

Memorandum

To: Government of Myanmar, Land Use Allocation and Scrutinizing Committee
From: Rachael Knight and Laura Goodwin, Namati
Re: Comments on Myanmar National Land Use Policy (Draft)
Date: December 30, 2014

Namati is delighted and honored to have an opportunity to comment on Myanmar's National Land Use Policy (Draft). The draft Policy sets out a critical framework to strengthen the land tenure security of all people and communities in Myanmar and to guide the adoption of a national land law and further harmonization.

As currently drafted, the Draft National Land Use Policy has the potential to ensure that Myanmar's growth will not disenfranchise its rural communities, but rather include them as key actors in the nation's development. We are delighted to see the draft Policy recognizes traditional land rights of ethnic nationalities, including men, women, and communities, in Part VII. We also support, as set out in Part III, the inclusion of critical safeguards concerning social and environmental impact assessments and consultation around land concessions. The moratorium in §36 is an excellent provision that will ensure time for proper implementation of such studies and participation. Similarly, the progressive notion included in §56 may help to protect against land speculation and acquisition by a small, elite minority. We commend the Committee for its attention to these matters. Overall, the draft Policy has the potential to protect community land rights, women's rights, ethnic nationalities' rights, the environment, and sustainable development.

Namati humbly offers a few improvements that we believe will help to ensure the full realization of the drafters' and policy makers' intent. The suggested alterations are as follows:

1. Include a section defining key terms.
2. Include a section reviewing how land may be held and used in Myanmar, as well as who can hold what kinds of rights.
3. Consider explicitly adding objectives to the Policy that promote the tenure security of women and marginalized groups.
4. Clarify the Policy's Basic Principles and include protecting the tenure security of all citizens of Myanmar.
5. Elaborate the duties and responsibilities held by officials at each level of land governance.
6. Allow for the categorization and protection of shared common lands.
7. Explicitly include community land rights as enforceable land rights, whether documented or not.
8. Initiate land use planning processes at the village or ward level.
9. Include additional protections into Part II, Chapter III, on The Change of Land Use by Individual Application
10. Ensure greater protections for the communal land use and management rights of ethnic nationalities.
11. Allow an independent commission or taskforce to issue reporting procedures for the National Land Use Council.

These matters are elaborated below.

1. **Include a section defining key terms.** The Policy would be greatly strengthened by the addition of a Definitions Section before §1, in which the meanings of all keywords are made clear to readers.
2. **Include a section reviewing how land may be held and used in Myanmar, as well as who can hold what kinds of rights.** The Policy would highly benefit from a clear, up-front section on the ways that land is classified and held in Myanmar. If all land is owned by the state, the Policy should state that clearly, and also state what citizens' rights to land encompass. May individuals and families hold land according to freehold/fee simple, leasehold - or may they only hold use and management rights? May more than one name, such as both a husband and wife, appear on documents related to such use and management rights? May groups or communities hold use and management rights? What kinds of rights may non-citizen investors hold? If ethnic communities may seek use rights, do these rights have the same weight and formality that individual land use certificates carry? Clearly stating such basic building blocks to tenure security will help to ground and clarify the National Land Use Policy.

3. **Consider explicitly adding objectives to the Policy that promote the tenure security of women and marginalized groups.** §6 of the draft Policy states that the Policy's objectives are to: "benefit and harmonize the land use, development and environmental conservation of the land resources of the State, to protect the land use right of the citizens and to improve land administration systems." Additional objectives might include:

- *"The Preservation of **cultural diversity** by allowing ethnic minority communities to remain on their lands, manage their natural resources in alignment with traditional practices, and prosper according to their chosen livelihood strategies;"*
- *"Flourishing local economies grounded in **secure common/shared lands** in villages throughout Myanmar that protect all community members' equal access to shared resources, allowing them to gather foods, medicines, and materials necessary for their families' survival;"*
- *"Families prospering due to **women's secure land rights**¹;"*
- *"**Food and water security** for all people of Myanmar"*

Alternatively, these kinds of goals/objectives might be outlined in §9 or §10.

