ARTICLE 19

Myanmar: Interfaith Harmonious Coexistence Law (Draft)

October 2016

Legal analysis

Executive summary

ARTICLE 19 has analysed the draft Interfaith Harmonious Coexistence Law (the draft Law) and finds that it does not meet international human rights standards, and, in particular, fails to promote and protect the rights to freedom of opinion and expression, freedom of religion or belief, and freedom from discrimination.

Although the draft Law supposes to promote "harmonious coexistence", its measures prioritise ambiguous and far-reaching restrictions on freedom of expression that will only close space for inter-communal dialogue and increase distrust within and between groups.

The draft Law introduces new criminal prohibitions on "blasphemy" as well as a staggeringly broad offence of "misusing of religion for political purposes". Together with ambiguous prohibitions on "hate speech", the draft Law threatens to expand significantly the tools available to the government to suppress the legitimate expression of opinions and dissent, with particular risks for minority and marginalised groups. The draft Law is therefore likely to be counter-productive to its intended objectives.

Recommendations

1. The draft Law should be withdrawn in its entirety, in favour of a new approach combining positive policy measures to promote and protect the rights to freedom of expression and equality, including through reforms to the Penal Code and the enactment of a comprehensive legal framework for the right to equality.

2. Any new draft Law should refrain from criminalising "blasphemy" or the so-called "misuse" of religion for "political purposes."

3. The advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination or violence should be prohibited in line with Articles 19(3) and 20(2) of the International Covenant on Civil and Political Rights (ICCPR), establishing a high threshold for limitations on free expression as set out in the Rabat Plan of Action.

4. The Myanmar government must sign and ratify the ICCPR and all other major international human rights treaties without delay.

Table of contents

Introduction

The draft Interfaith Harmonious Coexistence Law (the draft Law) has been developed by the Ministry of Religious Affairs and Culture of Myanmar behind closed doors over the course of 2016. While the process of development has been secretive without the substantive involvement of relevant stakeholders, the draft analysed by ARTICLE 19 is regarded as the second version to have been developed, although the government has at no point published or confirmed this to be the case.

International human rights law requires the Myanmar government to protect and promote the interrelated and mutually reinforcing rights to freedom of opinion and expression,[1] freedom of religion or belief, and freedom from discrimination: one right cannot be prioritised over another, and any tensions between them must be resolved within the boundaries of international human rights law. In relation to the right to freedom of expression, Article 19 of the International Covenant on Civil and Political Rights (ICCPR) requires that any limitation meet a three-part test: the restriction a) must be provided for by law; b) pursue a legitimate aim; and c) be necessary and proportionate.[2] Though states are required to limit the advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination or violence,[3] this is a last resort measure reserved only for particularly severe forms of "hate speech".

Although Myanmar has neither signed nor ratified the ICCPR or other main human rights treaties, ARTICLE 19 suggests that the standards contained within these treaties, which largely reflect customary international law, should guide the interpretation of Myanmar's Constitutional guarantees for freedom of expression in Article 364.

[1] International Covenant on Civil and Political Rights (ICCPR) Article 19(2) provides: 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.
[2] ICCPR Article 19(3) provides: 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.
[3] Article 20(2) of the ICCPR.

Analysis of the Draft Law

Definitions

Chapter 1, section 2 outlines definitions of key terms in the draft Law, many of which limit the scope of protections for the right to freedom of religion or belief as guaranteed under international human rights law,[4] which will likely also limit enjoyment of the right to freedom of expression:[5]

- The exhaustive listing of "**religions**" in section 2(c) is limited further by reference only to religions "most of the citizens worship" and is exclusionary and unnecessary. ARTICLE 19 recalls that General Comment No. 22 (1993) of the UN Human Rights Committee (HR Committee) makes clear that the right to freedom of religion or belief should not be confined to "traditional" or "recognised" religions but should be broadly construed, and also extends to "non-theistic and atheistic beliefs".[6] Defining "religions" more narrowly than in the General Comment undermines clarity in the Bill's key provisions, limiting the legal protections that the Bill might otherwise afford to persons with minority or marginalised religions or beliefs. The reference to "citizens" in section 2(c) may be understood as excluding protections of the right to freedom of religion or belief of non-citizens, and, by proxy, their right to freedom of expression.
- The definition of "**member of faith**" in section 2(d) does not make clear that the right to freedom to religion or belief is voluntarily exercised and that holding a religion or belief cannot be compelled, and one must be free to adopt, change or renounce a religion or belief. It also does not provide protection to persons who profess no faith, such as atheists, and therefore does not comply with Article 18 of the ICCPR and the guidance of General Comment No.22.
- The definition of "**religious leader**" (section 2(f)) is also unclear, as it potentially limits the application of section 6(d) prohibiting "disturbances" against religious events. It may discriminate against events of non-recognised religions or beliefs, in particular those organised by persons without citizenship, and thus limit their right to freedom of peaceful assembly.

