

# Human Rights and Access to Places of Worship in Myanmar

A legal Q&A  
January 2021

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# Human Rights and Access to Places of Worship Places in Myanmar: A Legal Q & A

## Introduction

Myanmar has an obligation to ensure access to places of worship as part of its overall international obligation to guarantee the right to freedom of thought, conscience and religion (hereinafter, freedom of religion or belief). Protecting this right is crucial in a country as ethnically and religiously diverse as Myanmar.

This legal Question & Answer paper considers specifically the current situation with respect to the right of access to places of worship in Myanmar, including the political, legal and administrative obstacles that prevent full enjoyment of this right, and the discriminatory application of the country's legal and regulatory framework to ethnic and religious minorities. This document, which is presented in a 'question and answer' format, should be read alongside the ICJ's October 2019 report *Challenges to Freedom of Religion or Belief in Myanmar*.<sup>1</sup>

## Background

Myanmar is an ethnically and religiously diverse country, and one with historically complex relationships between government and religious – particularly Buddhist – institutions.<sup>2</sup> The 2008 Myanmar Constitution guarantees the right to freedom of thought and religion.<sup>3</sup> However, it explicitly recognizes the "special position"<sup>4</sup> of Buddhism as the faith practised by the majority of the population, and only

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<sup>1</sup> International Commission of Jurists, *Challenges to Freedom of Religion or Belief in Myanmar* (October 2019), available at <https://www.icj.org/law-and-policy-reform-necessary-to-combat-intolerance-and-discrimination-based-on-religion-or-belief-recommends-new-briefing-paper-on-myanmar/>

<sup>2</sup>The Government uses the law relating to the Sangha Organization 20/1990 to control Buddhist Sangha organization and education. Under this law, the government prohibits and criminalize any acts/behaviors within the monastic orders that is deemed to be defiant or unacceptable from accepted teaching, which include banning organization of Buddhist monks other than the nine State-recognized monastic orders.

International Commission of Jurists, *Challenges to Freedom of Religion or Belief in Myanmar* (October 2019), available at <https://www.icj.org/law-and-policy-reform-necessary-to-combat-intolerance-and-discrimination-based-on-religion-or-belief-recommends-new-briefing-paper-on-myanmar/>

<sup>3</sup> Section 34 of 2008 Constitution of Myanmar only guarantees freedom of thought and religion as follow: "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."

<sup>4</sup> The constitution does not provide difference between the meaning of "Special Position" and "existence". Although Buddhism is not listed as State religion in the constitution, the existing practices are in favor of Buddhism over other religions in many ways. Despite the constitutional guarantee under section 363 to protect and assist constitutionally recognized religions, the Ministry of Religious Affairs and Culture which is supposedly responsible for implementing these obligations to ensure these protection and assistance to all recognized religions, one of its objectives listed is to purify, perpetuate and propagate Buddhism as it is the religion practiced by majority of the population in Myanmar. In addition, it has the Department for the Promotion and Propagation of the [Buddhist] Sasana which provide assistance to Buddhist institutions. This clearly proves that the ministry will support Buddhism over Christianity, Islam, Hindu, Animism or any other religion. Ministry of Religious and Cultural Affairs' Website. <http://www.mora.gov.mm/> (accessed on 17 December 2020).

acknowledges the “existence” of Christianity, Islam, Hinduism and Animism.<sup>5</sup> Although the Constitution makes no expressly discriminatory distinction between Buddhism and those other religious denominations,<sup>6</sup> discrimination persists both in law and practice against the latter group whose existence is simply acknowledged.<sup>7</sup>

In practice, restrictions appear to be enforced primarily against religious minorities, and onerous bureaucratic processes make it difficult to establish new places of worship or renovate existing ones. Members of minority religious groups have expressed frustration about the difficulties in finding premises to use as places of worship, procuring building permits or permission to conduct religious activities, and obtaining resources to open and maintain places of worship. Since the late 1990s, many non-Buddhist faith groups have been subject to regulations that make obtaining permits for the purchase of land for religious purposes, and renovation or reconstruction of religious structures extremely difficult.<sup>8</sup> While some of these regulations have since then been relaxed, members of religious minorities continue to report facing the same obstacles in obtaining permission for renovation or construction.<sup>9</sup>

According to representatives of civil society and religious organizations, while the State regularly grants permits for the construction of Buddhist pagodas, monasteries and *dhamma* halls, religious minorities are subject to a complex ‘land use and registration process’ for obtaining permits to construct, repair, and renovate their

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<sup>5</sup> The 2008 constitution only recognizes five religions in Myanmar under section 361 and section 362. While section 361 of the Constitution “recognizes special position of Buddhism as the faith professed by the great majority of the citizens of the Union”, The section 362 “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”. The 2008 constitution does not recognize other faiths practised in Myanmar such as Sikhism, Bahá’í Faith, Jainism and other religions (which constitute 0.2 % of the population according to the 2014 census) are not recognized. Todd M. Johnson and Brian J. Grim, eds., *World Religion Database* (Leiden/Boston: Brill, accessed April 2020).

<sup>6</sup> Section 363 of the constitution reads as follow: “The Union may assist and protect the religions it recognizes to its utmost.”

<sup>7</sup> “The Presidential Religious Affairs Advisory Group suggesting that if the government ignores majority will, “Buddhists will be angered and the country will go into turmoil” International Republican Institute, “Assessment of Religious Minorities Right in Myanmar”, p.g 19, October 2017 report. The fact that the special position of Buddhism is weakening the freedom of religion or belief of other faith groups in Myanmar violates the Human Rights Committee’ General Comment 22, para 9 which highlights that if a set of “religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers.”

<sup>8</sup> The Ministry of Religious Affairs and Culture postulated a notification (dated 10/02/1999) limiting the freedom of assembly for worship in houses for Christian, Islamic schools as Mosques. This notification is mentioned in the Director General U Myint Oo signed the reply letter (dated 19/08/2018) to Advocate U Khin Mg Cho’s complaint letter regarding prohibition of operating Islamic schools in Thakayta township, Yangon)

<sup>9</sup> See statement from Ministry of Religious Affairs and Culture (5 June 2017), at <http://www.mora.gov.mm/newsview.ASPX?nid=257> (in Burmese). The Minister also noted that permission from the Ministry of Religious Affairs and Culture is no longer required for religious events and festivals; instead permission must be obtained from respective local ward administrative offices. CHRO’s FoRB report 2013. [http://www.chro.ca/images/CHRO\\_FoRB\\_2013\\_1.pdf](http://www.chro.ca/images/CHRO_FoRB_2013_1.pdf)

places of worship.<sup>10</sup> The process is non-transparent and often confusing, and involves unclear timelines for decision-making bodies to decide on granting legal permits for places of religious worship. It is also unnecessarily lengthy and requires considerable time to visit various administrative offices. One result of this burdensome process is that minority religious groups sometimes build places of worship without a permit, usually just with an agreement (*Nar\_Leh\_Mhu in Burmese language*) from the local authorities and neighbours. However, proceeding without a permit enhances the risk that the authorities will take action against them later, as well as leaving them at the mercy of local leaders. Disputes can result in arbitrary actions, such as closing down of unlicensed places of worship, and restrictions on access to such places for minorities faiths groups.<sup>11</sup>

In Myanmar, women are restricted from accessing certain parts of places of worship. In public discourse, these restrictions are often justified by reference to a religious doctrine based on harmful gender stereotypes according to which women are “impure” during menstruation and the concept of “Hpon” which gives higher religious status to men especially in Buddhist societies.<sup>12</sup> This belief is particularly common among Buddhists, Hindus and Muslims.<sup>13</sup> The pervasive notion that there is a need to restrict women from accessing certain parts of places of worship often derives from entrenched patriarchal religious and cultural norms that are designed to disproportionately discriminate against women, and to degrade them as unworthy of the right to worship and/or access holy sites.<sup>14</sup>

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<sup>10</sup> The 2016 Myanmar National Building Code (MNBC) (2016), is issued by government-endorsed Engineering Department. UN-HABITAT and the Myanmar Engineering Society contributed to developing this code. Construction Ministry apparently involved in its development. <https://www.mes.org.mm/content/myanmar-national-building-code> . It is easier to get permission to build Dhamma Halls, lecture halls for Buddhist monks, which can be granted either as Use Zone I (a), (b) or Use Zone II.

