

MYANMAR PROGRAMME | June 2015



Assessment of 6th draft of the National Land Use Policy (*NLUP*)

ideas into movement

This assessment is in response to the 6th draft of the NLUP, released in May 2015, following months of public and expert consultations. It outlines some of the key positive and negative points of the new draft. The new draft NLUP has taken on board many of the concerns and recommendations raised by the public during the consultation process, and includes several key issues that would greatly improve Myanmar's land governance arrangements. However, some serious concerns remain. As in our past responses to the earlier (5th) draft of the NLUP, we take as our starting point how the draft fulfills principles and provisions negotiated and agreed upon by the world's governments – including the Government of Myanmar – and captured guidelines of the UN Committee on World Food Security (UN CFS) known as the Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests (hereafter referred to as the "TGs"). In addition, the assessment that follows is based on the English version of NLUP-6.

Our response to the 6th draft of the NLUP builds on our earlier assessment of the previous draft (<https://www.tni.org/en/briefing/challenge-democratic-and-inclusive-land-policy-making-myanmar>). We take this opportunity to briefly remind and reiterate our overall perspective on the NLUP. Overall, for Myanmar's land policy to succeed, it must seek to:

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

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

- (i) some already have access to land but this access threatened or is vulnerable to threat,
- (ii) some currently have little or no effective access to land and control over land-related decisions, and
- (iii) some previously had access but lost it due to armed conflict and natural disasters (such as Cyclone Nargis).

It is these three dimensions of the land problem in Myanmar today that define the type of policy response that is needed, and which the NLUP can and must try to address. The NLUP process presents a strategic opportunity to act on these core recommendations toward achieving a solid social foundation for peace, development and democracy after six decades of war and a resurgence of armed conflict.

Overall, while the 6th draft of the NLUP goes some way toward meeting this challenge, it should still go further in order to cover all three of the above-mentioned types of situations. While draft #5 addressed situation #1 (existing land tenure insecurity), and draft #6 now addresses situation #3 (need for land restitution), the current draft remains silent on the present and future problem of land concentration. **To address this problem, we call on the government to adopt an across-the-board land size ceiling (not only on land concessions) with land redistribution and land restitution, along with recognition of informal and customary land users rights, as the core pillar of the new NLUP.**

The Voluntary Guidelines for Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (hereinafter referred to as "Tenure Guidelines", which Draft #6 now recognizes, offers explicit guidance on policy formulation on these three points:

- (i) On the need to protect existing democratic access to land where this already exists but is or may be threatened, through legal recognition and allocation of tenure rights, guidance can be found in Article 7 (Safeguards), Article 8 (Public land, fisheries and forests), Article 9 (Indigenous peoples and other communities with customary tenure practices).
- (ii) **On the need to promote democratic access to land where poor, vulnerable and marginalized people have little or no access, through distributive and redistributive reform, guidance can be found in Article 15 (on land redistribution and land ceiling).**
- (iii) On the need to restore democratic access to land through land restitution in cases where people have lost their prior access as a result of armed conflict or natural disaster, guidance can be found in Article 14 (on land restitution).

Our more specific comments on Draft #6 are as follows:

Introduction



POSITIVE. Makes mention of a wider range of general purposes for which land policy is intended than in the previous version – including livelihood improvement of citizens, fulfilling basic needs of people, social and economic life, harmonious relations (Para.3).

In light of the explicit strength of the Constitutional framing of this section, and hence the policy overall, this paragraph could be similarly strengthened, for better balance between the noted economic and social functions of land in this policy, through explicit mention of international human rights law as a framing element of the policy especially as regards the social functions of land.



NEGATIVE. Makes strong explicit link to the contested Constitution, thereby seeming to privilege an overly economic view of land/ land policy for 'extraction and utilization by economic forces', and to secure right to private property, inheritance, and 'private initiative and patent'.

The latter term (e.g., 'patent') is a highly specialized term that has to do with the legal right of citizens to market intervention in relation to land resources and benefits of use. It is not a term that is commonplace, and it ought to have been introduced earlier into the public consultation, discussion and debate, not least in order to benefit from clarification of what it means, what is intended by it, and why it is important or necessary. Without such kind of discussion, it is *unclear whether the term is referring to just the land, or to the land and its associated resources as well* – for example, the minerals in the soil and under the ground, the water under the surface or running through the landscape, the flora and fauna living in and around a given boundary, including the forests. It is also *unclear what the term is permitting can be done with all such types of natural resources* – for example, whether this includes pharmaceutical patents on plant and/or animal derived materials, to name just one possibility.

Objectives and Basic Principles (Part I)



POSITIVE. This section is a vast improvement over the previous version in terms of bringing into play a wider range of objectives – especially non-economic/ non-business objectives (Ch.I).

Noteworthy strengths:

6.a (protection for the interest of all) – **However this section must be strengthened by recognition of basic principle of democratic processes in the determination of the public interest.**

- 6.b (livelihoods and food security of all)
- 6.c (protection customary rights and procedures)
- 6.d (independent dispute resolution mechanisms)
- 6.e (investment to support equitable development)

The same goes for the section on principles (Ch.II), which now contains a wider and deeper range of principles that could serve as points of legal leverage against creeping or flagrant unjust political, social and/or economic practices.

