Will Myanmar complete its transition towards an evidence-based approach to drug control?

A Myanmar Commentary

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Article

The recent publication of two single pieces of legislation - the amended 1993 Narcotic Drugs and Psychotropic Substances Law and the first National Drug Control Policy - is likely to form the basis of Myanmar's drug policy for several years to come. What does it mean for the country's transition towards an evidence-based approach to drug control, and how can the gaps between the two documents be addressed?

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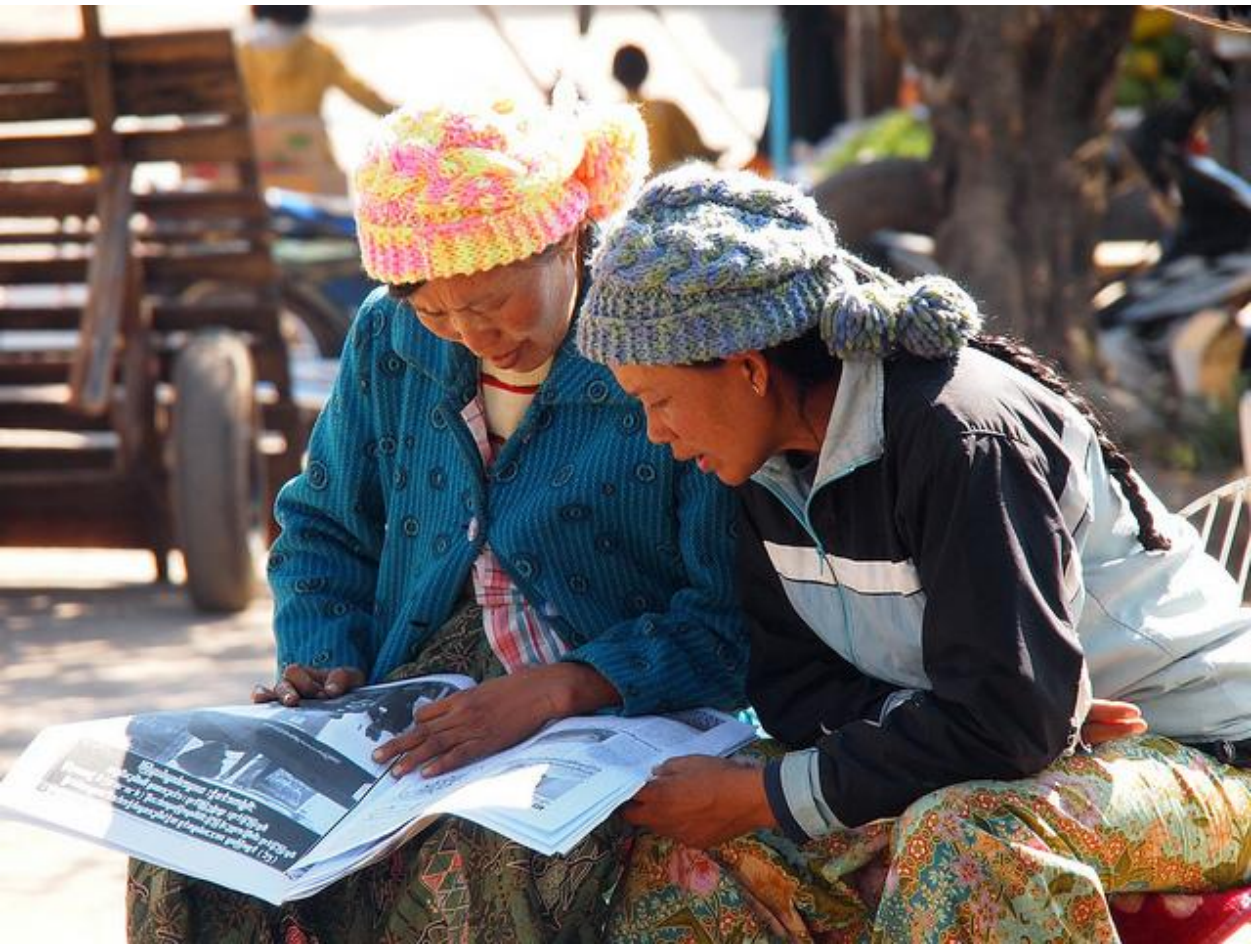

