



Myanmar

Reforming Myanmar's News Media Law and Printing and Publishing Enterprises Law

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Introduction¹

On 14 March 2014, two laws governing the print media were adopted in Myanmar, namely the News Media Law (NML)² and the Printing and Publishing Enterprises Law (PPEL).³ The adoption of two laws governing essentially the same issue seemed anomalous to many stakeholders and, in its 2013 analysis of a draft of the PPEL, the Centre for Law and Democracy (CLD) suggested that the two processes be combined so that a single law governing the print media sector could be adopted.⁴ This did not happen and, until now, the two laws have coexisted despite a number of provisions which overlap in terms of their subject matter. In the meantime, in August 2015, a dedicated Broadcasting Law was adopted to regulate that media sector.

For some time now, the Myanmar Press Council (MPC), which was created by the NML, has been discussing the idea of reforming the NML. To contribute to that process, in November 2016, CLD prepared a detailed analysis of ways in which the NML could be improved.⁵ In a meeting in December 2018 between representatives of CLD and of the MPC, the idea of integrating the two laws, namely the PPEL and the NML, came up again and, to move this process along, CLD promised to prepare an analysis of the two laws, pointing to how they might be combined and what an integrated and improved version might look like.

This Analysis is the outcome of that process. It aims both to reform the legal framework for the print media, in particular with an eye towards bringing it into line with international standards relating to the right to freedom of expression, and to integrate the substance of the PPEL and NML⁶ so as to have one law governing this sector. It was prepared by the Centre for Law and Democracy (CLD), with the support of International Media Support (IMS) and FOJO Media Institute.⁷

1. Combining the Two Laws

As noted above, CLD recommends that Myanmar move to integrate the relevant parts of the NML and the PPEL into one law. Maintaining two separate laws is redundant as they both

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² Law No. 12/2014, adopted the 14th Waxing Day of *Daboung*, 1375 M.E. (14 March 2014).

³ Law No. 13/2014, adopted the 14th Waxing Day of *Daboung*, 1375 M.E. (14 March 2014).

⁴ Comments on the draft Printing and Publishing Enterprises Law prepared by the Ministry of Information of Myanmar, March 2013. Available at: <http://www.law-democracy.org/live/wp-content/uploads/2013/03/Comments.Printing-Law.13.03.28.pdf>.

⁵ Note on Reforming Myanmar's News Media Law, November 2016. Available at: https://www.law-democracy.org/live/wp-content/uploads/2019/01/Media-Law-note.Nov16.final_.pdf.

⁶ Including the Rules adopted under this Law.

⁷ More information about CLD, IMS and FOJO and their work is provided at the end of this document.

regulate substantially similar matters – for example, both impose restrictions on the content that may be carried by the media – and seek to achieve similar objectives. In addition, the existence of two separate laws creates legal confusion and results in conflicting frameworks for media regulation, for example to the extent that they prescribe different standards for the media or require coordination between the bodies that oversee the implementation of the two laws.

These problems are particularly sensitive in the context of regulating freedom of expression, where overlapping and duplicative legislation can have a chilling effect on the diversity of information and ideas expressed through the media. In this context, having two laws means that journalists and others must take additional steps to ensure they comply with both laws and may self-censor to a greater extent than is strictly necessary because of confusion over the scope and exact meaning and import of each law.

Recommendation:

- The News Media Law and the Printing and Publishing Enterprises Law should be integrated into one law and otherwise amended to ensure that their provisions are in line with international and constitutional human rights standards.

2. Scope of Applicability

An extremely broad variety of means of communication is currently captured by the two laws in question. This is because both laws contain vague definitions of concepts governing their scope such as “publications” and “news media”. While the rights to freedom of expression and to access the news are guaranteed for everyone, rules designed specifically for the media should be limited in scope to the media sector as properly defined, so as to avoid imposing professional media standards on entities or individuals who are not professional journalists.

News Media Law

The definitions of “news media” and “news agency” in section 2 of the NML, as well as that of “news” in the accompanying Rules,⁸ are problematical due both to their vagueness and their overbreadth. For example, “news media” includes the activity of analysing information, which is a part of many professions, not simply the media business. Similarly, a “news agency” includes any business or organisation which collects and acquires information and distributes it to the media, which would include any academic, civil society or other group which presents its research findings to the media.

A further issue is the definitions of media worker (“news media man”) and “reporter”, which are also very general in nature and, as a result, cover non-professionals who engage in

⁸ Order No. 45/2015, adopted 17 June 2015

journalism-like activities (sometimes referred to as “acts of journalism”). The right to express oneself through journalistic activities should not be restricted to those who are formally recognised as professional journalists and, positively, the Law does not prevent non-professionals from engaging in such work. However, while the rights of non-professionals to engage in journalistic activities should be protected, they should not be expected or required to comply with professional standards designed for the formal media sector, which may be unrealistic for amateur writers.⁹ The NML appears to impose the same professional media obligations on everyone who falls within their broad definition of news media workers.

