

Myanmar: Interfaith Harmonious Coexistence Bill (3rd version)

September 2017

Legal analysis

Executive summary

In this analysis, ARTICLE 19 reviews the third version of the draft Bill for Interfaith Harmonious Coexistence (the draft Bill) for its compliance with international human rights standards.

The draft Bill is quite distinct from its [2016 predecessor](#), which ARTICLE 19 also analysed. While more narrowly focused in some ways, the draft Bill remains dangerous to the rights to freedom of opinion and expression, freedom of religion or belief, and freedom from discrimination. It still adopts a very broad definition of “hate speech”, and relies entirely upon the criminal law and coercive measures. As such, it fails to comply with international human rights standards.

The draft Bill, as with its predecessor, still prioritises censorship as the primary tool for responding to “hate speech”, in a manner that will only increase legal uncertainty and close space for peaceful inter-communal dialogue. If the draft Bill is enacted, it would add to the numerous tools the government frequently uses to suppress the expression of oppositional or critical views and dissent. This poses particular risks for minority and marginalised groups, who are most often the victims of the most severe forms of “hate speech”. The draft Bill is therefore likely to be counter-productive to its intended objectives.

Of new concern is the proposal in the draft Bill to create a Central Committee and Board of Investigation, new executive bodies which will not be independent from political influence, and which have undefined and sweeping powers to determine what constitutes “hate speech” and what the response to it should be. No oversight or accountability mechanisms exist to ensure those powers are not abused to violate human rights, including the right to freedom of expression.

Summary of recommendations

1. The draft Bill should be withdrawn in its entirety, in favour of a new approach combining positive policy measures to promote and protect the rights to freedom of expression and equality,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. 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, as well as prohibitions on direct and public incitement to genocide and incitement to crimes against humanity;
3. The protective scope of any measures to address “hate speech” should encompass all protected characteristics recognised under international human rights law, and not be limited to ethnicity and religion;
4. The Myanmar government should refrain from the creation of politicised administrative bodies for the purpose of identifying, investigating or initiating prosecutions for “hate speech” cases;
5. The Myanmar government must sign and ratify the ICCPR and all other major international human rights treaties without delay.

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Introduction

ARTICLE 19 has followed the legislative efforts of the Myanmar government of reviews its freedom of expression legislation, including drafting new legislation on “hate speech.”¹ In order to support the ongoing efforts and public debates on these efforts we have issued analyses of various legal drafts and comparative overviews of how these should protect freedom of expression and other fundamental rights. In all these documents, we urged the legislators to ensure that the new provisions comply with international human rights standards.

ARTICLE 19 finds that the draft “Interfaith Harmonious Coexistence” Bill (3rd version) (the draft Bill), 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 Bill, 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, freedom of religion or belief, and to equality.

Though it is welcome that restrictions on expression included in previous drafts have been withdrawn, such as blasphemy and limits targeting political speech, the narrower definition for “hate speech” remains broader than what can legitimately be restricted under international human rights law.

Also concerning is the proposed creation of two new administrative bodies to enforce these limitations on expression, which is likely to exacerbate rather than provide accountability or redress for discrimination and other rights violations. The constitution of these bodies, and the absence of mechanisms to ensure oversight or accountability, means that the potential for them to become politicised and target dissent is a distinct possibility. Any enforcement of limitations on rights should be left to an independent judiciary.

Still, the government’s approach fails to recognise the important role of strong non-discrimination laws more broadly, combined with positive measures to increase inter-communal dialogue and interaction, with the aim of building trust between communities and resilience against messages of hatred. Simply criminalising expression is likely to be counter-productive to this aim.

ARTICLE 19 therefore recommends the withdrawal of the draft Bill, and for an entirely new approach to be undertaken, combining positive policy measures, reforms to existing criminal laws, and the enactment of a legal framework for the right to equality and non-discrimination. ARTICLE 19 stands ready to provide further support in this process.

¹ Legal Analysis: Draft Interfaith Harmonious Coexistence Law”, ARTICLE 19, 31 October 2016; available at: <http://bit.ly/2h1SQLh>.

