



January 2017

EVIDENCE IS NOT SUFFICIENT TO SECURE LAND RIGHTS IN MYANMAR; IMPARTIAL AND TRANSPARENT PROCEDURES ARE CRITICAL

Since May 2016, the National League for Democracy (NLD) government has been standing up new “Land Reinvestigation Committees” at all levels. Similar to the previous Land Use Management Committees, the Reinvestigation Committees are tasked with reviewing land grab claims. The exact scope and powers of the Committees are not yet clear and appear to be developing differently in each State and Region. These Reinvestigation Committees comprise the General Administration Department (GAD) officials at lower levels. In a change from the past, they also include civil society or community representatives at each level, as well as Members of Parliament.

One of the issues these Committees will need to frequently address is missing, incomplete, or conflicting evidence of ownership. Namati offers this brief to examine the role that possession documents have played thus far in the implementation of Myanmar’s land reforms, and to encourage the government to establish simple, transparent mechanisms to ensure that land and justice are restored to farmers. Overall, we find that the system seems to discriminate against individuals who do not have land possession documents that support their claims. This needs to change. At the same time, the government should put more weight in the evidentiary merit of documents when they do exist.

Namati and partners assist farmers in Myanmar to claim their land rights through a community paralegal approach. Community paralegals are trained in relevant laws, community education, negotiation, and mediation skills to work with farmers to resolve a variety of land rights issues.

Dozens of data points are documented as part of each case's¹ resolution process to illustrate how the legal framework functions in practice. We frequently review our data collection tools and data quality. We recognize that in this brief we are unable to disaggregate our data on possession documents by type or strength; this is a weakness and important caveat to bear in mind when considering our conclusions. Focus groups and interviews with paralegals and clients and government officials² provide further qualitative context and insights. We draw our recommendations from the lived experiences of communities in Myanmar.

I. Lack of documentation of land use affects how the administrative system treats your case

a. Formal systems accept eyewitness testimony in lieu of documents, but cases without documentation take longer to process and involve higher unofficial fees³.

Government officials in Pyay and Southern Shan all agreed that when trying to register land or establish land tenure (possession) history, eyewitness testimony is equally as acceptable in formal processes as tax receipts and other written evidence.⁴ This is important as many farmers who did at one point have possession documents, have lost them due to floods, rot in the humid climate, or simple human error. We have also heard several stories of clients submitting documents to Parliament or the General Administration Department (GAD) as part of their effort to reclaim land, only to have those documents lost. Now that new mechanisms are forming, some cases that seemed on the verge of resolution in favor of our clients are being re-started from the beginning, but now without the documents that clients had during the first effort.

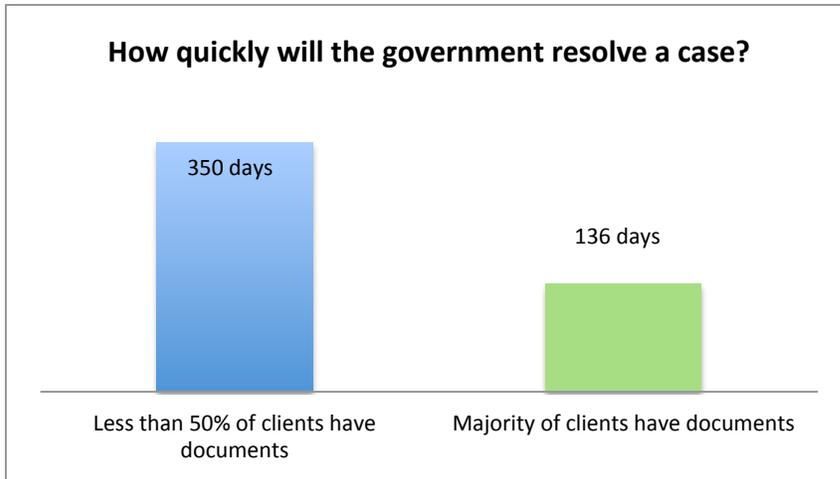
However, relying on testimony can increase the time government needs to resolve a claim. In particular, this seems to be the case in less densely populated areas, where paralegals and clients report delays in

¹ Since 2013, Namati and partners have worked on over 3,500 cases to support 21,000 farmers in claiming their land rights

² All names have been changed in this brief.

