

Land grabbing, conflict and agrarian-environmental transformations: perspectives from East and Southeast Asia

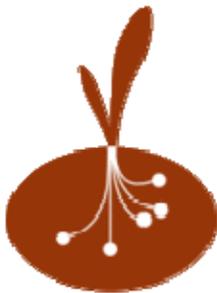
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Are the Odds for Justice 'Stacked Against' Them? Challenges and Opportunities to Securing Land Claims by Smallholder Farmers in Myanmar

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Abstract

In 2012, the Government of Myanmar (GoM) passed the Farmland Law and the Vacant, Fallow, Virgin (VfV) Land Law—creating a formalized land market. In essence, this created a formalized land market. Land titling is often considered “the natural end point of land rights formalization” (Hall et al. 2010: 35). This thinking has become dominant among most governments and development agencies ever since De Soto (2000) popularized it in *The Mystery of Capital*, in which he argued that the developmental successes of the West has relied on a strong legally-enforceable institution of property rights, without which assets, particularly land, would become “dead capital.”

In reality, there are at least two major obstacles in achieving this in Myanmar. The *first* is around the legacy of multiple regimes in creating “stacked laws” (Roquas 2002). This term refers to a situation in which a country has multiple layers of laws that exist simultaneously, creating conflicts and contradictions in the legal system, as well as challenges to creating a well-regulated land market envisioned by the Myanmar state with the passage of the two land laws. The *second* obstacle has to do with the fact that like many countries in the world, access to legal justice in Myanmar is dependent on one’s access to different material, social and political resources—directly to a history of patron-clientelism. Through a number of select case studies, this paper seeks to provide preliminary reflections on the following question: *In Myanmar, a country with a porous legal framework, how do smallholder farmers engage with the law, and where relevant, informal norms to strengthen legitimacy of their claims to land against confiscations?*

This paper seeks to contribute to the literature on agrarian rural movements by focusing specifically on the way farming communities in Myanmar engage with the law, while paying attention to the complications they face when they engage with legal institutions that are porous and ‘stacked’—a phenomena that is common to many countries in the early phases of rural democratization.

Keywords: stacked laws, patron-client relationships, legal justice, legal engagement

Introduction

In 2012, the Government of Myanmar (GoM) passed the Farmland Law and the Vacant, Fallow, Virgin (VfV) Land Law—creating a formalized land market. Even though landowners used to buy and sell land right up to 2012, that practice was not officially permitted by state law. The passage of the Farmland Law set up a legally recognized land market through the standardization of a predominantly private land-use certification and registration system. Land use certificate (LUC) holders are allowed to sell, exchange, inherit, mortgage and lease their land.

With reference to Fukuyama's 1989 essay, *The End of History?*, in which he proposed that Western liberal democracy with its attendant capitalist system would be the culmination of modernized society, land titling is often considered “the natural end point of land rights formalization” and “the end of contestation over the appropriate economic organization of society” (Hall et al. 2010: 35). This thinking has become dominant among most governments and development agencies ever since De Soto (2000) popularized the idea that the developmental successes of the West has largely relied on a strong legally-enforceable institution of property rights, without which assets, particularly land, would become “dead capital.”

In the face of mounting criticism against excessive liberalization of markets in the 1980's and 90's, particularly after the Asian Financial Crisis, the state has been attributed a more central role¹-- in this case to serve as the regulator of a land market to enhance market efficiency. Along these lines, efficiency requires alienable *private property titles*, which is the foundation of creating a *competitive land rental and sales market* (Binswanger and Deininger 1999). This dominant model argues that private property, backed up by strong legal institutions, state regulation and a free market would allow individuals who are more “fit” to use the land to invest in it, while allowing those who are less capable of making full use of the land to exit it (but with scant attention to questions of equity).

This paper recognizes that the mainstream model of land governance which prioritizes the economic value of land is highly problematic. In Myanmar, many indigenous communities do not only associate monetary value to their land, but also social, cultural, spiritual and historical values. As such, land has been central to many communities' self-reproduction and thus managed with strong communal tenure systems based on reciprocity. While recognizing this, this paper does not focus on the customary uses of land, but on the areas where there is already a land market—and where farming communities already have a history of interacting with state law and its apparatus. These tend to be the Burman-dominant lowland plains.

In these areas, Myanmar faces at least two major obstacles to achieving an *equitable and efficient* system for regulating this land market. The *first* obstacle is around how multiple regimes have contributed to creating what Esther Roquas calls “stacked laws” (2002). This term refers to a situation in which a country has multiple layers of laws that are built on top of each other, often creating conflicts and contradictions in the legal system, as well as challenges to creating a well-regulated land market. The *second* obstacle has to do with the fact that like many countries in the world, access to legal justice in Myanmar is dependent on one's access to different material, social and political resources. This is directly related to Myanmar's history of a socio-economic arrangement in which patron-client (Scott 1972) arrangements have defined people's access to a range of resources. These same arrangements hamper Myanmar's democratic transition, in which the establishment of rule of law is a central, but fraught process.

¹ In the 1990's and early 2000's, the state's role in land reforms was at the center of a debate between those who argued for market-led agrarian reforms or MLAR (Deininger 1999) over state-led agrarian reforms or SLAR (Borras 2006, Lipton 2011). While the former decried the inefficiency of SLAR in redistributing land through mechanisms such as government-set land pricing and corrupt bureaucracies, the latter claimed that MLAR, through its voluntary market mechanism, cannot and has not resulted in real and substantial redistribution of land from large landowners to the landless. They argued that state-intervention is needed for true redistribution to occur.

