Defamation?
Acknowledgements

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About FEM

Free Expression Myanmar (FEM) is a national human rights organisation that is expert in free expression and information, engaging in legal reform, defending victims of violations, and promoting best international standards.

This report forms part of FEM’s objective to promote appropriate and needed reforms. See:

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FEM supporters

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The manner in which states deal with allegations of defamation is an important indicator for how democratic they are. Authoritarian states have vague and confusing criminal law frameworks intended to suppress criticism of the government and powerful people. Democratic states have narrow civil law frameworks intended to stop malicious and harmful lies.

Myanmar is several years into its democratic transition but has not yet sought to improve its regulatory framework. Unfortunately, the state has instead adopted more laws which add to the confusing legal framework. As a result, the practice under previous governments of unjustly prosecuting journalists, political activists, and human rights defenders for their legitimate criticism has continued.

Those promoting reform of the legal framework often repeat the phrase “international standards” on defamation. International standards do not require every country to be the same; rather they are constantly evolving aims set by the international community for democracies to strive for.

This report seeks to outline contemporary international standards relating to defamation laws so that reformists, defence lawyers, the Myanmar government, and other interested persons can fully understand them.

“Filing lawsuits against and detaining civilians and journalists as a reason to protect the Tatmadaw and political leaders from personal attacks and defamation is not in line with international standards of democracy. It could potentially deter individuals from casting a spotlight on corruption, unfairness, and the impotence of the authorities. As a result, it hampers the development of our democratic culture in Myanmar.”

- U Tin Aung Tun, MP for Magwe

Introductio
Methodology

This report is written by several experts on international law who have significant experience in the development of legal frameworks in Myanmar relating to the media and the right to freedom of expression.

Limitations

Every international standard included in this report is a concise explanation of an established international legal norm. Each standard is summarised for brevity, but further details can be supplied to any interested parties.

The report

This report is formed of four sections: introduction, an explanation of defamation law and freedom of expression, a list of international standards, and an outline of Myanmar’s legal framework on defamation. The report has one main recommendation which is in the conclusion.
Defamation and freedom of expression

The purpose of a defamation law or provision is to protect an individual’s right to a “reputation.” A person’s reputation is their standing within society. The right to reputation is guaranteed under international law:

"Article 17: No one shall be subjected to […] unlawful attacks on his honour and reputation." - International Covenant on Civil and Political Rights (1966)

Where there is a right there is a remedy. "Defamation" is the word used to describe false statements of fact that damage a person’s reputation and require remedy. However, it is important to recognise that:

- Damaging someone’s reputation is often justified. For example, raising awareness of someone’s wrongdoing.
- Some people already have bad reputations. For example, it is difficult to defame a corrupt governmental official because their reputation is already bad.
- Damaging a person’s reputation is only defamation if it causes serious harm. For example, by affecting their business or leading to social exclusion.

The Chairperson of Myanmar’s Amyotha Hluttaw Bill Committee correctly stated that defamation is:

"[I]intentionally writing something online that is false and severely damaging to another." - U Zaw Min, MP for Sagaing

The purpose of a defamation law or provision is to protect an individual’s right to a “reputation.” A person’s reputation is their standing within society. The right to reputation is guaranteed under international law:
Defamation is not...

Different countries use different words for defamation, such as libel (written defamation), slander (spoken defamation), or calumny (false statements).

The purpose of all these defamation laws and provisions is to protect reputations, not completely different concepts. Defamation is not...

- "hate speech" or incitement: Incitement laws are intended to protect the safety and social equality of marginalised groups, not individual reputations.
- invasion of privacy: Privacy laws are concerned with the wrongful intrusion into something deeply personal, regardless of whether it is true or false, or whether it damages someone's reputation.
- blasphemy: Laws on blasphemy protect the sensitivities of religious belief. Only people, not beliefs (for example, Christian or communist), are afforded rights.
- public order or national security: These laws are intended to prevent violence or destruction of the state, not an individual’s reputation.

