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May 10, 2017

U Soe Thein
Director General, Communications Department
Ministry of Transport and Communications

U Thant Sin Maung
Minister of Transport and Communications
Ministry of Transport and Communications

U Tin Maung Win
Chair, Transport, Communication and Construction Committee
Pyithu Hluttaw

U Tun Tun Oo
Attorney General
Union Attorney General's Office

Re: Section 66(d) of the Telecommunications Law

Dear U Soe Thein, U Thant Sin Maung, U Tin Maung Win, and U Tun Tun Oo:

Human Rights Watch is a nongovernmental organization that monitors and reports on human rights in over 90 countries around the world. We have documented the human rights situation and advocated for the promotion and protection of human rights in Myanmar for over 25 years. In June 2016, we published a 113-page report on the right to freedom of peaceful expression and assembly in Myanmar.¹

We write to you to express our concerns about section 66(d) of the Telecommunications Law of 2013. We understand that revisions to this law are under discussion within the Ministry of Transport and Communications. The law is a holdover from the era when Myanmar's military or quasi-military-led governments attempted to restrict peaceful speech for political reasons. It continues to be used in a way that is creating new political prisoners and casting the democratically elected government in a bad light. We urge that

¹ Human Rights Watch, "They Can Arrest You at Any Time": The Criminalization of Peaceful Expression in Burma," <https://www.hrw.org/report/2016/06/29/they-can-arrest-you-any-time/criminalization-peaceful-expression-burma>.

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section 66(d) be repealed or thoroughly revised to end its misuse for political or other reasons and bring it in line with international standards for the protection of freedom of expression.

Section 66(d) is a criminal law provision that permits penalties of up to three years in prison for “extorting, coercing, restraining wrongfully, defaming, disturbing, causing undue influence or threatening any person using a telecommunications network.” Use of the law has soared since the new government took office last year, with at least 54 people charged with violating the law and at least eight people sentenced to prison terms to date, almost all for postings on Facebook or other social media.

Because section 66(d) is treated as a non-bailable offense, many of those charged have been detained for months pending trial. This means that even those ultimately found not guilty of violating the law will have suffered significant punishment for their speech. The families of those wrongly detained may also suffer great hardship, such as from lost employment while the accused remains detained. This may have a considerable chilling effect on free speech of individuals across the political spectrum in the country.

Section 66(d) raises a number of significant concerns under international law and should be repealed or substantially amended.² Human Rights Watch’s concerns are set forth below.

1. The restrictions imposed on speech need to be more clearly defined

Section 66(d) imposes vaguely worded restrictions on speech, leaving it unclear what speech falls within the scope of the law. Where, as here, the terms used are vague or ambiguous, internet, mobile phone, social media, and other telecommunications users are left uncertain about what speech will violate the law, violating the international legal requirement that restrictions on speech be formulated with sufficient clarity to enable them to regulate their conduct.

Section 66(d) criminalizes “threatening” or “coercive” speech but does not specify what types of threatening or coercive speech are covered by the restriction. At a minimum the law should be narrowed to apply only to serious threats to commit violence against another person, where the government can show the speaker intended the speech as a threat, and a reasonable person who was the target of the threat would have experienced genuine fear.

² Freedom of expression is protected in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and is considered part of customary international law. While the right is not unlimited, it is considered so fundamental that, under international legal standards, it can only be restricted under limited circumstances. Restrictions on peaceful speech are only permissible where the restriction is (1) provided by law; (2) imposed for the purpose of safeguarding respect for the rights or reputation of others, or the protection of national security, public order, public health, or morals; and (3) necessary to achieve that goal. To be provided by law means more than just that the restriction is contained in legislation. It requires that the restrictions be clearly worded to ensure that the public can tell what is and is not lawful, and to limit the discretion of those charged with enforcing the law so that the law is not used in an arbitrary or discriminatory manner, including the targeting of unpopular political views.

Other terms used in 66(d), such as speech “causing undue influence” and speech “disturbing” another person, are inappropriate in a democracy that protects freedom of expression and should be removed from the law. Most speech—and all political speech—is designed to “influence” others. This is, of course, welcome in a democracy. Yet under this law, telecommunications users cannot be certain when their attempts to influence someone will be considered to cause “undue” influence. Similarly, the restriction on speech that “disturbs” someone is insufficiently precise, as it makes the criminal liability of a telecommunications user dependent upon the opinion and sensitivity of those receiving the communication. More importantly, no one has the right not to be disturbed, as the right to freedom of speech isn’t limited to “nice” speech or speech that agrees with the majority viewpoint. A great deal of speech—and all political speech—will invariably “disturb” other people as individuals share information and opinions in private and public. There is no provision in international law for restricting speech that has “undue influence” or is “disturbing,” and there is no way to define these terms to protect freedom of expression, so we urge that they be deleted from 66(d).

2. Defamation should not be a criminal offense

Section 66(d) criminalizes “defamatory” speech, as do several other criminal laws in Myanmar. Countries around the world are increasingly recognizing that defamation should be considered a civil matter, not a crime punishable by imprisonment. The United Nations special rapporteur on the protection and promotion of the right to freedom of opinion and expression has recommended that criminal defamation laws be abolished,³ as have the special mandates of the UN, the Organization for Security and Co-operation in Europe, and the Organization of American States, which have together stated:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴

Defamation cases filed by government officials or public persons are particularly problematic. While government officials and those involved in public affairs are entitled to protection of their reputation, including protection against defamation, as individuals who have sought to play a role in public affairs they must tolerate a greater degree of scrutiny and criticism than ordinary citizens.

³ Report of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue Report, June 2012, UN Doc. A/HRC/20/17, para. 87.

