



CENTRE FOR LAW  
AND DEMOCRACY

# Myanmar

## Outline of Rules Affecting Freedom of Expression

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## 1. Introduction<sup>1</sup>

This Outline provides guidance to civil society and other interested stakeholders in Myanmar on the key elements of a legal framework governing freedom of expression which is consistent with international standards. In so doing, it also provides a tool for stakeholders to evaluate the consistency of the current legal framework with these standards. This Outline focuses on only the most important issues and is not intended to be an exhaustive guide to international standards.

This Outline begins with a table providing an overview of the main framework of rules governing freedom of expression, including the right to information, as prescribed by international law or found in most jurisdictions. It then describes international standards on criminal and civil content rules, namely laws restricting freedom of expression to combat hate speech, to protect national security/public order, to address obscenity, to protect the judiciary, to address blasphemy, false news and defamation, to protect privacy and to provide for the right to information.

Under international law, any restrictions on freedom of expression must meet the three requirements of being provided for by law and necessary to protect a legitimate interest. The Outline provides guidance on how the content restrictions can meet this test, noting the importance of adopting narrowly-tailored provisions targeting specific harms (such as hate speech or risks to national security) and noting areas where best practice or international law requirements call for avoiding restrictions altogether, such as in the area of blasphemy or protecting the judiciary from criticism.

The Outline then turns to international standards on media regulation, highlighting the importance of regulatory bodies being independent and the promotion of media diversity, and detailing how different rules are appropriate for different types of media (such as print media, private broadcasters, public broadcasters and online communications). Although different countries have taken different approaches to certain aspects of media regulation, clear international standards and best practices have emerged in relation to many issues, such as the need for media regulators to be independent and the illegitimacy of licensing regimes for journalists.

An overview table of the rules presented in this Outline is provided on the following page.

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## Content

|   |   |
|---|---|
| <p><b>Criminal</b></p> <ul style="list-style-type: none"> <li>• <i>Hate speech</i><br/>Advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence</li> <li>• <i>Security/Public order</i><br/>Intended and likely to incite to imminent violence</li> <li>• <i>Obscenity</i><br/>Not just offensive material but harmful content like child pornography</li> <li>• <i>Judiciary</i><br/>To protect the integrity of the judicial process, not individual judges</li> <li>• <i>Blasphemy/False news</i><br/>Neither are legitimate</li> </ul> | <p><b>Online Content</b></p> <ul style="list-style-type: none"> <li>• <i>Content filtering</i><br/>Illegitimate if not end-user-controlled</li> <li>• <i>Blocking orders</i><br/>Should be exceptional, proportionate, carefully tailored to harmful content and subjected to judicial/quasi-judicial oversight</li> <li>• <i>No strict liability for intermediaries</i><br/>Intermediaries should not be held strictly liable for content</li> <li>• <i>Specific to online harms</i><br/>Restrictions should avoid duplicating existing legislation and should target online-specific harms</li> </ul> |
| <p><b>Civil/Administrative</b></p> <ul style="list-style-type: none"> <li>• <i>Defamation</i><br/>Only for legitimate reputation, with appropriate defences (truth, opinion, reasonably publication) and limited sanctions</li> <li>• <i>Privacy</i><br/>Only where there is a reasonable expectation of privacy and this is not outweighed by the overall public interest</li> <li>• <i>Right to Information Law</i><br/>Should be adopted and implemented</li> <li>• <i>Online harms</i><br/>Specific to harms unique to cyberspace and non-duplicative of existing laws</li> </ul>                   |   |

## Media Regulation

### Independence of Regulatory Bodies and Commercial Issues

|   |  |  |
|---|--|--|
| <p><b>Journalists</b></p> <ul style="list-style-type: none"> <li>• <i>No licensing/registration</i><br/>Everyone should be free to engage in journalism</li> <li>• <i>Protection of sources</i><br/>Right to protect confidential sources of information</li> <li>• <i>Accreditation</i><br/>Only to ensure privileged access of journalists to limited space venues, not to control access to the profession</li> <li>• <i>Protection from attacks</i><br/>States should protect journalists from attacks by State and non-State actors, including online</li> </ul> | <p><b>Print Media</b></p> <ul style="list-style-type: none"> <li>• <i>No licensing</i></li> <li>• <i>Technical registration</i><br/>No discretion to refuse once requisite information has been provided</li> <li>• <i>Rights of correction and reply</i><br/>Right of correction where this will redress the harm; reply only for breach of a legal right</li> <li>• <i>Complaints</i><br/>Preferably self-regulatory; based on a pre-established code of conduct and only light sanctions</li> </ul> | <p><b>Private Broadcasters</b></p> <ul style="list-style-type: none"> <li>• <i>Licensing</i> <ul style="list-style-type: none"> <li>- Based on a frequency plan</li> <li>- Process should be fair and transparent</li> <li>- Key goal should be to promote diversity</li> </ul> </li> <li>• <i>Code of Conduct</i><br/>Developed in consultation with all stakeholders with the aim of setting standards, not punishing</li> </ul> |
| <p><b>Digital Space</b></p> <ul style="list-style-type: none"> <li>• <i>No licensing</i><br/>No licensing requirement for online content, at most only for the means of distribution</li> <li>• <i>Promotion of Internet access</i><br/>Obligation to promote access</li> <li>• <i>No Internet shutdowns</i><br/>No general Internet shutdowns for any geographic area</li> <li>• <i>Net neutrality</i><br/>No differential treatment of Internet traffic based on device, content, author, destination or origin of data</li> </ul>                                  |  | <p><b>Public Service Broadcasters</b></p> <ul style="list-style-type: none"> <li>• <i>Independence</i><br/>Governed by an independent board and benefiting from independent sources of public funding</li> <li>• <i>Mandate</i><br/>The mandate should be clearly set out in law, including providing a quality news service and serving all sections of society</li> </ul>  |

