

Burma Lawyers' Council
List of the most problematic provisions in the 2008 Constitution and Burmese laws
June 2012

The below gives an overview of provisions in the 2008 Constitution and Burmese laws that are, in the view of the BLC, the most problematic for the development of rule of law and democracy in Burma. Each constitutional provision or law is accompanied with a short rationale explaining why it is problematic.

This list is divided into three sections:

- I: Problematic provisions in the Constitution
- II: Repressive Burmese Laws and Acts
- III: Problematic Provisions in the Penal Code

I: Problematic provisions in the 2008 Constitution¹

Executive issues (including power of the military)

Non-Civilian Control of the Armed Forces -- Section 20(b)

Section 20(b) provides that the Defence Services have the right to independently administer all affairs concerning the armed forces. This is problematic because administration and responsibility of the armed forces should ultimately rest with the country's civilian political leadership. In most democracies, the President or Prime-Minister is the head of the armed forces – the Commander-in-Chief – and further executive control of the army and police should fall under relevant ministries.

Military Control of the NDSC -- Section 201

Section 201 creates the National Defence and Security Council (NDSC), probably the most powerful non-elected body under the Constitution. It consists of eleven officials, five of whom are required to be active-duty military personnel, while the remaining positions may be ex-army personnel. Given the stringent qualifications that all public officials must meet prior to assuming office, the army will be able to ensure that most of the latter positions will be occupied by current or former army personnel (see Section 232 for the rules on appointment of Union Ministers). The effect of this section is to constitutionally grant inordinate power in the hands of military officials.

Executive Power Rests Solely with the President -- Section 217

This section states that the executive power of the Union is vested in the President alone. In other democratic presidential systems, the executive power is vested in the Government as a whole and not in one person.

President Lacks the Power of the Commander-in-Chief -- Section 342

Unlike the practice in many democratic countries, under the Myanmar constitution the President is not the Commander-in-Chief but rather appoints a different person who has been proposed and approved by the NDSC. The problem here is not only that the President is not the Commander-in-Chief but that the power to choose the Commander-in-Chief is limited by the NDSC's role in the appointment.

Legislative issues (including political parties)

Military Representation in the Legislative Bodies -- Sections 74, 109(b) and 141(b)

These sections ensure a large military presence in Myanmar's Hluttaws (legislative bodies). Army representatives will make up one fourth of the total number of representatives in each legislative body. In traditional democracies, constitutionally mandated military presence in the legislative power is unheard of. This concept violates the principle of separation of powers and is contrary to a democracy in which the people are free to choose their own representatives. Military officers are not elected and are obliged to follow orders from their superiors, making it very unlikely they can cast their votes independently.

"Loyalty" Requirement for Political Parties -- Section 404

A political party shall: "(a) set the objective of non-disintegration of the Union, non-disintegration of national solidarity and perpetuation of sovereignty" and "(b) be loyal to the State."

It is not uncommon for a Constitution to forbid political parties that undermine or threaten the sovereignty of the State. It is, however, uncommon to require political parties to have "non-disintegration of the Union" and "loyalty" as their objectives. The loyalty requirement infringes freedom and independence because in a healthy democracy opposition parties regularly question the State's politics.

Broad Government Discretion over the Dissolution of Political Parties -- Sections 407 and 408

These sections state that if a political party infringes one of the following stipulations, it shall have no right of continued existence and can be dissolved:

- (a) having been declared an unlawful association under the existing law;
- (b) directly or indirectly contacting or abetting the insurgent group launching armed rebellion against the Union or the associations and persons determined by the Union to have committed terrorist acts or the association declared to be an unlawful association;
- (c) directly or indirectly receiving and expending financial, material and other assistance from a foreign government, a religious association, other association or a person from a foreign country;
- (d) abusing religion for political purpose.

The provisions of this section do not meet the standards of fairness or objectivity that are found in the constitutions of other democratic countries. The discretion granted under these sections to the Government which, in many cases, will be a political opponent of the parties accused of Section 407 activities, is so broad that it effectively allows the Government to stifle political parties' freedom of association, threaten opponents with dissolution, and restrict funding of opponents. The 2008 Constitution, moreover, does not allow for any review of political parties' activities by an impartial and legitimate body.

