

Challenges to Freedom of Religion or Belief in Myanmar

A Briefing Paper

October 2019

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1. Executive Summary

The right to freedom of religion or belief is guaranteed in a number of core international human rights instruments, and is also considered part of customary international law. It includes a broad range of rights, such as the freedom to have or to adopt a religion or belief of one's choice, and the freedom to manifest one's religion or belief in worship, observance, practice and teaching, either individually or in community with others, in public or private. Moreover, it places a duty on States to refrain from discriminating against individuals or groups of individuals because of their religion or belief, as well as the obligation to take necessary measures to prevent discrimination or violence by non-State actors.

Article 34 of the 2008 Constitution of Myanmar recognizes the freedom of religion or belief, and grants citizens the "right to freely profess and practise religion ... subject to public order, morality or health and to the other provisions of this Constitution." Article 364 further states that, "any act which is intended or is likely to promote feelings of hatred, enmity or discord between racial or religious communities or sects is contrary to this Constitution."

Article 361 of the Constitution recognizes the "special position of Buddhism." In contemporary public discourse, Buddhism has been closely associated with the State in the Burman-dominated centre of the country. Public messaging by Buddhist nationalist groups often carries a strong anti-Muslim message. This has included depictions of Islam as in opposition to Burmese values, inherently violent and a threat to Buddhism. At times, Buddhist nationalist groups have also advocated or condoned violence towards Muslims. The growing popularity of these movements has made Muslims, Christians and to a lesser extent, other religious minorities, feel increasingly vulnerable.

A number of laws in Myanmar impair the enjoyment of the right to freedom of religion or belief. Colonial-era "offences related to religion", commonly referred to as "blasphemy" laws, are still part of the Penal Code in Myanmar and are used, effectively, to criminalize criticism of religion, particularly Buddhism. In recent years in Myanmar, courts have convicted individuals under "blasphemy" provisions even in the absence of any evidence of deliberate and malicious intent to insult a religion, let alone on the basis of irrefutable evidence of incitement to violence, hostility or discrimination on religious grounds. People have been held criminally responsible simply because what they had either said, written, depicted or otherwise expressed was judged to be at odds with religious interpretations of influential clerical or State authorities.

In addition to the use of colonial-era blasphemy laws to suppress legitimate criticism or harmless activity related to religion, a more recent set of four laws has been introduced that appear to specifically target non-Buddhists, and particularly the Muslim community. While these laws do not expressly refer to Muslims or Islam, statements made by those advocating for their enactment indicate their discriminatory intent. These laws relate to population control, polygamy, religious conversion and marriage of Buddhist women. While all four laws give rise to concerns about the right to freedom of thought, conscience, religion or belief, the laws related to conversion and marriage are the most problematic.

Furthermore, members of religious and ethnic minority groups have been the main victims of crimes under international law primarily perpetrated by State security forces, as concluded by the UN Independent International Fact-Finding Mission in its September 2018 report to the UN Human Rights Council.¹ According to the Fact-Finding Mission, these have included crimes against humanity in Rakhine State, in Kachin State and in Shan State, and in the case of Rohingyas, possibly the crime of

¹ The Human Rights Council established its independent fact-finding mission in its

genocide.² The UN Security Council, General Assembly and Human Rights Council have all passed resolutions or statements calling for the implementation of the recommendations of the Government's own advisory commission,³ including lifting restrictions on freedom movement for all residents, particularly Rohingyas, and reviewing discriminatory laws with a view to ensuring their compliance with international human rights law and standards.

The International Commission of Jurists (ICJ) has identified a number of challenges related to the protection and promotion of the right to freedom of religion or belief in Myanmar. These include highly discriminatory legal arrangements for citizenship and the rights of residents in Myanmar, which target and most affect members of religious minorities (detailed in the ICJ's legal briefing published in June 2019). Arbitrary restrictions on places of worship, mostly for Christians and Muslims, also constitute a significant impediment to people's ability to practice their religion or belief in Myanmar (the subject of forthcoming research by the ICJ), as does preferential treatment of Buddhism, for example in the national school curriculum.

This paper will focus its analysis on two particular sets of laws: (i) colonial era "blasphemy" laws, which in recent years have also been used as one of several measures to restrict free speech, and (ii) controversial "race and religion laws" passed in the run up to national elections in 2015, particularly those related to religious conversion and marriage of Buddhist women.

1.1 Recommendations

In light of concerns detailed in the present legal analysis, and arising in connection with the above-mentioned challenges, the ICJ makes the following recommendations to the Government of Myanmar:

- Ensure that the right to freedom of thought, conscience, religion or belief and respect for culture and tradition are never used as pretexts to justify discrimination and violence;
- Repeal all blasphemy laws, particularly sections 295 and 295(a) of the Penal Code, or amend them substantially so that they are consistent with international human rights law and standards, including on freedom of expression; freedom of thought, conscience or religion; and equal protection of the law, as guaranteed under the ICCPR.
- Immediately and unconditionally release those imprisoned under section 295(a) or other laws for exercising their legitimate right to freedom of religion or belief.

² See also: ICJ, "ICJ releases legal Q & A on crime of genocide," 27 August 2019, available at <https://www.icj.org/icj-releases-legal-q-a-on-crime-of-genocide/>. ICJ, "Achieving Accountability for Gross Human Rights Violations in Myanmar," 16 January 2019, available at: <https://www.icj.org/myanmar-reverse-laws-and-practices-that-perpetuate-military-impunity-new-icj-report/>. ICJ, "Questions and Answers on Human Rights Law in Rakhine State," 20 November 2017, available at: <https://www.icj.org/myanmar-rule-of-law-must-drive-responses-to-rohingya-crisis/>.

³ The Rakhine Advisory Commission, chaired by former UN Secretary General Kofi Annan, was established by the Government of Myanmar. See: Advisory Commission on Rakhine State, "Towards a peaceful, fair and prosperous future for the people of Rakhine State: Final Report of the Advisory Commission on Rakhine State," 25 August 2017.

- Ensure proper exercise of prosecutorial discretion, so as to avoid unwarranted selective prosecutions under section 295 and 295(a) of the Penal Code, pending their repeal or substantial amendment as recommended above.
- Repeal or substantially amend the 2015 Religious Conversion Law to ensure it is in line with international human rights law and standards on the right to freedom of thought, conscience, religion or belief.
- Repeal the 2015 Buddhist Women’s Special Marriage Law in its entirety as it discriminates on the ground of religion and gender, and review other laws such as the 1872 Christian Women’s Marriage Act.
- Take credible action to combat hate speech, in particular where it amounts to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Legislative measures could include, for example, an anti-discrimination law, and amendments to the penal code to align relevant provisions with applicable international human rights law and standards.
- Develop a comprehensive policy and action plan on combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief, and also based on race, ethnicity and nationality. These should be developed through a transparent and inclusive consultation with relevant civil society organizations and other stakeholders, including minority groups. Furthermore, it should ensure that the said policy and plan include implementation of the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.⁴
- Produce a plan to review the discriminatory 1982 Citizenship Law, in line with the recommendations of the Government’s advisory commission, ensuring compliance with democratic principles, the rule of law and international human rights law obligations binding on the country; and direct ministries to interpret and implement current domestic legal provisions in line with the State’s international human rights law obligations;
- Through the constitutional reform process, expand the narrow definition of “fundamental rights” in the 2008 Constitution to legally protect the rights of all persons in Myanmar, without discrimination (with limited exceptions restricted to specific political rights). To give this effect in line with section 347 of the Constitution, the term “citizens” should be replaced with “any persons”, in section 34 of the Constitution, and in Chapter 8 on “fundamental rights.” to protect the right of all persons to freedom of religion or belief.⁵
- Ratify all core international human rights instruments, including the International Covenant on Civil and Political Rights; the International

⁴ Legislative measures need align with Human Rights Council resolution 16/18.

⁵ This change could be applied to constitutional provisions including: sections 21 (right to equality, liberty and justice); 348 (non-discrimination); 349 (equal opportunity); 354 and its subsections (freedom of assembly, expression and association); 356 (property); 357 (privacy); 366 (education); 367 (health); and 370 (livelihoods). See also: International Commission of Jurists, “Citizenship and Human Rights in Myanmar: Why Law Reform is Urgent and Possible,” 25 June 2019, accessed at: <https://www.icj.org/wp-content/uploads/2019/06/Myanmar-Citizenship-law-reform-Advocacy-Analysis-Brief-2019-ENG.pdf>.

Convention on the Elimination of All Forms of Racial Discrimination; and the Convention Relating to the Status of Refugees.

The ICJ also recommends that Myanmar civil society and media organizations play a leadership role in promoting an inclusive, pluralistic, democratic Myanmar, in which the human rights of all are fully respected, protected and fulfilled.

2. Background and current sociopolitical context

Myanmar is a religiously and ethnically diverse country. The 2014 Population and Housing Census, which also surveyed the religion or belief of residents, found that the vast majority of the country's population – comprising the ethnic Burman majority as well as many non-Burman people – practises Theravada Buddhism.⁶ The remaining population practises other religions, such as Christianity, Islam, Hinduism, Baha'ism, and other beliefs including animist practices.

