

PEN MYANMAR

SCORECARD ASSESSING FREEDOM OF EXPRESSION IN MYANMAR

APRIL 2017

At the one year anniversary of the National League for Democracy leadership PEN Myanmar and partners find significant shortfall in free expression reform

“The government has the power to promote media freedom and freedom of expression, but it hasn’t made it a priority.” – Scorecard participant

INTRODUCTION

On 11 April 2017 PEN Myanmar gathered expert partners to reflect on the state of free expression in Myanmar at the one year anniversary of the National League for Democracy leadership. This is the first of what will be an annual free expression scorecard. In November 2016 PEN Myanmar and its partners released a pilot scorecard midway through the NLD government’s first year. Those initial findings are used as a comparative baseline for this one year assessment. Six groups participated in the first mid-term scorecard; 14 groups (listed below) participated in the one year assessment.

A free expression environment that fosters informed dialogue, protects open debate, and promotes government transparency and accountability is a crucial foundation for democratic reform. The expert participants produced a freedom of expression scorecard assessing the progress – or lack of it – by the new government in the key areas needed to strengthen protections for free speech, media freedom, information access, and freedom of assembly. They also developed a series of recommendations.

Like the six-month scorecard, the scores tallied by the experts – 8 out of a possible 60 - indicated a significant lack of progress in instituting key reforms to secure free expression in Myanmar. Acknowledging that the challenges for reversing decades of repression are significant, participants pointed to multiple areas in which no clear path forward has been explicated by the new government, let alone embarked upon.

METHODOLOGY

Free expression indicators

- Laws and regulations
- Media independence and freedom
- Digital freedom
- Freedom of assembly, speech and opinion
- Right to information
- Safety and security

The scorecard process developed by PEN Myanmar uses six key indicators of a robust free expression environment (left), and takes into account government commitments, reforms, setbacks, failures, and inactivity. As their point of comparison, participants considered the state of free expression six months ago, when the first half-term scorecard was published, as well as the state of free expression under the previous Union Solidarity and Development Party (USDP) quasi-civilian administration (2010-2015). As there are no scorecards to serve as a baseline of that latter time period, participants drew on their combined experiences, as well as on media and other freedom of expression reports. The final tally reflects the combined scores of the individual participants.

Participating groups included (in alphabetical order): Article 19; Assistance Association for Political Prisoners (AAPP); Burma News International (BNI) ethnic media network; Human Rights Defenders Forum (HRDF); Human Rights, Human Dignity Film Festival (HRHDF); Myanmar IT for Development Organisation (MIDO); Myanmar Journalists Association (MJA); Myanmar Journalists Network (MJN); Myanmar Journalists Union (MJU); Myanmar Media Lawyers Network (MMLN); PEN Myanmar; Pyi Gyi Khin; The Equality Myanmar; and the Yangon Journalism School (YJS).

As a small number of the groups were not able to attend the scorecard discussion on 11 April 2017, they were given an opportunity to participate electronically. To enable an open discussion, participants are not identified or quoted by name in the assessment. The scoring, content and quotations represent diverse views expressed during the assessment, and are not necessarily held by each individual.

FINDINGS

'' When people are punished for criticizing the NLD, no one dares speak up for them.'' - Scorecard participant

ONE YEAR FREE EXPRESSION SCORECARD APRIL 2017

Total score: 8 out of 60

Score for each indicator:

- Laws and regulations: 2
- Media independence and freedom: 1
- Digital freedom: 1 (rounded up from 0.6)
- Freedom of assembly, speech, and opinion: 2
- Right to information: 1
- Safety and security: 1

Points ranking methodology:

- 0 - regression
- 1 - no progress
- 2 - very little progress
- 3 - a little progress
- 4 - some progress
- 5 - average progress
- 6 - more than average progress
- 7 - considerable progress
- 8 - substantial progress
- 9 - very substantial progress
- 10 - outstanding progress

In assessing the performance of the NLD government with regard to free expression during the first year in office, the group awarded a **score of 8 points out of a potential 60.**

The range for each of the six indicators was 0-10, with 0 being the lowest score (regression) and 10 the highest (outstanding progress). The range of the potential cumulative score was 0-60, with 60 being the highest score, and 0 the lowest. The final tally reflects the cumulative scores submitted by the individual participants for each indicator.