International human rights standards

ARTICLE 19's comments on the Draft Bill are informed by international human rights law and standards, in particular regarding the mutually interdependent and reinforcing rights to freedom of expression and equality.²

Although Myanmar has not signed or ratified the International Covenant on Civil and Political Rights (ICCPR), ARTICLE 19 suggests that obligations set out therein, which largely reflect customary international law, should guide the interpretation of Myanmar's Constitutional guarantees for freedom of expression in Article 364.

The right to freedom of expression

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights (UDHR),³ and given legal force through Article 19 of the ICCPR.⁴

The scope of the right to freedom of expression is broad. It requires States to guarantee to all people the freedom to seek, receive or impart information or ideas of any kind, regardless of frontiers, through any media of a person's choice. The UN Human Rights Committee (HR Committee), the treaty body of independent experts monitoring States' compliance with the ICCPR, has affirmed that the scope of the right extends to the expression of opinions and ideas that others may find deeply offensive,⁵ and this may encompass discriminatory expression.

While the right to freedom of expression is fundamental, it is not absolute. A State may, exceptionally, limit the right under Article 19(3) of the ICCPR, provided that the limitation is:

- **Provided for by law;** any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly;
- **In pursuit of a legitimate aim,** listed exhaustively as: respect of the rights or reputations of others; the protection of national security or of public order (*ordre public*), or of public health or morals;
- **Necessary in a democratic society,** requiring the State to demonstrate in a specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.⁶

Thus, any limitation imposed by the State on the right to freedom of expression, including to limit "hate speech", must conform to the strict requirements of this three-part test. Further, Article 20(2) ICCPR provides that any advocacy of national, racial or religious hatred that

² These are more comprehensively set out in "Hate Speech" Explained: A Tool Kit, ARTICLE 19, 2015; available at: <http://bit.ly/1PflHh4>.

³ Through its adoption in a resolution of the UN General Assembly, the UDHR is not strictly binding on states. However, many of its provisions are regarded as having acquired legal force as customary international law since its adoption in 1948; see *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit).

⁴ The ICCPR has 167 States parties, including Germany.

⁵ See HR Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para 11.

⁶ *Op cit.*, para. 22.

constitutes incitement to discrimination, hostility or violence must be prohibited by law (see more below).

The right to equality

Article 1 of the UDHR states that “all human beings are born free and equal in dignity and rights”; Article 2 provides for the equal enjoyment of the rights and freedoms contained in the declaration “without distinction of any kind,” and Article 7 requires protection from discrimination. These guarantees are given legal force in Articles 2(1) and 26 of the ICCPR, obliging States to guarantee equality in the enjoyment of human rights, including the right to freedom of expression, and equal protection of the law.

Limitations on “hate speech”

While “hate speech” has no definition under international human rights law, the expression of hatred towards an individual or group on the basis of a protected characteristic can be divided into three categories, distinguished by the response international human rights law requires from States:⁷

- Severe forms of “hate speech” that international law *requires* States to prohibit, including through criminal, civil, and administrative measures, under both international criminal law and Article 20(2) of the ICCPR;
- Other forms of “hate speech” that States *may* prohibit to protect the rights of others under Article 19(3) of the ICCPR, such as discriminatory or bias-motivated threats or harassment;
- “Hate speech” that is lawful but nevertheless raises concerns in terms of intolerance and discrimination, meriting a critical response by the State but should be protected from restriction under Article 19(3) of the ICCPR.

Obligation to prohibit

Article 20(2) of the ICCPR obliges States to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.” In General Comment No. 34, the HR Committee stressed that while States are *required* to prohibit such expression, these limitations must nevertheless meet the strict conditions set out in Article 19(3).⁸

The Rabat Plan of Action,⁹ adopted by experts following a series of consultations convened by the UN Office of the High Commissioner for Human Rights (OHCHR), advances authoritative conclusions and recommendations for the implementation of Article 20(2) ICCPR.¹⁰

⁷ For a full explanation of ARTICLE 19’s policy on “hate speech”, see Hate Speech Explained: A Toolkit, *op.cit.*

⁸ HR Committee, General Comment No. 34, 21 June 2011, CCPR/C/GC/34, para. 52.

⁹ The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, A/HRC/22/17/Add.4, Appendix, adopted 5 October 2012; available at <http://bit.ly/2fTNMG6>.

