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Land disputes and the ongoing development of the substantive rule of law in Myanmar (Burma)

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Abstract. The Myanmar Parliament has passed the *Farmland Law* and the *Vacant, Fallow, and Virgin Lands Management Law*. Both pieces of legislation form part of a legislative response as Myanmar (Burma) emerges from a sixty year period of chronic armed conflict. Part 2 of this paper outlines the underlying grievances associated with land disputes with a focus upon Kayin (Karen) and Rakhine (Arakan) states. Part 3 critically analyses the relevant constitutional and legislative framework and the role of Parliamentary bodies in light of these underlying grievances. Part 4 adopts a comparative stance and considers the approach taken in Kenya as it has sought to address similar issues. Finally, Part 5 reflects upon the role that constitutional and legislative reform in relation to land disputes plays in the ongoing development of the substantive rule of law in Myanmar (Burma).

1. Introduction

Recent years have seen the emergence of Myanmar¹ from a dark period of her history under years of military rule, tyranny and dictatorship. With a new Constitution,² the release of Daw Aung San Suu Kyi,³ Parliamentary elections⁴ and reports of greater freedom within the state;⁵ Myanmar has been on a journey from dictatorship to democracy. Within this context it is appropriate and timely to consider issues in relation to the ongoing development of the substantive rule of law in the state.

One such issue is that of land disputes. Given the turbulent history of Myanmar, it is perhaps unsurprising that the issue of disputed lands arises, as much of the armed

¹ This article will use the term “Myanmar” to describe the country that has also been known as “Burma”. This is not intended to be a political statement.

² *Constitution of the Republic of the Union of Myanmar 2008* (Myanmar); See also Nathan Willis, 'Natural disaster, national sovereignty and state negligence: an international law analysis of the denial of emergency relief after cyclone Nargis in Myanmar (Burma)' (2012) 31(2) *University of Tasmania Law Review* 134.

³ BBC News Asia-Pacific, *Burma releases pro-democracy leader Aung San Suu Kyi* (13 November 2010) <<http://www.bbc.co.uk/news/world-asia-pacific-11749661>>.

⁴ Aljazeera, *Suu Kyi defends election boycott* (18 November 2010) <<http://www.aljazeera.com/news/asia-pacific/2010/11/20101118101724623904.html>>; BBC News Asia-Pacific, *Burma's Aung San Suu Kyi wins by-election: NLD party* (1 April 2012) <<http://www.bbc.co.uk/news/world-asia-17577620>>.

⁵ This author has visited Myanmar on a number of occasions. His most recent visit was in June 2013. During this visit he spoke with numerous people who reported a perception of greater personal freedom when compared to previous years. These same people had previously reported limited personal freedom on previous occasions.

conflict with Myanmar's borders has arisen over disputed territory.⁶ As the Myanmar government has enacted the Farmland Law⁷ and the Vacant, Fallow, and Virgin Lands Management Law⁸ it is appropriate and timely to critically consider both pieces of legislation with reference to the underlying grievances associated with land disputes. This article focuses upon Kayin⁹ state in the east of the country and Rakhine¹⁰ state in the west. Further, with reference to Kenya, it is possible to adopt a comparative stance to inform this critical analysis.

Part 2 of this paper outlines the underlying grievances associated with land disputes with a focus upon Kayin and Rakhine states. Part 3 critically analyses the relevant constitutional and legislative framework and the role of the Parliamentary Committees in light of these underlying grievances. Part 4 adopts a comparative stance and considers the approach taken in Kenya as it has sought to address similar issues. Finally, Part 5 reflects upon the role that constitutional and legislative reform in relation to land disputes plays in the ongoing development of the substantive rule of law in Myanmar.

2. Underlying grievances associated with land disputes in Kayin and Rakhine states

2.1 Kayin state

Situated on the eastern side of Myanmar, Kayin state shares a border with neighbouring Thailand. Much of the history of Kayin state, Myanmar, and the chronic armed conflict there, has been documented elsewhere.¹¹ For present purposes it is sufficient to observe that recent history has seen the Karen National Union (KNU) participate in a cease fire and peace process with the Myanmar Government after an extended sixty year period of conflict between the armed forces of both political groups.¹² This peace process is fragile¹³ and it seems that issues of land¹⁴ are highly relevant to ongoing negotiations.¹⁵

⁶ Murray Hiebert and Phuong Nguyen, *Land Reform: A Critical Test for Myanmar's Government* (9 November 2012) Center for Strategic and International Studies (CSIS) <<http://csis.org/publication/land-reform-critical-test-myanmars-government>>.

⁷ *Farmland Law 2012* (Myanmar); *Farmland Bill 2011* (Myanmar); *Farmland Rules 2012* (Myanmar); Myanmar President Office, *Enforcement of Farmland Law designated Notification No. 62/2012* (3 September 2012) <<http://www.president-office.gov.mm/en/?q=briefing-room/notifications/2012/09/03/id-609>>.

⁸ *The Vacant, Fallow and Virgin Lands Management Law 2012* (Myanmar); *The Vacant, Fallow and Virgin Lands Management Rules 2012* (Myanmar).

⁹ This article will use the term "Kayin" state to refer to the state within Myanmar that has also been known as "Karen" state. This is not intended to be a political statement.

¹⁰ This article will use the term "Rakhine" state to refer to the state within Myanmar that has also been known as "Arakan" state. This is not intended to be a political statement.

¹¹ See Martin Smith, *Burma: Insurgency and the Politics of Ethnicity* (Zed Books, 1991); Bertil Lintner, *Burma in revolt: Opium and insurgency since 1948* (White Lotus, 1994).

