

A Myanmar Commentary: “Not About Us Without Us”: Legitimate national land law making by design

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As the government meets to design a “roadmap” for developing the new national land law, TNI looks at how the situation has changed since the development of the National Land Use policy a few years ago and reflects on the issues at stake for millions of people across the country with rights to land in the current context.

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Will the eventual roadmap design entail a quick and superficial process, which would likely end up favoring a pro-business outcome in terms of the content of the new national land law? Or, will it entail a slow and consultative process, which may – if combined with certain other conditions – increase the chances of a more social justice-oriented outcome? Good process is needed for good outcomes, if that is what we are aiming for. In the current context, a good NLL making process alone will not be sufficient. But it will at least be necessary – alongside other elements – if there can be any hope of overcoming injustice and mistrust to start forging a new path in the longer road to real land reform that is capable of contributing to peace, democracy and justice.



Farmers protesting against land confiscation in Thayetchaung township, Thanintharyi region / Photo credit Yukari Sekine

Introduction

As the year 2019 comes to a close, the struggle over rights to land in Myanmar has reached a new turning point. On December 18-19, 2019, the government will hold a workshop in Nay Pyi Taw to plan the official process (at least on paper) for making a new National Land Law (NLL) – the so-called “NLL Roadmap”.

Whatever its shape and substance, the new land law will eventually clarify the direction the Union government will take the country in not only in terms of rights to land. The new land law will also clarify the terms of “national development” and which development trajectory will be taken, and in so doing, will also clarify who will have to bear the costs of that choice.

As such this meeting may mark the beginning of an important turning point.

Will the eventual roadmap design entail a quick and superficial process, which would likely end up favoring a pro-business outcome in terms of the content of the new national land law? Or, will it entail a slow and consultative process, which may - if combined with certain other conditions — increase the chances of a more social justice-oriented outcome?

If a new national land law has a chance of being seen as legitimate in the eyes of those whose lives will be most affected by it, then serious attempts will have to be made in the NLL Roadmap to embrace and operationalize the principle of “not about us without us”.

Two scenarios

This moment has been in the making ever since the National Land Use Policy (NLUP) was enacted in early 2016, prescribed as it was by that policy. But it has long been envisioned by government actors as a key step in the country’s transition, although just how long ago this moment was conceived is unclear since most of the key decisions related to land and who has rights to it have tended to be tightly controlled by a relatively few players at the top.

The official question right now - which the upcoming roadmap workshop is supposed to go some way towards answering - is this: what kind of design including timeframe will the national land law making process follow?

As ever, this is not merely a technical-procedural question, but a highly political one. We can imagine two broadly distinct scenarios battling it out for the final word.

One possible scenario could be to move as quickly as possible to formulate and enact the new national land law, in order to finally clear the way for new business investors to proceed to operate “free and clear” of any legal impediments — including “harmonizing” the numerous existing laws and refereeing conflicting land claims between ministries.

In this first scenario, the land problem is ultimately an investment problem that the new land law ought to resolve as soon as possible in favor of helping the country to open up for business as the pathway to economic development. Such a scenario would perhaps get biggest support from the military, the NLD, foreign Chambers of Commerce and other big capital investment players who find the current land situation chaotic from a business perspective, and who view the chief role of state law to facilitate the land deals needed for big corporate driven development.

The other possible scenario would push in the other direction: to lengthen the time frame and bolster a longer process with activities that can satisfy some meaningful measure of public consultation and participation. This kind of process design is needed in order to increase the chances of ending up with a law that is considered legitimate at the level of society and supported by at least a critical mass of the Myanmar public across the whole country. This kind of legitimacy and support is also needed if the NLL Roadmap is to contribute to building ethnic peace.

This second scenario could conceivably be supported by a pretty wide range of actors and

organizations. Some might have business interests at heart but at the same time might also be concerned about their company's reputational risk and/or wanting to avoid appearing to do harm in terms of negative impacts of unregulated land investments. But many if not most supporters of this second scenario would probably envision a more genuinely wide open and exhaustive process that could reach out to deal with pressing social justice issues, problems and concerns. But they are likely to come up against some pretty serious obstacles in bringing this vision to life. Some of these obstacles would be internal to the National Land Law roadmap building process; but many other obstacles would be related to factors way beyond this specific process and therefore far harder to address.

