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Rule By Law

An Analysis of the Use of Legislation to Stifle Civil Society Space in Burma

The fact that a corrupt and compliant judiciary is already using recently enacted legislation to silence human rights defenders (HRDs) and stifle civil society space betrays the Burma government's motivations for initiating new legislation on media and civil society organizations (CSOs). Such legislation only furthers repression, censorship and government control rather than democracy, human rights and the rule of law. For the reality is that it is not "rule of law" but "rule by law" that characterizes President Thein Sein's Burma. Repressive legislation represents a more sophisticated and subtle tactic than the knee-jerk violence and disappearances of times past; and under this veil of legitimacy, the Burma government can restrict people's rights, control civil society, and silence those who threaten the regime's supremacy – as other countries in the region do – without the international community feeling the need to question its risky and dubious policy of full engagement and investment.

It is high time, however, that the international community peered behind the veil and took note of some of the more sinister undertones to Burma's recent reforms. By adjusting its own tactics in response, the international community can maintain some degree of leverage and ensure that Burma remains on a path towards true democracy where the rule of law prevails rather than towards a faux democracy just palatable enough for its doors to be open for business. The incentive is that Burma now has an unprecedented opportunity to take its rightful place as a genuine political and economic player on the world stage.

Overview

One of the main hopes for Burma's recent political reforms has been for a vibrant, open and flourishing civil society – a vital ingredient of any healthy democracy and a key factor in creating an enabling environment for sustainable development. For Burma's people to feel invested in the country's political, economic and social development, they must be allowed to participate and they must be empowered. Such progress cannot happen, however, if there are onerous or arbitrary restrictions on people's fundamental rights, if the rule of law is in any way compromised, or if civil society is stifled. A genuine transition to democracy requires the establishment of the rule of law, with a system of independent checks and balances, composed of transparent and accountable institutions capable and willing to protect the rights of all people.

This paper is primarily an analysis of the raft of legislation that is in the process of being pushed through parliament to target HRDs, activists, protestors and CSOs, and the threat that such legislation poses to their fundamental rights – which Burma is legally bound to respect and protect under the 2008 Constitution. This paper will also look at the current situation of political prisoners to demonstrate how the legislation is being misused in collaboration with a compliant judiciary and the Myanmar National Human Rights Commission, before finally making recommendations to the UN Members States.

Legislation

The rule of law requires the Burma government to amend or repeal all laws and policies not consistent with international human rights standards and laws, including those identified by the Special Rapporteur on the situation of human rights in Burma, Mr. Tomás Ojea Quintana. The Burma government continues to use these laws as tools to arrest, prosecute and imprison activists, journalists, and members of opposition groups. Repressive laws long used to imprison dissidents, such as the Unlawful Associations Act, the Electronics Transactions Act and the State Protection Act, remain on the books.

While the military-drafted 2008 Constitution is a flawed document in that it is fundamentally undemocratic, enshrines impunity, and places the military above the law and civilian authority, it recognizes a general liberty to exercise the fundamental rights to freedom of expression, assembly and association.¹ Exemptions are clearly stated – namely if such exercise contravenes other laws, undermines state security, or threatens law and order, community peace and tranquility, or public morality – and they are broadly in line with those exemptions set out in Article 19 of the International Covenant for Civil and Political Rights (ICCPR) (albeit Burma has not signed or ratified the ICCPR and is therefore not legally bound by its provisions). These three key fundamental rights are therefore protected under the 2008 Constitution, consistent with international human rights law. However, there are three pieces of legislation in particular that, either in their conception or their enforcement, gravely threaten these three fundamental freedoms, the first of which has already been enacted, as follows:

The Peaceful Assembly and Peaceful Procession Law

On 13 August, Naw Ohn Hla, a leading woman activist from Rangoon, gathered in Monywa, Sagaing Region, with over 50 local villagers to call for the suspension of the controversial Chinese-backed Letpadaung Copper Mine and to amend the 2008 Constitution.² After a tense stand-off, police moved in to arrest Naw Ohn Hla and nine other protest leaders, forcefully pulling them into the back of police trucks. Naw Ohn Hla was seized so violently that her clothing was partially pulled off. On 29 August, she was found guilty of disturbing public tranquility under Section 505(b) of the Penal Code and sentenced to two years in prison with hard labor.³ Her lawyer said she boycotted the hearing because “she does not have faith in the judicial system.”⁴ Naw Ohn Hla remains to be tried under the notorious Article 18 of the Peaceful Assembly and Peaceful Procession Law⁵ for allegedly holding a protest without permission. She did in fact request official permission prior to the protest, but was refused.