## 2. Content Rules

This section highlights international standards and best practices regarding key restrictions on content, along with a short description of the appropriate scope of these restrictions. Under international law, restrictions on freedom of expression must be provided for by law, serve a legitimate interest (namely respect for the rights or reputations of others, or protection of national security, public order (*ordre public*), public health or public morals), and be necessary to protect that interest. Necessity implies that restrictions are:

- clearly and narrowly defined and respond to a pressing social need;
- the least intrusive measure available, in the sense that there is no other measure which would be effective and yet less restrictive of freedom of expression;
- not overbroad, in the sense that they are not unduly wide and do not go beyond the scope of harmful speech and prohibit legitimate speech; and
- proportionate in the sense that the benefit to the protected interest is greater than the harm to freedom of expression.

### 2.1. Criminal Rules

#### 2.1.1. Hate speech

Many countries have criminal prohibitions on spreading hate speech, and this is actually required under international law. Article 20(2) of the *International Covenant on Civil and Political Rights*<sup>2</sup> (ICCPR) provides:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

As with all restrictions on freedom of expression, it is important to achieve an appropriate balance between protecting other legitimate interests and not unduly restricting free speech. Limiting hate speech rules to the scope set out in Article 20(2) of the ICCPR is a good way of doing this.

Article 20(2) is generally understood as including a number of different elements, as follows:

1. The term "advocacy" is understood as requiring intent so that it is only where the speaker wishes to incite hatred that liability may be imposed.
2. The speech must incite to hatred based on one of the three listed grounds, namely nationality, race or religion. This is one area where national laws generally go much

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<sup>2</sup> UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

further, banning incitement to hatred on a number of other grounds, such as ethnicity, gender, sexual orientation and so on.

3. The speech must incite others to one of the three results (see next point). It is clear from jurisprudence that this requires a close nexus between the speech in question and the result. A mere tendency or general risk of promoting the result is not enough. There must be a direct and high likelihood that the result will occur.
4. The speech must incite to one of three results, namely discrimination, hostility or violence. Two of these – discrimination and violence – are specific acts (with discrimination normally being defined in national law but generally involving the denial of services or benefits). The third – hostility – is a state of mind and so inherently harder to observe or monitor. However, it is clear that it is a very strong emotion, beyond mere prejudice or stereotyping. It seems likely that the word “hostility” was used to avoid repeating the word “hatred”, but that the intention was for this to represent a similar sort of intense emotion.
5. For the most part, “prohibited by law” has been understood as referring to a criminal law prohibition. However, civil and administrative law measures should also be considered in this area, such as codes of conduct for broadcasters and/or the right to bring a civil claim when one has suffered losses due to hate speech.

## 2.1.2. National Security/Public Order

Protection of national security and public order are both interests that may come into conflict with freedom of expression. While it is legitimate to impose some restrictions on freedom of expression to protect these interests, at the same time they are often abused to unduly limit free speech.

Laws restricting freedom of expression to protect national security go by a number of names, such as treason or sedition laws, State secrets laws, anti-terrorism laws and cyber security laws, among others. For all of these, it is essential to ensure that they are written and enforced in a manner which is compatible with international human rights law.

The *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, a set of principles on national security and freedom of expression adopted by a group of international experts, define a legitimate national security interest as follows:

A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use



or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.<sup>3</sup>

International human rights law has sought to keep national security and public order restrictions on freedom of expression within their proper bounds in three key ways. First, in line with the "provided for by law" part of the test for restrictions, they have called for relevant concepts to be defined clearly and narrowly. This is of particular importance in the realm of national security in view of the tendency of legislators to rely on overbroad and vague terms which lend themselves to abuse.

Terms such as "national security," "extremism" and "incitement to hatred" should be clearly and narrowly defined, while inherently vague notions like "information security" and "cultural security" should not be used at all as a justification for restricting freedom of expression.<sup>4</sup>

Second, it is accepted that individuals may only be punished on grounds of national security when they acted with the intent to undermine security. This not only provides appropriate protection for freedom of expression, but it also accords with basic due process guarantees, which hold that one can only be punished for a crime where one acted with the requisite intent.

Third, and most importantly, there needs to be a very close nexus between the speech and the risk to national security or public order. Absent this requirement, the risk of abuse of these sorts of provisions is very great, because authorities can claim there is a very general risk in relation to a wide swath of expression. This nexus requirement is reflected in Principle 6 of the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, which provides, in pertinent part:

Subject to Principles 15 and 16 [which further limit restrictions], expression may be punished as a threat to national security only if a government can demonstrate that:

...

