

Review of 2012 Farmland Law amendments

EarthRights International is a non-governmental, non-profit organization that combines the power of law and the power of people in defense of human rights and the environment, which we define as “earth rights.” We specialize in fact-finding, legal actions, training of grassroots and community leaders, and advocacy campaigns.

This review of the 2020 amendments to the 2012 Farmland Law focuses on the extent to which the changes are consistent with the Myanmar National Land Use Policy.

The 2012 Farmland Law has been widely criticized since its enactment and it is inconsistent with the National Land Use Policy (NLUP) and international standards. The 2020 amendments^[1] to the law offer some minor improvements, but overall they increase the divergence between the law and the NLUP and international standards. In particular, the amendments:

- put farmers at increased risk of criminalization, reducing their security of tenure;
- reassert centralized control over land under customary use and management;
- do not grant access to the courts or put in place measures to address transparency or corruption; and
- contain no measures to address gender, conflict or the peace process.

This law is the third time that the NLUP has been contradicted by a land law enacted since the 2015 election. Updating the Farmland Rules cannot adequately address these contradictions.

Criminalisation of farmers

Section 37–A creates a new criminal offence. It applies to “Any person (squatter) who is convicted of working at the farmland without obtaining the right to use farmland.” In summary:

- All users of ‘farmland’ without a Form (7) Land Use Certificate (LUC) may now be committing an offence with a fine or prison sentence of six months to two years.^[2]
- It is a strict liability offence: no intent to commit an offence is required by the farmer.
- To start the LUC application process for land they are already using, a farmer effectively has to admit to committing this new offence.
- There are no transitional provisions, so this offence applies immediately even though thousands are farmers will be unaware of it and have no way to comply.

The scope of this offence will depend on whether or not it is applied to all land use that fits within the law’s definition of ‘farmland’.

[1] Amended by the Law Amending the Farmland Law (Pyidaungsu Hluttaw Law No. 2 of 2020).

[2] Section 12(f), which states that those with the right to use farmland “shall not trespass and carry out without being granted by the relevant Administrative Body of the Farmland” has been deleted. It could potentially have been used in a similar way. Section 12 is, however, considered to apply only to farmers with a Form 7, although the wording is unclear.



Scenario 1 – offence applied to land that is recorded by the Department of Agriculture, Land Management and Statistics (DALMS) as farmland

If the offence is only applied to land recorded as farmland by DALMS records (i.e. on kwin maps), it will still affect millions of farmers. For example, farmers on 60-70% of land in Shan state that is classified as farmland do not have a Form (7). It would apply to land recorded as farmland under DALMS records even if it was under customary tenure. [3]

Land that is outside of the DALMS records, but that is used for farming is likely to be classified as Virgin, Fallow or Vacant Land under the Vacant, Fallow and Virgin Lands Management Law (VFV) Law. Using this land without a VFV Permit is also an offence (unless the land use comes within the customary exemption).

Scenario 2 – offence applied to land that comes within the law’s definition of ‘farmland’

In this scenario, use of land in a way that fits within the definition of ‘farmland’ (even if DALMS has not recorded it as farmland) would be an offence if the farmer does not already have a Form (7). It could apply to land that would otherwise have been categorized as VFV land. It would apply to ‘farmland’ exempted from the VFV law as customary land.

In either scenario, it appears that anyone farming anywhere in Myanmar is now at risk of criminalization if they do not already have a Form 7 or VFV Permit, particularly if local elites and officials utilize these recent amendments for personal gain [4]. This contradicts the basic objective of the NLUP to “strengthen land tenure security.” [5]

Customary land use practices / management

The amended law makes no reference to customary land use practices or management. The 2018 amendment to the VFV Law took customary land and shifting cultivation outside of the remit of the VFV Law. The drafters could have replicated this exemption, but chose not to do. This is a clear breach on the NLUP which requires “The customary lands of ethnic groups used traditionally that fall under current forest land or farmland or vacant, fallow and virgin land classifications shall be transparently reviewed, registered, and protected as “customary land”[6]. The amended law also ignores communal ownership, again breaching the NLUP. [7]

