Myanmar: Telecommunications Law, 2013

March 2017

Legal analysis

Executive summary

In March 2017, ARTICLE 19 analysed the Telecommunications Law 2013 (the Law) in the Republic of the Union of Myanmar for its compliance with international freedom of expression standards. The analysis not only highlights concerns and conflicts with international human rights standards within the Law but also actively seeks to offer constructive recommendations on how the Law can be improved

We note that some aspects of the Law are positive, such as its promotion of media pluralism through outside competition in Myanmar. However, the Law contains onerous provisions which have been used to severely limit freedom of expression and freedom of the media. These include Article 66(d), which provides criminal penalties for insults and defamation online, as well as Articles 40, 76, and 77 which provide powers of warrantless entry and emergency interception under broad circumstances not subject to prior judicial review. The consequence is that courts or other independent authorities are prevented from reviewing surveillance of or access to subscriber information and communications.

The Law also uses many key operative terms that are nowhere defined, including 'national security,' 'emergency situation,' and 'public interest.' The Posts and Telecommunications Department – which allocates telecommunications licenses - is tasked with enforcement yet it is subordinate to the Union Government and hence not sufficiently independent of the executive. Licensing requirements are not defined in law and the procedures as to their allocation or revocation are not transparent. Finally, the Law introduces criminal sanctions in the form of imprisonment where fines or administrative sanctions would suffice to enforce technical and regulatory violations.

The Law fails in these - and other respects - to sufficiently safeguard fundamental rights including the rights to freedom of expression as well as freedom of information and privacy.

Telecommunications are currently a central issue in Myanmar which has seen unprecedented expansion in this sector. However, we believe that it is vital that Myanmar's efforts to regulate these issues are consistent with its obligations to protect and promote freedom of expression under international law.

We also note the necessity for Myanmar to bring its other instruments, including but not limited to its 2008 Constitution and 2004 Electronic Transactions Law, in line with international freedom of expression standards.

ARTICLE 19 urges the Myanmar Government to address the shortcomings identified in the analysis and bring the Law into full compatibility with international standards of freedom of expression. We stand ready to provide further assistance in this process.

Key recommendations:

- Myanmar should sign and ratify all major international human rights instruments, in particular the International Covenant on Civil and Political Rights. It should also amend the provisions on the right to freedom of expression in the 2008 Constitution to ensure it fully complies with the international standards in this area;
- Criminal offences introduced in the Telecommunications Law should be removed and provided for in the regular criminal legislation;

- Penalties for offences in Chapter XVIII should be greatly reduced; imprisonment for technical or licensing offences should be replaced with fines or administrative sanctions;
- The Law should provide sufficient safeguards for the protection of human rights; Article 4 should specifically reference international standards;
- Articles 18(b)-(c), 66 (especially 66(d)), 68(a), 72 and 76 should be stricken in their entirety;
- Chapter III should be amended to guarantee the independence and autonomy of the Posts and Telecommunications Department, namely by making it not subordinated to the Ministry of Communications and Information Technology;
- Chapter III should be amended to require standards for directors of the Department, namely that directors be appointed through an open and democratic process. The directors should hold relevant expertise, be independent from political parties and commercial interests, and represent society and civil society as a whole;
- Chapter III should be amended to limit the licensing scheme to cases where public regulation is justified, such as for regulation of the frequency spectrum or regulation of public works;
- Article 6 should be amended to stipulate the licensing process in law rather than making it subject to Department regulations. This should include clear eligibility requirements, clear licensing and renewal policies, objective assessment criteria, and a schedule of fees;
- The Department should be required to give written reasons for refusing to grant or renew a license, and these decisions should be subject to independent judicial review;
- Restrictions to the import, manufacture, and commerce of communication equipment should be limited to maintaining technical standards to ensure efficient network operations;
- Article 40 should be stricken in its entirety. Searches and seizures must be subject to independent judicial review;
- Search and seizure powers must not be used to undermine or punish the use encryption and anonymity tools, which are integral to exercising the right to freedom of expression;
- Article 77 as written should be stricken. The possibility of cutting off Internet access should be prohibited in its entirety. Any restrictions on service in times of emergency should be narrowly defined, subject to prior judicial approval, and be reserved for exceptional circumstances.

