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

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ABSTRACT: In 2012, the Government of Myanmar passed the Farmland Law and the Vacant, Fallow, Virgin Land Law, with an aim to increase investment in land through the formalization of a land market. Land titling is often considered “the natural end point of land rights formalization.”¹ A major obstacle to achieving this in Myanmar is its legacy of multiple regimes which has created “stacked laws.”² This term refers to a situation in which a country has multiple layers of laws that exist simultaneously, leading to conflicts and contradictions in the legal system. This ambiguity is often manipulated by those who have more access to political and economic resources, particularly those who received large land concessions under the 1988–2010 military regime. In this context, this paper attempts to answer the question: In Myanmar, how do smallholder farmers engage with a stacked legal framework, which is ambiguous and unfairly applied, to defend themselves against land dispossession? The analysis seeks to contribute to the literature on the contest over land control and access through an analysis of how a stacked legal framework can be used to further disenfranchise farmers by elites, or on the contrary, by farmers to gradually reclaim this control through strategic political maneuvering.

Keywords: Myanmar land laws; stacked law; land confiscations; land dispossession; smallholder farmers

Introduction

In 2012, the Government of Myanmar passed the Farmland Law and the Vacant, Fallow, Virgin (VfV) Land Law. The purpose of these laws was to create a regulated private property system through the issuance of land use certificates (LUCs), also known as “Form Seven.” This in turn created a formalized land market. Even though landowners used to have different forms of documentation for their land,³ nothing like Form Seven existed prior to 2012.⁴ Moreover,

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¹Hall et al. 2011, 35.

²Roquas 2002, 11.

³These included tax receipts, Form 105 (a certified map), and farmers’ booklets issued by the Settlement and Land Records Department (SLRD) stating farmers’ rights and duties on their land.

⁴Author interview with former SLRD Directors on 23 May 2015.

although farmers had bought and sold land before 2012, this was not technically permitted under the law.⁵ The passage of the Farmland Law set up a regulated land market through the standardization of a private, predominantly individualized, land-use certification and registration system. LUC holders are now allowed to sell, exchange, inherit, mortgage, and lease their land.

Land titling is often considered “the natural end point of land rights formalization.”⁶ This thinking has dominated most governments and development agencies since Hernando De Soto popularized the idea that the developmental successes of countries with advanced market economies have largely relied on strong, legally-enforceable property rights, without which assets, particularly land, would not have catalyzed economic growth.⁷ After the 1997 Asian Financial Crisis, the state has been attributed a more central role as 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.⁸ This mainstream model of land governance argues that private property rights, supported by strong legal institutions, state regulation, and a free market, allow individuals who are more “fit” to use the land to invest in it.

Various scholars have argued that a private property model of land governance, which prioritizes the economic value of land as a central element in development, is problematic.⁹ In Myanmar, many communities attach social, cultural, spiritual, and historical value to land, not just monetary. As such, in many parts of Myanmar, particularly in upland ethnic minority states, land is managed with an emphasis on communal tenure. In following the trend of mainstream development thinking in which laws are used to reshape economic and political institutions in an effort to spur growth, Myanmar’s current land regulatory framework also requires non-marketable property to become marketable. The World Bank’s emphasis on the role of strong state law in development (good governance) has been criticized as a way to appear to move beyond the failures caused by neo-liberal policies under which markets operated with little state regulation, while still promoting many of the same neo-liberal assumptions.¹⁰ In this case, strong state law cannot undo many fundamental issues of mainstreaming a private-property titling program unless other issues, such as equity, are tackled. This leads to another common critique leveled at this mainstream land model: that it pays scant attention to power, as some people gain more benefits in a land market which lacks state limits on concentration.¹¹

While recognizing critiques of this mainstream model of land governance, I do not focus on the impact of state law on land managed under customary land tenure. These areas can be found across large swathes of the uplands of Chin State, Kachin State, Shan State, Karen State, Bago Region, Kayah State, parts of Rakhine State, and Special Administrative Areas such as Nagaland.¹² Instead, I focus on areas where state laws have been strongest in administering property,

⁵The 1953 Land Nationalization Act did not permit the exchange of land. But because people needed to buy and sell land, a quasi-legal land market arose. This is explained further on in the paper.

⁶Hall et al. 2010, 35.

⁷De Soto 2000.

⁸Deininger and Binswanger 1999.

⁹See for example Borras 2006 or Musembi 2007.

¹⁰Krever 2011.

¹¹Borras 2006.

¹²In some parts of these states and regions, where farmers practice sedentary farming, local authorities might also issue land use certificates. This process has tended to be much slower given the armed conflict, insecurity, and contested authorities that characterize these areas.

and where people have been familiar with the concept of individual private property¹³ for centuries.¹⁴ These tend to be in the Burman-dominant lowland plains.

In these areas, a major obstacle to a more efficient and equitable land governance system is the existence of “stacked laws.”¹⁵ This term refers to multiple layers of revoked and active laws layered on top of each other over time, often creating conflicts and contradictions in the legal framework. In the context of land issues, stacked laws can be used by farmers to argue for their claims, but more often than not, legal ambiguity is used to the detriment of smallholder farmers by the more powerful, especially economic elites who materially benefitted under the 1988–2010 military regime.

The rest of this paper attempts to answer the following three related questions:

- (1) Broadly speaking, how did a weak legal framework rife with stacked laws arise during the last four regimes in Myanmar: British colonial rule (1824–1948), the post-independence period (1948–1962), military rule (1962–2011) and the current reform period (2011–present)?
- (2) How is the ambiguity of this stacked legal framework used to the detriment of farmers?
- (3) How do smallholder farmers engage with a stacked legal framework, both inside and outside the court system, to defend themselves against land dispossession?

