



Analysis of the Guarantees of Freedom of Expression in the 2008 Constitution of the Republic of the Union of Myanmar

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Introduction

When it was first introduced in 2008, the new Constitution of the Republic of the Union of Myanmar was deemed to be a great improvement over the previous constitution. An important part of this was the more robust guarantees it included for human rights. And an important part of the latter was its relatively strong guarantees for freedom of expression.

At the same time, the guarantees for freedom of expression in the 2008 Constitution do not fully meet international standards in this area. This Analysis outlines the key attributes of international standards, and indicate how the guarantees of freedom of expression in the 2008 Constitution fail to meet these standards.

International Guarantees

The right to freedom of expression is one of the most fundamental rights, important in its own right and also as an underpinning of all other rights. At its very first session, in 1946, the United Nations General Assembly adopted Resolution 59(I), which states: “Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.”¹

Two years later, in 1948, the UN General Assembly adopted the *Universal Declaration of Human Rights* (UDHR), its flagship statement of the human rights recognised by the United Nations.² Article 19 of the UDHR guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

¹ 14 December 1946.

² UN General Assembly Resolution 217A(III), adopted 10 December 1948.

The UDHR, as a UN General Assembly resolution, is not formally legally binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law.

The *International Covenant on Civil and Political Rights (ICCPR)*³ is one of the two international treaties which elaborate on the provisions of the UDHR. Ratified by 167 States as of August 2012, not, however, including Myanmar, the ICCPR imposes formal legal obligations on State Parties to respect its provisions. Article 19 of the ICCPR guarantees the right to freedom of expression in very similar terms to Article 19 of the UDHR, as follows:

1. Everyone shall have the right to freedom of opinion.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

International courts and other authoritative bodies have repeatedly stressed the fundamental significance of freedom of expression as a human right. For example, the UN Human Rights Committee has stated:

The right to freedom of expression is of paramount importance in any democratic society.⁴

The Main Attributes of Freedom of Expression

The right to freedom of expression, as guaranteed under international law, is a complex right with a number of different characteristics. Some of the key characteristics of the right are as follows:

1. The right to hold opinions is absolute

Individuals have a right to hold any opinion whatsoever, no matter how extreme, ridiculous or anti-social. One does not always have a right to express one's opinions, but one should never be punished simply for holding an opinion, or be forced to hold another opinion.

2. The State is under an obligation to respect freedom of expression

Like all human rights, freedom of expression places obligations on the State, and not (at least directly) on other individuals or social actors. The State in this context means all three branches of government, individuals acting on behalf of the government, and other public sector actors, such as independent constitutional bodies.

3. Everyone enjoys the right to freedom of expression

³ UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, entered into force 23 March 1976.

⁴ *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

The right to freedom of expression belongs to everyone, not just citizens or residents. States are required to respect the freedom of expression rights of everyone under their jurisdiction. Everyone means everyone, including children, prisoners, officials and members of the military.

4. Freedom of expression includes the right to seek, receive and impart information and ideas

The most obvious attribute of the right to freedom of expression is the right to speak, or to impart information and ideas. Under international law, however, it also includes the right to seek and receive information and ideas. In other words, it protects not only the right of the speaker, but also of the listener. This is a key aspect of the right, as it is our right to receive information and ideas that enables us to participate in society as full citizens.

5. States have both negative and positive obligations to respect freedom of expression

We tend to think of freedom of expression as the right to be free of State interference: our right to speak without the State trying to stop us or sanctioning us. Freedom of expression also requires States to put in place certain positive measures to ensure the free flow of information and ideas in society. In most cases, these positive obligations flow from the right of everyone to seek and receive information and ideas.

6. Freedom of expression includes information and ideas of all kinds

Freedom of expression protects all kinds of information and ideas, not just those that are popular or uncontroversial. Anything that communicates meaning is covered whether it is right or wrong, whatever its purpose, including commercial speech, and even if most people find it offensive.

7. Freedom of expression includes the right to information

The right to freedom of expression, and in particular to seek and receive information, includes a right to access information held by public bodies. To give effect to this aspect of the right, States are under an obligation to adopt what are commonly referred to as right to information or freedom of information laws.

8. Expression is protected regardless of the medium

All forms of expressive activity – i.e. all mechanisms for communicating meaning – are covered by the guarantee of freedom of expression. This includes obvious forms of communication – such as speaking, writing, publishing newspapers and broadcasting – as well as less obvious forms – such as painting, sending SMS messages or smoke signals, and acting.

9. Freedom of expression is protected regardless of frontiers

The right to freedom of expression is not limited to individual States, but applies across international borders. Thus, we have a right to import newspapers from abroad, send and receive international letters, and access material from around the world on the Internet.