¹² Saw Yan Naing, 'The Struggle to Control the Peace Process', *The Irrawaddy* (online), 19 September 2013 <<http://www.irrawaddy.org/archives/44315>>; Displacement Solutions, 'Bridging the HLP Gap - The Need to Effectively Address Housing, Land and Property Rights During Peace Negotiations and in the Context of Refugee/IDP Return: Preliminary Recommendations to the Government of Myanmar, Ethnic Actors and the International Community' (June 2013) <<http://displacementsolutions.org/landmark-report-launch-bridging-the-housing-land-and-property-gap-in-myanmar/>>, 20.

¹³ Saw Yan Naing, above n. 12

One of the reasons that these issues are of greater relevance now is that there is an expectation that upon reaching a peace accord, refugees, many of whom are of Karen ethnicity and currently living in Thailand, will be expected to return to Kayin state.¹⁶ However, since the signing of the ceasefire in January 2012 there has been an increase in land confiscation, deforestation and industrial construction works in the state.¹⁷ There is also the issue of land mine contamination in these areas and the potential for conflict to resume.¹⁸

The Karen Human Rights Group (KHRG) has prepared a comprehensive report, released in March 2013, documenting these phenomena.¹⁹ The report relies upon data gathered between January 2011 and November 2012 and finds 'lack of consultation, land confiscation, disputed compensation and development-induced displacement and resettlement'²⁰ as key issues.

Of particular concern is the 'sharp increase in reports of land confiscation'.²¹ The confiscated land is reportedly used for 'plantation agriculture, logging, dam construction, mining and infrastructure development'.²² The incidents involve companies, both foreign and domestic together with Myanmar military troops and government officials.²³ It should also be noted that KNU agencies were also involved in these practices, but to a lesser degree.²⁴

The report further documents 'inadequate or no compensation' for these incidences of land confiscation and in cases where the purchase of land occurs, little negotiation or opportunity to refuse the purchase is afforded to the traditional land holder.²⁵

While the conflict has 'prevented the formal government registration of land ownership',²⁶ the KNU has reportedly, 'been trying to address the issue of land rights and began issuing its own land documents to displaced Karen two years ago'.²⁷ The Karen Agricultural Department has responsibility for this task.²⁸ There are also reports that the KNU will document land confiscation where it occurs and raise these in discussions with the government.²⁹

¹⁴ Saw Yan Naing, 'KNU and Karen NGOs Discuss Land Rights Challenges', *The Irrawaddy* (online), 26 July 2013 <<http://www.irrawaddy.org/archives/40801>>.

¹⁵ Saw Yan Naing, 'With ceasefire, Land-Mine Removal Begins in War-Torn Karen State', *The Irrawaddy* (online), 28 June 2013 <<http://www.irrawaddy.org/archives/38844>>.

¹⁶ Saw Yan Naing, above n 14.

¹⁷ Ibid.

¹⁸ Ibid; Saw Yan Naing, above n 15.

¹⁹ The Karen Human Rights Group (KHRG), 'Losing Ground: Land conflicts and collective action in eastern Myanmar' (March 2013) <http://www.burmalink.org/wp-content/uploads/2013/03/KHRG-2013.-Losing-Ground_Land-conflicts-and-collective-action-in-eastern-Myanmar.pdf>.

²⁰ Ibid 1.

²¹ Ibid 27.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid 28.

²⁶ Saw Yan Naing, above n 14.

²⁷ Ibid.

²⁸ Ibid.

²⁹ S'Phan Shaung, *The KNU land policy to go to the Burma government* (30 July 2013) Karen News <<http://karennews.org/2013/07/the-knu-land-policy-to-go-to-the-burma-government.html/>>.

At a Myanmar Land Rights Conference held in Chiang Mai, Thailand in June 2013 the KNU's land rights policy was discussed.³⁰ The issue of the return of the refugees was raised, but parallel to this, discussion occurred around the existence of '2 land laws'³¹ – the land law of the KNU and the land law of the Myanmar government. Statements were made implying that a 'KNU law'³² exists and further that the 'KNU will help make sure that land gets to the right person'.³³ In light of these statements, it seems prudent to ask how the KNU laws are framed, how the KNU will ensure that land 'gets to the right person'³⁴ and further, how the co-existence of KNU and Myanmar legal frameworks will work in practice. While we will return to these questions, it is worth noting that a report by Displaced Solutions has outlined the process undertaken by the KNU so far:

In addition, the Karen Agriculture Department (KAD), one of thirteen departments under the KNU, is working with the Karen Environmental and Social Action Network (KESAN) to use GPS and GIS for land documentation in KNU-held areas. The KNU plans to use this documentation for KNU land titling, and the KNU will use the ceasefire negotiations as a platform for trying to convince the Myanmar government to recognise KNU titles.³⁵

Further, it must be recognised that while there are reports of recent financial windfalls for the KNU,³⁶ they have arguably been substantially weakened, in terms of both finances and human resources for some time.³⁷

2.2 Rakhine state

On the western side of Myanmar, Rakhine state shares a northern border with Bangladesh and has an expansive south-western coastline onto the Bay of Bengal.

The state differs from Kayin state in that the level of organised armed conflict between ethnic groups and the Myanmar government has been lower.³⁸ And yet, there have been ongoing tensions and violent clashes between ethnic Rakhine and ethnic Rohingya³⁹ peoples that have resulted in the 'destruction of thousands of houses, the displacement of tens of thousands of people and an unknown number of deaths'.⁴⁰ It

³⁰ Emailed written notes from the Myanmar Land Rights Conference held in Chiang Mai on 5 June 2013 from Name Withheld to Nathan Willis, 28 June 2013.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Displacement Solutions, above n 12.

