
Myanmar: New policy promoting indigenous rights under threat

The last couple of years have been a period of significant change in Myanmar, most significantly represented by the victory of the NLD (1) in the November 2015 elections. Much less reported outside of Myanmar, but certainly just as significant was the January 2016 release of a new National Land Use Policy (NLUP) in Myanmar. The policy was released as part of the final major policy initiative of the outgoing administration before power was transferred to the incoming NLD administration in April 2016. The policy itself was the result of an unprecedented year-long consultation and review process largely overseen by the former Ministry of Environment, Conservation and Forestry under the auspices of a cross-ministerial body established by the vice president. Unseen in other policy development, the NLUP is recorded as having a total of at least 91 public consultations including 17 consultation led by government, and at least 74 led by civil society organisations across more than 40 townships and including 4 large national level consultation workshops. (2) The policy is envisioned to act as a guiding document in the drafting of a National Land Law and in reforming existing laws such as the antiquated 1894 Land Acquisition Act, and the 2012 Vacant, Fallow and Virgin Land Management Law which is the principle law that facilitates the allocation of ethnic customary lands to investors.

The resulting document is largely a compromise document containing 13 key parts that outline government policy on different themes. These include broad areas such as land use administration, and land use planning, to more specific parts focused on the granting of concessions of state owned lands; the procedures related to land acquisition, compensation resettlement; taxation; land monitoring and evaluation, as well as, importantly, land use rights of ethnic nationalities; and equal rights of men and women. The policy has been criticised by some land activist for not going far enough to stop land concessions and land related investments. The policy, however, is noteworthy in that it does offer significant reforms in land governance that attempt to regulate, restrict and suggest policy solutions to many of the current conflicts around land, including land grabbing and land alienation from concessions and state land leases on the traditional lands of various ethnic groups. In fact it could be said that the policy is a significant shift from the hitherto top-down land governance framework of Myanmar. The strong recognition of customary tenure, if implemented in law, would set Myanmar apart from some of more authoritarian neighbors of Vietnam, Cambodia and Laos.

The policy itself it is notable in that it contains the following basic principles: "To legally recognize and protect legitimate land tenure rights of people, as recognized by the local community, with particular attention to vulnerable groups such as smallholder farmers, the poor, ethnic nationalities and women." Most notably, the NLUP is significant in that for the first time it aims to recognise and protect customary as well as communal land tenure claims. In this regard, Part 8 on the Land Use Rights for Ethnic Nationalities is the most important section that is entirely devoted to recognition and protection of customary land holding of ethnic groups in Myanmar. Article 64 states that "Customary land use tenure systems shall be recognized in the National Land Law in order to ensure awareness, compliance and application of traditional land use practices of ethnic nationalities, formal recognition of customary land use rights, protection of these rights and application of readily available impartial dispute resolution mechanisms."

The Ethnic land rights section continues on in this vein. In its 11 articles, it acknowledges customary land management practices; protects ethnic lands from allocation to land concessions; recognises and protects rotational shifting cultivation systems; acknowledges the need for real participation of ethnic nationalities for decisions concerning their lands; recognises the importance of customary land dispute resolution procedures; and lays out basic principles for resolving historical land conflicts and displaced peoples. If implemented in law, these changes would represent a monumental departure from the current top-down governance of traditional lands in Myanmar.

Importantly, Part 9 of the NLUP contains a chapter specifically focused on the equal rights of men and women which was included after much debated and lobbying from local gender equality civil society groups in Myanmar. Women are significantly disadvantaged in Myanmar. This is true in particular in relation to land which is largely seen as the domain of men, and where it is commonplace that women are not included in land registration documents. (3) Part 9 of the NLUP is not extensive, consisting of only 2 articles. But article 75 spells out 8 specific land tenure rights that should be given to women. These include the right to own property as an individual or joint-title owner; the right to land when a spouse dies, or when property is divided in the case of divorce; and the right to participate and represent the community when making decisions concerning land.

The 2016 NLUP seems to represent a significant change of course for the country towards a more democratic and participatory land governance system that respects the rights of rural and ethnic communities who have long complained of state-sponsored land grabs. However, on 11 November 2016, barely 10 months after the NLUP was passed, an obscure, yet powerful commission in the National Parliament, known as the *Special Commission for Analysis of Legal and Special Issues* (hereafter referred to as the Special Commission) submitted a memo to Parliament. The memo, after referencing Article 37 of the 2008 constitution - that was drafted by the military and declares the State as the original owner of all natural resources above and below the land - states that the NLUP contained 6 “unfit and irrelevant facts” that should be removed from the document and a corresponding 6 items that “should necessarily be added”.