<sup>11</sup> According to an announcement of the Ministry of Religious Affairs and Culture dated November 21, 2016, a local general administrative official verbally ordered the closing of three mosques in Shwe-Kyin township, Bago that did not have legal permit to construct religious building. See: <http://www.mora.gov.mm/newsview.ASPX?nid=212> In response to a question about the burning down of a mosque in Lone-Khin Village tract, Hpa-khant township, Kachin State, U Myit Zaw Win, Director of Religious and Cultural Affairs Department, stated that “In order to construct religious/worship buildings, it is required to get recommendation from respective States and Regional Government and the locals and religious buildings that are not permitted to construct will be demolished.” Radio Free Asia (RFA), “Demolishing religious buildings that are not permitted to construct.”, August 04, 2016, <https://www.rfa.org/burmese/news/illegal-religious-buildings-remove-08042016072021.html>. In Thaketa township, the renovation of a religious building has been blocked by local administrative officials after complaints by concerned residents, most of whom are Buddhist, despite the fact that permission was granted by the township’s religious affairs office. Myanmar Times, “Building sealed after violent religious clashes in Yangon”, February 19, 2013, <https://www.mmtimes.com/national-news/4204-thaketa-conflict-site-sealed.html>

<sup>12</sup> Gender Equality Network, “Raising the Curtain Cultural Norms, Social Practices and Gender Equality in Myanmar”, P.37-38, November 2015. The belief is that if women can desacralize the relics embedded in the religious worship places.

<sup>13</sup> Ibid; ICJ interview with Hindu women faith leader in Myanmar, April 2020.; ICJ interview with Buddhist religious leader (Abott of Myawaddy Monastery) and Muslim religious leaders, April 2020.

<sup>14</sup> Gender Equality Network, “Raising the Curtain Cultural Norms, Social Practices and Gender Equality in Myanmar”, P.34-38, November 2015.





## **International legal Framework**

### **Duty to respect, protect and fulfill**

When States become parties to international human rights treaties, they undertake to respect, protect and fulfill the human rights guaranteed under such treaties. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill human rights means that States must take positive action to facilitate the exercise and enjoyment of the human rights guaranteed under these instruments.

#### **1 - *What international obligations does Myanmar have to guarantee access to places of worship?***

International human rights law and standards guarantee access places of worship, and such access is recognized under international law and standards as a core part of the freedom of religion or belief (FoRB). The right to access places of religious worship is guaranteed in the Universal Declaration of Human Rights (UDHR), as well as under the International Covenant on Civil and Political Rights and other international human rights treaties, as well as in the 1981 UN General Assembly's Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief ('1981 Declaration') and in the jurisprudence and General Comments of the UN human rights treaty bodies, such as the Human Rights Committee.

Article 18 of the UDHR provides that "Everyone has the right to freedom of thought, conscience and religion; this right includes [...] 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 similar terms, Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR),<sup>15</sup> which guarantees the freedom to manifest one's religion or beliefs and the right to worship in community with others, includes the right to access places of worship. While Myanmar has yet to become a party to the ICCPR, it is still bound to respect the right to freedom of thought, conscience, religion or belief (FoRB), since core aspects of the right have attained the status of customary international law.<sup>16</sup> The UN Human Rights Committee, the ICCPR's supervisory body, in its General

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<sup>15</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 18(1).

<sup>16</sup> Moreover, the Human Rights Committee has noted that "[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.

Comment 22,<sup>17</sup> has elucidated that: “[t]he concept of worship extends to ... various practices integral to such acts, including the building of places of worship.”<sup>18</sup>

The right to establish, maintain buildings dedicated to religion and access to places of worship is also guaranteed by the UN General Assembly 1981 Declaration, Article 6(a) of which affirms that: the right to freedom of thought, conscience, religion or belief includes the freedom: “[t]o worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes”.<sup>19</sup>

The UN Special Rapporteur on freedom of religion or belief (UN Special Rapporteur on FoRB) has repeatedly affirmed that places of worship are an essential element for the manifestation of the right to freedom of thought, conscience, religion or belief to the extent that the great majority of religious communities need the existence of a place of worship where their members can manifest their faith.<sup>20</sup>

In addition, other international human rights instruments recognize that religious places, sites and shrines enjoy a special protection.<sup>21</sup> Unlike other violations of the right to freedom of thought, conscience, religion or belief, attacks or restrictions on places of worship or other religious sites and shrines violate the right not only of a single individual, but the rights of a group of individuals forming the community that is attached to the place of worship.<sup>22</sup> In this context, the UN Special Rapporteur on FoRB has observed that, preventing members of a religious community from using a place of worship that belongs to them would constitute a violation of their right to

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<sup>17</sup> The UN Treaty Bodies’ General Comments are an authoritative source for identifying the scope and content of human rights provisions under international human rights law. See, e.g., the International Court of Justice’s decision in the case of *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*.

<sup>18</sup> 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. General Comment 22, para. 4

<sup>19</sup> UN General Assembly, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UN Doc. A/Res/36/55, 25 November 1981, article 6(a).

<sup>20</sup> Report submitted by Asma Jahangir, UN Special Rapporteur on Freedom of Religion or Belief, U.N. Doc. E/CN.4/2005/61, 20 December 2004, para 50.

<sup>21</sup> Human Rights Council resolution 6/37, Elimination of all forms of intolerance and of discrimination based on religion or belief (places of worship), in which the Human Rights Council urges States “To exert the utmost efforts, in accordance with their national legislation and in conformity with international human rights and humanitarian law, to ensure that religious places, sites, shrines and symbols are fully respected and protected and to take additional measures in cases where they are vulnerable to desecration or destruction” (para. 9(e)); “To ensure, in particular, the right of all persons to worship or assemble in connection with a religion or belief and to establish and maintain places for these purposes [...]” (para. 9(g)). See also: General Assembly resolution 55/254, Protection of Religious Sites, in which the G.A urges States “To exert their utmost efforts to ensure that religious sites are fully respected and protected in conformity with international standards and in accordance with their national legislation and to adopt adequate measures aimed at preventing such acts or threats of violence.”, UN Doc. A/Res/55/254, 31 May 2001. Under international humanitarian law, see Article 53 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), and Article 16 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), which protect places of worship in times of armed conflict.

<sup>22</sup> See Article 27, ICCPR, and Report submitted by Asma Jahangir, UN Special Rapporteur on Freedom of Religion or Belief, U.N. Doc. E/CN.4/2005/61, 20 December 2004, para. 51.

freedom of thought, conscience, religion or belief, and that the State cannot abdicate its responsibilities. "International law requires it to take positive steps to put an end to any situation in which the freedom of religion or belief is violated."<sup>23</sup>

Thus, Myanmar has an obligation to protect the right of all persons to worship or assemble in connection with their religion and to establish and maintain places of worship, including by guaranteeing people's access to places of worship for these purposes, and by ensuring that religious places, sites and shrines are fully respected and protected, including when they are at risk of destruction.

The UN General Assembly has urged all States, including Myanmar:

"To review, whenever relevant, existing registration practices in order to ensure that such practices do not limit the right of all persons to manifest their religion or belief, either alone or in community with others and in public or private".<sup>24</sup>

In turn, the Special Rapporteur on FoRB, in the context of his recommendations to the Turkish authorities with respect to the Christian, Greek Orthodox and Armenian religious minorities, made the following points, which are also relevant by analogy for the Myanmar authorities with respect to their obligation to guarantee access to places of religious worship.

"The Government should guarantee minorities the right to establish and maintain their own places of worship, and should allow them to build such facilities in places where new communities have taken root. Any limitations in this respect, for example urban development regulations, should be consistent with international jurisprudence (see General Commentary of the Commission on Human Rights), and this means that any non-conforming regulations should be repealed or revised."<sup>25</sup>

## **2 – Does the Myanmar constitution protect access to places of worship?**

The 2008 Constitution does not explicitly guarantee the right to access places of worship, including constructing and preserving places of worship. However, section 34 of the 2008 Constitution guarantees the freedom to manifest one's religion or belief as follows: "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." According to international law,<sup>26</sup> "the

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<sup>23</sup> Report by Mr. Abdelfattah Amor, Special Rapporteur on Freedom of Religion or Belief, Visit to Romania, E/CN.4/2004/63/Add.2, 16 December 2003, para. 104.

<sup>24</sup> UN General Assembly, Freedom of Religion or Belief, UN Doc. A/RES/68/170, 18 December 2013, para 14(f).

<sup>25</sup> UN General Assembly, Elimination of all forms of religious intolerance -Situation in Turkey, UN. Doc. A/55/280/Add.1, 10 September 2000, para 160(d).