Restrictions on Freedom of Expression

The right to freedom of expression is extremely broad in nature, creating a presumption in favour of all forms of communication. But in a small number of cases, communications can cause harm which is greater than the value of protecting the expressive activity. Thus, children may be harmed by seeing mature sexual material, an individual's reputation may be harmed if someone tells malicious lies about them, national security may be harmed if intelligence agents sell military secrets to the enemy, and business will not flourish if the State does not keep sensitive commercial information confidential.

International law recognises this and, as a result, it does not provide absolute protection to expression. Instead, it allows States to impose restrictions on this right to protect overriding public and private interests. However, international law sets careful limitations or conditions on the scope of such restrictions. The main test for whether or not a restriction is legitimate is found in Article 19(3) of the ICCPR:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

This has consistently been interpreted by international courts as imposing a three-part test for assessing whether or not restrictions on freedom of expression are legitimate. Only restrictions which meet all three parts of the test are deemed to be legitimate.

1. Provided by law

Only restrictions which are set out in law are legitimate. This reflects the idea that only the legislature should have the power to restrict a fundamental right like freedom of expression. Other public actors – such as the police, individual MPs, senior officials or military personnel – may not limit freedom of expression unless they are acting pursuant to a law. Furthermore, laws which restrict freedom of expression must not be unduly vague: they must be “formulated with sufficient precision to enable an individual citizen to regulate his or her conduct accordingly.”⁵ This is both to be fair – i.e. to avoid punishing individuals without giving them fair warning – and to avoid a chilling effect – as individuals will be wary of speaking if they fear what they say might be deemed to fall within the scope of a vague prohibition on speech.

2. Legitimate interest

The list of interests in Article 19(3) – namely the rights and reputations of others, national security, public order, and public health and morals – is exclusive so that only restrictions

⁵ UN Human Rights Committee, General Comment No. 34, 21 July 2011, para. 25.

which serve to protect these interests are legitimate. It is not enough for the restriction to serve one of these interests tangentially; this must be a primary objective of the restriction. Interests which have been rejected by international courts as illegitimate include getting people to vote in elections,⁶ praising the enemy (which was not deemed to threaten national security)⁷ and promoting a strong economy.⁸

3. Necessity

The majority of international decisions on freedom of expression are decided on the basis of the last part of the test, which requires restrictions to be necessary. Although it sounds obvious – why impose a restriction if it is not necessary – this part of the test is complex and has a number of elements.

First, the measure must respond to a pressing social need. Restrictions on freedom of expression, even if they serve one of the legitimate interests noted above, are not warranted if the harm to the interest is minor, insignificant or speculative. Thus, in the case above involving praise for the enemy, the UN Human Rights Committee rejected the State's claim that this would undermine its own citizens' resolve to fight as being speculative and likely to have at best a minor impact.

Second, the restriction must be the least intrusive measure possible. If a measure which is less harmful to freedom of expression would effectively secure the legitimate aim, it is not necessary to employ the more intrusive measure. For example, reputations can adequately be protected by civil defamation laws, so it is not legitimate to employ criminal defamation laws.

Third, the restriction should not be overbroad, in the sense of ruling out legitimate as well as harmful speech. Thus, a prohibition on criticising others to protect reputation would not pass muster, because much criticism is legitimate. Instead, defamation laws should be limited to prohibiting criticism involving false statements of fact which harm another's reputation.

Fourth, the restriction must be proportionate, in the sense that the benefits of protecting the legitimate aim outweigh the harm to freedom of expression. For example, large damage awards for defamatory statements have been held to breach this rule. The chilling effect on others that results from such awards, because they may then not be willing to make perfectly legitimate statements out of fear of being required to pay such a large sum of money, does more harm to freedom of expression than any benefit to reputations from those awards.

⁶ *Svetik v. Belarus*, Communication No. 927/2000, 8 July 2004 (UN Human Rights Committee).

⁷ *Kim v. Korea*, 3 November 1998, Communication No. 574/1994 (UN Human Rights Committee).

⁸ *Sohn v. Korea*, 19 July 1995, Communication No. 518/1992 (UN Human Rights Committee).

National Guarantees

The main guarantee of freedom of expression in the Constitution of Myanmar is found at Section 354, in Chapter VIII: Citizen, Fundamental Rights and Duties of the Citizens. Section 354 states:

354. Every citizen shall be at liberty in the exercise of the following rights, if not contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquility or public order and morality:

- (a) to express and publish freely their convictions and opinions;
- (b) to assemble peacefully without arms and holding procession;
- (c) to form associations and organizations;
- (d) to develop their language, literature, culture they cherish, religion they profess, and customs without prejudice to the relations between one national race and another or among national races and to other faiths.

