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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:

- www.FreeExpressionMyanmar.org
- www.facebook.com/FreeExpressionMyanmar
- coordinator@FreeExpressionMyanmar.org

FEM supporters

FEM would like to thank Heinrich-Böll-Stiftung for supporting this project. FEM would also like to thank Pen America and the US State Department Bureau of Democracy, Human Rights, and Labor for their support in increasing the impact of this report.

Involvement and endorsements

FEM would like to thank all those who were involved in developing these reform options. The options were first developed by the Decriminalising Defamation Advocacy Group in Bago in 2018. In 2019 and 2020 they have been strengthened and clarified in multiple consultations, tested with lawyers, and discussed at length with union MPs.
Introduction

“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

Myanmar is several years into its democratic transition but has not yet sought to improve its regulatory framework for defamation. As a result, hundreds of journalists, human rights defenders, and political activists have been unjustly prosecuted and imprisoned for exercising their right to freedom of expression.

Fortunately, many people, including in the government, parliament, and the judiciary, recognise that reforming defamation laws are one of the first – not last – steps to achieving democracy. The questions they have are: what options are there for reforming defamation laws and how did other countries do it?

This report outlines Myanmar’s six defamation laws, details how other similar countries reformed their defamation laws, and identifies reform options that could work in Myanmar. It is the third report in a series focused on defamation in Myanmar. The first report, “66d: No real Change” revealed the issue of Myanmar’s case law. The second, “Defamation?” compared Myanmar’s legal framework to international democratic standards on defamation.
ပထမအစီရင်ခံစာခေါ်သည် ဗီယက်နမ်စီးပွားရေးတွင် ပိုမိုအပြောင်းအလှင် အသေရဖျက်မှု့အားဖျင်သည် ပထမအစီရင်ခံစာခေါ်သည် ဗီယက်နမ်စီးပွားရေးတွင် ပိုမိုအပြောင်းအလှင် အသေရဖျက်မှု့အားဖျင်သည်

"ဗီ(အ) - သောက်ခံသော အောက်ပါအချက်များကို အထောက်အပြားပြုလုံးစေဖို့ ဗီယက်နမ်စီးပွားရေးတွင် ပိုမိုအပြောင်းအလှင် အသေရဖျက်မှု့အားဖျင်သည်

"အသေရဖျက်မှု့အားဖျင် အောက်ပါအချက်များကို အထောက်အပြားပြုလုံးစေဖို့ ဗီယက်နမ်စီးပွားရေးတွင် ပိုမိုအပြောင်းအလှင် အသေရဖျက်မှု့အားဖျင်သည်"
Defamation and freedom of expression

The purpose of a defamation law or provision is to protect an individual’s right to a “reputation”⁴. 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.”⁵

- International Covenant on Civil and Political Rights (1966)

“Defamation” is the word used to describe false statements of fact that damage a person’s reputation and require remedy.⁶ 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.

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, which is similarly protected under international law.9

"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.
Most of Myanmar’s defamation laws fail the three-part test. They fail because they are unclear and vague. They fail because having so many laws on defamation is unnecessary duplication. They also fail because the sanction of imprisonment is disproportionate. 12

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 misusing these limitations, 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, 10 or protect national security, public order, public health or morals. 11 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.

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Defamation in transitional democracies

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

The below table compares authoritarian and democratic situations and shows what democracies should be aiming for.

<table>
<thead>
<tr>
<th>Start of transition (more authoritarian)</th>
<th>End of transition (more democratic)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defamation confused with insult / offending</td>
<td>Defamation is clearly defined</td>
</tr>
<tr>
<td>No real defences</td>
<td>Defences are clear and evolving</td>
</tr>
<tr>
<td>Criminal laws or extreme civil laws</td>
<td>Criminal laws rare. Civil laws with proportionate compensation</td>
</tr>
<tr>
<td>Most cases are powerful people versus less powerful</td>
<td>Prosecutors unlikely to support criminal cases. Courts sceptical of powerful people bringing cases</td>
</tr>
<tr>
<td>Punishments protect feelings, not reputations</td>
<td>Compensation calculated on clearly measured harm</td>
</tr>
</tbody>
</table>

Defamation reform proposals - Authoritarian and democratic approaches to defamation - Page 9
Defamation in Myanmar

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

“Defamation reform proposals - (c): Defamation reform proposals - (c): '

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 "tranquillity".
Myanmar’s defamation laws

In Myanmar, legal provisions protecting reputations are included in several laws, all of which are different and potentially conflicting.14 Defamation falls under 11 provisions in six 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.