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Introduction

In this legal analysis, ARTICLE 19 reviews the 2013 Telecommunications Law in Myanmar for its compliance with international standards on the right to freedom of expression.

ARTICLE 19 has extensive experience in analysing telecommunications legislation and various freedom of expression laws. We have previously commented on several legislative proposals and laws and reviewed Myanmar's progress with promoting freedom of expression during the country's 2015 Universal Periodic Review.[1]

Internet use in Myanmar has multiplied in recent years. With the adoption of the Telecommunications Law, foreign firms were allowed in June 2013 to compete with state-backed telecommunications companies. Internet, smartphone, and Facebook usage in Myanmar increased as a result. However, with that increased connectivity has come a greater repression of speech online. Numerous individuals have faced prolonged pre-trial detention and years of imprisonment on account of Facebook posts deemed insulting to the government or military; for example

- A humanitarian worker, Patrick Khum Jaa Lee, received six months in prison for making a Facebook post deemed insulting to the military;

- A poet Maung Saungkha was sentenced to six months in prison—but faced up to five years—for publishing a poem considered defamatory.[2]

- In one case in November 2016, journalist Than Htut Aung and a colleague from the Eleven Media Group were arrested and charged with defamation under the Law for publishing an article accusing an official of corruption.[3]

- The UN Special Rapporteur on the situation of human rights in Myanmar recorded over forty cases in January 2017 under the Telecommunications Law, stating that individuals are being punished "merely for speaking their minds;"[4]

- The Law has been used in cases of defamation of key government individuals (including State Counselor Aung San Suu Kyi, President Htin Kyaw, and chief minister Phyo Min Thein).[5]

ARTICLE 19 observed in 2015 that the government of Myanmar exercises control over media in a very practical sense.[6] We reiterate our concerns that Myanmar has failed to ratify major international human rights treaties, and has not undertaken all necessary legislative reforms to fully protect the right to freedom of expression in the country. The aforementioned arrests

[1] These included the analysis of the Law Relating to the Right to Peaceful Assembly and Peaceful Procession, the News Media Law, the Printing and Publishing Enterprise Law, and the Telecommunications Law.
[2] Human Rights Watch, "They Can Arrest You at Any Time", 29 June 2016,
[3] *Ibid.*
[4] End of Mission Statement, 20 January 2017.
[5] PEN Myanmar recorded 38 such cases in 2016, up from seven between 2013 to 2015; see, e.g. Christian Caryl, Press freedom in Burma is under attack again—and Aung San Suu Kyi isn't doing anything about it, The Washington Post, 6 February 2017.
[6] Joint submission to the UPR of Myanmar by ARTICLE 19, MJA, MJN, and MJU, 23 March 2015.

of journalists chill freedom of expression and make the need for these reforms all the more urgent.

Telecommunications are currently a central issue in Myanmar which has seen unprecedented expansion in this sector. It is vital that Myanmar's efforts to regulate these issues are consistent with its obligations to protect and promote freedom of expression under international law. In this analysis, we highlight how the Law can be made compatible with relevant standards. We also note the necessity for Myanmar to bring its other instruments, including but not limited to its 2008 Constitution and 2004 Electronic Transactions Law, in line with international freedom of expression standards.

ARTICLE 19 urges the Myanmar Government to consider our recommendations in the review of the Law. We stand ready to provide further assistance in this process.

International human rights standards

The protection of freedom of expression under international law

The right to freedom of expression is protected by a number of international human rights instruments, in particular Article 19 of the Universal Declaration of Human Rights (UDHR)[7] and Article 19 of the International Covenant on Civil and Political Rights (ICCPR).[8]

The UDHR is not a binding treaty but a recommendatory resolution adopted by the UN General Assembly. Through time and universal acceptance, however, much of the UDHR has risen to the level of customary international law, including Article 19, and is therefore binding on all states.

