



SCORECARD ASSESSING FREEDOM OF EXPRESSION IN MYANMAR

2 MAY 2018

At the two-year anniversary of the National League for Democracy’s assumption of leadership, PEN Myanmar and its 18 expert partners find there has been either no change with regards to free expression or a worrying regression. They thus award a score of 2 out of a possible 60 points for the 2018 freedom of expression scorecard — a 6 point drop from 2017.

“The NLD government is closing the windows and doors to free expression. We are going backwards.” – Scorecard Discussion Participant

INTRODUCTION

A free expression environment that fosters informed dialogue, protects open debate, and promotes government transparency and accountability is a crucial foundation for democratic reform. On April 9, 2018 PEN Myanmar gathered expert partners to reflect on the state of free expression in Myanmar at the two year anniversary of the National League for Democracy (NLD)’s assumption of government leadership. The annual scorecards are released in early May to mark World Press Freedom Day.

The expert participants assessed the progress — or lack thereof — of the Union government in the key areas needed to strengthen protections for media independence and freedom, digital freedom, information access, freedom of assembly, speech and opinion, and safety and security, and proposed key recommendations.

The 2018 score — 2 out of 60 — indicates a significant lack of progress in instituting key reforms to secure free expression in Myanmar, as well as significant backsliding. Acknowledging that the challenges associated with reversing decades of repression during the military junta are significant, participants pointed to multiple areas where there had been either no change or significant regression, and where the government had engaged in practices that threaten free expression.

This is the third freedom of expression scorecard published by PEN Myanmar. The six expert groups that participated in the first pilot mid-year scorecard in November 2016 awarded a score of 8 out of 60 points, as did the 14 groups that participated in the May 2017 one-year assessment.

METHODOLOGY

The scorecard approach developed by PEN Myanmar and its partners uses six key indicators of a robust free expression environment, and takes into account government commitments, reforms, setbacks, failures, and inactivity. The range for each of the six indicators is 0-10, with 0 being the lowest score (regression) and 10 the highest (outstanding progress). The range of the potential cumulative score is 0-60, with 60 being the highest score, and 0 the lowest. The final tally reflects the cumulative scores submitted by the expert groups.

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As their point of comparison, participants considered the state of free expression in 2017 and 2016, as well as the five-year period when the Union Solidarity and Development Party was in power (2010-2015). As there are no scorecards to serve as a baseline for that latter time period, participants drew on their combined extensive experience and knowledge, as well as on media and free expression reports. Participation was limited to 18 expert groups invited by PEN Myanmar; although wide-ranging, they do not represent the views of all of the groups working in the country. While the groups are based in Yangon, many have a national mandate; to make the assessment even more inclusive and comprehensive, in future the intention is to also include expert groups from the ethnic states and regions. The objective of the scorecard is to assess and score the current situation, not to explain the intent or circumstances of the choices made or actions taken by the government.

The expert groups that participated in the 2018 scorecard assessment include: Article 19, Assistance Association for Political Prisoners, Athan, Burma News International, Equality Myanmar, Free Expression Myanmar, Human Rights Defenders Forum, Independent Lawyers' Association of Myanmar, Myanmar IT for Development Organization, Myanmar Journalism Institute, Myanmar Journalist Network, Myanmar Journalists Association, Myanmar Journalists Union, Myanmar Media Lawyers' Network, Myanmar Women Journalists Society, PEN Myanmar, Protection Committee for Myanmar Journalists, PyiGyiKhin, and Yangon Journalism School.

As four of the groups were unable to attend the scorecard assessment on April 9, they provided subsequent input. To enable an open discussion and safe environment, individual participants are not identified or quoted by name. The scoring, content, and quotations represent diverse views expressed during the assessment, and are not necessarily held by each individual.

Free expression indicators

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

FINDINGS

"Before it was elected the NLD believed in protest and criticism and encouraged it, but now it gets angry if you dare to counter anything it says or does." – Scorecard Discussion Participant

In assessing the performance of the NLD government with regards to taking steps to protect free expression during its second year in office, the group awarded a score of 2 points out of a potential 60. According to the scorecard ranking (listed below), a 2 out of 60 constitutes a mean average of 0.32 out of 10. This situates the score between no change and regression.