The 2008 Constitution of Myanmar recognizes "national races" of Myanmar, codified in law as comprising eight major groups: the Kachin; Kayah; Karen; Chin; Burman; Mon; Rakhine or Shan ethnic groups, who are descendants of families permanently living within the borders of current-day Myanmar since before the first Anglo-Burmese War.⁷ Many of the non-Burman residents live in states bordering Bangladesh, India, China, Laos and Thailand.⁸ Within and beyond these groups exist an extensive variety of different languages and cultural practices. According to the 2014 Census, the Burman is the largest ethnic group, comprising the majority of the population. Ethnic minority groups such as the Karen, Kachin and Chin have sizeable Christian contingents. People who practise Islam can be found in most ethnic groups, as can members of other faiths.⁹

Historically, religious and ethnic identities have intersected in a variety of ways in Myanmar, and this has contributed to shaping the treatment of minorities by both the State and society. In particular, following Myanmar's independence and creation as a nation-state in 1948, there has been a long and complex historical relationship of interdependence between the Buddhist religious leadership and the Government. Since 1980, the Government-appointed Sangha Maha Nayaka Committee has played a role in the regulation of the Buddhist clergy (known as The *Sangha*).¹⁰ Non-governmental Buddhist religious associations have also played a significant and often controversial role in shaping the public discourse on religious matters, including by promoting Buddhism as a defining element of Myanmar's national identity.¹¹

Section 361 of the 2008 Constitution "recognizes [the] special position of Buddhism as the faith professed by the great majority of the citizens of the Union." In contemporary public discourse, Buddhism has been closely associated with the State in the Burman-dominated centre of the country. Public messaging by Buddhist nationalist groups such as the Association for the Protection of Race and Religion (commonly referred to by its Burmese-language acronym, Ma Ba Tha) often carries a strong anti-Muslim message.¹² For example, Islam has been depicted as in opposition

⁶ The results of the Census, however, have been reasonably assessed as problematic, including due to significant sections of the population not being surveyed. For a discussion, see: International Crisis Group, "Counting the Costs: Myanmar's Problematic Census," Asia Briefing No. 144, 14 May 2014.

⁷ Section 3 of the 1982 Citizenship Law states this date as 1824. See also: ICJ, "Citizenship and Human Rights in Myanmar," (citation above), pp. 8.

⁸ See <http://themimu.info/census-data>. Christina Fink (2018) MYANMAR: RELIGIOUS MINORITIES AND CONSTITUTIONAL QUESTIONS, *Asian Affairs*, 49:2, 259-277, DOI: 10.1080/03068374.2018.1469860. Note that the breakdown of population by ethnicity is highly contested, including but not limited to claims that the Government has consistently underestimated the size of non-Burman communities. Myanmar is a "Union" of seven states and seven regions, in addition to the capital state.

⁹ Ibid.

¹⁰ See, for example, "Buddhism under a Military Regime: The Iron Heel in Burma", Bruce Matthews, *Asian Survey*, Vol. 33, No. 4 (Apr., 1993), pp. 408-423.

¹¹ For further discussion of Buddhist nationalism and the State in Myanmar, see: International Crisis Group, "Buddhism and State Power in Myanmar," Asia Report No. 290, 5 September 2017, particularly pp. 7-8.

¹² See Iselin Frydenlund (2017) Religious Liberty for Whom? The Buddhist Politics of Religious Freedom during Myanmar's Transition to Democracy, *Nordic Journal of Human Rights*, 35:1, 55-73, DOI: 10.1080/18918131.2017.1288950 and Iselin Frydenlund (2018) The birth of Buddhist politics of religious freedom in Myanmar, *Journal of Religious and Political Practice*, 4:1, 107-121, DOI: 10.1080/20566093.2017.1390656.

to Burmese values, inherently violent and a threat to Buddhism.¹³ At times, Buddhist nationalist groups have also advocated or condoned violence towards Muslims. The growing popularity of these movements has made Muslims, Christians and, to a lesser extent, other religious minorities feel increasingly vulnerable.

Issues of freedom of religion or belief must also be considered in the broader context of governance and the rule of law. From 1962 to 2011, a succession of military governments of various forms ruled the country. In 2011, executive power was transferred to a quasi-civilian government that pursued significant economic and political reforms. After receiving an overwhelming majority of the votes in the November 2015 elections, the National League for Democracy (NLD) took office on 1 April 2016. It was the country's first democratically elected, civilian-led government since the military coup of 1962 – albeit the military has retained its independence, and a substantial amount of control over the governance of the country.¹⁴

The NLD has a stated commitment to securing the rule of law, including through building strong justice institutions, both of which were important elements of its electoral platform. However, a lack of action on key policy issues, and restrictions on civil society and the free press, including through unwarranted prosecutions, have cast doubts on the ability of the NLD to make good on this commitment. Decades of military rule have systematically undermined the judiciary, and compromised the independence of the legal system. Linked to this, most of the population has no access to an effective remedy in the courts, despite being subject to unfair and discriminatory laws.¹⁵

The undercurrent tension of religion and ethnicity is particularly stark in the case of the right to citizenship. Burman, and particularly Buddhist Burman, generally have full citizenship and, as such, have relatively greater access to a range of educational, professional and social opportunities.¹⁶ Non-Buddhists, for example Christians of Kachin or Chin ethnicity, and Muslims who are not Burman, are effectively double minorities. Ethnic Shan, Mon and Rakhine Buddhists can generally obtain citizenship if they have the requisite documents, but still face widespread discrimination. Government-issued identification cards, which feature the holder's religion and "ethnicity", are required to access state services, and apply for jobs – yet more than 25 percent of the population lack such documentation, according to the 2014 Census.¹⁷ Opportunities for advancement in the civil service, police and military are relatively limited for religious and ethnic minorities; and whole groups, including Muslims, have been disenfranchised in the electoral process, with no sitting members in the national parliament.¹⁸ As a result, ethnic minorities and people of mixed ethnicity sometimes change their ethnic identification to Burman on their identification cards.

¹³ See, for example, International Crisis Group, "Buddhism and State Power in Myanmar", Asia Report N°290 | 5 September 2017; Ronan Lee (2016) *The Dark Side of Liberalization: How Myanmar's Political and Media Freedoms Are Being Used to Limit Muslim Rights, Islam and Christian-Muslim Relations*, 27:2, 195-211, DOI: 10.1080/09596410.2016.1159045; and Iselin Frydenlund (2018) *The birth of Buddhist politics of religious freedom in Myanmar*, *Journal of Religious and Political Practice*, 4:1, 107-121, DOI: 10.1080/20566093.2017.1390656.

¹⁴ For detail, see: ICJ, "Questions and Answers on Human Rights Law in Rakhine State," (citation above), pp. 3-4.

¹⁵ See ICJ, "Achieving Justice for Gross Human Rights Violations in Myanmar," (citation above), pp. 32-35.

¹⁶ Notably though, Burman Buddhist nationalists may not consider Burman those who profess religions other than Buddhism to be real Burman, because they conflate Burman identity with adherence to Buddhism.

¹⁷ Republic of the Union of Myanmar, "The 2014 Myanmar Population and Housing Census: The Union Report," *Census Report Volume 2*, pp. 207-210. The identity cards for which data was enumerated are: Citizenship Scrutiny Card; Associate Scrutiny Card; Naturalized Scrutiny Card; National Registration Card; Religious Card; Temporary Registration Card; Foreign Registration Card; and Foreign Passport.

¹⁸ Christina Fink (2018) *MYANMAR: RELIGIOUS MINORITIES AND CONSTITUTIONAL QUESTIONS*, *Asian Affairs*, 49:2, 259-277, DOI: 10.1080/03068374.2018.1469860.

Discrimination and human rights violations against minorities

Large-scale human rights violations perpetrated by the military against civilian populations throughout Myanmar have amounted to the gravest crimes under international law.¹⁹ The most egregious example of this in terms of scale and intensity is the situation of Rohingyas in northern Rakhine State. Other ethnic groups who have experienced violence include members of minority groups such as the Kachin. In its September 2018 report to the UN Human Rights Council, the UN Independent International Fact-Finding Mission concluded that that crimes under international law had been perpetrated in Rakhine State, in Kachin State and in Shan State. These included crimes against humanity, war crimes and, in the case of Rohingyas, possibly the crime of genocide. The UN Security Council, General Assembly and Human Rights Council have passed resolutions calling for the implementation of the recommendations of the Government's Advisory Commission on Rakhine State,²⁰ including lifting restrictions on freedom movement for all residents, particularly Rohingyas, and reviewing discriminatory laws with a view to ensuring their compliance with international human rights law and standards. To date, these recommendations have gone largely unheeded, with a lack of demonstrable progress on their implementation.

In addition to public vilification by the State media and State officials, the Rohingyas have been subjected to restrictions on marriage, domestic travel and observance of religious ceremonies. Furthermore, the people of Rakhine State, including the Rohingyas, have also been systematically denied economic, social and cultural rights, and the authorities have lacked the political will to address the situation, and allocate resources for their enjoyment of minimal essential levels of food, water, housing, health and education.²¹ A lack of transparency on major infrastructure projects in areas where ethnic Rakhines constitute the majority of residents, and increasing armed conflict affecting Rakhine civilians in 2019, have also contributed to human rights violations.²²

Despite an on-going formal peace process, fighting between the military and ethnic armed groups has continued in recent years, particularly in Kachin and Shan states since 2011, and more recently also in Rakhine State. Fighting has caused massive displacements – there are at present around 100,000 internally displaced persons in Kachin and Shan states.²³ Findings of the UN Fact Finding Mission include widespread allegations of human rights violations and abuses committed by conflicting parties against civilians, including unlawful killings, forced recruitment, illegal detention, torture and destruction of property.²⁴

In the vast majority of cases, the Government has failed to arrest, let alone prosecute those responsible for these acts, including systemic and wide-ranging discriminatory

¹⁹ For details, see International Commission of Jurists, *Achieving Justice for Gross Human Rights Violations in Myanmar*, Baseline Study, January 2018, accessed at: <https://www.icj.org/myanmar-reverse-laws-and-practices-that-perpetuate-military-impunity-new-icj-report/>.

²⁰ The Government of Myanmar established this Commission, chaired by former UN Secretary General Kofi Annan. See: Advisory Commission on Rakhine State, "Towards a peaceful, fair and prosperous future for the people of Rakhine State: Final Report of the Advisory Commission on Rakhine State," 25 August 2017.

²¹ Ibid.

²² For a discussion of human rights violations against Rakhine civilians based upon ICJ's independent field research, see: ICJ, "Special Economic Zones in Myanmar and the State Duty to Protect Human Rights," February 2017.