Protecting reputations is not protecting feelings. Reputations are objective concepts that can be assessed by an external person using an external measurement such as financial loss. Feelings are subjective and can only be measured internally by the person who feels them. Without any means of external measurement, it is impossible to prove a feeling happened, and equally impossible for a defendant to show that it did not. Courts should never make judgements based on subjective concepts.
Freedom of expression

Defamation laws always impact on the right to freedom of expression.

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

- Article 19 of the Universal Declaration of Human Rights

The right to freedom of expression is a fundamental human right, and the foundation of every free and democratic society. It is important for personal development, good governance, and the protection, promotion, and exercise of all other human rights. People who are free to speak their minds feel more respected, are better able to plan their lives, can act as a government watchdog, and can get involved in all sorts of decision-making.

All UN member states including Myanmar have committed to uphold the right to freedom of expression. This commitment can be found in Article 19 of the UDHR, Article 19 of the ICCPR, and in the ASEAN Human Rights Declaration. Elements of the right can also be found under international customary law.

The right to freedom of expression is precisely defined in international law. It:

- belongs to everyone regardless of their nationality or other background.
- includes the right to seek, receive, and impart information.
- includes ideas of all kinds, from political to media, to cultural expression, or even to jokes.
- can be expressed through any way, such as online or in street protests.
- applies regardless of borders.

\[\text{International standards on defamation} - \text{Page 5}\]
The three-part test

According to international law, the right to freedom of expression can be limited in very narrow circumstances. In order to stop governments from using this possibility, international law has a very precise rule, called the three-part test, which says that freedom of expression can only be limited if:

1. There is a clear and precise law – public officials cannot just censor as they like.
2. The limitation aims to either protect the rights or reputations of others, or protect national security, public order, public health or morals. There are no other acceptable aims.
3. The limitation is necessary in a democratic society to address a pressing need, and only if the limitation is proportionate to the harm caused.

Most of Myanmar’s defamation laws fail the three-part test. They fail part one because they are unclear and vague. They fail part two because having so many laws on defamation is unnecessary duplication. They also fail part three because the sanction of imprisonment is disproportionate.
Freedom of expression in Myanmar

The right to freedom of expression is protected in the Myanmar Constitution under Articles 6, 354, and 365.

“The Union’s consistent objectives are: (e) enhancing the eternal principles of justice, liberty and equality in the Union.”

- Article 6 of the Myanmar Constitution

Article 6 references "liberty", a concept with profound global political origins consisting of the social, political, and economic freedoms to which everyone is entitled - the historical basis for the more recent concept of "human rights".\(^{13}\)

Including liberty as a basic principle of the state is important because it means that all Myanmar’s laws, policies, and actions must enhance freedom. If they do not, then they are "unconstitutional".

In a democracy, courts exist partly to check whether the government’s laws, policies, and actions are unconstitutional. For example, if a law violates the right to freedom of expression, a judge should declare it unconstitutional on the basis that it contradicts the constitutional principle of liberty.

Articles 354 and 365

Articles 354 and 365 of the Myanmar Constitution are more specifically concerned with freedom of expression. Article 354 provides for the liberty to express and publish. Article 365 provides for the right to freely develop literature and arts. However, both are weakened by vague references to "security", "national solidarity", and "tranquility".
International standards on defamation

A defamation law or provision must achieve the correct balance between the right to reputation and the right to freedom of expression in order to ensure democracy can function. A proper balance means that people are not punished when criticising and holding accountable those in power. The globally accepted balance is known as the "international standards" on defamation.

International standards on defamation are built upon a number of sources including the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). For decades, the standards have been elaborated upon in international courts and by international governmental organisations, such as the United Nations. Some of the standards were briefly summarised by the United Nations in 2011 in General Comment number 34.

International standards apply to several parts of the state:

- Government and the legislature amending and adopting effective, necessary, and proportionate defamation laws
- Courts applying the law while protecting freedom of expression to the greatest extent possible
- Police and prosecutors ensuring defamation complaints are in the public interest.