<sup>26</sup> 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. General Comment 22, para. 4, Human Rights Council resolution 6/37, Elimination of all forms of intolerance and of discrimination based on religion or belief (places of worship), in which the Human Rights Council urges States "To ensure, in particular, the right of all persons to worship or assemble in connection with a religion or belief and to establish and maintain places for these purposes [...]" (para.

right to freely profess and practise religion” guaranteed under the Constitution should be understood as protecting the right of all persons to worship or assemble in connection with their religion, including their right to access places of worship.

Section 348 of the 2008 Constitution prohibits discrimination on the basis of religion as follows: “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.” However, the Constitution only recognizes five religions as prescribed in section 361 and 362. It does not recognize minority religions, such as Sikhism, Bahá’í faith, Jainism etc., which constitute 0.2 % of the population according to the 2014 census.<sup>27</sup>

In addition, these protections only apply to citizens, which is inconsistent with the general principle under international human rights law that the obligations of States towards individuals do not depend on the particular status of a person, including citizenship status (with some narrow exceptions, such as voting). While section 347 of the Constitution recognizes the principle of equality before the law and equal entitlement of legal protection against discrimination for “any persons”, other sections of the Constitution, including sections 34, 348, 354(d), guarantee the rights and the freedom to practise religions only to “citizen”. This undermines the guarantee of equal protection for all against discrimination enshrined in the Constitution, and constitutes a form of prohibited discrimination under international law.<sup>28</sup>

### **3 - Under international law, may States place any limitations on access to places of worship?**

States may, pursuant to Article 18(3) of the ICCPR, in certain narrow circumstances, impose limitations on aspects of the right to freedom of thought, conscience, religion or belief, including with respect to access to places of worship. However, any such limitation must comply with international human rights law and basic principles of the rule of law.

Any limitations should restrict access only when such limitations are clearly “prescribed by law” and “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”, consistent with Article 18(3) of the ICCPR. In this context, the Human Rights Committee has affirmed that: “[l]imitations may be applied only for those purposes for which they were prescribed

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9(g)); UN General Assembly, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UN Doc. A/Res/36/55, 25 November 1981, article 6(a).

<sup>27</sup> Although the 2014 census did not specify other religions in its data, according to the world religion database, Baha’is and Jains are recorded as minority religions in Myanmar. See Table 1.65 Countries with the most Baha’is, 1910 and 2010 and Table 1.73 countries with the most Jains, 1919 and 2010. Todd M. Johnson and Brian J. Grim, eds., World Religion Database (Leiden/Boston: Brill, accessed April 2020); see also Emily Fishbein, “Meet the Sikhs of Myitkyina”, July 28, 2018. <https://frontiermyanmar.net/en/meet-the-sikhs-of-myitkyina>

<sup>28</sup> These limitations enhance the risk that refugees, stateless person or others, such as Rohingya, whose citizenship status is denied or disputed, will face prohibited discrimination in the legitimate exercise of their right to practice a religion. See, ICJ, A primer on international human rights law and standards on the right to freedom of thought, conscience and religion or belief, January 2019. (p. 28)

and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.”<sup>29</sup> In the vast majority of cases, the imposition of criminal penalties are impermissible. Non-criminal measures are ordinarily effective and sufficient.<sup>30</sup>

Access to places of worship and conducting religious gatherings may be limited as long as the limitations imposed comply with international law and standards and the law restricting the exercise of the right to freedom of religion or belief is not applied in a discriminatory manner based on the ground of race, sex, language, religion or social origin. A blanket ban on access to places of worship would be difficult to justify in most circumstances.

**4 – In addition to the Constitution, what other domestic laws affect access to places of worship in Myanmar? Are they consistent with Myanmar’s international human rights obligations?**

The Myanmar’s Penal Code and certain offences related to places of worship in the Defense Service Act provide some protection to places of worship from damage and trespassing. The Ward and Village Tract Administration Law, on the other hand, imposes restrictions on the right to assemble for religious purposes. These legislative provisions have also been used in a discriminatory manner, particularly against religious minorities.

**Penal Code Offences related to places of worship and religious assembly**

**Myanmar’s Penal Code (1861)**

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.

296. Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship or religious ceremonies shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

297. Whoever, with the intention of wounding the feelings of any person or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or on any place of sepulture, ...causes disturbance to any persons assembled for the performance of

<sup>29</sup> Para 8, General Comment 22.

<sup>30</sup> ICJ, A primer on international human rights law and standards on the right to freedom of thought, conscience and religion or belief, January 2019. (p. 12)

funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

### **Offences related to places of worship in the Defence Services Act (1959)**

Section 66 (b) - Any person subject to this Act who commits any of the following offences, that is to say, by defiling any place of worship, or otherwise, intentionally insults the religion or wounds the religious feelings of any person; shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

### **Ward and Village Tract Administration Law (2012 – amended ??)**

Section 21 - If the person residing in the ward or village tract desires to hold ceremonies, public entertainments, exhibitions, tournaments and traditional festivals, he shall obtain the permit from the relevant responsible person and also comply with the stipulated terms and condition.

Section 24. The Ward or Village Tract Administrator shall safeguard the following rights of persons residing in the relevant ward or village tract:

- (a) the right of safety of premises and property;
- (b) the right to carry out matters relating to religion;
- (c) the right to nurture literature, culture, fine art and custom; etc.

Section 26 - Whoever fails to carry out [the] duty contained in section 21 shall be punished with imprisonment for a term not exceeding six months or with fine not exceeding fifty thousand kyats or with both by the relevant court.

The above provisions have been applied in a discriminatory manner and, therefore, their enforcement has given rise to violations of the principles of non-discrimination and of the right to equality before the law and equal protection of the law without discrimination. In addition, the ICJ considers that the way in which some of the above-mentioned provisions are formulated gives rise to concern about their lack of consistency with the principle of legality. For instance, sections 296 and 297 of Myanmar's Penal Code criminalize "disturbance" to any lawful assembly for religious worship and ceremonies with a deliberate intent. The ICJ considers that the notion of "disturbance" in both sections is vague and overbroad; moreover, they have clearly been applied in a discriminatory manner. In one famous case that illustrates the expansive and abusive application of these provisions, a Dutch tourist was initially charged on 23 September 2016 with an offence under section 295 for "defiling a place of worship" after he unplugged an amplifier used to broadcast a night-time Buddhist sermon at a local Dhamma hall in Maha Aung Myay Township, Mandalay Region.<sup>31</sup> On 6 October 2016, the charge was later replaced with an offence under

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<sup>31</sup> Myanmar times, *Arrested Dutch tourist was on first trip to Asia, witness tells Mandalay court* (03 October 2016)

section 296 for “disturbing a religious assembly.” He pleaded that he was not aware that the broadcast was religious in nature, and that he had no intention of insulting religion. Nonetheless, he was convicted on 6 October 2016, and sentenced to three months’ imprisonment with hard labour for disrupting a religious assembly.<sup>32</sup>

Similarly, in 2017, the Myanmar Police Forces charged three Muslim men for holding Ramadan prayers on the street in Thaketa township, Yangon, under the Ward and Village Tract Administration Law, which prohibits unauthorized public gathering.<sup>33</sup> This incident happened after the local Islamic school where they used to worship was sealed off following complaints that Muslims used it to host prayers instead of as a school, and following the head of District General Administration’s rejection of their requests to hold a prayer service. Local authorities later issued a statement stating that the three Muslim men were charged for holding the prayer service without permission, thereby threatening “stability and rule of law”.

The criminalization of acts under such broad and ill-defined provisions is impermissible, and it is a disproportionate response, especially when such acts are protected under international law and the Constitution of Myanmar, both of which guarantee the right to freely profess and practise religion.