³ We made the methodological decision in developing this brief to use 50% as a unit of analysis. There is no external metric or policy, which indicates this is a threshold. In 22% of cases (n=726), fewer than 10% of clients had documents; in 77% of cases (n=2,576) at least 50% of clients had documents.

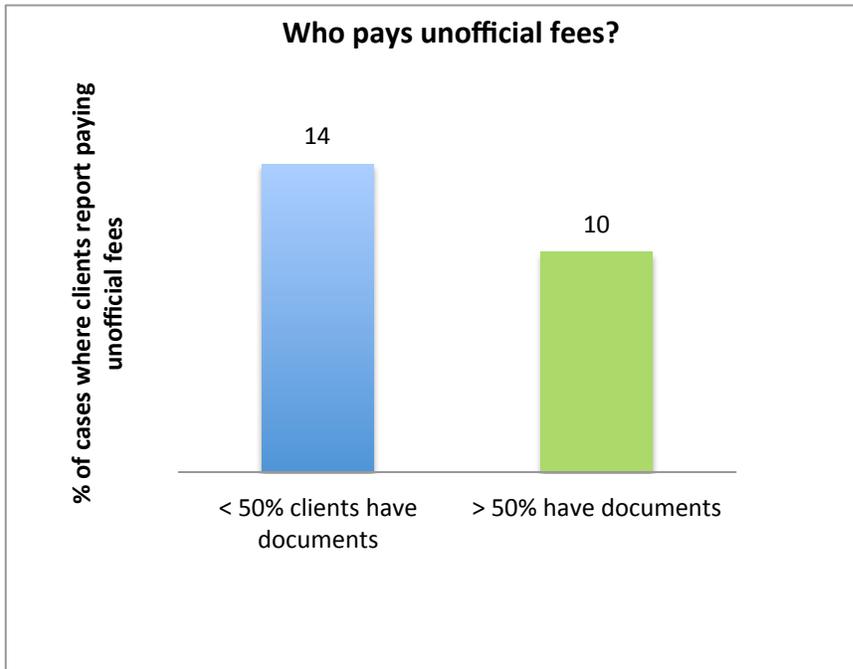
⁴ Our sample does not benefit from randomization. Our paralegals have discretion in what cases they choose to support, and often that means choosing complicated cases that they believe have a strong justification—i.e. have documents. In 78% of Namati's cases, at least half of clients have possession documents. According to local government officials and paralegals, in the broader population closer to only 30-40% of farmers have some sort of documentation.



SLRD staff traveling to measure land and collect testimony from neighbors. Collecting testimony is likely to fall under the purview of the Reinvestigation Committees going forward.

Research in other countries has also shown that

administrative inefficiencies and delays increase the chance for corruption, and that often a delay itself



may simply be a tactic for eliciting a bribe.⁵ Namati's data on unofficial fees should be taken lightly—even though our partners have close relationships with the communities in which they work, reporting on corruption remains very sensitive.⁶

Nevertheless, our data does suggest that farmers pay unofficial fees more frequently in instances where they don't have possession

documents than in cases where they do (14% vs 10% of cases). The amount of unofficial fees is also three times higher when they don't have documents.

⁵ See: Rushda Majeed, *Instilling Order and Accountability: Standard Operating Procedures at Indonesia's Ministry of Finance, 2006-2007*, Innovations for Successful Societies, Princeton University, April 2012. [A lack of clear administrative procedures is associated with increased opportunities for corruption]; and, Mohamed Mohabbat Khan, *Political and Administrative Corruption: Concepts, Comparative Experiences, and Bangladesh Case*, Transparency International, 11/29/2004. [Causes of corruption include rapid social or economic changes, like in Myanmar, and administrative allocation of access to rights.]

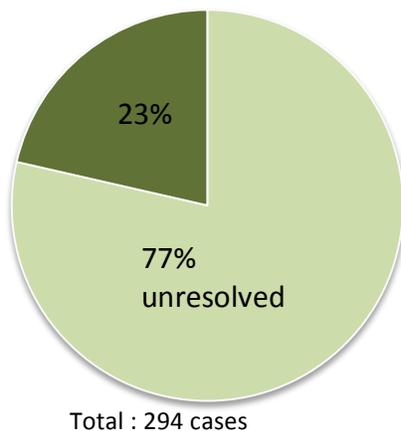
⁶ This may be due to both the psychology and logistics of collecting the data. Ultimately, it is the paralegals who document whether unofficial fees were paid. Clients may pay fees without the paralegal's knowledge and either not be willing to report it or may not know to report it. Alternatively, paralegals themselves may be hesitant to report to Namati and our partners that unofficial fees were paid; they may worry that the payment of a bribe suggests incompetence on their own part.