(b) it is likely to incite such violence; and

(c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

In exceptional circumstances, States may derogate from freedom of expression during a state of emergency. However, they must do so only "to the extent strictly required by the

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<sup>3</sup> Prepared by a group of experts convened by the London-based NGO ARTICLE 19 and adopted on 1 October 1995, Principle 2(a), <https://www.article19.org/data/files/medialibrary/1803/joburg-principles.pdf>.

<sup>4</sup> Special Rapporteurs for Promoting Freedom of Expression, 2018 Joint Declaration on Media Independence and Diversity in the Digital Age, 2 May 2018, para. 3(f), [https://www.ohchr.org/Documents/Issues/Opinion/JointDeclaration2May2018\\_EN.pdf](https://www.ohchr.org/Documents/Issues/Opinion/JointDeclaration2May2018_EN.pdf).

exigencies of the situation”, and the derogation may not be discriminatory or inconsistent with a State’s other international law obligations.<sup>5</sup>

### 2.1.3. Obscenity

Most countries place some sort of limit on the circulation of materials deemed to be obscene. At one level, this can involve restrictions designed to prevent minors from accessing this sort of material, such as requiring pornographic publications to be displayed in a way that ensures children cannot see their contents.

In most countries, certain types of obscene materials are absolutely prohibited. Child pornography, for example, is almost always illegal but most countries go further than this and ban other kinds of obscene materials. Once again, the challenge is how to strike an appropriate balance with freedom of expression. States benefit from a certain latitude in deciding on how far to go in prohibiting certain obscene materials given that such materials are usually not political expressions, which attract greater protection under international human rights law, and given differing values in difficult societies regarding obscene content. Nevertheless, there are limits to how far States can legitimately go in restricting obscene materials, and it is certainly not legitimate to subject everyone to the whims of more prudish members of society. Indeed, the right to freedom of expression extends to information and ideas which shock and offend, as well as those that are widely accepted, and so in principle it protects sexually explicit materials which some might find offensive.

The UN Human Rights Committee made an important comment on the scope of these sorts of restrictions in its 2011 General Comment No. 34:

The Committee observed in general comment No. 22, that “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.<sup>6</sup>

### 2.1.4. Protection of the judiciary

In many countries, criminal rules are in place which restrict freedom of expression with a view to protecting the integrity of the judicial process. These have two aims, namely, to ensure that the administration of justice is fair and operates without constraints and to protect the reputation of judges and/or the judiciary. Under the former category, one finds, among others, rules prohibiting the intimidation or biasing of witnesses, rules against perjury and

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<sup>5</sup> ICCPR, note 2, Article 4(1).

<sup>6</sup> General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/G/GC/34, para. 32, <http://undocs.org/ccpr/c/gc/34>.



rules prohibiting the disruption of court proceedings. If appropriately phrased, these are legitimate.

More controversial are rules designed to prevent the judiciary from criticism. In the past, such rules have been justified on the basis that there is a need to ensure respect for the judiciary so that citizens will accept their role as final arbiters of disputes in society. More recently, however, many States are finding that it is not necessary to prevent statements about the judiciary to this end. The judiciary and its members, like other public bodies and public officials, should not be shielded from critical commentary, which is important for accountability. Nevertheless, judges should retain the right to bring well-founded cases for defamation.

### 2.1.5. Blasphemy Laws

Many States still have blasphemy laws, which protect religion against criticism, on the books, although these are problematic from a free speech perspective. In many countries, these laws are discriminatory, with only the main religion being protected. Almost all such laws discriminate against atheists and non-theists, and they are often used to repress religious minorities, dissenting believers, atheists and non-theists. The UN Human Rights Committee has indicated that blasphemy laws are only legitimate in the narrow context of “circumstances envisaged in article 20, paragraph 2” of the ICCPR, which pertains to hate speech and protects believers rather than religious ideas. The Committee also highlighted the illegitimacy of any blasphemy laws that discriminate in favour of or against certain belief systems or that “prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.”<sup>7</sup> To best protect freedom of expression, blasphemy laws should be repealed in their entirety and States should rely instead solely on well-tailored hate speech laws.

### 2.1.6. False News Rules

Some countries also have false news provisions, which criminalise the dissemination of false statements, *per se*, instead of only targeting false speech that causes certain kinds of harm, for example to the administration of justice (in the context of perjury), to reputations (in the case of defamation) or to electoral integrity (in the case of well-tailored prohibitions on misinformation about the voting process during election periods). Such general prohibitions are not legitimate (see below). In addition, to pass muster as a restriction on freedom of expression, a prohibition on false statements must, if criminal in nature, include an appropriate intent requirement. The absence of such a requirement risks imposing severe penalties on those who are not even aware that they are sharing incorrect information or who

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<sup>7</sup> *Ibid.*, para. 51.

have limited capacity to engage in fact checking, which is clearly disproportionate (and also fails to conform to standards relating to presumption of innocence).

