

Burma / Myanmar : The Challenge of Democratic and Inclusive Land Policymaking

A Response to the Draft National Land Use Policy

Tuesday 19 September 2017, by [ALONSO-FRADEJAS Alberto](#), [FRANCO Jennifer](#), [KRAMER Tom](#), [TWOMEY Hannah](#), [VERVEST Pietje](#) (Date first published: 16 February 2015).

Myanmar's National Land Use Policy promises to make profound changes to the current economic, social, and political-institutional landscape. This is an important and bold step, but its impact will depend on how it addresses the often "messy" details of actual land based social relations.

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Executive Summary

In October 2014 the Myanmar government unveiled a draft National Land Use Policy (NLUP) and announced it would take public comments for a limited time before finalizing the document. Once it is finalized, the new policy will determine the distribution, use and management of the country's land and related natural resources like forests and rivers, for years to come.

It promises to make profound changes to the current land-related economic, social, and political-institutional landscape. This is an important - and bold - step for Myanmar, with its complex history of political and armed conflict and protracted displaced populations. More so because land policymaking also tends to involve simplification - that is, putting aside real-life facts and phenomena that have the potential to derail formal-legal standardization agendas.

Some simplification is unavoidable. But policies that too narrowly follow overly neat categories of land use will be unable to detect, adapt to or address many of the most significant and "messy" details of actual land based social relations. These are often the very facts that need to be understood and taken into consideration in the first place. So the big question at the heart of the NLUP process is: whose details are going to count? This briefing examines this question with a particular emphasis on an ethnic minority perspective.

An inclusive land use policy-making process that allows for - and encourages - full and meaningful participation for all rural working people is essential for ensuring a policy outcome that is widely and effectively accepted by society.

It is a significant and welcome development that the public is invited to submit comments and recommendations. If the government is to make this step matter, then it must follow through. It must ensure that the issues, concerns, and aspirations expressed by those whose lives and livelihoods are most affected or threatened by forced eviction and dislocation, land confiscations and

large-scale land deals, leave a substantial imprint on the policy that finally gets adopted.

The English version of the draft NLUP (as uploaded onto the government website) is positive in some ways and includes several key provisions that would improve Myanmar's current land governance arrangements. But it still needs improvement especially in terms of some fundamental principles in order to be better positioned to address these key and urgent land policy challenges.

Overall, for Myanmar's land policy to succeed, it must seek to:

- (i) ensure benefits to the landless and near-landless working peoples;
- (ii) remedy historical injustices;
- (iii) promote the distinct right of women to their own land rights;
- (iv) promote the distinct right of ethnic minority groups, and other customary communities such as Mon villagers in Karen State, for example, to their territorial claims as rural working people¹ and as indigenous peoples;
- (v) support ecological land and labor uses in pursuit of productivity;
- (vi) ensure state/public support for building diverse and sustainable livelihoods; and
- (vii) advance the rights of rural working people and peoples to access and use land for purposes and in ways of their own choosing.

This is because the current land problem plaguing Myanmar society today is rapidly increasing land polarization, which in turn, is tied to a deeper set of problems related to three main and broadly distinct types of situations affecting rural working households and peoples:

- (i) some already have access to land but this access threatened or is vulnerable to threat,
- (ii) some currently have little or no effective access to land and control over land-related decisions, and
- (iii) some previously had access but lost it due to armed conflict and also natural disasters (such as Cyclone Nargis). It is these three dimensions of the land problem in Myanmar today that define the type of policy response that is needed, and which the NLUP can and must try to address.

General Recommendations

The NLUP could be further improved in line with international standards. Given this urgent situation, we make the following overall recommendations:

1. An immediate moratorium on all current and planned land concessions and land confiscations as an interim measure to address current land conflicts;
2. Adoption of an across-the-board land size ceiling (not only on land concessions) with land redistribution and land restitution, along with recognition of informal and customary land users rights, as a core pillar of the new NLUP;
3. Adoption of a public and private investment strategy that promotes and supports rural working

people to stay on the land in a self-determining manner, that supports robust local economies and local food production systems and enables them to reach local and regional markets as a core pillar of the new NLUP;

4. Revision of the draft NLUP in line with and incorporating these and the other more specific recommendations outlined in this briefing;

5. Explicit commitment to review and amend all other relevant existing laws to be in line with the above. The NLUP process presents a strategic opportunity to act on these core recommendations toward achieving a solid social foundation for peace, development and democracy after six decades of war and a resurgence of armed conflict.

In support of making these improvements to the NLUP draft, the Voluntary Guidelines for Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (hereinafter referred to as “Tenure Guidelines”) are indispensable.

The Tenure Guidelines are the highest international standard on tenure of land, fisheries and forests to date and must be read in conjunction with other relevant international human rights instruments. The Myanmar Government is a signatory to these guidelines, which makes using them as the standard by which to improve the NLUP policy especially relevant and appropriate.

