepared the following summary analysis of relevant Tatmadaw orders.

Declaring a State of Emergency

In justification of the coup, the Tatmadaw declared a state of emergency on February 1, 2021, “in accordance with Article 417 of the 2008 constitution.”² The 2008 constitution

¹ <https://aappb.org/?p=13360>.

² <https://www.aljazeera.com/news/2021/2/1/full-text-of-myanmar-army-statement-on-state-of-emergency>

is Myanmar’s third and current constitution, drafted by the Tatmadaw as part of its “roadmap to democracy.” In reality, the 2008 constitution essentially institutionalizes military control by reserving 25% of parliamentary seats for the military and mandating key ministries to be led by army officers. Article 417 states the following:

If there arises or if there is sufficient reason for a state of emergency to arise that may disintegrate the Union or disintegrate national solidarity or that may cause the loss of sovereignty, *due to acts or attempts to take over the sovereignty of the Union by insurgency, violence and wrongful forcible means*, the President may, after coordinating with the National Defence and Security Council, promulgate an ordinance and declare a state of emergency.³

Article 419 of the Constitution, stating that “The Commander-in-Chief of the Defence Services to whom the sovereign power has been transferred shall have the right to exercise the powers of legislature, executive and judiciary,” has since served as the basis for numerous edicts issued by the Tatmadaw. Article 420, giving the Tatmadaw Commander the power to “restrict or suspend as required, one or more fundamental rights of the citizens” for the duration of the declaration of a state of emergency has also been cited as justification for many of the orders analyzed below.⁴

The Tatmadaw has justified the state of emergency in order “to perform scrutiny of the voter lists,” claiming “huge discrepancies” and “terrible fraud” with respect to the November 8th election.⁵ Independent, reputable observers agree that while there may have been some errors or omissions, there is no evidence of electoral fraud or major irregularities.⁶ On February 26, 2021, the junta’s appointed election chief, Union Election Commission Chairman Thein Soe, officially declared the results of the November 2020 election invalid.⁷

Despite this declaration, the Tatmadaw has not proven or presented any evidence that there were “acts or attempts to take over the sovereignty of the Union by *insurgency, violence and wrongful forcible means*,” thereby failing to meet the requirements of the Constitution for a declaration of emergency. The state of emergency itself is therefore likely invalid and would not withstand scrutiny under international law, which lays forth strict requirements with respect to the definition of “public emergency” and any subsequent derogation from international legal obligations.⁸

³ Myanmar 2008 constitution, available here:

https://www.constituteproject.org/constitution/Myanmar_2008.pdf?lang=en, emphasis added.

⁴ *Id.* Article 420 does not provide for any requirements of necessity or proportionality, and thus is out of line with international law. See *infra* note 8.

⁵ <https://www.aljazeera.com/news/2021/2/1/full-text-of-myanmar-army-statement-on-state-of-emergency>.

⁶ <https://www.bbc.com/news/55918746>.

⁷ <https://www.aljazeera.com/news/2021/2/26/uk-imposes-new-sanctions-on-myanmar-generals-over-february-1-coup>.

⁸ See art 4 of the ICCPR; see also, e.g., <https://www.ohchr.org/documents/publications/handbookparliamentarians.pdf> (emphasis added): “In exceptional circumstances, including armed conflict, rioting, natural disasters or other public emergencies that threaten the life of a nation, governments may take measures derogating from their human rights obligations, provided that the following conditions are met

Given the illegality of the coup and the state of emergency, any orders issued by the Tatmadaw during this time period are also of questionable legality. They certainly do not hold the same status as parliamentary laws passed by duly elected democratic representatives.

