66(d): No real change

An analysis of complaints made before and after the 2017 legal amendment

December 2017
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 build evidence of violations and promote appropriate and needed reforms. See:

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

FEM’s partners

FEM’s partners for this report were Myanmar ICT for Development (MIDO) and the Research Team For Telecommunications Law.

This project was delivered in cooperation with the Heinrich-Böll-Stiftung e.V.

The cover image is an algorithmic visual representation of the internet. Copyright to Mike Lee www.opte.org/maps/
66(d): No real change

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Over the past two years, Article 66(d) has been the tool of choice for those in positions of power who want to punish those who are trying to hold them accountable. The government’s amendment of 66(d) in August 2017 has had no discernible impact on this.

This report explains why 66(d) violates the right to freedom of expression and establishes clear evidence of how 66(d) is still being used to censor legitimate debate.

Key findings include:

- The majority of cases under 66(d) are powerful people complaining about those who criticise them.
- Most complaints under 66(d) are based on expression that cannot be defamatory because there is no assertion of fact. Most expressions are unflattering opinions. For the cases that could potentially be defamation, the courts do not use the definitions or defences in the Penal Code.
- 66(d) complaints have continued since the August 2017 amendment removed three grounds for complaint. Those three grounds were never used anyway so the amendment has no discernible impact on the scope of 66(d).
- Defendants are always convicted and sentences are disproportionately harsh. Every court has given a prison sentence and none has given a fine.
- Convictions are made on the admission of minimal, untested, and unreliable evidence. Unfortunately, it is unclear whether courts recognise this or are trying to improve it.
- People with legitimate complaints, such as women who are facing gender-based violence online, are forced to use this inappropriate law because no other exists.
FEM’s expectation is that this evidence will be used by a range of stakeholders in civil society and in government to continue the process of reforming the Telecommunications Law and repealing 66(d).

Recommendations

**Law**

- Repeal Article 66(d) of the Telecommunications Law.
- Amend the other problematic articles in the Telecommunications Law, namely Articles 4, 5-8, 18, 40, 68(a) and 75-77.
- Amend other problematic laws restricting legitimate online expression, including Articles 33-34 of the Electronic Transactions Law.
- Amend the Penal Code to decriminalise defamation. Adopt a civil defamation law instead that includes public officials must tolerate greater criticism, public bodies including the military cannot be defamed, and all defences in international standards.
- Adopt a law or amend current laws to make a framework for testing the authenticity, reliability, and admissibility of electronic evidence.
- Adopt a law on gender-based violence.
- Carry out reviews of all laws and bills to assess whether they are necessary and whether they duplicate or conflict with other laws. In particular, ensure that all criminal provisions are in the Penal Code, rather than other laws.
- Carry out effective multi-stakeholder consultations for each new law or amendment.

**Judiciary and courts**

- Impress on judges, through internal guidelines and training, the importance of judicial independence, including the balanced treatment of expert testimony.
• Issue internal judicial guidelines for testing the authenticity, reliability, and admissibility of electronic evidence.
• Train judges on international standards relating to freedom of expression and electronic evidence.
• Conduct a review of conviction rates and sentencing with the intention to develop internal guidelines on appropriate sentencing.

**Government and public officials**

• Stop making complaints under 66(d) for criticism of your conduct, or your character in doing that conduct. Issue internal guiding saying this.

**Myanmar Press Council**

• Use the evidence in this report to push for full repeal of 66(d).
• Monitor complaints made under 66(d) and when journalists are defendants, make public statements and give defence lawyers expert testimony on defining defamation and unflattering opinion.

**Civil society, media**

• Use the evidence in this report to push for full repeal of 66(d).
• Stop making complaints under 66(d). Using the law reinforces, justifies and legitimises it.
• Train editors and journalists on laws and legal principles relating to the limitation of freedom of expression such as defamation.
• Examine complaints under 66(d) to ensure that articles and stories properly identify whether cases could potentially be defamation or just intolerance of unflattering opinion.

**International community**

• Use the evidence in this report to push for full repeal of 66(d).
• Support programmes advocating for full repeal of 66(d).
• ဖိန်နေင်သည့်စစ္မွန္သည့်စာပါသွင်းသည့်အချက်များကိုအေထာက်အပေးသင်္သည်။

• ပမာဏများအပါအဝင်လူဦးရေများအားအေထာက်အပေးသင်္သည်။

• (လူဦးရေများအားဖြင့်)ဖျင်သွင်းသွားသောကျိုးကွဲများကိုစမီးသာသောအချက်များအားအေထာက်အပေးသင်္သည်။

• Support programmes to train public officials (including MPs) and the general public (through education curriculum and public information campaigns) in digital literacy and tolerance of diversity.
Internet access and mobile phones are comparatively new in Myanmar and the country remains one of the most disconnected countries in the world. Until 2010, the military government had strict controls on any technology that people could use to communicate with one another. Since 2010, access to the internet has grown from 1% of the population to 25% and many more people now rely on it, particularly social media, for gathering information and communicating with each other.