Under the amendment, any farmer or community using land in a customary system in a way that falls within the definition of farmland (which now includes ‘shifting cultivation land’) appears to be within the scope of the new criminal offence. This would mean that every single orchard, paddy and upland field that forms part of a customary system would have to be carved out of that customary system and registered. The risk of criminalization appears greater where land is already classified by DALMS as farmland (i.e. scenario 1 above), but the offence could be applied to any ‘farmland’ (i.e. scenario 2 above)

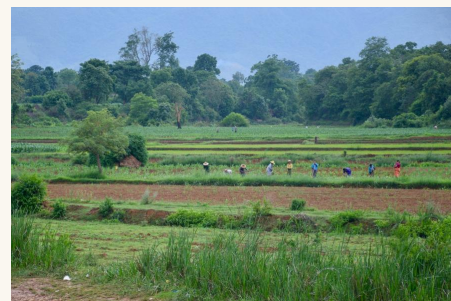
[3] See section 30-a of the VFV Law.

[4] They are cognizable offences, so investigations can be started by any police officer.

[5] Section 6(b) of the NLUP.

[6] Section 68 of the NLUP.

[7] Section 7(d) of the NLUP.



The amended, broader definition of ‘farmland’ now includes shifting cultivation (see below) which draws more customary land use into the ambit of the Farmland Law and the new criminal offence. This wide criminalization of customary practices may not have been the intention of the drafters, but the use of the word ‘squatter’ suggests that the offence is not aimed primarily at companies.

The rights granted under the Farmland Law are inconsistent with customary tenure for numerous well-documented reasons, not least that:

- it requires customary land users to give up their rights as customary users and ask permission for relatively weak, conditional user rights; and
- it treats land as an individually-owned economic asset.

Overall, the amended Farmland Law appears to have reasserted centralized control of farmland under customary tenure systems (including shifting cultivation land), treating it as an economic asset owned by the state. It copies the VFV Law approach of making farmers accept a centralized system of state ownership and relinquish customary rights, or risk criminalization. It vastly reduces the benefit of the exclusion of customary land from the VFV law. As with the VFV law amendment, it takes no account of the peace process, Nationwide Ceasefire Agreement or the situation of persons displaced by conflict.

It also suggests that the government and the drafters of the law consider that all land under customary tenure can be brought into the formal legal system simply by adding a categories such as ‘Shifting Cultivation Land’ to the Farmland Law.

This also highlights the need for interim protective measures for customary land use practices and management until a National Land Law is enacted.

Shifting cultivation

‘Shifting cultivation land’ has been added as a new category of farmland [8]. It is defined at a new section 3(e) to include rotational cultivation (a hlait kya taung ya) and shifting cultivation (shwit pyaung taung ya). Whilst recognition of shifting cultivation is a positive step away from previous hostility [9], as noted above, the failure to recognize customary land in the amendments is highly concerning. Shifting cultivation is rarely an individual activity; but a community-supported activity that takes place in the context of customary tenure and customary authority [10] which the Farmland Law has ignored. It also breaches the NLUP which requires the “Reclassification, formal recognition and registration of customary land use rights relating to rotating and shifting cultivation.” [11]

The inclusion of shifting cultivation land under section 3(a) in fact means that farmers carrying out shifting cultivation, whether or not under customary tenure, are now committing a criminal offence (even though there is currently no way of registering this land). When there is a way to register land, farmers would be surrendering any customary tenure claims.

[8] Section 3(a) of the amended Farmland Law.

[9] Including the NLD 2015 manifesto which pledged to “eradicate shifting cultivation”.

[10] Springate-Baginski, “Decriminalising agro-forestry: A primer on shifting cultivation in Myanmar.

[11] Section 41(b) of the NLUP.

Sections 4 – 9 of the Farmland Law do not apply to shifting cultivation land or alluvial land. These sections comprise Chapter II - Permission to Use the Farmland and Chapter III - Rights of Person who has the Right to Use the Farmland. Instead, rules for shifting cultivation land will be made under section 12 and the Central Farmland Body will be “adopting policy, guidance and supervision relating to the shifting cultivation land” [12]. So users of shifting cultivation land cannot currently apply for a LUC or secure rights over farmland and will have their rights determined by a ministry not Parliament.

