

PERSPECTIVE

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Myanmar's Telecommunications Law Threatens its Democratisation Process

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EXECUTIVE SUMMARY

- Section 66(d) of the 2013 Telecommunications Law, which criminalises online defamation, has emerged as a major threat to freedom of expression in Myanmar.
- Since it was enacted, 72 cases have proceeded to court, including 65 since the National League for Democracy government took office.
- The two-year campaign for amendments to the law by activists, journalists, human rights groups and some NLD lawmakers has accelerated in the past six months as the number of cases increases.
- While NLD leaders say an amendment bill will soon be tabled, only minor changes to the law are expected.
- Senior NLD officials have said amendments are not a priority. Lower House Speaker Win Myint has justified the criminalisation of defamation, saying that without strong punishments, the country will descend into “lawless anarchy”.

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INTRODUCTION

Since 2011 Myanmar has undergone rapid political, economic and social change as a result of a reform process initiated by the military. One notable transformation has been the dramatic expansion in both freedom of speech and access to information. Heavily censored private weekly newspapers available only in urban areas have been replaced by multimedia-focused news organisations that publish regular breaking news updates through Facebook. Where SIM cards and internet connections were once the preserve of the elite, they are now affordable for even the lowest-income households.¹

But amid this sunny picture of liberalisation, a dark and worrying cloud has emerged – one that is stifling online freedom of speech, and being used to send journalists, activists and ordinary internet users alike to prison. In 2013, lawmakers in Myanmar’s national legislature, the Pyidaungsu Hluttaw, approved a new Telecommunications Law. With the focus on breaking the monopoly of the state operator, Myanmar Posts and Telecommunications, lawmakers have said that they paid relatively little attention to the list of offences contained in section 66(d) of the law.² Thus in October 2013, Myanmar acquired a law that provided for a maximum three-year prison term for anyone convicted of defaming any person using a telecommunications network.

For almost two years, though, the section went unused. Then, shortly before the 2015 election, three cases were filed in quick succession. All three defendants received prison terms of six months. A total of seven cases were filed before the Thein Sein government left office, five of which ended in convictions and prison terms.

The application of 66(d) has accelerated dramatically under the National League for Democracy government. At the time of writing, 65 cases had been filed with police since the party took office, nearly all in relation to the posting of material on Facebook. Although the NLD has not shied away from prosecuting critics for defamation, it has not actually driven this increase. Rather, the growing number of cases has created a vicious circle in which greater awareness of 66(d) and how it can be employed has encouraged more people to use it. The section is no longer obscure; the expression “66(d)” has entered the public lexicon.

The prosecutions to date cover a broad range of situations, from family disputes and criticism of businesses to high-level corruption allegations and mocking of senior government and political figures. The military has regularly employed 66(d) against its online critics; in one case, nine students were charged over a play uploaded online that mocked officers. When seven were acquitted, the military filed an appeal against their acquittal to a higher court. The Yangon Region government has also emerged as a regular litigant.

Despite its democratic credentials, the NLD has shown little inclination to amend or abolish the section. The party has not only blocked its lawmakers from asking about plans to amend

¹ The number of active SIM cards has increased 10-fold in just five years, to about 100 percent of the population, with around 55 percent of users accessing data.

² For more on the genesis of the law see: “66(d): The defamation menace”, *Frontier Myanmar*, 13 January 2017 (<http://frontiermyanmar.net/en/66d-the-defamation-menace>).

the law, senior officials have even initiated section 66(d) cases against journalists and editors. It has been left to activists outside the party to campaign for a change.

A LEGAL PROBLEM

For all the consternation that it has caused, section 66(d) contains just 19 words. Therein lies one of its many problems. What constitutes defamation? In which circumstances can a defamatory act be exempt from prosecution? Who can file a complaint to the police? On what grounds can bail be granted, if at all? On all of these matters, the law is silent. This gives a great deal of discretion and decision-making power to township judges, who are susceptible to both corruption and political interference. Another key defect of 66(d) is that a third party can submit a complaint without needing the consent of the person who has been allegedly defamed.

This contrasts with the criminal defamation provision in the Penal Code of 1861. Section 499 of that code contains 10 exceptions, such as for public interest. Under section 500, those found guilty of defamation face a maximum two-year prison term, but in practise a small fine is the most common sentence; the accused is not normally detained. Because the prospects of conviction are much greater, and defendants tend to be arrested and detained – and thus effectively punished regardless of guilt – litigants naturally prefer 66(d) to the older law.

