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Briefing Paper:

The Right to Freedom of Expression in the Context of Myanmar's 2020 General Election

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As Myanmar approaches general elections in 2020, freedom of expression remains highly restricted.¹ Since the 2015 elections, authorities have imprisoned journalists, activists, and others exercising their right to freedom of expression under colonial-era laws as well as newer legislation. Many of these individuals were targeted after criticising the government, military, or political figures, demonstrating the limits to political discourse in Myanmar.

Authorities have curtailed expression in other ways, including by shutting down the Internet in Rakhine and Chin States. Ongoing for nearly nine months at the time of writing, the Internet shutdown stifles public discourse on policy issues and precludes the development of a fully informed electorate.

The Union Election Commission is responsible for regulating elections and has curtailed expression by political parties and candidates in past elections, particularly through prior censorship requirements. Electoral law provides for the dissolution of parties, as well as the disqualification or even prosecution of politicians, under vague provisions that prohibit 'disloyalty' to the Union and the utilisation of race or religion for political purposes. The laws provide a powerful tool for the government, military, or politicians to target their critics.

Myanmar faces severe problems with the proliferation of 'hate speech', but the government has done little to address the root causes of intolerance and discrimination effectively. A draft bill to combat 'hate speech' relies on overly broad criminal measures that could be weaponised against those with dissenting political opinions in the run-up to the election. Government responses to 'hate speech' hence risk both under- and overreacting to the problem.

This briefing paper describes the legal and policy framework relating to freedom of expression in the context of Myanmar's elections. It provides recommendations to the government of Myanmar to protect the right to freedom of expression during the upcoming elections and identifies priorities for future reforms.

¹ General elections are widely expected to be held in November 2020. International Crisis Group, 'Peace and Electoral Democracy in Myanmar', <https://www.crisisgroup.org/asia/south-east-asia/myanmar/b157-peace-and-electoral-democracy-myanmar>.

In the short term, the government of Myanmar should release those detained or imprisoned for their exercise of the right to freedom of expression. It should refrain from arresting anyone merely for exercising this right in the run-up to the election. The government should immediately lift restrictions on mobile Internet access in Rakhine and Chin States and abandon its proposed anti-‘hate speech’ legislation. The UEC should not issue any measures amounting to prior restraint on the expression of political parties and candidates and should ensure that broadcast regulations comply with the right to freedom of expression. Any government engagement with social media platforms should be conducted transparently and in line with international law and standards.

In the long term, the government of Myanmar should work to repeal or reform all laws that violate the right to freedom of expression under international human rights law and standards. These include laws that unduly criminalise expression, give broad power to the government to cut-off Internet access, and impermissibly restrict the expression of political parties and candidates. The government should reform the UEC into a genuinely independent body. Further, it should put significant resources into a national action plan aimed at combating the root causes of intolerance and discrimination in Myanmar.

Criminal measures restricting the right to freedom of expression

Myanmar’s legal framework contains several provisions that have been used to criminalise freedom of expression.² While many of these are found in Myanmar’s Penal Code and other colonial-era laws such as the Official Secrets Act and Unlawful Associations Act, others have been introduced more recently, including the 2013 Telecommunications Law, the 2017 Law Protecting the Privacy and Security of Citizens, the 2004 Electronic Transactions Law, and the 2014 News Media Law. These laws are likely to be used to prevent politicians, journalists, and others from expressing their opinions on important issues relevant to the elections.

The government and military have previously used these laws against their critics. For example, in September 2018, former newspaper columnist Ngar Min Swe was sentenced to seven years in prison and fined 100,000 kyat for sedition under section 124A of Myanmar’s Penal Code for Facebook posts critical of Aung San Suu Kyi.³ In February 2019, the editor-in-chief of the weekly Tanintharyi Journal was found guilty under the News Media Law of defaming regional officials and fined 500,000 kyats; an appeal is pending. The case was filed on behalf of former Chief Minister Daw Lei Lei Maw who has since been removed from her post and is facing corruption charges.⁴ In 2019, a court convicted Dr Aye Maung, a Rakhine politician, under section 122 (high

² For a detailed analysis of these provisions, see ARTICLE 19, Myanmar Briefing Paper: Criminalisation of Free Expression, May 2019, available at: <https://www.article19.org/wp-content/uploads/2019/06/2019.06.6-A19-Criminalisation-of-Free-Expression-final.pdf>.

³ Shoo Naing, ‘Myanmar arrests government critic under sedition law’, Reuters, 13 July 2018, available at: <https://www.reuters.com/article/us-myanmar-critic-arrest/myanmar-arrests-government-critic-under-sedition-law-idUSKBN1K32A5>; Toe Wai Aung, ‘Ngar Min Swe given 7 years for Facebook post’, Myanmar Times, 19 September 2018, available at: <https://www.mmtimes.com/news/ngar-min-swe-given-7-years-facebook-post.html>.

