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CHALLENGES AND OPPORTUNITIES OF RECOGNIZING AND PROTECTING CUSTOMARY TENURE SYSTEMS IN THE LAO PEOPLE'S DEMOCRATIC REPUBLIC

Policy Brief



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Key Messages

- The regulatory framework on the recognition of customary tenure in the Lao People's Democratic Republic could see a major change and advancement with a revised Land Law.

- Clear and comprehensive guidelines on the recognition and protection of customary land rights, including individual and communal land delimitation, adjudication, registration and titling need to be drafted, discussed, approved and supported by a capacity development and awareness creation programme.

- Thereafter, a major rollout of land registration related to customary tenure systems needs to be planned and implemented.

Background

This policy brief was developed in order to enable a meaningful engagement and policy dialogue with government institutions and other relevant stakeholders about challenges and opportunities related to the recognition of customary tenure in the Lao People's Democratic Republic. Customary tenure is understood to be the local rules, institutions and practices governing land, fisheries and forests that have, over time and use, gained social legitimacy and become embedded in the fabric of a society. Although customary rules are often not written down, they may enjoy widespread social sanction and may be generally adhered to by members of a local population (FAO, 2016). In this context, this document aims at strengthening the recognition and legal protection of customary tenure systems in the country in line with the key principles of the "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security" (VGGT). It is important to note that customary tenure systems exist on both communally managed land and on individual land used by individuals and households.

The Lao Government currently recognizes 49 ethnic groups and 160 subgroups. Most of these groups show complex interrelationships between ecosystems and cultural systems, such that changes in the external environment results in multiple impacts on the culture, livelihoods and customary practices (Ironsides, 2017).

Customary tenure arrangements exist in most rural villages and across most ethnic groups, including the lowland Lao population. For centuries, rural communities have managed common property resources for the benefit of all community members, and have used and protected specific resources such as forests and waterbodies. Rural communities have also created local rules and regulations for the seasonal or sporadic use of these

areas by groups or individual households for cropping, non-timber forest product (NTFP) collection, livestock grazing and fishing.

In the country's mountainous areas, shifting cultivation has long played an important role due to the scarcity of flat, fertile land in the valleys in which to practice paddy cultivation. Poorer villagers have always depended, to a higher degree, on communal resources than other groups. Land under a customary tenure system often serves as a "safety net" in times of hardship, especially given the fact that a significant part of villagers' food and protein is derived from forests in upland villages. Landlessness is very rare in rural areas where communal land is still available. The protection of sacred forests, ceremonial places and burial sites has been essential to maintaining sociocultural cohesion over generations.

Traditionally, villages in the mountainous areas of the Lao People's Democratic Republic were fairly evenly distributed over space, with most having recognized village areas of between 1 500 and 2 500 hectares. In many cases, village boundaries were well-known and local rules and traditions for the use and protection of village land were respected by villagers themselves and neighbours alike. Conflicts over resource use were rare. This situation began to change, however, during the Indochina Wars when people had to migrate to safe areas and sometimes resettle permanently.

In the 1990s, customary village land came under increasing threats, especially from the implementation of the national shifting cultivation stabilization programme, which was implemented through land and forest allocation (LFA) activities between 1994 and 2006. Under LFA, shifting cultivation practices were limited to three parcels only per family for rotational use, and great emphasis was placed on forest protection. As LFA activities were carried out in around 50 percent of Lao villages, they had widespread impacts on the collective use of village land, contributing to decreased access to land and natural resources and food insecurity.

A further factor leading to the loss of access to land and land tenure insecurity has been the arrival of outside investors. In view of promoting increased investments in land, the Lao Government allocated numerous land concessions to domestic and foreign investors. The vast majority of these concession areas overlap with community land, thereby causing an increase in land disputes, and threatening rural livelihoods.

Resettlement has also been a key strategy to facilitate the implementation of a range of rural development and poverty reduction policies, including the shifting cultivation stabilization and opium eradication programme. From 2004 onwards, Lao Government policies and strategies called for the resettlement of remote communities into consolidated village clusters to maximize poverty reduction activities and accelerate economic development. One result was that relocated villages lost access to their customary land and faced situations of land scarcity.

Meanwhile, Lao Government policies continue to place significant emphasis on forest protection. The 2005 Forestry Strategy provides a target of 70% forest coverage by 2020, and this has been restated in the Party Resolution on Land Management, issued in 2017. The country counts 24 national protected areas and 51 national production forest areas. In addition, provinces and districts have delineated their own protected forest areas, and these areas may contain entire villages, including their residential and agricultural production areas and customary use zones.