Through a number of select case studies, this paper seeks to provide preliminary reflections on the following question: *In Myanmar, a country with a porous legal framework, how do smallholder farmers engage with the law, and where relevant, informal norms to strengthen legitimacy of their claims to land against confiscations?*

A few caveats are in order prior. First, this paper does not propose a reified concept of the “rule of law.” Although many countries, including Myanmar, have adopted the rhetoric around the promotion of rule of law, it is understood here that rule of law does not exist objectively. The legal system doles out “justice” in response to the pressures exerted on it in a complex political play that involves an array of actors, including media, domestic and international civil society, religious leaders, etc. (Prasse-Freeman 2015). Second, even though the focus of the paper is about farmer’s interactions with the law, this analytical angle does not negate the presence of a wide range of other responses being employed by farmers to resist land confiscations—often outside of the legal system and ranging from more militant to more accommodating responses based on negotiation and compromise. On the other extreme, many communities such as those that reside in the remote uplands, have historically had little to no interaction with state administration and laws i.e. Chin State, and thus, have the least awareness to mount a response to land confiscations of any kind. Thirdly, it is not clear the mindset of the communities is motivated by the offensive position of ‘resistance’ or from the defensive position of ‘protection,’ (see Forsyth 2009) in which they appeal to authorities and others with power to protect their lives and livelihoods. This is to say that the complex interaction of a range of responses of which Myanmar’s rural social movement consists requires much broader and deeper analysis. Returning to the main question posed, his paper seeks to answer the following questions:

1. Broadly speaking, how did the existence of four regimes (British colonial rule (1824-1948), the post-independence period (1948-1962), military rule (1962-2010) and the current reform (2010- present) contribute to a weak legal framework rife with “stacked laws”?
2. What kinds of conflicts arise from a system of patron-clientelism in which people’s access to legal justice is mediated by differential access to a variety of material, social and political resources?
3. Given this weak legal framework, what are some ways in which smallholder farmers *navigate the law* i.e. strategies, and *secure legitimacy* i.e. use laws and policies or informal norms, to support their claims of rightful ownership to contested land?
4. Going forth, what implications does this have for strengthening conflict resolution mechanisms, particularly using the law, for farmers involved in land conflicts?

Drawing from fieldwork carried out in the last two years mainly in the low-land areas such as Ayarwaddy Delta and Mandalay Region, the paper considers conflicts at two levels: a) the intra-community level between farmers and b) between local communities and outsiders i.e. companies, state actors, the military, in land confiscation cases that are legacies of the past or as the part of the spate of ongoing land confiscations that have gripped the country. The cases covered also compare older and new land cases: a) cases being raised now, but which arise from past policies, i.e. such as the government’s promotion of concessions for industrial agriculture since 1994, and b) more recent cases that have intensified since the passage of the two land laws in 2012.

The research has also drawn on the following sources a) interviews with members of a national network of pro-bono lawyers who have been providing legal representation to farmers involved in legal cases over land that the latter claim has been confiscated; b) verification of analysis with civil society and farmer association leaders; c) review of newspaper coverage of land conflicts and cases.

A Legacy of Stacked Laws

Roquas (2002: 21-2) studied the way different sets of laws² influenced the claims of rural communities to land in Honduras, argues that different laws created over time to govern land use and property rights created a normative pluralism among people who engage with the law, that she terms “stacked law.” By employing this term, she gives what appears to be a chaotic system a degree of structure and emphasizes the way the way people can tease out and strategically employ separate normative elements of such a system. She explains how rural communities defending their access to land against confiscation seek to establish the validity of their claims based not only on current active laws, but also by invoking their understanding of older laws and policies that may no longer be valid. It is not only the formal state laws to which people will invoke to legitimize their claims, but also norms shaping property relations that might have organically arisen from a community itself, which could have operated on the margin of the state’s body of laws. This concept is useful in explaining the nature of the legal framework governing land access in Myanmar and the ways that a small but growing number of farmers threatened with land dispossession are beginning to strategically engage with the *state law, sometimes alongside informal norms*, to defend themselves against land confiscations.

The current system of land governance in Myanmar is very much influenced by the system put into place during the colonial era (1824-1948).³ England, after it seized control of Lower Burma in 1826 and expanded control of territory in 1855, used the Burmese rice plantations not only to feed its own industrial workers, but also to feed workers in plantations in India, in the tea and rubber plantations of *Ceylon* (Sri Lanka) and *Malaya* (Malaysia), and in the sugar plantations of the West Indies (Wolf 1982: 319-20). The need to rationalize the rice and taxes extracted from Burman farmers served as the impetus for the introduction of a system to assess individual land holdings and to introduce the idea of an “individual landholder’s right” (Furnivall 1991 [1939]: 116-31), via the passage of the 1876 *Lower Burma Land and Revenue Act*, which created rights to inherit and trade land after a farmer had used the land for 12 years consecutively. This law imported the British system of “property rights,” including the ability of cultivators to pledge land as collateral against loans such as those offered by the *Chettiars*, moneylenders indigenous to Southern India who provided the bulk of the credit to Myanmar, turning it into Asia’s ‘rice bowl’ at the beginning of the 1900’s. As the precursor to the cadastral maps, the British administrators introduced a scheme in which “the land of every cultivator was to be measured up, and he was to receive a statement showing that he possessed so many fields and so much garden land” (ibid: 124). Not long after, the British enacted the 1894 Land Acquisition Act, providing the basis for compensation when land is acquired by the state for itself or a private developer—a law alive until today.

The 1947 Constitution of the independent Union of Myanmar established the State as the ultimate owner of all natural resources and land, later reaffirmed by the 1974 and 2008 Constitutions. Soon after the first Constitution, the 1953 *Land Nationalization Act* reiterated the state’s ultimate rights to the land while making landlordism illegal by nationalizing all land, with a specific focus on the land accumulated by *Chettiar* moneylenders through debt-defaulting farmers. Under this law, the state leased land to cultivators with a “land to the tiller” policy. Because the state could always rescind the

² Roquas considers the Civil Codes of 1880 created in the early years of Honduras’s nation –building after it won independence from Spain, the laws governing communal lands called “ejidos” first referenced in the 1835 Land Regulation Law, and the first Agrarian Reform Laws of 1962 and the second in 1975, which shifted the focus back onto collective ownership rights from individual ones.

³ From the 11th to the 19th centuries, people in Burma proper lived under the absolute rule of Burmese kings who ruled with *dhammathats* (Leckie and Simperingham, 2009). They owned all land, and also extracted surpluses from farmers who were allowed tenancy rights to the land through cultivation. Even during the reign of kings, an informal land market was already developed in many areas.

lease, this could be considered a weak form of land tenure. Under this law, sales, mortgage and division of land were no longer officially allowed.