⁴ Ye Mon, ‘Dawei case deals another setback to press freedom,’ Frontier Myanmar, 3 March 2019, available at: <https://frontiermyanmar.net/en/dawei-case-deals-another-setback-to-press-freedom>; ‘Tanintharyi chief minister arrested on corruption charges,’ Frontier Myanmar, 11 March 2019, available at: <https://frontiermyanmar.net/en/tanintharyi-chief-minister-arrested-on-corruption-charges>.

treason) and section 505 (b) of the Penal Code⁵ for stating that the NLD-led government treated Rakhine people as ‘slaves’.⁶ He is now serving a twenty-year prison sentence.⁷

Authorities have often targeted youth activists. For example, on 7 November 2019, six Karenni youth activists were convicted under section 8(f) of the Law Protecting the Privacy and Security of Citizens and sentenced to six months’ imprisonment. The activists alleged that the state government had abused its power in allocating funds for the erection of a statue of General Aung San in the State’s capital, Loikaw.⁸

In addition, scores of military critics have been imprisoned. On 29 August 2019, human rights documentary filmmaker Min Htin Ko Ko Gyi was sentenced to one year’s imprisonment under section 505(a) of the Penal Code in relation to Facebook posts critical of Myanmar’s 2008 Constitution and the role it gives the military in government.⁹ Six members of the satirical performance group the Peacock Generation were convicted under section 505(a) of the Penal Code and section 66(d) of the Telecommunications Act after a satirical performance which included content related to the military.¹⁰

In recent months, authorities have cracked down on journalists particularly severely. Several journalists are currently facing charges under the 2014 Counter-Terrorism Law in relation to an interview conducted with the spokesperson of the Arakan Army after it was designated a terrorist organisation under the Law.¹¹ If convicted, they may be sentenced to life imprisonment.

⁵ Section 505(b) of the Penal Code criminalises the making or circulating of any statement ‘with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility.’

⁶ Ye Mon, ‘Aye Maung, Wai Hin Aung handed 20-year sentences for high treason’, 19 March 2019, available at: <https://frontiermyanmar.net/en/ayemaung-waihin-aung-handed-20-year-sentences-for-high-treason>.

⁷ Eleven Media, Supreme Court rejects special appeal for former MP Dr. Aye Maung’, 25 January 2020, available at: <https://elevenmyanmar.com/news/supreme-court-rejects-special-appeal-for-former-mp-dr-aye-maung>; International Crisis Group, ‘Peace and Electoral Democracy in Myanmar’, <https://www.crisisgroup.org/asia/south-east-asia/myanmar/b157-peace-and-electoral-democracy-myanmar>.

⁸ Zaw Zaw Htwe, *The Irrawaddy*, ‘Karenni Activists Who Were Jailed Over Myanmar’s Gen Aung San Statue Dispute Freed’, 13 December 2019, available at: <https://www.irrawaddy.com/news/burma/karenni-activists-jailed-myanmars-gen-aung-san-statue-dispute-freed.html>.

⁹ ARTICLE 19, ‘Myanmar: Yangon court convicts prominent filmmaker Min Htin Ko Ko Gyi’, 29 August 2019, <https://www.article19.org/resources/myanmar-yangon-court-convicts-prominent-filmmaker-min-htin-ko-ko-gyi/>.

¹⁰ Amnesty International, ‘Myanmar: More ‘outrageous’ convictions for satire performers’, 17 February 2020, <https://www.amnesty.org/en/latest/news/2020/02/myanmar-more-outrageous-convictions-for-satire-performers/>; Amnesty International, Myanmar: Further Information: Further Prison Sentences for ‘Peacock Generation’, available at: <https://www.amnesty.org/en/documents/asa16/1424/2019/en/>.

¹¹ Radio Free Asia, ‘Second Myanmar Media Group Charged Over Interview With Banned Arakan Army’, 1 April 2020, available at: <https://www.rfa.org/english/news/myanmar/arakan-media-04012020205617.html>; Human Rights Watch, ‘Myanmar: Editor Wrongfully Charged Counter-Terrorism Law Threatens Press Freedom, Freedom of Information’ 2 April 2020, available at: <https://www.hrw.org/news/2020/04/02/myanmar-editor-wrongfully-charged>.

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

- **Be prescribed by law:** Restrictions must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly. Ambiguous, vague, or overly broad restrictions on freedom of expression are therefore impermissible.
- **Pursue a legitimate aim:** Legitimate aims are exhaustively enumerated in Article 19(3)(a) and (b) of the ICCPR as respect of the rights or reputations of others and protection of national security, public order, or public health or morals. As such, it is impermissible to prohibit expression solely on the basis that it casts a critical light on the government or the political or social system espoused by the government.
- **Be necessary and proportionate:** Necessity requires that there must be a pressing social need for the restriction. Proportionality requires that a restriction on expression is not overly-broad and that it is appropriate to achieve its protective function. It must be shown that the restriction is specific and individual to attaining that protective outcome and is no more intrusive than other instruments capable of achieving the same limited result.

For many years, civil society and human rights organisations have been calling for the reform of Myanmar's legal framework to promote freedom of expression. Ahead of the 2020 elections, this call is even more urgent. At a minimum, in the lead-up to the 2020 election, the government should refrain from prosecuting individuals under the restrictive legal provisions identified in this briefing. The government should also prioritise the repeal or reform of the provisions identified in this briefing paper in consultation with civil society.

Recommendations

- The government should drop charges against and release from custody all those charged or imprisoned merely for exercising their right to freedom of expression and cease all criminal proceedings on these grounds.
- Parliament should repeal sections 124A, 295A, 499-500, and 505 of the Penal Code, section 8(f) of the Law Protecting the Privacy and Security of Citizens, section 66(d) of the Telecommunications Law, and section 34(d) Electronic Transactions Law and amend or repeal section 33 of the Electronic Transactions Law and sections 19 and 20 of the Peaceful Assembly and Peaceful Procession Law.