Particularly noteworthy positive new language:

- 7.a (protection legitimate tenure rights as recognized by local communities with particular attention to vulnerable groups such as smallholder farmers, the poor, ethnic nationalities and women)
- 7.b (increasing state accountability)
- 7.c (easy public access to information)
- 7.d (adopt the VGGT)
- 7.e (inclusive public participation and consultation in decision making related to land use and management)
- 7.h (fair procedures relating to restitution, and reclaiming land tenure and housing rights of IDPs and returning refugees)
- 7.i (ensure easy access to judicial review)
- 7.j (prioritise interests of public citizens over private companies in decision making)
- 7.k (ensure equal opportunities for men and women)
- 7.l (permit freedom of adoption of cultivation technologies)
– **However this provision could be strengthened by expanding the language to “cultivation technologies *and practices*”.**
- 7.m (procedures for addressing landlessness) – **However this provision could be strengthened by expanding the language to ‘landlessness *and land concentration*’.**

7.n (decentralise decision making) – **However this provision could be strengthened by expanding the language to ‘decentralise and democratize decision making related to land’.**



NEGATIVE. The section on Basic Principles (Ch.II) however also contains a few weaknesses, which ought to be corrected.

Noteworthy weaknesses:

7.d (adopt international 'best practices') – 'best practices' do not necessarily reflect the highest obligatory standard which is international human rights law; 'best practices' often seek avoidance of international human rights law obligations. **This language should be corrected as “adopt international human rights standard”.**

7.f (the promotion of 'market based solutions to address land management issues such as land speculation') – land speculation is not a problem of (poor) land management; although tried there is no evidence to date that market based mechanisms can 'solve' the problem of land speculation; the VGGT in fact embrace **both market and non-market mechanisms** in land and tenure rights transfers. So why are market based mechanisms privileged here over other non-market type mechanisms? **This specific provision should be either deleted or amended to encompass the full range of market and non-market mechanisms included in the VGGT.**

7.o (strictly enforce contracts) – while emphasis on contract enforcement can be beneficial, it is not always so in practice, since not all contracts are produced under fair or just conditions. **At the same time, provision needs to be made for addressing situations where power imbalances have produced unfair and exploitative contracts, which on moral grounds must not be enforced; therefore, the principle of enforcement should be *balanced by recognizing the right to review contracts.***

Land Use Administration (Part II)



POSITIVE. Noteworthy strengths:

Ch.I

9.b (regional and state land use committees now recognize representatives of farmers, experts and elders **as members**)

Ch.III

15.d (equal rights to access accurate and complete information)

15.e (recognition and protection of land rights existing for a long time whether or not registered, recorded and mapped **and (16.b) that are recognized by the local community**)

16 (provides requirements for participatory and consultative preparatory processes in establishing, recognizing and issuing legal land rights)



NEGATIVE. Noteworthy weaknesses:

Ch.III

15.e (land tenure security strengthened) – unless this provision is balanced by an across-the-board land size ceiling, it can lead also to deepening and/or reinforcement of unequitable land distribution and land concentration by the strengthening the land tenure security of current/ existing large land holders and landlords, including those who have previously acquired land from occupant-tillers through illegitimate ways and means. **To avoid and remedy land-based social injustice, this provision should be strengthened with recognition of the principle of “land to the tiller” and adoption of an across-the-board land size ceiling and other redistributive mechanisms to address and prevent land concentration.**

Planning and Changing Land Use (Part III)



POSITIVE. Noteworthy strengths:

Ch.I

17.c (inclusive, participatory and consultative approach in preparation and adoption of land use plans)

19.c (using 'bottom-up' participatory approach)

19.e (provide prior notice to the public and reaching consent)

19.h (establishing agricultural and ecological conservation zones)

19.i (reserved lands for allocation to landless)

19.k (provide consultation opportunities to the public during land use decision making)

20 (legitimate land use rights shall not be affected) – **However this must be strengthened by linking considerations of what constitutes 'legitimate land use rights' with basic principles, as delineated in the VGGT (Paragraphs in 3A and 3B).**

Ch.II

25 (subjecting land use plan maps and zones to public consultation and identifying specific required procedures and sequences)

Ch.III

27 (provides some safeguards to protect existing land users from negative impacts of land use change by individual application) – This section has been strengthened considerably from the NLUP-5; **however, the seriousness of potential negative impacts warrant that it should be strengthened further by linking it explicitly with key international standards, namely:**

- UN Guidelines on eviction and displacement
- VGGT provisions on “Guiding Principles” particularly paragraphs 3A and 3B;

- VGGT provisions on “Investments” particularly paragraphs 12.6, 12.7, 12.9, 12.10, and 12.14.
- Particularly as regards impact assessments, the VGGT 12.10 specifies: ‘prior and independent IAs on the potential positive and negative impacts that those investments could have on tenure rights, food security and the progressive realization of the right to adequate food, livelihoods and the environment’, among other points.