According to GRET study (2014), in practice, parallel systems of land administration demonstrated a *legal pluralism* that mixed formal with more organic norms that came to regulate the property relations. Because law did not permit transfers, but people had a need to buy or sell land, they created a system that resembled formal law. These transfers were made with store-bought contracts, known as “10-kyat contracts,” that bore close resemblance to state-sanctioned contracts. Notable markers included witnesses, and the signature and seal of a village leader or a township administrator, secured with a payment of 10,000 kyats. In addition, the transfers used a rationale set by the state for allowing farmers to keep land use rights: that the land had to be in use. By inference, farmers who sold their lands at this time argued that they were in fact ‘breaking state rules’ and therefore should sell it to someone who would be able to cultivate this land. Relying on such a practice, land continued to be used for collateral, the need for credit and the replacement of *Chettians* with local money lenders resulted in a credit arrangement called “*leh pyan ngwe pyan*” (return land return money) -- leading to many farmers losing their land when they failed to repay their debts. These practices created a form of documentation in parallel to the official farmer’s booklets issued by the Settlements and Land Records Department (SLRD) which stated the farmer’s official land use rights (*lei ya myei louq paing kwin*), as well as obligations such as paddy quotas to be sold to the government, tax payments, and duties to the cooperatives into which farmers had to join. This parallel system of documentation in the present day complicates titling, as the legality of the “10-kyat contracts” is starting to be challenged in courts.⁴

On 30th April 1962, right after a military coup, General Ne Win declared a policy called the “Burmese Way to Socialism,” which articulated the three central concepts to the regime: “nationalism, socialism and Buddhism” (Steinberg 1982: 76). Under this declaration, the military government headed by the Burma Socialist Program Party (BSPP), the only party to exist from 1962 to 1988, passed a series of laws (Hudson-Rodd et al. 2003) that strengthened the state’s control of land, while still promoting a “land to the tiller” policy. The 1963 *Tenancy Law* defined farmers as tenants on state-owned land, and extended the state’s granting of land to cultivators beyond the level started under the 1953 Land Nationalization Act. Under this centralized system, tenant farmers cultivated crops in accordance with the state economic plan, without freedom of crop choice. Violations of land use rights as prescribed by the state led to the reallocation of the land use right to a new farmer. In addition, the *Farmer’s Rights Protection Law* of 1963 was enacted to prevent confiscation of land and other farming implements in the event of farmers defaulting on their debts, except to the state.

Starting in 1974 and lasting until 2003, the military heavily extracted surplus from farmers both in terms of land confiscations and forced paddy procurement, particularly in the Delta (ibid). Farmers had to sell a quota of 12 baskets of paddy per acre owed to the government at about half the market price, which then used it to feed civil servants, soldiers and to gain export earnings. Those who could not meet the quotas had their land confiscated and allocated to other “more productive” farmers who also had closer ties to township administrators, in turn leading to greater land concentration and contributing greatly to the decline of the sector. In response to these coercive and extractive state actions, farmers resorted to localized resistance tactics closer to the “everyday forms of resistance”⁵ (Malseed 2008, Kerkvliet 2009). For example, a smaller farmer avoided the extractive state through a range of strategies. One strategy is by asking a larger farmer to fulfill his quota in exchange for the latter’s right to appropriate the former’s land, converting him into a sharecropper. Another strategy was to under-report land holdings so as to reduce the exacted quotas—a factor that complicates titling

⁴ Author interview with an informant handling land-related legal cases.

⁵ Except for rare explosive demonstrations such as the 2007 monk-led Saffron Revolution

now. The legacy of this policy continues to this day as farmers challenge the fairness of land lost under the rice quota policy (Thawngmaung 2003).

Along with the global depression, the rice quota policy facilitated the decline of the sector from its heyday right before World War II (1936-40).⁶ As a result, to harmonize with its official declaration of a transition to a “market economy” in 1988, the State Law and Order Restoration Council (SLORC)⁷ created a new policy in 1991 to promote private investment in agriculture production, called the *Duties And Rights of the Central Committee for the Management of Culturable Land, Fallow Land And Waste Land* (SLORC Notification No. 44/91), or “Wasteland Instructions.” These “Instructions” were the precursor to the 2012 Law bearing the same name, which was passed alongside the Farmland Law. With their passage, the Land Nationalization Act of 1953, Tenancy Law of 1963, and the Cultivators Rights Protection Law of 1963 were all revoked.

By 2012, given population growth and lack of resources allocated to the Ministry of Irrigation and Agriculture (MoIA), large expanses of land under cultivation was not included under cadastral maps or “*kwin*” maps —by default falling under the VFV category or still remaining under forest land. While 5.36 million land use certificates (LUCs) have been issued from January 2013 to 17th November 2014, according to the Deputy Minister of MoIA,⁸ many households still did not hold “*form 7*” for the lands on which they were cultivating, even if they had tax receipts from the annual modest taxes paid on this land. As this was the context in which the 2012 Farmland and VFV Law were introduced, it would come as little surprise that the titling process would be rife with conflict and ambiguity.

Review of Relevant Laws

Even before the addition of the two most recent land laws in 2012, Leckie and Simperingham (2009) already counted at least 73 active laws related to land governance. These laws relate to the regulation of land categories such as farmland, forest law, settlements land, land-based investments, municipal land, etc. In addition, there were a number of quasi-legal directives and orders signed into force by senior generals such as Order 1/64, dating from February 1964, that said anyone farming the land for more than five years had a right to the title. Given that this paper focuses on the struggles over control of agricultural land, this section briefly summarizes the laws most relevant to agricultural land use and ownership.

The supreme law of the land is the Constitution, and this means that all other laws, regulations and policies in Myanmar must comply with [it]. Not only the 2008 Constitution, but also the 1947 and 1974 versions clearly say that the state is the ultimate owner of all lands in the country (*Article 37*). This means that (highly conditional) *land use rights* may be granted, and that the government reserves the *ultimate* right to take them away. On the other hand, and which appears somewhat conflicting, is that the Constitution also refers to protection of private property (*Articles 35, 37, 356 and 372*) and requires the government to “enact necessary laws to protect the rights of the peasants and to obtain equitable value of agricultural produce” (*Article 23*).

