



Recommendations for Implementation of
Pro-Poor Land Policy and Land Law in Myanmar:
National Data and Regional Practices

October 2015

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Executive Summary & Key Recommendations

Myanmar is undergoing a major transition, opening space for significant change for the first time in decades. Secure land tenure for smallholder farmers and rural communities is essential in a heavily agrarian nation like Myanmar, where millions in the rural population – nearly 70% of the country – depend on agriculture for their livelihoods. Despite some updates to the legal framework, such as the 2012 *Farmland Law* and *Vacant, Fallow, and Virgin Land Law*, millions of Myanmar farmers remain vulnerable with insecure land tenure due to a complex and opaque set of land laws, unresolved historical land grievances, and widespread landlessness.

The common aim of Namati and Landesa is to support the development of a protective, pro-poor legal framework, that will empower farmers to use the law, make informed decisions about their land, and maintain secure land tenure – ultimately leading to poverty alleviation for poor, rural women and men.

Namati is a global organization dedicated to legal empowerment: putting the law into people's hands. Since the start of its Myanmar program in 2013, Namati and local partner Civil and Political Rights Campaign Group (CPRCG) have deployed 30 community-based paralegals in seven states and divisions to help farmers secure land tenure under Myanmar law. The paralegals conduct community legal education, assist farmers with application forms or complaint letters, accompany clients to government offices, and conduct follow-up as needed. With paralegal assistance, hundreds of Myanmar farmers received land use certificates, converted vacant land into farmland and secured rights, and even secured the return of land grabbed by powerful interests in the past. Over the past two years, the paralegals have worked alongside farming families and large groups of farmers to seek solutions to over 2500 land issues.

The Namati-CPRCG paralegals also rigorously track every case to build an understanding of farmers experience interactions with land-related laws and administrative systems. With paralegals across Myanmar including central lowlands and ethnic states, the geographic breadth of the program allows for meaningful comparisons of implementation and government decision-making across regions.

Landesa, a US-based nonprofit, has worked on issues of secure land rights for poor, rural women and men, including landless families, in over 50 countries since 1967, including comparative fieldwork and policy review in a dozen Asian countries (including five that have successfully carried out major land tenure reforms: Japan, Taiwan, South Korea, China, and Vietnam). In addition to this extensive regional experience, Landesa has carried out fieldwork in multiple areas of rural Myanmar.

The discussion and recommendations below are informed by the complementary perspectives and experience of Landesa and Namati – international and comparative examples of land reform and best practices, grassroots data from the experiences of Myanmar farmers, and additional fieldwork conducted by both organizations throughout the country. Here we highlight pressing needs – and recommend potential solutions – as the Myanmar government embarks on wide-reaching land policy reform. Namati and Landesa make the following key recommendations on the topics examined in this report:

- *Implement a pro-poor land policy that promotes agricultural productivity through land allocation to landless families, prioritizes smallholder farmers over industrialized agriculture, and supports these farmers with agricultural extension and credit.*

- *Recognize and formalize customary community land rights, including clearly established rights to forest land in current use and verification of community-led rights-confirming demarcation of external boundaries around ethnic areas; require and monitor free, prior, and informed consent during investment projects; and prioritize the resolution of acute, existing land disputes involving customary land rights.*
- *Strengthen the equitable position of women as landholders by involving women in decision-making bodies, including access to and presence on these bodies; improve legal protections for women's land rights, such as joint title on land use certificates; and mainstream women's participation in legal aid and registration initiatives as both agents of service and targets of legal assistance.*
- *Amend laws to reverse the approach to compulsory land acquisition and compensation such that largeholders are compensated in cash as smallholders are given land, not the other way around; prioritize the return of unused confiscated land; and address historical grievances through a mix of compensation approaches including divided ownership (or long-term rights), cash, new land, or shares in development.*
- *Increase access to land documentation and policy information for rural communities and individuals and ensure that mapping programs are affordable, transparent, and accessible; involve community participation; and enumerate landless families and available state land.*
- *Consider creating a land classification system that reduces the complexity of current categories, involves community participation to ensure the accuracy and appropriateness of new classifications, and is accompanied by sufficient education of communities and government officials alike so rules are understood and officials are confident to authorize reclassification.*
- *Proceed with land reforms in non-conflict and post-conflict geographic areas where and when possible, so that areas still in conflict will, in the future, be able to base their land reform work on successful neighboring models; support education and mediation in post-conflict communities, conducted by well-trained mediators, to resolve disputes and improve public awareness about land rights; and prioritize displaced and resettled communities in land allocation programs to address landlessness.*
- *Consider other Asian examples of the delegation of land administration to the states and regions, using land as a testing ground for devolution of governance and rights.*
- *Strengthen mechanisms for local land administration and local community access to land documentation, mapping, and dispute resolution processes in order to increase efficiency, better rely on local knowledge of ownership and classification issues, and ensure public awareness, transparency, and accountability.*

I. Smallholder Agriculture, Landlessness, and Equitable Land Allocation

Recommendation: Implement a pro-poor land policy that promotes agricultural productivity through land allocation to landless families, prioritizes smallholder farmers over industrialized agriculture, and supports these farmers with agricultural extension and credit.

The problems of landlessness, smallholder agriculture, and land allocation are inextricably linked. To successfully promote smallholder agriculture, a nation must have a population of farmers in possession of land and confident enough in their land security to make investments. Likewise, where landless agricultural laborers are common in a predominantly agricultural society, pro-poor land allocation is necessary to reduce landlessness. In Myanmar, the context is ripe for a policy and legal framework in which these three elements – *reduced landlessness* and bolstered *smallholder farming through equitable land allocation and support services* – to come together and build a fair and flourishing agricultural foundation for prosperity for Myanmar’s citizens.

Protection and Promotion of Smallholder Farmers in the Draft National Land Use Policy (NLUP)

The 6th Draft clearly establishes the protection of the rights of smallholder farmers as the first listed principle under *Part I, Chapter II – Basic Principles* (paragraph 7): “recognize and protect legitimate land tenure right of people as recognized by the local community, with particular attention to vulnerable groups such as smallholder farmers.” This emphasis on smallholder farmers provides the foundation of a pro-poor rural legal framework and agricultural policy, but also to builds the foundation for Myanmar to join the five great Asian success stories – Japan, Taiwan, South Korea, mainland China, and Vietnam. These nations’ agricultural productivity and overall economic growth were based upon the protection and promotion of the secure tenure rights of smallholder farmers. In *Part II, Chapter III – Land Information Management* also emphasizes “smallholder farmers” (paragraph 16(a)), ensuring that need in this area will be measured and that progress will be tracked.

A. Smallholder Agriculture Approach Is Most Equitable, Practical, and Productive

Decades of evidence from across Asia demonstrates that land reform efforts that prioritize and protect secure land rights for small farms, including micro-plots for those who were previously completely landless, are more effective than prioritizing large-scale commercial agriculture in attaining agricultural productivity and economic growth. The smallholder approach best protects the livelihoods of the most poor, is a realistic way to ensure access to land for all, and consistently leads to more productive agriculture. The most successful economies and most stable nations in Asia – Japan, Taiwan, South Korea, Vietnam, and mainland China – all took a predominantly smallholder approach to land reform rather than prioritizing large-scale plantations or mechanized farming. All realized great gains in productivity, with predominantly small farmer agriculture strikingly better than big holdings – whether private or collective farms.

With approximately 70% of its population rural and largely dependent on agriculture, Myanmar is potentially well-positioned to join these five great Asian post-war success stories in which smallholder agriculture laid the initial groundwork for the overall development of the society.

Namati fieldwork in Myanmar through its community paralegal program reveals that the vast majority of farmers seeking to secure their land tenure through the farmland registration process are smallholder farmers. Based on Namati findings as of Spring 2015, of the nearly 1500 clients from seven states and divisions working with Namati community paralegals on land registration, the vast majority – some 1050 families or 70% – were concerned with cases involving farmland of less than 5 acres (see Figure 1), with a further 20% of cases focused on farmland plots between 5 and 10 acres. The mean average size of the farms of the families Namati paralegals have supported for farmland registration cases in Myanmar is 5.53 acres. A smallholder approach for Myanmar, then, not only reflects the history of Asia’s five most successful economies, it also reflects the specific context and needs of Myanmar’s land insecure families.

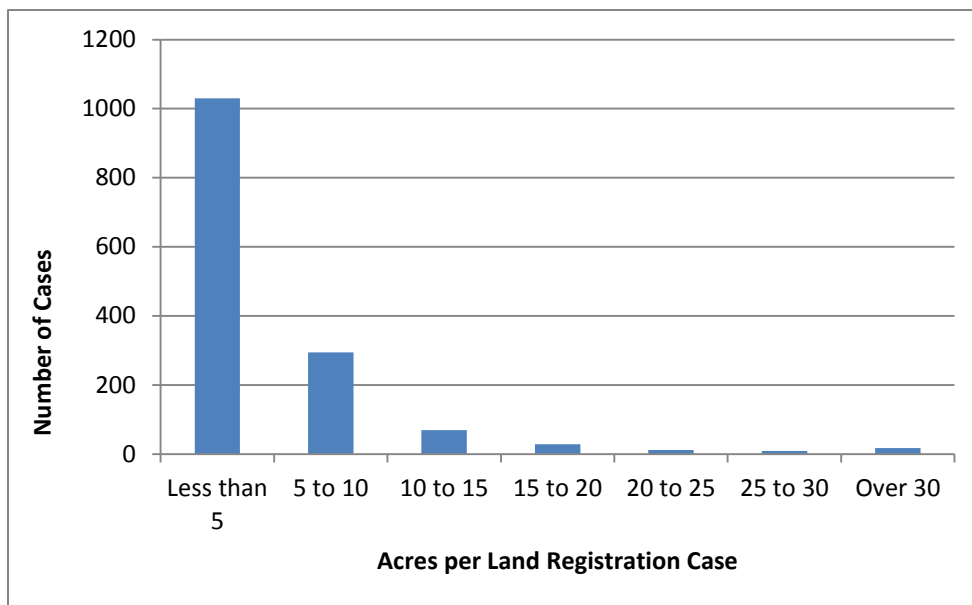


Figure 1- Number of Acres Per Farmland Registration Case in Myanmar (Namati 2015)

A decade of Landesa’s field research in India has found that approaches that support secure tenure for smallholders, including micro-plots for the previously landless, perform strikingly better than big holdings, with the peak of productivity per unit of land for the smallest farms often reached at just one-tenth of an acre. Medium and long-term investments by smallholders leading to greater productivity include irrigation, land leveling, intensive soil improvement, terracing and greenhouses, and agricultural loans. Evidence from China’s experience in 1962-1978 (a period of government-controlled large-scale agricultural collectives) supports this approach, with tiny private plots there accounting for 5% of arable land, but producing 15-20% of the total value of the nation’s agricultural production. The same was found in Russia’s private plots on government-mandated collective farms: 3% of arable land, but 25-30% of the value of agricultural production (including a large share of all vegetable, fruit, meat and dairy production, and even a majority of potato production). In South Vietnam, early land-to-the-tiller efforts led to significant improvements in productivity and stability: a 30% increase in rice production, and an 80% decrease in recruitment by the communist Viet Cong.