Every international standard included below is a concise explanation of an established international legal norm. Each standard is summarised for brevity, but further details can be supplied to any interested parties.
International standards on definition

Defamation laws must comply with the three-part test (see above). They should be designed as narrowly as possible so that they do not serve, in practice, to stifle freedom of expression.

Defamation laws should only apply to statements that are:

- False
- Factual
- Cause damage
- And the damage must be to a person’s reputation, which means that the statement must have been seen or heard by others.

Defamation laws should only apply to statements that result in serious harm to a person’s reputation.15

Defamation is best summarised as a false assertion of fact that results in serious harm to a person’s reputation.

International standards on scope

The scope of a defamation law is the extent of the area on which it is relevant.

Public bodies should not be allowed to bring defamation suits

This includes ministries, parliament, the judiciary, and the military.

Public bodies do not have a reputation as they are abstract entities without a profit motive and with neither emotional nor financial interests to protect. Public bodies exist for long periods of time and the only real reputation is that of the leaders and other senior decision-makers overseeing the institution. Bringing defamation suits is also a waste of public funds.
When public bodies bring defamation suits, it is almost always to prevent criticism of their performance and leads to a chilling effect on public debate.

**Objects and symbols cannot be defamed**

This includes flags, religious symbols, national insignia, and constitutions.

Like public bodies, objects and symbols do not have a reputation as they are abstract entities without a profit motive and with neither emotional nor financial interests to protect.

Allegations of defamation of objects or symbols are often smokescreens for stifling legitimate criticism of powerful institutions and their leadership.

**Public officials and politicians should tolerate more criticism than ordinary persons**

The more senior that they are, the more criticism they should tolerate. Politicians in particular should tolerate more criticism.

Public officials and politicians knowingly choose a public role in which they should expect scrutiny and vigorous debate on their words and actions, some of which will be highly critical.

If public officials and politicians are given similar status to ordinary persons, the constant threat of legal action would stifle the public debate which is vital to a democracy.

Public bodies, public officials, and politicians have significant non-legal options available to counter false information without using the law. In democracies they can use their press offices, public information systems, and issue public statements.

These non-legal options are even greater in Myanmar compared to other countries because the government controls all the broadcasters and the largest-selling newspapers too. It is clear therefore that when public bodies, public officials, and politicians use defamation laws, their aim is not to counter false information, but rather to punish and prevent criticism.
Public figures should tolerate more criticism than ordinary persons

A public figure is someone who engages in actions which generate publicity, such as authors, musicians, sports people, and religious and business leaders. By generating publicity, they become a matter of public interest.

Public figures are people who intentionally have a prominent social status. Like politicians, public figures choose a public role in which they should expect scrutiny and vigorous debate on their words and actions, some of which will be highly critical.

Public figures’ prominent social status means that they also have significant non-legal options available to counter false information. For example, they can speak through the media, or directly to social media audiences.

International standards on defences

Defences are legal arguments used to avoid liability. In a court, a defendant may contest allegations made against them, make counter-allegations, or use a defence arguing that even if the allegations are true, the defendant is not liable. For the below defences, a defendant normally holds the burden of proof.\[16\]
Truth is an absolute defence

Just because a statement attacking a person’s reputation is unflattering does not make it defamatory. A defamatory statement is one which is unwarranted - a false assertion of fact.

Defendants must never be held liable for defamation unless their assertion of fact is proven false. The defence of truth is an absolute and complete defence.

Showing that an assertion of fact is false is fundamental to any defamation case, and therefore the burden of proof should be on the prosecution or plaintiff to prove that the assertion is false.

In cases involving the public interest, the standard of proof required to show that an assertion of fact is false should be higher than in a normal case.¹⁷

In democracies the burden of proof is particularly important in cases involving public officials or politicians. Although public officials and politicians do have reputations, public debate would be stifled if everybody must prove the truth of everything they say. Instead, democracies generally accept that when a person chooses to take a public role they agree to greater criticism, some of which may be unwarranted, in the interests of the greater good.

