

ARTICLE 19

Myanmar: News Media Law

2014

Legal analysis

Executive summary

This analysis examines the compliance of the 2014 News Media Law of Myanmar with international standards on freedom of expression and media freedom. The News Media Law introduces some guarantees for media freedom, such as the prohibition of censorship and the recognition of specific rights of “media workers”. This may be seen as a positive attempt to begin dismantling the extensive apparatus of censorship in the country, and the government should be encouraged to build upon the positive elements of the Law.

However, ARTICLE 19 remains seriously concerned with shortcomings in the law. The safeguards for media freedom are heavily qualified and insufficient to meet international standards. All types of media, including print, broadcast and Internet-based media, remain under the unrestricted control of the government through the Media Council. The Media Council is not independent from government, and therefore fails to sufficiently safeguard the media from the application of content-based criminal laws that, while not imposing custodial sentences, still unjustifiably limit freedom of expression.

ARTICLE 19 calls on the Myanmar authorities to ratify the International Covenant on Civil and Political Rights (“ICCPR”) and comprehensively reform the News Media Law in order to ensure its compliance with international standards on freedom of expression.

Introduction

This analysis reviews the 2014 Media Law of Myanmar (“the Law”) for its compliance with international freedom of expression standards, in particular key provisions of the ICCPR. It is also based on ARTICLE 19’s extensive experience of working towards legal and policy reform in many countries on matters concerning the protection of freedom of expression and the right to information.

Although Myanmar has neither signed nor ratified the ICCPR or other main human rights treaties, ARTICLE 19 suggests that the standards in these treaties, which largely reflect customary international law, should guide interpretation of Myanmar’s Constitutional guarantees for freedom of expression.

Article 19 of the Universal Declaration of Human Rights (“UDHR”) protects freedom of expression and states:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The UDHR, as a UN General Assembly Resolution, is not directly binding on states. However, since its adoption in 1948, parts of the UDHR, including Article 19, are widely regarded as having acquired legal force as customary international law.¹

The ICCPR elaborates upon and gives legal force to many of the rights articulated in the UDHR.² Article 19 of the ICCPR guarantees the right to freedom of expression:

- 1) Everyone shall have the right to freedom of opinion.
- 2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.
- 3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a) For respect of the rights or reputations of others;
 - b) For the protection of national security or of public order (ordre public), or of public health or morals.

The Human Rights Committee, the international treaty monitoring body for the ICCPR, elaborates in General Comment No. 34 further guidance on interpreting Article 19, noting that “a free, uncensored and unhindered press or other media is essential in any society” and “constitutes one of the cornerstones of a democratic society.”³ The special mandates on freedom of expression for the UN Human Rights Council, together with regional mandate holders, have issued similar guidance in their annual joint declarations on freedom of expression.⁴

Positive features of the Media Law

¹ *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit).

² UN General Assembly Resolution 2200A (XXI), 16 December 1966, in force 23 March 1976.

³ Human Rights Committee, General Comment No 34 on Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34, 12 September 2011, available online at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

⁴ Declarations of the representatives of intergovernmental bodies to protect free media and expression; Ed. by Adeline Hulin. - Vienna: OSCE Representative on Freedom of the Media, 2013. - 87 pp. Available online at <http://www.osce.org/fom/99558?download=true>.



The Law contains several positive references to the important role of media in society, and expands legal protection for media freedoms and the rights of media workers. However, many of these advances are either problematic because they are vague, or because the rights they provide are too heavily qualified.

The objectives of the law (Chapter 2, Article 3), provide:

- Guarantee to the media “freedom from censorship to express, publish or distribute freely” although this is qualified by reference to Myanmar’s Constitution, which does not comply with international standards on freedom of expression;⁵
- The media will stand up firmly as “the fourth Estate” of the nation;
- To guarantee “entitlements and freedoms” to media workers, although also aiming to establish and develop “responsibilities, ethics, rules and regulations and practices” for the industry;
- To make news accessible for all citizens, although not for all persons in Myanmar;
- To establish conciliatory dispute mechanisms through the Media Council;

Other positive elements in the Law that should be expanded upon, including:

- The guarantee in Article 5 that “publications shall be free from censorship”;
- The guarantee of rights for “media workers” to criticize all branches of government;
- The Media Council’s inclusion of members of the media, as well as broader public representation;
- The lack of custodial penalties for breaching media standards, although these are a possibility through laws of general application;

Although these positive features are welcome additions to the legal landscape for the media in Myanmar, they are so heavily qualified or contradicted by negative aspects of the Law that ARTICLE 19 is concerned they will have little practical impact on media freedoms in the country.