II. Possession documents can be helpful but are insufficient to secure land rights in Myanmar

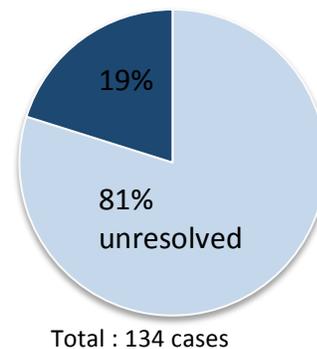
We've looked carefully at success rates across all the types of land cases that Namati and our partners handle (mainly land grabs, registration, local land disputes, and community forest land). Possession of documents like tax receipts and loan books which show that an individual was cultivating a certain acreage is strongly correlated with the ability to secure land rights in Myanmar, when looking at all case types combined. Across all our case types, where less than half⁷ of clients have possession documents, only one quarter are resolved. In contrast, half of all cases in which the majority of clients have documents are resolved. Looking at this data in a different way, we see that in almost 90% of all resolved cases, at least half of clients have possession documents.

However, it appears that this result is driven by cases other than land disputes. Land possession

Land disputes where the majority of clients have documents



Land disputes where < 50% of clients have documents



documents appear to have less influence on the outcome of land disputes. 77% of land disputes in which the majority of clients do have documents are never resolved. Nevertheless, this is still a better resolution rate than for land disputes in which fewer than half of clients have documents (81% remain unresolved). Moreover, in 69% of resolved disputes, the majority of clients have documents, suggesting it is important to have documents to get your case resolved. However, in 62% of unresolved cases, the majority of clients have documents.

One explanation for a high percentage of unresolved land dispute cases in which a majority of clients have possession documents could be that not all possession documents are created equal. For

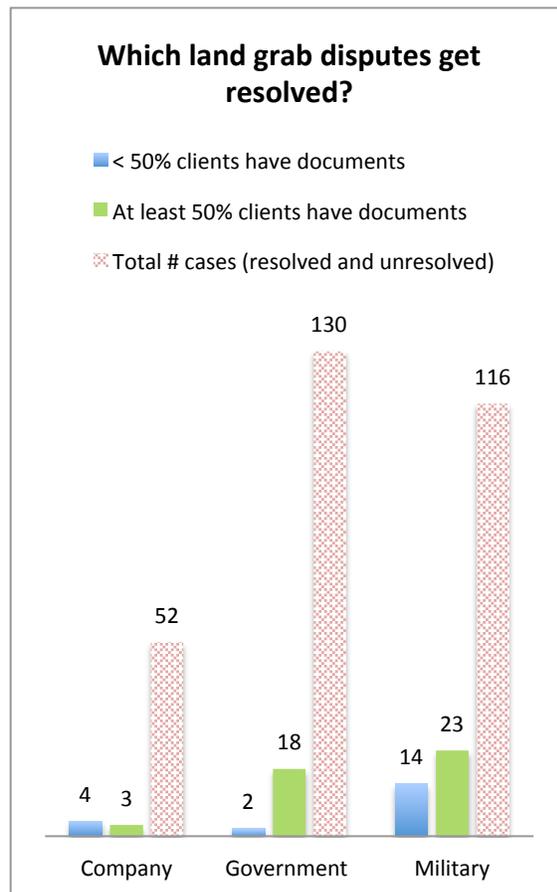
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example, in some cases clients might only have tax receipts for one year, whereas in other cases they have documents for ten continuous years, providing much stronger evidence of a legitimate claim to the land. Our data does not yet do a good job of assigning weights to different levels of documentation⁸. There do appear to be different correlations between documentation and resolution rates, depending on who acquired the disputed land.⁹

Government ministries: The overall resolution rate for land disputes in which a government ministry acquired the land is 15%. In 90% of these resolved cases, over half of clients had documents—the highest across grabber types. In cases where the majority of clients have documents, 80% remain unresolved. This suggests that ministry cases are very difficult to resolve even when clients do have documents, and almost impossible to resolve when clients do not have documents.