The 2012 Farmland Law sets up a legally recognized land market through the creation of a land-

⁶ According to Mya Than (1990), Myanmar’s rice exports were 3.177 million tons at this time, and gradually declined over the years-- the country exported 1.676 million tons in 1961/2 but only 0.3 million tons in 1987/1988, the year the SLORC took power, followed by 50,000 tons the next year. This is a ten-fold drop since the 1930’s.

⁷ The SLORC (1988 to 1997) took power from the BSPP after the 1988 student demonstrations. In 1992, General Than Shwe became the head of the SLORC, which in 1997 became the State Peace and Development Council (SPDC), the majority party to which President Thein Sein belongs.

⁸ See article ‘Proposal to help farmers obtain loans,’ accessed 10th January 2015, <http://www.elevenmyanmar.com/index.php?option=com_content&view=article&id=8601:proposal-to-help-farmers-obtain-loans&catid=44:national&Itemid=384>

use certification and registration system, primarily for private property. Property rights include the right to sell, right to exchange, right to access credit, right to inherit, and right to lease. But like before, this law limits farmers' ability to freely grow what they wish, requiring that they seek permission from authorities. The Farmland Administration Body (FAB), under the MoIA and with representation at the village up to the national level, issues LUCs at the township level. If a farmer breaches the conditions of use, the FAB may impose fines and/or take away land use rights, which civil society groups have criticized as being too strict on farmers. For example, the Farmland Law considers a farmer's failure to use the land within 6 months of being given a LUC a "violation" (compared to the four years given to a company as per section 16B of the VFV Law). The law also allows the state, through the FAB, to confiscate land for the "interest of the state and public," but this term leaves a great deal of room for interpretation. Compared to the 1894 Land Acquisition Act, the Farmland Law's Chapter 8 bylaws provide much more guidance for calculating compensation when land is taken, but this guidance is rarely consistently calculated. This results in farmers often receiving much less than they should according to this law. In addition, as decisions of the FAB may not be appealed to a court of law (Chapter 13, section 40), the rights of smallholder farmers to an independent appeal process is denied under this law, forcing them to resort to alternative strategies when seeking legal redress.

Though few land concessions have gone through the channel⁹ established under the VFV Law, the law regulates the leasing of land considered "vacant," "fallow" or "virgin" to alternative use. Chapters III and IV state that Myanmar investors, foreign investors (in joint ventures with Myanmar investors or government entities), government entities and non-government entities may apply to lease VFV lands for agriculture, livestock breeding, and other purposes. For agricultural projects, enterprises are given up to 5000 acres at one time, up to a maximum of 50,000 acres with leases of up to 30 years with extensions for up to a total of 30 more years. Also notable is Article 25(B) of the VFV Law, which recognizes existing use of land by farmers should there be a conflict between the existing tenant and another party that is claiming the land. Since most farmers in Myanmar do not yet have LUCs for farming on land that is officially considered VFV land, this clause has been useful in securing some degree of compensation in land disputes, particularly when the farmer can demonstrate extended land use with tax receipts—but rare are the cases when farmers are prioritized for titles when in such a conflict with an investor.

Forest Law of 1992 and Forest Policy 1995: These regulate all forest lands and forest resources in Myanmar. These forests can be divided into two categories—permanent forest estate (PFE) and non-permanent forest estates (NFE). Currently, PFE makes up 25.01% of the total land area, and about half of all forest lands. NFE includes Public Forests or "unclassified forests"—areas in which communities are allowed to harvest timber and non-timber products for subsistence, unless specifically prohibited-- and Waste Land is land that has no designated use or institutional home. These forest laws *link* to the new land laws since, normally, it is Public Forests and Waste Land that is allocated under the VFV Law as "virgin" land leases, managed by the Central Committee for VFV Land, for which the MoIA is the secretariat. Since many upland communities who practice shifting cultivation shift across several state categories of land—from agriculture, to forest, to conservation areas—this further challenges efforts to get statutory protection of these communal lands which have tended to follow customary laws.

Customary laws continue to operate alongside statutory laws in many remote ethnic areas given the evolution of state efforts to expand its reach to the remote areas of Myanmar over time.¹⁰ Under colonial administration, as spelled out in the British Frontier Areas Administration Notification dated

⁹ Author interview with DG of DICA, 2nd December 2014

¹⁰ Various portions of Burmese territories, including Arakan, Tenasserim were annexed by the British after their victory in the First Anglo-Burmese War in 1824-6; Lower Burma was annexed in 1852 after the Second Anglo-Burmese War. After the Third Anglo-Burmese War in 1885, Upper Burma was annexed, with the Chin Hills being acquired a decade later in 1895.

4th May 1886, Burma was administered in two different categories: *Ministerial Burma* or Burma proper, and *Scheduled Areas* or frontier areas, which covered about half of the total area of Burma. In frontier areas, the British vested in traditional headmen political and administrative authority over their subjects in exchange for loyalty. Laws in force in Lower Burma were generally not applicable in the Scheduled District, as confirmed in the 1935 Government of Burma Act, which have not been repealed up to today, including a set of manuals describing customary land laws (FSWG 2010). Customary laws on land govern land use, transfers and inheritance. They are locally contextualized, passed down, enforced and adhered to by community members. Most ethnic minority states followed customary law until the military government came to power in 1962, at which point all proceeding laws were officially applicable to the whole country. But *in practice*, state laws on land management have not been adopted by many ethnic minority hill-dwelling communities. While there are no laws that allow for security of communal land, the draft *National Land Policy* does contain a section on Ethnic Customary Land Rights.

The above sections demonstrate that the multiple regimes that have governed the country contribute to a legal pluralism where laws, policies, directives (and quasi-legal practices) have been developed over different regimes to promote different objectives. Although the passage of the 2012 Farmland Law revoked some of the older laws, many of the impacts from these older laws on the livelihoods of farmers are still felt. For example, while many farmers may have been farming on what is considered “VFV” land which was never mapped as farmland, under the 1963 Tenancy Law, these farming communities might have been given tenancy rights by the state to farm this land. *In the present day, as their land is threatened with confiscation by someone bearing a land lease certificate under the 2012 VFV Law, these farmers claim their rights granted to them under the old laws (and often alongside an articulation that time gives them a certain ‘customary right’)*. Thus, what is demonstrated here are the inefficiency and conflicts that come from a history of stacked laws. The GoM’s recent statement that it will prioritize streamlining these laws to align with a single master Land law, whose drafting it has initiated, is likely based on the same recognition that the legal framework governing its land is far from effective in promoting efficient land use.