In reviewing the Law, the authorities should build upon these positive features while addressing the concerns listed below.

⁵ Myanmar: Letter to Daw Suu on constitutional reform, 20 December 2013, available at: <http://www.article19.org/resources.php/resource/37457/en/myanmar:-letter-to-daw-suu-on-constitutional-reform>

Problems with the Media Law

There are numerous fundamental flaws in the Law from a freedom of expression perspective. Substantial reforms are required to ensure that media freedom is guaranteed, so that all media can operate free from State interference. We point to the following problems in particular:

Failure to explicitly recognise media freedom and freedom of expression

The “Objectives” of the Law (Chapter 2) do not explicitly recognise media freedom or the right to freedom of expression. While the Law references various “freedoms” or “entitlements” afforded to media organisations, media workers, and “citizens”, these are piecemeal and fail to comprehensively guarantee the importance of freedom of expression and media freedom.

Any regulation by the state of the media inevitably infringes upon the right to freedom of expression. Because of this, it is important that any law relating to regulation of the media:

- Clearly establishes the importance of media freedom and freedom of expression in a democratic society;
- Recognises that any regulation of the media interferes with the right to freedom of expression and must be justified;
- Creates an obligation on the state and its officials applying the law to ensure any interference with freedom of expression, including in the application of the law, is: (i) provided for by law; (ii) meets a legitimate aim, and (iii) is necessary in a democratic society.

In particular, the law should recognise the importance of media freedom to comment on public issues and inform public opinion without censorship or prior restraint.⁶ The law should stress the value of uninhibited expression, particularly in the circumstances of public debate in a democratic society concerning figures in the public and political domain. It should guarantee that there is no justification for restricting advocacy of multi-party democracy, democratic tenets or human rights.⁷

Comparatively, the Swedish and Finnish Press Codes demonstrate good practice for ensuring any interference with freedom of expression, in particular media freedom, complies with international law.⁸

Although the Law provides “freedom from censorship”, this guarantee is vague and contradicted by the extensive duties placed on media professionals in Chapter 4. For clarity, the Law should explicitly prohibit the state from scrutinising any expression prior to publication, or banning or otherwise restricting expression ahead of publication.⁹

Recommendations:

- The Law should include in its objectives “the promotion and protection of media freedom and the right to freedom of expression” in accordance with international human rights law, and stress the importance of unimpeded political debate;

⁶ General Comment 34, at para. 13.

⁷ *Ibid.* at para. 23.

⁸ Article 1 of the Finnish Act on the Exercise of Freedom of Expression in Mass Media states: “This Act contains more detailed provisions on the exercise, in the media, of the freedom of expression enshrined in the Constitution. In the application of this Act, interference with the activities of the media shall be legitimate only in so far as it is unavoidable, taking due note of the importance of the freedom of expression in a democracy subject to the rule of law.” Likewise, Article 4 of the Swedish Freedom of the Press Act states: “Any person entrusted with passing judgment on abuses of the freedom of the press or otherwise overseeing compliance with this Act should bear constantly in mind in this connection that the freedom of the press is fundamental to a free society, direct his attention always more to illegality of subject matter and thought than to illegality of expression, to the aim rather than the manner of presentation, and, in case of doubt, acquit rather than convict.”

⁹ Article 2 of the Swedish Freedom of the Press Act states: “There shall be no scrutiny of any written matter prior to printing, nor shall it be permitted to prohibit the printing thereof. Nor shall it be permitted for a public authority or other public body to take any action not authorised under this Act to prevent the printing or publication of written matter, or its dissemination among the general public, on grounds of its content.”

