

**Joint submission to the Universal Periodic Review of Myanmar by
ARTICLE 19, Myanmar Journalists' Association (MJA), Myanmar Journalists' Network
(MJN), and Myanmar Journalists' Union (MJU)**

**For consideration at the 23rd session
of the Working Group in October/November 2015**

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Executive summary

1. ARTICLE 19, MJA, MJU and MJN welcome the opportunity to contribute to the second cycle of the Universal Periodic Review (UPR) of Myanmar. This submission focuses on Myanmar's compliance with its international human rights obligations to protect and promote the right to freedom of the media, including freedom of expression and information.
2. Since Myanmar's first review and in particular since the creation of a new government in 2012, restrictions on the right to freedom of expression and media freedom have lessened, in some aspects, particularly in major urban areas. Indicators of a limited increase in the promotion of media freedoms include the establishment of several associations representing media workers, the creation of a Press Council, and an increasingly permissive environment for media workers to demand their rights.
3. Despite these steps, Myanmar has failed to show significant progress on the limited commitments it made to reform during its first UPR, in particular around protections for freedom of expression, including media freedom.
4. The issues of concern we address in this submission include:
 - Failure to ratify major international human rights treaties or to invite UN special procedures;
 - Failure to engage in necessary legislative reforms to guarantee the right to freedom of the media, including freedom of expression and information;
 - A spate of arrests and prosecutions of journalists, with significantly harsh punishments creating a noticeable chilling effect on journalists and media workers;
 - Government ownership as a practical tool of controlling the media;
 - A lack of transparency or meaningful public participation in the legislative process, resulting in serious weaknesses in draft laws and delays in their adoption.

Failure to ratify major international human rights treaties or invite UN special procedures

5. During its first UPR, Myanmar accepted recommendations *to consider* the ratification of the International Covenant on Civil and Political Rights (ICCPR) and other core human rights treaties, while its response to recommendations to sign and ratify these instruments was ambiguous. Myanmar has made no significant progress towards signing or ratifying these instruments since its first review.
6. Myanmar also committed to continued cooperation with the UN Special Rapporteur on the situation of human rights in Myanmar, but did not accept recommendations to extend a standing invitation to all special procedures, or recommendations to invite specific thematic mandate holders to the country, including on freedom of expression and

freedom of peaceful assembly. While Myanmar continues to cooperate with the UN Special Rapporteur on the situation of human rights in Myanmar by facilitating her visits, we note that when the Rapporteur came under highly personal and misogynistic criticism from religious leaders in 2015, the government did not publicly condemn the criticism nor show support for her mandate. Myanmar has not extended a standing invitation to all special procedures, nor responded positively to any request from mandate holders for visits.

Failure to engage in necessary legal reforms to guarantee the right to freedom of the media, including freedom of expression and information

7. Myanmar accepted some recommendations to bring its domestic laws into compliance with international human rights standards, including to “*take steps*” to review domestic laws with a view to guaranteeing the right to freedom of expression, association, and assembly, including assuring a free and independent media.
8. Positive developments since the first UPR include the abolishment by administrative decision of the Press Scrutiny and Registration Division in 2013, which ended the state mechanism for comprehensive pre-publication censorship. However, two new laws adopted regarding print media fail to comply with international standards on freedom of expression. Together with existing highly punitive laws that regulate the content and the work of the media, which are frequently used, the situation for media freedom remains highly precarious.

2008 Constitution of Myanmar

9. Myanmar did not accept a recommendation during its first review to amend the 2008 Constitution to bring it into compliance with international human rights standards. As Myanmar faces its second review, this remains a pressing concern.
10. Although protections for freedom of expression exist in Article 354 (liberty of expression and publication), and Article 365 (freedom of artistic expression), they do not comply with international standards:
 - **The scope of the right is too narrow**, and is not framed to capture all elements of freedom of expression guaranteed in international law;
 - **The right is not guaranteed to all people**, but is limited to nationals only, despite freedom of expression being guaranteed to all people under international law regardless of citizenship status.¹ This is particularly concerning in Myanmar, where an estimated 810,000 people are without citizenship.²
 - **Domestic laws take precedence over constitutional rights**, which are protected only to the extent that they are not in contradiction with existing laws;
 - **The permissible limitations to freedom of expression are too broad**, as they include aims not listed in Article 19(2) of the ICCPR, such as “national solidarity”, “the interests of one of several other national races”, and “community peace and tranquillity”;
 - **The threshold for imposing restrictions on freedom of expression is too low**. Rather than the high test of “necessary in a democratic society” required by international law, rights may be restricted where their exercise is merely “contrary to”, “detrimental to”, or “adversely affects” the broad range of interests listed.