³⁶ Saw Yan Naing, above n 12.

³⁷ Aung Zaw, 'The KNU: To Cease Fire, or Not to Cease Fire?', *The Irrawaddy* (online), February 2002 <http://www2.irrawaddy.org/article.php?art_id=2535>.

³⁸ Irish Centre for Human Rights, 'Crimes against Humanity in Western Burma: The Situation of the Rohingyas' (NUI Galway, 2010), 90.

³⁹ The term "Rohingya" is disputed and some literature exists challenging the existence of the group despite the overwhelming literature to the contrary. See eg U Khin Maung Saw, 'The "Rohingyas", Who Are They? The Origin of the Name "Rohingya"' in Uta Gartner and Jens Lorenz (eds), *Tradition and Modernity in Myanmar* (Lit, 1993) 89.

⁴⁰ Melanie Teff and Sarnata Reynolds, *Rohingya in Burma: Spotlight on Current Crisis Offers Opportunity For Progress* (30 October 2012) Refugees International

has been reported that ‘the government is doing almost nothing to foster reconciliation between the two groups’⁴¹ and that ‘over 115,000 predominantly Rohingya IDPs [Internally Displaced Persons] remain displaced...[and] continue to ensue terrible conditions in camps’.⁴² Other ethnic Rohingya people are fleeing by boat seeking asylum elsewhere.⁴³

This state too has historical evidence of land confiscation,⁴⁴ arising from the construction of “model villages”. As has been reported:

Once the order for the construction of a model village is made, the VPDC [Village Peace and Development Council] Chairman will begin confiscating land, often citing arbitrary reasons or by simply stating that their right to occupy the land has been rescinded. Confiscations are not subject to any formal procedures meaning that there is no right of appeal. The confiscated land will then be distributed amongst the “model villagers”. The Rohingyas are often forced to provide labour and materials for the actual construction of the model villages. Model villages are usually structurally superior to pre-existing Rohingya homes and are wired for electricity which is practically unheard of outside of the townships of Maungdaw, Buthidaung and Ruthidaung. Rohingya forced labour is also used to construct pagodas and schools to be utilized by the model village families.⁴⁵

Following confiscation, it is not uncommon for people of Rohingya ethnicity to then lease back confiscated land from model villagers who lack agricultural skills.⁴⁶ Further forced displacements, on the premise of preventing ongoing violent clashes between the ethnic groups, have also occurred.⁴⁷ It must be recognised that this violence, and the consequences thereof, is harming members of both ethnic communities with reports of lost incomes from farming by people of Rakhine ethnicity.⁴⁸

<<http://www.refugeesinternational.org/policy/recommendation/rohingya-burma-spotlight-current-crisis-offers-opportunity-progress-policy-r-0>>.

⁴¹ Shibani Mahtani, 'Myanmar Buddhists Ally Against Muslims', *The Wall Street Journal* (Singapore), 4 July 2013.

⁴² Altsean Burma, 'Burma's Facade: An Update on Conflicts, Displacement & Human Rights Violations' (12 March 2013); See also Office of the United Nations High Commissioner for Refugees, *Six months on, some 115,000 displaced people in need in Myanmar* (7 December 2012) <<http://www.unhcr.org/50c1ec3e9.html>>.

⁴³ Alisa Tang, *250 Rohingya men from Myanmar swim ashore in southern Thailand* (12 September 2013) Thomson Reuters Foundation <<http://www.trust.org/item/20130912101837-el6ym/>>; Human Rights Watch, 'All You Can Do Is Pray: Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State' (22 April 2013) <<http://www.hrw.org/reports/2013/04/22/all-you-can-do-pray-0>>, 75.

⁴⁴ Irish Centre for Human Rights, above n 38, 92; See also Asia Pacific Refugee Rights Network, *Joint Statement on the Requirements of a Regional Solution for the Rohingya* (6 March 2009) <<http://www.aprrn.info/1/index.php/resources/aprrn-statements/30-joint-statement-2>>.

⁴⁵ Irish Centre for Human Rights, above n 38, 100.

⁴⁶ *Ibid.*

⁴⁷ Human Rights Watch, 'The Government Could Have Stopped This: Sectarian Violence and Ensuing Abuses in Burma's Arakan State' (31 July 2012) <<http://www.hrw.org/reports/2012/07/31/government-could-have-stopped>>, 34.

⁴⁸ IRIN, *Ethnic tensions hit livelihoods in western Myanmar* (23 September 2013) <<http://www.irinnews.org/report/98810/post-conflict-tensions-erode-livelihoods-in-rakhine-state>>.

Additionally, land has been confiscated⁴⁹ to construct a \$US2.5 billion, 793 km pipeline that connects China, Myanmar and the Indian Ocean. The pipeline will carry natural gas from the gas fields off Rakhine state in addition to crude oil shipments from the Middle East,⁵⁰ and commenced transmitting gas on 29 July 2013.⁵¹

The port of Kyaukpyu, Rakhine state is predicted to become 'the region's next petrochemical hub after Singapore'.⁵² As a deep-sea port, it 'represent[s] the shortest trade route from India to China...saving [a] sailing distance [of] about 5000 kilometres compared to the existing route through the Malacca Strait to China'.⁵³ In light of the development potential, it is important to note that on 25 October 2012 a 14.4 hectare area comprising of 811 buildings on the eastern edge of Kyaukpyu was destroyed by arson attacks.⁵⁴ Interestingly, this area was mainly populated by people of Kaman ethnicity,⁵⁵ raising the possibility of other motives than ethnic tension in this instance.