It is virtually impossible to determine the extent of customary tenure in the country. How much land is claimed under communal land management systems can only be identified by village-based assessments, which can then be harmonized at the *kumban* level. This is one reason why numerous donor-funded projects, non-governmental organizations and even private companies have supported participatory land-use planning (PLUP) at the village and *kumban* levels, mostly in accordance with

a standardized PLUP approach defined by the Ministry of Natural Resources and Environment (MoNRE) and the Ministry of Agriculture and Forestry (MAF) in 2009. More recently, modified and varying approaches have emerged (Dwyer and Dejvongsa, 2017). It has been estimated that improved and up-to-date land-use plans are now available for some 470 rural villages (Ling, 2017).

Systematic land registration in the country started in 1997 and, by November 2015, 806 000 land titles, mostly for individual parcels in urban and peri-urban areas, were issued. The very first communal land titles (using collective title formats) were awarded in 2012 for communal bamboo resources in Sangthong District as part of a pilot project in four villages. In 2013, collective land titles were issued to 14 resettled communities in the area of the Nam Theun 2 hydropower project in Nakai District. Other pilot efforts have been made towards communal land registration based on PLUP, mostly in the north and Khammouane Province. The most frequently cited objectives of communal land titling are increased tenure security for rural communities, increased productive use of village land as a key poverty reduction strategy, and improved community management of natural resources with greater community participation, ownership and unity.



¹ The *kumban* is an administrative unit between the village and the district level. *Kumban* is often translated as “village cluster”. An average *kumban* consists of 6-10 villages.

Regulatory framework

The 2003 Constitution (amended in 2015) describes the Lao People's Democratic Republic as a multi-ethnic country that enshrines equality and the right to protect and promote customs (art. 8). Article 17 of the Constitution and Article 3 of the 2003 Land Law mandate that land and natural resources belong to the national community and are managed by the state, with the right to devolve user rights to individuals, families, companies and state organizations. The 1990 Property Law establishes five forms of property: 1) state property, 2) collective property, 3) individual property, 4) private property (property belonging to a private economic unit), and 5) personal property (items for personal use) (art. 2). It also states that ownership of land, underground resources, water, forests and wildlife belong to the national community and is vested in the state. The state may grant rights of possession, use, transfer and inheritance to other entities. Article 26 of the Decree on Implementation of the Land Law (No 88/PM of 2008) recognizes customary land utilization rights for individuals, organizations and village communities for which a land title or land certificate can be issued.

The ministerial instruction on land registration and titling (MoNRE No. 6036, 2014), distinguishes collectively owned land (*din luam mu*) or land belonging to a group of people within “a collective, production unit, or association” from communal land (*din xoum xon*), which is “commonly owned by a village or ethnic group, including communal ponds, forests, agricultural lands and

cemeteries”. Communal tenure, which is the more common type of tenure, refers to situations where villagers or ethnic groups living in one or more villages have well-defined, exclusive rights to jointly manage particular areas of land or forests. The state acknowledges these existing (customary) communal systems through the formalization of existing rules and rights, and eventually intends to issue titles. At present, however, communal land is only registered in pilot locations, and either no titles are issued due to the lack of an approved communal title format and the corresponding procedures, or the format of the collective title is used, which is not entirely suitable.

The MoNRE instruction on land registration and titling also give examples of which types of land can be considered for communal titling, such as village use forests including bamboo groves, communal tree plantation areas, land for agricultural production, village ponds, grazing land, cemetery and ceremonial grounds, sacred or spiritual forests. Reserved land areas for future use and allocation could also be considered, as well as other land areas that have the characteristics to be collectively used by villagers. Communal titles may also be issued to several villages when larger areas are managed jointly. Nevertheless, land located in nature reserves and protected areas is excluded from titling as communal land.

Since 2012, the Lao Government has been revising land-related policies and legislation. A new Land Law is under development while a Party Resolution that sets the direction for future land governance in the country was approved by the Central Committee in August 2017. The Resolution of the Party's *Central Committee on the Enhancement of Land Management and Development in the New Period* recognizes the importance of land as shelter and source of livelihoods for

people of multiple ethnic groups while also stressing its relevance for social economic development. It points out that “(...) the state must continue to recognize and protect land use rights held by individuals, entities, collectives and customary land rights (...)”. The resolution notices that “the state may retake land-use rights from individuals, entities, collectives and organizations for the purpose of state activities, public interest including development of infrastructure, national defence and socioeconomic development, by allocating new land or compensating at a reasonable price”. It also stresses the need to improve regulations related to land leases and concessions.

