



# Burma: Freedom of expression in transition

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## About Index

Index on Censorship is an international organisation that promotes and defends the right to freedom of expression.

Index uses a unique combination of journalism, campaigning and advocacy to defend freedom of expression for those facing censorship and repression, including journalists, writers, social media users, bloggers, artists, politicians, scientists, academics, activists and citizens.

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# Introduction

Burma is at a crossroads. The period of transition since 2010 has opened up the space for freedom of expression to an extent unpredicted by even the most optimistic in the country. Yet this space is highly contingent on a number of volatile factors: the goodwill of the current President and his associates in Parliament, the ability of Aung San Suu Kyi to assure the military that her potential ascendancy is not a threat to their economic interests and the on-going civil conflicts not flaring into civil war. The restrictive apparatus of the former military state is still available for the government to use to curtail freedom of expression – the most draconian laws are still on the statute book affecting the media, the digital sphere and the arts; police and local authorities have significant discretion when it comes to approving speech and performance, and the judiciary has a limited institutional understanding of freedom of expression. In effect, the old state remains in the shadows – or as one journalist told Index: “the generals have only changed their suits”.

Yet Burma has changed. The country is freer than it was during Index’s mission in 2009, when meetings were held in secret.<sup>1</sup> In March this year, Index co-produced a symposium on artistic freedom of expression with local partners, the first public conversation of its kind in recent history. The abolition of pre-censorship of newspapers and literature, the return of daily newspapers, the release of political prisoners and the open space given to political debate all signal real change. The question for the government and the opposition is: will the transition be sustained with legal and political reform to reinforce the space for freedom of expression and to dismantle the old state apparatus that continues to pose a threat to freedom of expression?

This paper is divided into the following chapters: Burmese politics and society; media freedom; artistic freedom of expression and digital freedom of expression. The report is based on research conducted in the UK and 20 interviews (with individuals and groups) in March 2013 conducted in Mandalay and Yangon. Due to the ongoing possibility of future prosecutions, the interviewees have been kept anonymous.

Politics and society looks at the role of the President, United Solidarity and Development Party (USDP), Aung San Suu Kyi and the National League for Democracy (NLD) and the student movement and freedom of expression, ethnic conflict and the constitution and the need for reform, freedom of association and freedom of assembly.

The media freedom chapter looks at the press council, existing impediments to media freedom, the state of media plurality and self-censorship in the press. The artistic freedom of expression chapter covers theatre and performance art, literature, music and film. Finally, the digital freedom of expression chapter looks at access issues, the impact of new technologies and state censorship on the digital sphere. The report is based on a series of interviews conducted in Rangoon and Mandalay in March 2013, with additional interviews conducted in April 2013 in the same cities.

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<sup>1</sup> Index on Censorship & article19, ‘Burma: Free speech crackdown accelerates’ (21 November 2008), <http://www.article19.org/data/files/pdfs/press/burma-free-speech-crackdown-accelerates.pdf> accessed on 10 July 2013.

## Recommendations

To maintain the progress of the transition the government of Burma must:

- Prepare a roadmap in this session of parliament that lays out how Burma will reform the legal framework that curtails freedom of expression. The reform must curtail the emergency legislation imposed by the military regime; end the licensing of newspapers and decriminalise defamation, open up access to the internet and remove restrictive laws that penalise its use and annul provisions in the penal code dating from British colonial rule that criminalise political speech and freedom of association. The EU, US and other partners must be prepared to revisit sanctions if the government of Burma fails to deliver this roadmap.
- Abandon the restrictive press law put forward by the Ministry of Information and allow the Press Council to continue to lead on the process of drafting a new legal framework for the press and other media actors.
- Prior to enacting a new legal framework for the press, the use of emergency powers to ban the publication of media in Burma must be stopped.
- Bureaucratic hurdles to freedom of expression should be removed immediately, in particular the requirement for permits for public performances (live music, public art, political readings) to be signed off by multiple layers of government.
- The government should give clear instructions to local police forces that the use of restrictive legislation to stop peaceful public demonstrations is excessive and should be stopped in particular article 18(b) of the Peaceful Assembly and Peaceful Procession Law and section 505 of the penal code.



# 1 Politics & society

Fifty years of authoritarian rule has left its mark on Burmese society affecting the speed and process of transition. This chapter will explore the political landscape and its potential effect on freedom of expression, the current impact of the government, constitution and judiciary on freedom of expression. Following this the chapter will explore how the ongoing ethnic conflict has impacted upon free speech and how recent developments in the right to freedom of association have affected the ability to protest in Burma.

It is unclear whether the transition to a functioning democracy based on the rule of law and human rights will be completed, or whether the transition will remain incomplete: this will have the largest impact on freedom of expression in Burma in the near-future.

The transition formally began in November 2010 with the release from prison of Aung San Suu Kyi. A week earlier the military-backed Union Solidarity and Development Party (USDP) won a landslide victory in the first elections held in Burma in 20 years. Although the elections were not fully fair and free they marked the beginning of a new more democratic process in the country.

Since 2010, political prisoners have been released, censorship boards abolished, the leading opposition political party the NLD has been allowed to regroup and by-elections have given leading NLD figures seats in parliament for the first time. Yet, there remains uncertainty over the motives of the main political actors and their commitment to the transition, in particular regarding President Thein Sein's commitment to reforms to bolster freedom of expression and other civil and political rights. The USDP's motives are also questionable as the party is split between reformers and those closer to the generals, who urge caution on the speed of change, or whether the transition should be happening at all.<sup>2</sup> While the government's choice is over the speed and depth of reform; the new openness is presenting Aung San Suu Kyi and the NLD with new scrutiny over their policies. Freedom of expression is providing space for the opposition to debate issues in public that had previously remained unresolved, but is also raising new questions for the opposition to answer. The space for political debate is far greater than at any time in Burma's recent history, yet with the transition incomplete, the legal framework has changed little. The restrictive 2008 constitution and the politicised judiciary means that the executive still has considerable powers to curtail freedom of expression; that these powers are increasing falling into abeyance does not mean that reform is no longer necessary.

Similar to some other states in transition, the greater political and social freedom has opened the space for once repressed ethnic, religious and generational tensions to resurface causing significant short-term instability in certain regions. This instability is now a cause of serious concern within Burma that may derail the pace of the transition.

Finally, one of the most serious challenges to freedom of expression in this chapter will be covered, namely Burma's restrictive laws on freedom of association and protest. Here little progress has been made since the beginning of the transition, and arguably with new laws on protest missing an opportunity for reform, progress has stalled.

### The role of the President Thein Sein and the USDP

The transition has been unexpected in Burma. Many of the same authoritarian military leaders that suppressed the 2007 'Saffron Revolution' are now in positions of influence in the newly formed Union Solidarity and Development Party (USDP), which is the leading party in the country, and is allowing the transition. In practice, the military has controlled the country since the coup d'état in

<sup>2</sup> Interview with journalist (Yangon, Burma, 15 March 2013)

1988 after the 'Four Eights Uprising', with the movement to civilian rule under the newly formed Union Solidarity and Development Party (USDP) merely regrouping the military-led State Peace and Development Council power networks into a new political party. Today, the Union Solidarity and Development Party (USDP) controls the main institutions of state in Burma: the presidency, near half the seats in the lower house (Pyithu Hluttaw) and over half the seats of the upper house (Amyotha Hluttaw) of the Burmese parliament. When the seats appointed by the military are included, the USDP has an overwhelming majority in both houses. The majority of USDP parliamentarians and politicians including President Thein Sein are closely associated with the military as former senior officers or as government officials with strong military connections. Thein Sein himself was a former army major<sup>3</sup> who rose up into the junta's State Peace and Development Council in 1997.<sup>4</sup> As the USDP and military still have extensive control of the political sphere, the transition is overly dependent on their willingness to reform Burma.

Thein Sein is pivotal to the country's transition which was unexpected and still surprises many Burmese activists who lived through the 1988 and 2007 uprisings. The independent media in Burma ascribe his motives for the transition as varying; from the need for increased economic independence from China, to the benefits for the military elites from economic development, to personal reasons such as his desire to secure the Nobel Peace Prize<sup>5</sup> or his wish to win the presidency in Burma's first truly free presidential elections.<sup>6</sup> The tough sanctions placed on Burma gave the international community significant leverage, the easing of sanctions in response to the transition has supported the reformers within the regime but diminished the leverage of the international community. The key question is now how committed the USDP is to reform and to what extent will the transition become embedded or retreat?

Leading retired generals have given Thein Sein and the USDP significant leverage to democratise in order to improve the state of the faltering economy. The generals hold economic interests in the Union of Myanmar Economic Holdings, which holds the generals' pension fund,<sup>7</sup> and Myanmar Economic Corp. Economists cannot determine how much these assets are worth in relation to the overall Burmese economy.<sup>8</sup> What is clear is that the generals have a strong vested interest in seeing economic development that will in turn increase the value of their holdings.

Thein Sein is not alone in the USDP in publicly welcoming the transition. There are a number of quasi-reformists within the government and the Union Solidarity and Development Party including the party's Vice-Chair Thura Aye Myint, the Minister for the Presidential Office Aungr Min and Thura Shwe Mann the speaker of the lower house and formerly the third most important person in the military regime. Thura Shwe Mann enjoys significant popularity among representatives of the Pyithu Hluttaw (lower house) thanks to his determination to empower the house. He is noted for his promotion of cross-party working, "If you really love your country...let's work for people without political bias, regional bias and religious bias".<sup>9</sup> His advocacy of parliamentary democracy is said to

3 ABC News, 'Thein Sein: from junta elite to Nobel nominee' (19 March 2013), <http://www.abc.net.au/news/2013-03-18/thein-sein3a-from-junta-elite-to-nobel-nominee/4579894> accessed on 19 April 2013.

4 Altsean-Burma, 'SPDC Who's Who: Thein Sein', <http://www.altsean.org/Research/SPDC%20Whos%20Who/SPDC/TheinSein.htm> accessed on 10 July 2013.

5 Prashanth Parameswaran, The Diplomat, 'Thein Sein: Nobel Laureate?' (9 October 2012), <http://thediplomat.com/asean-beat/2012/10/09/stranger-than-fiction-thein-sein-a-nobel-laureate/> accessed on 10 July 2013.

6 Interview with NLD activist (Mandalay, 12 March 2013).

7 The Irrawaddy, 'Waiting for an Industrial Revolution' (August 2003), [http://www2.irrawaddy.org/article.php?art\\_id=3049&page=3](http://www2.irrawaddy.org/article.php?art_id=3049&page=3) accessed on 10 July 2013.

8 James Hookway, The Wall Street Journal, 'Myanmar Reforms Challenge Military's Holdings' (30 November 2012), <http://online.wsj.com/article/SB10001424127887324705104578151061996230172.html> accessed on 10 July 2013

9 Myo Thant, Mizzima, 'Shwe Mann delivers reformist-style speech' (9 February 2012), <http://www.mizzima.com/news/inside-burma/6562-shwe-mann-delivers-reformist-style-speech.html> accessed on 10 July 2013



be the result of being overlooked for the presidency in favour of Thein Sein.<sup>10</sup>

## External influence

One particular pressure point for the military is their close economic and political relationship with the Chinese government that has led Burma to be over-dependent on Chinese as a source of inward investment and international support. Many in Burma have not forgiven the Chinese for vetoing a motion at the UN Security Council condemning the military's violence during the Saffron Revolution in 2007.<sup>11</sup> A number of Chinese-backed projects including the Monywa cooper project, Irrawaddy river dam (that would have exported 90% of its electricity to China) and the Letpadaung copper mine have all faced significant public opposition due to their links with China. The pressure on the government during the Irrawaddy river dam protests was so great the President suspended the project until after the 2015 elections. With the easing of US-EU sanctions and new overtures from these trading blocks, the China-Burma bilateral relationship is likely to be tested in the run-up to the 2015 elections.