The problem of overbreadth is of particular concern when it comes to online means of communication, since the definitions in the Law also define content disseminated over the Internet as a form of news media content. The Internet enables a vast range of means of sharing content, including content which could be deemed to be news, of which only part can properly be considered to be media content and subjected to the professional standards which apply to the news media. As currently worded, the NML would cover online blogs, social media activities and other informal uses of the Internet.

Printing and Publishing Enterprises Law

The PPEL also uses broadly defined terms. For example, section 2 defines a “publication” to include manuscripts, printed material, electronic material and other material having a similar visible form. Since a publisher is anyone who makes a publication, this definition arguably covers anyone who writes almost any document. Similarly, a “printer” is any owner of a “printing press”, which is defined in a way which would cover printers used in places such as households, schools, non-profit organisations, banks and law offices.

This potentially broad scope is somewhat constrained by section 23, which partially exempts certain publications from the scope of the law, such as specified publications by foreign, inter-governmental, civil society, academic and charitable organisations. However, the listed exceptions only apply to some provisions of the Law and notably not to the prohibitions on publication of certain content (discussed further below). A better approach would be to use precise, narrowly drawn definitions in the first place. For example, the PPEL creates an exception for announcements and invitations for social occasions and bereavement ceremonies but numerous other private printing activities would not be covered by this exception.

Furthermore, the very inclusion of printers does not align with the objectives of the Law which include promoting the development of the printing and publishing sector while preserving freedom of expression. Printers do not necessarily generate content themselves or engage in media or journalistic activities and yet the PPEL forces them to screen the material written by their clients for compliance with its rules. This imposes an inappropriate regulatory

⁹ An excellent discussion of the justifications for this may be found in a case decided by the Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, Series A, No. 5. Available at: http://corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf.

burden on printers, harming their ability to conduct business effectively and generally limiting the free exchange of information and ideas in society.

Recommended Integration and Reform

Any amended law should define much more clearly and narrowly its scope of application. While it seems unlikely that the authorities would enforce these rules against every person who writes a note or prints a document, vague laws enable abuse by bad faith actors to target those they disagree with or to attempt to influence the public narrative to their benefit. In addition, vague laws often have a chilling effect as individuals self-censor in an attempt to avoid any risk of violating the law. In a famous freedom of expression case, the European Court articulated the international standard for clarity in laws affecting freedom of expression:

[A] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.¹⁰

A new law should provide clarity in two areas, namely the entities and the individuals it covers. In terms of the former, the focus should be on professional media entities, to the exclusion of others, such as academic and civil society organisations, which happen to write about issues of public interest. It should focus on media entities *per se* instead of the more amorphous concept of “publishing enterprises”, and consideration should be given to eliminating references to “publications”, which should instead be covered, as relevant, through the definition of news media entities. A more careful definition of terms such as “news media” will limit the problem of extending the regulatory regime to private and informal writings and correspondence.

In terms of individuals, the focus should be on individuals who, on a professional basis, act as journalists or are otherwise directly involved in the newsgathering process (for example as camera persons or fixers). This should accordingly exclude those who work in a mere technical or service capacity in the media business, such as accountants, janitors and secretaries.

A combined law also needs to clarify what online actors are to be regulated so as to clearly differentiate between online media and other forms of Internet use such as social media, discussion boards and individual blogs, which cannot generally be treated as professional media. Admittedly, the distinction between more “formal” online journalism and less formal information exchanges is not perfectly clear and this reflects a new regulatory challenge in the digital era. However, the focus should be on professional media outlets. Clearly this will cover online versions of legacy media. Within Europe, a litmus test for going beyond this is whether the entity has an editorial process or simply represents content prepared by an individual on his or her own. Another better practice to consider, used in Indonesia, is not to cover, as a rule, entities which operate exclusively online but to allow these entities to opt into

¹⁰ *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6537/74, para. 49. Available at: <http://hudoc.echr.coe.int/eng?i=001-57584>.

the system if they wish to be treated as professional media actors. In this case, they will benefit from the protections offered by the law but also be subject to the more onerous legal obligations it imposes on media outlets.

Recommendations:

- The terms used to define the scope of the law should be clear and appropriately narrow, with the focus specifically on professional news media outlets.
- Printers, publishing houses, publishing enterprises, publications and other non-media entities, such as civil society organisations, should not be included in the scope of a new law.
- Only staff of media outlets who are engaged in news-gathering and directly related activities should be subject to the law in terms of both the benefits it confers and the obligations it imposes. At the same time, the right of non-journalists to freedom of expression and to engage in (non-professional) acts of journalism should be recognised.
- The law should distinguish between media which operate online and other forms of online content, and only apply to the former, although consideration should be given to allowing the latter to opt in on a voluntary basis.

3. Positive Protections

Currently, the NML and PPEL establish several protections for the rights of persons engaged in the news media business. These are important and, together, provide strong protection for the exercise of media freedom. This part of the Analysis identifies these provisions, noting that they should be retained in any amended legislation, and proposes areas where protections could be stronger.

