



Myanmar Briefing Paper: Criminalisation of Free Expression

May 2019

Introduction

Freedom of expression is severely threatened in Myanmar. The right to freedom of expression, guaranteed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and various other international legal instruments, is key to human development and dignity as well as the enjoyment of all other rights protected by international law. It is necessary for good governance and democracy, and essential in advancing Myanmar's fulfilment of its human rights obligations.

For decades, a key factor inhibiting freedom of expression in Myanmar has been the routine criminal proceedings brought against those exercising their right to freedom of expression. Several laws that criminalise speech and go beyond the restrictions that are permitted under international law remain in effect and have been used against journalists, activists, human rights defenders and individuals voicing opinions critical of the state. This briefing paper sets forth priorities for reforming the laws that criminalise free expression in Myanmar, including:

- Article 66(d) of the Telecommunications Law
- Articles 33 and 34(d) of the Electronic Transactions Law
- The Unlawful Associations Act of 1908
- The Official Secrets Act of 1923
- The Peaceful Assembly and Peaceful Procession Law
- Penal Code sections 124A (sedition), 295A (insulting religion), 499-500 (defamation) and 505 (incitement)

Although this briefing focuses on the provisions in these laws that criminalise free expression, it does not address problems relating to the enforcement, lack of judicial oversight, and procedural ambiguity in applying the laws, which also impede freedom of expression. The government of Myanmar should repeal or amend these laws in order to bring Myanmar's legal framework in line with international human rights law and standards relating to freedom of expression.

International Law

Under international law, freedom of expression can be restricted only in specific circumstances, often articulated as a three-part test. Restrictions must:

- **Be prescribed by law:** Restrictions must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly. Ambiguous, vague or overly broad restrictions on freedom of expression are therefore impermissible.
- **Pursue a legitimate aim:** Legitimate aims are exhaustively enumerated in Article 19(3)(a) and (b) of the ICCPR as respect of the rights or reputations of others,

protection of national security, public order, public health or morals. As such, it would be impermissible to prohibit expression solely on the basis that it casts a critical light on the government or the political or social system espoused by the government.

- **Be necessary and proportionate:** Necessity requires that there must be a pressing social need for the restriction. Proportionality requires that a restriction on expression is not over-broad and that it is appropriate to achieve its protective function. It must be shown that the restriction is specific and individual to attaining that protective outcome and is no more intrusive than other instruments capable of achieving the same limited result.¹

Additionally, Article 20 of the ICCPR sets out a number of specific types of expression which must be prohibited under the ICCPR, namely 'propaganda for war' and 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.'

The articles and laws described below fail to meet this three-part test and should be repealed or amended to accord with international law.

Sections 66(d) and 68(a) of the Telecommunications Law

Section 66(d) of the [2013 Telecommunications Law](#) provides criminal penalties for 'extorting, defaming, disturbing or threatening to any person by using any telecommunications network'. This vague provision has been one of the primary tools used by government authorities to target journalists, activists and others expressing critical opinions online.

Criminal defamation provisions are inherently vulnerable to exploitation, including by the government authorities tasked with enforcing them. Such provisions lack a meaningful connection to a legitimate aim provided by international human rights law and are not a necessary and proportionate response to the harms they supposedly protect against. ARTICLE 19 has consistently advocated for the abolition of criminal defamation laws. The Human Rights Committee has similarly urged all states party to the ICCPR to consider the decriminalisation of defamation.²

Authorities have also targeted journalists under section 68(a) of the Telecommunications Law, which prohibits 'communications, reception, transmission, distribution or conveyance of incorrect information with dishonesty or participation'. This provision is similarly overly broad and vulnerable to arbitrary enforcement.

A 2017 amendment to the Telecommunications Law introduced release on bail and reduced the maximum prison sentence to two years, but did not address section 66(d)'s fundamental incompatibility with the right to freedom of expression.

The Telecommunications Law should be amended, including by removing sections 66(d) and 68(a) in their entirety.

Sections 33 and 34(d) of the Electronics Transactions Law

Section 33 criminalizes any of the following acts using 'electronic transactions technology':

¹ See, Human Rights Committee (HR Committee), General Comment No. 34, CCPR/C/GC/34, 12 September 2011.

² Ibid. at para. 47.

- a) doing any act detrimental to the security of the State or prevalence of law and order or community peace and tranquility or national solidarity or national economy or national culture.
- b) receiving or sending and distributing any information relating to secrets of the security of the State or prevalence of law and order or community peace and tranquility or national solidarity or national economy or national culture.

While safeguarding national security is a legitimate aim under international human rights law, the expansive and vaguely defined restrictions imposed by the law are not necessary and proportionate. Its language is overly broad and captures behaviour that should not be criminalised.

Section 34(d) of the Electronic Transactions Law criminalises the ‘creating, modifying or altering of information or distributing of information created, modified or altered by electronic technology to be detrimental to the interest of or to lower the dignity of any organization or any person’. Following a 2013 amendment, the offense is punishable by only a fine, but remains criminalised. As stated above, states should consider decriminalisation of defamation provisions.

The Electronic Transactions Law should be amended, including by removing section 34(d) in its entirety and by amending section 33.