Land Confiscation Mediated by Patron Client Relationships

Large-Scale Conflicts

Another factor in who gets to benefit from the protection of the law needs to be situated within the historical context of a society built on patron-client relationships. Though basing it on the relationship between large landowner and tenant farmer, Scott (1972: 8) defined this as “a special case of dyadic (two-person) ties involving a largely instrumental friendship in which an individual of higher socio-economic status (patron) uses his own influence and resources to provide protection and/or benefits for a person of lower status (client) who, for his part, reciprocated by offering general support and assistance, including personal services, to the patron.”

From 1962 to 2010, the military state engaged in rent-seeking behavior, aptly described as “the informal privatization of public organizations [...] to advance the private interests and clients of long-standing... heads of states” (Burnell et al. 2011: 233). Specifically, the military regime was the patron to a network of clients that at once that were at once protected while carrying out the former’s bidding. This period also featured low democratic accountability, thin state budgets, reliance on extractive industries and an over-dependence on its main investor China, particularly after the West imposed sanctions in 1988. People were dominated by the state as its coercive apparatus acted unpredictably and unrelentingly to make examples of those who transgressed often unwritten but understood rules (Prasse-Freeman 2012).

With the passage of the “Wasteland Instructions” in 1991 the military government sought to grow its export economy by allocating vast tracts of land to favored investors—whether they had the capacity and willingness to use the land or not-- to promote the export of cash crops, including rice, sugarcane, cassava, soy, corn, rubber and palm. In addition, much of these concessions tended to be in ethnic minority states, with over 60% of over 5.2 million acres (DAP 2013) located in the conflict-affected Kachin State and Tanintharyi Region. Land was also confiscated by various government ministries, by the military and its related business enterprises, and investors well-connected to the regime. As concluded by the Parliamentary Land Confiscation Commission in early 2014, most of the land concessions at that time failed to follow the 1894 Land Acquisition Act—the only law that regulated compensation at the time of the confiscations. This past trend was confirmed by a lawyer known for being a pioneer in taking up and winning pro-bono cases representing farmers in land conflicts who said: “it is not that there is no law, but it is completely ignored in most cases.”¹¹

Right before the 2010 elections, the military-backed USDP party used distributions of land as patronage payments to secure the support of wealthy businessmen, some of whom became parliamentary members of the USDP, and later centrally involved with drafting the 2012 land laws.¹² On the other hand, the election has also created incentives for contending parliamentary candidates to appear responsive to their constituents. In fact, farmers’ activists often employ electoral politics as a way to secure MPs support for local communities embroiled in land conflicts.

Localized Land Concentration

At the local level, Scott (1972) presciently described the breakdown of more legitimate and collaborative forms of patron-client relations, as typified by large landowner and tenant farmers, in rural communities across Southeast Asia in the colonial period. He attributed this to the distortionary impact of colonial administration on these earlier relations, the increasing integration of lowland farming systems into market relations (which exposed small holders to market prices making them vulnerable to land forfeiture), and the concentration of land in the hands of absentee landlords. Together these contributed to social relations becoming increasingly economic in nature.

Similarly, Myanmar’s rural communities might also be seeing the gradual breaking down of mutually-beneficial patron-client relationships to more economic and even exploitative ones. In the past, the practice of “*Leh pyan ngwe pyan*” in which small farmers used land as collateral for credit advanced by larger farmers, and small farmers’ inability to meet paddy quotas had already started the process of land concentration. Now with the conversion to a land market through titling-based reform, which typically raises the commercial value of land, based on both actual investment and perceived increases of value i.e. as the case with speculation, it appears that the remaining vestiges of protective patron-client relationships continue to deteriorate. In effect, the “social relations of production”¹³ between members of the rural society are in effect, shifting from one defined more by reciprocity to one defined more by commercial exchange. The GRET study (2014) has documented cases of land owners who before might have allowed land access to landless farmers no longer doing so when their own chances for titling land became threatened either by tenant farmers challenging these landlords to the land¹⁴ or in more aggressive ways by landless farmers continuing to farm on land that they have been ordered to vacate (“plowing protests”). These have changed former patron-client relationships

¹¹ Author interview dated 26th December 2014.

¹² See article Mining, Plantations Affect Livelihoods of Kachin Villagers, NGO Says, accessed 30 May 2013 <<http://www.irrawaddy.org/health/mining-plantations-affect-livelihoods-of-kachin-villagers-ngo-says.html>>

¹³ This is a central concept put forth by Marx in his 1859 *A Contribution to the Critique of Political Economy*, where he said, “In the social production of their existence, men inevitably enter into definite relations.”

¹⁴ With reference to Order 1/64, dating from February 1964, that said anyone farming the land for more than five years had a right to the title (email exchange with NGO worker covering the Ayarwaddy Region, dated 7th August 2014)

into more oppositional ones.

In addition, as the creation of a land market has raised the commercial value of land, in part driven by speculative pressures on farmland that investors are seeking to convert into higher value industrial or residential land particularly on the outskirts of cities, local elites i.e. village leaders, township administrators, SLRD officers, are also responding to the material incentives of the increasing land values. There are growing signs that local elites are increasingly cutting off from old patronage relations with local villagers and are now creating new relations of patronage with the highest bidders¹⁵. From the village to the regional levels, the FAB both administrates land titles and approves of investments—in effect “brokering” land deals. For example, in land transactions with private investors in Bago, the village leader receives a commission of 100,000 MMK and the SLRD receives 200,000 MMK, compared to 30,000 MMK prior to 2012,¹⁶ but such transactions are increasingly becoming common across the country. In response to this growing (highly unregulated) land market, the number of land brokers has grown around the country.