News Media Law

The objectives of the NML, set out in section 3, affirm the rights and freedoms of media workers, the rights of citizens to write and distribute information through the news media, and the role of the news media as the fourth estate.

Section 4 contains a list of rights of news media workers. These include the rights to criticise the legislative, executive and judicial branches of government; to investigate, report on and disseminate information of importance to citizens; to expose cases where citizens have been deprived of their rights; and for publications not to be subject to prior censorship. Some of these rights are limited, however, by references to acting in accordance with the Constitution and the code of conduct.

Anonymity is protected in limited circumstances under section 8(a), namely when writing on specific public interest matters such as public health, security, the natural environment or

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corruption and after obtaining permission from the editor. This is an exception to the general rule under the Law, which requires the disclosure of one's name.

Section 7 protects the rights of media workers, in the context of war, riot and public demonstration, to be exempt from arrest or seizure and destruction of their devices, as well as the right to ask for protection from security organisations. Rule 31 further specifies that in battle, riot or protest zones, media personal can show a media identification card to the security organisation in that area, in which case they may collect news in that location, as long as they follow the rules for news gathering.

Section 4(d) of the NML protects the right to information for media workers, as well as the right to access government entities (in accordance with relevant terms and conditions), while section 6 recognises the right to request and view non-classified information. This is further elaborated in Rules 29 and 30, which set timeframes for responding to requests and provide a limited procedure for refusing requests (including the possibility of lodging a complaint with the MPC). These provisions are valuable, given that no general right to information law has so far been adopted in Myanmar, although they do not replace the need for a proper right to information regime.

Printing and Publishing Enterprises Law

Unlike the NML, the PPEL does not generally affirm or create any rights for those producing the publications it regulates. The one exception to this is sections 12 and 13, which provide that certified publishing enterprises and news agencies have the right to distribute information via the Internet. Given that this is in the chapter on export and import restrictions (discussed further below), it may have been included simply to clarify that online content is not subject to the export and import requirements that otherwise govern printed publications.

Recommended Integration and Reform

Neither the NML nor the PPEL explicitly recognise, as an objective or as a right, freedom of expression, including freedom of the media, and this gap should be addressed in an amended law. In addition, language affirming the importance of an independent media sector should be reflected in the objectives of the law. While these concepts are somehow already present in both laws, a clearly articulated affirmation of these rights would provide an important principle governing the interpretation of the law.

In addition, an amended law should take the approach of the NML and incorporate dedicated provisions which establish or affirm the rights of media workers. A new law should, however, go beyond what is already reflected in section 4 of the NML.

First, the law should explicitly protect editorial independence. This is the right of media entities to make their own decisions on what to report on and publish, without external interference. At one level, this would underscore Myanmar's transition away from a system of prior censorship, while leaving the media, like anyone else, open to post-publication challenges, including in the form of lawsuits. But it would also highlight the need for

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powerful social actors to avoid trying to exert undue influence over media content in other ways, such as through advertising or threats.

Second, a key right which is not currently protected is the right to protect the anonymity of confidential sources of information. This is a foundational protection for a free press, as it allows journalists to obtain information that might otherwise never become public knowledge. Protection of sources has long been considered a foundational feature of journalistic ethics. Laws should accordingly protect the ability of journalists to honour this ethical commitment. This right is not absolute but it should only be suspended in strictly defined circumstances and typically via court order. For example, section 10 of the United Kingdom Contempt of Court Act, 1981, states:

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

Similarly, in the Philippines section 1 of Republic Act No. 53, as amended by Republic Act No. 1477, provides the following protection for confidential sources:

Without prejudice to his liability under the civil and criminal laws, the publisher, editor, columnist or duly accredited reporter of any newspaper, magazine or periodical of general circulation cannot be compelled to reveal the source of any news-report or information appearing in said publication which was related in confidence to such publisher, editor or reporter unless the court or a House or committee of Congress finds that such revelation is demanded by the security of the State.

Third, while the NML's recognition of a limited right to report anonymously is a step in the right direction, it should be replaced by a general protection of the right to publish anonymously. This may encourage journalists to write about sensitive matters, such as corruption and other criminal behaviour, where otherwise they might fear reprisal. Such anonymity does not block subsequent civil suits, as someone who is aggrieved may still sue the media entity for content deemed to be illegal. In this case, editors should have the freedom to decide to take collective responsibility for content by allowing journalists to retain anonymity. If disclosure of identify is necessary for a serious criminal matter, a court order is the appropriate vehicle for this.

Fourth, the law should recognise the right of journalists and other media workers to organise themselves into professional bodies and associations. This supports the development of media professionalism by encouraging training, the promotion of professional standards and knowledge sharing.

Fifth, while the provisions in the NML governing journalistic access to conflict and protest zones, as well as protection in those zones, are important, they should be supplemented and strengthened. Journalists may need protection not only when working in conflict areas but also when reporting on highly sensitive issues such as corruption or organised crime. States have an obligation to protect all journalists who are in fact at risk due to their reporting, rather than only those who operate in dangerous locations. In addition to protection, the law should

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also place a special responsibility on law enforcement authorities to make an extra effort to bring those who commit crimes against journalist to justice.

