

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the situation of human rights in Myanmar

REFERENCE:
OL MMR 1/2018

29 May 2018

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the situation of human rights in Myanmar; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 34/22, 34/18, 32/32 and 34/5.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning a **draft law on International Non-Governmental Organizations (INGOs) which, if adopted, may have serious implications for civil society, in particular for INGOs operating in Myanmar.**

The draft law currently stands with the Parliament's Legal Affairs and Special Cases Assessment Commission and has not been sent for adoption to any of the Chambers yet. Following criticism on the draft law from civil society organizations, the Legal Affairs and Special Cases Assessment Commission delayed the legislative procedure as it is willing to receive technical advice on the law.

We welcome this initiative and encourage the Commission to take into account our analysis and advice provided below, in the best interest of f INGOs, in accordance with international human rights norms and standards.

We wish to bring to the attention of your Excellency's Government that some of the provisions of the draft law that, if adopted, would severely impinge on the rights to freedom of expression and association, as provided by articles 19 and 20 of the Universal Declaration of Human Rights. We recall that these rights can only be subject to restrictions in strictly defined circumstances, when provided by the law and if abiding the strict requirements of necessity and proportionality.

According to the information received:

1. Definitions

According to article 2 of the draft law,

“(a) International Non-Governmental Organization means an organization formed in any foreign country and registered in accordance with the Law of Myanmar which aims to carry out development and social welfare. It also includes Inter-governmental organizations (...)”

We are concerned that the term “*which aims to carry out development and social welfare*”, is overly broad, especially that no definition of what constitutes “*social welfare*” is provided in the draft. Beyond the concern regarding the restriction of the scope of activities analyzed in Section 2, such a vague definition could lead to broad interpretations from relevant administrative or judicial bodies and grant them the discretionary power to decide which INGO is allowed to operate in Myanmar.

The draft law also applies to inter-governmental organizations such as the European Union, the UN and the World Bank and others and whose work in Myanmar is already regulated by existing bilateral agreements between the respective organizations and the Government and whose staff are covered by the 1946 Convention on Immunities and Privileges of the United Nations signed by Myanmar on 25 January 1955.

2. The scope of activities

As previously highlighted, article 2 (a) restricts the activities INGOs are allowed to perform to “*social welfare*” activities.

Article 2.1 provides that:

“International Non-Governmental Organizations are prohibited from:

(a) organizing or performing political, religious and other activities that interfere with National Interest, Security, Defense, Unity, National Solidarity, perpetuation of sovereignty, or encouraging dissolution of the union;

(b) organizing or performing activities for profit or purposes other than social welfare; (c) organizing or conducting or supporting (or) participation (or) encouraging on the money laundering or terrorism activities;

(d) organizing or implementing activities against the norms, culture, or customs of Myanmar;

(e) organizing or engaging in activities which are against the law;

(f) violating any provisions of Myanmar laws.”

Article 5 (e) provides that:

“The functions and duties of the Central Committee are as follows:

(e) Assigning an organization to analyze whether or not activities of International Non-Governmental Organizations support the development of the State and the interest of citizens;”

We are concerned that the draft law severely restricts the scope of activities of INGOs by circumscribing permissible activities in ways which are incompatible with Myanmar's obligations under international human rights standards.

Firstly, several of the limitations contained in Article 2.1 are incompatible with international human rights standards because they protect objectives that are not considered legitimate for the purpose of limitations to the rights to freedom of expression and association. This includes, "national interest"; "national solidarity"; "perpetuation of sovereignty" and "norms, culture, or customs of Myanmar".

While the protection of "national security" is considered a legitimate objective for the purpose of limitations to the rights to freedom of expression and association, we are concerned that the wording of article 2.1 in this regard is vague and overly broad and therefore subject to potential arbitrary interpretations and application by administrative or judicial bodies. It is unclear how restrictions of the activities of INGOs in this regard are considered necessary and proportionate for the protection of national security. Moreover, we are concerned that, by circumscribing the activities of INGOs with those that do not interfere with Myanmar's "national interests", "unity", "solidarity" could jeopardize their independence. While assessing whether an organization is complying with the abovementioned activities, it could be considered that any activity which the authorities do not like or which runs contrary to their interest or opinions could fall outside the scope of activities that are permitted and established by the law. It would therefore be extremely difficult for INGOs to voice freely their dissenting opinions or criticism of the Government and act as a peaceful and legitimate counter balance to its actions and policies.