Drawing from secondary research and fieldwork carried out between 2013 and 2015 in the Ayeyarwady and Mandalay Regions, I consider conflicts at two levels: intra-community conflicts between farmers and local elites, and those between local communities and outsiders (such as private companies, state actors, and the military) in land confiscation cases. My field research includes interviews with pro-bono lawyers and legal aid workers who provide legal assistance to farmers land conflicts, interviews with civil society and farmer association leaders, and a review of newspaper coverage of land conflicts and cases.

Theorizing Stacked Laws in a “Law-of-Status” Society

Esther Roquas coined the term “stacked laws” to describe the property regimes she observed during her research on land conflicts in Honduras. She drew from the concept of “legal pluralism,” which refers to “more than one legal order, based on different sources of ultimate validity and maintained by forms of organization other than the state, within one political organization.”¹⁶ Roquas pointed out that pluralism within a legal framework can also be caused by different laws created over time which exist simultaneously despite contradictions between them, and variations in the way that state officials implement and enforce laws and policies – variations that often become normalized over time.¹⁷ In her conceptualization of stacked laws, instead of earlier laws being replaced by later ones, or multiple laws merging into a fluid comprehensive legal framework, legal frameworks come to have layers of different elements which people

¹³Even in the lowlands, there are defined plots under communal management, such as village grazing land, but cultivators use state-administrated private property model of managing nearly all the farmland.

¹⁴From the eleventh to the nineteenth centuries, people in Burma proper lived under the absolute rule of Burmese kings who ruled with *dhammathats* (Leckie and Simperingham, 2009). Kings claimed ownership of all land, and also extracted surpluses from farmers who were allowed tenancy rights to the land through cultivation. But even during this era, an informal land market was already developed in many areas.

¹⁵Roquas 2002, 11.

¹⁶Benda-Beckman 2002, 37.

¹⁷Roquas 2002, 19–22.

tease out and strategically employ. By doing so, individuals and communities establish the validity of their claims to land based not only on current active laws, but also by invoking their understanding of older laws and policies that may no longer be legally valid. This leads to differing interpretations of land rights between farmers and officials.

The concept of stacked laws is helpful in explaining Myanmar's legal framework, which has evolved over four regimes, from 1876 until the present. During these decades, new laws, executive orders, and policies have been stacked upon existing ones, creating a high degree of disjointedness in the legal framework. For example, seventy-three laws and regulations related to land governance existed prior to the most recent land laws in 2012. In addition, state officials have often been quiescent to practices that were not permitted by written law, but eventually became quasi-official. A good example of this arose in response to the 1953 Land Nationalization Act, which restricted land sales.¹⁸ These transfers typically were made with store-bought contracts, known as "ten-kyat contracts," that bore close resemblance to state-sanctioned contracts. The transactions were witnessed, marked with the signature and seal of a village leader or a township administrator, and secured with a payment of 10,000 MMK.¹⁹ In addition, these transfers required the land to be in use, although many farmers who purchased lands under such contracts were not able to do because of lack of capital. By inference, farmers who sold their lands at this time argued that they were breaking state rules and therefore should sell it to someone who would be able to cultivate this land.

In the present day, farmers' understanding of the legal framework is influenced by this history. When individuals or communities defend their land against confiscation, they utilize not only current laws, but also older laws and policies, some of which may no longer be active. Most commonly, farmers reference the 1964 Executive Order 1/64 that decreed that anyone farming a piece of land for more than five years, regardless of documentation, owned the use rights to that land. This decree exists in a grey zone of legality, since it was promulgated in direct reference to the 1963 Tenancy Law, which was revoked by the 2012 Farmland Law. "Even our member of Parliament asked us if we are still applying this order," said a SLRD officer in the Ayeyarwady Region.²⁰ In bringing up revoked laws and policies, farmers may argue that they were legitimate at the time the confiscation happened and should be considered in renewed conflicts over rightful ownership of land.

Ambiguity in such a system often does not work to farmers' advantage, because the powerful can more effectively exploit this, resulting in a rule-by-law system.²¹ This is related to the critique that the mainstream property model fails to address power relations that often require the active intervention of the state. This derives from a social order that has historically valued people according to their status and connections to each other, what Maung Maung Gyi calls a "law-of-status society."²² In such a society, "A person is never viewed as neutral member of society possessing rights and privileges as a human being ... Respect and attention is regulated according to the social scale."²³ Against this context, rule of law does not exist. The legal system doles out

¹⁸GRET 2014.

¹⁹The exchange rate used throughout the paper is 1,000 MMK to 1 USD, to account for the fact that the exchange rate has fluctuated from between 700 MMK and 1300 MMK per USD in the last five years (2011–2016).

²⁰Author interview on 19 February 2016 in Ayeyarwady Region.

²¹In contrast to rule *of* law, a contrast emphasized by Lee Ching Kwan, for example, in her research on Chinese labor movements (Lee 2007).

²²Gyi 1983, 170.

²³Ibid.

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, and religious leaders.²⁴

After many years in which Myanmar people lived under 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, state-society relations have to shift in a way which creates openings for such engagements to occur. It is with such openings that “rightful resistance”²⁵ emerges. As a “critique within the hegemony,”²⁶ rural communities opt to go through “approved channels and use a regime’s policies and legitimating myths to justify their defiance,” while at the same time trying to turn them into instruments for their own empowerment.²⁷ For example, when asked why they started to complain about confiscations of their land that had occurred decades ago, some farmers replied, “We heard the President say that he will support the return of illegally-confiscated land to the farmers. We also heard about the Parliament setting up a commission in August 2012 to investigate these cases.”²⁸ In a sense, when farmers engage with the law, they are calling for the state to apply its own laws fairly, transparently, and consistently – to shift away from a “rule-by-law” society to a “rule-of-law” society.