Opinion is an absolute defence

An opinion is a view formed about something. It falls short of certainty and may not necessarily be based on fact or knowledge. An opinion may be misguided, but as it is not an assertion of fact, it cannot be proven false.

Therefore, defendants must never be held liable for defamation based on a statement of opinion. The law has no role in regulating opinions as the right to opinion is absolute.¹⁸

Sometimes it is difficult to determine whether a statement is an opinion or an assertion of fact.¹⁹ This is particularly the case regarding statements intended as jokes, mockery, or exaggerations. At other times, an opinion can be insulting. Democracies prefer not to regulate subjective opinions, even those that are insulting, because of the danger posed to freedom when a government begins to decide which opinions are acceptable and which are not.
Defence of reasonable publication

A "reasonable publication" is a statement that includes an assertion of fact made in good faith but that later turns out to be false.

Defendants should not be held liable for defamation if they made an honest mistake based on information available at the time that they made the statement, and which they later changed after new information came out.

The media often uses the defence of reasonable publication. In democracies, the public expects to receive important news increasingly quickly, often within hours and often while a story is still developing. Therefore, journalists do not have much time to thoroughly verify facts and may make honest mistakes which they later correct. Punishing journalists or human rights defenders for every uncorrected false assertion would be disproportionate and would lead to mass self-censorship. If a media outlet or journalist repeatedly make honest mistakes due to a lack of capacity, a self-regulatory body, such as a press council, could publicly urge them to invest greater resources.

Defence of repeating the words of others

Repeating what somebody else has said in order to inform others, to share news, or in some cases to disagree with the original statement, is known as "words of others".

Defendants should not be held liable for defamation when it is clear that they are repeating an assertion of fact made by someone else, where the assertion is on something in the public interest, and where the defendant has not supported the assertion.

Journalists and others reporting news are expected to cover people's assertions when the subject is in the public interest, and in doing so they are not expected to distance themselves from the assertion or check its truthfulness.
In democracies it is in the public interest to hear both the positive and negative things that people say. A sign of good professional journalism is the inclusion of counter-statements to ensure balance wherever possible.20

The defence of repeating the words of others has become more relevant due to the ease with which people can share on Facebook and re-tweet on Twitter.

Defence of innocent publication

Unknowingly repeating, publishing, or helping disseminate defamation is known as “innocent publication”.

Defendants should not be held liable for defamation if they were not the author, editor, or publisher of the statement, and they did not know or have reason to believe that they helped share defamation.

This includes people who have no control over content like designers and newspaper sellers as well as intermediary companies like printers and internet service providers (ISPs).

There are often many people involved in newspapers, websites, and social media but only a few are liable for defamation. In democracies liability is narrow because otherwise everyone involved in dissemination would become a censor. For example, if a newspaper seller was liable, an editor would need to get the seller’s approval for every story. If Facebook was liable, Facebook would have to review every post before allowing it.

Consent is an absolute defence

A person who provides or somehow accepts (through words, actions, or behaviour) a statement that includes a false assertion of fact about themselves is regarded as “consenting” to the dissemination of that false assertion of fact.

Defendants should not be held liable for defamation if the subject had previously consented to that false assertion of fact.
People often repeat what they have been told. For example, in democracies media usually request a comment from the subject of their stories in order to be fair and balanced. If the subject gives or confirms false information, then they have consented to it and cannot later bring a defamation case.

Absolute and qualified privileges

The ability to speak freely is so important to debate in courts and elected bodies such as parliament that whatever is said in those courts and elected bodies is given the status of “absolute privilege”, commonly known as immunity.

Defendants should never be held liable for defamation for statements made under absolute privilege. This also applies to any media who report statements made under absolute privilege.