Shan Market in Pyin Oo Lwin / Photo credit Paul Arps / Flickr

A dual reform process

Myanmar has moved a step closer to completing the first reform in decades of its legal framework relating to drugs. Indeed, the recent publication of two single pieces of legislation is likely to form the basis of the country's approach to drug control for at least several years to come. The first piece is the amended version of the 1993 Narcotic Drugs and Psychotropic Substances Law (hereafter referred to as "the Law" or "the Drug Law"), which was enacted by the Union Parliament ("Pyidaungsu Hluttaw") on 14 February 2018.[1] The second, released less than a week later,[2] is the country's first National Drug Control Policy (hereafter "the Policy"), developed by the Central Committee for Drug Abuse Control (CCDAC) with support from the United Nations Office on Drugs and Crime (UNODC). This evolving legal and policy framework is a clear sign that the Government has acknowledged the shortcomings of the previous strategy, which was primarily based on the use of repressive measures. The military-appointed Minister for Home Affairs, Lieutenant General Kyaw Swe, thus recognised that "the past approach was very focused on supply reduction and less on other issues, and as a result did not achieve everything we had planned".[3]

The almost simultaneous release of these two key documents - the National Drug Control Policy and the amended 1993 Drug Law - would suggest that they were developed in the framework of a coordinated reform process aiming at aligning their contents and defining a comprehensive strategy towards the achievement of similar objectives. However, the Law and the Policy differ significantly, and even establish contradictory or incompatible priorities. While the National Drug Control Policy clearly places the focus on public health and development, the amended Drug Law continues to heavily lean on criminal justice and still prescribes extremely harsh prison penalties for both drug users (when caught with small quantities of drugs for their own use) and small-scale subsistence poppy farmers.

These differing choices are symptomatic of tensions between two different models of drug control: one based on repression, effectively a continuation of the current mainstream policies, and one that promotes a change of paradigm and is based on public health, human rights and development. This situation also highlights how different governmental bodies across the executive and the legislative branches can have significantly different stances on drug policy, and how this can impact the overall coherence of the government's approach.

Myanmar National Drug Control Policy: a key strategic document

The Government of Myanmar released, on 20 February 2018, its very first National Drug Control Policy. The Policy was developed by the CCDAC, with support from UNODC. An extensive consultation process enabled the participation of various Ministries and other Governmental bodies, civil society organisations, UN Agencies, and representatives from affected communities. This collaborative effort resulted in a document that defines the key features and priorities of the Government's new strategy to tackle drug-related problems in the country. Undoubtedly, the new Policy constitutes a major shift towards a more comprehensive and evidence-based approach. In fact, large sections emphasise the urgent need to develop public health interventions for drug users and rural development programmes in opium growing areas, but also to ensure respect for human rights and to refocus law enforcement and criminal justice efforts towards combating organised crime and corruption.

A new set of objectives

As highlighted in its preface, the Policy replaces the successive drug control plans adopted by previous Governments over the past 18 years, all of which aimed at "achieving a drug free country". This is a remarkable change in itself, as it signals the Government's intention to abandon the previous unrealistic goals and to focus instead on achievable objectives. In sharp contrast with the previous approach, the policy explicitly "aims to build safe and healthy communities by minimising health, social and economic harm".

Priority to public health interventions

The Policy identifies demand and harm reduction as one of its five priority areas. More specifically, three types of evidence-based interventions are prioritised, all of them ultimately aimed at reducing drug-related risks and harms for individuals and society at large: drug use prevention; harm reduction; and drug treatment, rehabilitation and reintegration services. It is worth noting that this is the first time that harm reduction has been officially listed as a priority intervention in any strategic document released by the CCDAC. In addition, the document explicitly suggests decriminalising drug use and transforming compulsory into voluntary treatment systems for drug users. A specific section also emphasises the importance of ensuring the availability and accessibility of controlled substances for medical and scientific uses.