At the same time, the draft Law **fails to define many key terms** that are essential to understanding the scope of provisions that either set out duties on the state or private actors, and/or permit restrictions on the exercise of rights through the criminal law. In many cases these provisions do not meet the requirement of legality under Article 19(3) of the ICCPR, as they are much too ambiguous, a problem that is exacerbated by a lack of definitions.

Recommendations:

- Revise definitions that unreasonably limit the scope of the right to freedom of religion or belief, including the terms "religion", "member of faith", and "religious leader", in line with HR Committee General Comment No.22;
- Expand the notion of freedom of religion to also include freedom of conscience and freedom of belief, to encompass persons who profess no religion, such as atheists;

[4] The Human Rights Committee, General Comment No. 22 on the right to freedom of thought, conscience and religion (Article 18), CCPR/C/21/Rev.1/Add.4, 27 September 1993; available at: http://bit.ly/2gkUHZz.
[5] See, for example, the UN Special Rapporteur on freedom of religion or belief, "two closely interrelated rights: freedom of religion or belief and freedom of opinion and expression", A/HRC/31/18, 23 December 2016; available at: http://bit.ly/1SJxPO4.
[6] The Human Rights Committee, General Comment No. 22, *op. cit.*

- Remove references to citizens, to guard against nationality-based discrimination;
- Include definitions for terms that are key to understanding the elements of new criminal offences, ensuring that those offences comply with international human rights law.

Objectives

Chapter 2, section 3 of the draft Law sets out its broad objectives. Though of limited legal effect, the prioritisation of issues it establishes may shape the interpretation of subsequent provisions.

ARTICLE 19 regrets that rather than seek to address the **root causes of discrimination and violence through non-coercive measures**, the objectives give more focus to limiting freedom of expression. This approach is likely to diminish rather than encourage opportunities for dialogue and understanding between groups, potentially increasing distrust and suspicion and the potential for discrimination and violence.

The objectives do not give sufficient and clear prioritisation to **the protection and promotion of the rights** to freedom of expression, freedom of religion or belief, and right to freedom from discrimination, nor do they recognise the indivisibility, interdependence and interrelatedness of these rights. The reference in section 3(d) to "enhancing" the State's "obligations as the guardian in terms of justice, freedom and equality" is positive, but could be strengthened. In particular, it should make clear that robust debate should be protected, even where expression may be considered offensive.[7]

Section 3(a), which emphasises preventing expression that "brings about" hatred, hostility or division, may be understood to support prior censorship measures on impermissibly broad terms. With the objectives in subsections (b) and (c) of ensuring "respectful", "considerate." and "polite and gentle" inter-communal relations, the draft Bill appears to be establishing a framework for policing civility. The limitations on freedom of expression that would result from operationalizing this broad "objective" are unlikely to be necessary or proportionate, and risk being abused to suppress minority dissent, inter-religious discourse, and legitimate criticism of public officials.

The draft Law's objectives overlook that **respect for pluralism and diversity** is also required within communities that share a religion or belief, where members may have diverging opinions. Addressing this gap would reflect the reality that no religion or belief community is monolithic, and that the expression of minority and dissenting thought within such communities must be protected from discrimination, violence or other forms of censorship.

The approach in the draft Law stands in contrast to legal and policy recommendations and best practice issued by international human rights bodies and experts. The UN Human Rights Council (HRC) committed states in Resolution 16/18 to take numerous, less-restrictive policy measures to tackle the root causes of discrimination and violence on the basis of religion or belief. This includes action to:

- Create collaborative networks to build mutual understanding, promoting dialogue and inspiring constructive action in various fields;

[7] HR Committee, General Comment No. 34, CCPR/C/GC/34, 12 September 2011, para 11; available at: http://bit.ly/1xmySgV.