¹⁰ The Rabat Plan of Action has been endorsed by a wide range of special procedures of the UN Human Rights Council, see, for example: Report of the Special Rapporteur on protecting and promoting the right to freedom of opinion and expression on hate speech and incitement to hatred, A/67/357, 7 September 2012; Report of the Special Rapporteur on freedom of religion or belief on the need to tackle manifestations of collective religious hatred, Heiner Bielefeldt, A/HRC/25/58, 26 December 2013; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on manifestations of racism, racial discrimination, xenophobia and related intolerance on manifestations of racism on the Internet and social media, Mutuma Ruteere, A/HRC/26/49, 6 May 2014; and the contribution of the UN Special Advisor on the Prevention of

- **Incitement:** prohibitions should focus only on the advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination, or violence from the audience, rather than the advocacy of hatred without regard to its tendency to incite action by the audience against a protected group.
- **Six part threshold test:** to assist in judicial assessments of whether a speaker intends and is capable of having the effect of inciting their audience to violent or discriminatory action through the advocacy of discriminatory hatred, six factors should be considered:
 - **Context:** the expression should be considered within the political, economic, and social context prevalent at the time it was communicated, for example the existence or history of conflict, existence or history of institutionalised discrimination, the legal framework and the media landscape.
 - **Identity of the speaker:** the position of the speaker as it relates to their authority or influence over their audience, in particular if they are a politician, public official, religious or community leader.
 - **Intent:** intent of the speaker to engage in advocacy to hatred, requiring both (i.) intent to target a protected group on the basis of a protected characteristic, and (ii.) knowledge that their conduct will likely incite the audience to discrimination, hostility or violence.
 - **Content of the expression:** what was said, including the form and the style of the expression, and what the audience understood by this;
 - **Extent and magnitude of the expression:** the public nature of the expression, the means of the expression and the intensity or magnitude of the expression in terms of its frequency or volume;
 - **Likelihood of harm occurring, including its imminence:** there must be a reasonable probability of discrimination, hostility or violence occurring as a direct consequence of the incitement.
- **Protected characteristics:** States' obligations to protect the right to equality more broadly, with an open-ended list of protected characteristics, supports an expansive interpretation of the limited protected characteristics in Article 20(2) of the ICCPR to provide equal protection to other individuals and groups who may similarly be targeted for discrimination or violence on the basis of other recognised protected characteristics.
- **Proportionate sanctions:** the term "prohibit by law" does not mean criminalisation; the HR Committee has said it only requires States to "provide appropriate sanctions" in cases of incitement.¹¹ Civil and administrative penalties will in many cases be most appropriate, with criminal sanctions an extreme measure of last resort.

The Committee on the Elimination of all forms of Racial Discrimination (the CERD Committee) has also based their guidance for respecting the obligation to prohibit certain forms of expression under Article 4 of the ICERD on this test.¹²

Genocide to the expert seminar on ways to curb incitement to violence on ethnic, religious, or racial grounds in situations with imminent risk of atrocity crimes, Geneva, 22 February 2013.

¹¹ Human Rights Committee, General Comment 11: prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29 July 1983, para. 2.

¹² UN Committee on the Elimination of Racial Discrimination, General recommendation No. 35: Combating racist hate speech, 26 September 2013, paras. 15 - 16. The CERD Committee specifies that five contextual factors should be taken into account: the content and form of speech; the economic, social and political climate; the position or status of the speaker; the reach of the speech; and the objectives of the speech. The CERD Committee also specifies that States must also consider the intent of the speaker and the imminence and likelihood of harm.

Permissible limitations

There are forms of “hate speech” that target an identifiable individual, but that do not necessarily advocate hatred to a broader audience with the purpose of inciting discrimination, hostility or violence. This includes discriminatory threats of unlawful conduct, discriminatory harassment, and discriminatory assault. These limitations must still be justified under Article 19(3) of the ICCPR and the three-part test set out above.

Lawful expression

Expression may be inflammatory or offensive, but not meet any of the thresholds described above. This expression may be characterised by prejudice, and raise concerns over intolerance, but does not meet the threshold of severity, at which restrictions on expression are justified. This also includes expression related to denial of historical events, insult of State symbols or institutions, and other forms of expression that some individuals and groups might find offensive.