By necessity, constitutional provisions on freedom of expression are relatively short, so what they really mean depends significantly on how they are interpreted by the courts and other decision-makers. In the case of Myanmar, due to the relatively recent adoption of the Constitution, as well as the historical lack of independence in the court system, interpretation may not yet be very developed.

Positive Guarantees

There are important textual differences between the guarantee of freedom of expression in the 2008 Constitution of Myanmar and the positive protection afforded to freedom of expression under international law. First, the former does not provide separate, and certainly not absolute, protection for opinions. Second, it applies only to citizens, and not to everyone. Better practice at the national level is to provide protection to everyone. Under international law, States are required to extend protection of human rights to everyone, not just citizens.

Third, and very importantly, it only protects the right to express oneself, and not to seek and receive information and ideas. This is again an important omission, for a number of reasons. This aspect of the right is important to protect communications between individuals, so that not only the speaker but also the listener can claim their right when communications between them are interrupted. It is also important to underpin the State's responsibility to foster pluralism and diversity in the media. This is very important in the current context of Myanmar, where the government is preparing press and broadcasting laws. The main grounding for this is the right of everyone to receive information and ideas, which has been interpreted as meaning a diverse range of information and ideas. Finally, as noted above, the rights to seek and receive information have also served as the foundation of the right of individuals to access information held by public authorities, referred to as the right to information (or sometimes freedom of information).

Fourth, the right does not explicitly extend to information and ideas of all kinds, although it might be interpreted in this way. Fifth, and related, it does not explicitly extend to all media of communication, or all means of expressing oneself. Again, this might be read into the provision. Finally, it does not explicitly apply regardless of frontiers. This is important, for example, to protect the right of citizens of Myanmar to access books and other expressive material from abroad.

Restrictions

The guarantee of freedom of expression in the Constitution of Myanmar permits restrictions on this fundamental right, but only in certain circumstances. As with the first part of the three-part test under international law, restrictions must be established in a law, as reflected in the phrase “if not contrary to the laws” found in Section 354.

The Constitution also only permits restrictions which serve to protect certain interests. The list, however, is different than under international law, and includes the following: “Union security, prevalence of law and order, community peace and tranquility or public order and morality”. Several of these – including security, law and order, public order and morality – find close parallels under international law. The others – namely “community peace and tranquility” – do not. While these are worthy social goals, they are not legitimate grounds for restricting freedom of expression. Political criticism, for example, may well undermine tranquillity, but is clearly protected speech under international law. These concepts are simply too broad to justify a restriction on freedom of expression.

Concern about these overbroad grounds for restricting freedom of expression is amplified by some of the duties listed in Chapter VIII of the Constitution of Myanmar. These include Section 388, which places an obligation on citizens to support “the emergence of a modern developed Nation” and Section 390, which calls on citizens to support the government in defending a range of interests, such as cultural heritage, the environment, and public property. While good citizens may well do these things, imposing a constitutional duty on them to do so could be open to abuse. Calls by citizens to privatise public property might, for example, be deemed to be contrary to these duties, and yet they are clearly protected speech.

The most important difference between the Constitution of Myanmar and international law in terms of protecting freedom of expression is the complete absence in the former of any requirement for restrictions to be necessary. Under international law, restrictions must be ‘necessary’ to protect one of the legitimate interests listed, and this is the most important part of the three-part test. Otherwise, any law claiming to protect one of the legitimate interests – even if it were massively overbroad, were really aimed at suppressing political criticism or were simply ineffective – would pass constitutional muster. The requirement of necessity is at the centre of international protection for freedom of expression and yet it is entirely missing from the current Constitution of Myanmar.

Recommendations:

- If the current Constitution of Myanmar is to be revised, consideration should be given to making the following changes to the current guarantee:
 - Adding in absolute protection for opinions.
 - Making it applicable to everyone, and to all information and ideas, expressed through any medium and regardless of frontiers.
 - Protecting not only the right to express oneself, but also the rights to seek and receive information and ideas.
 - Removing the reference to “community peace and tranquillity” as grounds for restricting freedom of expression.
 - Requiring restrictions to be ‘necessary’ for the protection of one of the listed interests.
- Consideration should also be given to expanding the scope of protection to include:
 - The right of journalists to protect their confidential sources of information.
 - A prohibition on prior censorship of the media.
 - Protection for the independence of public media, as well as bodies with regulatory powers over the media.
 - Protection for the right to information.

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