Note on the Strengths and Weaknesses of the Myanmar Broadcasting Law[1]

on behalf of the Centre for Law and Democracy and International Media Support

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Introduction

The Broadcasting Law of Myanmar was adopted by the parliament on 28 August 2015 after a long process of development and debate. The Centre for Law and Democracy (CLD) and International Media Support (IMS) very much welcome the adoption of this Law, which is largely in line with international standards and which should provide a solid basis for the development and growth of broadcasting in Myanmar. Indeed, it is our view that putting in place a proper legal framework for regulating the broadcasting sector, thereby moving it out of the direct hands of the Ministry of Information, was long overdue.

The Broadcasting Law goes a long way towards putting in place the key elements of a framework for broadcasting which is in line with internationally recognised standards. Among other things, it provides for the independent regulation of broadcasting by a new National Broadcasting Council (Council), it includes numerous mechanisms and systems to promote both external and internal diversity in broadcasting, it provides for

fair and appropriate systems for both licensing broadcasters and promoting professionalism, and it includes a number of other public interest rules. Indeed, it is fair to say that the Broadcasting Law of Myanmar does more to implement international standards than any other such law in Southeast Asia and perhaps in the whole of Asia.

At the same time, the Broadcasting Law is far from perfect. Perhaps the most serious failing is that it does not address issues relating to the digital terrestrial television transition, which is now imminent for every country that has not already done it, due to requirements emanating from the International Telecommunication Union (ITU). It also preserves the idea of government broadcasters, contrary to international standards, and could benefit from a number of technical improvements and additions.

This Note provides an assessment of the strengths and weaknesses of the Broadcasting Law. It is intended as a contribution to understanding the Law and to promoting further legal development – whether by way or regulations or amendments – that would bring the legal framework more fully into line with international standards. In addition to describing the key strengths and weaknesses of the Law, this Note also provides recommendations for achieving that objective.

1. Positive Features

It is important to start by outlining the positive features of the Broadcasting Law for two main reasons. First, it is important to understand what these are, and of course to preserve and even further strengthen them in any process of adopting either implementing regulations or amendments. Second, there has been some confusion in the debate about the Law, both within Myanmar and, unfortunately, even among international commentators, about its strengths and weaknesses.[2]

Some of the positive features of the Law include the following:

- It was adopted through a broadly consultative process which allowed for significant input by actors external to government or the parliament.

There were numerous roundtables and consultations by the Ministry of Information during the developmental phase of the draft Law and then another substantial round of consultations during the long period that the draft Law was before Parliament.

- It recognises important guiding principles for the regulation of broadcasting, including freedom of expression, diversity and independence.

Sections 3 and 4 of the Law, setting out the objectives and guiding principles for regulation, which provide the interpretive backdrop for the Law, refer to a number of

[2] For example, an analysis of the Law by ARTICLE 19 in November 2015 made several criticisms that were unfounded (to give just one example, that one-third of the members of the Council should be able to call a meeting whereas the Law already provides that three members can do that) or that were simply not supported by international law (for example that the 30% limit on foreign ownership should be increased). See Myanmar: Broadcasting Law, available at: https://www.article19.org/resources.php/resource/38199/en/legal-analysis:-the-myanmar-law-on-broadcasting.

important and internationally recognised standards such as freedom of expression, professionalism, diversity, independence, a three-tier broadcasting system (including commercial, community and public service broadcasters), fair competition, universal service, and fairness and non-discrimination in the allocation of licences.

- It recognises the importance of the independence of the regulator (the Council) and contains a number of measures to protect that independence.

The independence of the members of the Council is explicitly recognised in the Law (section 16) and a number of practical measures are put in place to protect that independence including:

  - requirements of expertise on the part of members (section 7(c));
  - prohibitions on individuals with political or industry connections from being appointed as members (section 8);
  - an open, transparent process for appointing members that involves civil society (section 9);
  - a process for appointing members that involves the two houses of parliament and the President, as well as feedback from the public (sections 10-12);
  - the election of office-bearers among the membership by the members themselves (as opposed to by an external actor) (section 13);
  - protection of the tenure of members and limited grounds for removal (sections 17-18); and
  - generally, clear legal frameworks for all of the activities to be undertaken by the Council, providing clear guidance for its work and confining its discretion.

- It puts in place a solid framework for licensing broadcasters which promotes core international standards in this area, in particular competition and fairness.