Finally, the right of the media to distribute content via any means of communication should be preserved and strengthened, subject only to specific regulatory rules governing those means of communication, such as the rules governing the allocation of broadcasting frequencies. A new law should retain and extend the provisions in the PPEL about disseminating content online, so as to recognise a general right to disseminate via any communications platform, especially given that communications systems continue to evolve rapidly.

Recommendations:

- The law should recognise explicitly the rights to freedom of expression and to freedom of the media, as well as the importance of an independent media sector.
- Consideration should be given to adding the following to an amended law:
 - Protection for editorial independence, meaning the right of media entities alone to make decisions about what content they publish.
 - The right to protect confidential sources, along with conditions on when courts can order source disclosure.
 - The right of media workers to publish content anonymously.
 - The right of media workers to organise themselves into professional bodies and other associations.
 - Protections for all journalists who are at risk of attack for what they write, as well as an obligation on administration of justice actors to make a special effort to bring those responsible for such attacks to justice.
 - The right to distribute content via any available means of communication, subject only to special regulatory regimes governing those systems (such as the rules governing the allocation of broadcasting frequencies).

4. Recognition of Media Businesses

Registration or licensing requirements for the media may be appropriate in limited circumstances. For example, licences in the broadcasting context can ensure diversity in the airwaves and accreditation schemes can promote journalistic access to places where public access is limited, such as courtrooms. However, international human rights standards and better practice at the national level discourage special registration requirements for the print and online media, since they rarely serve any legitimate policy purpose and are prone to abuse as a tool for exercising control over the media. Similarly, requiring individual journalists to register or obtain licences represents an inappropriate restriction on the practice of journalism.

News Media Law

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The NML neither establishes a registration scheme for media outlets nor requires individual journalists to obtain any sort of accreditation in order to engage in journalistic activities. Rule 19(g) empowers the MPC to regulate the carrying of badges or special identification by journalists. This can serve the important purpose of facilitating press access to places and events where public access is otherwise restricted and is, therefore, an appropriate activity for the Council.

Section 10 of the NML recognises the right of those wishing to engage in the media activities to establish a media business in various recognised ways, such as under the Myanmar Companies Act. However, section 11 also recognises the need for media businesses to obtain any relevant certificates or licences as provided for by other laws, in this case specifically the PPEL. In addition, Rule 19(j) references the registration regime established under the PPEL, by empowering the Council to coordinate with the Ministry of Information (Department of Copyright and Registration) for the purpose of compiling lists of publications which have been granted certificates or had them revoked.

Printing and Publishing Entities Law

The PPEL establishes a formal process of recognition for printers, publishers and news agencies which, as previously noted, are defined broadly. The process for obtaining what essentially amounts to a licence is not clearly articulated in the Law, which merely provides that complete and correct documents must be submitted to the Ministry of Information, which issues a certificate after payment of a fee (see sections 4 and 5). Certificates may be revoked or suspended if they are found to have been applied for dishonestly (section 6) and there is a limited right of appeal to the Minister of Information if this occurs (section 7). Section 15 prohibits anyone from engaging in printing, publishing or news agency activities without a certificate or where a certificate has been revoked.

This system is problematical inasmuch as it creates the risk that it could be used as a barrier to a free and independent press. Under the law, the Ministry of Information has significant discretion both to set the rules and in how to apply the system, given the absence of precisely defined procedures and requirements in law. There is, in particular, nothing to prohibit the Ministry from imposing burdensome registration requirements or high fees, from adding additional requirements for issuing certificates or from engaging in lengthy delays before issuing a certificate.

Recommended Integration and Reform

Ideally, the registration scheme outlined in the PPEL should be eliminated. It does not serve a clear purpose and not only places additional burdens on aspiring media outlets but entails unnecessary responsibilities for both the Ministry of Information and the MPC, which maintains a list of registered printers and publishers. Positively, in practice it appears the

current registration scheme has not been widely used to impose undue obligations or as a tool for control.¹¹ However, it is better to close off the potential for such abuse in the future.

Alternatively, if registration requirements are kept, an amended law should specify that fees must be reasonable, establish a simple procedure for obtaining registration, specify that registration cannot be denied or revoked for reasons other than the submission of fraudulent documents and set clear timeframes for the issuance of certificates. Ideally, the process should be overseen by a non-political body, such as the body which registers corporations or the MPC. An appeal to the courts, rather than to the Ministry of Information, should be available where registration is refused or revoked.

Finally, the lack of a licensing requirement for journalists is commendable and should be retained, as should provisions empowering the MPC to develop rules governing accreditation of journalists and carrying of journalistic badges. The protection could be strengthened, however, by specifically providing in the law that a licence is not necessary to practise journalism and by limiting accreditation to situations where public access is otherwise limited.