²³ See Statement by Ms. Yanghee LEE, Special Rapporteur on the situation of human rights in Myanmar at the 34th session of the Human Rights Council, 13 March 2017, at URL <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21355&LangID=E>.

²⁴ Ibid.

violence amounting in some instances to crimes against humanity.

As part of the “duty to protect” described below in section 3.1, States have the obligation to investigate, prosecute and punish all acts that amount to gross violations of human rights. They therefore have a duty to undertake prompt, thorough, independent and impartial investigations into violations of human rights and international humanitarian law, and to take appropriate measures in respect of alleged perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried, convicted and duly punished.²⁵

3. International Legal Framework

Myanmar’s international human rights obligations are to be found in the UN Charter, human rights treaties and general and customary international law.

Myanmar is a party to the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention on the Rights of the Child (CRC); the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography; the Convention on the Rights of Persons with Disabilities (CRPD); and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Myanmar has also signed, albeit it has yet to ratify, the Optional Protocol to the CRC on the involvement of children in armed conflict.

While to date Myanmar is not yet a party to the International Covenant on Civil and Political Rights (ICCPR), the NLD-led Government has stated that it plans to accede to the Covenant, and is reportedly taking steps toward doing so.

3. 1. Duty to respect, protect and fulfil human rights

With respect to all human rights obligations binding on States, whether because they arise under customary international law or under universal and/or regional human rights instruments, States have a duty to respect, protect and fulfil human rights. The obligation to respect human rights means that States must refrain from interfering with or curtailing the enjoyment of human rights; the obligation to protect human rights requires States to protect individuals and groups against human rights abuses; and the obligation to fulfil human rights means that States must take positive action to facilitate their exercise and enjoyment.²⁶

3.2. The right to freedom of thought, conscience, religion or belief

Article 18 of the Universal Declaration of Human Rights (UDHR) provides that “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

In respect of treaties, Article 18 of the ICCPR guarantees the right to freedom of thought, conscience and religion (hereinafter, freedom of religion or belief).²⁷ While

²⁵ Updated Set of Principles for the Protection of Human Rights through Action to Combat Impunity, UN Doc E/CN.4/2005/102/add.1 (2005).

²⁶ For an expanded exposition of this legal framework, see ICJ, “A Primer on International Human Rights Law and Standards on the Right Freedom of Thought, Conscience, Religion or Belief,” January 2019, available at <https://www.icj.org/new-primer-on-freedom-of-religion-or-belief-in-international-human-rights-law/>.

²⁷ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 18.

Myanmar is one of the few States that has yet to become a party to it, the ICCPR, with 173 States parties to date, reflects the contemporary universal standard with respect to the right to freedom of religion or belief, and the jurisprudence produced by its supervisory body, the UN Human Rights Committee, is an authoritative source for identifying the scope and content of the right under general international law. Indeed, the fundamental aspects of the right to freedom of religion or belief contained in Article 18 constitute customary international law, and are thus binding on Myanmar.²⁸

Article 18 of the ICCPR

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The right to freedom of religion or belief is also guaranteed in other international human rights instruments, both treaties²⁹ and declaratory standards,³⁰ including the UN General Assembly's Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981 ('1981 Declaration'), and has

²⁸ Daniel Wehrenfennig (2006) The Human Right of Religious Freedom in International Law, *Peace Review*, 18:3, 403-410, DOI: [10.1080/10402650600848498](https://doi.org/10.1080/10402650600848498).

²⁹ See, e.g., United Nations Educational, Scientific and Cultural Organization (UNESCO), *Convention for the Safeguarding of the Intangible Cultural Heritage*, 2003, Paris, UN Doc. MISC/2003/CLT/CH/14, Article 2 (C). See also *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3; and UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, A/RES/34/180.

³⁰ See, e.g., UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, UN GA resolution 217 A (III), Article 18; UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981, UN Doc. A/Res/36/55; UN General Assembly, *Combating Intolerance, Negative Stereotyping, Stigmatization, Discrimination, Incitement to Violence and Violence Against Persons, Based on Religion or Belief*, adopted by the General Assembly Resolution 72/176 of 29 January 2018, UN Doc. A/RES/72/176; UN General Assembly, *Freedom of Religion or Belief*, adopted by the General Assembly Resolution 72/177 of 19 December 2017, UN Doc. A/RES/72/177; UN General Assembly, *Freedom of Religion or Belief*, adopted by the General Assembly Resolution 71/196 of 24 December 2016, UN Doc. A/RES/71/196; UN General Assembly, *Combating Intolerance, Negative Stereotyping, Stigmatization, Discrimination, Incitement to Violence and Violence Against Persons, Based on Religion or Belief*, adopted by the General Assembly Resolution 71/195 of 23 January 2017, UN Doc. A/RES/71/195; UN General Assembly, *Effective Promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, adopted by the General Assembly Resolution 70/166 of 22 February 2016, UN Doc. A/RES/70/166; UN General Assembly, *Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, adopted by the General Assembly Resolution 66/168 of 11 April 2012, UN Doc. A/RES/66/168.

been elaborated on in great depth, among others, by the UN Human Rights Committee, the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance in their reports. As noted above in respect of the ICCPR, even though Myanmar is not a party to the Covenant, it is still bound to respect the core aspects of the right to freedom of thought, conscience, religion or belief. The adoption by consensus of the 1981 Declaration by the UN General Assembly reflects a broad common understanding of the issues addressed in the Declaration itself. Indeed, the 1981 Declaration is now viewed as of interpretative value insofar as the guarantees in Article 18 of the ICCPR are concerned. In addition, the core aspects of the right to freedom of thought, conscience, religion or belief featured in the 1981 Declaration constitute customary international law.³¹

The right to freedom of religion or belief is a wide-ranging right encompassing a number of distinct, and yet interrelated entitlements. International law, including Article 18 of the ICCPR, provides for and guarantees the right to freedom of thought, conscience, religion or belief broadly, encompassing the right to freedom of thought and personal convictions in all matters, and protecting the profession and practice of different kinds of beliefs, whether theistic, non-theistic or atheistic, and the freedom not to disclose one's religion or belief.³² International law also guarantees and protects the right not to have a religious confession.

The right to freedom of thought, conscience, religion or belief does not exist in a vacuum, but along a continuum with other rights – civil and political, as well as economic, social and cultural – human rights that, together with the right to freedom of thought, conscience, religion or belief, are all inalienable, inhere to all human beings by virtue of their common humanity, and are universal, indivisible, interdependent and interrelated.

3.3. Freedom from discrimination on the grounds of one's religion or belief and the right to equality before the law

One of the bedrock principles of international human rights is that States cannot engage in discrimination, including on the basis of religion or national origin. This is one of the pillars of international law, including the UN Charter and the Universal Declaration of Human Rights. The non-discrimination principle applies and is integral to all human rights, whether civil and political or economic, social and cultural. Thus, it applies to the right to freedom of thought, conscience, religion or belief.

States, therefore, have the duty to refrain from discriminating against individuals or groups of individuals because of their real or imputed religion or belief, as well as the obligation to take necessary measures to prevent discrimination by non-State actors. In this context, it is important to recall that multi-level, intersecting and compounding forms of discrimination, including in respect of age, gender, socioeconomic status, racial or ethnic background, national origin, citizenship, migration status, language, health status, particularly HIV/AIDS and disability, as well as poverty and sexual orientation or gender identity or expression, are all factors that can exacerbate or otherwise influence the nature of discrimination on the grounds of one's real or imputed religion or belief.

³¹ Ghana, N., Lindholm, T., Durham, C., Tahzib-Lie, B. G., 2004. Introduction. In: Lindholm, T., Durham, C., Tahzib-Lie, B. G. (eds), 2004. Facilitating freedom of religion or belief: A Deskbook. See, also, Max Planck Encyclopedia of Public International Law, Religion or Belief, International Protection, Christian Walter, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e867>.

³² UN Human Rights Committee (HRC), General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Article 18), 27 September 1993, UN Doc. CCPR/C/21/Rev.1/Add.4, paras 1 – 2.

In addition, under international human rights law, everyone has the right to equality before the law, and States have duties to act to prevent, prohibit, eradicate and remedy discrimination. The non-discrimination principle, the right to equality before the law and equal protection of the law without any discrimination, together, constitute fundamental principles of human rights protection.³³

Article 2 of the UDHR affirms that, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, *religion* [emphasis added], political or other opinion, national or social origin, property, birth or other status." Furthermore, Article 7 of the UDHR proclaims that, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." The ICCPR too clearly outlines both the non-discrimination principle and the right to equality before the law and equal protection of the law. Article 2(1) of the ICCPR provides that States "undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, *religion* [emphasis added], political or other opinion, national or social origin, property, birth or other status", while Article 26 proclaims that, "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as [...] religion".

Other international instruments, including the ICESCR, the CRC and the 1981 Declaration provide similar protections against discrimination on the grounds of religion or belief.³⁴ Furthermore, the Human Rights Committee has noted that even if the ICCPR allows States to take measures derogating from certain obligations under the Covenant in times of public emergency,³⁵ such "measures should not involve discrimination solely on the ground of [...] religion [...] Furthermore, article 20, paragraph 2, obligates States parties to prohibit, by law, any advocacy of [...] religious hatred which constitutes incitement to discrimination."³⁶

With respect to religious and ethnic minorities, Article 27 of the ICCPR clarifies that, "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

The UN Special Rapporteur on Freedom of Religion or Belief has stated that religious minorities remain the main victims of violations of the right of freedom of religion or

³³ See, e.g., Human Rights Committee, General Comment No. 18: Non-discrimination, 10 November 1989, para. 1.

³⁴ E.g., ICESCR Article 2(2): "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind such as [...] religion"; CRC, Article 30: "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language;" and the 1981 Declaration of the General Assembly, Article 2(1): "No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief."

³⁵ Under Article 4(1).