On the need to protect existing democratic access to land where this already exists but is or may be threatened, through legal recognition and allocation of tenure rights, guidance can be found in Article 7 (Safeguards), Article 8 (Public land, fisheries and forests), Article 9 (Indigenous peoples and other communities with customary tenure practices).

On the need to promote democratic access to land where poor, vulnerable and marginalized people have little or no access, through distributive and redistributive reform, guidance can be found in Article 15 (on land redistribution and land ceiling).

On the need to restore democratic access to land through land restitution in cases where people have lost their prior access as a result of armed conflict or natural disaster, guidance can be found in Article 14 (on land restitution).

Specific Recommendations

The NLUP could be further improved in line with international standards by explicitly declaring the following as policy aims in the Preliminary section of the document:

1. Respect for the multiple meanings and values in Myanmar society, including social and spiritual functions; ecological and environmental functions; and a political legitimacy function.

2. Special emphasis on poor, marginalized and vulnerable people and peoples in the context of national food security, the realization of the human right to food, and the peace process.

3. Measures to promote social justice, namely:

a. Recognition and protection of the tenure rights of small scale food producers, ethnic minorities, women, and other poor, marginalized and vulnerable customary users;

b. Establishment of a land size ceiling (not only on land concessions) with land redistribution of tenure rights to landless and near-landless working people, in order to promote democratic access to and control of land, as well as to avoid (re)land concentration.

c. Establishment of mechanisms of land restitution of tenure rights of those who have previously been displaced by armed conflict and natural disaster, especially IDPs and refugees, under safe and secure conditions, in order to restore those rights which were lost.

4. Recognition and protection of diverse agro-ecological conditions and diversity of farming systems, especially those which support food production for household consumption and local and regional markets.

5. Promotion of social justice and the progressive realization of human rights throughout Myanmar society.

Additionally, it is recommended to make the following improvements to some specific chapters:

1. Part I Chapter 1

a. Define clearly public purpose. The TGs offer relevant guidance: “States should expropriate only where right to land, fisheries or forests are required for a public purpose. States should clearly define the concept of public purpose in law, in order to allow for judicial review” (Art.16.1).

b. Adopt fully the entire standard of basic principles as laid out in the TGs Article 3A (“General principles”) and Article 3B (“Principles of implementation”).

2. Part I Chapter 2

a. Acknowledge that in many places throughout the country customary and informal land management mechanisms and institutions have emerged or persisted, while in some places these were disrupted or destroyed by armed conflict and natural disaster, among others.

b. Acknowledge that the five laws enacted in 2010-2013, including the SEZ law, have created dissent and should be reviewed and revised based on the purposes and principles of this national land use policy as revised above.

3. Part I Chapter 3

a. Indicate clearly how this structure will serve the state’s obligation to respect, protect and fulfill human rights under international law, especially the right of self-determination in the enjoyment of individual and collective land use rights.

b. Indicate how this structure will democratize control of land related decision-making and policy implementation.

4. Part I Chapter 4

a. Establish clear safeguards that recognize and respect actual land use practices including community decision-making.

b. Eliminate the category of VFV land, which when combined with a top-down (re)classification approach, risks hampering effective access to forest, land, fisheries and waterways by those whose lives and livelihoods most directly depend on it.

c. Adopt the Tenure Guidelines Article 8.1 which states that “Where States own or control land, fisheries and forests, they should determine the use and control of these resources in light of broader social, economic and environmental objectives” (and also Art.4.4 of the Tenure Guidelines).

d. Adopt the Tenure Guidelines provision in Article 1.1 on the wider objectives of responsible land policy.

5. Part I Chapter 5

a. The NLUP draft provides for recognition/protection of “long- term land user rights whether or not they have been registered, recorded or mapped”. Yet there is no differentiation of different users, where they come from or how they got onto the land in question. There is no mention of those who may have been on the land in an earlier era and may have been displaced by armed conflict or natural disaster or due to arbitrary eviction. It is not explicit about whose rights will be emphasized in this process or why such recognition and protection is important as a matter of public policy. Also, a key theme of the TGs is that land information management systems should be a pro-poor tool used to protect poor, marginalized and vulnerable groups from dispossession. Special care must be taken to ensure that land information and administration systems do not become a tool for dispossession. While a welcome provision, Art. 22(e) should nonetheless strive to specify how it will be determined who these long-term land users are, and how it will ensure their tenure protection from corporate or state actors over time.

b. These current weaknesses can be remedied by relevant provisions of the Tenure Guidelines, among others:

c. Adopt the Tenure Guidelines Article 1.1. d. Adopt the Tenure Guidelines Article 4 on the rights and responsibilities related to tenure, especially Articles 4.5, 4.6, 4.8 and 4.9, e. Adopt the Tenure Guidelines Articles 7.1 and 7.6 (Safeguards), Article 8.3, Article 9, and Article 10.

