Note on Reforming Myanmar's News Media Law[1]

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This Note was prepared in response to a request by the Myanmar Press Council (MPC) for an analysis of the News Media Law (Law),[2] including the Rules adopted under this Law (Rules),[3] in light of international standards relating to the right to freedom of expression. It was prepared by the Centre for Law and Democracy (CLD), with the support of International Media Support (IMS) and FOJO Media Institute.[4]

According to our analysis, the News Media Law is largely consistent with international guarantees of freedom of expression. However, there are ways in which we believe it could be further strengthened. Our assessment of the Law and recommendations for reform are set out below. The recommendations are based on the idea that there would, in due course, be a process of amending the Law and Rules, and they are designed to help ensure that such a process results in a law which is more fully in line with international standards and better comparative practice.

[2] Law No. 12/2014, adopted the 14th Waxing Day of *Daboung*, 1375 M.E. (14 March 2014).
[3] Order No. 45/2015, adopted 17 June 2015.
[4] More information about CLD, IMS and FOJO and their work is available at the end of this document.

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1. Scope of Applicability

Section 2(a) of the Law defines the 'news media' in an extremely broad fashion so that it would include the work of many non-governmental organisations (NGOs), online blogs and discussion forums, and arguably even many social media activities. This is supported by section 2(b) of the Rules, which defines 'news' in an extremely open-ended manner. And it is also supported by sections 2(d), (e) and (g) of the Law, which define, respectively, 'news broadcasting', 'newspaper' and 'Sar Nal Zine', again all very broadly.

It is important to define the scope of the Law carefully, and in an appropriate manner, given that a key thrust of the Law is to impose minimum professional standards on the news media. These standards are outlined in section 9 of the Law, and elaborated on in more detail in the Code of Conduct adopted by the Press Council in May 2014. It is not appropriate to attempt to impose these sorts of standards on social media users, which covers an increasingly large proportion of the population, civil society organisations, or even blogs run by individuals who are not necessarily trained journalists.

A better practice approach, employed in Indonesia, is to leave entities which disseminate information exclusively online (as opposed to traditional media which also operate online) out of the mandatory definitions in the law, but then to allow them to opt in voluntarily. If they do so, they will benefit from both the protections and credibility afforded by the law, but they will also be subject to the professional standards set out in the law.

A second concern here is that, for the most part, the entitlements and responsibilities set out in the Law apply to 'media workers', defined in section 2(b) as anyone who takes up any job related to the media. This would include janitors, accountants, makeup and wardrobe assistants, and a range of other actors whose job contains no direct link to the newsgathering function. Instead, the Law should apply its standards only to journalists and others who are involved directly in the newsgathering process (such as camerapersons and fixers).

Recommendations:

- The definitions of 'news media', 'news broadcasting', 'newspaper' and 'Sar Nal Zine' should be revised so as to apply only to media entities as traditionally understood.
- Consideration should be given to limiting the mandatory application of the Law to media which operate offline (i.e. to traditional newspapers, journals and broadcasters), as well as their online versions, while allowing purely

online media to opt in on a voluntary basis.
- The definition of 'media workers' should be limited in scope to individuals who are directly involved in the newsgathering process.

2. Positive Protections

Section 3 of the Law sets out its objectives, including to enable the media to operate free from censorship and to write, publish and distribute freely in accordance with the provisions of the Constitution. We believe that the objectives would be strengthened by adding in an explicit reference to freedom of expression and of the media, and to the key role an independent media play in a democratic society, to make it clear that supporting this is a goal of the Law and in order to help ensure that the Law is interpreted in a manner which is consistent with this right.

Section 4 sets out the rights of media workers. This is a positive and important section of the Law. The first three sub-sections refer to the right of media workers to investigate and report on various issues, but there is no general statement of the right to investigate and report on any matter which is not prohibited by a law which conforms to the constitutional guarantee. It is important to include such a statement in the law so as to avoid a situation where the examples referred to in sub-sections (a) to (c) are deemed to be an exhaustive list of what media workers may report on.

There are also a number of issues which are not addressed in section 4 but which are guaranteed in better practice media laws. The first is the right of journalists and others who report in the public interest to protect the secrecy of their confidential sources of information. The work of a journalist often depends on the cultivation of confidential sources of information, whose provision of (often sensitive public interest) information to the journalist depends on their belief that their identities will be protected. Better practice is to protect journalists against any form of criminal or civil sanction for refusing to disclose their confidential sources. Myanmar currently lacks this sort of legal protection for journalists.