4. **Clarify the Policy's Basic Principles and include protecting the tenure security of all citizens of Myanmar.** The principles underlying the National Land Use Policy are excellent, and the drafters should be highly commended. However, it is not clear how the lists in §9 and §10 are different, as both sections assert the Policy's main principles. We would also suggest changing the order of the introductory text of §9, as suggested below and adding a few clauses, so as to better introduce the ensuing lists:

In ~~implementing~~ **ensuring** sustainable economic development; effective environmental conservation and protection; **justice and equal rights for all peoples, including women, ethnic minorities and members of other vulnerable groups**; the continued entry of the foreign direct investments; social harmonization **and land conflict resolution**; and strong land tenure security and immovable property rights for all citizens of Myanmar, the National Land Policy should..."

It would then be possible to merge §9 and §10, which would allow the Policy's underlying principles to come across more clearly. (For example, 9(a) and 10(e) and are very similar, and might be combined.)

5. **Elaborate the duties and responsibilities held by officials at each level of land governance.** §18 enumerates the various responsibilities of the Union Government, National Land Use Council, the region and state governments, and district land use committees. The short list included is very good. However, it could be more comprehensive, so as to ensure a better safety-net for the protection of the rights of vulnerable groups. For example, we would suggest adding the following tasks to the list:

- *"Ensure protections for women's rights in the registration, inheritance and transfer of land between and within families;"*
- *"Ensure that land and natural resource rights of communities are protected in all land transactions, including the negotiation and implementation of land concessions and other*

¹ Studies have shown that securing women's land rights through co-titling or individual titling has a variety of positive benefits:

- An individual land titling scheme among urban squatters in Peru requiring that both spouses names are put on the title resulted in a 22% reduction in women's fertility – twice the fertility reduction as when the title was put in the name of only one family member (Field, 2003);
- A titling project in Nepal found a positive association between women's formalized land rights, women's sense of socio-economic empowerment, and the health of their children, and concluded that the impacts of secure, formal land title are comparable to the effects of increased education and employment opportunities (Allendorf 2007);
- A joint titling scheme in Punjab, India, proved to make women feel more attached to their homes and more empowered to assert their rights in court, should their husbands one day hypothetically seek to sell the land without their permission (Datta 2006);
- A titling scheme in Gujarat, India found that titling women's land increased their self-reported propensity to invest in their land (Baruah 2007);
- A joint titling scheme among urban squatters in Brazil was found to reduce family size – in both a reduction in women's fertility and in the fewer number of extended family members living in a home – and to lead to improved children's educational outcomes (Galiani and Scharrodsky 2005).

investment projects;”

- *“Ensure that the land and natural resource rights of all citizens of Myanmar are protected equally under law and in the justice system, regardless of class, ethnicity, amount of land owned/held, and other factors;”*
- *“Ensure transparency and information symmetries in all land transactions.”*

The Policy might also be strengthened by detailing how these institutions will inter-relate. For example, it may be helpful to explain how each level of land governance answers to or is held accountable to the level above it. This might include delineating what levels of governance hold which specific enumerated powers, as best-suited for the “level” at which they work.

6. **Allow for the categorization and protection of shared common lands in §19.** The §19 list does not include a category for lands held by a community used for multiple purposes, such as gathering firewood, wild fruits, vegetables, medicines and honey, hunting, foraging, and finding building materials for rural homes. As explained above, most rural families (most critically the landless, the poorest of the poor) rely on these lands to ensure their family’s basic survival. The *Lower Burma Land and Revenue Manual* (1911) uses the term “village common land” to apply to these kinds of lands and sets out excellent provisions for the management of these lands. The National Land Use Policy’s omission of this kind of land puts millions of peoples’ livelihoods and day-to-day survival at risk; should people not be able to access common areas for simple needs like firewood and herbal medicines, their families may become impoverished.