The Forestry Law (No. 6 of 2007), which is currently under revision, distinguishes three main categories of forests: 1) conservation forest, 2) protection forest and 3) production forest. At the village level, the local production forest is referred to as a “village use forest” (VUF). A VUF can, in specific cases, be located within a larger “national production forest” area. Issuance of a communal title for a VUF located within a production forest is legally possible. While the VUF is always considered as a communal area, protection and conservation forests located within village boundaries are considered as state land and cannot be subject to titling according to Article 7 of Decree No. 88/PM. Yet, many rural communities claim customary rights over state land areas, such as for NTFP collection in “controlled use zones” within protection and conservation forests, or limited utilization rights in national production forests in accordance with approved forest management plans. As noted above, entire villages are currently encompassed within these state forest categories. When state land is registered, these rights need to be considered.

Challenges

One of the key conflict points in the legal framework governing land in the Lao People’s Democratic Republic are the opposing statements of “land allocated by the Government (State)” (arts. 45 and 55 in the current Land Law) and “recognition through evidence of use or occupation”, as identified during the adjudication process. The concept of customary tenure, as stipulated in the VGGT, is based on the recognition of rights for areas under long-term use by rural communities. The Land Law and other regulatory documents always refer to an allocation of land by the state only. A potential solution to this problem would be to conduct a detailed assessment of current land-use systems in a village, understand customary rules, and then combine this into a planning exercise for future land use, land allocation and land management, and to prepare for land registration. This is the concept of PLUP in the Lao context.

The current Lao legal framework includes provisions that define and recognize customary land rights, including provisions for communal land registration and titling for land used and managed by village communities. While some provisions exist, political support for communal land titling from higher levels of government remains unclear. One of the key challenges is that there is no agreed on standardized procedure for the registration and adjudication of communal land areas. Certain requirements for the formalization of land rights even pose a barrier to the recognition of customary rights.

The numerous encroachments on customary land in rural areas across the entire country for land-based investments,

such as agro-industrial concessions, mining activities and infrastructure developments, have led to the destabilization of rural communities, shortages of productive land, and an increase in land conflicts. The unclear situation regarding rights to communal land in many areas has resulted in a breakdown of traditional rules and practices, and conflict between communities and outsiders as well as within communities. Cultural disintegration of villages as social, cultural and economic entities can be observed, and food and livelihood security are consequently threatened. Several studies conducted in the Lao People's Democratic Republic have shown the important links between land tenure insecurity and food insecurity (Kenney-Lazar, 2015). Poverty remains an important phenomenon in upland areas and women are particularly vulnerable. The fact that many villages are mixed villages of different ethnic groups further complicates the situation.

Despite the existence of legal provisions recognizing customary land rights, many of these rights go unprotected, are ignored and abused in practice (Kenney-Lazar, 2015). In the Lao People's Democratic Republic, as in many neighbouring countries, unless customary rights are formalized, registered and titled, villagers cannot defend their rights against outsiders, investors or encroachers. PLUP or village forest management agreements (VFMA) are not legally strong enough to protect against external interests, even though they are signed by district and occasionally provincial authorities (Ling, 2017). Customary rights are sometimes vaguely formulated and even contradictory, and thus cannot be defended under the current court system in case of land disputes. Communities are, therefore, seeking alternative support, especially by addressing the hotline established by the National Assembly, requests to local authorities and alliance building with some success.



Moreover, rural communities are generally unaware of their legal rights to land and, when they come into contact with local officials, they are confronted with unclear messages and conflicting interpretations of laws and regulations. Increasing land scarcity and mounting village refusal to accept land allocation to concessions and investment projects has, in some cases, changed the views of local officials.

Customary land rights are not restricted to individual or communal land, but often overlap with what the laws (i.e., Land Law and Forestry Law) define as state land, particularly protected forest and conservation forest. This salient issue needs to be addressed by the new legislation currently under development. The new Land and Forestry laws could, for instance, require that user rights (e.g., for NTFP collection) are registered as encumbrances or a servitude on the state land title, once these forests are legally registered.

Recognition of customary rights and communal land registration have been topics under discussion in the Lao People's Democratic Republic and among its development partners for more than ten years. Very few pilot examples of communal

land identification and registration have been implemented. While registration of private land under the systematic land registration has made progress in selected provinces, there is some unwillingness by local administrations to conduct customary land registration, due to an unclear legal situation and lack of instructions. Land registration teams also have a clear preference for working in urban and peri-urban areas with a focus on revenue creation. Fees for issuing customary land titles are minimal and communal land is exempted from land tax payment according to the Presidential Decree on Land Tax No. 03.