¹ ICCPR, Article 2(1). United Nations Human Rights Committee, General Comment No. 15 on the position of aliens under the covenant, 11 April 1986.

² UNHCR 2015 country operations profile

11. In addition, the Constitution provides **no explicit protection for the right to media freedom or the right to information**. In relation to media freedom, the Constitution would be strengthened by specific prohibitions on prior-censorship and media registration, as well as by adding guarantees for the independence of any body with regulatory powers over the media. On the right to information, many Constitutions include a duty for government to proactively disclose information in the public interest, and a right for all people to request and receive access to publicly held information, with a presumption in favour of disclosure.
12. Myanmar currently makes no effort to publish any kind of information. The News Media Law (2014) provides for a vague right for journalists to “request” (6.a) and “collect” information (4.d), including from non-governmental organisations or businesses which are in receipt of public funds (6.b). However, no mechanism exists with which journalists can exercise this limited right and, despite government commitments, some ministries still lack spokespeople, public relations departments or publicly advertised contact details.

1957 Penal Code and the Official Secrets Act

13. One of the most significant and common tools for restricting the right to freedom of expression, including of human rights defenders and journalists, is the Penal Code. A number of its criminal prohibitions are contrary to international human rights standards and should be repealed through comprehensive legislative reforms.
14. **Sedition (Article 124a and 505b):** The offence of sedition, defined as defaming or bringing disaffection against or contempt of the government, does not comply with international standards on freedom of expression. States can easily use such laws to limit public debate concerning public figures in the political domain, such as politicians, or to defend public institutions, where there is no connection between the expression at issue and a threat to a legitimate State interest, such as protecting national security or public order.
15. In October 2014, five media workers at *Bi Mon Te Nay Journal*, Kyaw Zaw Hein, Kyaw Min Khaing, Aung Thant, Win Tin, and Yin Min Tun, were sentenced to two years imprisonment for sedition and had all their equipment confiscated. They reported a political activist’s claims that an interim government was being formed. Prosecutors refused to bring the case under the News Media Law. The offence of sedition is incompatible with international human rights law. It is also contrary to international standards to prosecute journalists for reporting the words of others, where the journalist is simply reporting newsworthy statements without necessarily endorsing them.
16. **Promoting enmity or hatred (Article 153a):** The offence of promoting enmity or hatred is written in terms that are too broad; it has a chilling effect on legitimate reporting around issues affecting racial and religious minorities, while at the same time allowing for arbitrary interpretation that enables impunity for genuine acts of incitement to national, racial or religious violence. The provision should be brought in line with international standards, in particular Article 20(2) of the ICCPR, so that it is clear that it covers intentional acts of advocating hatred to incite others to violence, hostility or discrimination against protected persons. This should be implemented in line with the guidance provided in the Rabat Plan of Action.³

³ Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, OHCHR, 5 October 2012.