- Create a mechanism within governments to identify and address potential areas of tension between members of different religious communities, and assisting with conflict prevention and mediation;
- Train government officials in effective outreach strategies;
- Encourage efforts of leaders to discuss within their communities the causes of discrimination, and evolve strategies to counter them;
- Speak out against intolerance, including advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence;
- Combat denigration and negative religious stereotyping of persons, as well as incitement to religious hatred, including through education and awareness-building;
- Recognise that the open, constructive and respectful debate of ideas plays a positive role in combating religious hatred, incitement and violence.

It is through these practical policy measures that governments can increase inter-group communication and trust, and change hearts and minds to address the root causes of discrimination. This approach is also advanced in the Rabat Plan of Action,[8] endorsed by the UN Special Rapporteur on freedom of religion or belief,[9] and has influenced the approach of the UN Committee on the Elimination of Racial Discrimination.[10] Legislation to comprehensively protect the right to equality, on all grounds recognised under international human rights law, is also essential.[11] As explained below, it is only in very narrow circumstances that restrictions on specific forms of "hate speech" are foreseen as legitimate.

Recommendations:

- Prioritise as an objective in the Law the promotion of the values of diversity, pluralism and inclusion through the protection for human rights, in particular freedom of expression, freedom of religion or belief, and non-discrimination.
- Emphasise the crucial role of positive policy measures to increase inter-communal interaction and trust, such as those outlined in HRC resolution 16/18 and the Rabat Plan of Action, to tackle the root causes of discrimination and violence.
- Make clear that, in line with the Rabat Plan of Action, limitations on the right to freedom of expression will only be considered as a last resort in accordance with Article 20(2) of the ICCPR, and will not be abused to restrict dissenting or minority ideas that fall short of constituting incitement to discrimination, hostility or violence.

Responsibilities

Section 4 sets out "responsibilities" for "each member of faith" to refrain from certain forms of expression (subsection (a)) and to not discriminate against any "citizen" of the country on a variety of grounds (subsection (c)).

Section 4 is written in imperative language but does not make clear what the consequences are for individuals who fail to meet their "responsibilities", and, therefore, its legal effects are unclear. No sanctions are set out for violations, though the provisions largely duplicate (but do

[8] Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, OHCHR, 11 January 2013, A/HRC/22/17/Add.4, available at: http://bit.ly/2fTNMG6.

[9] UN Special Rapporteur on freedom of religion or belief, "two closely interrelated rights: freedom of religion or belief and freedom of opinion and expression", *op. cit.*

[10] Committee on the Elimination of Racial Discrimination, General Recommendation No. 35, CERD/C/GC/35, 26 September 2013; available at: http://bit.ly/1y70Yb9.

[11] The Camden Principles on Freedom of Expression and Equality (Camden Principles), ARTICLE 19, 2009, at Principle 3; available at http://bit.ly/1XfMDrL.

not mirror) the prohibitions set out in Chapter 5. The "responsibilities" also only apply to "members of faith", a limited term that brings further uncertainty to the status of non-believers.

Subsection (a) calls on each "member of faith" to refrain from "hate speech or actions that can bring about division, hostility, and disruption to peace between different religions and persons." Though this is not a prohibition as such, "bring about", "division" and "disruption" are vague terms that do not correspond to the types of expression or harm that Article 20(2) of the ICCPR specifies as necessitating restrictions. This may confuse the interpretation of subsequent provisions that do set out prohibitions on expression, and encourage a lower threshold for limitations. It may capture expression that should not be properly considered "hate speech" at all, such as "blasphemy" that offends adherents of one particular religion who may react violently to such expressions.

ARTICLE 19 notes that the Camden Principles on Freedom of Expression and Equality (Camden Principles) recognise that politicians and other leadership figures in society have an ethical (i.e. not legal) responsibility to avoid making statements that promote discrimination or undermine equality, and to contest such statements where others make them.[12] However, this responsibility should not be legally binding, and thus its codification in law would potentially be misleading, in particular when applied to the population at large. Ideally, such regulations should target influential individuals and only be enforced through systems of self-regulation, for example within for the machinery of a political party or Parliamentary standards body. Systems of self-regulation are to be preferred for media actors also.[13]

Section 4(c) of the draft Law sets out a responsibility for "each member of faith" not to discriminate on the basis of specified protected characteristics. Though the inclusion of protected characteristics such as gender, race and religion are welcome, other protected characteristics such as nationality, migration or refugee status, sexual orientation, disability, and age, should also be included. Other protected characteristics that are not recognised under international law, such as "status", "wealth", or "rank and position" should be removed from section 4(c), since they may be abused to protect public officials or other powerful individuals from criticism.