Stacked Laws over Four Regimes

The current system of land governance in Myanmar is very much influenced by the system put into place during the colonial era (1824–1948). Great Britain, after it seized control of Lower Burma in 1852, used locally cultivated rice to feed its own industrial workers as well as plantation workers across its empire.²⁹ In order to extract paddy and taxes from Burmese farmers, the British introduced a system to assess individual land holdings,³⁰ via the passage of the 1876 Lower Burma Land and Revenue Act. By granting the right to inherit and trade land after continuous use for twelve years, this law introduced the British system of property rights. 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.”³¹ The SLRD, created in 1906, administered the colonial tax collection system by issuing receipts for taxes collected on cultivated plots included in cadastral maps. Tax receipts delineated land holdings by plot, size, type, village, village tract names, and the name of the cultivator.³²

Another important law enacted by the British was the 1894 Land Acquisition Act, which established a legal basis for compensation when land was acquired by the state for itself or a private developer. In today’s land conflicts, many communities look to and invoke the 1894 Land Acquisition Act as it strengthens their claims for compensation for confiscations that occurred prior to 2012, when this was the only law regulating acquisitions.

Following independence from the United Kingdom, the 1947 Constitution of the Union of Burma established the state as the ultimate owner of all natural resources and land. This claim was reaffirmed in the 1974 and 2008 Constitutions. The 1953 Land Nationalization Act

²⁴See for example Cheesman 2015; Prasse-Freeman 2014.

²⁵O’Brien 1996.

²⁶Ibid., 34.

²⁷Ibid., 33.

²⁸Author interview in Ayeyarwady Region on 24 November 2014.

²⁹Wolf 1982, 319–320.

³⁰Furnivall [1939] 1991, 116–131.

³¹Ibid., 124.

³²GRET 2014.

nationalized all land, made landlordism illegal, and leased land to cultivators under a land to the tiller policy.³³ This law also banned the sale, mortgage, and division of land.

Not long after the military coup of 2 March 1962, General Ne Win declared the “Burmese Way to Socialism,” which articulated the three central concepts of the regime: “nationalism, socialism and Buddhism.”³⁴ The 1963 Tenancy Law defined farmers as tenants on state-owned land, and further extended the granting of land to cultivators. In addition, the Farmer’s Rights Protection Law of 1963 was designed to prevent confiscation of land by parties other than the military government, in the event of debt default by farmers. Also during this period, a number of directives were signed by senior generals, the most notable being Executive Order 1/64.

The military government enforced a paddy procurement policy from 1974 until 2003 under which farmers had to sell twelve baskets of paddy per acre to the government at a below-market price to feed civil servants and soldiers, and for export.³⁵ Those who could not meet this quota had their land confiscated and allocated to other “more productive” farmers, which increased land concentration.³⁶ At the same time, in order to reach even higher paddy output levels, military commanders encouraged farmers to cultivate on what was termed “VfV” as well as on reserve forest land. Because the SLRD has not updated its cadastral maps since the 1960s, many farmers have never received documents for their use rights on these lands. Another reason for a lack of documentation is because some farmers attempted to evade the harsh quotas by under-reporting the size of their plots. Today, farmers who participated in these government programs during the military era argue that they were only following the orders of their regional commanders at the time and have rights to compensation.

The rice quota policy contributed to the decline of the sector from its heyday right before World War II.³⁷ 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)³⁸ passed the 1991 “Wasteland Instructions”³⁹ to encourage private investment in agriculture production.⁴⁰ Notably, the military also suspended the 1974 Constitution from 1988 until the ratification of a new Constitution in May 2008.⁴¹ With the military not having to be accountable to any laws, this period was marked by rampant and unchecked land confiscation – a legacy against which struggles are carried out today.

³³Government of Myanmar 1894 Land Acquisition Act; Author interview with retired SLRD officers on 23 May 2015.

³⁴Steinberg 1982, 76.

³⁵Hudson-Rodd et al. 2003.

³⁶Thawngmung 2004.

³⁷According to 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 between 1961 and 1962 but only 0.3 million tons between 1987 and 1988, the year the SLORC took power, followed by 50,000 tons the next year. This is a ten-fold drop since the 1930s.

³⁸The SLORC took power from the BSPP after the 1988 student demonstrations. In 1992, General Than Shwe became the head of the SLORC, which changed its name to the State Peace and Development Council in 1997.

³⁹While these lands were hardly “wastelands” to those communities who used them for their daily livelihood, this idea, first brought to Myanmar in 1893 via the British who used this term to legitimize their desire to make all land profitable, has been used by the state ever since to justify reallocations of large swathes of land – whether it be for feeding the military in the post-independence years or to capture large revenues (Ferguson 2014).

⁴⁰See SLORC Notification No. 44/91.

⁴¹Another period when there was no Constitution was 1962–1974.

During this transition period the state adopted a policy of “state-mediated capitalism”⁴² and determined the nature, scope, and pace of this transition by involving only those close to the center of power. Lucrative deals involved military conglomerates such as the Union of Myanmar Economic Holdings Limited (UMEHL) and Myanmar Economic Corporation (MEC), government administrative bodies, and crony companies. These deals also involved foreign investments from countries that did not adhere to sanctions against Myanmar. The deals included oil and gas exploitation, the construction of hydropower dams, roads and other infrastructure, and agribusiness investment – all of which required displacement of many people from their land, nearly always with no compensation.

