



## Myanmar Briefing Paper: Countering ‘Hate Speech’

February 2020

### Introduction

This briefing paper sets forth recommendations for countering ‘hate speech’ in Myanmar, with a focus on draft legislation currently being considered by the Myanmar government. The Ministry of Religious Affairs and Culture was responsible for developing the initial versions of the proposed legislation, and in 2016 and 2017 shared drafts under the name ‘Interfaith Harmonious Coexistence Bill’ and later ‘Bill for Protection Against Hate Speech’. These drafts relied heavily on censorship and criminal penalties as means of addressing ‘hate speech’, an approach that violates international human rights law.

Responsibility for developing the legislation was later transferred to a committee chaired by the Ministry of Home Affairs. ARTICLE 19 has reviewed a subsequent draft of the bill dating from mid-2019 and titled ‘Protection Against and Prevention of Hatred Bill’. No public consultations have been on this draft, nor has it been publicly shared by the Ministry. In January 2020, the Ministry of Foreign Affairs indicated that the Ministry of Home Affairs had ‘stepp[ed] up its efforts to push through the Bill for an early adoption by the Hluttaw (Parliament).<sup>1</sup>

This briefing paper describes effective measures to combat ‘hate speech’ drawn from international standards and best practices on the right to freedom of expression and the right to equality. It draws upon ARTICLE 19’s September 2017 legal analysis<sup>2</sup> of the third version of the proposed legislation, and makes recommendations in line with international human rights law and standards, including Human Rights Council Resolution 16/18,<sup>3</sup> the Rabat Plan

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<sup>1</sup> The Republic of the Union of Myanmar, Ministry of Foreign Affairs, ‘Rakhine State: A Snapshot of Myanmar’s current efforts for peace and reconciliation,’ available at: <http://www.myanmarembassydhaka.com/wp-content/uploads/2020/01/Rakhine-State-A-Snapshot-of-Myanmars-current-efforts-for-peace-and-reconciliation.pdf>.

<sup>2</sup> ARTICLE 19, Myanmar: Interfaith Harmonious Coexistence Bill (3<sup>rd</sup> Version), Legal Analysis, 7 September 2017, <https://www.article19.org/wp-content/uploads/2017/09/170907-Myanmar-Hate-Speech-Law-Analysis-August-2017.pdf>.

<sup>3</sup> HRC Resolution 16/18 on combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief, UN Doc. A/HRC/Res/16/18, 24 March 2011, [https://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.RES.16.18\\_en.pdf](https://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.RES.16.18_en.pdf).

of Action<sup>4</sup> and the Camden Principles on Freedom of Expression and Equality.<sup>5</sup> Human Rights Council Resolution 16/18 sets out a universally agreed action plan for states to address intolerance on the basis of religion or belief. The Rabat Plan of Action provides practical legal and policy guidance to states on implementing Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR), which obliges state parties to prohibit ‘any advocacy of national, racial or religious hatred that constitutes incitement to hostility, discrimination or violence’.

The approach to addressing ‘hate speech’ exhibited in the several drafts of the proposed legislation is fundamentally flawed and incompatible with international human rights law and standards. ARTICLE 19 urges the Myanmar government to abandon this approach in favour of the development of a national action plan aimed at tackling the root causes of discrimination and hatred in Myanmar in line with Human Rights Council Resolution 16/18 and the Rabat Plan of Action.

The national action plan should lay out a broad range of positive policy measures to ensure that the right to equality and non-discrimination is fully protected in the country. In particular, the government should repeal all laws and policies that formally or informally institutionalise discrimination and exclusion and enact a comprehensive anti-discrimination law.

### **1. What measures should governments use to combat ‘hate speech’?**

The proposed legislation focuses on restricting and criminalising certain forms of speech. However, international guidance on countering ‘hate speech’ and promoting tolerance places greater emphasis on positive policy measures, including building trust among communities and resilience against messages of hatred. In general, criminalisation should be used to restrict speech only as an exceptional measure, in line with international standards.