3. Critical analysis of legal framework and the role of the Parliamentary Committees

3.1 Legal Framework

3.1.1 2008 Constitution

It must be noted that the 2008 Constitution⁵⁶ is controversial given that a referendum for its adoption immediately followed the Cyclone Nargis natural disaster in Myanmar amid international condemnation as to the inadequacy of the then military government's response, and further, the resultant validity of the referendum outcome given these

⁴⁹ William Boot, 'Chinese and Indian Firms Tipped for Kyaukphyu SEZ Bidding Race', *The Irrawaddy* (online), 12 September 2013 <<http://www.irrawaddy.org/archives/43874>>; See also Transnational Institute, 'Access Denied - Land Rights and Ethnic Conflict in Burma' (May 2013) <<http://www.tni.org/sites/www.tni.org/files/download/accesdenied-briefing11.pdf>>, 5.

⁵⁰ Leslie Hook, 'China starts importing natural gas from Myanmar', *Financial Times* (online), 29 June 2013 <<http://www.ft.com/cms/s/0/870f632c-f83e-11e2-92f0-00144feabdc0.html>>; 'No more irresponsible remarks on Myanmar-China pipelines', *Xinhua* (online), 29 June 2013 <http://news.xinhuanet.com/english/indepth/2013-07/29/c_132584106.htm>; 'The Myanmar section of Sino-Myanmar Gas Pipeline in operation - China's 4th largest energy import route', *Dong Fang Daily* (online), 18 July 2013 <<http://www.dfdaily.com/html/51/2013/7/18/1035473.shtml>>; Jacob Gronholt-Pedersen, 'Myanmar Pipelines to Benefit China; New Oil, Gas Supply Routes Are Set to Help Slake Nation's Growing Thirst for Energy; Local Tensions Rise', *The Wall Street Journal* (online), 13 May 2013 <<http://online.wsj.com/article/SB10001424127887324326504578466951558644848.html>>; Nirmal Ghosh, 'Myanmar states caught in Sino-India rivalry', *The Straits Times* (online), 21 June 2013 <<http://www.stasiareport.com/the-big-story/asia-report/china/story/myanmar-states-caught-sino-india-rivalry-20130621>>; May Wong, *Rakhine conflict won't affect Kyauk Phyi SEZ, says Myanmar govt* (9 September 2013) Channel NewsAsia <<http://www.channelnewsasia.com/news/business/international/rakhine-conflict-won-t/807528.html>>.

⁵¹ 'The oil and gas pipelines are the test stone for Myanmar's attitude toward China', *Global Times* (online), 29 July 2013 <<http://opinion.huanqiu.com/editorial/2013-07/4180937.html>>.

⁵² 'China in the lead', *Bangkok Post* (online), 20 May 2013 <<http://www.bangkokpost.com/business/news/350963/china-in-the-lead>>.

⁵³ Ibid; See map in Thant Myint U, *Where China Meets India* (Farrar, Straus and Giroux, 2012), xvi-xvii..

⁵⁴ Human Rights Watch, 'Damage Assessment Summary of Kyaukpyu' (25 October 2012) <http://www.hrw.org/sites/default/files/related_material/2012_Burma_Satimage.pdf>.

⁵⁵ Human Rights Watch, above n 43.

⁵⁶ *Constitution of the Republic of the Union of Myanmar 2008* (Myanmar).

circumstances.⁵⁷ However, the Constitution has been the subject of analysis and is worthy of consideration.

Under the current Constitution, specifically Article 37(a), the state is the ‘ultimate owner of all lands’.⁵⁸ This Article is in tension with other Articles⁵⁹ that indicate the ‘adoption of a market economy’.⁶⁰ In explaining Article 37, Orberndorf has stated that ‘this means that only land use property rights may be granted, and that the government reserves the power to rescind these rights’.⁶¹ As the Asian Human Rights Commission have correctly recognised, ‘this enables the state to take over any land on the pretext of embarking upon a project in “the national interest”’.⁶² Orberndorf further suggests that ‘[t]he Government’s right to rescind land use property rights should be limited to takings that serve a clear public purpose’.

It should be noted that the Constitution allows for ‘states, regions, divisions and zones [to] have authority to enact their own laws so long as they do not conflict directly with the Constitution or national laws, rules and regulations’.⁶³

It must be noted that moves are afoot to reform the current Constitution.⁶⁴ It is unclear as to the extent to which Article 37(a) may be considered in this process.

3.1.2 Farmland Law

The Farmland Law passed the Myanmar Parliament in 2012,⁶⁵ and was subsequently ‘enforced’ by the President on 31 August 2012.⁶⁶ There are also accompanying regulations in the form of the Farmland Rules.⁶⁷

It has been observed that the Law ‘attempts to put in place a system of securing rural land tenure through a land use certificate and registration system’.⁶⁸ This system allows for rights to be ‘transfer[ed], exchange[ed], or leas[ed]’.⁶⁹ And yet, as Oberndorf has correctly recognised, ‘the tenure security provided under the law is weak, due to the fact that the Government retains ultimate ownership of all land, and can rescind land use

⁵⁷ Willis, above n 2.

⁵⁸ *Constitution of the Republic of the Union of Myanmar 2008* (Myanmar), art 37(a); Robert B. Oberndorf, ‘Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law’ (Land Core Group., Food Security Working Group., November 2012) <http://www.forest-trends.org/publication_details.php?publicationID=3274>, 16.

⁵⁹ *Constitution of the Republic of the Union of Myanmar 2008* (Myanmar), arts 35, 37, 356 and 372; Oberndorf, above n 58.

⁶⁰ Oberndorf, above n 58.

⁶¹ *Ibid.*

⁶² Asian Legal Resource Centre (ALRC), *Myanmar at risk of land-grabbing epidemic* Asian Human Rights Commission, <<http://www.humanrights.asia/news/alrc-news/human-rights-council/hrc20/ALRC-CWS-20-03-2012>>.