After the 2011 elections, the Thein Sein government passed the 2012 Farmland Law, which authorized the Farmland Administration Body (FAB) to issue certificates to cultivators, households, and organizations. A holder of this certificate has the right to sell, exchange, inherit, and lease land, as well as to access credit.⁴³ If a farmer breaches the conditions of use, the FAB may impose fines and take away land use rights. The law also allows the state, through the FAB, to confiscate land when in the interest of the state. While this law provides more detailed guidance for calculating compensation, challenges remain in calculating the actual market rate of land values, given the lack of systematic transaction records. Significantly, since “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” (Chapter 13, section 40), smallholder farmers have no right to seek an independent appeal process.

The VFV Law regulates the leasing of land considered “vacant,” “fallow,” or “virgin” for alternative use. Public forests can be allocated under the VFV Law. Smaller concessions of up to fifty acres can be granted by regional authorities with little central oversight. The law also allows domestic and foreign enterprises, and government and non-government entities to apply for up to 5000 acres at one time, with maximum holdings of 50,000 acres on leases of thirty years that can be extended. Chapter III (30a) of this law decrees that farmers can apply to the regional government for permission to lease up to ten acres of VFV land. Article 25(B) of the VFV Law recognizes existing use of land by farmers should there be a conflict between the existing tenant and a party that claims the land. Since most farmers do not have written records for VFV land on which they have farmed, Article 25(B) can be useful in securing some degree of compensation in land disputes with companies negotiated out-of-court – but this clause is often ignored.

The above sections show how the current legal framework was developed, in which laws, directives, and policies (and quasi-legal practices) have been stacked onto each other over time, creating ambiguity and often conflict. Adding to this, given previous policies which encouraged cultivation of VFV land and population growth, and led to a lack of resources allocated to the Ministry of Irrigation and Agriculture,⁴⁴ large expanses of land under cultivation were excluded from cadastral maps or “kwin” maps.⁴⁵ While a little over nine million LUCs had been issued by January 2016, many farming households still did not hold certificates for the lands they cultivate.⁴⁶

⁴²Jones 2014, 3.

⁴³Though the by-laws are pending, the 2014 Farmers Rights and Protection Law states that farmers can grow what they want on agricultural land.

⁴⁴The names of many government ministries and departments have changed since the new government took power in April 2016.

⁴⁵Author interview with former SLRD Directions on 23 May 2015.

⁴⁶Data from Union-level SLRD office dated January 2016.

A case in Nyaungdone village tract in Maubin District in the Delta demonstrates how stacked laws and policies impact farmers. In 2001, military commanders instructed thirty-nine farming households to expand cultivation to VFV land. Some paid the annual tax of 3000 MMK, but many did not due to various reasons. Some were intimidated by government officers, while others did not have the wherewithal, time and money to make the trip to tax offices. In 2006, an outside investor applied for this land under the 1991 Wasteland Instructions. In their defense, the farmers argued that they had spent their meager savings and labor to clear this land. “Being thick and wild area with high bushes, we had to take twenty days for an acre clearance ... bushes reached up to eight feet ... we had to clear collectively ... that was not easy task at all,” said one farmer involved in this case. They also invoked Executive Order 1/64. The farmers’ claim to the land received the backing of village leaders, but township officials eventually decided to award the land to the outside investor.⁴⁷

Stacked Laws Against Farmers

Whether large-scale grabs by the military, government bodies, and companies, or smaller ones carried out by local elites, actors use stacked laws strategically against smallholder farmers by emphasizing some elements while ignoring others. Given the state’s limited capacity to define and enforce regulations nuanced enough to fit the complexity on the ground, “fuzzy zones of compromise, accommodation and bribery are the rule rather than the exception” as people attempt to negotiate weak and contradictory laws in their favor.⁴⁸ In a “law-of-status” society, those who can use their political and monetary resources do so to ensure that the law works in their favor.

Article 25 (b) of the VFV Law states that farmers who have used VFV land for an established period of time, officially or not, are entitled to compensation when this land is involved in a land conflict with a third party. However, rarely has this clause been followed or enforced. Instead, land confiscators choose to emphasize part (a) of the same article, which says that action will be taken against local cultivators causing “dispute, obstruction, trespass, and mischief” to those granted formal rights by the state to utilize VFV land. The net result is that land confiscators turn to the police and courts to legitimize their grabs while criminalizing the farmers.

Most land-related cases that come to the attention of legal aid providers involve farmers charged under Section 427 of the Myanmar Criminal Code for trespassing or 447 for damage to private property.⁴⁹ Evoking national security, the government at times charges farmers who are unwilling to leave confiscated land under the more serious section 505(b) which involves “defamation of the state.” Once charged, farmers are immediately put in jail until they are bailed out, thus intimidating them and other farmers from taking further action to regain their lands. As of May 2015, 944 farmers faced imprisonment under this charge, according to the Assistance Association for Political Prisoners.⁵⁰

Other examples demonstrate the way elements of a complex legal system can be selectively applied to the detriment of farmers. In Kanbaung Village in the Ayeyarwady Division, farmers possessed tax receipts for land until 1992, at which time their land had been confiscated without compensation. The FAB sided with the company which had received a formal land grant and did not acknowledge any violation of the 1894 Land Acquisition Act or the farmers’

⁴⁷Case reported by Share Mercy civil-society organization in Yangon on 14 May, 2015.

⁴⁸Hall et al. 2010, 16.

⁴⁹Author interview with legal-aid provider on 6 December 2014.