Companies: The overall resolution rate is a low 13%. In only 43% of resolved cases do a majority of clients have documents. This suggests possession documents really don't matter for resolving these disputes. However, this may be due to a small sample size (only seven resolved cases).

Government officials also suggested that companies will sometimes build schools or clinics rather than return land. The burden of proof in cases resolved in this way may be less than for cases where land is returned. Several paralegals hypothesized that companies care more about their reputation than they do about the documented strength of farmers' claims *in instances where the company is no longer using some of the land in question*. As such, a company might be more willing than government or the military to negotiate an agreeable outcome – even when farmers don't have documents – in order for the company to maintain a positive image and relationships with the community hosting their operations.



On the other hand, company-involved cases remain the most difficult to resolve. Qualitative research suggests this is because in many instances the company is still using the disputed land for some economic benefit, which is protected by law. Moreover, companies can deflect claimants by saying they

⁸ This will be addressed in our new case form, which also serves as the basis for our quantitative data collection. It is currently being piloted.

⁹ There are also differences by state and region, but a future Namati policy brief will thoroughly examine the various factors that influence resolution rates across regions.

received their permission to use the land from the government, and the farmers must thus take up the matter with the government directly.

Government military: The overall resolution rate for land disputes in which the military acquired the land is 32% - the highest of any grabber type. In 62% of resolved cases, over half of clients have documents. 64% of cases in which the majority of clients have documents remain unresolved. The data suggests that cases involving the military are relatively easy to resolve compared to other types, but having documentation does not seem to account for this difference.

Further research is needed to examine why there are such differences in both resolution rates and the importance of documentation between military and ministry cases.

III. Even when people have strong¹⁰ possession documents, their rights are not guaranteed

a. Farmers with documents struggle to reclaim released land due to a lack of transparency in the administrative system.

The two critical pieces of information that farmers need to regain land are a) evidence that they previously possessed the land (either documentation like tax receipts or eyewitness testimony), and b) specific maps and coordinates that demonstrate the same piece of land has been released¹¹. While the 2013 GAD Guideline requires entities giving up land to produce maps of the land they are releasing, these maps are not made public. Broad publication could lead outside speculators to attempt to take possession of the land and register it as their own, but not publishing these maps, or not, at least, providing them when requested by farmers or their paralegal representatives, leaves communities unable to move forward in reclaiming their land rights. This frequently leads to released land being “returned” to individuals who were not the original farmers.¹²

In some cases, it is helpful to know who is registered as the formal user of the land so that individuals with a competing claim may approach that formal user directly. There is an official process for requesting this type of information.¹³ However, clients are often not successful in their requests; the complexity of the form may be a contributing factor. In particular, question four of the form requires the requestor to state how they are related to the land for which they seek information, and to provide supporting documentation. The form does not specify whether neighbor testimony can be used as

¹⁰ These insights come from a qualitative examination of a few cases. We designated evidence as “strong” if it is continuous for several years or is Form 7.

¹¹ This is a formal process whereby a government entity, military, or company gives up land it acquired.

¹² For case studies of this process, see e.g. Caitlin Pierce and Nwe Ni Soe, “Streamlining Institutions to Restore Land and Justice to Farmers in Myanmar,” Namati, June 2016.

¹³ Form LR-103 and LR-105 see: UN Habitat Guidance Note on Land Issues in Myanmar

“documentation” of an individual’s relationship to the land in question. For clients who don’t have documents, their efforts to access formal records may be thwarted through this process.

However, paralegals and clients also report that accessing records for land that was taken by the military is particularly difficult, even when the client is able to provide supporting documentation for their relationship to the land; the SLRD (land records department) falls under the Ministry of Home Affairs, which is controlled by the military. Cases in which paralegals have been able to access records tend to be cases involving companies. Paralegals who have been shown (but not provided) copies of released land maps have been threatened with prosecution under the 1923 State Secrets Act when they photographed the documents for their clients’ use.

b. Farmers with documents are being prosecuted for trespassing.

Under the Myanmar Penal Code of 1860, there are several charges related to property. The first defines criminal trespass (section 441) as “Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property.” The second is section 425, which outlines compensation for “mischief”—this can include destroying crops. The 1860 Penal Code does not define “possession” nor provide insight on how property should be treated if it is on land that belongs to another.

“I’m too old to wait any longer for this land to be mine again...”