Comparison of the mid-term and one year scorecards

The expert participants awarded the same total score for the mid-term (November 2016) and one year (April 2017) scorecards – 8 points out of a potential 60. Six groups participated in the mid-term assessment; 14 groups participated in the one year assessment. Despite the difference in number of participants, and range of backgrounds and experience, they awarded the same total score.

With regards to the scores for each indicator: the participants agreed that there was no change or improvement for four of the indicators and so awarded the same scores: law and regulations (2 – very little progress); media independence and freedom (1 – no progress); right to information (1 – no progress); and safety and security (1 - no progress).

The participants awarded slightly different scores for two of the indicators. While digital freedom was awarded 0 (regression) for the mid-term assessment, for the one-year scorecard it was awarded 0.6 (rounded up to 1). This was largely because there was no further regression. One of the

categories - freedom of assembly, speech, and opinion - received a slightly lower score: from 3 (little progress) to 2 (very little progress). This is largely because laws were amended yet local officials continue to intimidate in many of the same ways they did in the past. Further details about scoring for each of the indicators, as well as observations offered by the expert participants, follow the recommendations.

RECOMMENDATIONS

Expert participants in the scorecard assessment provided a range of recommendations for the NLD government to expand and expedite its attention to strengthening free expression protections and fostering a more open, democratic society. As there has been little to no progress over the past six months with regards to free expression, many of the recommendations are similar to those found in the mid-term scorecard:

Laws and regulations:

- Enable the participation of civil society (and the greater population) in the legal and regulatory reform process for free expression by creating a transparent and participatory process (including establishing clear guidelines for public participation and input into the drafting process when passing or amending laws).
- Review and amend existing laws that do not meet international standards, including, notably, the Penal Code, the 2013 Telecommunications Law, the 2014 Printing and Publishing Enterprise Law, and the 2014 News Media Law.
- Make the broadcasting law operational as soon as possible so as to ensure open distribution of licenses according to public interest.
- Reform public institutions to ensure independence, including, notably, of the judiciary.
- Implement the Universal Periodic Review (UPR) recommendations for reform (proposed in 2015 and accepted by the former quasi-civilian administration).
- Sign and ratify the International Covenant on Civil and Political Rights (ICCPR).
- Ensure the language (terms used) is consistent in all new and amended legislation.

Media independence and freedom:

- Provide a clear plan and timeline as to when the government will close state media and/or reform it (i.e. create a public service broadcaster).
- Abolish special licensing obligations for private media.
- Ensure that cases against media and journalists are brought to the press council, not directly to the courts.

Digital freedom:

- Abolish Article 66 (d) of the 2013 Telecommunications Law.
- Amend the privacy law (anti-surveillance law) – officially called the Citizens Personal Privacy and Personal Security Law - to include a provision that guarantees digital freedom without surveillance.
- Amend the Electronic Transactions Act.
- Clarify the principles of lawful interception, including circumstances in which interception can take place, the approving body, how requests are made, etc.
- Adopt a rights-based approach to address the policy gaps related to human rights issues presented by the use of technology.
- With regards to preventing online abuse and/or misuse of the internet and social media, promote safe behavior, including protecting privacy online and promoting digital literacy.

Freedom of assembly, speech, and opinion:

- Include provisions and practices in the freedom of assembly by-law that guarantee security for spontaneous protests and protesters; ensure people's right of assembly.
- Develop a plan for encouraging more tolerance in line with the UN Rabat plan of action, in particular using broadcast and other media to open up discussions and challenge prejudices.
- Foster expression in ethnic languages and ethnic states (including publishing and broadcasting).

Right to information:

- Enact Right to Information Law that guarantees access to information in all public sectors.
- Train government officials on proactive openness and voluntary disclosure of information.
- Develop government digital platforms that are effective, efficient and transparent.

Safety and security:

- When there is no public interest, stop prosecutors from supporting criminal cases against journalists and others who speak out. Complainants should instead be referred to the press council or, if needed, to the civil courts.