⁵⁰Email exchange with AAPP on 24 May, 2015.

tax receipts. Instead, the FAB selectively applied Executive Order 1/64, and said that since the farmers had not farmed the land for the previous five years, they had lost their use rights.⁵¹ In the words of 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."⁵²

The selective use of law has been facilitated by a growing pool of land brokers. In Bago Region, it is common practice for village leaders to receive a commission for each transaction of 100,000 MMK (USD 100) and the SLRD 200,000 MMK (USD 200), compared to no more than 30,000 MMK (USD thirty) prior to 2012.⁵³ Similarly, in Madeya Township in Mandalay, the Great Wall Sugar Company paid land administration authorities to approve a VFV certificate, overriding the claims of twenty households that had cultivated this land for five years prior to the arrival of the company in 2000.⁵⁴

Finally, the use of laws to legitimize land grabbing is further aggravated by limited capacity in local administration across the country. For example, in one township in Mon State, the SLRD office was supposed to distribute 33,158 titles in fourteen months, with only twenty-two staff and a limited budget.⁵⁵ In addition to limited human resources and a short timeframe, the SLRD continues to use paper records and outdated maps. To meet work targets within these constraints, it took shortcuts such as not verifying maps with visits to the villages impacted by its decisions. In some cases, local elites are able to exploit the administration's stretched capacity. In Mon State's Thaton Township, a relatively well-off man secured the oral testimonies of alleged witnesses in order to grab the land of his neighbor, a widow who had been living and cultivating on her land for decades. With falsified documents, he convinced the village tract leader to endorse his application, which subsequently was approved at the township level.⁵⁶

Farmers' Political Approach to Laws

For a number of reasons, it is still uncommon for farmers to utilize laws to protect themselves against dispossession. Farming communities tend to have little information about laws and are deterred by the high cost of court litigation, particularly for civil suits. Said one pro-bono lawyer, "We only go to criminal court as defendants, not as prosecution. There are very few civil cases, and they are very costly. It is not a sustainable way to protect farmers."⁵⁷ On the other hand, the availability of lawyers to take on these cases is also limited, given recent history in which lawyers seen as too political were disbarred by the military government. Currently, court cases initiated by farmers are often subsidized by donors, usually development agencies working on rule of law issues who support legal aid services.⁵⁸ Additionally, township administrators who report to the military-controlled Ministry of Home Affairs pressure judges to not make decisions against those in power. As a result, there is only one known court case, described later on, involving farmers in Kachin state that resulted in compensation.⁵⁹

⁵¹ Author field visits in Ayeyarwady Region in November 2014.

⁵² Author interview on 21 November 2014.

⁵³ Case presented on 23 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.

⁵⁴ Author field visit to Madeya Township, 1 October 2015.

⁵⁵ Case presented on 23 December 2014 by a land expert who carried out a study on land tenure administration for FAO in Myanmar.

⁵⁶ Email from Land Core Group member on 22 September 2015.

⁵⁷ Author interview with legal-aid provider on 1 October 2015.

⁵⁸ For example, as of 2014 year-end, the Myanmar Legal Aid Network had an estimated 30 pro-bono cases for land-related conflicts.

⁵⁹ Often, opposing parties agree to settle cases through negotiation prior in order to avoid starting a court case.

Nevertheless, as explained below, this has not prevented farmers from initiating a number of civil suits employing a mix of different laws.

There are more instances in which farmers have had land returned as a result of the Parliamentary Land Confiscation Investigation Commission's work (although this has also been an imperfect process). Negotiations carried out by communities outside of the legal system have also prevented or delayed land takings or resulted in fairer monetary settlements. For example, compensation negotiations for land taken for the Kyaukphyu Special Economic Zone in Rakhine State resulted in an increased settlement of four million MMK (USD 4000) per acre for farmers.⁶⁰

Nonetheless, legal cases in which farmers strategically engage with different laws to protect themselves against dispossession are gradually increasing. 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 types of legal strategies available to farming communities; (3) alliances with media and other civil society groups; and (4) responses by the state.

Evolving Judiciary

In the last few years, there has been growing perception that the judiciary must not be subsumed under the executive and the military, as well as a growing call for judicial independence and reform.⁶¹ In August 2015, a campaign was started by the Nay Pyi Taw Legal Support Group against the appointment of twenty military officers to the Supreme Court.⁶² Demonstrating relatively more openness in the judicial system than under the military regime, one lawyer who previously had been imprisoned twice on contempt charges said that courts do not throw lawyers into jail as readily as they used to (Figure 1).⁶³

Defense lawyers play a vital role in shaping the outcomes in land confiscation cases. Given a history in which politically active lawyers were punished by the military government, lawyers tend to shy away from appearing politically motivated in any way. As such, lawyers employ a strategy in which legal arguments are crafted to appear to uphold laws. Because this is done with an 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.⁶⁴ For example, a weakness often noted by lawyers in the 2012 Farmland Law is that the FAB is a "closed system" which does not allow for an external appeals process. Even though many lawyers know that they have little chance of winning a case, it is through the process of taking on cases that lawyers indirectly advocate for changes to a political culture in which the strong use laws to their advantage against the weak, as well as for amendments to the laws themselves. "It is like demonstrators who keep on protesting – we do it even though we are likely to lose," said a pro-bono lawyer representing farmers charged with trespassing.⁶⁵

⁶⁰Discussion with Rakhine civil society leader on 25 December, 2014.

⁶¹See article <http://www.mmmtimes.com/index.php/national-news/nay-pyi-taw/18050-judicial-system-in-need-of-major-redress-says-pyithu-hluttaw-committee-review.html> (accessed 10 December, 2015).