In addition to productivity and stability, as a pro-poor solution to landlessness, allocation of small plots (using available government land or private land purchased on the open market) are more affordable for the state than attempting to distribute full-size farms – a major reason

Landesa has had success in working with governments in mainland China and India to adopt legal frameworks supporting smallholder land rights to address landlessness. If enough public land is not available to the state, the purchase of private land is the best approach. Confiscation, or purchasing land at below market value, will not work: as seen in India, where such an approach led to successful resistance by land owners in every state except Kerala and West Bengal. Rather, Landesa experience with the state purchase of land at market value has been very effective, especially with micro-plot allocation, for example in the Indian states of Karnataka, West Bengal, and Odisha.

More broadly, if Myanmar can make thoughtful use of the key experiences of both Asian successes and Asian failures in the agricultural sector during the seven decades since 1945, the chances for Myanmar’s own development success will be dramatically enhanced.

All five Asian successes realized great gains in productivity, with secure tenure for predominantly small farmer agriculture strikingly better than big holdings – whether private plantations or government-mandated collective farms. Consider the five in turn:

- Japan went from insecure tenant farming to small, secure owner-operators. Over the period from 1955 to 1970, agricultural production rose an average of 3% annually.
- Taiwan likewise went from insecure tenancy to small, secure owner-operators, and over the decade from 1952 to 1962 rice yields increased by 60% and farmers’ incomes by 150%. In terms of overall development impact, consider the following table showing consumption patterns in small-farm Taiwanese households (average farm size of just over three acres), as found in Landesa field interviews in the year 2000 (most of this consumption was domestically sourced):

Virtually all farm households had:	Most households had or had done:
Solid brick house Color TV VCR or DVR Stereo Cellphones Washing machine Refrigerator	Computer Private life insurance policy Stock on Taiwan’s stock market Off-island travel for vacation or visit

- South Korea likewise, from insecure tenancy to owner-operated farming, with rice yields up 70% post-reform from mid-1950s to mid-1970s (very small farms, with half under 1¼ acres).
- Mainland China initially went from tenancy to small-farm ownership, with a 70% increase in grain yields from 1949 to 1956, then tragically collectivized and suffered 30 million famine deaths; China ultimately broke up the collectives into small farms, with renewed productivity increase of 32% between 1978 and 1984 attributed to the break-up.

- Vietnam replaced tenancy with small-owner farms in the south in 1970 through 1973 (30% increase in rice yields) while government-controlled collective farms languished in the north, then pragmatically broke up the collectives into securely held small farms as production surged.

Moreover, both China and India have had successful experience with tiny, securely held micro-plots of one-twentieth to one-tenth of an acre as livelihood supplements / safety-nets. In China, before the break-up of the collective farms (and during the period 1962-1979) tiny household plots used 5% of the farmland, and produced 15-20% of the total value of agricultural production. In India, in programs spanning three states, micro-plot distribution has given several hundred thousand previously landless families a large boost in nutrition, income, and status. In the United States, diverse kitchen gardens were found to be 20 times more profitable per unit of land than industrial corn production.

At the foundation of all these productivity increases – both on small farms or even on smaller micro-plots or homesteads – is secure rights to the land which allows the agricultural household to confidently invest their labor, their savings, and other resources in substantial medium- and long-term improvements in that land: irrigation, drainage, land-leveling, terracing, intensive soil improvement and erosion control, greenhouses, tree planting, trellis crops, fishponds, animal husbandry, etc. Production of high-value crops can increase more than basic food crops, even though the latter increased dramatically: in Taiwan, with such diversification beyond basic food crops and an emphasis on securely held small farms, high value production – fruit, vegetables, and livestock – grew from 21% to 60% of the value of all farm production from 1952 to 1979.

By contrast, large plantations are consistently shown to use land less productively and efficiently than smallholders who are secure in their land rights. This holds true not only for basic food crops, but also for high value and “export” crops. The same does not hold true if the smallholders have insecure land rights: large-scale holdings divided into insecure small tenancies in Bangladesh, India, and Pakistan produced paddy yields at roughly two-thirds the metric tonnage of secure smallholders in South Korea, China, Taiwan, Vietnam and Japan. In Taiwan, bananas and sugar cane are produced by secure smallholders at consistently higher yields than Asian plantations, while smallholder yields of rubber in Malaysia, Indonesia, India, and Thailand are 80% higher than large plantations in those countries.

B. Smallholder Agriculture Can Best Address Landlessness

For Myanmar, who would be the chief beneficiary groups of secure land tenure programs, paralleling those discussed above? And what would the Asian experience show to be most feasible, and most beneficial (and what to be avoided)? These questions must first be addressed by recognizing that a pro-poor approach to land policy and law in Myanmar will center on alleviating the condition of landlessness. To begin, the full scope of landlessness should be precisely understood. Based on Landesa's experience working with landless populations in Southeast Asia since the 1960s, those lacking adequate land rights can be seen to fall into one of eight categories, found in varying proportions in Myanmar (some of the categories partially overlap):

- **Completely landless**, though working in the agriculture sector (generally agriculture laborers, especially daily workers)
- **Tenant farmers** (including sharecroppers)
- **Insecure “squatters”** on “government” or other public lands
- **Users of “customary” or other traditional lands** whose entitlement to that use is not recognized in the formal legal system
- **Internally displaced persons and refugees** whose traditional living has been from agriculture
- **Supposed land reform beneficiaries and other “smallholders”** whose land has never been regularized and who remain insecure
- **Pastoralists** who temporarily use land for grazing, but without legal recognition
- Also, **women**, not only those who are part of the above households, but those in families that have secure land rights, where women do not share in those rights

Land Allocation Required to Address Landlessness in the Draft NLUP

The 6th Draft of the National Land Use Policy of the Government of Myanmar addresses landlessness in three key ways: first, it raises the issue to its first basic principle; second, the draft requires that landless families be documented through a national survey; third, the policy mandates that land be allocated to landless families. Specifically, the *Basic Principles* of the draft policy strongly identify the need to address landlessness through policy implementation, requiring that the government begin “developing procedures to address landlessness” (paragraph 7(m)), ensuring that those without land or secure rights to land can flourish as smallholders. Moreover, a new provision of the *Land Information Management* chapter requires a survey of landless people, and the participation of local individuals in conducting the survey (paragraph 15(g)). Finally, and perhaps most importantly, land allocation to landless families is required, as seen in new Paragraph 19(i) of *Part III – Planning and Changing Land Use*: with the state mandating the creation of district level land use plans to establish “reserved land areas for allocation to landless citizens,” and *Part IV – Grants and Leases of Land at the Disposal of Government* includes a crucial supporting provision: “Arrangements shall be made to allocate land to landless stakeholders” (paragraph 30(f)).

Field research and interviews conducted by Landesa has led to the preliminary conclusion that much of the landless population in Myanmar falls into the first two categories: completely landless agricultural laborers and tenant farmers. In addition, the many farmers cultivating land officially designated as vacant land or forest land, as well as communities practicing communal management of their land and natural resources, likewise make up a large proportion of the landless population in the country. These types of land cannot be registered as farmland under

the current laws, and thus, many of these farmers are landless, falling into the categories of insecure “squatters” and users of “customary” or other traditional lands. For example, some farmers have approached Namati community paralegals for assistance in gaining farming rights for land officially classified as “forest land.” Although the farmers have been cultivating the land as farmland for many years – some of whom were encourage to cultivate the land in the first place – this land cannot be registered. Of those “forest land” users that have approached a Namati community paralegal for assistance, 83% reported having no other agricultural land. Thus, addressing these issues is essential to reduce landlessness.

Families working as landless agricultural laborers or tenant farmers may have previously held secure land rights, but were victims of land confiscations conducted with unfair compensation if any, or may have given up their land as family members migrated or moved to urban centers in search of work, or may be displaced farmers from other regions uprooted by conflict or environmental conditions such as Cyclone Nargis or the effects of climate change. Namati community paralegals also report that land expropriation in various forms, through pressure by government officials and large landowners alike, has led to smallholder families reverting to the status of landless agricultural laborers or tenant farmers. In Ayerwaddy Division, for example, Namati has found that land disputes are sometimes rooted in farmers who had been forced in the 1990s to leave their land because they cannot pay fees or taxes properly or because the farmers could not meet imposed production quotas. The local government then redistributed the land to other small farmers, who worked as tenants of the government. The result over the years, as this process is repeated, is five or six farmers making claims on the same plot of land. While approximately two-thirds of paralegal clients involved in local land disputes reported having some kind of possession document for the land, the process of resolving the dispute must take into account the multiple claims and ensure access to land for all parties – particularly where poor government policies in the past catalyzed the disputes. A pro-poor land allocation program would not take land from one smallholder and distribute it to others, rather it would seek out unused government land or purchase private land on the open market.

Discussions by Landesa with community leaders from seven states and regions across Upper and Lower Myanmar led to the conclusion that as many as 60% or more of agricultural households in these representatives’ townships are landless agricultural laborers, while a smaller percentage, perhaps 30%, are smallholder farmers many of whom now have land use certificates, and the smallest percentage were tenant farmers. These ratios were borne out in joint Landesa-Namati field research in eastern Shan State in Spring 2015 during interviews with landowners who reported that agricultural laborers were plentiful, and that if these small-farm owners were to sell their land they had no sense of obligation to the agricultural laborers who could just “move on and find other work.” This type of land insecurity is precisely contrary to the five great Asian success stories, where land security matches the Landesa definition: farmers secure in their land such that they are willing to make medium- to long-term investments in that land. Without possession of such confidence, the farmers are land insecure, or even landless.

In Myanmar, there appear to be five groups within rural society that could be greatly helped by the government to move from their present status of “insecure, non-investors” (that is, no investment of family labor, savings, credit, or other resources) with respect to the country’s precious agricultural land base, to the status of “secure and ready to invest resources.” These land-insecure, then, are the target groups for potential remedial actions that could transform Myanmar’s rural society:

(1) Insecure present users of public lands (sometimes on those lands for generations) who are insecure for any of a variety of reasons. May lack any documentation of their use rights, or have inaccurate or outdated documentation; or (even with seemingly good documentation) may be fearful due to ouster of others from their lands, threats, or violent conflict; or may lack any acknowledgment of their rights and be considered squatters. As with each of these, there is a clear need for fact-finding and quantification. (See also section VI. Land Classification, below.)

“If you wish for industrialization, prepare to develop agriculture.”