<table>
<thead>
<tr>
<th>Law Title</th>
<th>Articles</th>
<th>Adopted and amended</th>
<th>Criminal?</th>
<th>Sanction / remedy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Penal Code (M)</td>
<td>499-502</td>
<td>1845</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Electronic Transactions Law</td>
<td>34(d),17</td>
<td>Adopted in 2004 under the military. Amended in 2013 under the quasi-civilian government.</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Telecommunications Law</td>
<td>66(d),18</td>
<td>Adopted in 2013 under the quasi-civilian government. Amended in 2017 under the NLD.</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Anti-corruption Law (M)</td>
<td>46</td>
<td>Adopted in 2013 under the quasi-civilian government. Amended in 2018 under the NLD.</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Protection of Security and Privacy of Citizens</td>
<td>8(f),10</td>
<td>Adopted in 2017 under the NLD government.</td>
<td>✓</td>
<td></td>
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</table>
### 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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<tbody>
<tr>
<td>Definition</td>
<td>✓</td>
<td>✗</td>
<td>✗</td>
<td>✓</td>
<td>✗</td>
<td>✗</td>
</tr>
<tr>
<td>Scope</td>
<td>✓</td>
<td>✗</td>
<td>✗</td>
<td>✓</td>
<td>✗</td>
<td>✗</td>
</tr>
<tr>
<td>Public bodies are not able to bring suits</td>
<td>✗</td>
<td>✗</td>
<td>✗</td>
<td>✗</td>
<td>✗</td>
<td>✗</td>
</tr>
<tr>
<td>Public officials and politicians must tolerate greater criticism</td>
<td>✗</td>
<td>✗</td>
<td>✗</td>
<td>✗</td>
<td>✗</td>
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<tbody>
<tr>
<td>Truth is an absolute defence</td>
<td>✓</td>
<td>✓</td>
<td>✗</td>
<td>✓</td>
<td>✗</td>
<td>✗</td>
</tr>
<tr>
<td>Opinion is an absolute defence</td>
<td>✓</td>
<td>✓</td>
<td>✗</td>
<td>✓</td>
<td>✗</td>
<td>✗</td>
</tr>
<tr>
<td>Reasonable publication is a defence</td>
<td>✓</td>
<td>✓</td>
<td>✗</td>
<td>✓</td>
<td>✗</td>
<td>✗</td>
</tr>
</tbody>
</table>

**Sanctions and remedies**

- Civil law, not criminal law
- Imprisonment not allowed or used

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Defamation reform proposals - Myanmar laws compared to international standards - Page 12
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...22

...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.
Defamation reform proposals - ဗျားနားများသည် အင်အား ကမ်းလွှတ်စွာ ထိခိုက်စသည်။...and show no signs of reflecting the transition to democracy and judicial independence

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.

Gaps in legal defence

Although Myanmar’s legal framework clearly favours the complainant, legal defence strategies are also weak. Many lawyers are unfamiliar with defamation laws or using rights-based legal strategies to defend their clients and rely only on a strategy of arguing that the defendant did not make the allegedly defamatory statement. Below are several useful but in Myanmar largely unused legal strategies, each of which is a common legal strategy in countries with similar legal systems.

Proving every element of the crime

Penal Code Article 499 defines defamation as containing five elements. A prosecutor should prove each of these five elements beyond a reasonable doubt in order to secure a conviction. One defence strategy is therefore to cast doubt on any of these elements:
Defamation reform proposals - အသေချက်အားဖော်ပြရန်အတွက်အချက်အလက်များ - Page 15
The Reynolds defence

The “Reynolds defence” was created by Justice Lord Nicholls in a 1999 English judgement in which he decided that newspapers cannot be held liable for defamation if they have behaved responsibly, even if the information published later turns out to be false. Although the “Reynolds defence” was created in an English court, its substantive argument could be used in legal strategising by defence lawyers. Justice Lord Nicholls said that newspapers can demonstrate responsibility by:

- Reflecting the seriousness of the information in their decision-making
- Showing the public interest in the information
- Using reliable sources of information
- Taking steps to verify that information
- Showing the urgency of sharing the information
- Asking alleged persons for comment
- Publishing alleged persons’ comments
- Using the right tone in sharing the information
- Honest timing of the publication.

