



Land policy and land law

Extended synopsis

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December 2015, revised November 2020

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Overview

Land law has a long history in the Mekong Region, going back to the colonial era. In the post-socialist CLMV countries, there has been an acceleration and elaboration of land policy formulation and legislation around land, including laws on investment, natural resources, special economic zones and other related fields. International donors have been quite heavily involved in law drafting in some countries. Recent implementation of consultative processes around law formulation reflects the growing role of civil society organisations. Discussions around law reflect deeper tensions and debates around relationships between state and society in the countries in question.

Key trends and dynamics

Land policy and land law in the Mekong countries has moved through several key transitions from the colonial period, to wartime, to a period of inwardly-focused socialist practice, to a more outwardly oriented market-based development, and ultimately to a neo-liberal era characterised by regional cross-border investments in land for agricultural and other uses. While land policies and laws have developed in ways specific to each individual country, there are trends and processes common to some or all of them (Mellac and Castellanet 2015). The exception here is Thailand, which was never formally colonised, and whose government ultimately prevailed over a communist insurgency. This partially accounts for a long-standing consistency to its land laws (USAID 2011), as opposed to Cambodia where all land records were destroyed during the Khmer Rouge period

marking a break between people's pre-1970s patterns of land holding and their post-conflict tenure (Pubellier et al. 2015).

The history of socialist experiments emanating from the post-colonial period in the CLMV countries has given rise to post-socialist dynamics in land governance across the region. In Laos, Myanmar and Vietnam, there remain significant constitutional limits to individual – and therefore smallholder – rights in land. While in all three countries there are provisions for individual land holdings, in the one-party states of Laos and Vietnam the constitution stipulates that land is ultimately owned “by the people” as a whole and managed in trust by the State (Hansen 2013). In Myanmar, all land and natural resources are constitutionally owned by the State (Article 37). Cambodia's 1993 Constitution enshrines the right to private ownership through transferable land title, but the majority of unsurveyed and untitled land remains the property of the State, facilitating the granting of concessions on that land (Dwyer 2015).

The post-2000 neoliberal period of increasing reliance on market forces has seen land policies and land laws geared towards “turning land into capital”. Land laws enacted in CLMV countries have prioritised attracting private sector investment for commercial agriculture, mining, hydropower dams, and urban-industrial complexes. This is mainly operationalized through the granting of large-scale land concessions by the state to domestic and foreign companies. A key problem is that land ownership is often ambiguous and contested. Much of the so-called ‘state land’ granted to concessionaires is occupied and used by local communities, resulting in social conflicts. With few legal protections available to farmers, ethnic minorities and women to uphold their land rights, many smallholder groups have lost their agricultural and forest lands to companies or powerful individuals, making it difficult for them to maintain their former subsistence or semi-subsistence livelihoods (Carter and Harding 2015).

The 2001 Land Law in Cambodia and recently amended 2019 Land Law in Laos provide for the issuing of large-scale land concessions to domestic and foreign investors. Likewise, Myanmar's 2012 Vacant, Fallow and Virgin (VFV) Land Law allows for State expropriation of smallholders' land for large-scale agricultural enterprises (Obendorf 2012). Its 2018 amendment threatens to fine or imprison farmers who do not register the use of land classified as VFV. While the government has presented this as a unique opportunity for farmers to legitimize their existing land uses, studies indicate it represents a threat to the many farmers cultivating land in unregistered areas (Boutry & Mya Darli Thant 2020). A number of abuses in concession-granting results from the lack of coherence of national policies and competing administrative interests between different ministries, as can be seen in the example of Dawei SEZ in Myanmar (Sekine 2016). These are also the result of blatant abuses of power combined with very limited access to justice under prevailing state-business-civil society power gradients.

Land policies and land laws of countries in the Mekong region also reflect the various efforts, particularly by international donors, to instil international legal norms of good land governance that draw mainly from neoliberal market instruments but which also seek to protect small producers from the worst aspects of the concession boom. A key policy/legislative tool for attaining ‘growth with equity’ in the mainstream neoliberal development paradigm has been land titling and the creation of land/credit markets. The World Bank and other international donors have supported land titling initiatives in the region, first in Thailand from 1984, and in Laos and Cambodia in the 2000s,