Additionally, General Comment No 34,[9] adopted by the UN Human Rights Committee (HR Committee) in 2011, explicitly recognises that Article 19 of the ICCPR protects all forms of expression and the means of their dissemination, including all forms of electronic and Internet-based modes of expression.[10] In other words, the protection of freedom of expression applies online in the same way as it applies offline. State parties to the ICCPR are also required to consider the extent to which developments in information technology, such as Internet and mobile-based electronic information dissemination systems, have dramatically changed communication practices around the world.[11] The legal framework regulating the mass media should take into account the differences between the print and broadcast media and the Internet, while also noting the ways in which media converge.[12]

Similarly, the four special mandates for the protection of freedom of expression have highlighted in their Joint Declaration on Freedom of Expression and the Internet of June 2011 that regulatory approaches in the telecommunications and broadcasting sectors cannot simply be transferred to the Internet.[13] In particular, they recommend the development of tailored approaches for responding to illegal content online, while pointing out that specific restrictions for material disseminated over the Internet are unnecessary.

ARTICLE 19 is aware that Myanmar has neither signed nor ratified the ICCPR. As such, the standard developed under Article 19 of the ICCPR as well as comparative jurisprudence and authoritative statements from international and bodies presented in this analysis are not formally binding on Myanmar. However, it is suggested that the guarantee of the right to free speech in the Myanmar Constitution allows wide scope for interpretation. Given the fundamental importance of the right to freedom of expression, and its recognition in the Constitution, it is of the utmost importance that every effort be made to ensure that Myanmar laws are interpreted, to the extent possible, in a manner that respects freedom of expression. Jurisprudence from international and regional human rights bodies, as well as non-binding standard-setting documents, such as authoritative international declarations and statements, illustrate the manner in which leading judges and other experts have interpreted international

[7] UN General Assembly Resolution 217A(III), adopted 10 December 1948.
[8] GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc.
[9] General Comment 34, CCPR/C/GC/3, adopted on 12 September 2011.
[10] *Ibid*, para 12.
[11] *Ibid*, para.17.
[12] *Ibid*, para. 39.
[13] Joint Declaration on Freedom of Expression and the Internet, June 2011.

and constitutional guarantees of freedom of expression. As such, they are authoritative evidence of generally accepted understandings of the scope and nature of all international guarantees of freedom of expression. They also provide strong guidance regarding interpretation of the guarantees of freedom of expression found in the Constitution of Myanmar.

Limitations on the right to freedom of expression

Under international law, freedom of expression can be restricted only in exceptional circumstances, often articulated as a three-part test. It requires that restrictions must:

- Be prescribed by law: they must be formulated with sufficient *precision* to enable an individual to regulate his or her conduct accordingly.[14] Ambiguous, vague or overly broad restrictions on freedom of expression are therefore impermissible;

- Pursue a legitimate aim: exhaustively enumerated in Article 19(3)(a) and (b) of the ICCPR as respect of the rights or reputations of others, protection of national security, public order, public health or morals. As such, it would be impermissible to prohibit expression or information solely on the basis that they cast a critical view of the government or the political social system espoused by the government;

- Be necessary and proportionate. Necessity requires that there must be a pressing social need for the restriction. Proportionality requires that a restriction on expression is not over-broad and that it is appropriate to achieve its protective function. It must be shown that the restriction is specific and individual to attaining that protective outcome and is no more intrusive than other instruments capable of achieving the same limited result.[15]

Further, Article 20(2) ICCPR provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited by law.

The same principles apply to electronic forms of communication or expression disseminated over the Internet.[16]

Online content regulation

The above principles have been endorsed and further explained by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur on FOE) in two reports in 2011 as well as a 2016 report.[17]

In the 2011 report, the Special Rapporteur also clarified the scope of legitimate restrictions on different types of expression online.[18] He identified three different types of expression for the purposes of online regulation[19] and clarified that the only exceptional types of expression

[14] HR Committee, *L.J.M de Groot v. The Netherlands,* No. 578/1994, UN Doc. CCPR/C/54/D/578/1994 (1995).
[15] HR Committee, *Velichkin v. Belarus*, No. 1022/2001, UN Doc. CCPR/C/85/D/1022/2001 (2005).
[16] General Comment 34, *op.cit.*, para. 43.
[17] Reports of the UN Special Rapporteur on FOE, A17/27, 17 May 2011 and A/66/290, 10 August 2011.
[18] *Ibid*, para. 18.
[19] *Ibid.* These include a) expression that constitutes an offence under international law and can be prosecuted criminally; b) expression that is not criminally punishable but may justify a restriction and a civil suit; and c) expression that does not give rise to criminal or civil sanctions, but still raises concerns in terms of tolerance, civility and respect for others.