⁶³ United States Agency for International Development (USAID), ‘USAID Country Profile - Property Rights and Resource Governance - Burma’ (2013) <http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Burma_Profile.pdf>, 8-9.

⁶⁴ Sydney Law School, The University of Sydney, ‘Myanmar Constitutional Democracy Workshop, Report on Proceedings’ (8-10 May 2013).

⁶⁵ *Farmland Law 2012* (Myanmar).

⁶⁶ Myanmar President Office, above n 7.

⁶⁷ *Farmland Rules 2012* (Myanmar).

⁶⁸ Oberndorf, above n 58, 19.

⁶⁹ Invest in Myanmar, *New Myanmar Land Laws* (29 October 2012) <<http://www.investinmyanmar.com/new-myanmar-land-laws/>>.

rights if the conditions of use are not met'.⁷⁰ This has caused some to comment that the law, 'resembles the authoritarian socialist-era laws of old'.⁷¹ As previously mentioned, this 'opens the door to confiscation of agricultural land on any pretext associated with a state project'.⁷² Indeed it should have been said that the law, 'set[s] up a system of land admin[istration] that diminished security to tenure, lacks adequate procedural safeguards, undermines faith in the rule of law and fosters cronyism and corruption'.⁷³

The Transnational Institute sees the Farmland Law as:

significant because it signals the government's wholesale embrace of a Western-style (individual) private property rights regime that (re)values land and other associated natural resources as an economic asset, versus a more human rights based approach to the use, management and governance of land and natural resources.⁷⁴

Of further concern is that creation of a Farmland Administration Board created under the legislation is 'beyond the judiciary branch'⁷⁵ and 'may be considered as unconstitutional, since the current Constitution does establish clear separation of powers between the legislative, executive and judicial branches of Government'.⁷⁶

It should be noted that others see the legislation more positively as moving land trade away from the black market,⁷⁷ and the need for reform of the law, including in relation to judicial recourse has been flagged by the Government.⁷⁸

3.1.3 Vacant, Fallow and Virgin Lands Management Law

Like the Farmland Law, the Vacant, Fallow and Virgin Lands Management Law⁷⁹ (VFVLM) was passed by Parliament in 2012. There are accompanying regulations in the form of Rules.⁸⁰ The legislation 'allows leases of State land classified as 'vacant, fallow or wastelands [virgin lands]' for 30 year periods'.⁸¹ Under the legislation there is a:

⁷⁰ Oberndorf, above n ; It is noted that the published Law provides that 'the State is original owner of all lands'. It is recognised that this is likely a difference in translation rather than any substantive difference in legislative intent.

⁷¹ Asian Legal Resource Centre (ALRC), above n 62.

⁷² TrustLaw, *Myanmar farmers lose their grip on land* (30 August 2012) Thomson Reuters Foundation, <<http://www.trust.org/item/?map=myanmar-farmers-lose-their-grip-on-land>>; See also Displacement Solutions, above n 12, 27.

⁷³ Emailed written notes from the Myanmar Land Rights Conference held in Chiang Mai on 5 June 2013 from Name Withheld to Nathan Willis, 28 June 2013.

⁷⁴ Transnational Institute, above n, 3.

⁷⁵ Ibid.

⁷⁶ Oberndorf, above n 58, 19.

⁷⁷ Kyaw Kyaw, 'Land Reform Key to Burma's Future', *The Diplomat* (online), 25 August 2012 <<http://thediplomat.com/2012/08/25/land-reform-key-to-burmas-future/>>.

⁷⁸ 'Myanmar seeks to review Farmland Law, says forum', *Eleven Myanmar* (online), 4 December 2012 <<http://elevenmyanmar.com/politics/1573-myanmar-seeks-to-review-farmland-law-says-forum>>;

'Farmland Law to be revised for amendment', *Eleven Myanmar* (online), 1 July 2012 <<http://elevenmyanmar.com/politics/195-farmland-law-to-be-revised-for-amendment>>.

⁷⁹ *The Vacant, Fallow and Virgin Lands Management Law 2012* (Myanmar).

⁸⁰ *The Vacant, Fallow and Virgin Lands Management Rules 2012* (Myanmar).

⁸¹ Displacement Solutions, above n 12, 29.

lease limit of 5000 acres at any one time, with a total maximum amount of 50,000 acres for any single person or entity. Both nationals or Myanmar and foreign entities can lease land under this law subject to a two-step process involving approvals from the Myanmar Investment Committee and then the Land Allotment Committee. Some have claimed that up to half of the land in the country could ostensibly be classified as technically 'fallow', which, if correct, provides a very worrying indication that displacement may become rampant as the new law is implemented.⁸²

Those granted land use rights under this legislation do not have the right to 'mortgage, give, sell, lease or otherwise transfer or divide land without permission from the Cabinet of the Union Government'.⁸³

Some see this legislation as 'legally allow[ing] the government's Central Land Management Committee to reallocate smallholder farms...to private companies instead'.⁸⁴ It should be noted that 'the Vietnamese government recently purchased a 120,000 acre rubber concession in southern Rakhine state'⁸⁵ and that as at 31 Jan 2011, 2,161 acres of land in Kayin state had been granted to a single company.⁸⁶

An article in the New York Times has warned that 'investors should consider the land tenure impact of ventures, particularly because many of these infrastructure projects require removing farmers from their land, a destabilizing force during this sensitive transition'.⁸⁷ The government statement in relation to these laws states: 'those who obey the prescribed laws would have to bear the fruits while those who fail to follow it would face legal action'.⁸⁸

The Transnational Institute has recognised that 'smallholder farmers have been labelled as 'squatters' under this law'.⁸⁹ In a televised address, the President of Myanmar recently stated that 'the country was facing "difficulties in land management as squatters on forest land, virgin and fallow lands and others are acting as if they originally own the plot they illegally occupied'.⁹⁰ Given these words, it is reasonable to consider whether the current legal framework is directed towards a 'pretext of legality'⁹¹ rather than legislative reform directed towards the development of the substantive rule of law in Myanmar.