**5 – What does Myanmar law say about the type of restrictions, if any, that may be placed on access to places of worship during a public health emergency, such as the COVID-19 pandemic? Are these restrictions consistent with Myanmar’s obligations under international human rights law?**

The 2008 Constitution recognizes the protection of public health as one of the legitimate purposes for restricting freedom of religion: “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* (emphasis added).” Many of the restrictions imposed in Myanmar during the COVID-19 outbreak have been justified pursuant to four laws in particular: the Prevention and Control of disease outbreak control law (1995, amended in 2011); the Natural Disaster Management Law (2013); the Myanmar Penal Code (1861, amended in 2016); and the Criminal Procedure Code (1898). The Prevention and Control of Communicable Diseases law allows the Government to issue a decree to declare COVID-19 as a public health emergency and restrict public movement. These four laws contain criminal provisions that have been used to take action against those

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<https://www.mmtimes.com/national-news/mandalay-upper-myanmar/22855-arrested-dutch-tourist-was-on-first-trip-to-asia-witness-tells-mandalay-court.html>

<sup>32</sup> Myanmar times, Dutch tourist released from Mandalay prison, deported (23 December 2016) <https://www.mmtimes.com/national-news/mandalay-upper-myanmar/24349-dutch-tourist-released-from-mandalay-prison-deported.html>

<sup>33</sup> Burma Human Rights Network (BHRN), “Muslims jailed for three months for street prayers”, May 1, 2018. <http://www.bhrn.org.uk/en/press-release/1045-muslims-jailed-for-three-months-for-street-prayers.html>



who purportedly defy COVID-related rules and orders.

### **Applicable Legal Framework**

#### **“Prevention and Control of Communicable Diseases law (1995, amended in 2011)**

21 (b). In order to carry out the provisions of this Law: the Ministry of Health or the Department of Health may issue such orders and directives as may be necessary.”

Section 21(b) of Prevention and Control of Communicable Diseases law provides that the Ministry of Health may issue orders and directives in order to enforce the law and section 14 allows the Ministry of Health to confer on an organization or on a health officer the power to issue orders that restrict movement. Pursuant to section 21(b), the Ministry of Health and Sports (MOHS) issued two orders: an emergency order (no. 19/2020), issued on 28 February, declaring Covid-19 a public health emergency throughout the country; and order (no. 37/2020), issued on 16 April, which banned gatherings of five or more people<sup>34</sup> for purposes other than essential work.<sup>35</sup> Essential work included: going to hospitals/clinics, funeral rites, markets/shopping centers and courts and legal procedures, emergencies rescue activities, approved COVID-19 response activities and transporting goods.<sup>36</sup>

Although the first order (no. 19/2020) does not provide any specific penalties, the latter order (no.37/2929) allows criminal penalties for those breaching them.<sup>37</sup> People have been charged and prosecuted in connection with alleged breaches of these orders. Charges have been brought under the Prevention and Control of Communicable Diseases law, Natural Disaster Management Law and Myanmar Penal Code.<sup>38</sup>

#### **Natural Disaster Management Law (2013)**

<sup>34</sup> The order was later amended to allow social gathering of less than 30 people on 1 August 2020.

<sup>35</sup> Order no. 88/2020, issued by the Ministry of Health and Sports (MOHS) on 12 August 2020.

<sup>36</sup> In addition to a nationwide ban on gathering, the government has also instituted stay-at-home orders, curfews (from 12:00 A.M. to 4:00 A.M.), and closures of public events, entertainment venues, and religious institution; Zarni Mann, “Myanmar Extends Ban on Mass social gathering until June 15”, Irrawaddy, 29 May 2020, <https://www.irrawaddy.com/specials/myanmar-covid-19/myanmar-extends-ban-mass-gathering-june-15.html>.

<sup>37</sup> Section 15 of Prevention and Control of Communicable diseases (1995, amended in 2011) reads as follow: “Whoever fails to comply with any of the measures undertaken by the Department of Health under sub-section (a) of section 4 shall, on conviction he punished with fine not exceeding five thousand Kyats. Section 18 lists the penalties as follow: “Whoever violates the prohibitive or restrictive order issued by the relevant organization or officer under section 14 shall, on conviction he punished with imprisonment for a term which may extend to six months or with fine not exceeding fifty thousand kyats or both.

<sup>38</sup> U Zaw Htay, President’s Office Spokesman, told the Irrawaddy on 19 June 2020 that “8,470 people have faced action since late March under the Prevention and Control of Communicable Diseases law and 176 people under the Natural Disaster Management law.” San Yamin Aung, “Over 8,000 citizens prosecuted in Myanmar for COVID-19 breaches”, Irrawaddy, 19 June 2020, <https://www.irrawaddy.com/news/burma/8000-citizens-prosecuted-myanmar-covid-19-breaches.html>

"Section 25 – Whoever, if the natural disaster causes or is likely to be caused by any negligence act without examination or by willful action which is known that a disaster is likely to strike, shall be punished with imprisonment for a term not exceeding three years and may also be liable to fine."

Chapter 8 of the Natural Disaster Management Law, especially sections 25, 29 and 30 (a), sets out criminal penalties (either monetary fine or one to three years' imprisonment) for the failure to comply with the measures and orders issued pursuant to the law.

### **Myanmar's Penal Code (1861, amended in 2016)**

Section 188 – "Whoever, knowing that by an order promulgated by a public servant lawfully empowered to promulgate such order, is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to twenty thousand kyats, or with both, and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one hundred thousand kyats, or with both."

Section 188 of the Myanmar's Penal Code states that violation of "an order promulgated by a public servant lawfully empowered to promulgate such order" may be punished with imprisonment of up to six months or fine, or with both, if it causes a "danger to human life, health or safety, or causes or tends to cause a riot or affray."

#### *Negligent act likely to spread infection of disease dangerous to life*

Section 269 - Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

#### *Malignant act likely to spread infection of disease dangerous to life.*

Section 270 - Whoever maliciously does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous

to life shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

### **Criminal Procedure Code (1898)**

Section 144 - (1) In cases where, in the opinion of a District Magistrate, a Sub divisional Magistrate, or of any other Magistrate (not being a Magistrate of the third class) specially empowered by the President of the Union or the District Magistrate to act under this section, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in manner provided by section 124, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, or an affray. (2), (3), (4), (5), (6).

Since April 2020, Regional and State-level governments have imposed a temporary curfew (from 10 pm to 4 am, later amended to be from midnight to 4 am) pursuant to section 144 of the Criminal Procedure Code in force in Yangon, Mandalay, Bago, Sagaing, Kayah, Kachin, Ayeyarwaddy and Nay Pyi Taw Region.<sup>39</sup> Following the imposition of the curfew, some regional governments issued local orders to close down and restrict access to places of worship.<sup>40</sup>

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<sup>39</sup> Section 144 appears in Chapter 11 of the Criminal Procedure Code, entitled "Temporary Orders in Urgent Cases of Nuisance or Apprehended Danger."

<sup>40</sup> According to section -1(b) of Bago Regional Government's local order no. 2/2020 on 16 April 2020, section 2(b) and 2(d) of Kachin Regional Government's local order no.19/2020 on 8 April 2020, and section 3 of Mandalay Regional Government's local order no. 6/2020 on 29 April 2020, assembly for religious purposes such as worshipping, religious preaching or obeisance are restricted. "Most of Yangon's most popular pagodas, including Shwedagon, Botahtaung, Sule and Kabar Aye, have been closed to the public since March 28." Myanmar Times, "Public responds to COVID-19 restrictions in Myanmar", May 5, 2020. <https://www.mmtimes.com/news/public-responds-covid-19-restrictions-myanmar.html> Global New Light of Myanmar, "Religious places temporarily closed in Kalaw amid Covid-19" April 1, 2020, <https://www.globalnewlightofmyanmar.com/religious-places-temporarily-closed-in-kalaw-amid-covid-19/>

According to the Assistance Association for Political Prisoners-Burma, in May 2020, 504 people were prosecuted under either the Natural Disaster Management law or Myanmar Penal Code for failure to comply with the above-mentioned orders and other measures in relation to COVID-19.<sup>41</sup> U Zaw Htay, President's Office Spokesperson, told the Irrawaddy on 19 June 2020 that "8,470 people have faced action since late March under the Prevention and Control of Communicable Diseases Law and 176 people under the Natural Disaster Management Law."<sup>42</sup>

Furthermore, the above-mentioned orders<sup>43</sup> issued by the authorities with the stated aim of responding to the COVID-19 pandemic do not provide in sufficiently clear, precise and specific terms a legal basis to identify a recognizably criminal conduct under either the Natural Disaster Management Law or Myanmar's Penal Code. As a result, they are especially apt to be exploited by the authorities for abusive purposes, especially with respect to events that have been alleged to have taken place in areas where there is a history of discrimination against religious minorities.