<table>
<thead>
<tr>
<th>Statistics</th>
<th>Myanmar</th>
<th>Asia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average years of schooling % of secondary enrolment</td>
<td>4.7</td>
<td>51%</td>
</tr>
<tr>
<td>Mobile phone SIMs per 100 people</td>
<td>93</td>
<td>99</td>
</tr>
<tr>
<td>% of people using the internet</td>
<td>25%</td>
<td>42%</td>
</tr>
<tr>
<td>% of households with internet</td>
<td>24%</td>
<td>46%</td>
</tr>
<tr>
<td>Internet bandwidth per person (Kbit/s)</td>
<td>6.4</td>
<td>48</td>
</tr>
</tbody>
</table>

The internet has become a global public space that is rapidly growing in importance as people can openly communicate and share with one another. As the internet grows, old hierarchies and power-structures, including governments, react to being challenged with new laws and practices. In Myanmar, the internet is regulated under a legal framework that is restrictive, stagnant, and largely unsuitable for a democracy in the twenty-first century. Article 66(d) of the Telecommunications Law (2013) has become the most notorious symbol of the unsuitability of the legal framework, regularly appearing in the media and online as a tool to repress and punish those speaking truth to power.
ဗိုလ်ချုပ်အား ဥပဒေအရ ပါဝင်နိုင်သည်ကို ပိုမိုသော ပရိုဂရမ်များ ကျော်ကြားခြင်းမှ အချက်ရှိသည့် စီးပွားရေးအဖွဲ့အစည်းများကို အားထားပါသည်။ ငါကြီးများသော ဥပဒေများကို ပြန်လည်ချောင်းခြင်းမှ အများသော်လည်း အားထားခြင်းမှ ပြန်လည်ချောင်းခြင်းသည် အများသော်လည်း ထရုတ်ပြန်သည် 

66 Whosever convicted of any of the following offences is liable to an imprisonment not exceeding two years or a fine or both ... (d) Extorting, defaming, disturbing or threatening a person using a telecommunication network.
- Telecommunications Law (as amended in 2017)

2017 amendment

The National League for Democracy (NLD) government announced in 2017 its intention to amend Article 66(d) in response to widespread public criticism of how it was being used. Civil society organisations specialising in digital technology, media, and freedom of expression formed a broad coalition to urge the government to completely repeal 66(d) as it fundamentally contradicted with Myanmar's transition to democracy. Unfortunately, the government was unwilling to repeal 66(d) and instead made only small changes, including reducing the number of grounds for making a complaint, lowering the prison sentence, increasing the likelihood of bail, and stopping third parties from making a complaint.

The report

The coalition of civil society organisations urged the government to completely repeal Article 66(d) because they believed that minor tweaks would not stop a fundamentally anti-democratic law from being used to repress and punish those speaking truth to power. However, despite the coalition’s collective expertise and months of government advocacy and multi-stakeholder meetings, the government did not repeal.

The coalition learned that there is a lack of evidence to prove to the government and other stakeholders that 66(d) is fundamentally undemocratic, easily used to censor, and needs complete repeal. This report seeks to fill that gap by presenting clear, methodological research on how 66(d) has been used.
Structure

The report is formed of four sections: introduction; background on freedom of expression and an analysis of Article 66(d) under international standards; findings of the research; and conclusion. The findings section is broken down into an analysis of: the complainants; the defendants; the relationship between both parties; the grounds for the complaint; how the cases were resolved; and procedural issues. Recommendations can be found in the executive summary.

Methodology

FEM used a mixture of research methodologies, including primary and secondary research, desk and field-work, qualitative and quantitative data, and structured and unstructured interviews. Research was carried out over the past year, but particularly between May 2017 and November 2017.

Scope

The report covers the period of time between the adoption of the law and the report’s publication, November 2015 to November 2017. The report covers all cases nationwide.

Limitations

The report includes only those cases that FEM has been able to identify during the research process. Despite the supportive network of human rights defenders and journalists providing information from across the country, the general opaqueness of police and courts may mean that some cases will have been unintentionally overlooked.
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 in their countries. This commitment can be found in Article 19 of the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights, and in the ASEAN Human Rights Declaration. The right to freedom of expression is included under Article 354 of the Myanmar Constitution.