In keeping with the overtly secretive nature of the Special Commission, (4) the memo has not been publicly released in spite of the fact that it was submitted to the national parliament. Indeed, the existence of the document was only known to the wider land reform community through a brief mention in the local English language newspaper the Myanmar Times weeks later, which prompted further investigation by donor agencies. The document is signed by U Shwe Mann, Chairman of the Commission, and a significant political power in the government. A former general, Chair of the previously ruling USDP party, and speaker of the lower house of the national parliament under the former administration, U Shwe Mann and his family maintain significant economic interests around the country, including in agri-business investments. (5) Importantly U Shwe Mann is widely considered as a close ally of NLD leader and State Councillor Daw Aung San Suu Kyi. Indeed, it was widely reported in the press in 2015 that U Shwe Mann was purged from the previous USDP political party for being too close to the NLD leader. U Shwe Mann, whilst losing his seat at the 2015 election, nevertheless was appointed by the State Councillor to the Special Commission in what was seen by some as a reward for supporting Daw Suu Kyi in attempting to undertake constitution reform in the previous legislature. (6)

Looking at the 6 points listed as “unfit and irrelevant facts that should be excluded”, the first and last point are possibly the least controversial, referring to the establishment of a land information management entity, and to removing a reference to conducting 5-yearly reviews of the policy document respectively. The first point cited in the memo refers to Article 18 of the NLUP which suggests a “dedicated” entity for management of land information across the country. The Special

Commission, in recommending against such a body, has seemingly failed to realise that such a body already exists in the form of the *One Map Myanmar* project that aims to consolidate land related spatial data and information across different line ministries. (7) On the last point, the Special Commission lays the claim that a periodic update of the policy would require a periodic update of the law and that that would be unworkable, although the reasons for such an opinion are not stated. Given the importance of land policy and the current ongoing changing situation in Myanmar, it would seem to be entirely reasonable to review both land policy and law every 5 years.

The second issue identified for removal by the Special Commission refers to removing reference to the establishment of a special courts and independent tripartite arbitration process for land dispute resolution. Such an independent grievance system is proposed in Article 42 of the NLUP precisely because the current legal framework has proven to not be sufficient to resolve many land disputes. There is no recognition of communal community lands, customary land ownership or shifting cultivation in the current legal framework, and in fact, the above mentioned 2012 Vacant, Fallow and Virgin Land Management Law currently legalises the granting of traditional communal lands and fallow lands to private investors. By mandating the removal of the independent arbitration body (yet to even be established), the Special Commission seems to already be sending a clear signal that the status quo of state land hegemony should continue.

The third issue named for removal by the Special Commission is perhaps the most concerning: the removal of Part 8 on the land rights of ethnic nationalities in its entirety! As explained above, Part 8 is the principle chapter in the NLUP that gives explicit guidance on providing security of tenure over informal land ownership systems and traditional communal tenure arrangements and natural resource management system that currently predominate land governance for ethnic nationalities in Myanmar, particularly for those in the upland mountainous areas of Myanmar. Astoundingly, the Special Commission justifies the removal of the Part 8 on the grounds that the current legislation (specifically the Land and Revenues Acts; Towns and Villages Act, the Vacant Fallow and Virgin Land Management Law, and the Farmland Law and Forest Law) already respects customary rights and that these are in fact managed by the respective line departments. However, the words “customary” and “traditional” do not appear even once in either the Forest Law (1992), the Farmland Law (2012), or the Vacant, Fallow and Virgin Land Management (VFV) Law (2012). Moreover, the VFV Law is criticised by many ethnic rights groups as being one of the principle methods by which the State of Myanmar currently facilitates the transfer of traditional ethnic lands and natural resources over to private investors to undertake development projects. This has been a strong source of conflict between the Myanmar Union Government and ethnic groups. Furthermore, chapter 8 is the only section in the NLUP that specifically calls for a new Land Law to recognise customary tenure, and to provide the means to formally register current customary land tenure arrangements in law. The removal of chapter 8 would significantly undermine the traditional land tenure arrangements of ethnic nationality people by failing to take into account their particular livelihoods and land governance systems.

The protection and recognition of shifting cultivation is similarly targeted for removal by the Special Commission, which claims that the traditional agricultural system practised by upland ethnic groups “deteriorates natural environment”. The Commission advocates for the system to be “replaced with advanced farming practice such as upland farm, terrace farm, agroforestry”. Calling for the removal of any reference to the protection of this traditional agro-forestry system highlights an underlying weakness in understanding the complexity of land tenure arrangements in rural areas of the country. Such a removal also seems to seek to maintain the existing shifting cultivation eradication policy that has failed, both in Myanmar, and in the wider region. The livelihoods of ethnic nationalities living, in particular, in the uplands of Myanmar are currently highly vulnerable due to the very insecure land