At the same time, section 4(c) only creates a "responsibility" to protect "citizens" from discrimination, permitting by implication discrimination against non-citizens. However, non-citizen residents of Myanmar fall within the definition for a "member of faith" (section 2(d)), and are therefore responsible for not discriminating against others without receiving the equivalent protection where they are the victims of discrimination.

Protecting the right to equality would be more effectively achieved through a separate and comprehensive law that fully sets out the responsibilities of public bodies as well as relevant private actors, in addition to remedies for violations of the right.[14] Section 4(a) in the draft Law is wholly unfit for purpose in this regard.

Recommendations:

- Remove Chapter 3 of the draft Law, instead prioritising the adoption of a comprehensive law on non-discrimination.

---

[12] The Camden Principles, *op.cit.*, at Principle 10. 1.
[13] *Ibid.*, at Principle 9.
[14] *Ibid.*, at Principle 3 and 4. See also, by way of example, the UK Equality Act 2010 (as amended): available at http://bit.ly/1k8a7wN.

Censorship of legitimate expression

Chapter 5 of the draft Law sets out prohibitions, for which criminal penalties are set out in Chapter 6. Several of these are not justifiable restrictions on freedom of expression, and may have a chilling effect that is counterproductive to inter-religious communication.

Criminalising blasphemy

Section 6(a) of the draft Law expands **the excessively broad interpretation of "hate speech"** in section 4(a) on "responsibilities", including through the integration of a **criminal prohibition on blasphemy**.

Section 6(a) makes it an offence, *inter alia*, to "spread", through a variety of expressive means, the "distraction of gods, religious figures, religious texts, commandments and standards of a certain religion". The available criminal sanctions in section 7(a) are a minimum of 2 years and maximum of 3 years imprisonment, in addition to unspecified fines.

The language preceding this section also specifies prohibitions on ideas expressed "in order to belittle, tarnish, bring forth hatred, hostility, division", but it is unclear whether blasphemous expression must additionally have this purpose in order to be prohibited. It is also unclear against whom the expression must be targeted, and whether it must also be discriminatory in some way (for example on the characteristics set out in Section 5) if it is to be prohibited. Nevertheless, even if these points were clarified, the prohibition still sets a threshold for limiting expression which is much lower than the Article 20(2) ICCPR standard, and would not meet the requirements of Article 19(3) of the ICCPR.

ARTICLE 19 recalls that the repeal of blasphemy laws is recommended in the Rabat Plan of Action,[15] and strongly supported by the HR Committee in General Comment No. 34,[16] and has been recommended by several UN special procedures.[17] By way of regional comparisons, the Council of Europe,[18] European Union,[19] and Inter-American systems have each expressed concerns with blasphemy laws and recommended their repeal.[20]

---

[15] Rabat Plan of Action, *op. cit.*

[16] General Comment No. 34, *op. cit.*, at para. 48: "prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged by article 20, paragraph 2, of the Covenant." It also underlines that it would be "impermissible" for any such prohibition to "prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith."

[17] Report of the Special Rapporteur on minority issues, A/HRC/28/64, 2 January 2015; report of the Special Rapporteur on freedom of religion or belief, A/HRC/28/66, 29 December 2014; report of the Special Rapporteur on protecting and promoting the right to freedom of opinion and expression, A/67/357, 7 September 2012; UN Working Group on Arbitrary Detention, Opinion No. 35/2008 (Egypt), 6 December 2008. Para. 38. See also, for an international and comparative regional perspective, the Joint Declaration on defamation of religions, and anti-terrorism, and anti-extremism legislation, 9 December 2008; available at: http://bit.ly/2gna3g4

[18] Council of Europe Recommendation 1805 (2007), Blasphemy, religious insults, and hate speech against persons on grounds of their religion, 29 June 2007; available at: http://bit.ly/2gvZ071. See also: Venice Commission, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, 23 October 2008, at para 89; available at: http://bit.ly/1QU4bbF.