From forced eradication to rural development

Another priority area set out in the Policy is supply reduction and Alternative Development. Most notably, this section of the document starts with the acknowledgement that the majority of opium growers are small-scale subsistence farmers, and as a consequence establishes that the reduction of opium poppy will be, from now on, pursued primarily through the implementation of rural development projects. In fact, there is not a

single reference to the use of forced eradication throughout the entire document, which instead suggests that responsible bodies "educate and provide information to discourage drug production" and "empower communities to engage in sustainable livelihoods". This strongly contrasts with the past approach that relied heavily on the use of forced eradication. The new policy orientation therefore paves the way for replacing forced eradication efforts with alternative development programmes in opium growing areas.

Respect for human rights

The new Policy mainstreams human rights as a transversal issue, highlighting the need to "respect, protect and promote all human rights, fundamental freedoms and the inherent dignity of all individuals". More specifically, it reaffirms the principle that drug users shall not be treated as criminals, and promotes "criminal justice responses that respect human rights, including proportionate legal mechanisms" (proportionality of sentences). In addition, the policy recommends, although in a somewhat ambiguous formulation, "to consider to repeal the death sentence for drug-related offences".

Of course, it is early to say whether the important principles contained in this strategic document will translate into tangible changes of practices on the ground. This will largely depend on the willingness and ability of the CCDAC, and more generally the Ministry of Home Affairs and other relevant Government Ministries, to implement the policy according to the priorities they have identified. The allocation of human and financial resources to the various interventions, such as community-based drug treatment and social reintegration services for drug users as well as rural development in opium growing areas, will also be critical. Finally, it is imperative that the Policy be followed by a detailed action plan with quantified objectives and priorities, specific resources, a defined timeframe and proper monitoring and evaluation mechanisms.

Nevertheless, the approval of the new National Drug Control Policy by the Minister of Home Affairs is a highly encouraging move that provides significant hope and opportunity for the implementation of a more balanced approach to drug control, grounded in public health, human rights and development.

Amended 1993 Narcotic Drugs and Psychotropic Substances Law: a missed opportunity

The process to revise the 1993 Drug Law started as early as 2010. It included several meetings to allow the participation of various stakeholders. Notably, a four day consultation workshop was organised by the CCDAC in Nay Pyi Taw in February 2015, with support from UNAIDS and UNODC.[4] The stated objective of the Law reform was to better respond to the new challenges posed by problematic drug use, production and trafficking in the country, and, more specifically, to put a greater emphasis on public health and limit the use of criminal justice mechanisms to the most serious drug offences. Various Ministries and government bodies were involved in the process, and the resulting draft bill was published in newspapers in March 2017. The bill was discussed in the Upper and Lower Houses of Parliament in August and October 2017 respectively, and the amended Law was finally enacted on 14 February 2018.

Although it introduces at least one welcome improvement, the amended Law clearly falls short of initial expectations and, overall, fails to significantly reshape Myanmar's approach to drug control. Some of the most problematic aspects, extracted from an extensive legal analysis report released by the Drug Policy Advocacy Group in October 2017,[5] are listed below.

Decriminalising drug use: an uncompleted move

The most significant change introduced in the amended Law is the elimination of the previous obligation for drug users to register at the Ministry of Health to undertake medical treatment. In so doing, legislators virtually agreed to eliminate prison penalties for simple drug use, in an attempt to facilitate drug users' access to health services. Unfortunately, Members of the Parliament rejected a vital clause that exempted drug users caught with small amounts of drugs for personal use from prison penalties. This regrettable decision jeopardises the entire reform. Indeed, it directly undermines the bill's primary objective to place the focus on public health rather than criminal justice. By eliminating prison penalties for simple drug use, policy makers clearly acknowledged that severe punishment was an obstacle to drug users' access to health services. That being the case, this exemption should have been equally applied to the possession of small amounts of drugs for personal use. In fact, using drugs necessarily involves possessing them in the first place.