Indeed, the process to design the NLL Roadmap is resurrecting some of the same design issues that arose over the course of the NLUP public consultation process in 2014-2016. In this sense, this moment is the continuation — “Round 2” — of the high stakes political battle for the right to land — and to participate in the decision making that will directly affect their lives — of millions of rural working people across the country, that began with the NLUP.

But this time, the context is very different.

New context

It has been three years and ten months since the NLUP has been passed. The NLUP remains but a policy with no direct effect in law. In light of the current national government's failure to take it seriously, its political influence with regard to the new national land law making process appears highly doubtful until proven otherwise. And yet until now, the 2014-2015 NLUP process may be hailed as the most consultative process to date (relatively speaking) which benefitted from involvement – both inside and outside the formal government procedures — by many civil society organizations and grassroots actors. It should be recalled that the NLUP process started out extremely restricted and with a draft policy that failed completely to reflect the issues, concerns and visions of the vast majority of the country's most important land stakeholders [1]. But huge public concern – fueled by rising confiscations and displacements — served to open up small but significant windows for public participation and comment, thereby leading to a better outcome – very far from perfect, but at least a bit better. Within the extended 8-month consultation period from an initial three-week time, civil society organizations and local NGOs managed to organize around 74 public consultations all over the country with participation from over 5,000 people¹. At that time, for a country still in the very initial period of coming out of a straight-up military dictatorship, this was no small step.

Yet the meeting to discuss the roadmap for drafting of the National Land Law, which is taking place this week, is happening in a very different context. For over three years people have been waiting for this moment, but the situation has changed drastically.

In the two years since the NLUP was passed, amended versions of the 2012 Farmland Law, and the Vacant, Fallow, and Virgin (VFFV) Land Law were passed despite strong oppositions from the rural and ethnic populations. This reinforcement of the already much-hated VFFV Land Law did serious damage to both democracy-building and peace-building [2]. Key CSO networks such as Doe Myay (or Land In Our Hands/LIOH in English) devoted many hours to systematically studying these laws and proposing amendments and submitted their ideas to the government [3]. But their ideas were flatly ignored, resulting in an amended VFFV Land Law, for example, that is even worse for the majority of rural working people than the original. As of now, 47 million acres of land have been claimed to be vacant, fallow and virgin², of which around 75% are in the ethnic areas³, waiting to be handed over

for business interests. Hundreds of farmers have been criminalized, under these laws. Much trust has been lost; many rural working people across the country have lost faith that this government will act to guarantee their legitimate rights to land.

At the same time, another path towards land reform - the effort to promote national reconciliation and peace has become frozen. Demands from the ethnic armed organisations — including for meaningful recognition of ethnic customary tenure systems and restitution of the rights to land of IDPs and refugees - have been continuously rejected by the military as beyond the 2008 Constitution and existing laws (including the existing land laws), pushing away from a federal democracy system [4]. Between 2016-2018, over 700 armed clashes have been reported and more than 120,000 people were newly displaced throughout the country.⁴

In early 2016, Myanmar was still in a moment where “inauguration of a new government chosen by a landslide victory in historic elections offers an unprecedented opportunity to change course” [5]. Yet this opportunity has largely if not completely been squandered, and in its place, one finds deeper land problems accompanied by deeper doubts and lack of trust than ever.



Local workers at Shwe gas pipeline construction site on Maday island, Rakhine State / Photo credit Thant Zin

The adoption of the VFL law amendments, ongoing land grabbing, continued armed conflicts, and the blocked peace process have all contributed to “undermining opportunities to build trust and address the root causes of nationwide grievance, in which land is central” [6]. Unless a significant shift in the approach towards land reform is taken, it will be hard to ensure the inclusion of marginalized and vulnerable populations, which is necessary to produce a national land law anchored firmly on social justice and ethnic peace.

What is needed

The national land law making process should strictly respect and follow basic requirements such as transparency, participation, inclusion and timely information sharing, and using local languages [7]; but this time, it must be outrightly challenged for its current land reform paradigm, which centers on economic growth.