Joe Studwell, *How Asia Works*, 2014

quoting land reform scholar

Michael Lipton, *Why Poor People Stay Poor*, 1967

Remedies: The easiest will be providing good documentation where it is lacking (“land use certificate” issuance process appears to have major shortcomings and will need to have local-level research and, probably, extensive redoing). May need a moratorium on all smallholder evictions while Myanmar’s land policy and law are being rewritten.

(2) Users of “customary”, “ethnic”, or other traditional lands whose entitlement to that use is not recognized in the formal legal system.

Remedies: Here the laws themselves may create specific insecurity (e.g., no recognition for customary rights over taungya lands) and will need to be replaced with new law and policy. Formal land rights for communities will need to be provided in law, publicized, and enforced.

(3) Evictees, internally displaced persons, and impoverished returnees whose traditional living has been from agriculture.

Remedies: Here, actual use by the rural poor has terminated and they will need to be restored or adequately compensated for their lost land. More than 62% of Namati’s paralegal clients seeking a remedy to a past land grab possess no other agricultural land – meaning adequate compensation or a return of land held in government control is needed for secure tenure and livelihoods. Some actions may be easier than others: e.g., creating an inventory that clearly shows where there has been a statutory period of non-use by a big land-taker. In which case the land should revert to the former user according to law. Options such as “equity share” participation (see Taiwan, South Korea) in the profits of new enterprises on taken land should be explored where physical restitution is impractical.

(4) Completely landless rural poor, such as daily agricultural laborers. Preliminary investigation suggests this may be a very large group. Finding enough land to allocate “full-size” small farms of one to five acres to all or most of the completely landless may be impossible (either public land is occupied, or any available land is far too expensive).

Remedies: Depending on availability, especially of public land (which should be inventoried), farms of one or more acre may be distributable to landless agricultural laborers. Where this is impossible, distribution of house-and-garden micro-plots of roughly one-tenth of an acre, as in several Indian states or previously in China (see discussion above), may offer the best solution; with their positive impact amplified via extension services and credit. Any private use rights to be allocated should be acquired voluntarily on the open market, and are likely to be affordable given the small amount of land going to each beneficiary family (protections against price gouging exist and should be used).

(5) Women's land rights, even in households where men's land rights are secure, need to be a clear focus of attention. Where paralegals have assisted in land registration attempts, the vast majority (approximately 84%) of applicants are men, while the restriction of only one person's name on the land use certificate leaves women particularly vulnerable.

Remedies: The law should provide for explicit recognition of women's equal land rights wherever possible, e.g., when issuing land use certificates for farmland plots, whether current farming areas or new micro-plots, be sure to include two lines providing for husband and wife as joint rightholders; if a man is trying to sell land rights, require his wife's consent on the title document unless her husband can show the land is exclusively his; and give women representation and full status within traditional bodies hearing land disputes.

C. Asian Success Based on Three Foundations of Smallholder Agriculture

The natural question that arises when considering land reforms based on smallholder agriculture as the necessary alternative to large-scale plantations and industrial agriculture is: how did the five Asian success stories do it? What was the formula for taking a nation of land insecure tenant farmers, and building a pro-poor agricultural sector that was far more productive than industrial agriculture and which eventually led to the creation of prosperous economic powerhouses? The answer is three key elements:

- 1) Equitable distribution of land,
- 2) Agricultural extension and other rural development services provided to smallholder farmers, and
- 3) Credit made available to smallholder farmers.

1) Equitable distribution of land

As is clear in the Myanmar context, landlessness abounds. History has shown that neither the approaches of extreme socialism (collectivized farming) nor extreme capitalism (feudal tenancy or plantations) are effective in producing stable, prosperous agricultural sectors. In the five Asian successes, the first step was the equitable distribution of land to insecure tenant farmers. This land allocation occurred either through the distribution of state land or through the breakup of the estates of large landholders with compensation provided to owners. (In Asian states where land reform was attempted without such measures, for example the Philippines, such reforms failed.) In Myanmar, the new, progressive 6th Draft of the National Land Use Policy requires such a land allocation program: paragraph 19(i) of *Part III – Planning and Changing Land Use* requires that the state mandate the creation of district level land use plans

to establish “reserved land areas for allocation to landless citizens.” Importantly, *Part IV – Grants and Leases of Land at the Disposal of Government* includes a crucial supporting provision: “Arrangements shall be made to allocate land to landless stakeholders” (paragraph 30(f)). When this framework is in place, the first steps have been taken toward equitable land allocation to the landless, and the promotion of smallholder agriculture.

Three examples from the Asian successes illustrate how land allocation, as well as other efforts to improve tenure security, worked to create the equitable distribution of land in practice: the land-to-the-tiller programs of Japan, South Korea, and Vietnam.

Japan

The second wave of land reform in Japan, following early efforts in Meiji Japan in the late 19th Century, came through the in post-war 1946 *Agricultural Land Law*. The law limited the maximum amount of land ownership: a three-hectare limit for self-cultivated farms, a one-hectare limit for land with tenants owned by resident landlords, and a complete prohibition on absentee landlords. The law provided compensation to large landowners in the form of 30-year bonds, which had a comparatively low value. The reforms were led by the Ministry of Agriculture and implemented by local Land Committees that reviewed all irregular transfers – anticipating resistance by landlords and other difficulties during the transition. In the months before redistribution there were 250,000 cases of attempted land grabs, which were addressed by the Land Committees, and by the end of the first year of reform there were only 110 incidents of violence, with no lives lost. Within ten years, 90% of all land in Japan was owned by small farmers and agricultural production rose each year in the decade to follow.

South Korea

The 1949 *Land Reform Act* of 1949 formed the basis of South Korea’s move to equitable distribution of land and smallholder productivity. Prior to the reforms land ownership was highly inequitable, with only 4% of South Korean households owning 55% of all agricultural land. As in Japan, the reforms limited land ownership to a maximum of three hectares, and provided similarly low-value compensation for landlords. Following the reforms, 50% of all farmers owned less than one-half hectare, with ownership increasing from 10% of farming households to 70% of farming households. This agricultural sector – with the vast majority of farming households secure in their possession of very small plots – produced dramatically higher rice yields than the previous large plantations worked by tenant farmers, and formed the foundation of the economic miracle of South Korea.

Vietnam

The Land-to-the-Tiller Program in Vietnam, designed by what is now Landesa with the support of USAID, followed a similar path, though it took place in the middle of a civil war. The land allocation was based on a three-step process. In 1968, the reforms began with the end of “negative land reform,” a situation similar to Myanmar where landlords and the army had led land confiscations, evictions, and unlawful rent collection. Next, in 1969, government land was distributed to smallholders. Then, in 1970, private land was converted using fair market compensation. The result was that farmers had small plots between one and three acres in size, and one million tenant farmers received secure land rights. Compensation was set at the value of two and one-half times the annual paddy yield, and monetary compensation was provided through 20% cash and 80% bonds (eight-year bonds at 10% interest). Over three years, rice production increased by 30%, and Viet Cong recruitment dropped by 80%.

2) *Agricultural Extension and Other Rural Development Services*

The second crucial element in the five Asian successes was the support of these new land secure smallholder farmers with agricultural extension services. Agricultural extension services are essential to building confident and capable farming families, and they must be regularly accessible. In Japan in the 1940s, for example, these services were so pervasive that the government provided one extension worker, or trainer, per village. This technical advice on planting, cultivation, seeds, irrigation, soil, animal husbandry and many other subjects were a critical piece of these nations' growth.

By missing the agricultural extension services piece, and by providing only land, farmers can become trapped by other market forces. In India, for example, agricultural extension services are literally a question of life and death as farmers with secure land title face a plague of recent farmer suicides because they have lost the ability to farm sustainably. Of the pressures facing small farmers in India today, agricultural extension services are seen as the most fundamental need for smallholders. According to Indian agronomists, without such advice and support, market forces fill the vacuum and render small farmers vulnerable because of "the lack of sound agricultural advice from the government, leaving most farmers to the mercy of local shopkeepers who represent the interests of big agribusinesses" (Ravindran, 2015). One farmer from Amravati District in Maharashtra State, explains the impact of farming without the support of technical advice: "They force them to go away from farming which is based on soil, size of land holding, access to irrigation, and their own needs, and give them a one-size-fits-all industrial farming 'package': high yielding seeds for cash crops like cotton, and expensive pesticides and fertilizers. They buy all this on credit, and when their crops fail, they're trapped."

To address this problem of unprepared smallholders in India, some states are increasing the delivery of agricultural extension services by supporting local agricultural NGOs, and by linking these services with government land allocation and titling programs. In the State of Odisha, for example, the government-funded Odisha Tribal Empowerment and Livelihoods Programme supports landless and land insecure beneficiaries from tribal populations by delivering extension services to improve the productivity of smallholder farms and house and garden plots. In the States of West Bengal and Odisha, the government is working with organizations like Landesa to link titling programs with agricultural extension services and other support such as water wells and animal husbandry. At the national level, the draft *India National Rural Homestead (House-And-Garden) Plot Provision Act (2014)* includes fourteen government services that benefit smallholder farmers, and requires coordination from the departments that support these schemes for poor households at the state, district, and block levels.

In China, the government passed a new agricultural extension services law that specifically aims at addressing the need for technical knowledge by smallholder farmers. The 2013 *PRC Agricultural Technology Extension Law*, implemented by the Ministry of Agriculture, requires that local government must provide extension services free of charge to individual farmers and organizations, including technical assistance in the areas of seeds, fertilizer, use of pesticides, planting and cultivation techniques, irrigation and soil protection, soil improvement, agricultural product quality, and animal husbandry.

In the Myanmar context, farming community representatives have emphasized the need for access to information and technical resources about these critical areas of agriculture, in particular guidance on soil, irrigation, planting, and cultivation. The 6th Draft of the National Land Use Policy mentions these issues in passing under *Part XII – Research and Development*,

noting in Section 77 the need for “best land use management methodologies in order to promote sustainable land use” (g), and “appropriate land use practices based on soil types” (k). However, there is no broader elaboration of agricultural extension services in the draft Policy. Therefore, in Myanmar these services should be identified and their provision mandated under the forthcoming National Land Use Law.

3) Access to Credit

The third critical element in the recipe of the Asian economic powerhouses is access to credit by smallholder farmers. According to Joe Studwell, author *How Asia Works*, a study of these nations’ economic successes, low interest or no interest credit for farmers is especially vital during a major land reform transition like the one facing Myanmar. Secure smallholder farmers – unlike agricultural laborers or tenant farmers – succeed because they have confidence to make medium- and long-term investments in their land. Confidence, however, is not enough. The means to make those investments must be provided to jumpstart the process. In Japan, credit – along with other capital investments, such as farming roads – was an important part of the equation as the nation moved from a centralized, military-dominated government and an agrarian sector dominated by landlords, to a free market democratic state supported by secure smallholder farmers. Farming families needed the means to confidently navigate the dramatic transition and invest in their farms.

