Comments on the draft Printing and Publishing Enterprises Law prepared by the Ministry of Information of Myanmar

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Introduction

In early March, the Ministry of Information of Myanmar published a new law, the Printing and Publishing Enterprises Draft Law (draft Law), which was also submitted to parliament (the Pyi Htaung Su Hluttaw). The Government of Myanmar has made a commitment to put in place a legal framework for the media which is in line with international standards, as part of its broader programme of democratisation. These Comments are aimed to support the achievement of that goal. In particular, these Comments are intended to support local stakeholders – including the Ministry of Information (MoI), the parliament, the media and civil society groups – assess the extent to which the draft Law conforms with international standards relating to freedom of expression and hence advances the commitment to democratise Myanmar.

The Government of Myanmar started preparing legislation to regulate the print media sector in early 2012, in an effort to replace the highly repressive current legislative regime, including the Printers and Publishers Registration Law, 1962, with a more democratic framework. In August 2012, the MoI asked the newly formed Interim Press Council to take over the job of drafting the press law, and that body published a first draft of the law in January 2013, holding consultations on the draft at the same time.

The Centre for Law and Democracy (CLD) and International Media Support (IMS) have been providing support for the process of drafting a democratic press law since April 2012, when they hosted a Workshop on Print Media Regulation in Myanmar in Yangon, which was attended by representatives of the Ministry of Information, private and public newspapers, journalists and civil society, among others. Further meetings and workshops on this issue were held in August and November 2012, and February 2013.

Given that the MoI had allocated the task of drafting the press law to the Interim Press Council, many local stakeholders were surprised when the MoI published the draft Law. The MoI, for its part, has claimed that the draft Law is not a 'press law' but simply a law about registering printing presses and publishers. At a minimum, the scope of these two law drafting exercises should be harmonised, so as to avoid duplication and perhaps even contradictory rules. Consideration should also be given to consolidating the two processes, so that only one law governing this sector emerges, in which case it might make sense to allow the Interim Press Council to complete their work first.

The draft Law establishes three main regulatory systems. First, it puts in place a registration system for printers, publishers and news agencies (Chapter II, sections 3-6). Second, it establishes restrictions on the content of what may be published (Chapters III and IV, sections 7-8). Third, it establishes a regime governing the import, export and distribution of publications (Chapter V, sections 9-15). These are supported by chapters on prohibitions (effectively making it clear that breach of the rules relating to these three regimes are binding), on punishments (establishing the penalties that may be imposed for breaching the rules) and on transitional matters (including limitations on the scope of the law, the carrying over of registration under the Printers and Publishers Registration Law, 1962, issuing regulations and repeals). The three main regimes are examined in more detail in turn below.

The Registration System

Pursuant to section 3, printers, publishers and news agencies must obtain an 'acknowledgement certificate' from the Registration Officer, who is the director of the Copyright and Registration Division within the MoI. A 'printer' is defined as the owner of a "printing-press and publishing house", which are defined, respectively, as "engines for printing, printing equipments" and as a place in which a printing press is used "to print documents and press in large amount". A 'publisher' is defined as the publisher of "printed published matter" whether for profit or not, while a 'news-agency' is defined as "an enterprise which supplies the collected news report to printing media, electronic media and other media".

Section 4 sets out only very rudimentary rules regarding the issuing of acknowledgement certificates, namely that they be issued "for the designated period in accordance with specifications" and after the relevant fees have been paid. If anyone tries to get a certificate by fraud, or for purposes which are "opposed to the provisions of this law", the Minister may suspend or terminate it, and an appeal from this lies to the President of the Republic (sections 5 and 6).

It is prohibited to engage in printing, publishing or establishing a news agency without first obtaining a certificate (section 16) or to continue activities while the certificate is suspended or terminated (section 19). Breach of these rules may lead to a fine of between five and ten million Kyats (approximately USD5,670 to 11,340) (section 20).

Under international law, registration requirements for the print media – understood broadly to include printers and publishers as well, of course, as news agencies – are regarded with suspicion, in part because they may be abused to exert control over the media. As the (then) three special international mandates on freedom of expression – the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression – stated in a Joint Declaration of 18 December 2003:

> Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided.