⁶²See article <http://www.mmmtimes.com/index.php/national-news/nay-pyi-taw/16400-yellow-ribbons-seek-an-end-to-militarised-judiciary.html> (accessed 10 December, 2015).

⁶³Author interview with legal aid provider on 12 August 2015.

⁶⁴Author interview with legal aid provider on 20 December 2014; the same statements were made at a workshop with pro-bono lawyers at a land and the law workshop held on 15–16 July 2015.

⁶⁵Author interview with lawyer on 11 July 2015.



Figure 1. A lawyer counsels farmers on their land confiscation problems. Credit: SiuSue Mark.

Farmers Engagement with Stacked Laws- In and Out of Courts

Compared to the hundreds of criminal cases that have been filed against farmers, there are very few cases in which farmers have initiated legal action in order to get their land back or to win compensation. One lawyer defending farmers estimates that since the passage of the 2012 land laws, there have been only six civil cases.⁶⁶ Because these cases take several years to complete, their results are still pending.

Prior to 2012, in only one known civil case did a judge rule in the farmers' favor. This was a 2009 case involving 148 farmers and the Yuzana Conglomerate, which had been granted 200,000 acres in the Hukawng Valley in Kachin State. The calculation of compensation was based on an assessment of the average values in the area, resulting in 80,000 MMK (USD 80) per acre of paddy land, 60,000 MMK (USD 60) for *ya* land (farmland for crops other than rice), and 30,000 MMK (USD 30) for garden land; 150,000 MMK (USD 150) for a new house; and 20,000 MMK (USD 20) for the temporary huts constructed on fields. Because there were no other laws at the time, and the 1894 Land Acquisition Act did not provide specific guidance, the suit was based on tort law per the Burma Judiciary Law (section 13–3) and Civil Procedure Law (sections 16–19). However, the lawyer for the case estimates that, as of late 2015, thirty percent of the households had not accepted payment, and they are still demanding return of the land.

The few attempts to challenge administrative decisions by applying to the Supreme Court for a Constitutional Writ have been unsuccessful to date.⁶⁷ While farmers cannot directly appeal a decision made by the FAB, lawyers can challenge land confiscations by arguing that the parties responsible for confiscations fail to adhere to legal requirements. Cases which farmers

⁶⁶ Author interview with lawyer on 12 December 2015. Two cases are in Sagaing Division, two are in Maubin in Ayeyarwady Division, and two in Pyin Oo Lwin in Mandalay Division.

⁶⁷ "Land and Law in Myanmar: A Practitioner's Perspective," prepared by the NGO Partner Asia, 15–16 July 2015.



Figure 2. Farmers meet to discuss ways to respond to land confiscations. Credit: SiuSue Mark.

can provide some type of proof of land ownership, usually tax receipts, have the strongest chance of success. Farmers also refer to the principles of protection in old or revoked laws. For example, a rights-based group called the Myanmar Democratic Network lamented that the 1963 Farmers’ Protection Law was repealed. One network member said: “Before 2010, people were poor, but now people are so vulnerable that they cannot crawl out of poverty at this rate.”⁶⁸

In the 2012 Farmland and VFV Land law, some articles that offer specific types of protections to farmers include:

Farmland Law’s chapter 8 by-laws	give more specific guidance than the 1894 Land Acquisition Act for calculating compensation
Article 25 b of the VFV Law	says that farmers who have used VFV land for an established period of time, officially or not, are entitled to negotiation and compensation when this land is involved in a land conflict with a third party
Article 32 of the Farmland Law	says should a project take more land than is needed, the original owner should get it back
Article 16b of the VFV Law	says land that is unused for four years must be returned to the state

Several recent cases highlight the legal strategies employed by farmers for the return of land or compensation from government, military or companies. One case is in Sake Do Ta Ra Township in Magwe Division, in which nineteen villages with 5,000 people are seeking compensation from the government for a dam project begun in 2010. In 2013, legal aid providers mobilized villagers and provided the funds (USD 1800) for this case. These communities reference the Myanmar Constitution Chapter 14, Article 445, which decrees that previous government actions are the responsibility of the current government. Some farmers have invoked the 2012 Farmland Law

⁶⁸ Author interview on 24 November 2014 in Ayeyarwady Region.

to retroactively claim compensation from the start of the dam project. The 1908 Limitation Act, amended in 2014, allows up to twelve years for a party to sue for damages to immovable property. The 2012 Farmland Law (Chapter Eight) states that compensation payments should be calculated based on 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 market value of the land. Because land values had changed significantly since the time of confiscation, farmers involved in this case use current market value and backdate the total amount of compensation to the time the land was confiscated. Schedule 12 of the 2012 Farmland Law calculates compensation based on present-day market values. An exhibit from one case filed showed that total value is based on a multiplication of acres lost, price for that type of land, and total years since the land was confiscated.⁶⁹

Farmers are also using laws to regain their land without even going to court. The Letpadaung Copper Mine, a joint-venture of the state, a Chinese company named Wanbao, and UMEHL, and involves over 7000 acres of farmland confiscated in 2010 in Sagaing Region. After a November 2012 crackdown on demonstrators, a government investigation committee headed by Aung San Suu Kyi determined that the project should continue, but with revisions to the terms including more compensation to local communities and a greater share for the government. Though many farmers accepted an increased compensation package, some villagers continue to refuse to move. In 2016, they wrote letters to the township, district-level General Administration Department, and the police to claim their land. In these letters, they cite four laws: the 1894 Land Acquisition Act, the 1953 Land Nationalization Act (though revoked by the 2012 Farmland Law, this was still active at the time land was confiscated), the 2012 VFV Law (Article 16B), and the Farmland Law (Article 32). Based on these legal arguments, they have been able to reoccupy and farm one hundred acres of the confiscated land.⁷⁰ While this is a small percentage of the 7000 acres in dispute, this case is unique in how it demonstrates a creative use of laws outside the court.