The right to freedom of expression is precisely defined in international law which says that:

- It belongs to everyone regardless of their nationality or other background.
- It includes the right to seek, receive, and impart information.
- It includes ideas of all kinds, from political to media, to cultural expression, or even to jokes.
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 there is a clear and precise law – public officials cannot just censor as they like.
- If 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.
- If the limitation is necessary in a democratic society to address a pressing need, and only if the limitation is proportionate to the harm caused.

The Telecommunications Law

All countries have laws that regulate telecommunications to ensure they are efficient and effective. As telecommunications include mobile phones, internet, email and social media, any regulation must be careful not to undermine the right to freedom of expression.

Myanmar’s Telecommunications Law includes the objectives to contribute to the development of Myanmar, provide legal protection to companies and users, and supervise telecommunications to ensure the stability and security of the state. It establishes the Ministry of Transport and Communication.
Unfortunately, however, the Telecommunications Law violates the right to freedom of expression by including many undemocratic rules and creating a non-independent government regulator.

The Law gives the Myanmar security services disproportionate surveillance powers and harshly criminalises users for what they say online, without any of the safeguards for freedom of expression and privacy that are necessary and expected in a democracy.

**66(d)**

Articles 4, 5-8, 18, 40, 66, 68 and 75-77 of the Telecommunications Law all undermine the right to freedom of expression, but 66(d) is one of the most problematic. Article 66(d) as amended in 2017 includes four different criminal offences - extorting, defaming, disturbing and threatening.

**66. Whosoever convicted of any of the following offences is liable to an imprisonment not exceeding two years or a fine or both … (d) Extorting, defaming, disturbing or threatening a person using a telecommunication network.**

- Telecommunications Law (as amended in 2017)
66(d) and the three-part test

Article 66(d) violates the right to freedom of expression because it does not pass the three-part test.

Part one of the test – clear and precise law

None of the four crimes listed under 66(d) are acceptable under international law because none are defined. Without a clear definition, they are vague and can be easily misused and abused.

Part two – legitimate aim

Three of the crimes listed under 66(d) – extortion, defamation and threatening – are regarded in international law as legitimate aims for limiting the right to freedom of expression. However, the crime of "disturbing" is not acceptable.

Part three – necessary and proportionate

None of the four crimes listed under 66(d) are regarded as necessary under international law. It is not necessary to include the criminal offences of extortion, defamation, or threatening in 66(d) because each one is already included in Myanmar’s Penal Code. Not only are these three already included in the Penal Code, but the Penal Code versions are far better – they are more detailed, more clearly defined, and include some defences.

The crime of “disturbing” is not necessary in a democracy because the most valuable expression, such as allegations of corruption or wrongdoing, would be regarded as highly disturbing to the wrongdoer!
66(d) and defamation

According to international law, the right to freedom of expression can be limited to prevent defamatory expression. However, any limitation must still pass the three-part test. This means that the limitation must be clearly written in law and be proportionate and necessary in a democracy.

Limitations aiming to prevent defamation have been examined in detail and extensively tested by international courts for many years. As a result, international standards on defamation are comprehensive. The most relevant international standards include:

- Defamation is defined as an unwarranted attack on someone’s reputation - a false assertion of fact. Unflattering opinions may be offensive or insulting, but they are not statements of fact so are not defamatory.
- Reporting the words of others, unknowingly publishing defamatory statements, or reasonably reporting something thought at the time to be correct, are not defamation.
- Defamation should not be a criminal offence. Imprisonment for defamation is never proportionate in a democracy.
- Public bodies, including ministries, local government and the military, should not be able to complain or sue for defamation under any circumstances. They have ample tools to respond to criticism and legal action is an improper use of public money.
- Public officials including administrators, MPs and the president must tolerate more criticism than normal people. Public officials choose to serve the public, take public salaries, and must therefore tolerate higher levels of scrutiny.
66(d) and offensive expression

As none of the four crimes listed under Article 66(d) are defined in the law, the police, prosecutors and courts are potentially able to criminalise a huge range of expression which would normally be protected under international law.

One particular type of expression, which the police, prosecutors and courts seem to regularly include under the vague crimes listed in 66(d), is unflattering expression, often called "offensive" or "insulting".

Although nobody likes to be offended, protecting people from offense is not listed in the three-part test as a legitimate aim for limiting the right to freedom of expression.

This is because offense is a highly subjective concept that is almost impossible for any court to measure in an objective manner. For example, an elderly rural man may consider swear words to be offensive but regard gender-related words as acceptable, whereas a young urban woman may believe the complete opposite!

Offence is also excluded from the list of legitimate aims because democracies have seen that it is often abused by the powerful to suppress people. Powerful public figures, including political, business, and religious leaders, have often claimed to be offended when facing legitimate criticism about their beliefs, performance, corruption or wrongdoing. This criticism is a fundamental part of democracy and international law says it should not be inhibited.  