Recommendations:

- The special scheme of certificates for printers and publications should be removed.
- If the system is retained, the potential for abuse should be constrained through provisions which:
 - Specify that any registration fee should be reasonable, affordable and/or limited to covering administrative expenses.
 - Clarify the registration procedure in a way that ensures that it is simple, accessible and rapid.
 - Limit denial of registration to cases where incomplete or fraudulent documents have been provided.
 - Do not allow the Minister of Information to impose additional registration requirements.
 - Provide for oversight of the system by a non-political body, such as the MPC.

5. Restrictions on Media Content and Activities

Media regulation must balance the interests of promoting professional media conduct with respect for freedom of expression and of the press. To avoid unnecessary restrictions, international standards counsel against special criminal or civil regimes for media content.

¹¹ For example, according to one survey, editors and print media managers reported that “for the most part, registration was a simple and quick process without any overly burdensome criteria or hidden fees.” UNESCO and IMS, *Assessment of Media Development Indicators in Myanmar*, 2016, p. 41.

Instead, generally applicable laws regulating issues such as hate speech should suffice. As stated by the special international mandates for freedom of expression:

Content restrictions are problematical. Media-specific laws should not duplicate content restrictions already provided for in law as this is unnecessary and may lead to abuse. Content rules for the print media that provide for quasi-criminal penalties, such as fines or suspension, are particularly problematical.¹²

At the same time, administrative systems involving professional codes of conduct can promote higher quality and more responsible journalism. However, a number of safeguards should accompany any administrative systems for applying such codes. This part of the Analysis examines the content rules set out in the both the NML and the PPEL and proposes ways to ensure that they are better aligned with freedom of expression standards.

News Media Law

The NML sets out a number of conditions and restrictions on the content of what may be disseminated through the media, in section 9. These conditions and restrictions, in summary, contain obligations to review information for accuracy and completeness; to publish corrections of errors; to presume innocence until proven guilty and to refrain from contempt of court in coverage of ongoing court cases; to avoid improper technological modifications of photos, pictures or sounds; to avoid including a reporter's opinions apart from in opinion pieces, features or criticisms; to avoid intellectual property violations; to avoid harming the reputation or human rights of others; and to avoid instigating conflict based on birthplace, religion or nationality. Section 9 also requires news media outlets to comply with any further ethical requirements set by the MPC. The MPC adopted a detailed Media Code of Conduct in 2016.

In some cases, the substantive rules in section 9 are themselves a cause for concern. For example, the references to contempt of court, defamation and hate speech are not well defined, raising concerns that they may be misapplied or abused. More problematically, however, is that many of these rules are completely unnecessary, given that other laws, such as the Penal Code, already address problematical conduct in these areas. There is, as a result, no need for special quasi-criminal rules for the media to be found in media-specific legislation such as the NML.

Furthermore, even where special regulation of the media may be appropriate, for example in terms of dealing with ethnic or racial issues, these rules are not remotely specific or detailed enough to address these complex issues. Balancing the concerns raised by these restrictions with the interest of maintaining a free press requires far more nuanced rules than the simple references in section 9, which is a mere one-half page long. In contrast to this, the MPC's Media Code of Conduct is ten pages long.

Printing and Publishing Enterprises Law

¹² International Mandates for Promoting Freedom of Expression, 2003 Joint Declaration. Available at: <https://www.osce.org/fom/28235?download=true>.

Section 8 of the PPEL prohibits publishers and printers from disseminating several types of content. These broadly protect interests which may warrant imposing limitations on free speech, such as hate speech, national security, the rights and freedoms of others, obscene content and incitement to criminality or violence. However, like their NML counterparts, they are generally phrased in overly vague language. For example, they limit speech which can harm community peace and tranquillity, rather than limiting this to incitement to hatred, as is required by international law. Similarly, the definition of “obscene publication” is very unclear, incorporating terms such as “rude and abusive words and pictures”, as well as amorphous terms such as “shameless”, “fearless of sinning” and “unacceptable”. These terms are too subjective to provide publishers with any helpful guidance on what is or is not permissible and allow for discretionary application of the rules. Once again, these rules are also unnecessary because these issues are already addressed in the Penal Code and other laws.

Another concern here is that these rules are often overbroad. For example, section 8 prohibits content which merely encourages crimes, violence, gambling or drug abuse, rather than being restricted to incitement to crime. This low threshold risks penalising humorous or satirical content, as well as valid public policy discussions about the current scope of criminal or other laws. International standards suggest that speech inciting illegal acts should only be restricted where there is specific intent to do harm and a close nexus to illegal conduct. As articulated by the Indian Supreme Court:

The anticipated danger should not be remote, conjectural or far fetched. It should have proximate and direct nexus with the expression.... In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a ‘spark in a powder keg’.¹³

In addition to the section 8 restrictions, section 11 restricts the ability of publishers to import or export publications. Such activities are not entirely banned, but importers and exporters are required to notify the Ministry of Information about the publication. In addition, if the publication is printed locally, the printer must submit the publication to the Ministry. These requirements are unnecessary – it is not clear why notification of export/import activities is necessary – and they operate as an indirect restriction on the publishing industry. Given the vague definitions of publications in the law, they may also improperly limit the sharing of informal or private written materials internationally.

