

Grappling with dissent and political silencing during transition: The consequences of Myanmar's NLD-led government defamation law

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Abstract

In 2013, Myanmar's government passed the Telecommunications Law to regulate private telecommunication providers. Article 66(d) was intended to provide protection against defamation. Under the National League for Democracy (NLD)-led government, however, this Article is being used to stifle political dissent and suppress freedoms of media and expression in digital spaces. Wide-ranging public campaigns led by media and civil actors have advocated for the repealing of this Article, though none have been successful. This paper considers the barriers to reforming Article 66(d). It draws on primary interviews with activists, media professionals and academics based in Myanmar alongside secondary research to identify three key barriers to reform: Myanmar's political context under an NLD-led government, cultural dynamics towards the media, and existing policy frameworks. While this analysis finds that there are potential avenues for reforming the Article, it makes the conclusion that it is unlikely that meaningful reform will take place in the current context. This research provides an interesting insight to how Southeast Asian countries like Myanmar reconcile their political transitions and development with the influence of Western and domestic media.

Introduction

The National League for Democracy's (NLD) win at Myanmar's 2015 general election came with the expectation that it would further liberalise freedoms of media and expression. Under the NLD's governance, however, these freedoms have regressed.¹ A symbol of this decline is the use of Article 66(d) of the 2013 Telecommunications Law. The Telecommunications Law regulates private telecommunication providers and Article 66(d) contains provisions to charge an individual for using a

¹ Free Expression Myanmar, 'Myanmar's media freedom at risk' (Report, Yangon, Myanmar, 2018) 9–11.

provider in a defamatory way.² The intention was to provide respite for a country grappling with the influence of a liberalising media.

The practical use of Article 66(d) tells a different story. It is used to charge individuals who communicate political dissent via social media. Since the NLD came into power, more than half of the charges under the Article have been taken against those who criticise government officials.³ The Article continues to be used for these purposes despite significant campaigning from civil society actors who voice their concerns that it is being used as a tool to stifle freedoms of media and expression. The government displays an unwillingness for meaningful reform.⁴

This paper considers the possibility for reform under Article 66(d) by assessing three key barriers: Myanmar's political context; the country's cultural dynamics; and the impact of current policy frameworks. First, the effectiveness of previous amendments to the Article will be assessed, before drawing on current primary and secondary research to assess the possibility for reform. Ultimately, this paper argues that, without significant change in these areas, Article 66(d) of the Telecommunications Law is unlikely to result in meaningful reform.

Myanmar's political context

While there are some indications that reform may be possible in the current Myanmar parliament, actions suggests otherwise. The government amended Article 66(d) in 2017 following public outcry but the reforms were superficial. Rather than adhering to calls from civil campaigners and changing the Article's references to defamation, the most significant change was a reduction of the maximum prison sentence from three to two years.⁵ These amendments indicate the government's willingness to allow public pressure to influence policy and decision-making.⁶ Yet it is unlikely to make further changes in its current term.

Analysts argue that reforming Article 66(d) again is not a government priority.⁷ Media and political experts in Myanmar posit that the NLD uses its parliamentary majority to delegitimise policy debates

² The Telecommunications Law 2013 (Myanmar).

³ 'Home page', SayNoto66d, last modified 8 March 2018, accessed 28 July 2018, www.saynoto66d.info/.

⁴ Tea Circle Oxford, 'Myanmar's freedom of expression as a broken promise of the NLD', 30 May 2018 teacircleoxford.com/2018/05/30/myanmars-freedom-of-expression-as-broken-promise-of-nld/.

⁵ Oliver Spencer, Zar Chi Oo and Yin Yadanar Thein, 'The 66(d) amendment: Tinkering at the edges', *Frontier Myanmar*, 15 September 2017, frontiermyanmar.net/en/the-66d-amendment-tinkering-at-the-edges.

⁶ Anonymous interview with Myanmar media and political analyst. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018.