Internet Restrictions

On 20 June 2019, Myanmar's Ministry of Transport and Communications imposed a ban on mobile Internet services in nine townships in Myanmar's Rakhine and Chin States. Despite

campaigning by civil society,¹² legislative interventions from MPs,¹³ and international condemnation,¹⁴ eight townships in Rakhine State and one township in Chin State remain without mobile Internet access.¹⁵ While the government has banned Facebook in the past, the Internet shutdown in Rakhine State marks the first invocation of section 77 of the Telecommunications Law to impose a blanket cut to mobile Internet services.

The shutdown is one of the longest ever recorded and is estimated to have cost the economy at least USD 75.2 million.¹⁶ Advocates have expressed concern that the shutdown inhibits dissemination of information relating to safety and security; prevents civilians from contacting one another in case of an emergency; impedes access to healthcare; impedes the operations of organisations working and delivering aid in rural areas; and frustrates attempts to document ongoing human rights abuses.¹⁷

Section 77 of the Telecommunications Law, which provided the legal basis for the shutdown, gives the Ministry of Transportation and Communications broad discretion to suspend telecommunications services in ‘emergency situations’. The government has failed to provide a credible and legitimate justification for its invocation of this section to block mobile Internet access in Rakhine and Chin States. Special Rapporteurs have noted that cutting off Internet access, or even access to parts of the Internet, for either the whole population or part of the population, is a disproportionate interference with the rights to freedom of expression and information that ‘can never be justified under human rights law.’¹⁸ In effect for more than nine months at the time of publication, the shutdown is highly disproportionate. It further raises concerns about the implementation of the January 2020 preliminary ruling of the International Court of Justice, which orders Myanmar to ‘take all measures within its power’ to protect Rohingya Muslims against genocide. The shutdown makes it even more challenging to understand the situation in Rakhine State and whether any violations of the ICJ’s ruling are occurring.

¹² Thompson Chau, ‘Protesters demand end to internet blackout in Rakhine,’ *Myanmar Times*, 25 December 2019, available at: <https://www.mmtimes.com/news/protesters-demand-end-internet-blackout-rakhine.html>.

¹³ John Liu, ‘Internet shutdown has been imposed on Rakhine for six months,’ *Myanmar Times*, 21 December 2019, <https://www.mmtimes.com/news/internet-shutdown-has-been-imposed-rakhine-six-months.html>.

¹⁴ Human Rights Council Resolution A/HRC/42/L.21/Rev.1, 25 September 2019, para 9, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G19/284/51/PDF/G1928451.pdf?OpenElement>; European Parliament resolution of 19 September 2019 on Myanmar, notably the situation of the Rohingya (2019/2822(RSP), para 3, available at: http://www.europarl.europa.eu/doceo/document/TA-9-2019-0018_EN.html.

¹⁵ <https://www.mmtimes.com/news/govt-doubles-down-internet-shutdown-western-myanmar.html>

¹⁶ <https://www.top10vpn.com/cost-of-internet-shutdowns/>.

¹⁷ ARTICLE 19, Briefing Paper: Myanmar’s Internet Shutdown in Rakhine and Chin States, 2 August 2019, available at: <https://www.article19.org/resources/briefing-myanmars-internet-shutdown-in-rakhine-and-chin-states/>.

¹⁸ 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations

States around the globe have frequently shut down the Internet—fully or partly—during election periods,¹⁹ using justifications such as the control of ‘fake news’ or ‘hate speech’.²⁰ There is hence concern that the extended shutdown in Rakhine State could be a precursor to other shutdowns in the future, which would similarly violate international law. Moreover, the current Internet shutdown is likely to have significant consequences on the ability of those in Rakhine and Chin States to access information relevant to elections²¹ and those outside of Rakhine and Chin States to receive and assess information relevant to the situation in these States. As such, the current Internet shutdown has a seriously detrimental effect on the space for political discourse ahead of Myanmar’s elections. The Myanmar government should work to immediately restore Internet access to Rakhine State and refrain from blocking the Internet during the upcoming elections. In the long term, the Myanmar government should repeal section 77 of the Telecommunications Law.

Recommendations

- The government should immediately lift bans on mobile Internet access in Rakhine and Chin States.
- Parliament should repeal section 77 of the Telecommunications Law.

Limitations on speech by politicians and political parties

Myanmar’s Constitution, laws, and UEC-issued measures place limitations on the expression of political parties and candidates. Article 19 of the UDHR and ICCPR grant ‘everyone’, including political parties and political candidates, the right to freedom of expression and opinion.

Several of these provisions could potentially be used to exclude political candidates or parties on the basis of expression. They include limitations on expression relating to race, religion, and the State. For example, Myanmar’s Constitution requires that political parties be ‘loyal’ to the State, and political parties may be dissolved for ‘abusing religion for a political purpose,’ for receiving foreign funding, or for ‘directly or indirectly contacting or abetting’ an insurgent group.’²²

¹⁹ ARTICLE 19, Global Expression Report 2018/2019, available at:

<https://www.article19.org/reader/global-expression-report-2018-19/global-analysis/global-analysis-2/digital/internet-shutdown-and-blocking/>.

²⁰ Access Now, The State of Internet Shutdowns, 8 July 2019, available at:

<https://www.accessnow.org/the-state-of-internet-shutdowns-in-2018/>.