To resolve this, we suggest eliminating §19(c) and §19(g) and merging them into a more comprehensive category of “common land,” “village land,” or “community land.” This categorization would provide a more solid legal anchor for communities’ use rights of shared common land, one that could potentially be leveraged in national law to ensure that communities use and manage these lands equitably and sustainably. Such a change would also lend greater protection to lands that are currently under shifting cultivation patterns. Calling these lands “vacant” or “fallow” can have the legal impact of a) legally dispossessing communities’ claims to these lands and b) potentially absolving community members of responsibility to manage the land sustainably. In contrast, a category for “common village land” or “community land” would promote improved community land management, giving communities the power to use the lands as they choose – either allocating areas to landless families, renting the land to investors, maintaining them as shared common areas, or other uses that promote local health, prosperity and development.

Similarly, §19(h) on Protected Areas should explicitly include protections for sacred or religious sites, *“As defined by the Ethnic Minorities/Indigenous Peoples who consider these areas critical to the practice of their culture or religious beliefs.”*

7. **Explicitly include community land rights as enforceable land rights, whether documented or not.** §23(a) is fantastic, and aligns perfectly with the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests. However, it would be optimal if the Policy clearly states that,

“Lands owned, used or managed by communities according to longstanding cultural or local practices shall be legally recognized as formal, enforceable land rights, even if they have not yet been formally recognized, documented or registered by the state.”

To support this, the Policy might **allow for oral and landscape-based evidence of traditional, legitimate tenure rights.** Various other nations’ land laws and policies allow oral testimony, archeological evidence, and other landscape-based evidence to be proof enough of longstanding land claims. Allowing non-paper evidence to be proof enough of customary/traditional land claims will strengthen the land claims of rural communities and poor families.

Other sections that might be clarified to strengthen community tenure security include:

- Amend §22(d) to include community land rights under the definition of organizations, so that it says: “All individuals, legally formed organizations, organizations possessing or managing land

use rights, **and majority and minority ethnic communities** shall have the equal right to ...”

- §27, which grandfathers-in existing user rights, might be more specifically worded to apply to community rights to “common” areas, currently termed “vacant or fallow.” To make this clarification, the text might be changed to state:

*[The proposed district level-land use plans] shall not affect **the existing land user rights of women, men and communities** and all land uses in the places where the plans to change land use shall be carried out using the manner of zoning or individual application.”*

- §29(b) is excellent, but to clarify the intent of the drafters, the provision might be more clearly phrased to state that “The District Management Body....shall protect the continuous land use, land management and land tenure rights **of men, women and communities** whether or not they are registered.”
- §31 should be amended to include the category “community lands” or “shared common land” or “village land.” This category might encompass “pasture land.” A category for “taungya,” land cultivated by traditional methods, and rotating crop methods should also be included to protect farming methodologies that allow areas to appear “unused” at certain times.

8. **Initiate land use planning processes at the village or ward level.** Part II of the Land Policy, *Planning and Changing Land Use*, sets out the basis for extraordinary positive change throughout rural Myanmar. However, we humbly recommend amending the current planning process so that it starts at the community level - and mandating the process be highly inclusive and participatory and to include the ideas, opinions and needs of rural community members. Beginning at the community level may improve the quality of the land use plans. While district-level officials may have good technical knowledge, the ecological and territory-specific knowledge of the people living and making their livelihoods on the land cannot be surpassed.

For example, rather than §24(c) saying, “In carrying out the process above, it shall be carried out based on the manner for drawing land use map and the manner of coordinating with the men and women at the locality,” the text might locate the responsibility at the local level, saying instead:

“The men and women at the locality shall make an existing land and natural resource use map that reflects the current situation. They may then be supported to vision how their community might use lands and natural resource in the future, and craft land use plans based on those visions. The District Officers might then support the communities’ draft plans by facilitating advanced land use mapping, zoning, planning, and integration.”