that States are required to prohibit under international law are child pornography; direct and public incitement to commit genocide; hate speech; and incitement to terrorism. However, he also made clear that even legislation criminalizing these types of expression must be sufficiently precise, and there must be adequate and effective safeguards against abuse, including oversight and review by an independent and impartial tribunal or regulatory body.[20]

In his 2016 report, the Special Rapporteur reiterated that any demands, requests, or similar measures related to the take down of content or accessing customer information must satisfy the three-part test under Article 19(3) of the ICCPR.[21] He emphasized that states should set out to transparently implement regulations and policies, and also observed that service shutdowns are a "particularly pernicious means of enforcing content regulations."[22]

Independence of the regulatory bodies

The guarantee of freedom of expression applies with particular force to the media, including broadcast media and the relevant regulatory bodies. The need for protection of regulatory bodies against political or commercial interference was specifically emphasised in the 2003 Joint Declaration of four special rapporteurs, who considered:

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.[23]

Guaranteeing the independence of a regulator in practice involves various aspects. ARTICLE 19's publication *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*,[24] considers the following to be important:

> [The] institutional autonomy and independence of broadcast and/or telecommunications [regulatory bodies] should be guaranteed and protected by law, including in the following ways:
>
> - specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
> - by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
> - through the rules relating to membership;
> - by formal accountability to the public through a multi-party body;
> - and in funding arrangements.

The right to privacy, and surveillance of communications

The right to privacy is also well-established under international law. It is internationally recognised by Article 12 of the UDHR and Article 17 of the ICCPR. It complements and

[20] *Ibid*, para. 22.
[21] Report of the UN Special Rapporteur on Freedom of Expression, A/HRC/32/38, 11 May 2016, para. 85.
[22] *Ibid*, para. 48.
[23] The 2003 Declaration of the UN Special Rapporteur on Freedom of Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Special Representative on Freedom of the Media, 18 December 2003.
[24] ARTICLE 19, Access to the Airwaves, London, March 2002.

reinforces the right to freedom of expression: it is essential for ensuring that individuals are able to freely express themselves, including anonymously, should they so choose. The mass-surveillance of online communications therefore poses significant concerns for both the right to privacy and the right to freedom of expression.

The wording of Article 17 of ICCPR prohibits "arbitrary and unlawful" interferences with the right to privacy. Under international human rights law, restrictions to the right to privacy can only be permissible if the same test is met as that applicable to Article 19.[25] This has also been clearly set out by the UN Human Rights Committee[26] and UN Commission on Human Rights.[27]

[25] See, e.g. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 28 December 1999, A/HRC/13/37.
[26] UN Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988.
[27] UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4.

Analysis of the Telecommunications Law

General observations

Before laying down our specific concerns, ARTICLE 19 would like to make the following general comments about the state of human rights of telecommunications in Myanmar as well as the Telecommunications Law.

- Ratification of human rights treaties: Myanmar is not a party to key international human rights instruments, namely the International Covenant on Civil and Political Rights (ICCPR). We believe that the country must take immediate steps to sign and ratify the ICCPR and affirm its commitment to protecting and promoting freedom of expression as guaranteed by the international law;

- Insufficient protections for the right to freedom of expression in the 2008 Constitution: We note that while Myanmar's Constitution guarantees the right of freedom of expression in Article 354 and the right to privacy in Article 357, more could be done to bring this guarantee in full compliance with international standards. Namely, Article 354 guarantees every citizen the liberty to express and publish, although the right only applies to nationals of Myanmar. Further, the provision does not provide guarantees of media freedom, and contains several exceptions that subjugate the right to expression to other laws and provide for exceptions that go beyond permissible limitations under international standards. Finally, the Constitution contains no provision guaranteeing access to information or freedom of the media;

- Lack of independent regulatory body: The Myanmar Posts and Telecommunications Department is subject to the decisions of the Ministry of Communications and Information Technology, which itself is subject to the Union. Since the Department has broad licensing and investigatory powers, we note that this subordination of the Department does not provide it sufficient regulatory independence. This in turn undermines the ability of the Department to promote and protect freedom of expression through telecommunications regulations;