The amended Farmland Law has also grouped shifting cultivation land with alluvial land. Alluvial land is temporary and may move or even disappear. In contrast, the land used for shifting cultivation is not temporary, rather its use status alters (for example whether it is being left fallow or not). When permits to use alluvial land are granted, they are usually granted for 1 year only. Clearly this would be totally unsuitable for shifting cultivation where land may be used and left fallow on a long-term rotational basis; when farmer leaves land to fallow they need to know that they can return to it in future years. [13]

Gender

The amended law fails to take any steps to improve gender equality (such as measures to reinforce the position of women through joint land ownership). This breaches the NLUP. [14]

Failure to include administrative remedies

It is positive that the bar on proceedings against members of Farmland Administrative Bodies (FABs) has been removed [15]. However, there is still no accessible judicial mechanism to challenge FAB decisions. The Farmland Law retains the provision that “The decision of the Region or State Administrative Body of the Farmland shall be final and conclusive,” ignoring the requirements of the NLUP for “easy access to judicial review or other dispute resolution mechanisms that are independent, fair, transparent and affordable” and that “local customary dispute resolution mechanisms, if they choose to do so.” [16]

Return of appropriated land

The requirement to return land that has been appropriated for a public purpose if it is not used has been removed [17]. This appears to be a regressive amendment that legitimizes excessive land seizures. The implications are, however, unclear because the section also now incorporates the words ‘public interest’ and ‘in accordance with the relevant existing law’ – this means it is unclear whether or not confiscations are intended to take place under the Farmland Law or using the 1894 Land Acquisition Law (and, when it is brought into effect, the 2019 Land Acquisition, Resettlement, and Rehabilitation Law).

[12] Section 17(I) of the amended Farmland Law.

[13] Springate-Baginski, “Decriminalising agro-forestry: A primer on shifting cultivation in Myanmar.

[14] See Part IX of the NLUP.

[15] Section 40 of the amended Farmland Law.

[16] Sections 8(i) and 41(b) of the NLUP

[17] Section 32 of the amended Farmland Law.

Change of crop use

Farmers were previously restricted to farming a ‘regular’ crop. It was an offence (with a two-year sentence) to change crop without permission from the FAB. This has been amended to allow farmers to change between ‘seasonal’ crops, which is a positive change. Farmers still cannot change from seasonal crops to, for example, orchards or perennials.

Leaving land fallow

The law has been amended from requiring that farmland shall not be fallow without sound reason to:

- requiring permission to leave such land fallow from the Village Tract FABs;
- limiting the ‘fallow’ period to two years; and
- excluding shifting cultivation land (i.e. meaning that shifting cultivation land can be left fallow without permission).

The requirement to get permission provides farmers security if permission is given, but leaves farmers at risk of arbitrary decisions and corruption. Farmers that have already left land fallow without permission remain at risk. A requirement to notify rather than to seek permission would have been preferable. Guidance to the Village Tract FAB on how to exercise its discretion could be added to the Farmland Rules. The two-year fallow period may also be insufficient for ‘upland’ areas that fall outside of shifting cultivation land.

Farmer representation and committee decision-making

Five farmer representative seats have been added to village and township FABs. This is positive, although there is no process for selecting these representatives (this could be set out in the Farmland Rules).

Transparency and accountability

The amendments have not addressed the consistent failure of FABs to make decisions in a transparent, accountable way and to do so in line with government policies. The amendments could have added express requirements for FABs to take account of policies such as the NLUP and Agriculture Development Strategy.

Key issues left unresolved are:

- What is the extent of the powers of the committees?
- Do decisions have to be approved or ratified by other administrative structures (at Township/District/State/ Central levels)?
- Can decisions be made without all the members present?
- Do committee members have to declare conflicts of interests?
- How do committees record and inform people of their decisions?
- When and how can farmers review or challenge these decisions?

[18] Section 12(i) of the amended Farmland Law.

[19] Sections 16(c) and (d) of the amended Farmland Law.

[20] Including section 7(a) of the NLUP which sets out the principle “To ensure transparency, responsibility and accountability in land and natural resource governance”. See also section 17(a).



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