- The Law should guarantee against pre-publication censorship of any media by the state.

Vague restrictions on freedom of expression

Many provisions in the Law are phrased in broad, imprecise or vague terms. They are also frequently qualified by reference to the Myanmar Constitution or unspecified national laws. As a result, it is difficult on the face of the Law to determine the scope of the powers it confers on the state or regulatory body that it establishes, or the scope of the rights it affords to media workers and others.

Chapter 1 of the Law, dealing with definitions, is particularly vague and not comprehensive. The definition of “mass media” in Article 2(g) could encompass traditional print newspapers, online newspapers, broadcasters, the use of social media, or the printing of pamphlets by civil society, a political party, or even the state. Key terms, such as “publish” or “publication” are not defined. Distinctions between these media offered in separate definitions are overlapping and confused. The definition of “media worker” is similarly broad, including anyone professionally associated with an entity engaged in publications, regardless of whether they perform a journalistic or production related function.

Chapter 3 of the Law, setting out “entitlements of media workers” is also very vague. For example, “media workers” are permitted to “investigate, publish, broadcast information ... in accordance with rules and regulations”, without specifying which rules or regulations apply. Chapter 4 of the Law likewise imposes a broad “responsibilities” on media workers, which include the duty to avoid writing news “which deliberately affects the reputation of a specific person or an organisation or generates negative impact to the human rights”. Both of these Chapters raise concerns separate to their vagueness, discussed below.

ARTICLE 19 recalls that any restriction on the right to freedom of expression must be provided for by law. This requires the law to be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly, and the law must be accessible to the public.¹⁰ This is to guard against arbitrary and inconsistent interpretation of the Law, and to prevent abuse of the provisions by authorities.

The Law does not comply with these requirements, and therefore violates international standards on freedom of expression.

Recommendations:

- The Law must be re-drafted so that it is legally precise, easily understandable and accessible to the public;
- To the extent that it is necessary to reference other legal instruments to aid the interpretation of the Law, these must be specified by name.

Failure to distinguish between types of the media

The Law fails to distinguish between different types of media, treating all print, internet and broadcast media as the same, subjecting them to the same levels and method of regulation through the Media Council.

While it is important to stress that the right to freedom of expression and media freedom apply to all media types, international standards require distinction between different types of media when it comes to regulating (i.e. limiting) the conduct of those media.

¹⁰ General Comment No. 34, *op. cit.*, at para. 25.

Print and Internet Media

ARTICLE 19 is seriously concerned that the Media Council, which is not independent from the state (as outlined below), is charged with regulating the print and Internet-based media. It must be remembered that all media are subject to laws of general application, and it is therefore not necessary to develop specific regulation for print or internet-based media.¹¹

Experience shows that State regulation of print and internet-based media is invariably abused by the state to limit expression that it disagrees with or disapproves of, and undermines the ability of the media to effectively share information with the public. This violates international standards on freedom of expression.

Self-regulation is the preferred model of regulation for the print and internet-based media, which means that it should be left to the industry to develop and hold itself accountable for ethical media standards. This is often achieved through the establishment of “Press Councils” that are independent from the State, and open to all print media to join as members. The mandate of Press Councils vary, but they are generally tasked with formulating professional and ethical standards, and receive complaints regarding compliance with those standards.

For many Press Councils, internet-based media, including individual bloggers, are permitted to join the same self-regulatory bodies if they wish to – as is the case in Australia, New Zealand, Finland and the UK.

The broadcast media

The regulation of broadcast media, i.e. radio and television, should be established separately. It is concerning that the Law fails to define “broadcast media” sufficiently from other forms of media. Precision is important, because the state has specific duties under international standards on freedom of expression to protect freedom of expression through broadcasting. This is because the broadcasting spectrum is a limited public resource, and the state has an important, albeit limited, role to play in ensuring that the spectrum is used in the public interest for diverse and plural programming.