In most countries, the rules on source protection are not absolute, but they are only subject to exceptions under strictly defined conditions, namely where an overriding need for disclosure has been identified, the circumstances are of a sufficiently vital and serious nature, and reasonable alternative measures to obtain the information do not exist or have been exhausted. As an example, section 10 of the United Kingdom Contempt of Court Act, 1981, states:

> No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication

> for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

Second, it would be useful to provide protection for editorial independence in section 4. Editorial independence is the right of media outlets, in accordance with their own structures and systems, to decide what to report on, what news to carry and how to present the news. Of course media outlets remain potentially liable for the content they carry if it is in breach of the law. But that should always be a system of *post facto* liability. Protecting editorial independence is a way of prohibiting political and other forms of interference with the media.

Third, the right to publish and broadcast anonymously should be protected. While anyone who is harmed by content which is disseminated by the media should always be able to apply for redress against those responsible, it is enough to be able to sue the media outlet. If the editor wishes to protect his or her staff, and take collective responsibility for the content, that should be allowed. For serious criminal matters, the courts may order the editor to disclose the name of the individual who is responsible.

Fourth, it would be useful for the media law to recognise the right of journalists to organise themselves into associations and organisations as they may wish to do, subject to rules setting out the conditions for establishing organisations. Although this is not something that is currently under threat in Myanmar, it is still useful for Media Law to guarantee.

Fifth, it would be useful for the law to recognise the right of media outlets to use any means to distribute their content, subject only to rules setting out specific conditions for particular distribution systems (such as the licensing rules for accessing broadcasting frequencies found in the Broadcasting Act). It is important, in particular, to protect the right of the media to use online systems of distribution without constraints other than those which are required for the technical functioning of those distribution systems.

Section 7 of the Law sets out the right of journalists working in zones of "war, riot, public demonstration" to obtain protection from any security bodies which are working in those areas. This is useful but the obligation should not be limited to those working in conflict zones. While they face particularly acute dangers, those working in stable environments who report on particularly sensitive issues, such as exposing corruption or organised crime, may also face risks. As a consequence, better practice is to extend the right to request protection to anyone who is or may be targeted specifically for exercising their right to freedom of expression. The law should also call on the authorities to pay special attention to ensuring that those who commit crimes against journalists or others in retaliation for exercising their

right to freedom of expression are brought to justice. Such attacks are not only individual crimes but also attacks on freedom and democracy more generally and, as a result, they need to be treated with particular seriousness.

Recommendations:

- Section 3 of the Law should include an explicit reference to guaranteeing freedom of expression and media freedom, and refer to the fundamental role of the press in a democratic society.
- Section 4 of the Law should include a general statement about the right to investigate and report on any matter which is not prohibited by a law which conforms to constitutional standards, with the three bullets that follow being understood as particular examples of that right.
- Consideration should be given to incorporating the following protections into section 4:
  - A set of rules on the protection of confidential sources of information.
  - Rules on protection of editorial independence.
  - Protection for the right to disseminate content anonymously through a recognised media outlet.
  - Recognition of the right of journalists to organise themselves freely into associations and organisations.
  - Protection for the right to disseminate media content through any means of distribution, subject to the regulation of these distribution systems by other laws.
- Consideration should be given to extending the right recognised in section 7 to all journalists who are, for whatever reason, targeted for attack due to exercising their right to freedom of expression.
- Consideration should be given to calling on those responsible for the administration of justice to give particular attention to criminal cases which are motivated by a desire to silence the victim, given that these represent an attack on all members of society.

3. Standards in the Code of Conduct

Section 9 of the Law sets out a number of precise standards relating to the duties and ethics of media workers. These include such things as respecting the presumption of innocence, not making "improper" technological changes to content, and refraining from mentioning anything which may undermine reputations or human rights. The last clause here, section 9(i), calls on the media to comply with any ethical rules set by the Myanmar Press Council (MPC).

The problem with this approach is that all of these issues are complex, and cannot be addressed properly, including as to their exceptions and defences, in such a brief set of rules. Thus, in contrast to this section, which is less than a page long, the Code of Conduct adopted by the MPC is fully ten pages long.

A better approach would be only to refer to the sorts of issues that needed to be elaborated on in the Code of Conduct in the main law, and then to leave it to that Code to set out clear rules in each area. This is the approach taken in the Broadcasting Law, 2015, and it is an approach which allows for the Code to create the appropriate balance between different interests. For example, whereas section 9(g) simply calls on the media to avoid affecting reputation, which is not realistic, the MPC's Code devotes considerable attention to the issue of how to balance the need to protect reputations while also respecting the obligation of the media to report on matters of public interest.