although the latter programs were both aborted. The idea is that formal land title can help rural smallholders turn their most valuable asset, land, into a household level wealth-generating engine (de Soto 2000). However, in some cases such as Laos, the policy drive has been more to turn the country's land asset into national wealth through expropriation (Barney 2009; Baird 2011). While land titling has in some instances legitimized existing land holdings, it has also increased tenure insecurity in areas that remain unsurveyed and untitled, as these lands are then seen as reserved for state projects to be handed over to investors (Bugalski & Pred 2013; McCarthy 2016; Oldenburg & Neef 2014; Rabe 2013; Suhardiman, Kenney-Lazar, and Meinzen-Dick 2019). Overall, the issuance of land titles for farming households has been slow and incomplete, while land concessions granted to private developers has accelerated rapidly. In Myanmar, it is particularly worrying that recent government efforts to formalise land holdings – as long-term, conditional leases on State lands – do not recognise customary land rights and may actually create greater tenure insecurity (Obendorf 2012; Land Core Group 2012; McCarthy 2018; TNI 2013; Woods 2013a). In all countries but particularly in Myanmar, the legal recognition and protection of customary land rights remains weak. Even where there are some legal protections such as communal land titling, these come with risks. In Cambodia for example, the requirement for communities to prove indigenous status before gaining eligibility has been a barrier and is partly behind the very slow issuing of such titles (Milne 2013). Meanwhile, land and investment laws are being changed to facilitate foreign ownership of land (Mark 2016; Woods 2015a). In Vietnam, land policies are being used to legitimise state power in land management and the ability to intervene in land markets (Nguyen, Duan, and Zhang 2018).

In CLMV countries, the continuing status of most of the countries' land as state property eases the process of concession granting, particularly where land has been zoned in such a way that fallow areas, grazing land, secondary forest and other supposed "wastelands" can be appropriated as vacant. While the rules and specific laws vary from one country to another, this categorisation of land as wasted, unused or underutilised gives legitimacy to the granting land concessions for "productive" investments in the Mekong Region (Ferguson 2014).

Key actors and interests

Land policy, law and land use planning in Mekong countries have been subject to many influences and tensions, reflecting the multitude of interests within bureaucracies, and between donors, governments and civil society:

Governments in the Mekong Region (namely Cambodia, Laos and Myanmar) have embraced a concession model of economic development, reorienting land and related laws and policies to encourage foreign investment (mainly from Vietnam, China and Thailand) in large-scale agriculture and other land-intensive developments. One of the main motivations of governments in granting concessions is to reallocate land from to what is often seen as "unproductive" uses by smallholder peasants, to more "productive" export-oriented industrial agriculture controlled by companies. This reflects the sentiment of many in the government that forcing "unproductive" and "backward" peasants out of subsistence economies – through the eradication of swidden agriculture and enclosure of forest and other commons – will propel the rural population toward a modernised set of labour relations and bring about positive 'development' (Baird 2011).

While a significant part of the literature on land grabbing refers to "the State" as complicit in land deals that dispossess citizens, states are in fact variegated and complex, with many agencies at

different levels responsible for drafting, enacting and implementing land and related laws and policies. The Lao, Cambodian and Myanmar states are often described as exhibiting fragmented sovereignty because they grapple with institutional disconnect, internal struggles over regulatory power, and complex landscapes of overlapping land uses, with formal and informal claims to land. For private investors, the process of negotiating access to land with fragmented and at times competing state actors and institutions – even if permission is already granted on paper – can be complicated, costly and sometimes unsuccessful (Lu & Schönweger 2019). Ministerial clashes are frequently seen in tensions between conservation policy against aims to capitalise land (Mertz and Mertens 2017; MRLG 2019). For example, in Huaphan Province, Lao PDR, an aim to expand land use for maize contract farming clashes with REDD+ policy (Vongvisouk et al. 2016).

International donors have been quite heavily involved in land-related legal and policy development in the Mekong countries, particularly through neoliberal market instruments. With the support of the World Bank and AusAID, Thailand conducted a land titling programme from 1984-2004. It is held up as a positive model that has alleviated poverty and allowed smallholders to access credit markets using their land as collateral (Feder 1987; Feder and Feeny 1991; Jeffress and Onsrud 1989).

Donors have more recently supported programs that align with more progressive voices and counter-movement agendas on land governance. The Swiss Agency for Development and Cooperation (SDC) has since 2014 been supporting the Mekong Region Land Governance (MRLG) program, whose focus is on customary rights recognition and responsible agricultural investment. Other donor programs have similarly focused on strengthening land laws and policies, including increasing legal protection for smallholder farmers, ethnic minorities and women with regard to land access and ownership. While many donor-supported land reforms promise to build reliable legal frameworks, strengthen institutional capacity and create land-based knowledge and information systems, in practice, reforms have seldom led to desired or intended outcomes. In all five countries, donor programs have interacted with and been assimilated into local political-economic contexts and state territorialization agendas, particularly the interaction and co-existence of concessions and land titling programs (Biddulph 2011; Adler & So 2012).