As the Law stands, drug users who are caught with small quantities of drugs for their own consumption will continue to risk 5 to 10 years of incarceration. This is all the more unfortunate as the establishment of threshold quantities could have effectively helped the police and judges to distinguish between simple users and dealers, thus preventing an increase in drug trafficking.

The risks of compulsory drug treatment

The previous obligation for drug users to register - or face prison penalties - was replaced with an obligation to undergo drug treatment in principle (*Section 9, sub-section a):* "*The drug user shall go under treatment [...]* "). Although this legal obligation is not combined with prison penalties for not complying, it is nonetheless problematic for at least two reasons.

First, forcing an individual to undertake treatment clearly violates fundamental individual freedoms and contradicts the right to health as defined in the Constitution of the World Health Organization (WHO), as well as principles of drug dependence treatment advised by the WHO and UNODC.[6] It also disregards scientific evidence and constitutes a waste of scarce public resources, as the majority of drug users are not dependent users and therefore need no treatment.[7]

Second, this obligation could lead to the forced treatment of drug users in closed facilities. In fact, several countries in South East Asia – including Vietnam, Thailand, Cambodia, Malaysia and Lao People's Democratic Republic, have for many years used treatment centres to detain drug users under the guise of treatment.[8] Those centres have very high relapse rates (in Vietnam, for example, from 80 to 97%),[9] and twelve UN agencies released a public statement in 2012 calling on Governments to close all compulsory detention centres on the grounds that they violate human rights and threaten detainees' health.[10]

Rather than making drug treatment an obligation, the Government should instead focus its efforts on improving the accessibility and the quality of voluntary treatment options, information, counselling and harm reduction services for drug users who need them.

Prison penalties for small-scale subsistence poppy farmers: an unfair status quo

The amended Law does not introduce any change to address the situation of small-scale subsistence poppy

farmers, and poppy cultivation remains punishable with a minimum of 5 to 10 years of imprisonment, regardless of the quantity cultivated or the circumstances of the offence. As the Government's new National Drug Control Policy recognises, most people who grow opium in Myanmar are not criminals but poor small-scale farmers who cultivate poppy as a way to survive.[11] Prescribing long-term prison penalties without addressing poverty, food insecurity, armed conflict, lack of basic infrastructure, land grabbing or the absence of viable employment opportunities, to name only a few of the difficulties faced by farmers, is both iniquitous and unrealistic.

Instead, the Government should urgently take measures that can lead, in the absence of sustainable alternative livelihood options, to a *de facto* elimination of prison penalties for small-scale subsistence cultivation.

Continued death penalty for drug offences

Despite opposition from civil society groups and UN Agencies, the death penalty was retained in the Law for certain categories of drug offences. In this regard it must be noted that applying the death penalty to drug offences is both disproportionate and incompatible with international human rights norms. In addition, use of the death penalty for drug related offences is inconsistent with the objectives of the International Drug Control Treaties.[12] Finally, in countries where the death penalty is applied for drug offences, there is no evidence that it has any deterrent effect.[13]

In obvious contradiction with the objectives set at the beginning of the reform process, the amended Drug Law retains numerous shortcomings of the previous law and fails overall to comply with recognised international standards and best practices. In addition, and this is perhaps even more problematic, the text appears to be incompatible with the new National Drug Control Policy in multiple regards. This is all the more surprising as the new Policy was developed simultaneously and released just a week after the amended Law was enacted. Fortunately, it is not too late, and there is still some room left to manoeuvre and bridge the most egregious gaps between the two documents.

Ensuring a greater consistency between the Law and the Policy

While the process is, overall, moving in the right direction, inconsistencies between the revised Law and the newly released National Drug Control Policy have the potential to seriously impair the effectiveness of the entire reform. Indeed, these could lead to the implementation of fundamentally incompatible interventions and practices on the ground.