In contrast to China, the United States and United Kingdom while engaged in the situation, both remain myopic over the scale of the challenge of transition. Both countries were committed to easing sanctions with statements from Secretaries Kerry and Hague to this end.<sup>12</sup> Yet while the easing of sanctions is part of the package that has made the transition mutually beneficial for both parties, civil society in Burma is concerned that too much may be given away without corresponding reform that will deliver lasting change.

The US began easing its sanctions on trade on 17 April 2012, when it authorised the export of financial services in support of civil society in Burma. This was followed by a general license to export financial services, and make investments in the country on 11 July 2012. In November that year, the US eased the ban on imports from Burma.<sup>13</sup> Yet, asset freezes remain on individuals linked to the regime remain in place. On 23 November 2012, the US added seven new Burmese entities (individuals or companies) to its Foreign Assets Control register.<sup>14</sup>

The EU has eased its sanctions at a slower pace. The EU's sanctions which included an asset freeze on around 1,000 companies and institutions in Myanmar and a travel ban to prevent around 500 officials entering the EU were lifted on 22 April 2013 by the Foreign Affairs Council of the European Union.<sup>15</sup> The only remaining sanctions in place are to prevent arms sales to Burma. This decision was criticised by human rights NGOs for reducing the EU's leverage prior to more significant reforms being undertaken and at a time when ethnic conflict was escalating.<sup>16</sup>

For other partners, including India as an emerging power the relationship is motivated far more by

<sup>10</sup> Interview with a political insider (Yangon, 15 March 2013); Thomas Kean, *The Diplomat*, 'Burma's Biggest Win: Its Legislature' (1 February 2013), <http://thediplomat.com/2013/02/01/burmas-biggest-win-its-legislature/2/?all=true> accessed on 10 July 2013

<sup>11</sup> UN Security Council SC/8939, 'Security Council Fails to Adopt Draft Resolution on Myanmar, Owing to Negative Votes by China, Russian Federation', <http://www.un.org/News/Press/docs/2007/sc8939.doc.htm> accessed on 10 July 2013.

<sup>12</sup> Secretary of State John Kerry quoted by the Centre for International and Strategic Studies, 'U.S. Eases Myanmar Sanctions in Response to Reforms' (18 May 2013), <http://csis.org/publication/us-eases-myanmar-sanctions-response-reforms> accessed on 5 July 2013; Foreign Secretary Rt Hon William Hague MP quoted BBC News, 'EU lifts sanctions against Burma' (22 April 2013), <http://www.bbc.co.uk/news/world-asia-22254493> accessed on 5 July 2013.

<sup>13</sup> US Department of State, 'Administration Eases Ban on Imports From Burma' (16 November 2012), <http://www.state.gov/r/pa/prs/ps/2012/11/200639.htm> accessed on 7 July 2013.

<sup>14</sup> US Federal Register (Vol. 77, No. 226, 23 November 2012), <http://www.gpo.gov/fdsys/pkg/FR-2012-11-23/pdf/2012-28360.pdf> accessed on 10 July 2013

<sup>15</sup> 3236th Foreign Affairs Council meeting, Luxembourg, 22 April 2013, [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/136918.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/136918.pdf) accessed on 10 July 2013.

<sup>16</sup> Index on Censorship, 'Inside Story: Index on ethnic cleansing in Burma' (23 April 2013), <http://blog.indexoncensorship.org/2013/04/23/inside-story-index-on-ethnic-cleansing-in-burma/> accessed on 10 July 2013

economics and concern at China's "ring of pearls" sphere of influence. Prime Minister Manmohan Singh signed 12 Memorandum of Understanding on development and connectivity issues, but none on human rights, during his trip in May 2012.<sup>17</sup> India's support for the opposition was strong in the years after 1988, but had cooled by the end of the 1990s. Unlike Singh, Russia's Vladimir Putin hasn't visited Burma. Russia's relationship with Burma has been more similar to China in that Russia helped block a 2007 UN Security Council resolution on human rights violations in Burma and has worked with the country on "energy security", controversially helping Burma with a proposed nuclear reactor.<sup>18</sup> Since the transition, Russian oil companies have been increasingly present in the country.<sup>19</sup>

## The role of Aung San Suu Kyi and the NLD

The transition has opened up for the space for the largest opposition group the National League for Democracy (NLD) to operate. After 20 years under house arrest, the release of the NLD's general secretary, Nobel Prize winner Aung San Suu Kyi, was a hugely significant moment for the people of Burma. The release both signalled the intent of the generals and USDP to satisfy demands from the international community for reform and took the people of Burma by surprise due to the totemic importance of Aung San Suu Kyi's detention.

The arrests, detention and harassment of leading NLD figures including Aung San Suu Kyi were curtailed after the lifting of "the Lady's" house arrest on 13 November 2010. This has given the movement considerable space for political speech – with public rallies, media performances, reopened NLD offices as well as the ubiquitous posters of Aung San Suu Kyi prevalent across Burma. After being formally re-registering as a political movement in December 2011, the NLD won 43 of the 44 seats it contested in the 2012 parliamentary by-elections. While the situation for the NLD is markedly different, the transition has raised further questions for the movement: how can the NLD as a minority party live up to the expectations of the Burmese people for a more open society, can the NLD progress from a freedom movement into a modern pluralistic political party?

The NLD is publicly committed to democracy and human rights with a particular commitment to freedom of expression. The day of Aung San Suu Kyi's release she made a public statement in favour of freedom of speech saying: "[the] basis of democratic freedom is freedom of speech" adding that one woman's expression is not democracy "We must walk together".<sup>20</sup> During her first campaign speech to state television prior to the 2012 by-elections, Aung San Suu Kyi called for a number of reforms to strengthen freedom of expression including stronger protections for media freedom, judicial independence and legal aid.<sup>21</sup> As yet, these policies are not fully developed, but the NLD has engaged in various public debates during the transition with specific policy statements on media regulation and the constitution.

It is a significant indicator of the transition that the NLD is represented in parliament after over 2 decades of repression since their 1990 election victory was annulled by the military. Yet due to

17 Udai Bhanu Singh, Institute for Defence Studies and Analyses, 'An Assessment of Manmohan Singh's Visit to Myanmar', (1 June 2012), <http://www.idsa.in/issuebrief/AnAssessmentofManmohanSinghsVisittoMyanmar> accessed on 10 July 2013.

18 BBC, 'Russia and Burma in nuclear deal' (15 May 2007) <http://news.bbc.co.uk/1/hi/world/asia-pacific/6658713.stm> accessed on 10 July 2013

19 Russia: Beyond the Headlines, 'Russian oil companies heading for Myanmar' (22 April 2013), [http://rbth.asia/business/2013/04/22/russian\\_oil\\_companies\\_heading\\_for\\_myanmar\\_46305.html](http://rbth.asia/business/2013/04/22/russian_oil_companies_heading_for_myanmar_46305.html) accessed on 10 July 2013

20 CBCNews, 'Suu Kyi calls for talks with junta leader' (14 November 2010), <http://www.cbc.ca/news/world/story/2010/11/14/suu-kyi-burma.html#ixzz151EwNbqH> accessed on 10 July 2013

21 Democracy Digest, 'Burma must repeal repressive laws, Suu Kyi says in leaked broadcast' (13 March 2012), <http://www.demdigest.net/blog/2012/03/burma-must-repeal-repressive-laws-suu-kyi-says-in-leaked-broadcast/> accessed on 10 July 2013

the USDP and military majority in both chambers of parliament, the NLD's room for manoeuvre is limited. A few activists spoke of her election to parliament as a "stitch up" orchestrated by the generals that would give her the impression of power without any ability to change the situation.<sup>22</sup> There is an increasing fear the minority NLD group in parliament will be unable to satisfy the hunger for reform, leaving the public disenchanted.

After decades of oppression, NLD party activists routinely self-censored and were loath to criticise Aung San Suu Kyi or their party's policy. In recent weeks, the media have begun to speak out publicly over the lack of openness and democracy in the way that the NLD decides public policies, or media talking points<sup>23</sup> which still often come directly from Aung San Suu Kyi.<sup>24</sup> Many observers noted that the media fear alienating their audience by directly criticising Aung San Suu Kyi, and that self-censorship of criticism of her was arguably greater than the self-censorship of criticism of the government.<sup>25</sup> However, in recent months, the limited criticism of the NLD and Aung San Suu Kyi has increased with the publication of the report of the commission she chaired into environmental damage at Letpadaung.<sup>26</sup> Critics of the commission's report state that economic interests have been placed above concerns over the environmental damage of the mine.<sup>27</sup> While environmental activists in Mandalay refused to criticise Aung San Suu Kyi directly at an event which covered Letpadaung,<sup>28</sup> 500 angry local protesters made their views known during her visit on the day of the publication of her commission's report.

The NLD also faces a generational challenge. Many younger interviewees spoke of the need for a third political party to fully represent a wider range of views, and there was disillusionment with the NLD's congress in which older faces continued to dominate the expanded Central Executive Committee. The 88 Students Association, in particular Ko Ko Gi and Min Ko Naing, are increasingly critical of the NLD leadership and a faction of the Association led by Ko Ko Gyi are preparing to form a new party.<sup>29</sup> The ability of the NLD to accommodate a more pluralistic politics, after holding a near-monopoly on opposition to the military regime and the policies of any breakaway political parties, will in part determine Burma's ability to develop into a state where freedom of expression becomes deep rooted.

## The judiciary

Lawyers in Yangon expressed concerns over the independence of the judiciary. Prior to the transition, human rights defenders were handed down lengthy sentences by the judiciary, notably a 59 year sentence for comedian and activist Zarganar.<sup>30</sup> In 2008 Constitution embedded the lack of judicial independence with all Supreme Court judges appointed by the President. Parliament still has no right to deny presidential confirmations. These concerns echo the progress report of the UN Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana (7 March 2012) who noted: "Myanmar lacks an independent, impartial and effective judiciary" which seems

22 This was the opinion of 3 interviewees across 2 interviews in Mandalay on 12 March and Yangon on 15 March.

23 Fergal Keane, Index on Censorship, 'Welcome to Myanmar, Mr BBC' (12 August 2012), <http://www.indexoncensorship.org/2012/08/fergal-keane-reporting-burma/> accessed on 10 July 2013

24 Hanna Hindstrom, Democratic Voice of Burma, 'Is it foolish to criticise Aung San Suu Kyi?' (24 September 2012), <http://www.dvb.no/uncategorized/is-it-foolish-to-criticise-aung-san-suu-kyi/23942> accessed on 10 July 2013

25 Interview with journalists (Mandalay, 12 March 2013)

26 Aung Zaw, The Irrawaddy, 'The Letpadaung Saga and the End of an Era' (14 March 2013), <http://www.irrawaddy.org/archives/29405> accessed on 10 July 2013.

27 Asian Human Rights Commission, 'BURMA: Two sharply contrasting reports on the struggle for land at Letpadaung' (3 April 2013), <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-073-2013>, accessed 5 July 2013.

28 'The Resource Curse', Mandalay, 12 March 2013.

29 Hans Hulst, The Irrawaddy, 'Why the 88 Generation Students Party is Crucial' (21 March 2013), <http://www.irrawaddy.org/archives/30112> accessed on 10 July 2013.