Although offence is not explicitly included in the three-part test, many cases have been brought before international courts to ask whether restricting offence can be regarded as acceptable under the aim of protecting the rights of others or protecting public morality.
One of the most important international court decisions was the 1976 case of Handyside versus the United Kingdom, in which the international court said: "[The right to freedom of expression] is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population\(^8\).

The court said that tolerating ideas and information that may offend, shock or disturb some people is necessary because without such tolerance, pluralism and broadmindedness, "there is no democratic society\(^9\)."

For these very reasons, it is clearly established under international law that the right to freedom of expression, "embraces even expression that may be regarded as deeply offensive\(^{10}\)."
In October 2016, a village head in Lepadan made a complaint under 66(d) against a DVB journalist and a local villager who had posted online a video recorded by a DVB journalist of interviews about local corruption. The case is still awaiting trial.

FEM has identified 106 cases of criminal complaints made under Article 66(d) of the Telecommunications Law between November 2015 and November 2017.

Of these, 11 complaints were made when the USDP government was in power and 95 complaints were made under the current NLD government.

<table>
<thead>
<tr>
<th>USDP government</th>
<th>NLD government</th>
</tr>
</thead>
<tbody>
<tr>
<td>20% (5 months)</td>
<td>NLD was in government for 80% of the research period (20 months)</td>
</tr>
<tr>
<td>11%</td>
<td>90% of 66(d) cases identified took place under the NLD government</td>
</tr>
</tbody>
</table>

After the Telecommunications Law Amendment was adopted in August 2017, FEM has identified 9 new criminal complaints made under Article 66(d).

The complainants

In October 2016, a member of the NLD’s Central Executive Committee made a complaint under 66(d) against a Monywa-based member of the NLD who had reposted an unknowingly fake NLD announcement concerning the Committee Member’s resignation. The complaint was made in October 2016 and the NLD member received 6 months imprisonment.
The people who made complaints under Article 66(d) are not representative of the diverse Myanmar public. 75% of complainants came from just eight backgrounds: public service, political parties, military, business, media, religion, arts, and activism.

FEM is concerned that most complainants using 66(d) were in positions of power, and that the majority of complainants were related to the state\textsuperscript{11}.

- 51% of complainants were closely related to the state (public officials, political party-related, and military).
- At least 31% of complainants receive state salaries as state employees (public officials and military).
- 23% of complainants directly represent the state as public officials, including quarter administrators, police officers, and executive-level officers.
- 55% of the complaints made during the period of USDP government were made by members of the police or military, on behalf of alleged victims who were senior government officials.

\begin{tabular}{|c|c|}
\hline
\textbf{Complainants} & \\
\hline
\textbf{Type} & \\
\hline
Public officials & 23 \\
Political party-related (leaders, members, and supporters) & 21 \\
\textit{NLD (National League for Democracy)} & 17 \\
\textit{USDP (Union Solidarity and Development Party)} & 2 \\
\textit{DPP (Diversity and Peace Party)} & 2 \\
Military & 9 \\
Business-related persons & 10 \\
Journalists & 7 \\
Religious supporters & 6 \\
Arts-related persons (poets, writers, directors, actors) & 3 \\
Human rights defenders & 2 \\
\hline
\end{tabular}
The number of women that have made complaints under 66(d) has increased under the NLD government, but most complainants were men.

### The defendants

In January 2017, a military colonel made a complaint under 66(d) against the chairperson of a Pathein-based human rights defenders’ group who posted a live video on Facebook of a street theatre performance called "No more war". The case is ongoing.

The people who face complaints under Article 66(d) are not representative of the diverse Myanmar public. 67% of defendants came from just seven backgrounds: political parties, human rights activism, media, arts, public service, religion, and business. 0% of defendants are members of the military. FEM is concerned that most 66(d) defendants come from backgrounds where they are supposed to be holding the government and other powerful people to account.

- 61% of defendants were from backgrounds where they are actively raising awareness of issues and holding others to account (political party-related, journalists, religious supporters, arts-related persons, and human rights defenders).
• 37% of defendants were from backgrounds that commonly face all forms of censorship and without which we would never know of corruption and wrongdoing (human rights defenders, journalists, and arts-related).