In Myanmar, during fieldwork in Tachileik Township in Shan State, Namati and Landesa learned of a nascent farmer credit program led by the Ministry of Cooperation and supported by China. The program, called Green Project, provides loans of up to 300,000 kyats (about US\$300) with very low interest (1% per year) to villagers for “agriculture-related enterprises.” The amounts of loans have varied, and the process follows a micro-loan approach with requirements that small groups take loans together and sharing responsibility for repayment. This difficulty with the Green Project, though, is that the program managers are having a hard time finding very poor households – the target beneficiaries – to take out the loans, for fear of not being able to repay them, because they are land insecure. The result is that the Green Project ends up making its low-interest loans to wealthy villagers who then *buy up land with the loans* because it is considered an “agriculture-related enterprise.” The lesson from Tachileik Township in Myanmar: all three of the elements – land allocation, extension services, and credit – must take place together for smallholders to succeed.

II. Customary Land Rights

Recommendations:

- *Recognize and formalize customary community land rights, including clearly established rights to forest land in current use and rights-confirming demarcation of external boundaries around ethnic areas in consultation with communities.*
- *Require and monitor free, prior, and informed consent during investment projects.*
- *Prioritize the resolution of acute, existing land disputes involving customary land rights.*

To address the needs of ethnic groups, indigenous peoples, and others with customary land practices, many of the principles of landlessness and historical grievances (as elaborated in section I. Smallholder Agriculture, Landlessness, and Equitable Land Allocation and section IV.

Land Confiscation and Land Dispute Resolution) should apply. In addition, several other approaches are recommended:

- First, the state should recognize and formalize customary community land rights. Legal recognition of customary rights to land and natural resources has begun in several Asian states, such as the Philippines and India (as described below).
- Second, the state should require and monitor free, prior, and informed consent during all negotiation and contracting aspects of investment projects, including for lands of ethnic groups and indigenous peoples, who are often especially vulnerable to inequitable land acquisition. Free, prior, and informed consent requires that the community has the option to deny permission for the investment project and should involve convening the entire affected community and should require that at least three-fourths of the affected community must be consulted and give their approval.¹
- Third, the state should consider facilitating and registering the results of community-led processes of defining the external limits and boundaries of community lands to protect at-risk groups and allow for the right to decide rules for how the community will manage and administer their lands and natural resources within these boundaries.
- Fourth, the state should protect communities' customary land rights and uses as it develops and implements programs to address other issues such as poverty, landlessness, and natural resource management. If not considered, such programs can negatively impact community land rights. For example, the "transmigration" program in Indonesia tried to address poverty and natural resource management issues by moving people from densely populated areas such as Java to less populated areas such as Papua and Sumatra. Those that moved were allocated converted forest lands, but that land was often subject to competing claims from the local populations.
- Fifth, to avoid violence and to resolve long-standing conflicts, the state should prioritize the resolution of acute land disputes, including through increased legal awareness of local communities, supports such as legal aid to help resolve disputes through formal channels, and potentially, legal recognition of socially legitimate customary dispute resolution mechanisms, particularly where formal mechanisms are not adequate. In Sri Lanka, during the height of the 25-year civil war, the Tamil minority in Jaffna benefited from community-level legal education on land rights, and paralegal assistance with land documentation, to help address decades of conflict-related displacement.

The Philippines has taken a community titling approach to formally recognizing customary land rights through the 1997 *Indigenous Peoples' Rights Act* (IPRA), under which a national commission, with heavy input and evidence of historical and current land use and possession provided by the Indigenous Cultural Communities/Indigenous People, has authority to identify, delineate, distribute, and issue titles for ancestral domain lands. Such land and resources are community property belonging to all generations of the indigenous group and cannot be sold, disposed of, or destroyed. The commission has issued more than 250 community titles covering more than 1.6 million hectares. The IPRA also encourages indigenous groups to settle disputes

¹ For more on best practices on free, prior, and informed consent, see Food and Agriculture Organization of the United Nations. 2014. *Respecting Free, Prior and Informed Consent: Practical Guidance for Governments, Companies, NGOs, Indigenous Peoples and Local Communities in Relation to Land Acquisition*. Governance of Tenure Technical Guide 3.

under their customary laws through their own dispute resolution mechanisms, includes a required process for free, prior, and informed consent for land takings, and provides for legal assistance for indigenous communities. Such official recognition of these rights has protected communities against unlawfully losing their agricultural land to mining interests and has allowed communities to play an increasingly important role in forest and wildlife conservation, and has been used as a model for community forestry management in Vietnam.

Myanmar may also consider building on the existing community forestry initiative, and similar experiences in Vietnam and India, to better protect customary land rights within forests – and as an example for similar recognition of communal practices on non-forest land. In the case of Vietnam, the law does not explicitly recognize customary land rights. However, Vietnam's 2004 *Forest Protection and Management Law* recognizes the traditional rights of local communities to forest land they are currently using, and lays out several responsibilities for communities managing their forest land. Under Vietnam's law, forest dwelling communities can get long-term land use rights certificates for the land they traditionally have used if they develop a sustainable natural resource management plan for the area allocated to the village. The objective is to provide a balance between improving livelihoods of these poor communities through more secure land rights and long-term access to forest resources on the one hand, and environmental conservation on the other.

India has recognized the customary land rights of selected ethnic minorities through the 2006 *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act* (FRA), which formally recognizes and vests the customary land rights of members of Scheduled Tribes or those groups primarily residing in the forest for at least 75 years. An effort to formally recognize the existing users of the land, the FRA provides for traditional forest dwellers to apply for a title (either as an individual/household or as a community) to own, use, develop, and manage up to five hectares of forestland that the tribes traditionally inhabit. As of February 2015, the government had received almost 4 million individual and community claims and had distributed a total more than 1.5 million titles under the FRA. While the Act was intended to improve the livelihoods of the poor and encourage forest conservation, it has also been criticized by both environmentalists and forest dweller rights activists on multiple fronts: (1) not going far enough to achieve its goals; (2) generally weak implementation; and (3) inadequately protecting the land rights of women. While impact assessments are ongoing, many think that the increased security afforded to title holders has led to increased investment and more sustainable use of the land.

III. Women's Land Rights

Recommendations:

- *Strengthen the equitable position of women as landholders by involving women in decision-making bodies, including access to and presence on these bodies.*
- *Improve legal protections for women's land rights, such as joint title on land certificates.*
- *Mainstream women's participation in legal aid and registration initiatives as both agents of service and targets of legal assistance.*

While nearly half the world's population is still rural, and women do a large share of the agricultural work, only a small fraction of the farmland on which women depend is held by those women under any form of secure, long-term tenure. Securing land tenure for women is fundamental to a whole series of desired outcomes: improved income, better nutrition and

education for children, giving women a stronger voice within the family, and greater empowerment within the community. An increasingly large body of evidence demonstrates that when states actively prioritize women’s property rights, women’s land tenure security and other benefits can be greatly enhanced.

Years of Landesa experience in India, China, and Africa, have identified more than twenty concrete steps to implement secure women’s land rights, thus ensuring more equitable and productive land reforms. The full list is annotated in the Columbia University Journal of International Affairs (Prosterman, 2013). A few of these include: involving women in decision-making bodies, including not only access to but also presence on these bodies; strengthening legal mechanisms that protect women’s land rights, such as joint title and inheritance; and mainstreaming women’s participation in legal aid and registration initiatives as both agents of service and targets of legal assistance.

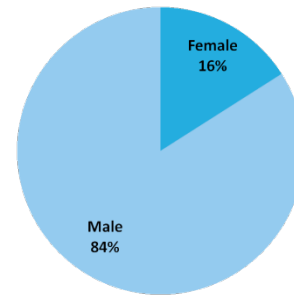


Figure 2 - Gender of Land Registration Clients in Myanmar (Namati 2015)

In Myanmar, women and men are equally involved in agricultural work, but the current farmland registration process includes space for only one name, generally the head of household, who is usually a man.² Across hundreds of land registration attempts undertaken with the assistance of a Namati community paralegal, 84% of land registration certificates are in men’s names only (see Figure 2). This low level of female land registration presented across all seven states and divisions where Namati paralegals work suggests that the lack of female land registration transcends ethnic differences and is linked, rather, to gender equity issues (see Figure 3).

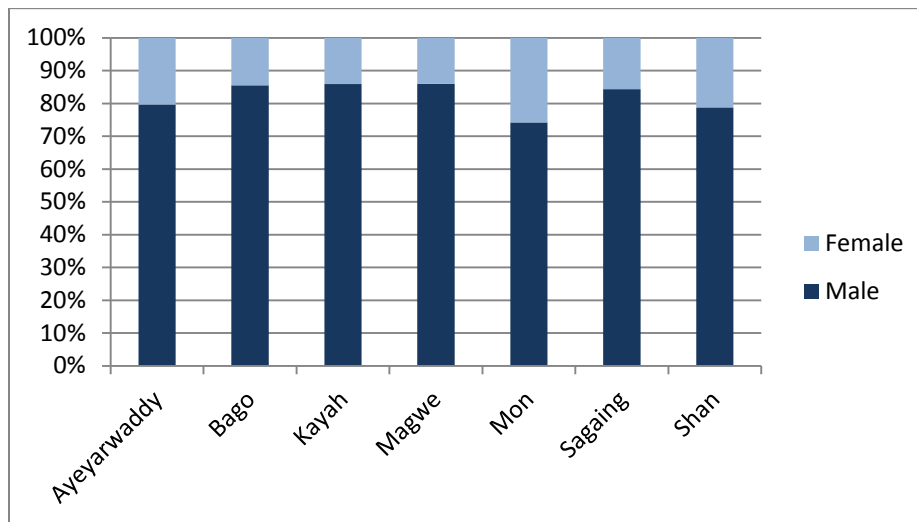


Figure 3 - Gender of Land Registration Clients by Region in Myanmar (Namati 2015)

² Note that the 6th Draft of the National Land Use Policy seems to correct the issue of including only one name on land registration documents by stating in *Part IX – Equal Rights of Men and Women* that women and men have equal rights to “hold individual or joint landholder rights” (paragraph 73). However, actual protection of women’s land rights will require changes in the current laws to implement this policy.

During separate and joint fieldwork by Namati and Landesa, communities in Myanmar often note that addressing the issue of women's land rights is not a serious concern as women are treated equally, and the need for joint registration, for example, is not a pressing one. The fact that only 16% of the paralegals' land registration clients were women, however, illustrates the risks to women's economic security. A common assumption about registration in women's names is that a married woman does not need to fear a loss of land tenure or overall economic security because she will be provided for by her male spouse (who holds tenure security). In reality, the land tenure insecurity women face occurs not only in the marriage itself – where the woman may have less say in the use or sale of the land, or in its passage to herself or to her children through inheritance – but also in many orbits outside of marriage, both for single women and in women-headed households. According to Namati data, more than a third of female clients seeking help with land security are unmarried, with 13% single, 22% widowed, and 1-2% are divorced or separated. (Only 2.5% of male land registration clients are widowed, divorced, or separated, while approximately 5% are single and 93% married.)