Since the laws do not prioritize awarding of titles to small holders who have often farmed on land officially considered VFV law, merely stating that negotiations have to be made with these farmers in the event of a land conflict normally disadvantages the poor, material incentives have led to local elites’ selective application of the 2012 Farmland and VFV Laws. As a result, many farmers around the country are being passed over for titles for land that they may have been farming for perhaps generations, often with tax receipts to prove it. The head of one local NGO supporting farmers’ issues said, “according to new laws, there is no more land grabbing, as the laws are used to legitimize them.”¹⁷

Local elites are not only using the land laws to create and strengthen these new patronage ties with investors, but they are also employing the use of police and the courts to further criminalize farmers. It is common for farmers to be charged under criminal codes 427 ‘trespassing’ or 44 ‘damaging private property.’¹⁸ Continuing the legacy of a military state which often created political prisoners by charging them as being a threat to national security, farmers who are unwilling to get off land that has been confiscated are being charged with the more serious criminal code 505(b) “defamation of the state.” Once charged, farmers are immediately put in jail until they are bailed out—effectively working to intimidate them and other farmers from taking further action to regain their lands. In another example, laws are used selectively to deny farmers restitution. In one village in the Delta that involved the company Aye Yar Shwe War¹⁹, though the community had tax receipts for the land up to 1992 when the land was confiscated, and it was clear that the 1894 Acquisition Act was violated, the FAB denied any restitution by responding with a cynically selective application of the directive that says anyone who had not worked the land for more than five years can lose this land.

Yet another difficulty in restitution is in situations in which the original party involved in the confiscation might have actually returned the land, but given the fact that land has often changed hands many times involving various parties paying for land leases, a legitimate claimant cannot be easily identified. For instance, in a case in the Delta involving 513 acres and 94 HHs, the original company said it had returned it to original owners, but the last village leader in turn sold those acres to new investors. In Feb 2014, the township administrator told the SLRD to bar these investors from using the land. After he was suddenly switched out, the new administrator is now siding with the companies.

¹⁵ Cases observed by author in fieldwork conducted around Pyin Oo Lwin, Mandalay Region in 2012 and Ayarwaddy Region in October November 2015.

¹⁶ Case presented on 23rd December 2014 in the FAO office in Yangon by a land expert who carried out a study on land tenure administration for FAO in Myanmar.

¹⁷ Author interview on 21st November 2014

¹⁸ Author interview with legal-aid defenders on 6th December 2014.

¹⁹ Author field visits in the Delta in November 2014.

In addition, local land grievances are aggravated by limited capacity in local administration across the country. For example, in Ye Township in Mon State, the SLRD office was supposed to distribute 33,158 titles in 14 months, with only 22 staff and limited budget.²⁰ In addition to administering the LUCs, the SLRD has to collect data on crop statistics. Given outdated technology, limited human resources and a short timeframe of one year to issue close to 7 million LUCs, the SLRD had to take short cuts such as using old maps from 1984 and skipping necessary verification steps in order to give out these titles. What happened in one village in Kanbaung Township in the Delta, which is likely to happen elsewhere, is that a household originally farming 10 acres received a LUC for 3 acres, while one farming 3 acres received a LUC for 10 acres—a situation that is likely to contribute to intensifying community conflict in what is already a polarized environment.

Farmers' Political Approach to Laws

For a number of reasons, *it is still uncommon for farmers to engage with laws* to protect themselves against dispossession. For the most part farming communities are afraid, have little information and are deterred by the high cost of court litigation. For example, in one case in Magwe involving 18 villages and 6000 people seeking compensation for displacement due to a dam project will cost 18 lakh (about USD\$1800).²¹ On the other hand, the availability of lawyers to take on these cases may also be limited. Right now, such suits initiated by farmers are often subsidized by donors, usually development agencies working on rule of law issues who support legal aid services.²² As a result, there are *no known* recent court cases that have resulted in farmers actually getting back confiscated land. Court cases in which farmers won at best resulted in increased compensation for confiscated land. Relative to land returns gained through court cases, there are more instances in which farmers have either gotten land returned as a result of the Parliamentary Land Commission's work (although this has also been an imperfect process). Negotiations carried out by local communities have also prevented/delayed land takings or resulted in fairer monetary settlement. For example, in the negotiation of compensation for land taken for the Kyaukphyu SEZ in Rakhine State²³, communities supported by an influential monk resulted in the increased settlement from 18 lakh to 40 lakh per acre for farmers whose farmlands are being confiscated for the SEZ. Nonetheless, there are a gradually growing number²⁴ of legal cases in which farmers are demonstrating strategic engagement with the laws to protect themselves against dispossession. The following sections will address a number of factors that are likely contributing to this phenomenon: 1) the evolving nature of the judiciary; 2) the shift towards a "rightful resistance" mentality; 3) the types of legal strategies available to farming communities; and 4) alliances with media and other civil society groups.

Evolving Judiciary

The slowly changing nature of the judiciary is a factor key to the growing number of cases in which farmers engage with the law. As part of the overall political reform and the growing recognition that the judiciary must not be subsumed under the executive, as was the case under the military government, judges are more independent than before. Particularly for high profile cases that receive

²⁰ Case presented on 23rd December 2014 by a land expert who carried out a study on land tenure administration for FAO in Myanmar.

²¹ Author interview with legal-aid defenders on 6th December 2014

²² The Myanmar Legal Aid Network has 30 cases to date. Namati is an example of paralegal assistance to public defenders. As of end of 2014, they have trained 30 paralegals across Ayeyarwaddy, Bao, Magwe, Sagaing, Shan, Kayah and Kachin.

²³ Discussion with Rakhine civil society leader on 25 December 2014

²⁴ While the total numbers is unknown, a lawyer who alone advises about one hundred cases estimates that there might be a few thousand such cases in the country.

strong media coverage, judges may be more hesitant to take bribes in exchange for favorable rulings. It is also because of the visibility of some land cases that more capable judges are being assigned to these cases by the Supreme Court.

Public defenders also play a vital role in shaping the outcomes in land confiscation cases. Given a history in which politically active legal practitioners were persecuted by the state for using the law to protect people from flagrant abuse of state law, lawyers tend to shy away from appearing politically motivated in any way. When taking on cases in which farmers have had their land confiscated, the lawyers employ a strategy in which legal arguments are crafted to merely uphold the “rule of law.” Because this is done with awareness that the laws themselves offer only weak protection to farmers, the cases are also chosen selectively so as to not only show *weaknesses in implementation* of these laws, but also *weaknesses in the laws* as perceived by some legal professionals. For example, a gap noted by lawyers in the 2012 Farmland Law is that the FAB is a “closed system” which does not bridge to an external appeals process, leading to a growth of court-based criminal cases targeting farmers. It is through the process of winning more cases that some members of the legal community indirectly advocate for changes in both the culture where the strong flagrantly ignore the laws, as well as for amendments in the laws themselves. On the other hand, there are also cases where farmers are choosing to break the law in order to show their rejection of laws, such as the Farmland Law, that they view as unjust from the onset, an entirely different set of strategies outside the scope of this paper.