<table>
<thead>
<tr>
<th>Defendants</th>
<th>Type</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Political party-related (leaders, members, and supporters)</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>NLD (National League for Democracy)</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>USDP (Union Solidarity and Development Party)</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>NDF (National Democratic Force)</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>DPP (Diversity and Peace Party)</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Human rights defenders</td>
<td>19</td>
</tr>
<tr>
<td></td>
<td>Journalists</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>Arts-related persons (poets, writers, directors, actors)</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>Public officials</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Religious supporters</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Business-related persons</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Other people (no professional or other related status)</td>
<td>35</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>106</strong></td>
</tr>
</tbody>
</table>

The number of women facing complaints under 66(d) has increased under the NLD government, but most defendants were men.
Relationship between the complainant and the defendant

In October 2016, a Bago-based member of the NLD made a complaint under 66(d) against a local USDP party member who had posted a photo of Aung San Suu Kyi online with the words "She is dead in a sitting position" and a phrase meaning that the people had become like dogs after the NLD gained power. The USDP member received 6 months imprisonment.

Complaints made under Article 66(d) often show similar offline conflictual relationship between complainants and defendants. Only 29% of complaints show a general conflict or argument between normal members of the public.

- 55% of complaints show powerful people trying to censor or punish weak people for criticism or allegations.
- 9% of complaints show private conflict or abuse based on family or sexual relations.
- 7% of complaints show conflict or revenge between supporters of opposing parties, or competition between supporters within one party.

FEM is concerned that 66(d) has become a retaliatory tool that can be easily used to continue or extend offline conflict that has not been effectively resolved through other means.

<table>
<thead>
<tr>
<th>Relationships</th>
<th>Type</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power relationship</td>
<td></td>
<td>58</td>
</tr>
<tr>
<td>Competing political parties' relationship</td>
<td></td>
<td>6</td>
</tr>
<tr>
<td>Internal political party relationship</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>General conflict relationship</td>
<td></td>
<td>30</td>
</tr>
</tbody>
</table>
Private conflict or abuse relationship | 11
---|---
Total | 106

**Grounds for the complaint**

In August 2016, a NLD party member made a complaint under 66(d) against a Myawaddy-based local person who had posted online saying "I ask if that foolish president is damn crazy" after the President dissolved local development committees. The local official was sentenced to 9-months imprisonment.

Complaints made under Article 66(d) are based on one of several grounds listed in the article. The 2017 Telecommunications Law Amendment reduced the number of grounds from seven to four.

<table>
<thead>
<tr>
<th>Original grounds</th>
<th>Grounds after amendment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Extorting</td>
<td>Extorting</td>
</tr>
<tr>
<td>Defaming</td>
<td>Defaming</td>
</tr>
<tr>
<td>Disturbing</td>
<td>Disturbing</td>
</tr>
<tr>
<td>Threatening</td>
<td>Threatening</td>
</tr>
<tr>
<td>Bullying</td>
<td></td>
</tr>
<tr>
<td>Making wrongful restraint</td>
<td></td>
</tr>
<tr>
<td>Exerting undue influence</td>
<td></td>
</tr>
</tbody>
</table>

Many complainants and defendants were unaware of which of the specific grounds their complaint falls under. Police and prosecutors do not give complainants clear advice on the grounds. Defence lawyers do not generally inform defendants either.

- 93% of complaints are made under the grounds of defamation.
- 4% of complaints are made under the grounds of threatening.
No complaints were made under the three grounds that were removed in the 2017 amendment: bullying, wrongful restraint, and exerting undue influence. FEM is concerned that as none of the removed grounds were ever used anyway, the amendment will therefore have no effect on the use of 66(d).

### Grounds for the complaint

<table>
<thead>
<tr>
<th>Type</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Extorting</td>
<td>1</td>
</tr>
<tr>
<td>Defaming</td>
<td>99</td>
</tr>
<tr>
<td>Disturbing</td>
<td>1</td>
</tr>
<tr>
<td>Threatening</td>
<td>5</td>
</tr>
<tr>
<td>Bullying</td>
<td>0</td>
</tr>
<tr>
<td>Making wrongful restraint</td>
<td>0</td>
</tr>
<tr>
<td>Exerting undue influence</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>106</strong></td>
</tr>
</tbody>
</table>

### Defamation

Article 66(d) does not include a definition of defamation. However, it is possible to analyse the complaints made under the grounds of defamation to see if the expression included any assertion of fact, which is the underlying factor of any definition of defamation.

- 66% of complaints were based on expression that did not include any assertion of fact and therefore cannot be defamation.
- 33% of complaints were based on expression that included some assertion of fact, and therefore could potentially be defamation.