tenure situation in those areas that fails to take account of their traditional land and natural resource management systems. Such systems are not currently recognised or protected in Myanmar legislation, and in this regard chapter 8 of the NLUP provides an overall direction for the development of future land governance frameworks around the particular context of ethnic nationalities who reside in the uplands but also the rights of customary tenure holders. The demands for the removal of reference to protection and recognition of shifting cultivation systems as well as the deletion of Land Rights of Ethnic Nationalities will likely be perceived as a significant betrayal of the open and participatory nature of the year-long NLUP consultation process. Additionally, according to Myanmar observers interviewed by WRM field researchers, such a move runs significant risk of damaging trust with ethnic CSOs and ethnic armed group representatives who are currently working with the government of Myanmar to negotiate a nationwide cease fire and peace agreement for the on again – off again conflicts that have plagued Myanmar for the last 5 to 6 decades. This is even more so given that the NLD election manifesto committed to “resolve problems between ethnic groups through dialogue based on mutual respect”. (8)

If calling for the removal of ethnic land rights and reference to the protection and recognition of shifting cultivation isn't bad enough, the Special Commission next calls for the removal of any reference to the equal rights of men and women with regard to land tenure, including in Part 8(a) of the basic principles mentioned earlier, and presumably also Part 9 on the “Equal Rights of Men and Women”. In the bizarre logic of the Special Commission, the call for the removal of such measures is founded on a perceived fear that ethnic unity will be affected, presumably because ethnic groups want to continue discriminating against women in terms of land ownership. No evidence is offered for such a statement. The statement appears based more on the personal opinions of Special Commission members - all of whom are men - rather than on any sort of empirical evidence. Indeed, as activities around the world in celebration of the International Women's Day on 8 March have once again underlined, the current situation of women's land rights, including in Myanmar, shows that there is considerable need to raise awareness on the rights of women in land governance in government agencies, in Myanmar as elsewhere.

Following the statement of the removal of the above points, the Special Commission then lays out 6 detailed items that should be added to the current policy. Some of these concern functioning of different administrative entities of the government. However, the overwhelming tone of many of the suggested amendments are related to maintaining business interests and the ability of the State to forcibly acquire all land as deemed necessary. The arguments are best summed up by the following rationale taken from clause six of the memo: "As for the State, the original owner of all land resources, if necessary, has full rights to acquire and manage land for public interest that should be included in the policy. Changing land use from farmland to other lands and land monopolization raise land price extensively, and consequently the domestic and foreign investors are facing with challenges. Therefore, the Union, or State or Regional Governments need to acquire land by paying compensation with fixed value in order to make use of land effectively and fruitfully."

It is not currently known how the Special Commissions challenge to the land reform desires of the majority of the population that were elaborated in an extensive year-long process, will play out. The Special Commission's memo appears to be slowly making its way through the government apparatus. The question that arises, however, is what impact an attempt on the part of the Government to unilaterally proceed with such measures would have on the trust and good will that was reportedly developed between the government and the citizens, civil society and ethnic nationality groups who took part in the year-long consultation process on the NLUP. Moreover, would such a move not be seen as a slap in the face to the nascent efforts at nation-wide consultation process around policy and law formulation? Looked at from the outside, the attack on the NLUP

appears like part of a broader battle playing out between those craving for land and agrarian reform on one side and crony business interests who want to maintain the status quo the other.

Yet what is perhaps most troubling about this case is that a largely un-elected, yet mysteriously powerful parliamentary body appears to be exerting significant influence over the land reform agenda in Myanmar. Will the government of Myanmar allow the wishes of the people to be overturned by such a secretive institution?

Article compiled by the WRM Secretariat based on the information from WRM field researchers and information cited below

- (1) NDL stands for The National League for Democracy. The party was founded in 1988 and is currently serving as the governing party in Myanmar, with Daw Aung San Suu Kyi serving as its President and State Counsellor of Myanmar.
- (2) Forbes, E., (2017). Civil Society Participation in Land Policy Making: the innovative experience of Myanmar's pre-consultation on the National Land Use Policy. Mekong Regional Land Governance Project. Vientiane and Yangon.
- (3) Namati, (2016). Gendered aspects of land rights in Myanmar: Evidence from Paralegal Casework. pp 5-6.
- (4) <http://frontiermyanmar.net/en/law-reform-a-daunting-challenge>
- (5) http://www2.irrawaddy.com/article.php?art_id=14151&page=3
- (6) <http://www.mmtimes.com/index.php/national-news/nay-pyi-taw/18853-thura-u-shwe-mann-appointed-to-head-own-legislative-commission.html>
- (7) <https://cdeweb4.unibe.ch/Pages/News/149/OneMap-Myanmar-New-CDE-project-launched.aspx>
- (8) http://www.burmalibrary.org/docs21/NLD_2015_Election_Manifesto-en.pdf