Yet another type of legal strategy uses contract law. As noted above, store-bought contracts were and are still used by some farmers when they mortgage their land. These contracts can be brought forth in some litigation cases where farmers lost their lands to a moneylender. A case in Myeik in Thaningtharyi Region demonstrates this. Starting in 2013, 189 farmers in three villages were charged with trespassing on land from which they had been ejected after losing this to a local money lender. According to the contracts they had signed with this money lender, they would not have to pay interest on their land. Additionally, the contracts stated that the money lender could use the farmers' Form 105 (a certified map issued by the SLRD) as collateral for the loans. Many signed without understanding the implications of these clauses. Their lawyer has argued these contracts are invalid on the grounds that the money lender is engaged in an unregistered illegal business under the 1945 Money Lenders Act. Prior to the case actually going to court, the moneylender agreed to start out-of-court negotiations with the farmers.⁷¹

The Role of Civil Society & Media

While most legal advocates avoid any appearance of activism, large land conflicts continue to draw the attention of civil society groups and media, who actively politicize and amplify local communities' demands for justice. Civil society groups that are involved with land conflicts

⁶⁹ Author interview with lawyer on 12 December 2015.

⁷⁰ A lawyer interviewed on 12 December 2015 identified at least four such cases; one in the Letpadaung copper mine, one in Shwe Bo Township in Sagaing Division and two cases are in Pyin Oo Lwin in Mandalay Division.

⁷¹ Author interview with lawyer on 15 August 2015.

are diverse and tend to cooperate in a fluid and informal manner based on the needs of each case. They include farmers associations, political groups such as the 88 Generation Students Movement, political parties, NGOs, and charismatic leaders such as monks. In successful negotiations, farmers usually mobilize these political forces to exert pressure on the government and confiscators. As a result, negotiations⁷² that occur out of court have so far resulted in the most favorable outcomes for farmers affected by land confiscations.

In one case in Taungoo Township in Bago Region, the Myanmar Cooperative Bank was granted 2400 acres of farmland by the SLRD in 2009 on a thirty-year lease to plant teak. As of end 2015, the company had only cultivated 200 acres. Farmers say that they have not received any compensation and since early 2015, have been staging protests to get this land back. This case benefitted from the legal advice of a lawyer, but what eventually forced the company to return 1888 acres of this land while increasing compensation by 500,000 MMK per acre was additional negotiations by a local NGO, pressure from the leadership of the ethnic armed group with influence in the area, and the community with the regional government.⁷³

Local, and increasingly international media coverage, has consistently focused on land confiscation cases and land conflicts since early 2012. The media played an important role in the Letpadaung copper mine case, particularly in the aftermath of the violent crackdown on a peaceful demonstration involving monks in November 2012.⁷⁴ Partly due to continued coverage, this became the first large-scale mine to renegotiate compensation with communities and revenue sharing with the government. The new package includes payment of USD two million annually to cover environmental costs in the production phase as well as two percent of net profits to be used for corporate social responsibility initiatives for the communities;⁷⁵ a job for each household or a monthly subsidy of between USD 70 and USD 160 a month depending on household size over a thirty year period;⁷⁶ and increased compensation for lost farmland. Nevertheless, watch groups continue to report that many in the affected communities are still worse off than before the project started.

Media has also helped sway decisions of some judges in favor of communities, as demonstrated in a case in Pyin Oo Lwin in the Mandalay Region. Here villagers had 20,000 acres taken twenty years ago, and as of the middle of 2014, half of this land was in the process of being returned, based on the Parliamentary Land Confiscation Inquiry Commission's recommendations. Thirty farmers initiated a lawsuit against a company involved with the land confiscation. When asked why they were engaging with the courts despite knowing that the courts tend to be corrupt, they replied that even without receiving bribes, judges could be swayed to rule in their favor with the pressure exerted by media and national campaigns. They credited these tactics for influencing the district-level court which ruled in their favor.⁷⁷

⁷²While this paper focuses primarily on large-scale land confiscations by more powerful actors against small-holder farmers, there are ongoing attempts by farming communities to use negotiations to resolve smaller conflicts within themselves.

⁷³See article <http://www.mmmtimes.com/index.php/business/18449-kma-group-returns-seized-land-to-former-owners.html> (accessed 30 January, 2016).

⁷⁴See article <http://www.irrawaddy.org/burma/wanbao-welcomes-inquiry-commissions-verdict.html/> (accessed 30 March, 2013).

⁷⁵See article <http://www.irrawaddy.com/burma/letpadaung-farmers-crop-compensation-demands-denied.html> (accessed 2 March, 2016).

⁷⁶See article <http://www.mmmtimes.com/index.php/business/19128-wanbao-prepares-to-re-start-letpadaung.html> (accessed 3 March, 2016).

⁷⁷Author interview with village in Pyin Oo Lwin on 22 June, 2014.