This would necessitate changing the order of the steps outlined in §32. A more participatory, community-driven process might begin with “information work in each village or ward” **before** the district has “propos[ed] and mapp[ed] for the land use zones...” Instead of the communities twice verifying District-level maps made by government officials, the government officials might instead twice verify the community-made maps.

Such a change would make the communities themselves the drivers of the land use planning process. This would help to ensure:

- Community-driven local development, aligned with local needs and preferences;
- Greater local ownership over – and thus less resistance to – the land use planning process;
- Land use plans that have greater synchronicity with the local ecology, and thus allow for better conservation and ecological diversity; and other positive results.

Such a community-driven planning process would also ensure that the information captured on the existing and new land use plans is highly accurate.

This amended planning process might also be an ideal moment for villages and wards to review,

amend, or draft community rules for sustainable and equitable local land and natural resources management. If driven by communities and well-facilitated by government actors, a local zoning and planning process would be the ideal time to support rural communities to align their rules with the national constitution, institute rules that protect the land rights of women and other vulnerable groups, ensure downward accountability for leaders, and create mechanisms to ensure that all community members are consulted and approve of plans to share local land with potential investors.

Also, §32 should clearly state that communities have the authority and free will to decide what they do **not** want to be zoned or planned for on their lands. The Policy should clearly state that:

“Wards and Villages have the right to decide whether or not to include zones for industry, mining, logging, and other endeavors on their lands. Should a Village or Ward be opposed to such zoning plans, the plans must be modified until a mutually-agreed local land use plan is reached.”

Similarly, under Part VII, on the *Land Use Rights by Ethnic Nationalities*, §69 should locate the initial responsibility for preparing land use maps, plans and records to community members at the village or ward level, supported by local village or ward administrators.

9. **Include additional protections into Part II, Chapter III, on The Change of Land Use by Individual Application.** §33 might include stronger language on what “notice” means, so as to ensure a high degree of public awareness of proposed land use changes and significant public participation in decision-making about such changes. For example, decisions changing an area’s land use from pasture land to an investment concession warrant significant public notice and consultation. The Policy might add a few words to specify that notice must be carried out in a way that is culturally appropriate and will ensure wide-scale public awareness and participation.

In addition, §34(b) and (c) might specify that environmental and impact assessments (EIAs) may not be carried out by a scientific agency of the applicant’s choosing, but rather by an independently–selected, impartial group of experts approved by members of a range of civil society experts and advocates. This precaution will ensure against investors and relevant officials paying and hiring scientists to arrive at “findings” that are not impartial.

10. **Ensure greater protections for the communal land use and management rights of ethnic nationalities.** §72 provides excellent protections for the land claims of Myanmar’s ethnic minorities. However, as suggested above, the lands of these communities might be instead classified as “community lands,” held, managed and governed according to local customary rules agreed upon by each ethnic community. Furthermore, we humbly suggest that the moratorium on granting investment concessions within ethnic nationalities’ lands be prolonged for 25 to 50 years, so as to allow them enough time to establish community-wide development plans and be the authentic, empowered drivers of their own economic development.
11. **Allow an independent commission or taskforce to issue reporting procedures for the National Land Use Council.** We suggest that §80(b) be changed to establish an independent commission or taskforce to issue reporting requirements for the National Land Use Council. Ideally, a state body should not draft its own reporting requirements, as this may allow opportunity for corruption, malfeasance, and obfuscation of facts and outcomes. An independent taskforce or working group convened specifically for this purpose may ensure that the reporting requirements establish true downward and upward accountability of the National Land Use Council.

We offer these suggestions humbly, and with great respect for all of the Land Use Allocation and Scrutinizing Committee’s hard work on this excellent draft document. As the National Land Use Policy (Draft) comes towards completion, we feel confident that this Policy will set Myanmar on the path towards comprehensive protection of individual and community land and natural resource rights and inclusive, sustainable development.