Starts with “Rightful Resistance”

After many years in which the state dominated the people with a coercive apparatus, people do not just suddenly develop the awareness or daring to engage with the law—an institution created and enforced by the state itself. In this regard, the state-society relations have to shift in a way which creates openings for such engagements to occur. It is with this opening that we can now observe what has been termed “rightful resistance” (O’Brien 1996). While not to be taken as a *blanket statement* to explain the range of responses against land confiscations, many rural communities are opting to go through “approved channels and use a regime’s policies and legitimating myths to justify their defiance. Rightful resisters know full well that instruments of domination which facilitate control can be turned to new purposes [...] of entitlement, inclusion, and empowerment” (ibid: 33). As “critique within the hegemony,” rightful resisters “take the values and programs of political and economic elites to heart while demonstrating that some authorities do not” forcing the latter to respond “lest they risk being charged with hypocrisy” (ibid: 34).

When farmers in the Ayeyarwaddy Delta were asked why they started to complain about their land conflict cases, in which the actual confiscation occurred one to two decades ago, they replied, “We heard the President say that he will support the of return illegally-confiscated land to the farmers. We also heard about the Parliament setting up a commission in August 2012 to investigate these cases.”²⁵ Here, the farmers were referring to the Parliamentary Land Confiscation Commission, initiated in response to a resurgence of older land confiscation cases, to assess whether cases submitted to it for review in 2012/13 did in fact break the laws at the time of confiscation, namely the 1894 Land Acquisition Act. Returning to the idea of “stacked laws,” while Chapter 8 of the Farmland Law lays out clearer guidelines for establishing compensation than the 1894 law, many farmers *do not* want to see the repeal of the 1894 Law as it lends legitimacy to their claims for compensation from old land confiscations. In other words, the 1894 Law exists and despite being outdated, it continues to be invoked now to lend strength to their claims.

²⁵ Author interview in the Ayeyarwaddy Region on 24th November 2014

Legal Strategies

Based on the initial outcomes of only a few cases, and even though the legal framework does not provide strong enough protection against what has come to be popularized as “land grabbing,” cases that can clearly demonstrate that laws active at the time of a confiscation were broken and for which farmers can provide a degree of proof tend to have the strongest chances of winning. In contrast, land lost due to the old regime’s policy of paddy procurement is considered “legal” by the state-- even if not legitimate in the eyes of farmers-- and thus, have little chance of winning retroactive compensation. Farmers are assisted by lawyers to construct legal arguments that derive from a *selective use of both old and new laws*, as well as semi-formal norms that structure property relations. Buffeting this, farmers also refer to the principles of protection in old or revoked laws. For example, farmers group called Myanmar Democratic Network (MDN) lamented that the 1963 *Farmers’ Protection Law* was repealed to the great distress of more farmers. One MDN member said: “Before 2010, people were poor, but now people are so vulnerable that they cannot crawl out of poverty at this rate.”

Some of the most oft-cited articles of the Constitution are those that refer to citizens’ rights to legal defense and to appeal decisions made in an independent judiciary (*Articles 19, 375, 377, 378*). This reference challenges the 2012 Farmland Law which states that decisions carried out by the FAB may not be appealed to a court of law. Specifically, the official English version of the law (chapter 13, article 40) states that, “No proceedings shall be filed at any court for any matter carried out in good faith in accord with this Law or rules made under this law to the members of various levels of Administrative Body of the Farmland.” In a court of law, farmers may appeal to articles in the Constitution that refer to protection of private property (*Articles 35, 37, 356 and 372*) or that require the government to “enact necessary laws to protect the rights of the peasants and to obtain equitable value of agricultural produce” (*Article 23*).

Often used are articles in the two 2012 laws which offer specific types of protections to farmers to challenge land confiscations. These include:

- The Farmland Law’s Chapter 8 by-laws that give more specific guidance than the 1894 Land Acquisition Act for calculating compensation
- Section 25 b of the VFV Law says that farmers who have used VFV land for an established period of time can turn it into agriculture land, and there should be negotiation and compensation when this land is involved in a land conflict with a third party
- Farmland Law section 32 says should a project take more land than is needed, the original owner should get it back
- VFV Law 16b says land that is unused for four years must be returned to the state

These provisions are often used together with the 1894 *Land Acquisition Act* to argue for and to calculate compensation. These laws are used in a *temporally* strategic way. Similar to the Parliamentary Land Confiscation Commission, farmers are arguing that old confiscations broke the 1894 law which regulated the confiscation at the time, and therefore, compensation or restitution of the land to the original owners must be granted now. But because the calculation of this payment is not specified in the 1894 law, farmers then *retroactively* apply the guidance in the 2012 Farmland Law in order to calculate compensation amounts. The 2012 Farmland Law specifically states that compensation payments should be calculated based on the following: three times the value of the average crop output per acre of land confiscated; two times the value of any improvements made on the land; and the value of the land itself at the current local value (which is often not possible to calculate given poor documentation of past transactions). For example, if a land grab occurred in 2000, farmers would backdate the Farmland Law’s compensation guidance—coming up a sum for fourteen years.

Harking back to the 1876 *Lower Burma Land and Revenue Act*, and affirmed by the practices

under the 1953 *Land Nationalization Act* and the 1963 *Tenancy Law* is farmers' use of tax receipts to contest land confiscations. Because many farmers or farmers might have lost these certificates i.e. due to Cyclone Nargis in the Delta in 2008, or the SLRD did not issue LUCs, but did collect taxes on the land used for cultivation, many farmers are now using tax receipts as evidence of a period of continued land use. Tax receipts have the following information: territorial division marked by a rough sketch of a plot within neighboring plots called "kwin"; the unique number of that particular plot; the size and kind of land; the village and village tract names; and the name of the cultivator (GRET 2014). In disputes, court cases will tend to rule favorably towards farmers with these receipts—at least by deciding to award farmers higher levels of compensation for past land confiscations.