HRC Resolution 16/18 and the Rabat Plan of Action set out several positive policy measures that states can take to combat ‘hate speech’, including:

- Creating collaborative networks to build mutual understanding, promote dialogue and inspire constructive action;
- Creating mechanisms within governments to identify and address potential areas of tension between members of different religious communities and assist with conflict prevention and mediation;
- Training government officials—including military officers, police officers, justice sector officials and teachers—on effective strategies to promote tolerance and address incitement;

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<sup>4</sup> 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, <https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/RabatPlanOfAction.aspx>.

<sup>5</sup> ARTICLE 19, Camden Principles on Freedom of Expression and Equality, May 2009, <https://www.article19.org/resources/camden-principles-freedom-expression-equality/>.

- Encouraging leaders to discuss within their communities the causes of discrimination and to develop strategies to counter them;
- Speaking out against intolerance, including advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence;
- Combating denigration and negative religious stereotyping of persons, as well as incitement to religious hatred, including through education and awareness-building;
- Passing legislation protecting the right to equality on all grounds recognised under international human rights law; and
- Establishing a public policy and regulatory framework that promotes pluralism and diversity of the media.

To effectively combat ‘hate speech’ and intolerance, the Myanmar government should adopt a national action plan that focuses on the positive policy measures described above, rather than relying primarily on censorship and criminal penalties.

## **2. What restrictions on speech are permissible?**

Overly broad restrictions on speech can silence the kind of dialogue that ultimately promotes tolerance. As a result, restrictions on speech that are not carefully tailored risk contributing to, rather than combatting, intolerance.

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights, Article 19 of the ICCPR, and customary international law. Governments may only restrict intolerant or hateful speech to the extent that such restrictions comply with the requirements of Article 19(3) of the ICCPR. Article 19(3) of the ICCPR allows for restrictions on the right to freedom of expression only if they are:

- **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 for the rights or reputations of others, the protection of national security, public order or public health or morals; and
- **Necessary and proportionate:** the state must 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.<sup>6</sup>

Any restrictions on speech that do not satisfy these criteria are not permissible. For example, Article 19(3) permits restrictions on speech to protect the rights of others, justifying narrow

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<sup>6</sup> See, Human Rights Committee (HR Committee), General Comment No. 34, CCPR/C/GC/34, 12 September 2011.

limits on hateful speech directed at a group protected by international law or at specific individuals in a manner that threatens their rights. However, restrictions on speech to protect individuals or groups from offence, criticism or ideas they find disagreeable are not permissible under Article 19(3). Expression may be inflammatory or offensive, characterised by prejudice, or raise concerns about intolerance, and yet fail to satisfy the criteria for restriction under international law.

Previous drafts of the proposed legislation restrict speech to a degree that is incompatible with the above standards. In particular:

- Previous versions of the proposed legislation shared with civil society defined ‘hate speech’<sup>7</sup> to include speech that may cause ‘conflict’ or ‘dissension’ among religious people and groups. The mid-2019 draft substituted the term ‘hatred’ for ‘hate speech’,<sup>8</sup> but retained a similarly expansive definition and likewise linked the term to criminal prohibitions. The definitions provided for these terms are impermissibly broad, and suggest neither the necessary proximity to the incitement of discrimination, hostility or violence to justify the restriction under ICCPR Article 20(2), described below, nor the connection to protecting the human rights of others or other legitimate aims required by Article 19(3). Rather these provisions seem intended to protect religious beliefs or personal sentiment, a purpose that cannot be used to justify restrictions on speech.
- The use of the terms ‘hate speech’ or ‘hatred’—which have no precise definition in international law—in the proposed legislation is unhelpful and potentially confusing. In particular, the colloquial use of the term ‘hate speech’ often encompasses speech that is protected under international human rights law. The Myanmar government should abandon the use of these terms in law-making and instead focus on ensuring that criteria for restricting speech established by international law are clearly reflected in domestic legislation.
- While the mid-2019 draft reduced criminal penalties from a maximum of three years’ imprisonment to a maximum of one year’s imprisonment, or a fine, or both, for first-time offenders<sup>9</sup> and removed mandatory minimum sentences, the emphasis on custodial sentences remains disproportionate and out of line with international law.