On 27 August, matters took a turn for the farcical: in an ironic twist, activists in Rangoon were charged under Article 18 – widely used to persecute activists protesting against land grabs and human rights violations – for protesting against that very provision, in other words, for protesting the protest law.⁶ They were charged on the grounds that they had failed to obtain prior permission to protest. The charge carries a maximum sentence of a year in prison and a fine of 30,000 kyat (US\$35). On the same day, two other protestors were charged under the same law for leading a march by hundreds on 8 August to commemorate the 25th anniversary of the brutal crackdown on the 1988 student-led pro-democracy uprising.⁷

¹ Constitution of the Republic of the Union of Myanmar, 2008, Article 354(a)-(c), <http://bit.ly/XGYvr7>

² “Letpadaung Protestors Stage Sit-In Near Police Station,” The Irrawaddy, 14 August 2013, <http://bit.ly/14M2oQN>

³ “Activists Naw Ohn Hla Jailed 2 Years for Letpadaung Protest,” The Irrawaddy, 29 August 2013, <http://bit.ly/14M2oQN>

⁴ “Activist Naw Ohn Hla Boycotts Letpadaung Trial, Cites Judicial Failings,” The Irrawaddy, 28 August 2013, <http://bit.ly/19OkJK6>

⁵ The Right to Peaceful Assembly and Peaceful Procession Act, 2011, <http://bit.ly/14WITn9>

⁶ “Protesting the protest law,” Democratic Voice of Burma, 28 August 2013, <http://bit.ly/14WITn9>

⁷ “Myanmar Activists Held for Marching Against Protest Law,” Radio Free Asia, 27 August 2013, <http://bit.ly/16YIOuy>

In a statement in January, Human Rights Watch said that authorities in Burma have used the law “to prosecute rather than protect” those exercising their basic rights,⁸ and yet Daw Aung San Suu Kyi recently claimed that the public unintentionally violates some laws because they have difficulty following them.⁹ In fact Article 18 disregards citizens’ constitutional rights to freedom of assembly and expression, and a proposal to abolish it was reportedly submitted to the Lower House of Parliament in June of this year.

The Draft Associations Law

After holding consultations with CSOs, the Lower House of Parliament issued a second draft of the Associations Law on 19 August, before the close of Parliament for the September recess. However, this second draft makes largely cosmetic changes to the first draft, and does not materially alter the threat that the legislation poses to civil society – which is significant – with the result that it clearly violates constitutional and international standards of free association. It also flouts accepted international standards for laws on associations or CSOs. Despite the fact that (1) the draft Associations Law now avoids any explicit requirement for CSOs to seek permission to form, (2) removes the first draft’s draconian penalties for doing so without permission, and (3) superficially gives CSOs the option to register, in reality many organizations will have no other choice under the law.

First, under Chapter VI, all CSOs are required to register anyway, unless they fall under an exemption, which many, including advocacy and human rights CSOs, do not. Second, all CSOs are required to register to avail themselves of “benefits” to which any legal person is entitled, such as initiating judicial proceedings, seeking funding, opening a bank account, or even having a logo. The draft law will mean that no CSO will be able to function viably unless it registers. As before, registration involves seeking government approval. What this draft does is raise a smokescreen: it gives the impression of taking civil society recommendations into account by pretending to remove compulsory registration, but in reality serves the same purpose as before, namely to perpetuate government control over civil society in Burma.

If such a law must be enacted, registration must be genuinely voluntary, thereby allowing civil society individuals and organizations the space and the right to freely associate. It must protect the basic rights of citizens and be in line with constitutional and international legal and human rights standards, including the Universal Declaration on Human Rights and the ICCPR. Furthermore, any legislation must be drafted following full, transparent and meaningful consultation with civil society and the public, and take account of any recommendations.

While in the right environment, an associations law can be beneficial to civil society and the public in general, in a fragile political context such as Burma’s nascent democracy – barely two years old and still with a lot to prove – such a law is fraught with danger and can easily be abused to curtail citizens’ rights to freedom of association and expression rather than protect them. The Burma government’s cosmetic changes to the first draft of the law add weight to this argument and fan the flames of suspicion. In fact, there is no need for such a law, and it would be better to do without for the time being. If, in time, Burma is ready for an associations law that will serve to protect fundamental freedoms rather than restrict them, and also perhaps enable such genuine benefits as tax allowances for CSOs, then such legislation can be re-considered when the political climate is more stable, transparent and mature. Until that point, any discussion and approval of the draft legislation should be suspended. The right to freedom of association – so long denied to Burma’s people – must be preserved and protected at all costs. Otherwise, not only will human rights,

⁸ “Burma: Drop Charges Against Peaceful Protestors,” Human Rights Watch, 13 January 2013, <http://bit.ly/V6P7KI>

⁹ “Public’s Difficulty in Following Some Existing Laws Lead to Habitual Violation,” Eleven Myanmar, 1 September 2013, <http://bit.ly/19PqYTF>

democracy and the rule of law be compromised, but also essential services such as welfare, education and health.