Ensuring diverse and plural broadcast programming while safeguarding media independence is a complex task. It requires the state to establish an independent, transparent and accountable regulatory body to ensure broadcast frequencies are allocated fairly, according to a transparent broadcast policy designed to maximise media pluralism and diversity. Unlike the print and internet media, this body is not self-regulatory but is independent from the industry, as well as the state and political parties.

The regulatory body, independent of the legislature, should also be tasked with creating a “code of conduct” to guide the ethical conduct of broadcast media. Enforcement of the code of conduct should not be punitive, but should focus on remedies such as the broadcast of rulings by the regulatory body.

ARTICLE 19 does not believe the Media Council is well suited to this function, and that the regulation of broadcasting should be set out in a separate law.

Recommendations:

- The law should distinguish between print and internet-based media on the one hand, and broadcast media on the other, with regulation only specified in relation to broadcast media;
- The print and internet-based media should only be governed by laws of general application, and should be encouraged to adopt and enforce ethical standards through self-regulation;
- Separate regulation is required to ensure that media freedom is secured for broadcast media.

¹¹ Joint Declaration on Freedom of Expression and the Internet, 2011, available at: <http://www.osce.org/fom/78309>;

Failure to guarantee the rights of journalists

As outlined above, the definition of “media workers” as “a person who takes up any job related to the media industry” in Article 2 of the Law is very vague. It could apply to journalists, production assistants, computer technicians, secretaries or cleaners working for media companies. It is therefore not clear who is protected by the limited guarantees for “media workers” in the Law, and also who is subject to the extensive obligations created for this same class of persons.

ARTICLE 19 recalls that all people have the right to freedom of expression. However, to assist journalists in the exercise of their function, it is important to provide persons exercising the function of journalism with specific legal protections. The professional status of a person, or their association with other journalists or an established media house, should not be relevant to this determination. Instead, a broad definition of “journalist” should mean any person regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication.¹²

Chapter 3 sets out the “entitlements of media workers”, including the freedom to criticise the state, to collect and request information from the state and other sources, to investigate and publish, to be exempt from being arbitrarily detained or having their equipment seized, and limited guarantees for anonymous communication. As identified above, many of the provisions in this section are vague, or qualified by reference to the constitution or other unspecified laws. The scope of protection afforded by these “entitlements” is therefore unclear, allowing for arbitrary and inconsistent interpretation.

ARTICLE 19 is concerned that the Law may be interpreted to restrict these rights to a limited class of “media workers”, or be considered exhaustive of the rights enjoyed by journalists when it is not comprehensive. Instead, all people should enjoy these rights and entitlements, and this should be set out in the constitution. The right to freedom of expression includes the right to protection from violence in the exercise of that right, the right to access information held by the government, and the right to freely criticise the government. While journalists should also enjoy these freedoms, the Law should not be misinterpreted as affording a narrow class of persons a monopoly over them.

In relation to specific laws that can assist journalists in the exercise of their function, the Law should provide a section on the protection of the identity of journalists’ sources where they wish to remain anonymous.

The Law should also provide the obligation of the state to protect those exercising their right to freedom of expression. This must include:

- I. Special measures of protection should be put in place for individuals who are likely to be targeted for what they say where this is a recurring problem;
- II. Ensure that crimes against individuals for exercising their right to freedom of expression must be subject to independent, speedy and effective investigations and prosecutions; and
- III. Victims of crimes against freedom of expression have access to appropriate remedies.¹³

The Myanmar Authorities should also consider the adoption of various laws to enable the practical exercise of the rights to freedom of expression for all people. This should include, for example, laws on access to information, and reform to administrative, civil and criminal laws to bring them into compliance with international standards on freedom of expression. The adoption of these laws should also be regarded as critical for securing media freedom.

Recommendations:

- The term “media worker” should be replaced with the term “journalist” throughout the Law. The Law must also specify that the term “journalist” must be broadly understood as “any person

¹² See, for example, Appendix to Council of Europe Committee of Ministers Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information.