For instance, in May 2020, 14 Muslims assembled together at a residence in Mandalay for collective religious worship were charged with criminal offences under Natural Disaster Management Law carrying sentences of three months' imprisonment for defying a public gathering order under the provisional order no. 37/2020.<sup>44</sup>

Regional Governments have also resorted to enforcing various sections of the Natural Disaster Management Law and Myanmar Penal Code imposing criminal penalties to take actions against people allegedly defying the orders. For instance, under section 25 of Natural Disaster Management Law, which punishes violators with imprisonment for a term not exceeding three years, four Christians, including a famous Christian preacher, have been charged for defying a ban on gatherings in Yangon on 14 April 2020.<sup>45</sup> It was alleged that the gathering at the Church led to at least 74 people

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<sup>41</sup> The majority of them (563) were charged with offences under section 188 of Penal Code for defying the night curfew order, and 31 people were charged with breaches of section 15 and 18 of the Prevention and Control of disease outbreak control law, and section 25, 26, 26(a), 27, 28(b), 30(a)(b) of the Natural Disaster Management law. Assistance Association for Political Prisoners (AAPP), "Cases related to COVID-19 Pandemic for May 2020" June 5, 2020, <https://aappb.org/2020/06/11306/>

<sup>42</sup> San Yamin Aung, "Over 8,000 citizens prosecuted in Myanmar for COVID-19 breaches", Irrawaddy, 19 June 2020, <https://www.irrawaddy.com/news/burma/8000-citizens-prosecuted-myanmar-covid-19-breaches.html>

<sup>43</sup> An emergency order (no. 19/2020), issued on 28 February, and order (no. 37/2020), issued on 16 April

<sup>44</sup> Two, who were minors, were released on bond at the Children's court. Zarni Mann, "Myanmar Muslims Jailed For COVID-19 Rules Breach", Irrawaddy, May 8, 2020. <https://www.irrawaddy.com/news/burma/myanmar-muslims-jailed-covid-19-rules-breach.html>

<sup>45</sup> AFP in Yangon, "Myanmar police arrest Canadian pastor for defying coronavirus ban", The Guardian, May 20, 2020. <https://www.theguardian.com/world/2020/may/20/myanmar-police-arrest-canadian-pastor-for-defying-coronavirus-ban>

testing positive for COVID-19.<sup>46</sup> The preacher and his co-organizer were denied bail, and later sentenced to three months' imprisonment with hard labour.<sup>47</sup>

However, it appears that individuals belonging to the Buddhist religious majority who have allegedly committed breaches of the orders have been treated much more leniently than Christians or Muslims allegedly guilty of similar conduct. For example, the two organizers of a religious ceremonial cremation of a prominent Buddhist Abott in Ye Phyu, Thaninthayi region, in April 2020 were prosecuted under section 188 of Myanmar Penal Code for breaching the order banning gathering of five or more persons, and were exclusively sentenced to a monetary fine of 100,000 kyats.<sup>48</sup>

Moreover, it would appear that the Myanmar's criminal justice system shields certain State officials from criminal prosecutions for the very same conduct that has led it to criminally sanction other people. For example, the Yangon Region Chief Minister and other regional officials who attended Buddhist religious gatherings with several groups of people, including government officials on 24 May 2020, were exempted from prosecution.<sup>49</sup>

The cases above suggest that, while minority religious groups are sanctioned under laws that permit criminal prosecutions and even imprisonment, the majority Buddhist groups committing the same or very similar acts (e.g. collective gathering for religious event in breach of the order banning gatherings of five or more persons) are charged with offences that may only result in monetary fines upon conviction or even exempted from prosecution.

While international human rights law does allow limitations on the outward manifestation of religious belief particularly in the public health context, where such manifestation may harm or risk harming the rights of others, the UN Special Rapporteur on Freedom of Religion or Belief has cautioned that, "the role of the State is not to be a protector of religiously motivated practices as such, but to be an impartial guarantor of every individual's fundamental rights, .....[States]...must find

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<sup>46</sup> According to contact tracing mapping of MOHS, at least 74 people were infected through direct or indirect contact with people attending the Christian preacher's assembly for religious purpose. The preacher was found to be infected as well. Khin Moh Moh Lwin, "Pastor who sermon caused spike in Covid-19 cases get three months in prison.", Myanmar Now, Aug 7, 2020. <https://myanmar-now.org/en/news/pastor-whose-sermon-caused-spike-in-covid-19-cases-gets-three-months-in-prison>

<sup>47</sup> *ibid*

<sup>48</sup> Dawei Watch, "Over 70 cases of COVID-19 Rules Breach ("ကိုဗစ်ကာကွယ်ရေး ဖောက်ဖျက်မှု ၇၀ကျော်") May 11, 2020. <http://www.daweiwatch.com/2020/05/11/news/24337/> Zarni Mann, "Different Laws applied to Myanmar COVID-19 restrictions lead to inconsistent punishments for violators", May 13, 2020. <https://www.irrawaddy.com/specials/myanmar-covid-19/different-laws-applied-myanmar-covid-19-restrictions-lead-inconsistent-punishments-violators.html>

<sup>49</sup> Chan Thar, "NLD chief minister for Yangon slammed by own party for disobeying COVID-19 restrictions", May 27, 2020. <https://myanmar-now.org/en/news/nlds-chief-minister-for-yangon-slammed-by-own-party-for-disobeying-covid-19-restrictions> Kyaw Phyo Tha, "Apparently, Myanmar Govt's COVID-19 rules don't apply to Yangon Chief Minister", Irrawaddy, May 27, 2020. <https://www.irrawaddy.com/opinion/commentary/apparently-myanmar-govts-covid-19-rules-dont-apply-yangon-chief-minister.html>

ways to impose only those restrictions that are necessary to protect public health.”<sup>50</sup>

The fact that the restrictions described above have led to criminal prosecutions and sanctions that appear to be motivated, in whole or in part, by discrimination on religious grounds, with Muslims and Christians targeted for more severe punishment than Buddhists, constitutes a violation of the non-discrimination principle and of the right to equality before the law and equal protection of the law without discrimination enshrined in international human rights laws and in the Constitution of Myanmar. In addition, the discriminatory enforcement of the law, with only certain religious minorities being the object of criminal sanctions, and others belonging to the religious majority escaping prosecution and sanction or incurring much more lenient punishment for the same or very similar conduct,<sup>51</sup> calls into question the very necessity of the resort to the criminal law in this context. This is particularly problematic in areas of the country affected by armed conflict or other places with a history of State’s discrimination against religious minorities.

The ICJ is also concerned that criminal charges under section 25 of the Natural disaster management Law criminalizing “any negligence act by willful action” brought against those who participated in the religious gatherings (e.g., those previously mentioned) in an alleged breach of the orders appear to be an overreach of the criminal law.

Similarly, the ICJ is concerned that such criminal prosecutions fail to conform with the principle of legality due to vague language in the law restricting access to places of worship. Section 188 of Myanmar Penal Code, for example, which criminalizes disobedience causing or tending to cause “annoyance” to any person lawfully employed, contravenes the principle of legality and, therefore, undermines the separation of powers and the rule of law since language such as “annoyance” is subject to selective interpretation by local officials and law enforcement.

These legal provisions are also problematic because they may lead to the imposition of disproportionately severe criminal penalties for breaches of the two above-mentioned orders.

## ***6 - What administrative procedures and regulations affect access to places of worship? Are they consistent with freedom of religion or belief and with the non-discrimination principle?***

Notwithstanding the protections afforded to freedom of religion or belief by the

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<sup>50</sup> Ahmed Shaheed, the UN Special Rapporteur on Freedom of Religion or Belief, “A conversation with U.N. Special Rapporteur Ahmed Shaheed: COVID-19 and Freedom of Belief”, June 18, 2020.