State Response

Different levels and types of state actors have responded to the groundswell of protests from rural communities. At the highest level of policy-making, state officials have recognized that land conflicts create social instability. At the national level, the Minister of Environmental Conservation and Forests said at the opening of the third National Land Use Policy consultation in July 2015:

Since the population is growing over time, only with the proper management of limited land resources, will there be a harmonized execution of programs for provision of basic needs of the people, improvement of their socioeconomic conditions and development of the State. Land use conflicts between the State, Public and Investors, encroachments, controversial tenure rights and unregulated land leases are quite common these days as a result of the lack of proper Land Use Policy.⁷⁸

The Parliamentary Land Confiscation Investigation Commission was initiated in August 2012 in response to a surge of appeals by farmers to their then newly-elected Parliamentary representatives for help in solving confiscation cases. The Commission's task was to assess whether land confiscation cases that occurred under the military regime from 1988 to 2010 did in fact break the law at the time of confiscation, namely the 1894 Land Acquisition Act. Importantly, even though the 1894 Land Acquisition Act is outdated, many farmers do not want to see it repealed as it lends legitimacy to their past claims for compensation.

The Parliamentary Land Confiscation Investigation Commission concluded that most of the land concessions had failed to follow the 1894 Land Acquisition Act, which was the only law that regulated compensation at the time of the confiscations. In its first report, the Commission wrote that the main causes of land confiscations included: (a) urban development expansion; (b) industrial zone development; (c) military cantonment expansion; (d) national infrastructural projects including railways, airports, and highways; (e) state factories; and (f) agribusinesses. It also determined that sixty percent of the 500,000 acres of land that had been confiscated during this period was carried out by the military. The remainder had been confiscated by the private sector and various government ministries and individual officials, nearly all with no or negligible compensation.⁷⁹

The actual land return process has been hampered for various reasons. Often, those holding confiscated land delay its return by claiming they plan to develop it. For example, the military says that a large part of its land holdings deemed to be "excess" by the Commission is in fact necessary for defense purposes in conflict areas. In addition, the process for returning land is complicated by the fact that the land has changed hands multiple times, from original owners to tenant farmer(s). Additionally, communities have also lamented the corruption among local administrators in the handling of these land returns. Pro-bono lawyers and NGOs providing legal assistance are supporting farmers to negotiate this process.

Below the national level, state support for resolutions to land disputes varies. In the Ayeyarwady Delta, the regional government has identified more land to be returned than that recommended by the Parliamentary Commission. According to the current Regional SLRD Officer,

The Commission told us to return 27,000 acres, and the regional government ordered that 49,620 acres additional be returned, totaling 76,700 acres. 44,290 acres have been returned to 4881 farmers; another 32,000 acres have been given to 4887 farmers for temporary use.⁸⁰

⁷⁸Official transcript of speech dated 29 July, 2015.

⁷⁹See article <http://www.mmtimes.com/index.php/national-news/10923-mps-pressure-govt-to-return-farmland.html> (accessed 26 November, 2015).

⁸⁰Interview conducted by author on 19 February, 2016.

The Region's Minister of Agriculture explained:

I am a farmer and my sons are involved with farming. You can imagine which sides we stand for ... For example, with the Ngwe Saung hotel zone, before 2012 the compensation was only required for the trees and crops, but now we are negotiating payments for the land.⁸¹

Farmer association leaders think that the Ayeyarwady authorities have supported farmers in some instances not only because some leaders want to leave a positive legacy. The Delta has a history of politically active farmers with which the recent government has wanted to negotiate; the USDP wanted to win votes in the November 2015 elections; and land conflicts have greatly hindered economic investments.⁸²

Conclusion

I have shown that Myanmar's land system is governed by stacked laws built on top of each other over time, leading to legal conflicts and contradictions. Even as the country's top leaders articulate the government's intention to move towards "rule of law," those who have tended to benefit from the absence of this are learning to strategically use the ambiguity of this stacked legal framework to their advantage. Motivated by the growing value of land, land confiscators of various types have been able to use state law to legitimize their actions, while further criminalizing smallholder farmers.

Nevertheless, as a result of gradual reforms in the judicial system, the growing presence of legal aid providers, and an increasing willingness among farmers to engage with the law, a small number of civil suits initiated by the latter to defend against land confiscations have been brought to court. Assisted by legal aid providers, these farmers demonstrate a creative use of stacked laws to construct legal arguments, whose outcomes are as yet undetermined. But given the very slow process (up to three years for civil cases) and a very weak judiciary still largely influenced by the Ministry of Home Affairs, it is unlikely that struggles limited to the legal sphere will result in significant gains for smallholder farmers in the near term.

In contrast, most of the gains made by farmers in recovering land or gaining compensation have occurred outside the legal system, usually through effective mobilization of a range of civil society actors, including farmers associations, political groups such as the 88 Generation Students Movement, political parties, NGOs, charismatic leaders, and members of the media. While lawyers have historically tended to avoid appearing overtly political in land cases, the linking of legal with political strategies appears to be necessary in Myanmar's current context – in which the law continues to be manipulated by those with access to more political and economic resources.

Going forward, if the National League for Democracy government prioritizes legal reforms such as strengthening the capacity and independence of the judiciary, streamlining the legal framework, and building on the work initiated under the Parliamentary Land Confiscation Investigation Commission, the country might begin to see more clarity and consistency of application of law. This could reshape a society that has been characterized by a "law-of-status" to one that comes closer to the practice of rule of law.

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⁸¹Interview conducted by author on 20 February, 2016.

⁸²Interview conducted by author on 5 December, 2015 and 20 February, 2016.

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Appendix 1: Acronyms

FAB: Farmland Administration Body

LUC: land use certificates

MEC: Myanmar Economic Corporation

MMK: Myanmar kyat (the local currency)

SLRD: Settlement and Land Records Department

SLORC: State Law and Order Restoration Council

UMEHL: Union of Myanmar Economic Holdings Limited

VFV: Vacant, Fallow, Virgin (land)