30 Reduced to 35 years on appeal, Index on Censorship, 'Burma: Free Zarganar!' (29 April 2010), <http://www.indexoncensorship.org/2010/04/burma-free-zarganar-protest-index-on-censorship/> accessed on 4 April, 2013.

unwilling to reform internally “the Chief Justice and other justices of the Supreme Court, the Special Rapporteur noted limited acknowledgement of challenges and gaps in capacity or functioning, and a lack of willingness to address his previous recommendations.”<sup>31</sup> A report, *The Myanmar Rule of Law Assessment*, expressed concerns that judicial decisions are sometimes made directly by the executive branch.<sup>32</sup> The assessment notes that in the criminal justice system more than 90 percent of accused are convicted, with no access to free legal defence, and that judges need training in the basics of criminal law, such as requiring witnesses and not just relying upon testimony of the police and military.<sup>33</sup> Without reform to improve the working of the judiciary, a chill will remain on civil society through concerns over the arbitrary application of the law and executive involvement in judgements and sentence lengths.

One important change to the administration of the law was the forced retirement of Thein Soe, the former Chief Prosecutor and a former general who was moved aside by the Chair of the Constitutional Tribunal. Soe was behind the lengthy sentences after the 2007 Cyclone Nargis protests.

## Ethnic conflict

“The country could fall apart at the touch of a key.”

Blogger Nay Phone Latt

Burma is host to some of the longest running ethnic-based civil conflicts anywhere on earth with the Karen ethnic conflict beginning after the end of World War II.<sup>34</sup> While the country is 90% Buddhist, it is also a multi-religious and multi-ethnic state home to over 100 ethnic groups. It is not a peaceful diversity, with a number of long-running conflicts that have increased in intensity in the past year. These conflicts have impacted on freedom of expression in a number of ways – with the military using the conflict as a pretext for tough security measures including the 1975 State Protection Act and a slower pace for the transition and in more structural ways for instance with ethnic-based restrictions on education limiting literacy. For the military, the conflicts are useful justification for draconian legislation, including the 1975 State Protection Act and elements of the 2008 Constitution that guarantee the integrity of the state. The military use state of emergency powers – such as in Rakhine State in June 2012<sup>35</sup> and in the city of Meikhtila on 22 March 2013<sup>36</sup> – routinely with little parliamentary or judicial oversight.

Resolution to on-going conflict in Rakhine State, Kachin State and Kayin State is not assured in the transition to democracy. In many ways, the opening up of Burmese society has re-opened many ethnic wounds. International Crisis Group argues the transition has opened up a space for nationalist causes to organise, allowing them to air grievances and issue a call to arms.<sup>37</sup> Peace campaigners in Burma have expressed concerns over the use of social media to organise violence against ethnic minorities.<sup>38</sup> The safety of certain ethnic groups, in particular the Rohingya,

31 UN Human Rights Council, 19th session 2012, agenda item 4, [http://unic.un.org/imucms/userfiles/yangon/file/A%20HRC%2019%2067\\_English%5B1%5D.pdf](http://unic.un.org/imucms/userfiles/yangon/file/A%20HRC%2019%2067_English%5B1%5D.pdf) accessed on 10 July 2013.

32 DLA Piper, Perseus Strategies, Jacob Blaustein Institute, ‘Myanmar Rule of Law Assessment’ (March 2013), <http://viewer.zmags.com/publication/69f423a6#/69f423a6/1>, accessed on 5 July 2013.

33 Thomas Reuters Foundation, ‘Judicial, constitutional reforms key to change in Myanmar’ (21 March 2013), <http://www.trust.org/item/?map=judicial-constitutional-reforms-key-to-change-in-myanmar/>, accessed on 5 July 2013.

34 Patrick Winn, ‘Myanmar: Ending the world’s longest-running civil war’, (13 May 2012), <http://www.post-gazette.com/stories/news/world/myanmar-ending-the-worlds-longest-running-civil-war-635657/>, accessed on 4 April 2013.

35 [http://www.nytimes.com/2012/06/11/world/asia/state-of-emergency-declared-in-western-myanmar.html?\\_r=0](http://www.nytimes.com/2012/06/11/world/asia/state-of-emergency-declared-in-western-myanmar.html?_r=0)

36 <http://www.irrawaddy.org/archives/30223>

37 International Crisis Group, ‘Myanmar: Storm Clouds on the Horizon’ (Crisis Group Asia Report N°238, 12 November 2012), p.2.

38 Interview with human rights activist (Yangon, 16 March 2013).

has deteriorated significantly during the transition with reports of systematic ethnic cleansing.<sup>39</sup> Increased freedom of expression, while aggravating ethnic violence, is also providing the platform for solutions to the conflicts. A 27-member commission to investigate the violence in Rakhine state was formed by the President comprising an MP, former political prisoners such as Zarganar and 88-generation member Ko Ko Gyi, alongside religious leaders from the Buddhist and Muslim communities, though notably no Rohingya representatives.<sup>40</sup> The commission recommended that the government set up a “truth-finding committee” to look into the causes of the 2012 violence, which was welcomed by Myo Thant a Rohingya representative of the Democracy and Human Rights Party.<sup>41</sup> Yet the committee was criticised by Rohingya representatives for not advocating reform to Burma’s widely criticized 1982 citizenship law, which denies the Rohingya Burmese citizenship.<sup>42</sup>

In response to the violence and ethnic cleansing,<sup>43</sup> Time magazine’s 1 July issue led with a front cover of nationalist monk U Wirathu with the headline, “The Face of Buddhist Terror”. On 25 June, the local distributor of Time magazine, Inwa publications, claimed that in response to public pressure it had decided to no longer distribute this issue of Time magazine. A day later, Burma’s government announced it had banned the sale, reproduction, distribution or even possession of this issue of Time. The Central Management Committee for Emergency Periods stated in government newspaper, *The New Light of Myanmar*:

“To prevent the occurrence of racial and religious conflict, the Central Management Committee for Emergency Periods has announced in the name of public interest not to allow sales, reproduction, distribution or possession of ‘The Face of Buddhist Terror’ article from Time’s July 1 issue. We have found that Time’s coverage can cause misunderstandings and jeopardize the interfaith trust-building that the government is trying to implement”.<sup>44</sup>

The banning of Time magazine demonstrates the limited space in Burma for discussion of ethnic conflict (see Press Freedom) and the sensitivity of the government on this issue.

The conflict affects freedom of expression in a broad range of ways. Access to education for many minorities in Burma is restricted by the internal displacement of 339,200 people with a further 808,075 deemed stateless by the UNHCR with no citizenship and limited access to education (less than 30% in some areas).<sup>45</sup> This lack of a formal education has reduced literacy for minority groups impacting on their ability to share and receive information, or access the media.

## Right to freedom of association and civil society

There remain significant legal restrictions to freedom of association in Burma. The 1988 Registration Law combined with the 1908 Unlawful Associations Act is used to prevent the registration of civil society organisations which should have otherwise been lawful under international law. The space for civil society grew after a number of international NGOs were

39 Human Rights Watch, ‘All You Can Do Is Pray: Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State’ (April 2013), <http://www.hrw.org/news/2013/04/22/burma-end-ethnic-cleansing-rohingya-muslims>

40 <http://www.mizzima.com/news/inside-burma/7791-burma-forms-commission-to-investigate-rakhine-state-unrest.html>

41 The Irrawaddy, ‘Arakan Report Angers Rohingya Leaders’ (29 April 2013), <http://www.irrawaddy.org/archives/33264> accessed on 9 July 2013.

42 Financial Times, ‘Myanmar urged to lift barriers for Rohingya’ (29 April 2013), <http://www.ft.com/cms/s/0/86aa989a-b0a7-11e2-9f24-00144feabdc0.html#axzz2Yeh1BPNf> accessed on 9 July 2013.

43 Human Rights Watch, ‘Burma: End Ethnic Cleansing of Rohingya Muslims’ (22 April 2013), <http://www.hrw.org/news/2013/04/22/burma-end-ethnic-cleansing-rohingya-muslims> accessed on 10 July 2013.

44 The Irrawaddy, ‘Govt Bans Time Magazine Issue, Raising Concerns Among Local Media’ (26 June 2013), <http://www.irrawaddy.org/archives/38575> accessed on 10 July 2013.

45 UNHCR, ‘2013 UNHCR country operations profile - Myanmar’ (2013), <http://www.unhcr.org/pages/49e4877d6.html> accessed on 10 July 2013

allowed into the country in the aftermath of Cyclone Nargis in 2008 and the government understood that not all international NGOs are human rights activists and that many put their humanitarian work first.<sup>46</sup>

As will be explained below, for domestic associations the legal framework remains restrictive, although the numbers of informal, often unregistered, civil society groups has risen during the transition. A number including youth movement “Generation Wave” and single issue groups such as those behind the Irrawaddy river dam protests have demonstrated success in publicly challenging the government. The threat remains that any retreat from the current openness of the government, will lead to draconian actions against unregistered (and therefore illegal under domestic law) groups.

The 1908 Unlawful Associations Act, a legacy of colonialism, gives the President wide-ranging powers to ban organisations for interference with the administration of law; undermining law and order, or constituting a threat to public peace. The exercise of such executive powers is not subject to judicial oversight. The law has been used to ban or prosecute civil society organisations in the past including groups promoting human rights.<sup>47</sup> The 2008 Constitution granted the right to establish associations (article 354c) and consult with civil society (article 118a<sup>48</sup>) and Index was told during its mission that registering an association had become easier in recent years.<sup>49</sup> It is still an arbitrary process with approval needed at township, district, state / division level and from the Ministry of Home Affairs. Neither does the legislation comply with international human rights standards – in particular, there is no right to appeal the decision at any level of government to refuse permission to form an association.

The Local Resource Centre in Yangon surveyed 40 grassroots NGOs in Burma in 2012 and found that policy directions at national level to liberalise the framework for registering NGOs were not being implemented by township-level officials making it difficult for many local NGOs to register or operate.<sup>50</sup> Associations complain it can take 6 – 12 months to get official approval. In Mandalay Region, officials warned groups that monks and nuns were not allowed to be members of non-government organisations.<sup>51</sup> In Yangon, a group that helped poor families take bodies to the cemetery had been refused permission to register for 10 years.<sup>52</sup> Many of these decisions are believed to be political, targeting known activists to reduce their ability to deliver services (and win approval) from the population at large. Civil society in Burma during the military dictatorship, where it was allowed, was focused on practical service delivery in safer areas such as health, education and protection of the environment. Many of those involved in civil society groups had a political background but due to the personal risk had decided to take a more incremental approach to reform. New more professional political associations are emerging including the Myanmar

46 Soubhik Ronnie Saha, The Hauser Center for Nonprofit Organisations at Harvard University, ‘Working Through Ambiguity: International NGOs in Myanmar’ (September 2011), p.8. [http://www.hks.harvard.edu/hauser/engage/humanitarianorganizations/research/documents/myanmar\\_report\\_final\\_version\\_2011\\_09\\_08.pdf](http://www.hks.harvard.edu/hauser/engage/humanitarianorganizations/research/documents/myanmar_report_final_version_2011_09_08.pdf) accessed on 10 July 2013.

47 Asian Human Rights Commission, ‘Diagnosing the un-rule of law in Burma: A submission to the UN Human Rights Council’s Universal Periodic Review’ (June 2010), <http://www.humanrights.asia/resources/journals-magazines/article2/0902/diagnosing-the-un-rule-of-law-in-burma-a-submission-to-the-un-human-rights-council2019s-universal-periodic-review> accessed on 10 July 2013

48 “If there arises a need to study the remaining matters other than those studied by the Pyithu Hluttaw Committees, the Pyithu Hluttaw may form Commissions and Bodies with the Pyithu Hluttaw representatives or including suitable citizens”, Mark SieSue, Journal of International Affairs, ‘How Civil Society Can Engage with Policy Making in Myanmar’s Transitional Context’ (30 July 2012), <http://jia.sipa.columbia.edu/how-civil-society-can-engage-policy-making-myanmar%E2%80%99s-transitional-context> accessed on 10 July 2013.