<sup>51</sup> Zarni Mann, “Different Laws applied to Myanmar COVID-19 restrictions lead to inconsistent punishments for violators”, May 13, 2020. <https://www.irrawaddy.com/specials/myanmar-covid-19/different-laws-applied-myanmar-covid-19-restrictions-lead-inconsistent-punishments-violators.html>

Constitution of Myanmar, discrimination persists as a result of the country's administrative and regulatory framework. In practice, for example, it is extremely difficult for members of a religious minority to obtain the necessary permission to build or renovate a building or acquire a piece of land for religious purposes. Local regulatory procedures necessary to receive official permission for constructing/renovating a religious building include the following:

1. All organizations, whether secular or religious, must register with the government to obtain official status. This official status is required for organizations to gain title to land, obtain construction permits, and conduct religious activities.
2. The land on which religious buildings would be built needs to be officially registered at the Department of Agricultural Land and Statistics as a Tax-free Religious land (*A\_Khun\_Loot\_Sasana\_Myay*).<sup>52</sup>
3. In order to register the land for a religious purpose, applicants must complete an application form.<sup>53</sup>
4. After completing the form, the applicant must also meet 12-14 specific administrative requirements<sup>54</sup> laid out under respective directives issued by the relevant state or regional government.
5. The applicant must obtain recommendations from government departments, including the General Administrative Department,<sup>55</sup> the Municipal Committee,<sup>56</sup> the Department of Urban Planning and Housing Development, and the Department of Religious Affairs, and then to the State and Regional government for their approval.<sup>57</sup>

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<sup>52</sup> According to section 2 (n) of Yangon City Development Committee Urban planning and Land management rules (2017) and section 2 (h) of Mandalay City Development Committee Urban planning and Land management rules (2015), a "Tax-free Religious land" (*A\_Khun\_Loot\_Tha\_Tha\_Na\_Myay* in Burmese language) is defined as a land that is permitted in accordance with existing law because it has been applied by a person who legally acquires the original land or ancestral land in accordance with the law for religious purpose.

<sup>53</sup> The designated form is not publicly available to date and according to the interviews conducted by the ICJ with different faith groups who have been through the process of registering land for a religious purpose, they are not aware of the existence of such designated form by their respective city development committees. The designated form for Myitkina township, Kachin State was provided to ICJ by the deputy director of Myitkina City Development Committees during the interview conducted in July 2020. In addition, the procedures for applying for religious land is described in the Standard Operating Procedures (SOP) of Kachin State Government, August 2019.

<sup>54</sup> See Annex A for unofficial translation of the directive from Mon, Kayin and Kachin State. Although, the existence of such similar directive in the other State and Regions is unknown, based on the ICJ engagement with different religious groups and analyzing their experience, it is considered that similar directive is provided by the rest of State and Regional Government.

<sup>55</sup> "The GAD is responsible for administering and managing all non-forest and non-farm land in the country. This includes town, village, religious and common land, riverbanks, ponds, cemeteries, grazing pastures and disposable state land." - Formulation and Operationalization of National Action Plan for Poverty Alleviation and Rural Development through Agriculture (NAPA), Working paper -10: Land Tenure and Administration, p.7. June 2016, Ministry of Agriculture Livestock and Irrigation, Food and Agriculture Organizations of the United Nations, <http://www.fao.org/3/a-bl833e.pdf> (Accessed 1 April 2020).

<sup>56</sup> According to Yangon Region Municipal Act 2013 section 4(g), 14(m) and (u), 69, the Yangon City Development Committees has regulatory power over the construction, repair or dismantling buildings (including religious buildings). According to Section 29, 9(c), 10 of the 2015 Mandalay Regional Municipal construction related rules, the Municipal committee can grant final permit for construction/repair/renovation of religious buildings.

<sup>57</sup> According to the section 29 of the 2015 Mandalay Regional Municipal construction related rules.

6. Along with these recommendations, the applicant can submit the form to the Ministry of Home Affairs<sup>58</sup> to get approval to administer the land for a religious purpose.<sup>59</sup>

These requirements make getting permission for establishing a place of worship extraordinarily difficult, and leave applicants at the mercy of an array of local, State/Regional and national officials, including leaving them vulnerable to these officials' potential prejudices. Not only are the regulations unnecessarily bureaucratic, but they leave too wide a discretion to officials. As a result, they have also been applied in a blatantly discriminatory manner.

The existing regulations are onerous for everyone.<sup>60</sup> But the likelihood of ethnicity and religion-based discrimination makes an already difficult process even more hardous for members of religious minorities. The barriers begin at the stage of obtaining or identifying land that has been, or can be, permitted for religious use. The Ministry of Home Affairs is vested with the authority to declare an area of land as a religious land.<sup>61</sup> In addition, the Ministry of Home Affairs, through the General Administration Department,<sup>62</sup> and City Development Committees (in Yangon, Mandalay and Nay Pyi Taw) have the decision-making authority to review and grant approval for constructing or renovating religious buildings.<sup>63</sup> There is no formal deadline set for these bodies to issue decisions,<sup>64</sup> which creates uncertainty and gives rise to a lack of accountability, both of which undermine the right of diverse faith

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<sup>58</sup> The relationship between Ministry of Home Affairs and General Administrative Department is provided in p.g 57 of "Assessment of Religious Minorities Right in Myanmar", October 2017 report by International Republican Institute

<sup>59</sup> Formulation and Operationalization of National Action Plan for Poverty Alleviation and Rural Development through Agriculture (NAPA), Working paper -10: Land Tenure and Administration, p.81. June 2016, Ministry of Agriculture Livestock and Irrigation, Food and Agriculture Organizations of the United Nations, <http://www.fao.org/3/a-bl833e.pdf> (Accessed 1 April 2020).

<sup>60</sup> Legal instrument includes the State and Regional Municipal Committee's construction related bylaws, and non-legal instruments are the public announcement the Ministry of Religious Affairs and Culture concerning building/renovation/repair of the religious structures and worship places, <http://www.mora.gov.mm/newsview.ASPX?nid=170> and 12 requirements are needed for official registration of religious land by the Mon State Ethnic Affairs Minister's directives dated on August 1, 2016.

<sup>61</sup> Formulation and Operationalization of National Action Plan for Poverty Alleviation and Rural Development through Agriculture (NAPA), Working paper -10: Land Tenure and Administration, p.81. June 2016, Ministry of Agriculture Livestock and Irrigation, Food and Agriculture Organizations of the United Nations, <http://www.fao.org/3/a-bl833e.pdf> (Accessed 1 April 2020).

<sup>62</sup> As per newly amended General Clauses law (2019), the "Ministry of Home Affairs/General Administrative Department" is replaced as "Ministry of Office of the Union Government/General Administrative Department".

<sup>63</sup> Formulation and Operationalization of National Action Plan for Poverty Alleviation and Rural Development through Agriculture (NAPA), Working paper -10: Land Tenure and Administration, p.63. June 2016, Ministry of Agriculture Livestock and Irrigation, Food and Agriculture Organizations of the United Nations, <http://www.fao.org/3/a-bl833e.pdf> (Accessed 1 April 2020); According to Section 29, 9(c), 10 of the 2015 Mandalay Regional Municipal construction related rules (2015), the Municipal committee can grant final permit for construction/repair/renovation of religious buildings.

<sup>64</sup> According to International Republican Institute's report on "Assessment of Religious Minorities Right in Myanmar", p.g 55, October 2017, "there are no details provided about how the Committee determines whether it will grant permission."



groups to access to places of worship.<sup>65</sup> In addition, the regulatory framework does not specify the procedures to be followed in the event of a dispute between the applicant and members of the decision-making bodies when applications are denied. Absence of right to appeal in the law allows discretion to make these consequential decisions to rest solely with administrative, non-representative bureaucratic bodies.

There ought to be, in any event, a right of appeal against a negative decision to a judicial body, consistent with the rule of law, principle of due process, the separation of powers and the right to access to justice and effective remedies for human rights violations. Such a right to appeal would also be consistent with the 2008 Constitution (section 19(c)) and the constitutional guarantee that “any person” shall enjoy equal rights before the law (section 347).

Although the Ministry of Religious Affairs does not have the legal authority to grant permits for constructing or renovating religious buildings,<sup>66</sup> it plays a role in influencing the decision of the Ministry of Home Affairs and of the State/Regional Government and relevant City Development Committees to designate land for religious use. For instance, the Ministry of Religious Affairs has stipulated that permission to construct or repair religious buildings “depends upon the population of the location”.<sup>67</sup> Affected individuals have reported to the ICJ that this factor (i.e., the wishes of the population of the location) is still widely cited by the authorities when reviewing applications for legal status of places of worship.<sup>68</sup> In practice, this means that minority religious groups in majority Buddhist areas are denied permissions to establish places of worship because they do not constitute a large enough percentage of the local population. In the worse scenarios, as in Karen State, many Muslims faced serious difficulties in buying new land, renovating and building new places of worship.<sup>69</sup>

In addition, the fact that the Ministry of Religious Affairs – which is heavily controlled and operated by staff members belonging to the majority Buddhist religion<sup>70</sup> – has

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65 Section 363 of 2008 Constitution highlights that the State may assist and protect the religions it recognizes to its utmost.