This demographic make-up of female clients served by community paralegals reveal at-risk groups consistent across Landesa work and research in other Asian states. In India, for example, in the state of Odisha, Landesa works with single women to secure their land rights and several distinct categories face distinct needs: widows, divorcees, abandoned women, never married women, and physically challenged women are often the poorest of the poor, and remain invisible in the eyes of land registration. In one case in Landesa's fieldwork in Odisha, a single woman was relegated to living in the family's cow shed because she was unmarried. Under a government land allocation program, supported by Landesa, she was identified and received a homestead plot.

Often, a lack of access to land rights is part and parcel of what has led to these women existing at the margins of family life and social life, while the provision of land to these women is a key to their economic opportunity. Prevention, then, can be seen through the joint registration of land use rights, and cure can be seen through land allocation programs for the landless that specifically seek out these types of landless women.

In conflict settings, the percentage of single women can be even higher, where men have left either to serve in armed forces, or have migrated for employment often for many years. In Sri Lanka, in the northern district of Jaffna, many women-headed households came about because of the 25-year civil war and blockade of the northern Tamil ethnic area, separating it from the majority Sinhalese south. Husbands, brothers, and fathers had either been conscripted, killed in battle, or left the Tamil north for India or southern Sri Lanka in search of work. The result was thousands of single women and women-headed households with responsibility for their families and their farms but with no legal rights to the land that supports them. A women-run legal aid center based in Jaffna addressed this problem through a registration program targeting these women, assisting them to get title to their land.

In addition to the fundamental right of equal access for women and men to the rights of the land their farm, other benefits of joint titling or co-titling for women and men are extensive. Studies from several international settings, cited by Namati in its December 2014 memo on Myanmar's Draft National Land Use Policy, demonstrate that efforts to promote gender equality in land registration provide not only improved land tenure security for women, but are also associated with numerous other health, social, and economic benefits. These include reduced fertility, improved child health, increases in educational outcomes for children, and women's empowerment including the assertion of land rights within the family.

India Case Study in Women's Land Rights³

A Gandhian "peaceful march on Delhi" by representatives of the landless poor was called off when the organizers and the Union government signed the Agra Agreement on 11 October 2012. This set a timetable for major new land tenure reform, including measures that recognize women's land rights and universal distribution of one-tenth acre house-and-garden or homestead plots to the landless rural poor on a gender-sensitive basis.

To meet one of the undertakings in the Agreement, Landesa joined Indian civil society organizations under the guidance of the Ministry of Rural Development to create a draft National Right to Homestead Bill, which now awaits full cabinet approval and submission to the legislature. The bill draws upon extensive experience with state-level homestead-allocation programs over the past ten years, in which women's land rights figure prominently, and which addresses the need for many of the measures outlined in the text, including:

Signaling their eligibility for a separate ten decimal (1/10 acre) homestead plot, the definition (Section 2) of "Family," states that, "widows, divorcees and women deserted by families [sic: husbands] shall be considered separate families." Further, "Single Women" means "widows, divorced women, separated women, women whose husbands are missing and unmarried women aged 30 years or more."

It is expressly provided that "The title to the homestead shall be granted in the name of adult women member/s of the eligible family, except in cases, where there is no adult woman member in the family." (Existing state-level homestead programs have included title [patta] solely to the wife in Karnataka, and jointly to wife and husband in West Bengal.)

The list of those with "priority in allocation of homestead" parcels (Section 8) begins with "woman headed families" and "single women" (note definitions above).

Also of great potential importance to poor women who are priority beneficiaries are the multiple "measures and modes of identifying beneficiary homesteadless poor families" (Schedule I on MINIMUM FEATURES OF THE IMPLEMENTATION PLAN ON RIGHT TO HOMESTEADS, subparagraph (1)(a), accompanied by the requirement of assuring "that there is no exclusion of any genuine and eligible landless poor and homesteadless family" (subparagraph (1)(c)) also provides that all homestead allotment shall be "free of any charge" (paragraph (5)). These provisions should help, respectively, with the problems of "invisibility" and of destitution that are likely to characterize many members of this beneficiary group.

³ Note that this case study and the one that follows are excerpts from Prosterman, Roy L. 2013. "Enhancing Poor Rural Women's Land Rights in the Developing World." *Journal of International Affairs* 67: 147-64.

China Case Study in Women's Land Rights

China broke up its collective farms between 1979 and 1984, generally distributing the land in equal "shares" to every member of the household. This devolution of farming activity to the individual household level led to large initial increases in productivity through short-term improvements, such as timing of operations, seed selection, careful application of fertilizer, hand-weeding, etc. However, individual shares were not delineated on the ground, and generally only the name of the "head of household," usually male, appeared on documentation. He also made the decisions as to use for all the household's land.

Importantly, most villages adopted a process for continuing equalization, called "readjustment," under which village cadres periodically took back land and reallocated it in new configurations, to take account of both overall population change and changes in the population of each household due to daughters-in-law marrying "in" to the village, daughters marrying "out" to their husband's village, births, and deaths. This preserved absolutely equal land shares for everyone in the village, but came at a heavy and unanticipated cost: the "investment horizon" for making medium- to long-term investments in any specific piece of land was nearly zero (a single season, or at most one year), since no one knew when the cadres, who gained in various ways from their power to "readjust," might take back that piece of land in a readjustment.

To encourage investment, the 1998 Law of Land Administration of the People's Republic of China provided that farmers should have thirty-year use rights to their allocated land, and made adjustments of that land very difficult. Following this, the Law of the People's Republic of China on Land Contract in Rural Areas, adopted in 2002, virtually ended readjustments and, in so doing, offered several provisions of special interest for women's land rights: Article 6 strongly affirms rural women's equal land rights. However, Article 21(1) requires that each thirty-year contract include only the representative of the contracting household. Subsequent research has shown that only 17 percent of issued contracts contained wives' names, with a moderately higher 38 percent in a second document, a certificate, which is also issued.

Article 30, importantly, provides that a woman who marries out to her husband's village keeps her original land share unless and until she receives a land share in her husband's village, and that likewise holds if she becomes widowed or divorced. And, since readjustment is now disallowed, she is unlikely to receive a land share in her husband's village. This raises a difficulty that is reflected in field research that found that: "[F]ew women would exercise the right to continue farming their portion of the land after they are married. One reason for this is that women who leave their village to marry are not able to travel back and forth to the land. Also, exercising the right to a portion of the family's land is shameful for many women. On the other hand, families that are able to keep their daughter's land are more likely to allow a divorced or abandoned daughter to return home and assert her right to that land."

The problem cannot be resolved by restoring old-style readjustments, since this would make every Chinese farmer—both women and men—unsure of their tenure and generally unable to invest. One possibility that is gaining support is to keep landholdings as they presently are, household by household, but to readjust the notional number of shares among which they are divided accordingly as household population changes, or at least as daughters marry out of the family and daughters-in-law marry into the family. It should be noted that the individual shares of household members are not physically delineated; one knows, for example, that if a particular household contracts five mu, or one-third of a hectare, and if it has four members, each member therefore has a share equal to one-fourth of that one-third hectares, but not presently located on any specific part of that one-third hectare. The law could also be clarified to provide that any share-holder could ask to partition their share in-kind and have it demarcated on the ground, so that if occasion arose, they could farm it separately, lease it out, sell it, or assign it.

IV. Land Confiscation and Land Dispute Resolution

Recommendations:

- *Amend laws to reverse the approach to compulsory land acquisition and compensation such that largeholders are compensated in cash as smallholders are given land, not the other way around.*
- *Prioritize the return of unused confiscated land.*
- *Address historical grievances through a mix of compensation approaches including divided ownership (or long-term rights), cash, new land, or shares in development.*

There are several general compensation approaches for confiscated land, including: (a) fair compensation at the time of the taking, (b) the return of unused land acquired by the state, or (c) restitution for unfair compensation of a recent taking or for a historical confiscation.

A. Fair Compensation at the Time of the Taking

The broad context of land insecurity in Myanmar is marked by countless instances of land confiscation. Many such confiscations were irregular and occurred during decades of military rule, the land often confiscated by the military itself, or its agents, without satisfactory cause or explanation, and the negative effects of these takings continues to be felt today. Many farmers who lost land in the 1980s and 1990s are now asserting their claim and attempting to obtain the return of their land for the first time. (See Figure 4.) In recent years, some land confiscation has become more regularized, proceeding through legal channels with some measure of transparency and guided by some efforts at compensation, while overall communities report that land confiscation—regular and irregular, alike – has accelerated since the recent government reforms.

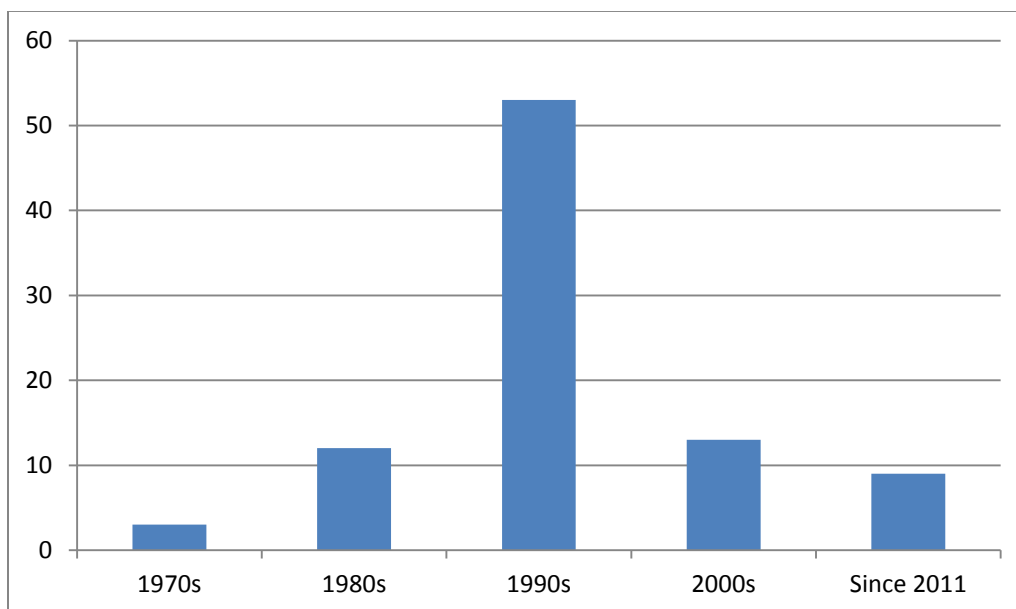


Figure 4- Myanmar Paralegal Cases – Year of Land Confiscation (Namati 2015)

There are two laws that lay out rules for land confiscation and compensation: (1) the antiquated 1894 *Land Acquisition Act*; and (2) the 2012 *Vacant, Fallow and Virgin Lands Law*, the same recent legislation to which many attribute the recent acceleration in government land giveaways. While the 2012 law's provisions on compensation provide are reasonable – payments of three times the value of average crop output per acre of land confiscated, two times the value of improvements made, and one time the value of land itself at current local value – the method by which these payments are calculated, and the due process by which the confiscations and compensations are conducted, have come under heavy criticism. Likewise, the 1894 *Land Acquisition Act* sets out a process for government to follow in acquiring land for a public or business purpose, including notification and compensation procedures, but the provisions are not consistently followed.