Through various land based coalitions, **civil society organisations** have been active in the process of land policy and legal reform through public consultations in each country. International and local NGOs have played a prominent role in helping support and coordinate consultation processes (Oxfam 2013; Wells-Dang 2013; Wells-Dang, Tu, and Burke 2016). The Land Information Working Group in Laos, the Land Core Group in Myanmar and the Land Alliance (Landa) in Vietnam have brought together state and non-state actors and provided comments on draft land laws and policies. In Myanmar, the Gender Equality Network has advocating for the role and rights of women in land-related violations, giving input into the National Land Use Policy (Faxon, Furlong, and Phyu 2015). The degree of inclusiveness and openness in consultation processes varies from one country to another and there are few guarantees that civil society participation will result in the incorporation of their perspectives and proposals (Polack et al. 2014).

NGOs also play an important role in land law implementation through educational campaigns, for example, around land registration procedures, farmers' rights and the law. There are an increasing number of guides looking at how to inform communities, and help them take action in cases of land-related grievances (Allaverdian et al. 2017; Pierce and Nant Thi Thi Oo 2016). While laws and

regulations in Mekong countries grant people freedoms and rights to peaceful assembly and to contest and appeal decisions through judicial and non-judicial arbitration, there has been limited progress in all countries with regards to access to justice for victims of land rights violations (Adler et al. 2006). Serious rights violations continue to arise as a result of forced evictions and dispossession of lands and resources, often backed by laws and policies that favour investors over smallholder farmers.

Key contestations and debates

A key point of contestation is land policy seeking to maximise large-scale foreign investment in land, on the one hand, and security of tenure for smallholders on the other. In Vietnam, planned revisions to the Land Law favour consolidation for private enterprises, yet there are debates as to whether this will result in more productive land use, at the expense of smallholder access (Nguyen and Warr 2020; Phuc To et al. 2019). Recent land and investment laws and revisions in Myanmar have been criticised for providing certainty for investors at the expense of smallholder security (Obendorf 2012; Buchanan et al. 2013; TNI 2013; Woods 2013a; 2013b). A particular problem is that customary land-use rights are not formally recognised by the current legal regime (Andersen 2016; Mark 2016; Springate-Baginski 2019; Boutry & Mya Darli Thant 2020). Most *taungya* or shifting cultivation/grazing land is not formally registered or mapped, making such areas particularly vulnerable to confiscation by private actors under the pretext of claiming “waste land” (Land Core Group 2009). There are thus continuing disparities and contradictions between rights given in law and enacted through policy, on the one hand, and customary rights and practices on the other (Diepart 2015; Adler & So 2012). Yet in the quest for a federalist state in Myanmar, ethnic minority groups in the borderlands have set up their own legal frameworks, in which recognition of customary tenure helps garner public support (Suhardiman, Bright, and Palmano 2019). In Thailand, legal developments have benefitted smallholders, firstly to combat against extra-territoriality for outside imperial powers, and later against communist insurgency (Larsson 2012). However, there has been a struggle to recognise the rights of people living in forest areas subsequently given protected status by the state (Fisher 2011; Johnson and Forsyth 2002).

State appropriation of land also provides challenges for land conversion in peri-urban areas (Hall, Hirsch, and Li 2011). Under Vietnamese land law, State appropriation of land is only permissible where it is required for public infrastructure, national defence or social and economic development that is in the public interest – a category that is open to interpretation and challenge (Suu 2009). In Laos, the revised 2019 Land Law allows requisition of land for public purposes or state investment projects with appropriate compensation (Articles 147 and 152). In practice, “public purpose” can be very broadly interpreted to include economic development that is for private economic gain. Moreover, the law does not require communities to be consulted over concessions planned in or near their villages.

Another key issue is the oft-heard heard problem that law exists in the books but not in practice. For example, it is commonly heard that Cambodia has good land laws but the challenge of implementation remains vast. National land laws often reflect the priorities and interests of international donors who ascribe to international legal norms that define the contours of “good land governance” (Flower 2018). In practice, however, configurations of political economy in each country make institutions highly resilient to change. Formal law is often superimposed on complex fields of pre-existing customary, colonial, socialist and market liberalisation laws (Crouch 2014; Adler

& So 2013; Lund 2011; Gillespie 1998). In Mekong countries, law thus often serves as a basis for negotiation of outcomes rather than for implementation or challenge, and in increasingly economically polarised societies this often leads to unequal outcomes (Adler & So 2012; LRICI 2011). Lack of law enforcement and irregularities in the implementation of existing legislation has also led to the proliferation of land-related human rights abuses (Colchester et al. 2013). There is a general perception that law serves the interest of the powerful. Instead of striving to improve transparency and accountability, legislative reform often appears to be aimed at formalizing the central role and prerogatives of the ruling parties. This has prompted some people to argue that land reform can only be truly effective with the support of enforceable grievance mechanisms (Gillespie, Hualing, and Nghia 2014).