Accurate reporting is, of course, an important professional aspiration for journalists. At the same time, there are serious problems with blanket false news provisions, which unjustifiably restrict freedom of expression.<sup>8</sup> They exert a chilling effect on journalists, who have a professional obligation to report in a timely manner on matters of public interest, and they may be abused to elevate widely held views to the status of ‘facts’ or to limit the expression of unpopular opinions. As the special rapporteurs for freedom of expression stated in their 2017 Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda:

General prohibitions on the dissemination of information based on vague and ambiguous ideas, including “false news” or “non-objective information”, are incompatible with international standards for restrictions on freedom of expression, as set out in paragraph 1(a), and should be abolished.<sup>9</sup>

Should States establish units dedicated to combatting disinformation or misinformation, their mandates should be clearly defined with adequate guarantees of independence. It may be preferable for such units to focus on disseminating accurate information in order to counter disinformation or misinformation, but mandates may extend further, for example by providing for the possibility of working with online platforms to identify certain forms of harmful disinformation or misinformation (such as medical misinformation) to be tagged with warning labels. Strict rules should be in place to ensure that any power to mandate the correction of inaccurate information is consistent with the right to freedom of expression (which would allow for this only in very limited circumstances). In addition, States should, at all times, also refrain from propagating false information.

## 2.2. Civil Rules

### 2.2.1. Defamation

Every State has in place some system of rules to prevent unwarranted attacks on reputation, otherwise known as defamation laws. An increasing number of countries are doing away with criminal defamation laws. Essentially, criminal defamation laws are not necessary because civil defamation laws are adequate to protect reputations.

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<sup>8</sup> UN Human Rights Committee, Concluding Observations on Cameroon, UN Doc. CCPR/C/79/Add. 116, November 1999, para. 24, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F79%2FAdd.116](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F79%2FAdd.116).

<sup>9</sup> Adopted 3 March 2017, para. 2(a), <https://www.law-democracy.org/live/legal-work/standard-setting/>.

A number of international authorities have stated that criminal defamation as a whole represents a breach of the right to freedom of expression. For example, in their 2002 Joint Declaration, the special international mandates on freedom of expression stated: "Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws."<sup>10</sup> Although States should decriminalise defamation to guarantee fully freedom of expression, at a minimum, defamation regimes should never allow for imprisonment and any fines or damages should not be excessive or punitive in nature.

Defamation laws must respect several standards if they are to be legitimate as restrictions on freedom of expression. First, they should only protect actual reputations – for example of individuals or entities with the right to sue and be sued – and not be used to protect objects – such as State or religious symbols, flags or national insignia – or public bodies.

Various defences should be available against an allegation of defamation, including that the impugned statement was true, that it was an opinion or that it was reasonable in all of the circumstances to make the statement, even if it ultimately proves to be inaccurate. Statements made in the course of proceedings before legislative bodies or courts, and fair and accurate reports on those statements, should be protected, as should good faith statements made in the performance of a legal, moral or social duty or interest.

Public officials should enjoy less protection from criticism than others in view of the importance of free and open debate on matters of public interest, and this should be reflected in the application of any defamation law. It also follows from this reasoning that dedicated insult or '*lèse majesté*' laws are particularly problematic from a human rights perspective and, where they exist, should always be repealed.

Finally, remedies for defamation should aim to redress the harm done, not to punish the party who made the statement. Non-pecuniary remedies, such as rights of correction or reply, should be prioritised and any monetary awards should be strictly proportionate to the harm done. Consideration should be given to putting an overall cap on the monetary damages that may be awarded, particularly in jurisdictions where there is evidence of the imposition of punitive damage awards.

### 2.2.2. Privacy

Most countries have civil laws providing protection for privacy, just as they do for reputation. This is legitimate, and indeed necessary to protect the right to privacy, as long as these laws are appropriately circumscribed and provide for adequate protection against abuse. For example, four different types of privacy interests the breach of which should give rise to a civil cause of action were identified in an influential American law review article:

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<sup>10</sup> Adopted 10 December 2002, <https://www.osce.org/files/f/documents/8/f/39838.pdf>.

unreasonable intrusion upon the seclusion of another, appropriation of one's name or likeness, publicity which places one in a false light and unreasonable publicity given to one's private life.<sup>11</sup> This classification has been adopted throughout most jurisdictions in the US and has proved to be influential in Canada and the UK.<sup>12</sup>

Two constraints on these laws are necessary to ensure that they are not used to unduly restrict free speech. First, they must be limited in application to situations in which an individual has a reasonable expectation of privacy, taking into account all of the circumstances. Second, where the overall public interest is served by dissemination of a statement, this should prevail over the privacy interest. This might be the case, for example, where an invasion of privacy disclosed evidence of corruption or of a threat to life or safety.

Although freedom of expression and privacy are sometimes in tension, and in such cases require a proper balancing, the relationship between these two rights is not always adversarial. Indeed, the existence of sufficiently robust privacy and data protection laws is key to creating an enabling environment for freedom of expression. To this end, States should respect users' decisions to remain anonymous online and to use encryption. However, States may, exceptionally, undertake necessary surveillance measures to trace or otherwise respond to criminal activities or national security threats. States should ensure that the regulatory framework for such surveillance conforms to international standards and authorise surveillance in only the most exceptional circumstances. Collection of information should be subject to oversight by the judiciary on a case-by-case basis (and not provide for judicial oversight of the overall policy as a whole), and sufficient guarantees of due process should be observed.