The Draft Printing and Publishing Enterprise Law

On 4 July, the Lower House of Parliament approved the draft Printing and Publishing Enterprise Law¹⁰ despite strong opposition and criticism by the interim Myanmar Press Council (MPC), local media and freedom of expression watchdogs.¹¹ This draft came as a surprise, written in secrecy and presented to Parliament by the Ministry of Information (MoI) before any consultation could take place – a week after the MPC had released its own draft, as previously agreed. Local and international media vehemently opposed the official draft, with the Committee to Protect Journalists saying that, “if passed in its current form, the draft law will essentially replace Burma’s old censorship regime with a similarly repressive new one.”¹² Article 19 called for it to be withdrawn or rejected, “as it would be a major step backwards for freedom of expression and freedom of the media, restoring prior censorship and full governmental control over the press.”¹³

The MoI’s draft does not recognize the right to freedom of expression. It is overly vague as regards its definition as to whom the law applies – for instance the definition of “publication” is so broad that posters and e-mails would be subject to it. In addition, the draft law places “publications,” “publishers,” etc., under the “authorization” and “control” of the government, whereas, under international norms and principles, media should be independent from governments. Furthermore, the draft creates a pre-censorship system by requiring printers and publishers to obtain a “certificate of registration” from the government, enabling the government to reject critical voices. It is also vague as to what speech is prohibited, such as speech that is against the rule of law or the 2008 Constitution, which is not in line with exceptions under international law. It also includes large and disproportionate sentences for non-compliance with the legislation.

Despite strong opposition, the Lower House of Parliament adopted the MoI’s draft with only small and minor amendments, such as ending the possibility of a jail sentence for journalists who do not comply with the strict regulations.¹⁴ “During negotiations with the [MoI], we pointed out clauses [that would limit press freedom] and we learnt that those clauses were still included in the draft law that was approved by the Lower House today,” said Zaw Thet Htwe, a member of the MPC.¹⁵ The adoption of the draft by the Lower House revived the opposition to the bill by journalists and the MPC. “Since that bill came out, it has been protested,” said Chit Win Maung, another member of the MPC.¹⁶ First praised as one of the most significant areas of progress and change in transitioning Burma, media freedom is now backtracking.¹⁷ Beyond the immediate threat that the adoption of the draft law represents, media freedom is facing many challenges, including issues related to the coverage of sensitive topics such as the recent wave of anti-Muslim violence or the military situation in ethnic areas, as well as journalistic ethics and self-censorship.

The draft law was reviewed by the Upper House of Parliament shortly before the September parliamentary recess. However, the amendments suggested by the Upper House in no way reflect satisfactorily the criticisms of the draft law. The main concern, namely that the Burma government will retain discretion as regards approval and that media is not therefore independent, still applies. As it is now clear that the Burma government is trying to maintain its grip on media and to restrict

¹⁰ Printing and Publishing Enterprise Law Bill, 2013, <http://bit.ly/19Ph11F>

¹¹ “Lower house passes controversial press law,” Democratic Voice of Burma, 4 July 2013, <http://bit.ly/123hnlT>

¹² “Draft Media Law a Step Backward for Burma,” Committee to Protect Journalists, 1 March 2013, <http://bit.ly/18DjVaP>

¹³ “Myanmar: Ministry’s Draft Press Bill Would Restore Prior Censorship and Full Government Control,” Article 19, 25 March 2013, <http://bit.ly/18Ds2Ww>

¹⁴ “Myanmar’s Press Council Opposes New Media Legislation,” Radio Free Asia, 5 July 2013, <http://bit.ly/17TD34J>

¹⁵ “Lower house passes controversial press law,” Democratic Voice of Burma, 4 July 2013, <http://bit.ly/123hnlT>

¹⁶ “Myanmar Journalists Decry Approved Press Bill,” Eleven Myanmar, 6 July 2013, <http://bit.ly/1dRdG6w>

¹⁷ “Burma falters, backtracks on press freedom,” Committee to Protect Journalists, 13 June 2013, <http://bit.ly/19OIQJS>

freedom of expression, it is up to the Union Parliament to stand up and reject the draft law. If adopted, the draft law would become one of the most serious obstacles to Burma's transition to a free and democratic country.