In this sense, the development of adequate by-laws can significantly help to bridge the gaps and better define how certain provisions in the Law should be understood and interpreted. Mobilising legal expertise to support this process will be of critical importance. Meanwhile, the two following propositions could be considered as a matter of priority.

Use by-laws to ensure the voluntariness of treatment

The Policy explicitly consecrates the voluntariness of drug treatment, through the affirmation of two important principles ("to transform compulsory treatment into voluntary treatment" and "to respect, protect

and promote all human rights, fundamental freedoms and the inherent dignity of all individuals"). In order to reconcile the Law with the Policy, by-laws could clarify that all references to drug treatment and rehabilitation contained in the Law shall be understood as referring exclusively to *voluntary and non-coercive interventions*. Another provision could also specify that the use of judiciary procedures – as defined under Section 9, f and g - should be strictly limited to cases where a drug user has committed a criminal offence as a result of his or her own drug dependency (i.e. a theft committed to buy for drugs). Hence, legal orders to undergo drug treatment would remain the exception and be used only as an alternative to criminal prosecution for other offences. The same interpretation could be extended to Section 15 of the amended Law, which establishes the conditions under which a court can order mandatory community service.

Clarify the definition of drug possession in the by-laws

As it stands, Section 16 of the Law prescribes extremely harsh prison penalties (5 to 10 years) both for drug users caught in possession of small amounts of drugs for personal use and for small-scale subsistence poppy farmers. This clearly contradicts key principles contained in the Policy (to decriminalise drug use and to consecrate alternative development, rather than criminal prosecution, as the primary intervention for reducing illicit cultivation of opium poppy). Here again, there is room to introduce significant flexibility by further defining the scope of Section 16 c and how "possession of drugs" shall be understood. For instance, a by-law provision could specify that the possession of quantities of drugs smaller than those established under Section 26 do not fall under the scope of offences listed under Section 16, as they are considered to be for strictly personal use. Similarly, another provision could clarify that penalties foreseen under Section 16 do not apply to the cultivation and possession of opium poppy by small-scale farmers under a certain surface area or production quantity (to be defined).

Issue internal directives to suspend the arrest of drug users and small-scale subsistence farmers

In addition to the inclusion of specific provisions in by-laws, the Ministry of Home Affairs should seriously consider issuing internal orders and directives instructing the Myanmar Police Force and the General Administration Department not to arrest or prosecute drug users caught with small quantities of drugs under a certain threshold or small-scale subsistence farmers. Such an approach would not be new in the country and has actually been used by the Myanmar Police Force before. Indeed, the Ministry of Home Affairs released in 2001 an unpublished internal directive that instructed all police officers not to use the possession of condoms as evidence of prostitution. Similarly, another directive instructed police officers not to arrest drug users for the possession of needles and syringes, although this continued to occur in practice. Also, and even more importantly, it is useful to note that drug users are currently not being arrested in the direct vicinity of Harm Reduction facilities, as a result of informal but explicit orders that were released by the CCDAC to all their field officers in the country. This clearly highlights how the adoption of a new set of orders could concretely allow the implementation of a different approach, even in the absence of new amendments to the Drug Law.

The introduction of changes to the legal framework, either via by-laws or Ministerial orders and directives are commonly used around the world and have the significant advantage that they do not require revising law. In fact, there are numerous examples of countries that have decided to implement new approaches to drug control without actually reviewing their main Drug Law. In this regard, the case of the Netherlands is emblematic, as it is the Dutch Police Force that took the lead on drug reform in the country, issuing a series of internal orders instructing their officers not to arrest drug users. This resulted in the *de facto*

decriminalisation of all drug use in the country, although the Dutch Law continues to stipulate that drug use is illegal. Legislative change can be a lengthy and complicated process; it is unrealistic to expect it take place on a regular basis. In contrast, it is easier to stop enforcing an existing law, or some of its sections, and to prioritise other approaches implemented via the introduction of internal orders.