Defamation reform proposals - ယခုအချက်အလက်များအားနည်း၍ ၊ မိသားစုတို့အား ပြောပြချက်တင်ခြင်း - Page 16
• ပြည်သူဘာသာရေးဌာနအားလုံးကို ပြုလုပ်ခြင်း အများအားဖြင့် အချိန်ကို ဖော်ပြခြင်း
• အမေရိကန်အစိုးရအစား ပြည်သူဘာသာရေးဌာန ဖော်ပြခြင်း
• ဗုဒ္ဓဗေဒအတွက် ပြည်သူများ အနေဖြင့် ပြုလုပ်ခြင်း
• ပြည်သူဘာသာရေးဌာနအား တို့ပြုလုပ်မှု ဆောင်ရွက်ခြင်း
• ပြည်သူဘာသာရေးဌာနအား အများအားဖြင့် အနေဖြင့် ပြုလုပ်ခြင်း

Defamation reform proposals - ဗုဒ္ဓဗေဒအတွက် ပြည်သူများ အနေဖြင့် ပြုလုပ်ခြင်း - Page 17
Other countries’ defamation reforms

Many democratic and transitional countries have reformed their defamation laws in order to protect freedom of expression. Each can provide lessons for defamation reform in Myanmar. Reform processes in the following countries are particularly inspirational because they share with Myanmar very similar common law systems and similar colonial penal codes.

**Sri Lanka**

In 1998, the Sri Lankan government re-imposed media censorship and increased prosecutions of journalists and human rights defenders in order to cover up what the government was doing, including in its response to growing conflict. Two years later, a Sri Lankan newspaper editor who was facing 11 defamation charges appealed to the UN, raising international attention to the government’s widespread misuse of defamation laws to stifle criticism.

In 2001 elections, the Sri Lankan people voted in a new government which promised to reverse the country’s democratic decline. Within a year the new government had completely decriminalised defamation laws to show everyone that they were different from previous dictators. Sri Lanka only has civil defamation laws now.

**United Kingdom**

Many advanced democracies still have old criminal defamation provisions in their laws. However, in practice they are rarely or never used because their people no longer accept the idea of criminalising defamation. For example, the UK had criminal defamation provisions until 2013 but the provisions had not been used for 30 years.

**Myanmar**

In 2009, the military government’s widespread misuse of defamation laws to stifle criticism began to attract global attention, including from the UN. In the aftermath of a coup in 2010, Myanmar’s new government announced its commitment to reforming the country’s media law. In 2012, the government introduced a new system of online reporting, which has been widely accepted by the international community.

**Advanced**

Defamation reform proposals - မြန်မာနိုင်ငံနှင့် အသုံးပြုသူများ - Page 18
In 2010, a public campaign to reform defamation laws was launched following increasing reports that they were being misused, particularly by powerful business owners. Although the UK’s criminal defamation provisions had not been used for many years, campaigners wanted full decriminalisation because the potential threat still resulted in a chilling effect on freedom of expression.

Senior journalists and scientists joined human rights defenders to promote the campaign, which reminded people that the UK still needed more democratisation. After a year of public pressure and public consultations, the Ministry of Justice introduced a draft defamation bill in 2011. The defamation bill proposed decriminalising defamation and went to parliament in 2012 and after significant consultation was adopted in 2013. The UK only has civil defamation laws now.

India

In 2011, the Indian National Congress government announced its interest to follow Sri Lanka’s lead and decriminalise defamation. Two years later, the Minister of Information and Broadcasting announced his support for decriminalisation. India’s Law Commission published a consultation paper in 2014 which encouraged decriminalisation too.

Unfortunately, a different government without any commitment to reform was elected in 2014. Campaigners redirected their attention to the Indian Supreme Court in a bid to get the Penal Code provisions repealed. The Supreme Court announced in its 2016 decision that while it could not repeal the provision, it did believe that nobody should be prosecuted for, “calling a government corrupt or unfit”.