The expert participants found that there was regression for five of the indicators: law and regulations (0.1 – regression), media independence and freedom (0.4 – regression), digital freedom (0 – regression), freedom of assembly, speech, and opinion (0.07 – regression), and safety and security (0.07 - regression). They awarded a slightly improved score for only one

indicator: right to information (1.3 – no progress) up from 1.0 in 2017. The scoring was based on a number of factors, including the use of antiquated laws that do not meet international standards to arrest and imprison journalists who are covering stories and conducting investigations in the public interest, including, notably, the two imprisoned Reuters journalists; a Citizen’s Privacy and Security Protection Law that was enacted with little or no transparency or consultation, and that lacks components related to digital freedom and data protection; the continued criminalization of defamation; the generalized lack of public participation or input into the drafting of laws; the need to amend the Peaceful Assembly and Peaceful Procession Law to ensure a presumption in favor of the rights to free expression and assembly; the failure to close government media, to amend the News Media law, and to abolish the Printing and Publishing Law; restricted access to conflict zones, notably in northern Rakhine, Shan, and Kachin States; and the government’s decision to monitor social media activity.

MAY 2018 FREE EXPRESSION SCORECARD

Total score: 2 out of 60

Score for each indicator:

- Laws and regulations: 0.1 (down from 2 in 2017)
- Media independence and freedom: 0.4 (down from 1 in 2017)
- Digital freedom: 0 (down from 0.6 (rounded up to 1) in 2017)
- Freedom of assembly, speech, and opinion: 0.07 (down from 2 in 2017)
- Right to information: 1.3 (up from 1 in 2017)
- Safety and security: 0.07 (down from 1 in 2017)

Points ranking methodology for each indicator:

- 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

RECOMMENDATIONS

“We need to work together to improve the score. That means taking the scorecard around the country and discussing it with parliamentarians and the government so they can better understand free expression – what it is, why it is so important, and how to protect it.” – Scorecard Discussion Participant

Expert participants in the scorecard assessment proposed a series of recommendations for the Union government and parliament to expand and expedite its attention to strengthening free expression protections and fostering a more open, democratic society.

- Enact a Right to Information Law that guarantees access to information, establishes mechanisms for implementation, and overrides all other laws, including the 1923 Official



Secrets Act. Train government officials on proactive openness and voluntary disclosure of information. Develop government digital platforms that are effective, efficient, and transparent.

- Conduct an open and inclusive public consultation on reforming the following laws to bring them into line with international standards and best practices: Peaceful Assembly and Peaceful Processions Act, Penal Code, Unlawful Associations Act, Electronic Transactions Law, Official Secrets Act, and the Telecommunications Law.
- Implement the Supreme Court strategic plan (passed in early 2018) for reform of the judiciary.
- Adopt a civil defamation law that decriminalizes defamation, including overriding Section 66(d) of the Telecommunications Law.
- Amend the privacy law — officially called the Citizens' Personal Privacy and Personal Security Law — to include a provision that guarantees digital freedom without mass surveillance.
- 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.
- Ensure the safety of journalists in war zones, and conflict and disaster areas, as well as journalists reporting on issues of critical public interest and conducting higher risk investigations. To end impunity, conduct thorough investigations and prosecutions of past and current murder and physical attack cases.
- Reform the news media law, adding safeguards to ensure the independence of the Press Council so that it is able to act as a strong self-regulation and protection body. Empower prosecutors to use public interest as a basis for not supporting cases; complainants should instead be referred to the Press Council or, as needed, to the civil courts.
- Close government print media, and close or transform government broadcast media into a public service broadcaster. Implement the Broadcasting Law and ensure an equitable distribution of licenses according to public interest and with a view to diversifying ownership. Abolish the Printing and Publishing Law. Abolish special licensing obligations for private media.
- Promote safe behavior online, including protecting privacy online and promoting digital literacy. 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.
- Sign and ratify the International Covenant on Civil and Political Rights (ICCPR) and the optional protocols.
- Implement the Universal Periodic Review (UPR) recommendations for reform (proposed in 2015 and accepted by the former government).

KEY REFLECTIONS ON THE FREEDOM OF EXPRESSION INDICATORS FROM THE 9 APRIL ASSESSMENT

Laws and Regulations: 0.1 score out of a possible 10 points (down from 2 in 2017)

“A lot of laws need amending, but instead they are using them to send journalists to prison.” – Scorecard Discussion Participant

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- Over the past year, the Myanmar parliament amended and enacted 29 laws, including the Telecommunications Law, and enacted one new law, the Citizens' Personal Privacy and Personal Security Law.
- When you want to discuss laws and regulations, it is hard to get in touch with this government and/or they say they are too busy. The former government was more flexible. When you ask this government to amend laws, they often amend them in the wrong way or they do nothing. This government is also more threatening than the last one; instead of amending recommended laws, it uses them to threaten and imprison journalists, notably via 66(d).
- There is no known plan for reforming criminal sanctions in the penal code (including sedition), which are not appropriate in a democratic country and which should be dealt with through civil law in accordance with relevant international standards.
- Over the past year, antiquated colonial laws have been used to arrest and imprison journalists, including the Unlawful Associations Act and the Official Secrets Act.
- The NLD has enacted a privacy law but with little or no transparency or consultation, and lacking components related to digital freedom and data protection.
- There continues to be little to no public participation or input into the drafting of laws, and there are no specific channels that enable CSO or public involvement.