Statements made under a legal, moral, or social duty, but outside of courts and parliament, such as speaking in public meetings or reporting alleged crimes to the police, are given the lesser status of “qualified privilege”. Statements made under qualified privilege are also not liable for defamation unless they are proven to have been made with malice.

MPs and courts can only do their job if they are free to debate and argue openly without restriction. Democracies believe that even the smallest threat of restriction could potentially lead to self-censorship and the adoption and application of bad laws and flawed decisions. In courts, absolute privilege applies to judges, lawyers, witnesses, police, and those giving evidence. Democracies also want to ensure that courts never have jurisdiction over what elected MPs say in parliament.
Sanctions and remedies are given by courts in response to the harm caused by defamation. Sanctions usually fall under criminal laws which are intended to prevent behaviours regarded as undesirable by society. Criminal sanctions include prison sentences and monetary fines that go into the state coffers.

In democracies, when given a choice, people who allege they have been defamed often choose to use civil rather than criminal law because they want any financial damages to come to them rather than being given to the state.

International standards on criminal sanctions
Criminal defamation laws should be replaced with civil defamation laws

Criminal sanctions are increasingly regarded as unjustifiable in a democracy because they are both disproportionate and unnecessary.21

Criminal sanctions are disproportionate because the involvement of police and prosecutors, as well as long trials, imprisonment, criminal records, and the resulting social stigma and loss of livelihood are considered overly harsh compared to the harm caused. They are also unnecessary because many countries, including in Asia, have shown that reputations can be effectively protected using civil laws.22

Criminal defamation laws should therefore be replaced with civil defamation laws.

International bodies such as the UN and UNESCO increasingly condemn criminal defamation laws because of the significant chilling effect they have on free expression. Globally, the majority of criminal complaints are made by powerful people such as politicians, religious leaders, and business owners, usually to prevent legitimate criticism. Sometimes, criminal cases are brought by the complainant as a form of revenge against the defendant.

Criminal sanctions are only justifiable in the most serious cases

In countries that choose to retain criminal defamation laws, they should only ever be used in the most serious cases where there is significant public interest in using criminal sanctions.

Police and prosecutors should not support criminal sanctions

Police, prosecutors, and other public officials should not initiate or prosecute cases involving criminal sanctions, including when the complainant is a public official.

This is because the involvement of police, prosecutors, and other public officials is considered disproportionate against the defendant, is a waste of public funds for no public benefit, and is likely to lead to a chilling effect on freedom of expression.
Criminal sanctions require a high standard of proof

When criminal defamation laws are used, the prosecution holds the burden of proof. The prosecution must prove beyond a reasonable doubt that:

- The assertion of fact was false
- The defendant knew it was false or showed reckless disregard for its truthfulness
- The assertion was made with the intention of causing harm to the reputation of the complainant.

Imprisonment is never justifiable

In cases where the prosecution has proven defamation which has resulted in serious harm, it is never acceptable for a court to sentence a defendant to imprisonment, regardless of how severe the damage to reputation was.

Criminal defamation laws were once regarded as proportionate and necessary because defamation disputes were a concern of the state as those persons defamed often sought redress through violence, such as by duels. Democracies have since established non-violent mechanisms to deal with such disputes. Without the threat of violence, criminal laws are no longer necessary.

International standards on civil remedies

Remedies usually fall under civil laws which are intended to resolve disputes between individuals. Civil remedies include published corrections as well as financial damages that go to the person whose reputation has been harmed.
Non-financial remedies are usually sufficient redress

Where a statement has been found to be defamation, the publication of an apology, a correction, or a judgement made by a court or a press council, should be regarded as a proportionate remedy for most defamation cases.

Correction, apology, publication of a judgement, and reply

A correction fixes mistaken information. An apology expresses regret for any harm caused by that mistaken information. A publication of a judgement is a notice that the defendant has done wrong. A reply is an opportunity for the defamed to explain why information was mistaken and describe any resulting harm to their reputation.