The rule set out in section 8(a) about when it is appropriate to use subterfuge – or to refuse to identify oneself as a journalist – to collect the news is another example of an issue which does not receive sufficiently careful treatment in the Law. It would be preferable to list this as an issue which needed to be addressed in the Code to be adopted by the MPC, while leaving the specific details to that Code. In fact, the current MPC Code has several detailed provisions on this issue.

Recommendation:

- Consideration should be given to fundamentally revising the approach towards regulating content in the Law and, instead of setting out directly binding rules, to provide a list of the issues which the Code to be adopted by the MPC needs to address and then letting the MPC draft appropriately tailored rules for inclusion in the Code in each area which strike an appropriate balance between media freedom and the need for the media to behave in an ethical manner.

4. Application of the Code of Conduct

At present, there is some confusion as to how the standards set out in section 9 of the Law are to be applied. Pursuant to section 21, anyone who feels that they have been aggrieved by media behaviour which is not in line with section 9 may complain to the MPC. Pursuant to section 22, in this case the MPC shall carry out a process of

"conciliation" to try to resolve the complaint, failing which, the complainant may go to court.

In terms of actual penalties, section 25(a) of the Law provides for fines of 100,000 to 300,000 kyats for breach of section 9(b), namely failing to publish an appropriate correction in case inaccurate news has been published. In turn, section 25(b) provides for fines of between 300,000 and 1,000,000 kyats for breaches of sections 9(d), (f) and/or (g) (namely improper technological modification, breach of intellectual property rights, or disseminating content which negatively impacts on the human rights or reputation of a specific person). Finally, section 26 provides that breach of section 9(h) – governing incitement based on birthplace, religion or nationality – shall lead to prosecution under any existing law. No penalty is provided for in case of breach of sections 9(a), (c), (e) or (i).

There are a number of problems with these rules from a self- or co-regulatory perspective. First, a key point of establishing the MPC is for it to address conflicts over unprofessional behaviour in the media. To limit its role to conciliation is too restrictive. Press councils around the world have the power to resolve complaints through adjudicative or decision-making processes, and are not limited to conciliation.

Second, the law should indicate clearly what powers the MPC has in case of a breach of the Code and these powers, in line with the comment just above, should be binding on media outlets (i.e. they should be required to follow the orders of the MPC, subject to appealing against them before the courts). Such powers should apply to breaches of all parts of the Code (unlike the current situation where breach of certain rules does not appear to attract any sanction). Section 19(b) of the Rules sets out the only clear power of the MPC in such cases, which is to issue warnings to media outlets and to publicise those warnings. It seems that the MPC does not have the power to impose the fines stipulated under section 25 of the Law because section 30 of the Law indicates that action under section 25 shall be instituted by filing a court case.

Better practice is grant the power to oversight bodies like the MPC to impose a range of possible sanctions or measures in case of breach of a code of conduct. The lowest level measure, which will often be sufficient, is to issue a warning. It should also, however, be possible for the MPC to require media outlets to carry a statement acknowledging that they have acted in breach of the Code. Finally, in more serious cases, it may be legitimate for the MPC to impose fines on media outlets, but this power should be limited to cases where the conduct in question has been particularly egregious and alternate measures of resolution (i.e. warnings and carrying statements) have been unsuccessful.

Third, while it is, of course, always possible to appeal from a decision of an administrative body like the MPC to the courts, on the basis that the body has not applied the law properly, there are two very different possible types of review. One is where the courts review the whole matter again and substitute their own decisions for that of the administrative body, broadly referred to as *de novo* review. The second, which is wider administrative judicial review, is where the courts simply determine whether or not the administrative body acted within the scope of its legal authority, for example as to matters of jurisdiction, procedural justice and penalties. In such cases, any review of the substance of the interpretation of the Code would be limited to assessing whether or not the interpretation applied by the MPC was not unreasonable, arbitrary, capricious or an abuse of discretion (but not necessarily whether it was 'right' in the sense that the court would have come to the same conclusion). This sort of review recognises the specialised expertise of bodies like the MPC in their areas of work – in this case media professionalism – and respects their decisions unless there is clearly something wrong with them. For bodies like the MPC, this is a better approach, given that the courts are not well equipped to address questions of media professionalism.