A protection of sorts was built into the Telecommunications Law, however. Under section 80(b), prosecutions require the approval of the Ministry of Transport and Communications. In one case, the ministry opposed prosecution on the grounds the defendant had not posted the offending material.³ For the most part, though, it is not clear whether section 80(b) is being ignored or the ministry is granting permission for cases to proceed. Either way, it reflects either official indifference or support for the use of 66(d).

Cases proceed in a range of ways, depending largely on the identity of the defendant and the complainant. In high-profile cases – such as when the complainant is the military or the government – the defendant is detained almost immediately and held while police investigate the allegation. Bail is typically denied. The case takes up to six months to conclude, at the end of which a sentence of six to nine months is handed down, leaving the defendant with just a short period left to serve.

The political nature of these cases is barely concealed. Judges have been known to privately apologise to the defence for not granting bail, explaining that they were acting under instructions.⁴ Eleven Media chief executive officer Than Htut Aung and editor Wai Phy, who were arrested after accusing Yangon Chief Minister Phyto Min Thein of bribery, were initially denied bail by the township judge. However, two months after their arrest, it was granted on health grounds – just days after they published a grovelling apology to the chief minister.

³ This was the case involving *The Voice*. The ministry said the columnist should be released, but that charges should proceed against chief editor Kyaw Min Swe.

⁴ Personal communication with a human rights defender, November 2016.

In a legal sense, the impact of 66(d) is relatively easy to gauge. Prosecutions can be detected and tracked, although activists say that there are likely to have been cases of which they are not aware, particularly those resolved through negotiation before proceeding to court. More difficult to assess is the impact of 66(d) on the behaviour of ordinary internet users. While a few red lines have emerged – mocking the military or accusing government officials of corruption, for example – the clause is so vague that in most circumstances, modifying behaviour to avoid a potential criminal charge is fiendishly difficult.

One response has been to employ fake or anonymous Facebook accounts, which were already common in Myanmar prior to 2015. However, these are unlikely to provide protection in the face of a determined police investigation, which can require internet providers to turn over identifying information. Anecdotally, the rise in 66(d) prosecutions has prompted widespread self-censorship.

For the country's vibrant media, section 66(d) is particularly troubling. Journalists and publications are generally unable to mask their identity. 66(d) has made life more difficult than the pre-publication censorship regime that existed prior to August 2012 because they are now forced to guess at what might create a legal problem. This guesswork inevitably leads to self-censorship.⁵

TIME FOR CHANGE

One of the first people to be prosecuted under the law, Maung Saungkha, has emerged as the leading advocate for reform of 66(d). He established and leads a committee that keeps a record of cases and their outcome, and has been lobbying lawmakers to submit amendments to the Telecommunications Law. He is also regularly quoted in the media, and posts updates about 66(d) on his Facebook page.

More recently, journalists have launched a coordinated campaign against 66(d). This was prompted by the arrest of *The Voice* editor Kyaw Min Swe and columnist Kyaw Zwa Naing in relation to a satirical article that made fun of a propaganda movie released by the Tatmadaw to mark Armed Forces Day.

Some prominent MPs have expressed support for amendments. Nay Phone Latt, a Yangon Region lawmaker who was sentenced to 20 years' imprisonment for posting videos of the military's crackdown on protesters in September 2007, is an unsurprising advocate.

In the Pyidaungsu Hluttaw, an upper house NLD lawmaker has twice tried to submit a proposal to amend the law, citing its impact on media freedom. On both occasions, in January and June, the proposal was rejected by the party's internal vetting committee, ensuring that it did not even get to the speaker's office for consideration.⁶

⁵ The most egregious breaches of censorship rules tended to result in publications being temporarily suspended.

⁶ "NLD refuses lawmaker's article 66(d) parliament question", *The Irrawaddy*, 9 June 2017 (<https://www.irrawaddy.com/news/burma/nld-refuse-lawmakers-article-66d-parliament-question.html>).

Since the first 66(d) prosecutions in 2015, international human rights organisations such as Amnesty International, Human Rights Watch and the International Commission of Jurists have also publicly campaigned for amendments to the Telecommunications Law.

In some cases, they have called for the complete removal of criminal defamation. This is unlikely to be heeded, however. Criminal defamation remains widely used across Asia, including Southeast Asia. There seems to be little public pressure to remove criminal defamation completely. This is likely because the civil court system does not provide an effective means of redress. Among politicians, there is clear support for maintaining criminal defamation: A 2015 survey by the International Federation for Human Rights found that only 26 per cent of political parties contesting that year's general election wanted to abolish criminal defamation under section 499/500 of the Penal Code.