In terms of specific measures, land reform must start from “People are owner of the land” [8] or “ownership of all natural resources, including those under the ground, to the people in the respective states and sub-states” [9].

Ensuring land tenure rights for the people does not mean converting land into a profit-making machine. Rather, it must seek to protect rural working people’s everyday ways of being a community with their own cultures and traditional ways of living intact. Here, full and meaningful recognition of customary law as such and of customary land tenure systems as seeds of a new inclusive society is crucial. This means admitting that chunks of customary lands are being “cut off” and “chopped out”,

to be reallocated to others, often by profiteers making use of the VFV Law and Form 7 to accomplish this, and that many customary systems are deliberately being put under economic and militarization pressures that are hollowing them out — and then putting in place mechanisms for customary rights holders to reclaim those areas. That necessitates viewing land not as distinct, disconnected plots that have to be made “fit” for the purpose of so-called Industrialization 4.0 or Myanmar 4.0, but rather, as part of the broader social-ecological landscape comprising the surrounding rivers, hills, mountains, and forests that customary practices care for and that sustain whole communities.

Current land reform must at the same time prioritize full and meaningful restitution of land to the people who were forced off from their land due to land grabbing or armed conflict [10]. A country-wide survey showed that about 43% of the people possessed legal documents issued by the Government when their lands were grabbed, despite the strong emphasis on legalization of land tenure rights [11]. The tension is at an all time high as waves of China-Myanmar Economic Corridor and mega-investment projects rush to Myanmar, needing vast acres of land and natural resources. Restitution of land to an estimated 1.5 million internally displaced persons while another 1.5 million refugees from Myanmar still remain in Bangladesh, Thailand, and India⁵ should take place as described in the Internally Displaced Persons (IDP) and Refugees Right to Land Position Paper (August 2019). It demands “a special law should be enacted with clear provisions to fully facilitate our safe and dignified return and to fulfill our right to restitution in our villages of origin, in line with existing international human rights principles and standards, and with our full and meaningful participation and our free, prior and informed consent”.

Neither real recognition nor restitution is possible without proceeding in combination with redistributive reform – a measure that through application of an across-the-board land size ceiling and a basic guaranteed minimum access (land floor) both remedies existing land concentration and stands in the way of future land concentration.

These three measures in turn must be accompanied by a shift in a wider set of policies in the direction of encouraging and helping the beneficiaries of social justice land reform to stay on their lands, build a life of wellbeing and dignity for themselves and their children, and contribute to ecological regeneration especially in places where past land grabbing has caused damage to health of the natural resource base on which all of us ultimately depend.

The proposals for deep land reform (outlined above) are not outdated abstract ideas, but rather they have emerged as land policy demands by local people based on their specific experiences of dispossession, displacement, and disenfranchisement [12]. One can find these principles expressed in land policy consultations, land policy making “from below” processes (and their outcomes) being undertaken especially by many ethnic communities, CSOs and even a growing number of ethnic armed organizations.

Conclusion

What these “land policy making from below” examples illustrate is that it is possible – under the right conditions – to design a process where those who are most affected have a voice and that voice is actually listened to and manifested in policy making outcomes.

With regard to the government NLL Roadmap, unless it is opened up to extensive and meaningful consultations with the people, including the historically marginalized and vulnerable groups across the country, in every state and region, the resulting national land law cannot be socially just. Moreover, those consultations and decision-making processes would have to be free from external manipulation, interference, coercion and intimidation, and be conducted in a climate of trust [13]. If

meaningful consultations are to take place, it will take time and sufficient resource allocation to the process. It cannot be limited to urban locations under formal, comfortable settings with a few selected representatives. The process needs to reach out to and effectively involve the people from all walks of life; urban and rural, peasants or semi-peasants, fisherfolks, forest dwellers, women, youth, ethnic populations, etc.

Good process is needed for good outcomes, if that is what we are aiming for. Already so much trust has been lost and will need to be recovered; with regard to land, for all the reasons outlined above, the government is embarking on this NLL Roadmap process from a starting position of well below sea-level. This means that a good NLL making process alone will not be sufficient. But it will at least be necessary – alongside other elements – if there can be any hope of starting to change the dynamic of downward slide and to start forging a new path in the longer road to real peace, democracy and justice.