Judicial issues (including amnesties and pardon)

Flawed Procedures for Pardons and Amnesty -- Section 204

Under Section 204(a), the President receives the power to grant a pardon. This is not unusual in Presidential or Constitutional monarchy systems, but the procedure should be regulated to some extent. There should be a waiting period before a pardon can be requested and a pardon procedure should not establish innocence but rather forgive the petitioner after his acceptance of responsibility, remorse and atonement. It should not be an easy way out of a conviction.

Under Section 204(b), the President has the power to grant amnesty, but only in accord with the recommendation of the NDSC. This section allows the NDSC to have significant control over amnesties for military personnel or other suspected criminals it wishes to protect. The procedure of how an amnesty recommendation is dealt with by the President is unclear and not described in the Constitution, which leaves it open to abuse. See also Section 445 below regarding immunities.

Lack of Input from the Legislature in the Judicial Appointment Process -- Section 299 (c)(i)-(ii)

The Chief Justice and other Supreme Court Judges are nominated by the President, who will submit the nominations to the Pyidaungsu Hluttaw for approval. The Pyidaungsu Hluttaw “shall have no right to refuse the person nominated by the President [...] unless it can clearly be proved that the persons do not meet the qualifications for the post prescribed in Section 301”.

This section excessively limits the legislature’s ability to participate in the appointment of judges, effectively giving the President almost unrestricted power over the appointment process. In other democracies, the legislature sets its own standards as to when it will approve a judicial appointment. Under Section 299, however, it can only reject a candidate who clearly does not meet Section 301 qualifications, which are matters such as age, judicial experience, and loyalty to the government. There can be no consideration of qualities such as judicial philosophy, personal character, or ethical behavior. Furthermore, the burden is on the legislature to show clear evidence that the candidate does not have the Section 301 qualifications.

Commander-in-Chief as the Highest Arbiter of Military Justice -- Section 343

Section 343(b) provides too much power over military justice to the Commander-in-Chief. It makes the Commander-in-Chief’s decisions over all legal matters involving the military “final and conclusive.” This section could be interpreted to give the Commander-in-Chief the power to overturn the rulings of court-martials. Under the Constitution, the Commander-in-Chief is not elected and not accountable to any higher authority.

Immunity for Government Officials -- Section 445

Article 445 of the 2008 Constitution states that, “No proceeding shall be instituted against the said [previously-ruling] Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties.” This Article, also known as the Immunity Clause, grants amnesty to any previous officials who have committed any crime, as long as the crime was committed as a result of their official duties. The military general who committed war crimes, the chief of intelligence who arrested and tortured political dissidents, the army commander who used forced labor for construction projects; all of them would be shielded from any Burmese criminal or civil proceeding under the Immunity Clause. This contravenes customary international law, under which there is no amnesty for core international crimes. The Immunity Clause also violates Burma’s obligations as a signatory to the Geneva Conventions to prosecute persons who have committed war crimes.²

State of emergency and fundamental freedoms issues

State Control during Emergencies -- Sections 40 and 419

The Constitution gives unduly broad rights to the President and the army during times of emergency. As the nature of a threat to the country becomes more severe, the army assumes more power. Under Section 40(c), the most severe state of emergency, the Commander-in-Chief of the Defence Services can take full control of the State. Pursuant to Section 419, under this circumstance the Commander-in-Chief shall have the right to exercise the powers of legislature, executive and judiciary. This is a divergence even from Myanmar’s previous constitutions. Under the 1947 Constitution, the President was the chief executive, there was no parallel military government and, even in times of war, all law-making powers were vested in the Parliament.

The Section 40 provisions regarding emergencies are, furthermore, too vague. It is not clear, for instance, when “a local government is unable to perform its Constitutional duties”, or when “life and property” are threatened, or when there is a threat of a “disintegration of the union”. These situations are not defined, giving too much discretion to the President or Commander-in-Chief.

Broad Limitations to Fundamental Freedoms -- Section 354

This section limits fundamental freedoms such as expression, assembly and association by subjecting them to “laws enacted for State security, prevalence of law and order, community peace and tranquility or public order and morality.” While limitation clauses are not uncommon in democratic

constitutions and international human rights treaties, the limitation clause provided in Section 354 is particularly broad and does not require that restrictions, for example, have to be consistent with democratic values.

Power to Suspend Rights during Emergencies -- Section 420

Section 420 states that the Commander-in-Chief of the Defence Services may, during a state of emergency, restrict or suspend one or more fundamental rights. In traditional democracies, some fundamental rights, such as the right to assembly, might be restricted or suspended during a state of emergency. Certain fundamental rights, however, such as the right to life and the right not to be tortured, can under no circumstances be restricted. Section 420 does not distinguish between suspendable and non-suspendable rights, implying that any rights can be suspended.