While registration of the print media is not entirely ruled out under international law, to be legitimate, registration systems must meet certain conditions. As the special mandates noted in the same 2003 Joint Declaration:

> Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.

Assessed against these standards, there are several problems with the proposed registration regime in the draft law. First, the scope of the system is extremely unclear. Pursuant to the definitions noted above, which are the only ones which are formally relevant, practically any printed matter that is produced in a large quantity, such as a poster or even a type of envelope, would be covered. There are certain exclusions in section 24(b), but the potential scope of the registration requirement remains vast. Under international law, the scope of a system like this must be very clear from the law, so that it is apparent to everyone whether or not they need to register before engaging in an expressive activity. Furthermore, the scope of the system should be limited to publications which really can be considered to be 'press' (i.e. newspapers and journals). It is questionable whether a registration regime should even be applied to the press; extending it beyond that to cover other types of expressive activity is simply not legitimate.

The draft Law also includes definitions of 'publication' (which includes handwritten and electronic material, as well as newspapers, journals and books), 'newspaper' (which is daily printed matter which includes news or comment), 'bulletin, journal, magazine' (which includes regular publications) and 'book' (which includes any "part of a book or essay or sheets"). It is not clear what the relevance of these definitions are to the registration regime, since they are not, at least in English translation, referred to in the rules on registration. At best they are confusing, while at worst they could be deemed to expand the scope of the registration regime even further.

Second, the system fails to meet the standard noted above that any registration systems should be independent of government. The system is run from within the MoI, the Minister of Information has the power to suspend or terminate registration, and appeals go to the President of the Republic, so that every element of the system is intimately

linked to government. Ideally, if such a system is to be imposed, it should be managed by a body which is insulated from political interference. Options might include the Press Council which is to be established or the body which registers commercial enterprises. At the very minimum, the powers to terminate registration and to decide appeals should lie with the courts, and not the Minister and President.

Third, the procedures for registering printers and publishers are not set out in the draft Law, beyond specifying that certificates will be for a set duration and that fees will be charged. Instead, this is left to be determined through regulation, presumably by the Minister or Ministry of Information. Granting the government a wide degree of discretion to set rules which affect freedom of expression is not legitimate under international law. This is particularly the case given that the procedures should not, in accordance with the quotation above, impose substantive conditions on registration or allow for any discretion to refuse registration, once the formalities have been complied with. Instead, the main procedures governing registration should be set out in the primary legislation.

Fourth, the Minister has the power to suspend or terminate registration not only for fraud (dishonesty in the application) but also on the grounds that the purpose is "opposed to the provisions of this law". The latter is both unacceptably vague (i.e. it gives the Minister far too much discretion to take the extremely serious step of suspending or terminating a newspaper or journal) and inherently illegitimate (no one should be able to prevent a newspaper or journal from operating based on some notion about its purposes, as opposed to applying sanctions to it after publication of illegal material).

Finally, the sanctions for non-compliance with the regime of registration are too onerous. In particular, minimum sanctions in this context are not justifiable; courts should have the discretion to take into account mitigating circumstances (such as good faith or honest error) when imposing sanctions.

Recommendations:

- Consideration should be given to doing away entirely with the regime of registration for publishers, printers and news agencies as it is not necessary and could be abused to control the print media.
- If a registration system is to be maintained, it should at least meet the following conditions:
    - The scope of the obligation to register should be clearly defined and should be limited to periodical, mass distribution publications that carry news and/or current affairs.
    - The system should be overseen by an independent body, such as the Press Council or the body which registers commercial enterprises.
    - Appeals against refusals to register, as well as the power to impose sanctions, should lie with the courts.
    - The procedures for registration should be set out in the primary legislation and should not impose substantive conditions on those wishing to register or grant the authorities any discretion to refuse registration once the conditions have been complied with.

- The power to suspend or terminate registration should be limited to cases of fraud in the application process, and should be exercised only by the courts.
- There should be no minimum sanction for breach of the rules relating to registration.

Content Controls

Section 7 of the draft Law imposes a number of restrictions on the content of what may be published by printers and publishers (which is extended to imported publications by virtue of sections 10 and 12, and to websites by virtue of section 15). The specific restrictions prohibit published material which:

- "aggrieves" different national groups or religions;
- incites to violence, or jeopardises the "tranquillity of community; and prevalence of law and order";
- is obscene;
- abets a crime or incites crime, cruelty, violence, gambling or the use of drugs; and
- "opposes and breaks" the constitution or other laws.