²¹ There is some concern that authorities may cancel elections in conflict-affected areas in Rakhine State due to conflict. As International Crisis Groups reports, decisions to cancel voting by the UEC have been opaque in the past. Crisis Group at p 11, <https://www.crisisgroup.org/asia/south-east-asia/myanmar/b157-peace-and-electoral-democracy-myanmar>.

²² Myanmar Constitution, sections 404(b) and 407(d). Political parties can also be dissolved for ‘having been declared an unlawful association under the existing law;’ ‘directly or indirectly contacting or abetting the insurgent group launching armed rebellion against the Union or the associations and persons determined by the Union to have committed terrorist acts or the association declared to be an unlawful association;’ or ‘directly or indirectly receiving and expending financial, material and other assistance from a foreign government, a religious association, other association or a person from a foreign country’ Sections 407(a)-(c).

These provisions are not sufficiently narrowly tailored to comply with the right to freedom of expression. For example ‘indirectly contacting or abetting’ an insurgent group could capture a range of activities that could be used to silence political dissent, such as the criticism or questioning of repressive anti-terrorism measures. Prohibitions on ‘abusing religion’ are not only vague; they fail to protect a legitimate state interest. While bans on foreign funding may serve a legitimate aim, dissolution of a political party is an extreme measure and hence disproportionate.²³ As a result, these provisions do not comply with the right to freedom of expression. Similar provisions protecting the State are found in the Political Party Registration Law.²⁴ In 2014, the UEC reportedly threatened to reject the NLD’s application under the law after the NLD made statements critical of the military.²⁵

Myanmar’s election laws—including the Amyotha Hluttaw Election Law, Pyithu Hluttaw Election Law, and Regional and State Election Law, which share many identical provisions (together the ‘Election Laws’)—define malpractice to include ‘using religious symbols or instigating with plans to vote or not to vote based on race or religion for being elected as Hluttaw candidate.’ Committing malpractice results in disqualification from an election.²⁶ The Election Laws further disqualify a person who, ‘uses religion for political purpose and utters, delivers speech, and makes or issues declaration to vote or not to vote and who encourage and incite such acts or is a member of an organisation which carries out such acts.’²⁷

Article 25 of the ICCPR protects the right to stand for election. This right must not be suspended or restricted except on grounds that are established by law and which are objective, reasonable, and non-discriminatory.²⁸ The restrictions in the Election Laws are vaguely worded and overly broad, which makes them likely to lead to self-censorship. They fail the test of legitimacy as they do not give political candidates sufficient information to regulate their conduct according to the law. Further, a candidate should only be disqualified from an election if he or she was afforded a fair hearing before a competent tribunal.²⁹ However, decisions relating to ‘malpractices’ are left to the Election Tribunal, a body formed by the UEC, with recourse to a court of law explicitly excluded by section 86 of the Election Laws.³⁰ Denial of judicial review renders the process unfair and incompatible with article 25 of the ICCPR.

²³ Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Research Paper 1/2019, June 2019, p 5, available at: <https://www.ohchr.org/Documents/Issues/Opinion/ElectionsReportDigitalAge.pdf>.

²⁴ Political Parties Registration Law, 2014, section 5.

²⁵ Human Rights Watch, ‘Burma: Election Fundamentally Flawed’, 4 November 2015, available at: <https://www.hrw.org/news/2015/11/04/burma-election-fundamentally-flawed>.

²⁶ Amyotha Hluttaw Election Law, section 10(b); Pyithu Hluttaw Election Law, section 10(b); *Regional and State Election Law*, section 10(b).

²⁷ Amyotha Hluttaw Election Law, section 10(i); Pyithu Hluttaw Election Law, section 10(i); *Regional and State Election Law*, section 10(i).

²⁸ Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996) at paras. 4, 15 and 17.

²⁹ See the requirements of due process, enshrined in article 14, paragraphs 1 and 3 of the ICCPR, which include the requirement that a person be presented with the evidence on which charges are based, and be afforded a fair hearing before a competent tribunal.

³⁰ Amyotha Hluttaw Election Law, section 86; Pyithu Hluttaw Election Law, section 86, *Regional and State Election Law*, section 86.

Disqualification can occur in relation to ‘creating violence, making false accusation or writing, creating public unrest to a party or person for the purpose of electing a Hluttaw candidate.’³¹ While protecting public safety is a legitimate aim under the ICCPR, the provision is so broad that it is likely to capture permissible speech. The provision should only remain if amended to narrowly prohibit speech which is likely to impact public safety.

More drastically, the Election Laws define criminal offences to include ‘uttering, making speeches, making declarations and instigating to vote or not to vote on grounds of race and religion or by abetment of such acts.’³² Offences are subject to a maximum term of imprisonment of one year and a fine of up to 100,000 kyats.³³ Again, these prohibitions are overly broad and likely to lead to self-censorship. They fail to meet the test of ‘legality’ as they do not give political candidates sufficient information to regulate their conduct according to the law. Given the broad and vague wording of the offences, disproportionate penalties that would violate international law are likely.

Furthermore, several measures issued by the UEC impact the ability of politicians and political parties to exercise their right to freedom of expression.³⁴ Section 15 of UEC Directive 1/2014 imposes strict prohibitions on candidates. It prohibits actions which could harm union integrity, national reconciliation and sovereignty; security, rule of law, and peace; actions contrary to the Constitution and laws; actions which could harm the dignity of the country or military; actions leading to conflicts regarding race or religion; ‘hate speech’ affecting political parties or candidates; ‘political fraud using religion’; and incitement, including incitement that prevents civil servants from carrying out their duties.³⁵ The penalty for non-compliance is unclear. As with other provisions, such overly broad categories fail the test of legality as they do not give political candidates sufficient information to regulate their conduct accordingly. Consequently, they are likely to lead to self-censorship.