II: Repressive Burmese Laws and Acts

Unlawful Associations Act 1908³

Enacted in 1908 during the British colonial era, this Act makes it illegal for individuals to contribute or assist in any way in the functioning of any organization which the President declares (unilaterally and according to his/her discretion) to be illegal. The British colonials used the Act to oppress opponents of colonial rule. Most of the political prisoners in Burma, some of whom were released recently, were charged under this Act.

This law, among other things, makes it an offence, punishable with imprisonment for between two and three years and a possible fine, to have contact with any organization which the Burmese authorities have declared illegal (such as the Burma Lawyers' Council). Burmese lawyers have been targeted under this law for representing farmers that complained about land seizures to the International Labour Organization.⁴ The NLD was declared an unlawful association in the past and people in contact or working with the NLD were then arrested and jailed.

Official Secrets Act 1923⁵

Another Act instated by the British colonial regime to ensure their colonial subjects did not enjoy the right to freedom of information. The Act makes it unlawful for any person to possess, control, receive or communicate any classified document or information from the State that may have an adverse affect on the sovereignty and integrity of the State, or which may affect Burma's foreign relations or threaten the safety of the state. The Act gives the authorities extensive powers to classify any information as "secret." Those found guilty under this Act can be punished with imprisonment for up to two years or fined, or both. The Act prevents the transparency of the Government and contains vague and broad terms that are susceptible to abusive interpretations.

Wireless Telegraphy Act 1933⁶

An Act instated by the British colonial regime making it an offense to have in possession any "wireless telegraphy apparatus" without permission. Amended in 1995 to cover the use of unlicensed fax machines, and again in 1996 to cover computer modems. Anyone found possessing these "apparatus" without official permission was made liable to be imprisoned for up to three years or fined. The effect of this Act is to indirectly prohibit the acquisition of information through modern technologies, in contravention of Article 19 of the Universal Declaration of Human Rights.

Emergency Provision Act 1950⁷

This Act is used to imprison journalists and writers. Section 5 of this Act makes it a criminal offence "to spread false news, knowing, or having reason to believe that it is not true," and anyone who is considered to have contributed towards the diminishment of respect or disloyalty among members of the civil service or the military towards the government, either of which can be prosecuted with up to seven years imprisonment. Further, it allows anyone who causes or intends to disrupt the morality or the behavior of a group of people or the general public, or to disrupt the security or the reconstruction of stability of the Union, to be sentenced to seven years in prison, a fine or both. The law is very broad and leaves open to the authorities to decide when news is "false", when a person contributed to the

“diminishment of respect” or “disloyalty” of others, and what the disruption of “morality” entails. These vague terms are all open to abuse and lead to arbitrary decisions to imprison people for merely expressing their views.

State Protection Law 1975⁸

"The Law to safeguard the State against the dangers of those desiring to cause subversive acts", also known as the "State Protection Law", was amended in August 1991 to increase the maximum permissible term of imprisonment from three to five years. The BLC published an analysis of this “Broadest Law in the World” in December 2001.⁹ The 1975 State Protection Law allows the authorities to detain anyone who has committed or is about to commit an act that may be considered an "infringement of the sovereignty and security of the Union of Burma," or a "threat to the peace of the people". Article 14 allows the Cabinet to extend a person’s detention for up to three additional years.

The State Protection Law allows detention under very broad and unclear terms without the necessary safeguards of a judicial review. For instance, Article 9 provides that “Only necessary restriction of fundamental rights shall be decided”. The law does not provide, however, when a restriction is “necessary” or who decides it is “necessary”. Further, Article 9(e), states that a person “against whom action is taken” will only be handed over to judicial authorities if “sufficient facts for filing a lawsuit have been gathered”. The wording implies that people may be indefinitely detained without trial if ample evidence cannot be found.

Law relating to Formation of Organizations 1988¹⁰

This law regulates the formation of organizations like associations, committees and clubs. It requires prior permission from the Ministry of Home and Religious Affairs to form an organization. If denied permission, the organization must not form or conduct activities. This provision contravenes ILO Convention No. 87, to which Myanmar is a party, which prohibits governments from requiring prior authorization to form a union.