THE 'FRUITS OF JUSTICE'

The campaign against 66(d) has been effective at least in forcing NLD leaders to acknowledge the issue and make promises to amend the law. Their response has in general, however, been cautious, often involving a referral of the issue to former parliamentary speaker Thura Shwe Mann's Legal Affairs and Special Cases Commission.

At the time of writing, the bill to amend 66(d) is still with the government and has not yet been transferred to the parliamentary bill committee. Little specific information has emerged on what one can expect. Significantly, neither the government nor the party has given any indication that it plans to scrap the defamation clause completely. In June 2017, senior NLD official Win Htein – a member of Shwe Mann's commission – said it was simply not a priority.⁷

For those who assume that the NLD represents liberal democracy, this stance is likely to seem perplexing. The party, though, is highly centralised, secretive and authoritarian, and this is reflected in its approach to government and law making. While the NLD seeks to uphold certain democratic values, such as free and fair elections, others – such as freedom of expression – are seen as foreign and politically dangerous, particularly during Myanmar's transition to democracy. At the same time, it is important to note that the party is not monolithic, and there is a bloc of support within the NLD for repealing or significantly changing 66(d).

Perhaps the most senior official to publicly address the issue is Win Myint, an NLD lawmaker, a former lawyer and the speaker of the lower house,⁸ when he was asked about it at a press conference on December 21, 2016. His comments provided an insight into the party's thinking on the topic.

⁷ "Communication law 'likely to be reviewed'", *The Myanmar Times*, 12 June 2017 (<http://www.mmimes.com/index.php/national-news/nay-pyi-taw/26337-communication-law-likely-to-be-reviewed.html>)

⁸ Although Win Myint sought to distance the NLD from the law, he neglected to mention that he was one of the lawmakers who voted to approve it, having served in parliament after being elected at a by-election in April 2012.

Win Myint made a number of arguments to justify its existence. The first was that those who have been defamed needed the “protection of the law” so they could seek “justice”. Second was that the law was necessary for societal stability. “Society will not be stable when people and groups start defaming each other. There will be lawless anarchy,” he said. Third, the defamation clause in the Penal Code was not strong enough. He argued that online defamation was more harmful because of its potential to reach a far wider audience, and that judges therefore needed the ability to hand down a sentence of longer than two years. Fourth, he said that discussion about the law was often “misinformed”. Judges had the discretion to grant bail, he said; they could also give a sentence of any length, from one day up to three years. Finally, Win Myint said that those who had evidence to support what they have written would not be convicted under 66(d).

Win Myint was dismissive of those calling for reform; in his view, “the ones who are insulting other people are demanding impunity”. If the NLD acceded to “what the media have been writing and demanding, people will be defaming other people and the victims won’t receive the fruits of justice. We have to make sure there is a check and balance.”

There are several problems with Win Myint’s arguments. The first is his assumption that judges can use their discretion to decide on bail, verdicts and sentencing. For cases of a political nature, this is typically not the case. Second, truth is not a defence under 66(d). Win Myint can offer no assurances that those who make truthful claims will be released. Third, the regular denial of bail effectively punishes a defendant regardless of whether she or he has breached the law. Fourth, the difference in punishment between the Penal Code and 66(d) is negligible when considered in light of the fact that most sentences handed down under the latter are of around six months.

Some have argued that the NLD’s reluctance to amend 66(d) is due to concern that it might impact its relationship with the military. However, there is little evidence to support this argument and in private conversation NLD officials do not cite it as a reason.⁹

CONCLUSION

The many problems with 66(d) have become more pronounced over time, as the number of complaints filed to the police grows. Of particular concern is the broad discretion granted to judges, who are susceptible to political interference. Despite the section’s apparent incompatibility with democratic values and a sustained campaign for its amendment, the NLD has been slow to respond to the growing outcry. Its leaders have justified the existence of a criminal defamation clause covering internet postings and even applied the section against journalists and activists.

In the coming months, the NLD is expected to amend the law to fix some of the more obvious shortcomings, such as the denial of bail and the ability of a third party to file a defamation case. However, it appears unwilling to make wholesale changes. The

⁹ Private conversations with human rights defenders who have discussed the issue with party leaders, November and December 2016, and June 2017.

shortcomings in the law need to be seen separately from the broader issue of criminal defamation, which is likely to be retained in Myanmar in the foreseeable future.

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