This does not preclude States from taking legal and policy measures to tackle the underlying prejudices of which this category of ‘hate speech’ is symptomatic, or from maximising opportunities for all people, including public officials and institutions, to engage in counter-speech. Many of these positive measures are set out in the Rabat Plan of Action,¹³ which draws extensively upon ARTICLE 19’s Camden Principles on Freedom of Expression and Equality.

UN Human Rights Council standards

The UN Human Rights Council (HRC) has as recently as March 2017 stressed that action is required from the Myanmar government to address incitement to violence, including as against members of ethnic, religious and linguistic minorities.¹⁴

The resolution emphasises the importance of a holistic approach, with measures to promote tolerance as well as proscribe the most severe forms of “hate speech”:

Strongly encourages the Government of Myanmar to take the measures necessary to address discrimination and prejudice against women, children and members of ethnic, religious and linguistic minorities across the country, and to take further action to publicly condemn and speak out against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, and to adopt measures to criminalize incitement to imminent violence based on nationality, race or religion or belief, while upholding freedom of expression, and to increase efforts further to promote tolerance and peaceful coexistence in all sectors of society in accordance with Human Rights Council resolution 16/18 of 24 March 2011 and the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence by, inter alia, further facilitating interfaith and intercommunal dialogue.¹⁵

The HRC has therefore instructed the Myanmar Government to specifically draw upon the Rabat Plan of Action (see above), as well as HRC Resolution 16/18, in developing their response to “hate speech”. It contains an action plan, predominantly setting out positive policy measures

¹³ *Op. cit.*

¹⁴ HRC resolution 34/22; adopted without a vote on March 2017; available at: <http://bit.ly/2xisOsF>.

¹⁵ *Ibid.*, para 14.

for States to address the root causes of intolerance and discrimination, in particular that based on religion or belief.¹⁶ These include action to:

- Create collaborative networks to build mutual understanding, promoting dialogue and inspiring constructive action in various fields;
- 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,¹⁷ endorsed by the UN Special Rapporteur on freedom of religion or belief,¹⁸ and has influenced the approach of the UN Committee on the Elimination of Racial Discrimination.¹⁹ Legislation to comprehensively protect the right to equality, on all grounds recognised under international human rights law, is also essential.²⁰

Since the Rabat Plan of Action and HRC Resolution 16/18, numerous initiatives have sought to flesh out the responsibilities of other non-state actors to address “hate speech”. In relation to religious leaders, for example, this includes the Fez “Plan of Action for Religious Leaders and Actors to Prevent Incitement to Violence that Could Lead to Atrocity Crimes”,²¹ and the Beirut Declaration on 18 Commitments on “Faith for Rights”.²² Both documents set out various measures that religious leaders can undertake, and which States can support, to address the root causes of hatred and intolerance.

¹⁶ For a full guide to HRC Resolution 16/18, see: “Implementing HRC Resolution 16/18: a framework for inclusivity, pluralism, and diversity”, ARTICLE 19, February 2017; available at: <http://bit.ly/2wwjIR8>.

¹⁷ 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>.

¹⁸ 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.*

¹⁹ Committee on the Elimination of Racial Discrimination, General Recommendation No. 35, CERD/C/GC/35, 26 September 2013; available at: <http://bit.ly/1y70Yb9>.

²⁰ The Camden Principles on Freedom of Expression and Equality (Camden Principles), ARTICLE 19, 2009, at Principle 3; available at <http://bit.ly/1XfMDrL>.

²¹ Plan of Action for Religious Leaders and Actors to Prevent Incitement to Violence that Could Lead to Atrocity Crimes (2017); available from Global Freedom of Expression, Columbia University, at: <http://bit.ly/2fXwSey/>

²² Beirut Declaration and its 18 commitments on ‘Faith for Rights’, OHCHR 2017; available at: <http://bit.ly/2v5Y8dk>.

Analysis of the draft Bill

Definitions

Chapter 1, section 2 of the draft Bill outlines definitions of key terms in the draft Bill, many of which are improvements on the more restrictive terminology of previous drafts.