Key differences and commonalities among Mekong countries

Land policies and laws are enacted on a country-by-country basis and each country has gone through reform at different times, in some cases through several iterations. A key commonality is the dynamics created by the superimposition of neoliberal projects in land onto post-conflict and/or post-socialist societies. In particular, the post-colonial experience and experiments with various guises of socialism have shaped the political economy of land in particular ways. There are also common donor influences associated with organisations such as FAO, the World Bank, DFAT, SDC, GIZ and others seeking to promote policy reform in the land sector, either directly by having input into laws and policies or through international agreements that governments and private parties adopt, such as the *Voluntary Guidelines on the Responsible Governance of Land Tenure* (FAO 2012).

In some instances the diffusion of international legal norms has resulted in common legal concepts and categories, such as provisions for land privatisation through titling programs, or customary and community-based lands and natural resource tenure. A recent paper conducted a review of laws in 100 countries, demonstrating that the recognition of and provisions for collective land ownership have improved over recent years (Wily 2018). In practice, however, these vary considerably across the Mekong countries. For example, the 2001 Land Law in Cambodia recognises communal land titles, but it sets up a number of hurdles that have made application for such land tenure recognition a drawn-out process. In Laos, communal land is being recognised on a pilot basis, and it is not tied to indigenous status (Baird 2013). In Myanmar, customary land-use rights are not formally recognised (Oberndorf 2012). Meanwhile, in Thailand there have been various schemes of community land titling over a number of national governments, but ultimately collective land tenure arrangements sit uneasily with either individuation of property within a free market or with state control over land (Hayward 2017).

Key links and interactions across borders and across scale

Historically, there has not been a great deal of interaction among governments in the formulation of land laws and policies, though legal norms have been diffused through the aid programs of international donors. There are signs that legal borrowing increasingly occurs within the Asian region, and there is more legal exchange or at least comparison within the region (Baird 2015; Baird 2013). For example, Myanmar has looked at Cambodia's experience in communal land titling. When it comes to agricultural use of land, there has been exchange, such as comparing experiences on tissue-culture banana production between Lao PDR, China, and Myanmar, or a more general interest in contract farming in Thailand.

There are also various instances of governance and policy advocacy supported at a regional level, often as part of global initiatives – for example, the significant involvement of international donors and NGOs in developing and promoting the use of the *Voluntary Guidelines on the Responsible Governance of Tenure* (FAO 2012). Franco and Khu Khu Ju (2016) outline how farmers in Myanmar have been using the guidelines to frame their pursuit of land justice and peace. Commodity booms and other global drivers of land grabbing suggest that governance reform also needs to extend beyond the land policy framework within individual countries and look at markets and regulatory arrangements at a distance from the site of grabbing. For example, complaints over land use for sugar plantations by the Thai company Mitr Phol in Cambodia have engaged an international CSO network in Southeast Asia and also Europe (Hall et al. 2015). A recent court case in Thailand on the matter concerned land in Cambodia, the first cross-border case of its kind. This is in line with what Sikor et al (2013) refer to as a shift in global land governance from “territory” to “flows”, where governance across borders is enacted through control over flows of goods produced on land, rather than direct control over land as territory.

Key reform issues and strategic openings

Land law reform remains a sensitive area of public discussion in many countries. Key reform issues and openings include:

- Involvement of reform-oriented companies in land governance reforms and new sets of laws that minimise land conflicts and provide more systematic methods for access to land. This is so that the potential for any future illegal land grabs do not pose significant risks to investors and increase their exposure to judicial claims.
- The incorporation of responsible investment into laws and policy, taking into consideration the rights of local land users, the environmental impacts of land use, and the needs of investors.
- Providing a basis for secure individual ownership or use rights under titling arrangements
- Legal recognition of customary and communal land
- Consultative processes in law and policy formulation
- Matching compensation policy and practice to market prices for land
- Constitutional definitions of rights in land between "the people" as a collective, state, business entities and individuals
- At the provincial and district level, openings in improving practices that link land allocation, resettlement, compensation, livelihood support and other programs oriented to smallholders through awareness and concern among local government officers who have to deal with consequences of decisions made higher up. Up-scaling the isolated successes of local initiatives may provide a useful direction for longer-term reform at higher levels.

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