Land confiscation, or compulsory acquisition, is a normal part of the governing function of a state. Most constitutions and laws allow compulsory acquisition for “public purposes,” “public uses,” and/or “in the public interest,” and these takings occur for many purposes: transportation (roads, canals, highways, airports, railways), public buildings (schools, libraries, hospitals, public housing), public utilities (water, sewage, electricity, gas, communications, dams, reservoirs), public parks (playgrounds, gardens, sports facilities, nature preserves), and defense purposes (military bases). As Myanmar further develops, these instances of land confiscation will likely increase. Therefore, due process for such confiscations must be adhered to so that all parties are treated justly, through a process that includes free, prior, and informed consent and fair compensation, that is clearly defined in the relevant laws and that follows the several steps of a well-designed compulsory acquisition process recognized in international law and practice (see Figure 5).

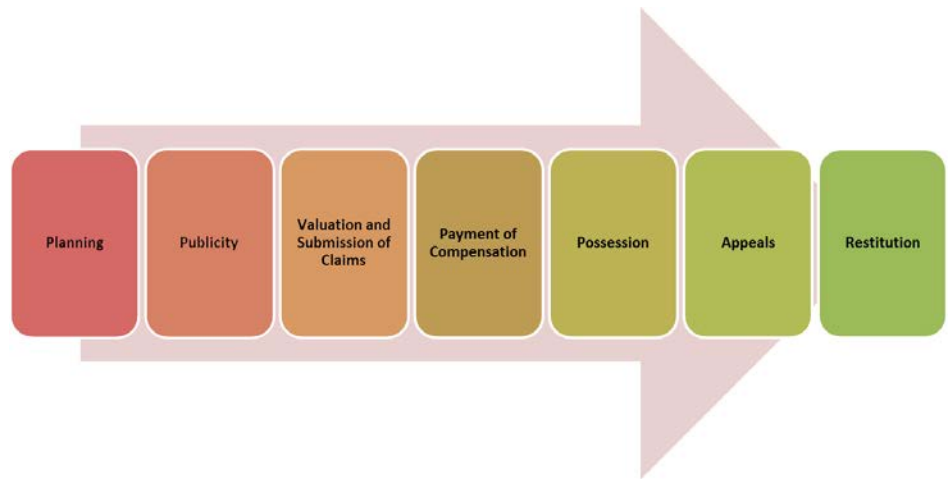


Figure 5 - Internationally Recognized Steps in Well-Designed Compulsory Acquisition Process (Landesa 2015)

Beyond the need for a clearly defined process for land takings, in its current context of high rates of landlessness, and the need for supporting the growth of smallholder agriculture through more secure land rights for smallholder farmers and land allocation to address landlessness, Myanmar should consider re-evaluating the whole approach to land acquisition. The overall framework of compulsory land acquisition and compensation should shift such that it is largeholders who are compensated with cash as smallholders are given land, not the other way around. A recent report by Pyoe Pin, presented at the 2015 World Bank Conference on Land and Poverty came to a similar conclusion, arguing that land law and policy language in Myanmar should be changed to privilege the position of smallholders in land conflicts: “Strengthening protective mechanisms for farmers in the transition to a land market—Most importantly, this involves specific legal changes to the 2012 land laws that clearly state that priority must be given to a farmer who can demonstrate extended cultivation of farmland when involved in a land conflict with an external investor. This lack of protection has contributed greatly to land

confiscations across the country.” (Siu Sue Mark & Aung Kyaw Thein, Pyoe Pin Programme study Jan. 2015) Such an approach, taken to its logical conclusion, would create a presumption in favor of active smallholder agriculture – not the trickle-down economics of large-scale agriculture and industrialization through Special Economic Zones and the like – as the spearhead of pro-poor agricultural, and in turn industrial, development in Myanmar.

B. Return of Unused Confiscated Land

This approach has been used with some success in Southeast Asia in recent years, as communities, governments, and civil society groups have become more sensitized to the prevalence of land grabs. Due to the prevalence of unresolved, historical land grabs in Myanmar, it is likely that many of these cases involve unused land. The legal provisions under current Myanmar law that support an approach to returning unused land are:

- *Farmland Law*, section 32: should a project take more land than is needed, the remainder should be returned to the original owner; and
- *Vacant, Fallow and Virgin Lands Law*, section 16(b): land unused for four years must be returned to the state.

In Vietnam, recent examples of the return of unused land taken for use in industrial complexes have followed an approach similar to the remedies that are available in current Myanmar legal context. In 2013, provincial authorities in the southern Provinces of Tay Ninh and Long An returned 5000 hectares of land to thousands of rice farmers. The land was part of several planned industrial parks and golf courses, and this landmark case saw these two provinces as the first to return unused land. The government agency responsible was the Department of Planning, which formed an Interagency Committee to investigate whether the industrial complexes were productive, as required under the law. They were found to have thousands of hectares of unused land, and in addition to returning the land to the farmers, the authorities publicized the decision and encouraged the former users to take the land and return to farming.

In Cambodia, a different approach was used in 2001 to return unused land taken under economic land concessions. Similar to the *Vacant, Fallow, and Virgin Lands Law* in Myanmar, which encourages large land concessions – from 50 acres up to many thousands of acres ostensibly to jump-start the development of the economy – Cambodia’s 2001 *Land Law* allocated one million hectares for large scale agriculture and industrial uses in its own effort at trickle-down development. Following this wave of compulsory land acquisition, much of the land remained unused, and the government took the step of promulgating regulations to tax the unused land, with the effect of terminating the right of concession holder because the loss in taxes exceeds the gain from possession of unused land. Data is not yet available on the efficacy of this approach, but it can be considered as one among several approaches to land allocation to landless farmers to support smallholder agriculture in Myanmar. A second approach in Cambodia has been the return of land taken with unfair compensation. In one well-publicized example, a luxury development project had issued unfair compensation to 900 evictees, and due to pressure from NGOs and the World Bank (which suspended its loans to Cambodia), the concession was cancelled and the land returned.

In Myanmar, communities have taken several approaches to pressing for the return of confiscated land. One has been the use of courts, which requires donor-supported legal services due to prohibitively high court fees. In these cases, rarely has land been returned, with successful cases nearly always leading to orders for compensation to be increased. For example,

according to the recent Pyoe Pin report, one suit in Magwe involving villagers who lost land to the construction of a dam will require court fees of 18 lakh kyats (about US\$1800). A more effective approach in Myanmar has been the use of the Parliamentary Land Confiscation Commission, which has had a more successful number of cases, without the costs of court fees. These cases involve actual return of land, and according to the Secretary General of the Commission, as of June 2015, approximately 30,000 cases have been submitted to the Commission with about 20,000 having been heard. Of those, a small number of cases have been deemed to be justified in receiving compensation: 882. Many of these are collective cases, and according to the Commission they have benefited 33,608 families through the return of about 335,000 acres (180,000 acres of farmland and 150,000 acres of urban land).

While these figures seem like a good start, joint fieldwork by Namati and Landesa in Eastern Shan State found that farming communities regularly complain of unjust past takings of land or poor compensation in recent takings, providing detailed accounts of specific losses. Extrapolated across the five states and divisions where Landesa staff has conducted fieldwork, the seven states and divisions where Namati has active community paralegal programs, and taking into account the regular reports by farmers associations, community activists, legal aid lawyers, and international organizations, the number of justified claims should far exceed 882 – perhaps by orders of magnitude. Further, when land is returned to a local level, the multiple claims to that land create a resurgence of disputes over land allocation. The government currently lacks criteria by which these claims can be decided in a transparent and participatory manner. As a result, the issuance of land use certificates for returned land is ad-hoc – sometimes land goes to the original farming family, sometimes land is granted to a family that worked the land as a tenant of the military, sometimes land goes to the farmers currently using the land, and on occasion corruption and personal interests mean land is given to people who never had a valid claim at all.

In such a context, the process of relying on courts or a national-level parliamentary commission will not come close to making the Herculean lift required to provide just compensation to those damaged by unjust takings. And, if the overall development goal is to reduce landlessness and to support smallholder farmers so that they flourish, the best approach is to embark on an immediate and rigorous nationwide land allocation program – drawing upon on the experience of the five great Asian success stories (described in section I. Smallholder Agriculture, Landlessness, and Equitable Land Allocation).

C. Restitution for Unfair Compensation of a Recent or Historical Confiscation

Addressing past grievances in land should not begin as a zero-sum approach in which the aggrieved party receives the land, and the present user-claimant must vacate. Other more effective approaches to restitution programs include: a mix of ownership (or long-term rights) in which the disputed land is divided, and one party provides support to the other; or states may add to the pot through compensation either in cash, new land, or shares in development. In mainland China, Taiwan, and South Korea, Landesa has found that providing equity shares in non-agricultural development was an effective approach in compensating for land acquisition, and in South Africa cash compensation was successfully used for those who had suffered from past evictions (though in Myanmar in-kind land compensation may be needed to restore livelihoods). Preventative measures to ensure that the source of the grievances does not recur are important; in India, for example, the state has prohibited or placed moratoria on transfers by some groups receiving restitution, such as Scheduled Tribes.

A perceived fairness in land distribution is another critical element in addressing historical grievances, including fair representation in creating the legal mechanisms – statutory language, the involvement of drafters and implementers, and the locales of decision-making – as well as transparency through ongoing public statements and public consultations (but also a realistic time schedule allowing participation, which had previously seemed to be an issue in Myanmar). In-kind compensation may be best to restore livelihoods, but clearly acknowledging grievances is also an important part of this process, and land truth and reconciliation commissions, or similar structures, should be considered, as were effective in South Africa.