⁷ Anonymous interview with Myanmar media and political analyst. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018 and Anonymous discussion with political researcher during ANU course dinner in Naypyidaw, Myanmar, 10 July 2018.

that contradict its platform. The government's intentional delay of amendments to the Peaceful Assembly and Peaceful Procession Law highlight its unilateral power to determine any law desired, wherein reforming Article 66(d) is undesirable.⁸ Some NLD politicians even argued in parliament that the 2017 amendments to the Article were insignificant, giving hope to those campaigning for change.⁹ Although there are some avenues for achieving reform in the current parliament, it is unlikely unless those working in and outside the NLD can change the party's platform. The NLD could respond to public pressure and meaningfully reform 66(d), yet their pattern of decision-making indicate that it is unlikely.

Others attribute the NLD's ascension to power as context for its unwillingness to reform Article 66(d). When the Union Solidarity and Development Party (USDP) won the 2010 election it did not have significant levels of public support, so it passed a suite of reforms to relax freedoms of media and expression.¹⁰ The intention was to legitimise itself in the eyes of the public and the media by engaging them in its governance. On the contrary, the NLD interpreted its victory in 2015 as proof of its legitimacy and has demonstrated limited interaction with the media or civil society.¹¹ This position connects strongly with the use of Article 66(d) and the government's subsequent unwillingness to reform because they view critics as distorting their relationship with the public.¹² While activists and media professionals argue that the NLD's relationship with voters – and Myanmar's democratic transition – would strengthen if it opened itself to criticism, they agree it is unlikely given its recent electoral positioning.¹³

The NLD's position is not unique to Myanmar, rather, it is indicative of a broader trend across Southeast Asia. The influence of social media has led governments in the region to pass laws that restrict digital

⁸ Anonymous interview with Myanmar media and political analyst. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018.

⁹ Ei Cherry Aung, 'Myanmar's parliament debates controversial telecom law', *Mizzima*, 29 July 2017, www.mizzima.com/news-features/myanmar%25E2%2580%2599s-parliament-debates-controversial-telecom-law.

¹⁰ Nicholas Farrelly and Chit Win, 'Inside Myanmar's turbulent transformation', *Asia & the Pacific Policy Studies* 3, no. 1 (2016): 43.

¹¹ Anonymous interview with Myanmar media and political analyst. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018; Anonymous interview with peace process consultant. Interview by ANU students. In-person interview. Yangon, Myanmar, 18 July 2018; and Anonymous interview with member of Myanmar Press Council. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018.

¹² Maung Aung Myoe, 'The NLD and Myanmar's foreign policy', *Journal of Current Southeast Asian Affairs* 36, no. 1 (2017): 117; Anonymous interview with member of Myanmar Press Council. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018; and Interview with Aung Khant and Maung Saungkha. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018.

¹³ Interview with Aung Khant and Maung Saungkha. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018 and Anonymous interview with member of Myanmar Press Council. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018.

freedoms.¹⁴ Thailand recently passed laws which threaten to prosecute social media users for criticising the monarchy – where charges are made under similar guises of ‘defamation’.¹⁵ The Vietnamese government has gone further to work with Facebook to explore strategies on the site itself that would complement the government’s censorship laws.¹⁶ These governments use morality to justify their decisions and argue that they are protecting their constituencies, but the actions taken are being used to stifle dissent.¹⁷ This demonstrates how governments are grappling to reconcile their political transitions with Western influences and domestic criticism via social media. While the NLD may face domestic pressure to reform Article 66(d), reform may be unlikely without a broader push to relax restrictions that exist elsewhere in the region.

Even in Myanmar, Article 66(d) does not exist in isolation – it is a key element to the NLD’s broader pattern of stifling dissent. Since coming into power, the NLD has made concerted efforts to silence criticism of its government on and offline. Maung Saungkha, an activist jailed under Article 66(d), notes an increasing government surveillance over media and activist circles under the NLD.¹⁸ He says that, where the Article polices criticism in the media, the influence of the Peaceful Assembly and Peaceful Procession Law imitates similar practices in offline spaces. These laws are creating a culture of unease and self-censorship among civil actors when they engage with, or criticise, domestic politics. These feelings of uncertainty are increased by the government’s recent announcement to spend six billion kyat on a social media monitoring team: while it says the team will safeguard young users, little has been said publicly about its mandate.¹⁹ The limited transparency is worrisome to civil actors because they

¹⁴ Liu Yangyue, ‘Transgressiveness, civil society and internet control in Southeast Asia’, *The Pacific Review* 27, no. 3 (2014): 384 and Ben Doherty, ‘Silence of the dissenters’, *The Guardian*, 22 October 2010, www.theguardian.com/technology/2010/oct/21/internet-web-censorship-asia.