Section 5 of the law prohibits the formation of organizations “that attempt, instigate, incite, abet or commit acts that may in any way disrupt law and order, peace and tranquility, or safe and secure communications”. Due to the broad and vague language, this section has led to the prohibition of organizations, formal or informal, that threaten the status quo.

Although a new Labour Organizations Law has recently been promulgated in Burma, it only covers labor unions and thus is not as broad as the Law relating to Formation of Organizations.

The Television and Video Law 1985 / 1995 / 1996 Television and Video Act¹¹

This Act requires any persons who hold or use a television set or video recorder to obtain a license. This law is often used to target journalists and to prevent them from working. A breach of the law could lead to imprisonment for up to three years. The biggest problem with this law is that it is too broad and the punishments are too severe. Also, there is no assurance that after requesting a license, it will be granted. This law was clearly enacted to ensure strict control of the media. It contravenes Article 19 of the UDHR protecting the right to freedom of information.

The Motion Pictures Law 1996¹²

Licenses to make films must be obtained from the Myanmar Motion Picture Enterprise, which are later censored if necessary. This law is part of the Government policy of restricting the freedom of people to information. Movies that will not be condoned by the Government will not be shown. Despite all the recent reforms, “The Lady”, a movie about Daw Aung San Suu Kyi, is not allowed in Myanmar.

Computer Science Development Law 1996¹³

This law requires anyone in Myanmar to request permission from the Ministry of Communication before importing or possessing computer equipment or software. It also prohibits the use of this

equipment if it undermines or sends out information regarding state security, prevalence of law and order and community peace and tranquility, national unity, state economy or national culture. Punishment is imprisonment for a minimum of 7 years and a maximum of 15 years. The claimed purpose of the law is “(a) to contribute towards the emergence of a modern developed State through computer science” and “(b) to lay down and implement measures necessary for the development and dissemination of computer science and technology”.

This law is too restrictive and punishment for violations is too severe. Even after permission is given to possess the equipment, it cannot be used to freely express opinions. This law, like others, also creates a “chilling effect”. Computer users fear violating the law and thus are less likely to use the computers to disseminate what may well be information that is perfectly lawful, even under the restrictions of the Computer Science Law.

Internet Law 2000¹⁴

This “law,” established by the State-owned Myanmar Post and Telecommunications (MPT) for users of its internet service, imposes regulations on Internet postings that may be deemed detrimental to the country, its policies or security affairs. The regulations create extremely restrictive internet rules that are clearly intended to censor criticism of the government.

For instance, they forbid the posting of “any writings detrimental to the interests of the Union of Myanmar” (Section 1); “[a]ny writings directly or indirectly detrimental to the current policies and secret security affairs of the Government” (Section 2); and “[w]ritings related to politics” (Section 3). It further only allows the person who is granted an internet account to use the internet (Section 5) and holds this person responsible for all internet use of that account (Section 6).

The creation of webpage requires prior permission (Section 10). The MPT also has the right to amend and change the regulations on the use of internet “without prior notice” (Section 12). Violation of any of the above sections results in termination of internet use and legal action (Section 14).

Electronic transaction law 2004¹⁵

The 2004 Electronic Transaction Law was promulgated by the Government to regulate all use of electronic transactions throughout Burma. In a broad sense, the law could serve as a solid framework upon which E-commerce and E-government could be built in the future.¹⁶ Its objectives sound similar to the ones in the above-described Computer Science Development Law.

However, this law similarly contains severe punishment for the misuse of electronic transaction technology including: (a) doing any act detrimental to the security of the State or prevalence of law and order or community peace and tranquility or national solidarity or national economy or national culture; (b) receiving or sending and distributing any information relating to secrets of the security of the State or prevalence of law and order or community peace and tranquility or national solidarity or national economy or national culture (Section 33). The punishment for infringement is imprisonment from 7 to 15 years.

The law’s broad and vague terms leave discretion to the authorities to imprison anyone that expresses opinions electronically that the authorities view as a threat.

III: Problematic Provisions in the Penal Code

The Myanmar Penal Code¹⁷

The Myanmar Penal Code is still based on the British Colonial Penal Code, and except for some amendments, identical to Penal Codes in other previous Indian British Colonies, such as India, Bangladesh and Malaysia. Some sections of the Penal Code are clearly outdated and need to be revised to comply with international standards.