To ensure licensing fairness the Law, among other things:

  - sets out a framework for rules for licensing and then requires the Council to adopt more detailed rules in relation to any particular licensing process (sections 31-34);
  - provides clear and detailed criteria for how decisions between competing licence applications should be made (section 35);
  - provides clear and appropriate rules for licence renewal (sections 39-41); and
  - sets clear conditions for the revocation of licences (sections 42 and 89).

- It includes a number of other measures to promote diversity.

The Law establishes a number of rules to promote diversity in broadcasting in terms both of external diversity (the existence of different broadcasters) and internal diversity (the existence of diversity inside broadcasters). These include:

  - the contribution of an applicant to diversity and programme quality as a licensing condition (sections 35(a)(iv), (v), (vi) and (vii));
  - rules on undue concentration of media ownership and cross ownership (sections 50-52);

- appropriate limits on foreign ownership which will protect local voices in broadcasting during the early development phase of this sector in the country (section 48);
- minimum quotas for the number of local channels to be offered by distribution services (section 64(a));
- minimum quotas for local content and content production by independent producers for broadcasters (section 67); and
- limits on the amount of advertising that can be carried by commercial broadcasters and a requirement to carry public service advertisements (section 72).

- It recognises a three-tier system of broadcasting involving public service, commercial and community broadcasters, in line with better international practice.

The need for a three-tier system for broadcasting is widely recognised in international standards and the Law respects this. It unfortunately also provides for government broadcasters (on which see below). While the rules governing public service broadcasting are essentially left to be dealt with in another law (apart from a brief statement on this issue in section 46), the Law includes very strong provisions on community broadcasters, including by guaranteeing a strong allocation of frequencies to this sector and a requirement to put in place simple licensing processes and fees (sections 56-57).

- It puts in place a fair and consultative process for regulating the content of programmes and advertisements.

The Law requires the Council to develop a Code of Conduct for broadcasters in a transparent and participatory fashion and sets out clearly the main areas the Code should cover (sections 75 and 77). The Council must develop rules for processing complaints based on the Code, which must be fair and balanced and allow the broadcaster an opportunity to be heard (sections 78-80), and the regime of penalties for breach of the Code is graduated and focuses on less onerous penalties (section 81). The rules relating to rectification (correction) and the right of reply are also carefully tailored and fully in line with international standards (sections 84-86).

2. The Digital Transition

The ITU has set a deadline of 2020 for all countries to complete the digital terrestrial television transition and to switch off analogue terrestrial television transmission. This is a very important process for a country to go through, which requires some very important policy and regulatory decisions to be made and systems to be put in place. These affect the whole process of development of the television sector and also impact directly on the public, many of whom will need to obtain specific equipment to be able to continue to receive digital broadcasts (often in the form of either a digital television or set top box to convert signals so as to be able to be processed by an analogue television). The complexity of decision-making in this area is reflected in the five-page 2013 Joint Declaration of the special international mandates on freedom of expression,

titled Joint Declaration on the Protection of Freedom of Expression and Diversity in the Digital Terrestrial Transition.[3]

An initial decision needs to be made about what digital transmission system to use, but many other policy and regulatory decisions flow from that. For example, in some countries, strict separations are imposed between content producers and content distributors in the digital terrestrial space, based on the fact that many different channels can be distributed through one transmitter. Decisions about standard and high definition channels, other services and so on also need to be made. Ultimately, at least a framework of legal rules are needed to guide regulatory behaviour in this area. Before any such rules are adopted, there is a need for broad public consultation on many of these issues. As noted above, the Broadcasting Law is silent on the whole issue of digital terrestrial television.

Recommendation:

- Consultations should begin immediately with a view to incorporating a framework of legal rules on the digital terrestrial television transmission (and the analogue switch-off) into the Broadcasting Law.

3. Government Broadcasting

The Law defines the idea of government broadcasting services as "radio and television services which is owned and administered by union level government organization, state, region and self-administrative regional governments in order to broadcast public information accurately" (section 2(h)), and recognises this form of broadcasting in several places (sections 4(b), 38(d), 45(a) and 61-62). International standards do not recognise this as a legitimate type of broadcasting and, instead, focus on public service, commercial and community broadcasters. Indeed, a cardinal principle of international law is that both broadcast regulators and broadcasters should be strictly independent of government.

We understand that there are existing government broadcasters in Myanmar and that it might take some time to decide what to do with them. According to international standards, they should either be transformed into independent public service broadcasters or perhaps privatised to become commercial broadcasters. By recognising and somehow entrenching the idea of government broadcasters, the Law inhibits rather than supports the need to transform these broadcasters as described above.