Media Independence and Freedom: 0.4 (down from 1 in 2017)

“Government media are even more powerful than they were before.” – Scorecard Discussion Participant

- The Ministry of Information still exists, as do its media operations. In stark contrast, the playing field for private media remains equally challenging and/or has gotten worse. Despite statements made prior to being elected about government-owned media having no place in a democracy, the NLD has made no move — or announced any plan — to close government media; on the contrary, it has expanded its reach and maintained its privileged access to public funding, printing presses, distribution networks, and government information. The government says it needs state media so that it can tell people what it is doing; this demonstrates a lack of understanding or willingness to support an independent media sector. This is also illustrated by the mandatory licensing of media outlets. State-owned media should be closed, or turned into public service or private media, and all references to state-owned media should be removed from the Broadcasting Law. Guidelines should be developed for the fair and unbiased placement of government news and advertisements.
- The lack of transparency with regards to media ownership supports monopolies that sustain government friendly media. The broadcast sector remains largely controlled by the state, military, and their cronies. The only exceptions are the independent broadcaster DVB, which broadcasts via satellite from Thailand; online broadcasters; and the five new digital television content production agreements. The latter give the false impression that the broadcast sector is freer and more diverse.
- There are now more restrictions. Journalists would like to write about everything but they need to self-censor if they write about highly sensitive issues such as the military or conflict. They also have trouble physically accessing conflict zones.



- Complaints against journalists and other media actors concerning their professional activities should be directed to the Myanmar Press Council rather than being settled by the application of criminal law in Myanmar's courts.

Digital Freedom: 0 (down from 0.6 (rounded up to 1) in 2017)

"The government should have abolished 66(d). Instead it has decided to spend a lot of money to monitor what its citizens are doing on social media." – Scorecard Discussion Participant

- Digital freedom has exploded, and the traditional powers feel threatened and are cracking down. There is no safety for people online.
- Since the NLD government assumed power, there have been dozens of defamation cases using Section 66(d) of the Telecommunications Law, which prohibits actions that "extort, threaten, obstruct, defame, disturb, inappropriately influence or intimidate." The government and parliament have ignored calls to abolish 66(d) and to decriminalize online defamation; the amendments to the law passed in 2017 were inadequate. Because of 66(d) people are self-censoring.
- The government has not made any move to amend the Electronic Transactions Law.
- Measured discussion and dialogue are noticeably absent online, particularly with regards to the northern Rakhine crisis. The government says it will tackle intolerant speech, including hate speech and misinformation, disinformation, and propaganda (so-called fake news) by spending US\$6 million on the monitoring of social media activity. This decision has been widely criticized and is seen as an effort to monitor its own critics and to conduct general surveillance. To prevent cyber bullying and the misuse of the internet as well as social media, efforts are needed to promote safe behavior such as protecting privacy online and promoting digital literacy.
- The restrictions to Freedom of Expression stipulated in the Electronic Transactions Law should be more narrowly defined, and criminal penalties for breaching those restrictions should be removed.

Freedom of Assembly, Speech, and Opinion: 0.07 (down from 2 in 2017)

"Whether assembly, speech, or opinion, it is a zero for regression." – Scorecard Discussion Participant

- The Peaceful Assembly and Peaceful Procession Law needs amending to ensure a presumption in favor of the rights to freedom of expression and assembly, and that the state protects and promotes these rights without discrimination. In the meantime, it is harder than last year to obtain permission to hold public events.
- In line with the UN Rabat Plan of Action, Myanmar should develop policies for countering intolerance that do not infringe on the rights to freedom of expression and opinion.
- Freedom of expression in publishing and broadcasting in ethnic languages in ethnic states should be promoted.
- The proposed hate speech bill is vague and overly broad and will not be good for freedom of speech or opinion.
- Physical access by journalists to conflict zones, and to information about conflict zones, is severely restricted.