Fourth, in some countries – notably Indonesia – the press council is treated as a specialised body for media complaints. This is based on the idea that the media law is a *sui generis* or specialised legal regime for the media and that, as such, it takes priority over other legal rules when it comes to matters involving the media. The most important specific implications of this are that legal complaints regarding the media which involve matters which are addressed in the code of conduct – such as privacy, defamation, hate speech and so on – cannot be the subject of another legal challenge – i.e. through the general criminal or civil law – until they have already been the subject of a complaint to the press council. In other words, if anyone has a dispute with the media regarding something which is addressed in the code of conduct, they must first complain to the press council and may only go to the civil or criminal courts once that process has been completed (and, in that case, only obtain any further redress to the extent that any sanctions applied by the press council were insufficient to redress the harm done).

Recommendations:

- The MPC should have binding powers to adjudicate complaints about unprofessional behaviour in the media, in addition to any powers it has to mediate or undertake conciliation between complainants and media outlets.
- The law should set out a progressive range of measures or sanctions which the MPC can take or order media outlets to take where it finds a breach of the Code of Conduct and such orders should be binding in the sense that media outlets are required to respect them.

- The law should only provide for administrative and not *de novo* judicial review of the decisions of the MPC, in the sense that, in terms of substantive interpretation of the Code of Conduct, the court will only overturn the decision of the MPC where its interpretation was unreasonable, arbitrary, capricious or an abuse of discretion.
- Consideration should be given to putting in place a system along the lines of that of Indonesia, whereby the News Media Law is treated as a *sui generis* law for the media, leading to a situation whereby complaints involving the media would need to go to the MPC first before going to the courts.

5. Appointments to and Independence of the MPC

The members of the MPC are appointed in accordance with sections 13-16 of the Law, as elaborated upon in sections 5-17 of the Rules. The Law establishes only general rules for the appointment of members, which includes three members being nominated, respectively, by the President of the Union, the Chairman of the *Pyithu Hluttaw* and the Chairman of the *Amyotha Hluttaw*, and between 12 and 27 other members, as proposed by various media or writers' groups, on the one hand, and civil society groups working in other areas, on the other hand. The Rules clarify the process somewhat by providing for the appointment of an election committee, by the Ministry of Information in consultation with the MPC, comprised of three former MPC members (not seeking re-election), two legal experts, three media experts (also not seeking election) and one senior official.

There are a number of basic problems with this approach, which could be substantially improved. First, the core rules on appointments should be in the Law and not the Rules. For example, the main provisions relating to the election committee should be set out in the Law.

Second, at present, section 13(d) of the Law provides that there shall be 15 to 30 members, while section 16(b) of the Rules provides for a quick replacement if the number of members falls below 15, at which point the MPC would become non-operative. It may be noted that 30 is a huge number for such a body and that countries with press councils with such a large number of members tend not to be very effective. In contrast, the Press Council of Indonesia, which is one of the most effective in the world, only has nine members, despite that being an enormous and very diverse country.

Furthermore, a far more robust approach than the one taken currently in the Law would be to set a fixed number of members. This avoids the uncertainty of having a potentially wide range of number of members and helps ensure continuity and

stability on the body. Then, in parallel to this, the Law should set a minimum number of members who would form quorum for decision-making purposes, normally one-half of the members, rounded up (so, if there were 11 members, quorum would be six persons). In this way, missing one or two members would not suspend the operations of the body, but decisions might only be taken at a meeting where enough members were present. Such systems are in place in many countries for administrative bodies and they have proven to work very well and to be robust against minor changes in the number of members.

Third, there are problems with the manner of appointment of the election committee. The Ministry of Information appears to have important powers regarding appointments to the committee, which is not appropriate given that this is supposed to be an independent body. And these powers are exercised in consultation with the existing MPC, which is again not appropriate given that a number of the members of the MPC can be expected to be seeking re-election during any given election (members seeking re-election cannot actually sit on the committee, but the whole MPC appoints the committee).

An alternative approach for this is recommended. This could, for example, involve having different sectors nominate members of the committee (for example, the bar association could nominate one or two members, the leading journalists' associations one or two, academics another one and so on).

Fourth, given the cardinal importance of independence for media regulatory bodies, it is not appropriate for representatives to be proposed directly by official bodies, even though they are a small minority at the moment. Although, in the past, it was felt that officials should have a role to play on all bodies, in fact there is no need for an official to sit on the MPC. This has already led to some legitimate criticism and it is not in line with better practice. Similarly, there is no need to have a senior official on the election committee for the members of the MPC.