[19] See, for example: EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief (2013)

[20] Inter-American Court of Human Rights, *"The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile*, 5 February 2001

Together, these standards put forward several arguments supporting the repeal of blasphemy laws under international human rights law, making clear that they fall short on each of the requirements of the three-part test set out in Article 19(3) of the ICCPR. The prohibition on blasphemy in section 6(a) is therefore:

- **Not provided for by law**, as it employs terminology that is either vague or so subjective as to empower an arbitrary or abusive interpretation. It is not clear from section 6(a) against whom the expression should be targeted to constitute an offence, or whether those persons should be targeted on discriminatory grounds.

- **Not in pursuit of a legitimate aim,** as international human rights law distinguishes between the *protection of ideas or beliefs* from the *protection of the rights of people* on the basis of their religion or belief. The right to freedom of religion or belief under international law attaches to individuals, and does not protect religions or beliefs *per se* from adverse comment or scrutiny or allow restrictions on freedom of expression for that purpose. This remains the case even if the expression is considered offensive to adherents of a particular religion or belief.

- **Not necessary in a democratic society,** in particular as it may be abused to prevent and punish the expression of minority or controversial views. This includes inter- and intra-religious dialogue, but also criticism of religious leaders and commentary on religious doctrine and tenets of faith. At the same time, individuals in positions of power often enforce these restrictions for political advantage, to target their critics and avert accountability for wrongdoing, using "blasphemy" prohibitions to broadly target any dissent. The provision is also susceptible to discriminatory application, as such laws often are applied to privilege the religion or belief of a dominant group against those held by minority or marginalised group.

The custodial sanctions and unlimited fines in section 7(a) of the draft Law for blasphemy are disproportionate, and should be repealed alongside the prohibition on blasphemy.

Recommendation:
- Remove the prohibition on blasphemy in section 6(a), and the associated penalties in section 7(a), and bring the provision in line with Article 20(2) of the ICCPR.

Criminalising "misusing religion for political purposes"
The criminal offence in section 6(c) of "**misusing religion for political purposes**" is especially concerning. Section 7(c) provides as punishment a minimum of 1 year and maximum of 2 years imprisonment, in addition to an unspecified fine.

- Firstly, the draft Law provides no definitions of what "misusing religion" means, nor what "political purposes" are. This lack of clarity means the provision does not meet the requirement of being "provided for by law" under Article 19(3) of the ICCPR, and may be abused to target legitimate expression, including on issues concerning religion and politics.

- Secondly, section 6(c) does not pursue a legitimate aim, as it does not specify any harm that it is seeking to suppress (for example, the incitement of violence), other than political expression. The HR Committee has been emphatic that restrictions aimed at

limiting criticism of the government, public officials or its institutions are illegitimate and therefore wholly incompatible with Article 19(3) of the ICCPR.[21]

- Thirdly, restricting "the misuse of religion for political purposes" is not necessary in a democratic society. The HR Committee is clear that political expression should be accorded heightened protection, including where it concerns debate on figures in the public and political domain.[22] In part, this is due to the essential importance of open debate to the exercise of the right to public participation.[23] This is no less the case where individuals' political opinions are shaped or motivated by their religion or belief, and it should not be up to the government to determine the legitimacy of this. Differential treatment of expression on this basis may amount to discrimination on the basis of religion of belief, and additionally violate Articles 2(1) and 26 of the ICCPR.

It therefore follows that the sanctions outlined in section 7(c) should not be in place, and if imposed would be grossly disproportionate.

Recommendation:
- Remove section 6(c) on misusing religion for political purposes, and remove the penalties in section 7(c).

Prohibiting "hate speech"
Section 6(a) of the draft Law contains a broad prohibition on what may loosely be described as "hate speech", but without using this term as such. Leaving aside the portion of this provision which deals with blasphemy (analysed above), the remainder of Section 6(a) prohibits:

> Spreading in one way or another either through word of mouth, written form, noticeable symbol, expression, news, rumour, writing, publication, movie and music, or through electronic technology of through fiction, in order to belittle, tarnish, bring forth hatred, hostility, division [...]

The criminal sanctions, set out in section 7(a), are a minimum of 2 years and maximum of 3 years imprisonment, in addition to unspecified fines.

ARTICLE 19 recalls that international human rights law requires states to prohibit any "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence", in Article 20(2) of the ICCPR, so long as those provisions also comply with the requirements of Article 19(3) of the ICCPR.