¹⁵ Yangyue, ‘Transgressiveness, civil society and internet control in Southeast Asia’, 384 and ‘Freedom on the net 2016: Thailand country profile’, Freedom House, accessed 28 July 2018, freedomhouse.org/report/freedom-net/2016/Thailand.

¹⁶ Geoffrey Cain, ‘Kill one to warn one hundred’, *The International Journal of Press/Politics* 19, no. 1 (2013): 96 and David Hutt, ‘Is Facebook helping Vietnam suppress online dissent?’, *Asia Times*, 2 June 2018, www.atimes.com/article/is-facebook-helping-vietnams-pro-democracy-crackdown/ (site discontinued).

¹⁷ Yangyue, ‘Transgressiveness, civil society and internet control in Southeast Asia’, 398.

¹⁸ Interview with Aung Khant and Maung Saungkha. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018 and Anonymous interview with member of Myanmar Press Council. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018.

¹⁹ Anonymous interview with member of Myanmar Press Council. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018; Interview with Aung Khant and Maung Saungkha. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018; Tea Circle Oxford, ‘Myanmar’s freedom of expression as a broken promise of the NLD’; and Moe Moe, ‘Parliament approves funds for internet oversight body’, *The Irrawaddy*, 21 March 2018, www.irrawaddy.com/news/parliament-approves-funds-internet-oversight-body.html.

fear that the government may use the team to monitor their activities, given their reliance on online spaces for organising and recruitment.²⁰

This online monitoring demonstrates how defamation laws can set a clear political culture where silencing dissent is considered an expected and necessary element to the NLD's governance. The government's actions have created an atmosphere of caution among civil actors – its loudest critics. If they continue to have their desired effects, then it is unlikely the government will consider relaxing these restrictions.

Myanmar's cultural dynamics

Unless proponents for reform can mobilise wider support to amend Article 66(d), the relationship between the NLD and the public will pose a significant barrier to change. They already face difficulties because a strong distrust for media and activism has been brewing in Myanmar since the NLD took power.²¹ These public sentiments are influenced by the rhetoric of Aung San Suu Kyi, who has shown little sympathy for those charged under Article 66(d) despite being a former political prisoner herself.²² She has not given any press conferences since she began her position, nor has she met with any domestic media, thus hampering the public's ability to report effectively on local issues.²³ The relationship that the NLD has with the public means that its leaders can set cultural attitudes with their actions, knowing that the public is likely to adopt these sentiments due to its support for the Aung San Suu Kyi and her party.²⁴ The NLD's influence over the public's perception of the media therefore makes it difficult for civil actors to attract sympathy and mobilise support around the issues they champion like reforming Article 66(d).

While this distrust for the media and activists continues to permeate throughout Myanmar's society, civil actors still consider education to be a key element to their role. Proponents of reform believe that their role should not focus solely on legal reform, but on educating the public about the importance of freedom of expression and civil rights more broadly.²⁵ Because these concepts are still largely

²⁰ Interview with Aung Khant and Maung Saungkha. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018.

²¹ Lisa Brooten, 'Burmese media in transition', *International Journal of Communication* 10 (2016): 190–92.

²² Anonymous interview with member of Myanmar Press Council. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018.

²³ Ibid.

²⁴ Anonymous interview with Myanmar media and political analyst. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018; Anonymous interview with member of Myanmar Press Council. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018; Interview with Aung Khant and Maung Saungkha. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018; and Anonymous interview with an editor of English-language Myanmar publication. Interview by ANU students. In-person interview. Yangon, Myanmar, 18 July 2018.