D. A Brief Note on Dispute Resolution

Land programs, and the legal aid work that accompanies them, should involve legal education of dispute resolution bodies, program administrators, and beneficiaries as to the land policy, land law, and registration processes. It should not be taken for granted that decision-makers fully understand these statutory frameworks and procedures. In India, Sri Lanka, and Cambodia education of justice sector actors and land department officials has accompanied land titling programs and has led to some good outcomes. Many models of dispute resolution bodies exist for addressing land issues, including land tribunals in Australia and Hong Kong, and specialized land courts in New Zealand serving the Maori indigenous peoples, and in the United States in the state of Massachusetts. In South Africa, land dispute resolution follows a model related to truth and reconciliation commissions.

V. Information Management

Recommendations:

- *Increase access to land documentation and policy information for rural communities and individuals.*
- *Ensure that mapping programs are affordable, transparent, and accessible; involve community participation; and enumerate landless families and available state land.*

Farmers must be able to access and understand information about their land in order to protect their land tenure security. Access to information is also a key feature of good governance. An accurate, transparent, and accessible information management allow farmers to prove their legitimate rights to the land, give other notice of those rights, increases smallholders status in the eyes of the state and within their communities, and can lead to improved access to, and greater efficiencies in the provision of, other government services, such as agricultural subsidies or extension services. A number of key features are crucial to ensuring that such an information system protects the interests of smallholder farmers: (1) affordable; (2) transparent; (3) accessible, including through physical proximity of the records to the people it covers; (4) equitable; (5) covers complex and overlapping land rights, including customary systems and secondary land rights; (6) builds on existing social systems rather than relying solely on written documentation; and (7) include checks and balances to protect vulnerable groups, including women. While in some cases, having such records accessible online is a feasible option, in settings where computer and internet availability are low, a physical copy of the records in an accessible place, is preferable. While many land records in Myanmar are held at the township level, the distance and process involved in accessing these records still proves to be a formidable obstacle to the average rural farmer. Myanmar may consider other options, such as the village or village-tract level, for better accessibility.

Such publicly accessible records should include a description of the land, including the official classification of the land and accurate official maps and survey records, where available; a listing of those with rights to the land (primary land rights holders; tenants; community or secondary rights to access and use the land or the resources located on the land, such as water or trees; liens or mortgages; easements; and government rights to land) and a record of all transactions of such rights.

In Andhra Pradesh, India, village-level land administration officials maintain the land records, identifying the land owners and making entries in the Record of Rights. Such records include basic information such as the name of the landowner and the area, classification value and assessment of the land. In areas where surveys have been completed, the land records are more detailed and include other objective information about the land such as the water rate, soil type, nature of possession, liabilities, tenancy, and crops grown. The Record of Rights is physically located at the village-level land administration office, and villagers can come to inspect the record. When a change to the records needs to be made, the local officials have well-established processes to follow, including sending the revisions to the state-level land records department. For instance, in the case of inheritance, the heirs can submit an application to the local officials, who then provide notice to the public, allow a period for others to raise objections, and then settle the dispute if there are objections. If the change is then approved, the local officials modify the Record of Rights accordingly.⁴

One fundamental area of land policy in which information management is important, especially in the early periods of reform, is the enumeration of landless families.⁵ This aspect of mapping is critical to pro-poor land reforms, and it is envisioned in the new 6th Draft of Myanmar's National Land Use Policy: a new provision of the *Land Information Management* chapter requires the participation of local individuals in conducting a survey of landless people (paragraph 15(g)), which is a strong start, both to get the issue into the land use planning policy process, and to ensure transparency. Also in India, in the State of Odisha, the government's Revenue and Disaster Management Department, which governs land allocation to landless populations, issued an order in 2015 to launch a month campaign to fully enumerate all landless families. The local Revenue Department officials led the enumeration process. The commitment shown by the government to carry out enumerations, and then to follow through with actual land allocations to landless families, is a useful model for Myanmar. However, while the State of Odisha allowed just one month for the process, to effectively implement such an important and complex task, a timeframe of at least several months is required.

A potentially significant development in land information management in ASEAN states in recent years has been the introduction of One Map, a land mapping database that states have agreed to share on a government by government basis. The system has been embraced to varying degrees in different ASEAN states, with Singapore using the resource more widely and with states like Indonesia and Malaysia less so. Recently, however, some observers in Indonesia believe it can help address issues like indigenous peoples' customary land tenure, environmental issues, and smallholder rights. It is hoped that this approach can be useful in dealing with land conflicts, including in Myanmar. However, there is risk that it may lock in certain disputes if they are officially mapped prior to being resolved.

⁴ Note that the Revenue Department of Andhra Pradesh is trying to make land records even more accessible, and in June 2015, launched an online tool, Mee Bhoomi, so that rights holders can access their records personally. The process of going through local officials to access land records is also still available.

⁵ For a discussion of the definition of landless, see Section 1.B. Smallholder Agriculture Can Best Address Landlessness.

As the One Map tool is developed and implemented in Myanmar, it will be important to ensure that the information in the mapping system is accurate and represents the reality of land holdings and uses. Participatory mapping can be a powerful tool in gathering such accurate information on land and resource use, hazards, traditional knowledge and practices, and community values and perceptions. Participatory mapping also allows an opportunity to bring the knowledge and perspectives of communities (including those who may have been previously marginalized in such processes) to the attention of decision makers at various levels of government.

VI. Land Classification

Recommendation: Consider creating a land classification system that reduces the complexity of current categories, involves community participation to ensure the accuracy and appropriateness of new classifications, and is accompanied by sufficient education of communities and government officials alike so rules are understood and officials are confident to authorize reclassification.

A recurring concern raised by smallholder farmers in Myanmar is the difficulty in coping with the complex structure and strict classifications of types of land. Many farmers, both as individual farming families and those farmers seeking customary rights to communal land, face significant burdens in attempting to secure their land tenure due to the current land classification system. Farmers using land that is classified by the government as vacant, fallow, or virgin land, for example, cannot register that land until it is “converted” in official records into farmland. This obstacle exists even when that land is and has been used for agricultural cultivation for decades. Re-classification of the land involves completing several different administrative process to ask for use rights, request land reclassification, and then apply to the Settlement and Land Records Department (SLRD) for issuance of a Form 7 certifying the newly classified farmland use rights.⁶ (Occasionally SLRD will permit a farmer to apply directly for a land use certificate under the Farmland Law, based on evidence of longstanding agricultural use of paddy land (*le*). However, this practice is not consistently used in all areas.)

In most cases in Myanmar, efforts to follow the necessary steps for reclassification are not followed due to various obstacles: (1) the rules are not understood by one or both parties (farmer and SLRD official); (2) the rules are perceived to be too onerous to complete; or (3) the SLRD official does not feel confident that they have the proper authority to complete such a reclassification. As a result, nearly all the vacant land reclassifications completed by the Namati-CPRCG paralegals moved forward through, as one paralegal described the process, “negotiation and discussion.” It is also possible, aside from the three obstacles described above, that officials, farmers, or both may believe there is a financial or efficiency interest in resolving these reclassifications through negotiation and discussion, and the exchange of informal fees or payment of bribes that such a process may entail.

In the Indian State of Odisha, government officials set out to create a uniform land classification system in 2011 – a process that could be an example for Myanmar. There were previously 32

⁶ Under the *Farmland Law* (2012), following the application and verification process, the Form 7 certifies the holders right to farm a particular plot of land. A Form 7 can only be issued for land classified as “farmland.” See President Office Notification No. 62/2012 (2012), s. 23(a).

classifications of land and officials had concluded it was too complicated a system for land owners and officials alike. The effort to make the system uniform included satellite imagery to modernize maps, regular “camp courts” to assist villagers to correct their Rights of Record through community participation and official verification of actual land use, and additional training curriculum offered through the Revenue Inspector Training Institutes to ensure the new classification system is well understood by the relevant officials.

Because of the diversity of land uses in Myanmar, some level of complexity in classification is warranted and inevitable. One evolution in the classification process has occurred during the 2015 amendment process to the Draft National Land Use Policy, when in June 2015 the 6th Draft dropped the ten land classifications in favor of a simple set of three (Agricultural land, Forest land, and Other land, see: Chapter II, Section 12). The draft Policy empowers “relevant government departments and organizations” to “review and amend” land types “transparently” which is a substantial change in policy, and may reduce some of the obstacles to secure land use rights faced by farmers (Section 13). In addition to land classification, the draft policy maintains seven zones that District Land Use Committees may establish (Urban and rural development zone, Agriculture zone, Livestock breeding and fishery zone, Protected area zone or national security zone, Commercial zone, Industrial zone or mining zone, Grazing land zone, and Forest zone; Chapter II, Section 22). The creation of these zones is guided by a detailed set of regulations requiring public consultation and input (Sections 23-25), however the process could better protect the existing land uses of farmers and communities if rural communities first develop plans for equitable land and natural resource use at a local level, with the District government then combining these plans into a district-level zoning scheme.⁷

Taken as a whole, these land classifications and zones still maintain a diverse set of categories which can create obstacles to understanding by smallholder farmers and officials alike, and leave the possibility that various government departments may create yet more complex and unclear land classification systems. However, the categories are now accompanied by a reclassification process permitted under the draft Policy, and a more rigorous zoning permission process, which – together – may allow farmers legal rights to farm their land, potentially enabling these same farmers to conduct their own inclusive community mapping and zoning processes to inform current and future land and resource use.

In the meantime, farmers in Myanmar face insecure land rights where their land use does not match the official classification of land. For instance, farmers allocated vacant land in the past due to government agricultural policies are likely more vulnerable in terms of tenure security. Across 2000 paralegal cases related to land registration, 86% of clients attempting to register farmland had some documentary proof of their claim, such as a past tax receipt. These documents do matter – 68% of cases in which a client had documentary proof have been resolved with the assistance of a paralegal, compared to just 35% when the client has no documents, and must rely on neighbor testimony and other means of verification.

Only 67% of clients attempting to register vacant land (as distinct from farmland) had any document showing possession to assist in the multi-step process of converting and registering

⁷ Such regulations on public consultation and input should be consistent with the principles of consultation and participation of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012), s. 3B6. The Food and Agriculture Organization of the United Nations and the Agricultural Fund for International Development have also published guidelines and handbooks for participatory land use planning that reflect international best practices and could be useful in drafting regulations and developing procedures for public participation in land use zoning.

vacant land (see above). In addition, many farmers hold documents that were never incorporated into the relevant government records, making recognition of the farmers' right to their plot of vacant land more contentious.

Various types of land face issues with classification and conversion, as they involve customary uses, questions of fallowing during crop rotation, and other overlapping protections linked to ethnic nationalities. The final policy and legal framework will need to speak specifically to these tenure rights, addressing and clarifying a process that has been underway since the mid-20th century.