### 2.3. The Right to Information

It is now widely recognised that everyone has a right to access information held by public authorities, subject only to a limited set of exceptions to protect overriding public and private interests. This right must be implemented through legislation. Such legislation should establish a broad presumption in favour of access to all information held by all public bodies; place an obligation on public bodies to disclose a wide range of information of public interest on a proactive basis; put in place clear procedures for making requests for information; detail a clear and narrow set of exceptions to the right of access; and provide for an independent appeals mechanism to contest refusals to grant access.

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<sup>11</sup> William L. Prosser, "Privacy", (1960) 48 Cal. L. Rev. 383.

<sup>12</sup> See, for example, *Jones v. Tsige*, 2012 ONCA 32, paras. 16-19 (Ontario Court of Appeal), <https://www.canlii.org/en/on/onca/doc/2012/2012onca32/2012onca32.html?autocompleteStr=2012%20ONCA%2032&autocompletePos=1>.

## 2.4. Online Content

States may legitimately impose certain new restrictions to address challenges unique to online speech target. The potential for information to spread particularly rapidly and widely through cyberspace presents certain novel challenges, such as in the context of spam, cyberbullying, ‘doxing’ (posting publicly online personal identifying information) and sharing intimate photos without the consent of their subject. Any efforts to combat online harms should be necessary (i.e. proportionate and not overbroad), in addition to being limited to challenges specific to cyberspace. For example, it is unnecessary to enact a law on defamation in cyberspace because defamatory online content would normally already fall under the scope of a defamation law of general application.

Like all restrictions on freedom of expression, any measures taken to address online harms must also meet the three-part test contained in Article 19(3) of the ICCPR of being provided for by law, serving a legitimate interest, and being necessary to protect that interest. Any legislation on online harms should eschew imposing overly harsh sentences, especially in view of the need to avoid a ‘chilling effect’ that would hamper the ability of the Internet to fulfil its important role in fostering freedom of expression. For many online harms, often the best approach is to update existing legislative prohibitions, for example on stalking, harassment or invasions of privacy, to ensure they cover online content rather than introducing new prohibitions that often tend to be sweeping in scope or duplicative of existing rules.

When not controlled by users, *ex ante* content restrictions are a form of prior censorship which is not generally permissible under international human rights law. Government-imposed content filtering systems that are not end-user controlled are impermissible restrictions on freedom of expression. However, in exceptional cases, certain content may be blocked, for example to block child pornography or hate speech inciting violence or genocide. Any exceptional blocking orders should be proportionate and carefully tailored to block only the targeted content and should be subject to adequate due process and judicial or quasi-judicial oversight.

States should refrain from imposing strict liability on intermediaries (such as search engines, social networks or Internet service providers) for the content they host or transmit. Laws that require intermediaries to screen and remove content without sufficient procedural safeguards, including a requirement for a judicial or quasi-judicial order, raise significant human rights concerns.

## 3. Media Regulation



This section outlines the key features of and options for regulation of the media in a manner which is consistent with freedom of expression. The first part focuses on three key cross-cutting media regulation themes, namely the need for regulatory bodies to be independent, the need for regulation to foster diversity and core commercial measures. The second part is divided along the lines of key types of media, namely journalists, the print media, the broadcast media, public service broadcasters and online content.

### 3.1. Overview

Three key principles underpin media regulation:

- **Freedom:** the rules should not unduly restrict the freedom of the media either in terms of the establishment and operation of media outlets or in terms of content.
- **Independence:** the rules should as far as possible prevent both State (political) and commercial interference in the media.
- **Diversity:** the rules should promote diversity so as to promote the widest possible access to the media and to ensure that the media serve the needs and interests of all groups in society and showcase a wide range of perspectives and content.

#### 3.1.1. Independence of Regulatory Bodies

It is well established under international law that bodies which exercise regulatory powers over the media – whether this be over licensing, accreditation, allocation of subsidies or any other issue – should be independent in the sense of being protected against interference of a political or commercial nature. Indeed, as noted above, this is a fundamental principle of media regulation. The reasons for this are fairly obvious. Absent such protection, the decisions of these bodies will be influenced by political or commercial considerations rather than freedom of expression and the public interest. The lack of protection for independence is one of the most serious threats to freedom of expression in many countries.

The question of how to protect independence in practice is a difficult one, and the specific modalities of doing so depend on the local political and institutional context. As a general principle, involving a greater range of players – including the legislature and civil society – in the process of appointing the governing members of regulatory bodies helps to bolster independence. Protection for the tenure of members, and against removal once appointed, is also important.

#### 3.1.2. Diversity

The 2007 Joint Declaration on Diversity in Broadcasting of the four special international mandates on freedom of expression – the United Nations Special Rapporteur on Freedom of



Opinion and Expression, the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information – focused entirely on media diversity, stressing its importance as an aspect of freedom of expression and as an underpinning of democracy.<sup>13</sup>

The Joint Declaration identified three distinct aspects of media pluralism or diversity: content, outlet and source.<sup>14</sup> **Diversity of content**, in the sense of the provision of a wide range of content that serves the needs and interests of different members of society, is the most obvious and ultimately the most important form of diversity. Diversity of content, one aspect of which is giving voice to all groups in society, depends, among other things, on the existence of a plurality of types of media, or **outlet diversity**. Specifically, States should create an enabling environment for different types of broadcasters – including public service, commercial and community broadcasters – each of which bring varying perspectives, programming and speakers/audiences. The absence of **source diversity**, reflected in the growing phenomenon of concentration of media ownership, can impact media content in important ways, as well as independence and quality.

