Myanmar: Analysis of the Second Amendment of the Broadcasting Law

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On 1 November 2021, the Myanmar State Administrative Council, the de facto government of the military regime running Myanmar, adopted the Second Amendment Law to the Television and Radio Broadcasting Law, Law No. 63/2021 (Second Broadcasting Amendment). It did so purportedly acting under Section 419 of the Constitution of the Republic of the Union of Myanmar, which provides that, during a state of emergency,[1] the "Commander-in-Chief of the Defence Services to whom the sovereign power has been transferred shall have the right to exercise the powers of legislature, executive and judiciary." No public consultations were held prior to the adoption of this piece of legislation.

The main changes effected by these amendments were, first, to substantially expand the scope of the definition of "broadcasting" in section 2(a) of the 2015 Broadcasting Law, No. 53/2015 (Broadcasting Law), to also include "any other technology for the people to directly catch the television and radio programmes", while removing the following limitation from the earlier definition: "In this definition, Internet-based broadcasting shall not be included." Second, the penalties in sections 96-99, which had hitherto been limited to fines, all had prison sentences – of varying lengths but ranging between a minimum of six months and a maximum of five years – added to them. Third, a new section 99-a was added, providing for fines of between MMK 10,000,000 and 50,000,000 (approximately USD 5,500-27,500) and imprisonment of between one and five years, for breaching any subordinate rules (such as by-laws, rules, regulations or orders) which had been adopted under section 106 (providing for the adoption of such subordinate rules). Finally, a new section 105-a provides that offences under the law shall be cognizable offences, meaning that police can make an arrest for such offences without a judicial warrant.

All of these changes are highly problematical from the perspective of international law standards relating to freedom of expression and criminal due process. Indeed, looking at them as a package, it seems hard to avoid the conclusion that the main intention behind these changes is to allow for the imposition of prison sentences on individuals who disseminate audio or video content online that is critical of the military regime. The following sections of this Analysis focus, respectively, on the scope of the definition of broadcasting and other issues (sanctions and criminal due process guarantees).

[1] The military claimed that a state of emergency was declared on 1 February 2021.

Scope of Broadcasting

The exact nature of the expansion of scope of the definition of "broadcasting" through the Second Broadcasting Amendment depends on what is understood by the term "television and radio programmes". Neither this, nor either "television" or "radio" separately, are defined in the Broadcasting Law. It seems quite clear that the intention behind these amendments, given that they removed the explicit exclusion of "Internet-based broadcasting", is to cover the dissemination of at least certain types of video or audio content online. What is not clear is how far this will go. At one extreme, it could be deemed to cover even a video or audio clip disseminated over commercial websites such as YouTube, Facebook or TikTok. Other options are that it would cover: anyone who disseminates video or audio content over a private website, anyone who regularly disseminates video or audio content, or perhaps only those who include news among their offerings; print media outlets that also disseminate video or audio content (which is virtually all such outlets today); or only online entities that more closely resemble radio or television stations. Yet another possibility is that the scope of this will be defined through subordinate legislation, such as by-laws, rules or regulations.[2]

According to international law, any restriction on freedom of expression must be set out in a law that is clear and accessible. The discussion below on the implications of expanding scope of the definition of "broadcasting" makes it very clear that this does represent a restriction on freedom of expression. As such, the very fact that the scope of new definition is so unclear renders it illegitimate as a restriction on freedom of expression.

The most significant implication of expanding the scope of the definition of "broadcasting" is that any entity which wishes to engage in broadcasting must, pursuant to section 31(a) of the Broadcasting Law, obtain a licence prior to starting broadcasting activities.[3] Pursuant to section 14(b) of the Law, the Council is responsible for issuing broadcasting licences, while sections 31-36 set out reasonably detailed rules governing the licence application process. It is quite clear from these rules that the issuing of licences is a discretionary matter which depends, among other things, on "broadcasting policy, interest of potential broadcasters and market capacity and the public interest" (section 34(a)). The Broadcasting Law also sets out various grounds for revoking a licence, including a serious violation of the legal rules or programme standards (section 42(d)). Licensees must also pay a licence fee (section 45). Operating a broadcasting service without a licence is, pursuant to sections 92, 93 and 95, prohibited, subject to fines and now, with the amendments, prison sentences (see sections 96, 97 and 99).