Recommendation:

[3] Adopted 3 May 2013. Available at: http://www.law-democracy.org/live/wp-content/uploads/2013/05/mandates.decl_.20131.pdf.

- The Broadcasting Law should not recognise or otherwise endorse the idea of a government broadcaster.

4. Independence of Regulatory Bodies

As noted above, it is a cardinal principle of international law that bodies which exercise regulatory powers over the media should be independent of government (as well as of the sector that they are regulating). At the same time, international law clearly recognises that it is legitimate if the role of developing at least higher-level policy remains a government prerogative. The Broadcasting Law creates two entities – the National Broadcasting Development Authority and the Council – one of which, the Authority, is firmly in government hands and one of which, the Council, is largely independent.

The duties and responsibilities of the Authority are described in section 6 and a careful assessment of these responsibilities makes it clear that they are overwhelmingly of a policy and/or planning nature. They include, among other things, developing a plan for the development of broadcasting, developing a Broadcast Spectrum Management Plan, drafting polices to promote the growth and development of the sector, approving technical standards and facilitating a coordinated regulatory framework for the sector. In many countries, at least some of these functions – such as the development of the spectrum plan and approving technical standards – are undertaken by the regulator and there may be certain advantages to insulating these sorts of decisions from the political process.

It was noted above that the Law recognises the importance of the independence of the Council and contains a number of measures to protect that independence. There is no perfect or foolproof way to protect the independence of a regulator and systems for this must be designed with the local political environment in mind. At the same time, some improvements could be introduced to enhance the structural independence of the Council. In particular, the President plays an unduly important role in both appointing and removing members. In terms of the former, the President and speakers of the two houses of parliament, the Pyithu Hluttaw and Amyotha Hluttaw, each nominate six individuals for membership of the Council, for a total of 18 nominations, with the participation of professional and civil society organisations (sections 9 and 10). The public is invited to provide feedback on this shortlist and the President then appoints the nine members of the Council from among the 18 nominees, taking into account the public feedback (sections 11 and 12). To broaden out this process, it might be preferable for the Pyithu Hluttaw to propose nine names to the President for appointment.

Section 18 provides for the removal of members of the Council by the President, in limited circumstances and after due process. This is a fairly robust system but it could

be further improved by requiring a recommendation from a super-majority of the other members of the Council before the President might remove a member.

Section 91 provides for an appeal from certain decisions of the Council – namely those relating to issuing licences, to renewing licences, to suspending or revoking licences and to imposing administrative fines – to the President. This is simply not legitimate. Appeals against decisions of the Council should never be decided by a political actor but should, instead, go to the courts.

Recommendations:

- Over the longer term, consideration should be given to whether or not some of the functions of the Authority might not be better undertaken by the Council.
- Consideration should be given to further insulating the process of appointing and removing members of the Council from any risk of political interference in the ways noted above.
- Section 91 of the Law should be repealed and replaced by a rule allowing for appeals from decisions of the Council to go to the courts.

5. Rules on Concentration of Ownership

It is well established under international law that States should put in place clear rules limiting undue concentration of ownership of the media. This is based on the fact that international guarantees of freedom of expression protect not only the right of the speaker but also the rights to "seek" and "receive" information and ideas (i.e. the rights of viewers and listeners). As a result, restrictions on undue concentration of media ownership, which may look like restrictions on the freedom of expression rights of owners, are actually measures to protect the freedom of expression rights of listeners and viewers (i.e. from only getting information and ideas from a small range of sources).

A clear statement of the need for rules on ownership was made by the UN Human Rights Committee, which is responsible for overseeing compliance with the *International Covenant on Civil and Political Rights*, in its 2011 General comment No. 34: Article 19: Freedoms of opinion and expression:

> [E]ffective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression. … Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views. [footnotes omitted][4]

[4] 12 September 2011, CCPR/C/GC/34, para. 40. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en.

The Broadcasting Law includes rules on concentration of ownership in Articles 49-52. Article 49 requires licence applicants to provide information about their ownership structures to the Council and public, and to obtain Council approval for any material changes to this if a licence is issued. This is fully in line with international standards, although it would be useful to require any approved changes in ownership also to be made public.

Section 50 prohibits any one individual or corporation from owning and operating more than one company offering the same broadcasting service in the same geographic area (with the exception of a distribution service). This is a clear rule of the sort that is needed in Myanmar. However, it suffers from two weaknesses. First, it makes more sense to prohibit concentration of control over services rather than owning and operating those services. Control is the key issue here, and may be present at relatively low levels of actual ownership. In South Africa, for example, ownership of 20 percent of the shares of a commercial broadcaster is deemed to constitute control.[5]

Second, the limit relates to a broadcasting service, which is defined in section 2(d) of the Law as being a public service, commercial, community or governmental broadcasting service, or a broadcast distribution service. The Law fails, however, to indicate whether or not a 'service' is equivalent to a channel or may instead be a station offering multiple channels. In the latter case, an individual or company could control just one broadcasting service (i.e. station), but offer potentially dozens of channels, totally undermining the whole idea behind the rule.