66 According to announcement of the Ministry of Religious Affairs and Culture dated 05, June 2017, “The Ministry delegated authority to the respective local administrations for rules and regulations concerning with religion and religious affairs.” <http://www.mora.gov.mm/newsview.ASPX?nid=170> (Accessed Jan, 2020).

67 The U.S State Department, 2007 Religious Freedom report. The areas are not clarified in the report.

68 ICJ, “Myanmar: ICJ hosts workshop with civil society on freedom of religion or belief and places of worship,” November 25, 2019.

<https://www.icj.org/myanmar-icj-hosts-workshop-with-civil-society-on-freedom-of-religion-or-belief-and-places-of-worship/> ; ICJ, “Myanmar: ICJ supports youths and civil society on freedom of Religion and Belief”, February 27, 2020 <https://www.icj.org/myanmar-icj-supports-youth-and-civil-society-on-freedom-of-religion-and-belief/>

69 Minority Watch, “Voiceless Cry: The Situation of Myanmar Muslims (Case Study: Karen State)-2012-2013”, p.28, 2013. International Republican Institute, “Assessment of Religious Minorities Right in Myanmar”, p.g 55-56, October 2017 report.

70 See detail history of the Ministry of Religious Affairs and Culture and the fact that they have established special department, Department for the Promotion and Propagation of the Sasana dedicated for propagation of Buddhism.

[http://www.mora.gov.mm/mora\\_ministry1.aspx](http://www.mora.gov.mm/mora_ministry1.aspx) (Accessed Jan, 2020).

the authority to provide a recommendation concerning applications for constructing or renovating religious buildings gives rise to concern that the Ministry would enforce these powers in a discriminatory manner against religious minorities.<sup>71</sup>

While in principle there is a single process for all religious communities, there are some specific State/Regional level rules for Buddhist communities to apply for their specific places of worship, known as “Buddhist ordination hall”. For instance, sections 55-56 of the City Planning and Land Administration Laws and Regulations (2017) (“မြို့ပြစီမံကိန်းနှင့် မြေစီမံခန့်ခွဲမှု ဆိုင်ရာ လုပ်ထုံးလုပ်နည်းများ” in Burmese language) is an additional rule applicable only to Buddhist worship places, i.e., land for Buddhist ordination hall. Those rules provide more permissive building regulations for the majority Buddhist population heightening concern that the whole regulatory system is skewed in favour of the Buddhist majority, and actively discriminates against religious minorities.

Furthermore, some laws and procedures blatantly discriminate against religious minorities and expose them to criminal charges. For example, section 28 of Mandalay Regional Municipal construction related rules (2015), and an official announcement of the Ministry of Religious Affairs and Culture,<sup>72</sup> require the maintaining of shape and size of the original structure post renovation. However, in practice, this requirement applies only to religious minorities.<sup>73</sup>

In addition, even when approvals are obtained, local governments sometimes order<sup>74</sup> a halt to renovations process – or even demolish newly renovated structures purportedly because they are not in keeping with the original shape and design of the buildings.<sup>75</sup> In some cases, officials do not provide a timeline for lifting their orders halting renovations.

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<sup>71</sup> Hein Ko Soe, “Religion ministry, GAD target Islamic schools”, Frontier Myanmar, July 24, 2018. <https://frontiermyanmar.net/en/religion-ministry-gad-target-islamic-schools>

<sup>72</sup> On the Ministry of Religious Affairs and Culture website, it is announced that in regards to constructing, renovating and repairs while “maintaining its original shape” of the religious building of Buddhist, Christian, Islam, Hindu residing in respective State/Regions, for approval process the applicant does not need to submit to the Ministry of Religious Affairs and Culture, but to respective Regional Government. Public announcement the Ministry of Religious Affairs and Culture concerning building/renovation/repair of the religious structures and worship places dated July 3, 2016. <http://www.mora.gov.mm/newsview.ASPX?nid=170> (Accessed Jan, 2020).

<sup>73</sup> Based on ICJ interview with several confidential sources including civil society representatives, representatives from religious communities in Yangon, Mandalay, Bago, and Hpa-an since July 2019 to February 2020.

<sup>74</sup> Usually, such orders come from either verbal instruction or issued orders by the local general administrative officials.

<sup>75</sup> According to announcement of the Ministry of Religious Affairs and Culture dated November 21, 2016, the local General Administrative Official verbally instruct to close down the three mosques in Shwe-Kyin township, Bago that did not have legal permit to construct religious building. See: <http://www.mora.gov.mm/newsview.ASPX?nid=212>. In Thaketa township, the renovation of the religious building has been blocked and ordered to tear off the expanded roof by local administrative officials on the claim of expanding the size of the building by concerned residents, most of whom are Buddhist, while the permission was granted by the township’s religious affairs office. Myanmar Times, “Building sealed after violent religious clashes in Yangon”, February 19, 2013, <https://www.mmtimes.com/national-news/4204-thaketa-conflict-site-sealed.html>

The lack of clear deadlines for decision-making bodies' determination of applications for legal status of religious worship places, coupled with a lack of sufficient information on the process of application, causes the process to be lengthy and requires considerable time and frequent visits to various offices. This was reported by minority religious groups, such as Muslims and Christians in Karen State, Bago and Mandalay Region.<sup>76</sup> As a result, places of worship have been built without legal permits. In turn, this has resulted not only in the forced closure of unlicensed places of worship, and in the restricted access of minority faith groups to places of worship,<sup>77</sup> but also in people praying in their homes or street. However, in some cases, Christians and Muslims have been prosecuted for praying at places not designated as places of worship,<sup>78</sup> including their homes<sup>79</sup> and in street, on the basis that such prayer sessions threatened "stability and the rule of law".<sup>80</sup> This practice undermines the fundamental rights, including the right to equality, enshrined in section 34, 354(d) and 348 of the 2008 Constitution. It is also inconsistent with Myanmar's international human rights law obligations.

### ***7 - Does the regulatory process for constructing or renovating a place of worship create obstacles for the practice of freedom of religion or belief?***

Yes, it creates substantial obstacles to the exercise of rights guaranteed in the Myanmar Constitution and under Myanmar's international human rights law obligations.

The regulatory framework described above has created confusion for many people seeking to obtain permission to establish a place of worship. While these complex bureaucratic rules and requirements affect everyone, they increase the risk that

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<sup>76</sup> Based on ICJ interview with several confidential sources including civil society representatives, representatives from religious communities since July 2019 to February 2020. Rachel Fleming, "Hidden Plight Christian Minorities in Burma", United States Commission on International Religious Freedom, December 2016. Chin Human Rights Organization (CHRO), "Stable and Secure?: An Assessment on the current context of Human Rights for Chin People in Burma/Myanmar", 2018.

<sup>77</sup> FortifyRights, "Myanmar: Investigate Destruction of Religious Buildings" July 5, 2016. <https://www.fortifyrights.org/mya-inv-2016-07-05/>

<sup>78</sup> Police Authorities in Myanmar have charged three Muslim men for holding Ramadan prayers in the street after the local school where they used to worship was shut down by a nationalist mob in Thaketa township, Yangon. The sentence was based on the section 26 of the Ward and village Tract Administration Law, which prohibits unauthorized public gatherings, though legal authorities have argued there is a clear exemption for religious events. Burma Human Rights Network (BHRN), "Muslims jailed for three months for street prayers", May 1, 2018. <http://www.bhrn.org.uk/en/press-release/1045-muslims-jailed-for-three-months-for-street-prayers.html>

<sup>79</sup> "Authorities block gatherings of for worship inside private residences in Ayeyarwady Division and Yangon City", BHRN, "Persecution of Muslims in Burma" report, 2017. BHRN, "BUDDHIST MOB IN RAKHINE STATE ATTACKED CHRISTIANS CELEBRATING CHRISTMAS", January 4, 2019. <https://progressivevoicemyanmar.org/2019/01/04/buddhist-mob-in-rakhine-state-attacked-christians-celebrating-christmas/>

<sup>80</sup> Agence France-Presse reported that the local authorities in Thaketa township, Yangon issued a statement stating that the prayer session threatened "stability and the rule of law". RFA, "Myanmar Muslims face charges for holding Ramadan prayers" June 2, 2017, <https://www.rfa.org/english/news/myanmar/three-muslims-charged-for-praying-in-public-in-myanmars-yangon-06022017170508.html>

religious minorities be left at the mercy of bureaucrats at all levels of an administration with a long history of hostility to religious minorities – particularly Muslims.<sup>81</sup>

A lack of clarity about whether and how land may be transferred for religious use also inhibits access to places of worship. The activities related to land use and to transfer of ‘ownership’ for religious purposes are managed by development committees in the three major cities of Yangon, Mandalay and Nay Pyi Taw.<sup>82</sup> However, the absence of guidance on the regulatory process, as well as the lack of eligibility criteria for religious land, lead to rules being administered in ways that make it difficult to establish places of worship.