49 Interview with an NGO worker (Mandalay, 13 March 2013); interview with a lawyer (2) (Yangon, 16 March).

50 Shwe Yee Saw Myint, Myanmar Times, ‘NGOs ramp up lobbying for changes to organisation law’ (25 June 2012), <http://www.mmtimes.com/2012/news/632/news63218.html> accessed on 10 July 2013

51 Ibid, Myanmar Times.

52 Interview with a lawyer (2) (Yangon, 16 March 2013).

Institute for Democracy and the Yangon School of Political Science, but many still refuse to register formally.

In August 2012, Burma's Lower House of Parliament passed a motion "urging the government to draft an NGO registration law commensurate with the age as the president called for cooperation with civil society in the democratic transition".<sup>53</sup> Deputy Minister for Home Affairs Brig-Gen Kyaw Zan Myint has stated he does not believe a new NGO registration law is necessary, while personally acknowledging the legal grey area where less than a quarter of NGOs working inside Burma are registered under the current law.<sup>54</sup> In March, the state media reported that the government's redraft of the law included all the previous articles with only one new article excepting organisations that perform functions essential "daily livelihood functions".<sup>55</sup>

*Case study: "Generation Wave"*

Youth underground movement "Generation Wave", emerging from an underground organisation, became a public group on 9 October 2011, on the fourth anniversary of the movement's founding. As an underground organisation it faced severe repression with many of its leaders fleeing the country and the arrest of 27 of the movement's activists in 2008. The signals the movement used to decide whether to work openly give an insight into the thinking of civil society in Burma. The meeting between Aung San Suu Kyi and President Thein Sein and her release from house arrest were seen as a seminal moments in the country's transition. The reopening of NLD offices across the country was also seen as a significant indicator that they could regroup. Within four months of regrouping, they led their first public protest – without permission – in Yangon. In May 2012, the group collected 67,000 signatures for peace in Kachin state, an action unhindered by the authorities. One special branch officer even asked to sign the petition. "Generation Wave" models their organisation on the successful icons of peaceful protest such as Mahatma Gandhi and Martin Luther King, in contrast to what they perceive as the more confrontational, and often violent approach of the 8888 uprising. One activist argued young people wanted "no more Che Guevaras". "Generation Wave" has more in common politically with modern equality movements, with a strong emphasis on ethnic equality and civil rights. "Generation Wave" continues to face restrictions on its activities with activist Moe Thway facing prosecution under section 505(b) of the Penal Code for an interview with a journalist where he criticised the local police for their use of section 144 of the Penal Code to keep villagers from their fields near the Letpadaung mining project. If found guilty, Moe Thway could face 2 years in jail.

Freedom of assembly

## Freedom of assembly

When interviewed, many activists, artists and lawyers raised the restriction on freedom of assembly as having the biggest impact on their freedom of expression due to its effect on public performance and public demonstrations that have the ability to influence public opinion. While the 2008 constitution guarantees the right to freedom of assembly (section 345(b)), a number of laws, including the Peaceful Assembly and Peaceful Procession Law and section 505 of the penal code are not compatible with the constitutional provision and therefore should be amended.

Section 505 of the penal code dates from the colonial era (1861) and continues to be used to stifle freedom of association. Breaching section 505 of the penal code is a criminal offence with a

<sup>53</sup> Nyein Nyein, The Irrawaddy, 'NGO Registration Law to be Drafted' (17 August 2012), <http://www.irrawaddy.org/archives/11784> accessed on 10 July 2013

<sup>54</sup> Ibid.

<sup>55</sup> Local Resource Centre, 'Discussion on the Bill Amending the Unlawful Association Act of 1908' (11 March 2013), <http://lrcmyanmar.org/en/event/discussion-bill-amending-unlawful-association-act-1908> accessed on 10 July 2013

sanction of up to two years imprisonment.<sup>56</sup> The key provision of section 505 states: -

“505. Whoever makes, publishes or circulates any statement, rumour or report, -

... (b) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity”<sup>57</sup>

The broadness of this public order provision gives the police an effective tool to curtail freedom of association. Recently, it has been used to prevent public performances by artists in Mandalay (the police stated it would cause “alarm”).<sup>58</sup>

The law on Peaceful Assembly and Peaceful Procession was revised as of December 2011. Human rights organisations – including the International Commission of Jurists<sup>59</sup> and Human Rights Watch<sup>60</sup> - criticised the revision for falling short of international standards. Under emergency provisions from 1988, no assembly of more than 5 people for “the same purpose” was lawful. The new law allows peaceful assembly, but requires prior notification which is used in an arbitrary manner to hold up the organisation of event and can be used to ban them. To demonstrate, local groups need to apply for a permit from the police specifying: the time of the demonstration, the number of people who will attend and the streets you wish to protest on. All of these can be amended by the local authorities. On the permit, an organiser has to be specified (including their address and national ID number) who bears direct responsibility for any disorder or violence: a large disincentive to organising any actions in a country emerging from a military dictatorship.

Section 18 of the law is now used in conjunction with the law on Peaceful Assembly and Peaceful Procession. Civil society groups have been arrested using article 18(b) of the Peaceful Assembly and Peaceful Procession Law, then subsequently charged under section 505 of the penal code.<sup>61</sup> This combination of laws is used in particular to suppress local politics. A protest by market traders on 6 August 2012 was broken up using section 18 and one of the protest’s organisers was charged with causing “disharmony”. Section 18 permits fines of up to 30,000 Kyat (\$30).<sup>62</sup>

The wide range of laws available to the authorities to curtail the free association and freedom of expression of civil society groups and associations is still stifling the openness of Burmese society. While the laws are no longer applied to the same extent as prior to the transition, their continuing existence in the criminal code is having a chilling effect on the formalisation of civil society from informal groupings into more professional NGOs and the restrictions on protest limit the ability of civil society to engage a wider spectrum of the population. The lack of judicial independence compounds the chilling legal framework, allowing for arbitrary judgements and sentencing and increasing the risks for civil society groups to exercise their right to freedom of expression.

56 The Government of Burma, ‘The Penal Code of Burma’, (1 May 1861), [http://www.burmalibrary.org/docs6/MYANMAR\\_PENAL\\_CODE-corr:1.pdf](http://www.burmalibrary.org/docs6/MYANMAR_PENAL_CODE-corr:1.pdf), accessed on 8 July 2013.

57 Burmese Penal Code (1 May 1861). Text provided by a leading opposition lawyer.

58 Interview with artists (Mandalay, 13 March 2013).

59 International Commission of Jurists, ‘Response to the Questionnaire on Best Practices that Promote and Protect the Rights to Freedom of Peaceful Assembly and of Association’ (January 2012), [http://www.ohchr.org/Documents/Issues/FAssociation/Responses2012/other\\_contributions/World-International\\_Commission\\_of\\_Jurists\\_contribution.pdf](http://www.ohchr.org/Documents/Issues/FAssociation/Responses2012/other_contributions/World-International_Commission_of_Jurists_contribution.pdf) accessed on 10 July 2013

60 Human Rights Watch, ‘Burma: New Law on Demonstrations Falls Short’ (15 March 2012), <http://www.hrw.org/news/2012/03/15/burma-new-law-demonstrations-falls-short> accessed on 10 July 2013

61 An example of this was the arrest of Ko Wai Lu, Daw Shan Ma, Ko Myo Chit, Ko Ye Lin, Daw Naw Ohn Hla and Ko Nyi Nyi, the key organisers of protests in Yangon on the Latpadaung Mountain issue (see: Mizzima, ‘International condemnation for Monywa crackdown’, 2 December 2012, <http://www.mizzima.com/news/world/8489-international-condemnation-for-monywa-crackdown.html> accessed on 10 July 2013)

62 Currency exchange approximate based on the market rate on 9 July 2013.



# 2 Media freedom



- မြည်သူများ အသိပညာတိုးပွားရေးအတွက် အခမဲ့ ဖတ်ရှုနိုင်ပါသည်။  
ကျေးဇူးပြု၍ ဖတ်ရှုပြီးပါက မြန်လည်ထာရှိုပေးပါရန်။  
စာအုပ်များလှူဒါန်းလိုပါက ထားရှိလှူဒါန်းနိုင်ပါသည်။

It will be argued in this chapter that the media in Burma is freer now than at any point in the last decade, yet significant challenges remain and there are troubling signs on the horizon. The abolition of the pre-censorship of the printed press, the return of daily newspapers and of formerly exiled independent newspapers and media outlets all point to demonstrable change since the beginning of the transition. It is also a better climate for journalists with the release of a number of journalists from jail during the transition.<sup>63</sup>

Under Burma's five decades of military rule, the country's media environment became one of the most restrictive anywhere on earth. The 1962 Printers and Publishers Registration Act established Press Scrutiny Boards to scrutinize all material prior to publication, or in some cases after publication. After a flurry of open publication during the August-September 88 revolution, the military amended the 1962 Printers and Publishers Registration Act to significantly raise fines payable by newspapers that break its strict rules from 2,000 Kyat (\$2) to 30,000 Kyat (\$30).<sup>64</sup> As a result, Burma remained in the top ten of Freedom House's "least free" countries with regards to press freedom from 2002 to 2010,<sup>65</sup> before emerging from the group in 2011 as a result of improvements made during the transition.

Progress has been made but the media is still not free.<sup>66</sup> The existing media laws are still highly restrictive. Legal reform, as initiated by the Press Council and sought by domestic NGOs, is necessary to provide a proportionate legal framework to bring Burma into line with its international obligations. While the laws are restrictive, the transition has meant they are no longer used to the same extent. As one activist said:

"We call it 'rubber theory': the authorities use the law as they see fit, every day the restrictions stretch and reshape."<sup>67</sup>

Currently there are four laws that have been proposed or drafted with the aim of reforming the legal framework for the media: a draft press law which is the work of the press council, a draft Printing and Publishing law, which was proposed by the Ministry of Information and a consultation on a new Broadcasting Law. Public Service Media reform to create a model of majority publicly-funded, public-interest newspapers is also on the agenda. This chapter will look at these proposals in more detail as well as analysing other restrictions in place that also require reform – in particular, reform to the licensing framework for newspapers and reform of Burma's criminal defamation laws.

## The Press Council and the new press law

The Press Council has an important role to play in revising a number of the laws that impact on freedom of expression. The council was founded in October 2012, after the Ministry of Information instructed the main newspapers and journalist associations to set up a self-regulatory body. Journalists have complained the government intervention in the formation of the Press Council prevented the formation of a genuinely self-regulatory press council. Despite this, the current Press Council is made up of 29 members, many of whom are independent journalists and opposition media editors, as well as representatives from media business owners. The Ministry of Information tasked the Press Council with drafting a new press law within a year. The council has been

63 There is no clear, accurate figure for the number of journalists in prison. Committee to Protect Journalists, '2010 Prison Census' (1 December 2010), <http://www.cpj.org/imprisoned/2010.php> accessed on 10 July 2013

64 article19, 'Censorship Prevails, Political Deadlock and Economic Transition in Burma' (March 1995), <http://www.article19.org/data/files/pdfs/publications/burma-censorship-prevails.pdf> accessed on 8 June 2013.

65 Freedom House, 'Freedom of the Press 2013 – Burma' (1 July 2013), <http://www.freedomhouse.org/sites/default/files/Global%20and%20regional%20tables.pdf> accessed 8 July 2013.

66 Ibid.

67 Interview with activist (Yangon, 13 March 2013).

criticised for the amount of time it has taken to make proposals with still no finalised press law available.<sup>68</sup> It is the case however that the significant engagement the Council has undertaken with external groups during its drafting process has taken time. The Council has committed to using a broad new press law to reshape the press freedom legal framework.