Section 51 addresses cross-ownership and prohibits a company from owning 100 percent of a private newspaper or broadcast media and more than 30 percent of another such entity (it is not clear from the English text whether or not the other entity has to be in the other media market). Once again, there is a problem here with relying on percentages rather than control, so it would be preferable to indicate that anyone who controls either a private broadcaster or newspaper may not control another such entity. It would also be useful to add in a geographic element here, so that co-ownership of entities operating in different geographic markets would be allowed.

Section 52 provides for the Council to adopt regulations relating to sections 50 and 51, so that may be a way of addressing the weaknesses in these provisions.

Recommendations:

- The Council should include a commitment in its regulations to make public any changes to broadcast ownership that it approves pursuant to section 49 of the Law.
- The Council should adopt regulations making it clear that the references to

[5] See section 66(5) of the Electronic Communications Act, No. 36 of 2005.

owning and operating a broadcasting service in section 50 mean exercising control over such a service and that the reference to 'service' means one specific broadcasting channel.

- The Council should also adopt regulations making it clear that section 51 prevents one person from exercising control over both a private newspaper and a broadcaster operating in the same geographic area. If this is not possible, then section 51 should be amended to achieve this result.

6. Other Issues

Community broadcasting is defined in section 2(g) of the Law as being entities which are non-profit in nature and run by civil society organisations and various other types of entities, and which distribute "the necessary information for relevant organization or civil society". It is only in sections 55 and 60 of the Law that the need for a sufficient link to a relevant community and the idea of providing content which is relevant for that community is introduced. In the end, the Law does include all of the relevant elements of a community broadcaster but it would be preferable if the section 2(g) definition already included them.

Section 67(b) provides that national television stations should allocate at least 30 percent of their programming time to locally produced programmes, while section 67(c) calls for at least 20 percent of programmes to be produced by independent producers (which would represent 67 percent of the total amount of local content). 30 percent seems a very low percentage, particularly when compared to the rule in section 67(a) that requires national radio broadcasters to carry at least 70 percent local content. Section 68 allows the Council to review and adjust these rules, either generally or for any particular broadcaster, so that may provide a means to address this concern.

Section 75(a) of the Law provides that the Code of Conduct for broadcasters should be based on "moral and ethical values" and "widely accepted [national] standards for the media". The reference to "moral and ethical values" in section 75(a) is less than ideal, given that such values are very personal and subjective in nature. A more appropriate reference might be to 'community values', which are used in some countries to determine standards in this context. The potential harm from this reference is mitigated somewhat by section 75(b), which provides that the Code should be adopted in a transparent and participatory fashion, but it would still be preferable to replace the reference.

Section 89(a) provides that the Council shall revoke or suspend licences whenever licence holders violate the provisions of the Law or made false statements on their licence applications. In contrast, section 89(b) limits the cases where licences may be revoked to quite serious violations. The word 'revoke' should be removed from section 89(a), leaving section 89(b) to deal with this, and more stringent conditions should be put on the suspension of licences (which should be reserved for repeated and serious

violations of the Law which less intrusive measures, such as warnings and fines, have failed to address).

Section 96 provides for fines of between 30-50 million kyats for operating a broadcasting service without a licence while section 99 provides for the same fines for continuing to operate a service that has been suspended or revoked, which makes sense. However, section 97 provides for much smaller fines – of between 5-10 million kyats – for continuing to operate a service once the licence has been terminated, which is just as serious as the wrongs identified in sections 96 and 99.

Recommendations:

- In due course, the discrepancy between the definition of community broadcasters in section 2(g) of the Law and their functional definition in section 55 should be resolved, perhaps in the shorter term through regulation.
- The Council should consider increasing the percentage of local programming that national television channels are required to carry.
- In due course, consideration should be given to replacing the reference to "moral and ethical values" in section 75(a)(i) with a more objective standard.
- Section 89 should be amended along the lines suggested above so as to preserve the strict rules in section 89(b) for revocation of licences and so as to impose stricter conditions on the suspension of licences.
- Consideration should be given to increasing the fines provided for in section 97 to the same level as the fines in sections 96 and 99.