According to international law, while it is legitimate to require broadcasters to obtain a licence, it is not appropriate to require this of the print media. Indeed, even registration requirements for the print media are looked on with suspicion under international law and are not legitimate if the grant officials the discretion to refuse registration. For example, in their 2003 Joint Declaration, the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, and the Organization of American States (OAS) Special Rapporteur on Freedom of Expression stated:

[2] Normally, under the Broadcasting Law, these would be issued by the Ministry of Information with the consent of the cabinet.
[3] See also sections 92, 93 and 95, which prohibit the operation of a broadcasting service without a licence or where the licence has been terminated, revoked or suspended.

> Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.[4]

The fact that print media outlets offer audio and audio-visual content through their websites, already an increasingly common practice at the time the 2003 Joint Declaration was adopted, clearly does not affect this standard.

Although the special rapporteurs have not specifically addressed the issue of licensing of Internet activities, this issue was addressed in the Council of Europe's Declaration on freedom of communication on the Internet, Principle 4 of which states, in part:

> Furthermore, the active participation of the public, for example by setting up and running individual websites, should not be subject to any licensing or other requirements having a similar effect.[5]

It is clearly impractical to try to impose a licensing requirement on the activities of individuals through social media and this would in any case represent an even more serious breach of the right to freedom of expression than licensing individual websites.

The question of whether it is legitimate to require online entities that effectively operate as radio or television stations to obtain a licence is more complex. This is not the practice in a large majority of democratic States. An important reason for this is that scarcity, which is a key justification for licensing other broadcasters, simply does not exist online. Furthermore, licensing online broadcasters would likely constrain the growth and development of this sector, undermining diversity, a key freedom of expression value. There is an ongoing debate about how to ensure fair competition between licensed broadcasters and the large on-demand or over the top services with which they now compete, such as Netflix or Amazon Prime Video, which operate largely free of regulatory constraints.

At a minimum, to be legitimate under international law, any requirement for online broadcasters to be licensed would need to include a very clear definition of which services it applied to, which should be limited to entities which effectively operate as radio or television stations, and be justified by reference to a legitimate aim, such as fair competition or the promotion of diversity. This clearly does not apply to non-profit operators which would, as a result, need to be excluded from the obligation to obtain a licence. The Second Broadcasting Amendment clearly fails to meet these standards.

The Broadcasting Law also sets out a number of specific rules relating to different types of broadcasting services – public service, commercial, community, government and broadcast

[4] Adopted 18 December 2003. The special rapporteurs have been adopting Joint Declarations on freedom of expression themes together since 1999, all of which are available at: https://www.osce.org/fom/66176. See also General Comment No. 34, 12 September 2011, para. 39, https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf. General Comments are authoritative interpretations of rights that are issued periodically by the UN Human Rights Committee, the official body that oversees compliance with the *International Covenant on Civil and Political Rights* (ICCPR), the main UN treaty guaranteeing civil and political human rights.

[5] Adopted by the Committee of Ministers on 28 May 2003, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805dfbd5.

distribution services (sections 46-66) – and then a number of rules that govern all broadcasting services. Some of the latter include:

- Allocating minimum percentages of time to programmes produced locally and by independent producers (section 67).
- Broadcasting programmes for special audiences (section 69).
- Preserving programmes for 28 days (section 70).
- Providing programmes of "high historical value" to various archival bodies (section 71).
- Respecting various rules relating to advertising (sections 72-4).
- Respecting the broadcasting code of conduct (sections 75-82). The code shall impose a number of obligations on broadcasters, including to respect balance and impartiality in the news, to strive for accuracy in the news, to classify programmes, to show respect in terms of taste and decency, and in relation to religion, human rights issues and the coverage of crime.
- Rectifying mistakes and providing a right of reply (sections 84-6).

It is quite clear that while it may be legitimate to impose these sorts of requirements on professional broadcasters, and potentially also on the audio and video content disseminated by print media outlets, these sorts of requirements are entirely inappropriate for most of the audio and video content disseminated over social media platforms or through other private websites (other than those operated by professional media). Consider, for example, the absurdity of requiring a commercial company which hosted an advertising video clip on its website to offer a right of reply or to produce programmes for special audiences, or even of requiring a private video blogger to allocate time to independent producers. The code of conduct, in particular, is specifically designed to apply only to professional broadcasters.