Political Prisoners

Despite President Thein Sein's announcement that all political prisoners would be released by the end of the year,¹⁸ there are still significant numbers of political prisoners in Burma's jails, including many women activists. The Assistance Association for Political Prisoners (AAPP) has confirmed the continued detention of at least 118 political prisoners in total as of 30 September, despite the fact that at least 283 political prisoners have been released in the six reported amnesties since 1 September 2012. The UN Special Rapporteur on the human rights situation in Burma, Mr. Tomás Ojea Quintana, said after his mission to Burma in August that, "there continue to be prisoners of conscience in [Burma], and...[they] should be released immediately and unconditionally."¹⁹ However, many of the political prisoners who have been granted amnesty were released conditionally under Article 401 of the Code of Criminal Procedure with outstanding criminal records. This means that they can be re-arrested without warrant at any time for any violation of existing laws, at the discretion of the executive branch of government, to serve the remainder of their sentences – often exceeding 50 years. Many recently released political prisoners have also faced harassment and restrictions on their civil rights, including on their freedom of movement, such as via the denial of passports.

More ominously, AAPP also reports the arrest of at least 88 additional HRDs or protestors since 1 September 2012 and the sentencing of 105, mostly under Article 18 of the Peaceful Assembly and Peaceful Procession Law. These figures represent a huge increase from the previous year, and indicate the threat that this legislation poses and the reason why it was enacted. Burma government officials often deny the existence of political prisoners and instead insist that they are rather "ordinary criminals" who have violated existing laws. This confirms that the Burma government uses legislation as a means of silencing HRDs and stifling civil society. Therefore, any claims about amnesties of political prisoners must be tempered with the knowledge that, when accounting for political prisoners, the Burma government never mentions the ongoing judicial harassment and imprisonment of new political prisoners, such as Naw Ohn Hla, for exercising their right to peaceful and legitimate protest. A revolving door system is not the same as opening the doors.

In order to resolve any discrepancies regarding the number of remaining political prisoners, a thorough investigation should be conducted by an independent review panel composed of competent domestic and international experts, including UN representatives. The establishment of such an independent review panel is already supported by the UN Special Rapporteur, UK Foreign Secretary William Hague, US Ambassador to Burma Derek Mitchell, Amnesty International and Human Rights Watch.

Furthermore, the government of Burma must ensure that those who exercise their constitutional rights to freedom of assembly, non-violent protest and expression must be protected rather than harassed by domestic laws and state authorities, while the Parliament must amend repressive legislation as a matter of urgency. Finally, opposition political parties and the international community – and in particular the EU, which has devised a set of guidelines for the protection of HRDs²⁰ – must denounce such judicial harassment and pressure the government of Burma to

¹⁸ "Burma Promises To Free All Political Prisoners By Year's End," Voice of America, 15 July 2013, <http://bit.ly/15lPaBK>

¹⁹ Statement of the Special Rapporteur on the Situation of Human Rights in Myanmar, 21 August 2013, <http://bit.ly/14WnLMS>

²⁰ European Union Guidelines on Human Rights Defenders, <http://bit.ly/a4bQKm>

release activists such as Naw Ohn Hla immediately so that they can continue their valuable human rights work. Otherwise, there is a serious risk that continuing rights abuses will undermine the ongoing reforms in Burma, to the detriment of its people.

The Myanmar National Human Rights Commission and the Judiciary

Essential to promoting the rule of law and safeguarding the people of Burma's fundamental human rights is the establishment of a fully independent and transparent Myanmar National Human Rights Commission and a fully independent and competent judiciary. However, in light of grave human rights violations occurring with regularity and impunity in Burma, the Myanmar National Human Rights Commission (MNHRC) has been worryingly silent. It has not investigated or released statements on any of the cases of violence, judicial harassment or imprisonment of HRDs or peaceful protestors, nor has it called for the repeal of laws that are repressive or that do not comply with international human rights standards.²¹ Its current *modus operandi* is simply to toe the Burma government's line, fail to publish in detail the findings on the thousands of complaints that it claims it has received, and refuse to investigate human rights abuses, especially in ethnic and/or conflict areas. Such inaction raises questions about the willingness of the commissioners to actively promote and protect human rights, and their freedom of expression and independence from President Thein Sein, who established the MNHRC and nominated the commissioners.

On 28 August, the Upper House of Parliament approved the Myanmar National Human Rights Commission Enabling Law.^{22 23} While there are some positive aspects to the legislation, as stated in Burma civil society's recent recommendations,²⁴ some provisions pose serious threats to the commission's independence. It is therefore vital that the Lower House and the Union Parliament reconsider the draft legislation in light of these recommendations, and enact a law that will establish a fully independent commission in line with the UN Paris Principles.²⁵ These principles set out the minimum international standards for national human rights institutions to fulfill their role. Such independence will allow the MNHRC to act as a proper check and balance on the executive and judiciary by investigating and speaking out on human rights violations such as the recent judicial harassment of activists.