Recommended Integration and Reform

Both laws currently contain content restrictions which are inappropriate both because they are already covered in other laws (i.e. because they are duplicative) and because they do not treat these complex issues in a sufficient nuanced manner that represents a fair balance between protecting freedom of expression and competing interests. Such direct content restrictions should be removed from any new law regulating the media.

¹³ *S. Rangarajan v. P.J. Ram* [1989](2), SCR 204, p. 226.

Rather than imposing direct content restrictions in a media-specific law, a far better approach is for the law to call for an independent regulator, such as the MPC, to develop a detailed Code of Conduct to promote professionalism. The law could set out the issues which such a code is expected to address, such as hate speech, accuracy and the manner of reporting on legal cases, but it should leave it to the regulator to develop the Code, in consultation with interested stakeholders. This will allow for far more detailed and nuanced attention to be given in the code to these issues than is possible through legislation. It will also allow for far more appropriate responses to unprofessional behaviour than the fines envisaged in the NML and PPEL (see the part below on Enforcement and Monitoring Mechanisms).

Recommendations:

- Direct and special content restrictions for the media – such as are found at section 9 of the NML and section 8 of the PPEL – should not be imposed through media-specific legislation.
- Instead of imposing direct content restrictions, a new media law should task the MPC with developing and applying a Code of Conduct. The primary legislation may list the types of issues that should be addressed in the Code, but it should leave it to the MPC to actually develop the rules.
- The additional procedures for the import and export of publications currently found in the PPEL should be removed.

6. Enforcement and Monitoring Mechanisms

Promoting high standards in the media is a positive goal but, where this is enforced via either overly harsh sanctions or an insufficiently independent body, it fails to strike an appropriate balance between respecting freedom of expression and promoting media professionalism. The manner in which the rules set out in media laws are enforced are key to achieving an appropriate balance here. This part of the Analysis focuses on the issue of enforcement of the substantive rules set out in the NML and PPEL.

News Media Law

The main substantive rules set out in the NML, as discussed in the previous part of this Analysis, are found in section 9. The Law is not very clear on how these rules are to be enforced. Section 21 provides generally for complaints to be lodged with the MPC, while section 22 provides that in such cases the MPC shall conduct a conciliation procedure, suggesting that the MPC does not have formal binding adjudicatory powers. If the conciliation does not lead to a settlement, a case may be lodged before the courts (section 23). The Rules clarify that where someone brings civil or criminal proceedings that person must withdraw any complaint lodged with the Council. Rule 38(b) also clarifies that a court case may be brought where the parties fail to abide by the decision reached through conciliation.

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Section 25 establishes fines for violations of some provisions of section 9, namely failing to publish a correction of inaccurate news (for breach of section 9(a) of MMK 100,000 to 300,000 or approximately USD 65 to 195), or improper technological modifications to photos, pictures and sounds, breach of intellectual property rights or content which affects the human rights or reputations of others (for breach of sections 9(d), (f) or (g) of MMK 300,000 to 1,000,000 or approximately USD 195 to 655). According to section 30, cases under section 25 should proceed via a direct complaint before the courts.

For instigating conflict based on birthplace, religion or nationality – in breach of section 9(h) – the matter should be prosecuted under existing laws (section 26), while no explicit penalties are provided for violating other provisions, such as requirements to review information for accuracy and completeness (section 9(a)), to avoid contempt of court (section 9(c)), to avoid expressing opinions apart from in certain circumstances (section 9(e)) and to comply with any additional ethical rules set by the MPC (section 9(i)).

Printing and Publishing Enterprises Law

The Ministry of Information has important enforcement powers under the PPEL. It has the authority to issue certificates to printers and publishers, to revoke or suspend such certificates and to deal with appeals from decisions to revoke or suspend certificates. It is also responsible for receiving notices regarding import or export of publications. It is the courts, however, which have the authority to impose penalties for breach of these legal obligations, pursuant to sections 19-21. These penalties take the form of fines, which range from MMK 100,000 to 5 million (approximately USD 65 to 3,275).

For breach of the rules on content in section 8 of the Law, the person involved may apply to the appropriate court, which then has the power to issue a temporary injunction banning distribution of the publication and/or to issue a declaration of invalidity, essentially cancelling the publication (sections 9-10).

Recommended Integration and Reform

Overall, we recommend that the primary body for regulating the print media should be the MPC, subject to ensuring that this body is sufficiently independent (see below under Myanmar Press Council). An appeal from the decisions of this body should then lie to the courts.