- Allow journalists more extensive access to conflict and frontline areas to report on issues of critical public interest and to promote transparency and accountability.
- Ensure safety of journalists in war zones, and conflict and disaster areas.
- To discourage impunity, conduct thorough investigations/prosecutions of past murder and physical attack cases,

REFLECTIONS ON THE FREEDOM OF EXPRESSION INDICATORS

Laws and regulations:

“The NLD is trying to reform laws but based primarily on their own perceptions, not on international human rights standards.” - scorecard participant

- Over the past year, the Myanmar parliament amended 19 laws, including the Peaceful Assembly and Peaceful Procession Act, and enacted 23 new laws, including one related to Freedom of expression – the Citizens Personal Privacy and Personal Security Law. In a positive step forward, it also abolished the Emergency Act and the State Protection Law.
- New and amended laws are not in accordance with international standards.
- Public participation and input into the drafting of laws has decreased over the past year (compared to the former quasi-civilian administration).
- Although CSOs have sent feedback and suggested drafts to the parliament, they have not been included in the upcoming parliamentary agenda.
- In a sign of positive progress, however, parliament members have indicated they are willing to consider PEN Myanmar’s proposed amended news media law.
- With regards to the amendment to the Peaceful Assembly and Peaceful Procession Act: according to the law, it is only necessary to inform the authorities 48 hours in advance of public meetings, protests, etc. yet local officials still ask to see detailed plans, including numbers of people, organizers, slogans, etc. and it is still very difficult to hold spontaneous strikes; as well, there is no clear definition of the use of force permitted to disperse crowds.
- According to CSOs, laws related to the Ministry of Home Affairs are very difficult to address.
- Although a CSO working group met a group of parliamentarians to discuss the chilling effect of section 66-d of the Telecommunications Law, the parliament has been silent on this topic.
- There are no specific channels that enable CSO involvement or public consultations in the drafting of laws.
- Since the NLD took power, the legal framework has remained largely the same, with a few exceptions, including, notably, the rescinding of the Emergency Provisions Act.
- The NLD has enacted a privacy law but without components related to digital freedom or data protection, and it is not clear
- There is no known plan for reforming criminal sanctions in the penal code, including sedition, which are not appropriate in a democratic country.

Media independence and freedom:

“As long as there are state media, we will not have media freedom” - scorecard participant

- The Ministry of Information still exists, as do state media operations.
- Due to Myanmar Now’s investigation into the abuse of young maids, members of the Myanmar Human Rights Commission, among others, had to resign. That demonstrates the power of media, yet it is a rare case in Myanmar. It is not possible to do these kinds of investigations into the government or powerful political actors.
- There are no protection mechanisms for journalists (including investigative journalists) or media outlets.
- There is no formal access to government information. Journalists and private media have difficulty getting updated information from government ministries.

- Ethnic media continue to struggle.
- The News media council is not yet fully independent.
- The public has started using the Telecommunications Law as a means to seek revenge; as a result, it is becoming difficult to amend it.
- CSOs used to freely upload human rights reports online, yet now they have to be cautious.
- The playing field for private media remains equally challenging, and/or has gotten worse. For example, despite statements made prior to being elected about state-owned media having no place in a democracy, the NLD has made no move – or announced any plan – to close state media; on the contrary, it has expanded its reach and maintained its privileged access to public funding, printing presses, distribution networks, and government information.
- Due to the threat of defamation, media workers are forced to practice self-censorship.
- Private media face pressures linked to, among others, politics, religion, the role of the military, ethnic armed groups, business, and economic development.
- Media are widely owned by business cronies of the military and former government, and media ownership is not transparent.
- There are no plans to end mandatory licensing of media outlets.
- As the broadcast law is not yet operational, the sector remains controlled by the state, military and their cronies (with the exception of the independent broadcaster DVB that broadcasts via satellite from Thailand, and five new content providers).
- Physical access by journalists to conflict zones, and to information about conflict zones, is severely restricted (for example, there is very limited and, in some case, no access to northern Rakhine State).
- The press council remains legally dependent on the government as, for example, the president has the power to appoint and remove members.
- State media under the NLD is better written propaganda.

Digital freedom:

''The government regressed during its first six months in office with regards to digital freedom; during the second half of the year it maintained the status quo'' - scorecard participant

- There are an increasing number of defamation cases using Section 66(d) of the Telecommunications Law, which prohibits actions that “extort, threaten, obstruct, defame, disturb, inappropriately influence or intimidate” and has a maximum 3-year prison term. There are more than 55 court cases since the new government came into power. Government officials and party members use the law to curtail their critics.
- Measured discussion and dialogue are noticeably absent online, particularly with regard to recent events in conflict areas.
- There has been continuing growth of intolerant speech online, including hate speech and so-called “fake news”, and the government has not responded with any demonstrable plan to proactively encourage more tolerant and open debate.