The judiciary is politically pliable and lacks independence, and there is an utter lack of effective and accessible redress mechanisms, judicial or otherwise, within the country. Victims have little to no meaningful means of seeking redress for the violations that they have suffered, and the judiciary is increasingly used as a weapon – in conjunction with repressive legislation enacted by a Parliament dominated by the military and the military-backed ruling Union Solidarity and Development Party – to silence HRDs and peaceful protestors. There is little doubt that soon this repressive collaboration between Parliament and judiciary will be applied in just the same way to media publications and CSOs if the current draft legislation is enacted. The international community must act before it is too late.

Recommendations

All UN Member States should:

²¹ *Burma: "Lost in Transition,"* Burma Partnership and Human Rights Education Institute of Burma, in upcoming report by Asian NGO Network on National Human Rights Institutions, 2013.

²² "Upper House approves Human Rights Commission Bill," Mizzima, 30 August 2013, <http://bit.ly/a4bQKm>

²³ The Myanmar National Human Rights Commission Law (Draft) Pyidaungsu Hluttaw Law, 2013, <http://bit.ly/1dReiJn>

²⁴ "Civil Society Recommendations on the Myanmar National Human Rights Commission Law," 23 August 2013, <http://bit.ly/14Wo2zq>

²⁵ National Institutions for the Promotion and Protection of Human Rights (A/RES/48/134), UN General Assembly, 20 December 1993, <http://bit.ly/1bl4tFW>

- Strongly urge the Burma government to review without delay all existing legislation, including the Peaceful Assembly and Peaceful Procession Law, the 2008 Constitution, discriminatory electoral laws, the Printers and Publishers Registration Act, the State Protection Law, the Electronic Transactions Law, and the Unlawful Associations Act, and amend or repeal those that are repressive and not consistent with international human rights standards and laws.
- Strongly urge the Burma government to reconsider and, if necessary, postpone all pending legislation, including the draft Associations Law and the draft Printing and Publishing Enterprise Law, to ensure that any legislation enacted in the future upholds rather than restricts people's rights to the fundamental freedoms.
- Call upon the Burma government to ensure that all laws are introduced, debated, formulated and enacted in an accessible and transparent process in which the people and civil society of Burma are meaningfully consulted and their inputs considered.
- Call upon the Burma government to become at the earliest opportunity a State party to the ICCPR and its two Optional Protocols, recognize the competence of the Human Rights Committee to receive and consider communications under Article 41 of the ICCPR, and align domestic laws and practices with the ICCPR and the Optional Protocols.
- Strongly urge the Burma government not to use any legislation to restrict people's rights to the fundamental freedoms, to silence HRDs, or to stifle civil society space more generally.
- Call upon the Burma government to facilitate rather than obstruct peaceful protests and to respect the right to freedom of peaceful assembly as an essential component of true democracy.
- Call upon the Burma government to abolish government approval of associations and other CSOs and to respect the right to freedom of association as an essential component of true democracy.
- Call upon the Burma government to abolish censorship both in law and in practice and to respect the rights to freedom of the press and expression as essential components of true democracy.
- Express grave concern at the judicial harassment and imprisonment of HRDs and peaceful protestors and call upon the Burma government to release all political prisoners, including those detained since the amnesties began, and to refrain from judicially harassing or imprisoning any more HRDs or peaceful protestors.
- Urge the Burma government to resolve any discrepancies regarding the number of remaining political prisoners by conducting a thorough investigation by an independent review panel composed of competent domestic and international experts, including UN representatives.
- Encourage the Burma government and Parliament to ensure that the Myanmar National Human Rights Commission Enabling Law fully complies with the UN Paris Principles in order that the MNHRC is independent, transparent and effective, investigates all human rights abuses, calls for the repeal of laws that are repressive or that do not comply with international human rights standards, and protects and promotes human rights across the country, particularly in relation to cases of violence, judicial harassment or imprisonment of HRDs or peaceful protestors.
- Strongly urge the Burma government to undertake urgent judicial reforms to ensure the independence, impartiality and accountability of the judiciary, lawyers, and prosecutors, so that they are free from any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason, and to draw on the assistance of the UN and other international organizations in this regard.
- Encourage the Burma government generally to reform and build sustainable democratic institutions, so as to establish and uphold the rule of law in Burma.