Experience has shown that untitled land is at higher risk of encroachment and appropriation without proper compensation. Systematic registration and titling of all land resources located within village boundaries, whether these are individual plots or communal land or state land, could provide a solution, but this approach is costly, time-consuming and often hindered by limited staff resources. On the other hand, limiting registration of land under customary tenure systems (individual or communal land) only could increase the perceived and real tenure insecurity for those pieces of land.

Opportunities

Land-use planning has a long tradition in the Lao People's Democratic Republic, and today many of the more than 8 500 rural villages have been involved in some sort of land-use assessment or planning. The quality and usability of the resulting maps and other products varies greatly. Many of the older LUP maps have either been lost beyond recovery or are simply outdated and grossly inaccurate. This was problematic, given the fact that the main intention of the LUP team was to limit shifting cultivation to three parcels per family, restrict forest use by villagers, or relocate the village altogether. Yet, with the emergence of the PLUP approach in the late 2000s – and its application to many donor-supported projects, ranging from poverty alleviation, rural development to village forestry – numerous examples of participatory land-use plans can be found throughout the country.

A comprehensive and truly participatory PLUP exercise provides an opportunity for villagers to: 1) analyse the current evolution of traditional agricultural and forest use systems; 2) reflect on traditional tenure and its evolution; 3) review existing rules; and 4) take decisions on future use and tenure of specific pieces of land located within village boundaries. A well-prepared LUP map clearly shows the boundaries of communal land and the particular use category. A full PLUP process is not complete without the participatory elaboration and formalization of existing village regulations (*lebeab baan*) and some preliminary discussions on specific management rules and regulations for the communal land parcels. Very often, these simple regulations are based on existing traditional rules, which exist in many villages but are often not sufficiently documented. It is extremely relevant to document community rules in order to define how rights to land are allocated within the local society, and to define



how access is granted to rights to use, control and transfer land, as well as associated responsibilities and restraints.

PLUP procedures clearly follow the stipulations of the VGGT that “states should assist to formally document and publicize information on the nature and location of land, fisheries and forests used and controlled by the community” (VGGT, para. 9.8). Finally, during the process of village PLUP, an elected land and natural resources management committee (taking into account existing customary authorities) could be established under the village administration, which is an important step for the enforcement of village regulations.

Clear boundaries with designated tenure and land-use types, explicit rules on how decisions concerning management are made by the community, and straightforward management responsibilities are pre-conditions for any community-level land management approach. It is important that local institutions are fully involved and actively participate throughout the process. Local institutions further strengthen the sense of responsibility and security by being founded on local decision-making and governance mechanisms. Consequently, the recognition of customary tenure rights and communal land registration in rural areas of the Lao People’s Democratic Republic could be based on a comprehensive PLUP process.

PLUP itself, or the formulation of village regulations or temporary agreements, are not alternatives to formal recognition and recording of customary rights, but rather an interim step. There are many examples in the country where the existence of approved land-use plans and local regulations has not prevented the loss of community land due to the allocation of concessions or other forms of land appropriation (Ling, 2017). On the other hand, there are also examples where having valid land-use plans has empowered communities to negotiate better, or receive fairer, compensation in cases of land dispossession. As an additional protection against new land acquisitions, interim

protective measures could be introduced based on PLUP.

Ideally, the land registration process in the village should be conducted as a systematic and inclusive exercise that includes the registration of all individual or communal land located within village boundaries. This corresponds to the recommendation in the VGGT that when “tenure rights of communities with customary tenure systems are formally documented, they should be recorded with other public, private and communal tenure rights to prevent competing claims” (VGGT, para. 9.8). Communal land registration must imperatively include agricultural land-use zones for rotational cropping because these often represent the major part of productive land in rural areas as well as VUFs. Legally secured access to customary tenure areas is the single most important factor to reduce poverty and secure livelihoods.

According to the Law on the Local Administration (No. 47 of 2003), villages are the lowest administrative unit and form part of the state organization in the Lao People’s Democratic Republic. Communal titles could, therefore, be issued in the name of one village or even several villages, in case of shared customary land areas for several communities. Communal land titles are permanent tenure certificates.

Furthermore, the Lao Government has recently initiated important initiatives with applications and recognition by the World Bank Forest Carbon Partnership Facility and preparations for REDD+² readiness. In this context, it will also be important to recognize the essential role of rural villagers in forest management and protection, which would be further fostered by legal recognition of VUFs and locally established village forest management plans.