17. **Obscenity (Articles 292, 294):** The provisions on obscenity are very subjective, and may be abused to enforce out-dated concepts of “public morals” that do not reflect diverse or evolving public attitudes, or to discriminate against individuals or groups. Such provisions should be amended to comply with the three-part test set out in Article 19(3) of the ICCPR.
18. **Insulting religion or religious feelings (Articles 295a, 298):** Prohibitions on criticising religion – commonly known as blasphemy – are not compatible with international standards on freedom of expression, and they should not be abused to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.⁴ Such prohibitions are not necessary, as acts of incitement to discrimination, hostility or violence should be dealt with under prohibitions as envisaged by Article 20(2) of the ICCPR.
19. **Criminal defamation (Articles 499 – 502)** carries a prison sentence of up to two years or an unspecified fine. UN and regional independent mechanisms on freedom of expression have called on States to decriminalise defamation, since criminal laws on defamation fail to strike the proper balance between individuals’ reputation rights and freedom of expression.⁵ Individuals’ reputations can be protected more effectively, with proper safeguards against abuse, through the civil law. The UN Human Rights Committee have also called on States to consider decriminalising defamation,⁶ a call that the African Commission on Human and People’s Rights has also made.⁷
20. In 2013, a journalist with Eleven Media Group, Ma Khine, was sentenced to 3 months imprisonment for criminal defamation (Article 500) of lawyer Aye Aye Phyo in relation to an article on endemic corruption in Myanmar’s legal system. She was also convicted for trespassing on the lawyer’s property (Article 451), and using abusive language (Article 294).
21. Since 2014 Eleven Media Group media workers Nay Htun Naing, Than Htut Aung, Thein Myint, Wai Phyo and Myat Thit have been in court facing prosecution for criminal defamation for an article critical of the proposed Public Service Media Bill, alleging it would facilitate the misuse of public funds to further the incumbent government. Given that the Bill provides for state-owned newspapers, the establishment of which is against international standards on free expression, the concerns are highly legitimate.
22. **Other criminal provisions are abused to stifle media freedom.** Prosecutions have been reported following journalists’ contacting government officials or departments for comments on allegations of wrongdoing. Rather than investigate the wrongdoing, the response has been to prosecute the journalist under harsh criminal law provisions, ignoring lighter forms of dispute resolution available under the 2014 News Media Law:
- In April 2014, DVB media worker Zaw Pe, together with his source, Win Myint Hlaing, were sentenced to 1 year imprisonment for trespassing and “disturbing a civil servant on duty” (Penal Code, Art. 448 and 353 respectively) after questioning a local official in regards to allegations of government irregularities in the spending of public funds. No attempt was made to investigate the accusations of corruption.

⁴ UN Human Rights Committee, General Comment Number 34, 12 September 2011, CCPR/C/GC/34, at para. 48

⁵ Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 10 December 2002

⁶ HR Committee, General Comment No. 34, *op. cit.*, at para. 47

⁷ Resolution on repealing criminal defamation laws in Africa, African Commission on Human and Peoples’ Rights, ACHPR/Res 169 2010

- In July 2014, media workers for Unity Journal, Lu Maw Naing, Paing Thet Kyaw, Sithu Soe, Yarzar Oo and Tint San were initially sentenced to 10 years, later reduced to 7 years, imprisonment with hard labour for trespass (Official Secrets Act Art. 3.1.a). The journalists reported on an alleged chemical weapons factory and land confiscations by the military. The punishment of 7 years hard labour was grossly disproportionate compared to the harm caused. The prosecutors refused to bring a case of breach of ethical standards under the News Media Law, as a more appropriate remedy.

2014 News Media Law

23. The News Media Law, adopted in 2014 following consultations with the Interim Press Council, is flawed. While it follows the abolishment of the Press Scrutiny Board and the Broadcasting Censorship Board, the law entrenches State controls over the print media and fails to guarantee minimum standards of press independence and freedom.
24. The law promises to establish a permanent Press Council to replace the Interim Press Council, intended as an alternative forum for dispute resolution to avoid prosecution, but this has yet to materialise due to severe delays in adopting the necessary bylaws. This has left the Interim Press Council operating without a mandate or procedures. While the government has brought some cases to the Interim Press Council, the more controversial cases have been sent straight to the criminal courts for determination under much more severe laws. As a result, there is growing distrust among media workers in the Interim Press Council and scepticism about what will replace it.
25. There also remain concerns about the substance of the adopted law:
 - **The law fails to explicitly and comprehensively guarantee media freedom or freedom of expression**, instead setting out limited and piecemeal freedoms or entitlements. For example, although the law guarantees “freedom from censorship”, this is ambiguous and contradicted by extensive and disproportionate duties placed on media workers through the law.
 - **The law places many broad, imprecise or vague restrictions on freedom of expression**, frequently qualified by reference to unspecified national laws, many of which have not been reformed since colonial or military rule. As such it is difficult to determine the scope of the powers it confers on the state, or the rights that it affords media workers.
 - **The law fails to distinguish between types of media**, subjecting them to the same levels and method of regulation. International standards are clear that the regulation permissible depends upon the medium.
 - **The law fails to guarantee certain protections of rights essential for journalists**, such as protection of journalists’ sources.
 - **The law gives the state control over journalists’ ethics**, which should not be a matter of legal obligations that the State has a determinate say in, but should instead be promoted through self-regulation for the print media.
 - **The law gives inadequate dispute resolution powers for the Press Council** before jurisdiction passes to the judiciary, where State-determined “ethical standards” are imposed through criminal sanctions including fines and imprisonment. Alternative forms of regulatory redress, such as the right of reply or right to correction, or orders to publish decisions by the Press Council, are not available. The real threat of recourse to criminal sanctions will likely have a serious chilling effect on the media.
 - **The law does not safeguard the independence of the Press Council**. While the Council is currently operating in a relatively free manner, the lack of safeguards

means that any future government could easily and unduly influence its decision-making.