Corrections, apologies and replies are only necessary in response to defamation, not to hurt feelings.

A right of reply is necessary only when a correction or apology was inadequate to restore a damaged reputation. A reply should have similar prominence to the original defamation. For example, in a similar position in a newspaper, a similar time of day on television, or posted with similar importance on Facebook.

Publication of a judgement should also have similar prominence to the original defamation.

Financial damages should be proportionate and calculated according to real harm

Financial damages should only be awarded by a court where they are necessary because publication of a non-financial remedy has not been sufficient to redress the harm caused by the defamation.

Any damages awarded must be proportionate and should never threaten significant harm to the defendant or their ability to continue working. Courts must be careful not to give damages that create a chilling effect on others.
Calculations determining the size of compensatory damages should be clearly defined in law and should only cover the actual and proven physical, financial, and social loss caused as a result of the reputational harm. A strict limit on damages should apply to any unquantifiable physical and social loss.

Calculations of compensatory damages should ensure that any correction, apology, publication of a judgement, or reply is properly reflected in a reduction of the size of the damages.

Financial damages should not punish

Financial damages should almost always be compensatory and not a form of punishment. Limited punitive damages should only be added in very special circumstances where the plaintiff has proven that the defamation included significant malice or negligence.

International standards on related procedures

Supporting alternative dispute resolutions

Laws and courts should support people who claim to have been defamed to seek redress through alternative dispute resolution mechanisms such as press councils. However, those mechanisms must ensure that they maintain the same or higher protection for free expression than courts.

In democracies many people who are defamed prefer complaining to press councils because they are fast and less costly, whereas courts are slow and require expensive lawyers.

Statute of limitations

Cases should only be accepted within a limited period of time after the alleged defamation took place. This is called the “statute of limitations” and protects defendants who may forget what happened or lose evidence over time.
Expeditious treatment

The manner in which defendants are treated by the justice system can have a serious chilling effect on freedom of expression. Long, expensive, and stressful court cases can encourage self-censorship more than a bad law.

Everybody is entitled to expeditious treatment with a fair and public hearing by a competent, independent, and impartial court.25

In criminal cases, everybody also has the right to:

- Be informed promptly and in detail of the charge
- Have adequate time and facilities to prepare a defence
- Be tried without undue delay
- Have legal assistance (free if necessary)
- Examine witnesses
- Have a free interpreter
- Not be compelled to testify against themselves or to confess guilt.

"Strategic lawsuits against public participation" or "SLAPPs" are a new tactic used by powerful people and institutions to encourage self-censorship. SLAPPs are not expected to win in court, but are instead intended to be long, expensive, and stressful for the defendant. Such malicious abuse of defamation laws makes a significant chilling effect and are often used by powerful and wealthy individuals who want to silence debate.

Equality of arms

There should be a fair balance in the opportunities given to both the complainant and the defendant to argue their case. Both should be given equal opportunity to call witnesses and cross examine them too. Courts should also ensure that one side is not significantly undermined by a lack of financial resources.
Protecting anonymous sources

Journalists and others who publish in the public interest have a right to keep their sources of information confidential and anonymous.

Proving that an assertion of fact is true may create an ethical dilemma if a defendant wants to protect an anonymous source.

Journalists and others who rely on sources should not be required to testify unless it is absolutely essential, the information cannot be found elsewhere, and there is no likelihood of harming the journalist or restricting their access to similar sources in the future.26

Best practices

New laws and landmark court cases made in other countries are not legally binding but are useful sources to consult on the most advanced decisions and most persuasive reasoning. Courts should accept the submission of such relevant case law in order to educate the court.
In Myanmar, legal provisions protecting reputations are included in several laws, all of which are different and potentially conflicting. Defamation falls under 11 provisions in five criminal laws. The oldest of these laws, the Penal Code, is the only law that defines defamation or includes defences. The other laws adopted after the Penal Code include no definitions and no defences.