A third type of legal strategy appeals to non-land related laws, including those that apply to contracting or small loans which can be used in courts to judge the validity of the semi-official 10-kyat contracts. As earlier explained, these were often used in past land transfers when land was bought, sold, or mortgaged for loans. These contracts are being brought forth in some litigation cases where farmers lost their lands when they could not pay the exorbitant interest rates exacted by money lenders.

Yet another type of law used deals with local administration. These are used to challenge the validity of decisions made by the township administrators, who have disproportionate powers at local levels as "political brokers." In the past, they enforced paddy procurements and still play a central role in arbitrating titles and returning lands. Given the increasingly monetized nature of patron-client relationships, as argued here, decisions made by local administrators often go against their own internal regulatory standards. In a land-related case in Bago, a judge recently ruled that an administrator broke the General Administrative Department's own laws, while avoiding making any overt political statement that could have been interpreted as anti-state.

Alliances with Media & Civil Society

Although legal advocates tend to avoid looking "activist" or "anti-state," nonetheless, legal cases continue draw the attention of media and various civil society groups, who amplify local communities' demands for justice. For example, in the infamous Letpadaung copper mine case, the media continues to provide regular updates on the conflict while activists continue to support these communities in their demands for better compensatory settlements. While the media does not provide the most in-depth analysis of these land conflicts, its continues to play an important role by continuing to focus attention on land issues, usually by covering more sensationalist stories like "plowing protests"—which are usually considered to be ineffective in helping farmers secure their lands, resulting in farmers being arrested. This media attention is especially vital as the country gears up for the elections in 2015, in which media coverage is dominated by the debates over constitutional amendments as top elites seek to shape the electoral rules.

The role of the media is demonstrated in a specific case in Pyin Oo Lwin in Mandalay Region.²⁶ Here villagers had 20,000 acres taken 20 years ago, and as of mid-2014, half of this land was in the process of being returned according to the Parliamentary Land Confiscation Committee's recommendations. The 30 farmers in this village initiated a lawsuit against a company involved with the land confiscation. When asked why they are engaging with the courts, despite knowing that the courts tend to be corrupt, they replied that even without paying bribery charges to the judge (as was the practice up until now) with the pressure exerted by media and national (even global) campaigns, judges could be swayed to rule in their favor-- as did the district level court. After the regional court ruled against them, they appealed the case the national level courts, where it is now. In addition, they have told their parliamentary members that: "We only want to vote for those who really support us

²⁶ Author interview with village in Pyin Oo Lwin on 22nd June 2014

with our land issues, not to build a bridge.”

Civil society groups also play a crucial role, particularly in negotiating settlements between communities and external groups, even before a case goes to court. In Ayeyarwaddy Region and nationally, local farmers’ associations have played an important role by advocating to the regional government against farmers’ imprisonment and return of confiscated land, as in Mawlamyinegyun Township when 246 farmers were criminally charged in 2013.²⁷

Implications for Practice & Policy

The above analysis lends to a set of recommendations for policy and practice that relates to the way laws are developed and applied to promote the efficient and fair use of land. These recommendations recognize that placing all lands into a land market is *highly problematic*, particularly given how many communities do not see their land only in economic ways, but also with all its associated social, cultural, spiritual and historical values. But where such a market exists, a strong regulatory system must be put in place, while ensuring social protection mechanisms for people as the country transitions into a liberalized land market. These recommendations are:

Streamline the legislative framework for land— As already recognized by the government in its current efforts to create a unifying National Land Use Policy and Land Law, the legislative framework for land governance must be streamlined to facilitate a more efficient administration of land use and ownership, as well as the effective application of laws in land conflict cases

Strengthen protective mechanisms for farmers in the transition to a land market— 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 farm land when involved in a land conflict with an external investor. This lack of protection has contributed greatly to land confiscations across the country.

Empower the judiciary-- The judiciary needs to continue on its path of reform where it continues to develop its independence from other branches of government, as well as from those who can pay for favorable judgments, as was the case in the past. Legal professionals at all levels should be supported in making high-level legal analysis that both upholds adherence to laws, while seeking to fill gaps in them over time.

Stimulate demand for legal services-- This involves a change in perceptions among the public towards the law and the institutions through which it is administered. The work that is being done to date in making legal services more accessible to the public is necessary and needs to be further strengthened.

Minimize abuse of powers at the local level— Administrators, particularly the FAB, operate in a closed system and wield a great deal of power at local levels. Township administrators have traditionally been the “political brokers” for the state, playing a central role in land administration during the paddy procurement, granting of titles, and return of lands. Administration has depended on one’s relationship with the administrator i.e. clientelism. Attempts to professionalize local administrators, such as the work being carried out by MDRI, are steps in the right direction. An independent appeals process to the FAB has already been called for by civil society and legal defenders

Pace the liberalization of the land market- In the conversion to a land market, a central question is on *phasing*. This considers whether and when to introduce partial privatization (as in the case of China in the early 1980s) or full privatization (as in the case of several members of the Former Soviet Union in the late 1990s) in order for a state to more effectively manage more equitable land institutions. In

²⁷ Interview with farmer’s activists based in Patheingyi, Ayeyarwaddy Region, on 24th November 2014.

the FSU case, full liberalization of the land market led to rapid land concentration. In the shorter term, mechanisms such as land holding taxes, stricter land conversion process and penalties for speculation could be put in place. In the longer term, spatial planning and zoning of land use would also be needed in order to plan for the best use and management of land.

Conclusion

The above analysis seeks to demonstrate that land plays a central role in Myanmar's development. While this paper does not advocate that land governance must enforce the creation of a land market throughout the country, a strong regulatory system must be put in place where such a market exists. At the same time, protective mechanisms must be in place so as to counter the tendency for laws to be manipulated to further disadvantage vast numbers of the rural poor. This is even more necessary given the extractive nature of Myanmar's political economy, one built on patron-client relationships, and which has become increasingly more economic with the shift to a liberalized land market. The way that these new legal institutions are shaped must consider this pervasive characteristic of social relations in the country. Without it, much of the efforts to support rule of law will be wasted and even worse-- distorted towards the continuing benefit of a few.

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