Journalists in Mandalay were positive about the Press Council's work in consulting journalists and a broad range of civil society representatives. Beyond the clear interest of journalists in enhancing media freedom, a new press law has the potential to enhance freedom of expression more broadly. Yet the Press Council also recognises the political constraints in which it operates and the need for the final law to be acceptable to parliamentarians, who will vote on the law. The Press Council has received guidance from international organisations<sup>69</sup> and the secretary of the council, Kyaw Min Swe, told Index their law borrowed from similar laws in India, Indonesia and Austria.

The Press Council has produced two drafts of its "Press Law".<sup>70</sup> The first draft of the Press Law was criticised for falling short of international standards by setting out in statute a prescriptive list of responsibilities for journalists with overly restrictive rules on content which will encourage pre-censorship, the law also allowed for the licensing of newspapers and the prior-censorship of foreign publications.<sup>71</sup> Some civil society groups thought the Press Council should go further in advocating for the repeal of restrictive laws.<sup>72</sup> The second draft of the Press Council's Press Law contained stronger protections for freedom of expression. The second draft contains a number of positive recommendations including: the abolition of criminal defamation, the increased use of mediation (Chapter IV) to settle disputes, including a right to correction or clarification; increased judicial oversight, a limit on criminal penalties present in the existing law and the establishment of a new right to information (Chapter III). There are still improvements to be made: the internal mediation proposed by the Press Council would allow the journalists and editors who are members of the Press Council to act as judge and jury over complaints from members of the public. As the complaints could be about journalists who are members of the Press Council, the internal mediation must be more independent from the Press Council in order for it to be attractive for claimants. The review of journalists' requests for information, led by judges (Chapter III), may be less effective due to the limited knowledge of the judiciary in the field of freedom of information and the judiciary's lack of independence. A specialist information commissioner model, with an expert in the field of freedom of information tasked with assessing specific information requests, may be more appropriate and effective.

Beyond drafting its Press Law, the Press Council is also working to improve media standards in Burma. According to International Media Support (IMS), the media in Burma is currently dominated by young, untrained journalists with an average age of 25.<sup>73</sup> This places a large burden on editors, who must ensure that the content produced is compliant with Burma's tough laws. The granting of licenses to newspapers to publish on a daily rather than weekly basis is viewed by editors as a significant, and welcome, challenge with more copy to check for compliance with media ethics and internal standards.

68 Discussion with a civil society activist (Yangon, 16 March 2013).

69 Including the Centre for Law and Democracy and the South East Asia Press Alliance: <http://www.law-democracy.org/live/wp-content/uploads/2012/08/Myanmar-Guidance-on-PressLaw.English5.pdf>

70 A translation of the first draft is available here: <http://www.article19.org/data/files/medialibrary/3626/Press-Law-Bill.pdf>, accessed 10 July 2013.

71 article19, 'Myanmar: Press bill falls far short of international law and would leave press open to abuse' (27 February 2013), <http://www.article19.org/resources.php/resource/3626/en/> accessed 10 July 2013.

72 Forum-Asia, 'Burma/Myanmar: New Forms of Control and Threats to Freedoms of Expression, Assembly and Association amidst Reforms Fanfare' (October 2012),

<http://www.forum-asia.org/uploads/books/2013/March/FA-FFM-Burma-2013March.pdf> accessed on 10 July 2013

73 p.6, International Media Support, 'Change is in the air', (January 2012)

### *The challenge from government*

During the process of re-drafting its Press Law, the Ministry of Information unexpectedly published a draft Printing and Publishing Enterprise Law which would continue to give the Ministry of Information the power to license newspapers, news websites and foreign news agencies and has strict rules on pornography and the incitement of public disorder. Burma's increasingly vociferous civil society launched a public campaign to prevent the adoption of this law, including launching a public signature petition. The Press Council sent letters to the president and the Speaker of Parliament setting out their objections to the law. Perhaps, as a reflection of the increased responsiveness of the government to external pressure after just one day of coordinated pressure, the Chair of Parliament's House of Representatives Sports, Culture and Public Relations Development Committee (and Vice-Chair of the Union Solidarity and Development Party), Thura Aye Myint, said the law needed reflecting upon and it would not be debated in this session of parliament. This gave the Press Council space to formulate a viable press law by June. Unfortunately, at the time of publication, the Press Council has still not published its revised press law. Instead, on 4 July, the Lower House of Parliament approved the Ministry of Information's Printing and Publishing Enterprise Law to the dismay of the Press Council.<sup>74</sup> Members of the Press Council have threatened to resign if the Ministry of Information law is passed by the Upper House of Parliament and signed into law by the President.<sup>75</sup>

The Ministry of Information's draft Printing and Publishing Enterprise Law was seen as analogous to the 1962 law. Punishments under this proposed law were not as harsh as the 1962 law with the maximum prison sentence reduced from seven years to six months and fines capped at around \$12,000 for owners of publications (equivalent to the salaries of four journalists for a year).

Even though the punishments for breach of the law would be reduced, the proposed Ministry of Information Law would be highly prescriptive and limit a significant amount of public interest reporting. Chapter III of the law listed a broad number of categories of article that would be prohibited:

#### Chapter III

##### Rules and Regulations to be followed for publishing and printing

7. Printers or Publishers shall not print or publish the relevant publications which -

- (a) reveals a subject that aggrieves, other similar national races or other different national races and similar or other religion.
- (b) instigates for violence or jeopardize the tranquility of community; and prevalence of law and order
- (c) portrays obscene language, pictures, photos and paintings.
- (d) abets and instigates any criminal case, cruelty, violence, gambling, committing Narcotics Drugs and Psychotropic Substances crimes.
- (e) publish and print the matter that opposes and breaks the provisions of the constitutional law or other existing law.

The broadness of these clauses in particular the clause on portraying obscenity (clause c), abetting gambling (clause d) and publishing material that opposes the constitution (clause e) would under-

<sup>74</sup> Eleven Myanmar, 'Myanmar journalists decry approved press bill' (6 July 2013), <http://www.elevenmyanmar.com/national/2693-myanmar-journalists-decry-approved-press-bill> accessed on 8 July 2013.

<sup>75</sup> The Irrawaddy, 'Burma's Press Council Threatens Resignation Over Media Rules' (8 July 2013), <http://www.irrawaddy.org/archives/39522> accessed on 8 July 2013.

ably add to the uncertainty facing journalists reporting on public interest matters.

The full range of reasons why the Ministry of Information produced this draft law are unclear; what is clear is that former military generals and seen to be the driving force behind the law and that they (in particular, Dhan Shwe) disagree with the Press Council's liberalising Press Law. The Ministry of Information's draft law is indicative of some of the complexities of the transition: the restrictive law was put forward by government officials with the clear intent of by-passing an established civil society process and to dictate the terms of the debate as the government used to. Yet the campaign against this law highlights the new strength of civil society in Burma and their ability to exercise pressure on the government. The outcome of this process in particular whether the Upper House of Parliament and Presidential Office ignore the Press Council (forcing mass resignations) and allows the Ministry of Information's law to proceed, will be a key test of how much effect the transition is having on media freedom.

## Existing impediments to media freedom

### *Criminal defamation*

Criminal defamation originates from the colonial penal code of 1861.<sup>76</sup> Section 499 of the penal code ("Of defamation") provides for a jail sentence of up to two years. Criminal defamation is viewed as an increasing problem for Burmese journalists. Many editors told Index that although they welcomed the abolition of the Press Scrutiny Boards, pre-publication censorship removed the risk of a criminal defamation claim lodged by public officials against their journalists. In the last year, there have been a number of cases where public officials have threatened to use criminal defamation actions against journalists.

In March 2012, the Ministry of Mining lodged a case against Kyaw Min Swe, the chief editor of *The Voice*, for an article in which he alleged corruption by the ministry's officials. The charges were dropped in February 2013 after mediation by the press council between the parties.

The list of defences in criminal defamation law is extensive including the defence of truth, a variety of honest opinion defences and the defence of qualified privilege.<sup>77</sup> Civil defamation has a more narrow range of defences, but is viewed to be a lesser problem because it is rarely used. In order to protect media freedom, libel should be decriminalised in line with the recommendations of the UN special rapporteur on freedom of expression.<sup>78</sup> In addition, civil defamation laws must not give rise to excessive costs or damages and must have adequate defences to protect the public interest, truth and fair comment.

### *The licensing of newspapers*

The end of pre-publication censorship began with the termination of the Press Scrutiny and Registration Division (PSRD). It was according to the state journal *New Light of Myanmar* signed off at the cabinet meeting on 24 January 2013.<sup>79</sup> It was a Ministry of Information official, not an

<sup>76</sup> The Government of Burma, 'The Penal Code of Burma', (1 May 1861), [http://www.burmalibrary.org/docs6/MYANMAR\\_PENAL\\_CODE-corr.1.pdf](http://www.burmalibrary.org/docs6/MYANMAR_PENAL_CODE-corr.1.pdf), accessed on 8 July 2013.

<sup>77</sup> Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, *The English and Indian law of torts* (1905), p. 156; interview with lawyer (2), Yangon.

<sup>78</sup> Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (seventeenth session, agenda item 3, 16 May 2011), [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf) accessed on 5 July 2013.

<sup>79</sup> [http://www.ifex.org/burma/2013/01/29/censorship\\_board/](http://www.ifex.org/burma/2013/01/29/censorship_board/)

NGO, that described the abolition of the Press Scrutiny and Registration Board as necessary in order for the country to be consistent with the “Myanmar Constitution and the UN Declaration of Human Rights (UNDHR).”<sup>80</sup> 1 April 2013 heralded the return of independent daily newspapers to the streets of Burma, effectively ending the government’s use of the 1962 Printers and Publishers Registration Act to limit non-state media to publishing only weekly journals. However, other provisions from the 1962 Act are still in force. Newspapers continue to be licensed by the Ministry of Information under the Press Scrutiny and Registration Division (PSRD). Failing to register for a licence prior to publication carries a maximum jail sentence of three years under the Printers and Publishers Registration Law of 1962.<sup>81</sup>

The licensing of newspapers is an unwarranted restriction on freedom of the media in Burma on principle and in practice. In practice, the process for licences has failed to be transparent. On 1 February 2013, the government allowed newspapers to apply for daily licences. A number of publications were refused licences for arbitrary reasons including the Eleven Media Group, whose application apparently lacked an official revenue stamp valued at 100 kyats (\$0.12).<sup>82</sup> Eventually the decision was overturned and the group launched a daily newspaper The Daily Eleven symbolically on World Press Freedom Day on 3 May.<sup>83</sup> Editors and journalists were concerned that their previous political activities would be assessed by the PSRD when awarding daily licences after the application included questions as to the previous political activities of the applicant. On the whole, these fears were not realised during the granting of daily licenses for newspapers, yet the threat that politicians or the military will move to withdraw licenses remains.

The registration process has been time-intensive and restrictive with the application requiring a code of practice, a code of ethics and a code of conduct for the publication — even though the Press Council is working on a series of ethical codes for journalists as part of its ongoing negotiations to draft a more proportionate press law.