Presenting a Draft Cyber Security Law

On February 9, 2021, the Tatmadaw released a new, draft Cyber Security Law.⁹ Mobile operators and telecoms license holders received a copy of the 36-page document outlining the proposed law and were given less than a week to respond.¹⁰

ICNL received an unofficial English translation of the draft Cyber Security Law and, at the request of local partners, prepared a [summary briefer](#) and longer analysis.¹¹ The draft Law is highly problematic, and would violate the freedom of expression and right to privacy of Myanmar residents, as well as non-residents and foreigners.¹² The Law criminalizes online content deemed to be “misinformation” or “disinformation” intended to “cause public panic, loss of trust or social division,” penalizing those found guilty of spreading such rumors or “fake news” with jail time or fines. It also criminalizes expression that causes “hate, disrupts unity, stabilization, or peace,” thereby giving the military virtually unlimited power to police any expression it finds distasteful.

The Law further expands the Tatmadaw’s powers to order internet shutdowns, in violation of international standards. It also requires internet service providers (ISPs) to provide personal user data to the Tatmadaw upon request, thereby violating privacy rights, and criminalizes the failure of ISPs and their personnel to comply. Finally, the Law criminalizes the creation of “fake” accounts and websites “with the intent of causing public panic, loss of trust or social division.” Anonymity, including the right to use pseudonyms, has been recognized as an important component of safeguarding free expression, privacy, political accountability, and public participation.

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- A state of emergency, which threatens the life of the nation, must be officially declared.
 - The specific measures derogating from an international treaty must be officially notified to the competent international organizations and other States Parties.
 - Derogation is permissible only to the extent strictly required by the situation.
 - The derogation must be lifted as soon as the situation permits.
 - The rights subject to derogation must not be among those that admit no derogation.”

⁹ <https://www.reuters.com/article/myanmar-politics-Internet/myanmar-junta-cyber-bill-would-violate-rights-critics-say-idUSL1N2KG1XG>.

¹⁰ <https://www.channelnewsasia.com/news/asia/myanmar-military-government-s-cyber-bill-would-violate-rights-14165312>.

¹¹ Summary available here: <https://www.icnl.org/post/analysis/myanmar-draft-cyber-security-law-and-other-threats-to-fundamental-freedoms>. The full analysis can be requested via email to asia@icnl.org.

¹² On 10 February, a group of 158 Myanmar civil society organizations released a [statement](#) rejecting the draft Cyber Security Law, while reiterating their view that the Myanmar military could not legitimately exercise legislative authority.

Invalidating Municipal Committees

On February 10, 2021, the Tatmadaw, under Min Aung Hlaing’s leadership as Senior General and “Chairman of State Administration Council,” released State Administration Council Law No (1/2021), Amending Yangon City Development Law, and State Administration Council Law No (2/2021), Amending Mandalay City Development Law. These two edicts (published in the military’s newspaper, “The Global New Light of Myanmar”) remove chapters in both Laws relating to Mandalay and Yangon’s Development Committee’s elected members, their duties, responsibilities, and powers.¹³ The orders were accompanied by announcements of the formation of new Yangon and Mandalay Development Committees, with members now appointed by the Tatmadaw, rather than elected. Such moves are expected to redirect control of Yangon and Mandalay into the Tatmadaw’s hands, and further undermine Myanmar’s democratic processes.

Voiding Privacy Rights and Surveilling Overnight Guests

On February 13, 2021, the State Administration Council issued two additional orders. The first, State Administration Council Law No (3/2021): Fourth Amendment of the Ward or Village-Tract Administration Law,¹⁴ reinstates the requirement for citizens to register any guests with local authorities (previously removed under the Third Amendment),¹⁵ and to notify the relevant Ward or Village-Tract Administrator of the guest’s departure. It also authorizes “receiving and granting the information of guest list for overnight guests from other wards or village-tracts, inspecting the guest list and taking action [in case of] fail[ure] to inform the guest list” by authorities. This provision seemingly authorizes security forces to conduct nighttime checks of guests within a household. Indeed, such household checks have taken place recently and facilitated the arrests of activists, coup opponents, and members of civil society. This government order clearly amounts to an unjustified violation of privacy rights.