³⁶ Human Rights Committee, General Comment No. 18: Non-discrimination, 10 November 1989, para.2. Article 20(2) of the ICCPR reads as follows: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

belief and other acts of religious intolerance.³⁷ Religious and belief minorities face various forms of discrimination, including with regard to official registration procedures or undue limitations with respect to religious teaching, dissemination of religious materials and displaying religious symbols. Some religious minorities are also adversely affected by intolerance, threats or acts of violence perpetrated by non-State actors, which are often tolerated or encouraged by the authorities.³⁸

Moreover, when religious minorities are groups that follow “a so-called non-traditional or newer religion”, the members of these communities may be the object of suspicion and, consequently, may suffer greater limitations of their right to freedom of religion or belief.³⁹

3.4. Freedom to adopt, change or renounce a religion or belief

According to international standards, the right to freedom of thought, conscience, religion or belief guarantees and includes the right to adopt a religion of one's choice, as well as the right to change religion, and the right to retain a religion. These entitlements are core elements of the right to freedom of thought, conscience, religion or belief; they have an absolute character, and cannot be subject to any limitation whatsoever, reflecting the nature of the right to freedom of thought, conscience, religion or belief guaranteed under international law.⁴⁰

While the freedom to manifest one's religion in principle comprises the right to attempt to convince and convert other people, including through teaching, the right to freedom of thought, conscience, religion or belief does not protect “improper proselytism”, such as the offering of material or social advantage or the application of improper pressure with a view to gaining new adherents.⁴¹

3.5. Freedom of opinion and freedom of expression

The right to freedom of thought, conscience, religion or belief may, at times, be perceived to be in tension with other human rights. Indeed, it may come into conflict with other rights, such as the right to freedom of expression – a right with which the right to freedom of thought, conscience, religion or belief is closely interrelated. However, as noted by UN Special Rapporteur on the Freedom of Religion or Belief, both rights facilitate “the flourishing of free and democratic societies in conjunction with other rights to freedom”,⁴² and any perceived tensions between the right to freedom of thought, conscience, religion or belief and other human rights are usually based on the “misunderstanding that the right to freedom of religion or belief protects religions or belief systems per se.”⁴³ Instead, the international human rights law framework guarantees the right to freedom of expression and the right to freedom of thought, conscience, religion or belief of *individual human beings*, as opposed to guaranteeing the supremacy of any particular belief or religious system or specific expression, for that matter.

³⁷ Report of the Special Rapporteur on freedom of religion or belief, U.N. Doc A/61/340, 13 September 2006, pp. 49-51.

³⁸ Interim report of the Special Rapporteur on freedom of religion or belief, U.N. Doc A/64/159, 17 July 2009, para. 29.

³⁹ Report of the Special Rapporteur on freedom of religion or belief, U.N. Doc A/61/340, 13 September 2006, pp. 49-51.

⁴⁰ As the Human Rights Committee has noted, the fact that “this provision [i.e., the right to freedom of thought, conscience, religion or belief guaranteed by Article 18 of the ICCPR] cannot be derogated from, even in time of public emergency” is testament to the fundamental character of the freedom it guarantees. Article 4, ICCPR; UN Human Rights Committee, General Comment 22, para. 1.

⁴¹ See, for example, *Larissis et al v. Greece*, Applications nos. 140/1996/759/958960, judgment, European Court of Human Rights, 24 February 1998.

⁴² See “Two closely interrelated rights: freedom of religion or belief and freedom of opinion and expression”, Heiner Bielefeldt, *Freedom of Religion or Belief: Thematic Reports of the UN Special Rapporteur 2010 – 2016*, p. 331.

⁴³ *Ibid.*

Article 19(1) of the ICCPR guarantees the right of everyone to hold opinions without interference, and Article 19(2) guarantees the right of everyone to freedom of expression, including to 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 one's choice.

The Human Rights Committee has observed that, "all forms of opinions are protected including opinions of a...religious nature", and that, "harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of Article 19(1)."⁴⁴ The Committee has also considered that criminalizing the holding of an opinion, no matter the opinion, is incompatible with Article 19.⁴⁵

Freedom of expression is not an absolute right, and it may be subject to State regulation for the furtherance of the purposes set forth in Article 19(3) of the ICCPR, such as respect of the rights or reputations of others, the protection of national security, public order, public health or morals. "However, when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself."⁴⁶ In any event, protection of a particular religion or religious belief *per se*, or an individual's personal beliefs, do not constitute legitimate grounds recognized under international human rights law and standards for the lawful imposition of certain restrictions on the exercise of the right to freedom of expression.

There are instances in which a person's freedom of expression may be lawfully restricted, including for the protection of certain religious communities, particularly minorities, from discrimination. However, such restrictions should be prescribed by law, for the purposes recognized by the ICCPR, and be strictly necessary for the protection of interests set forth in Article 19(3) ICCPR.⁴⁷

Similarly, one's freedom to manifest one's religion or beliefs may be subject to limitations to "protect public safety, order, health, or morals or the fundamental rights and freedoms of others".⁴⁸ Even when the circumstances are as such that, under international human rights law, States may legitimately impose such limitations, the limiting measures chosen must not restrict the exercise and enjoyment of the right to manifest one's religion or belief more than absolutely necessary in any given context. In addition, States may only impose such limitations when they can demonstrate that the restrictions to which they wish to resort are both prescribed by law and necessary solely to "protect public safety, order, health, or morals or the fundamental rights and freedoms of others".

3.5.1. "Blasphemy" laws

The Human Rights Committee, expounding on ICCPR Article 19, has stated: "Prohibitions of displays of lack of respect for a religion or other belief system,

⁴⁴ UN Human Rights Committee (HRC), General Comment 34: Freedoms of Opinion and Expression (Article 19), UN Doc. CCPR/C/GC/34, (2011), para. 9, available at: <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

⁴⁵ *Ibid.*, para. 48.

⁴⁶ *Ibid.*, para. 21. In the same General Comment, the Committee has clarified that, "Paragraph 3 [of Article 19, setting out the grounds on which freedom of expression may be legitimately restricted] lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated." (footnotes omitted), para. 22.

⁴⁷ *Malcolm Ross v. Canada*, Human Rights Committee Communication No. 736/1997, UN Doc. CCPR/C/70/D/736/1997 Views of 26 October 2000, see paras 11.1 – 11.6.

⁴⁸ Article 18(3), ICCPR.

including “blasphemy laws”, are incompatible with the Covenant, except in the specific circumstances envisaged in Article 20, paragraph 2, of the Covenant”.⁴⁹ The Committee has further clarified that it is impermissible for any such laws to discriminate in favour of or against a particular religion or belief system, or their adherents over another or religious believers over non-believers. It is also impermissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.⁵⁰

3.5.2. Principle of Legality

The principle of legality is a general principle of law contained in almost every international human rights instrument,⁵¹ as well as a basic tenet of criminal law.⁵² It requires that crimes – and corresponding sanctions – be defined in law in an intelligible manner, and that conduct that is criminalized be clearly defined. Vague and overbroad laws purporting to prevent intangible social harms, such as “[im]morality” laws, which can be used to punish a wide range of behaviours and enforced in an abusive manner, likely fail to satisfy the principle of legality.⁵³

Legal certainty, or *lex certa*, is a basic principle of general criminal liability, and a basic principle of law: namely, that the law needs to be predictable, fairly certain and capable of being respected. Legal certainty is particularly important in the criminal law context, given the gravity of the consequences that breaches of the criminal law entail. Criminal offences must be clearly, precisely and comprehensibly drafted so as to be easily understood.

⁴⁹ UN Human Rights Committee, Concluding Observations on the United Kingdom of Great Britain and Northern Ireland-the Crown Dependencies of Jersey, Guernsey and the Isle of Man, 25 April 2000, UN Doc. CCPR/CO/79/Add.119, HRC, GC 34, para. 48. Article 20(2) of the ICCPR relates to the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. This prohibition does not necessarily mean censorship or stifling of freedom of expression but possibility of civil remedies. See Commission of Human Rights, Travaux Préparatoires of Article 20 of the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/SR.377,10, cited at, Michael G. Kearney, *The Prohibition of Propaganda for War in International Law*, 2007, New York, Oxford University Press, p. 111.

⁵⁰ See, for example, International Commission of Jurists, “On Trial: the implementation of Pakistan’s blasphemy laws,” November 2015.

⁵¹ See, ICCPR, e.g. Article 15(1) in respect of the principle of *nullum crimen sine lege*.

⁵² See S Lamb, ‘*Nullum Crimen, Nulla Poena Sine Lege* in International Criminal Law’ in A Cassese & P Gaeta, *et al.* (eds.). The principle of legality covers several rules, which are interconnected and sometimes overlapping. First, the prohibition on the retroactive application of the criminal law: no act may be punished as a crime that was not a criminal offence under a law applicable to the accused at the time of the act, and the rule that upon conviction the accused may not be punished with a higher penalty than that which was provided in law when the action took place. Second, the rule that the criminal law must be sufficiently clear to provide notice that the act was prohibited at the time it was committed (principle of *lex certa*). Third, the rule that a crime may not be created through analogous application of criminal law (prohibition against analogy or *lex stricta*). Fourth, in line with these rules, it is often also accepted that only criminal law statutes can define a criminal offence and prescribe a penalty (principle of *lex scripta*). See, Piet Hein van Kempen, ‘Introduction – Criminal Law and Human Rights’, in: P.H.P.H.M.C. van Kempen (ed.), *Criminal Law and Human Rights*, The International Library of Essays on Criminal Law, England/USA: Ashgate, 2014, p. XI-XXXIII. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2953285. See also, some of the general principles of criminal law enshrined in the Rome Statute of the International Criminal Court, e.g., Article 22 *Nullum crimen sine lege*, Article 23 *Nulla poena sine lege*, Article 24 on non-retroactivity *ratione personae*, and Article 25 on individual criminal responsibility.