⁸² Ibid; See also Oberndorf, above n 58, 22.

⁸³ United States Agency for International Development (USAID), above n 63, 12.

⁸⁴ Land Research Action Network (LRAN), *Land Not for Sale in Myanmar* (12 October 2012) <<http://www.landaction.org/spip.php?article666>>.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Roy Prosterman and Darryl Vhugen, 'Land to the Tillers of Myanmar', *The New York Times* (online), 13 June 2012 <http://www.nytimes.com/2012/06/14/opinion/land-to-the-tillers-of-myanmar.html?_r=0>.

⁸⁸ Ministry of Agriculture and Irrigation, Myanmar., *Main Purpose of Farmland Law Enables All Farmers* (2012) <<http://www.moai.gov.mm/>>.

⁸⁹ Transnational Institute, above n 49, 4.

⁹⁰ Kyaw Kyaw, above n 77.

⁹¹ Ibid.

3.2 Parliamentary Bodies

A number of Parliamentary bodies have been established in Myanmar in recent times. The Rule of Law and Tranquility Committee (RLTC) is chaired by Daw Aung San Suu Kyi and released a report on 31 July 2013.⁹² The report outlines the receipt of '3466 letters regarding land grabbing'⁹³ and finds:

Lands for plantation are grabbed illegally. Land grabbers work in those lands taking land rent. Although grabbed lands are decided to be returned to original owners according to the findings of Inquiry Commissions, the owners have not received them back yet. Sometimes, they are even brought to the court with charges of trespassing. Buildings are constructed on grabbed land as they don't want to return to original owners.⁹⁴

It is important to note that although the RLTC report makes this finding, there is no recommendation within the report directly addressing the issue of land confiscation. In relation to the RLTC, a Rakhine Nationalities Development Party (RNDP) member of the committee has commented, 'although the report does a good job highlighting the need [for rule of law], I am not very satisfied with it',⁹⁵ and further, 'The committee does not actually have authoritative power to intervene, except highlighting the issues affecting the people'.⁹⁶

In addition, the Land Investigation Commission (LIC)⁹⁷ found that 'the army had taken some 250,000 acres of farmland from its owners, and proposed in December last year that confiscated land should be returned its [sic] original owners. The military has not complied, however'.⁹⁸ The report stated that:

Farmlands were confiscated for six different reasons: the expansion of urban areas; expansion of industrial zones; expansion of army battalions and military units; construction of state-owned factories; implementation of state-run agricultural and animal husbandry projects; and land allocation to private companies with links to military.⁹⁹

⁹² Rule of Law and Tranquility Committee, Myanmar, 'Report of the Rule of Law and Tranquility Committee' (31 July, 2013).

⁹³ Ibid, 3.

⁹⁴ Ibid, 4.

⁹⁵ Nyein Nyein, 'Interference in Judicial System Harming Burmese People: Lawmakers', *The Irrawaddy* (online), 14 August 2013 <<http://www.irrawaddy.org/archives/42022>>.

⁹⁶ Ibid.

⁹⁷ John Chit Nyien, 'Seized Land' Commission facing problems during investigations', *Mizzima* (online), 7 September 2013 <<http://www.mizzima.com/news-91481/prisoner-watch/10016-seized-land-commission-facing-problems-during-investigations>>; Htet Naing Zaw and Aye Kyawt Khaing, 'Military Involved in Massive Land Grabs: Parliamentary Report', *The Irrawaddy* (online), 5 March 2013 <<http://www.irrawaddy.org/archives/28506>>.

⁹⁸ Lawi Weng, 'Rubber Tappers Say Burma Army Is Blocking Plantation', *The Irrawaddy* (online), 13 September 2013 <<http://www.irrawaddy.org/archives/43930>>.

⁹⁹ Htet Naing Zaw and Aye Kyawt Khaing, above n 97.

According to the LIC, there is 20,000 acres of land in Rakhine state that is disputed.¹⁰⁰ The Human Rights Foundation of Monland have reportedly criticised the LIC, 'we've found the land investigation Commission has no power in Parliament. They are just a group who communicate between the land victims and the government'.¹⁰¹ Another report of the finding states that '300,000 hectares were confiscated by the army, which offered little compensation to affected farmers and crushed any local dissent...these land grabs are not coming under scrutiny from both the public and Parliament'.¹⁰² While the government has promised to 'solve land confiscation issues within a year',¹⁰³ the mechanisms with which this may occur are unclear.

4. Comparative consideration of the approach taken in Kenya to address land disputes

Seven thousand kilometres from Myanmar, in sub-Saharan Africa, lies Kenya. The parallels with Myanmar may not be immediately apparent but both arguably share a number of common features. Both are former British colonies, both have seen ethnic conflict, both have communities that derive their livelihood from smallholder agriculture,¹⁰⁴ both have undergone recent Constitutional reform, and importantly for our purposes here, both have experienced land disputes, including land grabbing,¹⁰⁵ within a context of violence.¹⁰⁶

4.1 Constitutional framework

The 2010 Constitution of Kenya,¹⁰⁷ contains a protection to the right of property acquisition and ownership.¹⁰⁸ In addition a Chapter of the Constitution is dedicated to Land and Environment.¹⁰⁹ While it is clear that 'All land in Kenya belongs to the people of Kenya',¹¹⁰ there are distinctions made between classifications of ownership, 'public, community or private'.¹¹¹

¹⁰⁰ Thein Hlaing, 'Restoration of land seized too slow, too less: Inquiry Commission', *Mizzima* (online), 28 August 2013 <<http://www.mizzima.com/news-91481/prisoner-watch/9938-restoration-of-land-seized-too-slow-too-less-inquiry-commission>>.