In 2017, backbench parliamentarians put forward the, “Right to Protection of Speech and Reputation Bill” to decriminalise defamation. The Indian National Congress leader, Rahul Gandhi, made a manifesto commitment for the 2019 elections that Congress would decriminalise defamation if elected.
The Maldives held its first-ever democratic elections in 2008 following the adoption of a new constitution. The people elected the democratic campaigner, Mohamed Nasheed as the country’s first elected president. The government wanted to demonstrate to the people that it was different from the previous dictatorship. Within a year, the government adopted a new law to completely decriminalise defamation.

Unfortunately, in 2012 a coup forced out the elected president and returned the authoritarian government again. They adopted the, “Anti-Defamation and Freedom of Expression Act” to re-criminalise defamation because it was their greatest tool to threaten and harass the media and civil society.
General reforms to deal with forthcoming challenges

Myanmar is likely to face new and growing challenges in its application of defamation laws. These forthcoming challenges have been seen in other similar countries which have responded to them in different ways. Reform of the defamation framework should factor in and prepare for them. They include:

**SLAPPs**

"Strategic Lawsuits Against Public Participation" (SLAPPs) are a malicious method of using defamation laws to bully and promote self-censorship. Complainants do not expect their complaint to succeed in court. Instead, their aim is to intimidate and silence others. Usually the complainant is richer than the defendant and can afford long and complex cases. Defendants withdraw or apologise to escape from the case. SLAPPs are banned in many countries and courts are expected to identify and dismiss cases that have no legal merit and are clearly intended to bully.

**Business abuse**

Some unscrupulous businesses combine their sizable legal budgets with unfair and punitive defamation laws to bring large or repeated cases, with the intention of punishing critics and encouraging self-censorship. As a result, such businesses become free to act unethically or unlawfully without the public being properly informed. Anybody who tries to raise awareness is likely to be bankrupted or seriously inconvenienced. Some countries deal with this issue by requiring businesses to get prior permission before bringing a defamation case. Other countries have added a threshold for “substantial financial loss” whereby complainants must demonstrate significant harm.
Proponents of criminal defamation laws often argue that civil courts are unaffordable to many members of the public who cannot afford to pay for lawyers. Fulfilling the right of access to justice for everyone regardless of their means is an important aim. However, the vast majority of criminal defamation complaints are made by powerful people, not by poorer or marginalised people. Such powerful people often have adequate means to pay for their own lawyers, so it is unfair that their case is supported by State-funded prosecutors, which diminishes the State’s budget.

Early test of harm

Complainants often bring cases based on trivial claims in which there was little to no harm caused. Often in these cases the only harm is to personal feelings for example from jokes, insults or parody, and the complainant cannot demonstrate the harm caused in any measurable way. In some countries, courts may determine whether a test of harm is satisfied before the majority of the court proceedings, so that the court can quickly dismiss cases which have resulted in little to no harm.

Apologies and corrections

Much of the harm caused by defamation can be reduced or removed altogether if it is followed by a quick correction or apology. In many countries, this quick response is recognised in defamation laws and their application by courts. If a defendant quickly corrects false information or corrects and apologises, courts take that into account when deciding on the case. However, a defendant should never be forced to make an insincere correction or apology.

Procedural reform

Complainants often intentionally misuse procedures to increase the inconvenience and cost of cases. This encourages self-censorship as people fear being caught up in a protracted and costly case. These tactics include procedural tricks that are not in the defamation law. Many countries have tried to balance legal reform with procedural reform, recognising that improvements in both are necessary in order to ensure defamation laws are not misused.
အသေရဖျက်မှုဆိုင်ရာ ဥပေဒများ - ပြပ်ပေးလဲေရးအဆိုး ခွဲခြားချက်များ - ပြပေး/ချက်များ

မိုးချောင်းပေးသည် (အစည်းအဝေးမှားသောကြောင့်)

ဆွဲခြင်းမှားသော ပညာရေးလုပ်ငန်းများကို အသေချင်းလိုအပ်သည်

ပြုလုပ်မှုများကို အကူအညီနေသည်။ ပြုလုပ်ခြင်းများနှင့် မိုးချောင်းပေးခြင်း

စာရင်းပြန်စိုးချင်သည် အဆိုတော်များကို အကူအညီဖော်ပြထားရေးအတွက်

ဆင်ဆာြပန်ြဖတ်ကျော်ကြားမှုများကို အကူအညီဖော်ပြထားပေးရမည်

လွတ်လပ်ရေးစားမှုများကို အကူအညီဖော်ပြထားရမည်။

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Reform options in Myanmar

Myanmar has different options to reform its defamation laws in order to make them acceptable in a democracy. Each option has its benefits and challenges.