In line with our recommendations on content, under Restrictions on Media Content and Activities, the MPC should be empowered both to develop and to apply the Code of Conduct. It should, in this regard, have the power both to conduct conciliation proceedings and to undertake formally binding adjudications. The law should also set out clearly the remedial measures or sanctions which the MPC may impose (beyond simply engaging in mediation). This could range from a simple warning to requiring the media outlet to issue a statement acknowledging a breach of the Code of Conduct. In the most serious cases, the Council might also be empowered to issue fines, but only where the conduct involved was egregious and

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other attempts to resolve the issue had not been successful. For content issues, the courts should have the power to affirm or reverse the decisions of the MPC, but not to apply more serious sanctions (unless these are pursuant to other laws). These powers of the MPC should be accompanied by appropriate due process requirements to ensure that both complainants and the media outlets concerned are treated fairly.

The decisions of the MPC should, as noted above, be appealable to the courts. However, the law should clarify the standard of review to be conducted by courts. A process of administrative review – whereby courts would only assess whether the MPC acted within the scope of its legal authority and in a way that was not arbitrary, capricious or an abuse of discretion and not whether the court deems the original decision to be ‘correct’ in the sense that it would have come to the same decision – would be preferable, because this would reflect a degree of deference to the Council’s expertise on media matters. The alternative, namely *de novo* review, whereby courts review the entire case as if it was a new case and substitute their own decision for that of the MPC, would not give sufficient weight to the specialised expertise of the Council.

One of the advantages of the current approach is that the penalties for breaches of the content rules are substantially lighter than those contained in other laws, most notably because no prison sentences are provided for. However, if the rules in the media-specific law do not displace laws imposing more severe penalties, this advantage is not achieved and, instead, the system simply creates an additional regulatory requirement for the media.

One of the ways to protect the media against the harsh penalties in the criminal and civil law, unless these are genuinely warranted, is to require those with complaints against the media to go first to the MPC for a remedy before they pursue a legal remedy before the courts. The current system does the opposite, prioritising court remedies when these are pursued. The former would provide for a rapid and cheap resolution of the matter while also allowing those who believe that whatever remedy they may have obtained before the MPC is not sufficient to pursue the matter in the courts. This system is in place in Indonesia and has proven to provide a very appropriate balancing of interests.

Beyond content rules, it would also make sense to transfer any system for registering the print media that is retained under a new law to the MPC. There is no need for this activity to be overseen by a political body such as the Ministry of Information and the current approach has the unfortunate effect of dividing responsibilities in this area between the Ministry and the MPC, which is inefficient and could lead to mistakes.

Recommendations:

- The MPC should be given primary responsibility for regulating the print media. This should include:
 - Developing the Code of Conduct (as recommended above).
 - Entertaining complaints about breach of the Code with the power to review complaints both through conciliation and through a formally binding

adjudication.

- Imposing a range of remedial measures on media found to have breached the Code, as provided for in the law.
 - Apply procedures during complaints that protect the due process rights of all parties.
- The standard of review by the courts of the actions of the MPC should be that of judicial review, whereby they only review whether the MPC has acted reasonably and in line with its mandate, and not whether its decisions are ‘correct’.
 - Consideration should be given to requiring those who believe the media has acted unprofessionally to lodge a complaint first with the MPC under the Code of Conduct and to allowing them lodge a court case only after the MPC has processed the complaint, if they still feel they have not received appropriate satisfaction.
 - To the extent that any system of registration is retained for the print media, consideration should be given to providing for this to be overseen by the MPC.

7. Myanmar Press Council

It is very important for bodies with regulatory powers over the media to be independent of government. This helps prevent inappropriate political interference in the media and strengthens the ability of the regulator to make impartial and fair decisions. While the current regime governing the MPC contains some important protections for its independence, these could be strengthened, particularly if, as recommended above, the scope of the Council’s regulatory powers, including in relation to remedies, were expanded. Some structural reforms could also enhance the efficient functioning of the MPC.

This part of the Analysis discusses the current structure of the MPC under the NML and points the way forward in terms of reforms. Since the PPEL does not address the MPC, it is not reviewed here.

News Media Law

Section 13 of the News Media Law provides that the membership of the MPC may range from between 15 and 30 persons. Three official members are proposed by, respectively, the President and the chair of each of the two legislative bodies. The other members are proposed by a coalition of groups of media members and agencies, printers, publishers, writers, poets and cartoonists, and a coalition of civil society groups, including academic experts. The NML does not provide any further detail on how the selection process works.

The Rules provide somewhat more guidance on the appointments process, primarily via the appointment of an Election Committee. This Committee is formed by the Ministry of Information in discussion with the MPC and is composed of former Council members, legal experts, media experts and a government official. Rule 11(a) also empowers the Ministry of

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Information to develop further criteria governing the way members of the Committee are elected by the media and civil society groups.

Council members serve for three-year terms, limited to two consecutive terms, as provided in for in section 15 of the NML. According to section 16, members may be removed from office through voluntary resignation, by the President upon a recommendation of two-thirds of the members of the MPC in case of certain forms of misconduct or an inability to fulfil the duties of a member, upon conviction for a character-based offense or due to lunacy or death.

Funding for the Council, according to section 19 of the Law, may come from four sources: 1) government grants; 2) local and foreign donations; 3) aid from international or non-governmental organisations; and 4) contributions from news media businesses.