¹⁰¹ Lawi Weng, above n .98

¹⁰² Lawi Weng and Saw Yan Naing, 'Gathered Farmers Call on Govt to End Land Grabs', *The Irrawaddy* (online), 20 August 2013 <<http://www.irrawaddy.org/archives/42420>>.

¹⁰³ Eleven Media Group, *Govt plans to solve land confiscation issues within a year* (19 September 2013) <<http://elevenmyanmar.com/national/3454-govt-plans-to-solve-land-confiscation-issues-within-a-year>>.

¹⁰⁴ UN Office for the Coordination of Humanitarian Affairs, *Land dispute spawns violence, displacement* (1 May 2007) <<http://www.irinnews.org/report/71884/kenya-land-dispute-spawns-violence-displacement>>; See also Peter Ondiege, 'Land tenure and soil conservation' in *In Land We Trust: Environment, Private Property and Constitutional Development* (1996) .

¹⁰⁵ Omwanza Ombati, 'Repossession of Illegally Acquired Public Land in Kenya: Limits of Law and the prospects for Transitional Justice in Redress' (2004) 2 *The East African Journal of Human Rights and Democracy* 59.

¹⁰⁶ UN Office for the Coordination of Humanitarian Affairs, above n 104.

¹⁰⁷ *The Constitution of Kenya 2010* (Kenya).

¹⁰⁸ *Ibid*, art 40.

¹⁰⁹ *Ibid*, ch 5.

¹¹⁰ *Ibid*, art 61.

¹¹¹ *Ibid*.

Public land is defined under the Constitution¹¹² and includes roads,¹¹³ minerals,¹¹⁴ state land,¹¹⁵ and 'land in respect of which no individual or community ownership can be established by any legal process'.¹¹⁶

The Community land class is 'held by communities identified on the basis of ethnicity, culture or similar community of interest'¹¹⁷ and is 'registered in the name of group representatives under the provisions of any law'.¹¹⁸ There are also Constitutional provisions to allow the declaration of community land by Parliament or the transfer by 'any process of law'.¹¹⁹ Importantly the Constitution provides that 'Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rules of members of each community individually and collectively'.¹²⁰

Under the Constitution, Private land is 'registered land held by any person'.¹²¹

Sifuna has recognised that, 'land is also of considerable political significance'.¹²² In particular, in Kenya, 'land was a central issue in the struggle for independence',¹²³ and 'has over the years continued to be a rather emotive and sensitive issue politically'.¹²⁴

4.2 Ethnic disputes over land in Kenya

Kahl has outlined a helpful hypothesis that explains the ethnic violence in the 1990s in Kenya.¹²⁵ In his chapter, Kahl explains that it was tempting to 'point to the process of democratization as the chief culprit',¹²⁶ of the 'ethnic clashes',¹²⁷ that 'occurred in the period after Kenya began its transition to democracy'.¹²⁸ And yet, there was a 'scarcity of arable land',¹²⁹ 'historically rooted grievances over land',¹³⁰ and this created a 'golden opportun[ity] for state elites to exploit rising intergroup competition to cling to power'.¹³¹ Kahl argues that 'the clashes were clearly politically motivated, although the government denied it'.¹³² He considers that 'state complicity is strongly suggested by the failure of [the] government to prevent the spread of violence. The Kenyan police and other state security apparatuses have traditionally acted quickly to contain real or

¹¹² Ibid, art 62.

¹¹³ Ibid, art 62(1)(h).

¹¹⁴ Ibid, art 62(1)(f).

¹¹⁵ Ibid, art 62(1)(a-e).

¹¹⁶ Ibid, art 62(1)(d).

¹¹⁷ Ibid, art 63(1).

¹¹⁸ Ibid, art 63(2)(a).

¹¹⁹ Ibid, art 63(2)(b).

¹²⁰ Ibid, art 63(4).

¹²¹ Ibid, art 64(a-b).

¹²² Nixon Sifuna, 'Public Regulation of the Use of Private Land: Opportunities and Challenges in Kenya' (2009) 5 *Law, Environment and Development Journal* 38, 42.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Colin H Kahl, 'Land and Lies: Ethnic Clashes in Kenya' in *States, Scarcity and Civil Strife in the Developing World* (Princeton University Press, 2006) .

¹²⁶ Ibid, 117.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid, 118.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid, 122.

perceived insecurity and violence in the country'.¹³³ And that the groups had, 'managed to live side by side for decades without killing one another'.¹³⁴ Matter rejects this argument.¹³⁵ For Matter:

Violence was not produced through top-down incitement, but rather through a convergence of patron and client interests and a significant shift in the patronage networks through which rights in land are mediated. More fundamentally, this examination of the dynamics that led to violence...underscores how rights in land can be tenuous and contingent upon fragile connections to power, producing an institutionalized insecurity.¹³⁶

To this author Kahl's argument seems stronger.