FEM is concerned that the lack of definition in 66(d) means that any expression can be called “defamation”, regardless of whether it includes any assertion of fact. If defamation was properly defined in 66(d), at least two-thirds of all complaints would have been rejected.
Complaints on the grounds of defamation

<table>
<thead>
<tr>
<th>Type</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Potentially defamatory expression - includes an assertion of fact</td>
<td>33</td>
</tr>
<tr>
<td>Non-defamatory expression - only opinion and does not include</td>
<td>66</td>
</tr>
<tr>
<td>a assertion of fact</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>99</td>
</tr>
</tbody>
</table>

FEM is also concerned that there is no evidence that those expressions that included some assertion of fact were properly assessed by the court to see if they were defamatory. For example, although it is preferable that each expression would have been assessed under international standards, expression could also have been assessed under Article 499 of the Penal Code. Article 499 includes both a definition of defamation and 10 defences. Defence lawyers were ignored when referring to Article 499 and when presenting the court with evidence backing up the defendant’s assertions of fact. When compared to the defences in Article 499:

- 9% of complaints based on expression that included assertions of fact would be regarded by most people as evidentially true.
- 52% were opinions on a public official’s conduct. Most of these were allegations made in good faith of corruption and wrongdoing.
- 24% were opinions on a private (i.e. not a public official) person’s conduct.
<table>
<thead>
<tr>
<th>Applicable defences</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>True and for the public good</td>
<td>3</td>
</tr>
<tr>
<td>Any opinion made in good faith on a public official’s conduct or character (in their conduct)</td>
<td>17</td>
</tr>
<tr>
<td>Any opinion made in good faith on a person’s conduct or character (in their conduct)</td>
<td>8</td>
</tr>
<tr>
<td>A truthful report of a court case</td>
<td>2</td>
</tr>
<tr>
<td>Any opinion made in good faith on the merits of a decided court case or the characters of those involved</td>
<td>0</td>
</tr>
<tr>
<td>Any opinion made in good faith of the merits of art/literature/performance or the character of the creator (in their creating)</td>
<td>1</td>
</tr>
<tr>
<td>A criticism made in good faith of a junior or person in a similar relationship</td>
<td>0</td>
</tr>
<tr>
<td>A complaint made in good faith to a relevant authority</td>
<td>0</td>
</tr>
<tr>
<td>An accusation made in good faith about another person’s character for the good of the speaker, receiver, or public good</td>
<td>1</td>
</tr>
<tr>
<td>A caution made in good faith for the good of the speaker, subject, or public good</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>32</strong></td>
</tr>
</tbody>
</table>
Gender-based violence

Five complaints under Article 66(d) were based on abusive treatment of young, unmarried women. In each case, the complainant woman's ex-boyfriend threatened to publish intimate information or images online with the intention to shame the woman or extort money from her. FEM is concerned that women are forced to use 66(d) because Myanmar has no law on gender-based violence. A law on gender-based violence would give a proper framework for these women to access justice.

In July 2017, a participant in an intimate videemade a complaint under 66(d) against a junior member of the police in Minbu who had allegedly posted the video onlinewithout the consent of those involved. The case is still at trial.

Resolution

In November 2016, a Babedan phone shop owner made a complaint under 66(d) against another phone shop owners after a long online dispute. The second owners spent three-weeks in jail before the owners reached a settlement outside of court and the case was withdrawn.

Complaints made under Article 66(d) can be resolved either by being withdrawn by the complainant, by being rejected by the prosecution or the court, or by reaching a decision in court.

- 35% of complaints have been resolved. 20% of complaints have been decided in court, 10% have been withdrawn by the complainant after being settled out of court, and 5% have been dropped by the prosecution due to a lack of evidence.12.
65% of complaints are still awaiting some form of resolution. 48% are supported by enough evidence for the prosecution to bring charges and are therefore awaiting trial. 17% are still being investigated.

FEM is concerned that no complaints have been thrown out of court despite allegations of suspects being mistreated while in police custody. Examples of alleged mistreatment are consistent with the definition of torture or cruel, inhuman or degrading treatment or punishment under Article 5 of the Universal Declaration of Human Rights. FEM is not aware of any investigation into these allegations.

<table>
<thead>
<tr>
<th>Status of 66(d) cases</th>
<th>Type</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under investigation</td>
<td>-</td>
<td>18</td>
</tr>
<tr>
<td>Awaiting trial</td>
<td>-</td>
<td>51</td>
</tr>
<tr>
<td>Dropped</td>
<td>-</td>
<td>5</td>
</tr>
<tr>
<td>Settled out of court</td>
<td>-</td>
<td>11</td>
</tr>
<tr>
<td>Completed, decision handed down</td>
<td>-</td>
<td>21</td>
</tr>
<tr>
<td>Total</td>
<td>106</td>
<td></td>
</tr>
</tbody>
</table>

**Convictions and sentencing**

100% of defendants have been found guilty by the court of first instance. No defendant has been acquitted. FEM is concerned by the high conviction rate for complaints made under Article 66(d). Such high conviction rates are usually only found where courts are not independent of the government, where defendants are pressured into confessing, or where defendants claiming innocence are punished with higher sentences.14.
People convicted under 66(d) were usually given a sentence of six months imprisonment. Only 14% of those convicted have been given a different length of imprisonment\(^5\). This demonstrates a level of systematic rather than arbitrary sentencing. However, FEM is concerned that all convicted persons have been sentenced with imprisonment and none have been issued with a fine. This demonstrates that courts sentencing under Article 66(d) overwhelmingly rely on the most disproportionate and unnecessary punishment provided for in the law.