⁵³ See, e.g., Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.

4. National Legal Framework

Historically, since at least the period of the monarchy of the Burman royal court in Mandalay, Buddhist ideas and institutions have been used to legitimize and sustain political power. Consequently, Burmese Buddhists have come to expect that their rulers promote Buddhism and support Buddhist institutions.⁵⁴ Although British colonial rule disrupted this system, the links between Buddhist religious institutions and governing authorities has persisted, for instance in the Ministry of Religious Affairs and in the Ministry of Labour, Immigration and Population.⁵⁵ While the Burman royal court at various stages in history exercised authority over various parts of territory, other kingdoms and systems of governance have also existed within this territory, including but not limited to the Mon and Arakan kingdoms and, therefore, the borders of current day Myanmar are not necessarily reflective of the Burman kingdom.

Debates regarding the place of religion in the Constitution of Myanmar are not new. General Aung San, the country's political leader at the time of independence and father of State Counsellor Daw Aung San Suu Kyi, argued for a secular constitution.⁵⁶ Other prominent nationalists pressed for Buddhism to be recognized as the state religion. In the end, section 21 of the 1947 constitution recognized what was termed "the special position of Buddhism", while also acknowledging the practice of other religions in the country. It also stated that religion should not be used to incite hatred, and that laws can be passed to prohibit such "transgressions".⁵⁷

This central tension in the Myanmar's constitutional framework has persisted in the current Constitution, which was adopted in 2008: the Constitution provides protection for religious practices other than Buddhism, but also appears to give the latter a special status, and to guarantee enhanced protections for it.

⁵⁴ See, Walton, M. (2016). *Buddhism, Politics and Political Thought in Myanmar*. Cambridge: Cambridge University Press.

⁵⁵ See, for example: ICJ, "Citizenship and Human Rights in Myanmar," (citation above), pp. 10.

⁵⁶ See, for example, Melissa Crouch (2015) *Constructing Religion by Law in Myanmar*, *The Review of Faith & International Affairs*, 13:4, 1-11.

⁵⁷ Christina Fink (2018) *Myanmar: Religious minorities and constitutional questions*, *Asian Affairs*, 49:2, 259-277. The 1974 ("socialist") constitution removed this reference to the special status of Buddhism, which was subsequently put back into a new Constitution in 2008. <http://www.burmalibrary.org/docs07/1974Constitution.pdf>.

Provisions related to freedom of religion and belief in Myanmar's Constitution

34. Every citizen is equally entitled to freedom of conscience and the right to freely profess and practise religion subject to public order, morality or health and to the other provisions of this Constitution.

348. The Union shall not discriminate [against] any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, official position, status, culture, sex and wealth.

361. The Union recognizes [the] special position of Buddhism as the faith professed by the great majority of the citizens of the Union.

362. The Union also recognizes Christianity, Islam, Hinduism and Animism as the religions existing in the Union at the day of the coming into operation of this Constitution.

363. The Union may assist and protect the religions it recognizes to its utmost.

While the Constitution recognizes a variety of rights, these are generally only afforded to citizens (see below, section entitled "Myanmar's citizenship laws").⁵⁸ Furthermore, many of these rights are subject to constitutional clauses that contemplate their contravention in certain circumstances. Despite this, Section 347 provides: "The Union shall guarantee [emphasis added] *any person* to enjoy equal rights before the law and shall equally provide legal protection."

Article 34 of the 2008 Constitution grants citizens the "right to freely profess and practise religion ... subject to public order, morality or health and to the other provisions of this Constitution." Article 364 further states that, "any act which is intended or is likely to promote feelings of hatred, enmity or discord between racial or religious communities or sects is contrary to this constitution." At the same time, however, Article 361 recognizes the "special position of Buddhism."

There are a number of laws and policies in place in Myanmar that appear to violate the protection of the right to freedom of religion or belief in the Constitution, as well as under international law.

4.1. Myanmar's citizenship laws

Myanmar legal framework regulating citizenship is primarily sourced from the 2008 Constitution, the 1982 Citizenship Law (amended in 1997)⁵⁹ and three 1983 Citizenship procedures.⁶⁰ Unelected governments enacted these legal instruments

⁵⁸ For instance, the protection against discrimination, in section 348, is restricted to citizens: "The Union shall not discriminate any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, official position, status, culture, sex and wealth." For further discussion of constitutional rights in Myanmar, see: ICJ, "Special Economic Zones in Myanmar and the State Duty to Protect Human Rights," February 2017, pp. 80.

⁵⁹ 1982 Citizenship Law. Section 76 of the Law repeals the 1948 Union Citizenship (Election) Act and the 1948 Union Citizenship Act. Note that section 146 of the 1974 Constitution conferred authority to the government to prescribe all laws with respect to citizenship. See also, 1997 Law Amending the Myanmar Citizenship Law, (The State Law and Order Restoration Council Law No 4/97)

⁶⁰ 1983 Citizenship Procedures (with respect to full citizenship), Notification 13/83. 1983 Citizenship Procedures (with respect to associate citizenship), Notification 14/83. 1983 Citizenship Procedures (with respect to naturalized citizenship), Notification 15/83.

during five-odd decades of military rule in the country. Various directives guide implementation of the relevant domestic legal provisions; however, their legal basis is unclear, generally they are not publicly available, and they are subject to arbitrary implementation.⁶¹

The 1982 Law introduced a hierarchy of citizenship categories, privileging members of “national races” considered as indigenous by the State, and conferring a qualified and insecure form of lesser citizenship to others. The three categories are: (full) “citizen,” “associate citizen” and “naturalized citizen.”

Due to the discriminatory character of this law, and its discriminatory implementation in practice, many individuals who are life-long residents of Myanmar have been effectively rendered stateless,⁶² including members of various ethnic groups, and children of mixed parentage. Even for so-called “full” citizens, some constitutional rights are limited or wholly restricted, for example, the prohibition on becoming President if a family member is a non-citizen.⁶³ What results is a system that is highly discriminatory and often applied arbitrarily; furthermore, the resulting human rights violations are compounded by the lack of access to justice, including the rights to judicial review, remedies and redress.

The problem of discriminatory citizenship arrangements extends across the country. Many actors have rightly highlighted the situation of Rohingyas – most of whom are Muslim – who the State generally does not recognize as citizens, and whose situation, as a result, is an egregious example of the damaging impact of the 1982 Law and of its discriminatory application. At the same time, numerous other ethnic and religious groups – including but not limited to persons of Indian, Chinese, Nepali and Pashtu descent – are also not considered as “nationals” and, as a result, typically do not enjoy rights otherwise afforded under the Constitution and international human rights law. More than 25 percent of persons enumerated in the nationwide 2014 Census lack a documented legal identity,⁶⁴ and changes to the State’s methods of citizenship documentation are under consideration.⁶⁵ The status of those returning to Myanmar after periods abroad as refugees or migrants is so far unresolved. The increasing number of marriages between citizens and non-citizens, and between citizens of different ethnicities, raises complex questions, including for the children of these unions. In this time of increased political and economic integration with other States, following years of relative isolation, the potential economic impediments of the unclear and insecure legal status of returnees do not appear to have been assessed.

4.2. Offences related to religion: “blasphemy” laws

Offences against religion in Myanmar are based on laws promulgated during British colonial rule, as significant sections of the Indian Penal Code (IPC), 1860, are still applicable in Myanmar, like in Pakistan, India and Bangladesh. During colonial rule, five provisions relating to “offences against religion” were introduced in the sub-continent. Four of them, sections 295 (intentional damage or defilement of a place or object of worship); 296 (disturbing religious ceremonies or gatherings); 297 (trespassing on places of burial); and 298 (intentionally insulting an individual’s

⁶¹ See: ICJ, “Legal Briefing on Citizenship Law in Myanmar,” June 2019, <https://icj.org/country/asia-pacific/southeast-asia/myanmar/>.

⁶² Article 1.1. of the 1954 Convention relating to the Status of Stateless Persons “the term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law.”

⁶³ Section 59(f) effectively bars the State Counsellor Daw Aung San Suu Kyi from becoming President of the Union because her sons are foreign nationals.

⁶⁴ Republic of the Union of Myanmar, “The 2014 Myanmar Population and Housing Census: The Union Report,” Census Report Volume 2, pp. 207-210.

⁶⁵ State Media has reported, “The Ministry of Labour, Immigration and Population has adopted a smartcard project for the people living in Myanmar.” See: Global New Light of Myanmar, “If there any issue arises regarding to repatriation, we will resolve it through diplomatic channel: Permanent Secretary U Myint Thu,” 12 November 2018, pp. 4.

religious feelings) were introduced in 1860. Section 295(a), was added to the Indian Penal Code in 1927.

Together, these provisions related to offences against religion are commonly referred to as “blasphemy” laws; they are still part of the Penal Code in Myanmar and are used, effectively, to criminalize criticism of religion, particularly Buddhism.

Offences related to religion in Myanmar’s Penal Code

295. Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class or persons, with the intention of thereby insulting the religion of any class of person or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

295(a). Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of [persons resident in the Union], by words, either spoken or written, or by visible representations, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

298. Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

4.2.1 History of the blasphemy laws

During colonial rule, the justification for introducing criminal provisions related to “offences against religion” – or “blasphemy laws” – was the maintenance of law and order. Where people professing different religions were living together throughout British India, including in Burma, the colonial authorities considered essential for controlling the colonized populations to avoid conflicts between different groups.