2014 Printing and Publishing Law

26. The Printing and Publishing Law was adopted by Parliament at the same time as the News Media Law, but without any consultation. While still incompatible with international standards on freedom of expression, the law is less draconian than its 1962 predecessor. It lessens the extent of pre-publication censorship, reduces the number and severity of criminal sanctions, narrows the scope of restrictions, and government oversight over the media has been partially transferred to the courts. However, in particular, key problems with the law include:

- **The law serves no legitimate democratic purpose**, since it is not necessary in a democratic society to specifically regulate the print media beyond general laws that apply to all commercial activities. This is because regulation of the print media by the State has not been proven to increase standards, but instead increases the likelihood that the State will abuse its power to exercise undue influence over the media, reducing its independence and therefore its quality.
- **The law forces the media to get licences**, requiring printers and publishers to register, without giving any reason or establishing a proper procedure. International standards are clear that registration requirements for the media are not necessary, as such systems are often abused to censor critical voices without pursuing any other legitimate aim. If a registration system is to be imposed, an independent body with a clear and open procedural system that explicitly guarantees freedom of expression should oversee it.
- **The law includes overbroad and vague content restrictions** that are not in accordance with international law and should be replaced with laws of general application.

Significant delays in adopting draft legislation on broadcasting to strengthen rights

27. The draft Broadcasting Bill was initially presented to Parliament in 2013 and has since remained stuck in the parliamentary process. The initial Bill was not consulted on before being presented to Parliament, and as a result the level of opposition has delayed its process. The government tightly controls the free flow of information in the broadcasting sector, both on radio and television. There is very little programming on issues of public interest, with minimal coverage of news and current affairs, and very little open debate. Instead, programming is highly focused on providing entertainment, including serials. The government directly or indirectly controls all publicly available broadcast channels. The current content of the draft Bill is unclear, but initial concerns with it include:

- It includes provisions for state-run broadcasting, without clear explanation of what it is, how it is governed, or how it is accountable to the public;
- It does not include any proper requirements for the broadcasting spectrum to be regulated according to the public interest, ensuring pluralism and to promote the right to freedom of expression;
- It provides insufficient safeguards to protect the regulator's independence from the government. For example, the regulator's members are nominated by politicians and can be sacked by the president (Article 20b). It also allowed for the Ministry of Information and the Ministry of ICT to "issue rules" without any explanation of what such rules cover (Article 108). As such, in effect, the government would have control over those with the power to issue, renew and revoke broadcasting licences;

- It provides sanctions that are disproportionate and would result in punitive punishments that do not depend on being proportionate to the harm incurred;
- It contains no rules on elections, including electoral guarantees to ensure participation and informed choices;
- It contains limitations on the openness and transparency of awarding broadcasting licences, with no obligation for the regulator to hear applicants or give clear reasons in writing for its decisions;
- It contains no provisions for digitalisation or convergence.

Draft Public Service Media Bill

28. The draft Public Service Media Bill was initially presented to Parliament in 2013 and has since remained stuck in the parliamentary process. The content of the current draft Bill remains unclear but the Bill initially included some positive provisions, such as the recognition of the importance of independence from government and of accountability to Parliament and the public. Many issues of concern remain:

- It retains state funding for newspapers by turning state-run newspapers into newspapers controlled by a regulator. There is, however, no justification for spending public money on such a newspaper, and the money could be better spent enabling greater media diversity through ensuring newspapers are free to operate, and supported equally through, for example, government advertising.
- It provides insufficient safeguards to protect the independence of the public service broadcaster. For example, the board are chosen by politicians – instead of media professional organisations and civil society – and it contains no eligibility criteria or nomination procedures which could therefore result in bias. Governors can be dismissed without reason or the opportunity to appeal.
- It provides a limited mandate for the broadcaster, with no requirement for the provision of impartial and independent information or the responsibility to act as a forum for democratic debate, social cohesion and integration.
- It provides insufficient safeguards for editorial independence, for example by not banning staff from taking instructions whatsoever from external sources, nor does it stipulate where editorial independence applies. It also does not include provision for the right of media workers to protect their sources.
- It fails to explicitly obligate media pluralism and diverse viewpoints and perspectives, particularly important given Myanmar's diverse ethnic, linguistic and religious groups.
- It provides insufficient guarantees for public participation in the governance of the broadcaster.