- Excessive police powers: In setting out to provide powers of inspection and compliance, the Telecommunications Law goes beyond to what is permissible under international human rights law. Numerous provisions provide warrantless search and surveillance powers in order to access subscriber information. These powers do not require a court order nor do they need probable cause. They are also broad enough to punish the use of encryption or anonymity tools which are integral to exercising freedom of expression online;

- Unnecessary creation of criminal laws and sanctions: Article XVIII of the Telecommunications Law creates a number of criminal offences, including cybercrime offences, as well as disproportionate sanctions of up to years in prison for what amount to technical or licensing violations. We note that the Telecommunications Law is an unsuitable medium for introducing criminal offences, and criminal sanctions should be dealt with in the regular criminal/penal laws; of course fully compliant with international human rights standards (including clear intentionality and harm requirements). Further, the technical violations in the section should replace imprisonment with at most fines or administrative sanctions;

- Lack of procedural safeguards for human rights protections: Procedural safeguards for human rights protections are markedly absent throughout the Telecommunications Law, particularly in Article 4 which sets out the aims of the Law. There is no reference to Myanmar's obligations to uphold and protect the right to freedom of expression and other human rights. The absence of any such provisions could threaten the entire Law's compatibility with international standards and the enforcement of human rights in this area.

Recommendations

- Myanmar should sign and ratify all major international human rights instruments, in particular the International Covenant on Civil and Political Rights; .
- The 2008 Constitution should be amended to include all elements of freedom of expression guaranteed in international law, including the rights to freedom of expression, freedom of information, and freedom of the media to all people, including non-citizens. Permissible limitations to freedom of expression should be narrowly construed and should be in accord with the ICCPR;
- Criminal offences introduced in the Telecommunications Law should be scaled back or removed entirely;
- Penalties for provisions in Chapter XVIII should be greatly reduced and imprisonment for technical or licensing offences should be replaced with fines or administrative sanctions;
- The Law should provide sufficient safeguards for the protection of human rights; Article 4 should specifically reference international standards.

Content regulation, including criminal defamation

Article 66(d) of the Telecommunications Law creates a criminal penalty of up to three years in prison for "extorting, coercing, restraining wrongfully, defaming, disturbing, causing undue influence or threatening to any person by using any Telecommunications Network." Further, Article 68(a) punishes communication of "incorrect information with dishonesty or participation." These provisions provide an opportunity to severely punish individuals for speech-related offences, including defamation, on virtually any medium.

ARTICLE 19 makes the following comments on these provisions:

- The provisions of Article 66(d) enable prosecutions for criminal defamation online. However, we note that criminal defamation laws are inherently vulnerable to being exploited where they are left to government authorities to enforce. For this reason, we have consistently advocated for the abolition of criminal defamation laws. The HR Committee has similarly urged all states party to the ICCPR to abolish criminal defamation laws.[28] Such laws rarely can be said to pursue a legitimate aim and be necessary and proportionate;

- The provisions are exceedingly broad and fail to meet the requirement of legal certainty. As set out above, in order for legislation to meet the legality criterion, the law must be formulated with sufficient precision to enable an individual to regulate his or her conduct. The key elements of the provision are, in their current form, near-infinite in scope and hinge upon highly subjective terms that are open to a broad range of interpretation.

[28] HR Committee, Concluding observations on Italy (CCPR/C/ITA/CO/5); Concluding observations on the Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2).

We are aware that Article 66(d) has already been used to punish scores of individuals for Facebook posts deemed critical of the government and military. The UN Special Rapporteur on the situation of human rights in Myanmar recorded over forty such cases in January 2017 prosecuted under 66(d), stating that individuals are being punished "merely for speaking their minds."[29]

Some of the provisions – e.g. the provisions on "disturbing" or "causing undue influence" might also fail the requirement of legitimate aim under international law. As noted above, restrictions on freedom of expression must serve a legitimate legislative objective which is of sufficient importance to justify limiting a fundamental right. As such, "disturbing" material should be distinguished from material that is actually harmful, only allowing restrictions which have as their objective the prevention of harm. For example, from the comparative perspective, the European Court of Human Rights, for example, has stated that freedom of expression is applicable "to 'information' or 'ideas' that ... offend, shock or disturb the State or any other sector of the population."[30] It is not for a judge, or even elected officials, to decide what materials we should or should not be able to access, in the absence of a real risk of actual harm.