U Kyaw Myint is 80 years old. U Htun Htun Htwe is 78 years old and in poor health. In 1979 the Ministry of Agriculture took 804 acres of land from three neighboring village tracts. U Kyaw Myint and Htun Htun were among 100 other farmers whose families lost most of their land to the Ministry.

The land was transferred to the Myanmar Sugarcane Enterprise, a state-owned company, in 2000. In 2006 a Myanmar company, Sutta, acquired the land, and in 2012 a Thai company, Delicious Foods, entered the mix through a joint venture with Sutta.

These farmers have been trying to reclaim access to this land since 1988, and renewed their efforts in 2011 as Myanmar’s transition to democracy began. In 2012 the Parliamentary Investigation Commission recommended that the land be returned to the original farmers. The farmers maintain that Delicious Foods and Sutta agreed to release 28 acres.

But the farmers weren’t in the clear yet. According to the farmers, members of the Village Land Management Body took three years to process the farmers’ application for Form 7, and ultimately requested 100,000 kyat per acre to register the land. According to official policy, the process should have taken 3 months and cost only 500 kyats per application.

To pay these unofficial fees, the farmers had to sell off their cows and take loans, but finally they received Form 7 for the land they’d lost over 30 years before. When the paralegal discovered this fee had been paid, he informed the farmers of the correct fee (only 500 kyat) and encouraged them to return to the officials and request their unofficial fees returned. The officials refused.

Now the companies’ tenant farmers, who had been using this land even after the companies stopped, are suing the original farmers for trespassing. The farmers have shown the court their Form 7, but it is ignored. These farmers have been going to the courthouse—over an hour from their home village—every one to two weeks since 2015.

Stories of farmers being arrested and sued for criminal trespass or mischief after conducting “plow protests” on land that they believe is rightfully theirs, but which another is farming, are common in Myanmar. Namati’s partners and paralegals are also now seeing cases in which farmers have been granted rights by the administrative structures, only to be taken to court by current users. The price of defense can cost a farmer around 600,000 kyat in legal fees, not to mention the cost of transportation and time spent away from his or her livelihood.

c. Some policies aimed at systematizing resolution of land grab cases unfairly ignore possession documents.

A Special Order by the Minister of Irrigation and Agriculture provides that if a farmer has been working the land for the five most recent years, they become the true owner.¹⁴ It does not matter what historical land records or documents may reveal. The Land Management Committees used this rule when trying to resolve cases involving competing claims, in particular between tenant farmers and “original” farmers in Ayeyarwaddy Division. Although it can be useful to have guidelines, this particular one seems too rigid given the history of formal and informal land ownership and shifting government economic policies in Myanmar.

Moreover, under the new Land Reinvestigation Committees, this guideline may, to the disadvantage of previous owners, intersect with Committees’ priorities. The land-return process in Myanmar is no longer new—it began four years ago (2013) when the GAD set forth guidelines for companies, ministries, and military to “release” or give back to the state land they had acquired under the 1894 Land Acquisition Act. However, in many instances the release did not follow the officially outlined process and the land was not returned to original users. Tenant farmers continued farming the land, but no longer with the formal involvement of whichever entity had initially acquired (and subsequently released) the land. That means that in some instances, the five-year threshold is rapidly approaching.

Interviews with members of Land Reinvestigation Committees in Pyay, Ayeyarwaddy, and Southern Shan State suggest that each Committee will be prioritizing which cases it hears first in slightly different ways—in Pyay, the focus will first be on non-military cases, in Shan, no indication has yet been given. In some locations, the priorities also continue to shift over time. We know of at least one case in Bago which involved the military taking land and selling it to private owners to create fishponds. The farmers tried to submit their information to the previous Parliamentary Investigation Commission in 2012, but were told that the Commission was prioritizing military, not company or private cases. So the farmers had to wait four years, until a new mechanism was established. They recently resubmitted their case to the new Reinvestigation Committee and to the Ministry of Defense, as the land was initially taken by the military. Once again, they are being told to wait; this time, military cases are not the first priority.

¹⁴ This is a corollary to Executive Order 1/64 which states that if a farmer has not been using the land for the previous five continuous year, then they are not the rightful owner.