Section 295(a), in particular, was added to the Indian Penal Code in 1927 in light of an increase in tensions between Hindu and Muslim communities following widespread agitation against the acquittal of the publisher of a pamphlet describing the life of the Prophet Muhammad.⁶⁶

⁶⁶ In 1924, a pamphlet titled “Rangila Rasool”, purporting to describe events in the life of the Prophet Muhammad, written by an anonymous author, was circulated in Punjab. The pamphlet triggered angry responses from segments of the Muslim community, and a case was registered against the publisher, Mahashe Rajpal, under section 153 of the Indian Penal Code (IPC) for provocation with the intent of causing a riot. Mahashe Rajpal was convicted by the trial court, but in 1927 the Punjab High Court acquitted him on the grounds that the intention “to attack the Mahomedan religion as such or to hold up Mahomedans as objects worthy of enmity or hatred” could not be proven. The Court added that section 153 of the IPC was not intended to “prevent all adverse discussions of the life and character of a deceased religious leader.” Following widespread agitation against Mahashe Rajpal’s acquittal and calls for reform in the penal code to protect the dignity of the Prophet Muhammad, in 1927 the Government introduced section 295A to criminalize “deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious believers”.

Of the many offences related to religion in force in Myanmar today, this particular provision has been the most problematic – both in text and in practice.

4.2.2. Incompatibility with international human rights law

The provisions related to blasphemy in the Penal Code, particularly sections 295(a) and 298, are incompatible with Myanmar's international human rights obligations to respect the rights to freedom of thought, conscience, religion or belief; freedom of expression; and the principle of non-discrimination and the right to equality before the law and equal protection of the law without discrimination for all. In addition, the vague and over-broad formulations of these blasphemy laws violate the principle of legality, and leave them open to subjective interpretation and misuse. They also appear to be incompatible with Myanmar's Constitution, which guarantees the right to freely profess and practise religion.

As discussed above, the international human rights regime, and Article 18 of the ICCPR in particular, guarantees the right of every individual to freedom of religion or belief. However, such right does not entail – or extend to – the protection of any particular religion. It is the right to have, adopt and practise one's religion of choice that is guaranteed and protected under the international human rights framework – as opposed to the protection, maintenance or guarantee of any particular religion *per se*.⁶⁷

Criticism of any particular religious sentiment or of a religion itself does not necessarily limit or threaten the right of others to exercise their freedom to have, adopt or manifest their religion, any more than criticism, mockery, etc. of any particular political belief or opinion.⁶⁸ The right to freedom of religion or belief does not, either expressly or by implication, place a duty on all persons to have respect for everyone's religion or belief at all times,⁶⁹ nor does it include the right to have one's faith elevated to a status over and above any others and/or where it is free from criticism or even insult.⁷⁰

Section 295(a) of Myanmar's Penal Code criminalizes "outraging the religious feelings" of any class of people with a "deliberate or malicious intent." A bare reading of the provision shows that it aims to protect "religious feelings", as opposed to the right to have, adopt and practise one's religion of choice. Similarly, section 298 relates to "wounding the religious feelings", which is not one of the legitimate grounds on which limitations of the right to freedom of expression may be imposed under international human rights law and standards.

There is also a clear difference between insult and offence to a particular religion or religious belief on the one hand, and advocacy of hatred that constitutes incitement to discrimination, hostility or violence on religious grounds. While international human rights law prohibits the latter, the former is a protected activity under Article 19 of the ICCPR,⁷¹ though its exercise may be subject to restrictions in certain, very limited circumstances, and only such that are provided by law and are necessary.⁷² The Human Rights Committee has also stated that criminalizing the holding of an opinion, no matter the opinion, is incompatible with Article 19.⁷³

⁶⁷ Jeroen Temperman, "Blasphemy, Defamation of Religions & Human Rights Law", 17 April 2012, *Netherlands Quarterly of Human Rights* 2008, pp. 517-545, at pp. 7-8, available at: SSRN: <https://ssrn.com/abstract=2041292>.

⁶⁸ *Ibid.*, pp. 10-11.

⁶⁹ *Ibid.*, p. 10.

⁷⁰ Asma Jahangir, Special Rapporteur on freedom of religion or belief, and Doudou Diène, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Report on Incitement to Racial and Religious Hatred and the Promotion of Tolerance, UN Doc. A/HRC/2/3, (2006), para. 36.

⁷¹ Jahangir and Diène, at *supra* note 70, p. 16.

⁷² See above section 3.5 Freedom of opinion and freedom of expression.

⁷³ Human Rights Committee, GC 34, *supra* note 44, para 48.

Sections 295(a) and 298 of the Penal Code in Myanmar fail to make this distinction as they criminalize “outraging” and “wounding” religious feelings – not incitement to violence, hostility or discrimination on the grounds of religion.

Furthermore, a prerequisite of the right to a fair trial recognized globally is that criminal offences must be prescribed by law and conform to the principle of legality. This means that they must be formulated clearly and precisely to ensure individuals can regulate their conduct accordingly. Vague laws undermine the rule of law because they leave the door open to selective interpretation and prosecution, based on discriminatory policies of government officials and judges’ personal predilections.

The elements of the “offences” proscribed by sections 298 and 295(a) are vague and overbroad and, therefore, are open to subjective interpretations; they give virtually no instruction to ordinary individuals or law enforcement officials and the judiciary regarding what behavior is actually prohibited. For example, it is not clear what “outraging the religious feelings” of “any class” means in section 295(a) of the Penal Code, as “outrage” is an inherently subjective term that can allow an unduly wide range of acts and expressions to be prosecuted under the provision. The language in section 298, i.e. “wounding the religious feelings of any person” is similarly vague and subjective.

Criminal provisions on “blasphemy” raise another overarching concern. Pursuant to such provisions, entirely harmless conduct is prohibited and criminalized simply on the ground that it is deemed offensive to the sentiments of other people. However, the gravity of an allegedly blasphemous statement is a matter of subjective analysis, rather than a question of an objective evaluation of harm caused, and of the culpability, if any, of the person responsible. Harm and culpability, in turn, are the elements required to warrant the imposition of criminal sanctions.⁷⁴ As a result, “blasphemy laws” are *per se* eminently arbitrary, and run the risk of being arbitrarily enforced.

4.2.3. Misuse of blasphemy laws

In recent years in Myanmar, courts have convicted individuals under the above-mentioned blasphemy provisions of the Penal Code even in the absence of any evidence of deliberate and malicious intent to insult a religion, let alone on the basis of irrefutable evidence of incitement to violence, hostility or discrimination on religious grounds. People have been held criminally responsible simply because what they had either said, written, depicted or otherwise expressed was judged to be at odds with religious interpretations of influential clerical authorities.

There are a number of recent examples of the abuse arising from charges under sections 295, 295(a) and 298 of the Penal Code.

Htin Linn Oo, a writer and information officer for the National League for Democracy, was charged under sections 295(a) and 298 of the Penal Code in December 2014. These charges followed a speech Htin Linn Oo had given at a literary event in October 2014, in which he had expressed criticism of members of the clergy (the Sangha) referencing Buddhism as a basis to discriminate against other religions. In June 2015, he was convicted and sentenced to two-and-a-half years in prison with hard labour.⁷⁵ He was released after a Presidential pardon on 17 April 2016, along with other 83 other prisoners.

⁷⁴ Martha Nussbaum, “Secret Sewers of Vice: Disgust, Bodies and the Law”, in Susan Bandes (ed.), *The Passions of Law*, New York University Press, 1999, pp. 19-62, cited at Peter Cumper, & Tom Lewis, “Last Rites and Human Rights: Funeral Pyres and Religious Freedom in the United Kingdom”, 2010, *Ecclesiastical Law Journal*,12(2), 131-151, Cambridge University Press.

⁷⁵ See Vani Sathisan, Sanhita Ambast and Reema Omer, “Blasphemy Prosecutions Invoke Dignity of Religion to Deny Human Rights and Undermine the rule of Law”, 21 July 2015,

In 2014, leaders of the Ma Ba Tha expressed outrage at the use of an image of the Buddha wearing headphones and being portrayed as a DJ in a trance-like state in promotional material for a bar in Yangon.⁷⁶ The owner of the bar, the general manager (a New Zealand citizen) and the bar manager were arrested on charges of blasphemy under section 295 and 295(a). They were also denied bail after the arrest. On 17 March 2015, they were convicted and sentenced to two-and-a-half years in prison with hard labour under 295(a) of the Penal Code (at least one of these individuals, the general manager, was released more than one year later pursuant to a presidential pardon).

The blasphemy law provisions are so broad that they risk being used to silence criticism of religious belief. Given the political and cultural context, this makes practitioners of minority religions or non-believers especially vulnerable to prosecutions under these provisions. In addition, in practice, while the Government appears willing to utilize these laws to prosecute allegations of blasphemy related to Buddhism, as discussed above, advocacy of violence and discrimination against members of minority religions has gone unchecked.⁷⁷

4.3. "Race and religion" laws

In addition to the use of colonial-era blasphemy laws to suppress legitimate criticism or harmless activity related to religion, a set of recently introduced laws appears to specifically target non-Buddhists, and particularly the Muslim community.

These laws began to be discussed publicly for the first time in June 2013, when, at a religious conference in Yangon, U Wirathu, a prominent monk associated with the 969⁷⁸ and Ma Ba Tha movements, presented two drafts laws that, when enacted, would restrict inter-religious marriage and conversions.⁷⁹ (Note: an arrest warrant for U Wirathu was issued in May 2019, although this appears to be in connection to his criticisms of the Government, rather than his anti-Muslim activities.)⁸⁰ These draft laws required Buddhist women planning to marry men belonging to another religion to seek official permission from local authorities. They also included a clause according to which a man not professing the Buddhist faith who wished to marry a Buddhist woman was required to convert to Buddhism.⁸¹

ICJ, available at: <https://www.icj.org/blasphemy-prosecutions-invoke-dignity-of-religion-to-deny-human-rights-and-undermine-the-rule-of-law/>.

⁷⁶ See, for example, Paul Fuller, "The idea of 'blasphemy' in the Pāli Canon and modern Myanmar", *Journal of Religion and Violence* 4 (2), pp. 159-181.