Recommendation

- Articles 66 (especially 66(d)) and 68(a) should be stricken in their entirety.

Lack of independence of the regulatory authority

International freedom of expression standards mandate that bodies that exercise regulatory powers over the media and the telecommunications sector should be independent of the government. Chapter III, specifically Article 6, provides for the Posts and Telecommunications Department to declare policies, procedures, and regulations regarding licensing. However, the Department is organized under the Ministry of Communications and Information Technology, and is required to submit license applications to the Ministry under Article 7. Article 8 provides that the Ministry "may" accept any of the recommendations of the Department, and those recommendations are further subject to the approval of the Union Government.

The Department is subordinated to the Ministry and the Union Government and is not independent of either. Further, there are no standards for the composition of the Department or Ministry. These procedures should be transparent in accord with international standards. The members of the Department should be appointed through an open and democratic process, be representative of society as a whole, and possess relevant expertise.

Recommendations

- Chapter III should be amended to guarantee the independence and autonomy of the Posts and Telecommunications Department;
- Chapter III should be amended to require standards for directors of the Department, namely that directors be appointed through an open and democratic process. The directors should hold relevant expertise, be independent from political parties and commercial interests, and represent society and civil society as a whole.

[29] End of Mission Statement, 20 January 2017.
[30] *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737, para. 49.

Lack of clarity of the licensing process

Article 6 of the Law provides for the Department to declare licensing policies, but contains no legislative standards for the issuance of the licenses. We observe that the definition of 'telecommunications service' and 'telecommunication' are broad — applying to transmission or reception of any information over any conducting cable or any radio or other transmission. This would seem to require Internet providers to apply for licenses. A prior authorization requirement is therefore excessive. Licensing schemes should be limited to instances where there is a need for public regulation, such as regulating the frequency spectrum.

The decision process related to allocating of licenses for the frequency spectrum should also be open and transparent. While we acknowledge that the legislative process may not be the ideal medium for implementing detailed rules of technical complexity, the Law should at least specify primary rules and principles needed to obtain a license.

The Law should provide that the Department clearly state its reasons for granting, denying, or revoking licenses, and make available independent judicial review for these decisions. Failing to do so undermines the goal of 'maximum disclosure' and the public's right to know the policies of government but also due process guarantees. Currently, Chapter XVI only provides for appeal to the Ministry, and Chapter XVII gives the Union Government power to select individual members for a special appeal tribunal.

We also note that Chapter V imposes excessive obligations on part of licensees, from paying fees, to — in Article 18 — taking measures "not to affect the national security" and agreeing to "comply with the directives by the Department." These provisions are very broad and are not formulated with sufficient provision to adhere to permissible limitations under international law. Powers in time of emergency should be defined and limited to the least restrictive measure; any interferences should be contingent on prior judicial review and only in effect for a limited period of time.

Recommendations

- Chapter III should be amended to limit the licensing scheme to cases where public regulation is justified, such as for regulation of the frequency spectrum or regulation of public works;
- Chapters III, specifically Article 6, should be amended to stipulate the licensing process in law rather than making it subject to Department regulations. This should include clear eligibility requirements, clear licensing and renewal policies, objective assessment criteria, and a schedule of fees;
- The Department should be required to give written reasons for refusing to grant or renew a license, and these decisions should be subject to independent judicial review;
- Article 15 should be limited and amended to specify in law the obligations of licensees;
- Articles 18(b)-(c) should be stricken as written.

Access to technology

Chapter VIII of the Law gives the Department the power to publish technical standards subject to approval by the Ministry. It also makes the manufacture or sale of telecommunications equipment contingent on approval by the Department.

The ability to use technological equipment is part of the exercise of freedom of expression. We note that it may be necessary to restrict the trade of certain telecommunications equipment to ensure compliance with technical standards. However, we insist that any limitations on acquiring technology or using networks or services be compatible with the three-part test under international law.

Recommendation

- Restrictions to the import, manufacture, and commerce of communication equipment should be limited to maintaining technical standards to ensure efficient network operations.