IV. Recommendations for Government

1. The government's dispute resolution system needs to acknowledge the legitimate evidentiary support that documents provide but also be flexible to provide justice in instances where no (or few) documents exist. Accepting eyewitness testimony as a form of evidence is a positive step. The Reinvestigation Committees need to go a step further and ensure that appropriate, market value compensation is paid to farmers with strong evidence (either documents or eyewitness) if their land cannot be returned. A mediation process should also be built into the system to resolve cases with multiple legitimate claims, some of which may be supported by documents and others by testimony.

2. The 2017-2018 budget needs to increase financial support to the Ministry of Agriculture and local level GAD (Home Affairs) if the NLD government is serious about making the Reinvestigation Committees successful. Over the past several years, national expenditures for agriculture have ranged from a paltry 2-5% of the government's total expenditures. The new government is currently drafting its first budget. The final budget of the former government set expenditures and policy priorities for 2016-2017. As such, the 2017-2018 budget is the first opportunity for the NLD government to show its commitment to resolving land issues and building institutions and processes that work. The Committees will need funds to carry out the groundwork investigation they are tasked with, as well as to build their capacity for mediating these difficult competing claims.

3. Specific information about released land (i.e. coordinates) needs to be published and shared. Anecdotal evidence suggests that often it is only when there is a published announcement—a legal requirement-- that someone has applied for Form 7 on a piece of land do farmers learn that "their" land has been released and that they must act quickly to try to reclaim their rights before someone secures the stronger tenure rights now available through Form 7. The January 2016 National Land Use Policy's Chapter 3 outlines goals for land information management, including updating and presenting land information and maps in formats that are digital and easily accessible to the public. This should include specific information on released land as well as disclosure requirements by the SLRD when information on ownership is requested. It is important that this component of the National Land Use Policy be translated from policy to law.

4. Focused training for judicial officials on land law and rights should be pursued. The National Land Use Policy proposed that "special courts" for land related issues be established, recognizing the complexity of land-related laws and issues in Myanmar and the need for specialists within the judicial system. As an interim step, judges need to be trained to understand land documentation (like Form 7). Individuals who possess Form 7 should not be charged with trespassing or mischief on the associated land.

5. The new investigation committees need to have a transparent and consultative process for selecting their civil society and community representatives. Based on our interviews with Committee members, it appears that each Committee is taking its own approach to

selecting its non-governmental members. Some Committees are compiling lists of civil society leaders and permitting a vote to select a representative, others are simply selecting individuals with whom they've worked before or with whom they have a close personal relationship. There are also no systematic roles and responsibilities for these representatives, though most understand their role to be one of simply communicating the Committee's requests for additional information and decisions to farmers. Given the multitude of factors that seems to influence case outcomes even when strong evidence can be collected, civil society and community representatives need to be selected in a fair and transparent process. They should also have a role in helping to resolve and investigate cases that are lacking in written evidence, not just in transmitting information to the complainants.

V. Methodology

The quantitative data set analyzed for this brief was compiled by Namati's network of paralegals between August 2013 and December 2016 and was based on land issues they handled in their role as community paralegals. These community paralegals are present in a limited number of townships in each state and division in which Namati works and take on cases as requested by clients. This dataset does not benefit from either full coverage or randomization. It should not be considered comprehensive or representative of all land issues in Myanmar. Rather, it provides a snapshot of people who are actively trying to make use of Myanmar's laws and contains qualitative and quantitative information from over 3,500 cases. The paralegals documented over six-dozen data points for each case. They are also intimately aware of the qualitative information surrounding each case, the community members involved, and the bureaucratic processes. Government officials at the village and township level were interviewed and focus groups with paralegals and clients were also conducted.

About Namati

Namati is an international NGO focused on legal empowerment. In a world where 4 billion people live outside the protection of the law, Namati is dedicated to putting the law in people's hands. Namati is building a movement of "community paralegals", who work with communities to bridge the gap between the written law and its practical application in everyday life. Namati has worked with over 40,000 active clients in eight countries to protect land, enforce environmental law, and secure basic rights to healthcare and citizenship. Namati draws on that grassroots experience to seek large-scale structural reforms in the law itself and in the institutions through which law is applied.

Namati established a program and office in Myanmar in early 2013, with an exclusive focus on land rights (registration, reclassification, and land grabs). Since then, and in partnership with six local organizations, Namati has supported a network of 90 paralegals serving farmers in parts of seven states/divisions: Together, we have helped 21,000 people claim their land rights in Myanmar.

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