Religion or belief

ARTICLE 19 notes that this Chapter includes more expansive definitions of “religious faith,” “religious follower,” and “religious leader,” with references to officially recognised religions removed. This has the advantage of recognising 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 their religion or belief.²³

However, we find that improvements must be made to recognise that not all people hold a religious belief as such, such as atheists or humanists. 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”.²⁴ This has implications for the right to freedom of expression also, as it is often persons with non-traditional or minority religions or beliefs whose rights are most often violated.

Ethnicity

While the draft Bill supposes to protect “ethnic groups” from “hate speech”, less guidance is given on these terms in Chapter 1, Section 2.

Narrowly defining these terms would limit the scope of any protective measures the draft Bill otherwise provides. However, an expansive definition would clarify that the scope of protective measures is intended to be broad. In this respect, “ethnic groups” could be built upon to make clear that this encompasses groups defined by their race, colour, descent, and national or ethnic origin, regardless of citizenship status.

Similarly, the role of leaders within respective “ethnic groups” could be acknowledged, to reflect the acknowledgement given to “religious leaders”. Notwithstanding that ethnic groups tend not to be formally organised in the same way as religious groups, there are nevertheless often persons who play leadership roles in communities who may be necessary to engage in tackling “hate speech”.

Citizenship

ARTICLE 19 welcomes that, compared to the previous draft, restrictive references to “citizenship” have been removed from the draft Bill.

At the same time, it would be beneficial to go further, and expressly recognise that the draft Bill seeks to protect the rights of all persons, regardless of citizenship status. This would clarify

²³ 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>.

²⁴ The Human Rights Committee, General Comment No. 22, *op. cit.*

that the protective scope of the draft Bill extends to persons who do not qualify for citizenship under Myanmar's citizenship laws.

Defining “hate speech”

Section 2(j) of the draft Bill defines “hate speech.” This definition is analysed in conjunction with the prohibition on “hate speech” (Section 10 of the draft Bill) below.

Recommendations on definitions:

- 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, and ensure their equal protection under the law;
- Expand the concept of “ethnic groups” to be inclusive of “race, colour, ethnic or national origin”;
- Expressly recognise that all persons, regardless of citizenship, are considered protected under the law;
- Ensure that any definition of “hate speech” used to prohibit expression is narrowly defined, and conforms with Articles 19(3) and 20(2) of the ICCPR.

Objectives

Chapter 2, section 3 of the draft Bill 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 observes that the objectives of the Draft Bill are clearer than in previous drafts, with notable improvements to their tone and focus. In particular, there is less emphasis on restricting expression, and a clearer commitment to protecting individuals from harm. However, there are numerous improvements that are still required.

Protection of human rights

The objectives do not sufficiently prioritise the protection and promotion of human rights, in particular the rights of all people to equality and to freedom of expression, freedom of religion or belief, and freedom of assembly.

While section 3(b) speaks to paying “due regard for the rights of others among diverse religious faiths and ethnic groups”, this does not accurately reflect the government's obligation under international human rights law to *protect and promote* these rights. The objectives would be strengthened by accurately reflecting this obligation, and by expressly listing the most relevant rights.

Similarly, the draft Bill should seek to protect all persons from the harms of “hate speech”, and expand the listing of protected characteristics beyond religion and ethnicity. The listing should include, *inter alia*: race, colour, ethnic or national origin, migrant or refugee status, sexual orientation, gender identity, sex, disability, and any other protected characteristic recognised under international human rights law.

Prevention by respecting diversity, pluralism and dissent

The objectives focus on protection from “hate speech”, whereas it would be more effective to focus on positive strategies for prevention that address the root causes of hatred and discrimination. Greater emphasis should therefore be given to increasing respect for diversity and pluralism, through positive measures that seek to enhance opportunities for dialogue and understanding between groups.

The objective stated in section 3(c) of the draft Bill to “create and establish a human society being settled together within the State” must therefore be revised, as it may be misinterpreted to encourage a singular national identity where pluralism and diversity is not respected. The suppression of difference in order to promote a national identity that is monolithic will create more tension, with negative consequences for freedom of expression that will disproportionately affect persons belonging to minority groups or expressing dissent. For the same reason, the term “dissension” (translated elsewhere in the law as “dissent”) should be removed from section 3(a).

The objectives of the draft Bill should be clear that diversity and pluralism are valued, and that this means robust debate and disagreement are protected, even where expression may be considered by some to be offensive.²⁵

Recommendations on Objectives:

- Prioritise as an objective in the draft Bill 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.