⁷⁷ See, for example, Iselin Frydenlund (2017) Religious Liberty for Whom? The Buddhist Politics of Religious Freedom during Myanmar's Transition to Democracy, *Nordic Journal of Human Rights*, 35:1, 55-73, p. 63; International Commission of Jurists, "Implementable Action Plans from the ICJ to the new Parliament & Government", 3 May 2016, accessed at: <https://www.icj.org/wp-content/uploads/2016/06/Myanmar-Recommendation-to-NLD-Gvt-Advocacy-Analysis-Brief-2016-ENG.pdf>.

⁷⁸ A loosely organized network of Buddhist monks. For details, see Iselin Frydenlund (2018), The birth of Buddhist politics of religious freedom in Myanmar, *Journal of Religious and Political Practice*, 4:1, 107-121.

⁷⁹ The monks approached retired lawyer U Ye Khaung Nyint to draft short versions of the Marriage Bill and the Conversion Bill, which Nyint considered a meritorious religious act: see J Carroll, "The Man Who Wrote Ma Ba Tha's 'Race and Religion Laws'", *Frontier Myanmar*, 10 October 2015, accessed at: <https://frontiermyanmar.net/en/interview/the-man-who-wrote-ma-ba-thas-race-religion-laws>.

⁸⁰ At the time of writing this report, U Wirathu remained at large. See: Zaw Naing Oo, "Arrest warrant issued for Myanmar hardline monk Wirathu," 29 May 2019, available at: <https://www.reuters.com/article/us-myanmar-buddhist/arrest-warrant-issued-for-myanmar-hardline-monk-wirathu-idUSKCN1SZ0FU>.

⁸¹ Matthew J. Walton, Melyn McKay & Daw Khin Mar Mar Kyi (2015) Women and Myanmar's "Religious Protection Laws", *The Review of Faith & International Affairs*, 13:4, 36-49, p. 2.

At the beginning of July 2013, the National Democratic Force (NDF) political party⁸² announced plans to develop and submit a similar law to Myanmar's parliament, with a party leader explaining that they were introducing it with the intention of protecting poor Buddhist women from being exploited by men of other religions who would "take advantage" of their "impoverished circumstances".⁸³

Although initial public reaction to the proposed laws was mixed, those associated with the 969 and Ma Ba Tha movements launched a nationwide signature campaign in support of the draft legislation and, a few weeks later, claimed to have gathered two and a half million signatures.⁸⁴ By that time, two additional draft laws, related to population control and polygamy, had also emerged and the entire package of four draft laws – referred to as the "Race and Religion Protection Laws" – was submitted to Parliament. In 2015, the Union Solidarity and Development Party-led Parliament passed the four pieces of legislation.⁸⁵ These laws should be understood in the context of rising anti-Muslim sentiment, including acts of violence through riots in different parts of Myanmar, in the lead up to the 2015 national elections.⁸⁶

While the laws do not expressly refer to Muslims or Islam, statements made by those advocating for their enactment indicate their discriminatory intent.⁸⁷

Many religious, civil society and human rights groups strongly opposed the passage of these laws, arguing that their provisions did not comply with international human rights law and standards, and that their enactment would lead to a deterioration of interreligious relations at a particularly sensitive and uncertain time in Myanmar's history.⁸⁸ In response, a statement from the 969 movement called them "fake countrymen" and "traitors on national affairs", and suggested that they were working on behalf of foreign organizations.⁸⁹

⁸² The National Democratic Force (NDF) was formed in 2010 as a breakaway faction of the National League for Democracy (NLD). Members of the NDF decided to contest the 2010 general elections in Myanmar, which the NLD boycotted.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ See "Myanmar: UN rights experts express alarm at adoption of first of four 'protection of race and religion' bills," 27 May 2015, accessed at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16015&LangID=E>.

⁸⁶ For a discussion, see: Justice Trust, "Exposing the Hidden Hands Behind Anti-Muslim Violence in Myanmar: Case Study of the Mandalay Riots," Policy Brief, February 2015.

⁸⁷ By way of example, in an interview given in June 2015, U Wirathu spoke about the need for the laws to be enacted, and stated: "There are lots of difficulties due to the Muslims, they cause problems. They rape Burmese Buddhist women in many towns and cities. They rape teenagers and children under age... The women are very vulnerable (in marriage). The man pretends to be Buddhist, and then she is allured into Islam and she is forced to wear [the/a] burqa. Some women are tortured if [they] continue the practice of [their] religion. If she is pregnant, she will be mistreated until miscarriage. In one case, a woman was even killed. If a woman of another religion marries a Muslim man she loses all her religious freedom and all her human rights... Then they are forced to commit sacrilege, for example to step on Buddha's images. They force Buddhist women to sin..." Reproduced in Iselin Frydenlund (2017) Religious Liberty for Whom? The Buddhist Politics of Religious Freedom during Myanmar's Transition to Democracy, *Nordic Journal of Human Rights*, 35:1, 55-73, p. 63.

⁸⁸ See, for example, <https://humanrightsinasean.info/article/myanmar-women%E2%80%99s-rights-groups-oppose-interfaith-marriage-act.html> and <http://mizzima.com/news/mass-call-myanmar%25E2%2580%2599s-civil-society-drop-%25E2%2580%2598nation-race-and-religion%25E2%2580%2599-bills>.

⁸⁹ See, for example, <https://www.irrawaddy.com/news/burma/nationalist-monks-call-ngos-traitors-opposing-interfaith-marriage.html>.

While all four laws give rise to concern about violations of the right to freedom of thought, conscience, religion or belief, the laws related to conversion and marriage are the most problematic and will be discussed in detail below.

4.3.1. Anti-conversion law

The preamble of the law concerning religious conversion makes reference to Article 34 of the Constitution of Myanmar, which protects religious freedom.⁹⁰ It states the law is being enacted as "there is a need for transparency and a system in place under Article 34 of the Constitution to regulate freedom of religion and the freedom to choose and convert [from/to a] religion."⁹¹

The law makes a number of serious inroads into the right to freedom of thought, conscience, religion or belief. Above all, it subjects the conversion process, as well as the interpretation of the provisions of the law itself, to the discretion of non-judicial and non-representative bureaucratic bodies, thus giving the State inappropriate and unnecessary powers incompatible with the right to freedom of religion or belief, as well as the right to privacy.⁹² With respect to the limitations the law imposes on the conversion process, the ICJ notes that, according to international human rights law and standards, the right to freedom of thought, conscience, religion or belief guarantees and includes the right to adopt a religion of one's choice, as well as the right to change religion and the right to retain a religion. In Article 18, the UDHR proclaims that "everyone has the right to freedom of thought, conscience and religion", and clearly guarantees that such a right "includes freedom to change his religion or belief". Furthermore, these aspects of the right to freedom of thought, conscience, religion or belief have an absolute character and are not subject to any limitation whatsoever, reflecting the nature of the right to freedom of thought, conscience, religion or belief guaranteed by Article 18 of the UDHR and Article 18 of the ICCPR. Indeed, to do otherwise would constitute a violation of the right not to "be subject to coercion which would impair [one's] freedom to have or to adopt a religion or belief of [one's] choice", guaranteed, *inter alia*, by Article 18(2) of the ICCPR. Therefore, by imposing a conversion process that entails a series of obstacles to conversions (see section immediately below for further details on this), the anti-conversion law violates the above-mentioned international human rights law and standards.

4.3.1.1. Administrative Obstacles to Conversion

This section describes further violations of the right to adopt or change religion to which the provisions of the anti-conversion law give rise.

The law requires individuals who want to change their religion to apply to a state-governed body – called a "registration board" – comprising individuals from the religious affairs office, immigration department, administration department, women's affairs federation, an education officer and elders.⁹³ The law does not set out any requirement that Myanmar's various ethnic and religious communities be adequately represented on the registration boards.

Anyone wanting to convert must report personal information to the township registration board, including their current religion and the religion to which they want to convert, as well as their reasons for converting. They must then undergo questioning by the

⁹⁰ Unofficial translation of the "Religious Conversion Law" by the Chin Human Rights Organization available with the ICJ.

⁹¹ Ibid.

⁹² See International Commission of Jurists and Amnesty International, "Myanmar: scrap 'race and religion laws' that could fuel discrimination and violence", 3 March 2015, accessed at: <https://www.icj.org/myanmar-scrap-race-and-religion-laws-that-could-fuel-discrimination-and-violence/>.

⁹³ Section 3 of the Religious Conversion Law.

registration board to ascertain whether the person “truly believes” in the religion to which they desire to convert.⁹⁴

The law also requires the registration board to interview applicants to determine whether they have made the decision to convert freely. At the time of the interview, the board is also required to schedule a 90-day period for the applicant to study the religion to which they want to convert, including the religion’s marriage and family laws and customs. The period can be extended up to a maximum of 180 days on the applicant’s request. The board must issue a determination as to whether the applicant has or has not been induced or is otherwise under undue pressure to convert. The board has the authority to deny a conversion certificate.⁹⁵

The law imposes onerous administrative burdens upon those seeking to convert to another religion, which constitute impermissible interferences with the exercise of the right to adopt a religion of one’s choice, as well as the right to change religion, and convert to a different one, which are all core entitlements of the right to freedom of thought, conscience, religion or belief. Indeed, under international human rights law, as mentioned above, those elements have an absolute character, and cannot be subject to any limitation whatsoever. The freedom to have or to change one’s religion or belief is inalienable and may not be infringed or otherwise curtailed or hampered by the State or others for that matter, under any circumstances.

4.3.1.2. Age restrictions on conversion

Under the law, only people over the age of 18 years are permitted to apply for religious conversion. This contravenes, in particular, Myanmar’s obligation under Article 14(1) of the CRC to respect the right of the child to freedom of thought, conscience and religion.

4.3.1.3. Unclear definition of offences under the law

The law prohibits “conversions with an intent to insult, degrade, destroy or misuse religion” (section 14); “compelling conversion” through bonded debt, inducement, intimidation, undue influence or pressure (section 15); and preventing, interfering or hindering people from converting (section 16). These provisions carry sentences of imprisonment of up to two years, six months, a fine of not more than MMK 200,000; 300,000 and 50,000 respectively or both.