- There is increasing surveillance of journalists and media lawyers handling sensitive cases, including those representing the imprisoned Reuters journalists.
- Filmmakers and performance artists still face direct censorship and other threats. For example, the military strongly criticized the use of generic military uniforms at a performance held in support of peace-building activities, as well as an accompanying speech by former student leader U Min Ko Naing in January 2018.
- People are getting arrested simply for expressing their opinions. After spending nearly a decade as a child soldier, for example, in March Aung Ko Htway was sentenced under Section 505(b) of the country's Penal Code, pertaining to making, publishing, or circulating information that may cause public fear or alarm and incite people to commit offenses against the state or disturb public tranquility. His offence was that he spoke to Radio Free Asia's Burmese Service about his forced abduction into the military when he was a teenager.
- Journalists cannot write stories about the military without fearing repercussions; parliamentarians have also had to apologize to the military.
- The government repeatedly says that instead of criticizing them, people should help them. This isn't useful or appropriate in a democracy.

Right to Information: 1.3 (up from 1 in 2017)

"You can get information from government officials if you have connections or you know them. But that's not the way it should work. Everyone has the right to access information no matter who they are or who they know."—Scorecard Discussion Participant

- On a positive note, civil society participated in the development of a draft RTI law in collaboration with the Legal Affairs and Special Cases Assessment Commission (the so-called Shwe Mann Commission). However, it is believed that the draft law was modified before it was presented to parliament and that, as a result, there is no longer any guarantee that the RTI law will override all other laws, including the Official Secrets Act. If true, this last minute modification significantly undermines the law.
- Chapter 9 of the News Media Law outlines the rules and conditions governing media workers' access to government information, yet in reality there is a great lack of consistency. 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 do not hold press conferences and instead release statements on their Facebook pages; moreover, they only share the information they want to share, not the information journalists are asking for. Ethnic journalists are often treated poorly, although due to the National Ceasefire Agreement some say there is increased access to some armed groups that are signatories.
- The Extractive Industries Transparency Initiative project serves as a good example of the lack of access to vital information. Although all of the data must be transparent, some departments cannot meet this requirement.
- The government should develop effective open data and e-government platforms, with all of the ministries connected to each other, yet to date very little has been done to make this happen.



Safety and Security: 0.07 (down from 1 in 2017)

“People who freely express their opinions in this country are not safe.” – Scorecard Discussion Participant

- Journalists should be given access to conflict areas to report on issues, including armed conflict and human rights violations. The government should take steps to ensure the safety of journalists in conflict zones and frontline areas.
- Threats and physical attacks against journalists should be thoroughly and independently investigated, and all perpetrators held to account.
- Journalists should not face repercussions for reporting the truth, yet over the past year many journalists have been imprisoned using a variety of antiquated laws. Journalists feel unsafe, especially when doing high-risk investigations or working in conflict areas. They feel there are no protection mechanisms and that the laws are there to threaten them, not to protect them. A lot of journalists have not had safety training. Freelance journalists in particular are vulnerable, and have no legal, safety, or institutional protection. The safety of the people giving them information (interviewees, witnesses, and sources) is also a concern.
- Impunity continues; for example, there has been no progress in the Ko Par Gyi case, a freelance reporter who died while in military custody in 2015 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 in 2016.
- As the Press Council does not have the ability or independence to protect journalists and media, it is largely ineffectual. Since it is almost entirely funded by the parliament and the president has the power to appoint and remove members, it is not viewed as independent and it is not trusted.
- Some government officials, NLD party members, their supporters, businesses, and media outlets are very sensitive to criticism and resort to civil and criminal lawsuits. Fear of such actions fosters self-censorship.
- The privacy law and new digital monitoring committee have raised fears of increased surveillance under the NLD.
- Women are particularly marginalized, including women journalists. As well, if they talk openly about the harassment they are experiencing, they risk repercussions and threats.

The freedom of expression scorecard discussion was organized by PEN Myanmar, with support from PEN America. For more information, please contact PEN Myanmar secretary, Han Zaw, 09 44 308 1350, hanzaw.media@gmail.com.

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Athan - <https://www.facebook.com/athan.foe.myanmar/>

Burma News International - <http://burmese.bnionline.net/>

Equality Myanmar - <http://equalitymyanmar.org/>

Free Expression Myanmar - <http://freeexpressionmyanmar.org>

Human Rights Defenders Forum (HRDF) - <https://www.facebook.com/HRDefendersForum/>

Independent Lawyers' Association Myanmar - <http://www.ilam.org.mm>

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