The former Special Rapporteur on the rights to freedom of peaceful assembly and association has stressed in his first thematic report that members of associations should be free to determine their statutes, structure and activities and make decisions without State interference. Associations pursuing objectives and employing means in accordance with international human rights law should benefit from international legal protection. They should enjoy, inter alia, the rights to express opinion, disseminate information, engage with the public and advocate before Governments and international bodies for human rights (A/HRC/20/27, para 64.).

Additionally, the reference to "*organizing or implementing activities against the norms, culture, or customs of Myanmar*" could further arbitrarily hinder an INGO's activities. We are of the view that civil society organizations' activities are aimed at nurturing progressive societies. At times, in advocating for progress, civil society places itself in a position where its views or agenda contradicts the existing norms, culture and customs of a given country. It is by taking such positions that civil society organizations have often been catalysts propelling States towards the adoption of progressive legislation and policies that at times

deviate from a particular State's traditional mores. In his last report to the Human Rights Council, the former Special Rapporteur on the rights to freedom of peaceful assembly and of association, provided a mapping of the achievements of civil society throughout history. The reports stresses that associational life has enabled people to hold the powerful to account, to advocate for and implement progressive social changes, and to address many of the tensions inherent to societies. It allows individuals to aggregate their views and voices and is essential in any democratic society (A/HRC/35/28).

Finally, regarding “*organizing or conducting or supporting (or) participation (or) encouraging on the money laundering or terrorism activities*”, we consider that if the fight against terrorism or money laundering is legitimate, the rights to freedom of association, as provided for by Article 20 of the UDHR, should be restricted only if provided by law, and in a manner that is necessary and consistent with the strict application of the principle of proportionality (A/HRC/20/27, para. 16).

3. Registration, reporting and monitoring

Registration and reporting

Article 9 provides that:

“International Non-Governmental Organizations shall perform their work according to the stipulations in their registration certificate”.

Article 11 stands as follows:

“The rights and duties of an International Non-Governmental Organization with a representative office or project office in Myanmar shall be prescribed in a Memorandum of Understanding entered into with the relevant government department and government entities”.

Article 12 provides that:

“A representative office or project office or authorized representative of International Non-Governmental Organization in Myanmar shall file reports and audits in the appropriate way”.

Article 9 and 11 impose important requirements for NGOs to be able to operate in Myanmar, such as the registration certificates or the memorandum of understanding. The law does not provide any information, either on the nature of these certificates nor on the memorandum of understanding. Furthermore, the reporting requirement could constitute an additional burden on the work of INGOs and negatively impact smaller organizations which have more limited financial and human resources at their disposal.

In his first report to the Human Rights Council, the former Special Rapporteur of the rights to freedom of peaceful assembly and of association stressed that the right to freedom of association equally protects associations that are not registered, particularly when the procedure to establish an association is

burdensome and subject to administrative discretion. Furthermore, a notification procedure rather than a prior authorization procedure requesting the authorities to establish an association as legal entities, better complies with international human rights law (A/HRC/20/27, para. 56 and 58).

We further consider that reporting requirements should not be overly burdensome as it could dissuade organizations, in particular smaller structures, to register and then operate due to the lack of resources.

Monitoring

Article 5 of the draft law provides a long list of duties for the Central Committee:

5. The functions and duties of the Central Committee are as follows (we underlined):

- (a) *implementing the objectives of this Law;*
- (b) *coordinating between the relevant government departments and government entities and the International Non-Governmental Organizations to conduct social and economic development;*
- (c) *systematically coordinating activities among the various International Non-Governmental Organizations;*
- (d) *monitoring International Non-Governmental Organizations to ensure they conduct activities in accordance with rules and regulations;*
- (e) *assigning an organization to analyze whether or not activities of International Non-Governmental Organizations support the development of the State and the interest of citizens;*
- (f) *coordinating between the relevant Regional or State government or Nay Pyi Taw Council or government departments and government entities and International Non-Governmental Organizations;*
- (g) *ensuring International Non-Governmental Organizations report their activities to the relevant ministry in a prescribed manner;*
- (h) *handling complaints that International Non-Governmental Organizations are not acting in accordance with the law;*
- (i) *making reports to the Union Government about International Non-Governmental Organizations;*
- (j) *providing information about International Non-Governmental Organizations, as necessary, to the relevant Regional or State government or Nay Pyi Taw Council or government departments and government entities;*
- (k) *performing other duties as assigned by the Union Government under this Law.”*