The second order, State Administration Council Law No (4/2021)¹⁶ purportedly amends the “Law Protecting the Privacy and Security of the Citizens”¹⁷ by suspending Sections 5, 7, and 8 of the Law in accordance with Article 420¹⁸ of the Constitution. All

¹³ The text of the edicts are available here: <https://www.gnlm.com.mm/state-administration-council-law-no-1-2021-law-amending-yangon-city-development-law/> and <https://www.gnlm.com.mm/state-administration-council-law-no-2-2021-law-amending-mandalay-city-development-law/>. The original laws can be found here:

<http://www.asianlii.org/mm/legis/laws/coydllaorcln111990794.pdf> and <http://www.asianlii.org/mm/legis/laws/comdlpadcln82002639.pdf>.

¹⁴ Available here: <https://www.gnlm.com.mm/fourth-amendment-of-the-ward-or-village-tract-administration-law/>; original law available here: <http://www.asianlii.org/mm/legis/laws/wovtalh2012669.pdf>.

¹⁵ See here for more info: https://progressivevoicemyanmar.org/wp-content/uploads/2018/05/20180410_ACDD_Grassroots_Democracy_-_Print-ready.pdf.

¹⁶ Available here: <https://www.gnlm.com.mm/amendment-of-law-protecting-the-privacy-and-security-of-the-citizens/>.

¹⁷ Available here: https://www.myanmar-responsiblebusiness.org/pdf/Law-Protecting-Privacy-and-Security-of-Citizens_en_unofficial.pdf.

¹⁸ Again, Article 420 states: “The Commander-in-Chief of the Defence Services may, during the duration of

three provisions provide important privacy and due process protections. Section 5 obligates the “Relevant Ministry and Responsible Authorities” to “ensure that there is no damage to the privacy and security of the citizen except where this occurs in accordance with existing law.”¹⁹ It also provides that Authorities should “not enter into a person’s residence or a room used as a residence, or a building, compound or building in a compound, for the purpose of search, seizure, or arrest, unless accompanied by [a] minimum of two witnesses who should comprise Ward or Village Tract Administrators, Hundred- or Ten-Householder Head.”²⁰ Section 7 of the Law establishes that “No one shall be detained for more than 24 hours without permission from a court unless the detention is in accordance with existing law.” Section 8 requires that a lawful order, permission, or warrant be issued in order to carry out various search and seizure actions, including entering private residences, conducting surveillance, intercepting private communications and data, interfering with personal matters or harming one’s reputation, or seizing property.

The amendments suspend these fundamental privacy and procedural guarantees in violation of international standards.

Broadening the Definition of High treason

On February 14, 2021, the Tatmadaw issued State Administration Council Law No (5/2021), Law Amending the Penal Code.²¹ Section 3 of this edict amends the language in Section 121 of Myanmar’s Penal Code,²² which defines high treason as using “force of arms or other violent means to overthrow the organs of the Union.” The edict adds “attempt” or preparations “to alter [by] unconstitutional means or *any other means...* the organs of the Union”²³ to the actions constituting high treason (punishable by death). This all-encompassing language would cover virtually any act aimed at changing the state by any method, including peaceful protest, advocacy for legal reform, or an online discussion about a constitutional referendum. The edict would therefore allow for the prosecution of almost any action and individual opposing the state – in this case, the military junta – on any level. Its overbreadth and vagueness violate principles of predictability and legality under international law.

the declaration of a state of emergency, restrict or suspend as required, one or more fundamental rights of the citizens in the required area.” Its overbreadth is incompatible with international standards around the protection of rights during states of emergency. See *supra* note 8.

¹⁹ Law Protecting Privacy and Security of Citizens, art 5, *supra* note 17.

²⁰ *Id.*

²¹ Available here: <https://www.icnl.org/resources/library/state-administration-council-law-no-5-2021-law-amending-the-penal-code-and-state-administration-council-law-no-6-2021-law-amending-the-code-of-criminal-procedure>.

²² Available here: https://www.burmalibrary.org/docs6/MYANMAR_PENAL_CODE-corr.1.pdf.

²³ *Supra* note 21, emphasis added.