5. Land disputes and the substantive rule of law

5.1 Substantive rule of law – International Commission of Jurists approach to land

Writing in 1966, the International Commission of Jurists (ICJ) stated that 'the land problem is one of the most fundamental and complicated problems. Consideration to appropriate land reform programmes must therefore be given a high priority'.¹³⁷ They continued, 'the right to own property is a fundamental human right and should be recognized in law and in practice without any discrimination...in the case of expropriation or restrictions on use of private property, adequate compensation, of which the persons entitled may freely dispose, should be awarded'.¹³⁸

While Dicey has been considered the originator of the phrase, 'the rule of law',¹³⁹ it is possible to determine a number of schools of thought that have emerged to interpret the phrase.¹⁴⁰ Tamanaha has classified the ICJ position as a one that 'encompasses "the social, economic, educational, and cultural conditions under which man's [sic] legitimate aspirations and dignity may be realised"'.¹⁴¹ It is clear that the ICJ position

¹³³ Ibid, 123.

¹³⁴ Ibid, 159.

¹³⁵ Scott Matter, 'Clashing Claims: Neopatrimonial Governance, Land Tenure Transformation, and Violence at Ennoosupukia, Kenya' (2010) 33(1) *Political and Legal Anthropology Review (PoLAR)* 67, 68.

¹³⁶ Ibid.

¹³⁷ International Commission of Jurists, *The Rule of Law and Human Rights - Principles and Definitions* (1966), 45.

¹³⁸ Ibid, 43.

¹³⁹ A V Dicey, *Introduction to the study of the Law of the Constitution* (Macmillan, 10th ed, 1968).

¹⁴⁰ Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' in Richard Bellamy (ed), *The Rule of Law and the Separation of Powers* (Ashgate Dartmouth, 2005); See also David Clark, 'The many meanings of the Rule of Law' in Kanishka Jayasuriya (ed), *Law, Capitalism and Power in Asia* (Routledge, 1999) and Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010), chapter 11.

¹⁴¹ Brian Tamanaha, 'The Rule of Law for Everyone?' (School of Law, Washington University in Saint Louis, 28 February 2003) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=312622>, 6.

falls within the substantive (rather than formalist) rule of law school of thought given the ICJ approach says ‘something about the content of the rules themselves’.¹⁴²

5.2 Substantive rule of law – Constitutional and legislative reform in Myanmar

In considering the substantive rule of law approach to the need for constitutional and legislative reforms it is clear that there is a need to allow an understanding of the broader social and political context to inform that analysis.

On the basis of the foregoing in this article, it is clear that there are some within Myanmar who stand to benefit from ongoing human rights abuses in relation to land, and more generally, ethnic tensions. Indeed it could be argued that the tensions in Rakhine state, for example, have links with the geopolitical struggle for control of the sources and means of supply of natural resources. Further, in Kayin state the desire to establish large-scale plantations, build roads, mine, and log the forests has occurred parallel to ongoing ethnic tensions. It seems reasonable to ask: who benefits from the ongoing ethnic tensions? Arguably, those who benefit are not those who continue to argue their case for legal recognition in either state. This author would argue that, like in Kenya, the people of Myanmar have suffered while the elite have manipulated deep-seated historical undercurrents to their own economic and political advantage.

In light of this Constitutional and legislative reformers must be firstly mindful of the human impact of their reforms. The question reformers should ask themselves is simple: How will this reform directly assist the people of Myanmar? For too long, the people of Myanmar have been subservient to colonial, military and political masters. The time is right for the emergence of political and legal actors who seek first to further the plight of the people through the development of the substantive rule of law.

Substantively, this may require reconsideration of the notion that ‘the state is the ultimate owner of all lands’¹⁴³ and a consideration of Kenya’s approach that ‘all land in Kenya belongs to the people of Kenya’. Further, it may require incorporation of the Kenyan Constitutional notion of Community land. It may also require the establishment of a compensation and dispute resolution mechanism to address the circumstances that will likely arise, for example in Kayin state, where there are two conflicting legal titles to land – one under KNU law and another under Myanmar law.

Indeed, there is also the need for the RLTC to be supported in both Constitutional reform and legislative reform in relation to land disputes. While the Committee has recognised the issues, they lack substantive legal responses to these issues in their report.

6. Conclusion

Daw Aung San Suu Kyi has ‘warn[ed] against “blind optimism”’,¹⁴⁴ and ‘urged the international community to look at Burma’s situation “very objectively” without painting an “over-optimistic picture” of the country’.¹⁴⁵ This article has sought to do just that. While it is clear that Myanmar has, unclenched their fist to hold the extended

¹⁴² Clark, above n 140, 33.

¹⁴³ *Constitution of the Republic of the Union of Myanmar 2008* (Myanmar), art 37(a).

¹⁴⁴ Alternative ASEAN Network on Burma, ‘Burma Bulletin’ (September 2013), 1.

¹⁴⁵ *Ibid.*

hand of the United States and others,¹⁴⁶ it seems clear that the substantive constitutional and legislative provisions are yet to reflect the loosed grip on the everyday lives of the people of Myanmar. The journey from dictatorship to democracy must not occur in rhetoric alone. There must be the recognition of, and provision for, democratic, people-led processes that allow the freedom aspirations of all to be met; not just the freedom aspirations of a few. This paper, with reference to Kenya, has considered the current legislative response to the underlying grievances in two states of Myanmar as she seeks to emerge from decades of chronic armed conflict. It is clear that a constitutional and legislative reform journey has begun, but it is also clear that without ongoing critical and objective analysis to inform that journey it is possible that reforms will provide a veneer of legality and only further enshrine elite power in a manner that fails to incorporate the substantive rule of law.

¹⁴⁶ Office of the Press Secretary, The White House, *Remarks by President Obama at the University of Yangon* (19 November 2012) <<http://www.whitehouse.gov/the-press-office/2012/11/19/remarks-president-obama-university-yangon>>.