⁴ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression, 2002, <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=87&IID=1> (accessed June 11, 2014). Similarly, the African Court on Human and Peoples’ Rights has held that imposing a custodial sentence for defamation violates both article 9 of the African Charter on Human and Peoples’ Rights and the ICCPR. African Court on Human and Peoples’ Rights, *Lohe Issa Konate v. Burkina Faso*, Application no. 004/2013, December 5, 2014, <https://www.african-court.org/en/images/documents/Judgment/Konate%20Judgment%20Engl.pdf> (accessed June 17, 2015).

This distinction deters those in positions of power from using the law to penalize their critics or those who seek to expose official wrongdoing, and it facilitates public debate about issues of governance and common concern.

A review of the cases brought under section 66(d) in recent months highlights this concern. Many of the cases involve criticism of public figures, and many involve comments on matters of public interest. For example, Myo Yan Naung Thein was recently sentenced to six months in prison for a Facebook post criticizing the military commander-in-chief and calling for his resignation, while Aung Myint Tun was sentenced to six months in prison for erroneously posting that National League for Democracy (NLD) leader U Win Thein had resigned for health reasons.

Others have been sentenced for speech that is “insulting,” rather than defamatory within the usual meaning of that term. For example, Aung Win Hlaing was sentenced to nine months in prison for a post calling President Htin Kyaw “an idiot” and “crazy.” However, as the UN Human Rights Committee has made clear, the mere fact that an expression is considered insulting to a public figure is not sufficient to justify the imposition of criminal penalties.⁵

3. There should be a presumption of bail for speech-related offenses

Because the Telecommunications Act does not specifically state that violation of section 66(d) is a bailable offense, it is treated as non-bailable under the Code of Criminal Procedure.⁶ As a result, the defendant does not have the right to bail, and may be detained pending trial at the discretion of the court. In practice, it appears that those accused of “defaming” government officials or the military are routinely denied bail, while those accused of statements affecting non-public figures are frequently released. One Member of Parliament told Human Rights Watch approvingly, “If you defame an ordinary citizen you will get bail, but if you defame our leaders, you will not.”

There is no legal justification for denying bail to individuals accused of nonviolent speech offenses unless there is clear and compelling evidence that they will flee the jurisdiction or will tamper with evidence. We understand from news reports that the office of the Attorney General has, similarly, recommended that those charged with violating section 66(d) be eligible for bail in accordance with the Code of Criminal Procedure.⁷

⁵ UN Human Rights Committee, General Comment no. 34, para. 38. See also UN Human Rights Committee, General Comment no. 34, para. 42: “The penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression.”

⁶ Myanmar’s Code of Criminal Procedure defines a “bailable offense” as an offense shown as bailable in the Second Schedule of the Code of Criminal Procedure or made bailable under any other law. Any other offense is deemed “non-bailable.”

⁷ “Attorney General Weighs in on internet defamation law,” *DVB*, May 5, 2017, <http://www.dvb.no/news/attorney-general-weighs-internet-defamation-law/75384>.

4. Third-party complaints should not be permitted, and only government prosecutors should be able to file criminal complaints under 66(d)

Section 66(d) permits anyone to file a complaint that a particular communication has violated the law. Many of the “defamation” complaints filed have not been filed by the person allegedly defamed, but by others who were offended by the statement. If the purpose of the law is to protect the rights of those threatened, extorted, or otherwise harmed through a telecommunications device, then third parties should not be able to file cases. As stated above, individuals who believe they have been harmed under section 66(d) should have the right to file civil cases. But so long as Myanmar law allows criminal prosecutions in cases involving freedom of expression, only government prosecutors should be able to file criminal complaints under 66(d). This will limit frivolous complaints and ensure that criminal charges will only be considered in cases in which independent state prosecutors conclude that it is in the public interest to override the right to freedom of expression by filing a case.

5. Section 66(d) is duplicative of other criminal laws

Myanmar’s Penal Code already makes criminal many of the offenses contained in section 66(d). For example, extortion is a crime in sections 383-389 of the Penal Code. Similarly, wrongful restraint is made criminal by sections 339 and 341 of the Penal Code. Since there is nothing in the Penal Code to prevent prosecution of those offenses when committed by means of a telecommunications device, their inclusion in section 66(d) is unnecessary.

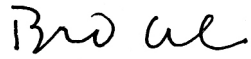
Recommendations:

For Myanmar to fully meet its international legal obligations, section 66(d) of the Telecommunications Act should be repealed. In the interim, the government should make the following amendments to the law:

- Amend section 66(d) of the Telecommunications Act to specify that violations of that section are bailable offenses within the meaning of the Code of Criminal Procedure.
- Amend the law to make clear that only a government prosecutor can file a criminal complaint under section 66(d).
- Delete the references to “defaming,” “disturbing,” and “undue influence.”
- Amend the law to specify that it applies only to serious threats to commit violence against another person, where the government can show the speaker intended the speech as a threat and the speech induced real fear in the person who was the target of the threat.
- To the extent that restrictions on extortion or wrongful restraint refer to criminal actions that are not otherwise already penalized in the Penal Code, clearly and narrowly define those terms to ensure that telecommunications users can determine what communications fall within the bounds of the law and that restrictions on free expression are minimized.
- Where actions are already prohibited under the Penal Code, eliminate duplicative language in the Telecommunications Law.

We hope that you find these recommendations useful as you consider how best to amend this provision of the law that has frequently been used to violate the free speech rights of individuals and cast a shadow on the right to freedom of expression in Myanmar more generally.

Sincerely,

A handwritten signature in black ink that reads "Brad Adams". The signature is written in a cursive, flowing style.

Brad Adams
Asia Director
Human Rights Watch