Instituting New Severe Penalties for Alleged Crimes, Sabotage, or Obstruction against the Tatmadaw

Under the same February 14 edict,²⁴ State Administration Council Law No (5/2021), Law Amending the Penal Code, the Tatmadaw amended Penal Code Section 124-A criminalizing attempts to “bring into hatred or contempt, or excite or attempt to excite disaffection towards the Government” by adding “Defence Services or Defence Services Personnel” after “Government.” The amendment also increases the penalties for violating this provision from three years imprisonment to a range of 7 to 20 years, plus fines.

Section 124-A, widely known as Myanmar’s sedition law, already diverged from international standards on free expression, criminalizing any feelings of “disloyalty” or “enmity” (the Code’s definition of “disaffection”) toward the government; it was regularly used to suppress critics of the government and members of civil society.²⁵ As amended, the sedition law will almost certainly be used to arrest those opposing the coup.

The amendment also adds two new sections as follows:

- 124 C. Whoever intends or causes to sabotage or to *hinder the success of performance of the Defence Services and law enforcement organizations* who are engaged in preserving the stability of the State, shall be punished with imprisonment for a term of twenty years, to which fine may be added...
- 124 D. Whoever causes or hinders the Defence Services personnel and Government employees towards the Government, *disrupts or hinders by any means, those who are carrying out their duties*, such a person shall be punished with imprisonment which may extend to seven years or with fine or with both.²⁶

The amendment does not define “sabotage,” “disrupt,” or “hinder.” It is evident that nearly any act that could be presented as “hindering” law enforcement or military personnel would fall under these provisions and be subject to disproportionate penalties. If police or army personnel are trying to clear a street of peaceful protesters, any of the protesters or those not actively assisting authorities could be deemed to be “hindering” the successful performance of Defence Service or law enforcement duties.

Criminalizing Causing Fear and Spreading False News

State Administration Council Law No (5/2021), Law Amending the Penal Code, also criminalizes those who “cause fear, spread false news, agitate directly or indirectly

²⁴ *Id.*

²⁵ See, e.g., <https://www.hrw.org/report/2019/01/31/dashed-hopes/criminalization-peaceful-expression-myanmar>.

²⁶ *Supra* note 21, emphasis added.

criminal offence against a Government employee.”²⁷ Penal Code Section 505, widely used by past military and quasi-military governments to penalize speech critical of government policies, has been extended to include any expression that would not only cause military personnel to mutiny or fail in their duty, but would also “affect, hinder, disturb, damage the motivation, discipline, health, [or] conduct upon Government or the Defence Services and the duty of government employees or members of defence services to being into the hatred, disobedience, disloyalty.”²⁸ The amendment further adds a new Section, 505-A, which criminalizes whoever

- a) causes or intends to cause fear to a group of citizens or to the public,
- b) causes or intends to spread false news, knowing or believing that it is untrue,
- c) causes or intends to commit or to agitate directly or indirectly criminal offence against a Government employee, any kind of Government employees or Government employees.

These measures collectively broaden an already repressive law, criminalize misinformation and disinformation in violation of international standards on free expression, and subject any who seek to influence individual army personnel to heavy criminal penalties. Anybody can be said to have caused fear for almost any statement, and the standards for what is “false” are not objective, and cannot be left to the Tatmadaw to fairly determine.

Eliminating Due Process Protections

On February 14, the Tatmadaw issued State Administration Council Law No (6/2021), Amending the Code of Criminal Procedure.²⁹ For the new or amended crimes mentioned above, namely 124C, 124D, and 505A, it specifies that warrants are required for 124C and 124D, but not for 505A; and that 124C and D offenses are “non-bailable” (i.e. bail would be at the discretion of the court, not a matter of right), while bail for charges under 505A is left unspecified. It is notable, and somewhat contradictory, that while the crime of sabotage appears to require an arrest warrant, the ‘crime’ of “causing fear” or knowingly “spreading false news” does not, with no provisions made for bail. For crimes with penalties ranging from three to twenty years in prison, the lack of due process protections is disturbing. These provisions effectively give the army the power to arrest and imprison its opponents at will.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Also available at *supra* note 21; unofficial translation of the Code of Criminal Procedure available here: <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/61341/99607/F-865467823/MMR61341.pdf>.