Several measures imposed by the UEC limit campaign messaging. During the 2015 elections, the UEC required political parties presenting their platform on state-owned television to submit their speeches to the UEC and Ministry of Information in advance and to refrain from criticising the military or encouraging protests against the government.³⁶ Per Directive 1/2014, political candidates were also required to seek UEC permission before campaigning on private media. Furthermore, a 2017 measure reportedly required political parties to submit any press

³¹ Amyotha Hluttaw Election Law Section 66(l); Pyithu Hluttaw Election Law Section 66(l) *Regional and State Election Law, section 66(l)*.

³² Amyotha Hluttaw Election Law Section 58(c); Pyithu Hluttaw Election Law Section 58(c), *Regional and State Election Law, section 58(c)*.

³³ Amyotha Hluttaw Election Law, section 57; Pyithu Hluttaw Election Law, section 57, *Regional and State Election Law, section 57*.

³⁴ In its 2015 report, ANFREL concluded that ‘restrictions that prohibited the military from criticising the government also limited the political space and freeness of the campaign to some extent.’ ANFREL, ‘General & Local Elections; Myanmar 2015,’ p 36.

³⁵ Union Election Commission, Directive 1/2014.

³⁶ The Republic of the Union of Myanmar, Union Election Commission, Notification No. (52/2015)(2015 August 27),

Instruction to political parties broadcasting on TV and radio. See also, The Carter Center, ‘Observing Myanmar’s 2015 General Elections; Final Report,’ available at: https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/myanmar-2015-final.pdf.

statements to the UEC prior to issuance so it could check for compliance with the Constitution. The UEC enacted the measure after several parties had issued statements relating to the conflict in Rakhine State which appeared to rebuff the National League for Democracy.³⁷

The limitations contained in these directives amount to prior censorship. Prior censorship, especially concerning matters of political importance, is prohibited under international law except in extremely narrowly defined circumstances. Any restriction on freedom of expression must be necessary. Given the fundamental importance to a democratic society of free political debate during election campaigns, this implies that an election broadcast may be subject to prior censorship only where it is virtually certain that the broadcast would cause immediate, irreparable, and substantial harm. These concerns are all the more valid in light of the lack of independence of the UEC.³⁸ Any requirements to submit campaign messages to the UEC for prior approval should be repealed or replaced before the 2020 elections.

Exacerbating these issues, the directives are not readily available on the website of the UEC or its Facebook page, making it difficult for political parties to understand the content of the directives and for voters to understand the limitations under which political parties operate. In its Strategic Plan 2019-2022, the UEC identified the need to disseminate election-related materials both online and in print, which would be a positive step forward, especially if materials were translated into ethnic minority languages.³⁹

Recommendations

- The UEC should repeal and replace notifications and directives containing requirements that violate the right to freedom of expression, including requirements that campaign messages and press statements be subject to review by the UEC.
- The UEC should publish an election calendar to make political parties, candidates, and the public aware of the election timeline.⁴⁰
- The UEC should increase consultation with stakeholders before making decisions.
- The UEC should make all directives, notifications, and policy documents available online and in print.
- In the long-term, the UEC should be reorganised as an independent entity.

'Hate speech', misinformation, and disinformation

States are increasingly grappling with the effects of 'hate speech', misinformation, and disinformation in the context of elections.

³⁷ Naw Betty Han, The Myanmar Times, 'Parties fear new rule will restrict them' 7 November 2017, available at: <https://www.mmtimes.com/news/parties-fear-new-rule-will-restrict-them.html>.

³⁸ See, e.g. European Union Election Observation Mission General Elections 2015, 'Final Report,' 2015.

³⁹ Union Election Commission, Strategic Plan 2019-2022, p 16.

⁴⁰ See, e.g. ANFREL, 2018 Myanmar By-Elections: Building the Foundation for Successful 2020 Elections, available at: <https://anfrel.org/wp-content/uploads/2019/03/2018-BE-report-English-version-PDF.pdf>.

In Myanmar, observers have raised concerns that ‘hate speech’ online and offline could provoke violence during the election period.⁴¹ However, there is significant confusion around the term ‘hate speech’, and inappropriate responses to ‘hate speech’ can do more harm than good. Measures to address ‘hate speech’ in the lead-up to elections should, therefore, be carefully calibrated to the harms they seek to prevent.

While there is no definition of ‘hate speech’ in international law, the term should be understood to encompass any expression of discriminatory hate towards people on the basis of a protected characteristic, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, indigenous origin or identity, disability, migrant or refugee status, sexual orientation, gender identity or intersex status, or other protected characteristic recognised under international human rights law. ‘Hate speech’ should not be confused with speech critical of the government, political parties, or politicians.