²⁵ Interview with Aung Khant and Maung Saungkha. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018.

unfamiliar to Myanmar's cultural fabrics, directors of Athan, a local non-government organisation that promotes freedom of expression, say it is difficult to identify cultural and linguistic translations for these terms in their work.²⁶ These barriers are familiar to many civil actors in Myanmar who must engage in vernacularisation to develop cultural understandings of such concepts.²⁷ For the directors of Athan, this forms a difficult but necessary aspect to their work.²⁸

Mobilising support for greater freedoms of expression will not be possible without a cultural understanding of their importance and practice. Even so, Athan understand that the core barriers exist in Myanmar's political, not cultural, frameworks.²⁹ Because NLD's leaders have considerable influence over the population, they argue that their work must focus on political advocacy.³⁰

Myanmar's policy frameworks

One area where civil actors believe they have the strongest possibility for reform is the duplication of the law regarding the chargeable offences within Article 66(d). The Penal Code 500 already outlines defamation in Myanmar, for example.³¹ Proponents of reform argue that very few charges like those under the Article 66(d) have been used outside of the Telecommunications Law, despite the Penal Code being in place since British rule.³² While the Penal Code does not refer to digital spaces explicitly, interpretations of the legal instrument would allow it to protect against defamation.³³ Proponents for reform argue that the Penal Code contains sufficient provisions for defamation and that Article 66(d) is being used as a political tool. Therefore, they argue, it should be reformed to reduce duplication and limit its use as a tool to stifle debate. While these arguments were used by civil actors to promote reform before the 2017 amendment, the superficial nature of that change indicates that the argument was not convincing enough to sway the NLD-led government.³⁴

²⁶ Ibid.

²⁷ Lynette Chua, 'The vernacular mobilization of human rights in Myanmar's sexual orientation and gender identity movement', in *Law & Society Review* 49, no. 2 (2015): 308, 316.

²⁸ Interview with Aung Khant and Maung Saungkha. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018.

²⁹ Ibid.

³⁰ Ibid.

³¹ 'Myanmar: Briefing paper on criminal defamation laws', International Commission of Jurists, accessed 29 July 2018, www.icj.org/myanmar-briefing-paper-on-criminal-defamation-laws/.

³² Interview with Aung Khant and Maung Saungkha. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018.

³³ Anonymous interview with Myanmar media and political analyst. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018 and interview with Aung Khant and Maung Saungkha. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018.

³⁴ Anonymous interview with Myanmar media and political analyst. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018 and interview with Aung Khant and Maung Saungkha. Interview by ANU students. In-person interview. Yangon, Myanmar, 17 July 2018.

Even if Article 66(d) was reformed, there are sufficient legal frameworks that could be used to limit debate and expression in online spaces. A host of media professionals have already been arrested under laws including the Penal Code and the Official Secrets Act in Myanmar for allegedly publishing defamatory and incorrect statements about government officials.³⁵ The frequency of these restrictions within Myanmar's legal framework demonstrates that, while reforming Article 66(d) of the Telecommunications Law will be an important step to relaxing freedoms on media and expression, the issue is far more pervasive. Meaningful reform to relax Myanmar's restrictions on freedoms of media and expression would need to extend beyond Article 66(d) and would require a significant shift to the cultural and political attitudes within Myanmar.

Conclusion

This paper has drawn upon primary and secondary research to assess the possibility of meaningful reform to Article 66(d) of the Telecommunications Law. It has argued that there are three key barriers to change: Myanmar's political context, cultural dynamics and existing policy framework. While there are possible avenues for change – from the favouring opinions of NLD representatives expressed during parliament debates about the 2017 amendments, to the mobilisation of civil society and the duplicity of laws – it is unlikely that Article 66(d) will change in the current context. The paper has outlined a host of barriers, from the NLD-led government's claims of legitimacy and its relationship with the public, to regional trends for online restrictions and the public's distrust for the media, which pose significant barriers for meaningful reform.

The NLD's resistance to reforming Article 66(d) sets a dangerous norm where the silencing of dissent and criticism becomes essential to sustaining its governance. It indicates that they are unwilling to engage civil and media actors in Myanmar's democracy and discredit the crucial role that such actors have played in the country's liberalisation until this point. For a government still grappling with a political transition, the NLD should be wary of the impact this norm may have on sustaining its leadership.

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³⁵ Lisa Brooten, 'Burmese media in transition', 185.

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