² United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries. For further information see <http://www.un-redd.org/>.

Recommendations and ways forward

1. Complement the new regulatory framework for the legal recognition of customary tenure and prepare comprehensive implementation guidelines

- The revised Land Law may be approved in 2018. Together with the revised Land Law, a number of decrees will need to be prepared, including one on the registration of customary land rights (communal and individual land). The new legislation could provide clear and broadly understandable definitions of “customary tenure”, “individual land” and “communal land”; and indicate a title format for customary land. Ideally, the new Forestry Law will also be passed after harmonization with the Party Resolution. It will be essential to harmonize aspects of recognition of customary tenure and individual and communal land registration in this important legislation.
- Comprehensive guidelines on customary tenure recognition, including individual and communal land registration and titling need to be drafted and subsequently submitted for discussion and review by relevant stakeholders. Pilot experiences could be considered as an initial step in the development of these guidelines. Furthermore, the guidelines could: i) provide clear criteria and standards for village land delimitation; and ii) indicate applicable surveying accuracy requirements and surveying techniques for larger communal parcels.
- In addition to the registration of individual and communal land under customary tenure systems within the village and its

administration, a decision will need to be made as to how customary use rights to larger areas of state land, including user rights in state forests, can be recognized and registered as well.

2. Strengthen capacity development and awareness creation

- Consolidated training of the District Office of Natural Resources and Environment/ District Agriculture and Forestry Office, and Provincial Office of Natural Resources and Environment/Provincial Agriculture and Forestry Office staff based on the new guidelines and the revised legal framework will be necessary.
- The various initiatives to create legal awareness and training for rural communities need to be continued and expanded. To operate effectively, the Lao Government needs to actively endorse and support these campaigns, which should not only be left to non-governmental organizations and donors. Legal aid could also be provided so that communities involved in land disputes are able to defend their customary tenure rights.

3. Prepare for and implement the rollout of customary land rights registration with a comprehensive and clustered approach

- Once the legal framework is in place, MoNRE will need to plan for the rollout and implementation of customary land registration and titling. Wherever possible, this should be combined with an approach to systematic and inclusive land registration. A well-balanced approach to land registration needs to be established between urban/peri-urban areas and rural and even remote areas. To some extent, revenue from land registration in urban areas could be used for subsidizing land registration in rural areas. Incentives for staff to work in rural environments need to be reviewed and adapted.

- For rural areas, land registration activities could be initiated in areas where participatory and detailed land-use planning activities have recently been conducted, and where approved quality PLUP documents are available. This should also include villages where village forestry projects have been active and jointly developed Village Forest Management Plans have been established. Overall, participatory land-use planning activities supported by MoNRE and MAF as a basis for land registration need to be intensified and extended. This will require effective coordination of land-use planning with land titling processes.
- Currently, PLUP documents are officially approved by the District Governor but do not provide protection of customary tenure. Community-led efforts to document and map their customary lands using PLUP can be the basis for interim protection measures.

4. Re-delineation of the forest categories

- Efforts are underway to re-delineate the three forest categories (conservation forests, protection forests and production forests) at the national, provincial and district level. Large areas of the national landscape are currently classified as protection forest or national production forests, which include major parts of agricultural production zones of villages. This poses real limits to efforts to address both land and forest tenure under customary regimes. It is also critical to ensure that forest management is sustainable. This re-delineation effort, which is based on a request from the National Assembly, should be strongly supported.

5. Firmly establish targets for land registration in rural areas in national strategies and plans

- Given the goal of the Lao Government to remove itself from “least developed country” status by 2020, it is important to demonstrate the potential for securing customary tenure rights, especially among upland ethnic groups, for food and nutrition security and poverty reduction. When the Lao Government revises its strategies and national plans in line with the Sustainable Development Goals to meet the targets of poverty alleviation, rural development and sustainable land management, there will be no alternative to promoting land registration and the recognition of customary rights for communal land in rural areas. Communal land registration will also demonstrate the potential for communities to manage forests, in light of the ambitious targets for forest protection formulated by the Lao Government.
- The next National Socio-Economic Development Plan and its implementation plans should contain separate targets for individual, collective and/or communal, and state land registration. This would be one step towards reporting on the Sustainable Development Goal Indicator: “Proportion of total adult population with secure tenure rights to land, with legally recognized documentation and who perceive their rights to land as secure, by sex and by type of tenure”.

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