States regularly exploit the label ‘hate speech’ to discredit, or even prohibit, expression that is critical of the State, the symbols of the State (such as flags and emblems), or powerholders. However, international standards do not permit restrictions on the right to freedom of expression to protect ‘the State’ or its symbols from insult or criticism. These entities cannot be the target of ‘hate speech’ because they are not people and are therefore not rights-holders. Status as a head of State or other public official is not a ‘protected characteristic’ on which discrimination claims, or the characterisation of ‘hate speech’, can be based. Indeed, public officials are legitimate targets of criticism and political opposition and should display a higher degree of tolerance toward criticism than other persons.⁴²

The UEC should distinguish between ‘hate speech’ and legitimate political speech, including in its regulation of election broadcasts. The UEC should refrain from issuing any measures that would impact the ability of political parties or candidates to comment, whether positively or negatively, about politicians, political parties, government bodies, or the military. At the same time, the UEC should use its platform to encourage political parties to refrain from the use of ‘hate speech’, including in mass media and online.⁴³ Furthermore, the UEC itself should speak out against hate speech.⁴⁴

⁴¹ European Union Election, ‘Follow-up Mission, Republic of the Union of Myanmar, Final Report,’ April 2019, available at: https://eeas.europa.eu/sites/eeas/files/efm_myanmar_2019_final_report_english.pdf; Hunter Marston, ‘The hate speech threat to the 2020 election’, Frontier Myanmar, 6 April 2019, available at: <https://frontiermyanmar.net/en/the-hate-speech-threat-to-the-2020-election>; ‘Hate speech intensity and trajectory could shift in Myanmar 2020 elections’, Mizzima, 30 November 2019, available at: <http://mizzima.com/article/hate-speech-intensity-and-trajectory-could-shift-myanmar-2020-elections>; European Union Election Observation Mission General Elections 2015, “Final Report,” 2015.

⁴² See also, The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, ARTICLE 19 (2006), Principle 6, available at: <https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf>; ‘Subject to Principles 15 and 16, expression may be punished as a threat to national security only if a government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence’.

⁴³ See, e.g. ‘My Pledge’ for Tunisia 2014 Election’ available at: <https://www.article19.org/resources/pledge-tunisia-2014-election/>.

⁴⁴ See also, Countering Hate Speech in Elections: Strategies for Electoral Management Bodies

The Myanmar government has for several years considered problematic legislative solutions to the issue of ‘hate speech’. ARTICLE 19 has analysed four successive versions of the proposed legislation—now titled the ‘Protection Against and Prevention of Hatred Bill’—each incompatible with international human rights law.⁴⁵ Among other flaws, the various drafts of the bill rely primarily on censorship and criminal sanction as means of addressing ‘hate speech’. As such, the new law, if passed, is likely to facilitate the harassment and imprisonment of minority groups and government critics rather than effectively curb ‘hate speech’.⁴⁶

Myanmar’s enforcement of existing laws suggests that the proposed legislation is likely to exacerbate human rights challenges. Under the current government, overly broad provisions in the Penal Code and other laws have been regularly used to arrest and prosecute journalists, human rights defenders, and critics of the government.⁴⁷ Meanwhile, the government has made no efforts to credibly investigate or prosecute incitement to discrimination, hostility, or violence, including in the context of human rights violations against the Rohingya. For example, in 2019 government officials charged ultranationalist monk U Wirathu, whose preaching tours were linked by the UN Fact-Finding Mission to attacks against Muslims,⁴⁸ with sedition for his comments critical of the government rather than thoroughly investigating his potential role in inciting violence.⁴⁹

Instead of pursuing new legislation to restrict ‘hate speech’, the Myanmar government should develop a national action plan containing positive policy measures to combat ‘hate speech’ and intolerance in line with Human Rights Council Resolution 16/18 and the Rabat Plan of Action.⁵⁰ Such measures could include support for education, interfaith dialogue, diversity of media, and counter-messaging initiatives. Passage of comprehensive non-discrimination legislation could also be an effective means of combating the root causes of discrimination and intolerance in Myanmar.⁵¹ Furthermore, amending laws that entrench discrimination, including the 1982

IFES White Paper, January 2018, available at:

https://www.ifes.org/sites/default/files/2017_ifes_countering_hate_speech_white_paper_final.pdf.

⁴⁵ ARTICLE 19, ‘Myanmar Briefing Paper: Countering “Hate Speech,”’ February 2020, available at:

<https://www.article19.org/resources/myanmar-briefing-paper-countering-hate-speech/>.

⁴⁶ For instance, Athan has noted that 45% of all cases filed under section 505(b) in 2018 were related to Karenni youth leaders who protested over the erection of a statue of General Aung San. Athan, ‘Promises Turn Into a Statue,’ p 56, available at: <https://progressivevoicemyanmar.org/wp-content/uploads/2019/04/English-compressed.pdf>.

⁴⁷ See, ARTICLE 19, ‘Myanmar: UN Human Rights Council must act to secure key reforms ahead of 2020 elections’, 24 February 2020, available at: <https://www.article19.org/resources/briefing-on-myanmar-human-rights-council-must-act-to-secure-key-reforms-ahead-of-2020-elections/>.

⁴⁸ Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc

A/HRC/39/CRP.2, 17 September 2018, paras 742 and 1325-1326.

⁴⁹ ‘Arrest warrant issued for Myanmar firebrand monk Wirathu,’ AFP, 29 May 2019, available at:

<https://frontiermyanmar.net/en/arrest-warrant-issued-for-myanmar-firebrand-monk-wirathu>.