Criminalising “hate speech”

Chapter 6, section 10 of the draft Bill prohibits “hate speech” as follows:

Utterance of hate-speech, reiteration of hate-speech and spreading it out, publicity for hate-speech through information communication technology for the purpose of creating dissent and conflict among diverse religious followers and ethnic groups, are strictly prohibited.

Chapter 1, section 2(j) defines “hate speech” in the following terms:

Hate speech denotes any bodily or verbal action by any manner or by a certain language which can create conflicts and dissension among diverse religious faiths and ethnic groups.

Chapter 10, section 15 of the draft Bill provides that there is a minimum sentence of 6-months imprisonment, and maximum sentence of 3 years’ imprisonment, for violating this prohibition.

This prohibition on “hate speech” does not comply with international human rights law. It remains dangerously broad, and will likely be abused to punish legitimate dissent.

²⁵ HR Committee, General Comment No. 34, CCPR/C/GC/34, 12 September 2011, para. 11; available at: <http://bit.ly/1xmySgV>.

ARTICLE 19 considers that the draft Bill should dispense with the term “hate speech” entirely insofar as it is used as a basis for restricting expression. Instead, more precise categories of expression that may legitimately be subject to restriction should be identified in the draft Bill. This would include the Article 20(2) ICCPR prohibition on “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

ARTICLE 19 strongly urges that the key elements of the Article 20(2) ICCPR prohibition that are absent from section 10 and section 2(j), should be integrated to these provisions in the draft Bill. These include:

- **Advocacy of discriminatory hatred constituting incitement:** the absence of a requirement that there is advocacy of discriminatory hatred that constitutes incitement to a prohibited act makes the prohibition in the draft Bill exceptionally broad. It means that a person may be held responsible for expression that causes “conflict or dissent”, even where their purpose was neither to advocate hatred nor incite harm against others. This could lead to minority or dissenting expressions being punished simply because there was a violent or hostile reaction to them. This privileges the position of antagonists, and places persons with minority or dissenting opinions in situations of particular vulnerability. Integrating the elements of advocacy of discriminatory hatred and incitement from the ICCPR is necessary to distinguish acts of incitement that are discriminatory, from controversial statements that may cause a violent backlash. The latter should be protected according to international human rights law.
- **A target group defined by a protected characteristic:** the draft Bill, and Sections 10 and 2(j) in particular, have a narrow focus on religious and ethnic groups. To more accurately reflect Article 20(2) of the ICCPR, the focus must be advocacy of a hatred against a particular group because of their protected characteristic (such as race, nationality or religion). The listing should include, *inter alia*: race, colour, ethnic or national origin, migrant or refugee status, sexual orientation, gender identity, sex, disability, and any other protected characteristic recognised under international human rights law.
- **Incitement to violence, hostility or discrimination:** Sections 10 and 2(j) of the draft Bill do not require the audience of the expression to be incited towards committing a harmful act against the target group. International standards require that for a prohibition to be necessary, the advocacy of hatred must reach a threshold of severity so high that it is likely to incite a harmful act, i.e. imminent violence, hostility or discrimination. Determining whether the severity threshold has been met requires applying the six-part test, set out in the international standards section above.
- **Dissent is not harmful:** the inclusion of the term “dissension” or “dissent” in Sections 10 and 2(j) of the draft Bill directly contravenes the core principle of international human rights law that expression cannot be suppressed merely on the basis that it is controversial or others disagree with it. This remains the case even where certain ideas are likely to cause a violent reaction from those offended by the expression; the law should focus on holding those persons responsible for their unlawful reaction, rather than criminalising the expression itself. Any prohibition should be narrowly connected to the potential for expression to advocate hatred against a particular group, so as to incite violence, hostility or discrimination against them.
- **Intent:** it is not clear from Section 10 and 2(j) what standard of intent must be demonstrated to find a person criminally liable under Section 15. Given the serious nature of the penalties to be imposed on the exercise of a fundamental right, specific intent 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 use of the term “for the purpose of” in Section 10 does not make this intent requirement sufficiently robust.