In principle, the licensing of newspapers in Burma has proven to be problematic as it grants the government the power to stop publication. Under the existing licensing regime, newspapers continue to have their licences revoked. In July 2012, the license of The Voice journal was temporarily suspended for breaking news of a cabinet reshuffle<sup>84</sup> and printing a satirical cartoon on the cover page, while the Snapshot news journal was also suspended in June 2012 for printing a photograph of a murder victim whose death triggered sectarian violence.<sup>85</sup>

### *Emergency legislation*

The banning of the sale, reproduction, distribution or even possession of the Time magazine issue, “The Face of Buddhist Terror” (see Ethnic Conflict) by The Central Management Committee for Emergency Periods demonstrated the limited space in Burma for discussion of ethnic conflict and the sensitivity of the government on this issue. The use of emergency legislation and its impact on press freedom in Burma is of particular concern to the Press Council who believe a dangerous

80 Comments by Ministry of Information Deputy Minister Ye Htut first meeting of the Media Development Thematic Working Group (MDTWG) held in Yangon on 9 February 2013 <http://www.unescobkk.org/news/article/myanmar-pursuing-the-next-phase-of-media-reform/>

81 Socialist Republic of the Union of Myanmar, 1962 Printers and Publishers Registration Law (Law No. 1 amended by the Revolutionary Council of the Union of Myanmar, 1971), <http://tiny.cc/y811zw> accessed on 10 July 2013.

82 Eleven Media, ‘EFTA and Myanmar sign trade declaration’ (1 July 2013), <http://elevenmyanmar.com/national/2645-govt-rejects-leading-private-news-media-company-to-publish-daily> accessed on 10 July 2013.

83 Asian News Network, ‘EMG launches Daily Eleven’ (6 May 2013), <http://asiannewsnet.net/EMG-launches-Daily-Eleven-46326.html> accessed on 8 July 2013.

84 The Irrawaddy, ‘Two Rangoon Journals Suspended Indefinitely’ (31 July 2012), <http://www.irrawaddy.org/archives/10508> accessed on 10 July 2013.

85 David Stout, Democratic Voice of Burma, ‘Government suspends news journal’s operations’ (12 June 2012), <http://www.dvb.no/news/gov%E2%80%99t-suspends-news-journal%E2%80%99s-operations/22402> accessed on 10 July 2013.

precedent has now been set. The Press Council was not consulted and it claims neither was the Ministry of Information.<sup>86</sup>

### *Media plurality*

The return of formerly exiled media groups such as Mizzima, the Irrawaddy, the Democratic Voice of Burma and the ethnic media umbrella group Burmese News International<sup>87</sup> has added to the plurality of the media in Burma and demonstrates that media organisations are optimistic that the transition could be sustainable.

There is a push from civil society, in particular from members of the Press Council, for parliament to create a media anti-monopoly law to promote media pluralism. While there is, as yet, no draft anti-monopoly law, the Ministry of Information is working on a plan to reconstitute the state-run newspapers – New Light of Myanmar, The Yadanabon, The Mirror – into a model of public service media, comprising of public funding for public interest journalism (of up to 70 per cent of revenue) with editorial independence.<sup>88</sup> In June 2013, it is expected the Public Service Media law will be tabled in the Lower House. The draft law has been criticised for creating public service newspapers that could intensify the government's competition with private newspapers, with the result of undermining their income.<sup>89</sup>

The government has indicated the Public Service Media Law will move state-owned television channel MRTV towards a public service broadcasting model, which is a positive step.<sup>90</sup> Concerns remain<sup>91</sup> that the law has insufficient safeguards to guarantee the independence of the new public service broadcaster. In the meantime, both the BBC and VOA are involved in training work to improve editorial standards at MRTV and at the Ministry of Information to move the organisation towards a public service broadcasting model.<sup>92</sup> In March 2013, it was announced that MRTV will work with UNICEF regarding programming on healthcare for children and for ethnic minorities.<sup>93</sup>

The new public service broadcasting model will also require new rules prior to the 2015 presidential elections to ensure not only the impartiality of the coverage but also to restrict election spending in order to prevent the block purchase of advertising on limited frequency media by one particular political party.<sup>94</sup>

86 *Ibid*, The Irrawaddy (26 June 2013).

87 Democratic Voice of Burma, 'Exile media crafting new role from inside Burma' (11 July 2013), <http://www.dvb.no/uncategorized/exile-media-crafting-new-role-from-inside-burma/25190> accessed on 10 July 2013. ;

88 UNESCO Bangkok, 'Myanmar pursuing the next phase of media reform' (28 February 2013)

<http://www.unescobkk.org/news/article/myanmar-pursuing-the-next-phase-of-media-reform/> accessed on 10 July 2013.

89 Comments made by an international NGO (Yangon, 16 March 2013).

90 Kavi Chongkittavorn, The Nation Thailand, 'Myanmar's media shake-up Asean' (1 October 2012),

<http://www.nationmultimedia.com/opinion/Myanmars-media-shake-up-Asean-30191401.html> accessed on 10 July 2013.

91 Article 19, 'Myanmar: Public service media needed but proposed bill inadequate' (26 June 2013), <http://www.article19.org/resources.php/resource/37123/en/myanmar-public-service-media-needed-but-proposed-bill-inadequate> accessed on 9 July 2013.

92 *Ibid* 15; BBC Careers, 'Latest jobs with the BBC'

[https://careers.bbc.co.uk/fe/tpl\\_bbc02.asp?newms=jj&id=45568&aid=10298](https://careers.bbc.co.uk/fe/tpl_bbc02.asp?newms=jj&id=45568&aid=10298) accessed on 19 March 2013;; Mizzima, 'Voa, MRTV to cooperate in programming, training' (8 June 2012),

<http://mizzimaenglish.blogspot.co.uk/2012/06/voa-mrtv-to-cooperate-in-programing.html>

accessed on 10 July 2013.

93 Reliefweb, 'UNICEF signed Action Plan on "Community on Air" Initiative with MRTV, FM Radio Stations and Ministry of Health' (21 March 2013),

<http://reliefweb.int/report/myanmar/unicef-signed-action-plan-%E2%80%9Ccommunity-air%E2%80%9D-initiative-mrtv-fm-radio-stations-and> accessed on 10 July 2013.

94 Comments made by an international NGO (Yangon, 16 March 2013).

### *Broadcasting law*

The government is consulting on a new Broadcasting Law which has also seen input from international experts<sup>95</sup> and UNESCO. UNESCO's representative in Myanmar has welcomed the provisions that the new Broadcasting Law has to create an independent broadcasting council similar to the United State's Federal Communications Commission (FCC). The draft law includes safeguards to ensure media plurality and prevent excessive media cross-ownership though there continues to be concern over the ability of the government to influence the state broadcaster.<sup>96</sup>

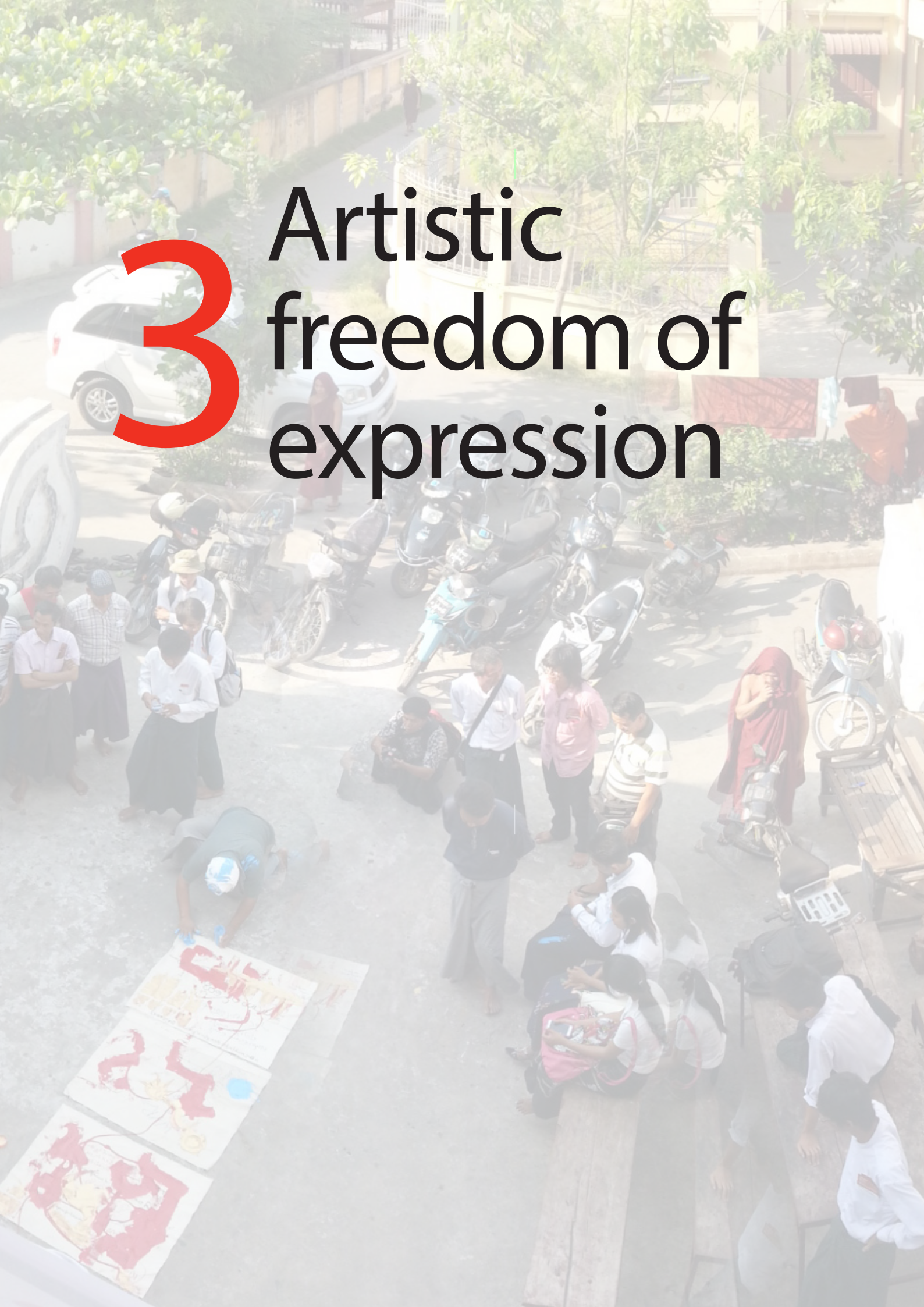
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<sup>95</sup> Comments made by UNESCO (Yangon, 16 March 2013). The international experts are: Toby Mendel the Executive Director of the Centre for Law and Democracy, representatives from The Friedrich-Ebert-Stiftung and Dr. Monroe Price of the Center For Global Communication Studies.

<sup>96</sup> Interview with an international NGO (Yangon, 16 March 2013).



# 3 Artistic freedom of expression



“In the past political art was very easy – ‘this government is bullshit’ – but now due to the transition period and role of Aung San Suu Kyi in government it’s more complex, people are wary of making sweeping statements.”<sup>97</sup>

The abolition of pre-censorship in the print media has created a more widespread relaxation of pre-censorship including for other artistic forms. Artists were clear that the situation had improved significantly since the beginning of the transition, in particular there was more freedom to criticise the military and the USDP. One clear indicator of the greater openness was demonstrated by The Art of Transition symposium co-produced by Zarganar’s company HOME (House of Media and Entertainment) and Index.<sup>98</sup> The symposium, which was a licensed event, was the first cross art form debate about artistic freedom of expression in the country.

The new openness is in contrast to the legal framework which continues to be highly restrictive. Exhibitions, performances and all non-print expression have to be licensed and are subject to pre-censorship by the authorities prior to the granting of a license for their public display. Section 505 of the penal code and section 18 of the law on Peaceful Assembly and Peaceful Procession are used to control public performances (see Freedom of assembly, above). Broad and arbitrary application of the law makes it difficult for artists to know if their art will lead them to be prosecuted. The continued presence of police and informers at artistic events has the potential to chill free expression, although many Burmese artists seem relaxed about their presence as the space for cultural expression opens up.