NEGATIVE. Noteworthy weaknesses:

Ch.I

17.b – revising and updating land use plans/ maps in a timely manner will not in itself ensure that diverse spatial planning systems, objectives and decision making systems – or any potential positive and negative impacts of changes to these — will be understood or taken into consideration. **This section must be strengthened through incorporation of the following VGGT provisions:**

- on “Regulated Spatial Planning”
(Para. 20.1, 20.2, 20.3, 20.4 and 20.5 of the VGGT)

While it does mention and to some extent address the land tenure insecurity of current legitimate land users and the need for land for the landless, this Part III:

- Does not yet fully or adequately address other crucial and urgent land use change priorities, particularly land use planning geared explicitly toward *correcting past injustices and avoiding future injustices* – e.g., reversing land concentration and restoring the land rights of IDPs and refugees.

Grants and Leases of Land at the Disposal of Government (Part IV)



POSITIVE.

28 (steps required before government can give grant or lease)

29 (suspending grant or lease action until the required steps are implemented)

30 (specifying relocation criteria and protection procedures)

32 (piloting contract farming) – **However this section should be strengthened further through adding provisions establishing the right to regularly and periodically review contracts as a safeguard against potentially unfavorable terms, such as fixed (low) buying prices for farm produce amidst (high) price volatility, for example, from getting ‘locked in’ for onerously long periods of time.**

34 (pilot testing projects based on land grants and leases)



NEGATIVE.

- **Section 31, on regulating large-scale land grants and leases, is even dangerous, since it has the potential to create new and/or worsen existing land conflicts and deepen the existing volatile and urgent condition of land polarization:**

· **31.a** – sets a cap on land size of these kinds of land transactions (grant/ lease) without any evidence that it prevents land grabbing/ speculation, but with plenty of evidence that it facilitates land grabbing/ speculation (e.g., Cambodia); this is not the same as an “across-the-board land size ceiling”, which is the regulatory principle that is needed to arrest and correct extreme land polarization;

- **31.b** – sets a cap based on a company’s capacity, again without any evidence whatsoever of effectiveness in preventing land grabbing/ speculation;
- **31.c** – provides for establishing a legal definition of land grabbing/ speculation, which will not in and of itself prevent land grabbing, but rather has the potential to legalize much land grabbing/ speculation that is currently seen as illegitimate by many people;
- **31.d** – suspension of rights will have differential impacts on land users, with the most vulnerable and marginalised likely to suffer serious negative consequences more acutely and for longer length of time than better endowed land users.

> While pilot testing projects is a potentially useful mechanism, the Impact Assessment component of pilot-testing should be linked explicitly with key international standards, namely:

- UN Guidelines on eviction and displacement
- VGGT provisions on “Guiding Principles” particularly paragraphs 3A and 3B;
- VGGT provisions on “Investments” particularly paragraphs 12.6, 12.7, 12.9, 12.10, and 12.14.
- Particularly as regards impact assessments, the VGGT 12.10 specifies: ‘prior and independent IAs on the potential positive and negative impacts that those investments could have on tenure rights, food security and the progressive realization of the right to adequate food, livelihoods and the environment’, among other points.

Procedures Related to Land Acquisition, Relocation, Compensation, Rehabilitation and Restitution (Part V)



POSITIVE.

Definite improvement overall, but still weak and requires strengthening:



NEGATIVE. 36 (“international best practices”) – **This terminology of “best practices” should be discarded in favor of “international standards and existing obligations under international law”;** this is because there is no evidence or guarantee that what is considered best practice is in fact in line with states obligations under international human rights law to which the Government of Myanmar is party. **Explicit links to the most relevant international governance instruments should be made in this Part V, namely:**

- ILO 169
- UN Guidelines on Eviction and Displacement
- UNDRIP
- VGGT
- Pinheiro Principles

Land Use Rights of Ethnic Nationalities (Part VIII)



POSITIVE. Noteworthy strengths:

In general this section Part VIII has been improved considerably in terms of clearer formulations and tighter language in the direction of safeguarding the land rights, including customary land use and decision making processes, of ethnic nationalities and ethnic minority people and peoples.

Especially noteworthy is the addition of Paragraph 72.



NEGATIVE. Noteworthy weaknesses:

69 – while an overall improvement from the previous draft, this provision must be explicit in linking such support to the desires, needs and aspirations of ethnic (indigenous) people and peoples as they themselves express these to be.

In general, this Part VIII should explicitly reference the VGGT, which contains numerous provisions that are relevant, including especially Part 2 Sections 3, 4 and 5; Part 3 Sections 8 and 9; Part 4 Paragraph 12.7 ; and Part 4 Section 14.

Equal Rights of Men and Women (Part IX)



POSITIVE. Noteworthy strengths:

In general this section Part VIII has been improved considerably in terms of clearer formulations and tighter language in the direction of safeguarding the land and land-related decision making rights of women in particular.



NEGATIVE. Noteworthy weaknesses:

While the overall policy has been improved with reference in Part I to the VGGT, **this section should reinforce the principle of gender equality in the enjoyment of tenure rights by making explicit reference to the VGGT provision on gender equality (Part 2 Section 3B Paragraph 4).**



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