Freedom of assembly, speech, and opinion:

''We no longer need to ask permission to hold public protests, but there are consequences.'' - scorecard participant

- The Peaceful Assembly and Peaceful Procession Law has been amended and some restrictions waived, yet enforcement is still weak in remote areas i.e. some local officers continue to abide by old regulations.
- With reference to a recent nurses’ strike: although citizens are largely free to protest, institutions continue to pressure their leaders. There is no protection mechanism in the law for strikers.
- Although no action has been taken under the peaceful assembly law, other restrictive laws such as defamation and court offence are wielded (for example, more than 65 farmers were recently arrested after striking); so you are free to protest, but there are often repercussions and a lack of protection.

- Special branch still attends public event, protests, takes notes, and questions participants.
- Under the current government it is easier to obtain permission to hold film festivals on university campuses and in Maha Bandoola Park and People's Park in Yangon, as well as to organise CSO forums in ethnic states, and literary talks in different towns.
- On a positive note, the Human Rights, Human Dignity Film Festival was held in 29 places in 2016.
- Unlike the former administration, the NLD is not protecting religious extremists like the Ma Ba Tha; the movement is seen to have lost power since the NLD assumed office and citizens are thus less afraid to speak up. The Ministry of Cultural and Religious Affairs released a statement and intervened in the Myanmar Now/Ko Swe Win case. The State Authority Sangha Maha Nayaka Committee banned the hard-liner monk U Wirathu from delivering sermons in Myanmar for one year.

Right to information:

"Most ministries ignore requests for information or tell you to go somewhere else." - scorecard participant

- While the parliament and government ministries are generally approachable and easy to contact, there is no legislation linked to right to information.
- There has been little to no movement with regards to passing an RTI law that would codify requirements for disclosure.
- Chapter 9 of the News Media Law outlines the rules and conditions governing media workers' access to information from the government, yet in reality there is a great lack of consistency i.e.: although in some cases it is easier to make appointments and to obtain information, it is generally difficult, and most departments and ministries do not respond or have anyone assigned to deal with this task
- Most ministries ignore requests for information.

Safety and security:

"There has been no justice in impunity cases. The perpetrators are still free." - scorecard participant

- Myanmar's Ministry of Cultural and Religious Affairs intervened in support of the Myanmar Now investigative journalist Ko Swe Win who was being sued for defamation by Ma Ba Tha leader U Wirathu. This is the first time the Ministry has intervened in this kind of case. The case against Ko Swe Win has subsequently been dropped.
- Impunity continues. There has been no progress in the Ko Par Gyi case, a freelance reporter who died while in military custody in 2014 in Mon State, or in the case of Ko Soe Moe Tun, the investigative journalist who was found dead on the side of the road in Monywa, Sagaing Region.
- There has been some progress in conflict areas i.e. some cases received attention and those who committed the crimes were brought to justice. For example, the military admitted for the first time that five civilians were killed during interrogations.
- The media council does not have enough power to protect journalists and media and so is not as effective as it could be.
- Journalists feel insecure, and at times unsafe, when doing sensitive investigations.
- Government officials, NLD party members, their supporters, businesses, and media outlets are very sensitive to criticism and often resort to defamation accusations. Fear of such actions fosters self-censorship.
- On a positive note, there is generally less fear of surveillance under the NLD.
- Neither the press council nor media organisations have adequate plans and capacity to protect journalists.
- Freelance journalists are vulnerable, and have no legal or institutional protection.

The freedom of expression scorecard discussion was organized by PEN Myanmar, with support from PEN America. For more information, please contact PEN Myanmar program manager Zar Chi Oo at +95-95055041 or +95-979 5380745

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4. Human Rights Defenders Forum (HRDF) (<https://www.facebook.com/HRDefendersForum/>)
5. Human Rights, Human Dignity Film Festival (HRHDF) (<http://www.hrhdff.org/>)
6. Myanmar IT for Development Organisation (MIDO) (<https://www.facebook.com/Myanmarido/>)
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