Criminal penalties are only one of several ways that states may restrict ‘hate speech’. Indeed, penalties for incitement should principally be contained within civil and administrative law, and criminal penalties should be imposed only as a last resort and in the most severe cases. The requirement of ICCPR Article 19(3) that restrictions on speech be proportionate means that recourse to criminal law should be avoided if less severe sanctions would achieve the intended effect and that criminal penalties for offending speech should not be excessive.

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<sup>7</sup> The mid-2019 draft of the proposed legislation uses the term ‘hatred’ instead of ‘hate speech’ to describe the type of communications prohibited under the law.

<sup>8</sup> The previous term used ‘amoun zaga’ is commonly understood in Myanmar language to encompass only verbal expression.

<sup>9</sup> The bill allows for repeat offenders to be imprisoned for up to three years.

Narrowly tailored amendments to the Penal Code offer the best path to addressing speech that constitutes incitement and warrants criminalisation. Further, the Penal Code could be amended to recognize specific categories of bias-motivated crimes (i.e. ‘hate crimes’) that target individuals on the basis of a perceived or actual protected characteristic. Such crimes could include bias-motivated offences against the person, such as assault or battery, or against property.

### **3. What speech must be prohibited?**

Under international law, states have an obligation to prohibit the following two types of speech:<sup>10</sup>

- **Direct and public incitement to genocide and other discriminatory violations of international criminal law.**<sup>11</sup> To be ‘public’, speech must be made in a public place or through a medium—such as mass media or digital technologies—that enables it to reach the public or a section of the public. The ‘direct’ nature of incitement refers to the close causal relationship between the speech and the danger of genocide or another international crime. Additionally, the speaker must specifically intend to incite genocide or another international crime.

⇒ **How?** International law requires that direct and public incitement to genocide and other discriminatory violations of international criminal law be a criminal offence.
- **Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, as required by Article 20(2) of the ICCPR.** Prohibitions should focus on speech that is intended and likely to incite the audience of that speech to engage in acts of discrimination, hostility or violence against a protected group, rather than advocacy of hatred without regard to intent or likelihood of actually inciting a prohibited action against a protected group.

⇒ **How?** Prohibitions against incitement to hostility, discrimination or violence should principally be contained within civil and administrative law, and criminal penalties should be imposed only as a last resort and in the most severe cases. The proposed legislation is not crafted to specifically address incitement to discrimination, hostility or violence, but rather encompasses broad categories of speech, thus opening channels for abuse.

### **4. Who should be protected?**

Measures to combat ‘hate speech’ should encompass all protected characteristics that appear in non-discrimination provisions of international human rights law. ARTICLE 19 advocates for

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<sup>10</sup> Restrictions on speech made for these purposes must also comply with the requirements of Article 19(3) of the ICCPR.

<sup>11</sup> Direct and public incitement to genocide is prohibited in the Convention on the Prevention and Punishment of the Crime of Genocide (1948) (Genocide Convention) and the Rome Statute of the International Criminal Court (1998). While incitement to other violations of international criminal law is not prohibited in the Convention on the Prevention and Punishment of the Crime of Genocide (1948) (Genocide Convention) and the Rome Statute of the International Criminal Court (1998), ARTICLE 19 argues that they should be considered within this category.

the inclusion of the broadest range of protected characteristics, including but not limited to: race, colour, sex, language, religion or belief, political or other opinion, national or social origin, property, birth, indigenous origin or identity, disability, migrant or refugee status, sexual orientation, gender identity and intersex status.