- **Proportionality of sanctions:** international human rights law does not require criminal sanctions for cases of incitement, in particular for cases of incitement to discrimination or hostility. The focus on custodial sentences, including the provision of minimum sentences, does not provide judges with sufficient flexibility to ensure that any sanctions imposed are proportionate. Fines and community sentences should also be considered as alternative sentences. In addition, alternative causes of action in civil and administrative law provide alternative forms of seeking redress that can prove more proportionate and effective.

Given the particular context in Myanmar, including the concerns expressed in HRC resolution 34/22 in March 2017, the draft Bill should expressly prohibit incitement to atrocity crimes, including direct and public incitement to genocide as well as incitement to crimes against humanity.

Convictions for direct and public incitement to genocide require proof of several key elements:

- **Public:** the expression inciting others to commit acts of genocide must be “public”, indicating there must be a communication in a public place, or to the public or a section of the public, for example through mass media and digital technologies;
- **Direct:** the expression must be “direct”, i.e. the communication must be sufficiently specific as a call for action, showing a close relationship between the expression and the danger of an act of genocide occurring. However, direct does not mean explicit, as implicit expression may also directly incite genocide if in its linguistic and cultural context it is sufficiently clear to its audience;
- **Intent:** the speaker must specifically intend to incite genocide, and intend for genocide to occur. This requires the speaker to specifically intend to engage in the communication calling for genocide, and either specifically intend to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, or at least be aware of the substantial likelihood that the commission of genocide would be a probable consequence of his acts;

As with all forms of incitement, the incited act (genocide) need not actually occur; creating the potential for genocide is sufficient to incur liability. Where genocide does occur, the act of incitement may be considered to be an act of genocide in itself, and charged as separately or additionally as instigation or complicity.

While international law does not prescribe that States criminalise incitement of other international crimes, such as crimes against humanity, ARTICLE 19 considers that such offences are justified, and are compatible with international human rights law relating to freedom of expression.

Recommendations on criminalising “hate speech”:

- Revise sections 10 and 2(j) of the draft Bill to meet the requirements of Article 20(2) and Article 19(3) of the ICCPR, including by removing any references to “dissent” or “dissension”, and by making clear that there is a high threshold for limitations on expression, as set out in the six-part test of the Rabat Plan of Action;
- Revise section 15 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;

- 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, thereby providing more victim-centred alternatives to criminal prosecutions that can provide more effective remedies;
- Criminalise the “public and direct incitement to genocide” and incitement to crimes against humanity, in line with international criminal law and international human rights law.

Creation of new administrative bodies

The draft Bill seeks to create two new administrative bodies, the Central Committee for protection against religious and ethnic hatred (the Central Committee) and the Board of Investigation (Chapters 3 and 5, respectively). Both bodies are created to implement the draft Bill, with their respective competencies set out in Chapters 4 and 5. A series of criminal measures are to be instituted to compel cooperation with these bodies (Chapter 6) with criminal sanctions also set out separately (Chapter 7).

The need for coordinated government action

ARTICLE 19 considers that any meaningful strategy to address the root causes of “hate speech” while protecting the rights to freedom of expression and equality requires comprehensive action from agencies across government, as is foreseen in the Rabat Plan of Action.

Establishing mechanisms to ensure that such policies are created and implemented in a coordinated and unified way is therefore a potentially positive proposition. However, this presumes that the government has such a comprehensive strategy and the resources to implement them, and this is not clear. It is therefore difficult to evaluate, on the basis of the draft Bill alone, whether the creation of the Central Committee would be a positive or negative development.

Lack of clarity in Committee’s powers

Chapter 4 of the draft Bill does not clearly set out the powers and objectives of the Central Committee, nor the types of policy actions that it will further the implementation of. This reflects the overarching and fatal weakness in the draft Bill, which is its preoccupation with restrictive measures to limit freedom of expression through the criminal law, instead of measures to address the root causes of hatred and discrimination by promoting pluralism and diversity.

In light of this, the vague instruction in the draft Bill in section 5(b)(2) that the Committee will lay down “necessary policies, instructions and schemes” to “protect against conflicts through hate speech” poses a danger that these as yet undetermined government actions will focus on measures of censorship. This would close space for discussion and restrict access to information, and potentially exacerbate conflict between different religious or ethnic groups. It is concerning that no provision in the draft Bill requires that these further government actions be constrained by international human rights law.