Recommendations

- The expansion of the definition of "broadcasting" should be removed entirely and replaced with the earlier definition of this.
- At a minimum, the definition of "broadcasting" should, insofar as it applies to online dissemination of content, be clear in scope, be limited to entities that which effectively operate as radio or television stations, be justified by reference to a legitimate aim and exclude non-profit services.

Other Issues

An important part of the Second Broadcasting Amendment is devoted to adding imprisonment as a sanction to the fines currently found in sections 96-99 of the Broadcasting Law, effectively transforming them from administrative into criminal offences. These changes are as follows:

- The section 96 sanction, for breach of section 92, namely operating a broadcasting service without a licence, has been increased from MMK 30-50,000,000

(approximately USD 16,500-27,500) to the same fine and/or imprisonment of between three and five years.

- The section 97 sanction, for breach of section 93, namely continuing to operate a broadcasting service after termination of the licence, has been increased from MMK 5-10,000,000 (approximately USD 2,750-5,500) to the same fine and/or imprisonment of between six months and one year.
- The section 98 sanction, for breach of section 94, namely operating a broadcasting service in breach of the rules on concentration of ownership or having deliberately provided wrong information on a licence application, has been increased from MMK 10-30,000,000 (approximately USD 5,500-16,500) to the same fine and/or imprisonment of between one and three years.
- The section 99 sanction, for breach of section 95, namely continuing to operate a broadcasting service after the licence has been suspended or revoked, has been increased from MMK 30 to 50,000,000 (approximately USD 16,500-27,500) to the same fine and/or imprisonment of between three and five years.

A new section 99-a is similar in its effect. It provides for fines of between MMK 10-50,000,000 (approximately USD 5,500-27,500) and imprisonment of between one and five years for breaching any subordinate rules – specifically "bylaw, rules, discipline, notification, order, directive or any item of procedure" – adopted under section 106 (which provides for the adopting of such subordinate rules). Previously, section 87 allowed for administrative sanctions to be imposed on broadcasters which breached the law or "rules or regulations adopted by the Council". Section 88 provided that the sanction "shall depend on the gravity and frequency of the offense or violation" and then set out a range of possible sanctions starting with warnings and going up to licence revocation.

Under international law, sanctions for breaches of rules which impose restrictions on freedom of expression must themselves be proportionate, even where some sanction is warranted. While it is appropriate to impose sanctions for all of the actions set out in sections 92-95, imprisonment is a wholly excessive sanction for them. These are administrative wrongs for which administrative sanctions, i.e. fines, are appropriate. Looked at from another perspective, breach of all of these rules would normally be motivated by financial considerations, so a financial penalty is an appropriate way to address them.

Beyond this, general principles relating to the right to liberty, protection against cruel and unusual punishment and criminal due process rights also mean that any sentence of imprisonment must be strictly proportionate to the gravity of the crime committed. These principles mean that minimum sentences, especially for crimes which "apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people", are likely to breach human rights standards.[6] The offences covered by sections 92-95 of the Broadcasting Law, in particular the ongoing operation of a broadcasting service without a current licence, fit all of these descriptions, whether or not the scope of this obligation is interpreted broadly or narrowly. For example, many different individuals may be considered to play a part in the ongoing operation of radio or television station, all of whom might be caught by these rules. In contrast, the fines that were available previously would presumably be levied on the corporate actor which owned the station.

[6] See, for example, R. v. Lloyd, [2016] 1 SCR 130, para. 35 (Supreme Court of Canada), https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15859/index.do.

Finally, a new section 105-a provides that offences under the Broadcasting Law shall be cognizable offences. This means that police can make an arrest for such offences without a warrant, normally only as long as reasonable grounds for this exist. Normally, the category of cognizable offences is reserved for the very most serious crimes, given the significantly expanded police powers that these offences engage. Examples include actions like murder, waging war, rape and kidnapping.[7] The offences in question simply do not reach this level of seriousness.

Recommendation

- The expanded sanctions in sections 92-95, as well as new sections 99-a and 105-a should be removed.

[7] See, for example, Advocate Chikirsha Mohanty, "What is a Cognizable and Non-Cognizable offence in India?" LawRato, 22 September 2021, https://lawrato.com/indian-kanoon/criminal-law/what-is-a-cognizable-and-non-cognizable-offence-in-india-612.