¹³ Joint Declaration on Crimes Against Freedom of Expression, 2012, see: <http://www.article19.org/resources.php/resource/3348/en/joint-declaration-on-crimes-against-freedom-of-expression#sthash.gkGzyHTv.dpuf>

regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication”;

- The “entitlements” offered in Chapter 3 should be understood as rights enjoyed by all persons, and re-drafted to comply with the requirements of legality;
- The Law should provide protection to the anonymity of journalists' sources;
- The Law should include specific measures to prohibit and protect against crimes committed against people for exercising their right to freedom of expression
- The Myanmar authorities should consider holistic reform to the legal framework for freedom of expression in the country to ensure the freedom of expression rights of all people, including journalists, are safeguarded.

The state should not determine journalists' ethical obligations

Chapter 4 of the Law sets out “Responsibilities and a Code of Conduct” to be complied with by “media workers”.

ARTICLE 19 is very concerned that the state, through the legislature, is establishing responsibilities and rules specifically to bind media workers, either replicating laws of general application or establishing greater standards for the state to hold the media to. The Media Council, which is not independent from the state, only has limited powers for dispute resolution before jurisdiction passes to the judiciary with powers to prosecute media workers for violating these standards and impose criminal sanctions.

Several of the obligations set out in Chapter 4 are legal duties that do not require repeating specifically for “media workers”, since these already exist in other laws that are of general application. These include laws that prohibit contempt of court, defamation, intellectual property infringement, and incitement to hatred. It is not necessary to repeat in the Media Law that the obligations created by these laws apply to journalists, as this is likely to chill the freedom of expression of the media. These laws of general application that potentially impact on the right to freedom of expression must also be brought into compliance with international standards.

Other obligations set out in Chapter 4 set a higher standard for conduct of media workers than imposed on people generally, and may be considered “ethical” or “professional” obligations. These include the obligation to report accurately and reliably, and to ensure corrections for incorrect news.

The Media Council have preliminary responsibility to enforce these standards by bringing concerned parties together to agree a compromise. If this fails, the “appropriate” Courts are given jurisdiction for criminal prosecution, with fines ranging from 100,000 kyats to 1,000,000 kyats. Alternative and less severe sanctions, such as requiring the right of reply or correction, or the publication of the decision of the Media Council, are not provided for.

ARTICLE 19 reiterates that the state, including the legislature, should not formulate or establish ethical or professional standards for media of any type, including print, internet-based and broadcast media. Enforcement of those standards should be through bodies that are independent of government, any sanctions should not be punitive in nature, and must never result in criminal prosecution or the imposition of criminal fines.

As specified above, the creation of ethical standards for the print and internet-based media is best accomplished through self-regulation. For the broadcast media, codes of conduct should be established in a participatory and transparent manner by an independent, transparent and accountable regulatory body.

Recommendations:

- The Law should not specify ethical obligations for the media, or create enforcement mechanisms for those standards or sanctions;

- Any Law concerning the media should not replicate criminal or civil laws of general application;
- Print and internet-based media should adopt their own ethical standards through self-regulation;
- The broadcast media should be subject to a code of conduct established in a participatory and transparent manner by an independent, transparent and accountable regulatory body.

The Media Council is not independent

The Law establishes the Media Council in Chapter 6. Rather than guarantee the independence of this regulatory body from the state, it specifically allows the President, and the People's Parliament and National Parliament to appoint a representative each.

Beyond the appointment of these three representatives, the distribution in representation from other specified bodies, including the industry and community, are not provided. It is therefore unclear which media will appoint its own representatives and how many, and likewise which other communities will appoint representatives. There are no safeguards to prevent political influence over these appointments. Likewise, Chapter 7 provides for various sources of funding for the Media Council but is not specific about how those revenue streams will be safeguarded to ensure independence.

We reiterate that the Media Council should not be given the competence to have any powers over all the different forms of media, in particular print or internet-based media, which instead should be self-regulated. In relation to broadcast media, a separate and dedicated regulatory body should be established by law, with sufficient guarantees for its independence from the state, political parties, and other interest groups.

Recommendations:

- The Media Council should not have any powers over print or internet-based media, which should be self-regulated;
- Broadcast media should be regulated by an independent, transparent and accountable regulatory body.