Once land is donated for religious purposes, the applicant needs to register the land at the Settlement and Land Records Department as ‘Tax-free Religious land’ (*A-Khun\_Loot\_Sasana\_Myay*). Similar to the transfer of ownership of the land, whenever a certain piece of land already belongs to someone, it is difficult for the land’s owner to register the land for a religious purpose. There is no national regulation setting out the registration process.<sup>83</sup> Although state and regional legal guidance is publicly available in some States and Regions, such as Yangon Region, Mandalay Region and Mon State, it is not available in other Regions and States.

In Yangon, sections 53-54 of the temporarily approved City Planning and Land Administration Laws and Regulations (2017) (မြို့ပြစီမံကိန်းနှင့် မြေစီမံခန့်ခွဲမှု ဆိုင်ရာ လုပ်ထုံးလုပ်နည်းများ) constitute the applicable guidance to register land for a religious purpose, whatever the religion. Sections 55-56 provide additional guidance only for Buddhist places of worship, i.e., land for Buddhist ordination halls. Sections 28-29 of the Mandalay Regional Municipal construction related rules (2015) set out the process for obtaining permission to build a religious building – including the requirement to obtain recommendations from the General Administrative Department, Municipal Development Committee, Housing Department, and Department of Religious Affairs for constructing, renovating and repairing while maintaining the original shape of the religious building.<sup>84</sup> Section 29 empowers the

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<sup>81</sup> Examples of the types of questions raised by those with whom the ICJ spoke include: Which agency does one go to first?; What supporting paperwork and documents are required? What kind of authority does each agency play at particular levels – whether it is advisory or decision-making level?; How long will it take to get the permission?; Can the decision be appealed? If yes, to whom should the appeal be submitted?

<sup>82</sup> Kempel, Susan, Matthew Arnold, Ye Thu Aung, and Kyi Pyar Chit Saw. 2015. P.1. Municipal Governance in Myanmar An Overview of Development Affairs Organizations. Yangon: The Asia Foundation and Myanmar Development Research Institute – Centre for Economic and Social Development. Rachel Fleming, “Hidden Plight Christian Minorities in Burma”, United States Commission on International Religious Freedom, December 2016.

<sup>83</sup> Previously, the national guidance on construction and renovation of buildings including religious one is set out under “Building (regulation of construction and repair) Act, 1946. However, it is repealed in April, 1 1993 by the Government. Rachel Fleming, “Hidden Plight Christian Minorities in Burma”, United States Commission on International Religious Freedom, December 2016.

<sup>84</sup> Unofficial translation of section 28 of the Mandalay Regional Municipal construction related rules (2015)

Municipal Development Committee with the authority to grant this permission.<sup>85</sup>

In Mon State, a directive from the Mon State Ethnic Affairs Ministry on registering religious land was issued on 1 August 2016, setting out the 12 specific administrative requirements for the registration process.<sup>86</sup> Four out of the 12 administrative requirements require minorities to obtain a recommendation from ward/village/township/State level Buddhist Sangha-Maha-Nayaka Committee<sup>87</sup> and Religious Affairs, and Township/State level head of Religious Affairs Committee. The Religious Affairs Committee is especially problematic as the majority of its members are Buddhist.<sup>88</sup>

Such complex and vague procedures give the officials administering these processes the power to make decisions that may involve discrimination against religious minorities, and thus make it difficult or impossible for such minorities to establish places of worship.<sup>89</sup> For instance, according to many minority religious representatives interviewed by ICJ,<sup>90</sup> permit applications for renovations of existing buildings are either denied or subject to a lengthy process taking at least five years or more, not to mention permit applications for building new places of worship. Such disproportionately bureaucratic requirements impose discriminatory burdens and restrictions on religious minorities violating their right to worship or assemble in connection with their religion, including their freedom to access places of worship guaranteed under the Constitution. These unjustifiable restrictions are incompatible with international human rights law and standards.<sup>91</sup>

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<sup>85</sup> Permission to build a religious building and renovate/repair a religious building. Unofficial translation of section 29 of the Mandalay Regional Municipal construction related rules (2015)

<sup>86</sup> See Annex A for unofficial translation of the directive. Although, the existence of such similar directive in other State and Regions is unknown, based on the ICJ engagement with different religious groups and analyzing their experience, it is considered that similar directive is provided by the rest of State and Regional Government.

<sup>87</sup> "...renovations to religious structures require the agreement of the township's Sangha Nayaka Committee, which is made up of Buddhist monks, as well as the signed consent of neighbours living five doors either side of the mosque." Eaint Thet Su, "For Myanmar Muslims, religious freedom founders in red tape", Frontier Myanmar, April 13, 2020. <https://frontiermyanmar.net/en/for-myanmar-muslims-religious-freedom-founders-in-red-tape>

<sup>88</sup> Although it is not specified the detail breakdown of religious affairs committee's member's religion per se, it is reported to ICJ during several interviews conducted since July 2019 to February 2020.

<sup>89</sup> Eaint Thet Su, "For Myanmar Muslims, religious freedom founders in red tape", Frontier Myanmar, April 13, 2020. <https://frontiermyanmar.net/en/for-myanmar-muslims-religious-freedom-founders-in-red-tape>

<sup>90</sup> Based on ICJ interview with several confidential sources including civil society representatives, representatives from religious communities in Kachin, Karen, Chin, Mandalay, Bago and Yangon since July 2019 to February 2020.

<sup>91</sup> UN General Assembly, Freedom of Religion or Belief, UN Doc. A/RES/68/170, 18 December 2013, para 14(f)(j); UN General Assembly, Elimination of all forms of religious intolerance -Situation in Turkey, UN. Doc. A/55/280/Add.1, 10 September 2000, para 160(d); Human Rights Council resolution 6/37, Elimination of all forms of intolerance and of discrimination based on religion or belief (places of worship), in which the Human Rights Council urges States "To exert the utmost efforts, in accordance with their national legislation and in conformity with international human rights and humanitarian law, to ensure that religious places, sites, shrines and symbols are fully respected and protected and to take additional measures in cases where they are vulnerable to desecration or destruction" (para. 9(e)); "To ensure, in particular, the right of all persons to worship or assemble in connection with a religion or belief and to establish and maintain places for these purposes [...]" (para. 9(g)); See also: General Assembly resolution 55/254, Protection of Religious Sites, in which the G.A urges States "To exert their

Annex A: Requirements for registering a land for religious purpose (Unofficial Translation)<sup>92</sup>

1. Original statement of the respective Abbott or Minorities' religious leaders of applied land
2. Statement affirming that the religious land is detached from the surrounding land<sup>93</sup>
3. Map of surrounding environment
4. Photos of the buildings on the applied land, which is already established (or currently undergoing construction.
5. Recommendation of the different level of ward/village (Than\_Ga\_Nar\_Ya\_Ka) group
6. Recommendation of the different level of Township/State (Than\_Ga\_Nar\_Ya\_Ka) group
7. Land history records by the township Settlement and Land Record Department
8. Land records (Myay\_Sa\_Yin) by the Township Settlement and Land Record Department
9. Recommendation of Ward/Township Administrator
10. Recommendation of Township Level Religious Affairs
11. Recommendation of District Administrators
12. Recommendation of State Level Religious Affairs
13. To submit donation or donation agreement contract (if it's available)
14. The paid receipt for land tax (25 times the amount of land tax) to be paid for when applying for religious land

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utmost efforts to ensure that religious sites are fully respected and protected in conformity with international standards and in accordance with their national legislation and to adopt adequate measures aimed at preventing such acts or threats of violence.", UN Doc. A/Res/55/254, 31 May 2001.

<sup>92</sup> Unofficial translation of the directive from Mon, Kayin and Kachin State. Although, the existence of such similar directive in the other State and Regions is unknown, based on the ICJ engagement with different religious groups and analyzing their experience, it is considered that similar directive is provided by the rest of State and Regional Government.

<sup>93</sup> According to the Yangon Municipal Development committee's construction related requirements, the surrounding land here can be understood as at least 10 households/lands next to the proposed religious land. (i.e. 2 on the right and left, and 3 from front and back of the proposed land.)

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