Article 5 provides (see above highlighted terms and provisions) for the Central Committee to perform a number of activities which could constitute undue interference with INGO’s activities and rights. According to this article, the Central Committee has the power to “assign” to organizations their activities that should be guided by “the State and the interest of citizens”. Particularly worrying is also the “complaints handling” as well as the Committee’s role in “providing

information about International Non-Governmental Organizations, as necessary, to the relevant Regional or State government or Nay Pyi Taw Council or government departments and government entities”.

In addition, article 19 provides that “the relevant Region or State Government or Nay Pyi Daw Council shall have responsibility” to examine and supervise the “performance of INGOs in their jurisdiction”, as well as:

“(b) recommending and submitting their recommendations to the Union Registration board, in cases to issue or extend the terms, amend, change, or revoke a certificate of registration for an International Non-Governmental Organization in their jurisdiction;
(c) reviewing the activities of International Non-Governmental Organizations in their jurisdiction and submitting a report to the Central Committee once every six months; or submitting special reports, if necessary”.

We express concerns regarding the invasive monitoring role foreseen in the draft law by Articles 5 and 19. The supervisory power given to these different bodies is overly wide and intrusive in the life of an association. It could result in a practice of abusive control from these entities.

We are further concerned that these provisions, coupled with the provisions of articles 7 and 8, are overly broad as there is no guidance regarding the monitoring of activities or regarding the manner the Central Committee should execute its monitoring authority. This could lead to excessive discretion and oversight power of the entitled supervisory bodies.

The former Special Rapporteur on the rights to freedom of peaceful assembly and of association has previously underlined that “the right of independent bodies to examine the associations” records as a mechanism to ensure transparency and accountability, but such a procedure should not be arbitrary and must respect the principle of non-discrimination and the right to privacy as it would otherwise put the independence of associations and the safety of their members at risk (A/HRC/20/27, para 65).

4. Sanctions

Article 22 of the draft law provides that:

“The Central Committee, may suspend, all or part of the activities of registered International Non-Governmental Organizations, or terminate their registration, in any of the following events:
(a) failure to apply for an extension of their registration, once the registration has expired, in accordance with law;
(b) violating any prohibitions under section 21 of this Law;
(c) violating terms of their registration certificate;
(d) failure to commence operations within 12 months of obtaining a registration certificate”.

We are concerned that the overly broad terminology of this Article further reinforces the power of the Central Committee to unilaterally decide to suspend or terminate INGOs' registration over vague grounds. Furthermore, the draft law does not foresee the possibility for INGOs to appeal the decision of the Central Committee.

We recall that the suspension and the involuntarily dissolution of an association are the severest types of restrictions on freedom of association. As a result, it should only be possible when there is a clear and imminent danger resulting in a flagrant violation of national law, in compliance with international human rights law. It should be strictly proportional to the legitimate aim pursued and used only when less severe measures would be insufficient. Moreover, such measures should only be taken by independent courts (A/HRC/20/27).

5. Comparative regulations

Article 23 of the draft law provides that the renewal and extension of the terms of registration of INGOs shall be registered under the 2014 Association Registration Law. Therefore, this draft law, along with this legislation should be governing the registration of INGOs once the draft law will be adopted. Nevertheless, numerous provisions of both texts are overlapping and sometimes in conflict with each other. The existence of two different texts presents the risk of legal confusions and could be in contradiction with the principle of legality, a core principle of human rights and of the rule of law requiring precision in legal provisions.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore be grateful for any additional information or comment(s) you may have on the above.

1. Please provide any additional information you may have about the above mentioned issues.
2. Please explain what steps have been taken to ensure civil society organizations and other actors are consulted and how Your Excellency's Government intends to take into account the comments provided in this communication while reviewing the draft law.
3. Please provide specific details about the measures which will be undertaken to ensure that Your Excellency's Government will respect its international obligations, in particular the rights to freedom of expression and association.

We would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

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