Only three appeals have been made over the past two years. Two appeals have been made by defendants of which one was rejected and one accepted with the guilty decision reversed. One appeal for a longer sentence has been successfully made by a complainant. FEM is concerned that only a low 14% of defendants have appealed against their conviction. Convicted persons do not appeal because they believe that appeals courts punish appellants with extended sentences. Convicted persons are also dissuaded due to the high costs associated with appeals, and a lack of trust in the independence of the judiciary.

Two persons convicted under Article 66(d) have received amnesties from the government. However, in both cases the amnesties were given shortly before the persons completed their sentences and were anyway due for release. Both persons retain criminal records as amnesties do not reverse convictions.

<table>
<thead>
<tr>
<th>Decisions</th>
<th>Type</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decisions by courts of first instance</td>
<td>21</td>
<td></td>
</tr>
<tr>
<td>Guilty</td>
<td>21</td>
<td></td>
</tr>
<tr>
<td>Not-guilty or acquitted</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Appeals</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>By the complainant</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>By the defendant</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Decisions by appeals courts</td>
<td>3</td>
<td></td>
</tr>
</tbody>
</table>
Procedural issues

In December 2016, a Gant Gaw villager made a complaint under 66(d) against a former-USDP MP who had posted online accusing villagers of having magical powers. The villager’s complaint was made after the former MP had himself made a complaint under 66(d) against one villager. However, after the former-USDP MP became subject to a complaint, the Ministry stepped in to mediate and the case was settled out of court.

Both complainants and defendants face procedural issues when trying to access justice. Procedural issues include inefficiency, failures in due process, and violations of human rights.

Admissibility of electronic evidence

In most 66(d) cases, the prosecution’s only material evidence submitted to the court was a printed screenshot of the alleged criminal content - usually a printout of an individual social media post - and a printed screenshot of the user’s profile.

FEM is concerned that Myanmar has no legal framework or judicial guidelines on testing the authenticity, reliability, or admissibility of electronic evidence⁹. Electronic evidence is notoriously easy to forge with the use of simple computer software. For example, impersonated social media accounts can be created and screenshots can be graphically manipulated. This raises serious doubts as to how printouts can be reliable sources for indicating culpability.
Judicial skills and knowledge

Hearing complaints made under Article 66(d) requires a high level of technical skills and understanding. Although some of Myanmar’s judges have accessed the internet and used social media before, FEM is concerned that they do not usually have the relevant skills, experience, or available guidelines to test the reliability of the electronic evidence put before them.

In other countries, judges rely on independent experts or expert testimony. However, judges in Myanmar often regard the police’s testimony as the only necessary expert opinion, even though the police are part of the prosecution and are therefore not independent. FEM is concerned that in several 66(d) cases, courts have disregarded expert testimony from organisations that are well-regarded in Myanmar for their digital expertise. As a result, defence lawyers generally no longer seek or use expert testimony in 66(d) cases.

Arbitrary bail

Article 66(d) is a criminal provision and therefore defendants are detained in prison while awaiting trial. Defendants wait on average 5-7 months after being charged, and courts have the option to use bail provisions to release defendants from prison during this period. FEM is concerned that bail decisions appeared to be arbitrary. Without bail, defendants are often in prison for a longer time than they would have been if they were found guilty at the start. At the beginning of the research period courts were unlikely to give bail. At the end of the research period, and following the Telecommunications Law Amendment, courts were more likely to give bail.

Although courts are now more likely to give bail, the time between charge and trial has grown from an average of 5-7 months to an average of one year. FEM is concerned that while this delay may be the result of inefficiency across the judicial system as a whole, it increases stress for those involved.
Access to justice

Complaints made under Article 66(d) are more likely to be accepted by police and properly investigated if the complainant is an influential person, such as a member of a political party, a public official, or a wealthy person. FEM is concerned that complaints are less likely to be accepted and investigated if the complainant is not influential or if the complainant is a woman making allegations under 66(d) in relation to extortion, fraud, or threatening behaviour, including sexual harassment.

Ministry role

The Telecommunications Law says that complaints under Article 66(d) cannot proceed to trial without permission from the Ministry of Transport and Communications. The Ministry does not publish how decisions are made, how many complaints are received, how many are permitted, or how many are rejected. FEM is concerned that this gives the Ministry significant control over a complainant’s access to justice, without any safeguards for ensuring transparency and due process.