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Endnotes

1. Combination of figures from LCG, Loka Ahlinn and MRLG, “Civil Society Participation in Land Policy Making: the Innovative Experience of Myanmar’s Pre-consultation on the National Land Use Policy”, February 2017, and LIOH, “NLUP Consultation Process Report”, 2015
2. MOI Webportal Myanmar, 4 October 2019,
<https://www.facebook.com/MOIWebportalMyanmar/posts/2319230631538123>
3. GRET, Land and Livelihoods Policy Brief #1,
<https://www.gret.org/publication/myanmar-millions-of-farmers-are-at-risk-of-being-considered-trespassers-on-their-own-lands/?lang=en>, Accessed on 12 December 2019
4. Myanmar Peace Monitor, <https://www.mmpeacemonitor.org/category/dashboard>, Accessed on 12 December 2019
5. GRET, Land and Livelihoods Policy Brief #1,
<https://www.gret.org/publication/myanmar-millions-of-farmers-are-at-risk-of-being-considered-trespassers-on-their-own-lands/?lang=en>, Accessed on 12 December 2019

P.S.

- TNI, 17 December 2019:
<https://www.tni.org/en/article/not-about-us-without-us-legitimate-national-land-law-making-by-design>

Footnotes

[1] See TNI’s Pro-business or Pro-poor? – Making sense of the recently unveiled draft national land use policy:

https://www.tni.org/files/download/myanmar_land_policy-1.pdf

[2] See TNI Commentaries, available on ESSF (article 47242), [Myanmar – “A Declaration of War](#)

on Us”: The 2018 VFV Law Amendment and its Impact on Ethnic Nationalities and ESSF (article 51600), [Myanmar in Focus - Implementation of Burma’s Vacant, Fallow and Virgin Land Management Law: At Odds with the Nationwide Ceasefire Agreement and Peace Negotiations](#).

[3] See LIOH’s Statement On The Current Land-Related Laws And Their Amendments:
https://lioh.org/wp-content/uploads/2018/12/Eng_LIOH_statement_20180523_.pdf

[4] See Karen Peace Support Network’s Burma’s Dead End Peace Negotiation Process: A Case Study for Land Sector:
<https://progressivevoicemyanmar.org/wp-content/uploads/2018/07/Eng-Burmas-Dead-End-Peace-Negotiation-Process-KPSN-report-web.pdf>

[5] see TNI Commentary “The right to land at a crossroads in Myanmar” 05 July 2016:
<https://www.tni.org/en/article/the-right-to-land-at-crossroads-in-myanmar>

[6] See Analysis of the Vacant, Fallow, and Virgin Land Management Law by Saw Alex Htoo and Frank Scott:
https://progressivevoicemyanmar.org/wp-content/uploads/2019/02/landresearchactionnetwork_web.pdf

[7] See CSO’s Open Letter to NLUC:
https://lioh.org/wp-content/uploads/2019/11/CSO_response_on_NLUP_201911.pdf and Our Custom, Our Life by Shan State CSO Network:

[8] See KNU Land Policy:
https://www.tni.org/files/article-downloads/knu_land_policy_eng.pdf

[9] See BEWG’s Resource Federalism: a roadmap for decentralized governance of Burma’s natural heritage:
https://www.bewg.org/sites/default/files/pdf_report_file/ResourceFederalismWEB_0.pdf

[10] See KNU Land Policy:
https://www.tni.org/files/article-downloads/knu_land_policy_eng.pdf

[11] See LIOH’s Destroying People’s Lives: The Impact of Land Grabbing on Communities in Myanmar:
https://www.tni.org/files/article-downloads/lioh_research_report_eng_0.pdf

[12] See Statement by Federation of Ethnic Farmers Network:
https://www.facebook.com/1907280322851895/photos/pcb.2478468172399771/2478468079066447/?type=3&theater&_rdc=1&_rdr

[13] See CFS Tenure Guidelines:<http://www.fao.org/3/i2801e/i2801e.pdf>
and The Equator Principles on Engaging Affected Communities:
<https://equator-principles.com/wp-content/uploads/2019/11/The-Equator-Principles-November-2019.pdf>