VII. Other Critical Issues in the Land Context

A. Conflict and Post-Conflict Land Reforms

Recommendations:

- *Proceed with land reforms in geographic areas where and when possible, so that areas still in conflict will, in the future, be able to base their land reform work on successful neighboring models.*
- *Support education and mediation in post-conflict communities, conducted by well-trained mediators, to resolve disputes and improve public awareness about land rights.*
- *Prioritize displaced and resettled communities in land allocation programs to address landlessness.*

One of the most difficult areas faced by land reform is what to do in conflict settings, where there is either an active armed conflict or a cease-fire in which opposing parties have established separate governing structures. Overlapping claims to land by current residents and returning refugees, future planning for land allocation and registration within opposing government structures, and the danger of work in such environments are just a few of the issues facing land reforms in conflicts and post-conflict areas. Despite – or because of – these challenges, farmers living in conflict settings still face some of the greatest need, and land reform work must plan to address these populations. However, it is important to keep in mind that land is often a source of the conflicts themselves, so addressing and resolving land issues in a conflict setting – hard as it may be – may be a vital part of any effort to resolve the conflict.

Those implementing land reform efforts in conflict settings should be prepared to frame their work at least as a model for the future, as was eventually the case with South Vietnam's Land-to-the-Tiller Program. While the program successfully provided secure smallholder farms to one million families between 1970 and 1973, several years later as South Vietnam was absorbed into the Communist North, the productivity of those farms in the south served as a model as Vietnam began to address the productivity problems being experienced under government-mandated collectivization. Ultimately, the government dismantled the collective farms in favor of 20-year rights for farmers, later extended to 50 years in 2014. Such an approach as Landesa took in Vietnam in the 1960s and 1970s might be useful in Myanmar where some states are experiencing conflicts that have either paused under ceasefire arrangements, or remains active. While some reforms may hold and remain, others may serve as models for the future or the bases on which to extend reforms.

In Nepal, following a decade-long civil war with Maoist insurgents, and with land rights as one of the root causes of the conflict, the peace process and post-conflict period has been marked by

efforts to conduct dispute resolution to address new and long-standing claims. The roots of these land conflicts have included changes in population and accompanying rises in land prices, a lack of education by local communities on land law and accompanying citizen rights, and the abuse of parties during land transactions by unscrupulous brokers, leading to land disputes about inheritance, ownership, and land boundaries. To address these issues, the courts have been one route used, while more effective results have come through mediation conducted by well-trained mediators, coupled with improved public awareness about land rights.

East Timor may provide a model useful to the Myanmar context, as it has experienced one of the most difficult and layered forms of colonial and ethnic-based conflicts: first the European colonialization of the island, then the Japanese occupation in World War II, and finally the invasion and occupation by Indonesia from the 1970s through 1990s. The situation was more complicated by the significant displacement of the local population, followed by the issues facing returnees to these lands. The process of land reform in East Timor is still in early stages, and early efforts have underscored the complicated land issues in the region and the long process that will be required to resolve them. The land reform process involves establishment of local land administration offices, land allocation programs for the landless, resettlement of hundreds of thousands of Timorese from abroad and from other parts of the island, and legal education of families about land title questions – policies to address these and other post-conflict land issues may be instructive for Myanmar.

B. Federalism

Recommendation: Consider other Asian examples of the delegation of land administration to the states and regions, using land as a testing ground for devolution of governance and rights.

As Myanmar continues in its governance transition, and pursues efforts to achieve national ceasefire agreements, the ongoing question of the future of some form of federalist state arises. This issue of federalism will have significant bearing on the questions of land policy facing Myanmar, from seemingly minor questions such as: Could State and Division-level parliaments set up their own land confiscation committees, as the national parliament has? Why are some states and divisions reputedly more active in the area of land reform, such as Ayerwaddy Division? And what will become of the land policies and reforms already undertaken in territory controlled by ethnic armed groups, such as that of the Karen National Union in Tanintharyi Division or the Kachin Independence Organization in Kachin State?

In several Asian countries, governments have dealt with these questions of federalism and land policy, with differing levels of success. In India, for example, the Constitution divides the legislative power into three areas of jurisdiction: (1) those governed by the Union government; (2) those reserved for the state governments; and (3) those on which the Union and state governments can legislate concurrently. Land policies are a state issue under the Indian Constitution, and therefore, the state-level governments hold the exclusive power to pass land legislation. The Union parliament may only pass land laws under certain circumstances when the legislation is in the national interest and with a two-thirds majority. While there is some influence from the central government – for example, the roots of one of India's important protections of women's land rights, joint titling, lie in a national-level women's empowerment policy – fundamental policies, such as land allocation to the landless, are firmly state matters.

The case of Indonesia provides three instructive examples of different approaches to land policy as different forms of federalism took hold in ethnic provinces. These distinct federalist

structures, which were developed in the 1990s during the governance transition following the rule of Suharto, each devolved control over land and resources to the provinces in question: East Timor, Aceh, and Papua. In the transition from authoritarian rule of Suharto, the East Timorese, Acehnese, and Papua issued demands for independence with varying levels of force. The central government initially responded with a federalist approach to address grievances by these and other ethnic nationalities that was general in scope, but the three nationalities pressed more forcefully for autonomy and the government created specific policies for each.

- East Timor separated entirely from Indonesia through a referendum, becoming an autonomous state and authority to create its land policies and laws.
- Aceh received special autonomy in 2001, but as the ongoing Free Aceh Movement and armed conflict (GAM) continued to press for full independence, and then the devastating tsunami struck Aceh in 2004, the process of autonomy became disrupted. Eventually, the 2001 Special Autonomy Law concerning Aceh was replaced by the 2006 Law on the Governing of Aceh, which led to further devolution of rights and set the framework for the National Land Agency to devolve its powers to the province and districts.
- Like Aceh, the province of Papua was also given autonomy in 2001 under a Special Autonomy Law which devolved rights, including land rights. Through the special autonomy given to Papua, the Indonesian government was seen as providing substantial independent governance, moving from a previous posture of trying to integrate the ethnic nationalities to an accommodation approach. Under the 2001 law, Papua has been given very substantial local authority over key issues, including greater autonomy over natural resources and land.

C. Decentralization

Recommendation: Strengthen mechanisms for local land administration and local community access to land documentation, mapping, and dispute resolution processes in order to increase efficiency, better rely on local knowledge of ownership and classification issues, and ensure public awareness, transparency, and accountability.

Decentralization of certain functions of land administration and rulemaking – whether through local government or through local branches of central government – can greatly improve the efficiency and effectiveness of a land administration system, and brings these functions closer to the smallholder farmers, making the land administration system more accessible to the average person. While local-level SLRD officials in Myanmar have the authority and confidence to deal with common registration of farmland, on trickier issues such as conversion of vacant land or forest land or contesting a land confiscation, local authorities defer to higher, more centralized authority. These complex cases are much more likely to require interaction with authorities at the state/divisional level or central level compared to a farmland registration attempt. In the experience of Namati-CPRCG paralegals, some cases, such as registration of land previously classified as farmland, are typically decided locally. However, many other types of cases, such as those involving forest land, are referred to state/divisional- or national-level authorities, making it more difficult for farmers to actually pursue resolution to their cases (see Figure 6).

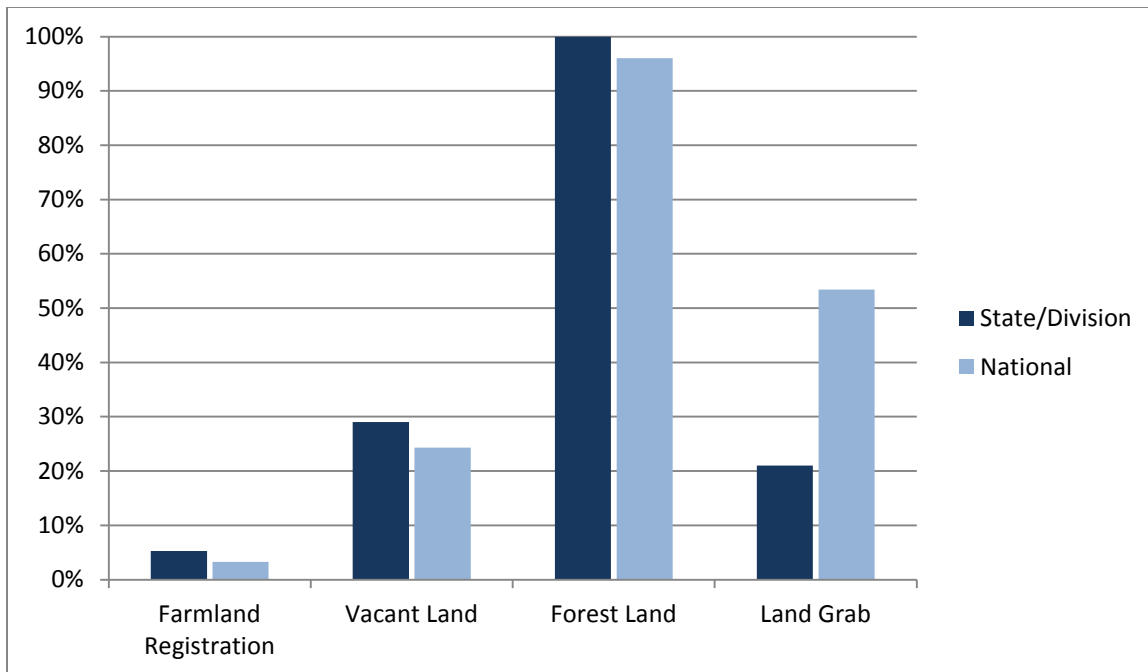


Figure 6 - Percentage of Cases Requiring Involvement of Higher Level Authorities for Resolution (Namati 2015)

While in many cases, deference to a higher authority is warranted (i.e., for an appeal of a lower level decision; setting policies and procedures that protect marginalized groups from discrimination at lower levels), each time a case is referred to a higher authority, it becomes less transparent, more difficult to access, and less understanding of local contexts. For example, in India, village commons areas that are used by all members of the villages are often recorded as “waste land” in official government records. In the event of a dispute, local authorities are in a better position to verify existing users of such land than higher level officials who likely have never seen the village.

Even when certain government functions are decentralized to more local level institutions, the role of the central government remains critical in creating uniform procedures that ensure unbiased decision-making and transparency and supporting and holding accountable local-level decision makers. For example, in West Bengal, India, the gender bias of local authorities in a decentralized land distribution program resulted in unmarried women being excluded from lists of potential beneficiaries, and in response state-level officials stepped in to correct this oversight.

In China, policies over land are highly centralized. But provincial governments handle administration of land such as approving land acquisition and specific compensation standards for land taking not in conflict with central laws, and the monitoring and correcting of violations of central laws. For example, the central law requires a compensation package of no more than 30 times the annual agricultural production of a piece of land. It is up to each province to decide the specific multiplier, which allows the compensation to take into account local context but leads to varying compensation levels across the county. Also, a province may do whatever the central law delegates. For example, in terms of compensation for standing crops in a land taking, the central law explicitly delegates to each of the provinces the power to decide on standards of compensation for standing crops.

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