A number of authoritative statements support the idea that the right to freedom of expression obligates States to promote all three types of diversity, namely those of source, outlet and content. It has, however, always been recognised that there is a need to distinguish between how the print and broadcast sectors are regulated. In many States, only diversity of source is regulated in the print media sector. At the same time, some States provide for subsidies for the print media as a means of promoting diversity of content in that sector.

The growth the Internet has led to new commercial challenges for the media industry, which has lost sources of revenue, and especially advertising, with the advent of digital communications. Specifically, large online actors, most notably Facebook and Google but also others, have, through their own revenues from advertising, successfully monetised third-party news content by linking to and creating fora for engaging with news content. In this context, the challenges to journalistic revenue models wrought by digitisation have drawn increasing international concern,<sup>15</sup> and several States have begun to explore different models for supporting news media.

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<sup>13</sup> Adopted 12 December 2007, <http://www.osce.org/fom/66176>.

<sup>14</sup> See also Thomas Gibbons, "Concentrations of Ownership and Control in a Converging Media Industry", in Chris Marsden & Stefaan Verhulst, eds., *Convergence in European Digital TV Regulation* (London, Blackstone Press Ltd., 1999), pp. 155-173, p. 157.

<sup>15</sup> For example, the Council of Europe's Committee of Ministers called for revenues derived from online news content to be "equitably shared and, if necessary, redistributed from online platforms to news content providers, ensuring a balancing effect of such monetisation on the economics of the media industry." *Declaration by the Committee of Ministers on the financial sustainability of quality journalism in the*

One approach, adopted in Australia, has been to require certain large technology companies – mainly Facebook and Google – to negotiate agreements with media outlets to compensate them for revenue generated from their content, with a requirement to enter arbitration proceedings in case agreement cannot be reached.<sup>16</sup> The Australian model is a novel approach to addressing a pressing issue but remains controversial for various reasons, including the fact that only media outlets which meet certain requirements, including mandatory registration with the Australia Communications and Media Agency and minimum income thresholds, are eligible for compensation,<sup>17</sup> thereby disadvantaging smaller media outlets. An alternative model is a ‘tax and spend’ approach, whereby taxes on digital services which are provided in a given jurisdiction<sup>18</sup> could be used to help finance direct government subsidies to independent news outlets. Whatever model is used to support journalism in the digital age, States should ensure that funding is distributed equitably according to clear and transparent rules which aim to promote media diversity.

### 3.1.3. Commercial Issues

Undue concentration of media ownership weakens freedom of expression in various ways. It has a strong tendency to undermine diversity, as uniform perspectives are promoted within the ownership group, and the same programmes are syndicated among different media in the group. As a result, international law requires States to put in place measures to prevent concentration of media ownership, both within a given sector – such as print or broadcast media – and between different media sectors.

It may be noted that while general anti-concentration measures are aimed primarily at ensuring a competitive market, for which a limited number of competitors – say three or four – is normally enough, anti-concentration measures for the media have a far loftier and more challenging goal, namely ensuring that the public can receive a wide range of different views and perspectives on matters of public debate. It is, therefore, recognised that special, more stringent, anti-concentration measures are needed within the media sector than what is needed simply to ensure competition.

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*digital age*, 13 February 2019, section 12(c),

[https://search.coe.int/cm/pages/result\\_details.aspx?objectid=090000168092dd4d](https://search.coe.int/cm/pages/result_details.aspx?objectid=090000168092dd4d). See also Joint Declaration on media independence and diversity in the digital age, note 4.

<sup>16</sup> News Media and Digital Platforms Mandatory Bargaining Code, 24 February 2021,

[https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652\\_aspassed/toc\\_pdf/20177b01.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_aspassed/toc_pdf/20177b01.pdf;fileType=application%2Fpdf).

<sup>17</sup> *Ibid.*, section 52.

<sup>18</sup> Until recently, those jurisdictions often failed to capture any tax revenues on services being provided in their jurisdictions. See, for example, Fernando Heller, “Spain’s new Google and Tobin taxes to generate about €1 billion this year”, Euractiv, 18 January 2021,

<https://www.euractiv.com/section/digital/news/spains-new-google-and-tobin-taxes-to-generate-about-e1-billion-this-year/>.



In many countries, public advertising represents a significant part of the overall advertising market and thus an important source of revenue for the media. If the allocation of this advertising is not insulated against political interference, it can be a potent force for exercising control over the media. It is thus important that systems be put in place to prevent this, including by ensuring that the placement of public advertising is based on fair and objective criteria, including market conditions.

## 3.2. Regulation of Different Media Sectors

### 3.2.1. Journalists

Licensing of journalists, whereby they must go through a process of applying to practise their profession, is not a legitimate restriction on their freedom of expression. Unlike other professions – such as medicine, law and engineering – the practice of journalism is a fundamental human right, so that restrictions on access to the profession cannot be justified. Indeed, even registration schemes for journalists will fail to pass muster as restrictions on freedom of expression since interests such as reputation can be protected through bringing actions against the media outlet responsible for dissemination of any such statements.