However, we find that section 6(a) of the draft Law does not follow the structure of Article 20(2) of the ICCPR or reflect its key elements. This makes the scope of the offence dangerously broad and open to abuse, and therefore incompatible with Article 19(3) of the ICCPR. The key elements of the Article 20(2) ICCPR prohibition that are absent from section 6(a) include:

- **Advocacy of discriminatory hatred**: Section 6(a) focuses on spreading any expression that might be considered demeaning in various ways, without requiring actual *advocacy* of

[21] General Comment No. 34, *op. cit*, at paras 42 – 43.
[22] *Ibid.*, at paras 34 and 38.
[23] General Comment No. 34, *op. cit.*, at para. 13, 20

discriminatory hatred. Requiring advocacy would imply an act of expression that seeks to promote discriminatory hatred publicly towards the target group. The focus should be on the emotional state of the audience of the expression toward the targets of the hate speech, rather than the emotional impact on the targets of the hate speech.

- **A target group defined by a protected characteristic**: Section 6(a) does not make clear which group the prohibited expression is targeting, nor the protected characteristics (such as race, religion, nationality etc.) that is the basis for the advocacy of discriminatory hatred is being advocacy. For the limitation to reflect Article 20(2) of the ICCPR, the expression must be advocating hatred against a particular group, which is targeted in whole or in part on the basis of a protected characteristic (such as their race, nationality or religion). ARTICLE 19 advocates that a broader range of characteristics, recognised within Articles 2(1) and 26 of the ICCPR, should be included here.

- **Incitement to violence, hostility or discrimination:** Section 6(a) does not require the audience of the expression to be incited towards committing a harmful act against the target group. International standards suggest that to necessitate prohibition, the advocacy of hatred must reach a threshold of severity so high that it is likely to incite a proscribed outcome, i.e. imminent violence, hostility or discrimination. Determining whether the severity threshold has been met requires applying the six-part test set out below.

- **Intent:** it is not clear from Section 6(a) what standard of intent must be demonstrated to find a person criminally liable. Given the serious nature of the penalties to be imposed on the exercise of a fundamental right, specific intent to engage in advocacy of hatred and, in so doing, to incite particular harms should be shown. There is therefore a need to show intent to engage in the advocacy of discriminatory hatred, intent to target a particular group on the basis of a protected characteristic, and knowledge that this would likely cause a proscribed outcome (violence, hostility or discrimination).

The Camden Principles set out proposed definitions for some of these key terms.[24]

The Rabat Plan of Action makes clear that this is a high threshold, to be determined by a judge on the basis of very narrowly drawn laws, setting out six criteria:[25]

- **The context of the expression,** taking into account the existence of conflict in society and in particular any history of violence or institutionalised discrimination against the target group, as well as the legal, political, and media landscape;
- **The identity of the speaker**, in particular their position, authority or influence in relation to their audience;
- **Intent to engage in advocacy of hatred constituting incitement to violence, hostility or discrimination**, (as described above);
- **The content or form of the expression**, including what was said, its form and tone, and what the audience would understand from this, in particular where the incitement is indirect;
- **The extent of the expression**, including how public it was and the reach of the expression; and,
- **The likelihood and imminence of inciting violence, hostility or discrimination**.

[24] The Camden Principles, *op. cit.*, at Principle 12.
[25] The Rabat Plan of Action, *op. cit.*, available at: https://goo.gl/wgSVim; See also: "Hate Speech Explained", *op. cit.*, at pages 78 – 81.

We also point out that Article 20(2) ICCPR doesn't require criminalisation, as this is a fairly severe sanction. However, where there is incitement to violence and the six-part severity threshold is demonstrated, proportionate criminal sentences may be justifiable.

Recommendations:

- Revise section 6(a) so that it meets the requirements of Article 20(2) and Article 19(3) of the ICCPR, establishing a high threshold for limitations on expression as set out in the six-part test of the Rabat Plan of Action.
- Add provisions for civil causes of action against advocacy of discriminatory hatred constituting incitement to violence, discrimination or hostility, and, where necessary, in the administrative law, as more victim-centred alternatives to criminal prosecutions that can provide more effective remedies;
- Revise section 7(a) to remove minimum custodial sentences, and set a limit to fines to ensure their proportionality. Alternative criminal sentences, such as community service, should also be available.

Freedom of peaceful assembly

Chapter 5, section 6(d) of the draft Law prohibits:

> Obstructing, disturbing, threatening, and attacking worshiping services, donation events and parades led by a religious leader in accordance with the practicing religion without harming stability and peace.