Option 1: Adopt a Civil Defamation Law

The first option is to adopt a Civil Defamation Law. A Civil Defamation Law is a mechanism for people whose reputations have been harmed to get compensation. A Civil Defamation Law is the preferred option.

Benefits

- The law would repeal all criminal defamation provisions in Myanmar’s six defamation laws. It is fast and effective because it instantly repeals those provisions without needing to amend each law individually.
- Any compensation awarded by the court goes to the plaintiff rather than to the State. This enables the plaintiff to repair their reputation with the compensation that they receive.
- It reduces State expenditure because the State is less involved in the case. The State does not need police to investigate the allegations, prosecutors to fight the case in court, or prisons to house people.
- It encourages people to solve conflict themselves, rather than involve the punitive State.

Challenges

- Adopting a full law takes time. It should take time to ensure a proper process of open consultation that has involved all stakeholders.
A Civil Defamation Law can be misused by powerful people to bankrupt journalists, human rights defenders, and others who use their right to freedom of expression. Therefore a law must be drafted well in order to ensure it is not misused. It should include all the defences necessary under democratic standards and there must be an appropriate limit on damages.

Option 2: Add stronger defences to the Penal Code

The second option is to add stronger defences to the Penal Code. This would require amending Article 499 to revise the exceptions listed within to fully include those defences listed in international democratic standards. They include the defences of: truth, opinion, reasonable publication, repeating the words of others, innocent defences listed in international democratic standards. Penal Code. This would require amending Article 499 to order to ensure it is not misused. It should include all the defences necessary under democratic standards and there must be an appropriate limit on damages.

Benefits

- Stronger defences would enable defendants to defend themselves when arrested or charged, so that cases are either dropped by the police and prosecutors or rejected by the courts.
Challenges

- The chilling effect on journalists, human rights defenders and others in Myanmar comes not only from the threat of imprisonment, but also from the threat of being investigated and prosecuted by a heavy-handed State. Criminal defamation cases are notoriously slow and inefficient in Myanmar. Adding stronger defences may not result in this changing.
- In practice, it is unclear whether the Penal Code defences are properly considered in cases filed under the other five laws. If the current Penal Code defences are not properly used at this time, then strengthening them may not have the desired effect.
**Option 3: Remove all prison sentences**

The third option is to remove all prison sentences from Myanmar’s criminal defamation laws. This would require a bill to amend the laws so that in each the defamation provision is removed from the list of crimes punishable by prison, leaving it only punishable by fines.

**Benefits**

- Imprisonment for defamation is extremely disproportionate in all cases. Removing prison sentences from Myanmar’s six criminal defamation laws would significantly reduce the chilling effect that the laws have on journalists, human rights defenders, and others exercising their right to freedom of expression.

- Replacing imprisonment with proportionate fines would also have a less negative effect on freedom of expression because defendants would not be imprisoned and therefore would be able to continue to work as journalists etc. after being convicted.

- The replacement of imprisonment with proportionate fines would reduce the State’s expenditure on prisons.

**Challenges**

- A criminal record for defamation is still disproportionate. Criminal records affect a person negatively such as by undermining their social status or damage their ability to find employment.

- A large and disproportionate fine could be problematic to a defendant if they do not have the ability to pay it. If they do not pay it, they would still be threatened with imprisonment for failure to pay.

- The chilling effect on journalists, human rights defenders and others in Myanmar comes not only from the threat of imprisonment, but also from the threat of being investigated and prosecuted by a heavy-handed State.

- Reforming six laws takes significant time and political energy to achieve.
Option 4: Limit to “Deliberate and serious defamation”

The fourth option is to amend the six criminal defamation laws so that they apply only to “deliberate and serious defamation”. This would require a bill to amend the laws so that in each, the phrase, “deliberate and serious” is added before each, “defamation”.