The mid-2019 draft of the proposed legislation incorporated into the definition of ‘hatred’ a much broader list of protected characteristics than previous versions, although it does not include citizenship as a protected characteristic. This addition represents an improvement but fails to correct the larger concerns regarding the law’s function and structure.

## **5. Who is responsible for identifying and responding to hate?**

As described above, an effective approach to addressing ‘hate speech’ and intolerance will employ a range of positive policy measures beyond criminal restrictions of speech. It is therefore useful to establish mechanisms and bodies to ensure that such policies are created and implemented in a coordinated manner. National human rights institutions that comply with the Paris Principles, or other independent institutions, may oversee the implementation of legal and policy measures to tackle discrimination. They can work independent from law enforcement agencies to collect data on the prevalence of hate crimes, discrimination and ‘hate speech’ and inform policy responses. Law enforcement agencies that are properly trained and insulated from political interference are best suited to investigate and prosecute crimes.

The most recent available draft of the Myanmar government’s anti-‘hate speech’ legislation proposed establishment of two new bodies: a ‘Central Committee for Protection against Religious and Ethnic Hate-Speech’ and a ‘Board of Investigation’. The roles and responsibilities of both bodies are poorly defined but appear to be focused on the enforcement of criminal measures. In particular, the structure of the Central Committee leaves it vulnerable to politicisation, and there are no explicit requirements that the Central Committee’s actions comply with international human rights law. As such, it is highly likely that the Central Committee would prioritise censorship of protected expression over other policy measures, in line with the general approach of the previous drafts of the proposed legislation.

## **Conclusion and recommendations**

ARTICLE 19 believes that Myanmar’s draft anti-‘hate speech’ legislation is fundamentally flawed, and that any future drafts that adopt the same approach will likewise be incompatible with international law and likely to do more harm than good. Legislative proposals in this vein should be withdrawn in favour of a new approach focused on positive policy measures to promote and protect the rights to freedom of expression and equality, including through reforms to the Penal Code. To this end, ARTICLE 19 urges the Myanmar government to develop a comprehensive national action plan describing these measures and a timeframe for their implementation.

The government should initiate a national consultative process to design and implement positive, non-restrictive policy measures to address the root causes of discrimination in line with the guidance of HRC Resolution 16/18 and the Rabat Plan of Action. It should ensure the full and effective participation of civil society, including representatives of groups and

communities most impacted by hate speech and discrimination. The government should also engage influential actors such as legacy media, social media companies, and political and religious leaders.

Moreover, legislative measures aimed at tackling discrimination or responding to advocacy of discriminatory hatred constituting incitement to discrimination, hostility, or violence should:

- Establish a high threshold for restrictions of the right to freedom of expression in line with Articles 19(3) and 20(2) of the ICCPR;
- Criminalise direct and public incitement to genocide and other discriminatory violations of international criminal law;
- Prohibit the intentional advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, utilising criminal penalties only as a measure of last resort, in line with the guidance of the Rabat Plan of Action;
- Ensure that criminal penalties are proportionate, including by setting limits on fines and providing alternatives to criminal sentences, such as community service;
- Include protections for all groups that could be targeted on the basis of their identity.

Non-legislative public policies and other officially backed initiatives should similarly seek to provide protection to all groups that are vulnerable to discrimination. Such legislation and policy measures should also specifically extend protection to all individuals, regardless of citizenship status.

The Myanmar government should also repeal all laws and policies that formally or informally institutionalise discrimination and exclusion and enact a comprehensive anti-discrimination law. It should avoid the establishment of politicised administrative bodies for the purpose of identifying, investigating or initiating prosecutions for 'hatred' or 'hate speech' and reform the Myanmar National Human Rights Commission in line with the Paris Principles. The government should sign and ratify the ICCPR and all other major international human rights treaties without delay.

ARTICLE 19 further encourages the government of Myanmar to report on its progress against relevant international standards, including by actively participating in future meetings of the Istanbul Process on the implementation of HRC Resolution 16/18, and by providing information to OHCHR and the UN Secretary General on efforts to implement this resolution.