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Conformity to basic international standards

None of Myanmar’s defamation laws conform to even the most basic of international standards. The oldest law, the Penal Code, has some conformity, but only to a very limited extent.

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**Myanmar’s defamation laws in practice**

The application of Myanmar’s defamation laws in courts has further demonstrated that they do not conform with even the most basic of international standards. In particular, case law has shown that Myanmar’s defamation laws and their application:

...**protect feelings rather than reputations...**

Myanmar’s defamation laws have been used to punish statements of opinion rather than assertions of fact. Such opinions have been labelled “offensive” and attacks “proven” simply through subjective criteria against which defendants are powerless to dispute.

...**ignore defences...**

Even the limited defences included in the Penal Code provisions on defamation have sometimes been overlooked. As a result, defendants often rely on highlighting the prosecution’s procedural mistakes such as the quality and quantity of evidence rather than focusing arguments on substantive defences.

...**punish criticism of public officials and politicians...**

Powerful people, including public officials, politicians, religious leaders, military, and business leaders are supported by prosecutors and the police to bring suits against those who criticise them. Neither the government nor the judiciary encourage such powerful people to tolerate greater criticism in the interests of democracy.

...**delay...**

Cases progress in an extremely slow and burdensome manner both before and during court trials, resulting in significant damage to the defendant’s financial and mental health.

...**always apply punitive sanctions...**

Verdicts are usually made in favour of the complainant and result in highly punitive criminal sanctions for the defendant. Although the law provides for both fines and imprisonment, courts choose the harsher sentence.
There is little evidence that courts have begun to shift their role during the transition to democracy. For example, courts do not seem to reflect upon the compatibility of past laws and precedents set under previous authoritarian governments, in light of the rights provided for in the new constitution, such as the principle of liberty.
Conclusion

Myanmar is not the first country to start a transition to democracy. It follows many others, most of which have found that reforming defamation laws was a critical first step to democracy. Without reform, public debate, which democracies rely on, cannot be open and free.

Countries in transition to democracy need a goal to aim for, which is international standards. International standards on defamation are the balancing act between the right to freedom of expression and the right to a reputation. The balance has been examined in detail by a variety of international bodies and tested extensively by international courts for many years. As a result, international standards on defamation are comprehensive.

This report has described each of the most authoritative international standards on defamation. Unfortunately, Myanmar’s legal framework and its implementation fall far short of these international standards. Myanmar’s laws and courts do not support even the most basic standards required for even the newest aspiring democracy.

However, Myanmar is at the beginning of its transition – which is an excellent opportunity for the government to lay out its plans for the coming years.

Recommendations

Establishing a legal framework that is more appropriate for a democracy and at least conforms to basic international standards requires significant work by both the government and the courts. Given the current situation, the most effective approach would be to consult, draft, and adopt a single civil defamation law that overrides all other laws – effectively decriminalising defamation in Myanmar. A second option would be to remove prison sentences from each law, leaving only fines as a punishment.

In the meantime, courts can and should take advantage of the vagueness of current laws and start to interpret them in favour of international standards and the principle of liberty included in Myanmar’s Constitution.
For information on the burden of proof for the complainant and prosecution, please see below section on criminal sanctions.

For more information, please see the joint statement: Repeal 66(d) to protect legal constitutionality, non-duplication and clarity — Free Expression Myanmar.


4 This is an ancient concept in legal philosophy, for example known as "Ubi jus ibi remedium" in Latin.


6 For further information on “hate speech” and incitement see: http://freeexpressionmyanmar.org/incitement

7 For information on the burden of proof for the complainant and prosecution, please see below section on criminal sanctions.

8 See below for more information on the inappropriate inclusion of defamation provisions in Myanmar's newly adopted Law Protecting the Security and Privacy of Citizens (2017).

9 This is an ancient concept in legal philosophy, for example known as "Ubi jus ibi remedium" in Latin.

10 "Rights of others" only covers those rights established in the International Covenant on Civil and Political Rights, and other similar international human rights laws, GC34, para 28.