Conclusion

The process of review for the Myanmar drug legal framework led to the adoption of two ambivalent texts. On the one hand, the new National Drug Control Policy undoubtedly signals a clear shift away from a repressive model and towards an evidence-based approach to drug control based on public health, human rights and development. On the other hand, the amended Narcotic Drugs and Psychotropic Substances Law continues to lean heavily on the use of repression, compulsory treatment and harsh prison penalties. In such a context, the key to success lies in finding practical ways in which the significant improvements introduced in the new Policy can actually be implemented. This is an essential precondition to ensure that Myanmar's efforts to transition towards an evidence-based approach to drug control will result in tangible benefits, not only for drug users and small-scale farmers, but also for all Myanmar people, and for communities at large.

Mixing "the old and the new", or introducing only gradual reform, can be tempting. However, this would almost certainly lead to mixed results that would disappoint both the champions of repression and the supporters of a more humane approach. There is little doubt that if repression and more progressive elements are implemented simultaneously, each side will simply hold the other responsible for continued failures. The reality is that harsh prison penalties and forced eradication are simply not compatible with public health, rural development and human rights. Fortunately, it is not too late, and the rapid adoption of adequate by-laws and internal orders can help to bridge the gaps that currently exist between the amended Drug Law and the National Drug Control Policy.

Without a doubt, Myanmar is at a crossroads and has a unique opportunity to complete its transition towards an evidence-based approach to drug control. But in order for changes in policy to become reality, the Ministry of Home Affairs must clearly show the way and affirm its commitment to leading this change and concretely implementing its new National Drug Control Policy. More than a future – and highly hypothetical – new Drug Law revision, political will is, and will remain, what ultimately determines the extent to which Myanmar policing practices will change on the ground.

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[1] For access to the full text (in Burmese), see: http://www.burmalibrary.org/docs24/km%2015.2.18.pdf
[2] See full document on: https://www.unodc.org/documents/southeastasiaandpacific//2018/02/Myanmar...
[3] Speech at the new Policy's launching event in Nay Pyi Taw. See: https://www.unodc.org/southeastasiaandpacific/en/myanmar/2018/02/new-nat...
[4] See: https://www.unodc.org/southeastasiaandpacific/en/myanmar/2015/03/myanmar...
[5] "Guiding Drug Law reform in Myanmar: a legal analysis of the draft bill amending 1993 Narcotic Drug and Psychotropic Substances Law". Report released by the Drug Policy Advocacy Group in October 2017. https://www.tni.org/en/publication/guiding-drug-law-reform-in-myanmar
[6] See: https://www.unodc.org/documents/drug-treatment/UNODC-WHO-Principles-of-Drug-Dependence-Treatment-March08.pdf

[7] UNODC estimates that only 10 to 15% of drug users will develop a problematic pattern of drug use or become dependent. See https://www.unodc.org/unodc/en/data-and-analysis/statistics/drug-use.html

[8] International Harm Reduction Programme (2011), Treated with cruelty: abuses in the name of drug rehabilitation (New York: Open Society Foundations) https://www.opensocietyfoundations.org/sites/default/files/treatedwithcruelty.pdf

[9] Human Rights Watch (2001), The rehab archipelago: Forced labour and other abuses in drug detention centres in Southern Vietnam https://www.hrw.org/video-photos/video/2011/10/04/rehab-archipelago-abuses-vietnam-drug-detention-centers

[10] For more information see UN joint statement on compulsory drug detention and rehabilitation centers: http://www.unaids.org/sites/default/files/sub_landing/files/JC2310_Joint%20Statement6March12FINAL_en.pdf

[11] Transnational Institute, "Bouncing back, relapse in the Golden Triangle", June 2014

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[13] See comparative studies on: http://www.abc.net.au/news/factcheck/2015-02-26/fact-check3a-does-the-death-penalty-deter3f/6116030

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