Unlawful Associations Act of 1908

The Unlawful Associations Act empowers the President to declare groups to be ‘unlawful’ with far reaching consequences for those groups and individuals who interact with them. Section 17(1) provides for two to three years’ imprisonment for any person who ‘is a member of an unlawful association, or takes part in meetings of any such association, or contributes or receives or solicits any contribution for the purpose of any such association or in any way assists the operations of any such association’. Section 17(1) has been frequently employed in a highly arbitrary fashion to target journalists, activists and community leaders working in conflict areas.³

The Unlawful Associations Act should be reformed in line with international human rights law and standards, including by providing clarity on the criteria for identifying which types of organisations may be deemed ‘unlawful’ and narrowing the types of interactions with such groups that are prohibited.

Official Secrets Act of 1923

Section 3(1) of the Official Secrets Act of 1923 establishes criminal penalties of up to 14 years’ imprisonment for a range of activities including entering a ‘prohibited place’; making sketches, plans, models or notes that may be ‘useful to an enemy’; and obtaining, collecting, recording, publishing or communicating ‘any secret official code or password, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy’. This extremely broadly language has been used frequently to prosecute journalists and others, often in relation to their reporting on military activities.⁴

³ See, for example, Amnesty International, “Myanmar: Further information: Kachin pastor sentenced to four years in prison”, 5 December 2017, <http://bit.ly/2CvyTUY>.

⁴ See, for example, Naw Lwin, “Myanmar Now Reporters Threatened With Arrest by Military”, 25 June 2018, <https://bit.ly/2N5L0OK>.

As stated above, any restrictions on freedom of expression should meet the three-part test set forth in Article 19(3). The language of section 3(1) is overly broad and captures behaviour that should not be criminalised. The Official Secrets Act applies to a broad range of information and activities that could be relevant to journalism, academic research and other legitimate activities. Further, it penalises behaviour even when there is no proof of intent to harm the state or a risk of harm from the disclosure.

The Official Secrets Act should be repealed in its entirety, and necessary protections for state secrets incorporated into a comprehensive right to information law in line with international human rights law and standards.

Peaceful Assembly and Peaceful Procession Law

Although a 2016 amendment to the [Peaceful Assembly and Peaceful Procession Law](#) replaced a requirement to obtain police permission to hold a protest with a requirement to provide notice, the law still imposes criminal penalties of up to six months' imprisonment for failure to provide such notice or to comply with other onerous requirements. Further amendments passed by Myanmar's upper house of Parliament in 2018, but still pending before the lower house, would extend these reporting requirements and increase criminal penalties.

The Peaceful Assembly and Peaceful Procession Law has been used repeatedly by the current and former government to silence peaceful protesters expressing dissent or criticizing the government. In 2018, it was deployed repeatedly against anti-war demonstrators.⁵

The Peaceful Assembly and Peaceful Procession Law should be amended in line with international human rights law, which should include but not be limited to amending or repealing Sections 19 and 20.

Penal Code sections 124A (sedition), 295A (insulting religion), 499-500 (defamation), and 505(b) (incitement)

Several sections of the Penal Code criminalise legitimate forms of expression and are also in urgent need of reform:

- Article 124A of the Penal Code criminalises sedition, defined as behavior that brings 'or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards [the Government established by law for the Union or for the constituent units thereof]'. The provision has been used repeatedly to silence government critics.⁶ International standards do not permit restrictions on the right to freedom of expression that are made in order to protect the state or its symbols, and heads of state or other public officials are legitimately subject to criticism and political opposition. **Article 124A of the Penal Code should be repealed.**
- Article 295A of the Penal Code, which provides for up to two years of imprisonment for 'outraging religious feelings', has frequently been used against religious minorities and individuals speaking out against extremism.⁷ Blasphemy provisions such as article 295A are not in line with international standards, such as those set forth in the Rabat

⁵ See, for example, Zarni Mann, "Two Anti-war Demonstrators Jailed for 2 Months Over Yangon Protest", 22 May 2018, <https://bit.ly/2s2T1dE>; Zarni Mann, "Court Refuses Bail for Elderly Trio Detained Over Land Protest", 26 September 2018, <https://bit.ly/2Sug8JG>.

⁶ See, for example, Shoo Naing, "Myanmar arrests government critic under sedition law", 13 July 2018, <https://reut.rs/2Eag9hU>; Toe Wai Aung, "Ngar Min Swe given 7 years for Facebook post", 19 September 2018, <https://bit.ly/2UmMPuz>.

⁷ See, for example, Michael Caster, "Myanmar's Religious Hate Speech Law", 5 May 2016, <https://bit.ly/2R9zR4j>.

Plan of Action and Human Rights Committee General Comment 34.⁸ **Article 295A should be repealed.**

- Articles 499-500 of the Penal Code provide up to two years' imprisonment for the crime of defamation. As explained above, under international human rights standards, penalties for defamation should never include imprisonment and states should consider decriminalising defamation. **Articles 499-500 should be repealed.**
- Article 505 of the Penal Code criminalises 'incitement', defined as the making of a statement 'with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity'. Only advocacy of discriminatory hatred that constitutes incitement to hostility, discrimination or violence should be criminalised, in line with Articles 19(3) and 20(2) of the ICCPR, or where it constitutes direct and public incitement to genocide and other violations of international criminal law. **Section 505 of the Penal Code should be reformed in line with international law.**

⁸ Rabat Plan of action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, UN Doc. A/HRC/22/17/Add.4, 5 October 2012; HR Committee General Comment 34, op. cit.