Even with the transition, a number of subjects are still off limit and social taboos persist particularly around religion and art. Culture considered to “Westernise” Burma (the bar on Western culture began in 1962) such as horror, sexually explicit content and nudity will be censored. One artist noted that the art community was aware of the parallels between this transition and the end of the Suharto period in Indonesia where the government continued to clamp down on cultural taboos using a propaganda slogan: “Free but polite”.

## Literature

Pre-publication censorship of literature has been suspended in stages; first children’s books were no longer subjected, finally political literature was allowed prior to the total abolition of the censorship board in August 2012. In the past, the Central Registration Board for Printer and Publishers would ask for up to 60 copies of books to be kept as part of the publication authorisation process. Now, the authorities ask for 12 copies to be submitted post-publication, for legal deposit libraries. Significant uncertainty about the legal framework persists and publishers fear post-publication pulping of their books, or a legal case (in particular criminal defamation), even though there have been no high profile cases against publishers.

The tradition of literary talks, long suppressed under SLORC period, made a return after the Saffron Revolution. Before the transition, literature tours of towns and villages were an important source of information, with writers masking the discussion of politics by appearing to discuss Western texts with clear similes. Leading cultural figures have used the transition as an opportunity to tour villages to speak about freedom of expression and political subjects such as press freedom, the rule of law and environmental damage. Burma hosted its first international literature festival

<sup>97</sup> Interview with artist (Yangon, 15 March 2013).

<sup>98</sup> See: <http://www.indexoncensorship.org/tag/burma/> for the forthcoming symposium report.

(February 2013) in Yangon with writers including Jung Chang whose novel *Wild Swans* has just been published in Burma<sup>99</sup>. It remains banned in China. Significantly, exiled 88 generation writers including Pascal Khoo Thwe and Khoo Thwe returned to Burma for the festival. Criticism was made of the entry fee, which exceeded the average daily wage excluding many possible participants.

## Comedy

There is no doubt among artists that the authorities fear public performance more than art installations, in particular public performances of comedy and poetry, due to their ability to influence a greater number of people and their importance in Burmese tradition. Traditional Burmese forms of storytelling and satirical / comic performance such as Than Gyat and Anyeint, once banned, have made a comeback.<sup>100</sup> The ban on Than Gyat, imposed by the government, was lifted in 2012.<sup>101</sup> Zarganar, one of the country's foremost comedians, has begun testing the limits of free expression during the transition. During a six hour marathon Anyeint comedy show broadcast live on Sky Net (a new pay per view TV channel),<sup>102</sup> Zarganar pushed the boundaries with satirical skits on Aung San Suu Kyi, President Thein Sein, corruption and an unambiguous chant mocking new freedoms translated as "we are free to do anything now – sell our shit, piss on the streets".

## Visual art

The pre-censorship of visual art remains in place through the use of bureaucratic hurdles that it is a requirement to meet in order to display visual art in a public place. All exhibitions must be approved by the Ministry of Information and the local township authority, prior to its public display. It can take up to 2 months to apply for a permit from the local authorities. This bureaucratic hurdle limits the commercial opportunities for artists, but also makes it difficult for artists to respond to political or cultural situations as they arise. Police informers continue to visit art galleries and it is believed that the blacklist of artists created by the Ministry of Information, formally out of use since 2009 still applies in the granting of permits for public exhibitions of art.<sup>103</sup>

The decisions reached by government officials are often arbitrary. One artist's sculpture of a dead body was refused a permit for display in 2010 because the authorities said there "was too much black." Art that crosses the line between criticism of the government and what is deemed to be gratuitously offensive continues to be censored. Impressionist or abstract interpretations of partial nudity will now normally be approved by local authorities for exhibition, but the clear depiction of sexual organs will not. Artists self-censored criticism of Buddhism or Buddhist symbols, in part due to the belief that such art would not be licensed for public display, but also out of fear of reprisals by members of the public.

Though boundaries remain, in Yangon many private art galleries have decided to view the transition as a period in which to test boundaries and have decided not to apply for a permit to

99 Irrawaddy Literary Festival, <http://irrawaddylitfest.com/>, accessed on 12 July 2013.

100 Than Gyat, revolves around the Burmese New Year and teams of performers compete for cash prizes to satirise mistakes made during the previous year (to, it is said, avoid them in the coming year).

101 Discussion in Yangon with Index, 29 March 2013.

102 The show took place in Yangon on 27 March 2013 and was watched by Index live. It is alleged that President Thein Sein watched the show on television.

103 Art practitioner (Yangon, 16 March 2013).

display art due to the length of this process. There is also an increasing space for political art. Artist Nyo Win Maung remade Rodin's "Thinker" - without a brain - using state newspapers to signal the regime's lack of intelligence. The piece was approved for public display. A significant amount of art has been displayed in galleries in Yangon that directly criticises President Thein Sein.<sup>104</sup>

## Performance art

The limitations on public visual performance art were considered the greatest restriction on artistic freedom of expression by artists in Mandalay.<sup>105</sup> Though these art forms, often highly politicised, could in certain cases get past the censors because the artistic language and imagery was sufficiently obscure in most instances the police continue to view public performance art as a challenge to public order. In Yangon, artists believed obtaining permission for public performance art was easier than elsewhere in the country, but the Beyond Pressure festival faced obstacles obtaining the necessary permits for public performances in December 2012.<sup>106</sup> In Mandalay the limitation on public performance was identified as the top restriction on artistic freedom of expression.<sup>107</sup> One Mandalay artist, Suu Myint Thein, was detained after a street performance on World Peace Day 2012 after police claimed he "frightened many people" and blocked the traffic.<sup>108</sup>

## Film

Burma's Television and Video Act 1996 requires all videos, except family recordings, to be viewed by the Motion Picture Censor Board for films or, for locally produced or imported video footage, the Video Censor Board. Failure to comply may result in fines, imprisonment of up to three years and the confiscation of property. The Video Censor Board consists of two representatives of government organisation, the Myanmar Motion Pictures Enterprise, a number of Ministry representatives and "suitable citizens".

In early December 2011, the Minister of Information and Culture Kyaw Hsan was reported to have announced that the censorship regime for the press and motion pictures would be relaxed. This has taken place across most genres, though sex and nudity are still mostly off limits, and horror is the genre which is most affected with whole-film bans. Political films that were previously banned or restricted in Burma are now being shown – for example, "Burma VJ", and "Click in Fear" – both showed startling footage of brutal military attacks on protesting monks during the Jasmine Revolution. The latter film was even projected onto the front of the modern Taw Win shopping plaza in Yangon. The Art of Freedom Film Festival in January 2012 publicly challenged the film censors by showing uncensored films in Burma for the first time. In June 2013, Min Thin Ko Ko Gyi's Human Rights and Human Dignity Film Festival pushed the boundaries of artistic expression by showing international films on human rights issues for the first time in the country.

<sup>104</sup> Index viewed some of this art at a gallery in Yangon and at an exhibition, "The Resource Curse" in Mandalay.

<sup>105</sup> Interview with artists (Mandalay, 12 March 2013); interview with artist (Yangon, 14 March 2013).

<sup>106</sup> Myanmar Times, 'Beyond Pressure art fest comes to close' (10 December 2012), <http://www.mmmtimes.com/index.php/lifestyle/3536-beyond-pressure-art-fest-comes-to-close.html> accessed on 10 July 2013.

<sup>107</sup> Symposium of artists (Mandalay, 12 March 2013).

<sup>108</sup> Phyto Wai Kyaw and Sithu Lwin, Myanmar Times, 'Performance artist stopped during MDY show' (24 September 2012), <http://www.mmmtimes.com/index.php/national-news/mandalay-upper-myanmar/1775-performance-artist-stopped-during-mdy-show.html> accessed on 10 July 2013.

## Music

The transition has led to the suspension of the pre-publication censorship of music improving freedom of expression for musicians and performers. However, the use of force to break up live music and curtail freedom of expression has been replaced by bureaucratic obstacles as demonstrated in the case study on applying for a live music permit (see below).

The Myanmar Music Association is now nominally independent but it maintains a close working relationship with the government. Producers must file copies of new music with the Association on behalf of the Ministry of Information and musicians fear that anything controversial will be handed over to the authorities who may sue the artist for defamation.<sup>109</sup>

Beyond politics, not all genres of music attract the same level of attention from the authorities: US style hip-hop has been perceived as a threat by the authorities for some time. In 2007, rapper G-Tone was dragged from the stage of an illegal gig after displaying his tattoo of prayer beads, seen as a symbol of support for the monks. Musicians still considered hip-hop, punk and heavy metal as more likely to be refused permission for a licence to perform than pop music, or traditional Burmese music.

### *Case study: obtaining approval for a live music permit*

To apply for a live music permit permission is needed from every level of government: from the urban ward authority (or village tract), the smallest division of government; once this is obtained the applicant needs 2 papers of approval from the township in which the musician or band intends to play and also national approval from the Myanmar Music Association. Once these 3 approvals have been obtained, permission must be sought from the township authorities and the township police station followed by permission at district level then from the divisional or state authority (for instance, Yangon division). At divisional level, the Mayor of the division must sign off on the event personally. If any of these authorities refuse the permit, even on a technicality or minor mistake on the form, the process must begin again. The process is unable to handle a large number of applications for cultural permits so is invariably slow. There is no reason why a single level of government should not be responsible for live music permits. Musicians told Index the complexity of the process was devised to stop live music performances and was a form of “bureaucratic censorship”. One musician had spent 8 weeks applying for a permit with over a dozen visits to police stations and municipal offices. Musicians try to remain on good personal terms with the authorities and bribery is still used to ensure edgy work is allowed a permit – anecdotally this seems to be in decline as the rules are relaxed. Whereas once the police asked directly for bribes, now they ask for money for repairs, one applicant was told by the police: “We really need money to fix our office, we’d be very grateful.”

<sup>109</sup> Interview with musician (Yangon, 15 March 2013).

The background of the image shows a close-up of a network switch or patch panel. Several white Ethernet cables are plugged into the ports. The ports are numbered, with visible numbers including 13, 14, 15, 23, 25, and 26. The cables have RJ45 connectors with a small latch. The overall image is slightly blurred and has a light, semi-transparent overlay, making the text stand out.

4

# Digital freedom of expression

Real improvements have been made that strengthen digital freedom of expression in Burma from ending the blocking of Skype calls, to restrictions on internet cafe use being lifted and a reduction in SIM costs which will open up access to the internet and mobile telecoms. However, the legal framework remains largely unchanged during the transition to civilian government, in particular the draconian Electronic Transactions Act which contains many restrictive provisions on internet use. Built into the network infrastructure there are physical restraints on the internet in Burma with only one internet gateway for personal users allowing the possibility of deep packet inspection and web filtering. Upload speeds in Burma remain slow and the country's mobile telephone and internet usage is one of the world's lowest, which affects the dissemination of information. It is also alleged that activists' email accounts have been hacked by the state. While in practice the internet and internet activists are considerably freer than a year ago, in theory they are still liable to lifetime prison sentences for the political use of email accounts. Without legal reform and technical reform, digital freedom of expression will remain chilled and mobile and internet use will continue to be highly limited.

### Access issues, smartphones and mobile telephony

Internet usage, mobile phone penetration and the use of smartphones in Burma remain extremely low by regional standards. According to the World Bank in 2011, only 1% of the population was online – compared to 10.1% in India, 23.7% in Thailand and 35.1% in Vietnam.<sup>110</sup> Many Burmese believe this is due to a deliberate policy by the regime to restrict access to the internet and mobile phone technologies to prevent opposition activists from organising.