6. Part II Chapter 1

a. The NLUP draft stresses a technical approach to planning and changing land use, which might clash with actual uses and knowledge on the ground; risks putting at risk poor, vulnerable and marginalized households and communities; principle of “bottom-up” is not applied to decision-making over which information will be accepted.

b. The Tenure Guidelines recognize diverse development models and farming systems, as well as diverse land use change purposes. They would not envision definitions of suitability that promote large-scale investment exclusively and at the expense of the marginalized, and would envision definitions that permit pro- poor redistributive reform alongside other types of investment

c. The current draft of the NLUP’s Article 26 must be read against the Tenure Guidelines provisions on principles of implementation which call for participation of the most affected people (TG Art.3B.6). Currently, Art. 26(c) of the NLUP draft outlines a ‘bottom-up’ approach will be used for urban planning matters, while “deciding” and “determining” will rest with the district level (Art. 26(d) and Art. 26 (g)). This veers away from the principle of participation as elaborated in the Tenure Guidelines.

7. Part II, Chapter 2

a. “Changing land use by zoning”: interesting provision to “protect the continuous land use, land management and land tenure rights whether or not they are registered”; but not explicit on priorities in terms of how/which continuous users and uses will be prioritized; risks ratifying current users/uses at the expense of those who suffered from past misappropriations; removes earlier draft’s principle of FPI consent (e.g., role in decision making) in validating proposed land use zoning, and instead settles on informing public and stakeholders.

b. Part II overall is oriented to providing safeguards in favor of displacement, for which there are UN Guidelines, the UNDRIP, and ILO 69; main safeguard is impartial environmental and social impact assessment, which is interesting, but not yet based on the international human rights principle of FPIC or the standard on development related evictions and displacement (UN Guidelines); provision to prevent land grabbing is severely weakened by setting limits on land acquisition according to the capacity of each company that applies for concession, rather than the international standard set by the Tenure Guidelines; safeguards on contract farming are not clearly based on existing human rights standards.

8. Part IV

a. The NLUP establishes procedures for land acquisition, compensation, resettlement, and rehabilitation together, but this section is very short and grossly lacking in detail (especially when compared with the part on taxation). Notably, restitution is not mentioned at all. The provision also fails to elaborate on the circumstances under which compensation will be required (i.e. Why displacement is occurring in the first place), the mechanisms and procedures in place to ensure resettlement and rehabilitation are carried out, etc.

b. The TGs have entire sections dedicated to the respective topics of land consolidation (Article 13), restitution (Article 14), expropriation and compensation (Article 16). The draft NLUP should be revised to conform with the Tenure Guidelines, starting with shifting the NLUP draft's emphasis from harmonization with national law to harmonization with international standards, such as FPIC (for before land deals occur) and restitution (for after land deals occur).

c. The draft NLUP should also be revised to fully meet the most relevant and existing international human rights standard set by the UN Guidelines on Development related Eviction and Displacement, UNDRIP and ILO 69.

9. Part V

a. This part should be revised to conform with the Tenure Guidelines particularly on ensuring "accessible to all" (Art. 21.1) and should ensure that alternative dispute resolution mechanisms, including democratic customary land conflict resolution systems, are supported and made accessible.

10. Part VII

a. Being such an important topic, this section should be moved forward in the NLUP to a place of higher prominence.

b. Provide greater clarification to ensure that terms like cooperation, consultation, and participation are adopted in a meaningful way, and not in a checklist style manner.

c. Potentially positive, but contradictory provision: while it claims to recognize and protect the right of all ethnic nationalities to their land, it also suggests provisions aimed at ending the traditional taungya system by reclassifying these as "permanent taungya"; lacks clarity on who gets to decide how ethnic nationalities can use and manage their land and prescribes a particular farming system, highly dependent on costly external inputs.

11. Part VIII

a. Art. 78 should be revised to make clear how it conforms fully with existing international standards, especially CEDAW and the Tenure Guidelines gender equality Principle of Implementation, which calls on states to: "Ensure the equal right of women and men to the

enjoyment of all human rights, while acknowledging differences between women and men and taking specific measures aimed at accelerating de facto equality when necessary. States should ensure that women and girls have equal tenure rights and access to land, fisheries and forests independent of their civil and marital status” (Article 3B4).

12. Part IX

a. This is a welcome provision if it opens the way to remedying the problems associated with the existing land and investment laws; and if it raises the demands on this policy to actually and comprehensively address the underlying land issues and in ways that go beyond a technical-procedural approach.

13. Part X

a. This provision should explicitly reference to the international human rights principle of evolutive law, and explain clearly how it relates to the formulation of the prospective new land law.

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P.S.

* TNI. 16 February 2015:

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