⁵⁰ HRC Resolution 16/18 on combating intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence and violence against, persons based on religion or belief, UN Doc. A/HRC/Res/16/18, 24 March 2011,

https://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.RES.16.18_en.pdf; Rabat Plan of action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, UN Doc. A/HRC/22/17/Add.4, 5 October 2012, <https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/RabatPlanOfAction.aspx>.

⁵¹ Ibid.

Citizenship Act, would both combat discrimination and improve voter eligibility, particularly for Rohingya and other ethnic minority groups.

Similarly, responses to misinformation and disinformation should be carefully crafted to respect the right to freedom of expression. In March 2020, the Ministry of Transport and Communications ordered telecommunications operators to block 221 websites that, according to Myanmar authorities, contain ‘adult/explicit content’, ‘child sexual abuse’, or ‘contribute to misinformation’ or ‘fake news’.⁵² The banned websites reportedly include ethnic media outlets *Development Media Group* and *Narinjara*.⁵³ The government of Myanmar has failed to publicly disclose the legal basis of the block or its justification for identifying particular sites as subject to the order.

Measures attempting to control the spread of ‘fake news’ through censorship or the application of criminal penalties often fail to conform with international human rights law because of their vague and arbitrary nature.⁵⁴ Four freedom of expression rapporteurs have stated that, ‘general prohibitions on the dissemination of information based on vague and ambiguous ideas, including ‘false news’ or ‘non-objective information’, are incompatible with international standards.’⁵⁵ Similarly, ARTICLE 19 has repeatedly raised concerns about the use of ‘fake news’ laws and other forms of criminal sanction and censorship to combat misinformation and disinformation.⁵⁶

Other measures, such as positively promoting voter education materials, advertisement transparency, media literacy initiatives, fact-checking, and diverse, independent media sources to ensure plurality of political views can be powerful tools in countering the effects of

⁵² ARTICLE 19, ‘Myanmar: Immediately lift ban on ethnic news websites,’ 1 April 2020, available at: <https://www.article19.org/resources/myanmar-immediately-lift-ban-on-ethnic-news-websites/>.

⁵³ The Irrawaddy, available at: <https://frontiermyanmar.net/en/operators-split-as-telenor-rejects-govt-order-to-block-fake-news-sites>.

⁵⁴ United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information “Joint declaration on freedom of expression and ‘fake news’, disinformation and propaganda,” 3 March 2017, available at: <https://www.osce.org/fom/302796>.

⁵⁵ Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information, ‘Joint declaration on freedom of expression and “fake news”, disinformation and propaganda’, 3 March 2017, available at: <https://www.osce.org/fom/302796>.

⁵⁶ See, e.g., ARTICLE 19, ‘Thailand: Computer Crime Act,’ 31 January 2017, available at: <https://www.article19.org/data/files/medialibrary/38615/Analysis-Thailand-Computer-Crime-Act-31-Jan-17.pdf>; ARTICLE 19; Singapore: New law on “online falsehoods” a grave threat to freedom of expression’, 9 May 2019, available at: <https://www.article19.org/resources/singapore-new-law-on-online-falsehoods-a-grave-threat-to-freedom-of-expression/>; ARTICLE 19, ‘Malaysia: Communications and Multimedia Act must be urgently revised,’ 24 March 2017, available at: <https://www.article19.org/resources/malaysia-communications-and-multimedia-act-must-be-urgently-revised/>.

misinformation and disinformation campaigns.⁵⁷ During the election period, the UEC should utilise these positive policy measures in any efforts to combat misinformation and disinformation.

Recommendations

- The government should immediately lift all restrictions to news outlets banned for alleged dissemination of ‘fake news’ or ‘misinformation’.
- Parliament should refrain from passing the flawed ‘Protection Against and Prevention of Hatred Bill’, which is incompatible with international human rights law.
- The government should develop a national action plan to implement Human Rights Council Resolution 16/18 and the Rabat Plan of Action.
- The UEC should publicly denounce ‘hate speech’ and intolerance, train staff on non-discrimination and conflict resolution, bring on more diverse leadership, and increase dialogue with political parties and the media.
- The UEC should fully implement UEC Strategic Plan pillar 5 and carry out voter education programmes to ensure citizens are properly informed about the voting process and other relevant issues, including in rural areas and minority languages.
- The UEC should work collaboratively with CSOs in any response to ‘hate speech’.
- The UEC should improve its dissemination of key information to increase its credibility and counter disinformation.

Engagement with social media platforms

As noted above, Myanmar has frequently targeted online expression with laws pre-dating the advent of the Internet, or with newer laws such as the Telecommunications Law. It has also set up a social media monitoring team with USD 4.8 million in funding but with no clear mandate.⁵⁸ To date, Myanmar has not taken the kind of drastic steps taken by some other States to regulate social media platforms. For example, some States have imposed third party liability on platforms and required them to censor or moderate content in a manner inconsistent with international law. Nevertheless, with the significant attention paid to social media in the context of recent elections, concerns around state engagement with social media platforms are legitimate.

At all times, including during election periods, States should not use extra-judicial measures or seek to bypass legal processes to restrict content. For example, they should not use private pressure—such as the threat to restrict access to markets—to gain concessions from social media platforms concerning content moderation. At the same time, companies are under no obligation to comply with government requests that have no basis in law. They remain free to decide whether such requests are in breach of their Terms of Service.