Benefits

- Adding “deliberate” to the law creates a threshold where it must be proved that a defendant intentionally defamed a complainant. The prosecution would need to show that the defamation was malicious, and not just accidental or a fair comment on what was known at the time. This would significantly reduce the number of cases so that only the worst examples got to court.

- Adding “serious” to the law creates a second threshold where it must be proved that the defamation resulted in real harm. The prosecution would need to measurably prove that harm, rather than just assuming some harm had occurred. This would also reduce the number of cases, and in particular remove cases in which feelings were harmed rather than actual reputations.

Challenges

- Criminal defamation laws would still exist in Myanmar, which is against democratic standards.

- There is a risk that the two thresholds are ignored or weakened in courts over time. This has been seen in relation to the defamation defences in the Penal Code which in practice seem to have been ignored or weakened in courts over time.
Reforming six laws takes significant time and political energy to achieve.
Conclusion

This report is the third in a series on defamation. The first showed how defamation laws are being misused in Myanmar. The second explained the international democratic standards that Myanmar should be aiming for. This third report outlines how other similar countries reformed their laws and proposes options that the Myanmar government could take.

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.

In Sri Lanka and the Maldives, new democratic governments used defamation reform as their signature policy to highlight their difference from their authoritarian predecessors. In the UK and India, defamation reform was a recognition of the development of democratic standards and the need to address injustices.

The Myanmar government could learn from all. Myanmar is still at the beginning of its transition and the 2020 elections in particular are an excellent opportunity for the government to lay out its plans for the coming years.

Recommendations

This report has proposed options, each of which has its benefits and challenges. The government should commit to one:

- Option 1: Adopt a Civil Defamation Law
- Option 2: Add stronger defences to the Penal Code
- Option 3: Remove all prison sentences
- Option 4: Limit to “Deliberate and serious defamation”
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- Law reform proposals - ဗိုလ်ချုပ်ရေးအစိုးရ

For further information on 'hate speech' and incitement see: http://freeexpressionmyanmar.org/incitement-hate-speech

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


2 See “66(d): No real change” available at: http://freeexpressionmyanmar.org/66d-no-real-change/


4 Article 12 of the UDHR, and Article 17 of the ICCPR.

5 Laws are normally concerned with objective criteria and therefore “honesty” is inappropriate as it relates to subjective feelings. However, during the drafting of Article 12 and Article 17, “honesty” was included to refer to an objective measurement of moral standing, in addition to “reputation” covering professional and social standing. Today, “reputation” is regarded as encumbering moral, professional, and social standing, particularly this article’s domain.

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

7 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).

8 Article 19 of the UDHR, and Article 19 of the ICCPR. “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

9 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).

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, GC4, para. 28. "The States Parties to the Covenant..." (ICPR, 1976) states the applicability of these international human rights documents to Myanmar are found in: Article 27 (GC4, para. 32.

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, GC4, para. 32.  The protection of the intergenerational harmony of any given tradition should not be limited through the same standard as that of other traditions. The protection of the intergenerational harmony of any given tradition should not be limited through the same standard as that of other traditions. The protection of the intergenerational harmony of any given tradition should not be limited through the same standard as that of other traditions. The protection of the intergenerational harmony of any given tradition should not be limited through the same standard as that of other traditions.

12 See the joint statement: Repeal 66(d) to protect legal constitutionality, non-duplication and clarity


14 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. A person is not deemed to have defamed another merely by making any false statement of fact.

15 Article 500. Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both. Where the defamatory matter is published with the intention of ridiculing the person defamed, the term of imprisonment shall be extended to five years.
Article 501: Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Article 502: Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

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


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:

(a) 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;

(b) committing any one of the following: (i) causing any person to be in a state of panic; (ii) any person to be injuriously affected in the mind; (iii) causing or attempting to cause public antipathy, hatred, or ill-will, or excite or attempt to excite enmity or hatred between different classes of persons,

Article 503: Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall, in addition to imprisonment for a term which may extend to two years, or with fine, or with both.

Article 504: Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall, in addition to imprisonment for a term which may extend to two years, or with fine, or with both.

Article 505: Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall, in addition to imprisonment for a term which may extend to two years, or with fine, or with both.

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Defamation reform proposals

Legal options for democratising Myanmar’s defamation laws

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