Some of these offences are not necessarily inconsistent with the right to freedom of thought, conscience, religion or belief. For instance, section 15 appears to seek to proscribe forced conversion, which in itself would amount to a violation of the right to freedom of religion or belief. Indeed, Article 18(2) of the ICCPR affirms that: “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” Having said that, not each and every conduct covered by section 15 would necessarily justify resort to criminal sanctions. For instance, criminalizing each and every instance of “undue influence or pressure” to induce someone to convert may be unnecessary and disproportionate, and other means, short of the criminal law, would suffice as criminalization must always be a measure of last resort. Moreover, section 14, which purports to proscribe conversion “with an intent to insult”, is vague and broadly worded, and thus clearly open to abuse, as well as being inconsistent with international human rights law and standards and the principle of legality (see section 2.5.2. above).

Section 10(b) of the law provides that registration boards shall “establish whether the applicant has been under inducement, intimidation, undue pressure or duress in converting [from] his/her religion”, and submit the findings to “the concerned Regional or State Government, Regional or State Department of Religious Affairs or Regional or State Immigration and National Registration Office.” Putting such discretion in the hands of

⁹⁴ Section 5, *ibid.*

⁹⁵ Section 6, *ibid.*

registration boards threatens the right to freedom of thought, conscience, religion or belief, including, in particular, with respect to individuals who belong to religious minorities. Given that sections 14 to 16 criminalize a range of conduct, section 10(b) may be interpreted to mean that, based on the findings of the registration boards, Government departments could also refer cases for prosecution.

Using force, coercion, undue influence or other abusive conduct to induce someone to convert to a certain religion – as well as preventing anybody from a religious conversion undertaken of one’s own free will – would equally constitute impermissible impairments on the exercise of the right to freedom of thought, conscience or religion.⁹⁶ If the Government’s aim is to minimize forced conversions, it would be appropriate to prohibit in law undue interference with individuals’ right to freedom of thought, conscience, religion or belief, to allow for an accessible and transparent process to challenge such interference, and to place the ultimate determination of whether such a law has been violated in the hands of an independent and impartial judiciary. Under international human rights standards, nobody, including registration boards should have any role in determining whether individuals can or cannot convert from one religion to another religion.

Furthermore, it is problematic that registration boards made up of local government officials and other community members are mandated to make determinations as to whether a particular religious conversion was coerced or made under undue influence. This problem is compounded by the absence in the law of a right to appeal against a decision of the registration boards. In any case, the right of appeal should be to a judicial body, as per the rule of law principle of due process, afforded as a “fundamental right” in the 2008 Constitution (section 381), alongside the constitutional guarantee that “any person” shall enjoy equal rights before the law (section 347). However, even if a right of appeal against such decisions existed, and even if the registration boards were to be made more representative, the discretionary power the law gives them renders the whole system of registration boards incompatible with the right to the freedom of religion or belief, particularly the right to adopt a religion or belief of one’s choice.

4.3.2. Buddhist Women’s Special Marriage Law

The preamble of the 2015 Buddhist Women’s Special Marriage Law states that the objective of the law is “to enable the enjoyment of equal rights by Myanmar Buddhist Women and non-Buddhist men with respect to marriage, divorce, partition and guardianship of children and to give [them] effective protection.”⁹⁷ While on its face, this aim appears to be legitimate, in practice, the law has been used to discriminate on both religious and gender grounds, something that is incompatible with Myanmar’s domestic and international human rights law obligations. The context in which this legislation was enacted suggests that it was introduced with a discriminatory intent, and particularly aimed at placing limitations on Buddhist women from marrying Muslim men. In one telling comment on the need for the law, U Aung Myaing, Chairperson of the Theravada Dharma Network,⁹⁸ stated that “our Buddhist women are not intelligent enough to protect themselves from the predations of Muslim men seeking to marry and convert them.”⁹⁹

⁹⁶ Both types of behaviour would constitute violations of the Article 18(2) of the ICCPR, which states that: “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”

⁹⁷ Unofficial translation of the Myanmar Buddhist Women's Special Marriage Law, 2015.

⁹⁸ A network largely comprised of lay Buddhists closely associated with U Wirathu, which was established in order to defend Buddhism after the 2012 riots between the Rohingya and the Rakhine Buddhist communities in the Rakhine state. The Theravada Dharma Network was also involved in drafting initial versions of the “race and religion” bills. See Iselin Frydenlund (2018) The birth of Buddhist politics of religious freedom in Myanmar, *Journal of Religious and Political Practice*, 4:1, 107-121.

⁹⁹ Matthew J. Walton, Melyn McKay & Daw Khin Mar Mar Kyi (2015) Women and Myanmar's “Religious Protection Laws”, *The Review of Faith & International Affairs*, 13:4, 36-49, p. 3.

If the legislation was meant to provide equal protection against forced conversions as a result of marriage, it should apply to all religions equally, and to both men and women. However, it explicitly and exclusively targets and regulates the marriage of Buddhist women with men professing a religion other than Buddhism. For instance, the law establishes “provisions to be observed by non-Buddhist man” (Chapter 5), but no similar – or any – rules or obligations are placed on the Buddhist wife.

Several of the provisions in the law appear to facilitate the enjoyment of human rights. For example, provisions ensuring that a wife is able to practise her religion freely; allowing any children born to freely practise the religion of their choice; and preventing the husband from forcefully converting the wife to his religious faith. However, these provisions do not equally protect the non-Buddhist husbands – and are, therefore, discriminatory and in contravention of Article 16(1) of the UDHR. Article 16 (1) provides that, “men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution”.

Article 24(g) of the law states that a non-Buddhist husband of a Buddhist wife shall not “insult, in words or in writing or through visible representation or gesture, with bad intention to cause bitter feeling to the Buddhist (sic).” This provision allows for possible excessive restrictions on the husband’s right to freedom of expression as enshrined in Article 19 of the UDHR as it provides no guidance as to what behavior or gestures could “cause bitter feelings”. The provision, therefore, contravenes the principle of legality, according to which the terms of a law must not be vague or overbroad. Furthermore, it is also discriminatory, as no similar provision exists for the wife or for any other types of cross-religious marriages.

The law also targets Buddhist women marrying non-Buddhist men. It reinforces stereotypes that Buddhist women are “vulnerable”, and that non-Buddhist men are likely to disrespect their wives’ religious beliefs, and to attempt to forcibly convert them. In this regard, Article 35 relies on discriminatory stereotypes that non-Buddhist men are more likely to abandon their wives and abuse them.¹⁰⁰ There is no factual basis for such assertions, but they echo claims by some extremist groups used to justify violence and discrimination against non-Buddhist groups in Myanmar, in particular against Muslims.¹⁰¹

4.3.2.2. Custody of children

Moreover, provisions of the law relating to children’s custody (i.e., Articles 25(b); 32(b); 34(a)(iii); and 34(b)(bb)) do not feature the best interests of the child as a primary consideration, as required by Article 3(1) of the CRC.¹⁰² Instead, these provisions automatically grant a Buddhist woman married to a non-Buddhist man guardianship of all children should they divorce.¹⁰³

¹⁰⁰ See, for example, Matt Schissler, Matthew J. Walton & Phyu Phyu Thi (2017) Reconciling Contradictions: Buddhist-Muslim Violence, Narrative Making and Memory in Myanmar, *Journal of Contemporary Asia*, 47:3, 376-395: “Among the religions, Islam is resentful, because if you marry one woman, you can marry her sister, and also her other relatives. I have seen that. They have those kinds of habits...For that reason, I do not like Islam religion, and they are bad”.

¹⁰¹ *Ibid.*

¹⁰² Article 3(1) of the CRC reads as follows: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

¹⁰³ See International Commission of Jurists and Amnesty International, “Myanmar: scrap ‘race and religion laws’ that could fuel discrimination and violence”, 3 March 2015, accessed at: <https://www.icj.org/myanmar-scrap-race-and-religion-laws-that-could-fuel-discrimination-and-violence/>.

5. Conclusion

Myanmar is at a crucial moment in its history, when strengthening the rule of law and building sustainable peace will require the protection of religious pluralism, the development of an inclusive national identity, and ensuring that those inciting violence against minority communities are held accountable. All of this, in turn, will necessitate the efforts of multiple actors and institutions, including the media, the legal profession and the judiciary. Religious leaders and institutions will also be critical in developing norms and a social political context that supports religious pluralism and tolerance.¹⁰⁴

Addressing violations and abuses of the right to freedom of thought, conscience, religion or belief necessitates a range of measures, including those identified in the recommendations of this report (above). Legislative reforms are important and implementable steps that can be taken to address barriers to the right to freedom of religion or belief, in line with the State's obligations under international human rights law. This includes ensuring that respect for culture or traditions cannot be used as pretext to criminalize lawful behavior or to justify discrimination and violence, and by recognizing law reform as a critical prerequisite to the development of a pluralistic democratic society for future generations. A constitutional reform process also presents opportunities to better protect the rights of religious minorities, and to embed in law the values that underpin respect for diversity of religious or other beliefs in a democratic society. At the same time, discrimination and arbitrariness in the application of laws must also be addressed, including through comprehensive policies and action plans, in addition to and complementary to legal measures. To be effective, such reforms should be coupled with efforts led by the Government to address pervasive discrimination within governance structures.

The Government and legislature have a particularly important role to play in setting legal rules and guiding cultural change toward a society that respects the right to freedom of religion or belief for all persons in Myanmar without discrimination, as well as the rights of ethnic and religious minority groups more broadly. Law reform aligned to the State's international human rights law obligations provides a sound underpinning to progress this vision.

¹⁰⁴ See Matthew J. Walton and Susan Hayward, "Contesting Buddhist Narratives Democratization, Nationalism, and Communal Violence in Myanmar", East-West Center, 2014, pp. 34-43.

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