International law requires States to protect the right of journalists and others who publish information in the public interest to refuse to disclose their confidential sources of information. The rationale behind this is not that journalists have special rights which ordinary citizens do not. Rather, the reasoning is that such protection is necessary to ensure the right of everyone to receive information on matters of public interest. Absent such protection, confidential sources are unlikely to come forward with information, and so the general public will be denied access to it.

Privileged access of journalists to certain venues – such as legislative bodies and the courts – is premised on the same principle of serving the wider right of the public to receive information on matters of public interest. Accreditation is the primary means by which journalists are guaranteed privileged access to these venues. Accreditation should not, therefore, be confused with or abused to create a system of registration or licensing of journalists. As with all regulatory powers, accreditation should be overseen by a body which is protected against political or commercial interference.

States also have positive obligations to create a safe environment for journalists, including online, where journalists now experience forms of violence and harassment that are uniquely enabled by digital communications, such as cyberattacks, doxing, smear campaigns and trolling. A major concern with these kinds of attacks on journalists is the extent to which they are coordinated or planned by malicious actors with the intent of discrediting or harming journalists and thereby silencing them, to the detriment of all.



Under international human rights law, States should exercise due diligence to address attacks on journalists by State and non-State actors. A State's positive obligations in these areas can be summarised as an obligation to prevent and protect, and, when attacks do occur, to investigate, prosecute and provide redress. These obligations extend to cyberspace, where States should take steps address online violence by private actors. However, any such efforts should be consistent with international standards and should be sufficiently well-tailored to ensure that any measures aiming to protect journalists are not instead abused to target journalism or unduly restrict freedom of expression. Examples of positive efforts States can undertake include engaging in educational campaigns on online violence, providing protective equipment to journalists who are at risk and training law enforcement on responding to online attacks.

### 3.2.2. Print Media

In many countries, the print media are not subject to any special form of regulation, over and above the general rules which apply to the legal form in which they are established (such as a corporation). It is established that licensing of the print media, as with licensing of journalists, whereby one must apply for permission to establish a print media outlet, is not legitimate. Even technical registration systems for the print media are considered unnecessary and may be abused, and hence should be avoided. Such systems will only be legitimate where they meet certain conditions, namely:

- there is no discretion to refuse registration, once the requisite information has been provided;
- registration does not involve substantive conditions, other than that the name being proposed for the media outlet is not already being used;
- the process of registration is not excessively onerous; and
- the system is administered by a body which is independent of government.

Rights of correction and reply, if appropriately framed, can provide redress against wrongs such as defamation and invasion of privacy which is less intrusive than the redress provided by the civil law and yet is somehow more effective (particularly for defamation, since these remedies directly address the misleading statement). Self-regulatory systems for providing these rights are preferable to statutory since they are less open to abuse.

To conform to international standards, any mandatory rights of correction and reply must be appropriately circumscribed. Given that it is less intrusive, a right of correction should be the preferred remedy whenever it will effectively redress the wrong done. A right of reply should be provided only in the context of a breach of a legal right of the claimant which cannot be redressed through a correction.



In some countries, bodies – such as a press council – are established by law to provide those who feel they have been wronged by material disseminated through the print media with an opportunity to complain. While this can provide an effective means of balancing the need to address unprofessional media behaviour and to protect media freedom, where an effective self-regulatory complaints body exists, one should not be imposed by law. Any statutory complaints body should, as with all regulatory bodies, be independent. Furthermore, complaints should be judged against a pre-established code of conduct, which has been developed in consultation with all stakeholders, and the only sanction should be a requirement to print a message acknowledging the wrong.

### 3.2.3. Private Broadcasters

Unlike the print media, it is necessary to license broadcasters, at least inasmuch as they use the radio spectrum to disseminate their products, if only to ensure orderly use of the airwaves. The airwaves are a limited public resource and it is accepted that regulation may also ensure that they are used in the public interest. In many countries, regulation comprises both licensing of broadcasters and oversight of content.

The licensing process should be in accordance with a developed frequency plan. In higher population density areas, where demand for spectrum resources is expected to exceed supply, licences should be offered on a competitive tender basis. In lower density areas, an open application or open bidding system may be employed. The process of assessing applications, whether pursuant to a competitive tender or open process, should be fair and transparent, and allow for public input. Applications should be assessed by an independent regulator in a fair, transparent and non-discriminatory manner against criteria which are published in advance, and which include the goal of promoting media diversity in the areas of content, outlet and source.

To promote diversity, the ownership structure of licence applicants should be included as part of the application, along with an overview of the programming proposed to be provided. Where granting an applicant a licence would either increase concentration of media ownership or fail to ensure a greater range of material is available to the public, this should be taken into account in deciding whether or not to issue the licence.

Licensing can be done in a way that contributes to all three of the types of diversity (content, source and outlet). Content diversity can be promoted by making this an explicit licensing criterion, so that aspirant broadcasters which are proposing a greater degree of content diversity should have a greater chance of being awarded a licence. Similarly, the need to allocate licences to all three types of broadcasters – public service, commercial and community – can be built directly into the licensing process, supporting outlet diversity. Finally, source diversity can be promoted by licensing rules which prohibit the allocation of further licences to owners who already control too many broadcasters.