In addition to these more significant issues, we have the following comments on the process of appointing and removing members of the MPC:

- Members whose term of office is terminated before the end of their tenure, in accordance with section 16 of the Law, should be replaced, in accordance with section 16 of the Rules, only where six months or more remain of their tenure.
- Section 10 of the Rules envisages more than four times as many members of the MPC being nominated by media groups as by other civil society groups (between 10 and 22 for the former, and only two to five by the latter). This is not appropriate and could lead to accusations that the MPC is too close to the media. In Indonesia, for example, one-third of the members represent

the general public while in the United Kingdom a majority of all members, including the chair, do not come from the media community.

- According to section 11(a) of the Rules, the Ministry of Information can, in consultation with the MPC, issue criteria for members. This is not an appropriate role for the Ministry to play. The main rules should be set out either in the Law or in the Rules (which are adopted by Cabinet).
- Section 7 of the Rules sets out various prohibitions on members of the MPC. This should be moved to the main body of the Law, as it is an important provision, and a prohibition on elected representatives, in addition to officials, should be added. In addition, a set of positive requirements for members should be added, for example requiring them to be citizens, to have leading expertise in their fields and to be recognised as being upstanding members of society.

Section 19 of the Law provides that the sources of funding for the MPC shall be grants from the government, donations and aid from different sources and contributions from media businesses. In practice, and based on the experience of other countries, contributions from the media can be expected to be limited in nature. In addition, while donors will likely continue to support the work of the MPC, they will be unlikely to contribute towards supporting regular operating expenses. The source of funds for this, then, is likely to remain largely dependent on the government.

In light of this, ways to protect this source of funding from interference should be considered. One approach, which is used in many countries, is to require the budget for the press council to be included formally as a budget line in the overall budget, whether it falls under the budget of a ministry or is an entirely separate budget line. This at least ensures that parliament formally approves, and hopefully considers, the budget allocated to the body.

Recommendations:

- The core provisions on the appointment of the members of the MPC should all be found in the primary law and the rules should only elaborate on these core provisions.
- Consideration should be given to substantially reducing the number of members of the MPC, for example to nine, 11 or 13.
- Consideration should be given to providing for a fixed number of members on the MPC, rather than a range as is currently the case, and then to setting a minimum quorum or number of members who would need to be present for decision-making purposes.
- An alternative approach for the appointment of members of the election

committee for members of the MPC should be used.
- There should be no representatives proposed directly by official bodies on the MPC or officials on the election committee for members of the MPC.
- Members of the MPC whose term of office is terminated before the end of their tenure should be replaced only where six months or more remain in their term of tenure.
- The ratio of members nominated by media and by other civil society groups should be reconsidered in favour of more members being nominated by the latter.
- The Ministry of Information should not be able to set criteria for members, apart from via having Cabinet adopt Rules.
- The prohibitions for members should be moved from the Rules to the Law and a prohibition on elected representatives should be added.
- A set of positive requirements for members should be added to the Law.
- Ways to enhance the independence from the government of the funding of the MPC should be considered.

6. Operations of the Myanmar Press Council

The powers of the MPC are set out in section 17 of the Law, as elaborated on in section 19 of the Rules. The Council has a wide range of powers but it does not explicitly have the task of promoting freedom of the press, although section 19(c) of the Rules does empower it to publicise interferences in the activities of media outlets. It also does not have any explicit power to resolve general disputes between the media and the government or other sectors of society. This power has proven to be particularly useful in Indonesia, where the Press Council has often sponsored negotiations between the media and other players when a conflict arises.

Better practice is for the laws establishing administrative bodies to set out certain general rules regarding decision-making meetings, so as to ensure that these are conducted fairly and properly, and that a proper record is kept of decisions. The idea of setting a minimum quorum for decision-making has already been mentioned. These sorts of rules might, among other things, also provide for who shall chair the meetings, for the conduct of voting at meetings, for the taking and adoption of minutes of the meeting, and so on.

Recommendations:

- Consideration should be given to adding the powers to promote press freedom and to resolve conflicts between the media and other sectors of

society to the existing powers of the MPC.
- At least a basic framework of rules governing decision-making meetings of the MPC should be added to the Law.

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International Media Support (IMS) *is a non-profit organisation working with media in countries affected by armed conflict, human insecurity and political transition. In more than 45 countries worldwide, IMS helps to strengthen professional practices and ensure that media and media workers can operate even under challenging circumstances. In Myanmar, IMS is implementing a comprehensive media development programme supported by Denmark, Norway and Sweden focusing on legal reform, capacity development and professionalization of the media, outreach and access to information, and the peace process.*

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