Recommended Integration and Reform

As we recommended above, the MPC should be retained and have its regulatory remit expanded, provided that its independence and ability to operate fairly is protected. While the current NML provides an initial framework for this, a new law should incorporate stronger provisions in several key areas.

First, it is preferable for the key provisions regarding the appointment of members of the MPC to be contained in the primary law as opposed to the accompanying rules. For example, Rule 7 contains a list of disqualifying criteria for Council candidates, such as employment as a public servant or holding office in a political party; these criteria should be included in the law itself. The rules relating to the appointment of the Elections Committee is another example of provisions which should be found in the primary legislation.

Second, there are currently far too many members of the MPC, ranging from 15 to 30, which makes the Council unwieldy and inefficient, and leads to less flowing debate and decision-making processes. In contrast, Indonesia's Press Council only has nine members, despite the fact that Indonesia is a vast and extremely diverse country. This problem is exacerbated by a lack of any quorum requirement before decisions may be made. This creates the risk that a small minority of the members of the Council could meet and make important decisions in the absence of the other members. A quorum requirement avoids this risk.

Third, the current appointments process allows for undue political interference in the MPC. The clearest instance of this is the three Council members proposed by political officials which, while a small minority, does not reflect better international practice. Similarly, the Ministry of Information exercises too much influence over the selection of the Elections Committee and setting criteria governing the elections process. The presence of a government official on the Elections Committee is again of questionable value and creates a risk of interference. According to Rule 11(a), the Ministry can, in consultation with the Council, set rules for members. Any such rules should either be set out directly in the legislation or left to the Council itself to determine.

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A completely different approach to appointments, which would reduce the potential for political influence, would be to allow different sectors to nominate a set number of persons. Nominations could, for example, be made by the bar association, academics, journalist and media associations and civil society organisations.

Fourth, while it is important that the MPC be independent from political interference, it is also crucial that it not be monopolised by the media. Currently, Rule 10 significantly weights members proposed by media groups (10-22 candidates) as compared to those proposed by civil society (2-5 candidates). A more even split would result in a more balanced Council. More seats should be reserved for persons representing the public interest generally. This is the practice in other countries:

- In Indonesia, out of a nine-member council, 3 members represent journalists, three represent media owners and three represent the public.
- The Australian Press Council has 23 members, including an independent chair and nine other unaffiliated “public members”, 11 representatives of media organisations and two independent journalists.¹⁴
- The Irish Press Council consists of 13 members of whom 7 are independent with the remaining six coming from the media industry.¹⁵

Fifth, it is also important to protect the funding of the MPC from a risk of political interference. While funding from the media sector is theoretically a good way of doing this, in practice it is unlikely that this sort of funding will be sufficient or consistent enough to cover day-to-day operating expenses. This means that it is necessary to ensure a reliable and regular stream of public funding which cannot be used to undermine the independence of the Council. One way to do this is to require that the budget of the Council be included as a separate line item in the overall budget, so that it is somehow directly approved by parliament. The law could also explicitly require the government to ensure that the Council has sufficient funds to cover its operating expenses. Whatever model is chosen, the Council should still be able to receive contributions from other sources.

Finally, there are some other technical improvements that could be introduced. It would be useful, in addition to the disqualifying criteria for members, to include a set of minimum standards for them, which might refer to issues such as expertise, education and good moral standing. Rule 16 provides for members whose term of office is terminated before the end of their tenure to be replaced. In addition to moving this into the main body of the law, it should apply only where six months or more remain in their tenure, so as to avoid going through the complex appointments process for very short-term appointments.

Recommendations:

¹⁴ Constitution of the Australian Press Council, 15 May 2018, Section 11. Available at:

https://www.presscouncil.org.au/uploads/52321/ufiles/APC_Constitution_15_May_2018.pdf.

¹⁵ Constitution Memorandum of Association of the Press Council of Ireland (as updated 2018), paras. 6.5-6.6. Available at: http://www.presscouncil.ie/_fileupload/PCI%20Constitution%20-%20Updated%20-%20May%202018.pdf.

- The key rules relating to appointments to and the structure and operation of the MPC should be included in the primary legislation rather than in subordinate rules.
- The number of members of the MPC should be reduced, perhaps to 9, 11 or 13 members, and rules on minimum quorum for meetings should be added.
- The way that members are appointed to the MPC should be designed so as to limit, as far as possible, the risk of political influence. Consideration should be given to how best to do this, including by removing political appointees, by limiting the role of the Ministry of Information in the process and potentially by having a wider range of bodies nominate members.
- The balance of MPC members between media and public representatives should be adjusted so that more members represent the overall public interest.
- The law should set out clear rules that require the government to provide an appropriate level of funding to the MPC and ensure that the budget is included as a separate line in the overall budget approved by parliament.
- Minimum qualifications should be established for Council members.
- The rules on replacing members whose tenure has been terminated early should come into play only where six months or more remain in the tenure of the departing member.

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