Special measures should be taken to promote community broadcasting in view of the often more modest resources of such outlets and their key role in the media ecosystem. To this end, in their 2007 Joint Declaration on Diversity in Broadcasting, the special international mandates on freedom of expression recommended the following: “Community broadcasting should be explicitly recognised in law as a distinct form of broadcasting, should benefit from fair and simple licensing procedures, should not have to meet stringent technological or other licence criteria, should benefit from concessionary licence fees and should have access to advertising.”<sup>19</sup>

It is common in many countries to impose certain positive obligations on broadcasters, which may be either general or specific in nature. The idea behind these obligations is to promote content diversity or, to put it differently, to ensure that the public receives a range of different types of content. In many countries, broadcasters are required to carry a certain amount of domestic, regional or even local programming. In many States, broadcasters are also required to carry programming produced by independent producers. The idea behind this is to promote wider access to the airwaves and, as a result, greater content diversity.

It is common to impose minimum programme standards, or a code of conduct, on broadcasters by law, but where an effective self- or co-regulatory system is in place, this is not necessary. Where a statutory system is imposed, it should be based on an established code of conduct, developed in consultation with all stakeholders, as with any such code governing the print media. Sanctions should be graduated, starting with a warning and then a requirement to broadcast an acknowledgement of breach, and the goal should be to establish and promote professional standards, rather than to punish. More severe sanctions should be imposed only for serious and repeated breaches which lighter sanctions have failed to remedy.

### 3.2.4. Public Service Broadcasting

As with other areas of media regulation, control by the government or political interests of a public broadcaster represents a breach of the right to freedom of expression. The governing boards of public broadcasters should be protected against such interference in the same way as other regulatory bodies.

A key goal of public service broadcasting is to complement and enrich the content provided by commercial broadcasters. To do this, the former need to be able to operate relatively free of commercial pressures and this, in turn, requires that they receive public financial support. Such support should be adequate to enable them to fulfil their mandates and yet be protected against the possibility of being used to exert political pressure. The best way to do this is to

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<sup>19</sup> Note 13.

fund public broadcasters through a direct public levy, for example on an electricity bill or based on television set ownership.

It is also important that public broadcasters have a clear mandate set out in law, both to clarify what is expected of them and to provide for an accountability framework. The precise details of this mandate will depend on the country and context, but these broadcasters are normally expected to fulfil such functions as providing a comprehensive and quality news service, giving voice to and satisfying the information needs of all sectors of society, developing national culture and programming, and providing educational programming.

### 3.2.5. Digital Space

The Internet does not have the same bandwidth limitations as television and radio broadcasting. As a result, the Internet is not a limited public resource and no legitimate justification exists for imposing licensing requirements on online speech. It may be legitimate to establish licensing or registration processes governing the means of distribution of Internet access (for example, through cable, satellite or mobile phone services). However, it is not appropriate to impose special licensing systems on Internet service providers or Internet-based communications services, above and beyond those that apply generally to telecommunications service providers.

To be legitimate, restrictions on online speech should normally be content-specific rather than applying to whole websites or platforms. Mandatory blocking of entire websites, IP addresses, ports, network protocols or types of uses (such as social networking), as well as removal of webpages from servers, is an extreme measure that should be undertaken exceptionally and require authorisation from a judicial or other body which is not subject to political influences. Such measures are justifiable in only narrow circumstances, for example where they are necessary to protect children against sexual abuse. Decision-makers should publicise which sites they have blocked and the reasons for doing so.

The act of disrupting or blocking access to Internet services and websites is a form of prior restraint, i.e. a type of action that prohibits speech or other forms of expression before they can take place. The justification of any such measure therefore comes with a heavy burden of justification under the three-part test for restrictions on freedom of expression. General Internet shutdowns for a given geographic area are inconsistent with international human rights law because they invariably fail to meet the requirement of necessity and are disproportionate.

Consistently with the principle of 'net neutrality', States should refrain from and legislate against differential treatment of Internet traffic based on device, content, author, destination, or origin of data. States should also require Internet service providers to be transparent about their management of Internet traffic.



States also have other positive obligations in the context of the Internet. Due to its key role not only in facilitating modern life but also in giving access to information that is needed to support a range of other rights, it is increasingly accepted that States have an obligation to promote universal access to the Internet. This does not mean that States are expected to provide universal access immediately, an impossibility for many States. Instead, they need to devote appropriate attention and resources to this issue. This can be achieved through different means, including regulatory measures (such as universal service obligations for access providers), direct support, promoting awareness and giving special attention to access for persons with disabilities.

## 4. Conclusion

Freedom of expression is a key human right on its own and plays an essential instrumental role with respect to democratic governance and wider sustainable development objectives. International standards and best practices have emerged that provide key guidance on how to best guarantee this right. This Outline presents an overview of the principal international standards for laws which impact freedom of expression, as well as the rights to information and privacy, with the hope of informing stakeholders in Myanmar. The Centre for Law and Democracy hopes that it provides a useful overview of the legal regimes that States should both put in place and avoid adopting to support freedom of expression. Please do not hesitate to get in touch with us if you want more information on any of the issues addressed in this Outline.