Pursuant to section 8, the Registration Officer may hold a publication to be invalid for breach of section 7. No such publication may be imported, exported, printed, published, distributed or sold (section 17), so a section 8 order is effectively a banning order. Breach of this rule may lead to a fine of between one and five million Kyats (approximately USD1130 to 5,670) (section 21).

An initial question is whether it is appropriate to include any content restrictions in a press law. Under international law, the print media should not be subject to special criminal and civil content restrictions that go beyond the rules that apply to all forms of expression, although it may be legitimate to set up a special administrative regime for the print media, for example by establishing a press council and giving it a mandate to develop and apply a code of conduct. At the same time, it may be noted that the sanctions for these offences in the draft Law are substantially lighter than those provided for in the 1861 Penal Code for similar offences. For example, the distribution of obscene materials may, pursuant to sections 292-294 of the Penal Code, attract a term of imprisonment for up to three or six months.

There are, however, serious problems with the scope and nature of the proposed offences. The nature of what is prohibited is, in many cases, at least in the English translation, unacceptably vague. For example, it is not clear what it means to 'aggrieve' a group on the basis of nationality or religion. Under international law, the standard for this is advocacy of hatred that incites to violence, discrimination or hostility. Similarly, instead of jeopardising the prevalence of law and order, the international standard is again incitement to crime. Equally problematical is the fact that it is not legitimate to restrict free speech to protect some of the listed interests. Thus, under international law, community tranquillity is not an interest which justifies restrictions on freedom of expression, beyond incitement to crime; instead, offensive speech is protected. While

incitement to crime is prohibited in most countries, incitement to cruelty, gambling or the use of drugs which is not a crime is not prohibited (i.e. the scope of this rule should be limited to incitement to crime). International law specifically protects speech which criticises or opposes the constitution or other laws, as long as it does not constitute incitement to violence.

Far more problematical, however, is the power of the Registration Officer effectively to ban newspapers and journals for breach of section 7. This is effectively a form of prior censorship exercised by a political organ of government. While not quite as problematical as the former system of prior censorship, it is completely contrary to international law. Under international law, responsibility for breach of content rules should be applied only by the courts, and not political actors, and should be applied post-publication (i.e. should not involve the banning of a publication). This is without prejudice to any individual responsibility for committing crimes which might be imposed through the criminal justice system.

Recommendations:

- The prohibitions in section 7 should be reviewed and revised to bring them into line with international standards.
- The system for applying the section 7 rules should be completely revised so that publications are only responsible before the courts for these rules, and the sanctions are limited to the fines provided for in section 21 (i.e. and not allow for the banning of publications).

Importing, Exporting and Distributing

Section 9 of the draft Law provides that the import and export of publications must respect the provisions of the "Export and Import Law and Procedures". To the extent that these rules are already legally binding, section 9 is redundant.

Pursuant to section 11(a) of the draft Law, those wishing to import documents (which is not defined in the draft Law) must register those documents by sending their titles, a description of their type and a number of sample documents to the Registration Officer. Section 11(b) requires printers who print 'printed matters' regionally to register them by sending samples to the Registration Officer. Breach of these rules is prohibited by section 18, and this may lead to a fine of between one and three hundred thousand Kyats (approximately USD110 to 340) (section 22).

To a large extent, the comments above regarding registration also apply to these provisions. Of particular note is the lack of clarity as to the scope of these provisions, the fact that the system is applied by the MoI rather than a body that is independent of government, and the lack of clear procedures for registration. It may be noted that such a registration requirement for imported publications, which appears to apply even to the importation of a small number of documents, such as a few books, would impose a major administrative obstacle to the free flow of information across frontiers, which is protected under international law. It is also largely impractical, inasmuch as the electronic

importation of books and other documents is increasingly accessible to citizens of Myanmar.

Recommendations:

- Section 9 of the draft Law should be removed.
- Consideration should be given to doing away with the system of registration for importation of documents and regional printing activities.
- If the system is retained, it should be revised in line with the recommendations above regarding the overall registration system.

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