Government ownership and control over media

29. In addition to a severely restrictive legal environment, the government exercises control over media in a very practical sense. Indeed, the failure to engage in comprehensive legal reforms is evidence of its reluctance to relinquish this control.

30. In the print media, the government owns two newspapers, the *Mirror* and the *New Light of Myanmar*. Aside from financial backing – their cover price is at least four times less than their private sector counterparts – these state newspapers are supported for example by state infrastructure, such as distribution across the country using government transport. As a result, their circulation is over four times that of the largest private newspaper. Journalists for state-owned newspapers are also offered privileged access to government information sources. This makes survival as a private newspaper difficult.

- In 2014, three private newspapers closed: *The Empire*, *Myanmar Newsweek*; and *Burma Age*.
- In 2015, one longstanding and highly regarded daily newspaper, *Mizzima*, announced that it would be closing down as it could not compete.

31. The government has also directly threatened private newspapers. In 2014, *Irrawaddy* newspaper was told that if they did not change the spelling of their newspaper to the officially recognised spelling, the government would not allow its journalists access to government press conferences.

Elections

32. In an election year, it remains concerning that two years after the establishment of a partially civilian government all television and radio channels, plus the largest daily newspapers, remain under state control. As a result, the information that most of the population receives regarding the election process, political party manifestos, and the candidates themselves, is controlled directly by the government via the Ministry of Information. While the Universal Periodic Review will take place after the elections, unless this situation changes, all future elections cannot be deemed to be free and fair.

Recommendations

33. Based upon the above observations, ARTICLE 19, MJA, MJU, and MJN call upon the Government of Myanmar to significantly improve the overall conditions for freedom of expression and media freedom in the country. In particular, the Government of Myanmar should:
- Sign and ratify all major international human rights instruments, in particular the International Covenant of Civil and Political Rights;
 - Extend a standing invitation to all UN Special Procedures, and in particular invite the Special Rapporteur on promoting and protecting the right to freedom of opinion and expression to officially visit the country;
 - Amend the 2008 Constitution to guarantee the supremacy of rights over other laws, and to fully guarantee human rights, including the rights to freedom of expression, freedom of information, and freedom of the media in accordance with international standards to all people, including non-citizens;
 - Urgently amend the 1957 Penal Code to repeal the provisions on Sedition (Article 124a and 505b), insulting religion (Articles 295a, 298), criminal defamation (Articles 499 – 502), and to amend the offences of promoting enmity or hatred (Article 153a), and obscenity (Articles 292, 294), to bring them into conformity with international standards on freedom of expression;
 - Amend the News Media Law to bring it into line with international standards, ensuring that its primary purpose is to promote and protect the right to freedom of expression and media freedom;
 - Expedite the creation of the new Permanent Press Council by adopting the News Media bylaws and ensuring its full competency and independence from government;
 - Cease the practice of referring cases that should be considered under the News Media Law by the Permanent Press Council to the criminal courts;
 - Repeal or substantially amend the Printing and Publishing Law, in particular to remove licencing regimes for the printed press, and remove all vague, overbroad or illegitimate content restrictions;

- ix. Return the draft Broadcasting Bill and Public Service Media Bill to meaningful public consultation, amending them in accordance with international standards, in particular regarding proper safeguarding of the new oversight bodies' independence from government;
- x. End all government ownership and other forms of indirect control over the printed media, and ensure the establishment of fully independent public service media;
- xi. Order the immediate and unconditional release of the *Unity Journal* and *Bi Mon Te Nay Journal* media workers and cease their prosecution;
- xii. Expunge the convictions of Zaw Pe, Win Myint Hlaing and Ma Khine, and provide them with adequate compensation;
- xiii. Facilitate greater information-sharing between government and media by creating open, accessible, responsive and properly resourced media relations offices within all ministries and across all government offices nationwide;
- xiv. Being an open and meaningful public consultation with a view to creating a right to public information law.