Enacting Electronic Transactions Law Amendments

On February 15, 2021, the Tatmadaw announced the adoption of State Administrative Council Law No. (7/2021), Amending the Electronic Transactions Law (ETL, 2004,³⁰ amended in 2014). Introduced with no forewarning or consultation, the ETL amendments³¹ mirror many of the provisions in the draft Cyber Security Law, including the “fake news” and disinformation provisions, expansive data seizure and surveillance powers, and excessive criminal penalties. Given that the draft Cyber Security Law asserts to repeal the ETL in its entirety (Article 89), it seems that the ETL amendments were instituted as a temporary means to enforce certain Cyber Security Law provisions until the Cyber Security Law enters into force.³²

The ETL amendments introduce a broad definition of “cyber-attack” as follows: “the use of any cyber resource in the field of cyber’s administrative, financial, economic, rule of law; Committing an offence against an attack aimed at national security or public safety and property; Attempt to commit; Encouragement; Incitement or conspiracy.”³³ This definition is broad and ambiguous, and could be interpreted to restrict legitimate online activity or communication.

The personal information provisions of the ETL amendments are similar to the draft Cyber Security Law and allow for wide search and seizure of personal information and data, with those responsible for data violations subject to imprisonment for 1 to 3 years, or hefty fines. Persons convicted of “creating misinformation and disinformation with the intent of causing public panic, loss of trust or social division on cyberspace” (similar again to the Cyber Security Law) are subject to similar penalties.³⁴ Other vaguely defined cybercrimes, such as “preventing access to [a] cyber resource or making it difficult,” are punishable by 2 to 5 years imprisonment or 20,000 USD fines.³⁵

The ETL amendments give the Tatmadaw wide latitude to police the Internet and all electronic communications, and to prosecute anyone for any type of objectionable expression or electronic act. In so doing, the ETL amendments violate international standards relating to the freedom of expression.

³⁰ Available here: https://www.burmalibrary.org/sites/burmalibrary.org/files/obl/docs15/2004-SPDC_Law2004-05-Electronic_Transactions_Law-en.pdf.

³¹ Unofficial translation available here: <https://freexpressionmyanmar.org/wp-content/uploads/2021/02/Electronic-Transaction-Law-Amendment-2021-EN-MM.docx.pdf>.

³² For more information on the ETL amendments, please see Free Expression Myanmar: <http://freexpressionmyanmar.org/myanmars-new-electronic-transactions-law-amendment/>; and <https://www.rfa.org/english/news/myanmar/new-charges-02162021203452.html>.

³³ *Supra* note 31.

³⁴ *Id.* at art 38c.

³⁵ *Id.* at art 38d.

Declaring Martial Law

In mid-March, the Tatmadaw declared martial law in parts of Yangon, Mandalay, and other districts of the country, purportedly to “provide security, the rule of law and community peace.” The decree effectively transfers executive and judicial power to the Yangon regional commander and other military officers, who have been entrusted with administrative, judicial, and military powers in these areas.

Other Threats to Civic Freedoms

Already under significant pressure, associations and civil society organizations are likely to be subjected to additional scrutiny, particularly in relation to funding. Currently, the Association Registration Law (2014) recognizes the right of associations to exist without being registered, provides for registration of associations on a voluntary basis, and affirms the right of associations to receive funding from international sources. In the wake of the coup, however, military entities from the Department of Social Welfare to General Min Aung Hlaing himself have expressed concern about alleged “illegal organizations” and their funding flows. Communications sent by government departments to international non-governmental organizations (INGOs) undergoing their memorandum of understanding (MoU) renewal process have explicitly asked INGOs to share information regarding funding sources. At the first meeting of the “Security, Stability, and Rule of Law Committee” on February 26, 2021, General Min Aung Hlaing raised the specter of legal actions against the formation of “illegal organizations,” as well as the need to scrutinize funding flows. Civil society organizations are deeply concerned that restrictive changes to registration and additional oversight over cross-border funding will soon be proposed.

ICNL will continue to monitor legal developments around the coup in Myanmar and stands ready to assist civil society in navigating and responding to these new restrictions.

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