Sweeping investigatory and surveillance powers

Chapter XII, Article 40, of the Law provides far-reaching powers for the Department to conduct investigations as well as delegate inspection teams to do the same. Under Article 40, the Department can force any person to "furnish any necessary information, data, papers and documents" as well as "enter and inspect" any facility where telecommunications are provided. The only requirements for the inspection teams under Article 40(b) are that they are "suitable persons."

We note that these provisions are disproportionate and far exceed the bounds of due process requirements. Article 40 provides the power for any individual appointed by the Department to search and seize places and materials – not necessarily related to telecommunications services – without any judicial authorization or cause. Any search and seizure powers should at a minimum be defined in law and subject to independent judicial review.

Article 76 provides the Department for matters "relating [to] national defense and security or public interest" the ability to enter and inspect, or require the submission of documents. Failure to cooperate would carry six months imprisonment under Article 71. The power of entry is not subject to any judicial warrant requirements, and the requisite "relating" to national defence or public interest is exceedingly broad.

There is a strong connection between privacy and freedom of expression. Far-reaching search powers have a chilling effect on the ability of individuals and media to engage in free speech. These provisions are thus incompatible with both the guarantees of privacy contained in Article 357 of the Myanmar Constitution as well as under international law.

The protection of anonymity is a vital component in protecting the right to freedom of expression as well as other human rights, in particular the right to privacy. Wide provisions may threaten users of anonymity or encryption technologies with penalties for failing to cooperate with providing information if they are unable to decrypt data or communications. The Special Rapporteur on FOE has held that compelled decryption orders are restrictions on expression and hence are subject to the three-part test under international law. [31]

Recommendations

- Article 40 as written grants wide warrantless search and entry powers to the Department and any individuals it designates. The provision should be stricken in its entirety. Searches and seizures must be subject to independent judicial review and require cause;

[31] Report of the Special Rapporteur on FOE, *op.cit.*

- Article 76 should be stricken;
- Search and seizure powers must not be used to undermine or punish the use encryption and anonymity tools, which are integral to exercising the right to freedom of expression.

Service suspensions in emergency

Article 77 provides for the Ministry in an "emergency situation" to suspend services, intercept communications, and to temporarily control services.

We note that under international standards, cutting off Internet access, or even access to parts of the Internet for either the whole population or part of the population is a disproportionate interference with the right to freedom of expression. Shutdowns can never be justified on either public order or national security grounds. Measures such as mandatory blocking of access to websites, IP addresses, ports, network protocols or types of uses should only be ordered by a court of law.

In times of genuine emergency, there may be legitimate grounds for authorities to adopt exceptional measures, such as requiring broadcasters to carry emergency announcements. However, we are concerned that Article 77 as written could allow the government to repress the flow of information under the pretence of an 'emergency.'

Recommendations

- Article 77 as written should be stricken. The possibility of cutting off Internet access should be prohibited in its entirety. Any restrictions on service in times of emergency should be narrowly defined, subject to prior judicial approval, and be reserved for exceptional circumstances.

Disproportionate sanctions

Chapter XVIII of the Law provides several sanctions for various offences, particularly in Articles 66 and 68 (some of them already mentioned above). Several of these offences, such as unauthorized access, releasing a virus, or theft using a telecommunications network are cybercrimes that should be addressed in the regular criminal/penal law, while meeting the human rights standards, in particular clear intentionality requirements.

We note that many of the technical violations include punishment of imprisonment for terms of up to years. Article 65 punishes the operation of services without a license with up to five years in prison. Imprisonment is a disproportionate punishment for technical or licensing offences – such as supplying or importing telecommunications equipment that does not meet technical standards. A fine would be a more appropriate sanction and serve the purpose of deterrence.

Further, Article 72 punishes with up to six months' imprisonment the violation of any rule or regulation promulgated by the Department. This does not provide adequate legal notice and effectively gives the Department the ability to create criminal laws.

Recommendations

- Computer crimes should be stricken from the Law and dealt in the regular criminal legislation (e.g. Criminal Code); particularly, Sections 66 and 68 should be stricken;

- Penalties for provisions in Chapter XVIII should be greatly reduced and imprisonment for technical or licensing offences should be replaced with fines or administrative sanctions;
- Article 72 should be stricken.

About ARTICLE 19

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at http://www.article19.org/resources.php/legal.

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