High Treason Law Used to Prosecute Dissidents -- Section 121 and 122

These sections penalize “High Treason”, with punishment up to a maximum of 25 years imprisonment or the death penalty. High Treason is defined in Section 121 as waging war or using violent means to overthrow the Union or assisting, inciting or conspiring with any person or State in or outside Burma to reach the same goal. This definition is prone to abuse and has been used to imprison dissidents or members of the several independence groups inside Burma.

Serious Limitations on the Right to Assembly -- Sections 143, 145 and 152

These provisions punish members of an unlawful assembly with imprisonment up to six months and punish the participants that fail to disperse after being so ordered with up to 2 years imprisonment. Persons that threaten to assault or obstruct any public servant from dispersing an unlawful assembly can be punished with imprisonment up to three years. These provisions overlap in subject matter with the Unlawful Associations Act and are a serious limitation on Section 354 of the Constitution, which guarantees the right to assembly. These sections and the Unlawful Associations Act should be amended for consistency and for compliance with the Constitution and international standards.

Vague Definition of Public Nuisance -- Section 290

This section penalizes “whoever commits a public nuisance [...] not otherwise punishable by this Code [...] with a fine”. Nowhere in the Penal Code is “public nuisance” defined and is thus susceptible to abuse.

Criminalization of Sodomy -- Section 377

Section 377 penalizes voluntary “carnal intercourse” (sodomy) with up to ten years imprisonment. Similar laws have led to protests in other countries still using the British colonial Penal Code (e.g., India, Singapore, Malaysia). This law should be amended so it does not penalize carnal intercourse or sodomy committed in private between two consenting adults.

Excessive Limitations to the Freedoms of Expression and Assembly -- Section 505

This section deems it unlawful to make, publish or circulate any statement, rumour or report “(b) with intent to cause, or which is likely to cause, fear or alarm to the public [...] whereby any person may be induced to commit an offence against the State or against the public tranquility”. According to an “exception” in the law, there is no offence if a person commits this act without the intent and when believing the statement, rumour or report is true. The Government has used this provision to arbitrarily repress and punish those taking part in free expression, peaceful demonstrations, and forming organizations. The provision should be amended to ensure it does not unnecessarily limit Section 354 of the Constitution, which ensures the freedom of expression and assembly.

¹ <http://burmadigest.info/wp-content/uploads/2008/11/myanmar_constitution-2008-en.pdf>

² Revealing Burma’s System Of Impunity: A Briefer For The Commission Of Inquiry Campaign Prepared By Burma Lawyers’ Council, p. 2, available at: <<http://www.scribd.com/doc/66847676/Burmas-System-of-Impunity-BLC-Briefer>>

³ <http://www.blc-burma.org/html/Suppressive%20Law/ulaa_e.html>

⁴ “Lawyers group request abolition of Unlawful Association Act”, Democratic Voice of Burma, 30 March 2009, <<http://www.dvb.no/news/lawyers-group-request-abolition-of-unlawful-association-act/2105>>

⁵ <http://www.blc-burma.org/html/burma%20code/lr_e_bc02_17.html>

⁶ Wireless Telegraphy Act, Burma India Act 17/33, The Burma Code Volume VII (available in paper form)

⁷ <http://www.burmalibrary.org/docs6/Section_5_of_the_Emergency_Provisions_Act-en.pdf>

⁸ <http://www.blc-burma.org/html/Suppressive%20Law/spl_e.html>

⁹ <<http://www.burmalibrary.org/docs6/State-Protection-Act-analysis.pdf>>

¹⁰ <http://www.blc-burma.org/html/myanmar%20law/lr_e_ml88_06.html>

¹¹ <http://www.blc-burma.org/html/myanmar%20law/lr_e_ml96_08.html>

¹² <http://www.blc-burma.org/html/myanmar%20law/lr_e_ml96_09.html>

¹³ <http://www.blc-burma.org/html/myanmar%20law/lr_e_ml96_10.html>

¹⁴ <<http://www.mail-archive.com/cypherpunks@cyberpass.net/msg00468.html>> No official English translation was available.

¹⁵ <http://www.blc-burma.org/html/myanmar%20law/lr_e_ml04_05.htm>

¹⁶ Stephen E. Blythe, "Rangoon Enters the Digital Age: Burma's Electronic Transactions Law As A Sign of Hope for A Troubled Nation", *International Business Research*, Vol. 3, No. 1 (2010).

¹⁷ <<http://www.blc-burma.org/html/myanmar%20penal%20code/mpc.html>>