Other provisions in Chapter 4 indicate that the primary role of the Central Committee is to be a clearing house to identify and prioritise the prosecutions of “hate speech” cases (section 5(c)-(f)). Such cases are identified by the Committee itself, with ambiguous cases referred to a “Board of Investigation” for more information, or are referred directly from the Cabinet.

It seems that the Committee does not prosecute the cases itself, but refers them to the police. However, where necessary, the Committee will establish a “Board of Investigation”. A Board

consists of 5 – 7 individuals, who have the power to compel persons to cooperate with their investigations, and who are required to comply with the Criminal and Civil Codes of procedure and evidence. The Board completes detailed reports with recommendations for the Committee to consider.

Independence of the Committee

The Committee is not an independent body, but is entirely politicised. Its membership of 9 includes the Union Minister and the Director-General of the Religious Affairs Department (Chapter 3), with no criteria specifying the competencies and qualifications for other post-holders. There is no requirement for minority religion or ethnic groups to be represented on the Committee, nor for any of the individuals to have expertise in conflict-prevention or the protection of human rights. Similarly, there is no mechanism for the public or representatives of minority groups to refer cases to the Committee, with all cases identified at the initiative of executive entities.

The constitution of a “Board of Investigation” is not specified in the draft Bill.

The politicised nature of the Committee creates the distinct possibility that the identification and referral of cases will entirely reflect the preferences of the government. Allies of the government who engage in real instances of incitement to violence will likely not face scrutiny by the Committee. At the same time, the broad definition of “hate speech” in the draft Bill would enable the Committee to target and harass people who are critical of the government.

Sanctions for failure to cooperate with the Committee or Board of Investigations

The draft Bill creates various offences for failure to cooperate with the Committee or Board of Investigators. These are:

- Violating an order or instruction of the Committee (Section 11), with six months to three years’ imprisonment available as punishment (Section 16);
- Appearing or failing to appear in front of a Board of Investigation without valid reasons, substantial evidence or witnesses (Section 12), with six months to two years imprisonment available as punishment (Section 17);
- Disturbing a Board of Investigation’s investigations (Section 13), with two to six months available as punishment (Section 18).

Considering the ambiguities surrounding the role of the Committee and Board of Investigation, there is the potential that persons will fall foul of Sections 11 – 13 without intending to. For example, while violating an order or instruction of the Committee is an offence, no provision setting out the powers of the Committee indicates what their powers to give out orders or instructions are.

This is particularly concerning for members of minority groups who may be required to appear before these entities in the course of their investigations, and should not be re-victimised and/or criminalised through this process.

Recommendations on the creation of new administrative bodies:

- The role of the Central Committee should be limited to ensuring inter-agency coordination to roll out positive policy measures to address the root causes of hatred and discrimination in society; these positive policy measures should be developed through an open, inclusive

and participatory process with communities that are most affected by “hate speech”, and guides by HRC resolution 16/18 and the Rabat Plan of Action.

- Any role for identifying and monitoring “hate speech” in Myanmar should be assigned to a politically independent body, comprised of experts in the field who have a comprehensive understanding of international human rights law. A reformed National Human Rights Commission, fully in compliance with the Paris Principles, would be an appropriate body for this role.
- Any role for investigating and prosecuting “hate speech” should be assigned to specialist units within the police and prosecution services; there must be clear guidance to these entities to ensure the protection of the right to freedom of expression, and to ensure that investigations and prosecutions are insulated from any political pressure.

Freedom of peaceful assembly

Section 14 of the draft Bill sets out the following prohibition:

No one can threaten and forbid the religious rites and rituals in accordance with the legal permission, such as worshipping ceremonies, preaching assemblies, performing devotions, offering ceremonies, religious ceremonies in process on the roads etc.

Chapter 7, section 19 provides a minimum of three months and maximum of 1 years' imprisonment as a sentence.

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 14 of the draft Bill 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. The terms “threaten” or “forbid” may be interpreted to restrict any protest within sight and sound of events led by religious leaders.

Recommendation on freedom of peaceful assembly

- Remove section 14 from the draft Bill, together with the sanctions in section 19.

Conclusions

ARTICLE 19 considers that notwithstanding some improvements, the draft Bill remains 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.

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