Still less than 10% of the population have a mobile phone telephone number compared to 70% in India and 80% in China. The next lowest country in the region for SIM ownership is Nepal at 50% penetration.<sup>111</sup> In part this is due to the government restricting the availability and price of SIM cards, though the cost of SIM cards has dropped from a peak of \$4000 a decade ago to below \$10 now.<sup>112</sup> Smartphones remain limited in use primarily due to the cost of mobile data, but Burma's mobile penetration is expected to grow from 9% to 80% by the end of 2015.<sup>113</sup> The government has signalled it intends to license a second private mobile operator, with international telecoms firms such as Vodafone expressing interest in the license.<sup>114</sup> International human rights organisations have urged corporations bidding for the license to be open and transparent over their payments to the government of Burma to prevent corruption and not to engage with military or political figures who have committed human rights violations.<sup>115</sup> It remains the case that there are no roaming agreements with foreign mobile phone operators, making it harder for NGOs and journalists to operate within the country.

110 The World Bank, 'Data: Internet users (per 100 people)' (2013), <http://data.worldbank.org/indicator/IT.NET.USER.P2> accessed on 10 July 2013.

111 Nokia Siemens Networks, 'Myanmar Mobile Market: a market dynamics study' (March 2013), <http://tiny.cc/bxtqvw> accessed on 10 July 2013.

112 Interview with digital activist (Yangon, 16 March 2013); South China Morning Post, 'Monopoly to go in bid to boost Myanmar's telecommunications' (8 April 2013), <http://www.scmp.com/news/asia/article/1209271/monopoly-go-bid-boost-myanmars-telecommunications> accessed on 10 July 2013.

113 Rajani Baburajan, infoTECH Spotlight, 'Myanmar's SIM Card Price Slashed by 99 Percent' (8 April 2012), <http://sim-server.tmcnet.com/articles/333327-myanmars-sim-card-price-slashed-99-percent.htm> accessed on 10 July 2013.

114 Bloomberg, 'Vodafone Teams With China Mobile for Myanmar License Bid' (5 April 2013), <http://www.bloomberg.com/news/2013-04-04/vodafone-teams-with-china-mobile-for-myanmar-mobile-license-bid.html> accessed on 10 July 2013.

115 Human Rights Watch, 'Reforming Telecommunications in Burma: Human Rights and Responsible Investment in Mobile and the Internet' (May 2013), p. 3. <http://www.hrw.org/node/115496/section/3> accessed on 10 July 2013.

## State censorship

The state engages in legal censorship, online surveillance, technical censorship and filtering. The legal framework has a particularly chilling effect on digital freedom of expression. The 2004 Electronic Transaction Act (in particular section 33) prohibits the use of technology for use that is “detrimental to the security of the State or prevalence of law and order or community peace and tranquillity or national solidarity or national economy or national culture”.<sup>116</sup> The law is broad and provides for 7 – 15 year prison terms (that can be applied multiply for additional offences). In 2008, 88 generation activist Min Htin Koko Gyi got 65 years in prison for using 4 email addresses, plus an additional 5 years for associated offences. In 2008, Zaw Htet Twe was given a 19 year sentence after speaking out during the Jasmine Revolution: 15 years under the Electronic Act and 4 years to “agitating monks”.<sup>117</sup> The release of both Zaw Htet Twe and Htin Koko Gyi, 4 years into their sentences, alongside government signals that it will consult on revising the Electronic Act shows the transition is also benefitting digital freedom.<sup>118</sup>

One of the legal restrictions on internet usage, that is the requirement to show a passport at internet cafes, has also now been relaxed. There is still much to do to improve the framework for digital freedom. Laws such as the 1996 Computer Science Development Law need reforming. The Law requires all network-ready computers to be registered with the MPT, with a maximum jail sentence for non-compliance of 15 years.<sup>119</sup>

Many activists are still concerned over online state agents tracking their activities and use pseudonyms, rather than their real names, to avoid detection. It was claimed by online activists that the Burmese authorities, similar to China’s “50 cent party members”, pay young people to spy on Facebook.<sup>120</sup> This claim is not collaborated by any specific evidence.<sup>121</sup>

The state also engages in technical censorship. In October 2010, the government founded a new Ministry of Defence ISP to separate military internet users from all other state and private users whose ISPs share traffic through a Ministry of Post and Telecommunications ISP. Previously, defence users shared an ISP with other government departments; the move will increase the speed of the internet connection for military users.<sup>122</sup> The changes also segmented all personal and commercial internet users (but not government users) and their ISPs under Yatanarpon Teleport ISP. The OpenNet initiative has argued that the use of multiple ISP levels allows the potential for greater screening and controls, while RSF believe the Yatanarpon ISP is used for DNS spoofing and ‘Man in the Middle’ attacks, the former to capture packets of data and even change the data in transit, the later to trick the user into logging into a fake website so the intermediary can access their passwords.<sup>123</sup>

Index on Censorship reported that Burma had begun filtering the internet using web filter Fortinet as early as 2005.<sup>124</sup> The OpenNet initiative has published a revised list of filtered websites which

116 Myanmar Times, ‘Government to redraft ‘outdated’ electronic transactions law’ (4 February 2013), <http://www.mmmtimes.com/index.php/national-news/3977-govtment-to-redraft-outdated-electronic-transactions-law.html> accessed on 10 July 2013.

117 Interview with journalists at the Press Council (Yangon, 16 March 2013).

118 Myanmar Times, *ibid*.

119 OpenNet Initiative, ‘Country profiles: Burma (Myanmar)’ (6 August 2012), <https://opennet.net/research/profiles/burma> accessed on 10 July 2013.

120 Index on Censorship, ‘The mechanics of China’s internet censorship’ (9 January 2013), <http://uncut.indexoncensorship.org/2013/01/china-internet-censorship/> accessed on 10 July 2013.

121 Interviews with youth activists (Mandalay and Yangon, March 2013).

122 RSF, ‘National Web Portal: Development or Repression’ (November 2010), p.6, [http://en.rsf.org/IMG/pdf/rap\\_birmanie-2.pdf](http://en.rsf.org/IMG/pdf/rap_birmanie-2.pdf) accessed on 10 July 2013.

123 *ibid*, p.8,

124 Nart Villeneuve, *Index on Censorship* magazine, ‘Evasion Tactics’ (04: 2007), p. 78,



shows a number of websites including Gmail and Yahoo! Mail have now been made accessible.<sup>125</sup> In neither Yangon nor Mandalay was the internet filtered enough in either hotels or restaurants that mainstream websites, or dissident websites, were unavailable. However, filtering is set at national ISP level making it difficult for ordinary internet users to circumvent. Blocks on VOIP technologies in particular Skype were imposed in 2008 but lifted in 2012.

The transition has opened up the space for freedom of expression online, with the release of key internet activists, a decrease in the use of filtering and blocking of internet access and a reduction in the cost of SIM cards that will extend the availability of mobile phones and smartphones. There are notable exceptions that question the government's commitment to opening up the space for digital freedom. The realignment of Burma's state ISPs kept the physical infrastructure of Burma's internet access monopolised by the government and open to surveillance and interference. Filtering remains as does the undercover online surveillance of civil society activists. Most significantly, the highly draconian legal framework remains in place with long prison sentences for online political activity. Without legal reform, online freedom of expression will remain chilled.

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<sup>125</sup> OpenNet Initiative, 'Update on information controls in Burma' (23 October 2012), <https://opennet.net/blog/2012/10/update-information-controls-burma> accessed on 10 July 2013.

# Conclusion

Burma has made significant advances during the transition period, with progress across all the categories of this report: politics & society, media freedom, artistic freedom and digital freedom. The situation in the country has significantly improved since the beginning of the transition.

Underpinning the increased freedom of expression are the significant political changes that have seen the release from house arrest of Aung San Suu Kyi and the election of NLD parliamentarians during the 2012 by-elections. The release of Aung San Suu Kyi, the regime's most high-profile critic and political opponent, and other political prisoners was seen as a public signal to the Burmese people and civil society that the transition to civilian government was a possibility and that the government would tolerate dissent to greater latitude than in the past. Beyond this, a number of concrete advances have been made for freedom of expression including the abolition of the censorship boards, the end to the filtering of social networks and VOIP telecommunications, the return of daily newspapers and the greater latitude given to political expression, press comment and artistic expression by government officials.

There still remain challenges that limit freedom of expression in Burma. The legal framework is largely unchanged during the transition with a number of laws that restrict and impact upon freedom of expression namely: the State Protection Act (1975), the Unlawful Association Act (1908), the Television and Video Law (1985), the Motion Picture Law (1996), the Computer Science and Development Law (1996), the Printers and Publishers Registration Act (1962)<sup>126</sup> and significant sections of the penal code.<sup>127</sup>

It is of concern that laws enacted or proposed since the transition also fail to protect freedom of expression and assembly namely the Peaceful Assembly and Peaceful Procession Law (passed in 2011) and the new draft Printing and Publishing Enterprise Law (drafted by the Ministry of Information). These laws signal that the government's future commitment to reform may be less bold than the framework provided by the relaxation of the existing laws.

In light of this, it is clear that the lifting of targeted sanctions by the US and EU was premature without a strategy to maintain leverage in Burma to allow future reform. The lifting of the sanctions has disabled one important tool of leverage the US and EU had for Burma. While the US and EU continue to exercise leverage through the benefits for the regime of economic investment, this leverage must be used strategically to embed the transition. Without more structured reform of Burma's draconian legal environment, civil society will continue to face the ever-present risk of imprisonment for exercising its universal right to freedom of expression.

There is now a dangerous impasse, with the relaxation of sanctions reducing the incentive for the government of Burma to reform the remaining restrictive laws, while continued ethnic conflict is reducing the political impetus and attention on reform by both the government of Burma but also external partners.

To maintain Burma's progress during the transition, real concrete steps are needed to protect freedom of expression, including in the short-term the abandonment of the draft Printing and

<sup>126</sup> UN Human Rights Council, A/HRC/19/67, Session 19, 'Progress report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana' (2012), [http://unic.un.org/imucms/userfiles/yanon/file/A%20HRC%2019%2067\\_English%5B1%5D.pdf](http://unic.un.org/imucms/userfiles/yanon/file/A%20HRC%2019%2067_English%5B1%5D.pdf) accessed on 10 July 2013.

<sup>127</sup> In particular sections 143, 145, 152, 499 - 505, 505 (b) and 295 (A) of the penal code.

Publishing Enterprise Law, a commitment not to use emergency legislation and a clear roadmap for reform of the restrictive laws identified by the end of the next parliamentary session. Without a roadmap, the concerns of civil society that the transition is merely transitory will strengthen and the pushing of boundaries by artists, journalists and civil society groups in Burma will abate.

*To maintain the progress of the transition the government of Burma must:*

- Prepare a roadmap in this session of parliament that lays out how Burma will reform the legal framework that curtails freedom of expression. The reform must curtail the emergency legislation imposed by the military regime; end the licensing of newspapers and decriminalise defamation, open up access to the internet and remove restrictive laws that penalise its use and annul provisions in the penal code dating from British colonial rule that criminalise political speech and freedom of association. The EU, US and other partners must be prepared to revisit sanctions if the government of Burma fails to deliver this roadmap.
- Abandon the restrictive press law put forward by the Ministry of Information and allow the Press Council to continue to lead on the process of drafting a new legal framework for the press and other media actors.
- Prior to enacting a new legal framework for the press, the use of emergency powers to ban the publication of media in Burma must be stopped.
- Bureaucratic hurdles to freedom of expression should be removed immediately, in particular the requirement for permits for public performances (live music, public art, political readings) to be signed off by multiple layers of government.
- The government should give clear instructions to local police forces that the use of restrictive legislation to stop peaceful public demonstrations is excessive and should be stopped in particular article 18(b) of the Peaceful Assembly and Peaceful Procession Law and section 505 of the penal code.

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the voice of free expression