Increasingly, social media platforms are engaging with governments in advance of the elections. However, there has frequently been little transparency in agreements between platforms and

⁵⁸ Freedom House, ‘Freedom on the Net 2018,’ available at: <https://freedomhouse.org/report/freedom-net/2018/myanmar>.

states, which may have a significant impact on human rights or elections. This is often accompanied by a lack of meaningful consultation with civil society on issues by governments or platforms concerning the role of social media in elections. States and social media platforms should ensure full transparency in their engagements with each other and disclose any agreements concerning content moderation or otherwise affecting the rights of users.

Recommendations

- The government should ensure that any restrictions of online speech strictly comply with international human rights standards relating to freedom of expression.
- The government should be fully transparent in its engagements with social media platforms, including by publishing any agreements reached with platforms, and should ensure the opportunity for the participation of key stakeholders, including civil society.
- Social media platforms should be fully transparent in their engagements with the government, including by publishing relevant information in their transparency reports.
- Social media platforms should push back against government requests that violate human rights.

Broadcasting regulation and media freedom

Media freedom in the context of elections is likely to be shaped by the existing dynamics curtailing freedom of expression in Myanmar, described above. The high-profile case of *Reuters* journalists Wa Lone and Kyaw Soe Oo has been widely cited as creating a chilling effect on reporters in the country. Journalists have also faced violence and threats of violence while carrying out their work.⁵⁹

The lack of an access to information framework has exacerbated the lack of media freedom in the country. Instead of passing comprehensive right to information legislation that would facilitate access for journalists to information held by public bodies, the government has instead created even more layers of secrecy with the National Archives and Records Law, passed by Parliament last year.⁶⁰ The lack of media freedom in general is hence a major concern ahead of elections.

During the past election, the UEC reportedly imposed geographic restrictions on journalists, who were accredited to individual townships rather than the country as a whole.⁶¹ Such restrictions are unnecessary and unduly limit media freedom. The Myanmar Press Council has expressed a

⁵⁹ Article 19, 'Myanmar: UN Human Rights Council must act to secure key reforms ahead of 2020 elections,' February 2020, available at: <https://www.article19.org/wp-content/uploads/2020/02/2020.02.23-HRC-Briefing-March-2020-final.pdf>.

⁶⁰ Free Expression Myanmar, 'New National Records and Archives Law preserves government secrecy', 12 March 2020, available at: <http://freeexpressionmyanmar.org/new-national-records-and-archives-law-preserves-government-secrecy/>.

⁶¹ Human Rights Watch, 'Burma: Election Fundamentally Flawed', 4 November 2015, available at: <https://www.hrw.org/news/2015/11/04/burma-election-fundamentally-flawed>.

commitment working with the UEC to lift such restrictions so that individual journalists can report countrywide.⁶²

Broadcast regulations raise further concerns. Regulation of broadcasting is particularly important during an election period, when broadcasters have a unique role in informing voters and influencing public opinion. The UEC was lauded in 2015 for granting equal access to airtime for all political parties.⁶³ However, certain restrictions, such as a requirement to submit speeches to the UEC before going on-air,⁶⁴ are incompatible with the right to freedom of expression.⁶⁵ Television programming overwhelmingly portrayed the USDP in a positive light in the lead-up to the elections, contributing to unbalanced coverage.⁶⁶ Further, politically independent media monitors noted that air time on state-owned media was dominated by coverage of the then-President and state authorities.⁶⁷ These reports call into question the balance and impartiality of state-run broadcasting during the elections.

ARTICLE 19's Guidelines for Election Broadcasting in Transitional Democracies⁶⁸ were published in consultation with election and media experts. The Guidelines summarise international law and best practice concerning media governance, campaign coverage, allocation of airtime, media bias and manipulation, and voter education in the context of elections, among other topics. Since their publication, the Election Guidelines have received significant recognition and been cited in numerous international publications, including the European Commission for Democracy through Law and the Guidelines on Media Analysis during Election Observation Missions. They provide a helpful framework for protecting the right to freedom of expression in the context of broadcast regulation and should inform UEC guidelines for future elections.

Recommendations

- The government should lift all restrictions on media freedom, including those geographically limiting the coverage of journalists during the elections.
- Parliament should pass comprehensive right to information legislation and refrain from prosecuting journalists under the Official Secrets Act.
- The government should ensure that any broadcasting guidelines issued by the UEC are in line with the Guidelines for Election Broadcasting in Transitional Democracies.
- The government should adopt a legal and policy framework on the safety of journalists.

⁶² Nant Khaing, 'Myanmar Press Council will work with the UEC for media coverage of the 2020 election', *Mizzima*, 11 January 2020, available at: <http://mizzima.com/article/myanmar-press-council-will-work-uec-media-coverage-2020-election>.

⁶³ EU Election Observation Mission, 2015, p 26.

⁶⁴ Wa Lone, *The Myanmar Times*, 'Parties condemn UEC restrictions,' 1 September 2015, available at: <https://www.mmmtimes.com/national-news/16239-parties-condemn-uec-restrictions.html>.

⁶⁵ See section 3 above.

⁶⁶ EU Election Observation Mission, 2015, p 26-27.

⁶⁷ Unfinished Freedom, A Blueprint for the Future of Freedom of Expression in Myanmar, p. 8, available at: https://pen.org/sites/default/files/unfinished_freedom_lowres.pdf.

⁶⁸ ARTICLE 19, 'Guidelines for Election Broadcasting in Transitional Democracies,' August 1994, available at: <https://www.article19.org/data/files/pdfs/tools/electionbroadcastingtrans.pdf>.