11 Moral concepts are subjective and any limitation for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition, and must not undermine the universality of human rights or the principle of non-discrimination, GC34, para 32.

12 For more information, please see the joint statement: Repeal 66(d) to protect legal constitutionality, non-duplication and clarity — Free Expression Myanmar.


13 For the conceptual origins of "liberty", see Aristotle's Politics Book No. 6

14 United Nations, General Comment No.34, 102nd session of the Human Rights Committee, 11-29 July 2011, para. 47:
http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf

15 Article 12 of the UDHR and Article 17 of the ICCPR use "attacks", a term used to mean that only deliberate and serious statements should be regarded as defamatory.

16 For information on the burden of proof for the complainant and prosecution, please see below section on criminal sanctions.
“Preponderance of the evidence” and “beyond a reasonable doubt” are the normal standards of proof for civil and criminal cases respectively. A medium standard of proof is “clear and convincing evidence” which is a more rigorous standard to meet than the preponderance of the evidence standard, but a less rigorous standard to meet than proving evidence beyond a reasonable doubt. In order to meet the standard and prove something by “clear and convincing evidence”, a party must prove that it is substantially more likely than not that it is true:

https://www.law.cornell.edu/wex/clear_and_convincing_evidence

Article 19 of the UDHR, Article 19 of the ICCPR.

Journalists are trained to distinguish between fact and opinion. For a useful journalist training guide on different types of facts and different types of opinions, see: https://www.thenewsmansual.net/Manuals%20Volume%203/volume3_56.htm

International standards on defamation

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Justice Michael Tugendhat speaking at a workshop in Yangon in 2018.

Article 14 of the ICCPR.

ICCPR Article 19.

Council of Europe, Committee of Ministers, Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, https://wcd.coe.int/ViewDoc.jsp?id=3429078&Site=CM


Article 499: Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

For example, see UN General Comment No. 34; UNESCO Doha Declaration, 3 May 2009; Justice Michael Tugendhat speaking at a workshop in Yangon in 2018.

21 For example, see UN General Comment No. 34; UNESCO Doha Declaration, 3 May 2009; Lohé Issa Konaté v. Burkina Faso, African Court, 5 December 2014; Herrera-Ulloa v. Costa Rica(2 July 2004), Ricardo Canese v. Paraguay (31 August 2004), and Tristán Donoso v. Panama (27 January 2009), Inter-American Court of Human Rights; Cumpana Maze v. Romania, European Court of Human Rights, 17 December 2004.

22 For example, Sri Lanka decriminalised defamation as early as 2002.

23 "Preponderance of the evidence" and "beyond a reasonable doubt" are the normal standards of proof for civil and criminal cases respectively. A medium standard of proof is "clear and convincing evidence" which is a more rigorous standard to meet than the preponderance of the evidence standard, but a less rigorous standard to meet than proving evidence beyond a reasonable doubt. In order to meet the standard and prove something by clear and convincing evidence, a party must prove that it is substantially more likely than not that it is true:

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The Penal Code sanctions (fine sizes and imprisonment terms) were updated in 2016 in an amendment under the quasi-civilian government:

Article 33: If prosecution is going to be brought, he/she will be fined from the minimum of 300,000 kyats to the maximum of 1,000,000 kyats or a fine or both. (d) creating, modifying or altering of information or distributing of information created, modified or altered by electronic technology to be detrimental to the interest of or to lower the dignity of any organization or any person.

Article 34: Whoever commits any of the following acts shall, on conviction be punished with imprisonment for a term from 1 year to a maximum of 3 years or a fine or both: (d) creating, modifying or altering of information or distributing of information created, modified or altered by electronic technology to be detrimental to the interest of or to lower the dignity of any organization or any person.

Article 35: For further information on defamation case law see the report “66(d): No real change” available at: http://freeexpressionmyanmar.org/66d-no-real-change/
Defamation?

International standards and Myanmar’s legal framework

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