Chapter 6, section 7(d) provides a minimum of 1 year and maximum of 2 years imprisonment as a sentence, with unspecified fines.

ARTICLE 19 is concerned that this vague prohibition duplicates already existing limitations on conduct in assemblies and public order related offences, which raise their own freedom of expression concerns. Section 8(b) of the draft Law may be read as permitting simultaneous criminal proceedings under other laws for the same conduct. While it is essential to ensure that people are able to exercise their right to freely manifest their religion or belief, others must also be free to exercise their rights to freedom of peaceful assembly and to freedom of expression. Concepts such as "obstruction" or "disturbance" could be interpreted broadly to forbid any protest within sight and sound of events led by religious leaders. Moreover, protecting only those religious events that are not "harming stability and peace" is a subjective standard that may lead to discrimination on the basis of religion or belief, and a lack of protection for views the government disagrees with.

Recommendation

- Remove section 6(d) from the draft law, together with the sanctions in section 7(d).

Conclusions

The draft Interfaith Harmonious Coexistence Law (the draft Law), proposed by the Ministry of Religious Affairs and Culture of Myanmar, does not meet international human rights standards and should not be introduced to the Pyidaungsu Hluttaw (the Myanmar Parliament) in its current form. Efforts should instead focus on developing positive policy measures, alongside reforms to the Penal Code and the development of a comprehensive non-discrimination legal framework, to ensure both the right to freedom of expression and the right to equality.

Following an analysis of the draft Law, ARTICLE 19 considers that it does not provide a sound legal framework to protect and promote the interrelated and mutually reinforcing rights to freedom of opinion and expression,[26] freedom of religion or belief, and freedom from discrimination.

International human rights law requires the Myanmar government to protect and promote all of these rights: one right cannot be prioritised over another, and any tensions between them must be resolved within the boundaries of international human rights law. In relation to the right to freedom of expression, Article 19 of the International Covenant on Civil and Political Rights (ICCPR) requires that any limitation meet a three-part test: the restriction a) must be provided for by law; b) pursue a legitimate aim; and c) be necessary and proportionate.[27] Though states are required to limit the advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination or violence,[28] this is a last resort measure reserved only for particularly severe forms of "hate speech".

Although Myanmar has neither signed nor ratified the ICCPR or other main human rights treaties, ARTICLE 19 suggests that the standards contained within these treaties, which largely reflect customary international law, should guide the interpretation of Myanmar's Constitutional guarantees for freedom of expression in Article 364.

ARTICLE 19 finds that the draft Law stands in opposition to these standards. Though it supposes to promote "harmonious coexistence", its measures prioritise ambiguous and far-reaching restrictions on freedom of expression that will only close space for inter-communal dialogue and increase distrust within and between groups. This includes through broad criminal prohibitions on "hate speech" that impose minimum sentences of imprisonment for blasphemy and "misusing of religion for political purposes". The draft Law will therefore be counter-productive to combatting discrimination and violence that is motivated by or perpetrated against people on the basis of religion or belief.

Moreover, the draft Law does not provide safeguards against its likely discriminatory impacts on the freedom of expression and equality rights of already marginalised groups, including

[26] International Covenant on Civil and Political Rights (ICCPR) Article 19(2) provides: 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.
[27] ICCPR Article 19(3) provides: 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.
[28] Article 20(2) of the ICCPR.

those with minority religions or beliefs, non-citizens, women, persons with disabilities, lesbian, gay, bisexual and trans (LGBT) people, as well as political opposition and dissenters.

ARTICLE 19 recommends the withdrawal of the draft Law, and for an entirely new approach combining positive policy measures, reforms to existing laws, and the enactment of a legal framework for the right to equality and non-discrimination.

ARTICLE 19 considers that the draft Law is profoundly flawed from a freedom of expression perspective, and should therefore be withdrawn. The Ministry of Religious Affairs and Culture should consult broadly on a new set of objectives for any replacement Law in line with international human rights standards, using as a model HRC resolution 16/18 and the Rabat Plan of Action.

This legislative process should include plans to review and reform, as a priority, the Penal Code of Myanmar and other provisions that unnecessarily restrict freedom of expression, in addition to enacting a comprehensive legal framework on equality and non-discrimination.

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, freedom of expression and equality, 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.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org.

For more information about the ARTICLE 19's work in Myanmar, please contact Yin Yadanar, Programme Manager for Myanmar at ARTICLE 19, at yin@article19.org.