The Law does not say that complainants must get permission from the Ministry to withdraw their complaints, but in practice the courts ask for this. The process of getting permission from the Ministry takes an average of three months. FEM is concerned that this deters and delays the desirable resolution of cases outside the court.
Over the past two years, Article 66(d) has been the tool of choice for those in positions of power, particularly related to the state, who want to extend their punishment of people who are trying to hold them accountable, online.

Article 66(d) is fundamentally undemocratic because it is so vague. At least two-thirds of all complaints would have been rejected if 66(d) was properly defined. Attempts to deal with the law's vagueness by referencing the definitions used in Myanmar’s Penal Code have been unheeded in courts.

The government responded to public outcry against 66(d) by amending the law in August 2017 and reducing the grounds for complaint from seven to four. However, FEM has not identified a single complaint based on the grounds that the government removed from the amendment. As such, the amendment has made no discernible impact.

Every single case brought before a court of first instance has resulted in a guilty verdict, and every single guilty verdict has resulted in a comparatively harsh term of imprisonment. Defendants do not appeal because they believe that appellate courts will punish them more for doing so.

Each guilty verdict has been reached despite significant procedural issues. Prosecutions rely on unreliable evidence, and inexperienced courts are unwilling to listen to expert testimony. Trials are delayed while defendants remain in prison without bail. Allegations of mistreatment of defendants are ignored.
At the same time, complainants with legitimate concerns and who are not powerful or influential are unlikely to get the redress that they want. Complaints are less likely to be properly investigated if they are made by people who are not influential, or by women, or are related to threats or extortion. The complaints are opaquely controlled by the Ministry of Transport and Communications who decide without any apparent safeguards whether a complaint can go to trial or be withdrawn if settled elsewhere.

In conclusion, despite the 2017 amendment, cases are continuing and the law remains a primary tool for censoring criticism and silencing critics. The Myanmar government should recognise that there is no place in a democracy for 66(d), and it needs to be completely repealed.

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1For a full breakdown of the problem with each law and article, and an explanation of the relevant international standards, see www.FreeExpressionMyanmar.org/laws/
3“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.
4Moral 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.
5For a full breakdown of the problem with each law and article, and an explanation of the relevant international standards, see www.FreeExpressionMyanmar.org/laws/
6GC34, para 47. In addition, international law says that defamation laws should not protect institutions, such as the army or the administration (GC34, para 38).
7In circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by international law upon uninhibited expression is particularly high (GC34, para 38). This includes that legal provisions prohibiting blasphemy or other displays of a lack of respect for a religion or other belief system, including criticism of religious leaders or commentary on religious doctrine and tenets of faith, are unacceptable limitations on the right to freedom of expression (GC34, para 48).
8Hindyside v. the United Kingdom, 7 December 1976, Application No. 5493/72 (European Court of Human Rights)
9Hindyside v. the United Kingdom, 7 December 1976, Application No. 5493/72 (European Court of Human Rights)
11FEM was also concerned that 38% of complainants rely directly on the right to freedom of expression to do their professional work (political party-related, journalists, religious supporters, arts-related persons, and human rights defenders).
12In one of these cases, there are allegations that the prosecution was pressured by outside interests to drop the complaint.
13For example, one interviewee convicted under Article 66(d) alleged that after being arrested, they were placed in a "diplomacy room" in which seven men dressed in plain clothes asked the same repeated questions for two days in a row without a break.
14For example, see reports on Russia’s or China’s similarly high conviction rates of over 99%: https://www.thetimes.co.uk/article/russian-conviction-rate-is-higher-than-under-stalin-hj2y70bqa and https://www.washingtonpost.com/news/morning-mix/wp/2014/03/11/china-scored-99-9-percent-conviction-rate-last-year?utm_term=.6825666d6368
15San Shwe, vice-chairperson for Pathein NLD, received 3 months prison term. Aung Win Hlaing (aka Anyar’Thar), chair-person of Myawaddy Development Support for the NDF, received 9 months prison term. Shane Aung, in Tamwe Township, received 2 years prison term.
16The Philippines has also adopted the E-Commerce Law (2000) and the Rules on Electronic Evidence (2001), which says that an electronic document is considered the functional equivalent of a paper-based document. Article 5 of the Rules provides that, “before any private electronic document offered as authentic is received in evidence, its authenticity must be proved by any of the following means: (a) by evidence that it had been digitally signed by the person purported to have signed the same; (b) by evidence that other appropriate security procedures or devices as may be authorized by the Supreme Court or by law for authentication of electronic documents were applied to the document; or (c) by other evidence showing its integrity and reliability to the satisfaction of the judge.”
66(d): No real change

An analysis of complaints made before and after the 2017 legal amendment.

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.